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ARTICLES

THE POLITICS OF THE BAIL SYSTEM: WHAT'S THE PRICE FOR FREEDOM?

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> What has been demonstrated here is that usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply money.[1]
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> —Robert F. Kennedy Attorney General

I. INTRODUCTION

The bail business has morphed from a simple barter of goods during colonial times to modern-day, mafia-like tactics, intent on ousting the competition. The battle between the commercial bail bond industry and government pretrial services is predicated on which entity is capable of providing cost-efficient pretrial release for those awaiting disposition of their criminal case.[2] The continual changes in bail reform attempt to address flawed applications of the law, including such problems as manipulation by the aristocracy[3] and right to an attorney at bail hearing[4] to current day concerns of balancing public safety[5] and jail overcrowding.[6]

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1. Frederick Reece, *Does Bail Really Work To Promote Justice?*, MINT PRESS NEWS (Oct. 17, 2013), http://www.mintpressnews.com/draft-jail-bonds-frederick/170698.

2. *See* Tim Bryce, *Eric Holder vs. the Bail Bond Industry*, PATCH.COM (Mar. 6, 2012, 8:58 AM), http://patch.com/florida/dunedin/bp—eric-holder-vs-the-bail-bond-industry-7e462e8d#.U-P-2_ldXW8 (comparing Attorney General Eric Holder's pretrial release program to the commercial bail bond industry).

3. *See* Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 FORDHAM URB. L.J. 121, 127 (2009) ("[T]he royal judges were able to literally comply with the [Habeas Corpus] Act yet still deprive royally-accused defendants of their liberty before trial by deliberately setting bail so high that the defendants could not pay.").

4. *See* Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1721 (2002) (describing the lack of enforcement of the right to counsel at bail hearings across the nation).

5. *See* United States v. Salerno, 481 U.S. 739, 745 (1987) (examining the Court's requirement to balance the Federal Government's compelling interests in public safety with the liberty interest of the detainee).

Despite these changes, the current bail system should be scrapped in favor of mandated pre-trial release unless the State can prove the defendant is a flight risk or a danger to society. Those defendants who pose such a risk may be held to a county-registry (or sheriff) deposited registry of funds or surety. Due to the current bail system and its adverse economic impact on the poor and minorities,[7] some states have expanded their pre-trial release programs. For example, Maryland, recently decided to expand pre-trial release under the state constitution's Declaration of Rights, Article 24, the "due process" provision.[8] Texas has four provisions in its constitution that would permit a similar challenge.[9]

Despite this noticeable solution that recognizes the importance of one's liberty, a stalemate continues to exist. Clashing political ideologies and institutional alliances prevent any comprehensive workable solution to reconcile the dissonance between the various factions. Bail bond proponents balk at any suggestion of innovative approaches to pretrial release.[10]

Dismantling the commercialization of the bail industry would eliminate the appearance of judges as a silent partner benefitting from the bottom line.[11] Vigorous opposition by the bail lobby stymies efforts to reform the unwarranted practice of pretrial detention of indigent defendants.[12]

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6. *See* David S. Abrams & Chris Rohlfs, *Optimal Bail and the Value of Freedom: Evidence from the Philadelphia Bail Experiment* (John M. Olin L. & Econ., Working Paper No. 343, 2D series, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=995323 (examining the cost-benefit analysis for low and high bail cost levels with regard to the detainees and society).

7. *See Bail and Its Discrimination Against the Poor: A Civil Rights Action as a Vehicle of Reform*, 9 VAL. U. L. REV. 167, 167 (1974) ("The present money-based bail system's most 'glaring weakness is that it discriminates against poor defendants, thus running directly counter to the law's avowed purpose of treating all defendants equally.'").

8. MD CONST. art. XXIV; *see also* JUSTICE POLICY INSTITUTE, BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 33 (Sept. 2012), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf (describing Kentucky's expansion of pretrial services in 2011, which increased pretrial release and citations instead of detention and arrests).

9. *See* TEX. CONST. art. I, §§ 3a, 9, 10, 13 (referring to Texas constitutional provisions on § 3a equality under the law, § 9 searches and seizures, § 10 rights of accused in criminal prosecutions, and § 13 excessive bail or fines; cruel and unusual punishment; and remedy by due course of law).

10. *See generally* John Frank, *Bail Bill Tactics Questioned*, ST. PETERSBURG TIMES (FLA.), Apr. 13, 2010, at 8B (chronicling the political battle of the bail bill in the House of Representatives).

11. *See* JUSTICE POLICY INSTITUTE, *supra* note 8, at 40 (recommending the elimination of commercial bail bonds to end the status quo and decrease the influence of industries that benefit from money bail).

12. *See id.* at 42 (noting the interest private bail bondsmen have in preventing changes to the current bail process).

Statistics overwhelmingly indicate indigent defendants who are unable to post bond plead guilty despite being innocent.[13] This long established and accepted method of doing business appears neutral but, in actuality, results in class warfare on the economically disadvantaged. Ultimately, technology will provide a variety of tools previously underutilized, as well as unconventional ones, to monitor the accused while charges are pending.

Part I of this Article will chronicle the development of the bail system from its inception as merely a lucrative business venture to the "profits over people" business models built into today's American culture. Part II will examine how bail bondsmen, city officials, prosecutors, and judges appear independent, but are complicit in determining whether someone will be released or remain in jail. This section will also give a brief overview of the Texas bail system. Part III gives an overview of the discriminatory nature of the bail bond industry especially in regards to minorities and the poor. It discusses how other states are proactively addressing this issue and the particular section of their constitutions used to establish a progressive plan of action. Part IV addresses the various solutions other states have put forth to fight the bail bond industry, how Texas could and should fight the problem, and a look at how technology can be utilized to improve the monitoring of defendants on pretrial release.

II. HISTORY OF THE BAIL SYSTEM

Bail laws in the United States grew out of a long history of English statutes and policies.[14] Dating back to Medieval England, sheriffs were responsible for determining bail.[15] They would often use the money obtained from bail for their own benefit.[16] The determination of bail was then shifted to magistrate judges in the Habeas Corpus Act of 1679.[17] This provided that magistrates were to require criminals to present a

13. *Id.* at 25–26 ("People detained due to money bail are put under greater pressure to enter a plea bargain, which has become the *de facto* standard in resolving more than 95 percent of cases each year.").

14. *See* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 727 n.17 (2011) (citing Caleb Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 965–66 (1965)).

15. *The History of Bail Bonds*, SANTA CRUZ BAIL BONDS.COM http://www.santacruzbailbonds.com/3109.html (last visited Oct. 25, 2014) ("The Statute of Westminster (1275) limited the discretion of sheriffs with respect to the bail. Although sheriffs still had the authority to fix the amount of bail required, the statute stipulates which crimes are bail able and which ones are not.").

16. *Id.* ("In medieval England, the sheriffs originally possessed sovereign authority to release or hold suspected criminals. Some sheriffs would exploit the bail for their own gain.").

17. Habeas Corpus Act (1679) § I.

surety in exchange for their discharge.[18] The act also referenced certain offences that, by law, would be unbailable.[19] Limitations against excessive bail setting were adopted in the English Bill of Rights in 1689.[20]

In addition to the Bill of Rights, the Judiciary Act of 1789 made references to bail requirements and guidelines.[21] Specifically, the Act identified which types of crimes were bailable and set limitations on judicial discretion in setting bail.[22] The Act provides that all non-capital crimes are bailable and in capital cases, the decision to detain a suspect prior to trial was to be left to the magistrate.[23] The Judiciary Act specifically states:

> [u]pon all arrests in criminal cases, bail shall be admitted, except where punishment may be by death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein.[24]

A. *The Ratification of the Eighth Amendment*

The United States of America continued this adopted principle of requiring bail for discharge in the ratification of their constitutional amendments.[25] The English Bill of Rights warned against excessive bail.[26] This was formally adopted and ratified in 1791 as the Eighth Amendment of the U.S. Constitution.[27] The Eighth Amendment provides "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual

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18. *Id.*

19. *Id.*§ II.

20. *See* Wiseman, *supra* note 3, at 124 (reasoning that the purpose of the restriction on bail imposition was to prevent judges from circumventing the bail requirement by setting a bail amount high enough to reduce the ability of posting the required bail).

21. *Id.* at 130 ("Although the wording has been altered and the subject matter expanded, the Judiciary Act's bail provision clearly has its roots in the Westminster Statute/ Pennsylvania Frame of Government line of Angle-American bail law.").

22. *Id.*

23. *Id.*

24. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (codified as amended at 18 U.S.C. § 3141 (2006)).

25. *See generally* Kayla Gassman, *Unjustified Detention: The Excessive Bail Clause in Removal Proceedings*, 4 CRIM. L. BRIEF 35, 39 (2009) (discussing that there is no absolute right to bail, and the right is not found in the constitution; however, the option of bail is not barred, and it is generally left up to Congress).

26. *See id.* at 41 (recounting the abuses of imposing excessive bail that existed in seventeenth century England and led to Parliament's passage of protections against such abuse within the English Bill of Rights).

27. *See* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 839, 880 (2013) (examining the historical foundation of the Eighth Amendment's language).

punishments inflicted."[28] The adoption of the Eighth Amendment was an effort to subdue government officials from abusing their power in granting bail.[29] The goal of the Eighth Amendment was to assure the accused would appear for trial and not corrupt the legal process by absconding.[30] Logically, anything more is excessive and punitive.[31] The Eighth Amendment sought to protect the integrity of this process.[32] To avoid coercion or pre-punishment in the administration of justice, the court examines and scrutinizes an accused's culpability.[33] Thus, the Eighth Amendment was ratified to subdue any abuse of discretion.[34]

B. *Bail Reform Act of 1966*

In 1966, the U.S. Congress enacted the Bail Reform Act of 1966.[35] This legislation provides that a non-capital defendant is to be released, pending trial, on his personal recognizance or on personal bond, unless the judicial officer determines that such incentives will not adequately assure his appearance at trial.[36] Under the Bail Reform Act of 1966, it is

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28. U.S. CONST. amend. VIII.

29. *See* Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right To Bail*, 32 N. KY. L. REV. 1, 26 (2005) (outlining "[t]he traditional standard for determining excessiveness is abuse of discretion" and the "Eighth Amendment expressly forbids excessive bail").

30. Ken Strutin, *Pretrial Detention, Bail and Due Process*, LAW LIBRARY RESOURCE XCHANGE n.2 (July 2, 2011), http://www.llrx.com/features/pretrialdetention.htm#_ftn2.

31. *Id. See* United States v. Marion, 404 U.S. 307, 320 (1971) (drawing a connection between the Sixth Amendment's right to a speedy trial and the Eighth Amendment's protection against excessive fines in regard to delay of a trial and any obstruction that can adversely affect the defendant in their legal proceedings). These obstructions should be mitigated by setting bail amounts limited only to effectuate the purpose of the 8th Amendment, anything more would be in violation of these principles. *Id.*

32. U.S. CONST. amend. VIII; *see also Marion*, 404 U.S. at 320 (stating delays in legal proceedings would have detrimental effects on the safeguards of trial such as the Sixth Amendment's right to a speedy trial and the Eighth Amendment's protection against unreasonable penalties, fines, and excessive bail).

33. Strutin, *supra* note 30 (stating the statutorily recognized factors in determining the likelihood of the accused's return include: character, reputation, habits and mental condition, employment and financial resources, family ties and the length of residence in the community, and prior criminal record).

34. Floralynn Einesman, *How Long is too Long? When Pretrial Detention Violates Due Process*, 60 TENN. L. REV. 1, 3 (1992) ("In 1984, through sweeping legislation, Congress dramatically altered the way in which the matter of bail was determined in federal criminal cases.").

35. *See generally* Paul G. Reiter, Annotation, *Construction and Application of Provisional of Federal Bail Reform Act of 1966 (18 USC §§ 3146, 3147) Governing Pretrial Release or Bail of Persons Charged With Non-capital Offense*, 8 A.L.R. FED. 586, 590 (1971) (describing the Bail Reform Act of 1966).

36. *See* Einesman, *supra* note 34, at 4–5 (discussing that Congress excluded "danger to the community," as a factor for determining bail because it is inconsistent with tradition).

solely within the judge's discretion to determine whether bail is appropriate.[37] If the judge believes the bail will not assure the defendant's appearance at trial then the judge *shall* select an alternative from a list of conditions, such as restrictions on travel or placing the defendant in the custody of someone who agrees to be their supervisor.[38] Individuals charged with a capital crime are to be released unless the judicial officer has reason to believe the person will flee or pose a danger.[39] In non-capital cases, however, a judge is not permitted to consider a suspect's danger to the community.[40] The judge is only allowed to do so in capital cases or after conviction if the judge is authorized to do so.[41]

C. *Bail Reform Act of 1984*

The Bail Reform Act of 1966 was replaced with the Bail Reform Act of 1984. The primary goal of the replacement was to allow pre-trial detention of individuals based upon their danger to the community.[42] Essentially, the Bail Reform Act of 1984 makes protection of the public the pivotal factor in determining whether to grant bail.[43] Section 3142(f) of the Bail Reform Act of 1984 provides that only persons who fit into certain categories are subject to detention without bail: (1) persons charged

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37. *See id.* (explaining that a change the Bail Reform Act of 1966 presumptively granted to every defendant, is release on personal recognizance or a bond, which the court orders).

38. *See* Reiter, *supra* note 35, at 596 (outlining the conditions that can be imposed to assure the appearance of a person before a judicial officer including "any other condition deemed reasonably necessary").

39. *Id.* at 605–06 ("§ 3148 provides that an accused should be released in accordance with the provisions of § 3146 unless the judge has reason to believe that an accused released upon specified conditions might 'pose a danger to any other person or to the community,' indicates plainly and explicitly that danger to a person or the community, a concern in capital cases or after conviction, is a factor signally and deliberately absent from § 3146.").

40. *See generally* Jeffrey F. Ghent, Annotation, *Propriety of Denial of Pretrial Bail Under Bail Reform Act (18 USCS §§ 3141 et seq.)*, 75 A.L.R. FED. 806, 809 (1985) (stating that certain provisions, potentially granting judges the power to consider a suspect's danger to community, did not apply to non-capital defendants).

41. *Id.* ("What constitutes 'danger to any other person or to the community' within meaning of 18 USCS § 3148 providing for release of person charged with capital offense or convicted of offense and awaiting sentence or having appeal pending, unless court believes that release conditions will not assure such person will not pose such a danger.").

42. *See* Matthew S. Miner, *Hearing the Danger of an Armed Felon—Allowing for a Detention Hearing Under the Bail Reform Act for Those who Unlawfully Possess Firearms*, 37 U. MICH. J.L. REFORM 705, 709 (2004) (explaining that the point of the Bail Reform Act of 1984 was to allow courts to determine which defendants represent an unreasonable danger to others and which could be allowed release on bail).

