

The War on Public Safety

*A Critical Analysis of The Justice Policy Institute's
Proposals for Bail Reform*



Dr. Dennis A. Bartlett
Executive Director, American Bail Coalition

Executive Summary

Whether consumers realize it or not, there is currently a war being waged in the criminal justice system: a war being waged by government funded programs on a private industry. A war being waged with taxpayer dollars against a private industry that generates significant revenue for states and local communities. A war being waged that adversely impacts our communities' public safety interests.

Did you know that violent career criminals are being released from jail on nothing but a promise to return for their court dates?

Did you know that your tax dollars are used to fund these releases?

Did you know that almost 30% of those people released on a "promise" never show up to court?

Did you know that no one goes after those people to bring them back?

Did you know that the only way these persons are returned to custody is when they are ultimately re-arrested for additional crimes...thus creating another crime victim in the process?

Did you know that there is a method of pretrial release that doesn't cost taxpayers anything?

Did you know that there is a method of pretrial release that ensures that 99% of those released make it to court...and that for those who do not make it to court, it pays a financial penalty to the county?

If you answered "No" to any of the above questions, then you will want to read the following document.

Over the past few months, *The Justice Policy Institute* has released two separate whitepapers designed to criticize and attack the commercial bail bonding industry, or "Money Bail" system as they refer to it. Both of these so called "research" documents are not only riddled with anti-bail propaganda, but also are filled with misinformation, unchecked facts and baseless claims against private businesses. Even simple things like the names and locations of specific counties are misrepresented (i.e., Broward County Texas...there is no such county).

In response, the American Bail Coalition (ABC) thought it important to clarify and correct the many misrepresentations found in these publications. This document is a critical analysis of the two JPI whitepapers. It points out the many deceptions being promulgated by JPI, and also provides real facts, quotes and statistics that support the existence of commercial bail bonding as the most effective form of pretrial release.

We have identified 18 key deceptions in the JPI documents. Each of these deceptions is identified and responded to with what we call a "Bail Truth."

Also provided at the end of this document, as an Appendix, is a list of questions that every citizen, county commissioner, judge, law enforcement official, legislator, etc. should be asking about their county's Pretrial Service Agency. From the risk assessment methodology they say is being used to how their performance is measured, we think that every taxpayer and community member has the right to know these things.

“*Pretrial professionals have the mind set that “they” know what is best – not judges or anyone else. It is a real sense of elitism.*”

An Anonymous Pretrial Insider

Introduction

September 2012 will forever be known as the Justice Policy Institutes' (JPI) "Bail Month." As of the writing of this paper, JPI has issued two papers, both of which make the following claims:

- The abolition of money bail, and
- The obstacle to this aspiration is the commercial bail bond industry,
- And hence, elimination of commercial bail will usher in an era of bail reform

The following is a critical analysis of JPI's recommendations, which are mostly the usual recycled anti-bail references that they have perpetuated in forums over the last four decades. However, starting in the spring of 2011, there has been much a more aggressive and targeted attempt by the anti-bail folks to not only "reform pretrial," a proposed information which got its initial kickoff a half century ago under then Attorney General Bobby Kennedy, but to discredit and eliminate commercial bail in the process. With these two new marketing pieces, basically JPI has attractively repackaged its same old "bail is the enemy" propaganda that it has used for decades.

This initial analysis will be followed up with a more detailed criticism. Allegedly "Bail Month" as well as both papers were funded by a grant for the Open Society Foundation, a Soros funded entity. My initial impression of both papers, and an opinion shared by a number of other readers including a pretrial professional, is that despite their being well written and addressing serious deficiencies in the criminal justice system, they lack one important element: FACTS. These papers are so detached from the realities of the criminal justice system and the world of release pending trial as to constitute more of a burden than the one they purport to relieve. So let's start with the basics, something that the pretrial community struggles with, as usual.

“*Excessive bail shall not be required....*”

The Eighth Amendment of the US Constitution

What is a Bail Bond?

There are at least five methods of pretrial release:

1. Release on own recognizance (ROR) [No dollar amount set for bail.],
2. Cash bail [Defendant posts full amount of bail.],
3. Unsecured financial bail [Defendant posts no dollar amount and is released on promise to appear, upon failure of which, he is obligated for the whole amount.],
4. Cash deposit bail [Defendant pays a small percentage – usually 10% -- of the bond set, which is supposed to be refunded upon appearance.], and
5. Surety bail [A private party, typically a qualified insurance company called a "surety", guarantees the appearance of defendant in court, upon the failure of which, the surety pays the court the full amount of the bond].

Surety bail is the only pretrial method wherein a third party, by means of a written undertaking, financially guarantees to the court the appearance of the defendant. If the defendant does not show, the surety pays.

