

ARTICLES

Asymmetric Subsidies and the Bail Crisis

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When individuals are arrested or indicted for a crime, governments have legitimate interests in assuring that those individuals show up for future legal proceedings and also do not cause more social harm in the meanwhile. To serve those legitimate interests, governments may restrain the personal liberty of those presumptively innocent individuals—traditionally accomplished either by incarceration or by release subject to certain sureties and conditions. The choice, in short, is between jail and bail.

Currently, governments skew that choice by subsidizing the costs of jail but not bail. The result—wholly predictable given the size and asymmetric nature of the subsidy—is that the United States maintains an inefficiently large jail population that both costs taxpayers too much and excessively limits the liberty of too many. Prior commentators and reformers have correctly identified the overuse of pretrial detention in jails as a major public policy crisis and have urged substantial reforms to current bail processes up to and including the abolition of state constitutional rights to bail (as one state has recently done). We believe that the hostility toward bail overlooks the root cause of the problem, which is the asymmetric subsidization of jail over bail. We propose a balanced subsidization system that can preserve the beneficial aspects of a traditional bail surety system while (i) reducing unnecessary and inefficient restraints on individual liberty, (ii) addressing the distributional inequities of current practices, and (iii) saving taxpayers billions of dollars per year.

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INTRODUCTION

The last several years have seen “a truly astounding” and “unprecedented” outpouring of scholarship and commentary decrying the large number of individuals held in pretrial detention, measuring the negative social consequences of such detention, and debating what to do about it.¹ As multiple prior

¹ Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1113 (2019). For just a sample of the more prominent articles, see Russell M. Gold, *Jail as Injunction*, 107 GEO. L.J. 501, 544–52 (2019); Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 737–38 (2018); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 506–08, 557–66 (2018); Megan T. Stevenson, *Distortion of Justice: How the Inability*

commentators have documented, approximately a half-million individuals are held in pretrial detention on any given day.² A majority—perhaps even a large majority—of those individuals remain incarcerated even though the courts have found them not dangerous enough to require continued incarceration and, accordingly, have set bail bond amounts and conditions providing sufficient sureties to justify their release.³ In short, hundreds of thousands of presumptively innocent⁴ people sit in jail every day because they both lack sufficient assets to post bonds themselves and are too poor to afford the fees of private bail sureties who could post bonds. Moreover, because pretrial detentions typically last only a portion of a year, the annual number of individuals detained pretrial easily reaches into the millions.⁵ It is thus not

to Pay Bail Affects Case Outcomes, 34 J.L. ECON. & ORG. 511, 530–38 (2018); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 769–72, 780–86 (2017); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 594–95, 599–600, 607–11 (2017); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1417–29, 1472–92 (2017); Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1353–80 (2014); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1318–21, 1361–67 (2012); Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 4–7 (2017). The literature also includes substantial contributions from various public policy centers, including well-researched reports from the Hamilton Project of the Brookings Institution and the Justice Policy Institute. See generally PATRICK LIU, RYAN NUNN & JAY SHAMBAUGH, BROOKINGS INST., *THE ECONOMICS OF BAIL AND PRETRIAL DETENTION* (2018); JUST. POL'Y INST., *BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL* (2012).

² See Wiseman, *supra* note 1, at 1346 (relying on data from 2011 and concluding that “roughly half a million people in the United States are in jail awaiting the resolution of the charges against them at any given time”); Yang, *supra* note 1, at 1401 (citing 2014 data to estimate that “almost half a million” people are in pretrial detention); Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://perma.cc/9924-HEM9> (estimating that over 555,000 people are in pretrial detention).

³ See Yang, *supra* note 1, at 1401 (concluding that “the majority of defendants are detained before trial because they cannot afford to pay relatively small amounts of bail”). An article by Professors Emily Leslie and Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529, 536 tbl.1, 544 (2017), reports data from New York City showing that 93% of felony defendants and 95% of misdemeanor defendants in pretrial detention are “held on bail, which means that they failed to put up the amount of money set by the arraignment judge.”

⁴ See *Coffin v. United States*, 156 U.S. 432, 453 (1895) (describing the “presumption of innocence in favor of the accused” as “the undoubted law, axiomatic and elementary,” and as lying “at the foundation of the administration of our criminal law”).

⁵ See Sawyer & Wagner, *supra* note 2, at n.2 (estimating that “at least 4.9 million unique individuals were arrested and booked into jails in 2017”). Professor Lauryn Gouldin relies on 2016 data to estimate that “11 million people move through” U.S. jails

hyperbole to estimate that our criminal justice “system casually detains millions of people each year on bonds they cannot pay.”⁶

Not surprisingly, incarcerating hundreds of thousands of nondangerous, presumptively innocent individuals on a daily basis imposes huge costs—in terms of both the financial expenditures by governments and the harder-to-measure (but nonetheless very real) social costs. Direct expenditures by federal, state, and local governments on all pretrial detentions have been reasonably estimated at \$38 million per day, or nearly \$14 billion per year.⁷ If even half of those in detention are there because of a financial inability to post a bail bond, governments are spending \$7 billion to detain bailable, nondangerous defendants. Moreover, such direct governmental expenditures are only one component of the complete social costs, which may be many billions of dollars higher.⁸

The high costs of pretrial detention, coupled with the seemingly unfair and inefficient practice of jailing nondangerous defendants merely because they are too poor to post bail, have drawn intense criticism. The country’s system of pretrial detention has been described as being in “shambles”⁹ and as a “broken system” that imposes “staggering costs” on both defendants and taxpayers and that is filled with “inequities and inefficiencies.”¹⁰

per year, Gouldin, *supra* note 1, at 678, though this figure likely does not count unique individuals.

⁶ Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643, 1645 & n.9 (2020). The statement is reasonable so long as “millions” is construed to mean only about two million. Professor Mayson’s data suggests a range between 1.7 and 2.8 million (5.3 million unique individuals arrested and jailed, at least temporarily, with 32%–53% being detained in jail due to an inability to post bond).

