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Profit Over People

The Commercial Bail Industry Fueling America's Cash Bail Systems

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Introduction and summary

On any given day in 2022, 658,000 people are incarcerated in jails across the country, more than 80 percent of whom are awaiting trial to determine if they will be convicted of a crime.¹ Although courts have determined that most people can safely await their trial while remaining in their communities, the inability to afford the cost of cash bail prevents thousands of people from accessing pretrial release.

The pretrial process that is supposed to protect community safety and ensure access to justice has been corrupted by the corporate influence of the commercial bail industry. A small group of large insurance corporations oversees a web of private companies that make an estimated profit of \$2.4 billion each year.² For-profit bail companies get rich by foisting nonrefundable costs onto the very people who can least afford the cost of bail, most often people experiencing poverty and people of color. These costs are owed even if the charges are dropped or the person is found not guilty at trial.

The commercial bail industry actively defends cash bail systems that produce racially³ and economically unjust outcomes,⁴ high rates of pretrial incarceration,⁵ significant costs to taxpayers,⁶ and negative public safety consequences.⁷ The commercial bail industry traps people who cannot afford cash bail premiums in a predatory cycle of debt and incarceration, in the same way that payday loan companies and other predatory lenders make a profit by taking advantage of people who need help affording the necessities of daily life.⁸ Moreover, commercial bail companies operate with little oversight or accountability, frequently engaging in abusive and unethical practices that jeopardize public trust and undermine the legal system's ability to administer justice.

This report is presented in five sections. The first section provides context for the two-tiered systems—one for the rich, one for the poor—in which the commercial bail industry operates. The second section outlines the stakeholders in the commercial bail industry and describes their roles in the commercial bail process.

The third section explores harmful practices many industry stakeholders engage in, to the detriment of their individual clients and the broader community. The fourth section highlights how legislation has expanded the use of commercial bail bonds while current regulatory frameworks fail to provide necessary accountability and oversight. Finally, the fifth section makes recommendations for various state-level reforms. It is crucial that policymakers implement solutions to rein in the commercial bail industry and protect clients from industry abuses.

Two-tiered cash bail systems reinforced by the commercial bail industry

The practice of assigning cash bail as a condition of an individual's pretrial release has led to two-tiered systems of justice. People with money can return to their communities while they await trial, while those without money are forced to choose between remaining incarcerated—and facing the harms that accompany pretrial detention—and entering into a predatory contract with a commercial bail company to obtain release.

For people without the resources to pay a full bail amount, the only way to avoid pretrial incarceration in the vast majority of states without a state-run cash bail system is to hire a commercial bail bond company to pay on their behalf. These companies promote themselves as providing a public service, but in reality, they capitalize on unjust cash bail systems to extract their profit from underresourced individuals and families.

In exchange for a fee, called a premium, commercial bail agents enter into an agreement with the court that they will pay an individual's full bail amount if the individual fails to appear in court.⁹ This transaction places the responsibility of ensuring individuals return to court on the commercial bail agent. The premium amount is typically from 10 percent to 15 percent of the total bail assignment.¹⁰ Unlike cash bail deposits made by those who can afford to pay them upfront, premiums collected by agents are nonrefundable. Premiums are not returned to the individual even in cases of false or illegal arrest, when charges are dropped, or when an individual is found not guilty.¹¹ From 2011 to 2015 in Maryland, \$75 million in nonrefundable premiums was paid by people whose cases did not result in a conviction.¹²

Today, the setting of cash bail is an arbitrary practice. Those who enforce a jurisdiction's bail policies (bail setters) often rely on bail schedules—arbitrary lists of cash bail amount recommendations for different charges¹³—rather than conducting a meaningful assessment to determine the conditions that would

best support a released individual, ensure their appearance in court, and protect public safety.¹⁴ Bail setters regularly assign unaffordable bail amounts without considering an individual's ability to pay,¹⁵ even though most Americans lack the resources to cover many emergency expenses. This is due in large part to the reliance on commercial bail companies to cover the costs that individuals cannot afford to pay.

In 2017, 57 percent of Americans could not afford a \$500 emergency expense without incurring debt.¹⁶ Because of the systemic inequities in criminalization and enforcement practices that target people from underinvested communities, people involved with the criminal legal system tend to have fewer financial resources than the U.S. population as a whole. In fact, in 2019, 80 percent of people involved with the criminal legal system were assessed as being legally “indigent,”¹⁷ meaning they were “unable to afford the necessities of life.”¹⁸ Still, the median bail amount for felonies in 2009 was \$10,000,¹⁹ meaning a person arrested on a felony charge would have to pay \$1,000 to secure their release. The commercial bail industry capitalizes on these economic vulnerabilities by offering to pay the cost of an individual's release and extracting payment regardless of the outcome of the case.

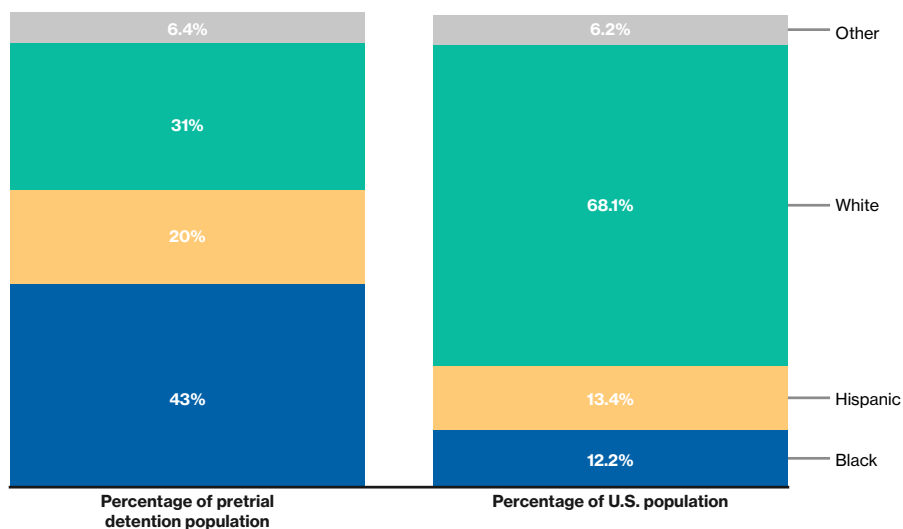
Injustices within current cash bail systems

