

## Commercial Surety Bail: Assessing Its Role In the Pretrial Release and Detention Decision

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*"The commercial bail system prevailing in most jurisdictions in the United States has long been criticized. . . . Two recent articles from the New Orleans Times-Picayune illustrate the reason for this tradition of criticism. The first of these recounts the complaints of commercial bail bondsmen that, because of jail overcrowding, judges have been releasing detainees who pose a low escape risk on their own recognizance or on that of someone personally connected to them. Thus, the bondsmen complain, these "bread and butter" clients are getting out of jail without having to pay the bondsmen, to the great detriment of their profits. The irony of the implication that the release system exists to enrich bondsmen rather than to secure appearance seems lost on all. To make matters worse in the bondsmen's view, continuing competition for the remaining clients forces them to consider writing bonds for higher-risk defendants, which poses a serious dilemma. Those "who don't want to take the risk of having to track down bail jumpers are seeing their profits dwindle." The unasked question is why should bondsmen profit if they are unwilling to secure the accused's appearance? The bondsmen's view of the system implied here is that it exists to provide them with low-risk profits from individuals sufficiently reliable that they could otherwise convince a judge that they are likely to appear. Thus, the system fails them to the extent that they are forced to choose between reduced profits or performing an actual service.*

(F.E. Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives*, 1991).

Reforms in pretrial release decision making in the past 30 years have helped promote the use of nonfinancial release options — such as own recognizance (OR) and conditional pretrial release — in every court system nationwide. Currently, 23 states, the federal system, and the District of Columbia mandate a *presumption of nonfinancial release* in their bail laws.<sup>1</sup> Oregon, Wisconsin, and Kentucky have abolished commercial surety bail in favor of nonfinancial release options and privately-secured money bail.<sup>2</sup>

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<sup>1</sup> Contact the Pretrial Services Resource Center for a list of these states.

<sup>2</sup> See Addendum.

These reforms have helped reduce the reliance of courts nationwide on commercial surety bail.<sup>3</sup> Data on pretrial release in the nation's most populous counties show that commercial surety bail was used in only 15 percent of felony cases in 1990<sup>4</sup> and 13 percent in 1992.<sup>5</sup> Further, in some states, defendants who once may have been subject to high surety bonds now qualify for pretrial detention under laws designed to protect public safety. In 1992, 16.6 percent of felony pretrial detainees in large counties were held under such provisions.<sup>6</sup>

Bail reform has forced the commercial surety industry to defend its role in the pretrial release process. Industry proponents regularly testify before city and county boards claiming to offer a bail option that is superior to nonfinancial releases, free to taxpayers, and responsive to public safety concerns. They also argue that pretrial services agencies — programs that help courts in many jurisdictions determine the most appropriate type of pretrial release or detention for individual defendants — should be eliminated or limited in scope to handling indigent defendants.

Proponents of commercial surety bail often support these claims with misinformation about failure to appear (FTA) rates for nonfinancial and surety bail releases. For example, in one Arizona county, these proponents argued that defendants released conditionally and supervised by the court's pretrial services agency had an FTA rate approaching 60 percent, while surety releases had a rate of only three percent.<sup>7</sup> A subsequent study by the pretrial services agency found that nonfinancial releases had an FTA rate nearly half that financial releases.

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<sup>3</sup> Surety bail's decline was noted by Celes King, former president of the Professional Bail Agents of the United States. Speaking to the *Daily News* (Whittier, California), Mr. King stated: "In the 1960s . . . the bondsmen virtually had the keys to the jail. But the pendulum now has swung the other way." (*Daily News*, "Bail Bond Trade Slumps Despite Rising Crime," February 20, 1994).

<sup>4</sup> *National Pretrial Reporting Program: Felony Defendants in Large Urban Counties, 1990* (Washington, D.C.: Bureau of Justice Statistics, May 1993), p. 8.

<sup>5</sup> *National Pretrial Reporting Program: Pretrial Release of Felony Defendants in Large Urban Counties, 1992* (Washington, D.C.: Bureau of Justice Statistics, November 1994), p. 2, Table 2.

<sup>6</sup> *Ibid.*

<sup>7</sup> Taken from testimony by Jerry Watson, Chairman of National Association of Insurance Bail Underwriters' Legislative Committee, before the Pima County Board of Supervisors, September 13, 1993.

Supporters of nonfinancial pretrial release alternatives must be prepared to counter efforts by commercial surety proponents to discredit other pretrial release options. The most practical first step is to know the arguments these proponents make and how to address them.

This monograph discusses the assertions made by proponents of commercial surety bail regarding the value of that form of pretrial release. It seeks to address the claim that a pretrial release system heavily reliant on commercial surety bail can better provide for court appearance, public safety, and cost control.

## ADVOCATES OF COMMERCIAL SURETY BAIL

While there are many local and regional groups advocating the use of commercial surety bail, three groups appear to be spearheading the agenda of these advocates nationwide. The National Association of Bail Insurance Companies (NABIC, formerly the National Association of Surety Bail Underwriters) is an association of 12 bail-underwriting insurance companies. It has “Legislative” and “Executive” Committees involved in lobbying and public relations. NABIC lobbyists have appeared at pretrial agency budget hearings and have solicited meetings with county judicial and legislative officials nationwide. They also have placed advertisements critical of pretrial services in local newspapers and sent fliers and letters to local and national legislators attacking these programs.

The American Legislative Exchange Council (ALEC) is a conservative, nonprofit organization whose membership includes 2,400 state legislators. Its biggest contribution to the surety industry is literature and “research” advocating the increased use of money bail.

*Strike Back!* is a partnership between NABIC and ALEC. Originally begun in California in 1994 as the surety bail industry’s response to a loss of business and membership in that state, *Strike Back!* now has a national agenda to place legislative restrictions on the defendants eligible for

any release short of surety bail and attempt to “show the utter failure” of pretrial services agencies and their alleged danger to the community.<sup>8</sup>

## SURETY PROPONENTS’ ASSERTIONS ABOUT COMMERCIAL SURETY BAIL

**B**elow are the most common arguments made by commercial surety bail advocates — in the context they usually appear — and the opposing facts.