43. *Id.* at 708–09 ("Congress passed the Bail Reform Act of 1984 to give courts the flexibility to detain potentially dangerous defendants.").

with a crime of violence; (2) an offense for which the maximum sentence is life imprisonment or death; (3) certain drug offenses for which the maximum offense is greater than 10 years; (4) repeat felony offenders; (5) or if the defendant poses a serious risk of flight, obstruction of justice, or witness tampering.[44] There is a special hearing held to determine whether the defendant fits within one of these categories with the outcome that anyone who does not fit within one of the categories being admitted to bail.[45]

The Federal Bail Reform Act of 1984 extends a number of protections.[46] For instance, evidence of other crimes may be presented by hearsay, which is not subject to cross-examination.[47] Additionally, it is not required that defendants receive advance notice that prosecutors will seek detention based on past criminal behavior.[48] Thus, defendants may not be able to adequately respond to the government's request for detention.[49] Lastly, whenever the government, through a federal prosecutor, offers a proffer of evidence about the defendant, the Act of 1984 does not mandate an opportunity for confrontation by the defendant of any kind.[50] Once bail has been set, defendants are left in the hands of bail bondsmen vying for their business.

III. THE BUSINESS OF BAIL

Issues related to bail were litigated to clarify revisions of the law[51] whereas the business model to generate revenue has virtually remained unchanged.[52] The first modern bail bond business in the United States

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44. 18 U.S.C. § 3142(f) (1988).

45. *See* Einesman, *supra* note 34, at 11–12 (stating a judge must find by "clear and convincing evidence" that a defendant should be held without bail).

46. *See id.* at 1 (describing that the new protections afforded to defendants include that courts may look at and assess an individual's "risk of flight," and potential "danger to the community" to determine bail, and allows courts to presumably release defendants that pose little to no reasonable risk).

47. *See* United States v. Acevedo-Ramos, 755 F.2d 203, 208 (1st Cir. 1985) (discussing hearsay testimony by one Agent Hill was sufficient to meet the "clear and convincing" requirement to be heard by a magistrate or a judge).

48. *Id.* at 209.

49. *See* United States v. Delker, 757 F.2d 1390, 1397 (3d Cir. 1985) (citing Gerstein v. Pugh, 420 U.S. 103 (1975)) (stating that full advisory safeguards such as "counsel, confrontation, cross-examination, and compulsory process . . . are not essential" in detention hearings and that probable cause "traditionally has been decided by a magistrate in a nonadversary proceeding" on hearsay).

50. *See id.* at 1397 (stating that traditional means of due process and confronting witnesses against a defendant pertain to trial and not to pre-trial bail hearings, and hearsay evidence can be used as well).

51. *See generally* Strutin, *supra* note 30.

52. *The Old Lady Moves On*, TIME, Aug. 18, 1941, at 69.

was established in 1898 by Tom and Peter McDonough in San Francisco in 1898.[53] Their system required the defendants to pay a percentage of the court specified bail amount, and in exchange, the McDonough Brothers put up the cash as a guarantee that the person would appear in court.[54] The original bail bond business operated by the McDonough Brothers in San Francisco from 1896 to 1946 established the framework used by the industry to make money today.[55]

Presently, the bail industry is driven by financial terms like market share, revenue, and profits, to justify its referendum on pretrial release programs.[56] In fact, many of the same questionable methods used by the McDonough Brothers, driven by the mentality that "green is the new black," are similar to those used in today's money-over-people culture.[57] Bail bondsmen continue to be prosecuted for illegally using financial incentives to influence officials to get more business.[58] The predatory nature of the occupation of a bondsman plays into the hands of the public's negative impression of the occupation.[59]

Today's savvy bail bondsman understands how social media can be used to combat their image as a financial predator.[60] Business experts

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53. CASEY WELCH & JOHN RANDOLPH FULLER, AMERICAN CRIMINAL COURTS: LEGAL PROCESSES AND SOCIAL CONTEXT 246 (2014).

54. *Id.*

55. *The Old Lady Moves On, supra* note 52.

56. *See generally* Abdulai Bah & Sam Black, *Big Insurance Behind Bail Bonds*, FAULT LINES BLOG (May 23, 2014, 1:09 PM), http://america.aljazeera.com/watch/shows/fault-lines/FaultLinesBlog/2014/5/23/the-big-insurancebehindbailbonds.html (describing the bail bond business).

57. Shane Bauer, *Get Out of Jail Free*, THE INVESTIGATIVE FUND (May 12, 2014), http://www.theinvestigativefund.org/investigations/economiccrisis/1964/get_out_of_jail_fee/?page=1.

58. *See* United States v. Rubio, 321 F.3d 517 (5th Cir. 2003) (affirming convictions of extortion committed by bail bondsmen who paid Assistant District Attorneys in exchange for reduced or dismissed charges); United States v. Box, 50 F.3d 345 (5th Cir. 1995) (bail bondsman was prosecuted for "extort[ing] money (through bonds and fines)" in exchange for working with the sheriff's department to arrange dropped or reduced charges). *See generally* DAVID SCOTT DAVIS, DEVIANCE AND SOCIAL ISOLATION: THE CASE OF THE FALSELY ACCUSED 177–94 (Princeton Univ., 1982) (illustrating the "illegal and unethical behavior" that occurs in the bail bonds industry and contributing factors to such behavior).

59. *See generally* DAVIS, *supra* note 58, at 201 (providing reasons why the public has traditionally held a negative perception of the bail bondsman occupation and the bail industry).

60. *See* Jay Baer, *How to Humanize a Sketchy Industry*, CONVINCE & CONVERT, http://www.convinceandconvert.com/social-media-strategy/how-to-humanize-a-sketchy-industry (last visited Sept. 20, 2014, 7:16 PM) (describing ExpertBail's utilization of social media, including its website with shareable videos, its blog "Bail Bond Jail Blog," and Facebook page with "more than 3,000 fans").

advise that media presence is essential to branding any business.[61] For example, a leading online newsletter devoted to information related the bail industry advised on how to market on Pinterest, which is primarily known for fashion and craft projects.[62] Marketing strategists also advise that Instagram offers several techniques on how to use this type of media to advertise a business.[63] Leonard Padilla, the bondsman for Casey Anthony, garnered national media attention as an expert on the bail process when he appeared on CNN[64] and Nancy Grace.[65] Ira Judelson, branded New York's most famous bondsman, wrote a book flaunting the glamorous life of high stakes bail for celebrity clients, and embraced "legal loan shark" as his moniker.[66]

Bail bondsmen often tout their savings to the taxpayer because law enforcement resources aren't used to track down those who fail to appear for court.[67] A USA Today series disclosed budget concerns as the basis for many prosecutors and police refusal to extradite fugitives across state

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61. *See* Courtney Gordner, *5 Ways Bail Bondsmen Can Get Good Leads from the Internet*, ABOUTBAIL.COM (Nov. 16, 2013), http://www.aboutbail.com/articles/1740/5-ways-bail-bondsmen-can-get-good-leads-from-the-internet (listing five ways bail bondsmen can benefit from utilizing media).

62. *Id.* Specifically, Gordner suggests linking the business's website to Pinterest, and adding "Pin It" buttons to allow visitors to share the website's content, as two ways bail bondsmen can use Pinterest as a marketing tool. *Id.*

63. *Id.* Gordner discusses five techniques for using Instagram for marketing: sharing fun images to advertise subliminally, using hashtags to increase chances that the business will "start trending," uploading short videos displaying the business logo and contact information, "follow" other users, and embed Instagram videos on the business's website to create a "cross-platform marketing campaign." *Id.*

64. *See Nancy Grace: Latest Caylee Anthony Case Details* (CNN television broadcast Dec. 12, 2008) (transcript *available at* http://transcripts.cnn.com/TRANSCRIPTS/0812/12/ng.01.html) (transcribing the Nancy Grace show discussing the Caylee Anthony Case with Leonard Padilla, bounty hunter); *see also Leonard Padilla*, WIKIPEDIA, http://en.wikipedia.org/wiki/Leonard_Padilla (last visited Oct. 17, 2014) (summarizing the life of Leonard Padilla, a professional bounty hunter out of Sacramento, California, who appeared on CNN as a bail expert during the Caylee Anthony murder trial).

65. *See Missing Caylee Anthony: The Casey Anthony . . . Bail Bondsman . . . Bounty Hunter . . . Media Saga Continues*, SACRED MONKEYS (Aug. 29, 2008), http://scaredmonkeys.com/2008/08/29/missing-caylee-anthony-the-casey-anthony-bail-bondsman-bounty-hunter-media-saga-continues (providing video of Nancy Grace's interview with Leonard Padilla about the Caylee Anthony case); *see also Nancy Grace: Latest Caylee Anthony Case Details*, CNN.COM (Dec. 12, 2008), http://transcripts.cnn.com/TRANSCRIPTS/0812/12/ng.01.html (transcribing the interview with Leonard Padilla, bounty hunter, on the Nancy Grace show).

66. IRA JUDELSON WITH DANIEL PAISNER, THE FIXER: THE NOTORIOUS LIFE OF A FRONT-PAGE BAIL BONDSMAN 3 (2014).

67. *See* Sean Cook, *To Bail or Not to Bail—That is the Question!*, Blog post in *Bail Bonds*, PREMIERE BAIL BONDS (May 22, 2012), http://www.premierebailbonds.com/to-bail-or-not-to-bail-that-is-the-question (supporting the privatization of the bail industry in the

borders despite committing serious offenses.[68] The bail trade has spawned a subset of collaborators who support the industry, such as the bounty hunter who also has a financial stake in the return of the defendant.[69] Virginia established professional requirements in order to have uniformity in the training and licensing of fugitive recovery agents in that state.[70] The regulation allows the courts to hold unlicensed impersonators criminally accountable.[71] These unofficial police officers finder's fee varies, depending on the bond and difficulty of the case.[72]

Duane Chapman—a.k.a. "Dog the Bounty Hunter"—is the most recognized in his field and is the face of the industry as a financial success story.[73] Chapman's rise from convicted felon to business owner resonated with the public as his antics played out on his reality show for eight years.[74] A photographer embedded with a New York bondsman captured the mystique and complex relationship between bondsmen, defendants, and bounty hunters in a series of still shots, in an effort to expose the allure of the industry.[75] The strategy to soften the image of the industry with women agents combats the negative stereotype by conveying an element of compassion in what is perceived otherwise as ruthless business.[76]

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justice system because when bail bondsmen spend money to ensure that individuals appear for court the government does not have to, saving taxpayer dollars).

68. Brad Heath, *The Ones That Get Away*, USA TODAY, http://www.usatoday.com/longform/news/nation/2014/03/11/fugitives-next-door/6262719 (discussing budgetary concerns as justification for the refusal of officials to extradite offenders across state borders).

69. *Cf.* Taylor v. Taintor, 83 U.S. 366, 371–72 (1872) (authorizing sureties to seize and deliver the "principal" in another state once bail is given).

70. *See Finding Felons in Virginia*, ALEXANDRIA TIMES (June 25, 2008), http://alextimes.com/2008/06/finding-felons-in-virginia (referencing requirements from the "Regulations Relating to Bail Enforcement Agents," including entry curriculum, firearms training, and licensing procedures).

71. *See* Joseph P. Smith, *Alleged fake bounty hunter indicted*, THEDAILYJOURNAL.COM, (Sept. 29, 2012), http://archive.thedailyjournal.com/article/20120929/NEWS01/309290047 (reporting the arrest of a man who, impersonating a bounty hunter, arrested a woman and held her at the police station until a friend posted her bail).

72. Ralph Thomas, *The Bail Bond Recovery Business*, PI MALL, http://pimall.com/nais/n.bailrec.html.

73. Bauer, *supra* note 57.

74. *Id.*

75. CLARA VANNUCCI, BAIL BOND (2014), *available at http://claravannucci.com/projects/bail-bond-bondsmen-defendants-and-bounty-hunters/.*

76. *See* Sylvia Belmond, *Cashing In A Get-Out-Of-Jail-Card*, THE ACORN (May 22, 2014), http://www.theacorn.com/news/2014-05-22/Community/Cashing_in_a_getoutofjail_card.html (reporting on how Tonya Rynerson, a "skilled and compassionate bail bond agent," is changing the stereotype of the bail bond industry).

Even the repo man[77] recognizes a business opportunity within the bail infrastructure by selling license plate reader information to bail bondsmen.[78] The industry formed its own associations, Professional Bail Agents of the United States (PBUS) and The National Association of Bail Enforcement Agents,[79] whose sole purpose is to promote the advancement of the bail agenda.[80] Some agents have altered the industry standard ten percent of the bond requirement by offering convenient payment plans in order to retain customers.[81] The rise of the bail industry as a dominant force compels agents to protect their turf by pursuing legal action against judges who interfere with their ability to maximize profits.[82]

Desperate to generate revenue at any cost, crafty bail agents continue to produce new schemes such as those exploiting inmates by offering a discount on the bail fee owed in exchange for steering clients their way.[83] Agents eager for business can jeopardize a client's freedom, and subject them to rearrest, by circumventing rules requiring assets necessary to write a bond exceeding a certain amount.[84] Predictably, agents acting in their capacity as a bondsman are prohibited from using their status to

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77. *Repo man*, YOURDICTIONARY, http://www.yourdictionary.com/repo-man (last visited Jan. 5, 2015) (defining repo man as "a person who works for creditors and who takes back items after debtors do not pay for them").

78. *See* Julia Angwin & Jennifer Valentino-Devries, *New Tracking Frontier: Your License Plates*, WALL ST. J., (Sept. 29, 2012), http://online.wsj.com/news/articles/SB10000872396390443995604578004723603576296 (discussing the many issues involved in using license plate trackers by police officers and private companies, such as repossession businesses).

79. *See Finding Felons in Virginia*, ALEXANDRIA TIMES (June 25, 2008), http://alextimes.com/2008/06/finding-felons-in-virginia (explaining that national organizations were formed to "clean up" the bail industry's "image").

80. *See* Kimberly Faber, *Bail Conference: PBUS Sneak Peek*, COLLATERAL MAG. (Feb. 13, 2013), www.aboutbail.com/articles/1427/bail-conferece-pbus-sneak-peek (discussing a bail conference that will further the bail agenda by providing members with necessary information and strategies to overcome obstacles in the bail business).

81. *See EZ Bail Bonds Announces New Payment Plans for Brazoria Bail Bonds*, PRWEB (May 17, 2014), http://www.prweb.com/releases/2014/05/prweb11862475.htm (promoting EZ Bail Bond's new flexible payment plans available for a majority of legal issues).

82. Whitney Bermes, *Belgrade bail bonds business sues Park County, judge*, BOZEMAN DAILY CHRONICLE (May 14, 2014, 5:13 PM), http://www.bozemandailychronicle.com/news/crime/article_6e039408-dbbd-11e3-80ba-001a4bcf887a.html (reporting a bail bonds business sued a judge for unlawfully acting as a bail bondsman resulting in a lost business opportunity for the agency).

83. Jim Norman, *Report: New Jersey bail bond system deeply flawed*, NORTHJERSEY.COM (May 22, 2014, 7:20 AM), http://www.northjersey.com/news/report-new-jersey-bail-bond-system-deeply-flawed-1.1020592.