In recent decades, the commercial bail industry has fought to protect its profit potential by maintaining cash bail practices that reinforce racial and economic injustice and jeopardize public safety. The flawed decision-making related to cash bail assignments produces stark racial disparities in the population of people incarcerated pretrial. People of color, particularly Black people, receive cash bail assignments at higher rates and higher amounts than similarly situated white people.²⁰ When comparing similarly situated Black and white individuals, Black defendants are 3.6 percent more likely to be assigned bail, and they receive bail amounts that are \$7,280 greater, on average.²¹ Black defendants are also less likely to be released with no conditions or to be given nonmonetary conditions.²² Together, these disparities result in significant racial differences in the pretrial detention population.

FIGURE 1

Strong racial disparities exist among pretrial detention populations in the United States

Share of pretrial detention and U.S. populations by race in 2002



The total percentage of the U.S. population does not equal 100 percent due to rounding discrepancies in the data cited.

Source: Wendy Sawyer, "How race impacts who is detained pretrial," Prison Policy Initiative, October 9, 2019, available at https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

Racially disparate bail assignment practices also make people of color more likely to need a commercial bail bond to afford release.²³ From 2011 to 2015, Black people in Maryland paid nearly 2 1/2 times more in premium payments than all other races combined.²⁴ In practice, cash bail systems extract wealth from the same Black communities that have faced generations of intentional disinvestment.

Furthermore, recent reforms have demonstrated that cash bail is unnecessary – and often unhelpful – to protect community safety and ensure appearance in court. For example, many jurisdictions have implemented bail reform without any significant increase in recidivism rates.²⁵ After New Jersey implemented bail reform in 2017, the state saw decreases in the rate of all categories of crime. Violent crime rates decreased 18 percent immediately following reform.²⁶ In 2018, Philadelphia ended the practice of prosecutors requesting cash bail for many misdemeanors and nonviolent felonies without seeing any increase in recidivism.²⁷ In Harris County, Texas, where misdemeanor bail reform was initiated under a consent decree in 2019, rearrest rates have remained stable.²⁸ Despite widespread disinformation surrounding bail reform in New York City, a recent report by the city’s comptroller revealed that pretrial rearrest rates were nearly identical before and after bail reform was implemented.²⁹

Current bail setting and commercial bail practices ignore the fact that most people who are arrested are safe to be in the community. The vast majority of people arrested in the United States are arrested on nonviolent charges. In 2016, less than 5 percent of arrests were for charges of violent crime.³⁰ In 2020, the rates of property crime were approximately 2,100 per 100,000 people, while violent crime rates were 379 per 100,000 people.³¹ Cash bail systems’ reliance on arbitrary bail schedules incarcerates people based on their access to money, draining taxpayer resources even when there is little risk to public safety. Systems that rely on cash bail produce high rates of unnecessary pretrial incarceration,³² which is known to increase recidivism.³³ One study found that assigning cash bail was associated with a 6 percent to 9 percent increase in the rate of recidivism.³⁴

The for-profit industry behind failing cash bail systems

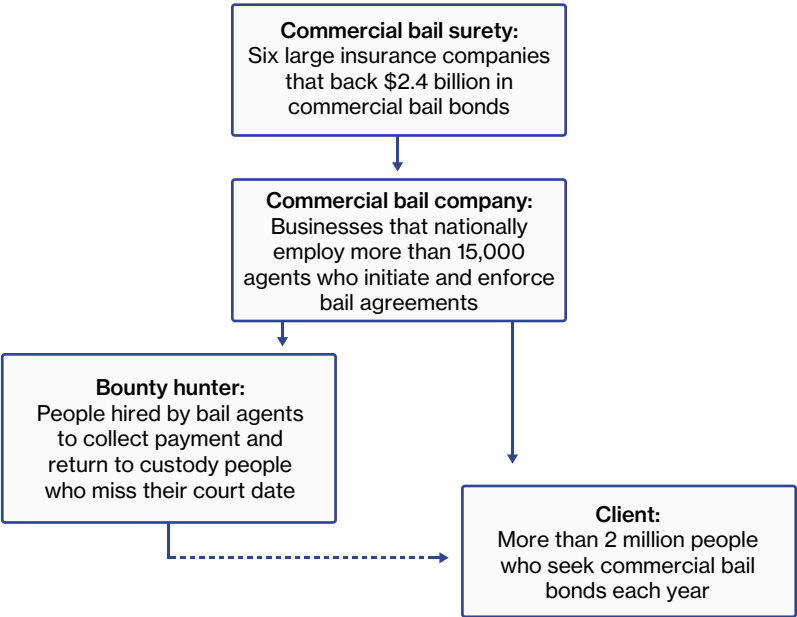
Unlike almost every other country in the world, the United States allows corporate interests to profit off people who have been arrested and are at risk of pretrial incarceration. The United States and the Philippines are the only two countries in the world that allow for the operation of a commercial bail industry and use of commercial bail bonds,³⁵ though some U.S. states have banned the use of commercial bail bonds or restricted or eliminated the use of cash bail.

The commercial bail industry is made up of a number of entities. Clients work directly with commercial bail agents, who are responsible for initiating the contractual relationship between the client and the bail company and enforcing bail contracts. Today, there are an estimated 15,000 bail bond agents in the United States³⁶ who are responsible for bailing out more than 2 million people each year.³⁷ At times, commercial bail agents will hire bounty hunters to find people who missed their court dates and return them to custody or to harass clients in efforts to collect overdue payments.

