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## America's Cash Bail Crisis: Learning from Our Common-Law Roots

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# America's Cash Bail Crisis: Learning from Our Common-Law Roots

BY JAKE FEILER\*

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## I. INTRODUCTION

Cash bail is an epidemic. Many jurisdictions in the United States use a cash bail system to facilitate the pre-trial release of people who the police arrest.<sup>1</sup> Using this system, a “court determines an amount of money that a person has to pay in order to secure their release from detention . . . [and] serves as collateral to ensure that the defendant appears in court for their trial.”<sup>2</sup>

Unfortunately, this system's consequences severely outweigh any benefits. Although the idea of “innocent until proven guilty” sits at the core of America's legal system, in 2020, “[3] out of 5 people in U.S. jails . . . [had] not been convicted of a crime.”<sup>3</sup> This statistic equates to almost 500,000 people sitting in jail because they could not afford their bail and despite the fact that no court had found them guilty.<sup>4</sup> As Tim Murray, director of the Pretrial Justice Institute, describes it, “[w]e don't have a system currently that does a decent job of separating who is dangerous and who isn't . . . [w]e only have a system that separates those who have cash and those who don't.”<sup>5</sup>

Out of this cash bail crisis, a \$2 billion commercial bail bond industry formed that preys on people who cannot pay their court-mandated bail.<sup>6</sup> People who cannot afford to pay cash bail can turn to a bail

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1. Lea Hunter, *What You Need to Know to Know About Ending Cash Bail*, CTR. FOR AM. PROGRESS (Mar. 16, 2020), <https://www.americanprogress.org/article/ending-cash-bail/>.

2. *Id.* If courts do not impose any other release conditions, courts “release” defendants in exchange for this cash collateral, and these defendants are free to wait for trial without further restrictions. Elizabeth Hardison, *Cash Bail, Explained: How It Works and Why Criminal Justice Reformers Want to Get Rid of It*, PA. CAP.-STAR (July 14, 2019, 7:42 AM), <https://www.pennacapital-star.com/criminal-justice/cash-bail-explained-how-it-works-and-why-criminal-justice-reformers-want-to-get-rid-of-it/>.

3. Hunter, *supra* note 1.

4. *Id.* Pre-trial detention due to cash bail is one reason United States prisons are overpopulated. In 2020, the Prison Policy Initiative found that “one in five prisoners in the world is incarcerated in the U.S. – despite the fact that the U.S. only accounts for less than 5 percent of the global population.” Vanessa Taylor, *How the Cash Bail System Criminalizes Poverty and Amplifies Inequality*, MIC (Mar. 3, 2021), <https://www.mic.com/impact/what-is-cash-bail-why-is-it-so-problematic-64100036>. See discussion *infra* Part V(A).

5. Shane Bauer, *Inside the Wild, Shadowy, and Highly Lucrative Bail Industry*, MOTHER JONES, <https://www.motherjones.com/politics/2014/06/bail-bond-prison-industry/> (last visited Mar. 9, 2022).

6. Kayla James, *How the Bail Bond Industry Became a \$2 Billion Business*, GLOB. CITIZEN (Jan. 31, 2019), <https://www.globalcitizen.org/en/content/bail-bond-industry-2-billion-poverty/>.

bondsman, who “usually charges a percentage of the total bail amount for their services . . . [and] [i]n return, the bail agent files a bond for the full amount to secure the person’s release from jail.”<sup>7</sup> The catch is that although people who are able to pay their own bail receive all their money back from the court, people who utilize a bail bondsman—and are thus subjected to high charges—do not get back the fees they must pay for the service.<sup>8</sup> The American Civil Liberties Union (ACLU) of California wrote how “despite the veneer of accountability suggested by bail, it’s a system propped up less by the pursuit of justice and more by profit motives.”<sup>9</sup>

To protect their investments, many bail bondsmen hire bounty hunters to ensure that the defendants they contract with comply with their bail terms.<sup>10</sup> These bounty hunters operate outside the law, and “may break into homes of defendants without a warrant, temporarily imprison them and move them across state lines without entering into the extradition process.”<sup>11</sup> Because they do not need to follow many of the same rules that police do and do not receive the same training as law enforcement, bounty hunters often cause trouble while taking advantage of this freedom.<sup>12</sup>

Federally, bounty hunters trace their authority to the United States Supreme Court’s affirmation—almost 150 years ago—that common law protects bounty hunters’ right to operate.<sup>13</sup> Practically, most bounty hunter regulations come from state law that varies from state to state.<sup>14</sup> In an area akin to the “wild west,” bounty hunters “use dangerous and sometimes illegal tactics to retrieve defendants . . . including confrontations at gunpoint . . . [and] often complicate and endanger public safety.”<sup>15</sup>

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7. *Id.*

8. *Id.*

9. *Id.* Unsurprisingly, the United States is one of only two countries in the world that uses a commercial bail bond system, the other being the Philippines. Louis Jacobson, *Are U.S., Philippines the Only Two Countries with Money Bail?*, POLITIFACT (Oct. 9, 2018), <https://www.politifact.com/factchecks/2018/oct/09/gavin-newsom/are-us-philippines-only-two-countries-money-bail/>.

10. Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, WASH. & LEE L. REV. 1297, 1308 (2012).

11. Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES (Jan. 29, 2008), [https://www.nytimes.com/2008/01/29/us/29bail.html?pagewanted=all&\\_r=1](https://www.nytimes.com/2008/01/29/us/29bail.html?pagewanted=all&_r=1).

12. Appleman, *supra* note 10, at 1309–10.

13. See *Taylor v. Taintor*, 83 U.S. 366 (1872). For further discussion on *Taylor*, see discussion *infra* note 189.

14. Appleman, *supra* note 10, at 1309.

15. *Id.* at 1309–10. For example, an unlicensed bounty hunter recently pled guilty to committing 10 misdemeanors while he searched for a bail jumper. Aaron Besecker, *Unlicensed Bounty Hunter Pleads Guilty to 10 Misdemeanors*, BUFFALO NEWS (Nov. 29, 2021),

Ultimately, the combination of cash bail, a commercial bail industry, and bounty hunters adds up to a common sequence of events that almost always leads to disastrous consequences. For example, a former landlady accused Jason Turner and his wife of stealing a washing machine.<sup>16</sup> When Turner eventually needed help posting bail, he turned to Edmund Langevin III—a bondsman and bounty hunter who had previously bailed out Turner's sister.<sup>17</sup> Because Turner had a previous rap sheet involving petty crimes, one bail condition that a court mandated was that Turner consistently check in with his parole officer.<sup>18</sup> When Turner missed his most recent meeting with his parole officer, Langevin went to find him.<sup>19</sup> Seeing three men sitting in a car in Turner's driveway, Langevin drew his gun, ran toward the driveway, and shot Turner in the stomach as he ran away.<sup>20</sup> Although a court still punished Turner for stealing the washing machine, there is no indication that anyone seriously investigated Langevin for shooting Turner and he retained his firearm license after the incident.<sup>21</sup>

Many countries around the world use the United States' bail system as an example of what not to do in their own countries,<sup>22</sup> and with good reason—Jason Turner's experience is easily avoidable. Interestingly, cash bail, a commercial bail bond industry, and bounty hunters are almost nonexistent in England,<sup>23</sup> a country that traces its bail system to the exact same foundations as the United States.<sup>24</sup> Not only is cash bail basically absent, but the English bail system's underlying goals seem to be fundamentally different from America's. Whereas profit fuels America's bail

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[https://www.buffalonews.com/news/local/crime-and-courts/unlicensed-bounty-hunter-pleads-guilty-to-10-misdemeanors/article\\_dc8286ce-512f-11ec-b6a8-8397e9b57f9d.html](https://www.buffalonews.com/news/local/crime-and-courts/unlicensed-bounty-hunter-pleads-guilty-to-10-misdemeanors/article_dc8286ce-512f-11ec-b6a8-8397e9b57f9d.html). These misdemeanors include four counts of menacing, two counts of criminal trespass, three counts of child endangerment, and one count of criminal mischief. *Id.*

16. Bauer, *supra* note 5.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. F.E. DEVINE, COMMERCIAL BAIL BONDING: A COMPARISON OF COMMON LAW ALTERNATIVES 2 (1991).

23. *Bail Conditions: Securities and Sureties*, PRACTICAL LAW UK PRACTICE NOTE W-006-5957 (last updated Jan. 30, 2022) [hereinafter *Bail Conditions*]; Natasha Preskey, *Stacey Dooley Meets the Bounty Hunters: "Hunting Fugitives is Like Popping a Pimple"*, BBC (Aug. 7, 2019), <https://www.bbc.co.uk/bbcthree/article/e96db3dd-0c88-48f6-810c-cb10c7d255aa>.

24. Timothy R. Schnacke et al., *The History of Bail and Pretrial Release*, PRETRIAL JUST. INST. 4–6 (Sept. 23, 2010), [https://www.cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI\\_2010.pdf](https://www.cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI_2010.pdf).

system,<sup>25</sup> the English system's creators were primarily driven by the desire "to make bail more equitable to the poor."<sup>26</sup>

It is apparent that our bail system is broken. Instead of serving as a method of ensuring that defendants appear at trial or reflecting penalties fit for the defendants' crimes, America's bail system criminalizes poverty, detrimentally impacts innocent people and low-risk defendants, and is economically inefficient.<sup>27</sup> Moreover, America has embraced a commercial bail bond industry that takes advantage of the people it is supposed to help.<sup>28</sup> Comparing the United States' bail system with England's bail system helps shed further light on these issues in America—as England also traces its origins to the Anglo-Saxon period,<sup>29</sup> but almost never uses cash bail and has rejected the formation of a commercial bail bond industry. It is evident that the United States can learn from how England's bail system developed, consider why the rest of the world looks at America's bail system unfavorably, and use these lessons to implement reform.

Part II of this Note describes the background of the United States' cash bail epidemic, particularly the ways the current system criminalizes poverty, detrimentally impacts innocent people and low-risk defendants, and is economically inefficient. Part III next examines how the modern-day English and American bail systems both trace their origins to the Anglo-Saxon version of bail and how that version of bail operated. It then discusses how the English and American bail systems developed after the United States declared independence and how the countries' modern-day bail systems operate. Part III specifically emphasizes the ways England rejected cash bail and a commercial bail industry as it reformed its bail system, as opposed to the United States' acceptance of cash bail and encouragement of its commercial bail industry. Part IV then looks outside of England and explores why most of the world looks unfavorably on the United States' bail system, the ways a few former British Commonwealth countries and the European Court of Human Rights' bail systems differ from the United States' bail system, and why America is violating international law. Finally, Part V assesses what lessons the United States can

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25. James, *supra* note 6.

26. Kurt X. Metzmeier, *Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations*, 8 PACE INT'L L. REV. 399, 425 (1996).

27. There are other more fair and effective methods that courts can use to release defendants pre-trial and still ensure that the defendants appear at their trials. These could include check-in calls with police officers, text-message court reminders, reporting to a supervising officer, drug testing, living at a specified address, curfews, not driving, surrendering a passport, or electronic monitoring through an ankle bracelet. See *infra* Part V(C).

28. James, *supra* note 6.

29. Metzmeier, *supra* note 26, at 399.

learn from the way England's system developed, suggests solutions to the issues Part II discusses, and argues that implementing these reforms can help solve America's cash bail crisis.

## II. AMERICA'S CASH BAIL CRISIS

Many Americans are understandably frustrated, alleging that the United States' cash bail system is racist and ineffective. In the wake of major protests over police conduct the last few years, cash bail has become a common topic and donations have flooded bail funds to help protestors arrested by police.<sup>30</sup> Some states have even begun the process of ending cash bail at the state-level, from Washington D.C. in 1992<sup>31</sup> to the California Supreme Court's recent decision in March 2021.<sup>32</sup> But only Illinois has fully eliminated it.<sup>33</sup>

This Part first discusses the issues that America's cash bail system poses on the country generally and at an individual level. Next, this Part examines how America's cash bail system affects commercial bail bondsmen. Finally, this Part argues that it is problematic that through our cash bail system, commercial bail bondsmen can benefit from disproportionately hurting certain groups of individuals.

On a macro-level, the biggest consequence of America's profit-driven cash bail system is that it "criminalizes poverty and is a structural linchpin of mass incarceration and racial inequality."<sup>34</sup> Cash bail disproportionately impacts people who make lower incomes because of bail's high price.<sup>35</sup> In the United States, "the median felony bail bond amount (\$10,000) is the equivalent of 8 months' income for the typical detained

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30. Camila Domonoske, *Protest Arrests Led to Surge of Bail Fund Donations: Impact Could Be Long Lasting*, NPR: ALL THINGS CONSIDERED (June 23, 2020, 5:00 AM), <https://www.npr.org/2020/06/23/879711694/protest-arrests-led-to-surge-of-bail-fund-donations-impact-could-be-long-lasting>.