84. *See* Liz Evans Scolforo, *York County officials unsure if bondsman had authority to post murder-for-hire defendant's $10M bail*, YORK DISPATCH (May 30, 2014, 12:02 PM), http://www.yorkdispatch.com/breaking/ci_25865269/york-businessman-accused-murder-hire-plot-free-10m (reporting prosecutors in York County considered filing a petition to

avoid prosecution for violating the law despite their quasi-cop powers.[85] Upon completion of a certification,[86] a typical salary for a bondsman can range from $50,000 to $150,000.[87] This industry gambles on whether a person will show for a court date and wins big when failure to do so occurs; contributing to a rainy day fund for its agents is a sure thing in this money making enterprise.[88] Even though bail bonds are a risky business, the security of having a "safety net" built into the framework makes it an attractive occupation for many. It is easy for bail bondsmen to ignore the effect of their career on the population they profess to help.

A. *Bond Market Competition*

Typically, bail bond companies require the defendant to pay the full premium percentage of a bond.[89] For example, a defendant would be required to pay $10,000 on a $100,000 bond with a ten percent cash option.[90] Generally, the money a defendant is required to pay is not refundable, regardless of the ultimate verdict at trial.[91]

As bail bonds market competition increases, many bondsmen have been reduced to offer payment plans.[92] Under these plans, some defend-

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revoke a man's bail because they are certain that the bail bondsman who paid the bail did not have enough assets to do so and thus, violated a county ordinance).

85. *See* The Associated Press, NC court: Bail bondsman not immune from speeding law, WXII12 (June 3, 2014, 2:13 PM), http://www.wxii12.com/news/nc-court-speeding-banned-in-bail-jumper-chases/26308260#!bzjEJd (reporting a North Carolina appeals court judge declared that bail bondsmen are not exempt from state speeding laws when chasing bail jumpers).

86. *See generally Bail Bondsman Training Programs and Requirements*, EDUC. PORTAL, http://education-portal.com/articles/Bail_Bondsman_Training_Programs_and_Requirements.html (outlining the bail bondsman training programs, prerequisites, employment and salary information, continuing education, and certification).

87. *See generally* Omkar Phatak, *Bail Bondsman Salary*, BUZZLE, http//www.buzzle.com/articles/bail-bondsman-salary.html (last updated May 3, 2014) (comparing average starting salaries between bondsmen working independently or in a firm combined with other factors such as commission percentages, years of experience, and region of the country in which employed).

88. *See generally* Bah & Black, *supra* note 56 (noting that insurance companies, which are essential to the bail bond business, face virtually no risk when reaping benefits from bail bonds).

89. *See* Jennifer Garcia, *How Do Bail Bonds Work in Texas?*, EHOW, http://www.ehow.com/how-does_4572534_bail-bonds-work-texas.html (discussing the agreement between an inmate and a bail bondsman, under which the bail bondsman charges a percentage of the inmate's required bond amount that needs to be paid in order for the inmate to be released from jail).

90. *Id.*

91. *Id.*

92. *See* Thomas Zambito, *N.J. defendants are set free on bail payment plans without judges, prosecutors knowing*, NEWJERSEY.COM (Dec. 1, 2013, 12:24 PM), http://www.nj

ants are paying as little as three percent of their bond to the bondsman.[93] Such low upfront costs have created a detriment to the justice system.[94] Defendants who fail to adhere to payment plans will often leave family and friends who have cosigned their bond on the hook for the outstanding debt.[95] This problem has sparked criticism in the bail bond industry.[96] As a result, New Jersey, for example, has launched a broad based investigation into the bail bond industry.[97]

Bail bond agents attribute the increase in competition throughout the industry to bail bond companies that rely on high volumes of clients.[98] Veteran bail bond agents argue that such companies attract clients by offering low down payments.[99] Such offers fuel the increase in bail bond market competition.[100] Additionally, low down payment offers are also making it difficult to ensure defendants will return to attend trial.[101] Veteran bail bond agents believe the increase in market competition has de-

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.com/essex/index.ssf/2013/12/nj_defendants_being_set_free_on_bail_payment_plans_without_judges_prosecutors_knowing.html (noting that bail bond industry competition has caused such companies to reduce bail percentage amounts defendants must pay, leaving some with payment plans as little as $75 per week).

93. *Id.*

94. *See id.* (asserting the payment plans and lower percentages in bail bonds undermine a court's order and often lead to defendants returning to court with a new criminal charge).

95. *See id.* (stating the investigations of a New Jersey newspaper revealed numerous lawsuits filed by bail bond companies against co-signers after the defendants failed to fulfill their bond obligations).

96. *See id.* (interpreting the point of view of a Prosecutor's Office chief of staff and the concern that the bail bond industry "still remains such an unregulated industry").

97. *Id.*

98. *PCS Bail Bonds, Tarrant County, Texas' Most Trusted Bail Bond Service, Advises Clients to Use Ethical Services and Avoid Bail Bond Traps and Tricks*, PCS BAIL BONDS (Jan. 15, 2014), http://www.pcsbailbonds.com/blog/use-ethical-services-and-avoid-bail-bond-traps-and-tricks.

99. *See* Ed Krayewski, *Bail Bonds Market Competition, Discount Deals Freaking Out Authorities, Other Bail Bonds Agencies in New Jersey*, REASON.COM (Dec. 5, 2013, 3:47 PM), http://reason.com/blog/2013/12/05/bail-bonds-market-competition-discount-d (describing the method used by bail bond companies in an effort to "court clients with low down payment offers"); *see also* PCS BAIL BONDS, *supra* note 98 (providing that a possible reason for offering low bond payments to defendants may be rested on the effort to avoid the pre-trial services avenue that potential customers/defendants may consider).

100. *See* Krayewski, *supra* note 99 (identifying how low bond offers have "fueled the shift" of industry competition); *see also* PCS BAIL BONDS, *supra* note 98 (reiterating how significant low discount offers and bond payments contribute to the "incredibly competitive" nature of the bail bond industry).

101. *See* Zambito, *supra* note 92 (criticizing usage of reduced bond payments, which consequently result in a high rate of defendants not appearing to court hearing); *see also* Krayewski, *supra* note 99 (considering the expansion of pre-trial services as a result of low payment deals, which create a higher risk of defendant's not showing up for trial).

stroyed an honorable business.[102] Public sentiment exposing the nefarious relationships with power brokers concerned with only making money and the adverse impact on jailed inmates unable to post bond has resulted in some bondsmen getting out of the business.[103]

B. *The Texas Bail System*

The Texas Bail system operates the same as other states in that it requires a person presumed innocent to pay a fine in order to secure their freedom before a trial.[104] The right to counsel has been determined by the courts to attach at the time of arrest, but indigent citizens who are arrested in Harris County, for example, are appointed counsel after being read their rights, a probable cause hearing is held, and bond is set or denied.[105] It is during this phase that a citizen accused of an offense is susceptible to making statements that are being recorded to the Judge or prosecutor, which may later be used against him.

Additionally, the courts in Harris County have proposed a program, similar to the current program implemented in Maryland courts, to provide counsel at a defendant's initial appearance in court.[106] This blueprint could be implemented in any Texas county.[107] It addresses all of the potential roadblocks and offers a practical explanation that outweighs any contention that it would be expensive, unconstitutional, and

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102. *See* Krayewski, *supra* note 99 (stating that veteran bail bond companies believe intense competition has destroyed a once honorable business).

103. *See* Tony Castro, *Bondsmen Are Starting to Bail Out*, L.A. DAILY NEWS, (Dec. 3, 2008 9:00 PM), http://www.dailynews.com/20081204/bondsmen-are-starting-to-bail-out (discussing the observations of Los Angeles based bondsmen on the closure of bail bond companies and the adverse effects on inmates).

104. Baradaran, *supra* note 14, at 761 ("[C]ourts held that bail before conviction is a matter of right, not discretion, for all offenses but capital offenses. Many state constitutions also included provisions allowing detention for capital cases where there was enough 'proof' against the defendant."); *see also id.* at 761 n.207 (citing Ex parte Smith, 5 S.W. 99, 100 (Tex. Ct. App. 1887)).

105. *See generally* Robert J. Fickman, *Harris County Texas: Where the Innocent Must Plead Guilty to Regain Their Liberty*, FICKMAN L. BLOG (NOV. 27, 2013), http://blog.fickmanlaw.com/2013/11/harris-county-texas-where-the-innocent-must-plead-guilty-to-regain-their-liberty (imploring judges to devise a solution to the lack of personal recognizance bonds granted in Harris County).

106. *See* Alex Bunin & Andrea Marsh, *Proposal for Counsel at* TEX. CODE CRIM. PROC. ART. 15.17 Proceedings, VOICE FOR THE DEFENSE ONLINE (Jan. 29, 2014), http://voiceforthedefenseonline.com/story/proposal-counsel-tex-code-crim-proc-art-1517-proceedings (proposing a pilot program to navigate defendants through their initial appearance before a Harris County magistrate, and noting that a similar program has been implemented in Maryland).

107. *Id.*

ineffective.[108] A tweak in the process at that stage would add an attorney with little disruption but create an opportunity to advance an argument for a personal recognizance bond (PR bond) on behalf of the citizen. A PR bond allows a citizen to be released on their "personal recognizance," agreeing to show up for court without paying a fee.[109] If the accused fails to meet conditions of release, the PR bond is revoked and full payment of the bond is required in order to be released.[110]

The addition of an advocate on behalf of the defendant at this juncture could have a ripple effect on the staggering number of citizens who remain in custody because they cannot afford to post a bond. In 2012, Harris County jail statistics indicate that 94,000 people were arrested and less than six percent received a PR bond.[111] Local defense attorney, Rob Fickman led the charge against this unjust practice by penning an open letter to all of the County Criminal Court at Law Judges imploring them to halt the effects of the "Plea Mill."[112] Specifically stating, "the accused remain in jail because they have not been able to hire a bondsman and your courts will not give them a personal recognizance bond. Logic dictates that people prefer liberty over incarceration."[113]

IV. Discriminatory Nature of the Bail System

The system discriminates as bail bondsmen remain part of the political process, with interests antithetical to those of the accused. It is true that a bondsman provides a necessary service to a "captured audience," but a bondsman business is not there to act like a nonprofit would, with lofty goals of enhancing the quality of one's life. A bondsman business is there

108. *See id.* (explaining that these challenges "are offset by the benefits to justice, the potential for reducing jail population, and savings in the long run").

109. *Released on Your Own Recognizance*, Free Advice, http://criminal-law.freeadvice.com/criminal-law/criminal-law/released-on-own-recognizance.htm (last visited Sept. 18, 2014) ("A defendant released on his own recognizance is allowed to leave jail with the promise that he will show up later on his court date. Similar to how a person signs a document promising to appear in court for a traffic violation but is otherwise free to go, defendants charged with misdemeanor or felony offenses sign an agreement at the jail promising to appear for their later criminal court date. Some states call this agreement a *personal recognizance* or PR bond, others may call it something else such as an OR for 'own recognizance.'").

110. *See id.* (noting the financial ramifications of personal recognizance bond revocation).

111. *See* Paul Kennedy, *Is It Time To Bail On The Bond System?*, The Defense Rests (Dec. 5, 2013, 7:00 AM), http://kennedy-law.blogspot.com/2013/12/is-it-time-to-bail-on-bond-system.html (quoting statistics from the Office of Criminal Justice Coordination).

112. Fickman, *supra* note 105.

113. *Id.*

like any other business—to make money and increase profits.[114] The rise of the bail industry as a dominant force is the result of a methodical plan to induce decision makers to support their initiatives under the guise of savings to taxpayers and public safety propaganda.[115]

The culprit responsible for organizing the agenda to win political friends and influence state budgets is the American Legislative Exchange Council (ALEC).[116] ALEC, founded in 1973 by a right-wing activist, enlisted corporate giants and other conservatives to join this movement.[117] ALEC's mission statement contends its goal is to "discuss, develop and disseminate public policies that expand free markets, promote economic growth, and limit the size of government."[118] Questions about the organization's influence were exposed by the Center for Media and Democracy through the website entitled "ALEC Exposed."[119] This led to a feeding frenzy by the media outlets to uncover the scope of ALEC's allies and who benefitted from this association.

A treasure trove of documents detailing the organization's inner workings was leaked by an activist and analyzed by policy experts who were

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114. *See generally* Timothy R. Schnacke et al., *The Third Generation of Bail Reform*, DENV. U. L. REV. ONLINE ARTICLES (Mar. 14, 2011, 3:01 PM), http://www.denverlawreview.org/online-articles/2011/3/14/the-third-generation-of-bail-reform.html (criticizing the current bail system in light of a possible reform).

115. *See generally* Mike Weishar, *Knowing the Enemy: The American Legislative Exchange Council (ALEC)*, QUIET MIKE (Apr. 14, 2014), http://quietmike.org/2014/04/14/knowing-enemy-american-legislative-exchange-council-alec (outlining the relationship between the American Legislative Exchange Council and legislative lobbying efforts).

116. *Id.* ("ALEC is not a think tank or a lobbying group. It is a council presently made up of 1810 state legislators, 85 members of congress, 14 sitting or former state governors and more than 200 corporations.").

117. *See* Editorial, *The Big Money Behind State Laws*, N.Y. TIMES, Feb. 13, 2012, at A22, *available at* http://www.nytimes.com/2012/02/13/opinion/the-big-money-behind-state-laws.html?_r=0 (stating in brief the foundational history of the American Legislative Exchange Council (ALEC)).

118. MICHAEL HOUGH ET AL., ALEC 2013: JOBS, INNOVATION, AND OPPORTUNITY IN THE STATES: TWENTY FIVE PROPOSALS TO PUT THE STATES BACK TO WORK 2 (2012), *available at* http://www.alec.org/wpcontent/uploads/ALEC2013_Jobs_Innovation_Opportunity.pdf.

119. *See generally* COMMON CAUSE, AMERICAN LEGISLATIVE EXCHANGE COUNCIL IN OREGON 1 (2012), *available at* http://www.commoncause.org/research-reports/OR_060112_Alec_Report_2.pdf (discussing the exposition of ALEC by the Center for Media and Democracy, as well as the subsequent fallout); John Nichols, *ALEC Exposed: A trove of documents reveals the vast corporate strategy of this powerful right-wing group*, THE NATION August 1–8, 2011, *available at* http://www.thenation.com/article/161978/alec-exposed# (providing the analyses performed by policy experts following the unearthing of decades of model legislation).

astounded at the coalition of business and political members.[120] Each exposé began to unravel how legislatures were given instructions to manipulate the political process to benefit ALEC.[121] Revelations that the organization helped corporate America draft legislation for states and push the legislation through by right wing legislators, at the expense of minorities, consumers, and the education system, was just the beginning.[122] Donations by David and Charles Koch of Koch Industries are estimated to exceed $1 million dollars to support conservative causes.[123] Another finding of ALEC's influence was discovered when a Florida lawmaker neglected to remove a boilerplate clause from a bill she introduced.[124] The legislators who are members "receive trips, food and lodging that provide many part-time legislators and their families with vacations, along with the opportunity to rub shoulders with prospective donors."[125] The revelations of the secret relationships between corporations and ALEC led to an online petition to force legislators to disclose their association.[126] The shift in support for ALEC led corporations to abandon their support for the controversial organization when it became

120. *See* Nichols, *supra* note 119 (providing the analyses performed by policy experts following the unearthing of decades of model legislation).