A Primer on the Surety Triangle

Suretyship exists whenever one party guarantees performance by another party of an obligation or undertaking. The one whose obligation or undertaking is guaranteed is the primary obligor or principal (in this case, the defendant); the one who guarantees that the obligation or undertaking will be performed is the surety, (the bail agent); and the one in whose favor the guarantee is given is the obligee (the court). The contract must be in writing and must specify a time, date and place for the principal to appear. This contract of suretyship is known as a surety bond (in this instance a surety bail bond). It is like a policy of insurance in that it provides indemnity to the obligee - as an insurance policy provides indemnity to the insured - against loss up to a specified amount resulting from the happening of a named contingency, that is the failure of the principal to perform or fulfill the prescribed obligation or undertaking (in this case failing to appear for court.) In the event of a failure to appear, the bond upon motion of the state's attorney will be forfeited, whereupon the entire penalty of the bond becomes due and payable by the surety. Depending on the grace period, if after a forfeiture, the accused is surrendered, the forfeiture will be vacated and if the surety has paid the forfeiture, the amount will be returned.

What Does a Bail Agent Do

A bail agent is a retail producer of surety bail bonds. He is an independent and licensed insurance agent, an independent business person, and not an employee of an insurance company. He has a contract with a surety insurance company which grants him power of attorney to execute and post a surety bail bond backed by the carrier's financial resources. The bail agent, like any other insurance agent, earns a commission for posting the bond. When a defendant purchases a bail bond from the bail agent, the bail agent affirms to the court that if the defendant does not appear the agent will pay the face of the amount of the bond set by the court. In turn the defendant pays the agent a premium and a signed promise to return (even if the bail agent physically has to apprehend the client.)

There are approximately 15,000 licensed bail agents in the US.

These small, independent businesses are multi-generational and employ in-total nearly 25,000 Americans around the country.

The bail industry costs taxpayers \$0 and generates revenue for local communities through taxes.

Efficacy of Commercial Surety Bail

What is the purpose of bail? Is it to sweat plea bargains from defendants, to punish defendants, to enrich the state through forfeitures, to manage jail populations and enhance “system efficiency”, release the highest number of defendants possible? None of the above. Despite the American Bar Association’s effort to insert into the concept of bail,

- protecting the rights of both defendants and victims,
- shielding the community from danger,
- gaining release for as many defendants pending trial as possible,
- and engender a new doctrine of pretrial justice,

the Supreme Court mandated that the purpose of bail *solely and primarily* is to secure the appearance of the defendant in court. To wit:

In United States v. Ryder, the Supreme Court states: “...the object of bail in criminal cases is to secure the appearance of the principal before the court for purposes of public justice.”

In achieving this end, the most efficient method of pretrial release is secured release, that is, release on commercial surety bonds. The U.S. government itself has confirmed this. The Bureau of Justice Statistics, using almost 15 years of data, has documented the track record of other methods and commercial bail. The 2007 BJS study, entitled *State Court Processing Statistics, 1990-2004, Pretrial Release of Felony Defendants in State Courts (November 2007, NJC 214994)*, upholds the assertion that commercial bail is more effective in getting defendants to court and confirms that those released on secured bonds are less likely to commit crimes than those on unsecured release while back on the streets awaiting trial.

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

““

*The optimist, who thinks
that all things will turn
out well, has to resort to
conspiracy theories, when
they do not. ””*

Gary Willis

Bail Fail: Why the U.S. Should End the Practice of Money for Bail

Is non money bail constitutional? Are non financial means of release pending trial unconstitutional? Well, according to that the part of the 8th amendment about bail not being excessive it certainly meets the Constitution's test. You can't be less excessive than zero. Regarding "excessive" the Supreme Court has said that bail is excessive when it is set in an amount higher than that reasonably calculated to ensure that one accused will stand trial and submit to sentence if found guilty. It doesn't say a high bail cannot be set if the charge is grave enough to discourage the defendant's appearance. However, the 8th amendment also says that there shall be bail. What is a sufficient surety on an OR release? The constitutions of 41 states say that bail can only be granted by "sufficient sureties". Even the four states that prohibit commercial bail not only use money bail but require sufficient sureties.

Hence, the starting point of the 8th amendment on bail is that it is all about getting a person to court, but don't set it too high. They didn't want it too low either. Too high bail deprives the defendant. Does bail set too low make the community suffer? BJS has shown repeatedly that defendants released on their own recognizance or deposit bail fail to appear more often and commit more crimes pending trial than those released on secured bonds. Does the public get a fair shake when a defendant is released with low or no financial conditions? Is it constitutional?



“Anyone who doesn't take the truth seriously in small matters cannot be trusted in large ones either.”

Albert Einstein

The War on Public Safety

The following is a fact check of the JPI document, *Bail Fail: Why the U.S. Should End the Practice of Money for Bail*. The bail industry felt it necessary to correct the many mis-truths and deceptions that have been presented by JPI. We believe that once you review these corrections you will see this JPI piece not as an academic view on the failures of the bail industry, but rather an over reaching myopic attack on commercial bail and ultimately public safety.

JPI Deception #1

Eliminate money bail. While eliminating the use of money bail may be challenging, it is possible to begin taking steps in this direction by banning the use of for-profit commercial bail bonding companies.