Backing most commercial bail bonds is a small network of insurers. In 2021, there were just six sureties or large insurance corporations (Fairfax Financial Holdings Limited; Bankers Financial Corp.; Allegheny Casualty, International Fidelity and Associated Bond (AIA); Financial Casualty & Surety Inc.; Lexington National Insurance Corp.; and American Surety Co.)³⁸ that underwrote 76 percent of bail bonds written that year.³⁹ In 2019, an estimated \$15 billion in bail bonds was written.⁴⁰ The exact profit of the commercial bail industry is difficult to calculate,⁴¹ but the industry has been estimated to collect as much as \$2.4 billion in profit each year.⁴²

FIGURE 2

The commercial bail process



Sources: Color of Change and American Civil Liberties Union's Campaign for Smart Justice, "Selling Off Our Freedom: How Insurance Corporations Have Taken Over Our Bail System" (Oakland, CA: 2017), available at <https://www.aclu.org/report/selling-our-freedom-how-insurance-corporations-have-taken-over-our-bail-system>; American Civil Liberties Union Smart Justice and Color of Change, "Commitments to Anti-Racism Ring Hollow: Fairfax Financial is the Last Big Insurance Holdout in the Dying Bail Industry" (Oakland, CA: 2021), available at https://www.aclu.org/sites/default/files/field_document/012121-fairfaxbail.pdf; Rebecca B. Fisher, "The History of American Bounty Hunting as a Study in Stunted Legal Growth," N.Y.U. Review of Law and Social Change 33 (2) (2009): 199–232; Joshua Page, Victoria Piehowski, and Joe Soss, "A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation," The Russell Sage Foundation Journal of the Social Sciences 5 (1) (2019): 150–172, available at <https://www.rsjournal.org/content/5/1/150>.

The commercial bail industry by the numbers

6	15,000	\$15.1 b	\$2.4 b
insurance corporations	commercial bail agents	written in commercial bail bonds annually	billion in annual industry profits

The only insurance without risk

The commercial bail industry could not exist without the backing of insurance companies that serve as a surety. Sureties are a form of insurance in which a third party agrees to take on the debt of another if the debtor defaults or is unable to pay.⁴³ Most commercial bail bonds are backed by a surety, meaning that a large insurer agrees to pay the forfeiture—the total bail amount owed if a client fails to appear in court—if the bail company is not able to.⁴⁴ With the financial backing of these large insurers, bail bond companies are able to write bail bonds for amounts far greater than the money the company has on hand. Though managing risk of loss is an inherent feature in all other insurance transactions, bail surety companies enjoy millions of dollars in profit from bail bonds while bearing virtually no risk of having to pay if an individual fails to appear in court.⁴⁵ This is because insurers pass off the risk of paying the forfeiture to the client and then to the bail company.

The forfeiture process is initiated by the court after an individual fails to appear. The court must send notice of the forfeiture to statutorily defined parties.⁴⁶ Grace periods are provided in 35 states to allow the person accused of a crime time to respond before the forfeiture is finalized.⁴⁷ Once the forfeiture is finalized, several things must occur before a bail surety can be held liable:

- **The commercial bail company must fail to return the individual to custody.** Bail companies are given a grace period to locate an individual who has missed their court date or provide an explanation as to why the client failed to appear. If the individual is returned to custody, the company owes no forfeiture payment.
- **The commercial bail company has failed to collect the money from the signer(s) or co-signers.** In signing the bail contract, clients and co-signers assume the responsibility of paying if the individual fails to appear in court. Commercial bail agents may also require clients and co-signers to put up assets, such as a car or home, as collateral to prove the signers' ability to fulfil their payment requirements.⁴⁸ Only after forfeiture collection and collateral repossession attempts have failed would the bail company have to pay.
- **The commercial bail company has exhausted its “build-up fund.”** Most sureties require that bail companies pay an additional 10 percent of each premium into a “build-up fund,” a reserve held by the surety that ensures the bail company has the funds to pay forfeitures if they occur.⁴⁹

Only after every option above is exhausted will a surety company have to pay a forfeiture. As a result of passing off the liability for paying forfeitures to clients, their loved ones, and bail companies, AIA Surety Bail Bonds, an insurer underwriting around \$700 million in bail bonds each year, has never had to pay a loss in more than 100 years of operation.⁵⁰ In 2012, cumulative losses of commercial bail insurers were less than 1 percent of all bail bonds written that year.⁵¹ Other insurance industries, such as the automobile and property insurance industries, typically report 40 percent and 60 percent annual losses, respectively.⁵²

Losses also remain low for the industry because the industry routinely fails to pay forfeitures owed to the court. Cities and counties across the country have claimed that the industry owes them millions of dollars. For example, bail agents reportedly owe more than \$2 million in forfeitures to New York City,⁵³ \$35 million to Dallas County, Texas,⁵⁴ \$1 million in East Baton Rouge Parish, Louisiana,⁵⁵ and \$26 million in Harris County, Texas.⁵⁶ When Harris County, Texas, tried to recover \$850,000 of owed forfeitures, one bail bond company went to court to avoid having to pay, claiming that the county was at fault for neglecting the debt for so long while another company filed for bankruptcy.⁵⁷ In the same system where an individual can be returned to custody for failing to make a bail premium payment, commercial bail industry actors withhold millions of dollars from the government without accountability.

Profit and abuse: Commercial bail Industry gets rich at the expense of safety and justice

“The bondsman’s focus, from a purely business model, is on how much money will be made to profit the company versus broader concerns like public safety.”