121. *See* Mike McIntire, *Conservative Nonprofit Acts as a Stealth Business Lobbyist*, N.Y. TIMES, Apr. 22, 2012, *available at* http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html?pagewanted=all (assessing ALEC's role and influence as a lobbying force in various state legislatures).

122. *See generally The United States of ALEC: Bill Moyers on the Secretive Corporate-Legislative Body Writing Our Laws*, DEMOCRACY NOW! (Sept. 27, 2012), http://www.democracynow.org/2012/9/27/the_united_states_of_alec_bill (stating the various issues to which ALEC has assigned a specific task force).

123. *See* Lisa Graves, *ALEC Exposed: The Koch Connection*, THE NATION, August 1–8, 2011, *available at* http://www.thenation.com/article/161973/alec-exposed-koch-connection (condemning the financial relationship between the Kochs and ALEC).

124. Nick Surgey, *ALEC Exposed, for 24 Hours*, COMMON BLOG (Jan, 31, 2012), http://www.commonblog.com/2012/01/31/alec-exposed-for-24-hours ("When legislators introduce one of ALEC's bills, they normally remove this paragraph. Sometimes (but only sometimes) legislators will make some slight alterations to an ALEC model bill, perhaps to include something specific to them or to their state." In this case the Florida lawmaker submitted the document word for word, without any change.).

125. *Exposed: ALEC's Influence in Missouri*, PROGRESSMISSOURI 4 (Jan. 21, 2014, 9:45 PM), *available at* https://www.scribd.com/doc/201186361/ALEC-in-Missouri-2014-Report. The article poses and answers the question: "[w]hy would a legislator be interested in advancing cookie-cutter bills that are giveaways for multinational corporations located outside of Missouri?" *Id.*

126. *See* Robert Sloan, *Expose and Abolish the American Legislative Exchange Council (ALEC)*, CHANGE.ORG, http://www.change.org/p/expose-and-abolish-the-american-legislative-exchange-council-alec (directing users to a petition that was served on the Indiana Governor, Indiana State Senate, and Indiana State House).

known for orchestrating the "stand your ground" laws and voter suppression tactics.[127]

The American Bail Coalition has been a member of ALEC for more than a decade and has described the American Legislative Exchange Council as its "life preserver."[128] The attack on government pretrial services by the bail industry follows ALEC's playbook on how to discredit the competition and offer their services as the alternative. The "About-Bail" website details the predatory tactics to grooming the electorate to be seduced by the industry.[129] The first step is for the bail agent to mask his or her behavior by establishing him or herself as the kind of person one would not suspect had an alternative motive.[130] The website further advises them to get to know the legal community, particularly judges and district attorneys, so the agent can educate them on bail bonds and legislation.[131]

The second tactic is the ability to charm and radiate sincerity by gaining a better understanding of why people support government programs.[132] Bail agents recruit collaborators by spending time with them to establish a trusting relationship in order to gain support for fighting legislative change.[133] The agents will deliberately cultivate a relationship with a powerful ally, such as a prosecutor, to speak on their behalf to the com-

127. *See Corporate Exodus Continues from ALEC as Secretive Right-wing Group's Policies Come to Light*, DEMOCRACY NOW! (July 11, 2012), http://www.democracynow.org/2012/7/11/corporate_exodus_continues_from_alec_as (noting that twenty-five corporations, four major nonprofit organizations, and fifty-five elected officials have stopped supporting ALEC in the wake of Trayvon Martin's killing); *see also* DEMOCRACY NOW!, *supra* note 122 (stating corporations such as Coca-Cola, Kraft Foods, McDonald's, Mars, Procter & Gamble, Johnson & Johnson have pulled out of ALEC).

128. *See American Bail Coalition*, SOURCEWATCH.ORG (July 25, 2014, 12:52), http://www.sourcewatch.org/index.php/American_Bail_Coalition (showing the longstanding connection between ALEC and the American Bail Coalition).

129. *See generally 5 Reasons Bail Agents Should get to Know the Local Legal Community*, ABOUTBAIL.COM (May 2, 2013), http://www.aboutbail.com/articles/1148/bail-agents-legal-community (explaining that a purpose of getting to know the legal community would be to help push politically advantageous legislation).

130. *See generally id.* (noting that the public would be more likely to support legal professionals, as opposed to bail agents).

131. *See generally id.* (instructing bail agents to meet and cooperate with members of the legal community).

132. *Id.* ("Battling government programs is difficult, but understanding why people and legislative representatives are supporting those programs gives bail agents an advantage for forming a sophisticated and effective strategy to combat the issue.").

133. *See id.* (commenting a bail agent may be able to establish beneficial contacts by interacting with community members).

munity to convey credibility.[134] The agent continues the grooming by doing favors, such as attorney recommended bonds.[135] The "AboutBail" article concludes that time spent nurturing the relationship is beneficial because it solidifies community ties.[136]

ALEC members contend the organization merely "provides a forum for lawmakers to network."[137] Ultimately, ALEC devotees succeed in hoodwinking the public because participants agree to keep the benefits of their relationship a secret. The object of the bail industry's ire are government pretrial assessment programs that release citizens from custody based on a rubric evaluation and not contingent on the ability to pay. Most criminal justice studies are sponsored by agenda driven stakeholders who are more interested in validating their perspective than resolving the dispute based on unbiased data. As a result, one side of the conflict is the private sector culture that believes less government increases competition without regard to its impact on anyone. This leads to a private sector that is competing against a public sector culture that believes the government can provide a service that is fair across the board to everyone.[138] Dueling statistics from proponents and opponents support their respective positions alleging a successful rate of court appearances after being released from custody.[139]

The pretrial assessment programs were initiated as an alternative to correct the abusive use of bail by judges.[140] A point system that took into account community ties, criminal history, and other variables was suggested as a tool to predict whether someone would return to court.[141]

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134. *Id.* ("[C]ommunity members may be more easily convinced of the positive aspects of bail when they are outlined by legal professionals . . . rather than the agents themselves.").

135. *See id.* (explaining how a bail agent should expand their business by referrals and recommendations).

136. *Id.*

137. McIntire, *supra* note 121.

138. *See generally* Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement From Bail Jumping*, 47 J. L. & ECON. 93 (2004) (comparing the effectiveness of public police and the private bail agent when dealing with defendants who fail to appear).

139. *See id.* at 118 (recommending that bail agents are more effective than the police at "discouraging flight and at recapturing defendants").

140. *See generally* TIMOTHY R. SCHNACKE, ET AL., THE HISTORY OF BAIL AND PRETRIAL RELEASE, (2010), *available at* http://www.pretrial.org/download/pji-reports/PJI-History%20of%20Bail%20Revised.pdf (providing a concise history on bail and pretrial release and explains the progression of those programs to present day).

141. *See* Qudsia Siddiqi, *Prediction of Pretrial Failure to Appear and Alternative Pretrial Release Risk-Classification Schemes in New York City: A Validation* Study, NATIONAL CRIME JUSTICE REFERENCE SERVICE (Oct. 26, 2000), https://www.ncjrs.gov/App/publications/Abstract.aspx?id=204585 (recommending that the points system could "potentially

The Conference of Chief Justices endorsed the court administrator's pretrial assessment that took into account the purpose of bail and advocated discontinued use of bail schedules.[142] The New York Chief Justice's assessment included revamping the bail statutes with public safety and failure to appear in mind, while allowing judges the discretion to impose conditions as an effective method to ensure fairness.[143] Consequently, the final conclusions by pretrial assessment advocates agree, "the extensive use of money bail as the primary release mechanism has distorted the pretrial justice process."[144]

The bail industry responded with their studies that dismissed the pretrial assessment studies as biased[145] and taunted assessment advocates that research published by the Department of Justice supported commercial bail as the most effective method to decrease failure to appear rates by accused persons awaiting disposition of criminal cases.[146] One of those advocates, The Golden States Bail Agents counsel submitted a memo emphasizing the credibility of the studies relied on by the bail industry.[147] Another study out of Dallas, which further showed support of the bail industry with a finding of a slightly better return rate, cautioned

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reduce the jail population of defendants awaiting trial" by identifying those who are low, moderate, and high risk of failure to appear).

142. *See generally* Arthur W. Pepin, *Conference of Chief Justices Resolution 3 Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release*, PRETRIAL JUST. INST., (2012), http://www.pretrial.org/wp-content/uploads/2013/02/CCJ-Resolution-on-Pretrial-1.pdf (urging court leaders to adopt the evidence-based assessment, and defining "the purpose of bail is to ensure the accused will stand trial and submit to sentencing if found guilty").

143. *See* Jonathan Lippman, *The State of the Judiciary 2013 "Let Justice Be Done,"* NYCOURTS.GOV 3–4 (Feb. 5, 2013), https://www.nycourts.gov/ctapps/news/SOJ-2013.pdf (explaining the goal of bail statutes should not be to incarcerate those who cannot afford to be released but it is for defendants who are at risk for not returning to court).

144. JUSTICE POLICY INSTITUTE, *supra* note 8, at 3.

145. *See generally* THOMAS H. COHEN & BRIAN A. REAVES, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS (Dep't of Justice, Bureau of Justice Statistics, Nov. 2007) *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=834 (providing a detailed statistical analysis of felony cases while identifying potential variables that could impact pretrial release and misconduct).

146. *See generally* Dennis A. Bartlett, *The War on Public Safety: A Critical Analysis of The Justice Policy Institute's Proposals for Bail Reform*, AMERICAN BAIL COALITION (Sept. 4, 2012), http://www.asc-usi.com/userfiles/BailResources/War%20on%20PublicSafety.pdf (responding to studies done by the Justice Policy Institute by identifying eighteen falsities in the documents and responding to each).

147. *See* Written Testimony from Albert W. Ramirez, Counsel for Golden State Bail Agents Ass'n, to Little Hoover Commission, at 6–7 (Nov. 27, 2012) *available at* http://www.lhc.ca.gov/studies/activestudies/bail%20and%20sentencing%20reform/Ramirez%20Testimony.pdf (explaining how the risk assessment tools relied on by the bail industry, which help determine flight risk, are not as "scientific" as they are promoted to be, and how bail agents use similar analysis without any cost to taxpayers).

victory until differences across specific offense types could be evaluated.[148] Pretrial assessment advocates countered the bail industry relied on faulty data by dissecting every study the bail industry used to support its position.[149]

However, not all agreed with the studies presented by bail industry advocate or sang the same praises of the commercial bail industry.[150] In Wisconsin, the commercial bail industry's attempt to return was met with a flurry of criticism that forced the governor to veto the bill.[151] Vocal critics denounced the crafty bill as a scheme through which money meant for crime victims to now go to bail bondsmen when the defendant was convicted.[152] The Governor of Wisconsin, Scott Walker, remarked that his decision to veto the measure resulted from the same easiness he had to two years when the same bill was proposed.[153]

The bail industry then began a campaign to methodically discredit the accuracy of the pretrial assessment programs.[154] The two-fold attack questioned the cost to taxpayers to run the government sponsored pro-

148. *See Bail Bond Study Seeks to Predict No-Shows for Criminal Trials*, U. OF TEX. AT DALLAS, (Jan. 31, 2013), http://www.utdallas.edu/news/2013/1/31-21851_Bail-Bond-Study-Seeks-to-Predict-No-Shows-for-Crim_article-wide.html (finding that the defendants who were released via bail bond agent were more likely to appear in court than those released by other types of bonds).

149. *See* Kristen Bechtel et. al, *Dispelling The Myths: What Policy Makers Need To Know About Retrial Research*, PRETRIAL JUSTICE INSTITUTE (Nov. 28, 2012), http://www.pretrial.org/download/pji-reports/Dispelling%20the%20Myths%20(November%202012).pdf (stressing to policy makers the need to be cautious when reviewing studies and to support research that addresses the three purposes of a bail decision: "(1) maximizing public safety and (2) maximizing court appearance while (3) maximizing pretrial release").

150. *See* Patrick Marley, *Governor Scott Walker to Veto Bail Bonds Measure*, JOURNAL SENTINEL (June 30, 2013), http://www.jsonline.com/news/statepolitics/gov-scott-walker-to-veto-bail-bonds-measure-b9942781z1-213726561.html (detailing an anticipated veto by the Governor of Wisconsin of a provision that allowed bail agents to be for profit; opponents argued the provision would take away funds used towards a victim's restitution).

151. *See id.* (discussing a proposed provision that allowed bail agents to be for profit; opponents argued the provision would take away funds used towards a victim's restitution).

152. Bruce Murphy, *The Wisconsin Budget's Private Bail Bond System Spells the Return of Debtors' Prison*, ISTHMUS (June 13, 2013), http://www.isthmus.com/isthmus/article.php?article=40147.

153. Marley, *supra* note 150. Governor Walker of Wisconsin said that "[t]wo years ago [he] vetoed it out, [he] had some concerns then and looked at it and heard from a lot of folks, particularly law enforcement, that were concerned and so [he] took it out." *Id.*

154. *See Bail Bond Industry Addresses the War on Public Safety*, MARKET WIRED (Oct. 9, 2012), http://www.marketwired.com/press-release/bail-bond-industry-addresses-the-war-on-public-safety-1710883.htm (responding to the papers published by the Justice Policy Institute that were felt to be negative towards bail agents, by issuing a response that outlines eighteen rebuttal points).

grams and injected a fear factor element of whether it could protect the public.[155] The group associations assembled at conventions to map out a strategy on how to discredit the pretrial programs.[156] Powerful bail bondsmen began to exert their influence, rallying their cohorts to exert their influence to marginalize pretrial assessment as inefficient and without taking into account the public's safety. For example, a Lubbock, Texas bail bond office manager recounted an incident where he prevented a client who was eligible to be released free of charge by pretrial services was subsequently denied release when the manager confronted the judge who signed the order.[157] Another example of this influence occurred in Broward County, when its pretrial program suffered the same fate as the Lubbock program, after being heralded as saving the county money.[158] In Broward County, the bail bondsmen group hired a lobbyist who worked in the same capacity for the commission that ultimately defunded the Broward pretrial program.[159] Another shutdown of bail reform occurred in Connecticut where one of its representatives indicated he worked tirelessly for years to enact bail reform, but efforts were thwarted each time by the powerful bail bond lobby.[160]

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155. *See generally The American Bail Coalition's Iliad*, NEWSLETTER (American Bail Coalition) Oct. 2010, at 2 *available at* http://www.asc-usi.com/userfiles/BailResources/ABC_Newsletter%20V1.pdf (explaining how the private bail industry has helped ensure defendants show up to court without taxpayer money, which has also decreased the risk of reoffending thereby preventing future victims).

156. Faber, *supra* note 80 (quoting Corrine Markey's comment that the goal of the Bail Conference is to "arm our members with information and strategies to push back against attacks on commercial bail within their communities").

157. *See* Laura Sullivan, *Bail Burden Keeps U.S. Jails Stuffed With Inmates*, NATIONAL PUBLIC RADIO (Jan. 21, 2010, 2:00 PM), http://www.npr.org/2010/01/21/122725771/Bail-Burden-Keeps-U-S-Jails-Stuffed-With-Inmates (illustrating the influence and power of the private bail bond industry on local elected officials working with pretrial release programs).

