

TAMING THE WILD WEST: USING UNSECURED BAIL BONDS IN NEVADA’S PRETRIAL-RELEASE PROGRAM

*Hayley E. Miller**

TABLE OF CONTENTS

INTRODUCTION.....	1239
I. HISTORY OF THE UNITED STATES BAIL-BOND SYSTEM	1241
II. THE CURRENT BAIL INDUSTRY IN NEVADA	1245
III. PROBLEMS WITH THE CURRENT NEVADA BAIL-BOND SYSTEM	1248
IV. OTHER STATES’ METHODS OF PRETRIAL-RELEASE REFORM	1253
A. <i>Kentucky</i>	1253
B. <i>Colorado</i>	1255
C. <i>General Criticism of Pretrial Release Programs Using Unsecured Bonds</i>	1257
V. NEVADA SHOULD ADOPT UNSECURED BOND PRETRIAL-RELEASE METHODS.....	1259
CONCLUSION	1264

INTRODUCTION

“What happens in Vegas, stays in Vegas,” right? Maybe. At least that was your intention last night. Now, as you “shake the glitter off your clothes”¹ and stagger out into the hot sun of an early desert morning, you are unsure. Your cell phone rings, aggravating the pounding in your head, and your friend’s name pops up on the screen. Turns out you need to bail him out of jail, or he is going to stay in Las Vegas too.

* Juris Doctor Candidate, May 2016, William S. Boyd School of Law, University of Nevada, Las Vegas. The author would like to dedicate this note as a thank you to her family, Bruce, Crystal, and Holden (TM!) Miller for their unwavering and unconditional love and support. She would also like to thank Katherine Frank, Gil Kahn, and the entire Volume 16 staff of the Nevada Law Journal for their assistance in editing this piece.

¹ KATY PERRY, *Waking Up in Vegas*, on ONE OF THE BOYS (Capitol Records 2008). The chorus of this song includes, “Get up and shake the glitter off your clothes now; That’s what you get for waking up in Vegas.” *Id.*

Bail is “the money required to obtain release from pretrial detention.”² Chances are you and your friend will be unable to front the money yourselves, as the average cost of bail is a few thousand dollars, perhaps more if your friend is charged with multiple crimes. So, to get out of jail your friend will need a bail bond. Bail bonds are legal agreements, secured by the cost of bail, that guarantee a person’s appearance at trial. Lucky for you, downtown Las Vegas is prime real estate for a plethora of bail bondsmen, most of whom are willing to help—for a price. Nevada, like most states, is home to the decidedly devious industry of commercial bail bondsmen. The commercial bail industry deals in secured bonds. Essentially, a defendant unable to make bail obtains pretrial release by paying a bondsman a fee to secure the bail bond. The defendant also signs a contract guaranteeing to appear in court and designating collateral for the forfeiture of the bond if the defendant skips town.

On its face, the system sounds genuine. Why not provide a service to make posting bail easier? The answer lies in the nature of for-profit business: financial incentive. The prevalence of the commercial bail industry has contributed to increases in the cost of bail. As a result, more people must wait behind bars in the period before trial, despite being presumed innocent until proven guilty. Today, the majority of people in pretrial detention simply cannot pay for freedom.³ Further, the commercial bail industry can tempt judicial officers into ethical violations, such as receiving “kickbacks” from bail bondsmen for bond referrals.⁴ And, the industry breeds a new type of vigilante justice, as bounty hunters search for and recapture defendants who flee.

But, there is a new sheriff in town. Pretrial-release systems utilizing unsecured bonds are a proven alternative to commercial bail bonds. An unsecured bond allows a defendant to make bail without needing to put up cash. Instead, if a defendant is rated as “low risk” through a pretrial analysis, he is released on supervision and still held liable for a subsequent failure to appear in court. Four states have outlawed commercial bail practices and implemented unsecured-bond pretrial-release programs. Many more states utilize some type of unsecured-bond pretrial-release program in conjunction with secured bonds. How-

² JUSTICE POLICY INST., FOR BETTER OR FOR PROFIT: HOW THE BAIL BONDING INDUSTRY STANDS IN THE WAY OF FAIR AND EFFECTIVE PRETRIAL JUSTICE 9 (2012).

³ Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015), http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?_r=0.

In New York City, where courts use bail far less than in many jurisdictions, roughly 45,000 people are jailed each year simply because they can’t pay their court-assigned bail. And while the city’s courts set bail much lower than the national average, only one in 10 defendants is able to pay it at arraignment. To put a finer point on it: Even when bail is set comparatively low—at \$500 or less, as it is in one-third of nonfelony cases—only 15 percent of defendants are able to come up with the money to avoid jail.

Id.

⁴ See, e.g., Madeline Baro, *Texas Sheriff Pleads Guilty*, ASSOCIATED PRESS (Mar. 10, 1998), <http://www.apnewsarchive.com/1998/Texas-Sheriff-Pleads-Guilty/id-b28f7718500fba4f2db24384133975d3> [<https://perma.cc/PS36-5PQE>].

ever, pretrial-release programs are not a uniform solution. Nevada should reform its bail industry to include an evidence-based pretrial-release program providing a defendant a range of options, including commercial bail.

Part I of this Note details the history of the U.S. bail-bond system and how the commercial bail industry earned such a prominent role in pretrial release. Part II explains the current condition of Nevada's commercial bail industry and the laws governing Nevada's bail bondsmen. Part III analyzes the problems created by the Nevada commercial bail industry. Part IV showcases two unsecured pretrial-release systems presently used by Kentucky and Colorado and addresses the criticisms of those systems. Part V offers a recommendation for reform of the Nevada bail industry and advocates for the inclusion of an unsecured-bond pretrial-release system as a supplement to the current system.

I. HISTORY OF THE UNITED STATES BAIL-BOND SYSTEM

The early origins of the bail-bond system reach all the way back to the Roman Empire, but America's notion of bail derives from one-thousand-year-old English roots.⁵ The Anglo-Saxons used bail to predict the results of trial and as a means to avoid the many abuses inherent in pretrial imprisonment.⁶ The British colonies in America applied traditional English law for criminal justice, but it was not long before differences in cultural customs and crime rates created the need for more liberal criminal penalties, ultimately restructuring the American bail administration.⁷ By the summer of 1789, the first U.S. Congress passed the Judiciary Act, granting an absolute right to bail for those charged with non-capital federal crimes.⁸ A number of states followed suit, establishing a right to bail for almost all defendants.⁹ Thus, the

[p]rinciples of the early American bail system—set forth in the Judiciary Acts of 1789 and the U.S. Constitution's Eighth Amendment—were: (1) Bail should not be excessive, (2) A right to bail exists in non-capital cases, and (3) Bail is meant to assure the appearance of the accused at trial.¹⁰

However, Americans' favoritism of corporal punishment soon created problems within the new system.¹¹ Assigning the appropriate bail amount was

⁵ TIMOTHY R. SCHNACKE ET AL., PRETRIAL JUSTICE INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 1 (2010).

⁶ *Id.*

⁷ *Id.* at 4.

⁸ *Id.* at 5. Section 33 of the Judiciary Act states:

And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be 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, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law.

Judiciary Act of 1789 § 33, 1 Stat. 73.

⁹ See SCHNACKE ET AL., *supra* note 5, at 4–5.

¹⁰ *Id.* at 5.

¹¹ *Id.* at 6.

difficult. “[A]ssigning a monetary equivalent to either corporal punishment or imprisonment is largely an arbitrary act.”¹² Further, releasing a defendant pre-trial was hardly considered a viable option, as charges resulting in corporal punishment carried a great incentive to flee.¹³ But as America grew, the criminal justice system became more robust, and the amount of time between an accusation and trial increased dramatically.¹⁴ Also, contrary to English law, the American legal system provided “an absolute right to have bail.”¹⁵ Pretrial release for an accused defendant became an unavoidable option, but determining whom to release and for what amount of money was a complex issue.¹⁶

Additionally, the expansive nature of the American frontier frustrated the original pretrial-release method.¹⁷ First, original pretrial-release included finding a close friend, neighbor, or family member to act as the defendant’s “personal custodian” while the defendant waited for trial.¹⁸ Because of the scattered population and poor communication systems, it was exceedingly difficult for the judiciary to find suitable personal custodians in frontier America. Second, “the vast unsettled American frontier provided a ready sanctuary for any defendant wanting to flee.”¹⁹ Under the old system, any defendant released to a personal custodian could easily use the expansive wilderness to their benefit. As a result, the American judicial system had few choices but to utilize commercial bonds.²⁰

It is generally believed that the commercial bail-bond industry was a product of the Wild West.²¹ In San Francisco, two brothers, Peter and Thomas McDonough, began issuing bail bonds as a favor to lawyers who frequented their father’s saloon.²² At this time, lawyers often posted bail for their own clients by charging extra fees.²³ The McDonoughs offered to post bail for the lawyers’ clients in exchange for a fee, and once the client made a court appearance, the money was returned.²⁴ The concept of secured bail bonds was born. By the late Nineteenth century, the brothers converted their father’s saloon into a multi-million dollar business—“the most notorious business house in San

¹² *Id.*

¹³ June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 522 (1983).