Four states have banned the involvement of for-profit, private citizen businesses in the judicial process: Kentucky, Wisconsin, Illinois, and Oregon. Around the U.S., various jurisdictions have chosen to ban bail bondsmen even if their state has not, such as Broward County, Texas, and Philadelphia, Pennsylvania.

Bail Truth #1

First of all, Broward County, Texas? No such jurisdiction exists.

On April 9th 2012, the Pennsylvania First Judicial District (Philadelphia) issued an order for the reintroduction of commercial bail due to the massive failure of the city's pretrial system to insure defendants' appearance at court. For over four decades, the city's pretrial system, the very system endorsed by JPI, from which commercial bail had been banned, affected the loss of over \$1 billion in uncollected forfeitures and the spawning of 47,000 fugitives. (Bail reform literature and advocacy documents omit mention of Philadelphia. Once touted as a pretrial beacon with the first risk instrument matrix, it was the pretrial gold standard. However, with the Inquirer series of articles in December 2009 documenting the collapse of the city's criminal justice system and pretrial program, bail reformers pass it over in embarrassed silence.)

Although the four aforementioned states have eliminated commercial bail, they have not eliminated money bail. Wisconsin is a relentlessly money bail state, setting impossibly high amounts and requiring in most cases full cash bail. Judges have admitted in writing that they use high bail to keep defendants punitively detained. Their chief reason for opposing the reintroduction of commercial bail in the state is that they now control the bail money. Furthermore, there are 22,000 fugitives in Milwaukee alone. Kentucky pretrial services under the direction of the capable Tara Klute has reached a high degree of performance, but it's not a pretrial paradise either. Commercial bail operates throughout the counties in terms of ATM like bail kiosks which charge 7.5% premium per bond plus other service charges. There are complaints that pretrial takes from 10 days to two weeks to determine the release of a defendant. A Jefferson County sheriff complains that his county has 77,000 fugitives. The primary means of release in Kentucky is the surety bond -- not a commercial surety bond, but a private one with the defendant, or family and friends securing the release with their own assets. In Oregon, there is a 30% FTA rate, plus it has become a haven for fugitives, especially the Portland area, from all over the Pacific Northwest because the state disallows recovery of fugitives. The state has lost at least \$86 million in uncollected forfeitures. Illinois has developed, especially in Cook County, a para-bonding system -- loansharks and payday lenders. Not only is the elimination of money bail challenging in these there four states, it is highly unlikely. As far as eliminating money bail in the other 46 states, probably impossible even if commercial bail was excised.

JPI Deception #2

Amend the Bail Reform Act and policies to comply with the Equal Protection Clause. Current practices allow for people to be treated differently within the criminal justice system on account of their financial status. Elimination of money bail is an important step toward eliminating disparities in pretrial outcomes due to financial status.

Bail Truth #2

JPI appears to be confused about The Bail Reform Act of 1984 which allows pretrial detention for persons who are arrested for serious crimes who might pose a danger to the community. This statute is a federal statute and applies only to federal defendants. It has been used by federal courts to uphold detention of persons accused of terrorist acts [*US v Goba* (2003)]. It upholds detention without bail, hence, renders moot any pretrial outcome due to financial status. Is JPI implying that federal courts are in violation of equal protection in those cases where in the courts apply the statute, if so they are in opposition to the Supreme Court in *US v Salerno* (1987).

JPI Deception #3

Include the voices of all involved parties to ensure that reforms to the pretrial process are meaningful and effective. As victims and their advocates provide a unique and critical understanding of the harm done and potential harm that could be done, it is important to build them into the pretrial release decision making process.

Bail Truth #3

“One of the most insightful findings from our surveys was the large number of interactions that bail agents actually have with crime victims.” Through these surveys, we found out that 86% of bail agents in the ExpertBail Network have an interaction with a crime victim at least once a month. To be honest, that number shocked us at first. However, the more we thought about it, our shock evolved into excitement. We saw an immediate need for us to identify ways to tap into the potential of the bail agent and the bail process and leverage it as a resource to guide victims at a true time of need.” - Executive of a major national victim advocacy group

The War on Public Safety

JPI Deception #4

Expand community education programs, such as the Neighborhood Defendant Rights programs, that inform people in the community about how to navigate the pretrial process. The confusing and inherently coercive pretrial process is challenging even for those with adequate financial resources and educational background. Understanding the process, legal rights, and what to expect could help people navigate this part of the case process more successfully.

Bail Truth #4

The best place to get this information free of charge is at a local bail bond agency. In fact, most bail agents have very sophisticated websites that provide information on not only how to navigate the bail process but also on how to select the best bail bond agent to work with. From videos to social media sites to podcasts the bail industry has become an incredible knowledge resource for consumers and communities to learn about bail.

JPI Deception #5

Use citations and summons to reduce the number of people being arrested and processed through jails. This is one solution to our jail overcrowding problem as police officers can more easily dispense citations while on the streets without needing to transport individuals to a booking facility.