*A United States Department of Justice-sponsored national study of pretrial services agencies proves that defendants “released” by these agencies have much higher failure to appear rates than defendants released on surety bail.*<sup>9</sup>

Since 1988, the United States Department of Justice’s Bureau of Justice Statistics has sponsored the National Pretrial Reporting Program (now the State Court Processing Statistics program), an ongoing survey of felony case processing in 40 of the nation’s 75 most populous counties.<sup>10</sup> In 1992, the last NPRP survey to be published by BJS, 13,206 felony cases, weighted to represent over 55,000 cases from the 75 largest urban counties, were sampled.

Among the data collected in the NPRP survey are pretrial release decision outcomes (whether defendants secure pretrial release and how) and rates of pretrial misconduct (failures to appear for scheduled court dates and rearrests). NPRP has reported varying pretrial misconduct rates for defendants securing different types of release. For example, in 1990, defendants securing conditional pretrial release and those released on surety bail had failure to appear rates of 14

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<sup>8</sup> Taken from a statement by California Bail Agents Association lobbyist Danny Walsh, *CBAA News*, Fall 1994, p. 2.

<sup>9</sup> This argument was advanced in *Strike Back!* and NABIC correspondence to mayors of cities participating in the National Pretrial Reporting Program: “The Federal Bureau of Justice Statistics has just finished an exhaustive study on the behavior of persons released pending trial on State charges . . . Among other findings, the following was reported:

1. Persons released through the taxpayer-funded methods [pretrial services agencies] are **LESS LIKELY TO MAKE THEIR COURT APPEARANCES** than are persons released through the standard “appearance guaranty” approach [commercial surety bail]. (Letter to the Hon. William A. Johnson, Mayor, Rochester, New York April 13, 1995)

<sup>10</sup> The Pretrial Services Resource Center monitors NPRP data collection and reporting for the U.S. Department of Justice.

percent.<sup>11</sup> In the 1992 survey, the rates for surety releases was 15 percent, compared to 19 percent for conditional releases.<sup>12</sup> Using these data, advocates of commercial surety bail have implied that conditionally-released defendants are actually released by pretrial services agencies and that these “pretrial services agency releases” have worse failure rates than surety releases. However, both of these assumptions are wrong.

While some pretrial services agencies have limited release authority granted through the court, none have the same release powers as a court or bail bondsmen. Any discussion of release practices must consider those of the courts and bail bondsmen.

The fact that pretrial programs are not releasing agents has been made clear by the U.S. Justice Department agency that oversees NPRP. For example, responding to letters by *Strike Back!* to federal legislators, the Director of BJS wrote: “As BJS has already told Strike Back, as well as others, its comments are based on the premise that BJS statistics identify people who have been involved with a pretrial services agency. This is not true. BJS collects state court data on felony defendants that identify the type of pretrial release used. One such type, conditional release, is defined by BJS as ‘usually’ being under the supervision of a pretrial release agency. However, there is no way to determine which defendants granted ‘conditional release’ (or any other type of release for that matter) were actually under the supervision of a pretrial release agency. BJS data also does not address the involvement of a pretrial release agency in the form of information or recommendations in any release decision by the court. BJS publishes clear definitions of each pretrial release category used in its reports. (It should be noted that the term ‘government-sponsored’ release, often used by Strike Back, is not used in any BJS publications). As currently defined, these release categories do not allow for an assessment of the performance of pretrial release agencies.”<sup>13</sup>

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<sup>11</sup> *National Pretrial Reporting Program: Felony Defendants in Large Urban Counties, 1990*, p. 11, Table 13. The 1990 NPRP sample was the first to include conditional pretrial release as a distinct release type.

<sup>12</sup> *National Pretrial Reporting Program: Pretrial Release of Felony Defendants, 1992*, page 10, Table 14.

<sup>13</sup> Letter from Jan M. Chaiken, Director BJS to the Honorable Gene Green, July 8, 1996.

In addressing letters sent by NABIC to the mayors of NPRP jurisdictions, alleging that the survey showed persons “released through the local taxpayer-funded agency” (pretrial services) had worse court appearance rates, the Chief of BJS’s Law Enforcement and Pretrial Statistics Unit wrote: “The reference to a pretrial services program is a misrepresentation of the NPRP. Upon examination of the NPRP data collection form, it is clear that while one can readily identify felony defendants released on surety bond with the NPRP data, a defendant’s involvement with a pretrial program cannot be ascertained . . . Nothing is included in the NPRP data form that would allow an analyst, including those at BJS, to determine the involvement of a pretrial release program in any case.”<sup>14</sup>

Also erroneous is the use of aggregate NPRP data results to assess all defendants released conditionally. For example, while the 1992 NPRP aggregate failure to appear rate for conditional release is 19 percent, 13 of the 28 NPRP jurisdictions where conditional release was used had failure to appear rates *below* this figure. These ranged from five percent to 16.7 percent.<sup>15</sup> Of the 25 NPRP jurisdictions where conditional and surety releases were used, 10 recorded lower failure to appear rates for conditional releases while two had rates for the release types within 0.2 percent of each other.<sup>16</sup>

A good example of how NPRP aggregate data may not apply to individual survey sites is Monroe County (Rochester), New York. *Strike Back!* and NABIC mailed correspondences to the mayor of Rochester stating that persons released “through taxpayer-funded methods” failed to appear more often. However, the 1992 NPRP survey found that defendants released conditionally and supervised by the county’s pretrial services agency had a failure to appear rate more than two-thirds *lower* than those securing release through surety bail.

Finally, as comprehensive as NPRP is, it does not capture all the factors possibly related to pretrial misconduct. As the head of BJS’s Law Enforcement and Pretrial Statistics Unit noted:

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<sup>14</sup> Letter to NPRP Site Officials from Brian Reaves, BJS, May 10, 1995.

<sup>15</sup> 1992 NPRP database (machine readable file).

<sup>16</sup> *Ibid.*

“Of course, this study cannot control for factors that may be relevant to both the pretrial release decision and the pretrial conduct of released defendants, if they are not collected by the NPRP. Some examples of such factors are employment status, income, educational background, and drug abuse history. *It is also important to note that no analysis of NPRP data, no matter how exhaustive, will provide insight into the performance of pretrial release programs.*”<sup>17</sup> (Emphasis added).