¹⁴ *Id.*

¹⁵ WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA 11–12 (1976).

¹⁶ *See id.* at 12.

¹⁷ Shane Bauer, *Inside the Wild, Shadowy, and Highly Lucrative Bail Industry*, MOTHER JONES (June 2014), <http://www.motherjones.com/print/248186> [https://perma.cc/Z4YC-X6FE].

¹⁸ THOMAS, JR., *supra* note 15, at 12.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See* SCHNACKE ET. AL., *supra* note 5, at 7.

²² *Id.*

²³ *Id.*

²⁴ Bauer, *supra* note 17.

Francisco”—underwriting secured bonds for local defendants.²⁵ While this particular establishment lasted only fifty years, the McDonough's idea, coupled with rapidly increasing bail amounts, allowed the commercial bail bond industry in America to flourish.²⁶

Opponents of the new system were quick to criticize. By the 1920s, reports of excessive bail amounts and the unwieldy power of professional bondsmen began to sway the national conversation regarding bail bonds toward the use of pretrial release alternatives.²⁷ The commercial bail industry ignored these issues, and by the 1940s, national bail rates had soared, such that “many defendants had no choice but to either pay a bondsman or sit in jail until trial.”²⁸ It was clear that what began as an entrepreneurial scheme between two brothers had become an “integral part of the criminal[]justice system.”²⁹

In 1951, the Supreme Court offered its first opinion on the bail-bond institution.³⁰ *Stack v. Boyle* involved multiple defendants seeking a reduction of bail amounts, claiming that the high rates were excessive under the Eighth Amendment.³¹ The Court held the bail amounts in question were constitutional and upheld the modern bail-bond practice, explaining that bail serves as an additional assurance of “the presence of that defendant.”³² The Court also emphasized the necessity of individual assessments in determining a defendant's bail.³³ Four months later, the Court clarified its decision in *Carlson v. Landon*, holding that an accused's right to freedom before conviction is not absolute, because the Eighth Amendment “fails to say all arrests must be bailable.”³⁴ Together, these cases developed the precedent that bail is a fundamental but not

²⁵ *Id.* (quoting *The Old Lady Moves On*, TIME (Aug. 18, 1941), <http://content.time.com/time/magazine/article/0,9171,802159,00.html>). The company was known as ‘The Old Lady of Kearny Street,’ and lasted only fifty years, but left its legacy in the form of the commercial bond industry. *Id.* Time Magazine reported on the company's closing:

The Old Lady helped San Francisco be what many a citizen wanted it to be—a wide-open town. She furnished bail by the gross to bookmakers and prostitutes, kept a taxi waiting at the door to whisk them out of jail and back to work. But she was also a catalyst that brought underworld and police department into an inevitably corrupt amalgam . . . [M]any a citizen thought simply: “Good riddance.”

Id.

²⁶ SCHNACKE ET AL., *supra* note 5, at 7.

²⁷ *Id.* See generally ARTHUR L. BEELEY, THE BAIL SYSTEM IN CHICAGO (1927).

²⁸ Bauer, *supra* note 17.

²⁹ *Id.*

³⁰ SCHNACKE ET AL., *supra* note 5, at 8.

³¹ 342 U.S. 1 (1951); SCHNACKE ET AL., *supra* note 5, at 8.

³² *Stack*, 342 U.S. at 5.

³³ *Id.* at 9 (“Each defendant stands before the bar of justice as an individual. Even on a conspiracy charge defendants do not lose their separateness or identity.”); SCHNACKE ET AL., *supra* note 5, at 8–9.

³⁴ 342 U.S. 524, 545–46 (1952); SCHNACKE ET AL., *supra* note 5, at 9.

absolute right.³⁵ But, the court left the state and federal legislatures to adjust the parameters of the bail-bond system.³⁶

Throughout the 1960s, a multitude of studies continued to highlight the same faults inherent in the commercial bail-bond system, prompting interest in bail reform.³⁷ In 1966, Congress passed the Federal Bail Reform Act, marking the first legal revisions to the bail system since 1789.³⁸ Generally, the Act declared non-capital federal defendants “were to be released pending trial on their personal recognizance or on ‘personal bonds’ unless the judicial officer determined that these incentives would not adequately assure their appearance at trial.”³⁹ While states took interest in reforming bail legislation, many continued to rely on the commercial industry.⁴⁰

With more interest in pretrial release alternatives, many professional organizations, such as the American Bar Association (ABA), designed standards addressing policy disparities among bail and pretrial-release laws resulting from the 1966 reform efforts.⁴¹ Specifically, the ABA argued for the abolition of secured bonds, claiming “[t]heir role is neither appropriate nor necessary and the recommendation that they be abolished is without qualification.”⁴²

Since the 1960s, bail reform has slowly incorporated the addition of effective pretrial services.⁴³ In 1984, Congress passed the Comprehensive Crime Control Act, which included the Bail Reform Act of 1984.⁴⁴ Part of the Bail Reform Act of 1984 required the district courts to measure community safety in a federal defendant’s pretrial-release assessment.⁴⁵ “The Act create[d] a rebuttable presumption toward confinement when the person has committed certain delineated offenses, such as crimes of violence or serious drug crimes.”⁴⁶ This preventative detention provision was challenged in *United States v. Salerno*, but the Supreme Court held it did not violate the Fifth Amendment’s Due Process Clause or the Eighth Amendment.⁴⁷ The preventative detention provision was constitutional because an individual would only face detention after a detailed analysis indicating he posed a danger to the community, and the government has the right to protect the safety of its citizens.⁴⁸ The Court concluded,

³⁵ SCHNACKE ET AL., *supra* note 5, at 9.

³⁶ *Id.*

³⁷ *Id.* at 10.

³⁸ *Id.* at 12. The act was codified at 18 U.S.C. §§ 3141–3151.

³⁹ SCHNACKE ET AL., *supra* note 5, at 12.

⁴⁰ *See id.*

⁴¹ *Id.* at 13.

⁴² AM. BAR ASS’N, ABA STANDARD FOR CRIMINAL JUSTICE, PRETRIAL RELEASE 46 (3rd ed. 2007); SCHNACKE ET AL., *supra* note 5, at 15.

⁴³ SCHNACKE ET AL., *supra* note 5, at 16.

⁴⁴ *Id.* at 17.

⁴⁵ *Id.*

⁴⁶ *Id.* at 18.

⁴⁷ 481 U.S. 739, 755 (1987).

⁴⁸ *Id.*

“[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”⁴⁹

The novel concept of a pretrial analysis measuring community safety and an accused's risk of failing to appear was quickly adapted, and by 1999, at least forty-four states were issuing pretrial-release decisions relying, in part, on those factors.⁵⁰ In 1987, Congress analyzed the Bail Reform Act of 1984's effect on the industry.⁵¹ Under the new law, there was a greater number of pretrial detainees than in years prior—51 percent for a lack of bail money and 49 percent for danger to public safety.⁵² But, the overall results were clear: only 1.8 percent of defendants released pretrial failed to return to court, a drop of 0.3 percent from when the prior law controlled.⁵³ More importantly, court officials found that implementation of the community-safety analysis made the law “more direct and honest.”⁵⁴ Indeed, as a result of the Bail Reform Act of 1984, Illinois, Kentucky, Oregon, and Wisconsin passed legislation eliminating the commercial-bail industry and adopting some type of unsecured-bond pretrial-release program.⁵⁵

In more recent decades, state legislatures have become the battleground between the commercial-bail industry and pretrial-services agencies.⁵⁶ Although most states revised bail statutes to include the consideration of community safety, many of their bail-bond systems remain flawed, as those states have yet to “adopt[] a system that calls for the type of careful scrutiny of information about the defendant's background and financial circumstances.”⁵⁷ Many jurisdictions still commonly determine a defendant's pretrial release with little to no information about the defendant's financial circumstances or potential risk to the community.⁵⁸ Instead, most pretrial release decisions are “hurried initial appearance proceedings,” where the defendant is frequently without counsel.⁵⁹

II. THE CURRENT BAIL INDUSTRY IN NEVADA

Nevada's bail-bond statutes are some of the most detailed and comprehensive in America, but they are based on the basic principles of the commercial-

⁴⁹ *Id.*

⁵⁰ SCHNACKE ET AL., *supra* note 5, at 18.