⁷ PRETRIAL JUST. INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST? 2 (2017). That estimate is derived by multiplying a conservative estimate of the number of pretrial detainees (450,000) with a reasonable estimate for the cost per day of pretrial detention for one detainee (\$85). The estimate has been widely cited in the popular and academic literature. *See, e.g.*, Heaton et al., *supra* note 1, at 781 n.227; Dorothy Weldon, Note, *More Appealing: Reforming Bail Review in State Courts*, 118 COLUM. L. REV. 2401, 2442 n.271 (2018); Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1128 n.32 (2018); Yang, *supra* note 1, at 1401 n.3; Nick Wing, *Our Money Bail System Costs U.S. Taxpayers \$38 Million a Day*, HUFFINGTON POST (Jan. 24, 2017), <https://perma.cc/K7TH-WZJZ>.

⁸ *See, e.g.*, Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71, 90, 93, 129 (2019) (finding the total social costs of incarceration, accounting for the costs of prison crime, to be approximately two to three times the direct governmental expenditures on incarceration); *see also infra* note 176 (discussing the sources of such additional social costs).

⁹ Appleman, *supra* note 1, at 1369.

¹⁰ Gouldin, *supra* note 1, at 677, 679.

Among the practices of the pretrial detention system, bail has been singled out for a special degree of scorn by top scholars. To Professor Sandra Mayson, “money bail” is “a system that conditions liberty on wealth” and is “both unjust and inefficient.”¹¹ Professor Russell Gold views “money bail systems” as “fundamentally flawed” because they “detain too many people who are not dangerous and grant liberty to defendants who are.”¹² Professor Crystal Yang describes current bail practices as “largely ignor[ing] private and social costs”—harsh words from a law and economics scholar—and, even worse, as “potentially generating massive losses to social welfare.”¹³ Professor Samuel Wiseman simply condemns bail as “an archaic institution” that “consistently results in detention for poverty.”¹⁴

To modern scholars, the path forward in reforming the nation’s pretrial detention practices is to shift from the so-called wealth-based system of private bail to a “risk-based” system.¹⁵ Importantly, such risk-based systems involve government agents assisted by new technologies—judges or magistrates armed with computerized risk-assessment tools and judicial or executive branch agents deploying electronic monitoring tools such as GPS ankle bracelets or cell phone tracking technology. Such scholarship is not mere idle academic chatter. A broad range of public policy centers and think tanks have taken up the cause, and several states have fundamentally changed (or are in the process of changing) their laws on pretrial detention. Most dramatically, New Jersey recently repealed its state constitutional provision guaranteeing the right of defendants to “beailable by sufficient sureties”¹⁶—language tracing back to the seventeenth century and surviving in more than twenty state constitutions¹⁷—and

¹¹ Mayson, *supra* note 1, at 492.

¹² Gold, *supra* note 1, at 527.

¹³ Yang, *supra* note 1, at 1404, 1492.

¹⁴ Wiseman, *supra* note 1, at 1350, 1352.

¹⁵ John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1746 (2018) (describing the “central goal” of recent reform efforts as being “to end the wealth-based system, and move pretrial justice systems toward a risk-based model”); *see also* Mayson, *supra* note 1, at 508 (describing the recent reform movement as trying to “shift[] the entire pretrial paradigm from a cash-based to a risk-based model”); *id.* at 492 (stating that the “core reform goal is to untether pretrial detention from wealth and tie it directly to risk”).

¹⁶ N.J. CONST., art. I, ¶ 11 (amended 2017).

¹⁷ The language dates back to Pennsylvania’s 1682 colonial constitution, which guaranteed that, with certain limited exceptions, “all Prisoners shall be Bailable by Sufficient Sureties.” June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 531 (1983) (quoting 5

replaced that guarantee with language permitting the abolition of private bail in favor of a governmentally run system of pretrial risk assessment and monitoring.¹⁸

This Article departs from prior scholarship by focusing not merely on the current bail system (with its concededly troubling aspects) but on the entire system of governmental funding for pretrial restraints on liberty. Focusing on the current bail system in isolation misses the root of the problem. Bail, after all, is a good thing. Bail gets people released from jail. Indeed, a large number of state constitutions expressly guarantee a right to bail, and the practice is recognized in the Bill of Rights.¹⁹

Bail is not the problem. The problem is that, out of the range of pretrial restraints on liberty, our society subsidizes the full cost (or nearly so) of the most restrictive option—jail—and leaves the bail or surety option open only to those who can afford it or who have friends or relatives willing to subsidize it. Stated another way, current practice puts the power of the public fisc on the side of restraining the personal liberty of presumptively innocent individuals to the maximum extent possible. It should then be absolutely unsurprising that our country has such an excessively large pretrial jail population. Consistent with basic economic principles, the country is getting a lot more of what it is heavily funding.

To address that problem, this Article proposes a symmetric subsidization system in which, at least for the poor, the government would subsidize the costs of bail sureties up to the expected costs of jail. Such a change has many advantages. First of all, it is far less radical than the abolition of a previously cherished

AMERICAN CHARTERS 3061 (F. Thorpe ed. 1909)). It was incorporated in Pennsylvania's Revolutionary Constitution and thereafter served as a "model for almost every state constitution adopted after 1776." *Id.* at 532. It remains unchanged in the current Pennsylvania Constitution. See PA. CONST. art. I, § 14; see also Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 920, 939, 966 (2013) (also tracing the "sufficient sureties" language to the Pennsylvania charter of 1682 and counting, at that time, twenty-four state constitutions that continued to guarantee the right with that or similar language).

¹⁸ See N.J. CONST., art. 1, ¶ 11 (providing merely that defendants will be "eligible for pretrial release" and stating the circumstances in which such pretrial release "may be denied" (emphasis added)); see also *State v. Robinson*, 229 N.J. 44, 52 (2017) (noting that "[b]efore this year, New Jersey had long guaranteed defendants the right to bail" (emphasis added)). Following the constitutional change, New Jersey "replaced [its] prior heavy reliance on monetary bail" with a largely governmentally run system that "calls for an objective evaluation of each defendant's risk level and consideration of conditions of release that pretrial services officers will monitor." *Id.* at 54.

¹⁹ U.S. CONST. amend. VIII (stating that "[e]xcessive bail shall not be required").

constitutional right to bail (as New Jersey has done). It also respects the tradition of bail as a check by private actors against potential abuse by governmental actors. And it makes sense economically, as it will likely lower the social costs of the pretrial detention system while saving the government money.