158. *Compare* Laura Sullivan, *Bondsman Lobby Targets Pretrial Release Programs*, NATIONAL PUBLIC RADIO (Jan. 22, 2010, 2:00 PM), http://www.npr.org/templates/story/story.php?storyId=122725849 (reporting that Broward County commissioners voted to "gut" funding for the pretrial program after lobbying efforts by bail bondsmen, creating a disservice to the tax payers—the program cost about $7 a day as opposed jail at $115 a day, per inmate), *with* Sullivan, *Bail Burden Keeps U.S. Jails Stuffed With Inmates*, *supra* note 157 (reporting on county commissioners decision to build a new $110 million jail in Lubbock instead of expanding pretrial release programs due to the lobbying efforts of bondsmen who want to "keep [the] program as small and unproductive as possible).

159. *See* Sullivan, *Bondsman Lobby Targets Pretrial Release Programs*, *supra* note 158 (detailing how lobbyist Rob Book, hired by Broward's bondsmen and the commissioners, spread almost $23,000 across the council, before the bill to gut the pretrial program was passed).

160. *See* Russell Nichols, *States Struggle to Regulate the Bond Industry*, GOVERNING (Apr. 2011), http://www.governing.com/topics/public-justice-safety/States-Struggle-to-Regulate-the-Bond-Industry.html (quoting former Connecticut Representative

The collusion between prosecutors, judges, and bail bondsmen skews the decision-making process determining the actual charge, the amount set for bond, and ultimate payment required for release.[161] The district attorney from Clatsop County, Oregon acknowledged collusion when declaring that "[t]he bail bond system is rife with corruption."[162] The assumption that prosecutors use race as a factor to determine who should be charged with an offense, while unsubstantiated empirically, is accepted as true because of the disproportionate number of African- Americans and Latinos incarcerated.[163]

The basis for some of the decisions made by prosecutors was exposed in a study that showed disparities in the treatment of African-Americans versus Anglos.[164] Data corroborating that African-Americans and Latinos were more likely to be detained pretrial than similarly situated whites, confirms prosecutors' abuse of their discretion.[165] There have been numerous scandals involving "pay-to-play" types of schemes involving officials ranging from judges to police to jailers, all conspiring with bail bondsmen in order to get paid.[166] In an attempt to stomp out this

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Michael Lawlor, an advocate for regulation of the bail bond industry, who has pushed many bills that continue to get turned down: "[t]hese bills dealt with setting up a system for overseeing the industry, getting them to play by the rules they were supposed to play by").

161. *See generally* Sullivan, *Bail Burden Keeps U.S. Jails Stuffed With Inmates*, *supra* note 157 (reviewing several factors that contribute to the collusion such as: bondsmen paying a reduced percent back to the county if the client runs, allowing the bail bondman to profit even when no effort is made to apprehend the absconder, and judges setting bond "ten times higher than what people can afford").

162. Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES, Jan. 29, 2008, http://www.nytimes.com/2008/01/29/us/29bail.html?pagewanted=all&_r=0# (suggesting bail bondsmen are incentivized to "collude with lawyers, the police, jail officials and even judges" to increase bail because bail bond companies do not compete on price).

163. *See* Saki Knafosake, *Study Finds Racial Disparities In Manhattan DA's Office*, HUFFINGTON POST (updated July 9, 2014, 1:59 AM), http://www.huffingtonpost.com/2014/07/08/racial-disparities-manhattan-da_n_5568866.html (discussing the findings of a Vera Institute for Justice study, conducted in Manhattan, NY, which examined 200,000 cases from 2010 through 2011 and revealed disparities in treatment of blacks and Latinos compared with whites, "raising the question of whether [the prosecutors'] decision-making process is tainted by racial prejudice").

164. *Id.*; *see* Besiki Kutateladze, Whitney Tymas & Mary Crowley, *Race and Prosecution in Manhattan*, VERA INST. OF JUSTICE (July 8, 2014), http://www.vera.org/pubs/special/race-and-prosecution-manhattan (highlighting specific factors integrated into the Vera study, and the overall result of the study, that "race remained a factor in case outcomes").

165. Kutateladze, Tymas & Crowley, *supra* note 164. S. Knafosake, *supra* note 163 ("[B]lacks were 10 percent and Latinos 3 percent more likely than whites to be held behind bars before trials.").

166. *See* Drew Broach, *FBI records shed light on Jefferson Parish Courthouse corruption investigation*, THE TIMES-PICAYUNE, (Nov. 3, 2011, 10:14 PM), http://www.nola.com/crime/index.ssf/2011/10/fbi_records_shed_light_on_jeff.html (reporting an incident involving a disgruntled bail bonds agent informing the FBI that bail bonds company was "paying

corruption, the Federal Bureau of Investigation conducted an undercover operation in Louisiana, where judges were arrested in a sting designated "Wrinkled Robe" for funneling business to bondsmen for a cut of the profits.[167] In fact, a bondsman testified that contributing to a judge's campaign is the price for doing business.[168] This scheme was not the first. There was a similar scheme in Chicago in the 1960s that led Chicago officials to shut down the commercial bail industry, and court clerks assumed the task securing the appearance of clients with charges pending.[169] A National Public Radio exposé on bail bond debt discovered that bondsmen in California owe counties $150 million, and bondsmen in New Jersey owe $250,000.[170]

Ultimately, any testimony for or against commercial bail or pretrial services has been met with skepticism based on the affiliation of the discussant.[171] Efforts to have an unbiased discussion are answered with accusations of deliberately hijacking the question to suit a particular agenda.[172] This failure to come to a solution only hurts those in society

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off judges and justices of the peace . . . picking up the tab for their vacations, as well as buying food and drinks for sheriff's deputies who worked at the parish jail").

167. *See id.* (detailing the FBI's nine year inquiry regarding the Jefferson Parish Courthouse in Gretna, LA that resulted in two state judges being sent to prison, two others losing their jobs, impeachment of a federal judge, and the dismantling of the town's dominant bail bonds company).

168. Michelle Krupa, *Green took bribes, exec testifies; Bond firm's ex-CEO says judge sought, took cash*, TULANE LINK (June 23, 2005), http://www.tulanelink.com/tulanelink/green_box.htm. Lori Marcotte, Bail Bonds Unlimited former vice-president and chief executive officer, provided testimony that Judge Alan Green "[a]sked for cash, and he put it in his pocket" in exchange for setting bonds for criminals defendants to increase business at Bail Bond Unlimited. *Id.*

169. CHARLES R. ASHMAN, THE FINEST JUDGES MONEY CAN BUY AND OTHER FORMS OF JUDICIAL POLLUTION 200–06 (1973) (illustrating the investigation into and conviction of Judge Kerner for accepting bribes). *See generally* SCHNACKE ET AL., *supra* note 140, at 10–11 (stating the 1963 legislation known as the Illinois Ten Percent Deposit Plan, which directed the bond fee to be paid directly to the court instead of bondsmen, was enacted at the same time courts were questioning the corrupt practices often found in the bail industry).

170. Sullivan, *Bail Burden Keeps U.S. Jails Stuffed with Inmates*, *supra* note 157 (reporting the amount of money counties are not receiving due to "breaks" in the amount that bondsmen should pay when a client does not appear at court).

171. *See generally* Fred Grimm, *The Cost Of Bailing Out The Bail Bond Industry*, MIAMI HERALD BLOG (Apr. 19, 2010, 10:16 AM), http://miamiherald.typepad.com/grimm_truth/2010/04/the-cost-of-bailing-out-the-bail-bond-industry.html (publishing Senior Judge Peterson's letter to a Florida State Senator "protesting the proposed bailout of the bail bond industry," which compared the commercial bail industry with the pretrial release programs from the perspective of the judiciary).

172. *See generally* Deborah Jallad, *Alternatives to bail bonds are costly*, HERALD-TRIBUNE (Feb. 28, 2012, 1:00 AM), http://www.heraldtribune.com/article/20120228/COLUMNIST/120229537 (challenging the Herald-Tribune's February 16, 2012 editorial titled

most susceptible to discrimination; the poor and minorities. An open letter from a judge, offering his support for pretrial services based on his personal experiences as a prosecutor, was ridiculed by pro-bond advocates.[173] The Baltimore Sun even took dissenting Chief Judge Mary Ellen Barbera to task when she trivialized any potential harm resulting from a lawyer not being present at a bail hearing.[174]

A. *The Discrimination Falls On The Backs Of The Poor And People Of Color*

An examination of the Commercial bail bond business practice to require payment of a non-refundable fee in order to be released from jail has a poll taxesque aura in the 21st century. The bond payment is used as a precondition in order to be released from custody without regard to financial capability.[175] The impact of this type of legal intimidation has a disproportionate impact on minorities and the poor.[176] A Milwaukee Deputy District Attorney voiced his opposition to attempts to return to commercial bail due to the financial hardship it created for minorities and

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"Sensible, cost-effective justice," by arguing that the issue is not between the cost of pretrial release programs and jail, but between costs of private bail and pretrial services).

173. *See* Jax, Comment to, *The Cost Of Bailing Out The Bail Bond Industry*, MIAMI HERALD BLOG (Apr. 19, 2010, 10:16 AM), http://miamiherald.typepad.com/grimm_truth/2010/04/the-cost-of-bailing-out-the-bail-bond-industry.html (questioning the Judge's stance that a document entitled "Taxpayer Funded Pretrial Release: A Failed System" was providing the Florida legislature with "false, erroneous and misleading information").

174. *The right decision on bail; Our view: Defendants should have lawyers whenever their liberty is at stake*, BALTIMORE SUN (Sept. 27, 2013, 12:31 PM), http://articles.baltimoresun.com/2013-09-26/news/bs-ed-bail-20130926_1_court-commissioner-hearings-bondsman-denied-bail. The article condemns Chief Judge Barbera's dissenting opinion in a Court of Appeals decision, which held that "criminal defendants have a right to counsel at commissioner hearings," by arguing that lawyers are necessary to persuade commissioners to "consider all relevant information before making a decision" because their decisions not usually overruled. *Id.*

175. SCHNACKE ET AL., *supra* note 140, at 16 ("[I]n recommending that commercial sureties be abolished, the ABA relie[d] on numerous critiques of the money bail system" including "the absence of any relationship between the ability of a defendant to post a financial bond and the risk that the defendant may pose to public safety.").

176. *See generally* Diane Sweet, *Nation of Inmates: The Impact on Poor And Minority Communities*, CROOKS AND LIARS (Feb. 20, 2013, 2:30 PM), http://crooksandliars.com/diane-sweet/nation-inmates-impact-poor-and (detailing how sociologists have found that incarceration impacts not only the offender's detained circumstance, but extends to their families by continuing the poverty cycle). A notable finding of the study is that "African-Americans—, who represent 12 percent of the US population—, make up 37 percent of federal prisoners, and Latinos—, who are 16 percent of the population—, make up 35 percent of the prisoners." *Id.*

low-income individuals.[177] This has drawn increased attention and spurred an investigation by government officials into the rising costs of housing inmates awaiting disposition of their criminal case.[178] An arrested Occupy Wall Street protestor noted the impressive number of citizens in custody unable to post a $50.00 bond and advocated redirecting activism efforts to the communities affected by this injustice.[179]

Ironically, a spokesman for the Professional Bail Agents concedes the system is not fair but maintains it is the best in the world.[180] At the same time, unsuspecting citizens eager to be released from jail unwittingly sign contracts giving bondsmen authority to charge fabricated fees for contrived breaches in agreement in order to justify keeping their money.[181] Some jurisdictions have legal procedures that are rarely utilized by lawyers to challenge bail. For example, Paul Kennedy, a Houston DWI attorney and criminal defense blogger, pointed out a rarely used provision in the Texas Constitution which allows attorneys to combat prosecutor's assertions that a bail schedule is the decisive authority on when bail can

177. Joe Forward, *Provisions Allowing Bail Bondsmen Could be on the Horizon*, ST. B. WIS., (May 1, 2013), http://www.wisbar.org/NewsPublications/RotundaReport/Pages/Article.aspx?ArticleID=10740. Milwaukee Deputy District Attorney Lovell Johnson stated that "bail bond programs 'breed corruption within the criminal justice system' . . . essentially tax[ing] minorities and low-income individuals, who must pay a non-refundable fee, even if the defendant is eventually found innocent . . . Under present law, if the defendant is found guilty, money posted by the defendant to the court for bond can be used to make restitution." *Id.*

178. *See generally Cost of Pre-Trial Detention in City Jails Takes Bite Out of Big Apple's Budget*, INDEP. BUDGET OFF. OF THE CITY OF N.Y., http://www.ibo.nyc.ny.us/newsfax/nws56pretrialdetention.html (last visited October 25, 2014) (identifying that in 1999, New York city had spent up to $860 million in jail operations, and approximately two-thirds of the jail population were considered pre-trial detainees costing the city about $123.00 per day for each detainee).

179. Chris Arnade, *An ex-banker and Occupier walk into a jail. Guess which one's serving time?*, THE GUARDIAN (June 11, 2014, 6:15 PM), http://www.theguardian.com/commentisfree/2014/jun/11/cecily-mcmillan-occupy-protestor-exclusive-conversation. The article relays how Cecily McMillanwas "made aware of the wide gulf that separates New Yorkers, and of a system that is so stacked against those with so much less. At every juncture, the criminal justice system seems to be kicking the poor in the teeth . . . The less money you have, the less power you have, and the greater chance your mistakes will be punished." *Id.*

180. Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, *supra* note 162 (discussing the "flaw in the system" where defendants are required to pay "nonrefundable fees to a private business" even when they have not been convicted for a crime and make their court appearances). *Id.* Liptak, *supra* note 157.

181. *See* John Eligon, *For Poor, Bail System Can be an Obstacle to Freedom*, N.Y. TIMES (Jan. 9, 2011), http://www.nytimes.com/2011/01/10/nyregion/10bailbonds.html?pagewanted=all&_r=0 (reporting on the increasing number of revoked bonds and surrendered defendants by bail bondsmen, allowing the bondsmen to retain the fees, sometimes for "unnecessary or invented services," that are stipulated in the defendant's contract).

be denied.[182] Other jurisdictions have nicknames, for instance in New Orleans, that convey bail's callous use without regard to seeking justice. New Orleans inmates coined the phrased "D.A. time" which is a 60-day waiting period while a decision is made whether or not to file charges.[183]

One tool to aid in inmates' defense while awaiting trial are publications designated for inmates to help educate them of their rights while in custody.[184] The Freedom Fund non-profit is the only program in the nation that pays the bail for low income people, and has a 93 percent return for scheduled court dates.[185] The Freedom Fund is just one humanitarian tool available to resolve the unfair pretrial detention of the indigent until the bail industry as a dominant force in criminal jurisprudence is diminished. Other such resources and humanitarian tools are needed, however.

The United States has approximately 2.3 million in prison, which is "more than any other nation."[186] Statistics indicate: "60 percent of those imprisoned are people of color though they constitute only 30 percent of the total U.S. population."[187] While studies continue to conflict on the effect of race and pretrial decisions, it is only logical to conclude that because a higher percentage of minorities and the poor are incarcerated they are being affected the most by the deadlock between the competing factions in the debate over bail.[188]

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182. Kennedy, *supra* note 111 (quoting statistics from the Office of Criminal Justice Coordination).