⁵¹ *Id.* at 19.

⁵² U.S. GEN. ACCOUNTING OFFICE, GAO REP. NO. GGD-88-6, CRIMINAL BAIL: HOW BAIL REFORM IS WORKING IN SELECTED DISTRICT COURTS 17 (1987).

⁵³ *Id.* at 4.

⁵⁴ *Id.* at 33.

⁵⁵ JUSTICE POLICY INST., BAIL REFORM UPDATE, 2013: PRETRIAL SERVICES PROGRAMS REFINED AND EXPANDED THEIR REACH, WHILE THE BAIL INDUSTRY CONTINUED TO FIGHT FORFEITURE COLLECTION AND NON-FINANCIAL RELEASE 1 (2013).

⁵⁶ *See* SCHNACKE ET AL., *supra* note 5, at 24.

⁵⁷ *Id.* at 18–19.

⁵⁸ *Id.* at 19.

⁵⁹ *Id.*

bail industry.⁶⁰ A defendant who can post his own bail either pays cash or credit to the court and has the full amount returned upon his court appearance. Generally, a bail-bond company posts bail for a defendant who cannot pay and assures the court the defendant will appear.⁶¹ The defendant signs a contract promising the bail-bond company 15 percent of the cost of bail plus administrative fees, and usually provides co-signers and collateral to cover the liability of a failure to appear. The defendant is released from custody until trial, and the bail is returned to the company once the case is settled, provided the defendant appears in court.⁶²

To receive a bail-agent license in Nevada, one must be a state resident for at least one year, be eighteen years old, pass a written exam, file a \$25,000 bond, and complete a six-hour course on the bail-bond industry.⁶³ The qualifications are similar for a bail-enforcement agent, commonly known as a "bounty hunter." A bounty hunter must be twenty-one years old, have a high school diploma, and pass multiple background and psychological tests.⁶⁴ Neither a bail agent nor bail-enforcement agent may practice the trade if they have prior felony substance abuse or fraud convictions.⁶⁵

Like many states, Nevada permits bail agents to have arrest authority over defendants at any time and any place within the state, provided that local law enforcement is notified immediately upon making an arrest.⁶⁶ Nevada bail-bond companies claim bounty hunters are rarely utilized, as most enforcement can be accomplished with a telephone call to the defendant or his co-signers.⁶⁷ Unfortunately, the defendant's co-signers are frequently left liable if the defendant leaves town.⁶⁸

Under Nevada Revised Statute (N.R.S.) section 697.300, bail bondsmen in Nevada must charge 15 percent of the cost of bail or \$50, whichever is higher, plus administrative fees.⁶⁹ Although Nevada's rates are not the highest nationwide, they are not the lowest.⁷⁰ Some states, such as California and Michigan, cap bail costs at 10 percent, while Washington and Alaska place no limits on

⁶⁰ *Nevada Bail Law*, BAIL LAWS (2016), <http://www.baillaws.com/laws/Nevada> [<https://perma.cc/62AA-QX8F>]; see also F. Andrew Taylor, *Bail Bondsmen Sometimes Get Bad Rap*, L.V. REV.-J. (July 15, 2014), <http://www.reviewjournal.com/life/public-safety/bail-bondsmen-sometimes-get-bad-rap> [<https://perma.cc/KYL6-EL3R>].

⁶¹ Taylor, *supra* note 60.

⁶² *Id.*

⁶³ NEV. REV. STAT. § 697.150 (2013); *Nevada Bail Law*, *supra* note 60.

⁶⁴ NEV. REV. STAT. § 697.173.

⁶⁵ § 697.150(2); § 697.173(2).

⁶⁶ § 178.526; § 697.325.

⁶⁷ Taylor, *supra* note 60.

⁶⁸ *Id.*

⁶⁹ *How Much Does Bail Cost?*, ABOUTBAIL, <http://www.aboutbail.com/pages/bail-cost> [<https://perma.cc/9MZC-4U2Z>] (last visited Apr. 13, 2016).

⁷⁰ See generally *id.*

the cost of bail.⁷¹ In Clark County, Nevada, the Justice Court uses a fee schedule to serve as a reference point for judges setting bail in criminal cases.⁷² The schedule sets bail by categorizing individual offenses as identified by the Nevada Revised Statutes.⁷³

There is no standard bail for certain crimes.⁷⁴ The category A felonies of murder, sexual assault, first-degree kidnapping, and high level trafficking of a controlled substance, as well as the category B felonies of attempted murder and DUI resulting in substantial bodily harm, all receive “set in court” bail amounts.⁷⁵ When a defendant is charged with any of these felonies, the judge will consider the parties’ arguments when setting bail.⁷⁶

All other category B felonies have a standard bail of \$20,000 per count.⁷⁷ Category C felonies have a standard bail of \$5,000,⁷⁸ with the exception of battery/domestic violence resulting in substantial bodily harm, which has a standard bail of \$15,000.⁷⁹ Category D and E felonies have a standard bail of \$3,000.⁸⁰ Gross misdemeanors and typical misdemeanors have standard bail amounts of \$2,000 and \$1,000, respectively.⁸¹ Again, exceptions exist for battery/domestic violence (\$3,000) and driving under the influence (\$2,000), both with elevated bail rates of \$5,000 for second offenses.⁸²

Moreover, Nevada imposes additional bail amounts for statutory crime enhancements, as set by Nevada Revised Statutes.⁸³ These enhancements include crimes involving school property, crimes using the assistance of a child, crimes using a handgun containing metal-penetrating bullets, any offenses involving the use of a deadly weapon, the violation of a protection order, crimes where a victim is sixty years of age or older, hate crimes, and crimes furthering the efforts of a gang.⁸⁴ If a crime is “enhanced,” the bail is double the standard amount, unless one of the enhancements is an element of the crime.⁸⁵

⁷¹ *Id.*

⁷² Hofland & Tomscheck, *Las Vegas Justice Court Issues Newly Revised Standard Bail Schedule*, L.V. CRIMINAL ATT’Y BLOG (May 21, 2015), <http://www.lasvegascriminalattorneyblog.com/2015/05/21/70/> [<https://perma.cc/3ZVD-GMLP>].

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ JUSTICE COURT, LAS VEGAS TOWNSHIP STANDARD BAIL SCHEDULE (May 26, 2015), <https://www.clarkcountybar.org/wp-content/uploads/lvjcsbs15.pdf> [<https://perma.cc/228C-JYQX>].

⁷⁶ Hofland & Tomscheck, *supra* note 72.

⁷⁷ JUSTICE COURT, *supra* note 75.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

III. PROBLEMS WITH THE CURRENT NEVADA BAIL-BOND SYSTEM

The commercialization of the bail bond industry is extremely profitable. As such, the bail industry “discriminates against the poor and places Americans’ liberty at the mercy of private businesses.”⁸⁶ When bail amounts were reasonable, a defendant would either front the money himself or seek help from family and friends to pay the court. The defendant’s money was returned upon his appearance in court. However, as the cost of posting bail increased, paying alone was simply not feasible. The commercial bail-bond industry stepped in—much like the payday-loan industry—to provide indigent people with quick money.⁸⁷

Under the current structure of the commercial bail-bond system, the fees a defendant pays to a bail bondsman are nonrefundable.⁸⁸ Thus, those accused of a crime, innocent and guilty alike, are literally paying for freedom.⁸⁹ Remember, even today, a defendant capable of paying for bail independently has his funds returned after appearing in court. A family that must seek assistance from a commercial-bail agent may have to fully commit all assets and resources to obtain bail for a defendant.⁹⁰ That family now lacks the resources to hire a lawyer and is dependent upon the county’s already overworked public-defender system to provide representation. Hence, the commercial-bail industry decreases the likelihood a defendant hires a lawyer or forces the defendant to choose between hiring a lawyer and posting bail.