We pause here to address explicitly what, to a modern reader, may seem like four stumbling blocks to our thesis. First, it may seem utterly wrong to complain about an asymmetry between jail and bail because the two are not at all similar. Indeed, it may seem that jail and bail are closer to opposites than substitutes, with jail being confinement and bail being the “price” placed on pretrial freedom.²⁰ That view, however, is deeply ahistorical.

For centuries, bail was thought of as a system of custodial suretyship that was a substitute for jail. As William Blackstone explained it, bailed prisoners “instead of going to gaol” (pronounced “jail”) are maintained in the “friendly custody” of their “sureties.”²¹ As another eighteenth-century treatise put it, bail allows a defendant to have “Gaolers of his own choosing,” and “the end of the Law” is for bail agents to “put [bailed defendants] as much under the Power of the Court as if he had been in Custody of the proper Officer.”²² Even earlier, the seventeenth-century jurist Matthew Hale took the same view, writing that “he that is bailed, is in supposition of law still in custody, and the parties that take him to bail are in law his keepers.”²³ Such sources have

²⁰ So common is the modern view of bail being a price of freedom that it occurs in multiple titles in the relevant literature. See, e.g., Lydia D. Johnson, *The Politics of the Bail System: What's the Price for Freedom?*, 17 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 171, 171 (2015); HUM. RTS. WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 1 (2010), <https://perma.cc/6QQV-CEY5>. Describing bail as a way to “purchase” freedom can be traced back to academic work in the early twentieth century. ARTHUR LAWTON BEELEY, THE BAIL SYSTEM IN CHICAGO 157 (1927) (describing the plight of those unable to post bail as “too poor to purchase [their] freedom pending trial”). By the 1970s, the phraseology had even entered into the U.S. Reports, with the Supreme Court describing bail as the “premium price for [a defendant's] pretrial freedom.” *Schilb v. Kuebel*, 404 U.S. 357, 366 (1971). In differing forms and language, viewing bail being a way to pay a price for freedom or liberty is ubiquitous in the modern literature. See, e.g., Darryl K. Brown, *The Case for a Trial Fee: What Money Can Buy in Criminal Process*, 107 CALIF. L. REV. 1415, 1416 (2019) (describing “money bail” as allowing “defendants [to] pay both private bail bond firms and local governments for pretrial liberty”).

²¹ 4 WILLIAM BLACKSTONE, COMMENTARIES *294.

²² 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 115–16 (reprt. 1978).

²³ 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 124 (London E. & R. Nutt & R. Gosling 1736).

been continuously cited by U.S. courts into the current era,²⁴ and they clearly demonstrate, as Justice Ruth Bader Ginsburg explained, that the common law distinction between pretrial incarceration and bail is “a distinction between methods of retaining control over a defendant’s person, not one between seizure and its opposite.”²⁵

Paradoxically, the more bail is viewed traditionally—as the “friendly custody” by a jailer of the defendant’s own choosing—the more the dramatic difference in funding for the two forms of pretrial custody (nearly 100% for jail and 0% for bail) seems fundamentally wrong and in need of a new approach. The key to appreciating the case for symmetrically funding jail and bail is to recognize that, in subsidizing a defendant’s bail, the government is not buying the defendant’s freedom—it could give that to the defendant for free. Rather, it is buying a surety who will evaluate the riskiness of release, take some responsibility for the defendant, and pay a potentially hefty price (the bail bond amount) if the defendant flees. And sureties cost money.²⁶

Second, some readers might object to our proposal because they view it as eliminating economic incentives that, under the current conventional wisdom, are fundamental to bail. The “long tradition” of bail in this country might be thought to be based on the idea that defendants are required “to post some form of collateral in order to incentivize them to appear at a trial.”²⁷ That

²⁴ See *Castillo v. United States*, 816 F.3d 1300, 1304–05 (11th Cir. 2016) (first citing 4 BLACKSTONE, *supra* note 21, at *294; then citing 2 HALE, *supra* note 23, at 124; and then citing 2 HAWKINS, *supra* note 22, at 88 (3d ed. 1739)); *Williams v. Dart*, 967 F.3d 625, 634–35 (7th Cir. 2020) (first citing 3 BLACKSTONE, *supra* note 21, at *290; then citing 4 BLACKSTONE, *supra* note 21, at *300; then citing 1 HALE, *supra* note 23, at 583–86, 589–90; and then citing 2 HALE, *supra* note 23, at 77, 81, 95, 121).

²⁵ *Albright v. Oliver*, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring).

²⁶ See *Understanding Surety Bond Costs*, NNA SURETY, <https://perma.cc/L246-KMRL> (quoting surety costs “between 1% and 15% of the bond amount” depending on applicant’s “credit health”).

²⁷ Wiseman, *supra* note 1, at 1352. Similarly, Yang asserts that “the practice of money bail is premised on the idea that, by requiring defendants to post money, defendants have an increased incentive to abide by release conditions, such as appearing at trial.” Yang, *supra* note 1, at 1472. Yang’s assertion may be more accurate because it is describing “money bail”—a practice that is very much at odds with the traditional approach of bail and that did not flourish until the twentieth century. But even when such an incentive story is limited to the modern practice of money bail, it is often inaccurate. Many defendants—especially poor defendants—do not post money bail themselves but instead use the services of a bail bond agent, who typically collects a nonrefundable fee for becoming a surety on the bond. Precisely because the bail bondsman’s fee is nonrefundable, the payment by the defendant “is a ‘sunk cost’ [that] should not affect the likelihood of the

view of bail is, however, absolutely wrong as a matter of history. The traditional law of bail emphatically barred defendants from shouldering the financial risk of loss due to nonappearance.²⁸ Rather, the defendant had to have sureties, and the sting of loss due to the defendant's nonappearance had to operate always on the sureties, not on the defendant (who was barred even from contracting to indemnify the sureties for any loss). Thus, under the traditional approach, bail was *not* designed to be a wealth-based system, as defendants could not pay for their own bail. Our proposal for subsidizing bail sureties requires merely (i) reinvigorating the traditional view of bail as a surety relationship and (ii) adding the slight tweak of having the government subsidize the surety to the same extent that it is willing to subsidize the "surety" of a jail.

