RESPONSES TO CLAIMS ABOUT MONEY BAIL FOR CRIMINAL JUSTICE DECISION-MAKERS

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Introduction

This document was created to assist decision-makers in their efforts to improve the administration of bail. Specifically, it may be used to help these decision-makers respond to possible claims and/or questions, primarily about the use of money bail and commercial bail bondsmen, by bail bondsmen, the public, the media, and others in the justice system.

Many of these claims have been made before, only to recently re-surface. Most were also made in the mid-1990s, when the commercial bail bond industry actively but unsuccessfully sought to eliminate pretrial services programs across the country. Unfortunately, these assertions continue to be uninformed, inaccurate, or misleading. This paper seeks to remedy this situation by providing a somewhat comprehensive set of responses to the various claims surrounding the topic of money bail.

We use several terms of art throughout this paper. Our definitions are as follows:

"Money bail" – means the traditional money bail system, which includes any system of the administration of bail that is over-reliant on money. Some of its hallmarks include monetary bail bond schedules, overuse of secured bonds, a reliance on commercial sureties (for profit bail bondsmen), financial conditions set to protect the public safety from future criminal conduct, and financial conditions set without consideration of the defendant's ability to pay.

"Bail" (generally) – unlike many jurisdictions that define bail as an amount of money, we define bail as the process by which a defendant may be released from jail with conditions, which may be financial or non-financial. Bail defined as process or procedure, and not as an amount of money, is in line with the federal concept of the term, as well as with many jurisdictions' practical application of bail law, despite the existence of contrary statutory language focusing on money.

"Bond" or "Bail Bond" – as used in this paper, will refer to the agreement between the defendant and the court, or between a defendant, the surety (or bondsman) and the court, designed to procure the release of the defendant while providing some assurance that he or she will return to court and will not harm others in the community.

"Sureties" and "Commercial Sureties" – the term sureties, generally, refers to those who undertake to pay money or do any other act in the event that someone else fails to do something. More specifically, the term "commercial sureties" refers to those who, for a fee, undertake to pay money if a defendant fails to appear for court.

Claim 1: Jurisdictions seeking to reduce reliance on money bail and to increase reliance on pretrial services programs are only responding to jail crowding by letting dangerous people out of jail.

Response to Claim 1:

1. **While jail crowding is an important topic, many jurisdictions are seeking implement modern and effective bail policies and practices for other reasons, including better adherence to the research on bail, the "best practices" national standards, and the law.**
2. **Nevertheless, jail crowding provides a compelling reason to implement modern and effective bail policies and practices because the traditional money bail system fosters the release of dangerous criminals from custody, while keeping non-dangerous persons incarcerated unnecessarily.**

While jail crowding is certainly an important topic, as well as a legitimate purpose for making changes to the administration of bail, many jurisdictions are seeking to implement modern and effective bail policies and practices for other reasons. In research going back 80 years, virtually every neutral and objective study of bail has concluded that the traditional money bail system is inadequate, and that professional pretrial services programs provide cost effective methods for implementing the right to bail. Many of the earlier studies were summed up by scholar Wayne Thomas in his book *Bail Reform in America*:

> [these] studies had shown the dominating role played by bondsmen in the administration of bail, the lack of any meaningful consideration to the issue of bail by the courts, and the detention of large numbers of defendants who could and should have been released but were not because bail, even in modest amounts, was beyond their means. The studies also revealed that bail was often used to 'punish' defendants prior to a determination of guilt . . . which is [not] a permissible purpose of bail; that defendants detained prior to trial often spent months in jail only to be acquitted or to receive a suspended sentence after conviction; and that jails were severely overcrowded with pretrial detainees housed in conditions far worse than those of convicted criminals.[1]

In the 1964 National Conference on Bail and Criminal Justice, which studied the research and the state of American bail administration to date, Attorney General Robert Kennedy articulated the fundamental and pervasive problem of money bail as follows:

> [O]ur present attitudes toward bail are not only cruel, but really completely illogical. What has been demonstrated here is that usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defen-

1 Wayne H. Thomas, Jr., *Bail Reform in America* (Univ. CA Press 1976) at 15.

> dant. That factor is, simply, money. How much money does the defendant have?[2]

The research on bail led to two important generations of bail reform, in the 1960s and the 1980s, both of which sought, among other things, to dramatically diminish, if not completely eliminate money from the bail decision. Of the countless articles written about bail, the authors of this paper found no studies empirically demonstrating that setting a lawful, yet largely arbitrary amount of money on a bail bond will protect the public's safety. Moreover, the premise underlying many state statutes that risk of financial loss is necessary to prevent defendants from fleeing prosecution is unproven, and has been openly questioned by the American Bar Association as one of "doubtful validity."

Beginning in 1968, numerous national organizations and entities, such as the American Bar Association, the National Advisory Commission, the National District Attorneys Association, and the National Association of Pretrial Services Agencies issued 'best practice' national standards, all of which called for a significant reduction in the use of money in the bail setting process, the promotion of professional pretrial services, and the elimination of commercial sureties. Since then, the National Association of Counties has specifically recommended counties to re-align their policies and procedures to adhere to best practices and the national standards, and the American Probation and Parole Association has published a resolution supporting pretrial supervision services, in part because pretrial services agencies base their decisions on likelihood of court appearance and community safety considerations, as opposed to for-profit bail bondsmen, who make decisions based primarily on monetary considerations. Accordingly, many jurisdictions are considering the implementation of modern and effective bail policies and practices in order to follow the research on bail and pretrial release.

Additionally, many jurisdictions seeking to reduce their reliance on the traditional money bail system are doing so to better conform to the law. Most states constitutionally guarantee defendants (1) a right to bail that is not excessive, (2) the due process protections of fairness of the laws and the presumption of innocence, (3) the right to equal protection under the laws, (4) the right against self-incrimination, (5) the right to counsel, and (6) the right not to be punished prior to conviction. Most states also typically have enacted statutory schemes mandating bail setting practices that are individually tailored to each defendant. Yet, often these same states routinely rely on many of the hallmarks of the traditional money bail system, including monetary bail bond schedules, commercial sureties, hurried first advisements with no legal representation, statutorily based money bail amounts based on charge alone, as well as other bail setting practices, that conflict with these fundamental legal foundations.

Despite the fact that many jurisdictions are making changes to bail-setting for these other important reasons, jail crowding is a legitimate, if not compelling purpose for jurisdictions to reduce their reliance on money bail. In the recent article, *The Impact of Money Bail on Jail Bed Usage* (American Jails, July/August 2010),[3] author John Clark presents the most recent Bureau of Justice Statistics data showing: (1) an overall rise in jail

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2 *National Conference on Bail and Criminal Justice, Proceedings and Interim Report* (Washington, D.C. Apr. 1965), at 296.

3 Available from the American Jail Association, at http://www.aja.org/advertising/jailmagazine/default.aspx.

populations, and especially pretrial inmate populations, even as reported crime has gone down; (2) that the growth in pretrial inmate populations is being driven by the use of money bail; and (3) that money bail adds significantly to a defendant's length of stay in the jail, and sometimes means that the defendant will not be released at all prior to the case adjudication. The author concludes that "[i]n looking for ways to reduce correctional populations to better manage costs, the pretrial population must have a prominent place in any discussions. And at the forefront of those discussions must be the changing of reliance on money bail."

Jail crowding is not only costly to the community in a financial sense,[4] but also in a public safety sense. Jail crowding often leads to violence in the jail facility, endangering inmates and staff, as well as to emergency releases of sometimes risky or "dangerous" persons. A crowded jail can negatively affect virtually every decision made in any particular criminal justice system.

Finally, contrary to the claim above, an overall reduction in the use of money bail does not result in the release of dangerous criminals from jail. Indeed, the traditional money bail system itself *fosters* the release of those dangerous persons from jail. In the traditional money bail system, defendants are often allowed to pay an amount of money based on their top charge pursuant to a money bail bond schedule to secure their release from jail without any assessment of their risk to public safety by a professional pretrial services program. Those amounts are often too high for defendants to pay on their own, so commercial bail bondsmen are frequently used to help secure any particular defendant's release. Unfortunately, these bondsmen do not assess the defendants for their risk to public safety, and do not supervise them for public safety. Across the country, the commercial bail bondsman's only duty is to see that a particular defendant returns to court – they have no duty, and thus no incentive to seek to reduce the public's risk of encountering "dangerous criminals."

In a risk-based bail system, however, the type of system advocated by "best practice" national standards, all defendants are assessed for their risk to public safety and risk for failure to appear for court, and all are supervised, if needed, so as to minimize that risk. Most importantly, in a risk-based bail system, a seemingly dangerous individual is not automatically allowed out of the jail simply because he or she has money.

4 The American Bar Association states that in addition to other negative consequences to the defendant caused by unnecessary pretrial detention, such as loss of job and strained family relations, "such detention, often very lengthy, leads directly to overcrowded jails and ultimately to large amounts of scarce public resources for construction and operation of new jail facilities." *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007) at 33 [hereinafter ABA Standards].

Claim 2: The current system isn't broken, so we don't need to fix it.

Response to Claim 2:

1. **Some parts of the current system are not broken, but other parts are.**
2. **We currently rely too heavily on the use of money bail and commercial bail bondsmen, and neither one is related to public safety.**
3. **Currently, higher risk defendants with money can be released by posting a money bail bond from the bond schedule without any public safety supervision. Lower risk defendants who do not post the money bail bond remain incarcerated at unnecessary taxpayer expense.**
4. **The American Bar Association, the National Association of Pretrial Services Agencies, and the National Association of Counties have all acknowledged the ineffectiveness of the current money bail system and have called for extensive bail reform.**
5. **Many state statutes that foster the money bail system are also flawed.**

Claiming that the current bail system is broken or not broken is too simplistic and is an overgeneralization that often leads to unproductive conversation. It is more accurate to say that some parts of the current bail system are not broken and do function well to further the purposes of bail, and that other parts are ineffective and often counterproductive at furthering the purposes of bail.