Advocates of the commercial-bail industry justify the retention of the 15 percent fee as “compensation for the risks [bondsmen] take and costs they accrue.”⁹¹ However, the purported risk is not as precarious as it may seem. A commercial bail agent requires the defendant and/or his co-signers to sign a contract, legally obligating payment for the defendant’s failure to appear.⁹² Therefore, a defendant’s failure to appear rarely affects the bondsman.⁹³ Although the court can initiate proceedings to exact the bail amount from the bondsman, it is often the defendant’s co-signers who pay the forfeited amount.⁹⁴ And, if those co-signers are unable to pay, the bondsman can legally seize and liquidate any collateral used to secure the bond, such as a house or other property.⁹⁵

Another problem with Nevada’s current system is that an increase in the number of those accused who cannot pay for bail perpetuates costly jail over-

⁸⁶ Bauer, *supra* note 17.

⁸⁷ JUSTICE POLICY INST., *supra* note 2, at 12.

⁸⁸ *Id.* at 13.

⁸⁹ *See id.*

⁹⁰ *Id.* at 15.

⁹¹ NEV. REV. STAT. § 697.300 (2013); JUSTICE POLICY INST., *supra* note 2, at 13.

⁹² JUSTICE POLICY INST., *supra* note 2, at 13.

⁹³ *Id.* at 15.

⁹⁴ *Id.*

⁹⁵ *Id.*

crowding.⁹⁶ For example, across the country, 75 percent of pretrial detainees charged with minor crimes are jailed due to an inability to pay for bail.⁹⁷ In Nevada, property crimes account for about 80 percent of crimes committed.⁹⁸ Bail amounts for these crimes can be high, while the correlating sentences are likely to be low. Therefore, many of these detainees will spend more time in jail pretrial than after a potential conviction, thus substantially contributing to the problem of overcrowding.⁹⁹

Nevada's jails suffer from overcrowding, with the jail population reaching "an all-time high" in 2014.¹⁰⁰ In 2014, Nevada's incarceration rates were 13 percent higher than the national average.¹⁰¹ When a jail's overcrowding reaches maximum levels, it becomes an emergency situation.¹⁰² A jail experiencing such a condition is forced to release defendants—including those detained pretrial.¹⁰³ For example, in June 2015 the Clark County Detention Center released 105 inmates due to overcrowding conditions.¹⁰⁴ Although the Detention Center selectively released low-risk inmates, a system prone to overcrowding is not sustainable long term.¹⁰⁵ Further, releasing inmates under such emergency conditions contradicts a defendant's need to take the justice system seriously. Thus, the commercial bail industry invites jail overcrowding, a condition which undermines the justice system as a whole.

Further, pretrial detention adversely impacts the resolution of an accused's criminal case. Defendants who are detained prior to trial are three times more likely to be convicted than those defendants *charged with the same crime* who are released pretrial.¹⁰⁶ The correlation between incarceration pretrial and sub-

⁹⁶ See KATE LIND, SHOULD WISCONSIN ALLOW COMMERCIAL BAIL IN PRETRIAL RELEASE?, 26 WPRI REP. (Mar. 2013), <http://www.wpri.org/WPRI/Reports/2013/Should-Wisconsin-Allow-Commercial-Bail-in-Pretrial-Release.htm> [<https://perma.cc/MJ4D-EJDP>]; see also Cynthia E. Jones, "Give Us Free": Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 935 (2013); Carri Geer Thevenot, *ACLU Criticizes Nevada's Prisons in Report*, L.V. REV.-J. (Mar. 5, 2011), <http://www.reviewjournal.com/news/nevada-and-west/aclu-criticizes-nevadas-prisons-report> [<https://perma.cc/qq4d-hmuJ>].

⁹⁷ Jones, *supra* note 96.

⁹⁸ Nevada, NAT'L INST. CORRECTIONS, <http://nicic.gov/statestats/?st=NV> [<https://perma.cc/AXP6-75M4>] (last visited Apr. 13, 2016).

⁹⁹ Jones, *supra* note 96, at 935–36.

¹⁰⁰ Cassandra Taloma, *Metro Seeks Federal Help to Cut Back on Inmate Overcrowding*, L.V. REV.-J. (Sept. 15, 2015), <http://www.reviewjournal.com/news/las-vegas/metro-seeks-federal-help-cut-back-inmate-overcrowding> [<https://perma.cc/TL9E-VJXA>].

¹⁰¹ Nevada, *supra* note 98.

¹⁰² LIND, *supra* note 96. See generally Taloma, *supra* note 100.

¹⁰³ LIND, *supra* note 96.

¹⁰⁴ *CCDC Releases Inmates Due to Overcrowding*, LASVEGASNOW.COM (June 28, 2015), <http://www.lasvegasnow.com/news/ccdc-releases-inmates-due-to-overcrowding> [<https://perma.cc/J5HA-X3G9>].

¹⁰⁵ *Id.* The released inmates were people who were not originally sentenced to jail but who failed to pay fines or attend court-ordered classes or community service. *Id.*

¹⁰⁶ Bauer, *supra* note 17 (emphasis added); see also LOWENKAMP ET AL., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 3 (2013).

sequent conviction is so high, that it is almost “tantamount to a decision to convict.”¹⁰⁷ Two factors are the majority contributors to this disparity. First, those accused of crimes who must remain incarcerated pretrial, experience more difficulty planning a proper defense.¹⁰⁸ Defendants in pretrial detention are “handicapped in consulting with counsel, searching for evidence and witnesses, and preparing a defense.”¹⁰⁹

Second, pretrial detention increases the likelihood defendants will plead guilty, as they are desperate to get out of jail.¹¹⁰ One study estimates that, when detained pretrial, up to 50 percent of innocent defendants pled guilty to avoid a potential maximum sentence.¹¹¹ Defendants held pretrial also tend to receive more unfavorable plea deals from prosecutors.¹¹² Additionally, these plea deals have “devastating collateral consequences” on an innocent defendant’s life.¹¹³ The defendant receives a criminal record that will “hinder the individual’s job prospects, bar the individual from receiving public housing, and also potentially cloud a judge’s perception of the individual if they are arrested again.”¹¹⁴

Moreover, pretrial detention has deleterious effects on an accused’s personal life. Inmates can lose their jobs or housing when detained for a failure to post bail.¹¹⁵ A defendant who cannot make bail is likely already experiencing financial hardship. The defendant’s detention will impose further financial hardship on those dependent on his income. A detained defendant’s dependents may have to find alternative accommodations, in some cases necessitating a drastic life change.¹¹⁶ Above all, a detained defendant’s personal, professional, and family relationships are strained.¹¹⁷ Although the commercial industry operates at no direct cost to taxpayers, social costs are high when a defendant’s family loses its main source of income and housing.

Additionally, the length of time a defendant is detained directly correlates to the likelihood he will commit another crime.¹¹⁸ For example, low-risk defendants detained even a few days are 40 percent more likely to commit other crimes before trial than equally low-risk defendants held for less than twenty-

¹⁰⁷ Jones, *supra* note 96, at 936.

¹⁰⁸ *Id.* at 938; Bauer, *supra* note 17.

¹⁰⁹ Jones, *supra* note 96, at 938 (quoting *Stack v. Boyle*, 342 U.S. 1, 8 (1952) (Jackson, J., concurring)).

¹¹⁰ *Id.* at 936.

¹¹¹ Robert Veldman, *Pretrial Detention in Kentucky: An Analysis of the Impact of House Bill 463 During the First Two Years of Its Implementation*, 102 KY. L.J. 777, 781 (2014).

¹¹² Jones, *supra* note 96, at 936.

¹¹³ Alex Petrossian, *Finally Some Improvement, But Will It Accomplish Anything? An Analysis of Whether the Charitable Bail Bonds Bill Can Survive the Ethical Challenges Headed its Way*, 40 FORDHAM URB. L.J. 2013, 2019 (2014).

¹¹⁴ *Id.* at 2020.

¹¹⁵ Veldman, *supra* note 111.

¹¹⁶ *Id.*

¹¹⁷ *See id.*

¹¹⁸ Bauer, *supra* note 17.

four hours.¹¹⁹ And, commercial bail bonds provide no disincentive to prevent defendants released after a short detention from committing crimes while out on bail, because a defendant's re-arrest does not cause the forfeiture of their bail.¹²⁰ Thus, pretrial detention not only negatively affects an accused's personal life, but does nothing to prevent additional criminal activity.