Bail Truth #5

Citations properly used are an immense help to the criminal justice system. The downside is that too many cited people ignore their court dates, either through forgetfulness or by design, secure in the fact that they will not have to answer for it until they renew their driver's license. Such neglect balloons the warrant files. In California alone there are over two million outstanding warrants mostly due to defaults on citations. Profligate use of citations makes a laughing stock of the criminal justice system.

JPI Deception #6

Use standardized, validated risk assessments to determine who to release and how to release. Validated risk assessments are gaining popularity as judges look for more objective ways to conduct the pretrial process and many states can now provide models for how to implement this practice.

Bail Truth #6

*“And owing to the shallowness of our intuitions, we formulate our risk assessments too quickly.” Nassim Taleb, *The Black Swan**

Bail reform is focused on the “new era” of evidence based decision making. Evidence based practices are the current fad in all sorts of fields where the social sciences intersect with the criminal justice system. The hope is that it will provide a predictive tool wherever it is applied. It works something like this. Based on scientific observation desirable ends result from certain behavior(s). If the behavior can be reproduced, along with the same components and identical conditions, the same results can be guaranteed. This kind of positive or experimental method is not new. It undergirds modern science wherein sense perception is applied to the observation of phenomenon. In theory the results can be duplicated an indefinite number of times. This rightly is viewed as a powerful and useful tool to guarantee objectivity. It has but one weakness. It cannot penetrate to the moral and spiritual dimension of the human soul. A defendant’s decision to appear in court or not essentially is a moral decision. Will he or won’t he? No one ultimately knows. The bail reform movement after decades of striking out now is shoving all its chips to the center of the table, going all in, betting that evidence based practices will provide a tool of such predictability regarding a defendant’s performance, assessing the likelihood of the defendant’s returning to face charges in court, that it will obviate the need for money bail which will become as obsolete as the medieval barbarism of bloodletting.

Does it work? It’s fair to say that a lot of work needs to be done to not only to find a method, but also the quest is plagued by an across the board disparity in the definition of what constitutes evidence or empirically based reform, risk, risk assessment, risk management, measurement, accountability, etc. Then when all these categories have been cleaned and agreement reached on a risk assessment instrument, it then has to be evaluated to see if it works or to what degree it works. Pretrial services currently serve only a fraction of the country and only 42% of pretrial services use a risk assessment tool. Furthermore, the method is being eschewed by most judges whose use of money bail the bail reformers want “broken down”. One must give credit to the faith exhibited by those endorsing this approach, but it appears based more on an intuition and hope than reality that the current alchemy of evidence based practices will transform the criminal justice system. Hardly anybody in the bail reform community would credit the commercial bonding industry for employing risk assessment tools. Their general image of the bail agent is of one who makes highly subjective, gut decisions about risk. This is not to be discounted, but the commercial bonding community does not rely exclusively on instinct. The bail agent does an extensive interview with a client and more importantly with his family and friends and double checks the information given. While pretrial services on occasion voluntarily have their risk assessment tools evaluated, commercial surety bail is subject to regulation by the states’ departments of insurance. No pretrial service agency has ever undergone the nitpicking conduct market exam to which bail insurance companies and their agents have been subjected (for the cost of which they must pay the DOI in question -- not to mention any fines imposed by same). Departments of insurance perform such examinations in order to protect the consumer. One of the things they scrutinize is the agent’s risk assessment form, not only for content, manner of presentation, clarity of intent, and *usability* but to insure and protect a client’s financial rights also. Hence, risk assessment of clients is not the wholly owned turf of the pretrial services community.

JPI Deception #7

Implement measures of pretrial detention and release services to evaluate current programming and better inform pretrial reform efforts. In order to better understand the impact of pretrial detention and how the U.S. is performing compared to other nations, national data on pretrial detention should be gathered from jails and prisons that hold people who are going through the pretrial process.

Bail Truth #7

This is an oblique admission that pretrial agencies are ineffective. National data had been collected on the pretrial performance by the Bureau of Justice Statistics for over two decades. The pretrial community has used its political influence with the Justice Department to end the project mainly because the conclusions favored the performance of commercial bail over that of PTS agencies. Compare with other nations? Like Iran, Zimbabwe, India, Russia, or even benign Switzerland which can hold you in pretrial detention indefinitely? What possible lessons would they have for a country that has the 8th amendment?

JPI Deception #8

For-profit bail bonding businesses should be required to report on pretrial outcome measures such as rates of forfeiture and failures to appear. For-profit bail bonding companies are responsible for the release of millions of defendants each year. At this time, there is little regulation or oversight over this crucial aspect of public safety. Only when for-profit bail bonding companies are required to report on indicators of pretrial performance and outcomes will policymakers be able to make educated decisions around the use of bail and bail bonding as opposed to non-financial release options.

Bail Truth #8

Bail bonding agents and their insurance carriers are required by law in most states keep precise records. This is necessary to keep track of the millions of transactions annually. They are businesses and for the most part are regulated by the department of insurance or equivalent within the states, and often the counties and courts, where they do business. Bail agents are required to meet licensing and continuing education requirements. On any bond posted, the posting bail agent and his carrier, the bond amount, the defendant, and other particulars are a matter of public record. The same goes for forfeitures.