31. *What Changed After D.C. Ended Cash Bail*, NPR: WEEKEND EDITION SUNDAY (Sept. 2, 2018, 7:43 AM), <https://www.npr.org/2018/09/02/644085158/what-changed-after-d-c-ended-cash-bail> [hereinafter NPR: WEEKEND EDITION SUNDAY].

32. Maura Dolan, *California's Top Court Ends Cash Bail for Some Defendants Who Can't Afford It*, L.A. TIMES (Mar. 25, 2021 6:30 PM), <https://www.latimes.com/california/story/2021-03-25/california-supreme-court-nixes-cash-bail-some-defendants>.

33. Cheryl Corley, *Illinois Becomes First State to Eliminate Cash Bail*, NPR (Feb. 22, 2021, 8:36 PM), <https://www.npr.org/2021/02/22/970378490/illinois-becomes-first-state-to-eliminate-cash-bail>.

34. *After Cash Bail: A Framework for Reimagining Pretrial Justice*, BAIL PROJECT, <https://www.bailproject.org/after-cash-bail/> [hereinafter *After Cash Bail*].

35. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [hereinafter *The Whole Pie 2020*].

defendant.”<sup>36</sup> Moreover, the cash bail system tips the judicial system’s balance on racial lines. For example, “black and brown people . . . are at least 10 – 25 % more likely than white people to be detained pretrial or to have to pay money bail.”<sup>37</sup> Finally, pretrial detention due to people’s inability to pay cash bail accounts for almost the entire “net jail growth in the last 20 years.”<sup>38</sup>

At a micro-level, there are dire consequences for people that cash bail impacts. Statistics show that people “detained pretrial are three times more likely to be sentenced to prison than someone charged with the same crime who was released before trial.”<sup>39</sup> Even a small amount of time in jail can affect the likelihood that a person commits another crime. Low-risk defendants that police hold just two to three days “are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held less than 24 hours . . . and low-risk defendants held 8 to 14 days are 51 percent more likely to recidivate within two years than equivalent defendants held one day or less.”<sup>40</sup> Outside jail, many people go into pretrial detention with jobs, families, and established lives but risk losing it all as they sometimes wait years to resolve their cases.<sup>41</sup> Inside jail, defendants can suffer extreme mental anguish, sexual violence, and “the infliction of lasting trauma.”<sup>42</sup>

Moreover, pretrial detention can have a deadly effect. Police charged Kalief Browder, who was only 16 at the time, with stealing a backpack, and Browder spent three years at Rikers Island while waiting for his trial.<sup>43</sup> Although the court dismissed his trial, Browder killed himself two years after leaving Rikers Island.<sup>44</sup>

From an economic standpoint, cash bail is an extremely inefficient system. The Pretrial Justice Institute conducted a study in 2017 and found that because the cash bail system causes such high pre-trial incarceration

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36. *Id.*

37. *After Cash Bail*, *supra* note 34, at n.4 (citing Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POL’Y INITIATIVE (Oct. 9, 2019), <https://www.prisonpolicy.org/blog/2019/10/09/>).

38. *Id.* at n.3 (citing Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>).

39. Bauer, *supra* note 5.

40. *Id.*

41. *After Cash Bail*, *supra* note 34, at 3.

42. *Id.*

43. Margaret Talbot, *The Case Against Cash Bail*, NEW YORKER: NEWS DESK (Aug. 25, 2015), <https://www.newyorker.com/news/news-desk/the-case-against-cash-bail>.

44. *Id.*



rates, it forces U.S. taxpayers to pay about \$38 million a day<sup>45</sup> or \$14 billion annually<sup>46</sup> to fund the system. This includes the cost of paying for food, medical care, and security.<sup>47</sup> As well, when taking into consideration cash bail's collateral costs on the justice system, communities, and individuals, the cash bail system's cost jumps to around \$140 billion a year.<sup>48</sup> Unfortunately, the study found that most of the money is being spent on low-risk defendants who courts could safely release and whose charges courts tend to drop.<sup>49</sup>

This system has a real cost on individuals. In 2008, police arrested Demorrea Tarver in Baltimore and charged him with drug possession.<sup>50</sup> When the court mandated a \$275,000 bond for Tarver, Tarver's mother went to a bail bondsman for help.<sup>51</sup> The bondsman paid the bail but required Tarver's mother to pay him a \$5,000 down payment and promise to pay him \$27,500 (10% of the bail).<sup>52</sup> Although the police dropped all the charges against Tarver within a few weeks, Tarver was unable to pay the monthly fee to the bondsman, his case went to debt collection, and he now pays \$100 a month on the debt, which is "less than the interest that accrues . . . [and] at this rate he will [never] pay off his bail debt."<sup>53</sup>

While people are suffering because of the cash bail system, commercial bail bond companies and bounty hunters thrive from it. Duane

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45. PRETRIAL JUST. INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST? 1 (Jan. 12, 2017), <https://www.university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c2f50513-2f9d-2719-c990-a1e991a57303&forceDialog=0>.

46. Nick Wing, *Our Money Bail System Costs U.S. Taxpayers \$38 Million a Day*, HUFFPOST (Jan. 24, 2017, 5:51 PM), [https://www.huffpost.com/entry/money-bail-cost\\_n\\_58879342e4b098c0bba6d5c6](https://www.huffpost.com/entry/money-bail-cost_n_58879342e4b098c0bba6d5c6).

47. PRETRIAL JUST. INST., *supra* note 45, at 1.

48. *Id.* at 2.

49. *Id.* at 4. This \$140 billion could instead be spent in other areas that people are struggling with, such as rent, student debt, or health care. See Annie Nova, *Millions of Americans May Not Be Able to Pay Their Rent in October. What to Do if You're One of Them*, CNBC (Oct. 2, 2020, 12:01 PM), <https://www.cnn.com/2020/10/02/millions-of-americans-may-not-be-able-to-pay-rent-in-october.html>; Michael Sainato, "Killing the Middle Class": Millions in US Brace for Student Loan Payments After Covid Pause, GUARDIAN (Dec. 9, 2021, 6:00 AM), <https://www.theguardian.com/us-news/2021/dec/09/us-student-loan-crisis-payments>; Dan Witters, *In U.S., An Estimated 46 Million Cannot Afford Needed Care*, GALLUP, (Mar. 31, 2021), <https://www.news.gallup.com/poll/342095/estimated-million-cannot-afford-needed-care.aspx>.

50. PRETRIAL JUST. INST., *supra* note 45, at 4.

51. *Id.*

52. *Id.*

53. *Id.* (citing Annalies Winny, *Demorrea Tarver's Charges Were Dropped, but the 10 Percent Fee He Promised a Bail Bondsman on His \$275,000 Bail Has Him Drowning in Debt*, BALTIMORE SUN: BALTIMORE CITY PAPER (July 20, 2016, 3:00 AM), <https://www.baltimoresun.com/citypaper/bcp-072016-mob-bail-20160720-story.html>).

“Dog” Chapman, who a court convicted of first-degree murder in 1976,<sup>54</sup> became famous for his popular television show “Dog the Bounty Hunter” that ran eight seasons.<sup>55</sup> In the television show, viewers watch as Dog and his family chase fugitives who have broken their bail terms.<sup>56</sup> Talking about his life, Dog says “I need the attention.”<sup>57</sup> For Edmund Langevin III, all it took for him to become a bondsman and bounty hunter was five days of classes, a separate firearms class, and \$550.<sup>58</sup> From there, Langevin could arrest people and use a gun, and he eventually shot Jason Turner in the stomach.<sup>59</sup> One person described Langevin as thinking that “he’s higher than the law.”<sup>60</sup>

There are also prominent critics of and a lack of sympathy for the commercial bail industry and bounty hunters. Supreme Court Justice Harry Blackmun called the commercial bail industry “odorous,” and the American Bar Association referred to it as “tawdry.”<sup>61</sup> Years ago, Dog apprehended an American fugitive—Andrew Luster—in Mexico, but the Mexican police arrested Dog because Mexico outlaws bounty hunting.<sup>62</sup> Although Mexico extradited Luster to the United States, the FBI offered Dog no help, and the judge in Luster’s case refused to reimburse Dog for his expenses.<sup>63</sup>

There is clearly a cash bail problem in America. A system designed to get defendants to show up to court<sup>64</sup> has turned into a \$140 billion epidemic.<sup>65</sup> An industry that on the surface looks to help individuals has

54. Frances Kindon, *Dog the Bounty Hunter’s Dark Past As Convicted Murderer Deemed Too Dangerous to Enter UK*, DAILY MIRROR (Jan. 10, 2020, 10:46 AM), <https://www.mirror.co.uk/3am/celebrity-news/dog-bounty-hunters-dark-past-21245527>.

55. Adam Popescu, *Dog the Bounty Hunter Is Hunting Alone*, N.Y. TIMES (Jan. 17, 2020), <https://www.nytimes.com/2020/01/17/style/duane-chapman-dog-bounty-hunter.html>.

56. *Id.*

57. *Id.* Dog continues to work as a bounty hunter and recently tried to hunt down Brian Laundrie—who police suspected killed his fiancée Gabby Petito—before Laundrie committed suicide. Suman Varandani, *Brian Laundrie Update: Fugitive ‘Still Alive,’ Hints Dog the Bounty Hunter Despite Suicide Confirmation*, INT’L BUS. TIMES (Nov. 25, 2021, 8:50 AM), <https://www.ibtimes.com/brian-laundrie-update-fugitive-still-alive-hints-dog-bounty-hunter-despite-suicide-3345212>. Even though the police confirmed Laundrie committed suicide, Dog continues to speak publicly about how he believes Laundrie is still alive. *Id.*

58. Bauer, *supra* note 5.

59. *Id.*

60. *Id.*

61. Alex Tabarrok, *The Bounty Hunter’s Pursuit of Justice*, WILSON QUARTERLY (Winter 2011), <http://www.archive.wilsonquarterly.com/essays/bounty-hunters-pursuit-justice>.

62. *Id.*

63. *Id.*

64. Hunter, *supra* note 1.

65. PRETRIAL JUST. INST., *supra* note 45, at 2.

become a \$2 billion money-machine preying on the people most in need.<sup>66</sup> The lives of people like Jason Turner and Demorrea Tarver forever changed, but they remain just an afterthought for bounty hunters like Duane “Dog” Chapman and Edmund Langevin III.

### III. FROM ANGLO-SAXON ROOTS TO SYSTEMATIC ABUSE: HOW AMERICA'S BAIL SYSTEM DIVERGED FROM ENGLAND

Both the United States and England trace their current bail systems to the Anglo-Saxon version of bail.<sup>67</sup> As originally conceptualized, bail centered around prediction, and “reflected the judicial officer’s prediction of trial outcome.”<sup>68</sup> Bail bonds naturally grew out of this theory, becoming a method of protecting the accused’s freedom and ensuring they appear at trial.<sup>69</sup>

This Part discusses how the American and modern-day English bail systems both developed from the Anglo-Saxon version of bail, and how these bail systems diverged from their shared origins. This Part also highlights how, along the way, England rejected cash bail and took every opportunity to stop a commercial bail bond industry from forming, whereas the United States’ environment after it declared independence led to circumstances ripe for cash bail and a commercial bail bond industry to grow. Finally, this Part concludes by examining recent state-level bail reforms in the United States and arguing why these reforms are positive developments, but that we need more.

#### A. Anglo-Saxon Roots

During the Anglo-Saxon period, which refers to the period between 410 and 1066 in England,<sup>70</sup> people created a system as an alternative to avoid blood feuds, where a person could pay a fee to ensure that a defendant did not flee before paying a “bot, or penalty, to the injured.”<sup>71</sup> This fee became known as “bail” and “was identical to the amount or substantive worth of the penalty.”<sup>72</sup> The accused would find a surety to guarantee that the defendant appeared in court and to also pay the bail

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66. James, *supra* note 6.

67. Metzmeier, *supra* note 26, at 399.

68. Schnacke et al., *supra* note 24, at 1 (quoting June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 574 (1983)) (internal quotation omitted).

69. Metzmeier, *supra* note 26, at 401.

70. *Ancient History: The Anglo-Saxons*, BBC, [https://www.bbc.co.uk/history/ancient/anglo\\_saxons/saxons.shtml](https://www.bbc.co.uk/history/ancient/anglo_saxons/saxons.shtml) (last visited Mar. 9, 2022).