183. Katy Reckdahl, *Jailed Without Conviction: Behind Bars For Lack Of Money*, CHRISTIAN SCI. MONITOR (Dec. 16, 2012), *available at* http://www.csmonitor.com/USA/Justice/2012/1216/Jailed-without-conviction-Behind-bars-for-lack-of-money.

184. *See A Jailhouse Lawyer's Manual Chapter 34: The Rights of Pretrial Detainees* 34 COLUM. HUM. RTS. L. REV. 930 (2011) (providing one such resource for inmates).

185. THE BRONX FREEDOM FUND, http://www.thebronxfreedomfund.org/ (last visited Aug. 12, 2014).

186. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. TIMES (Apr. 23, 2008), http://www.nytimes.com/2008/04/23/us/23prison.html?pagewanted=all&_r=0 (citing data from the International Center for Prison Studies at King's College London to emphasize the number of American prisoners—contributing to "almost a quarter of the world's prison[ ]" population—compared with the country's population—"less than 5 percent of the world's population"); Amanda Scherker, *The 14 Most F#$%ed Up Things About America's Obsession with Putting People Behind Bars*, HUFFINGTON POST (June 16, 2014, 11:59 AM), http://www.huffingtonpost.com/2014/06/16/us-prison-size_n_5398998.html.

187. *See* Scherker, *supra* note 186 (analyzing the 2003 Bureau of Justice report, estimating "that at current rates, black men born in 2001 have a 32.2 percent lifetime likelihood of incarceration," and other research that "indicate[s] that black men serve between 14 and 20 percent longer prison terms than white men for the same crimes").

188. *See* JUSTICE POLICY INSTITUTE, *supra* note 8, at 40 (explaining that there are conflicting reports on how race affects pretrial decisions but that research does show there is some form of interaction between the two, at least indirectly).

V. SOLUTIONS TO THE BAIL SYSTEM

The counterpart to any problem is its solution. Due to the gratuitous and discriminatory nature of these archaic bail bond systems, changed laws allow judges to implement different alternatives outside of what these defendants have in their pockets.[189] "Released on recognizance" is one alternative provided to lower-risk defendants based upon their word to abide by specific rules and regulations.[190] Before deciding which defendants are low-risk or high-risk, judges take into account the circumstances and characteristics of each arrestee.

The state of Maryland has revamped its laws to circumvent the plague of bail as a business by implementing pretrial release programs. Pretrial release programs provide due process to those accused of crime, maintaining the integrity of the of the judicial process by securing defendants for trial, and protecting victims, witnesses, and the community from threat, danger, or interference.[191] These programs afford defendants eligible for release prior to trial the option to not sit in jail or unwillingly participate in the world of bail and bail bondsmen; both of which cost taxpayers a lot of out of pocket.

Other states, like Kentucky, Illinois, and Oregon have found a solution to bail problems by banning commercial bail bonds and bounty hunting.[192] According to the Bureau of Justice Statistics, in 2011, nearly three-quarters of a million individuals were in jail and 61% of those individuals were awaiting court action on a current charge.[193] It is likely that most of those individuals are indigent citizens imprisoned for petty crimes that commercial bail bondsmen do not take interest in because they cannot make a profit from or those that cannot afford bail. Another solution would be to challenge the constitutionality of the bail system as a whole, through each states' "holy grail": their constitutions.

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189. *See* THE NAT'L ASSN OF PRETRIAL SERVICES AGENCIES, THE TRUTH ABOUT COMMERCIAL BAIL BONDING IN AMERICA (2009), *available at* http://www.napsa.org/publications/napsafandp1.pdf (stating the trend of legislation in the United States is towards allowing judges a list of alternatives to traditional bail).

190. *Id.*

191. *See* Am. Bar Ass'n, *Pretrial Release Standards*, AMERICANBAR.ORG, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html (last visited June 3, 2014) (explaining that a pretrial release programs provide due process to those accused of a crime, maintain the integrity of the judicial process by securing defendants for trial, and protect victims, witnesses, and the community from threat, danger, or interference).

192. L. Jay Labe & Jerry Watch, *Commercial Bail Bonds*, AMERICAN BAIL BOND COALITION, *available at* http://www.americanbailcoalition.org/Resources/ABA-Bail-Chapter-Commercial-Bail-Bonds.pdf (last visited Sept. 21, 2014, 11:32 AM).

193. NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release.aspx (last visited June 3, 2014).

A. *The Maryland Solution: How Its Article 24 And Declaratory Judgment Changed Its Law?*

In Maryland, when a defendant allegedly commits a crime, he goes before a Commissioner, who conducts a pretrial hearing, where no record is preserved, to ascertain whether the arrestee is to be detained, released on bail, or released on the arrestee's own recognizance.[194] Counsel is normally not present during these hearings, and when counsel is present, it is only for those that who cannot afford it. This leaves indigent people at the mercy of Commissioners, who do not have to be lawyers or have any type of legal background. Because imprisonment is more probable than release, this deprives the arrestee of his procedural due process. Article 24 of Maryland's Declaration of Independence states:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the Law of the land.[195]

In *DeWolfe v. Richmond*, the Maryland Court of Appeals have long considered state-furnished counsel for indigent defendants an integral part of procedural due process.[196] Without counsel present, unrepresented arrestees are less likely to be released on their own recognizance, more susceptible to higher bail where they have to pay the expense of the bail bondsman's non-refundable 10% fee to avoid detention.[197] With the help of these commissioners and the judges affirming their recommendations, this further perpetuates the discrimination against indigent people while fattening the wallets of commercial bail bondsmen.

However, the Maryland Court of Appeals changed this offense. The court concluded that indigent defendants are entitled to representation during initial hearings before a District Court Commissioner.[198] This representation can assist the defendant during the hearings when the District Court Commissioners are considering the many factors like the defendant's family ties, employment status, financial resources, and length of residence in the community and in the State. Then these "pretrial" hearings before a District Court Commissioner will yield more arrestees being released on their own recognizances, thus resulting in fewer arrestees having the burden of interjecting non-refundable money in a skewed bail

194. MD. CODE ANN., CTS. & JUD. PROC. § 2–607 (West 2014).

195. MD. CONST. Declaration of Rights art. 24.

196. DeWolfe v. Richmond, 76 A.3d 962, 973 (Md. 2012).

197. *Id.* at 977.

198. *Id.* at 983.

system. Many states, like Maryland, have revamped their laws to circumvent the plague of bail as a business.

B. *How Other States Have Tackled Bail Issues*

There are several states that have followed Maryland's lead to protect due process rights, and to halt the discriminatory practices of the bail system. For example, according to Kentucky law, it shall be unlawful for any person to engage in the business of bail bondsman or to otherwise for compensation or other consideration: furnish bail, or funds or property to serve as bail, or make bonds or enter into undertakings as surety.[199]

To replace the for-profit bail system in Kentucky, pretrial programs were created. Like most pretrial programs, the courts in Kentucky determine whether defendants are entitled to pretrial release or bail by factors, such as: flight risk, unlikely to appear, and likely to be a danger to others.[200] If pretrial release is granted, the defendant is released on his or her own recognizance, or ordered to participate in a GPS monitoring device.[201] However, unlike most pretrial programs, Kentucky's pretrial programs function under the position that "persons accused of a crime are innocent until proven guilty and deserve a reasonable opportunity to not be kept in jail until tried."[202]

However, assistance is given to those defendants who are not granted pretrial release in Kentucky. Those who have bail imposed upon them are permitted, absent certain factors, a credit of one hundred dollars per day as payment toward the amount set for each day, or a portion of the day, that the defendant is to spend in jail before trial commences.[203] When there has been sufficient credit accrued to satisfy the bail, the defendant is released on his or her own recognizance.[204] Additionally, if the defendants can pay ten percent of the bail amount, in cash or by property bond, the bail amount is returned to the defendant as long as they are not charged with failure to appear.[205]

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199. KY. REV. STAT. ANN. § 431.510 (West 2014).

200. *Id.* § 431.066.

201. *Id.* § 431.067.

202. *The Legal Precedents Outlawing Bounty Hunter and Bail Bondsman Jobs in Kentucky*, BOUNTYHUNDTEREDU.ORG, http://www.bountyhunteredu.org/kentucky (last visited Jan. 3, 2015).

203. KY. REV. STAT. ANN. § 431.066 (West 2014).

204. *Id.*

205. *Id.*

Illinois, another state that has taken the fight to the bail bonds industry, passed its Code of Criminal Procedure in 1963.[206] This legislature quashed the commercial bail bond industry in Illinois.[207] Former Attorney General, Richard Daley, bashed the bail system as "inefficient, detrimental to the rights of defendants and a risk to the public welfare."[208] Illinois still has a bail system, just not a commercial bail system. Similar to Kentucky, once the defendant appears for his or her court date, the bail amount or property is released back to the defendant.[209]

Since the 1970s, the courts in Oregon have acted as bail bondsmen, further nailing a coffin into the business of commercial bail in the their state.[210] The argument, however, to allow bail bondsman back into the state is still ongoing. An Oregon sheriff penned an open letter claiming the return of commercial bail bondsmen to his state would be a disaster, because the benefits touted by the industry are misleading.[211] He advised the public that bounty hunters commit crimes in pursuit of fugitives, misrepresent savings to the court by using their services, and are only concerned with making money.[212] Opponents of the ban of commercial bail business believe commercial bail would be a great revenue stream for the state.[213] But, John Haroldson, the District Attorney for Benson County,

206. *The Legal Precedents Outlawing Bounty Hunter and Bail Bondsman Jobs in Illinois*, BOUNTYHUNDTEREDU.ORG, http://www.bountyhunteredu.org/illinois (last visited Jan. 3, 2015).

207. *See id.* (recognizing that Illinois does not allow the operation of the commercial bail bond system within its borders and alternatively, the state requires bail bonds be acquired from a government agency).

208. *Id.*

209. *See id.* (explaining the process of obtaining bail from government agencies). To obtain bail, collateral or a percentage of the bail must be collected up front. *Id.* Once the defendant appears at their scheduled court date the "deposit" is returned. *Id.*

210. *See id.* (commenting the state of Oregon has controlled the bail bonds process through the courts since 1970, rather than allowing any form of commercial bail bonds system).

211. *See generally* Daniel Stanton, *Bondsmen pose danger to public*, PORTLAND-TRIBUNE (May 11, 2011, 5:00 PM), http://portlandtribune.com/component/content/article?id=6639 (detailing reasons why Sheriff Daniel Stanton, of the Multnomah County Sheriff's Department, opposes the bail bondsman trade and how the business poses a danger to the public).

212. *See id.* (explaining how practices of the bail bondsmen pose a risk to the public and why the business should not be allowed in Oregon).

213. *See The Legal Precedents Outlawing Bounty Hunter and Bail Bondsman Jobs in Oregon*, BOUNTYHUNDTEREDU.ORG, http://www.bountyhunteredu.org/oregon (last visited Jan. 3, 2015) (explaining the current system requires law enforcement to be paid to apprehend fugitives and if a defendant does not pay their bond, the jurisdiction loses money).

Oregon, made the statement, "states use commercial bail bondsmen . . . [to] exploit the citizens through 'these profit-driven enterprises.'"[214]

Banning commercial bail businesses is a start to corralling discrimination in the criminal court systems. But, the bail system in its entirety remains a revolving door of repeated violation of the U.S. Constitution. The framers of the U.S. Constitution intended to provide citizens with the right to not be deprived of life, liberty, or property, without due process of law.[215] The bail system deprives citizens of these very rights.

C. *Solutions Found Within the Texas Constitution*

Many states have modeled their bill of rights after the Bill of Rights found in the U.S. Constitution. Texas has not only modeled its Bill of Rights like the United States, but it has created a more expansive and definitive version than the U.S. Constitution.[216] Ironically, its expansive and definitive version protected the rights of only freemen, not slaves or Mexicans. But little did the framers of the Texas Constitution know, Texas's Bill of Rights had the solution to the bail system.

i. History of the Texas Constitution

To know and understand how and why the framers of the Texas Constitution wanted to create a constitution that was more expansive and definitive than the U.S. Constitution, which could in turn provide a solution to the bail system, the history of its creation is vital. The Bill of Rights of the Texas Constitution consists of portions of different historical influences, such as the Magna Carta, the U.S. Constitution, Spanish civil law, and various other states constitutions.[217] The first Texas Constitution was expeditiously composed in 1836, during the Texas Revolution for the newly formed Republic of Texas.[218] The framers intended to draft a con-

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214. *Id.* (quoting District Attorney John Haroldson's statement regarding his belief that there are states that take advantage of their citizens through the state's use of a profit-driven commercial bail bonds system).

215. U.S. CONST. amend. XIV, § 1.

216. *See* Arvel (Rod) Ponton III, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 120 (1988) (explaining how the Texas Bill of Rights grants inherent rights, in comparison to the U.S. Constitution, which prohibits states from placing restrictions those rights).

217. *See id.* at 94, 119–20 (listing the "sources of liberty" that were used to create the Texas Bill of Rights); *see also, e.g.*, N.C. CONST. (1776); VA. CONST. (1776); KY. CONST. (1792); TENN. CONST. (1796).

218. *See The Texas Constitution of 1876*, TEXAS STATE LIBRARY AND ARCHIVES COMMISSION, https://www.tsl.texas.gov/treasures/constitution/index.html (last visited Sept. 20, 2014, 11:53 PM) (providing a historical setting for the drafting of the Texas Constitution by the delegates of the 1836 Convention under the threat of an imminent Mexican attack during the Texas Revolution).

stitution that would guarantee the indubitable rights of all the citizens of the Republic of Texas, free from the abuses imposed upon them at the hands of the government of General Santa Anna.[219] There were not any formal articles drafted, but the framers made sure to establish the right to trial by jury, and the other rights bestowed upon them by English common law, which were never afforded them under Mexican rule.[220]

As the Texas Constitution evolved into its final draft in 1876, the framers secured stronger assurances of "individual rights than provided for in the Constitution of the United States, by guaranteeing these rights in mandatory, positive language."[221] Under Mexican rule, citizens were accused and deprived of their liberty absent any of their basic rights.[222] This violation of due process was the framers' primary reason for drafting the Texas Declaration of Independence.[223] Specifically, Texas adopted its due process of law article thirty-five years before the enactment of the Fourteenth Amendment to the U.S. Constitution.[224] Under Texas Bill of Rights, due course of law and other provisions may "never be suspended,"[225] but the infringed upon due process rights of defendants who have been detained paint a different picture.[226]

ii. Analyzing the Texas Constitution

The concept of due process dispenses substantive and procedural safeguards.[227] Substantive due process required by the U.S. Constitution is to weigh the importance of the government's interest promoted by a challenged regulation, such as bail, with the fundamental right of not depriv-

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219. *See* Ponton, *supra* note 216, at 97 (listing multiple politically based influences on Texans that shaped creation of a constitution that granted them greater protection than that of the U.S. Constitution or Bill of Rights).

220. *See id.* at 110 (emphasizing that the framers of the Texas Constitution held the right of trial by jury to be of great importance; a right that they included in the Bill of Rights).

221. *Id.* at 99.