The commercial bail bond industry is under no obligation to provide a bond to anyone, and it frequently denies posting bonds for a defendant that is indigent.¹²¹ Generally, bail bondsmen are not willing to post a bond resulting in a low fee, as it is not worth the trouble and potential liability if the accused skips town.¹²² Thus, a defendant who cannot afford to pay a \$2,000 bond runs a high risk of remaining behind bars pretrial simply because a bail bondsman does not deem a few hundred dollars profit worth the hassle or liability of providing his service.¹²³ Further, bail bondsmen always have the option of refusing to provide bail without reason. If a bondsman feels an accused is a potential flight risk or is unable to pay, chances are the accused's request for bail will be denied. Nevada bail bondsmen are guilty of providing bail in such a subjective manner. A manager of a Las Vegas bail-bond agency claims, "I'm not going to do a bond for \$5,000 for someone who's unemployed. If they miss court, then they don't have any funds to collect."¹²⁴ Thus, Nevada's current commercial bail-bond industry promotes keeping low-risk indigent defendants behind bars for the simple inability to pay.

In Nevada, like other states with a commercial bail-bond industry, the potential for bondsmen to abuse the system is high. Although it is not a common occurrence, bail bondsmen will break the law to ensure a defendant's payment.¹²⁵ Bail corruption generally involves "the illegal bribing of justice officials and personnel, the coercion of bonded clients to engage in criminal activities or provide sex to the bondsman, or brutal and terroristic tactics used to extort clients' friends and family."¹²⁶ The relationship between a bondsman and a defendant is "toxic" by nature, as the bondsman is vested with "coercive police powers not possessed by private citizens."¹²⁷

Legally, a bail bondsman may actively search for a defendant who has failed to appear in court. Sometimes, the bondsman hires a bounty hunter or a bail-recovery agent to find a defendant who may have fled the jurisdiction. Al-

¹¹⁹ *Id.*

¹²⁰ JUSTICE POLICY INST., *supra* note 2, at 19.

¹²¹ *Id.* at 15; Petrossian, *supra* note 113, at 2020.

¹²² JUSTICE POLICY INST., *supra* note 2, at 15; Petrossian, *supra* note 113, at 2020.

¹²³ JUSTICE POLICY INST., *supra* note 2, at 15.

¹²⁴ Taylor, *supra* note 60.

¹²⁵ See, e.g., Craig Huber, *Las Vegas Bail Bondsmen Charged with Robbery, Assault, Kidnapping*, FOX5 VEGAS (Jul. 25, 2013), <http://www.fox5vegas.com/story/22263938/las-vegas-bail-bondsmen-charged-with-robbery-assault>.

¹²⁶ JUSTICE POLICY INST., *supra* note 2, at 40.

¹²⁷ *Id.*

though Nevada law requires bounty hunters to register with the state and receive minimal training, such requirements do not prevent the bounty hunter from vigorously pursuing a defendant.¹²⁸ Bounty hunters may take a person into custody and venture onto private property without first seeking police permission.¹²⁹ Allowing such behavior, typical of the “Wild West,” invites bail bondsmen and bounty hunters to behave illegally.

For example, in Las Vegas, Nevada around May 2013, two bail bondsmen were arrested and accused of assaulting and extorting money and property from clients.¹³⁰ The bondsmen would enter into a bail agreement with female clients but then charge their credit cards or take money from their deposit accounts without permission.¹³¹ The bail bondsmen would also kidnap the women to extort money and personal property.¹³² In total, the bail bondsmen were charged with twenty-four felonies, including kidnapping, robbery with use of a deadly weapon, assault, home invasion, and grand larceny.¹³³ Even if these violations are rare occurrences, the Nevada bail-bond industry is a breeding ground for illegal activity. Defendants who use the system out of desperation to make bail should not be subjected to the threats and assaults of their bail bondsmen.

Similarly, a California bail-bond business owner pled guilty to multiple felony counts for illegally soliciting business from the Orange County jail system.¹³⁴ The bond owner paid an inmate to find others in custody who required bail and recommend the bondsman's services.¹³⁵ In another example, Texas bail agents were caught paying “kickbacks” to law-enforcement officers in Starr County.¹³⁶ Shockingly, the bail agents paid police officers and jail officials for bond referrals.¹³⁷ Actions like these diminish the integrity of the commercial bail-bond system by portraying those in positions to help a defendant as unethical and easily corruptible.

¹²⁸ See generally *Training for Bounty Hunter Jobs in Nevada*, BOUNTYHUNTEREDU.ORG, <http://www.bountyhunteredu.org/nevada/> [<https://perma.cc/P45Q-4HP5>] (last visited Apr. 13, 2016).

¹²⁹ See NEV. REV. STAT. § 697.325 (2013).

¹³⁰ Huber, *supra* note 124.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ JUSTICE POLICY INST., *supra* note 2, at 42; John Crandall, *Bail Bondsman Pleads Guilty to Felony Charges*, MISSION VIEJO PATCH (June 30, 2012), <http://patch.com/california/mission-viejo/bail-bondsman-pleads-guilty-to-felony-charges> [<https://perma.cc/6524-AU7X>].

¹³⁵ JUSTICE POLICY INST., *supra* note 2, at 42; Crandall, *supra* note 133.

¹³⁶ JUSTICE POLICY INST., *supra* note 2, at 42; Baro, *supra* note 4.

¹³⁷ JUSTICE POLICY INST., *supra* note 2, at 42; Baro, *supra* note 4.

IV. OTHER STATES' METHODS OF PRETRIAL-RELEASE REFORM

Almost all states provide for some type of pretrial-release, either on personal recognizance or an unsecured appearance bond.¹³⁸ Four states—Kentucky, Illinois, Wisconsin, and Oregon—have completely eliminated commercial bail-bonding, while the majority of other states incorporate some form of non-monetary or unsecured bail-bonding into pretrial-release programs.¹³⁹ An unsecured-bond pretrial-release program provides for a defendant's release without financial conditions and is generally run by a state's county justice system. At the core of an unsecured-bond program are pretrial-release assessments, a mechanism used to ensure a defendant's pretrial release does not impair a court appearance or the safety of victims, witnesses, and the public.¹⁴⁰ After the rigorous assessment, the pretrial-program officers release a recommendation, listing a continuum of available release options specific to the defendant.¹⁴¹ Analyzed below are Kentucky's completely unsecured bail-bond industry, Colorado's "combination" bail industry, and general criticisms of the unsecured bail-bond industry.

A. Kentucky

The Justice Policy Institute recognized Kentucky's nonprofit bail-bonding institution as a "prime example of how states can achieve, maintain and improve pretrial outcomes."¹⁴² Outlawing the commercial bail bond system in 1976, Kentucky was one of the first states to create an unsecured bail-bond industry.¹⁴³ The Kentucky Pretrial Services Agency is funded by the court system and available to all counties.¹⁴⁴ However, even with an unsecured bond industry, Kentucky still suffered an inmate population increase of 45 percent from 2000 to 2009.¹⁴⁵ The dramatic increase was estimated to cost the state \$161 million by 2020 and devastate the holding capacity of the state's prisons.¹⁴⁶

The answer to Kentucky's problem was House Bill (H.B.) 463, designed to decrease the number of locally incarcerated defendants awaiting trial, thus increasing jail capacity and decreasing the societal cost of high incarceration rates.¹⁴⁷ H.B. 463, or the Public Safety and Offender Accountability Act, required Pretrial Services to use a "research-based, validated assessment tool to

¹³⁸ AMBER WIDGERY, NAT'L CONFERENCE OF STATE LEGISLATURES, PRETRIAL RELEASE CONDITIONS (2013), <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-conditions.aspx> [<https://perma.cc/HNS3-ACXR>].

¹³⁹ *Id.*; JUSTICE POLICY INST., *supra* note 2, at 43.

¹⁴⁰ WIDGERY, *supra* note 137.

¹⁴¹ JUSTICE POLICY INST., *supra* note 2, at 43.

¹⁴² *Id.* at 44.

¹⁴³ Veldman, *supra* note 111, at 780.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 781.

¹⁴⁶ *Id.* at 782.