71. Schnacke et al., *supra* note 24, at 1–2.

72. *Id.* at 2.

amount if the court convicted the defendant.<sup>73</sup> June Carbone, Professor of Law at the University of Minnesota Law School, stated that “the Anglo-Saxon bail process was perhaps the last entirely rational application of bail.”<sup>74</sup> This is because “the system accounted for the seriousness of the crime . . . and the bail bond was perfectly linked to the outcome of trial – money for money.”<sup>75</sup>

In 1066, following the Anglo-Saxon period, the Norman Conquest brought significant change to the criminal justice system.<sup>76</sup> The State began to take more control of the criminal process, leading “the overall use of corporal punishment [to increase], giving many offenders a greater incentive to flee. System delays also caused many persons to languish in primitive jails, and the un-checked discretion given to judges and magistrates to release defendants led to instances of corruption and abuse.”<sup>77</sup> The State also started taking away people’s right to bail for certain crimes, starting with people the State accused of homicide, and ending with “a catch-all discretionary category of persons accused ‘of any other retto [wrong] for which according to English custom he is not replevisable [bailable].’”<sup>78</sup>

In 1275, the government passed the first Statute of Westminster, a compilation of 51 existing laws that, along with other topics, codified bail.<sup>79</sup> One of the statute’s main purposes was preventing the accused

73. *Id.*

74. *Id.* (quoting June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 520 (1983)) (internal quotation omitted).

75. Schnacke et al., *supra* note 24, at 2.

76. *Id.*

77. *Id.*

78. *Id.* at 2–3 (quoting June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 523 (1983)). This new system gave sheriffs “broad discretion” to handle criminal cases until magistrates could travel to towns to handle the situations. *Id.* at 3. The State began to worry “that corrupt sheriffs were taking bribes to release felons while denying bail to deserving persons who could not pay both the bribe and the surety.” Metzmeier, *supra* note 26, at 402. As a result, the bail system began to evolve in response to increasing corruption in the system. Schnacke et al., *supra* note 24, at 3.

79. Schnacke et al., *supra* note 24, at 3. The statute created three criteria to help determine a person’s bail:

- (1) the nature of the offense (categorizing offenses that were and were not bailable); (2) the probability of conviction (requiring the sheriff to examine all of the evidence and to measure such variables as whether or not the accused was held on ‘light suspicion’); and (3) the criminal history of the accused, often referred to as the bad character or ‘ill fame’ of the accused.

from fleeing.<sup>80</sup> In line with this goal, the list of nonbailable crimes included many crimes reflecting on a person's propensity to flee, such as murder, treason, jailbreaking, counterfeiting, forging, poaching, thieving, "and any crime where the accused had confessed or effectively done so by fleeing."<sup>81</sup> According to Professor Carbone, however, "the Statute of Westminster rearticulated rather than abandoned the conclusion of the Anglo-Saxons that the bail process must mirror the outcome of the trial . . . each criterion can be reduced to a simple standard: the seriousness of the offense offset by the likelihood of acquittal."<sup>82</sup>

For about 500 years, the government did not make many changes to the first Statute of Westminster's bail system.<sup>83</sup> During the 17th century, however, "[t]he concept of bail as an individual right arose."<sup>84</sup> In 1627, the English Parliament passed the Petition of Rights, which required the State to present evidence of cause before a court could jail a person.<sup>85</sup> Parliament then passed the Habeas Corpus Act of 1679, "which established procedures to prevent long delays before a bail bond hearing was held."<sup>86</sup> While the Habeas Corpus Act created procedural safeguards, judges realized they could still set a high monetary amount for bail to jail defendants "indefinitely."<sup>87</sup> To solve this issue, in 1689, the State created the English Bill of Rights that "stated that 'excessive bail ought not be required,'" a phrase that would later find its way into the United States Constitution's Eighth Amendment.<sup>88</sup>

By the time the government passed the English Bill of Rights in 1689, England was well underway with colonizing America. But the colonies would not be a lasting venture. England established its first colony in 1607,<sup>89</sup> but by 1776, the colonists signed the Declaration of Independence and declared their freedom.<sup>90</sup>

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80. Metzmeier, *supra* note 26, at 402.

81. *Id.*

82. Schnacke et al., *supra* note 24, at 2–3 (quoting June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 526 (1983)).

83. *Id.* at 3. Any changes focused on defining the list of bailable offenses and "adding safeguards to the bail process to protect persons from political abuse and local corruption." *Id.*

84. Metzmeier, *supra* note 26, at 402.

85. *Id.*

86. Schnacke et al., *supra* note 24, at 3–4.

87. *Id.* at 4.

88. *Id.*

89. *Colonial America (1492–1763)*, AM. LIBR., [https://www.americaslibrary.gov/jb/colonial/jb\\_colonial\\_subj.html](https://www.americaslibrary.gov/jb/colonial/jb_colonial_subj.html) (last visited Mar. 9, 2022).

90. Jeff Wallenfeldt, *Timeline of the American Revolution*, ENCYC. BRITANNICA, <https://www.britannica.com/list/timeline-of-the-american-revolution> (last visited Mar. 9, 2022).

Although these early Americans shared their history with the English, cultural distinctions led to early signs of central differences in the two countries' bail systems.<sup>91</sup> Below, Parts III(B) and III(C) discuss how these cultural differences led these countries to develop bail systems that fundamentally diverged from their shared common roots.

### B. England's Bail System

The core tenets driving the modern-day English bail system reflect the country's goal that defendants appear at trial, rather than capitulating to cash bail and a profit-driven system.<sup>92</sup> To facilitate this goal, "England has a bail system which relies upon the imposition of criminal penalties for its fundamental sanction motivating the appearance of the accused."<sup>93</sup> As it stands today, England's modern-day bail system appears to have naturally progressed from its common-law origins.

This Part begins by exploring how England's bail system progressed from its Anglo-Saxon roots after the United States declared independence, and how England prevented the commercial bail industry's development. This Part next discusses England's passage of the Bail Act of 1976, how its modern-day bail system is based on the Bail Act of 1976, and how its current bail system works. Finally, this Part concludes by emphasizing England's almost non-existent use of cash bail and refusal to let a commercial bail industry form and argues that this helps England avoid the issues that America faces.

#### 1. England's Old Bail System

England's bail history—from the time the United States declared its independence until the Bail Act of 1976 (which dictates most of English bail law today)—demonstrates how the country set out to stick to its common-law roots, avoid cash bail's prominence, and stop the bail system's commercialization. There are two significant aspects to note about this history. First, England has continually emphasized the importance of assuring that defendants appear at trial. Second, by the 19th century, England took every opportunity to stop a commercial bail bond industry from forming

Regarding the first aspect, starting in 1275 with the Statute of Westminster and until the Bail Act of 1826, English magistrates used three primary factors to determine whether to grant a defendant bail: "[(1)] the

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91. Schnacke et al., *supra* note 24, at 4–6.

92. DEVINE, *supra* note 22, at 117.

93. *Id.*

seriousness of the offense; [(2)] the likelihood of the accused's conviction[;] and [(3)] the 'outlawed' status of the offender."<sup>94</sup> Following the Bail Act of 1826, the government passed a law in 1835 that granted bail for any offense, even if a person was likely guilty, as long as the court granting bail to the defendant did not jeopardize the defendant's appearance at trial.<sup>95</sup> Thus, early on, England emphasized the importance of the defendant's appearance at trial. Justice J. Coleridge poignantly underscored this purpose during the 19th century in the case *R v. Scaife*, when he said, "I conceive that the principle on which persons are committed to prison . . . previous to trial[] is for the purpose of ensuring the certainty of their appearing at trial."<sup>96</sup> Although England emphasized the importance of a defendant's likelihood to appear at trial, a combination of the 1835 Act and common law created a policy of preventive detention at the expense of personal freedom.<sup>97</sup> That is because, until the Bail Act of 1976, there was no right to bail; rather, judges had discretion to grant or deny an accused bail "to protect the public."<sup>98</sup>

Moving to the second aspect, it is evident that English common law rejected a commercial bail bond industry well before the country codified the Bail Act of 1976's prohibition.<sup>99</sup> In contrast to the United States, it is significant that England rejected the commercialization of bail almost immediately from the time the United States declared its independence. The first cases to arise in England that laid the groundwork for prohibiting a commercial bail bond industry were civil cases evaluating the legality of people indemnifying sureties.<sup>100</sup> It quickly became clear that courts held "any agreement to indemnify a person standing as a surety as an illegal

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94. Metzmeier, *supra* note 26, at 413.

95. *Id.*

96. *Id.* at 402 (quoting *R v. Scaife* [1841] 10 L.J.M.C. 144 (Eng.)).

97. *Id.* at 414.

98. *Id.* Three cases during the 20th century demonstrate England's use of preventive detention. In *R v. Phillips*, the court "denied bail to a repeated burglar and noted that if a court determines a persistent felon is likely to commit future crimes while on bail, bail should be denied." *Id.* (quoting *R v. Phillips* [1947] 32 Crim. App. 47 (Eng.)). In *R v. Wharton*, Chief Justice Lord Goddard, while discussing a lower court's decision to grant bail, stated "[i]t is surprising to find that the magistrates admitted him to bail considering his past record, because he had been convicted over and over again . . . This is what comes of granting bail to these men with long records." Metzmeier, *supra* note 26, at 413 (quoting Henry Palmer, *Bail — Prisoner With a Bad Criminal Record*, CRIM. L. REV. 565 (1955)) (internal quotation omitted). In *R v. Armstrong*, the court explained how "[i]t is clear that it is the duty of the justices to inquire into the [criminal record of the accused] and if they find he had a bad record . . . that is a matter which they must consider before granting bail." *Id.* (quoting *R v. Armstrong* [1951] 2 All ER 219 (Eng.)) (internal quotation omitted).

99. DEVINE, *supra* note 22, at 15–16.

100. *Id.* at 16.

contract and was therefore unenforceable.”<sup>101</sup> In 1855, the court in *Jones v. Orchard*—one of the first cases to discuss this issue—made “clear that an already established public policy against payments to sureties existed.”<sup>102</sup>

In 1881, the court in *Wilson v. Strugnell* decided one of the seminal cases on the commercialized bail issue when it handled a dispute that arose about an indemnity contract and the surety’s failure to pay a recognizance.<sup>103</sup> Writing for the court, “Justice Stephens held that such a contract to indemnify a surety for bail against his liability was illegal and void, it being a contract contrary to public policy . . . in part . . . the effect of the contract was to deprive the public of the security of bail.”<sup>104</sup> Moving forward, this case became important because Justice Stephens tied contracts to indemnify sureties as “contrary to the public interest . . . [by] undermining the surety’s interest in assuring the defendant’s presence for trial . . . [and depriving] the public of the security for the accused’s attendance intended by the process of bail.”<sup>105</sup>

In 1909, the court in *R v. Porter* decided the last major development against commercialized bail before the Bail Act of 1976.<sup>106</sup> The court held that “[i]f the surety is indemnified he loses his interest in the defendant’s appearance. Therefore, in every imaginable case an agreement to indemnify tends to produce a public mischief. Consequently, . . . any agreement to indemnify a surety is not only an unenforceable contract, it is a crime.”<sup>107</sup> The *Porter* decision held strong as the law until the Bail Act of

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101. *Id.*

102. *Id.* (citing *Jones v. Orchard* [1855] 139 Eng. Rep. 900 (CP)).

103. *Id.* at 17 (citing *Wilson v. Strugnell* [1881] 7 QBD 548 (Eng.)).

104. *Id.* at 18.

105. DEVINE, *supra* note 22, at 18. Throughout the 19th and 20th centuries, English courts continued to reign in any possibility of a commercialized bond industry. In 1899, the court in *Consolidated Exploration and Finance Company v. Musgrave*, found a contract between a surety and a third party—rather than the accused seeking bail like in *Wilson*—to indemnify the surety was illegal and void. *Id.* at 18–19 (citing *Consol. Expl. & Fin. Co. v. Musgrave*, 64 JP 89 (Ch. 1899) (Eng.)) [hereinafter *Musgrave*]. In holding that any agreement to indemnify a surety, regardless of whether it is the accused or a third-party who is indemnifying, was illegal, the Court emphasized how, “[i]t is essential that the person giving bail should be interested in looking after and if necessary exercising the legal powers he has to prevent the accused from disappearing. This is necessary for the protection of the public.” *Id.* (quoting *Musgrave*, 64 JP 89). In 1902, the court in *R v. Stockwell* [1902] 66 JP 376 (Eng.), further expanded on the law by holding it a crime, rather than just illegal and void, to enter a contract indemnifying a surety. *Id.* at 19. Finding this type of contract constituted a crime was “a major legal development.” *Id.*

106. DEVINE, *supra* note 22, at 19–20 (discussing *R v. Porter* [1910] 1 KB 369 (Eng.)). In the case, two friends bailed out the defendant on recognizance of fifty pounds, but shortly after the court released the accused, he paid each friend fifty pounds and absconded. *Id.*

107. *Id.* at 20 (discussing *R v. Porter* [1910] 1 KB 369 (Eng.)).