It also should be noted that the only other multi-jurisdictional failure to appear study, sponsored by the Department of Justice and conducted in 1981 by The Lazar Institute, found that the average failure to appear rates for nonfinancial releases was 12.2 percent compared to 13.6 percent for financial releases.<sup>18</sup> Moreover, a 1992 study of pretrial release in Connecticut found that statewide, 11 percent of defendants released conditionally failed to appear compared to 15 percent of defendants released financially.<sup>19</sup>

***As entrepreneurs, bail bondsmen must do well to stay in business. In fact, as business people, bondsmen cannot afford a failure to appear rate above three percent. Therefore, bondsmen must carefully select whom they release.***<sup>20</sup>

By necessity, the most important criterion for bondsmen in choosing defendants for release is the person’s ability to pay a bail premium: this is how bondsmen make a profit. The higher the premium, the more likely the bondsman (as a business person) will be to secure a defendant’s release, regardless of the charge. For example, data from NPRP found that in 1992, when bonds were set from \$10,000 to \$20,000, release rates were higher for violent-charged defendants (44 percent) than for those charged with property (24 percent) or public order offenses (34

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<sup>17</sup> *supra.*, note 13.

<sup>18</sup> The Lazar Institute, *Pretrial Release: A National Evaluation of Practices and Outcomes: Summary and Policy Analysis Volume* 1981, p. 15.

<sup>19</sup> Justice Education Center, Inc., *Alternatives to Incarceration Phase I: Pretrial Evaluation* (August 1993).

<sup>20</sup> This view is reflected in an article by Gerald P. Monks, former director of the Professional Bail Agents of the United States: “We are the only ones (commercial surety bail bondsmen) in the criminal justice system who have an economic reason to guarantee the defendant’s appearance in court. If they don’t show up, we go broke.” (Gerald P. Monks, *Caring Little Men Win, Big Bureaucracy Boys Lose!*, March 19, 1991).

percent).<sup>21</sup> In 1988, when bonds were set above \$20,000, defendants charged with drug offenses such as sale and trafficking were likelier to secure release than defendants charged with public-order crimes, 47 percent to 32 percent. However, drug-charged defendants were twice as likely to fail to appear.<sup>22</sup>

A release decision based mainly on a defendant's financial status is critically different from the assessment of release suitability used by the criminal justice system. While bondsmen primarily are interested in profit, courts are concerned with a defendant's potential for failure to appear or possible threat to public safety.

The emphasis on a financial criterion for pretrial release also illustrates perhaps the most disturbing aspect of commercial surety bail. When the court sets a surety, the actual release decision passes from an official accountable to the public to an entrepreneur accountable to no one. A judge may set a small bail intending the defendant to be released quickly or a large bail to make release unlikely. But a bondsman may focus on the higher bond since he will make the most profit there. In either case, the judicial intent is thwarted, resulting in unnecessary pretrial detention or the release of a high-risk defendant.

***Bondsmen have a strong financial incentive to locate and apprehend absconders.***<sup>23</sup>

This argument assumes that jurisdictions supervise bondsmen actively and require forfeiture of bail on surety absconders. While most states have guidelines for surety bail and bond forfeitures, regulation often is difficult or lax. For example, as of June 1996, the Florida Department of Insurance, which regulates commercial surety bondsmen in the state, had five staff persons assigned to oversee the state's nearly 1,000 licensed bondsmen.

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<sup>21</sup> *National Pretrial Reporting Program: Pretrial Release of Felony Defendants 1992*, p.4, Table 3.

<sup>22</sup> Bureau of Justice Statistics Bulletin, *National Pretrial Reporting Program: Pretrial Release of Felony Defendants 1988* (Washington, D.C.: U.S. Department of Justice, February 1991), p. 1.

<sup>23</sup> See, for example, "Rethinking Bail," a monograph by the Free Congress Foundation, a group supporting the use of commercial surety bail: "If a defendant 'skips,' the bail agent has time, and a financial incentive, to find him and bring him in." (Free Congress Foundation, "Rethinking Bail," *Policy Insights*, Number 201., p. 1).



A 1986 study on bail bonding in Fairfax, Virginia, Indianapolis, Indiana, Memphis, Tennessee, and Orlando, Florida concluded: “Although state insurance departments typically have regulatory authority over the bonding activities of at least the bondsmen who are agents of insurance companies, many of these departments have very little knowledge of bonding activities as a whole. There are several reasons for this. First, some states view bail bonding as simply one aspect of the entire insurance industry and do not single it out for special attention. Second, in other states where insurance departments regulate only the agents of insurance companies, many bondsmen may be unaffiliated with such companies. Finally, some states give the primary authority for regulating bail bondsmen to the local courts.”<sup>24</sup>

The study also quoted bondsmen estimates that only one to two percent of the face value of bails written actually were forfeited.<sup>25</sup>

The West Memphis, Arkansas *Evening Times* reported that uncollected bond forfeitures in the Crittenden County Quorum Court dating back to January 1995 totaled \$2,142,400.<sup>26</sup> The *Houston Chronicle* reported 20,000 outstanding bond forfeitures filed in Harris County, Texas between 1985 and 1991 and as much as \$100 million in unpaid forfeitures dating from the 1960s.<sup>27</sup> The *Valley Morning Star* (Harlingen, Texas) reported that court officials in Cameron County, Texas collected \$42,085 in bond forfeitures from 1990 to 1992, just over five percent of the total owed by bondsmen. Larger bail bond agencies “owned by lawyers who made political contributions paid proportionately less in forfeitures than smaller companies.”<sup>28</sup>

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<sup>24</sup> Mary A. Toborg, et al, *Commercial Bail Bonding: How it Works (Summary of Final Report)* (Washington, D.C.: Toborg and Associates, April 1986), p. 7.

<sup>25</sup> *Id.*, p. 21.

<sup>26</sup> “Payoff slow on forfeited bail bonds,” *Evening Times*, June 25, 1996.

<sup>27</sup> *Houston Chronicle*, July 21, 1991.

<sup>28</sup> *Valley Morning Star*, December 12, 1993.

Further, bondsmen can demand collateral equal to the full bail amount — if the defendant fails to appear, the potential loss from a forfeiture is covered. As one Washington, D.C. bondsman explained: “On a \$10,000 bond, I can ask for \$11,000. If he [the defendant] doesn’t show, the court gets the \$10,000 and I keep my \$1,000.”<sup>29</sup> This practice effectively eliminates any incentive the bondsman has to apprehend the absconder.