The third stumbling block to modern readers is likely confusion about how subsidizing bail sureties would work and how it differs from reducing bail amounts to more affordable levels. In fact, the basics of the system are easy to explain. Consider a truly destitute defendant for whom a court has set the bail bond amount at \$10,000 (approximately the current median amount required).²⁹ Lowering that bail amount to \$1,000 or \$500 may do little to help the very poor, as multiple studies show that very poor defendants often remain in jail despite bail being set as low as a few hundred dollars.³⁰

By contrast, under a bail system that is subsidized symmetrically vis-à-vis jail, the government would calculate the total expected costs of pretrial jail for such a defendant—a low estimate would be \$2,000³¹—and then be willing to pay that amount to any bail agent willing to become the surety on a \$10,000 bail bond (i.e., willing to shoulder the financial risk of potentially paying \$10,000 if the defendant flees or otherwise violates the terms of release). If multiple bail agents are willing to post the bond based on the government's opening offer for a subsidy (here, estimated

defendant's appearance." Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 989–90 (1994).

²⁸ See *infra* Part II.A.

²⁹ See Gold, *supra* note 1, at 504 (estimating the median bail amount at \$10,000); LIU ET AL., *supra* note 1, at 7 (estimating the median bail amount at \$11,700 for felony defendants in urban jurisdictions).

³⁰ See, e.g., Yang *supra* note 1, at 1401 & n.6.

³¹ Forty days is a low estimate for the number of days that defendants spend in detention prior to trial, and \$50 per day is a low estimate of the costs of jail. See *supra* note 7. Forty days times the \$50-per-day cost is \$2,000.

at \$2,000), the government would select the bail agent willing to charge the least. If competitive bidding drives the price substantially below \$2,000 (and that seems likely because, for defendants with average flight risks, bail agents are often willing to charge a fee of about 10% of the bond amount), the subsidized bail system would save the government money over what it would have paid to jail the defendant.

Fourth, some may misread our proposal as a subsidy for the long-scorned commercial bail bond industry. Our argument requires competition among bail sureties, but it does not require *commercial* bail sureties. Nonprofit bail funds and other charitable organizations could compete against one another to provide surety services, just as many nonprofits vigorously compete to provide educational or medical services.³² A government might reasonably exclude commercial sureties if the government believed that those commercial entities had demonstrated records of abusive practices. Or a government could subsidize bail generally and allow competitive forces to winnow which types of firms are best at being good sureties. Provided that the government provides subsidies and permits competition between firms, this Article takes no particular position on whether the government should limit its subsidies to sureties with particular types of institutional organizations.

Part III of this Article provides more details about the design of a bail subsidy system, including discussion about why the cost of incarceration provides an appropriate benchmark for the maximum size of the subsidy. For now, it is sufficient to note that, under a wide variety of reasonable assumptions, bail subsidies are highly likely to result in the release of many impecunious defendants who otherwise could not afford bail. Of course, not every defendant will be released under a subsidized bail system. Defendants charged with very serious crimes and deemed high flight risks by sureties may very well stay in jail, but that is as it should be. Society should pay the high costs of jail in circumstances where it is sensible to do so—but only in those circumstances.

This Article proceeds in four parts. Part I covers two important historical lessons. The first—that bail, traditionally viewed, is a form of ongoing custody, albeit one more “friendly” than jail—has already been mentioned. Reviving the traditional

³² See Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980) (arguing that nonprofits are more appropriate for some markets).

understanding of bail is an essential step in justifying bail subsidies and ending the modern bail crisis.

A second important lesson covered in Part I comes from the history of the debtor prison reform movement. An analogy to debtors' prisons has been drawn by both academic and political critics of the current pretrial detention system including, among others, former Governor Chris Christie, who prominently invoked the analogy when leading the abolition of New Jersey's constitutional guarantee of bail.³³ Prior academic literature, however, has done little to explore this valuable analogy. As Part I shows, debtors' prisons thrived in the eighteenth and early nineteenth centuries because the government was paying for the prisons. Reformers successfully reduced debtor prison populations by equalizing the government funding for debtor incarceration and debtor liberty (zero for each). The broad lesson from that experience is that reformers should follow the money: if they perceive too much incarceration and too little liberty, reformers should make sure that the public fisc is not asymmetrically funding the former over the latter.

Part II covers the record of prior reforms, which should give pause to all scholars (including us) who seek to improve the system. "Cash bail"—a "new approach" in the first half of the twentieth century but now very much in the crosshairs of the current reformers—was designed to "reflect changed social conditions" and was based on "a humanitarian interest in those accused persons who found themselves in foreign jurisdictions without helpful friends."³⁴ Yet that innovation made it easier to characterize bail as a way for the wealthy to purchase their freedom and likely weakened the policy case for the bail system. Other innovations have also had negative consequences or have simply been far less effective than had been hoped.

The current round of reforms has similar potential for unintended consequences. For example, it is not difficult to discern how New Jersey's abolition of a right to bail—a right described by the Supreme Court as an essential bulwark to secure an accused's

³³ Editorial, *Gov. Christie Takes on the Bail Bondsmen*, N.Y. TIMES (Aug. 14, 2014), <https://perma.cc/B382-2ZDA>.

³⁴ Note, *Indemnification Contracts in the Law of Bail*, 35 VA. L. REV. 496, 503–04 (1949).

“presumption of innocence”³⁵—could eventually have quite negative consequences for criminal defendants, even if that reform was enacted with the opposite intention. Still, among the modern reforms, we identify some reforms that point the way toward subsidized bail.

As previously mentioned, Part III provides details of how a subsidized bail system would work. It addresses important issues including whether a government should be willing to subsidize bail more than jail or vice versa and whether bail subsidies should be means tested. While these issues are important, the overarching thrust of this portion of the Article is that bail subsidies could be implemented in a number of reasonable ways, each of which is likely to be more economically efficient and socially desirable than the current asymmetric system of extensive funding for jail but not for bail.