1976, and there was not even a reported case dealing with a contract indemnifying a surety until 1972.<sup>108</sup>

By the late 20th century, however, many people began criticizing England's bail structure.<sup>109</sup> It seemed that England's focus on preventive detention and emphasis on a recognizance bail system was not working effectively. Although there was a low absconding rate,<sup>110</sup> a group conducted a review of England's bail system in the 1960s and found that "36.5% of persons scheduled for trial were in detention. The majority remained in jail from the arrest to the trial. The arrest stays averaged 31 days . . . Furthermore, 20% of those convicted after being detained received non-jail sentences."<sup>111</sup>

## 2. The Bail Act of 1976

In 1971, because of people's criticism and the bail system's ineffectiveness, England created a "Home Office working party" to analyze England's bail system and suggest reforms.<sup>112</sup> The working party established "five considerations for bail determination: 1) appearance at trial (the primary consideration); 2) likelihood of further offenses; 3) further police inquiries; 4) interference with witnesses and 5) protection of the defendant."<sup>113</sup> Utilizing these considerations, the working party suggested serious changes in a report titled "Bail Procedures in Magistrates' Court."<sup>114</sup> Some recommendations included: abolishing courts requiring a personal recognizance from defendants; refusing to accept cash bail as the primary form of bail in place of personal recognizance; making absconding an offense punishable by fine or imprisonment; creating a legal presumption of bail and requiring courts to show credible reasons to deny bail; and if needed, utilizing third-parties as sureties for defendants through recognizance or imposing non-financial bail conditions on the accused.<sup>115</sup>

The working party also firmly rejected a commercial bail industry. Looking at England's common law history, and quoting from *R v. Porter*,

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108. *Id.* at 19–20. In 1977, the court in *R v. Head and Head* [1978] Crim. P.R. 504 (App. Cas.), decided "[t]he final English common law case on indemnification . . . [decided] after the passage, but before the effective date, of the statutory provision which would replace it" and it followed the *Porter* case. DEVINE, *supra* note 22, at 21.

109. DEVINE, *supra* note 22, at 113–14.

110. *Id.* at 113 (internal citations omitted).

111. Metzmeier, *supra* note 26, at 415.

112. DEVINE, *supra* note 22, at 114.

113. Metzmeier, *supra* note 26, at 415.

114. DEVINE, *supra* note 22, at 114.

115. *Id.* (internal citations omitted).

the working party stated, “[i]t is clear that it is illegal to indemnify bail . . . regardless of whether it is done by the defendant or by a third party.”<sup>116</sup> As stated above, the working party instead recommended non-commercial third-party sureties.<sup>117</sup> Interestingly, in prohibiting a commercial bail industry, the working party cited its consideration of the United States’ commercial bail industry.<sup>118</sup> In its report, the working party “stated their understanding that such a system does not work satisfactorily in the United States, implicitly citing as criticism the high rates charged by bondsmen and the governing of bail decisions by a commercial assessment of the risks.”<sup>119</sup>

Ultimately, England passed the Bail Act of 1976, and the new law became effective in 1978.<sup>120</sup> The Bail Act instituted most of the working party’s recommendations and established a uniform set of criteria for courts giving or denying bail and procedures for the bail process.<sup>121</sup> Some of the significant recommendations that the Bail Act of 1976 instituted include prohibiting personal recognizance, making absconding a criminal offense,<sup>122</sup> and effectively outlawing commercial bail bonding.<sup>123</sup> By accepting most of the working party’s ideas, England “presents the purest available example of a bail system based upon criminal penalties.”<sup>124</sup>

### 3. England’s Modern Bail System and How it Avoids America’s Crisis

Today, the Bail Act of 1976 still acts as the English bail system’s foundation. A court can grant two types of bail, unconditional and conditional.<sup>125</sup> Unconditional bail “imposes an obligation on a defendant to attend court at a future specified date and time.”<sup>126</sup> Courts can also release defendants on conditional bail, which still requires the accused to attend court on a specific date but sets “conditions as to their conduct until that date.”<sup>127</sup>

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116. *Id.* at 44 (internal citation omitted).

117. *Id.*

118. *Id.*

119. DEVINE, *supra* note 22, at 44 (internal citation omitted).

120. *Id.* at 114.

121. Metzmeier, *supra* note 26, at 415.

122. DEVINE, *supra* note 22, at 114.

123. *Id.* at 45.

124. *Id.* at 114.

125. BAIL IN THE MAGISTRATES’ COURT, Westlaw Practical Law UK Practice Note 5-504-8061 (last updated 2021).

126. *Id.* at 2.

127. *Id.*

Section four of the Bail Act sets out the presumption that accused persons have a right to unconditional bail.<sup>128</sup> Schedule 1, however, contains certain exceptions to this presumption<sup>129</sup> and “the only justifications for denial of bail.”<sup>130</sup> For persons accused of non-imprisonable offenses, courts can only deny them bail “if they have previously broken bail.”<sup>131</sup> For persons accused of imprisonable offenses, a court does not need to grant bail if it:

(1) is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would – (a) fail to surrender to custody, or (b) commit an offence while on bail, or (c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.<sup>132</sup>

If courts grant defendants bail, they primarily use the threat of criminal sanctions to ensure defendants appear at trial, instead of relying on financial forfeitures.<sup>133</sup> If defendants fail to attend their specified court date, without reasonable cause for their absence, they are guilty of a criminal offense, and an arrest warrant is issued.<sup>134</sup>

Additionally, a court may require third parties to stand as surety for defendants.<sup>135</sup> As a matter of law, however, courts do not require sureties

128. *Id.*; Bail Act 1976, c. 63, § 4 (Eng.).

129. BAIL IN THE MAGISTRATES' COURT, *supra* note 125, at 7.

130. Metzmeier, *supra* note 26, at 415.

131. *Id.* at 415–16.

132. Bail Act 1976, c. 63, schedule 1, part 1, para. 2. In deciding on these issues, courts take into consideration the following factors:

(a) the nature and seriousness of the offence . . . (b) the character, antecedents, associations and community ties of the defendant, (c) the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings, (d) except in the case of a defendant whose case is adjourned for inquires or a report, the strength of the evidence of his having committed the offence or having defaulted, (e) if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not), would commit an offence while on bail, the risk that the defendant may do so by engaging in conduct that would, or would be likely to, cause physical or mental injury to any person other than the defendant . . . as well as to any others which appear to be relevant.

Bail Act 1976, c. 63, schedule 1, part 1, para. 9 (Eng.).

133. DEVINE, *supra* note 22, at 113.

134. Bail Act 1976, c. 63, § 6 (Eng.).

135. DEVINE, *supra* note 22, at 115.

as a regular bail condition, but only when needed.<sup>136</sup> Under the current system, “sureties enter a recognizance for the defendant’s appearance and, although the defendant’s personal recognizance has been abolished, they function as in a recognizance bail system.”<sup>137</sup> The English bail system also still prohibits courts from requiring sureties to provide cash bail or other securities as a condition of the accused’s bail.<sup>138</sup> If the accused absconds, “a court has discretion to forfeit all or part of a surety’s recognizance . . . [but] English case law on the liability of sureties remains quite strict. The heavy burden on a surety seeking remission of a forfeiture has been stressed.”<sup>139</sup>

The Bail Act of 1976 continued England’s common-law history of making it illegal to agree to indemnify sureties in criminal proceedings.<sup>140</sup> Section 9 of the Bail Act states that:

if a person agrees with another to indemnify that other against any liability which that other may incur as a surety to secure the surrender to custody of a person accused or convicted of or under arrest for an offence, he and that other person shall be guilty of an offence.<sup>141</sup>

This provision includes both situations where the indemnity agreement occurs before or after the person agrees to be a surety,<sup>142</sup> where only part or none of the liability amount is paid to the surety, and where there is no actual intent to indemnify.<sup>143</sup> Persons convicted of this offense are subject to imprisonment and serious fines.<sup>144</sup> Both the surety and the indemnifier are subject to breaking the law.<sup>145</sup> The modern-day English bail system is, therefore, “no more receptive to commercial bail bonding than it had been under the common law prohibition.”<sup>146</sup>

Courts can also impose non-financial bail conditions on accused parties.<sup>147</sup> Reasons for imposing these conditions on accused parties include ensuring their appearance at trial, preventing them from committing other crimes while out on bail, stopping them from interfering with

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136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 115–16.

140. *Id.* at 45.

141. Bail Act 1976, c. 63, § 9(1) (Eng.).

142. *Id.* § 9(2).

143. DEVINE, *supra* note 22, at 45.

144. Bail Act 1976, c. 63, § 9(4)(a) (Eng.).

145. DEVINE, *supra* note 22, at 45 (citing Bail Act 1976, c. 63, § 9 (Eng.)).

146. *Id.*

147. *Id.* at 116.

witnesses, ensuring their own protection, securing their availability to help with inquiries or reports, and guaranteeing their appearance with a legal representative before trial.<sup>148</sup> Common conditions courts impose include “living at a specified address, observing a specified curfew, reporting periodically at a police station, not contacting particular people, not going near particular places, not entering a place licensed to sell alcohol, not driving, and surrendering one’s passport and not leaving the country.”<sup>149</sup> Persons who break these conditions are subject to arrest, alteration of bail terms, or revocation of bail.<sup>150</sup>

Finally, only in situations where accused persons are “particularly likely to leave the country” do courts have the ability to require cash bail from defendants.<sup>151</sup> When courts require cash bail, accused persons can either secure their release by depositing cash or property with the court or have other persons do it for them.<sup>152</sup> If the accused absconds, the cash bail “is forfeited in whole or in part . . . [unless] he later appears and is able to show reasonable grounds for his earlier failure.”<sup>153</sup>

Compared to statistics taken before the Bail Act of 1976, the new bail laws were successful. Whereas before the law courts detained 36.5% of people scheduled for trial,<sup>154</sup> between 1980–1985 on average courts held only 13.5% of all offending people in custody.<sup>155</sup> That means courts granted bail to 86.5% of accused persons.<sup>156</sup> While bail rates were high during this period, absconding rates were still low, with around only 4% of “persons remanded on bail for indictable offense[s] at Magistrates’ Courts” absconding.<sup>157</sup>

148. Bail Act 1976, c. 63, § 3(6) (Eng.).

149. DEVINE, *supra* note 22, at 116.

150. *Id.*

151. *Id.* at 117.

152. *Id.* at 116.

153. *Id.* (citing Bail Act 1976, c. 63, §§ 3(5), 5(7)–(9A)). A few examples of situations where courts have imposed cash bail include:

£10,000 required of a French citizen accused of check fraud, . . . deposits of £3,000 and £5,000 required of two Italians accused of multiple drug charges, . . . [and requiring a] U.K. citizen charged with unlicensed export of military vehicle engines who wished to visit the United States . . . to deposit £25,000 plus obtain a surety.

*Id.* at 116–17 (internal citations omitted).

154. Metzmeier, *supra* note 26, at 415.

155. DEVINE, *supra* note 22, at 121.

156. *Id.* (internal citation omitted).

157. *Id.* at 121–22.

Because England's bail system primarily avoids using cash bail and does not have a commercial bail industry, it circumvents many of the problems that the United States faces. England's reluctance to use cash bail and emphasis on criminal punishment prevents it from: criminalizing poverty by ordering unnecessarily high cash bail; detrimentally hurting innocent and low-risk defendants by needlessly locking up certain defendants pre-trial; and wasting money by detaining defendants pre-trial who are either innocent, low-risk, or whose charges end up being dropped. Moreover, the commercial bail industry's absence in England prevents bail bondsmen from preying on defendants and forcing them into detrimental economic situations.