222. *Id.* at 109 (providing historical insight into the experiences of the 1836 Texas Constitution writers under Mexican rule, which would influence their drafting of the Texas Declaration of Independence).

223. *See id.* (discussing the experiences of the writers of the Texas Constituion that influenced the drafting of the constitution itself).

224. *Id.* at 112.

225. *Id.* at 113.

226. *See generally* Karen A. Rooney, Note, *Detaining for Danger Under the Federal and Massachusetts Bail Statutes: Controversial but Constitutional*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 465, 484 (1996) (examining federal and state bail statutes, and how they infringe on the due process rights of defendants).

227. *Id.* at 483 (declaring "[t]he Supreme Court of the United States has constructed [the Due Process Clause] to provide two basic forms of protection against improper governmental action," both substantive and procedural protections).

ing one of its liberties.[228] The bail system has been known to deprive defendants of their liberties. The Texas Constitution grants a more pronounced protection than the Federal Government.[229] Thus, by using these protections, the bail system is exposed as to not being "narrowly tailored to further a legitimate and compelling governmental interest."[230] This lack of legitimate and compelling government interest was proven in *Autran v. State*, involving a warrantless search and seizure.[231]

a. The Texas Constitution's Protection of Substantive Due Process

In *Autran*, Jimmy Autran and his adult son were pulled over for failure to drive within a single lane.[232] With Autran's permission, Deputy Baily searched the inside and the trunk of the vehicle, where he found a large ice chest that Deputy Bail attempted to open, but Autran obstructed this attempt.[233] Next, Deputy Bailey arrested Autran and the car was impounded and an inventory of the vehicle was conducted.[234] They opened the chest and found a large amount of money covered in white powder that appeared to be cocaine, and the inventory further lead to the officers uncovering a plastic key box, located under the driver's seat, with cocaine inside.[235]

Naturally, Autran moved to suppress the tangible evidence claiming a violation of the Fourth Amendment and the Texas Constitution, but the district court denied the motion stating that the inventory did not violate the Fourth Amendment.[236] However, the Criminal Court of Appeals of Texas reversed the lower court's decision, concluding the Texas Constitu-

228. *See id.* at 497 (examining federal and state bail statutes, particularly in a substantive due process challenge, and how the Supreme Court must weigh the government's interest against a defendant's fundamental right).

229. Autran v. State, 887 S.W.2d 31, 36 (Tex. Crim. App.—1994) (explaining how the Texas Constitution can offer more protection via to the concept of federalism, which "allows states to provide for greater protection" of individual freedoms than that of the U.S. Constitution).

230. Aime v. Commonwealth, 611 N.E.2d 204, 209 (Mass. 1993) (detailing that under the U.S. Supreme Court's standard of review for a violation of substantive due process of a fundamental right, the Court "will uphold only those statues that are narrowly tailored to further a legitimate and compelling government interest").

231. *Autran*, 887 S.W.2d 31.

232. *Id.* at 33.

233. *Id.*

234. *See id.* (noting that Autran and his son were arrested only after Autran's attempts to close the truck, preventing the deputy from looking inside the ice chest).

235. *See id.* (describing the results of the search performed on Autran's vehicle).

236. *See id.* (explaining the district court denied Autran's motion that evidence found during the search was done so in violation of the Fourth Amendment, as well as the Texas Constitution). The Court of Appeals affirmed the denied motion, holding the "Sherriff's

tion provides a privacy interest in closed containers, which cannot be trumped by police inventories.[237] In federal courts, warrantless search and seizures have been permitted because the governmental interests, such as the police protecting the property from unauthorized use or to avoid any danger to the police or civilians that seized the seized items could cause, outweighed the "minimal interference" of a citizen's constitutional rights.[238] The Texas Constitution, however, protected *Autran* from the "minimal interference" allotted by the U.S. Constitution.

Unlike *Autran*, the bail system is more than a minimal interference of citizen's constitutional rights. It is a clear violation that crumples any legitimate and compelling government interest. The intention of the framers of the Texas Constitution was not to accommodate the government's interest, but to apportion to its citizens all of their natural rights.[239] The Bail Reform Act appeased the government's interests by reasoning that there are some defendants who should be granted pretrial release, but those that are flight risks or deemed to be dangers to society if left on the streets, should be subjected to high bail amounts or no bail at all.[240] These interests, under the Texas Constitution, are not enough to avail its citizens of their natural rights.[241] Moreover, a study concluded that any factors used to determine what defendants would be rearrested because of dangerousness to society or flight risk would "incorrectly mispredict" those defendants that would not get rearrested.[242] The Supreme Court declared in *Schall v. Martin,* decisions regarding bail cannot depend upon factors such as dangerousness to predict future criminal conduct.[243]

Department procedures were clearly defined and followed . . . [and] neither the Fourth Amendment nor the Texas Constitution were violated." *Id.* at 33.

237. *See id.* at 41-42 (holding the Texas Constitution "provides greater protection than the Fourth Amendment in the context of inventories," and the officer's interest of protecting themselves and the property owned by Autran could have been satisfied via written and photographic documentation).

238. *See generally* United States v. Lawson, 487 F.2d 468, 475 (8th Cir. 1973) (reviewing a challenge of warrantless search, the court of appeals set a standard that "absent a warrant or falling within a recognized exception to the warrant requirement, there must be a minimal interference with the individual's protected rights").

239. *See generally* Ponton, *supra* note 216 (providing historical insight into the experiences of the Texas Constitution writers and the influences on their drafting the Texas Constitution).

240. Jonathan Zweig, Note, *Extraordinary Conditions of Release Under the Bail Reform Act*, 47 HARV. J. ON LEGIS. 555, 558 (2010).

241. *See Autran*, 887 S.W.2d at 42 (holding that the Texas Constitution "provides greater protection than the Fourth Amendment in the context of inventories").

242. 4 CRIM. PROC. § 12.3 (f) (3d ed.).

243. *See* Schall v. Martin, 467 U.S. 253, 279 (1984) (explaining that the Court does recognize the ability to predict future criminal conduct through numerous factors involving "a host of variables").

Liberty is a natural right and that right should not be taken or given away. The Texas Constitution is the prime protector of its citizen's basic freedoms.[244] The framers of the Texas Constitution knew there would be circumstances that command divergence from the U.S. Constitution.[245] Because of that fact, there is no court outside of Texas that would be cognizant or amenable to the needs of its citizens, but a Texas court.[246]

b. The Texas Constitution's Protection of Procedural Due Process

Once an action by the government or a statue has overcome the scrutiny of substantive due process, procedural due process stipulates that the government action or statute is implemented in a fair manner.[247] Even if the bail system survived substantive due process, the implementation of the bail system fails under procedural due process if the rights protected under the Texas Constitution are considered. The bail system simply is not implemented in a fair manner when the presumption of innocence is nonexistent when determining the rights of a defendant confined in a county jail before a trial ever begins.[248]

Since a defendant's liberty is at stake, there should not be any doubt that the presumption of innocence should permeate at its strongest when bail is set.[249] The articles within the Texas Constitution cultivate this presumption through due process because when a defendant is confined for a crime that the defendant has only been charged with, the restraint of this defendant's liberty presumes guilt.[250] This confinement creates a greater chance that the defendant is convicted and lowers the burden of the gov-

244. *See Autran*, 887 S.W.2d at 37 (citing Traylor v. State, 596 So. 2d 957, 961–62 (Fla. 1992)) (affirming that state courts and state constitutions, unlike their federal counterpart, do not face prudential concerns and therefore, can focus on protecting the citizens of their state).

245. *See generally id.* at 38 (Tex. Crim. App.—1994) (arguing that differences between federal and state constitutions call for a departure of the U.S. Constitution model to better serve the general principles of the government).

246. *See* Commonwealth v. Snyder, 413 Mass. 521, 528 (holding that the standards set by the Supreme Court of the United States do not need to be followed even if the provisions are identical); *see also Autran*, 887 S.W.2d at 40 (quoting Eisenhauer v. State, 754 S.W.2d 159 (Tex. Crim. App.—1988)) (affirming that Texas Supreme Court, for example, will not try to reconcile their constitutional provisions with the U.S. Constitution because of their duty to protect and defend the constitution and laws of the State of Texas).

247. Rooney, *supra* note 226, at 502 (quoting Aime v. Commonwealth, 611 N.E.2d 204, 209 (Mass. 1993)).

248. *See id.* at 499–500 (discussing whether the presumption of innocence protects detainees before and during trial).

249. Lester, *supra* note 29, at 2.

250. *See id.* at 9 (arguing that guilt is easily presumed when the presumption of innocence is not guarded).

ernment to prove the defendant's guilt.[251] Thus, the mere fact that a defendant is charged with a crime is not enough to support the justification for deprivation of liberty.[252]

iii. The Texas Constitution's Article I

The U.S. Supreme Court concluded, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights."[253] If the highest court in the land expressed such passion about how the bail system violates many privileges and rights, then a sweeping wave of change would flood the courtrooms.[254] But that has not happened. States like Texas, however, provide extra protection from the abuse of rights and privileges our forefathers created for its citizens.[255] Inside sections 3a, 9, 10, and 13 of Article I of the Texas Constitution, a roadmap can be found. This roadmap contains verbiage that can be used to combat and potentially strike a fatal blow to not only to the commercial bail industry, but the entire bail system as a whole.[256]

a. Texas Constitution: Equal Protection, Search and Seizure

The premise of the bail system has always been used as an assurance that the defendant will be compelled to return to court for trial or would not be granted release until the trial began.[257] To any would-be defendant that can afford bail, this offer of conditional release is ideal.[258] However, what happens to those who cannot afford to post bond? They either are forced to sit in jail awaiting trial or for charges to get dropped or dismissed; or they are forced into the discriminatory hands of greedy commercial bail bondsmen who the courts have given the power to de-

251. *See id.* at 3 (proposing a defendant granted pretrial release is less likely to be convicted because of the higher burden placed on the government).

252. Rooney, *supra* note 226, at 500.

253. Lester, *supra* note 29, at 36 (quoting Price v. Johnston, 334 U.S. 266, 285 (1948), *overruled on other grounds by* McClesky v. Zant, 499 U.S. 467, 482–84 (1991)).

254. *See id.* at 36 (arguing the Court's indecisiveness allows them to avoid directly confronting the issue of pretrial detention).

255. *See* Ponton, *supra* note 216, at 97 (analyzing the influence and purpose for Texans demanding more protection).

256. TEX. CONST. art. I, § 9 ("The people shall be secure . . . from all unreasonable seizure or searches . . . ."); TEX. CONST. art. I, § 13 ("Excessive bail shall not be required . . . .").

257. *See Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1489 (1966) (arguing the bail system is meant to reconcile the detriments a defendant can face if imprisoned and the detriments the criminal justice system can face if the defendant is not imprisoned).

258. *See id.* (asserting the bail system fails when a defendant has the resources to post bail).

cide what amount of collateral can be set.[259] This "willful blindness" of the discriminatory nature of the bail system discussed in Part IV of this Article, has unequivocally and unsuccessfully failed to assure society of the protection of its rights and privileges.[260]

In Article I, Section 3a of the Texas Constitution, the very nature to which the bail system can be challenged is presented when it states that all men are equal and that equality cannot be denied or diminished based upon "sex, race, color, creed, or national origin."[261] Based upon this very simple statement, the bail system is unconstitutional. The scales of justice pertaining to bail are not equaled, but heavily favored towards those who are wealthy and white.[262] Thus, the bail system can be challenged based upon these principles.

The largest population for against whom the system has discriminated remains indigent people.[263] These people are usually African-American or Hispanic.[264] More than sixty percent of black males are held within the criminal justice system in prison, jail, parole, or probation and a recent study shows that one out of every three black males will end up in jail during their lifetime.[265] Additionally, white youth are five times less likely to be incarcerated than black youth, and white youth are two or three times less likely to be incarcerated than Latino or American Indian youth.[266]

However, it has proven difficult to determine conclusively if "race" predicts pretrial decisions directly[267]—but it can be shown indirectly. For example, a high bail amount may not be set because a man is black or Hispanic, but that person may have had difficulty finding a job because of his race, therefore, this justifies a judicial officer in setting a high bail,

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259. *See id.* at 1490 (affirming that the criminal justice system has delegated its power to bail bondsmen, who generally, exercise little control over the accused but who ultimately decide which defendant can be released and the amount of money required for the release).

260. *See generally id.* at 1489–91 (discussing common criticisms of the bail system).

261. TEX. CONST. art. I, § 3a.

262. *See generally* Scherker, *supra* note 186 (illustrating that African-Americans are five times, and Hispanics about three times, more likely to be incarcerated).

263. *See Bail and Its Discrimination Against the Poor*, *supra* note 7, at 167 (arguing that the biggest weakness of the bail bond system is it discriminates against poor defendants).

264. *See Poverty in the United States: A Snapshot,* NAT'L CENTER FOR L. AND ECON. JUST., http://www.nclej.org/poverty-in-the-us.php (reporting that people of African or Hispanic descent are more likely than white to be living in poverty).

265. Scherker, *supra* note 186.

266. *Id.*

267. *See* JUSTICE POLICY INSTITUTE, *supra* note 8, at 15 (explaining that there is a correlation between factors, such as race, age, gender, and socioeconomic status, and pretrial decisions).

citing it as a flight risk due to an unstable source of income.[268] Sadly, minority groups are less likely to be released on their own recognizance than white people.[269]

The bail system disguises itself behind using its methods to assure all defendants return to court, but, based on the hope that a financial loss would outweigh the defendant's ability to leaving by flight, it is really meant to assure the return of those defendants that are flight risks.[270] This begs the question: what happens to those defendants who are not flight risks? What happens to those defendants who cannot afford bail because they are indigent? How does the bail system come to their rescue to prevent the violation of their liberties?

Of course, proponents of the bail system will say commercial bail would come to the aid of indigent arrestees, yet commercial bail systems nurture the discrimination of the indigent arrestee population.[271] A court passing this burden to commercial bondsmen is similar to teachers passing a child who they no longer want to deal with to the next grade to allow a new teacher to shoulder the burden. Commercial bondsmen have been delegated the option to decide which defendants can be released from jail and for what price, absent any concern as to whether the defendants actually show up for court or not.[272] Thus, when there are no options available to indigent defendants, they are seized and placed in jail.[273]

Article I, Section Nine of the Texas Constitution mirrors the language of Fourth Amendment of the U.S. Constitution.[274] This section puts forth the premise that people should feel secure they will not be subject to any "unreasonable search or seizure, absent a warrant or probable cause."[275]

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268. *Id.*

269. *See id.* (comparing the pretrial outcomes for African Americans to other races).

270. *See Preventive Detention Before Trial*, *supra* note 257, at 1491 (describing that the method behind the bail bond system encourages defendants to weigh the possibility of financial loss and their incentives toward flight).

271. *Cf. id.* at 1503 (discussing how peace bonds discriminate financially and raise equal protection issues).

272. *See Preventive Detention Before Trial*, *supra* note 257, at 1490 (discussing the responsibilities and privileges of a commercial bondsman through the bail system).

273. *Compare* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."), *with* TEX. CONST. art. I, § 9 ("The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizure or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.").