Part IV provides a detailed legal and economic comparison between our proposal of subsidizing private bail sureties and reforms like New Jersey’s that have government officers and agents alone deciding which defendants to release and monitoring them after release. That approach, frequently called a “pretrial services” approach, seems to be favored by prior reform-minded scholars, public policy advocates, and lawmakers. The choice between our proposed system and the pretrial service model is not one between a wealth-based and a risk-based system. It is instead a choice between a system with some private checks on governmental action and a system dominated by governmental actors. In analyzing that choice, we diverge from other commentators in two fundamental ways.

First, from a legal perspective, we defend the basic conceptual notion underlying bail—which, at its core, does not rest on some misguided principle that the rich should be able to buy their way out of jail. No court or commentator has ever defended the system on such grounds. Bail instead rests on the far more reasonable notions that (i) private sureties can help to ensure the performance of obligations and (ii) private actors generally can serve as a check against governmental overreach. Sureties are widely used in public and private law settings. Bail—or, more accurately, the entire system associated with bail—is merely one example of such a surety system. Reformers who seek the

³⁵ *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (“Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”).

abolition of bail rights (successfully, in the case of New Jersey) are, in our view, motivated by a legitimate goal—eliminating excessive pretrial incarceration of the poor—but they fail to appreciate the value of a properly constructed private surety system as a check on governmental decisions. Such a surety system has explicit textual recognition in a majority of state constitutions for good reason; it should not be lightly cast aside.

Second, from an economic perspective, we see the choice between subsidized bail and government-run pretrial services as a Coasean “make-or-buy” decision.³⁶ The government needs certain services—evaluating the riskiness of defendants, possibly monitoring them, and ensuring that they show up for trial. It can either make those services internally or buy them from outside entities such as bail agents. From that perspective, one of the widely acknowledged truths in the debate over pretrial detention—the extraordinary effect that the “rapid advance” in electronic and computer technologies is having in the field³⁷—cuts strongly in favor of our proposal.

Even now, society’s options for pretrial restrictions on liberty are not limited to jail, bail, or unconditional release. Rather, pretrial liberty restrictions exist on a spectrum ranging from jail (complete detention) to so-called unconditional release (release subject only to the single restriction on liberty that the defendant must appear for certain court dates). Between those two poles lies an increasingly diverse set of middle-ground options, including (i) home detention enforced by electronic ankle bracelets, (ii) restricted release permitting substantial freedom but still including some restrictions enforced by ankle bracelets or by GPS-enabled smartphone technology, (iii) bail (conditional release with sureties), and (iv) combinations of various elements of those options. Moreover, innovations in modern software, including artificial intelligence and machine learning algorithms, increasingly allow computerized predictions concerning risks of flight and dangerousness that are more accurate and, quite possibly, less discriminatory than the guesstimates made in the past. Our proposal allows private innovation to continue flourishing in this middle ground. The alternative cedes the field to governmental actors—including judges, magistrates, and bureaucrats in the criminal justice system—who, one might reasonably worry, could be less

³⁶ See generally Steven Tadelis, *Complexity, Flexibility, and the Make-or-Buy Decision*, 92 AM. ECON. REV. 433 (2002).

³⁷ Wiseman, *supra* note 1, at 1347.

receptive to new technology and innovation than private actors in an open and competitive marketplace would be.

Our focus on asymmetric subsidies also provides a general framework for evaluating all options in this middle ground—whether such options are governmentally or privately provided. Curiously, while governments usually fund jail in its entirety, they tend to be much stingier in subsidizing the middle-ground options. For example, many governments permit pretrial release with electronic ankle bracelets but require defendants to pay for the bracelets. The predictable result is that impecunious defendants are left incarcerated. To us, such a practice suffers from the same skewed subsidies that afflict the bail system: society foots the bill for the most draconian pretrial restriction on liberty (jail) but provides little or no subsidies for lesser restrictions on liberty. The result is predictable. Society gets much more of the heavily subsidized option—incarceration. Our proposal—which calls for an equalization of subsidies—provides the correct approach for analyzing the government’s general stance toward its financing of all pretrial restraints on liberty.

I. HISTORICAL LESSONS FOR BAIL REFORM

Any reformer trying to change the present should start with understanding the past. That’s especially true where the target of reform is a centuries-old legal institution so cherished in the past that it was enshrined in multiple constitutions. It’s even more important in the case of bail, where the very meaning of the word has changed with time.

This Article draws lessons from the history of both bail and debtor prison reforms. First, as detailed in Part I.A below, the traditional view—the one held by Blackstone but old even in his era—was that bail is a particular kind of surety system, a custodial suretyship more “friendly” than the four walls of a jail. That view persisted in the late nineteenth century, with the Supreme Court in 1873 describing bail as “a continuance of the original imprisonment.”³⁸

Paradoxically, recovering that traditional meaning of bail, which might seem unfavorable to defendants, is a good first step toward reform that is extremely favorable to defendants. After all, if governments massively, and often completely, subsidize the custody system known as jail, why then is it not just as

³⁸ Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1873).

reasonable—indeed, more reasonable—for governments to subsidize the less costly and more socially desirable custody system known as bail?

That’s not the only payoff from history. Modern political and legal commentary has frequently analogized the current bail system to debtors’ prisons. That analogy is an apt one, but the modern scholarship has not delved deeply enough into the historical record to recognize that, as detailed in Part I.B below, the debtor prison–reform movement holds important lessons for modern bail reform.