The American Bail Coalition (ABC) repeatedly has encouraged -- without success -- the Bureau of Justice Statistics to centralize this information. ABC has even offered to collect (free of charge) the data based on a BJS designed research instrument. Such a comprehensive study would be extremely valuable not only for policy makers but for the commercial bonding industry. Some in the pretrial community suggest that the bail industry fund their own study. Not a bad idea, but any study funded by the industry, regardless of its merits, would be DOA with the bail reformer community. Additionally, the bail industry's longevity in itself is the most telling sign of its effectiveness. When you operate a business that collects only 10% but must pay out 100% of the bail amount if you don't perform, you have to perform at levels of perfection or you go out of business quickly. So the fact that the bail industry has been around as long as it has, is proof alone that it works. *(Also see Bail Truth #6 about market conduct exams to which commercial bail carriers are subject).*

JPI Deception #9

Utilize pretrial supervision agencies. Pretrial services can assist both law enforcement and judicial officers to promote citations and appropriate bail determinations by providing risk assessment and fact-finding services.

Bail Truth #9

For the most part pretrial supervision is a myth. If any, it consists of robocalls to defendants. See Bail Truth #6 above regarding risk assessment. Most pretrial data is collected in interviews with criminal defendants who are presumed to be telling the truth.

JPI Deception #10

Use court notifications. Through personally manned or computerized programs, reminding people about upcoming hearings has proven to reduce failure-to-appear rates.

Bail Truth #10

A sound common sense suggestion and one that does reduce FTA rates. For decades it routinely has been employed by bail agents...at no cost to taxpayers.

For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice.

The second piece published by the Justice Policy institute is just as myopic and factless as the initial piece. While the first publication focused on attacking the sanctity of public safety in our communities, the second publication is a flat out, over-the-top smear campaign on the bail bond profession so as to justify the failures of pretrial services agencies.

****Please note, contrary to what has been stated in this JPI publication, Beth Chapman is neither the Senior Vice President of the American Bail Coalition nor ever has been a member of the same.***



“ *I am a firm believer in the people. If given the truth, they can be depended upon to meet any national crisis. The great point is to bring them the real facts.* ”

Abraham Lincoln

Attack of the Vampire Bondsmen

The following is a fact check of the JPI document, *For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice*. Once again, the bail industry felt it necessary to correct the many mis-truths and deceptions that have been presented by JPI. We believe that once you review these corrections you will see this JPI piece not as an academic view on the failures of the bail industry, but rather a misinformed and misguided attack on the commercial bail profession and industry.

JPI Deception #11

Bail amounts are increasing. Court officials who believe that the more money someone pays the more likely they are to show up in court have been increasing bail amounts to take into account that people who use bondsmen must only come up with a percentage - often ten percent - of the total bail amount in cash to secure their release. In a vicious cycle, this has led to some bail bondsmen lowering their fee or allowing people to pay on installments, which in turn leads judges to set even higher bails, to the point that most people can no longer pay their own bail. This in turn, leads to more people in jail because they cannot make bail. Between 1992 and 2006 the average bail amount more than doubled from \$25,400 to \$55,500, far outpacing inflation for that period

Bail Truth #11

Courts have demanded higher bail amounts in recent years. And it has disadvantaged not only defendants but bail agents, some of whom have cut premium rates in order to write any bonds at all. The bonding industry has worked hard to rectify this abuse. Admission to bail always involves a risk that the accused will flee. It is the duty of the judge to reduce the risk by fixing an amount calculated to hold the accused for trial and its consequences. But do higher bail amounts cause jail overcrowding? What is the current jail reality? On April 25, 2012, BJS released a new update on jails, entitled *Jail Inmates at Midyear 2011* <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=4293>. It reported that for the third consecutive year, jail populations had declined. Not much, only 1.8% for the last period, but going down nonetheless. As for overcrowding, while many local jails were struggling with high census, over all, jails were operating at 84% of their capacity, the lowest since 1984 and the incarceration rate was the lowest since 2002. Jails primarily are confinement facilities for those awaiting court action, hence it should come as no surprise that 61% of the inmates are in this category. The study reports that jails have a daily average of circa 450,000 for the reporting period, and counted in this group are nearly 63,000 outside of jail facilities on electronic monitoring, home detention, and other kinds of release pending trial. The result is a daily average in confinement of 387,000, around one tenth of 1% of the US population. Hardly a sky-is-falling scenario. Though the number of this cohort might remain the same day after day, individual inmates composing it vary. Jails have a quick turnover rate, 50% for the large jails, and 100% for smaller jails.

FACT: “For the third consecutive year, jail populations have declined.”

U.S. Bureau of Justice Statistics, 2012

JPI Deception #12

Political influence keeps bail bondsmen in business. Today, the industry does a conservative estimate of \$2 billion in revenue annually and is supported by around 30 insurance companies who underwrite them, who in turn are worth even more. The for-profit bail industry engages in multimillion dollar lobbying efforts to attack and defund pretrial services and increase their profitability by reducing regulation and financial risk. In California alone, the bail industry has spent almost a half million dollars on lobbying since 2000. In addition to lobbying, bail agents, businesses and associations have contributed over \$3.1 million to state-level political candidates from 2002 to 2011, with over 4 in 5 dollars spent in ten states.

