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# The State Factor

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*Jeffersonian Principles in Action*

*January 2009*

## ***CRIMINALS ON THE STREETS***

### ***A Citizen's Right to Know***

#### **Introduction**

Bail for the most part lives on the edges of American life. Most people will never need the services of a bail agent and beyond knowing bail is “something” that gets people out of jail, most people have only a vague idea of what it involves. Yet, bail is vital to a smooth-functioning criminal justice system in America. It is like the bottom row of bricks on a house. Without bail, public safety would collapse, and jails would be completely overcrowded. And, even though the system works quietly and efficiently in the background, it should command the attention of policymakers.

There are two primary methodologies to bail in America: one run by the private-sector, commercial surety bail, and the other run by the government pretrial release agencies. One costs the public nothing, the other consumes tax dollars. One system ensures that their client goes back to court to face charges, and ensures they commit fewer crimes while awaiting that court date. The other option has a poor track record on both of these counts. One picks up almost all of its fugitives, the other seldom, if ever, does. One works and the other does not. The system that works is commercial surety bail and the one that does not is government-run pretrial services.

Why are there two systems? About four decades ago, pretrial services got its start in order to help fill in a gap.

Then, as now, among the multitudes of people arrested were many indigent first-time non-violent offenders, people who commit low-level crimes, but are too poor to afford bail. Pretrial services was formed to attend to these unfortunates. However, over time, pretrial services has expanded nationwide into approximately 400 government funded entities and has amplified its mission from helping the indigent to helping all manner of defendants, including dangerous felons. Beyond merely assisting in the release of the non-violent indigent defendant, pretrial services are making a concerted effort to eliminate private-sector commercial bail and replace it with taxpayer-funded agencies as evidenced by their own adopted standards. In other words, they want the government to control the bail business entirely.

In its effort to eliminate the private-sector option, pretrial services have invoked an array of ideological principles all of which can be boiled down to “government is superior, more dependable than the private-sector, and does it better.” Not surprisingly, commercial bail for decades has contested this assumption. In this respect, commercial bail now finds itself in good company. The United States government sides with commercial bail on this point. An agency of the U. S. Department of Justice, the Bureau of Justice Statistics, published a study in November 2007, entitled *State Court Processing Statistics, 1990-2004, Pretrial Release of Felony Defendants in State Courts*, November 2007, NCJ

214994, which covered a decade-and-a-half of data and concluded two things: *first, that commercial bail trumps pretrial services in terms of performance, and second, that usage of commercial bonds has doubled.*

The obvious question: If we have a private-sector option that does the job better and at no cost to the taxpayer, why do we need pretrial services?

Pretrial service agencies exist on the local level, either county or municipal. Kentucky is an example of a state-level pretrial services agency. (The federal court system also has a pretrial services and probation agency that deals with federal defendants, which only amounts to five percent of criminal defendants nationwide). States and the federal government, on a case-by-case basis, provide some grant-funding for local pretrial service agencies. However, for the most part, state lawmakers, though they make laws regulating the commercial surety bail industry, are one step removed from the operations of pretrial service agencies. That does not mean they cannot make laws regulating such agencies. In fact, the critical point of this presentation is to encourage legislators to hold pretrial service agencies accountable to the taxpaying public by enacting legislation like ALEC's *Citizens' Right to Know* model bill, which can be found at the end of this paper.

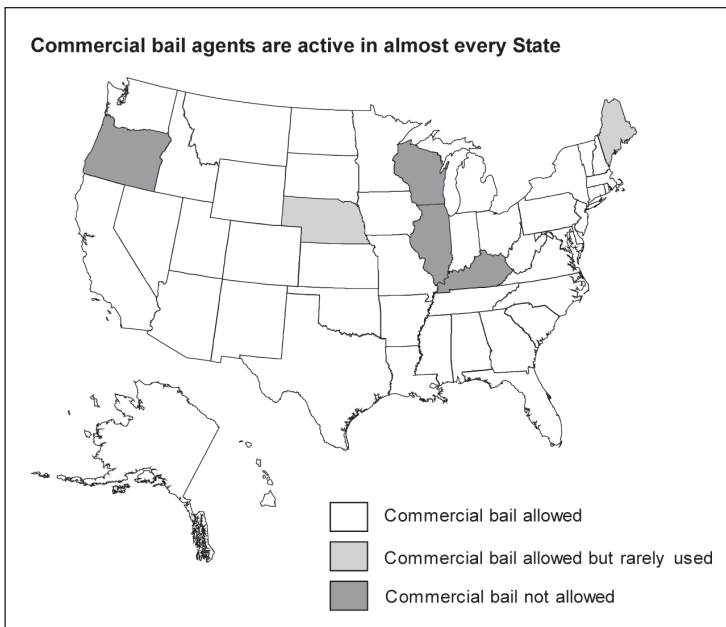
## The Benefits of Commercial Bail

Commercial bail has a long history in America. It is an outgrowth of medieval English common law in which a surety guaranteed a defendant's appearance to answer charges. Commercial bail is a natural market-driven development. Early on in American history, corporations with enough capital and authority to become surety, or the guarantor of the bond, served the public interest by providing bail for criminal defendants. In exchange for this service the surety charges a premium, which usually amounts to 10 percent of the total bond. Instead of burdening friends and family, those in need of surety could go to a company specializing in that business. There was a need for this service and private enterprise stepped in to provide it.