¹⁴⁷ *Id.* at 783.

measure a defendant's flight risk and public dangerousness."¹⁴⁸ Following the passage of the Act, a judge's bond decision must consider the pretrial risk assessment, provide increased information about the defendant to the decision process, and preserve issues for appeal.¹⁴⁹

Further, the Act streamlined Kentucky's pretrial risk assessment program.¹⁵⁰ Under the program, a defendant must come before a judge within twenty-four hours of arrest for bond determination, excluding arrests for capital offenses.¹⁵¹ The judge determines the bond amount starting with a presumption that every defendant should be released on his own recognizance.¹⁵² The judge then assigns release conditions after considering "whether the defendant constitutes a flight risk, is unlikely to appear for trial, or is likely to be a danger to the public if released."¹⁵³

This information is collected beforehand through a short interviews and investigations and includes, "the defendant's residency history, work status, current charge, legal status, any substance abuse history, any prior misdemeanor or felony convictions, any prior violent crime convictions, any prior failures to appear, mental health history, and any prior escape convictions."¹⁵⁴ Each category is assigned a point value. The total determines if a defendant is a low, moderate, or high risk for flight or public danger.¹⁵⁵ Generally, a low or moderate-risk defendant is released on his own recognizance, with pretrial supervision conditions for the latter.¹⁵⁶ A high-risk defendant's bail is left to the discretion of the judge; the judge may elect to reject the assessment and offer her own bail decision.¹⁵⁷

In the years following H.B. 463, Kentucky experienced relatively positive results.¹⁵⁸ The appearance rate of defendants and the public safety rate both increased 1 percent.¹⁵⁹ The number of low- and moderate-risk defendants released also increased, up 7 percent and 8 percent, respectively.¹⁶⁰ Reassuringly, the number of high-risk defendants released has remained about the same, indicating that the Bill's assessment program effectively detains the appropriate defendants.¹⁶¹ Therefore, it appears the Bill's purpose is being achieved, as more

¹⁴⁸ *Id.* (internal quotations omitted).

¹⁴⁹ *Id.* at 783–84.

¹⁵⁰ *Id.* at 786.

¹⁵¹ *Id.*

¹⁵² *Id.* at 787.

¹⁵³ *Id.* (internal quotations omitted).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 790.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (internal quotations omitted).

¹⁶¹ *Id.* (internal quotations omitted).

detainees are released, returning to court, and committing fewer crimes while on release.¹⁶²

Yet, this system is not without its critics. The majority of objections to H.B. 463 involve the judge's discretion to disregard the risk assessment and subjectively evaluate the defendant's risk.¹⁶³ Allegedly, judges have allowed this exception to "swallow the objective rule."¹⁶⁴ As a result, claims of "significant disparity in bond determinations" stem from the erratic use of this exception.¹⁶⁵ Studies measuring the post-legislation effect on release rates and public safety show that pretrial-release rates have increased unevenly throughout the state.¹⁶⁶ Therefore, the Bill's subjective exception should be clarified and reevaluated to prevent this disparity.¹⁶⁷

Further, critics point to the confusing nature of the bond-decision procedure.¹⁶⁸ Apparently, some risk-assessment factors overlap and can be considered both subjectively and objectively, allowing for potential biases to influence the entire process.¹⁶⁹ Thus, the "wide scope of the subjective exception" can hinder the statistically-neutral risk assessment and obstruct H.B. 463's pretrial program goals.¹⁷⁰

Despite complaints surrounding some of H.B. 463, proof of the plan's effectiveness is in the results. Kentucky's unsecured-bond pretrial-release program costs the state less money and works to reduce the likelihood of a defendant's failure to appear, while ensuring public safety. The program ensures defendants are only detained pretrial when necessary and serves as a model example for other states.

B. Colorado

In 2013, the Colorado legislature passed House Bill (H.B.) 13-1236, designed to overhaul the state's pretrial-release program.¹⁷¹ The Bill was designed to decrease the use of financial bonds and "[e]xpand and [i]mprove [p]retrial [a]pproaches and [o]pportunities."¹⁷² Colorado's statutes still require financial conditions for some types of pretrial release, but H.B. 13-1236 implements mandatory provisions for judges to consider when determining if a bond should

¹⁶² *Id.*

¹⁶³ *Id.* at 778.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 788.

¹⁶⁹ *Id.* at 788–89.

¹⁷⁰ *Id.* at 789.

¹⁷¹ TIMOTHY SCHNACKE, BEST PRACTICES IN BOND SETTING: COLORADO'S NEW PRETRIAL BAIL LAW 1 (n.d.), <http://www.ncsl.org/Documents/CJ/BestPracticesInBondSetting.pdf> [<https://perma.cc/STN6-Y8DT>].

¹⁷² *Id.*

be secured or unsecured.¹⁷³ H.B. 13-1236 created two types of unsecured bonds: personal-recognizance bonds with either statutorily-mandated conditions or additional non-monetary conditions.¹⁷⁴ Similar to Kentucky, when a defendant is booked into jail, he will have the opportunity for release within two days.¹⁷⁵ Judges are instructed to presume the defendant's release under the least-restrictive bail conditions, excluding statutory exceptions, and then examine certain factors (discussed below) to determine the appropriate type of bond.¹⁷⁶

Following this directive, a few Colorado counties created the Colorado Pretrial Assessment Tool (CPAT).¹⁷⁷ Using the CPAT, these counties collect and analyze evidence through interview and investigation to determine a defendant's pretrial-release risk.¹⁷⁸ The Pretrial Justice Institute verified the CPAT's analysis for accuracy.¹⁷⁹ CPAT then creates an individualized pretrial-release recommendation for the judge's consideration when setting a bond.¹⁸⁰ H.B. 13-1236 enumerated the pretrial factors for analysis: the defendant's possession of a home or cellphone; ownership or rental of a residence; contribution to residential payments; past or current problems with alcohol; past or current mental health treatment; age at first arrest; past jail or prison sentences; active warrants; other pending cases; current supervision requirements; and history of revoked bond or supervision.¹⁸¹ The CPAT determines how to score and weigh these factors for bond-condition recommendations.¹⁸²

Studies following Colorado's pretrial reform showed that Colorado jurisdictions still used secured money bonds for 69 percent of defendants' pretrial releases.¹⁸³ Although it may be too soon to see definitive results, one study showed the potential for a dramatic increase in the use of unsecured bonds.¹⁸⁴ In Colorado, a defendant's release on an unsecured bond achieved the same or better results regarding public safety as secured bonds.¹⁸⁵ Also, the use of secured monetary over unsecured bonds failed to increase a defendant's court appearance.¹⁸⁶ Most importantly, the use of unsecured bonds frees substantial jail resources, as unsecured bonds allow for a defendant's release, usually quick-

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 2.

¹⁷⁵ MICHAEL R. JONES, UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION 23 (2013).

¹⁷⁶ SCHNACKE, *supra* note 170.

¹⁷⁷ PRETRIAL JUSTICE INST., COLORADO PRETRIAL ASSESSMENT TOOL (CPAT) 3 (2013).

¹⁷⁸ *Id.* at 3-4.

¹⁷⁹ *See* JONES, *supra* note 174, at 5.

¹⁸⁰ *See* PRETRIAL JUSTICE INST., *supra* note 176.

¹⁸¹ *Id.* at 5.

¹⁸² *See id.* at 4.

¹⁸³ JONES, *supra* note 174, at 21.

¹⁸⁴ *See id.* at 19.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

ly.¹⁸⁷ Accordingly, if Colorado increased the number of defendants released pretrial on unsecured bonds, the state could maintain public safety and a defendant's likelihood of a court appearance, while preserving jail resources.

Indeed, it appears the CPAT is already working effectively to ensure defendants are not detained pretrial unnecessarily, without disregarding common sense when a defendant poses too big a safety risk for release. For example, a woman charged with attempting to poison her children was held on a \$300,000 bond despite attempts from her public defender to secure a personal-recognizance bond.¹⁸⁸ Under the CPAT, the defendant was not a flight risk and had a 95 percent chance of returning to court.¹⁸⁹ Yet, the judge chose to reject the pretrial-risk assessment, stating the potential severity of the defendant's sentence would create an incentive to flee.¹⁹⁰ Additionally, the judge felt the defendant's mental health made her a danger to herself and community.¹⁹¹ Thus, the Colorado judicial system is capable of correctly recognizing when a CPAT pretrial analysis should be a persuasive factor in pretrial-release decisions and when a defendant's release is too risky.