The International Association of Chiefs of Police⁵⁸

Commercial bail industry decision-making processes prioritize profit over public safety

Because bail agents collect their premium based on a percentage of the total bail amount, agents have more to gain from bailing out people accused of more serious crimes that carry higher bail amounts.⁵⁹ Furthermore, individuals who are assessed as being “low-risk” and therefore given a low bail assignment often remain incarcerated pretrial because they cannot afford bail and are not attractive clients to bail agents. As one bail agent explained: “If someone doesn’t come to court, by the time we go to their house, track them down and get them back in court, it’s not worth the \$75 we get from a \$500 bond. Let’s face it. It’s just not good economics.”⁶⁰ A report from The Minneapolis Foundation saw a similar trend in Minnesota, finding that bail agents often avoided accepting clients whose bail amounts were less than \$250, as these bonds were viewed as “risky and unprofitable.”⁶¹

Additionally, bail agents bear no responsibility if a client commits another crime—and in fact they reap a financial benefit if their clients are rearrested. Each time an individual violates a court condition or commits a new crime, the individual will either be returned to jail, in which case the bail agent retains the 10 percent premium and is relieved of their responsibility of ensuring the individual returns to court,⁶² or the individual’s bail amount is likely to increase.⁶³ As a result of the increased bail amount, the bail company can collect a higher premium. In this way, commercial bail companies can profit from increased harm to the community.

According to a Pretrial Justice Institute report, “The more that defendants are rearrested while on bond, the more potential business for the bonding companies. Rearrests simply become opportunities for repeat customers.”⁶⁴

Many bail bond companies employ unethical and abusive practices, targeting people when they’re most vulnerable

In order to secure release through a commercial bail bond, a person who is arrested, and often co-signers, must enter into a contractual relationship with a commercial bail company. If the accused individual does not agree to the terms presented to them, they are forced to remain in jail.⁶⁵ Like payday lenders, bail agents target people with limited financial resources, take advantage of their limited knowledge of their rights, and trap them in predatory contracts that create often inescapable cycles of debt.⁶⁶ In 2014, people who were incarcerated had incomes (prior to their detention) that were 41 percent less than those of nonincarcerated people of the same age.⁶⁷ Moreover, because of gender disparities that place most of the burden of caregiving on women, bail agents often target women in clients’ lives to be co-signers.⁶⁸ As the predominant co-signers of bail contracts, low-income women of color are disproportionately harmed by predatory commercial bail agreements.⁶⁹

Because the commercial bail industry is regulated at the state and local levels, the legality of contract provisions depends on where the commercial bail agent is located. However, studies examining commercial bail contracts and personal stories have revealed the commercial bail industry’s pervasive use of harmful contract terms. For example, a comprehensive study of bail bond contracts across California revealed that many contracts failed to provide required disclosures such as payment terms or fee assessments.⁷⁰ Many contracts also included provisions that the National Consumer Law Center suggests are likely illegal or unenforceable under California state law, such as preemptive waivers of bankruptcy, consent to enter the property of the accused or co-signer without a warrant, or illegal attorney’s fees.⁷¹ Commercial bail agents routinely rely on unethical contract provisions that, as one source notes, “violate common notions of fairness and justice.”⁷² The problematic nature of commercial bail contract provisions was recently acknowledged by a Montana court when it found two provisions common in bail contracts across the United States to be “void and unenforceable.”⁷³

Particularly harmful practices include:

- **Engaging in unethical solicitation:** States typically have laws regulating the place and means of soliciting bail clients. However, agents often disregard these regulations. Many bail agents engage in solicitation of clients without a license and solicit clients in areas forbidden by law such as courts, jails, and police stations.⁷⁴ In Baltimore, Maryland, for example, Discount Bail Bonds attempted to collect \$900,000 in 149 cases despite operating without a license.⁷⁵
- **Providing written contract terms that differ from original offers:** Commercial bail companies often employ “bait and switch” tactics—that is, they provide rates and terms over the phone or in advertisements that differ from those written in the contracts people ultimately sign.⁷⁶ For example, a bail company may advertise 5 percent premiums to lure people into the office without disclosing that another 5 percent will be automatically financed, resulting in a higher out-of-pocket cost.⁷⁷ Most bail bond companies do not publish their bail bond agreements, which prevents clients and co-signers from reviewing the terms and conditions prior to signing. In examining 400 commercial bail company websites in California, one study found that less than 15 percent of contracts were published online.⁷⁸
- **Taking advantage of their clients’ limited knowledge of their rights:** Knowing most people fully understand neither how commercial bail bonding works nor their rights when interacting with agents, bail agents often mislead people about provisions of their contracts and their legal options.⁷⁹
- **Using unethical strategies to override the reluctance of the co-signer:** Bail agents often override loved ones’ reluctance to enter into bail agreements by spreading fear about jail conditions.⁸⁰ Loved ones may be reluctant to take on the responsibility of ensuring a person returns to court or to take on the personal and financial burdens of co-signing. The overall message that bail agents convey in their conversations with reluctant co-signers is, “if you really care—if you really want to take care of defendants in this awful situation—you will pay the premium and co-sign the bond.”⁸¹ One agent was known to warn mothers that “their daughters were locked up with prostitutes, murderers, and thieves.”⁸²

Once the contract is finalized, bail agents often continue to rely on coercive practices, including:

- **Subjecting co-signing loved ones to unfair treatment:** Bail bond agents often require contracts to be co-signed by loved ones of the accused, “thus extending the economic costs across entire communities.”⁸³ Lacking a co-signer is one of the most frequent reasons people are denied bail bonds.⁸⁴ Family members and friends are forced to sign away their rights and incur debt to buy their loved one’s freedom.⁸⁵ Co-signers are frequently surprised to find that rather than just being responsible for the payment made at the time of release, they are also responsible for the full bail amount should the released person fail to appear.⁸⁶
- **Extorting sex in lieu of payment:** There have been many documented instances in which commercial bail agents have allegedly extorted sex from clients through threats that the agent would revoke their bail and return them to custody.⁸⁷ There have also been cases where commercial bail agents allegedly offered to accept sex in lieu of money when clients were unable to make their payments.⁸⁸ In fact, it was not until 2013 that Virginia explicitly made it illegal for bail bond agents to have sex with their clients.⁸⁹ At the time, it was believed to be the only state law of its kind.⁹⁰
- **Engaging in harassing behavior:** Bail agents often employ tactics that are prohibited for other debt collectors, including using physical restraint, orchestrated arrest, intimidation, repossession of collateral, and entering onto private property without a warrant and often with weapons.⁹¹ Bail agents often harass their clients, co-signers, and people close to them with endless phone calls⁹² and unannounced visits. For example, one co-signer began receiving calls threatening that she would be fired from her job if she failed to complete payment.⁹³ Shortly after, the bail agent began calling her job every day.⁹⁴