A. Blackstonian Bail: Custodial Suretyship

Blackstone described “the nature of bail” as “a delivery, or bailment, of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance.”³⁹ That description expressly denominates the bail agents as sureties, and it also describes the release of the prisoner from jail not as freedom but as a delivery of the prisoner into the possession of the sureties. Blackstone viewed “delivery” as synonymous with “bailment,” which even today denotes taking “possession” of the bailed item.⁴⁰ The prisoner, after his bailment to his sureties, was then “supposed to continue in their friendly custody, instead of going to gaol.”⁴¹

As that last passage suggests, Blackstone did not view jail as much different than bail, both of which he described not only in terms of custody but also in terms of suretyship. Unlike bail, jail is not a surety system in a strict legal sense. Jail is just four walls. Nevertheless, Blackstone viewed those walls as the ultimate sureties. In describing the charges “of a very enormous nature” in which bail was unavailable (e.g., murder), Blackstone explained that, in such cases, “the public is entitled to demand nothing less than the highest security that can be given; viz. the body of the

³⁹ 4 BLACKSTONE, *supra* note 21, at *294. Centuries before Blackstone’s era, the bail sureties may have been subjected to the criminal punishments due to the prisoner—“body for body”—if the prisoner did not appear for trial. A. ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 69 & n.1 (1913). Yet, under English law long-established even two hundred years ago, bail sureties in criminal cases were “not liable as in civil cases to stand in the place of their principal, in the event of his non-appearance.” CHARLES PETERSDORFF, A PRACTICAL TREATISE ON THE LAW OF BAIL IN CIVIL AND CRIMINAL PROCEEDINGS 510 (London, J. Butterworth 1824).

⁴⁰ See *Bailment*, BLACK’S LAW DICTIONARY (11th ed. 2019) (describing “bailment” of property as “a change in possession but not in title”).

⁴¹ 4 BLACKSTONE, *supra* note 21, at *294.

accused,” and so the accused was permitted to “have no other sureties but the four walls of the prison.”⁴²

Blackstone was not alone in his views. Earlier in the eighteenth century, the treatise writer William Hawkins (whom Blackstone cited) described the practice of bail as allowing a defendant to select “Gaolers of his own choosing,” and, like Blackstone, he saw bail and jail as close substitutes, with bail sureties being responsible for putting a bailed defendant “as much under the Power of the Court as if he had been in the Custody of the proper Officer.”⁴³ Similarly, the seventeenth-century jurist Matthew Hale described a bailed defendant as being “still in custody, and the parties that take him to bail are in law his keepers.”⁴⁴ As pithily summarized by an early twentieth-century commentator, a defendant bailed under the traditional view could accurately say: “I am out on bail; I am still in jail.”⁴⁵

The concept of custodial suretyship was so important to the traditional notion of bail that it was even reflected in ordinary language. Two centuries ago, the noun “bail” itself referred to the human sureties themselves—i.e., “[t]he person or persons who procure the release of a prisoner from the custody of the officer arresting him . . . by becoming surety for his appearance in court”—as much or more than to the inanimate “security given for the release.”⁴⁶ Such meaning lasted throughout the nineteenth century. The first edition of *Black’s Law Dictionary*, published in 1891, gave only one definition for the term “bail” in its noun form: “The sureties who procure the release of a person under arrest, by becoming responsible for his appearance at the time and place designated.”⁴⁷ The alternative meaning of “bail” as referring to the money or securities provided upon release was mentioned only in passing in the second paragraph of the definition for the verb form

⁴² *Id.* at *295.

⁴³ 2 HAWKINS, *supra* note 22, at 115; see also William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 61 & n.152 (1977) (tracking Hawkins in describing a bail surety as “a jailer of one’s own choosing”).

⁴⁴ 2 HALE, *supra* note 23, at 124.

⁴⁵ James V. Hayes, *Contracts to Indemnify Bail in Criminal Cases*, 6 FORDHAM L. REV. 387, 395 (1937).

⁴⁶ *Bail*, WEBSTER’S DICTIONARY (1828) (respectively, the first and second meanings listed). Webster cited language in Blackstone’s Commentaries—“[e]xcessive bail ought not to be required”—as a usage example for the second meaning. That language dated back to the 1689 English Bill of Rights, and similar language was later incorporated into the Eighth Amendment. U.S. CONST. amend. VIII.

⁴⁷ *Bail*, BLACK’S LAW DICTIONARY (1st ed. 1891).

of “bail.”⁴⁸ As late as 1893, the noun “bail” in general parlance referred more commonly to persons (those “act[ing] as surety for a person under arrest”) than to things (“[t]he security or guarantee given”).⁴⁹

All of this was much more than mere semantics. It had practical importance. Precisely because bail was so closely identified with jail, “the bail” (i.e., the sureties) had continuing legal powers over a released defendant. In the words of an 1824 treatise, “the bail” held an “unrestricted authority over the person of the defendant,” including the power to “seize his person at any time (as on a Sunday), or at any place, to carry him to a justice to find new sureties.”⁵⁰

That Blackstonian concept of bail was imported into the United States. In defining “bail,” John Bouvier’s 1839 legal dictionary—generally recognized as the first U.S. legal dictionary⁵¹—parroted the above-quoted passages from Blackstone nearly word for word, right down to describing the practice of bail as placing prisoners into the “friendly custody” of their “sureties.”⁵² The Supreme Court also embraced this notion of bail—and its implications—as is best shown by the 1873 case *Taylor v. Taintor*.⁵³

Taylor arose out of a bail bond executed by William Taylor as surety to have a defendant released from a Connecticut jail. After release, the defendant traveled to New York, was arrested, and

⁴⁸ See *id.* (defining “bail” as a verb to mean “[t]o set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and a place certain, *which security is called ‘bail.’*”) (emphasis added).

⁴⁹ 1 ISAAC K. FUNK, A STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 154 (New York, Funk & Wagnalls 1893) (respectively, the first and second definitions of “bail” as a noun). Funk’s 1893 dictionary lists meanings based on frequency of usage. See *id.* at xi (noting that “the most common meaning has been given first”). Other dictionaries do not necessarily take that approach. See Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 808–09, 808 n.89 (2018) (discussing the “sense-ranking fallacy” of assuming, without checking, that all dictionaries list meanings based on frequency of usage).

⁵⁰ PETERSDORFF, *supra* note 39, at 514–15; see also *Exp Gibbons* (1747) 26 Eng. Rep. 153, 153; 1 Atk. Rep. 238, 238 (similar). The reference to arrests on Sundays is significant because English law traditionally limited Sunday arrests to cases where “treason, felony or breach of the peace.” Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 247 & n.306 (1940). Thus, bail sureties had powers arguably broader than government officers.

⁵¹ See Sarah Yates, Black’s Law Dictionary: *The Making of an American Standard*, 103 LAW LIBR. J. 175, 178 (2011) (recognizing Bouvier’s dictionary as “the first American law dictionary”).