Nevertheless, for roughly 80 years, various critiques of the traditional money bail system have documented serious flaws with jurisdictions' heavy reliance on money bail. These flaws are typically manifested in many low risk defendants being unnecessarily incarcerated and in higher risk defendants being released before assessment for risk and seeing a judge at advisement.

Defendants are presumed to be innocent, and nearly all of them are guaranteed a right to bail under both federal and state law. However, under the traditional money bail system, current national data from the Bureau of Justice Statistics show that 62% of the nation's jail inmates are defendants being detained pretrial. Moreover, approximately 85% of pretrial inmates who are detained until their case is resolved remain in jail not because of their threat to public safety or concerns that they may abscond, but simply because they cannot pay a money bail bond or a commercial bail bondsmen's fee. The use of money alone at bail has never been shown to increase public safety or to reduce the risk of a defendant not showing up for court. It has only ever been shown to increase pretrial incarceration. Money has an inverse relationship with a jurisdiction's pretrial release rate – the more money bail is used, the fewer pretrial defendants are released.

Prolonged pretrial incarceration could lead to defendants losing their jobs, causing strain on defendants' families and other government agencies, and often hinders defendants in assisting with their own defense. Moreover, the latest research by the Bureau of Justice Statistics and the New York City Criminal Justice Agency

continues to confirm studies conducted thirty years ago that defendants who remain in jail pretrial are more likely than released defendants to plead or be found guilty and to receive longer sentences, even when other relevant factors such as type of charge, criminal history, family ties, and type of counsel are taken into account. Also, many of these defendants ultimately receive only probationary sentences, and occasionally the charges are dropped or defendants are acquitted, thus making their pretrial detention meaningless punishment. Because the costs to incarcerate an inmate in any particular jurisdiction can range from $50-$150 per day, funds currently used for unnecessary incarceration could be used for crime prevention, offsetting the harm created by the crime, and for other services that promote the quality of life for all residents.

In addition to unnecessarily incarcerating many lower risk defendants, the traditional money bail system fosters the release of many higher risk defendants. Under the traditional money bail system, defendants who have money for the full amount of the bail bond or the money required to pay a bondman's fee and collateral to satisfy bondsman's sense of potential profitability are often released prior to being assessed for their risk to public safety or for not appearing in court. These defendants are often released into the community with no pretrial supervision, and with few, if any, of the conditions of release authorized by typical state statutes or court rules.

Over the last several decades, the purpose of bail has evolved to protect public safety in addition to guaranteeing court appearances, and this purpose has been incorporated into the language of the federal statute and in virtually every state bail statute. Nevertheless, throughout this country the commercial bail bond industry has largely not adapted by establishing any mechanism or procedures of its own to ensure the public's safety while a defendant is in the community.

Moreover, in many states a commercial bail bondsman's only statutory duty is to guarantee that a defendant appears for court. In those states, the bail bondsman has neither the legal duty nor the motivation to assure that the defendant does not engage in criminal activity while pending trial or to follow any court-ordered conditions of release designed to protect the public. If a defendant commits a crime while on pretrial release, no forfeiture occurs, and the commercial bail bondsman is released from the bond with no repercussions for the breach of public safety.

Other aspects of the traditional money bail system indicate that the system has serious flaws. Money bail bond schedules, often designed with good intentions, are largely arbitrary, and arguably unlawful, if not unconstitutional. Professional pretrial services agencies, authorized in many states and deemed crucial to protecting the public by supervising defendants released pretrial, are underutilized. A judge's actual release decision, shaped by counsel's arguments, typically places too much emphasis on the monetary amount of the bail bond – a concept unrelated to either the risk of danger to the community or of failing to appear for court – and too little emphasis on which conditions or combinations of conditions would best alleviate these risks.

In 1964, then-Attorney General Robert Kennedy opined that, for many of the same reasons that exist today, "the right to bail has not been the right to release, it has been a right merely to put up money for release."[5] Starting in 1968, prominent national organizations, such as the

5 *National Conference on Bail and Criminal Justice, Proceedings and Interim Report* (Washington D.C. Apr. 1965), at 296.

American Bar Association, have acknowledged the ineffectiveness of the traditional money bail system and have called for extensive reform. Forty years later, the American Bar Association continues to recommend changes in a fundamentally flawed system, yet only a handful of states and a minority of counties or cities have made the corresponding changes.

The National Association of Counties (NACo), the only national organization representing the interests of county governments in the United States, has also weighed in on the issue of pretrial release and bail. Specifically, it has long recommended that local governments: (1) establish alternatives to the money bail system; (2) establish the essential pretrial services functions of screening, recommending bail bond conditions to judges, and supervising defendants pretrial; and (3) make greater use of non-financial pretrial release options, such as citation release and release on recognizance when there is a reasonable expectation that public safety will not be threatened. Most recently, at its 2009 annual conference, NACo passed a resolution asking Senators Webb and Specter to include bail reform in their National Criminal Justice Commission. It also updated its American County Platform language to strengthen the bail and pretrial services section, calling for counties to align their policies and practices with state statutes, national professional standards, and best practices on the pretrial release decision.

The following account sums up why the traditional money bail system is legally flawed in nearly all states, and why the justice system's reliance on commercial bail bondsmen, as they currently choose to operate, is problematic:

- Prior to the mid-1980s, the sole constitutionally valid purpose of bail was to assure the presence of defendants in court. Although never verified, a heavy reliance on arbitrarily-set money bail bond amounts was commonly believed to serve this purpose.
- Commercial sureties designed themselves to operate within this money bail system.
- After years of discussion, in the mid-1980s, the federal and most state governments changed the purpose of bail to be two-fold – to protect the public's safety in addition to assuring court appearance.[6]
- At this time, the heavy reliance on money bail, and the use of commercial sureties that operated within the money bail system, became largely obsolete because in most states money continued to be only legally tied to one of the two goals of bail – court appearance.
- Also at this time, locally operated professional pretrial services agencies were created to fulfill both purposes of bail.
- Professional pretrial services agencies, which can be government-run or contracted to private providers, have evolved to improve the quality of their services (e.g., increasingly using empirically validated risk assessment instruments, adapting pretrial supervision techniques to include best practices in community-based criminal justice supervision).
- On the other hand, commercial sureties have chosen not to adapt to include the second purpose of bail (public safety). Hence, the use of commercial sureties, at this time, is obsolete and does not fulfill the current dual purpose of bail as recognized by nearly all of this nation's courts.

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6 It appears that some states still do not explicitly include consideration of public safety in bail setting. *See, e.g,* CPL §510.39, 2; Mary T. Phillips, Ph.D., *Factors Influencing Release and Bail Decisions in New York City, Part 3 – Cross-Borough Analysis* (July 2004) at 2.

Claim 3: What's so great about the ABA standards? Why should I listen to what they have to say about pretrial release?

Response to Claim 3:

1. **Best practices in the field of pretrial release are based on empirically sound social science research as well as on fundamental legal principles, and the American Bar Association's standards use both to provide rationale for its recommendations.**
2. **While best practice standards are common to a number of justice-related fields, in the area of pretrial release the American Bar Association's standards are preeminent.**
3. **The ABA Standards have been extensively used by courts, legislatures, and numerous criminal justice systems across the country that are actively involved in improving bail and pretrial release.**

Best practice standards are common to a number of justice-related fields, but in the area of pretrial release the American Bar Association's (ABA) Standards for Criminal Justice on Pretrial Release stand out. Their preeminence is based, in part, on the fact that they "reflect[] a consensus of the views of representatives of all segments of the criminal justice system,"[7] which includes judges, prosecutors, defense attorneys, and academics, as well as various groups such as the National District Attorneys Association, the National Association of Criminal Defense Lawyers, the National Association of Attorneys General, the U.S. Department of Justice, the Justice Management Institute, and other notable pretrial scholars and pretrial agency professionals.

More significant, however, is the justice system's use of the ABA Criminal Justice Standards as important sources of authority. The ABA Standards have been either quoted or cited in more than 120 U.S. Supreme Court opinions, approximately 700 federal circuit court opinions, over 2,400 state supreme court opinions, and in more than 2,100 law journal articles. By 1979, most states had revised their statutes to implement some part of the Standards, and many courts, including state supreme courts, had used the Standards to implement new court rules.[8] According to Judge Martin Marcus, Chair of the ABA Criminal Justice Standards Committee, " [t]he Standards have also been implemented in a variety of criminal justice projects and experiments. Indeed, one of the reasons for creating a second edition of the Standards was an urge to assess the first edition in terms of the feedback from such experiments as pretrial release projects."[9]

The ABA's process for creating and updating the Standards is "lengthy and painstaking," but the Standards finally approved by the ABA House of Delegates (to become official policy of the 400,000 member association) "are the result of the considered judgment of prosecutors,

7 Marcus, *The Making of the ABA Criminal Justice Standards, Forty Years of Excellence,* 23 Crim. Just. (Winter 2009).

8 *Id.*

9 *Id.* (internal quotation omitted).

defense lawyers, judges, and academics who have been deeply involved in the process, either individually or as representatives of their respective associations, and only after the Standards have been drafted and repeatedly revised on more than a dozen occasions over three or more years."[10]

Best practices in the field of pretrial release are based on empirically sound social science research as well as on fundamental legal principles, and the ABA Standards use both to provide rationale for its recommendations. For example, in recommending that commercial sureties be abolished, the ABA relies on numerous critiques of the money bail system going back nearly 100 years, various social science experiments, law review articles, and various state statutes providing for its abolition. In recommending a presumption of release on recognizance and that money not be used to protect public safety, the ABA relies on United States Supreme Court opinions, findings from the Vera Study (one of the most notable social science experiments in the field to date), discussions from the 1964 Conference on Bail and Criminal Justice, Bureau of Justice Statistics data, as well as the *absence* of evidence, i.e., "the absence of any relationship between the ability of a defendant to post a financial bond and the risk that the defendant may pose to public safety."[11] For all of these reasons, and until anything better comes along, the ABA Standards provide the highest level of best practices in the field of bail and pretrial release.