Bail Truth #12

“Consistent with the processes provided in these Standards, compensated sureties should be abolished.”

ABA Pretrial Standard 10-1.4. (f)

While the ABA is committed to abolishing compensated surety, the ABA Torts and Insurance Division supports “compensated surety” and even has a Surety Subcommittee. In the face of attempts to eliminate an effective and robust industry, can any reasonable person expect the bail industry to cede the field to methods of release with a less than flattering tradition of marginal performance?

As for the lobbying amounts ascribed above, it is a pretty big stretch to conclude that the bail industry is buying its way through state and local governments with such conservative and responsible amounts of investment. All the while with Pretrial programs nationwide receiving millions of taxpayer dollars to do an ineffective and inferior job.

FACT: The American Bail Coalition has spent less than \$150,000 a year in lobbying efforts for the past decade.

For the record, according to the Surety and Fidelity Association of America, (SFAA), the trade organization for surety insurance, there are almost 500 surety insurance carriers in America. Of these, 35 companies write surety bail bonds which in 2011 secured the obligations of defendants to appear in court to the tune of \$13.6 billion. In the same time period, the aggregate of surety insurance companies secured the obligations of principals in all transactions for \$340 billion. Bail constitutes only 4% of the total. Hence it is a relatively small market compared to the whole. On the other hand, it employs circa 15,000 agents (roughly half of whom are women and half of whom are minorities) with perhaps 10,000 support personnel, who transact an estimated 3 million court appearance bonds annually. This translates into releasing from confinement each month an average of 250,000 defendants pending trial who otherwise would be holding down a jail cell. The cost of this service is borne solely by the commercial bail industry, unlike tax payer funded pretrial service agencies like the DC pretrial service agency with its annual price tag of \$61 million tax dollars.

JPI Deception #13

The American Legislative Exchange Council (ALEC) has been a driver of harmful bail legislation since 1994. Since the formation of The American Bail Coalition (ABC) and its association with ALEC, the for-profit bail industry has flourished while non-financial release has declined and bail amounts have risen. In the decade following their partnership, the percentage of arrested felons who were released without financial conditions fell from 41 to 25, while those release on a surety bond-that is, a bail bond-increased from 25 to 42 percent. ABC has joined forces with ALEC to draft model bills which reduce regulation and oversight of bail agents, promote higher bail amounts in bail schedules, increase the court's burden in pursuing bond forfeitures and restrict the funding of PTS agencies and the populations eligible to participate in their programs.

Bail Truth #13

ABC makes no apology for its membership in ALEC. In fact, quite the opposite. These allegations are false and can be proven to be so. Would that ABC-ALEC could take credit for the increased insistence by the courts on financial means of release! However this correlation is zero proof of casualty and has about as much validity as blaming increased terrorist attacks on the ABC-ALEC connection. Most of model legislation increases the regulation and accountability of the bail industry. All promote public safety. None advocate higher bond amounts -- that is for the court to determine. Execution of a bond forfeiture is a taking and, hence, subject to due process. The court is obligated to honor this and if it fail in this fundamental duty, the deficiency should be corrected.

Some in the industry have promoted restriction on PTS agencies in terms of both funding and client base. Some of these initiatives have been ill-advised. Many politicians irritated by the marginal performance of expensive public PTS programs, on their own have done likewise. For the most part, the bonding industry accepts the existence and necessity for PTS agencies.. The opposite is not true. The pretrial community and the so-called bail reform movement calls for the abolition of corporate surety bail. Given that PTS agencies cost the taxpayers circa \$100,000,000 annually, their marginal performance, and the resulting degradation of public safety, both ABC and ALEC have a responsibility to educate public officials re these lapses and have lived up to that pledge and will continue to do so.

FACT: Pretrial Service Agencies cost taxpayers \$100,000,000 annually...commercial bail cost taxpayers \$0.

JPI Deception #14

By its very nature, for-profit bail is ripe for corruption and abuse. That for-profit bail bonding introduces money and profit into the pretrial process and gives bail agents complete control of an accused person's liberty has led to numerous instances of abuse and corruption in the industry. Cases abound of bondsmen bribing jailers and inmates for increased access to potential clients, employing brutal and illegal methods to extort money and information and even using their extralegal powers to coerce people into sexual acts. The industry laments the negative image these abuses create, but it is the system itself which enables such behavior.

Bail Truth #14

In this respect, the bonding community differs little from any other. Corruption is no more prevalent in commercial bail than in any other business or the courts, law enforcement, corrections, and, indeed, in pretrial services. The solution is not abolition of same, but to clean them up. For the most part commercial bail polices its own. Bondsmen don't cover for their own just because they are bondsmen. They are the first to approach authorities about corrupt colleagues. Commercial bail is competitive. Why allow another bondsman to obtain and or maintain an edge over you in the market through corrupt practices? JPI also claims that commercial bail is like prostitution -- abuses are intrinsic to the system. That is, wherever you find commercial bail, you find corruption. If this were the case, commercial bail would have disappeared decades ago. Neither the public nor public officials would have tolerated a business to operate openly that of its very nature is corrupt.