Furthermore, the law provides protection for the state by forcing the surety to be held accountable for the full bail amount if the defendant skips. For well over a century commercial bail has been well established and most states have enacted statutes allowing public authorities to accept it.

Types of pretrial release used in State courts			
Type of release	Defendant	Financial liability for failure to appear	Liable party
<b>Financial</b>			
Surety bond	Pays fee (usually 10% of bail amount) plus collateral if required, to commercial bail agent.	Full bail amount	Bail agent
Deposit bond	Posts deposit (usually 10% of bail amount) with court, which is usually refunded at successful completion of case.	Full bail amount	Defendant
Full cash bond	Posts full bail amount with court.	Full bail amount	Defendant
Property bond	Posts property title as collateral with court.	Full bail amount	Defendant
<b>Non-financial</b>			
Release on recognizance (ROR)	Signs written agreement to appear in court (includes citation releases by law enforcement).	None	N/A
Conditional (supervised) release	Agrees to comply with specific conditions such as regular reporting or drug use monitoring.	None	N/A
Unsecured bond	Has a bail amount set, but no payment is required to secure release.	Full bail amount	Defendant
<b>Emergency release</b>	Released as part of a court order to relieve jail crowding.	None	N/A

Source: <http://www.ojp.usdoj.gov/bjs/pub/pdf/prfdsc.pdf>



- Bondsmen do not determine who gets out of jail, they deal with the reality as they find it. They do not create the court or dictate its release policies. Contrary to the claims of their opponents, the jail’s keys never leave the hands of this nation’s judiciary.

The growth and continued robustness of the commercial bail industry is a manifestation of the natural law of private enterprise, which, left to itself, succeeds in finding the optimum way of accomplishing a goal—in this case, the release of defendants from confinement pending trial, and their return to court to answer charges.

### **The Problem with Government-Run Pretrial Services**

Touted under the slogan of “bail reform,” pretrial services did not organically develop from within the American system like commercial bail. Perhaps this explains its failure and lack of adoption by most jurisdictions.

In fact, pretrial services have survived by going into the bail bond business itself. In most areas, pretrial services end up running a financial bail bond operation, which tries to duplicate the private-sector equivalent. Despite claiming to use a non-financial means of release and sugar-coating the reality with phrases like “least restrictive means of release,” pretrial services ultimately resort to using some form of financial means of release, the most common of which is the 10 percent cash deposit bail bond. By means of this method, the defendant is released from custody after depositing with the court an amount equal to 10 percent of the bond. If all appearances are made, the court promises to refund the deposit. Unfortunately, a pretrial services 10 percent deposit bond is essentially worthless paper. In the event of an absconded defendant, the bond cannot be forfeited, unlike a commercial bond, because there is no financial backer or surety. It’s supported by nothing. No one has assumed responsibility for the 90 percent balance of the bond other than the defendant who has fled. Under this system no one pays any penalty and the state is left with no defendant and no forfeited bond.

Source: <http://www.ojp.usdoj.gov/bjs/pub/pdf/prfdsc.pdf>

What does commercial bail bring to the table?

- Bondsmen are a necessary and integral part of the pretrial process. They help the court maintain a social control over the defendant in a manner unknown to pretrial service bureaucracies. The participation of friends and relatives is vital to both the court and bondsman by providing additional follow-up to ensure the defendant’s appearance in court.
- Local law enforcement is strapped for resources and bondsmen fill the gap by apprehending absconded defendants.
- Bondsmen assist the court to resolve mistaken and erroneous court dates.
- The bonding industry helps ease jail overcrowding by taking responsibility for defendants that the court could otherwise not release.
- If a defendant absconds and is never recovered, the bondsman pays the forfeiture judgment to the state—thus providing revenues.
- A judge has an incentive to use a bondsman because the responsibility for the defendant’s release is shared with the bondsman.

Furthermore, in many instances, court costs, fines, and attorney fees are routinely deducted from the 10 percent deposit the defendant paid, effectively eliminating the promise of a refund made at the outset of the transaction.