Commercial bail industry relies on a culture of violence to protect its bottom line

Most people show up for their court dates; when they do not, it is typically due to a systemic barrier or a lack of resources. Some people who fail to appear do not receive notification from the court about their hearings. Sometimes this is because the individual lacks a steady address. Other times, it is because the court failed to send a notice.⁹⁵ In addition, many resource barriers, such as lack of transportation, child care, and job coverage, prevent people from showing up in

court.⁹⁶ Other times, it is just forgetfulness.⁹⁷ Rarely are individuals intentionally evading prosecution.⁹⁸ Further, even when people miss their first appearances, most appear for subsequent hearings.⁹⁹

However, if a client does not appear for their required court date, the bail agent must locate and return the individual to custody so that they do not have to pay the forfeiture.¹⁰⁰ In those situations, bail agents often hire bounty hunters to locate the client.¹⁰¹ Bounty hunters are paid a percentage of the bond premium, but only if they successfully locate and return the person to custody.¹⁰² This commission payment model incentivizes the use of violent practices and apprehension methods.

Bounty hunting originated before the rise of organized policing and continues despite the country's continued expansion of police forces.¹⁰³ Bounty hunters are provided with broad powers to detain and arrest individuals who miss court dates.¹⁰⁴ While police and other law enforcement officials must follow procedures for arrest, bounty hunters are exempt from such regulations.¹⁰⁵ Bounty hunters typically do not need a warrant to arrest because their power over a client is derived from the predatory contracts clients are forced to sign.¹⁰⁶ When signing these contracts, clients unknowingly waive their rights to privacy and "consent to any force necessary to return them to custody."¹⁰⁷ Many bounty hunters take advantage of this consent and rely on violence to collect payment and return individuals to custody. These practices harm not only individuals accused of crime and their co-signers but also innocent individuals mistakenly identified by bounty hunters.¹⁰⁸

Violence and injury at the hands of bounty hunters

After failing to appear for a New Orleans court hearing, a bail agent sent a bounty hunter after an individual accused of stealing a bottle of aspirin. The tactics employed by the bounty hunter to return the person to custody resulted in the individual's hospitalization.¹⁰⁹ At the hands of bounty hunters, this individual was allegedly “shackled, beaten, and stuffed in a trunk.”¹¹⁰

In the middle of a snowy night, bounty hunters ordered Jake Reinhardt out of his home and onto the porch while his pregnant wife and toddler were asleep in their beds.¹¹¹ Surveillance footage of the incident shows one bounty hunter pointing a gun at Reinhardt¹¹² and asking for his brother, who had his bond revoked for misdemeanor charges.¹¹³ Reinhardt replied that his brother had never lived there.¹¹⁴ According to news reports, his brother had been planning to turn himself in after an upcoming doctor's appointment and made that known to the bail bond company.¹¹⁵ What's more, the bounty hunters refused to show a warrant for the arrest and stormed through Reinhardt's home with guns drawn.¹¹⁶

Commercial bail industry charges high premium rates and relies on unreasonable fees

Across the country, the commercial bail industry lacks the competitive pricing that is present in other industries.¹¹⁷ The standard premium rate is 10 percent to 15 percent of the assigned cash bail amount regardless of location. A recent California lawsuit suggests that noncompetitive prices could be a result of collusion between bail companies.¹¹⁸ The suit alleged that 28 bail companies in the state conspired to keep premium prices at 10 percent of total bail assignments and to conceal the ability to offer lower prices.¹¹⁹ The court held that the plaintiffs had made plausible claims of the existence of an antitrust conspiracy, despite the fact that the claims were ultimately dismissed for failing to sufficiently prove all of the defendants' roles in the conspiracy.¹²⁰

Paying commercial bail premiums often leads families to incur debt or sacrifice paying for necessities.¹²¹ If someone cannot pay the full premium amount at the time of signing, many states allow for premiums to be financed.¹²² Although this may seem like a benefit that makes it easier to satisfy bail assignments, the excessive fees associated with these premiums trap people in cycles of debt even after their cases have been resolved.

Fees associated with bail bonds are so extensive that some people end up paying more in fees than their total bail assignment. For example, one father was charged a \$19,500 recovery fee after his daughter missed her court date.¹²³ His daughter's original bail assignment was \$15,000 for alleged felony welfare fraud.¹²⁴ The daughter was in a drug treatment program only a few hours' drive away when she missed her court date.¹²⁵

Despite dropped charges or a “not guilty” verdict, bail agreements can lead to a lifetime of debt

In 2008, Demorrea Tarver, 18, was arrested on possession charges in Baltimore. Unable to pay the total premium amount of \$27,500 (10 percent of the full \$275,000 bail amount), Tarver's mother put down a \$5,000 down payment and entered into a payment plan with a commercial bail agent for the remaining \$22,500.

The charges against Tarver were eventually dropped, but Tarver's mother was still responsible for paying the remainder of the premium. The case went to debt collection after the mother and son were unable to pay the \$300-per-month financing payment. Starting in 2011, the debt collector began adding \$2,070 in annual interest and added thousands more in attorney's fees and court costs. Currently, Tarver's mother is paying \$100 per month on the debt. At that rate, Tarver and his mother will continue paying off the debt for the rest of their lives.¹²⁶

Rafiq Shaw was arrested in Baltimore in 2016 after doing nothing more than being in the wrong place at the wrong time. Despite having no evidence connecting him to the crime he was charged with, the district court nonetheless set his bail at \$100,000. Shaw's family couldn't afford to pay the 10 percent premium fee of \$10,000 that the commercial bail agent charged, let alone the \$100,000 bail assignment he was given. His loved ones were, however, able to pull together \$2,000 and entered into a financing plan in order to pay the remaining \$8,000 owed to secure his bail.