⁵² 1 JOHN BOUVIER, A LAW DICTIONARY 113 (Philadelphia, T. & J.W. Johnson, 1st ed. 1839) (entry for “bail”).

⁵³ 83 U.S. (16 Wall.) 366 (1873).

was extradited to Maine, where he was tried, convicted, and imprisoned for a crime committed prior to the execution of the bail bond in Connecticut.⁵⁴ When the defendant failed to appear for his trial in Connecticut (because he was imprisoned in Maine), the Connecticut state treasurer sued Taylor to recover on the bail bond.

Under settled law, the Supreme Court noted, “the bail” (again referring to the surety—Taylor—who secured the defendant’s release) could be relieved of the bond obligation if the defendant’s appearance for trial had been “rendered impossible.”⁵⁵ Taylor argued that his situation fell into that category, but the Court disagreed. The Court reasoned that impossibility was not a defense where the circumstances for the defendant’s nonappearance were “created by the obligor.”⁵⁶ The bail’s custodial control over the defendant was determinative on that point.

“When bail is given,” the defendant—or “the principal,” as the Court wrote—“is regarded as delivered to the custody of his sureties” and “[t]heir dominion is a continuance of the original imprisonment.”⁵⁷ To emphasize the point, the Court quoted colorful language from an early eighteenth-century English case declaring that “[t]he bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge.”⁵⁸ Because Taylor had such custodial powers, the Court viewed the nonappearance at the Connecticut trial as his fault for the “imprudent” decision to allow the defendant to “go beyond the limits of the State within which he is to answer,” which led to the defendant’s absence at trial.⁵⁹

Such a traditional notion of bail as a custodial suretyship has a double relevance to the thesis of this paper. First, precisely because bail and jail can be viewed as close substitutes, with bail a “friendlier” option than jail, society should not prefer jail to bail. Bail should be the rule, with jail limited to those exceptional situations where, as Blackstone said, “the public is entitled to demand nothing less than the highest security that can be given,”

⁵⁴ See *Taintor v. Taylor*, 36 Conn. 242, 244 (1869) (noting that the Maine crime was committed “before the giving of [Taylor’s] bail bond”).

⁵⁵ *Taylor*, 83 U.S. at 369.

⁵⁶ *Id.* at 370.

⁵⁷ *Id.* at 371.

⁵⁸ *Id.* at 371–72 (quoting Anonymous (1704) 87 Eng. Rep. 982, 982; 6 Mod. 231, 231).

⁵⁹ *Id.* at 372. The Court noted that if Connecticut had extradited the defendant to Maine, then the state would be responsible for the defendant’s absence, and the surety “would have been released” from his bond. *Id.* at 373.

and “no other sureties but the four walls of the prison” will suffice.⁶⁰ That view is both deeply traditional and highly sensible.

The Blackstonian view of bail has another implication that is even more relevant to our thesis and also distinguishes our thesis from prior scholarship. If jail and bail are both custodial surety systems, society should not provide vast subsidies to the former and not the latter. Differential subsidies for jail and bail cannot be justified on the theory that jail, unlike bail, is a form of custody, which is inherently a governmental function and thus should be paid for by the government. The two should be viewed as close substitutes for each other with, in most cases, the same shared goal of assuring the defendant’s appearance at trial.

Our argument against differential subsidies is more consistent with the practices of Blackstone’s era than modern readers might think. While the government of that time did not subsidize bail, it also did not subsidize jail. In the seventeenth and eighteenth centuries, English jailers charged their detainees fees for their own incarceration.⁶¹ So firm was that “defendant-pays” policy that individuals too poor to pay their jail fees could be held by their jailers even after they were *acquitted* of the charges that justified the initial detention.⁶² It was not until 1774—five years after the publication of Blackstone’s *Commentaries*—that Parliament began partially subsidizing jail by barring the continued detention of anyone acquitted of charges and paying jailers compensation for any fees lost from freeing the acquitted.⁶³ General abolition of jail fees, and accompanying public funding for jails, came later.⁶⁴ In sum, bail subsidies can be viewed as a return to a tradition of symmetry, appropriately adjusted given the reality of modern jail subsidies.

B. Lessons from Debtor Prison Reforms

Political, legal, popular, and academic discourse has repeatedly drawn an analogy between debtors’ prisons and incarceration resulting from an inability to post bail. As previously

⁶⁰ 4 BLACKSTONE, *supra* note 21, at *295.

⁶¹ See SIDNEY & BEATRICE WEBB, ENGLISH PRISONS UNDER LOCAL GOVERNMENT 5–8 (1922).

⁶² *Id.* at 6.

⁶³ See *id.* at 38.

⁶⁴ See George Fisher, *The Birth of the Prison Retold*, 104 YALE L.J. 1235, 1259 & n.106, 1263 (1995) (noting that abolition of jailer fees came a few years later with the work of the magistrate Thomas Butterworth Bayley).

mentioned, former Governor Christie drew the analogy in supporting changes to New Jersey constitutional and statutory law.⁶⁵ Similarly, Senator Bernie Sanders, in a 2018 interview, described the bail system in the United States as “outrageous . . . bring[ing] us almost back to Charles Dickens’s era of the debtor jails where people were in jail because they were poor.”⁶⁶ The analogy has also been drawn by Senator Cory Booker,⁶⁷ the ACLU and other public interest litigators,⁶⁸ and several newspaper editorials.⁶⁹ It has even entered the academic literature on the subject.⁷⁰

The analogy is, of course, imperfect. The solution ultimately applied in the field of debtors’ prisons—the abolition of all incarceration in the field—is not even being proposed in the field of pretrial incarceration. Nevertheless, the analogy is sufficiently good that it is worth filling a significant gap in the prior literature, which has done little more than make the analogy at a high level of generality. Even Professor Neil Sobol, who does the best job of integrating the history of debtors’ prisons into the modern literature on incarceration, limits himself to what he

⁶⁵ See Phil Gregory, *Praising Bipartisan Effort, Christie Signs N.J. Bail Overhaul*, WHYY PBS (Aug. 11, 2014), <https://perma.cc/M8E2-6GMA> (quoting Christie as saying that “non-violent offenders who do not deserve to sit in what has become the equivalent of debtors’ prison because they can’t afford to post the bail”).