Ultimately, bail's development in England—from the time the United States declared its independence through today—never strayed far from its common-law roots. This is primarily because England emphasized the importance of using bail to ensure defendants appear at trial, and it prevented a commercial bail industry from forming. People, however, still criticized England's bail system, and that criticism led the country to pass the Bail Act of 1976 and create its modern-day system. Today, the English bail system's primary function is criminal punishment for absconders.<sup>158</sup> Sureties acting as recognizance for the accused and non-financial bail conditions are both available but uncommon, with sureties being rarer.<sup>159</sup> In situations where the accused is particularly likely to leave the country, courts might require cash bail.<sup>160</sup> Finally, while a high percentage of accused persons are released, absconding rates remain low.<sup>161</sup>

As discussed in Part III(C) below, the United States took a different approach in developing its bail system—using cash bail and allowing a commercial bail industry to form—and now faces consequences because of it.

### C. *The United States' Bail System*

By the 20th century the United States' bail system had evolved into one of “quasi-preventive detention.”<sup>162</sup> Although there was a “strong presumption towards bail and the establishment of risk of flight as the only

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158. *Id.* at 122.

159. *Id.*

160. *Id.* at 117.

161. DEVINE, *supra* note 22, at 122.

162. Metzmeier, *supra* note 26, at 406. In *United States v. Salerno*, 481 U.S. 739 (1984), the Court held that the Bail Reform Act of 1984 was constitutional and validated America's quasi-preventive detention bail system. *See discussion infra* note 226.

proper grounds for denial of bail,” the commercial bail bond industry’s growth in the United States differentiated America’s system from England’s.<sup>163</sup>

This Part begins by addressing how the American bail system developed after the United States declared independence, focusing on how the circumstances at the time the country formed fostered an environment that naturally led to the prominence of cash bail and a commercial bail industry. This Part next examines the commercial bail industry’s formation in the United States, how it works, and the government’s support of the industry. After, this Part describes both federal and state bail’s development in the United States during the 20th century, positive changes that arose out of concern with bail bondsmen and cash bail dominating the system, and how the public’s fear of crime during the 1970s led to a preventive detention system. Finally, this Part concludes by discussing the United States’ current federal and state bail systems, examining positive reforms that some States have enacted, and arguing that these reforms are a step closer to our common-law roots, but that we need more change.

### 1. The United States’ Bail System After Independence

Like England, reviewing the American bail system’s development demonstrates how it went from an environment ripe for cash bail and a commercial bail industry, to “the prime example of a country dominated by commercial bail bonding.”<sup>164</sup> Before declaring independence, “the early colonies applied English law verbatim.”<sup>165</sup> This might be because the colonists still thought of themselves as English citizens governed by English law.<sup>166</sup> The early colonists, however, began to apply changes to the existing bail laws, and by the time the colonists declared independence, the “American legal custom had already developed a strong presumption favoring pre-trial release by means of a bail payment.”<sup>167</sup>

The United States’ Constitution does not provide an explicit right to bail nor state the crimes courts can grant bail for.<sup>168</sup> One of the earliest bail developments in the United States came when the founders passed the Eighth Amendment that prohibits “excessive bail.”<sup>169</sup> Next, Congress

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163. Metzmeier, *supra* note 26, at 406.

164. DEVINE, *supra* note 22, at 52.

165. Schnacke et al., *supra* note 24, at 4.

166. John-Michael Seibler & Jason Snead, *The History of Cash Bail*, 213 THE HERITAGE FOUND. 1, 3 (Aug. 25, 2017), <https://www.heritage.org/courts/report/the-history-cash-bail>.

167. *Id.*

168. Schnacke et al., *supra* note 24, at 5.

169. *Id.*

passed the Judiciary Act of 1789 that “granted an absolute right to bail in non-capital federal criminal cases.”<sup>170</sup> Following the passage of the Judiciary Act of 1789 and “[b]y the mid 19th century, most state constitutions included some sort of right to bail.”<sup>171</sup>

Looking at the environment in the United States after the colonists declared independence from England, cash bail and the commercial bail industry’s growth are unsurprising. Three conditions in the United States made it particularly susceptible to this growth.<sup>172</sup> First, “the Judiciary Act of 1789 and the constitutions of most states provided for an absolute right to have bail set except in capital cases.”<sup>173</sup> Second, at that time, the United States was a new frontier, and many people lacked close friends, family, or neighbors who could act as sureties.<sup>174</sup> Third, following its independence, many parts of the United States were unsettled and provided fleeing defendants with opportunities to escape.<sup>175</sup>

## 2. The Commercial Bail Industry’s Rise in America

Out of these conditions, commercial bail bonding began to rise in the 19th century. Most people trace the United States’ commercial bail industry’s origins to San Francisco.<sup>176</sup> Although defendants often found sureties, these sureties “promise[s] to produce the accused gradually became a promise merely to pay money should the accused fail to appear.”<sup>177</sup> Two brothers, Peter and Thomas McDonough, saw this situation as an opportunity.<sup>178</sup> In San Francisco in the mid-19th century, the McDonough brothers “began putting up bail money as a favor to lawyers who drank at their father’s saloon . . . Once the lawyers’ clients showed up for court, the brothers got their money back.”<sup>179</sup> Pretty quickly, the brothers realized they could charge a fee for this service,<sup>180</sup> and thus “founded the nation’s first commercial bail-bond firm from their father’s saloon,” and called it “McDonough Bros.”<sup>181</sup>

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170. *Id.*

171. Metzmeier, *supra* note 26, at 405.

172. Schnacke et al., *supra* note 24, at 6.

173. *Id.* (quoting WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA 11–12 (1976)).

174. *Id.*

175. *Id.*

176. Seibler & Snead, *supra* note 166, at 4.

177. *Id.* (quoting *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 967 (1961)).

178. *Id.*

179. Bauer, *supra* note 5.

180. *Id.*

181. Seibler & Snead, *supra* note 166, at 4.



The McDonough Bros.' business model became the standard for commercial bail bond businesses in the United States.<sup>182</sup> Many defendants could not afford cash bail themselves or did not have family or friends who could pay for them.<sup>183</sup> These defendants could then turn to a commercial bail bond company that, in exchange for a percentage fee (often around 10%), would post the full bail for the defendants.<sup>184</sup> By paying the defendants' bails, the bond company became responsible for ensuring the defendants' appearances in court "and [was] empowered to track down, detain, and return fleeing individuals."<sup>185</sup> If the defendants showed up at court, the court returned the bail amount to the bail bond company, who retained the defendants' fees.<sup>186</sup> If the defendants did not make it to court, the company lost the full bail amount.<sup>187</sup>

While England actively focused on outlawing a commercial bail industry and using cash bail only as a last resort, during the 1800s and early 1900s the United States' government and courts took the opposite approach. For example, people often cite the United States Supreme Court case *Taylor v. Taintor*<sup>188</sup>—decided in 1872—as authorizing bounty hunters.<sup>189</sup> Following the McDonough Bros.' success, and "[w]ith a growing number of defendants facing increasingly higher money bail bond amounts, the professional bail bond industry flourished in America. If

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182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Seibler & Snead, *supra* note 166, at 4.

188. *Taylor*, 83 U.S. 366 (1872).

189. Schnacke et al., *supra* note 24, at 7. Although the Court's main holding in *Taylor* did not discuss bounty hunters, the Court went outside the case's facts and generally stated:

When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner.

Todd C. Barsumian, *Bail Bondsmen and Bounty Hunters: Re-Examining the Right to Recapture*, 47 DRAKE L. REV. 877, 886–87 (1999) (quoting *Taylor*, 83 U.S. at 371). People often cite this language from the Court in establishing bounty hunters' rights. *Id.* at 887.

anyone ever saw these businesses as problematic, however, it was rarely reported.”<sup>190</sup>

### 3. 20th Century Bail Developments in the United States

Outside the commercial bail industry’s development, the United States’ bail system did not change much until the middle of the 20th century.<sup>191</sup> The Supreme Court then decided two important cases: *Stack v. Boyle*<sup>192</sup> in 1951 and *Carlson v. Landon*<sup>193</sup> in 1952. *Stack* is important for three reasons.<sup>194</sup> First, the Court articulated the purpose of preserving a federal right to bail, saying “federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”<sup>195</sup> Second, the Court determined that courts must make individualized assessments when determining bail amounts.<sup>196</sup> Third, the Court affirmed the role that bail bonds have, explaining that “the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused.”<sup>197</sup> *Carlson*, which came only a few months after *Stack*, clarified that people’s right to bail is not absolute in every case.<sup>198</sup> Through these two cases, the Supreme Court set a framework for bail:

[W]hile a right to bail is a fundamental precept of the law, it is not absolute, and its parameters must be determined by federal and possibly state legislatures. Where a bail bond is permitted, however, there must be an individualized determination using standards designed to set the bail bond at ‘an amount reasonably calculated’ to assure the defendant’s return to court; when the purpose of a money bail bond is only to prevent flight, the monetary

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190. Schnacke et al., *supra* note 24, at 7. As of May 2020, there were approximately 14,000 bail agents in the United States, with 3,200 bail agents in California alone. Sully Barrett, *How the Coronavirus Could Kill the \$2 Billion US Bail Bond Business*, CNBC (May 9, 2020), <https://www.cnbc.com/2020/05/09/how-coronavirus-could-kill-the-us-bail-bond-business.html>.

191. Seibler & Snead, *supra* note 166, at 4.

192. *Stack v. Boyle*, 342 U.S. 1 (1951).

193. *Carlson v. Landon*, 342 U.S. 524 (1952).

194. Schnacke et al., *supra* note 24, at 8.

195. *Stack*, 342 U.S. at 4.

196. Schnacke et al., *supra* note 24, at 8.

197. *Stack*, 342 U.S. at 5.

198. *Carlson*, 342 U.S. at 545–46.

amount must be set at a sum designed to meet that goal, and no more.<sup>199</sup>

By the 1960s, Americans began seriously criticizing the country's bail system.<sup>200</sup> It was becoming clear that bondsmen were starting to dominate the bail system; courts were not considering bail the way they should; courts were increasingly detaining defendants because the defendants' bails were more than they could pay; courts were using bail as a means of punishing defendants; and jails were becoming overcrowded because courts were detaining defendants—who they should have otherwise released—for not paying bail.<sup>201</sup>

Out of this concern, some positive changes emerged. In 1961, Louis Schweitzer founded the Vera Foundation, that in turn created the Manhattan Bail Project.<sup>202</sup> Schweitzer's group "posted bail for defendants with strong community ties and tracked whether they made their court appearance. The experiment proved that defendants released on their own recognizance had a lower non-appearance rate than those under the old money bail system."<sup>203</sup> In 1963, Illinois—unhappy with the commercial bail system—created the "Illinois Ten Percent Deposit Plan," whereby cash bail remained the primary form of bail, but the state eliminated the use of commercial bail bondsmen.<sup>204</sup> Even courts began reconsidering "the desirability of a system that was based on secured bonds and dominated by commercial money bail bondsmen, who had, in turn, become the focus of numerous inquiries into their often abusive and corrupt practices."<sup>205</sup>

Eventually, politicians caught wind of the public's changing opinion on bail. In 1964, then Attorney General Robert F. Kennedy stated how "[u]sually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence . . . The factor is simply money. How much money does the defendant have?"<sup>206</sup> At the same time, Senator Sam Ervin introduced legislation—intended at reforming federal bail practices—that ultimately turned into the Federal

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199. Schnacke et al., *supra* note 24, at 9.

200. Metzmeier, *supra* note 26, at 407.

201. Schnacke et al., *supra* note 24, at 9 (citing WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA 11–12 (1976)).

202. Metzmeier, *supra* note 26, at 407.

203. *Id.* (citing CHRIS W. ESKRIDGE, PRETRIAL RELEASE PROGRAMMING: ISSUES AND TRENDS 25–26 (1983)).

204. Schnacke et al., *supra* note 24, at 10–11.

205. *Id.* at 11.

206. Seibler & Snead, *supra* note 166, at 5 (quoting *Hearing on S. 2838, S. 2839, and S. 2840 Before the Subcomm. on Constitutional Rights and Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 88th Cong. (1964) (statement of Robert F. Kennedy, Attorney General)).