When Shaw's case eventually went to trial, the jury deliberated less than 30 minutes before returning a not guilty verdict. Despite being found not guilty, his family still has to pay the bail company \$100 per week until the \$8,000 is paid. Shaw, who made \$10.15 per hour at the time of his arrest, knew that he would be “paying for a long time ... like forever.”¹²⁷

The commercial bail industry increases taxpayer spending

Though purporting to reduce government spending, the commercial bail industry, which props up America's cash bail systems, is a driver of the billions of taxpayer dollars spent on incarceration. In 2017, taxpayers spent about \$38 million each day to incarcerate people prior to trial.¹²⁸ And while the cost of pretrial detention varies greatly nationally,¹²⁹ it is significantly greater than the cost of pretrial release no matter the jurisdiction. When Broward County, Florida, had a robust pretrial services agency in 2007, it cost the state just \$7 per day to release someone to the agency and \$115 per day to incarcerate them.¹³⁰ Unfortunately, Broward County significantly reduced funding for the program just two years later due to industry lobbying. In 2014, it cost Maryland from \$83 to \$153 per day to incarcerate an individual pretrial, while release with the support of a pretrial services agency cost around \$2.50 per day.¹³¹

In Harris County, Texas, a study revealed that if all people accused of misdemeanors and assigned a bail amount of \$500 or less between 2008 and 2013 were released without a cash bail assignment, the county would have spent \$20 million less on supervision annually.¹³² In Broward County, one study revealed that \$125 million could be saved annually by diverting 30 percent of the arrested population from pretrial incarceration to existing pretrial programs.¹³³

In addition to the direct costs of cash bail, there are many associated indirect costs. As a result of even short periods of pretrial incarceration, people often face destabilizing losses such as losing custody of their children and losing housing or employment that in turn force them to turn to public benefits. When accounting for the indirect costs of pretrial incarceration through increased reliance on public services such as homeless shelters, public assistance, and public defenders, the true national cost of pretrial incarceration is estimated to be \$140 billion annually.¹³⁴

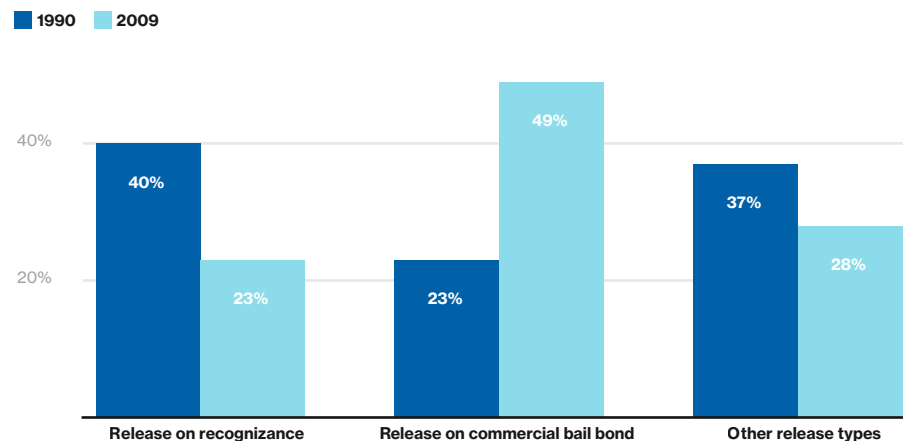
Inadequate regulation and oversight allows the commercial bail industry to operate largely unchecked

Since the 1990s, there has been a significant shift in favor of monetary pretrial release conditions, expanding the use of commercial bail bonds across the country. In 1990, 23 percent of pretrial releases used a commercial bail bond, while 40 percent of people were released on recognizance.¹³⁵ In 2009, releases that used a commercial bail bond more than doubled to account for 49 percent of releases.¹³⁶ The same year, only 23 percent of people were released on recognizance.¹³⁷ One driver of the change in bail setting practices was the passage of industry-friendly legislation at the state level. Legislative advocacy efforts were largely led by the American Bail Coalition (ABC), the trade association for the surety companies backing commercial bail bonds.

FIGURE 3

From 1990 to 2009, the rate of pretrial release through commercial bail bonds more than doubled while the rate of release on recognizance declined by almost half

Change in the rate of pretrial release types from 1990 to 2009



Source: Brian A. Reaves, "Felony Defendants in Large Urban Counties, 2009 - Statistical Tables" (Washington: U.S. Bureau of Justice Statistics, 2013), available at <https://bjs.ojp.gov/content/pub/pdf/fdluc09.pdf>.

The significant legislative influence of the commercial bail industry

In 1993, Louisiana passed legislation to thwart growing reform efforts to eliminate cash bail in the state. The legislation put a 2 percent fee on all bail premiums, to be divided among the stakeholders in the criminal legal system—specifically judges, district attorneys, sheriffs, and public defenders.¹³⁸ This fee created a financial interest among stakeholders in maintaining cash bail practices. From 2010 to 2013, Georgia, Louisiana, Mississippi, and New Jersey (prior to its 2017 bail reform) all enacted laws restricting the crimes for which a judge can release an individual on their own recognizance, increasing the likelihood that individuals will need to use a commercial bail bond to secure release.¹³⁹

Mississippi and Michigan enacted laws in 2007 and 2009, respectively, that allow courts to assign bail that can only be paid in the form of a commercial bond as a condition for early release.¹⁴⁰ Florida and Texas have enacted laws that create onerous and redundant reporting requirements for pretrial services agencies that far exceed the requirements on commercial bail companies.¹⁴¹ These laws all serve to undermine the effectiveness of pretrial services agencies, which provide an alternative to commercial bail bonds.¹⁴²

The insurance regulatory framework fails in overseeing the commercial bail industry