Government entities that try to replicate the success of the free-market system invariably fail. Pretrial services are no exception. To the misfortune of jurisdictions that have pretrial services, these programs tend to focus on their release mechanism without regard for its consequences. They congratulate themselves on having a successful release system if they (1) have a 10 percent deposit bond option, (2) have other release mechanisms like *release on own recognizance*, (3) and have sidelined commercial bail. This is done without regard to the effect on detention or failure-to-appear (FTA) rates. Once pretrial services reach these goals the means become the end. In fact, such programs have proven to suffer from higher detention and FTA rates than other jurisdictions that rely on bail bondsmen.

As mentioned previously, the Bureau of Justice Statistics (BJS) has documented the track record of both pretrial services and commercial bail and compared them. The recent BJS study upholds the assertion that commercial bail is more effective in getting defendants to court and confirms that those released on secured bonds are less likely to commit crimes than those on unsecured release while back on the streets awaiting trial.

What does the Bureau of Justice Statistics conclude?

*“Compared to release on recognizance, defendants on financial release were more likely to make all scheduled court appearances. Defendants released on an unsecured bond or as part of an emergency release were most likely to have a bench warrant issued because they failed to appear in court.”*

Not only the U.S. government, but the academic community as well, has weighed in on the side of commercial bail. In April 2004, the University of

Type of release	Number of defendants failing to appear	Percent still a fugitive after 1 year
All types	54,485	28%
<b>Surety bond</b>	<b>13,411</b>	<b>19%</b>
Emergency	1,168	22
Conditional	6,788	27
Property bond	490	30
Recognizance	20,883	30
<b>Deposit</b>	<b>4,548</b>	<b>31</b>
Unsecured bond	5,018	33
Full cash bond	2,179	36

Source: <http://www.ojp.usdoj.gov/bjs/pub/pdf/prfdsc.pdf>

Chicago Law School’s *The Journal of Law and Economics* (Vol XLVII [1]) published an article entitled “The Fugitive: Evidence on Public versus Private Law Enforcement from Bail Jumping” by two economic professors, Eric Helland and Alexander Tabarrok. They conclude:

*“Defendants released on surety bond are 28 percent less likely to fail to appear than similar defendants released on their own recognizance [via PTR], and if they do fail to appear, they are 53 percent less likely to remain at large for extended periods of time... Given that a defendant skips town, however, the probability of recapture is much higher for those defendants released on a surety bond. As a result, the probability of being a fugitive is 64 percent lower for those released on surety bond...These findings indicate that bond dealers and bail enforcement agents...are effective at discouraging flight and at recapturing defendants.”*

This means the public is appreciably safer with defendants released by commercial bail rather than by pretrial services. Unfortunately the taxpayer funds the more dangerous system – pretrial services. Commercial bail not only operates more effectively and safely, but it is a private enterprise and operates at no cost to the public. In fact, it pays premium taxes to the public, and if it fails, it pays cash forfeitures to the state.

The inescapable conclusion is that (1) taxpayers fund pretrial services and (2) pretrial services increases crime. The two preceding studies demonstrate that defendants released by pretrial service agencies are more prone to commit crimes while on release, due to a lack of effective supervision, compared to those released on commercial bail.

## The Solution

Pretrial service agencies usually resist revealing their poor track records. They are, however, government agencies and therefore accountable to taxpayers. The people have a right to know if their tax dollars are being used to bail dangerous criminals out of jail and what the behavior of these criminals is once released.

Government agencies are notoriously casual, and often irresponsible, in providing information about their effectiveness either to the public or to the press. The federal government and most states have been compelled to enact freedom of information laws that require government agencies to provide information to the citizens. Most recently many states have enacted transparency laws, which require state agencies to post spending on searchable websites. As of 2008, 16 states have enacted these types of laws for state spending. In spirit with this new movement towards transparency, it only makes sense to make pretrial services more transparent and accountable.

The primary purpose of government is the protection of life and property. But information about the effectiveness of pretrial service agencies is woefully lacking. About half these agencies do not even keep track of their failures to appear. Furthermore, it is a matter of justice to the taxpayer that pretrial service agencies should keep records on those they release and make that information available to the public. Pretrial services owe an account of their stewardship to those who fund them and for whom they work: the public.

*The Citizens Right to Know* bill would right this wrong. It would demand that pretrial service agencies reveal:

- Their budgets and staffing.
- Number of and kind of release recommendations made.
- Number of defendants released and under what kind of bond.
- Number of times a defendant has been released, his FTA record, and crimes committed while on release.
- Report the above in a timely and intelligible way and make it available to the public.

This innovative ALEC model bill will provide a great service to the public by holding government agencies more accountable to taxpayers and potentially reducing crime. *The Citizens Right to Know Act* has been adopted in Texas and this year it was signed into law by Florida Governor Charlie Crist.