274. *Compare* TEX. CONST. art. I, § 9 *with* U.S. CONST. amend. IV.

275. TEX. CONST. art. I, § 9.

The bail system often results in an "unreasonable seizure." Defendants are accused, charged, and bail is set. If bail cannot be made, the defendant is seized. It is unreasonable for a defendant to be seized, not because they committed a crime, but because they were unable to make bail.

Again, bail is set because the courts believe that a defendant can be released at their own recognizance. Bail is set because the courts believe that considering the offense they are charged with, these defendants will not pose a continual threat to society, and they will return to court as a condition of the release.[276] But these beliefs become worthless once a defendant cannot afford bail and is detained. What is the point of these factors used to determine if a defendant can be released, if actually being released is not an option? The point is that there is no point to bail in these situations, which makes detaining these Defendants unreasonable. Therefore, an accurate conclusion is drawn that the bail system violates the rights bestowed by the Texas Constitution.

b. The Texas Constitution: A Fair Trial

There are states that conduct bail hearings, much like Maryland before the seminal case *DeWolfe v. Richmond*,[277] as if they are not an integral part of criminal procedure. Bail in these places, is determined by some court appointed magistrate, who in many cases has no legal background. The right to counsel has no bearing on these hearings and a person without knowledge of criminal procedure is presented with facts and has the power to determine whether an accused has to pay for the right not to have their liberty taken from them. The Texas Constitution provides a defendant with effective counsel if he or she cannot afford one.[278] This right to effective counsel was placed in the Texas Constitution to ensure that the accused receives a fair trial.[279] Article I, Section Ten of the Texas Constitution clearly can be applied in terms of bail hearings, because a bail hearing can similarly result in the deprivation of one's liberty.[280]

Section Ten ensures a fair and impartial trial where a defendant can confront his or her accusers, and is free from using his or her own state-

276. *Contra Preventive Detention Before Trial*, *supra* note 257, at 1489 (asserting one of the biggest criticisms of the bail bond system is that it does not adequately protect society).

277. *See* DeWolfe v. Richmond, 76 A.3d 962, 965 (Md. 2012) (listing the duties of a judicial officer that includes determining whether there was probable cause for the arrest and if a defendant can be released on bail).

278. TEX. CONST. art. I, § 10. interp. commentary (West 2007).

279. Johnson v. Scott, 68 F.3d 106, 109 (5th Cir. 1995).

280. TEX. CONST. art. I, § 10.

ments to self-incriminate during trial.[281] To conduct an impartial trial there must be an impartial jury.[282] An impartial jury guarantees that the jury will not show partiality and favor the prosecution or the defense.[283] Where the bail system is concerned, there is no such thing as an impartial hearing or an impartial jury. When a defendant goes before the court to decide whether bail will be denied or set, a judge or court appointed magistrate decides, not a panel of six or twelve jurors. There is no sense of impartiality in these bail hearings because the judge is presented with facts provided to him by the prosecution, and these facts are taken as truth. The judge does not have to listen to all the facts to make an assessment. The evidence presented to the judge could be statements including hearsay, police reports, or the defendant's past criminal history. The defendant is not allotted the opportunity to testify on his own behalf, call witnesses, or cross-examine the witnesses that were presented to the judge by the prosecution.[284]

This is a direct violation of Section 10 of the Texas Constitution.[285] In *Sohail v. State*, the court reasoned that a defendant has a constitutional right to confront and cross-examine any witnesses against him.[286] Even though the confrontational clause is not absolute, it prohibits a witness from recalling any statements made by the defendant outside of court that are testimonial, without the defendant having a prior opportunity to cross-examine the said witness.[287] This further demonstrates the unconstitutionality of the bail system because this unfair trial denies a defendant who is presumed innocent, but risks detention, a "meaningful opportunity to be heard."[288]

c. The Texas Constitution: Excessive Bail

A solution to the manner in which excessive bail is set and the prevention of excessive bail is written in Article I, Section Thirteen of the Texas

281. *Id.*

282. *Id.* ("In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury.").

283. *See* Uranga v. State, 247 S.W.3d 375, 377 (Tex. App.—Texarkana 2008) (defining an impartial jury as "not favoring one party more than another, must be unprejudiced and disinterested, and should be equitable and just").

284. Rooney, *supra* note 226, at 484, 488.

285. *See generally* TEX. CONST. art. I, § 10 (West 2007) (providing rights of accused in criminal proceedings and interpretive commentary).

286. Sohail v. State, 264 S.W.3d 251, 258 (Tex. App.—Houston 2008).

287. *Id.*

288. *See generally* Rooney, *supra* note 226, at 484, 509 (stating a hearing is required subsequent to a detention order so as to allow the defendant a meaningful opportunity to be heard).

Constitution.[289] There it states that excessive bail cannot be set or imposed, or cruel or unusual punishment inflicted.[290] One of the factors that a judge or a court appointed magistrate is supposed to take into account when determining the amount of bail is the ability of the defendant to give bail.[291] In *Clemons v. State*, the court reasoned that courts are granted the power to set bail, but bail cannot be used as a method of oppression.[292] When this method of oppression has occurred, it constitutes a denial of bail. This denial of bail causes a defendant, who is presumed innocent, to be detained, which results in cruel punishment administered. The denial of bail is a clear violation of the Texas Constitution.[293]

Proponents argue that the amount of bail set is not oppressive because it is based upon the type of criminal offense charged. For example, a bail amount set for $400,000 in an aggravated sexual assault of a child would not be considered unconstitutional, even if the defendant could afford it or not, because of the nature of the charge and the likely propensity of danger that could await society if this defendant was released.[294] But, proponents would not be able to explain what society should do if this defendant can make bail. How important would those factors be in this scenario?

This defendant who poses a continual threat to society will be released because he can afford to be released. He could still be a flight risk, or due to the seriousness of the crime could elect to jump bail. This speaks to how the bail system breeds hostility to those who are indigent and favors those who have means, because in an effort to regain their liberty, indigent defendants will subject themselves to making a deal with the devil; commercial bail bondsmen.[295] The bail system is a failure and it is unconstitutional. The evidence of this failure and unconstitutionality has been proven with just a few of the sections found in Article I of the Texas Constitution. The very thing the bail system was meant to do, has become a vehicle for prejudice and injustice, a fate that goes against the spirit to which the Texas Constitution was drafted upon.

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289. *See* TEX. CONST. art. I, § 13 (West 2007) (prohibiting the infliction of excessive bail, cruel and unusual punishment, and providing remedies by due course of law).

290. TEX. CONST. art. I, § 13 (West 2007).

291. Foote, *supra* note 14, at 992.

292. Clemons v. State, 2fg20 S.W.3d 176, 178 (Tex. App.—Eastland 2007).

293. *See* Foote, *supra* note 14, at 993 (asserting excessive bail is functionally equivalent to a denial of bail).

294. *Clemons*, 220 S.W.3d at 179.

295. Foote, *supra* note 14, at 992, 996–97.

d. Implementing the Solutions

With the knowledge put forth in this article, the bail system should be confronted at every turn. This confrontation can be achieved by filing civil suits against county governments seeking declaratory judgments.[296] Under different circumstances, a county's government would have immunity from civil suits. However, according to the Uniform Declaratory Judgment Act, governmental immunity is waived for claims challenging the validity of an ordinance or statute.[297] As mentioned earlier, the many reasons to have bail in place has failed, such as to keep criminals who are a danger to society off the street. This fails because if those criminals can afford bail, they are released onto the streets to commit other crimes if they so choose. This leaves those who are detained, not because of guilt but merely because of being charged with a crime, deprived of their liberty in violation of their constitutional rights. It is clear that the bail system is ineffective. Therefore, a declaratory judgment could stand in a court of law.

VI. TECHNOLOGY

The advances in technology can also greatly contribute to relieving the bail bonds injustice through pretrial services to monitor citizens while waiting disposition of their case. The current studies evaluating the effectiveness of electronic monitoring utilizes the technology despite generating inconsistent results. The variation in findings is due to insufficient data to validate the outcome.[298] The range in technological monitoring options should be evaluated similar to pretrial detention assessment for restrictive or inclusiveness taking into account the detainees risk of flight and public safety.[299]

Current tracking tools range from accepted devices such as global position systems (GPS)[300] to the controversial human microchip.[301] The idea of a microchip placed in a human being to monitor activity is slowly be-

296. TEX. CIV. PRAC. & REM. CODE ANN. § 37 (West 2012) (prescribing the effects and procedure for obtaining a declaratory judgment remedy).

297. Mustang Special Util. Dist. v. Providence Vill., 392 S.W.3d 311, 316 (Tex. App.—Fort Worth 2012).

298. *See* Samuel Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1368–69 (2014) (describing the results of studies concerning the effects of pretrial monitoring technology).

299. *See generally* National Association Of Pretrial Services Agencies, Standards on Pretrial Release, at 9–12 (3d ed. 2004) (explaining the practices and policies of pretrial supervision and detention).

300. *See* Doug Adomatis, *Using GPS for Tracking People*, TRAVEL BY GPS, http://www.travelbygps.com/articles/tracking.php (last visited Aug. 12, 2014) (noting the general acceptance of GPS as a human tracking method).

coming an acceptable method as a result of the successful use in other areas of everyday life.[302] The biblical predictions attributed to the development of human microchip implants have instigated legitimate discussions on the legal implications of using it to track people.[303] The suggestion of human microchip as a monitoring tool would have to overcome Fourth Amendment and Fifth Amendment challenges in order to be used for tracking people.[304] The debate on using human microchips is an issue criminal defense lawyers acknowledge is ripe for litigation.[305]

The guidelines established by the U.S. Department of Justice advise the tracking options should coincide with the risk level of the offender.[306] It

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301. *See* Jim Galloway, *Delusions, the Legislature and an implanted microchip*, THE ATL. J. CONST., https://web.archive.org/web/20140817000217/http://blogs.ajc.com/political-insider-jim-galloway/2010/04/19/delusions-the-legislature-and-an-implanted-microchip (accessed by searching for http://blogs.ajc.com/political-insider-jim-galloway/2010/04/19/delusions-the-legislature-and-an-implanted-microchip in the Internet Archive index) (criticizing the introduction of a bill regarding involuntary microchip implants).

302. *See, e.g.,* Charles Smith, *Human Microchip Implantation*, 3 J. OF TECH. MGMT. AND INNOVATION 151, 153 (2008), *available at* http://www.jotmi.org/index.php/GT/article/view/tre2/456 (noting the manner in which implanted RFID microchips have been used by hospitals); Gena Mason, Note, *The Microchipping of America; Human Rights Implications of Human Bar Codes*, BEPRESS 15 (July 2009), http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=gena_mason (discussing the new "genome chip" implant designed to monitor the implanted human's entire genome); Arslan Afzaal, *Micro-chip Implant: Would you get one?*, RESPONSIBLE INNOVATION (May 24, 2013), http://responsible-innovation.org.uk/torrii/sites/default/files/MicroChip%20Implant%20Would%20you%20get%20one_1.pdf (stating that the RFID chip is the most common form of implant, then comparing microchip implants to tattoos and other identifying body modifications used in ancient cultures); Paul Eng, *Implant Chip, Track People*, ABC NEWS (Feb. 25, 2006), http://abcnews.go.com/Technology/story?id=98077 (describing the common ways in which having an implanted microchip would be desirable); Jane McGrath, *How Pet Microchipping Works*, HOW STUFF WORKS, http://science.howstuffworks.com/innovation/everyday-innovations/pet-microchip.htm (noting the growing prevalence of pet microchip implants).

303. *See generally* Mac Slavo, *The Mark: Scientist Claims Human Microchip Implants Will Become "Not Optional,"* SHTFPLAN.COM (Apr. 24, 2014), http://www.shtfplan.com/headline-news/the-mark-scientist-claims-human-microchip-implants-will-become-not-optional_04242014 (alluding to *Revelations* 13:16–17).

304. Elaine M. Ramesh, *Time Enough? The Consequences of Human Microchip Implantation*, 8 RISK 373, 391–98 (1997).

305. *See How Fair Is Installing Microchips To Criminals? Does This Violate Human Rights?*, CRIMINAL LAWYER GROUP, http://www.criminallawyergroup.com/criminal-attorney/how-fair-is-installing-tracking-microchips-to-criminals-does-this-violate-human-rights.php (last visited Aug. 12, 2014) (identifying the civil liberties concerns of the criminal defense attorneys with regard to human microchip implants).

306. *See* John H. Laub, et al., *Selection and Application Guide for Criminal Justice Professionals*, NATIONAL INSTITUTE OF JUSTICE, 24–31 (Working Paper, Dec. 2013), https://www.justnet.org/corrections/pdf/Draft-Offender-Tracking-Selection-and-Application-Guide-for-Public-Comment.pdf (detailing the training, legal, and operational considerations).

is estimated that more than 203 million Americans have telephones[307] that are embedded with software capable of tracking an individual in real time.[308] Social media devices used to connect friends for entertainment purposes can be adapted for pretrial use to supervise citizens. Skype,[309] Tango,[310] and Google Glass[311] are just a few of the social media devices capable of video conferencing in real time. This continually changing market will develop more options compatible with pretrial assessment programs to monitor pretrial detainees.

The goal of pretrial assessment is to provide a method for citizens awaiting disposition to continue their lives, as well as ensure their return to court, and protect the public without regard to their financial status. If technology isn't sufficient for certain offenses, then posting bond with the court should be done so that any money goes to the victims and not to support the bail industry.

VII. CONCLUSION

From its inception, bail has been a method of payment for one's freedom. The Constitution affords a right to life, liberty, and the pursuit of happiness. The bail system deprives citizens of their life in that it discriminatorily interrupts their daily interactions with the world. The bail system deprives citizens of their liberty by holding citizens hostage until they pay a court ordered ransom for freedom. Lastly, the bail system disturbs citizens' pursuit of happiness by forcing citizens to undergo an auction to the most affordable slave master, the commercial bail bondsman, to receive their freedom paper. Despite laws on the books prohibiting slavery and human trafficking, we must continue to work towards the elimination of this form of modern-day slavery.

Although some states have introduced programs such as pretrial release or even banned commercial bondsmen and bounty hunting from their states, the bail system in its entirety should be held unconstitutional. Recent technological developments can solve many issues, but the larger system of bail, first, must be eliminated. Our country cannot continue to

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307. Miranda Gibson, *AccuConference / Cell Phone Statistics: Updated 2013*, ACCUCONFERENCE (Jan. 23, 2014), http://www.accuconference.com/blog/Cell-Phone-Statistics.aspx.

308. Slavo, *supra* note 303.

309. Stefan Neagu, *How Does Skype Work? [Technology Explained]*, MAKE USE OF (July 30, 2009), http://www.makeuseof.com/tag/technology-explained-how-does-skype-work.

310. *ATAP Project Tango*, GOOGLE, https://www.google.com/atap/projecttango/#project (last visited Aug. 12, 2014).

311. *What It Does-Google Glass*, GOOGLE, https://www.google.com/glass/start/what-it-does.

allow this injustice to plague our judicial system; otherwise, instead of saving for our children's college funds, we will be compelled to have "Get out of jail for a percentage" funds. Is that what motivated our founding fathers?