C. General Criticism of Pretrial Release Programs Using Unsecured Bonds

A pretrial release program will be ineffective unless it is carefully constructed to improve a specific county's bail system. For example, the First Judicial District of Pennsylvania recently considered returning to the use of commercial bail bonds after multiple complaints that the bail system was "broken."¹⁹² The district implemented a combination secured/unsecured pretrial bail system in the 1970s, where defendants would pay an initial 10 percent deposit of their total bail and agree to owe the remaining amount for a failure to appear in court.¹⁹³ State officials admit to poorly managing the system, as by 2008, approximately 19,000 defendants had failed to appear each year, and the estimated cost of uncollected forfeited bail totaled one billion dollars.¹⁹⁴ Critics point out that the Philadelphia bail program allowed defendants to "'defeat the system' by failing to show up for court, wearing down witnesses and causing

¹⁸⁷ *Id.*

¹⁸⁸ Will Grandbois, *Mother Remains in Jail in Child Poisoning Case*, ASPEN TIMES (Aug. 26, 2014), www.aspentimes.com/news/12757935-113/alvarado-gomez-fang-court [<https://perma.cc/YJV3-RCPC>].

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See Nancy Phillips & Craig R. McCoy, *Phila. D.A. Says Bail System is "Broken,"* PHILLY.COM (Jan. 20, 2010), http://articles.philly.com/2010-01-20/news/24956177_1_bail-bond-companies-Fugitives-defendants [<https://perma.cc/GE7Y-9JL5>].

¹⁹³ Craig R. McCoy & Nancy Phillips, *Private Bail Industry Says it Could Help Philadelphia's Ailing System*, PHILLY.COM (Aug. 9, 2010), http://articles.philly.com/2010-08-09/news/24971105_1_brian-j-frank-bondsmen-thousands-of-criminal-defendants [<https://perma.cc/L87G-DSFA>].

¹⁹⁴ *Id.*; Phillips & McCoy, *supra* note 191.

cases to collapse in large numbers each year.”¹⁹⁵ Philadelphia’s inability to manage its faulty pretrial-release plan shows that a state-run “10 percent deposit bail” program is not an effective pretrial-release method.¹⁹⁶

But, Philadelphia’s bail program deteriorated for a few reasons. The city failed to collect forfeited bail; to determine if defendants could afford to pay forfeited bail; and to keep records of bail debt.¹⁹⁷ Philadelphia’s District Attorney claimed the city’s Clerk of Quarter Sessions Office was “so ineffective [in keeping adequate bail records] . . . that it ‘contributes to the fugitive crisis instead of alleviating it.’”¹⁹⁸ Thus, it appears a break down in the city’s management and administration of the unsecured pretrial-release program is to blame.

Proponents of pure commercial bail argue the system is the only way to achieve the lowest failure-to-appear rates. According to a study published in the *Journal of Law and Economics* in 2004, commercial bail provides a 28 percent lower failure-to-appear rate than a defendant released on his own recognizance.¹⁹⁹ The same report concluded a defendant is less likely to commit new crimes while released pretrial on commercial bail.²⁰⁰ Apparently, the structure of the commercial bail program inherently provides a stronger incentive for those issuing bail bonds to ensure a defendant appears in court.²⁰¹

A commercial bail agent’s desire for profit is an incentive that “aligns [his] interest[] with those of the courts and the public.”²⁰² To avoid the costly expense of a defendant’s bail forfeiture, a commercial bondsman will make a concerted effort to ensure a defendant appears in court; such an effort usually requires the bondman to impose special conditions on a defendant released on bail, such as monitoring or regular check-ins.²⁰³ These conditions reduce the likelihood a defendant will flee and generally involve regular electronic or physical contact.²⁰⁴ Additionally, the agents collect detailed personal information from the defendant and his co-signers in order to ensure a court appearance or a high probability of re-arrest.²⁰⁵

Further, because a defendant becomes liable to a bondsman upon a failure to appear in court, commercial bail agents hold the defendant’s co-signers liable and seize the defendant’s collateral to ensure a court appearance.²⁰⁶ The bail agents essentially create a network or “circle of responsibility” of people who

¹⁹⁵ Phillips & McCoy, *supra* note 191.

¹⁹⁶ McCoy & Phillips, *supra* note 192.

¹⁹⁷ Phillips & McCoy, *supra* note 191.

¹⁹⁸ *Id.*

¹⁹⁹ Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. & ECON. 93, 118 (2004).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 97, 118.

²⁰² LIND, *supra* note 96.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

also have a vested interest in guaranteeing the defendant appears.²⁰⁷ The network's effectiveness is offered as one reason secured bail bonds provide consistently lower failure-to-appear rates than other unsecured methods.²⁰⁸

Lastly, advocates for the commercial bail industry claim the amount of time and resources bail agents dedicate to comprising and enforcing commercial surety bonds allows for a more efficient system. Heavy caseloads frequently slow the judicial system, and management of a county's bail industry adds more work to an already exhausted system.²⁰⁹ Similarly, commercial bail agents have reserved time and resources to handle those defendants who flee.²¹⁰ Law enforcement officials, with ever-strained resources, often have higher priorities than chasing after a defendant who fails to appear. Thus, the nature of the commercial bail system allows bail agents to fine-tune their skills in providing bail and ensuring a defendant's appearance.

Indeed, statistics show the commercial bail industry is effective. The industry's success rate is alleged to be 98 percent, as only eight out of every one hundred defendants released on a surety bond will skip bail, and all but two will be recovered.²¹¹ Additionally, the industry offers reduced costs to taxpayers and the criminal justice system as a whole. The cost of a defendant's single failure to appear is estimated at \$1,775.²¹² Commercial bail bondsmen require no additional cost to taxpayers, while preventing costs related to a defendant's failure to appear.

Although the commercial bail industry is a system well-entrenched in the American judicial process, it is a result of tradition rather than efficiency. While statistics appear to plead a convincing case for continuing the industry, data on alternative pretrial-release programs show they are preferable to traditional bail systems. New pretrial-release alternatives are not always a perfect solution, but the programs may offer the same results with less collateral damage. The idea of bail bonds and bounty hunters may be a fond American concept, but unsecured-bond pretrial-release programs are a promising concept for the future.

V. NEVADA SHOULD ADOPT UNSECURED BOND PRETRIAL-RELEASE METHODS

Nevada can use unsecured bonds for pretrial release to maximize defendants' court appearance rates while minimizing the use of state and county resources. To effect such a change, Nevada should implement a pretrial-release program similar to Colorado's combination system. Complete reform of the

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

Nevada bail industry would be a drastic change and likely have unpredictable results. Nevada should integrate an unsecured-bond pretrial-release program into the existing commercial bail industry, with the goal of reducing the number of defendants detained for failure to post a cash bond. For best results, Nevada ought to adopt a verified evidence-based pretrial-assessment system, which allows a court to accurately rate a defendant's risk factor and recommend a secured or unsecured bond accordingly. Such a system would necessitate the creation of a Pretrial Services Program, with the state's district courts charged with oversight. Like Colorado and Kentucky, the Pretrial Services Program would interview and analyze the defendant and rank his risk type. The judge would consider this analysis upon determining bail, beginning with the presumption of pretrial release. With the addition of two types of unsecured bonds—those with either statutorily-mandated or additional conditions—Nevada should be able to maintain public safety, while reserving more jail beds for “unmanageably high risk defendants and sentenced offenders.”²¹³

Implementing an unsecured pretrial release program would have dramatic effects on the Nevada criminal-justice community. First, the state would stop placing low-risk defendants behind bars simply because of an inability to pay bail. Releasing low-risk defendants on an unsecured bond would save both defendant and county resources. Defendants from low-income families would be able to return home and continue to provide income and a sense of stability. Families of indigent defendants could pool resources to hire a defense attorney, instead of breaking the bank to post bail. These two consequences alone would have a positive impact on Nevada's indigent community and could reduce the number of people affected by the detention of a primary-income family member.

Nevada counties receive a monetary benefit from the addition of a pretrial-release program as well. With fewer defendants detained, county jails would require fewer resources and cost the county less money. Nevada taxpayers also receive a break. Currently, Nevadans pay an average of \$20,656 per inmate,²¹⁴ a number likely to experience a steep decline once the majority of low-risk defendants currently occupying jail beds are released on unsecured bonds. The state with the lowest cost per inmate is Kentucky—one of the original four states to outlaw the commercial bail industry.²¹⁵

As previously stated, Nevada has frequently battled the problem of jail overcrowding. Using the statistics from Colorado and Kentucky as guideposts and considering that 80 percent of Nevada's crime would most likely place a defendant in a low-risk category, it appears Nevada could reduce jail over-

²¹³ JONES, *supra* note 174, at 3.

²¹⁴ Nevada, *supra* note 98.