## **Citizens' Right to Know: Pretrial Release Act**

**Section 1. {Title.}** This Act may be cited as the "Citizens' Right to Know: Pretrial Release Act."

**Section 2. {Definitions}** As used in this Act:

A. "Annual Report" means a report prepared by a Pretrial Release Agency that accurately summarizes the effectiveness of such agency's uses of public funds

B. "Non-secured release" means any release of a defendant from pretrial custody where no financial guarantee is required as a condition of such release.

C. "Pretrial Release Agency" means any government funded program whose function includes making recommendations for the non-secured release of criminal defendants or for the release of criminal defendants on the partial deposit of bail amount.

D. "Register" means a public record prepared by the Pretrial Release Agency readily available in the clerk's office of the courthouse which displays the required data.

E. "Secured Release" means any release of a defendant from pretrial custody where a financial guarantee, such as cash or surety bond, is required as a condition of such release.

### **Section 3. {Public Record.}**

A. The Pretrial Release Agency in each county of (State) shall prepare a register displaying information regarding the cases and defendants who are recommended for release by such agency. The register shall be located in the clerk's office of the court in which the Pretrial Release Agency is located and the register shall be readily available to the public.

B. The register shall be updated on a weekly basis and shall display accurate information regarding the following information for each defendant whose non-secured release was recommended by the Pretrial Release Agency:

1. the charge against the defendant;
2. the nature of any prior criminal convictions against the defendant;
3. any court appearances required;
4. missed court date;
5. bench warrants issued; and,
6. instance of program non-compliance.

### **Section 4. {Annual Report.}**

A. Prior to the end of the first quarter of each calendar year, every Pretrial Release Agency in each county of (State) shall submit an annual report to (Applicable State Office) for the prior calendar year.

B. The annual report shall contain but not be limited to the following information:

1. the complete operating budget of the Pretrial Release Agency;
2. the number of personnel employed by the Pretrial Release Agency;
3. the total number of release recommendations made by the Pretrial Release Agency.;
4. the total number of cases reviewed by the Pretrial Release Agency;
5. the total number of cases in which non-secured release was denied by the Pretrial Release Agency.;
6. the number of defendants released on non-secured release after a positive recommendation by the Pretrial Release Agency;
7. the average period of time the defendant is incarcerated before being released on recommendation by the Pretrial Release Agency (These statistics should be classified as felonies and misdemeanors);
8. the total number of cases where the defendant was released on a non-secured release after a positive recommendation by the Pretrial Release Agency

and the defendant had at least one missed court date within one year of the date of release;

9. the total number of cases where a defendant was released on a non-secured release after a positive recommendation by the Pretrial Release Agency and a bench warrant was issued by the court on the defendant's failure to appear on a non-secured release;
10. the total number of cases where a defendant was released on a non-secured release after a positive recommendation by the Pretrial Release Agency and a bench warrant was issued by the court but remained unserved after one year; and
11. the total number of cases where a defendant was released on a non-secured release after a positive recommendation by the Pretrial Release Agency and a warrant was issued for the defendant after his or her release for additional criminal charges within one year.
12. total number of cases where a defendant was released on a non-secured release after a positive recommendation by the Pretrial Release Agency and the defendant was arrested on a new offense while on release under the Pretrial Release Agency's recommendation.

C. The annual report shall also contain an accounting of the percentage of the Pretrial Release Agency's annual budget which is allocated to steering defendants eligible for secured release toward obtaining their own release through non-government sponsored programs.

**Section 5. {Preparation of the Register and Annual Report.}** Every Pretrial Release Agency shall prepare the register and annual report out of their existing budgets, and no additional government funds shall be made available for the production of these items.

**Section 6. {Sanctions For Noncompliance.}** If the chief judge finds that the pretrial release program has not maintained the register or filed an annual report as required by Section 5, the chief judge shall:

1. For a first occurrence of noncompliance, require the pretrial release program immediately to prepare a written report explaining the noncompliance and what measures will be taken to bring the program into compliance and the date by which the noncompliance will be corrected.
2. For a second or subsequent occurrence of noncompliance, order the pretrial release program to show why it should not be sanctioned for its continued noncompliance. If pretrial release program cannot justify the continued noncompliance, the chief judge may order the program to reduce its budget by 25 per cent if it is a pretrial release program receiving public funds, and if the pretrial release program is a private entity, suspend further agency operation until full compliance is demonstrated.

**Section 7. {Severability Clause.}**

**Section 8. {Repealer Clause}**

**Section 9. {Effective Date}**

*Adopted by the Criminal Justice Task Force on July 31, 2008.*

*Approved by the ALEC Board of Directors on September 11, 2008.*

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American Legislative Exchange Council  
1101 Vermont Ave. N.W., 11th Floor  
Washington, D.C. 20005  
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