Though regulation of the commercial bail industry varies greatly by state, most states utilize the legal framework governing insurance companies. Lumping the commercial bail industry in with insurance companies is inadequate to provide the oversight necessary to protect people from industry abuses for four main reasons:

1. Lack of licensure requirements: Though 37 states require bail agents to be licensed, state commercial bail licensure typically involves only baseline requirements such as being over age 18, having no felony convictions, and completing minimal educational requirements. Ten states have no bail agent licensure requirements.¹⁴³ Only 22 states require bounty hunters to be licensed.¹⁴⁴

2. Absence of training requirements: Most states have no or few training requirements for bail agents or bounty hunters. In Virginia, it takes just five days of training to earn a bounty hunter license. In North Carolina, a 12-hour course and a passing grade on an exam are all it takes to become a licensed bounty hunter.¹⁴⁵

3. Ineffective oversight: Commercial bail bonds make up only a small fraction of businesses within state insurance agency oversight, meaning that bail industry complaints get lost within this large regulatory scheme. In California, the commercial bail industry represents just 2 percent of the insurance industry, while in Colorado, it is less than half of a percent of the state's insurance industry.¹⁴⁶

4. Lack of enforcement: In investigating bail practices, many states have highlighted the inadequate enforcement of existing regulations as a key factor contributing to continued industry abuses:

- **Connecticut:** “The commercial bail industry is dangerously unregulated. Unprofessional and illegal business practices among bail bondsmen and bail enforcement agents have been found to be pervasive and persistent despite the efforts of the state, which have been insufficient.”¹⁴⁷
- **Minnesota:** “Enforcement action was necessary”¹⁴⁸ because “too many people in the bail bond industry thought they were in the Wild West and the rules didn’t apply to them.”¹⁴⁹
- **New Jersey:** “Operating in the shadows of poor government oversight, the system is dominated by an amalgam of private entrepreneurs who profit from the process but are subject to weak controls easily manipulated or ignored with little or no consequence.”¹⁵⁰

Left unchecked, the actions of bail agents and bounty hunters have resulted in many tragic outcomes. Bounty hunters and commercial bail agents have been accused of crimes such as kidnapping and false imprisonment in order to extract money from clients and return them to custody.¹⁵¹ In some instances, the tactics of bounty hunters and commercial bail agents have allegedly resulted in injury and death not only to those on bail but also to innocent individuals who have no relationship with bounty hunters or their clients.¹⁵²

Insulation from judicial accountability

Individuals who would bring civil lawsuits against the industry face several institutional barriers. People who use bail agents have already had a negative interaction with the law, which makes them less-desirable plaintiffs and less likely to proactively avail themselves of the judicial process.¹⁵³ Further, many people who use bail agents have insufficient resources to afford bail and thus it is unlikely that they would be able to afford a lawyer to initiate a lawsuit against a bail bond company.¹⁵⁴

Additionally, the lack of state and federal mechanisms for accountability makes it difficult or impossible for people to initiate lawsuits against the industry. Moreover, some states have no legal mechanism for individuals to challenge problematic commercial bail contract provisions. For example, New York courts found that there was no private right of action under New York insurance law to challenge excessive premium prices or fees charged by the bail industry.¹⁵⁵ Similarly, in North Carolina, there is no contract claim individuals can bring against a commercial bail agent even if they signed the predatory contract under duress or if their bail amount is lowered.¹⁵⁶

Similarly, despite the fact that bail agents and bounty hunters fulfill responsibilities comparable to law enforcement and play a role in the criminal legal process, most courts have found that they are not state actors and therefore are not liable under Section 1983 of the Civil Rights Act.¹⁵⁷ Section 1983 is commonly used to sue law enforcement for claims arising from unconstitutional conduct such as excessive force, false arrest, false imprisonment, and wrongful death.¹⁵⁸ The inapplicability of Section 1983 has made it possible for bail agents and bounty hunters across the country to continue to subject innocent people to violent recovery practices with no accountability. However, a recent Montana lawsuit could signal a move toward greater judicial accountability. In *Mitchell and Meuchell v. First Call Bail and Surety Inc.*, the district court held that two common provisions in commercial bail contracts that seek to prevent lawsuits against the industry are void and unenforceable.¹⁵⁹ Though the case eventually ended in a settlement, it was the first time a court allowed a claim against a bounty hunter, bondsman, and insurance company to move forward as a joint enterprise under the Racketeer Influenced and Corrupt Organizations (RICO) Act.¹⁶⁰

Recommendations for state-level improvements to cash bail systems

The best way to restore the presumption of innocence in the U.S. criminal legal system and to eliminate the role money plays in determining access to fair and equitable pretrial justice is to abolish the use of cash bail. Illinois has provided a statewide model for other states to put an end to cash bail practices.¹⁶¹ In 2017, the Supreme Court of Illinois convened a commission of diverse criminal legal stakeholders to conduct a comprehensive review of the state's pretrial system and make recommendations for improvement.¹⁶² The result of this task force and its recommendations was an overhaul of the state's pretrial system through the passage of the Pretrial Fairness Act in 2021. Though some cities and localities across the country have limited the use of cash bail, Illinois is the first state to ban its use in all cases.¹⁶³ Short of eliminating the use of cash bail, states and jurisdictions should consider the following recommendations.

Eliminate commercial bail

In jurisdictions where the wholesale elimination of cash bail is currently infeasible, prohibiting the use of commercial bail bonds and establishing a court-run bail system would protect people against the harms caused by the commercial bail industry. Three states—Illinois, Wisconsin, and Kentucky—banned commercial bail through legislation, while Oregon¹⁶⁴ and Massachusetts¹⁶⁵ have effectively ended commercial bail practices through state court decisions. Massachusetts,¹⁶⁶ Oregon,¹⁶⁷ and Nebraska¹⁶⁸ offer varying alternative state-run programs through which the state, rather than a commercial bail agent, collects 10 percent of the bail amount. The 10 percent fee, less court fees or fines, is returned once an individual appears for trial. Elimination of the commercial bail industry in favor of government-run systems curbs abuses related to predatory contracts and violent and harassing conduct. However, these systems still rely on monetary conditions, thereby keeping people with limited resources who are safe to be in the community incarcerated pretrial because of their inability to pay.