Regarding the assertion that bondsmen and their agents actually bring in absconders, a committee of the Illinois legislature considered this claim 30 years ago and concluded that “with the nation-wide exchange of information between law enforcement agencies and the F.B.I., the average bail jumper has little chance of escape.”<sup>30</sup> Given the current nation-wide systems for exchange of information between law enforcement agencies that chance has diminished even further.

Research on fugitivity by release type is mixed. NPRP data for 1992 show that the *fugitive rate* (defined as the percent of released defendants who failed to appear and were not returned to court after one year) for surety releases is slightly lower than for conditional releases, three percent to five percent.<sup>31</sup> On the other hand, a 1987 study of pretrial release in Durham, North Carolina found that the percent of fugitives released on surety was nearly twice as high as for other releases, 26 percent to 14 percent.<sup>32</sup>

However, most research suggests that bondsmen do little to bring in absconders. For example:

A 1972 study of 1,000 surety release absconders in Los Angeles found that in 89 percent of the cases, police apprehended bail absconders with no help from bondsmen. In only

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<sup>29</sup> “Unpaid Forfeitures Changing D.C. Bail Bond Business,” *The Washington Post*, October 5, 1991.

<sup>30</sup> Committee Comments — 1663, Ill. Ann. Stat., c. 38, p. 300.

<sup>31</sup> *National Pretrial Reporting Program: Felony Defendants in Large Urban Counties, 1992*, p. 10, Table 14.

<sup>32</sup> Stevens H. Clarke and Miriam S. Saxon, *Pretrial Release in Durham, North Carolina* (Chapel Hill, N.C.: Institute of Government, University of North Carolina, 1987), pp. 29 - 30.

six percent of cases did a bondsman locate and arrest an absconder without police assistance.<sup>33</sup>

- A 1991 news article reported that nine out of 10 absconders on bail bonds in Harris County, Texas were returned by the police.<sup>34</sup>
- A 1994 survey of bond forfeitures by the Pima County Pretrial Services Agency found that nearly all absconders were brought back to court by law enforcement.<sup>35</sup>

*A surety bondsman's services are free to taxpayers.*<sup>36</sup>

The costs of commercial surety bail go beyond dollars and cents. Perhaps the greatest cost is the court's surrender of its release power to private interests. When this occurs, release no longer depends on an individual's suitability as defined by law, but his or her ability to pay a bail. As the American Bar Association's (ABA) Standards on Criminal Justice note:

*Indeed, the central evil of the compensated surety system is that it generally delegates public tasks to largely unregulated private individuals. Thus, although courts as a matter of form determine whether and on what conditions defendants should be released pending trial, in practice private sureties can override judicial orders by refusing to write bail bonds or surrendering bailed defendants at will.*<sup>37</sup>

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<sup>33</sup> Office of the County Counsel, "Survey of County Counsel Case Files of Actions to Exonerate Bail Forfeiture" (Los Angeles, CA: Office of the County Counsel, 1972). (Taken from Wayne H. Thomas, Jr., *Bail Reform in America* (Berkeley, CA: University of California Press, 1972), pp. 255 - 256).

<sup>34</sup> *Houston Chronicle*, July 21, 1991.

<sup>35</sup> Memorandum from Kim M. Holloway, Director Pima County Pretrial Services, to Mike Boyd, Chairman of the Pima County Board of Supervisors, February 10, 1994, p. 6.

<sup>36</sup> See, for example, the American Legislative Exchange Council, "Bail Reform: Restoring Accountability to the Criminal Justice System": "Utilizing the private bail system greatly improves the criminal justice system because the cost of the person's release is borne by the arrested person — not the taxpayer." (*The State Factor*, Volume 20, Number 1, January 1994).

<sup>37</sup> *Id.*, p. 115.

Making release dependent on financial ability also reduces the fairness of the bail decision. As stated by the *News & Record* (Greensboro, North Carolina):

*In practice, bail becomes an insurmountable obstacle for too many arrestees for whom the risk of flight or further crimes is low. Too often, the decision to tie up a jail bed at taxpayer expense is made by a bail bondsman with absolutely no regard for the public interest. Incredible as it seems, some prisoners await trial in jail because they are too harmless and therefore their bail is set too low to be financially interesting to a bondsman.*<sup>38</sup>

Another cost of surety bail is the corruption associated with its practice:

*The essence of the bail bond practice is to get a person out of custody who posts a bond that the person buys from the bondsman. To get the good risks and the “cream of the crop” — that is, those who are most likely to reappear in court — bondsmen have to get there first, before another bondsman or a court release officer . . . In order to do that, the prisoner has to know about and call the bondsman. How does the prisoner know the name of the bondsman? He gets it from the cop who arrested him. How does the cop make the referral? He has the business cards given to him by the bondsman in exchange for drinks after work, tickets to the ball game, dinner, a weekend at a beach cottage, and so on.*<sup>39</sup>

Surety bail’s record of abuse also is cited in the National District Attorneys Association’s (NDAA) *National Prosecution Standards*:

*The private bail bondsmen system has, however, been very prone to abuse. The system is criticized for four major shortcomings: (1) the high cost of securing a bondsman, (2) the discriminatory practices of many bondsmen and their power to*

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<sup>38</sup> “Our Crowded Jails” (Editorial) *News & Record* (Greensboro, North Carolina), June 26, 1990.

<sup>39</sup> Testimony of the Honorable Judge William C. Snouffer on February 8, 1989 opposing Oregon House Bill 2263.