Ironically, where commercial bail is prohibited, like in Chicago, an illegal bonding variant flourishes in the shadows like prostitution. Loan sharks put up the cash for bail for defendants and their families at exorbitant interest rates. Regarding sexual coercion, JPI's claim is an example of Wittgensteins' Ruler, that is, more is learned about the one measuring than the one being measured. We know more about the author's imagination than the motivations he attributes to his fantasy bail agent. Furthermore, why would not jailers, police, indeed, pretrial officers -- like a recent case in an Ohio jurisdiction wherein a pretrial employee was trading sex for release decisions [and his actions were covered up by his boss for 18 months] -- be any less subject to such a temptation? Is it that more slack should be given to one committing an act of sexual extortion if the perpetrator is exercising "legal" powers rather than "extra legal" powers."

"And if it isn't bad enough, there are PreTrial employees preying upon Defendants offering easier release conditions if the Defendant agrees to have sexual relations with them." - Vikki Marble

JPI Deception #15

Alternatives to for-profit bail bonding exist and are effective. Effective pretrial release programs employ rigorous, validated risk assessments, offer pretrial release recommendations and supervise and monitor released persons within a continuum of options. Successful models of pretrial services can be found in Multnomah County, Oregon, Kentucky and the Federal System.

Bail Truth #15

In comparison with commercial bail, both Multnomah County and Kentucky are substandard. No commercial bail entity descending to their level of performance could stay in business. This holds for the federal system also, with which the bonding industry rarely deals. Holding up the federal system to be emulated is illustrative of being detached from reality. The federal judicial system is a separate criminal system differing from state and local entities as much as if it functioned on another planet. It's hardly reflective of those systems for the other 30,000 or so jurisdictions in the US. First of all it handles only about 5% of the felonies, has the luxury of cherry picking its cases, ones where it will prevail, and 1-15 ratio for its pretrial and probation officers, with corresponding funding. No state, county, municipality could ever hope to fund a criminal justice system proportionally matching that of the federal justice system.

(Also see Bail Truth #6 in the previous section)

JPI Deception #16

End for-profit bail bonding. Every jurisdiction should follow the lead of the four states where for-profit bail bonding is banned and institute robust, risk-based pretrial programs. Short of legislative banning, jurisdictions should implement non-financial release guidelines and procedures as well as work to reshape outdated pretrial attitudes and beliefs.

Bail Truth #16

Time and time again, commercial bail has been proven in research conducted by the U.S. Department of Justice, Bureau of Justice Statistics to be the most effective form of pretrial release. Of the four states that currently do not allow commercial bail, two of them (Oregon and Wisconsin) have started the process of researching its re-institution. As pointed out earlier, the City of Philadelphia has recently re-opened its doors to commercial bail bonding to help it solve many criminal justice challenges.

Also see Bail Truth #1 above.

JPI Deception #17

Promote and further institutionalize pretrial services. Pretrial services are the most effective means of managing the pretrial assessment and possible release of people awaiting a criminal trial. They should be incorporated in justice systems where they are absent and supported where they currently exist. These agencies require political commitment to maintain adequate funding and to support legislation solidifying PTS as a jurisdiction's primary method of pretrial decision-making.

Bail Truth #17

Any number of studies both by academia and the government prove that pretrial service agencies not only are not the most effective means of managing the release of defendants pending trial but that they are the worst. (See BJS study referred to in the introductory remarks)

Not only the U.S. Government, but the academic community as well, has weighed in on the side of commercial bail. In April 2004, the University of Chicago Law School's *The Journal of Law and Economics* (Vol XLVII [1]) published an article entitled "The Fugitive: Evidence on Public versus Private Law Enforcement from Bail Jumping" by two economic professors, Eric Helland and Alexander Tabarrok. They conclude:

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

JPI Deception #18

Require greater transparency within the industry. Until such a time that for-profit bail bonding can be eliminated from our nation's pretrial systems, the industry must be held more accountable and to a greater standard of transparency.

Bail Truth #18

See Bail Truth #8. In addition, transparency should be required of pretrial service agencies. For the most part, it is almost impossible for an outsider to evaluate their effectiveness. Furthermore many agencies admit they are hesitant to reveal their true statistics because of fear of being embarrassed. (See no 1 above about how PTS agencies calculate FTA and also an expose of a PTS agency cooking their books <http://www.star-telegram.com/2012/08/05/4156542/release-program-uses-discredited.html>) In March 2011, the Bureau of Justice Assistance and the Pretrial Justice Institute (an organization openly dedicated to the abolition of commercial bail) published a document entitled "State of the Science of Pretrial Risk Assessment" by Cynthia A. Mamalian, PhD. The study states that most pretrial service agencies throughout the country favor or have adopted the same method of calculating failures to appear as that employed by Tarrant County featured in the above article). In contrast the commercial bail community uses the pass/fail method. No shows equal forfeitures which translate into cash penalties.