If ending commercial bail altogether is too high of a bar, there are several opportunities for states to better protect residents from the abuses of the commercial bail industry.

Build alternative systems to support release

To lessen or eliminate reliance on cash bail, it is necessary for jurisdictions to invest in a range of release alternatives that promote court appearance and protect community safety. For most people, release on recognizance or automated court reminders are sufficient to ensure court appearance. For individuals with higher needs, the establishment of pretrial services agencies has demonstrated success in maintaining or improving appearance rates and safety outcomes.¹⁶⁹

Pretrial services agencies, currently operational in 300 U.S. jurisdictions and in all federal court districts, provide many services—such as monitoring and supplemental resources and planning, including transportation and court reminders—to ensure court appearance.¹⁷⁰ Well-resourced pretrial services agencies can provide the type of individualized assessment of social service needs (such as housing, employment, health and behavioral health care, and child care) that is lacking from most current pretrial decision-making processes.¹⁷¹ These services can greatly reduce pretrial detention, which is known to increase rates of recidivism.

Most people who miss their court dates do so because of systemic or resource barriers. By assessing what may prevent someone from appearing, pretrial services agencies are well-positioned to connect people with community-based services. Unlike commercial bail agents who intervene after an individual has missed their court date, pretrial services agencies focus on preventing missed appearances in the first place.

In addition to promoting high rates of court appearances, pretrial services agencies increase public safety. As mentioned previously, pretrial incarceration itself increases the likelihood of recidivism.¹⁷² Pretrial services agencies help decrease the number of people incarcerated pretrial. In places with robust pretrial services agencies, thousands of people are safely released pretrial without jeopardizing community safety or causing any significant increase in crime. For example, Washington, D.C., has one of the oldest pretrial services agencies in the country and is often used as a model for other systems.¹⁷³ Despite eliminating cash bail in 1992, Washington, D.C., maintains high levels of court appearances

and low rates of recidivism during release. In 2017, 94 percent of people arrested in Washington, D.C., were released without cash bail and under the supervision of the district's pretrial services agency.¹⁷⁴ Of the 94 percent of people released, 88 percent of people appeared for their court dates,¹⁷⁵ and less than 1 percent of people released pretrial are arrested on charges for a new violent crime.¹⁷⁶ Similarly, in Virginia, a network of 35 pretrial services agencies provides services for 115 of the commonwealth's 133 cities and counties.¹⁷⁷ From 2017 to 2021, 93 percent of people released to a pretrial services agency in Virginia completed pretrial supervision without having bail revoked for a new arrest.¹⁷⁸

Invest in enforcement mechanisms

Administrative investment in enforcement of insurance industry regulations at the state level could prevent some of the harms that the commercial bail industry inflicts on clients. Historically, state agencies given regulatory power over the commercial bail industry have not been given the resources necessary to enforce claims against the industry, allowing it to operate without fear of accountability.¹⁷⁹ Providing increased funding to state government insurance departments and/or commissions for enforcement actions would promote compliance with state regulations and ensure that bad actors are held accountable. Additionally, state insurance departments and/or commissions can work to better educate consumers about common bail industry abuses and how they can submit complaints.

The positive impact of enforcement was demonstrated through a coordinated investigation of bail agent practices led by the California Department of Insurance (CDI) and the Santa Clara County District Attorney's Office. Prompted by an increase in complaints against bail industry actors, the investigation revealed widespread evidence of illegal activity among many bail agents, including paying incarcerated people for information about individuals newly admitted to jail and using unlicensed agents in bail transactions.¹⁸⁰ Ultimately, the investigation resulted in the arrest of 31 bail agents in 2015.¹⁸¹ The Santa Clara District Attorney's and Sheriff's offices reported that illegal activity decreased following this investigation.¹⁸² Since that time, there have been continuous calls for increased funding for enforcement. In March 2022, CDI's chief for investigations noted that the department was overwhelmed and that it lacked the resources for a comprehensive bail enforcement program.¹⁸³

Strengthen consumer protection laws

Consumer protection laws protect people against the type of unethical contract provisions and harassing and violent actions common within the commercial bail industry. However, consumer protection laws have not been applied to the commercial bail industry to the fullest extent possible,¹⁸⁴ and many consumer protection laws have gaps that make lawsuits against the commercial bail industry difficult. For example, though states have Unfair and Deceptive Acts and Practices laws that aim to protect consumers from predatory contracts (among other things), in 2018, at least 21 states explicitly exempted insurance businesses from the law and seven others limited the application of these laws in an insurance context.¹⁸⁵ State legislatures can pass legislation to end these types of explicit exemptions and/or clarify the inapplicability of insurance exemptions to the commercial bail industry where there is uncertainty.

In the past few years, there has been a greater effort to hold commercial bail companies and surety companies accountable using consumer protection laws. In 2021, California's First Appellate District ruled that bail bond companies must follow consumer protection laws, including California's Civil Code Section 1799.91, which requires that co-signers be provided with explicit notification of their responsibilities under a contract.¹⁸⁶ As a result of this litigation, the defendant bail company was prohibited from collecting nearly \$34.5 million in debt from co-signers who were not given proper notice.¹⁸⁷

Conclusion

For too long, the commercial bail industry has operated with little accountability or consequence, while collecting billions of dollars in profit from people with the fewest resources. The industry's continued existence undermines the legal system's presumption of innocence; drives up incarceration rates; perpetuates violence and abuse against individuals who are arrested, as well as against their loved ones; and jeopardizes community safety. It is essential that policymakers implement solutions that limit the role of money in pretrial release decisions, rein in the commercial bail industry through oversight and regulation, and protect clients from industry abuses.

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