*determine who shall be eligible for pretrial release, (3) the corruption that the system spawns, (4) the inability of bondsmen to insure appearance as well as less costly and complicated system(s).*<sup>40</sup>

The ABA Standards also describe commercial surety bail's history of corruption and abuse:

*Historically, the commercial bond business has been one of the most tawdry parts of the criminal justice system. Although the extent of corruption involving sureties has probably been exaggerated, by its very nature, the bail bond business is always vulnerable to predatory and illegal practices . . . A system of public prosecution ought not to depend upon private individuals using personal means to bring defendants before criminal courts; it is not surprising that such a system leads to abuse.*<sup>41</sup>

In an opinion affirming Wisconsin's ban on compensated sureties, an appeals court noted that private individuals acting as sureties are distinct from commercial sureties since they cannot subvert the judicial process nor "have the same business opportunity to corrupt police and officials as does a professional bondsman."<sup>42</sup>

Examples of abuses by surety bondsmen and their agents are many, including:

- A District of Columbia Superior Court clerk was convicted of altering court records to help bail bondsmen avoid \$47,500 in bail forfeitures. The clerk received money from various bondsmen to alter court documents, making it appear that bond forfeitures had been waived. (*The Washington Post*, February 6, 1993).

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<sup>40</sup> National District Attorneys Association, *National Prosecution Standards*, (1977) Standard 10.8, p. 142.

<sup>41</sup> American Bar Association, *Criminal Justice Standards: Chapter 10, Pretrial Release*, Standard 10-5.5, Compensated Sureties (1985) pp. 114-115.

<sup>42</sup> *Kahn v. McCormack* (App 1980) 299 N.W. 279.

- A board of Circuit Court judges in Utah ordered a bail bonding company to shut down for 10 days, following charges that a partner in the company offered to post bond for a client in exchange for sex. (*Salt Lake Tribune*, July 15, 1992).
- Two West Virginia state legislators with ownership interests in bail bond companies weakened a bill aimed at providing uniform procedures for bail bondsmen. The legislators eliminated a provision allowing defendants to post their own bonds to the court and a prohibition on bondsmen loaning money to defendants to cover their 10 percent fee. (*Berkeley Register-Herald*, February 28, 1990).
- Two bounty hunters were convicted of robbing and kidnaping two alleged drug dealers in Memphis, Tennessee. Police arrested the pair after one of the victims recognized one of the men as the person who had arranged her bail on a drug charge. (*Memphis Commercial-Appeal*, January 24, 1990).
- A City of Richmond, Virginia police officer, explaining why the reputation of bounty hunters with law enforcement “isn’t that great,” recalled an incident where a bounty hunter beat a suspect bloody, handcuffed him, threw him in a car, and drove away. The officer stated, “I don’t believe one man’s civil rights take a back seat to his being arrested for jumping bond.” (*Richmond Metropolitan Monthly*, April 1994).

Clearly the criminal justice system gains nothing from bonding for profit and, in fact, loses a great deal — such as integrity and equal treatment before the law — by maintaining such an anachronistic practice.

Finally, proponents of surety bail assert that a cost *savings* occurs for the taxpayer whenever a bondsman takes a defendant out of jail. But available evidence does not show any such relationship. States that have abolished commercial surety for profit, for example, have local jails no more (or less) crowded than states that continue the practice. The argument that the increased use of commercial surety bail will decrease the jurisdiction’s jail population simply is

not true. In fact, relying on bondsmen to decide who gets out of jail and who remains may help *cause* unnecessary and expensive pretrial detention.

## SURETY PROPONENTS' ASSERTIONS AGAINST PRETRIAL SERVICES AGENCIES

Commercial surety bail proponents see the decline of their industry tied directly to the increased role of pretrial services agencies. Besides extolling the “advantages” of commercial surety bail, these proponents often attack pretrial agencies as huge, expensive, and irresponsible bureaucracies. As mentioned earlier, most of these arguments involve mis-use of NPRP data. Below are other attacks made against pretrial agencies.

***Pretrial release programs have failed because they have gone beyond their original mandate — providing release for defendants who cannot afford money bail.***

Eliminating the financial inequities of surety bail was but one goal behind the bail reform movement that created pretrial services agencies. A much broader aim was *ensuring that conditions of pretrial release or detention were suited to the circumstances of individual defendants and based on the least restrictive options needed to ensure appearance and, when applicable, public safety.*

Most bail laws recognize that for many defendants (regardless of economic status), adequate assurance of court appearance and public safety can be met through nonfinancial release. These laws also relegate money bail to cases where nonfinancial alternatives cannot reasonably ensure against failure to appear. As one court ruled:

*The [Bail Reform] Act creates a presumption in favor of releasability on personal recognizance or upon the execution of an unsecured appearance bond. It is “only if ‘such release will not reasonably assure the appearance of the person as required’ that other conditions of release may be imposed.” Congress has established a hierarchy of less favored conditions which may be considered, but which may be utilized only in the event that no preferred condition is deemed*

*adequate to assure appearance. And so it is that the imposition of a money bond is proper only after all other nonfinancial conditions have been found inadequate.*<sup>43</sup>

Since the purpose of bail setting is to use the least restrictive means needed to assure appearance and safety, the proper “scope” of pretrial services agencies is to provide the courts with the information needed to determine appropriate bail for *all* defendants.

***Pretrial services agencies are a major cause of crime.***<sup>44</sup>

This argument assumes that pretrial services agencies release defendants. As stated earlier, this is not so — courts set conditions of pretrial release or detention. This aside, research shows no real difference in rearrest rates between defendants the courts release conditionally and those who post sureties. NPRP results for 1992 show that surety releases had a nine percent rearrest rate while conditional releases had a 10 percent rate.<sup>45</sup> A 1992 study of pretrial release in Connecticut found that 10 percent of conditional releases were rearrested compared to 17 percent of financial releases.<sup>46</sup>

The 1990 NPRP survey showed the rearrest rate for persons released conditionally was 11 percent and 13 percent for surety releases. Seven percent of all conditional releases were rearrested on a new felony charge, compared to nine percent of surety releases.<sup>47</sup>

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<sup>43</sup> *U.S. v. Leathers* 412 F.2d 169 (1969), 171. (Citations omitted).

<sup>44</sup> See, for example, *The Bailbond Chronicles*, a newsletter published by surety bail advocates: “All we hear about now is crime and violence, but one of the major causes of crime in this country is **‘PRE-RELEASE’** [emphasis in original].... Crime will continue to grow, as long as these agencies hoodwink their county commissioners, and governing bodies to give them funds to operate their agency to release these criminals without bail.” (“Pre-Release Agencies Major Cause of Crime,” *The Bailbond Chronicles*, Winter Edition 1993 (Volume 4, No. 4), p. 1.)

<sup>45</sup> *National Pretrial Reporting Program: Pretrial Release of Felony Defendants, 1992*, p. 11 Table 15.