Bail Reform Act of 1966.<sup>207</sup> Many states subsequently passed laws similar to the Bail Reform Act of 1966.<sup>208</sup>

Although the legislators who created the Bail Reform Act of 1966 intended the law to help reduce courts using bail as a form of preventive detention, the law did not have this effect. One issue was that the law “opened the door to individuals not receiving release on bail if a judge concluded they were likely to be found guilty.”<sup>209</sup> Another issue was that in the 1970s the culture in the United States began to shift towards favoring preventive detention, whether for capital or non-capital offenses.<sup>210</sup> In 1970, Congress authorized the District of Columbia Crime Act and allowed courts to utilize preventive detention with non-capital defendants, thereby detaining them without bail.<sup>211</sup> These new laws also authorized courts “to consider a defendant’s dangerousness when making bail decisions.”<sup>212</sup>

Bail in the States also followed a similar pattern. Although most states implemented laws similar to the Bail Reform Act of 1966, “[t]hese changes led to rising rates of pre-trial detention across the country . . . and . . . [m]oney bail became the primary method of releasing or detaining defendants which weighed heavily on individuals with little financial resources.”<sup>213</sup> Describing the United States’ bail system in 1967, the American Bar Association explained how the current system “is unsatisfactory . . . Its very nature requires the practically impossible task of transmitting risk of flight into dollars and cents and even its basic premise – that risk

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207. Schnacke et al., *supra* note 24, at 12. The Act contained a few important 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; (3) restrictions on money bail bonds, which the court could impose only if non-financial release options were not enough to assure a defendant’s appearance; (4) a deposit money bail bond option, allowing defendants to post a 10% deposit of the money bail bond amount with the court in lieu of the full monetary amount of a surety bond; and (5) review of bail bonds for defendants detained for 24 hours or more.

*Id.*

208. *Id.*

209. SHIMA BARDARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* 3 (2017).

210. Amanda Zaniewski, *Bail in the United States: A Brief Review of the Literature*, MASS. DEP’T OF CORRECTIONS 2 (Nov. 2014), <https://www.mass.gov/files/documents/2016/09/qx/bail-in-united-states-literature-review.pdf>.

211. *Id.*

212. *Id.*

213. *Id.*

of financial loss is necessary to prevent defendants from fleeing prosecution – is itself of doubtful validity.”<sup>214</sup>

#### 4. The United States' Modern Federal Bail System

Although, at the time, the public criticized the Bail Reform Act of 1966 because it did not do enough to stop cash bail and preventive detention, public opinion started to become more concerned with other aspects of bail. Bail reform in the 1970s was “characterized by heightened public concern over crime, including crimes committed by persons released on a bail bond. Highly publicized violent crimes committed by defendants while released pretrial prompted calls for more restrictive bail policies.”<sup>215</sup> There was a growing sentiment that judges should be able to consider a defendant's danger to the community when setting bail.<sup>216</sup>

By the 1980s, both states and the federal government responded to the public's desire to include a defendant's danger to the community in bail considerations. Following the District of Columbia Crime Act, many states passed similar bills that authorized courts to consider a defendant's danger to the community and utilize preventive detention.<sup>217</sup> Similarly, in 1984, Congress addressed the issue on a federal level by passing the Comprehensive Crime Control Act of 1984.<sup>218</sup> Chapter 1 of the new law contained the Bail Reform Act of 1984 and amended the Bail Reform Act of 1966.<sup>219</sup>

The Bail Reform Act of 1984 governs most of the United States' modern federal-bail law. The law orders the:

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 . . . [and if] the judicial officer finds that no condition or combination of conditions will reasonably assure the

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214. Schnacke et al., *supra* note 24, at 13 (quoting STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE, VOL. 1 (1968) (AM. BAR ASS'N, amended 2007)).

215. *Id.* at 17 (quoting *The Supervised Pretrial Release Primer*, PRETRIAL SERVS. RES. CTR. (BJA, August 1999), at 5).

216. *Id.* (citing *The Supervised Pretrial Release Primer*, PRETRIAL SERVS. RES. CTR. (BJA, August 1999), at 5). It is important to compare how in England during the late 20th century, the public began criticizing the country for using preventive detention, whereas in the United States during the same time, the public supported using preventive detention. *See* discussion *supra* p. 116.

217. *Id.*

218. *Id.*

219. Schnacke et al., *supra* note 24, at 17.

appearance of the person (as required) and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.<sup>220</sup>

The law also mandates a “rebuttable presumption toward confinement when the person has committed certain delineated offenses, such as crimes of violence or serious drug crimes.”<sup>221</sup> To assess whether to preventively detain a defendant, courts must consider certain factors indicating whether a defendant will appear at trial or pose danger to the community.<sup>222</sup>

Instead of using the Bail Reform Act of 1984 to eliminate cash bail, Congress specifically rejected the idea.<sup>223</sup> Members of Congress called the idea of eliminating cash bail “unjustified” and the “Department of Justice recommended preserving money bail as a historical and effective method to deter flight and secure reappearance.”<sup>224</sup> When considering the Bail Reform Act of 1984, the Senate Judiciary Committee explicitly endorsed cash bail, explaining that “[a] financial condition of release that results in the pre-trial detention of the defendant...does not necessarily require [their] release’ if the judge determines that ‘it is the only form of conditional release that will assure the person’s future appearance.”<sup>225</sup> In 1987, the United States Supreme Court decided the case *United States v. Salerno* and upheld the Bail Reform Act of 1984’s constitutionality.<sup>226</sup>

220. 18 U.S.C. § 3142(b), (e) (2008).

221. Schnacke et al., *supra* note 24, at 18.

222. Metzmeier, *supra* note 26, at 410 (citing § 3142(g)). These factors include:

1. nature of crime; whether it involves violence or drugs;
2. ‘weight of the evidence;’
3. person’s history, including character, physical & mental condition, job, finances, length of residence, community ties, drug abuse history, prior criminal & bail appearance record; and
4. nature and seriousness of the danger to any person or the community that would be posed by the person’s release.

*Id.* (citing § 3142(g)).

223. Seibler & Snead, *supra* note 166, at 6–7.

224. *Id.* (quoting S. REP NO. 98-225, at 11 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3194).

225. *Id.* at 7 (citing S. REP NO. 98-225, at 11 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3194).

226. Schnacke et al., *supra* note 24, at 18. *Salerno* “fundamentally changed how the criminal justice system views detention.” Laurie L. Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 LOY. L.A. L. REV. 1217, 1218 (2002). Although before *Salerno* courts could not assess defendants’ danger to the community, after the decision the United States “moved into an era in which there might technically be a presumption of innocence, but there are a host of criminal and civil laws that allow the government to detain individuals because it suspects they could cause future harm.” *Id.* In his dissent, Justice Thurgood Marshall poignantly noted that “we are quickly moving to a criminal justice system where ‘a person innocent of any crime may be jailed

## 5. The United States' Modern State Bail System and Recent Reforms

Although the federal bail system has not changed much since 1984, many states have modified their bail laws over the last 40 years, and a few states have enacted positive reforms. In 1992, Washington D.C.—although technically not a state—became an early bail reformer and basically ended its use of cash bail when it passed the Bail Reform Act.<sup>227</sup> The law enacted new guidelines on judges,<sup>228</sup> and one guideline in particular explicitly prohibits judges from imposing financial conditions that defendants cannot pay.<sup>229</sup> Instead, judges use a risk-based assessment system to determine the defendants they release<sup>230</sup> and use non-financial release conditions to help ensure defendants appear at trial.<sup>231</sup> Although Washington D.C.'s system still has its issues, it appears that the system's positive effects outweigh the negative effects. Washington D.C.'s courts release about 85 percent of defendants without bail and 90 percent of those defendants show up to court.<sup>232</sup> Moreover, Washington D.C. saves about \$398 million a year under this system.<sup>233</sup>

In 2017, the New Jersey Criminal Justice Reform Act went into effect and effectively eliminated cash bail in the State.<sup>234</sup> Instead, New Jersey now releases most defendants pending trial, but allows judges to detain defendants who are accused of certain violent crimes or defendants that a risk-based assessment system determines are a risk for not showing up to their trials.<sup>235</sup> The courts' pre-trial services division then oversees defendants that the courts release, ensuring that these defendants comply with certain non-financial release terms, like electronic monitors and

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indefinitely.” *Id.* at 1217 (quoting *Salerno*, 481 U.S. at 755 (Marshall, J., dissenting)). Although at the time the Court announced *Salerno* there were negative public reactions, that has changed over time, and now “the public and the courts predictably moved into an era in which we are relatively comfortable with preventive detention.” *Id.* at 1219.

227. Sara Dorn, *How D.C. Court Reforms Save \$398 Million: Impact 2016: Justice for All*, CLEVELAND.COM (Jan. 11, 2019, 7:33 PM), [https://www.cleveland.com/metro/2016/05/how\\_dc\\_court\\_reforms\\_save\\_398.html](https://www.cleveland.com/metro/2016/05/how_dc_court_reforms_save_398.html).

228. *Id.*

229. 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).

230. Dorn, *supra* note 227.

231. Marimow, *supra* note 229.

232. Dorn, *supra* note 227.

233. *Id.*

234. *Pretrial Justice Reform*, ACLU N.J., <https://www.aclu-nj.org/theissues/criminaljustice/pretrial-justice-reform> (last visited Dec. 21, 2021).

235. Mark F. Bernstein, *How New Jersey Made a Bail Breakthrough*, PRINCETON ALUMNI WKLY. 26, 26-30 (Nov. 2020), <https://www.paw.princeton.edu/article/how-new-jersey-made-bail-breakthrough>.

periodic check-ins.<sup>236</sup> New Jersey also enacted the Speedy Trial Act that requires courts bring defendants to trial within six months of their indictment.<sup>237</sup> Like Washington D.C., although New Jersey's system still has its problems, its positive effects seem to outweigh any of these issues. As of November 2020, the number of people in jail that were awaiting trial had fallen by more than 40 percent, while the number of defendants that appeared for court dates only dropped slightly from 92.7 percent to 89.4 percent.<sup>238</sup>

A few other states have also passed reforms. In 2018, a new law went into effect in Alaska that reduced the State's use of cash bail, and instead, Alaska now primarily uses risk assessment.<sup>239</sup> Courts release defendants that police charge with low-level crimes or who the risk-assessment system determines are low-risk on recognizance and sometimes with non-financial release conditions, but assess bail bonds for defendants police charge with violent crimes or who the risk-assessment system determines are high-risk.<sup>240</sup> New York passed a bail reform law that went into effect in 2020 and intended to reduce the number of people in jail pre-trial.<sup>241</sup> Facing backlash, however, New York amended the bill about three months after it went into effect.<sup>242</sup> Under the current law, the law bars judges from using cash bail for defendants police charge with most misdemeanors and nonviolent felonies, and courts must release these defendants under the least restrictive conditions possible that still ensure the defendants will attend trial.<sup>243</sup> Judges are authorized to use cash bail, however, for almost all violent felonies and certain nonviolent felonies, and can use cash bail based on a defendant's legal history and status.<sup>244</sup>

More recently, in 2021, Illinois became the first state to fully abolish cash bail<sup>245</sup> and the California Supreme Court significantly reduced judges' ability to use cash bail.<sup>246</sup> California has gone back and forth with cash bail, as it passed a law in 2018 that eliminated cash bail, but in 2020

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236. *Id.*

237. *Id.*

238. *Id.*

239. *Alaska Moves to Eliminate Cash Bail*, VERA INST. OF JUST. (Jan. 18, 2018), <https://www.vera.org/blog/alaska-moves-to-eliminate-cash-bail>.

240. *Id.*

241. Taryn A. Merkl, *New York's Latest Bail Law Changes Explained*, BRENNAN CTR. FOR JUST. (Apr. 16, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained>.

242. *Id.*

243. *Id.*

244. *Id.*

245. Corley, *supra* note 33.

246. Dolan, *supra* note 32.



a popular vote referendum defeated the law.<sup>247</sup> In 2021, however, the California Supreme Court held “it is unconstitutional to require defendants to remain behind bars simply because they cannot afford bail . . . [and] told judges to favor pretrial release and consider a person’s ability to pay before setting bail.”<sup>248</sup>

There are many similarities between Illinois and California’s reforms and England’s bail system. For example, Illinois will now require judges, who are handling non-violent defendants that cannot afford bail, to “impose the least restrictive conditions necessary to ensure a defendant’s appearance in court.”<sup>249</sup> The California Supreme Court stated that it is unconstitutional to “condition[] freedom solely on whether an arrestee can afford bail” and that other non-financial “conditions of release — such as electronic monitoring, regular check-ins with a pretrial case manager, community housing or shelter, and drug and alcohol treatment — can in many cases” protect the public and assure defendants appear at trial.<sup>250</sup> These actions move closer to England, where courts rarely use financial forfeitures to ensure defendants appear at trial, and instead utilize less invasive conditions such as the threat of criminal punishment, third-party sureties, or non-financial conditions.<sup>251</sup>

Although there has been some progress in the United States, both Congress and the United States Supreme Court have solidified the prominent role that cash bail plays in the country. Whereas England utilized every opportunity to reject the country’s use of cash bail, the United States has used most opportunities to legitimize the country’s use of cash bail. Moreover, since 1984, in both federal and state courts, “pretrial detention has become the norm rather than the exception.”<sup>252</sup> Ultimately, although there has been a growing push to eliminate cash bail at a state-level, federal courts and most states still use cash bail, supplemented with a commercial bail industry.