10 *Id.*

11 ABA Standard 10-5.3 (a) (commentary).

Claim 4: If reducing our reliance on money bail is such a good idea, why isn't everybody doing it?

Response to Claim 4:

1. **The United States and the Philippines are the only two common law heritage countries in the world that have not completely rejected the traditional money bail system.**
2. **At least 400 jurisdictions across the United States have created more effective or efficient bail-setting policies and practices.**

Significant criminal justice reform takes time, and this is especially true of reform needed in the complex area of bail administration. The "idea" to change the traditional money bail system has been advanced since the 1920s. Beginning in the early 1960s, the country experienced a first generation of bail reform that culminated in the creation of pretrial services programs and national best practice standards, which, in turn, uniformly called for the creation of alternatives to the money bail system. In the 1980s, a second generation of bail reform culminated in the recognition that public safety was a constitutionally legitimate purpose for imposing bail. As a result, most states created statutory schemes designed to consider and respond to risks to public safety when setting bail. Current bail reform efforts seek only to eliminate the last vestiges of the problematic money bail system that has been criticized throughout this and the last century.

As noted by researcher and author F.E. Devine, except for the United States and the Philippines, "the rest of the common law heritage countries not only reject [money bail], but many take steps to defend against its emergence."[12] In the United States, six states, the District of Columbia, and the federal system have, in various ways, vigorously eliminated overreliance on money bail in their pretrial release decision making process. Moreover, the Pretrial Justice Institute estimates that at least 400 local jurisdictions are already taking steps to significantly reduce their reliance on the traditional money bail system by creating more effective or efficient bail-setting policies and practices.

12 F.E. Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives* (New York, Praeger, 1991), at 201; *See also Illegal Globally, Bail for Profit Remains in U.S.,* New York Times (January 29, 2008).

Claim 5: As evidenced in a newspaper story from Philadelphia, changing from the current money bail system will result in fiscal disaster.

Response to Claim 5:

1. **The actual facts surrounding Philadelphia's experience do not make it comparable to most jurisdictions.**
2. **Governments should not form a budgetary reliance on money received from failures in the system like bond forfeitures. Instead, governments should fix the problems that lead to forfeitures in the first place.**

The Philadelphia story, titled "Fugitives Owe the City $1 Billion," has been used by commercial bail bondsmen nationwide as evidence that any government intrusion into their industry will result in fiscal disaster. The story reports that because: (1) Philadelphia uses a deposit bond system (requiring a defendant to pay the court only 10% of his largely arbitrary bail amount for release, and owing the remaining 90% only if he or she skips court); (2) the courts apparently never considered a defendant's ability to pay the bail amount when setting it; and (3) the city had no plan or procedure for going after any money forfeited by defendants who failed to appear, over the course of thirty years the city was owed one billion dollars in forfeited bail amounts. There are numerous problems with attempting to draw any meaningful conclusions from this example or to use this particular story as evidence from which to predict outcomes in any other jurisdiction.

First, the arbitrariness of using money to address risk leads to equally arbitrary total amounts owed, such as the $1 Billion cited in the article. Had Philadelphia's bail schedule set the amounts at twice their current value (e.g., $10,000 instead of $5,000 for a particular offense) its debt would have been double. If those amounts had been cut in half, the debt would be halved. Doubling and halving such amounts is not mere speculation. There have been documented accounts of jurisdictions making blanket increases[13] and decreases[14] to their monetary bail bond schedules, and the fundamental point is true even without schedules. If large, arbitrary money bail amounts are not set, they cannot be forfeited or owed. Commercial bail bondsmen capitalize on the current system of arbitrary bail amounts, which have grown to the point where many pretrial defendants cannot pay them on their own, and must rely primarily on their or their family members' collateral to cover any forfeited amounts.

Second, Philadelphia admittedly did not try to collect the money. If money is to be assessed against an individual for any government func-

13 *See Fewer to Get Out of Jail Cheap,* Colorado Springs Gazette (May 27, 2007) (reporting that the 4th Judicial District was raising the bond amounts for all crimes so that they would be more aligned with those in other judicial districts throughout the state).

14 *See Supreme Court Lowers Amount Iowans Need to Get Out of Jail,* Des Moines Register (August 16, 2007) (reporting blanket bond reductions for non-violent felonies and misdemeanors with no explanation for the reductions); *see also Lowered Bail Bonds Make System More Equitable,* Quad City Times (Aug. 31, 2007).

tion, an enforcement procedure should be created to ensure that the money is collected. Moreover, pursuant to many state statutes and the American Bar Association's Criminal Justice Standards on Pretrial Release, even if money is used as a last resort for a condition of pretrial release, judges should give consideration to the defendant's ability to pay. If a defendant's financial condition is considered, and if an effective enforcement procedure is put in place, there should be almost no situation where debts are discovered to be uncollectible.

Third, on general principle, no government should form any budgetary reliance on money due from bail forfeitures. Forfeited bail amounts represent a failure in the criminal justice system. Our societal goal for defendants who are released on bail should be that they do not behave in a way that leads to forfeiture of any kind. Because our system should be designed to prevent or reduce the kinds of behavior that would lead to forfeiture, the goal should be to collect no forfeiture money whatsoever. The media is fond of stories about amounts of money owed the government for things like bond forfeitures and parking tickets, for example, because the large numbers often seem scandalous. As it pertains to bail bond forfeitures, however, the focus of any debate should be on finding ways to eliminate the negative behaviors (e.g., new crimes, failures to appear for court) and not on finding ways to spend the money generated off of a failure to eliminate those behaviors. Programmatic improvements planned as part of many other jurisdictions' current bail reform efforts include several ways to reduce behaviors that currently lead to failures to appear and forfeited bail bond amounts.

Jurisdictions that endeavor to follow the research and national standards on bail and pretrial release will undoubtedly rely less on the use of arbitrary money bail amounts (based primarily on the defendant's top charge), and will focus, instead, on (1) whether to release the defendant based on his or her perceived risk of danger to the public and of failing to appear for court, and (2) which non-financial conditions or combination of conditions of release should be placed on that defendant to manage those risks. Judges will use money (or financial conditions of release) only when non-financial conditions will not assure appearance in court.

Claim 6: There are several reports and studies from the American Legislative Exchange Council (ALEC) saying that the commercial bail bond industry is superior to government operated pretrial services programs.

Response to Claim 6:

1. **Virtually every neutrally conducted study over the past eighty years has portrayed the money bail system and commercial sureties as inadequate, and professional pretrial services programs as cost effective.**
2. **As a lobbying group designed, in part, to further the goals of the commercial surety industry, studies from ALEC should be viewed skeptically.**

Virtually every neutrally conducted study over the past eighty years has portrayed the money bail system as inadequate, and professional pretrial services programs as cost effective. For the most part, these studies formed the basis for recommendations by the American Bar Association, the National District Attorneys Association, the National Association of Pretrial Services Agencies, and the National Association of Counties to eliminate certain hallmarks of the money bail system, including the use of commercial bail bondsmen, in favor of a system that rarely relies on money as a condition of release and that incorporates professional pretrial services risk assessment and community-based supervision.

The American Legislative Exchange Council (ALEC) is a 501(c)(3) lobbying group designed to advance its beliefs about free market economies, limited government, and federalism. It is run by a public board of directors (made up of state legislators), a private enterprise board (made up of officials representing several large private industries), and a small staff.

Web-based critics of ALEC claim that the organization is a front to provide legitimacy for the introduction of state legislation promoting the various private enterprises of its members. According to some of these critics, ALEC has fought the concept of global warming to appease its large oil and gas industry members, fought regulation of cigarette sales to minors to appease its tobacco industry members, and, relevant to this discussion, created misleading information about pretrial services agencies in order to satisfy Jerry Watson, Chief Legal Officer of the Allegheny Casualty Company, past head of the American Bail Coalition, and Immediate Past Chairman of ALEC.

Much of what has been written by ALEC has been echoed by the American Bail Association, the Americans for the Preservation of Bail, and various bail bondsmen across the country to fight pretrial services, and to retain (and ultimately to expand) the money bail system. While web-based critics of a group such as ALEC should also be viewed with caution, it appears that much of the information contained in the ALEC

publications concerning bail is either biased, misleading, rationally and empirically unjustified, or somewhat inflammatory (calling professional pretrial services agencies "criminal welfare" systems, and using statements such as, "thousands of violent criminals are released every day to roam our streets and neighborhoods, and your tax dollars are paying for it!").

Moreover, the critics' claim that ALEC is merely a front to provide legitimacy for such private members appears true. In a recent speech, Jerry Watson himself said that he had prepared a document, but "got [ALEC] to print it as an ALEC piece because we didn't want it to come from a bail bonding organization – we wanted it to look like it came from some neutral, political source."[15]

15 See at http://www.channels.com/search?search_box=AIA+&search_type=Episode#/search?search_box=AIA+&search_type=Episode at 27:52.

Claim 7: Most jurisdictions' efforts at bail reform are designed to put commercial bail bondsmen out of business.