Additionally, as mentioned earlier in Bail Truth #6, the bail bond industry is held to the highest standards through regulations and oversight. Insurance Companies must show complete transparency as they are continuously subjected to market conduct exams by the Departments of Insurance in the states where they operate. These exams are conducted in order to ensure accountability and protect the consumer. Pretrial Service Agencies on the other hand do not have this continuous scrutiny and oversight. There is no organization looking at their processes and procedures to determine if consumers are protected or not.

“*...philosophical
revolutionaries seem to
possess a curious serenity
with regard to the shedding
of other people’s blood.*”

John Keats, *Eminent Domain*

The War Should Not Be Waged Against Commercial Bail Bonding, but Rather For Public Safety.

Bail reformers are like astronomers who still believe in the Ptolemaic system in which the entire criminal justice system rotates around and accommodates itself to the their vision of the pretrial phase in contrast to the pretrial system being subject to the gravitation pull of the criminal justice system and its political and fiscal constraints.

Dear Reader,

Be you a judge, magistrate, sheriff, commissioner, legislator, crime victim, bail agent, or concerned citizen, you need to ask yourself a very important question.

Are bail reformers really advocating the elimination of an over two century old system that employs circa 25,000 people? A system and profession which **guarantees** the obligations of millions of defendants to appear in court to answer the charges against them? A system that underwrites this risk with billions of their own dollars, and not one dime of public money? Are bail reformers advocating a system which will not only eliminate the most effective form of pretrial release, but also employ more bureaucrats to operate at tax payer expense? Are bail reformers advocating a system that releases criminal defendants with no accountability and who have the potential to endanger public safety, by simply using an untested and unproven risk methodology similar to the one that drove the financial markets under waves in 2008?

It is time for the public to stand up and take notice. It is time for decision makers to see the truth. It is time for key stakeholders in the criminal justice system to understand the difference between fact and fiction. It is time for victims to stand up for their chance at justice.

The bail industry is ready to step forward and offer solutions to the challenges facing the criminal justice systems of our local counties and states. The bail industry is ready to offer real solutions, to the real problems impacting jail overcrowding and public safety. The bail industry is ready to work with Pretrial Service Agencies around the country to improve results and outcomes across all types of defendants and circumstances.

It is time for people to turn on the lights and see the truth around the bail bond industry. It is time to put away the propaganda, dispel the myths and stop the vampire talk.

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Why are we outsourcing public safety? The primary goal of any government is the protection of the people and their property. The Rockingham County Pre-Trial Release program does not and cannot meet this goal, and emptying the Rockingham County Jail to house inmates from other counties jeopardizes public safety, victims' security, and swift justice.”

Phillip Berger, District Attorney, State of North Carolina,
Seventeen A Prosecutorial District

About the Author

Dennis Bartlett has worked with the bail insurance industry since his retirement from the Department of Justice in 1994. He served in the Criminal Division cross assigned to INTERPOL Washington as a special assistant to the Director of the FBI for INTERPOL matters. Before joining DOJ he served in the CIA. Bartlett has an honors classical BA in philosophy from Gonzaga University, an advanced degree in French from the Universite' de Grenoble, an MA in international relations and Japanese from the University of Southern California, an MA in philosophy from St. Albert's College, Berkeley, Policy and Strategy certificate from the Naval War College, Newport, Rhode Island, and a doctorate in the history of Renaissance education from the University of San Francisco. He did post doctoral study in Latin prose composition at Oxford University, England.

He is also a retired Navy Commander, a former naval attaché, with a specialty in intelligence and special operations.

The Eleven Questions That Every Person Should be Asking Their Pretrial Services Agency

Question #1

How much does it cost to run a pretrial service agency and how are those costs broken out?

Question #2

How does a pretrial service agency calculate success? What metrics are used?

Question #3

How well does the success of a pretrial service agency compare with other forms of pretrial release (i.e., financially secured release through a commercial bail bond)?

Question #4

How are Failure to Appear (FTA) calculated? Is it event based (the percentage of non-appearances over total appearances) or is it defendant based (any missed appearance is 100% FTA)?

Question #5

How does a pretrial service agency's method of calculating FTA compare with other forms of release (i.e., financially secured release through a commercial bail bond)?

Question #6

What happens when someone fails to appear in a pretrial service agency? Does someone go and get the person? Who pays for the cost of them missing court? Who is held accountable?

Question #7

How much tax revenue or fees collected through a defendants failure to appear are generated by a pretrial service agency?

Question #8

How do pretrial service agencies determine and manage the "risk" associated with each defendant who is released?

Question #9

How do pretrial service agencies protect the rights of crime victims and ensure they get a chance at justice?

Question #10

How many people released through a pretrial service agency re-offend while under their supervision?

Question #11

How does that number of people who re-offend compare with other forms of release (i.e., financially secured release through a commercial bail bond)?