<sup>46</sup> Justice Education Center, Inc., *Alternatives to Incarceration Phase I: Pretrial Evaluation* (August 1993).

<sup>47</sup> *National Pretrial Reporting Program: Pretrial Release of Felony Defendants, 1990*, p. 9 Table 13.



## NATIONAL PERSPECTIVES ON PRETRIAL SERVICES AGENCIES

The protests of the commercial surety industry aside, there is a general acknowledgment of the importance of pretrial services agencies in the criminal justice system. Speaking before a U.S. House of Representatives sub-committee in 1990, a National Association of Counties (NACo) official stated:

*Pretrial services programs are established mechanisms for assisting jurisdictions to make informed decisions as to which arrestees can be safely released to the community with supervision to await trial and which should be held in jail.*<sup>48</sup>

In one of its publications, the U.S. Department of Justice “encourage(d) state and local agencies to consider use of block grant funds from the Anti-drug Abuse Act of 1988 to establish new pretrial services programs. The benefits to the public, the offender and the criminal justice system can be substantial.”<sup>49</sup> The publication went on to describe pretrial services agencies as: “proven, effective ways to assist the court in selecting and monitoring defendants who pose little danger to the community if released. The need to identify these defendants correctly has become more crucial as jail populations increase and the problem of drugs and crime continue to drain scarce justice system resources.”<sup>50</sup> In another publication, the Department noted:

*Formal pretrial services agencies provide an extremely valuable service to prosecutors and the courts by conducting a thorough risk assessment, recommending pretrial disposition and performing intensive monitoring of the arrestee. Such agencies are critical in effectively serving as coordinator*

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<sup>48</sup> Testimony of the Honorable Mark Ravenscraft before the House Sub-Committee on Government Information, Justice, and Agriculture of the Committee on Government Operations, April 14, 1990.

<sup>49</sup> Bureau of Justice Assistance, *Pretrial Services Program Brief* (Washington, D.C.: U.S. Department of Justice, 1990).

<sup>50</sup> *Id.*, p. 4.

*between the system and various programs that fall in the category of intermediate sanctions.*<sup>51</sup>

The ABA Standard for pretrial release:

*... rests on a hypothesis that pretrial incarceration should never be resorted to without first exhausting the possibilities of adequate supervision for defendants on conditional release. Conversely, it is equally indefensible to release criminal defendants who might commit new, and in particular dangerous, offenses pending trial without also taking reasonable steps to protect the community against that danger. The standard, therefore, recommends that every jurisdiction establish a pretrial services agency or similar facility, empowered to provide supervision for released defendants.*<sup>52</sup>

The U.S. Congress recognized the importance of pretrial services agencies when it expanded these agencies from ten demonstration sites to all federal districts in 1980. The Senate Committee on the Judiciary recognized the support for this move from the Judicial Conference of the United States, the NDAA, the American Correctional Association, the National Association of Counties, and the National Advisory Commission on Criminal Justice Standards and Goals.<sup>53</sup> The Committee also noted that analysis of the demonstration pretrial agencies by the Administrative Office of the United States Courts, the Federal Judicial Center, and the General Accounting Office “indicate that pretrial services agencies perform functions essential to the bail process.”<sup>54</sup>

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<sup>51</sup> *Edward Byrne Memorial State and Local Law Enforcement Assistance Program: FY 1991 Discretionary Program Application Kit*, “Enhanced Pretrial Services Documentation,” February 1991 (p. 233).

<sup>52</sup> American Bar Association, *Criminal Justice Standards; Chapter 10, Pretrial Release* (1985) pp. 25 - 26.

<sup>53</sup> U.S. Senate Committee on the Judiciary, *Pretrial Services Act of 1980: Report* (No. 96-982), p. 12.

<sup>54</sup> *Id.* at p. 11.

Colorado, Georgia, Illinois, Kentucky, Oregon, Virginia, and the District of Columbia have legislation similar to the federal system mandating or encouraging the establishment of pretrial services agencies.

## NATIONAL PERSPECTIVES ON SURETY BAIL

Three national criminal justice associations and one U.S. Department of Justice Commission have released criminal justice standards that recommend eliminating commercial surety bail. Excerpts from these standards appear below.

From the ABA's *Criminal Justice Standards*, Chapter 10: Pretrial Release; Standard 10-5.5, Commentary (1985, p. 113):

*Compensated sureties should be abolished. Pending abolition, they should be licensed and carefully regulated.*

From the NDAA's *National Prosecution Standards, Second Edition*: Pretrial Release (1991, p. 149):

*This edition of the standards continues the recommendation that compensated sureties be abolished. Indeed, the institution of bail bondsmen has greatly declined since the promulgation of the original standards in 1977 and there is little reason to believe this trend will be reversed in the 1990's.<sup>55</sup>*

From the National Association of Pretrial Services Agencies' (NAPSA) *Performance Standards and Goals for Pretrial Release and Diversion: Release* (1978, p. 25):

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<sup>55</sup> The NDAA's position was even more strongly worded in its original standard: "Recent analysis, beginning with the Vera Institute studies in the early 1960's have documented and expounded the basic weakness of money bail. Cash bail systems have been shown to be highly discriminatory, favoring the rich and punishing the poor and indigent — in spirit violating the concept of equal protection. Further, this system of release has not proven itself more effective in insuring trial appearance than any of the less complicated or less costly systems... there are strong arguments and statistical evidence to suggest that the bail bond system is no more successful in assuring trial appearance than other systems." National District Attorneys Association, *National Prosecution Standards*, Chapter 10: Pretrial Release, Commentary (1977, pp. 140 and 143).