Response to Claim 7:

1. **Most bail reform efforts are designed to eliminate the use of money during the pretrial process, and not to eliminate any particular actor involved in the criminal justice system.**
2. **To bring about true bail reform in the interest of increased public safety and the integrity of the judicial process, however, all criminal justice entities, as well as commercial bail bondsmen, would be required to change the way they do business.**

The national standards on bail and pretrial release call for the abolition of commercial sureties, and some jurisdictions have intentionally set out to put commercial bail bondsmen out of business. Nevertheless, most current efforts at bail reform are designed not to put any single entity out of business, but rather to eliminate the overreliance of money during the pretrial process. Full implementation of the national standards, however, requires justice system decision-makers, such as police, judges, attorneys, pretrial services professionals, as well as commercial bail bondsmen, to make changes to the way they currently do business. Entities that have come to rely on the overuse of money in the criminal justice system will likely be affected more than others.

Because the lawful purpose of bail is now twofold (since the 1980s, this purpose has been to protect the public's safety as well as to assure the defendant's return to court), the national standards recommend that judges release defendants only after assessing their risks to public safety and for failure to appear for court, and only to entities that are willing and able to supervise those defendants in a way that reduces both of these risks. However, because the purpose of a commercial bail bond contract is limited only to assuring a particular defendant's presence in court, and because there is typically no statutory requirement for bondsmen to adapt their polices or practices to adequately address public safety, a new system of bail administration – conforming to the recommendations from the national standards – would necessarily require commercial bail bondsmen to change their practices.

For example, in many states if a judge determines that a defendant is a threat to the victim, that judge may order active GPS monitoring. Moreover, if a judge determines that public safety is compromised so long as a defendant continues drinking, the judge may order alcohol monitoring. For-profit bail bondsmen are not typically in the business of providing GPS tracking or alcohol monitoring, or essentially any other method for supervising or monitoring non-financial conditions. On the other hand, professional pretrial services programs are typically created to provide this supervision, and they are often the only entities capable of assuring that these non-financial conditions are met. Theoretically, commercial bail bondsmen could change their business practices to respond to this need for supervision of non-financial conditions of release. Until now, however, they have chosen not to do so.

Claim 8: Releasing defendants under pretrial supervision represents more unwarranted government control over individuals.

Response to Claim 8:

1. **To further the dual purpose of bail (protect public safety and assure that defendants appear for court) some governmental control is warranted.**
2. **Because commercial bail bondsmen are not responsible for assuring the public's safety through their contracts with defendants, pretrial services programs have evolved to protect the public through lawful supervision methods.**
3. **Pretrial Supervision represents much less government control than incarceration.**

In the 1980s, after decades of witnessing defendants released on money bail bonds committing sometimes violent crimes, the federal government and nearly every state explicitly embraced public safety as a second, constitutionally valid purpose of setting bail, and revised their statutes accordingly. In many states, those revisions included, among other things, permitting judicial districts to create pretrial services agencies, placing defendants on pretrial release as a condition of their bail bonds, and using a variety of supervision methods designed to minimize the risk to public safety and of failing to appear for court. Accordingly, for the same reasons that governments provide police, court services, and corrections programs, some element of government control is inevitable for a bail system that endeavors to protect the public's safety.

Moreover, pretrial supervision must be compared to its alternative, which is typically incarceration.[16] Under the traditional money bail system, if a court decides that a defendant is safe for release into the community, but is only allowed to be released if he or she posts a money bail bond, it is typically a commercial bail bondsman who decides whether that defendant will actually get out. Defendants who are bad business risks (i.e., they do not have sufficient cash or collateral) are left inside a secure detention facility, which represents the ultimate amount of government control over individuals. In these cases, release on pretrial supervision represents much less government control than incarceration.

The national standards recommend that jurisdictions provide supervision techniques through a menu of options that judges can use to impose meaningful non-financial conditions of release, which are necessary for minimizing both the released defendants' risk of danger to the community as well as their risk of failure to appear for court. As stated before, the commercial bail bondsmen's only goal, and typically their only legal obligation, is to assure a defendant's appearance in court. Historically, commercial bail bondsmen have never "supervised" defendants for adherence to non-financial conditions, and

16 Looking at detention as an alternative to pretrial release is more appropriate than looking at pretrial release as an alternative to incarceration. American law envisions that most defendants will be released pretrial, and that pretrial incarceration will be used sparingly.

the courts have rarely, if ever, ordered them to do so. In contrast, professional pretrial programs were created precisely to supervise such conditions, cannot choose whom they supervise, and must tailor the supervision (from minimal to intensive supervision) to meet the legitimate needs of the judiciary. Unlike other sectors of private enterprise that have adapted over time to operate in a manner to fulfill the needs of the judiciary (such as private providers of probation or community corrections), the money bail bond system and commercial bail bondsmen have not adapted to the overwhelming desire by the public and the courts to address public safety.

Claim 9: The use of pretrial services programs is improper government intrusion into private industry.

Response to Claim 9:

1. **Response to victimization and illegal activity is inherently a governmental function. As long as crimes are considered to be offenses against all people in the state, the government is ultimately responsible for a defendant's case.**
2. **Sometimes governments must respond to failed or inadequate private industry practices to protect the public interest. If the private commercial bail industry does not adapt to important changes in laws, the government must reclaim its inherent duty to protect the public safety by overseeing certain important aspects of a defendant's case.**

The concept of crimes as public offenses emerged after the Norman Conquest in 1066. Since then, governments have recognized the shortcomings to systems of private retribution for wrongs against persons, and have gradually come to adopt the notion that response to victimization and illegal activity are inherent governmental functions. This makes the government primarily responsible for responding to threats to public safety or judicial integrity, just as it makes the government ultimately responsible for the events happening in that case. To the extent that private industry has found its way into the criminal justice system, it has done so only as an aberration, which must be closely monitored to reflect American principles of criminal justice.

Depending on whom you ask, there will be differing opinions on the issue of government intrusion into any legitimate private function. Nevertheless, in the case of the traditional money bail system, there are many who will argue that the government is not intruding into a legitimate private function because the commercial bail bondsmen have no valid role in what should always have been a purely government function. This is due, in part, to the commercial bail bond industry's commensal rise, taking advantage of flaws in the government-run justice system (e.g., setting money bail bonds without regard to the defendant's ability to pay) to create and foster a private enterprise. However, there are ample cases in the history of our nation (for example, the use of children to provide cheap labor) that reinforce the notion that sometimes, when left alone, private enterprise either will not, or cannot, act in the public interest. In those instances, government intrusion is warranted.

Thus, while there is some argument that private enterprise may be capable of assisting the courts with pretrial release, commercial bail bondsmen, as they have evolved in the United States, have not taken steps to do this (indeed, some would say they have taken steps to actively resist it) and therefore do not currently act in the public's interest. Commercial bail bondsmen only help those defendants with money – they will not write bonds for any particular defendant unless that person has both the money to pay the nonrefundable premium and the collateral to back up the entire amount of the bail bond. This profit-driven decision results in numerous defendants being unnecessarily incarcerated during

the pretrial period of their cases. Moreover, although most states and the federal government provide mechanisms, including menus of non-financial conditions of release, for reducing a defendant's risk to public safety while on pretrial release, commercial bail bondsmen have resisted calls to change their practices to "supervise" for public safety. Finally, when defendants fail to appear for court while under a commercial surety bond, the bail bondsmen spend much of their time seeking exoneration from the bond, rather than helping law enforcement track down the defendant. There is no value added to a defendant's case by including a commercial surety component, and thus the commercial bail bondmen provide no legitimate role in the criminal justice system.

Due, in part, to the failed practices of the commercial bail bond industry in this country, the national standards have called for the abolition of commercial sureties in favor of a stronger governmental role in pretrial release.

Claim 10: Pretrial services costs taxpayers too much money and does not hold defendants accountable like the money bail system.

Response to Claim 10:

1. **Compared to release on a surety bond and incarceration, and considering the functions that they provide, pretrial services programs are significantly more cost effective.**
2. **Both pretrial services agencies and defendants are held accountable when there are failures within a particular defendant's case, and the addition of money into any particular case does not necessarily increase that accountability.**

This issue is central to the discussion of bail reform, and the claim is worded in a variety of ways. The American Legislative Exchange Council (ALEC), the American Bail Coalition, and various commercial bail bondsmen have called government run pretrial release a "criminal welfare system," a "get out of jail free card," and "release at taxpayer expense" with no cost incurred by defendants. Commercial bail bondsmen often state that they can provide the same services for free, and that they, unlike a pretrial services program, are held accountable through the bond forfeiture process.

Preliminarily, the notion that anyone "gets out of jail free" must be dispelled. Anyone working in the criminal justice system knows that even defendants released on personal recognizance bonds to pretrial supervision pay significant costs for their liberty. Those costs may include, for example, a pretrial services supervision fee, the cost (including travel time) to perform drug or alcohol testing, the cost of location monitoring devices such as GPS, and the costs associated with office check-ins. Obviously, defendants who are required to pay a non-refundable fee to a commercial bail bondsman lose the use of that money to pay for the various non-financial conditions ordered by the court.

Variations among pretrial services agencies across the nation make discussions about the cost of pretrial release difficult to generalize. Yet, again, the cost to supervise persons while on release must be compared to its alternatives. A defendant released on a commercial surety bond must typically pay a nonrefundable fee, and may collateralize the bond so that the full amount of bail bond will be paid if he or she does not return to court. In theory, and based on a limited understanding of bail practice, such an arrangement would seemingly cost less than pretrial services supervision. However, commercial bail bondsmen typically do not "supervise" any condition of pretrial release except for the condition that the defendant appears for court. If any additional condition is placed upon the defendant, such as alcohol monitoring to protect the public safety from continued drinking while driving, some other entity must be used for supervision. That entity is typically a pretrial services agency. Because pretrial services agencies supervise defendants for compliance with all conditions, and because they do so to reduce the risk to public safety as well as the risk of non-appearance, the use of a commercial surety bond with pretrial supervision is superfluous and a waste of the defendant's money used to pay the bondsman's fee.