²¹⁵ Kentucky, NAT'L INST. CORRECTIONS, <http://nicic.gov/statestats/?st=ky> [<https://perma.cc/A6DD-E9XD>] (last visited Apr. 14, 2016). Kentucky taxpayers pay just \$14,603 per inmate, 55 percent lower than the national average. *Id.*

crowding with an unsecured-bond pretrial-release program.²¹⁶ Even if secured bond amounts are low, an unsecured-bond program allows for the release of more defendants. More defendants released pretrial means fewer resources are utilized housing multitudes of defendants whose release simply hinges on money. Such a program would reserve jail beds for those who truly deserve to be behind bars.

Further, there will always be an indigent defendant who cannot pay. Nevada's jail overcrowding problem is likely exacerbated by bail bondsmen who refuse to post a bond for a defendant who is perceived as a flight risk, unable to pay, or requires a nominal bond.²¹⁷ Such defendants are out of luck and must wait in jail to defend their innocence, while consuming the city's or county's resources. An unsecured-bond pretrial-release program reduces the number of pretrial detainees and prevents a bondsman's arbitrary decision from condemning a defendant to pretrial detention. Another benefit to detaining fewer defendants pretrial is the reduction in the amount of defendants who may be influenced by their time behind bars to commit more crime. Statistics show that a defendant jailed for even a few days pretrial is likely to commit additional crimes once released. A defendant surrounded by criminals can easily become a product of his surroundings. Conversely, a defendant released on an unsecured bond can have the support of his family and friends until his court appearance. Therefore, unsecured-bond pretrial-release program not only gives Nevada the chance to decrease jail overcrowding, but also potentially decrease the amount of crime.

To be sure, the most concerning issue about supplementing the commercial bail industry with an unsecured-bond pretrial-release program is the effect on public safety. However, Colorado's implementation of unsecured-bond pretrial release created public-safety results consistent with the status quo. Considering that Nevada is a regional neighbor to Colorado, it is probable Nevada would experience similar results in public safety ratings if the state chose to add an unsecured-bond pretrial-release program. Although it may be disconcerting to imagine defendants accused of crimes roaming the streets without any type of security, such a vivid daydream is unrealistic. At the core of an unsecured-bond pretrial-release program is an evidence-based analysis, which uses information obtained from multiple sources to produce a score indicative of a defendant's flight risk and danger to the community. Through this analysis, the program inherently accounts for defendants who pose a threat to public safety and prevents their release on unsecured bond. Moreover, a defendant's pretrial analysis is but one factor in a judge's decision to release a defendant on an unsecured bond. When considered in totality, the conscious design of an unsecured-bond pretrial-release program and its resulting effect on public safety weighs in favor of implementing the program.

²¹⁶ *Nevada, supra* note 98.

²¹⁷ *See supra* Part III.

Tantamount to public safety is the issue of ensuring a defendant appears in court. Similar to its effects on ratings of public safety, implementing unsecured pretrial-release bonds maintains or even increases a defendant's likelihood of appearing in court. In the Colorado study, the use of either bond affected similar results because both bonds potentially cost the defendant money for failing to appear. If Nevada were to implement an unsecured-bond pretrial-release program, it is likely the state would experience the same outcome.

Although comparable results between secured and unsecured bonds may appear to weigh in favor of continuing with the secured bond industry, this is not so. It is precisely because unsecured bonds affect the same result as secured bonds, that Nevada should consider including unsecured bonds in its pretrial-release program. An unsecured-bond pretrial-release program provides a safer and more stable alternative to the commercial bail-bond industry, while maintaining and potentially improving public safety and defendants' rate of appearance.

Lastly, an unsecured-bond pretrial-release program in Nevada would reduce the amount of illegal activity prevalent in the commercial bail-bond industry. Stories like the ones discussed above²¹⁸ about vigilante bondsmen and bounty hunters taking the law into their own hands are a potentially dangerous element of the commercial bail industry. Providing indigent low-risk defendants with pretrial release through unsecured bonds spells an end to manipulative bondsmen preying on those who cannot pay. With both secured and unsecured bonds resulting in the same rate of appearance, the specialized monitoring services that bondsmen claim are unique to the profession appear to be not so exclusive after all.

Implementation of an unsecured-bond pretrial-release program would be fairly simple for Nevada. In implementing its program, Colorado passed new statutes governing bail procedures. Nevada already uses a type of pretrial-release analysis to determine a defendant's release method. A defendant charged with a misdemeanor, gross misdemeanor, or non-violent felony is to be released on his own recognizance, per the state district court's decision.²¹⁹ Under a release on his own recognizance, a defendant is freed on an unsecured bond, usually with several conditions; N.R.S. section 178.4853 lists the factors courts must consider in analyzing a defendant's ability to be released on his own recognizance.²²⁰

If Nevada chose to adopt an unsecured-bond pretrial-release component to the state's bail industry, the state should consider N.R.S. section 178.4853 as a guide. Nevada courts have used the statute since 1981 to aid in analyzing a defendant's eligibility for pretrial release.²²¹ The N.R.S. section 178.4853 factors

²¹⁸ See *supra* Part III.

²¹⁹ Nev. Eighth Dist. Ct. R. Practice 3.80.

²²⁰ NEV. REV. STAT. §§ 178.4851, 178.4853 (2013).

²²¹ § 178.4853.

are almost an exact match to those used in the pretrial-release program in Colorado. Colorado's pretrial-release program—the same program Nevada should implement—expands on this simple system. Under the new unsecured-bond pretrial-release program, Nevada courts would implement their own “Nevada Pretrial Assessment Tool,” to provide individualized pretrial-release recommendations for a judge setting a bond. Most importantly, a judge would begin each defendant's pretrial-release analysis with the presumption of release on an unsecured bond. With the Nevada Pretrial Assessment Tool, each defendant would be analyzed for pretrial-release, regardless of the type of crime they committed. Even if a defendant's recommendation ultimately does not involve a type of unsecured-bond pretrial-release, this individual analysis will still allow defendants to receive more appropriate secured bonds.

With careful oversight of this system, Nevada can avoid pitfalls experienced by previous states which have implemented unsecured-bond pretrial-release programs. Unlike in Philadelphia, Nevada will have to take measures to ensure that all forfeited bail is collected and carefully monitor the program's financial impact on the state's resources. Also, the state will have to oversee the court's administration of the Nevada Pretrial Assessment Tool and be willing to adjust the Assessment to improve efficiency and fairness. If Nevada's unsecured-bond pretrial-release program is introduced thoughtfully and with caution, it should be successful.

Beyond Las Vegas, the state's addition of an unsecured-bond pretrial-release program would be well received in the rural areas. For example, Nevada County, located in California near Northern Nevada, recently implemented a type of unsecured-bond pretrial-release program to “help alleviate impacts on the jail yet add accountability to defendants waiting to go to trial.”²²² The program refers defendants for a risk analysis and allows for the release of qualifying defendants under court supervision. The county notes the program's success in larger cities and expects a significant reduction in cost from reduced incarcerations.

It is evident that the implementation of an unsecured-bond pretrial-release program in Nevada would offer significant improvement to the current bail industry. The program would be fairly easy to adopt, as Nevada courts already conduct a limited pretrial-release analysis for some defendants. Statistics show that an unsecured-bond system provides the same rates of public safety and court appearances, but without the negative effects of the commercial bail industry, such as jail overcrowding and vigilante bondsmen. Even if Nevada chose to start small in implementing unsecured-bond pretrial release, the benefits of the program are worth the reform efforts.

²²² *Supervised Release for Pre-trial Defendants*, KNCO 830 (Dec. 19, 2014), <http://knco.com/supervised-release-for-pre-trial-defendants/> [<https://perma.cc/E5AS-EDEQ>].

CONCLUSION

Nevada is ready to implement an unsecured-bond pretrial-release program of its own. The purpose of bail is not to punish a criminal defendant, nor to prohibit future criminal conduct. Quite simply, bail is a “procedural mechanism that seeks to serve the dual purpose of promoting law enforcement by encouraging defendants to return to court, while simultaneously upholding the presumption of innocence that is a hallmark of the American legal system.”²²³ Nevada’s current bail industry fails to promote either function. Under a commercial secured-bond system, many defendants are left to languish behind bars or suffer the harassment of bondsmen and bounty hunters. An unsecured-bond pretrial-release system offers the same rates of community safety and defendant court appearance, while conserving judicial resources and treating defendants with dignity. In a society where “liberty is the norm,” releasing defendants pretrial on an unsecured bond should be the preferred choice.²²⁴

²²³ Petrossian, *supra* note 113, at 2018–19.

²²⁴ United States v. Salerno, 481 U.S. 739, 755 (1987).