*The constitutional policy, and practical advantages of nonfinancial release over the traditional money bail system, together with the successful use of nonfinancial pretrial release conditions as an effective method for assuring court appearances support the elimination of money bail as a condition of release . . . Further, the availability of detention orders . . . enables the court to detain high risk defendants without the hypocrisy of resorting to the imposition of high money bail.*

The National Advisory Commission on Criminal Justice, appointed in 1973 by the U.S. Department of Justice, also called for eliminating commercial surety bail, stating:

*. . . whatever steps might be appropriate to insure appearance, the Commission vigorously endorses the removal of professional bondsmen from the entire area of pretrial release.<sup>56</sup>*

Criminal justice professionals are nearly unanimous in the belief that commercial surety bail is an archaic system. Reliance on private business persons does not improve defendant appearance in court nor safeguard public safety. Most bondsmen do not bring back defendants who abscond nor are held liable financially for failures to appear. Moreover, the abuses seemingly inherent in the system and the inequity of relying on financial ability rather than suitability for release suggest that surety bail is counterproductive to ensuring equal treatment under the law and the integrity of the criminal justice system. This is made even clearer by the existence of pretrial release options that address appearance and safety concerns without the problems inherent in commercial surety bail.

## STRATEGIES FOR ADDRESSING SURETY BAIL PROPONENTS' ASSERTIONS

***Frame the argument about pretrial release options to reflect the real issues.***

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<sup>56</sup> National Advisory Commission on Criminal Justice Standards and Goals: Courts, Standard 4.6, 1978, p. 83.

Proponents of commercial surety bail have attempted to gain control of the debate on pretrial release options by defining the argument's terms. This has put supporters of nonfinancial release alternatives on the defensive, answering charges of high failure rates and cost instead of presenting the subject's real issues. To move the discussion toward the real issues, advocates of nonfinancial release alternatives should stress the following points:

- *Pretrial services agencies have a legitimate and important role in criminal justice, a role surety bondsmen cannot play:* Pretrial services agencies help improve the release/detention decision by giving the court complete, accurate, and non-adversarial information. These agencies also monitor defendants the court believes are inappropriate for own recognizance release (OR) but not risky enough for detention. These are functions commercial surety bondsmen do not perform.
- *Comparisons of release decisions and their outcomes should be made between bondsmen and judicial officers, not bondsmen and pretrial services agencies:* Once a surety bail is set, a bondsman's release power is actually comparable to the court's. Conversely, the role of the pretrial services agency is not to release, but to help the court make the most informed bail decision. This is similar to the role a probation agency plays when it submits a pre-sentence investigation before sentencing.
- *Pretrial services agencies are more responsible in screening defendants for the court than surety bondsmen are in releasing defendants:* Pretrial services agencies check defendants' backgrounds, including court appearance and supervision history, before submitting information for the court to use to determine appropriate release or detention. Many agencies also use risk assessments validated through local research to recommend release or detention. By contrast, the primary criterion for a bondsman's release consideration is often the defendant's ability to post bail. The laxity of bail forfeiture enforcement — and the bondsman's ability to demand collateral equal to the full bail amount — lessen their concern about failures to appear.

***Collect and keep accurate local pretrial data.***

Jurisdictions should keep current data on pretrial release, failure to appear, and rearrest rates. These data should be for *all* release types, including surety and other financial bails to establish accurate rates for each release option.

***Keep up with literature on bail bonding and pretrial release.***

Pretrial agencies should keep a library of material on pretrial release and bail bonding. For example, NPRP/SCPS reports are available through the Justice Statistics Clearinghouse (1-800-732-3277). NPRP/SCPS data and *The Pretrial Reporter*, a bi-monthly newsletter covering pretrial and jail overcrowding issues, are available through the Pretrial Services Resource Center. Other sources of information include:

- The state's bail statute, local court rules, and court cases dealing with pretrial release and detention.
- NAPSA: The national association publishes *NAPSA News*, which reports on national and local actions of interest to pretrial services practitioners, and holds an annual pretrial services conference.
- Pretrial release standards and positions of major criminal justice associations, such as the ABA, NDAA, and NAPSA.
- The March 1993 edition of *Federal Probation*, which focuses on pretrial services agencies.<sup>57</sup>

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<sup>57</sup> This is available through the Administrative Office of the U.S. Courts (202 273-1620).

*Commercial Bail Bonding: A Comparison of Common Law Alternatives* (New York: Praeger Publishers, 1991) by Dr. Frank E. Devine. This book compares the American commercial bail system to other pretrial release mechanisms used worldwide.

***Enlist support of others who are opposed to commercial surety bail.***

Many actors within and outside criminal justice have spoken out against expanding the commercial surety bail system. When the Milwaukee County Board's Committee on Legislation considered whether to support re-introducing commercial surety bail in Wisconsin, the county's District Attorney testified against the measure:

*Having spent 15 years under both systems [with commercial sureties legal and with them abolished] . . . I just think in terms of the overall system, we're better off without them [commercial surety bondsmen].<sup>58</sup>*

The *Milwaukee Journal* expressed a similar opinion earlier (July 24, 1993):

*As a rule, bondsmen select inmates with high bail amounts who can offer collateral to cover the remainder. Low income defendants, no matter how worthy they may be as bail candidates, can expect to sit while high-risk defendants with access to cash go free . . . Bail bonding programs in other states are notorious sources of corruption. Most telling, states that allow bail bondsmen find their jails just as crowded as Wisconsin's.*

When the Oregon legislature considered re-introducing commercial surety bail in the state, a Multnomah County (Portland) judge testified against the measure:

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<sup>58</sup> Testimony of E. Michael McCann before the Milwaukee County Board Legislative Committee, September 16, 1993. The measure of support was defeated six votes to one.

*Bail bondsmen are a cancer on the body of criminal justice — they cannot and do not help improve it. And they will not save money for the system — they will make it more costly to the public as a group and to citizens individually.*<sup>59</sup>

When commercial surety bail lobbyists attacked the pretrial program in Pima County (Tucson), Arizona, the program received help not only from its chief judge and sheriff, but also a local newspaper:

*Giving bondsmen more authority would discriminate against poor people who can't afford their services. Bondsmen have no incentive to recommend that people awaiting trial, whether they can afford bondsmen's services or not, be released on their own recognizance — without having to post a bond. And it would allow bondsmen, instead of judges, to have a major hand in deciding who goes to jail and who goes free. Law enforcement officials recall the days before Pretrial Services when jails were bursting at the seams with petty offenders who couldn't afford to post bail . . . If bondsmen took over today, deputies predict, the situation would recur. And that would cost taxpayers far more than the current bill for Pretrial Services, which saves the taxpayers up to \$10 million annually by keeping people out of jail. Profit motives don't blend well with the goals of equal justice. And profit-driven bondsmen should not be allowed to take over Pretrial Services.*<sup>60</sup>

Responding to bondsmen assertions that the “private sector” could better secure future appearance than “taxpayer-funded agencies,” The Houston Chronicle wrote:

*“If the private sector can do as good or better job, why should the be government be doing it?”  
.... Well, private bonding companies do not arrange bail for indigent defendants; the Pretrial Services Agency does. Private companies make bail for just about anybody who can pay their*

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<sup>59</sup> Testimony of the Honorable Judge William C. Snuffer on February 8, 1989 opposing Oregon House Bill 2263. The bill did not pass.