Likewise, commercial bail bondsmen do not provide the other essential functions that pretrial services agencies provide. In preparation for bail setting, pretrial services agencies interview and screen defendants, and they strive to verify defendant information to provide courts with the best assessment of risk to public safety and for failure to appear for court. Pretrial services agencies also provide recommendations to judges about the types of bonds, various non-financial and financial conditions, and supervisory techniques that will ultimately reduce a defendant's overall risk.

As compared to another alternative, incarceration, pretrial services is significantly less financially burdensome to taxpayers. National data show that when money is placed on a defendant's bond as a condition of release, it takes several days, if not weeks, to obtain the financing for release. Moreover, many of these defendants are never able to obtain the financing or collateral needed to secure release, and their lengths of stay in the jail can last for months. Typical costs to supervise a defendant on pretrial release run below $5 per day, as compared to $50-$150 per day to incarcerate the same person. Given the volume of defendants and their average length of pretrial stay, jails can incur costs in millions of dollars per year simply to house inmates who are legally innocent until proven guilty. Jails that are crowded create an even more costly impact on taxpayers, as new jail construction can cost as much as $75,000 to $100,000 per inmate bed. To the extent that the traditional money bail system fosters jail crowding and new jail construction, it is incredibly costly as compared to pretrial services.

Most jurisdictions seeking to improve their bail setting practices have realized that some amount of "resource shifting" is advisable to provide the optimal taxpayer benefit. Those jurisdictions recognize that by shifting more resources to front-end services such as pretrial services programs, they will not only promote public safety and reduce failures to appear for court, but will also ultimately save their jurisdiction money by reducing the jail population and extending the useful life of the detention facility.

Finally, the costs associated with pretrial release and detention go beyond dollars and cents. The American Bar Association has stated that the "central evil," or primary cost to the public of the money bail system, is that it delegates public tasks to largely unregulated private individuals who determine who gets out of jail based upon their ability to pay. When assessing whether the commercial bail bond industry is truly cost free, one must take into account everything that characterizes commercial bail bondsmen, including their usurpation of public functions, their profit motive, their lack of accountability for public safety, and their occasional documented instances of abuse of power. Additionally, one should consider the social costs of unnecessary incarceration (loss of jobs, increased need for public assistance for families) as well as the social costs of letting people out on bond only because they can afford it and before their risk to the public and the integrity of the judicial process has been assessed.

As for accountability specifically, even under the current traditional money bail system defendants released pretrial without the help of commercial bail bondsmen have always been held accountable by the courts for failing to appear for court and for committing new crimes. The commercial bail bondsmen's argument that the money bail system is the only system that can ensure ac-

countability is simply untrue. The defendant is held accountable through traditional criminal court processes (e.g., new charges, bond revocations), and in jurisdictions that have pretrial services programs, those programs are also held accountable for the public safety aspects of a defendant's release, not simply his or her failure to appear for court, as is the case for a commercial bail bondsman. In addition to being held accountable by the courts, in many states pretrial services entities are also required to publish official reports on agency effectiveness, and in some states they are also accountable to community advisory boards.

The real issue concerning accountability in bail involves the admission of certain commercial bail bondsmen that they owe their allegiance to insurance companies, not the courts, and that they strive to develop methods for increasing the number of bail bond exonerations. In one state, a recent news story exposed bail bondsmen for using technicalities and other unethical strategies to be exonerated from bail bonds whenever defendants fail to appear. As the story noted, "[The bail agent] said his allegiance is not to the courts and the justice system, but rather to the insurance company. 'My job is to protect the insurance company from the loss . . . It's not a greed thing, we just don't want to pay.'"[17]

Commercial bail bondsmen often contend that they "pay out of their own pocket" if a defendant absconds, motivating them to keep track of that defendant. However, through the use of co-obligors, collateral, and agreements with insurance companies to underwrite the risks, commercial bail bondsmen have essentially shielded themselves from any personal liability.

Thus, to the extent that bail bondsmen collateralize their bonds using defendants' or their families' property as assurance of payment, those bondsmen have merely shifted their own accountability through private contract.

According to the national standards on bail and pretrial release, a slight but significant variation on the use of money in bail can accomplish the same results (i.e., court appearance) as other variations, but without the costs of unnecessary incarceration. If judges use *unsecured* money bail bonds, such as a personal recognizance bond with a monetary amount that the court may assess against defendants if they fail to appear, then the defendants are immediately released from custody, and may additionally be ordered to pretrial supervision. If judges use *secured* money bail bonds, such as cash or security bonds, defendants must remain incarcerated often until they are able to pay the full amount of the bonds or pay commercial bail bondsmen some percentage of the full amount of the bonds as a nonrefundable fee and collateralize the full amount of the bond. The latter option often results in unnecessary incarceration at taxpayer expense.

17 *Justice delayed while some fugitives run free, bondsmen pocket fees,* found at http://www.9news.com/rss/article.aspx?storyid=139626. In a response to that story, Mike Donovan, Director of Government Affairs for Bail USA, stated that he didn't believe that the bail agents were doing anything wrong, and that, instead, the courts were making "serious mistakes."

Claim 11: Requiring defendants to comply with so many conditions of release is just setting them up to fail.

Response to Claim 11:

1. **Bail bond conditions are typically authorized by statute or court rule to allow courts to balance defendants' risks to public safety and for missing court with their right to be released on bail.**
2. **Like probation and parole entities, pretrial services agencies typically have comprehensive systems of responses to "technical violations" of bond conditions, which prevents clogging the courts and the jail while maintaining the public's safety.**

This claim is similar to arguments made about probation and parole, and is an overgeneralization. While it is true that each condition of pretrial release that a judge might order represents a potential hurdle to the "success" of a pretrial defendant, those conditions and related methods of supervision are at least theoretically related to the defendant's risk to the community and for missing court, which are both constitutionally valid purposes for setting bail. Indeed, in several states, many conditions have been shown to be statistically linked to public safety and court appearance through validated risk assessments and are considered vital to the courts. Accordingly, someone who is low risk may receive no supervision whatsoever, while someone with a criminal history, drug and alcohol problems, and a tendency to move frequently will receive more conditions (such as drug and alcohol testing, frequent check-ins, etc.), and thus will require more supervision.

In addition, courts must balance considerations of danger to the public and appearance in court with the defendant's often constitutionally guaranteed right to bail. Pretrial supervision allows for reasonable assurances of all three of these factors, and thus release on pretrial supervision alone is a measure of success. In contrast, the denial of a defendant's release due solely to his or her inability to pay the bail amount or to a bail bondsmen's choice to not serve as a surety is an example of a failure of the bail administration process.

Presumably, this claim would assert that, as barriers to success, the sometimes numerous non-financial conditions could be adequately replaced with a single condition in the form of money. However, the amount of money that a defendant does or does not have is never related to the risk to public safety, and is only infrequently related to the risk of not appearing for court. Money has only been empirically linked to one thing – unnecessary pretrial detention – which is arguably the ultimate pretrial failure.

Finally, defendants' success or failure to abide by any number of lawful conditions tied to their release is largely their own decision, and the "setting them up to fail" argument tends to portray defendants as helpless individuals. Nevertheless, most pretrial services agencies, like probation and parole departments, have designed safeguards that allow for some lenience on "technical violations" before the court alters a particular defendant's pretrial status. Many of these entities have designed comprehensive systems of responses to violations of bail bonds that keep defendants out of the detention facility while protecting the public and assuring their presence in court.

Claim 12: Having to undergo drug or alcohol testing while on pretrial supervision violates defendants' fifth amendment rights against self-incrimination.

Response to Claim 12:

1. **Conditions of release are, by definition, conditions that the defendant must agree to in order to obtain release. To the extent that they are not compelled, there is no constitutional claim.**
2. **In many jurisdictions, defendants are court-ordered to participate in certain activities (such as drug testing) but voluntarily agree to be supervised for these conditions. Thus, they have no constitutional claim regarding compulsory self-incrimination.**

Conditions of release are, by definition, conditions that the defendant must agree to in order to obtain release. Although it may seem harsh, a defendant could choose not to abide by any particular condition and remain incarcerated during his or her pretrial period.[18] Across the country, conditions of pretrial release (such as drug or alcohol testing) have been lawfully enacted into law or court rule, and would likely survive constitutional scrutiny given that pretrial detention has itself survived facial challenges under both the Excessive Bail Clause and the Due Process Clause of the United States Constitution.

To the extent that a condition was believed to be unreasonable due to its perceived compulsion in any particular case, the defendant's option would be to challenge that condition through the traditional criminal appellate process. However, if that condition was deemed necessary to achieve a compelling government purpose (the most exacting test for assessing government action), it would likely pass constitutional muster in all but the most egregious cases.

Overall, whether brought under the Fifth Amendment (right against self-incrimination) or the Fourteenth Amendment (right to due process), defendants must show that their "confessions" resulting from drug or alcohol tests were compelled or involuntary. In many jurisdictions, defendants are court-ordered to participate in certain activities (such as drug testing) but voluntarily agree to be supervised for these conditions. By signing any agreement to undergo testing, they are submitting to these tests voluntarily, and thus they have no constitutional claim.

18 It should be noted that most jails will not hold a defendant merely because he or she cannot pay for, for example, a GPS unit, drug testing, or other non-financial conditions. However, defendants are typically held for their inability to pay the money associated with a bail bond.

Claim 13: Commercial bail bondsmen are better at getting people to court than are government operated pretrial services agencies.