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247. Horus Alas, *Why L.A. County’s District Attorney Has Joined the Movement to End Bail*, U.S. NEWS & WORLD REP. (Jan. 14, 2021, 2:35 PM), <https://www.usnews.com/news/cities/articles/2021-01-14/los-angeles-county-district-attorney-joins-movement-to-end-cash-bail>.

248. Dolan, *supra* note 32.

249. Emanuella Evans & Rita Ocegüera, *Illinois Criminal Justice Reform Ends Cash Bail, Changes Felony Murder Rule*, INJUSTICE WATCH (Feb. 23, 2021), <https://www.injustice-watch.org/news/2021/illinois-criminal-justice-reform-cash-bail-felony-murder/>.

250. Dolan, *supra* note 32.

251. DEVINE, *supra* note 22, at 117. England uses non-financial conditions such as “living at a specified address, observing a specified curfew, reporting periodically at a police station, not contacting particular people, not going near particular places, not entering a place licensed to sell alcohol, not driving, and surrendering one’s passport and not leaving the country.” *Id.* at 116.

252. BAUGHMAN, *supra* note 209, at 3.

#### IV. LEARNING FROM FORMER BRITISH COMMONWEALTH COUNTRIES, INTERNATIONAL LAW, AND THE EUROPEAN UNION

It is clear that while England sought to prevent cash bail's prominence and a commercial bail industry, the United States affirmed cash bail's constitutionality and protected the commercial bail industry's right to operate. This Part first discusses how much of the world looks unfavorably on the United States' bail system and the ways that three former British Commonwealth countries' bail systems—India, New Zealand, and Scotland—differ from the United States. This Part next explains the ways the United States' bail system differ from the European Court of Human Rights. Finally, this Part concludes by illustrating why the United States' bail system violates international law.

England is not the only country that minimizes cash bail and a commercial bail industry. That is because “[t]he commercial bail system prevailing in most jurisdictions in the United States has long been criticized.”<sup>253</sup> Other than England, countries such as India, Ireland, and New Zealand have held “agreements to indemnify bail sureties to constitute illegal contracts . . . Thus, any commercial development was effectively precluded.”<sup>254</sup> In fact, many countries use the United States' bail system as an example of what *not* to do.<sup>255</sup> F.E. Devine explains how:

The concern in these kindred systems to obstruct the development of commercial bail is a more telling reflection of the view taken of it than strident criticism would be. Those involved in the other systems care little what is done in jurisdictions in the United States so long as they are spared from doing the same. On occasion, however, proposals for reform in these countries have led to studies of options. On these occasions the role of American commercial bail bonding as a worldwide object lesson in what to avoid is articulated.<sup>256</sup>

There are many examples of countries that use bail systems that avoid the problems America has. For instance, in India, courts can never require cash bail.<sup>257</sup> Instead, the country applies a system that “functions almost completely by recognizance.”<sup>258</sup> India's bail system relies primarily on the “accused's recognizance . . . , but third-party sureties who also

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253. DEVINE, *supra* note 22, at 1.

254. *Id.* at 6–7.

255. *Id.* at 2.

256. *Id.*

257. *Id.* at 83.

258. *Id.*

function by recognizance are typically required. Non-financial conditions of conduct can [also] be required in cases where no right to bail applies.”<sup>259</sup> Also, although courts cannot require cash bail, courts can (but do not have to) accept cash bail if the “accused offers a deposit—usually because he cannot obtain the necessary sureties.”<sup>260</sup> If defendants abscond, plan to abscond, or violate any bail conditions, India may arrest them, rescind their bail, or alter their bail terms.<sup>261</sup>

In New Zealand, the country’s bail system stresses non-financial bail conditions as the primary method of ensuring that defendants appear at trial.<sup>262</sup> In fact, the law “completely remove[s] the possibility of imposing financial conditions from the lower courts, which handle most bails, so they can only impose nonfinancial conditions, release without conditions, or deny bail completely.”<sup>263</sup> If lower courts deny defendants bail, the defendants can still appeal to the higher court for bail, and this court can grant bail with conditions such as recognizances or sureties.<sup>264</sup> New Zealand, however, still outlaws cash bail at this level.<sup>265</sup> Finally, it is illegal to abscond in New Zealand and there are criminal penalties for defendants that do.<sup>266</sup>

In Scotland, the country’s bail system primarily uses a combination of criminal penalties and non-financial conditions.<sup>267</sup> Scotland specifically outlaws “granting bail under a pledge or deposit of money, or imposing a monetary pledge or deposit as a condition of bail, except where the court is satisfied that imposition of such a requirement is appropriate to the special circumstances of a case.”<sup>268</sup> Instead, courts can use any non-financial condition necessary to ensure defendants appear at trial, and if non-financial conditions do not work, the government imposes criminal punishment.<sup>269</sup>

The United States’ bail system also contrasts with the European Court of Human Rights’ approach. The European Convention on Human Rights Article 5.3 states that courts must not set bail “too high[,] . . . [t]he amount of the guarantee to be furnished by the detained person must be assessed principally in reference to him and his assets, and a court’s

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259. DEVINE, *supra* note 22, at 83.

260. *Id.*

261. *Id.*

262. *Id.* at 161.

263. *Id.*

264. *Id.*

265. DEVINE, *supra* note 22, at 161.

266. *Id.*

267. *Id.* at 139.

268. *Id.* at 140 (citing Bail Act 1980, §§ 1(a), 3–4 (Scot.)).

269. *Id.*

failure to assess the detainee's ability to provide bail constitutes a violation of the right to pretrial release."<sup>270</sup>

Moreover, the United States' bail system violates International Human rights law. The United States ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992.<sup>271</sup> The ICCPR codifies that every person is guaranteed certain rights and liberties.<sup>272</sup> Although ICCPR Article 9(3) "authorizes pretrial release dependent on guarantees, which may be in the form of money bail or other assurances," the international community has interpreted Article 9(3) to mean that:

[w]hile pretrial detention may be permissible under certain circumstances, it should be an exception and as short as possible. The maximum length of pretrial detention should be proportionate to the maximum potential sentence . . . If imprisonment is not to be expected as punishment for a crime, every effort should be made to avoid pre-trial detention.<sup>273</sup>

The United Nations Centre for Human Rights has also said that "certain crimes may be so 'lacking in severity that pre-trial detention may be inappropriate.'"<sup>274</sup> The International Convention on the Elimination of All Forms of Racial Discrimination's monitoring committee has urged parties "to ensure that the 'requirement to deposit a guarantee or financial security in order to obtain release pending trial is applied in a manner appropriate to the situation of persons in vulnerable groups . . . so as to prevent the requirement from leading to discrimination against such persons.'"<sup>275</sup>

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270. *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, HUM. RTS. WATCH 65–66 (Dec. 2010), [https://www.hrw.org/sites/default/files/reports/us1210webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf).

271. *Id.* at 63.

272. *Id.*

273. *Id.* at 65.

274. *Id.* (quoting U.N. CENTRE FOR HUMAN RIGHTS, COMM. ON CRIME PREVENTION AND CRIMINAL JUSTICE, HUMAN RIGHTS AND PRE-TRIAL DETENTION: A HANDBOOK OF INTERNATIONAL STANDARDS RELATING TO PRE-TRIAL DETENTION, at 79, U.N. Sales No. E.94.XIV.6 (1994)).

275. *Id.* at 67 (quoting Comm. on the Elimination of Racial Discrimination, Rep. on the Work of Its Sixty-Sixth and Sixty-Seventh Sessions, ¶ 26, U.N. Doc. A/60/18 (2005)). In 2017, Professor Philip Alston—the United Nations Special Rapporteur on extreme poverty and human rights and also a law professor in the United States—spent two weeks visiting the United States "to look at whether the persistence of extreme poverty in America undermines the enjoyment of human rights by its citizens." *Statement on Visit to the USA*, by Professor Philip Alston, United Nations Special Rapporteur on Extreme Poverty and Human Rights, U.N. HUM. RTS. OFF. OF THE HIGH COMMISSIONER (Dec. 15, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22533>. Professor Alston commented how a "practice which

## V. PROPOSED REFORMS

It is apparent that the United States' bail system deviated from its common-law roots while England's system did not stray far from the two countries' shared origins. Moreover, there is near universal agreement that the American bail system is flawed and violates International Human Rights laws. The United States, therefore, should look at the ways its system has diverged from England's and learn from our previous mistakes.

This Part proposes three modifications to the United States' bail system that can solve the issues Part II addresses: (1) eliminate cash bail, (2) prohibit the commercial bail bond industry, and (3) prioritize non-financial release conditions and release more defendants pre-trial. Alternatively, this Part suggests that the United States continue analyzing other countries' bail systems for guidance in reforming our own laws.

### A. Eliminate Cash Bail

The United States must eliminate cash bail. Cash bail ultimately “criminalizes poverty, as people who are unable to afford bail are detained while they await trial for weeks or even months.”<sup>276</sup> For example, the VERA Institute for Justice conducted a study in 2009 and found that only 37% of defendants could post bail when it was set at \$1,000 or less.<sup>277</sup> This is a typical bail amount across the country.<sup>278</sup> Conversely, bail poses no problem for people with a lot of money, who can post the entire amount of bail without much issue.<sup>279</sup> Adding to this problem, “[c]ash bail perpetuates inequities in the justice system that are disproportionately felt by communities of color” along with “those experiencing poverty.”<sup>280</sup>

Outside of cash bail's personal economic effects on people, it can also cause detrimental personal issues. When defendants cannot post bail, they often end up in jail awaiting trial.<sup>281</sup> Unfortunately, “spending even a few days in jail can result in people losing their job, housing, and even

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affects the poor almost exclusively is that of setting large bail bonds for a defendant . . . [and the] [m]ajor movement to eliminate bail bonds . . . needs to be embraced by anyone concerned about the utterly disproportionate impact of the justice system upon the poor.” *Id.* Professor Alston further noted that “bail bond corporations . . . exist in only one other country in the world, precisely because they distort justice, encourage excessive and often unnecessary levels of bail, and fuel and lobby for a system that by definition penalizes the poor.” *Id.*

276. Hunter, *supra* note 1.

277. Dan Kopf, *America's Peculiar Bail System*, PRICEONOMICS, <https://www.priceonomics.com/americas-peculiar-bail-system/> (last visited Mar. 12, 2022).

278. *Id.*

279. *Id.*

280. Hunter, *supra* note 1.

281. *Id.*

custody of their children. Studies show that pretrial detention can actually increase a person's likelihood of rearrest upon release perpetuating an endless cycle of arrest and incarceration."<sup>282</sup> Being held in jail can also hurt defendants' legal outcomes, with one study in Kentucky finding that "individuals with similar backgrounds who were not released before trial [were] over three times more likely to be sentenced to prison than those released."<sup>283</sup> The cash bail system also "often leads to the detention of people who do not pose a threat to public safety."<sup>284</sup>

It is also expensive to keep people in jail. Cash bail plays a part in "[t]he United States [spending] \$38 million *a day* to detain people pre-trial, and nearly \$140 billion a year."<sup>285</sup> One sheriff's department in Lake County, Oregon estimated that it costs \$130 a day to keep one defendant in jail.<sup>286</sup> These are costs that "could be redirected into education, housing, and economic development."<sup>287</sup>

Finally, cash bail causes overcrowding in jails. John Clark conducted a study in 2010 and explained how the Bureau of Justice Statistics has demonstrated:

(1) that jail populations, and especially pretrial inmate populations, have continued to rise even as reported crime has gone down; (2) that the growth in pretrial inmate populations is being driven by the use of money bail; and (3) that money bail adds significantly to a defendant's length of stay in the jail, and sometimes means that the defendant will not be released at all prior to case adjudication.<sup>288</sup>

Eliminating cash bail would help reduce the number of pre-trial defendants and is an easy way to begin fixing the issue of overcrowding in jails.<sup>289</sup>

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282. *Id.*

283. Kopf, *supra* note 277.

284. Hunter, *supra* note 1.

285. DATA FOR PROGRESS: THE JUSTICE COLLABORATIVE, THE END MONEY BAIL ACT 2, <https://www.filesforprogress.org/memos/money-bail-memo.pdf> (last visited Mar. 12, 2022) [hereinafter THE END MONEY BAIL ACT].