<sup>60</sup> *Arizona Daily Star*, July 30, 1993.



*fees; the Pretrial Services Agency grants bonds only to those most likely to abide peacefully in the community and show up for trial. Private companies do not advise the court about the backgrounds and criminal records of defendants; the Pretrial Services Agency does. When the jail is crowded, private companies do not search out defendants who are likely candidates for pretrial release but who haven't been able to make bond; the Pretrial Services Agency does.*<sup>61</sup>

***Educate others about the benefits of pretrial services agencies.***

Pretrial agency managers should educate others about their agency's role and its benefits to the entire criminal justice system. The more other actors know about these benefits, the more apt they are to offer their support when it is needed.

New members of *the judiciary* should know that pretrial services agencies provide information vital to assessing a defendant's potential for pretrial misconduct. This includes verified background information and criminal histories often not available from other sources, certainly not from bondsmen. Moreover, pretrial agencies offer the court a valid release alternative to OR and detention on bail — supervised pretrial release — as well as a court date notification system.

*Corrections* officials should understand that a pretrial services agency can help reduce needless pretrial detention by recommending a reasonable alternative to high money bail. Information collected by the pretrial program also can help jail officials classify inmates for placement in the jail.

*The public* should know that, by presenting accurate information on an individual's potential for misconduct, the pretrial agency helps enhance public safety by identifying defendants who may be detained pretrial. By offering an alternative to detention for eligible defendants, these agencies help reduce society's cost for managing its criminal justice system.<sup>62</sup>

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<sup>61</sup> Editorial, *Houston Chronicle* June 9, 1996

<sup>62</sup> Pretrial agencies should have material — such as pamphlets or brochures — readily available. This material should describe the agency, its goals, and benefits to the criminal justice system and the public. Agency officials also should develop ties with private groups interested in criminal justice.

*The media's* first exposure to a pretrial services agency should not result from attacks by bail bondsmen. Pretrial administrators should alert the media to their agency's goals and benefits to the criminal justice system. Administrators also should foster relationships with the media and "feed" positive information on release rates and successes of released defendants.

***Cite other types of financial release.***

When the court believes financial bail is needed, pretrial agencies should cite other types of money bail that are not as inherently abusive as surety bail. One example is *deposit bond*, where defendants post a percent of the bail's face amount directly to the court. If the defendant appears in court as required and abides by any conditions ordered, he or she receives the posted amount back. In some jurisdictions, the court keeps part of the posted amount as an administrative fee.

## CONCLUSION

Over the past 30 years, a simple "release/detain" approach to bail has evolved into a system offering judicial officers a range of options to meet the risks presented by individual defendants. This has led to a more equitable system of pretrial release and detention and less dependence on a release option — commercial surety bail — many believe should be limited, if not abolished. However, while losing their near monopoly on pretrial release, bondsmen and their allies still have the power in many jurisdictions to influence local decision makers who must cut costs and who are often unfamiliar with issues of pretrial release. Supporters of nonfinancial alternatives to surety bail must ensure that, in searching for ways to solve current problems and manage dwindling resources, decision makers avoid embracing old and discredited approaches.

## ADDENDUM

***Wording of state bail laws limiting or outlawing commercial surety bail:***

From the *Kentucky Revised Statutes*, Volume 16, §431.510 (a) (b):

It shall be unlawful for any person to engage in the business of bail bondsman as defined in KRS 304.34-010 (1), or to otherwise for compensation or other consideration:

- (a) furnish bail or funds or property to serve as bail; or
- (b) make bonds or enter into undertakings as surety; for the appearance of persons charged with any criminal offense or violation of law or ordinance punishable by fine, imprisonment or death, below any of the courts of this state, including city courts, or to secure the payment of fines imposed and of costs assessed by such court upon a final disposition.

From the *Oregon Code*, Title 14, §135.245 (3), (4), and (6):

- (3) The magistrate shall impose the least onerous condition reasonably likely to assure the person's later appearance. A person in custody, otherwise having a right to release, shall be released upon the personal recognizance unless release criteria show to the satisfaction of the magistrate that such release is unwarranted.
- (4) Upon a finding that release of the person on personal recognizance is unwarranted, the magistrate shall impose either *conditional release* or *security release* . . .
- (6) This section shall be liberally construed to carry out the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the defendant.<sup>63</sup>

From the *Wisconsin Annotated Statutes*, Chapter 969, § 969.12, Sureties

- (2) A surety under this chapter shall be a natural person, except a surety under s. 345.61. No surety under this chapter may be compensated for acting as such a surety.<sup>64</sup>

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<sup>63</sup> The Oregon law defines "security release" as release secured by cash, stocks, bonds, or real property.

<sup>64</sup> The law allows compensated sureties in traffic cases (§ 345.61). The state's elimination of compensated sureties in criminal cases was upheld in *Kahn v. McCormack* (App. 1980) 299 N.W. 2d 279.

Racial and ethnic differences in pretrial release decisions and outcomes: A comparison of Hispanic, black, and white felony arrestees. *Criminology*, 41(3), 873-908. CrossRefGoogle Scholar. Demuth, S., & Steffensmeier, D. (2004). Pre-trial/remand detention in Europe: Facts and figures and the need for common minimum standards. *ERA Forum*, 9(4), 527-542. CrossRefGoogle Scholar. Nagel, I. (1983). The legal/extra-legal controversy: Judicial decision in pretrial release. *Bail and sentencing: Does pretrial detention lead to harsher punishment? Criminal Justice Policy Review*, 25(1), 59-77. CrossRefGoogle Scholar. Sacks, M., Sainato, V. A., & Ackerman, A. R. (2015). Sentenced to pretrial detention: A study of bail decisions and outcomes.