Response to Claim 13:

1. **Because bail bondsmen have no responsibility to assure public safety, this claim is limited to only half of the dual purpose of bail.**
2. **Because of the varying local pretrial and court practices, the data are insufficient to make any meaningful comparisons. A number of ongoing local pretrial projects will likely create more relevant outcome data. Until then, decision makers should consider broader considerations surrounding the desirability of types of release.**

Commercial bail bondsmen are *only* concerned with getting people to court and not with public safety. Uniformly, neither this nation's legislative bodies nor its courts have required commercial bail bondsmen to consider public safety in their bonding practices, and the bondsmen have not assumed that responsibility on their own. Accordingly, this claim only addresses whether they perform the limited purpose of preventing failures to appear ("FTAs") better than professional pretrial services programs.

Commercial bail bondsmen typically rely on numbers generated from Bureau of Justice Statistics (BJS) studies of state courts in the 75 most populous United States counties between 1990 and 2004. Relying on these statistics, the for-profit bail bond companies have consistently stated that "commercial bail is the most effective method of pretrial release." The Pretrial Justice Institute (PJI) responded to this claim by releasing a fact sheet entitled *Understanding the Findings from the Bureau of Justice Statistics Report, "Pretrial Release of Felony Defendants in State Court."* In that fact sheet, PJI explained how wide variations between individual county pretrial services programs, as well as varying bail setting practices among judges, make the national data irrelevant to the question of effectiveness. Meaningful comparison of FTA rates between defendants released on a money bail bond posted by a commercial bail bondsman to defendants released through other means (e.g., personal recognizance or low cash bond with pretrial supervision) must be done locally, using common variable definitions and calculations.

In March of 2010, BJS itself released a document advising persons not to use its statistics for causal associations, and specifically warning that "evaluative statements about the effectiveness of a particular program in preventing pretrial misconduct may be misleading."[19] Despite the warning, the for-profit bail bondsmen have continued using the national statistics for both causal associations and evaluative statements.

Several jurisdictions are now in the process of creating studies designed to measure effectiveness and make comparisons across groups, while attempting to control for certain variables. When

19 *See State Court Processing Statistics Data Limitations,* at http://bjs.ojp.usdoj.gov/content/pub/pdf/scpsdl_da.pdf.

those studies are finished, more light may be shown on release-type effectiveness. Until then, PJI notes that "[t]he value of release types can be judged by other factors. For example, do we want potentially dangerous defendants to buy their way out of jail? Do we want low risk indigent defendants to take up expensive jail space because they cannot afford the services of a bail bondsman?" In addition, do we want to continue to administer bail in ways that contradict state and federal law? Jurisdictions that answer these questions "no" should cease their reliance on money bail and commercial bail bondsmen.

Claim 14: There are documented instances of dangerous criminals being released on pretrial supervision who have committed violent crimes while awaiting their trials.

Response to Claim 14:

1. **Justice cannot be fairly administered if the justice system sets policies in response to aberrant or sensational cases.**
2. **Some people, regardless of the type of supervision they are under, will still commit crime. This has happened before, and it will continue to happen so long as a 100% accurate prediction of human behavior is unattainable. While unfortunate to the issue of pretrial release, this fact is inevitable in a country and in states that constitutionally guarantee personal freedom before trial.**

This claim focuses on aberrations in the criminal justice system, which the media often find intriguing. For the most part, risk assessment, coupled with varying levels of supervision designed to minimize that risk, is adequate to keep nearly all defendants coming to court and staying out of trouble in the community during the pretrial period.

Unfortunately, there will always be aberrant cases. These cases exist now, under the money bail system and under all other forms of criminal justice supervision (e.g., diversion, probation, community corrections, parole, and even within jails and prisons). Indeed, because commercial bail bondsmen do not assess risk to public safety before writing their bail bonds, cases in which a defendant commits a new crime while on pretrial release are logically more likely to happen with release through a commercial surety with no pretrial supervision.

Occasionally, despite the best efforts of law enforcement, prosecutors, judges, pretrial services staff, and others in the criminal justice system, someone will commit a crime while under supervision, just as, under the money bail system, defendants commit new crimes while out on a cash or commercial surety bond. Nevertheless, a criminal justice system should not be run in response to either aberrant or sensational cases.

Claim 15: Bail bondsmen ease jail crowding by taking responsibility for defendants that the courts would not otherwise release.

Response to Claim 15:

1. **Commercial bail bondsmen may only write bonds, if they choose to, for defendants whom the courts have previously authorized release.**
2. **The money bail system actually operates to *cause* jail crowding. Nationally, 85 percent of defendants detained until the date of their trial are incarcerated because they were unable to afford the financial requirement on their bond. Large, arbitrary bail bond amounts, coupled with bail bondsmen who choose only to help release those defendants able to pay, have combined to contribute to jail crowding in the United States.**

This claim, from an American Legislative Exchange Council (ALEC) publication titled "The State Factor – Criminals on the Streets – A Citizen's Right to Know," is untrue. Under the traditional money bail system, a commercial bail bondsman cannot bond out a defendant unless a judge has already made the decision to release that defendant and has set a surety option bond. The decision to release comes first. The bondsmen's consideration of whether that defendant has enough money and collateral to satisfy the bond (i.e., the bondsman's profit interest) is secondary, although the bondsmen's decision can often result in nullifying the judicial decision to release.

Across the country, nearly all defendants enjoy an absolute right to be released on bail. Accordingly, any claim saying that the courts "would not otherwise release" these defendants is simply wrong. Judges routinely make decisions to release most defendants – unfortunately, they often do so without regard to the defendant's own financial condition, which, in turn, causes unnecessary pretrial incarceration.

Thus, the more important response to this claim is the widely accepted observation that the current system, with its emphasis on money bail and commercial bail bondsmen, is a large *contributor* to jail crowding. Arbitrary bail bond amounts, combined with the fact that commercial bail bondsmen only help to bond out those persons able to pay a premium and/or the promise of collateral, has led to growing populations of pretrial inmates who remain incarcerated because they cannot pay the bondsmen's fee or provide that collateral. Nationally, 85% of those defendants detained until their trial are in jail because they are unable to post the financial piece of their bond. Depending on the size of the jail and the individual bail setting practices employed in any particular jurisdiction, that number of defendants – those who have been deemed eligible for release by a judge, but who are not bonded out by a commercial bail bondsman because of lack of money – can average several hundred per day.

Claim 16: Unlike the government, bail bondsmen use bounty hunters at the bondsmen's own expense. Releasing defendants under pretrial supervision will ultimately cost taxpayers when absconders are located and arrested.

Response to Claim 16:

1. **When commercial sureties are involved with fugitive recovery, the expenses are typically borne by the defendant or the defendant's family. Moreover, the bounty hunter claim is overstated.**
2. **Pretrial services programs often have high court appearance rates, and arguments that focus on the small number of system failures avoids discussing the larger problems with bail.**

This claim is misleading for several reasons. In the event that commercial bail bondsmen search for missing defendants or hire bounty hunters (also called fugitive recovery agents) to search for them, the search expenses often come directly from defendants or their families, who have paid the commercial bail bondsman to serve as a commercial surety. Thus, bounty hunters are typically not used at the bondsman's own expense. Instead, defendants have often signed a contract that states that, in addition to the bondsmen's normal fee, they will pay for any fugitive recovery services that the commercial bail bondsmen or bounty hunters provide.

This claim also does not account for professional pretrial release agencies' success at getting defendants to court. In jurisdictions that use such services, professional pretrial services programs proactively make efforts to assure that defendants appear in court.[20] Accordingly, it is not atypical for a pretrial services agency to show a successful court appearance rate for *all* court hearings held during the course of a defendant's pretrial period of 92-98%, regardless of the type of bail bond used (personal recognizance, cash, or surety). Given this rate of success, any argument that focuses on the small number of system failures is misleading and avoids discussion of larger problems associated with the money bail system. Moreover, making sure defendants appear in court constitutes only one of the many critical functions performed by pretrial services agencies, which includes (1) information gathering and risk assessment; (2) making recommendations to judges, and (3) supervision.

Overall, there appear to be several misconceptions concerning the use and effectiveness of bounty hunters to apprehend fugitives. Because bail bonds are often co-signed and highly collateralized, "hunting down absconders" typically consists of commercial bail bondsmen persuading the co-signor (i.e., another person, often the defendant's family member, listed on the bondsman's contract) with collateral to convince the

20 In addition to their proactive efforts, many pretrial services programs also have procedures in place, or even specialized units, to find defendants who have failed to appear in court.

defendant to turn him or herself in. The national literature on this topic appears to be mixed, with arguments for and against the effectiveness of bounty hunters. Nonetheless, individual jurisdictions can quickly determine the accuracy of this claim by performing some simple research.

For example, in one U.S. jurisdiction, jail data showed that commercial bail bondsmen or their affiliates (e.g., bounty hunters) were responsible for only one half of 1% of all bookings in the local detention facility. Municipal, county, and state law enforcement was responsible for the remainder of bookings, including persons booked for new crimes. Additional research performed in that jurisdiction further demonstrated that commercial bail bondsmen rarely locate or apprehend defendants who had failed to appear. Four major law enforcement agencies in that jurisdiction, comprising over 87% of the county's population were polled, and they reported that commercial bail bondsmen notified them of the defendants' whereabouts for less than 1% of their adult arrests.

Finally, a survey of the court clerks in the judicial district of that jurisdiction was also illuminating. That survey showed that commercial bail bondsmen had approximately 250 contacts with the court in a one month period in 2009. Approximately one in five of the contacts consisted of bondsmen requesting to get off of a bail bond, and the remainder were for administrative reasons (e.g., a bondsman checking on whether a case had been adjudicated, or requesting the defendant's contact information from the court). There were zero documented instances of a bail bondsman bringing a defendant into court because of the defendant's failure to appear.