286. Kopf, *supra* note 277.

287. THE END MONEY BAIL ACT, *supra* note 285.

288. Schnacke et al., *supra* note 24, at 21 (citing John Clark, *The Impact of Money Bail on Jail Bed Usage*, AM. JAILS ASS'N (July/Aug. 2010), <https://www.americanjail.org/>).

289. *Id.* (citing John Clark, *The Impact of Money Bail on Jail Bed Usage*, AM. JAILS ASS'N (July/Aug. 2010), <https://www.americanjail.org/>). Covid-19's rise has made prison overcrowding an even more important issue that the United States needs to address. See Timothy Gower, *Citing COVID Threat, Researchers Urge Policy Changes to Ease Prison Crowding*, HARV. GAZETTE (Aug. 9, 2021), <https://www.news.harvard.edu/gazette/story/2021/08/crowding-in-prisons-increases-inmates-risk-for-covid-19-infections/> ("A new study by researchers at Harvard-affiliated

### B. Prohibit the Commercial Bail Industry

It is long overdue that the United States outlaws the commercial bail industry. There are three reasons the United States must do this: (1) the commercial bail industry targets disadvantaged people; (2) the commercial bail industry is not compatible with bail's purpose; and (3) the majority of the world rejects the use of commercial bail.

First, the commercial bail industry preys on the disadvantaged and favors people who don't need more help. People have rightly criticized the commercial bail industry for keeping "the poorest, rather than the most dangerous, defendants behind bars."<sup>290</sup>

For those people that can't afford to pay their cash bail, they can turn to bail bond agents. These agents require defendants to pay a fee—usually around 10 percent of the bail—and in return guarantee the bail amount.<sup>291</sup> But often, defendants cannot pay even just 10% of their bail amount, and instead use a payment plan to pay back bail bond agents.<sup>292</sup> As a result, "[t]he debt, paid over weeks or months of installments, can outlast the criminal case."<sup>293</sup> These plans with bail bond agents often include excessive late fees, requirements to sign "over collateral worth many times what is owed[.]" and if defendants "default they can trigger annual interest rates as high as 30 percent."<sup>294</sup>

This unjust system's result is that the commercial bail industry "siphon[s] millions from poor, predominantly African-American and Hispanic communities."<sup>295</sup> Over a five-year period in Maryland, people paid more than \$256 million in nonrefundable bail premiums.<sup>296</sup> Moreover, "[m]ore than \$75 million of that was paid in cases resolved with no finding of guilt, and the vast majority of it was paid by black families."<sup>297</sup> At the same time, bail bond agents favor the rich by offering "lower rates to those who are union members, hire their own lawyer rather than use a court-appointed one, or put up more valuable collateral."<sup>298</sup>

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Massachusetts General Hospital has found that crowding in prisons dramatically increases COVID risk among inmates.").

290. Jessica Silver-Greenberg & Shaila Dewan, *When Bail Feels Less Like Freedom, More Like Extortion*, N.Y. TIMES (Mar. 31, 2018), <https://www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html>.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. Silver-Greenberg & Dewan, *supra* note 290.

297. *Id.*

298. *Id.*

Second, the commercial bail industry and bail's purpose are inapposite. Rather than motivate people to come to trial, the commercial bail industry disincentivizes defendants to appear. F. E. Devine explains how:

[i]n short, practice under commercial bail undermines the logic of a bail system . . . Accuseds lose money to the bondsmen regardless of their conscientiousness about appearing. Their financial motive to appear is nonexistent. They have no reason to feel responsible to the bondsman as they might to a closely connected personal surety. Apart from any personal sense of responsibility, their only remaining motive to appear is fear of the bounty hunter.<sup>299</sup>

The commercial bail system defeats bail's purpose by removing any personal element from it. Many other countries that use common-law based bail systems "stress personal ties to the accused in suretyship . . . based on the conviction that corporations by their nature cannot properly fulfill the role they envision for sureties."<sup>300</sup> Irish commentators have stated how "the big business element of bail has often led to bizarre consequences, accentuated undoubtedly by the fact that there is no longer any personal relationship based on trust between the accused and his surety."<sup>301</sup> Meanwhile, commercial bail agents sometimes reap two or three times profit, have little incentive to ensure that the defendant appears in court, and can rely on the police to arrest defendants who default if the bail agent does not act.<sup>302</sup>

Third, the majority of the world looks unfavorably on the commercial bail industry. From "an international perspective, the commercial bail bonding system has provoked an almost universally unfavorable reaction. It has been observed that only one country, the Philippines, has adopted a commercial bail bonding system similar to the American system."<sup>303</sup> Although the United States has, for the most part, affirmed the commercial bail industry's right to operate, a consensus developed around the world that countries should strengthen their laws banning the commercial bail industry.<sup>304</sup> As indicated above, England took every opportunity it

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299. DEVINE, *supra* note 22, at 9.

300. *Id.* at 8.

301. *Id.* at 24 (quoting EDWARD F. RYAN & PHILIP P. MAGEE, *THE IRISH CRIMINAL PROCESS* 183 (1983)) (internal quotation omitted).

302. *Id.* at 9.

303. *Id.* at 15.

304. *Id.* at 58.



could to do this.<sup>305</sup> As well, “in the mid-1970s . . . Canada, . . . South Africa, four states and one territory in Australia, and even two American states, used the opportunity to provide a statutory basis for prohibiting indemnifying bail sureties.”<sup>306</sup> In 2007, the ABA even advocated for the elimination of commercial bail agents.<sup>307</sup>

### C. *Prioritize Non-Financial Release Conditions and Release More Defendants Pre-Trial*

Instead of using cash bail and a commercial bail industry, America's federal and state courts should both prioritize non-financial pretrial release conditions and release more defendants pre-trial.

Emphasizing non-financial conditions instead of cash bail can be an effective way of getting defendants to trial, without cash bail's severe consequences. Federal courts already do this to some extent but continue to utilize cash bail in various cases.<sup>308</sup> Examples of these non-financial conditions “could include check-in calls with officers and texted court reminders (studies have shown these can significantly improve court appearance rates), as well as helping people attend court by offering transportation.”<sup>309</sup> Another solution could be using ankle bracelets to electronically monitor defendants pre-trial.<sup>310</sup> Other conditions could include reporting to a supervising officer or drug testing.<sup>311</sup> As illustrated above,

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305. Similarly, while Australia was implementing bail reform in the late 1970s and 80s, the Law Reform Commission put out a working paper titled “Review of Bail Procedures” in which the Commission reviewed America's use of commercial bail bonding. DEVINE, *supra* note 22, at 46. The Commission stated that “weighing against” the two advantages the system may have, commercial bail bonding has “serious drawbacks.” *Id.* at 47 (quoting L. REFORM COMM'N OF W. AUSTL., REVIEW OF BAIL PROCEDURES 147 (1977)) (internal quotation omitted) [hereinafter REVIEW OF BAIL PROCEDURES]. The Commission further explained that “there are no sound reasons in principal for removing the present prohibition on indemnification of sureties,” *id.* at 47 (quoting REVIEW OF BAIL PROCEDURES 166 (1977)) (internal quotation omitted), and the Commission “unequivocally oppose[d] the introduction of professional bondsmen.” *Id.* (citing REVIEW OF BAIL PROCEDURES 166 (1977)). Likewise, the New South Wales Bail Review Committee issued a report in 1976 where it also opposed commercial bail bonding and called it “most undesirable.” *Id.* at 48 (quoting *Report of the Bail Review Committee*, Parl. Paper No. 46, 19 (NSW)).

306. *Id.* at 41.

307. Schnacke et al., *supra* note 24, at 15 (citing STANDARDS FOR CRIMINAL JUSTICE PRETRIAL RELEASE 45 (3rd ed. 2007)).

308. THE END MONEY BAIL ACT, *supra* note 285, at 4.

309. Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People From Jail, Explained*, VOX (Oct. 17, 2018 7:30 AM), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality>.

310. Annie Sweeney et al., *The End of Cash Bail? Backers and Opponents Ponder the Consequences as Bill Awaits Pritzker's Signature*, CHI. TRIB. (Jan. 17, 2021 5:00 AM), <https://www.chicagotribune.com/news/breaking/ct-cash-bail-ends-reaction-20210117-6wnxeifmhffo3jsrzfhuj5idum-story.html>.

311. THE END MONEY BAIL ACT, *supra* note 285, at 4.

England's bail laws are a strong example of a system that utilizes non-financial release conditions. England uses conditions such as "living at a specified address, observing a specified curfew, reporting periodically at a police station, not contacting particular people, not going near particular places, not entering a place licensed to sell alcohol, not driving, and surrendering one's passport and not leaving the country."<sup>312</sup>

After implementing more non-financial release terms, courts should release more defendants awaiting trial. Courts should be allowed to:

detain a person pending trial only after a judge finds by clear and convincing evidence that no pretrial release condition will suffice and detention is necessary to keep the community safe from violent physical force against another person or conduct that will cause another person significant bodily harm. Under all circumstances, the judge is required to use the least restrictive conditions possible and waive all fees for people who are unable to pay. If there is evidence that the defendant will not return to court in an effort to avoid prosecution, that risk can be addressed through appropriate pretrial conditions.<sup>313</sup>

Releasing more people pre-trial can help solve the issues that cash bail pose, including criminalizing poverty, severe personal economic effects on defendants who cannot afford their cash bail, the unnecessary burden on taxpayers to pay for defendants to stay in jail pre-trial, and jail overcrowding.

There are concrete examples in the United States demonstrating that eliminating cash bail and the commercial bail industry, emphasizing non-financial release conditions, and releasing more defendants pre-trial can be safe and effective. As explained in Part III(c)(5), places like Washington D.C., New Jersey, and Alaska have effectively moved away from cash bail and seen positive change under their new systems. With genuine evidence from these places that it is possible to successfully make these changes, there is no reason that the rest of the United States cannot implement these types of reform.

#### *D. Continue Analyzing Our Bail System and Other Countries' Laws*

If nothing else, the United States must create a committee or commission tasked with evaluating our bail laws and looking to other countries for guidance on how to reform our bail system. It is time to recognize

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312. DEVINE, *supra* note 22, at 116.

313. THE END MONEY BAIL ACT, *supra* note 285, at 3–4.

that if most countries around the world criticize our bail system and use it as an example of what not to do in their own countries,<sup>314</sup> we must look outside ourselves for guidance on how to reform our current laws.

There are many examples of other countries that have created these groups to evaluate their own and other countries' bail systems, and then used that research in creating their new bail laws. For example, in Australia, several groups performed studies in various jurisdictions, the most notable being the Law Reform Commission's study that reviewed each jurisdiction's bail laws, considered alternatives (such as the United States, which the Commission decided against), and suggested reforms.<sup>315</sup> In Canada, the Canadian Committee on Corrections Report did a comprehensive review of the country's bail system and specifically suggested laws that outlawed many of the controversial aspects of the United States' bail system.<sup>316</sup> In England, the working party studied the country's bail system, looked at the United States as one alternative (but quickly decided against it), and suggested reforms.<sup>317</sup>

Given that the American bail system has serious issues and other countries widely criticize our system, it would be prudent for the United States to, at the very least, create a committee or commission to evaluate our own and other countries' bail laws and suggest reforms.

## VI. CONCLUSION

The United States has a cash bail epidemic that a money-driven commercial bail industry fuels. Disadvantaged people suffer because of this, while people with money experience no consequences. Moreover, American citizens are bearing the burden of paying for a system that unnecessarily incarcerates defendants pre-trial.

The fact that the United States' bail system shares its origins with England's bail laws teaches us that this epidemic was not inevitable. At every point after the United States declared its independence from England, England chose to prioritize criminal punishment as the preferred method of motivating defendants to appear in court, chose non-financial conditions over cash bail, and prohibited a commercial bail industry from forming. Conversely, the United States protected our courts' ability to use cash bail and the commercial bail industry's right to operate. England is not alone in its actions, as most of the world looks to the United States' bail system for guidance on what not to do in their own countries.

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314. DEVINE, *supra* note 22, at 1–2.

315. *Id.* at 46–47 (citing L. REFORM COMM'N OF W. AUSTRAL., REPORT ON BAIL (1979)).

316. *Id.* at 42.

317. *Id.* at 44.

Although there is an epidemic in this country, that does not mean we cannot fix it. The United States eliminating cash bail, prohibiting the commercial bail industry, prioritizing non-financial release conditions, and releasing more defendants pre-trial would help solve many of the problems described above. At the very least, the United States must create a committee or commission to evaluate our bail laws and other countries' systems to determine what the best path forward is.