Thus, based on reports from local law enforcement, data from the local detention facility, and data from the courts, the frequency of that jurisdiction's commercial bail bondsmen bringing to court or the jail defendants who have failed to appear appears to be virtually non-existent, making the claim effectively meaningless.

Other jurisdictions may generate differing data, but it is unlikely that the bounty hunter function is nearly as large as it is portrayed by commercial bail bondsmen. Given improvements in communication and technology, the nation's federal, state, and local police agencies form a nationwide network of law enforcement. These trained and regulated professionals are by far the most likely entities to apprehend defendants who have absconded and to take them to a nearby detention facility. From there, defendants are returned to the court of jurisdiction if the judge has ordered the defendant's return. To assist in this effort, virtually all pretrial services agencies have current information on the residential and employment location of each defendant along with other personal contacts (including occasional bond co-signers).

Claim 17: Pretrial services programs were started with the legitimate purpose of helping indigent defendants: they have outgrown that purpose.

Response to Claim 17:

1. **Contrary to the contention that pretrial services programs have "outgrown their purpose," these programs have, in fact, grown to respond to an increasingly complex purpose that is much broader than serving only indigent defendants.**
2. **Moreover, pretrial services agencies respond to the two-fold purpose of bail – assuring public safety and appearance in court – while the money bail system and commercial bail bondsmen operating in this country do not. If the courts were to blatantly distinguish between rich and poor defendants, as the bondsmen would have them do, the courts would merely perpetuate a fundamentally discriminatory system that would likely violate the Constitution.**

Pretrial services programs were conceived, in large part, to combat fundamental inequalities in the money bail system against the poor.[21] However, their purpose has always been much broader than merely helping the indigent, and is more accurately tied to the overall purpose of the pretrial release decision, which includes "providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses, and the community from threats, danger, or interference."[22] Thus, contrary to the contention that pretrial services programs have "outgrown their purpose," the national standards on bail and pretrial release, as well as many statutes, envision that pretrial services agencies will be created and grow to fulfill the broader purpose of pretrial release for all defendants.

21 An equally compelling basis for the creation of these agencies, however, came from rising dissatisfaction with commercial bail bondsmen. Indeed, dissatisfaction with the commercial surety industry is interwoven with the rise of pretrial services agencies.

22 *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007) Std. 10-1.1.

In many states and in the federal system, pretrial services entities have readily adapted over the years in response to changes in law and public attitudes about criminal justice. The legal changes include: (1) federal and state recognition of danger to the community, or public safety, as a constitutionally legitimate purpose of bail in addition to court appearance; (2) the adoption and use of a range of non-monetary bail bond conditions to help further those purposes; and (3) the adoption and use of individualized defendant considerations that judges must consider when setting bail, including, among other things, a defendant's criminal history, employment status and history, family ties, and financial condition. Changes in the public's attitudes about criminal justice include public recognition of jails and prisons as finite resources, the understanding that most jail inmates are ultimately released back into the local community, and the desire to carry out criminal justice initiatives in an effective but cost-efficient manner. Professional pretrial services programs generally have adapted to perform the duties required to meet these legal and attitudinal changes. In virtually every juris-

diction that has one, pretrial services agencies collect, synthesize, and present the necessary individualized risk information to judges, make an informed recommendation to the judges concerning bail bond conditions, and supervise defendants to assure they are abiding by any number of conditions of release in the interest of public safety and court appearance. These functions are all important regardless of a defendant's financial situation.

Because commercial bail bondsmen have not adapted to changes in the law over the past few decades (i.e., they do not consider public safety in their determination of whether to contract with a particular defendant; they do not gather information or inform the court about the considerations necessary to make a meaningful bail determination; they do not monitor or supervise defendants to assure compliance with all court-ordered conditions of release), they are unable to provide the sort of services that the public desires and that the courts need to further the two-fold purpose of bail. Indeed, in some states commercial bail bondsmen have claimed that pretrial services agencies should continue helping the poor, leaving only the wealthier, incarcerated defendants for their services. By doing so, these bondsmen expose their profit motive at the expense of justice, and tacitly embrace a fundamentally discriminatory and potentially unconstitutional system.

Claim 18: There is no evidence that anyone is any safer without commercial bail bondsmen, or that pretrial release without the use of commercial bail bondsmen has helped anyone.

Response to Claim 18:

1. **The burden of proof for this claim is on the commercial bail bondsmen. There is substantial research and literature supporting the premise that eliminating or significantly reducing reliance on the traditional money bail system and increasing the use of pretrial services programs leads to safer communities, fewer failures to appear, and less costs. The federal government, several states, and numerous local jurisdictions either disallow or rarely use commercial sureties, all without any measurable decrease in public safety.**

The burden of proof for the applicability of this claim is on the commercial bail bondsmen. The vast amount of research on the subject of bail supports the premise that eliminating or significantly reducing reliance on the traditional money bail system and increasing the use of pretrial services programs leads to safer communities, fewer failures to appear, and a decrease in the social costs of confinement borne by the defendant, all with significant monetary savings for the public. As noted previously, based on this substantial research, the American Bar Association, the National Association of Pretrial Services Agencies, and the National Association of Counties, among other important national groups, all agree that the current money bail system should change.

For a variety of reasons, four states (Illinois, Kentucky, Oregon, and Wisconsin) do not allow commercial surety bail bonds, and the federal government, two other states (Maine and Nebraska), and the District of Columbia allow them but rarely use them. Other jurisdictions also make use of local laws or practices that effectively eliminate the use of money bail, all without any measurable decrease in public safety.

Claim 19: Pretrial services programs are required to report information to the state but they do not.

Response to Claim 19:

1. **This blanket claim must be gauged against each state's reporting requirements and practices. Nevertheless, research into actual practices in one state showed that all pretrial services programs across the state had dutifully filed the required reports, but that many commercial bail bondsmen have not filed their required reports in a consistent manner.**

This is a blanket claim that may be true or false, depending on the state you are in. The claim has been made primarily in states where American Bail Coalition and ALEC are attempting to push a bill called "The Citizen's Right to Know" law, which would implement onerous reporting requirements on pretrial services agencies.

Reporting requirements will vary across jurisdictions, so further research must be done locally to investigate this particular claim. In one state, for example, the statute requires pretrial services agencies to report various outcomes to a particular state department. From a cursory look at that state's practices, it appears that all pretrial services programs across the state have dutifully filed the required reports each year they have been required to do so. According to the data, however, the bail bondsmen in that state have fared worse. They, too, are required to file reports with a designated state oversight agency, but research into bondsman practices in 2004 and 2005 revealed that only half filed the required reports, and many of the filed reports were incomplete. Moreover, approximately 45% of the roughly 99 enforcement actions against commercial bail bondsmen in that jurisdiction in 2008 were actions based, at least in part, on the commercial bail bondsmen's failure to file their required annual reports.[23] Thus, in that state, as a group the commercial bail bondsmen, and not professional pretrial services agencies, have deficiencies in reporting.

23 In this particular jurisdiction, the state regulating agency oversees approximately 550 bail bonding agents out of a total of 110,500 insurance producers. In 2008, that agency reported 180 total enforcement actions against insurance producers doing business in the state. If these enforcement actions were evenly filed against all resident and nonresident insurance producers regulated by the agency, commercial bail bondsmen would be expected to account for only .005% of the actions (or only one case). Instead, commercial bail bondsmen accounted for 99 of the 180 enforcement actions against regulated insurance entities, or 55% of all enforcement actions for that year.

Claim 20: Private money bail bondsmen ensure the public's safety by bonding out only those defendants who pose no risk of FTA, leaving riskier defendants in jail.

Response to Claim 20:

1. **Commercial bail bondsmen have no duty and have assumed no responsibility for assuring public safety through their bail bond contracts. The defendants left in jail by the bondsmen are perceived as "risky" only in terms of their inability to pay the premium or collateral for the commercial surety in the event that they fail to return to court.**

Commercial bail bondsmen have no duty and have assumed no responsibility for assuring public safety through their bail bond contracts. By the commercial bail bondsmen's own admission, the people that the bondsmen leave in jail are those who are a high risk for not appearing for their court dates, and nothing more. Others left in the jail by the bondsmen are those who cannot afford their services or who do not own collateral to back up the bail bonds. Moreover, private bail bondsmen are typically not held accountable for any breach in public safety by a defendant out on one of their bonds – they are only held accountable if the defendant fails to appear for court. While judges must weigh a defendant's largely unfettered right to bail (individual liberty) with sometimes competing concepts of public safety and court integrity, money bail bondsmen are only concerned with whether the defendant will appear for court, the one concept tied directly to their profitability. Indeed, given their limited purpose, commercial bail bondsmen likely welcome clients who continue committing new crimes, but who show up for court, as opportunities to contract for increasingly more expensive bail bonds.

Claim 21: Pretrial supervision is unconstitutional.

Response to Claim 21:

1. **This claim is too broad to meaningfully answer. Generally, the burden of proving that a statute or other government action is unconstitutional is on those persons making the claim. At the very least, people making this claim must explain which parts of the federal or state constitutions have been allegedly violated, and provide legal support.**
2. **It is highly unlikely that release conditions will be declared unconstitutional pursuant to any facial challenge. Individual conditions imposed in particular cases, however, might be declared to be unconstitutional, but the ruling in such a case would likely be fact bound and not easily generalized to other cases.**

It is not enough to simply contend that some government action (like pretrial supervision) is unconstitutional without detail or explanation, and then expect others to prove its constitutionality. The overall burden is on those persons trying to show that something is unconstitutional, not the other way around. Without detail, such as which parts of the federal or state constitutions are implicated and legal support for the claim, a meaningful response is virtually impossible.

As it relates to government regulation or legislation, it has been said in the broadest sense that the government may employ all appropriate (within the scope of, and not prohibited by, the constitution) means that are plainly adapted to legitimate (within the scope of, and not prohibited by, the constitution) ends. A great amount of constitutional law is based on determining whether governmental means are somewhat rationally related to legitimate ends. Depending on the facts of the case and the claim brought, courts will often employ various standards articulating levels of scrutinizing the relationship. For example, when a fundamental right is implicated, courts will employ a "strict scrutiny" standard to assess whether the means are "necessary" to promote a "compelling" state interest. The Supreme Court has said that "'[t]he legitimate and compelling state interest' in protecting the community from crime cannot be doubted." *Schall v. Martin*, 467 U.S. 253, 264 (1984) (quoting *De Veau v. Braisted*, 363 U.S. 144, 155 (1960)). Thus, at least to the extent that conditions of pretrial release are considered necessary to promote the compelling interest of community safety, they appear to pass facial constitutional muster under the most exacting standard.

Many courts have said that they have the "inherent power" to place restrictive conditions upon the granting of bail. *See, e.g., United States v. Smith*, 444 F.2d 61, 62 (8th Cir. 1971). In most states, however, courts need not rely on this inherent power because conditions of bail and pretrial release are created by statute. Such statutorily created restrictions are typically presumed to be constitutionally valid, and those attacking the statute's validity often have the burden of proving its unconstitutionality beyond a reasonable doubt. Moreover, courts are reluctant to question a statute's constitutionality, and if a statute is susceptible to different interpretations, one of which is constitutional, the courts will interpret it

so as to satisfy constitutional requirements. *See, e.g., People v. Gonzales,* 534 P.2d 626, 628 (Colo. 1975). Indeed, there is a decent (though somewhat esoteric) argument that because courts must decide what the law is whenever they rule on a concrete claim, they implicitly declare the law to be valid whenever it is applied. If true, one could also say that because courts have spent the last several years deciding claims under the current bail and pretrial release statutes without significant legal problems, the laws are at least presumptively valid. Accordingly, any person contending that a statute creating conditions of pretrial release is unconstitutional would face some fairly big hurdles.

In addition, in some states the courts themselves may have expressly approved of conditions of release and never questioned the constitutionality of such conditions. In those states, release conditions and supervision methods may be presumptively valid, with a high burden on those opposing the conditions to prove their unconstitutionality.

Throughout the country, there have been cases in which state courts have decided that a *particular* condition of release is invalid based on statutory or constitutional grounds, but those cases are rare, and are largely limited to the facts of the case. Likewise, throughout the federal system, courts have also found particular conditions either statutorily or constitutionally invalid, but those cases are also rare. For example, in *United States v. Martin-Trigona*, 767 F.2d 35 (2d Cir. 1985), the trial court's condition that the defendant submit to a psychological examination in order to determine future dangerousness was found to be invalid because the federal statute required future dangerousness to be determined at the time of the bail setting, not at some later date.

In *United States v. Goossens*, 84 F.3d 697 (4th Cir. 1996) the trial court's condition that a defendant not cooperate with law enforcement during his pretrial release period was declared invalid because it was not related either to assuring the defendant's appearance in court or to protecting public safety. In *United States v. Rose*, 791 F.2d 1477 (11th Cir. 1986), the trial court's condition that it would retain the bail bond to pay any future fine was declared excessive under the Eighth Amendment and contrary to the federal statute because the purpose of the condition appeared either to enrich the government or punish the defendant.

On the other hand, because the federal statute allows judges to impose "any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community," 18 U.S.C. § 3142 (c) (1) (B) (xiv), federal courts have approved many conditions not listed by the statute, including a condition freezing a defendant's assets, *United States v. Welsand*, 993 F.2d 1366 (8th Cir. 1993), and a condition that the monetary condition of release (bail bond amount) will be forfeited upon commission of another crime, *United States v. Gigante,* 85 F.3d 83 (2nd Cir. 1996). Like the federal system, many states have statutory provisions allowing judges to impose conditions that will render it more likely the defendants will fulfill their other conditions of release, which allows some flexibility for the court to be somewhat "creative" at this stage.

In practice, any particular defendant alleging unlawful pretrial release conditions would likely claim several different conditions illegal under various statutory or constitutional theories. Such a case might resemble *In Re York*, 892 P.2d 804 (Cal. 1995), in which the defendant argued that

random drug tests and warrantless searches during his pretrial period of release violated the concept of a presumption of innocence, his right to privacy (Fourth Amendment), and his right to equal protection of the laws. As in *York* (which held against the defendant), other state courts would likely decide each claim based on the particular facts of that case and the body of law associated with the state or federal statutory or constitutional claim alleged to have been violated. Thus, by itself, the broad claim that pretrial supervision is unconstitutional is merely conclusory, and would likely fail as a matter of law.

Claim 22: Pretrial supervision is unlawful punishment before conviction.

Response to Claim 22:

1. **The United States Supreme Court has held that actual pretrial *detention* with appropriate procedural due process safeguards is regulatory, and not penal, under the Bail Reform Act of 1984. Because pretrial detention is not considered punishment given the legitimate regulatory goal of protecting public safety, it is highly unlikely that the less restrictive option of release with conditions would be considered punishment given the same goal.**
2. **A more appropriate claim is that pretrial detention, which occurs as a result of judges setting unaffordable money bail bonds without the procedural due process safeguards envisioned by the United States Supreme Court, is unlawful punishment before conviction.**

It is undisputed that pretrial punishment is constitutionally forbidden. See *Schall v. Martin*, 467 U.S. 253, 269, (1984) ("It is axiomatic that '[d]ue process requires that a pretrial detainee not be punished.'") (quoting *Bell v. Wolfish,* 441 U.S. 520, 535 n.16 (1979)). Nevertheless, while each condition of bail and pretrial release may appropriately be viewed as some restriction on a defendant's liberty, the United States Supreme Court has said that actual pretrial *detention*, with appropriate procedural due process protections, is regulatory, and not penal under the Bail Reform Act of 1984. See *United States v. Salerno*, 481 U.S. 739 (1987). Relying on *Schall* (which, in turn, relied on factors articulated by the Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) to determine whether an act of congress is penal or regulatory in character), the Court in *Salerno* stated that unless Congress specifically intended to impose punishment, "the punitive/regulatory distinction turns on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternate purpose assigned to it.'" *Id*. at 747 (quoting *Schall*, 467 U.S. at 269) (further quotation omitted). Given the Court's conclusion that pretrial detention itself is not considered penal given the Act's legitimate regulatory goal of preventing danger to the community, it is highly unlikely that release with conditions would be considered punishment given the same goal.

While particular states may have no direct cases on point, it is possible nonetheless that those states may have approved of the *Salerno/Schall* analysis by using the same basic approach in other contexts. If so, it would be unlikely for the state court to decide the issue differently than the federal courts.

It should be noted that the Court in *Salerno* also uttered the memorable statement, "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." 481 U.S. at 755. The Court emphasized that the "extensive safeguards" embedded in the Bail Reform Act and the "careful delineation of the circumstances under which detention will be permitted" were crucial to repelling the constitutional challenges. In many cases across this coun-

try, however, defendants are having bail bonds set in unaffordable, if not excessive amounts, leading to pretrial detention without the procedural safeguards envisioned by the Court in *Salerno*. Those cases provide more compelling instances of possible unlawful punishment prior to conviction.

Claim 23: Defendants may have a right to bail, but they don't have the right to post bail.

Response to Claim 23:

1. **While perhaps technically true in an extremely limited sense, the claim has several problems, including its bias toward the traditional money bail system. Moreover, saying that one has no right to post bail makes the right to bail essentially meaningless.**

In an extremely limited sense, the statement is true. While United States Constitution prohibits "excessive" bail, the courts have generally not held that defendants have a fundamental right to have their bail bonds set in such a way that they can post it in all cases. Nevertheless, there are several problems with this claim.

First, the claim itself shows an ingrained bias toward the money bail system, which relies primarily on amounts of money to determine defendants' freedom. While other conditions of release may arguably present hurdles to maintaining a particular defendant's freedom once he or she is released, an unattainable monetary condition of release acts to prevent the defendant's release altogether. This directly raises the issue of 'excessive bail' and pretrial punishment, which are clearly prohibited. The purpose of a monetary condition of release is not to assure that a defendant cannot pay it, but to assure that there is some incentive to return to court (for several reasons articulated by the national standards, monetary conditions of release are never appropriate to protect the public safety, the other constitutionally valid purpose of bail). In states in which the governing statute requires judges to consider a defendant's financial condition when making the bail determination, it is at least arguable that an amount set higher than his or her ability to pay is unreasonable, and thus excessive.

Second, constitutional rights must be meaningful, and to say that a defendant has a particular right but with no concomitant right to fully realize it, ignores Supreme Court law to the contrary. For example, in *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985), the Court emphasized the need for a "meaningful" opportunity to realize the right to a fair hearing:

> This Court has long recognized that, when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to prepare his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.
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> Our recognition since [1953] of elemental constitutional rights, each of which has enhanced the ability of an indigent defendant to attain a fair hearing, has signaled our increased commitment to assuring meaningful access to the judicial process.

Third, while no court has explicitly stated that defendants enjoy a right to "make bail" in all cases, it is more significant that few, if any courts, speak of a qualified, or limited right. Indeed, many courts speak of an "absolute" right to bail, and the United States Supreme Court has called the right to bail "unequivocal." Saying that a defendant has no right to make a monetary bail bond amount is tantamount to saying that he or she has no right to wealth, which, while true, misses the point of bail reform altogether.