⁶⁶ Lauren Gambino & Ben Jacobs, *Bernie Sanders’ Cash Bail Bill Seeks to End “Modern Day Debtors’ Prisons”*, THE GUARDIAN (July 25, 2018), <https://perma.cc/97EJ-3BZJ>; see also *Sanders Introduces Bill to End Money Bail*, BERNIE SANDERS, U.S. SENATOR FOR VT. (July 25, 2018), <https://perma.cc/J9VZ-BWGX> (describing the jailing of people who “cannot afford cash bail” as “a ‘debtor prison’ system”).

⁶⁷ See Morgan Simon, *Candidate Forum with Biden, Sanders, Trump, Warren Bears Bad News for Private Prison & Bail Bond Industries*, FORBES (Oct. 29, 2019), <https://perma.cc/398N-YQ2C> (quoting Booker’s analogy between bail and debtors’ prisons).

⁶⁸ Danny Wicentowski, *Taking On Cash-Bail Policies, Missouri Supreme Court Aims to End Debtors’ Prisons*, RIVERFRONT TIMES (Jan. 31, 2019), <https://perma.cc/Y6VA-LXDS> (describing litigation by the ACLU and another public interest group challenging the “cash-bail system” as “creat[ing] unconstitutional systems of debtor’s prisons”); ACLU OF NEB., *UNEQUAL JUSTICE: BAIL AND MODERN DAY DEBTORS’ PRISONS IN NEBRASKA 4* (2016), <https://perma.cc/EZC3-PHB4>; Lorelei Laird, *Court Systems Rethink the Use of Financial Bail, Which Some Say Penalizes the Poor*, A.B.A. J. (Apr. 1, 2016), <https://perma.cc/M7TF-QVL6> (reporting on another public interest litigator who describes bail practices as leading to “debtors’ prisons”).

⁶⁹ See, e.g., John Lantigua, *Opinion, Florida Jails Serving as Debtors’ Prison*, TALLAHASSEE DEMOCRAT (Sept. 4, 2017), <https://perma.cc/YJ6B-YE9E>; Bruce Murphy, *Opinion, The Wisconsin Budget’s Private Bail Bond System Spells the Return of Debtors’ Prison*, ISTHMUS (June 13, 2013), <https://perma.cc/N5EW-3CVL>.

⁷⁰ See, e.g., Appleman, *supra* note 1, at 1316–17 (arguing that recent practices have “transform[ed] pretrial detention into a modern-day debtor’s prison”); Neil L. Sobol, *Charging the Poor: Criminal Justice Debt and Modern-Day Debtors’ Prisons*, 75 MD. L. REV. 486, 502 (2016) (listing the costs and fees associated with bail as one reason that current incarceration practices can result in de facto modern-day debtors’ prisons).

acknowledges to be a “short” discussion of the U.S. history of debtor prison reforms.⁷¹

Reconnecting the academic literature on bail to civil law topics such as debtor prison reform is especially appropriate because much of the law on bail developed within the old processes of imprisonment for civil liabilities. Blackstone, for example, introduced the concept of bail in his third volume, devoted to “Private Wrongs.”⁷² Instead of serving process, plaintiffs in Blackstone’s era (and for a long time thereafter) could have defendants arrested even before obtaining a judgment, and defendants needed bail to secure their release while awaiting the civil trial.⁷³ In reintroducing bail in his fourth volume, on “Public Wrongs,” Blackstone merely referred back to his discussion in the preceding book as having “shewn” the “nature of bail.”⁷⁴ Given the close historical connection between bail and the processes of incarceration for civil liabilities, debtor prison reforms are likely to be instructive. Three lessons are particularly relevant.

1. Protecting the poor.

Odd as it may sound, the law governing debtors’ prisons included substantial protections for the poorest of the poor. As far back as the eighteenth century, most states granted debtors release from prison if they were not charged with fraud and they either took an oath of poverty or assigned all of their estates to their creditors.⁷⁵ As the law of Virginia was explained by Thomas Jefferson (who knew a lot about debt), debtors who “ma[de] faithful delivery of their whole effects, are released from confinement, and their persons for ever discharged from restraint

⁷¹ Sobol, *supra* note 70, at 494–98.

⁷² 3 BLACKSTONE, *supra* note 21, at *287–92.

⁷³ See Richard Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 28–29, 34–39 (1926) (describing civil arrest in the 1920s); Eugene J. Morris & Hilton M. Wiener, *Civil Arrest: A Medieval Anachronism*, 43 BROOK. L. REV. 383, 387–90 (1977) (describing laws that allowed civil arrest for torts, such as fraud, as late as the 1970s).

⁷⁴ 4 BLACKSTONE, *supra* note 21, at *294. In his discussion of bail in criminal cases, Blackstone devoted most of his discussion not to the nature of bail (which had been covered in his book on private wrongs) but instead to the bail issue, unique to criminal law, of which offenses were not bailable. See *id.* at *295–97.

⁷⁵ See PRISON DISCIPLINE SOC’Y, FIFTH ANNUAL REPORT OF THE BOARD OF MANAGERS OF THE PRISON DISCIPLINE SOCIETY 40–46 (Boston, Perkins & Marvin 1830) (summarizing the laws of nine mid-Atlantic and New England states, all of which granted discharge from debtors’ prison via an oath or assignment). For a proposal to adapt this oath of poverty to modern bankruptcy, see Richard M. Hynes & Nathaniel Pattison, *A Modern Poor Debtor’s Oath*, 108 VA. L. REV. (forthcoming 2022).

from such previous debts.”⁷⁶ While that price for freedom would have been dear to the wealthy, it was cheap to the poor and free to the destitute.

Recent political and legal commentators are therefore quite wrong in asserting that current pretrial incarceration practice is *as bad as* the old law governing debtors’ prison. It’s not; it’s worse. Even legal systems willing to imprison individuals on the basis of mere civil liabilities were still generally unwilling to waste resources imprisoning the very poor based merely on their poverty.

One last point deserves emphasis: while most state rules protecting the poor from debtors’ prison were statutory, both Pennsylvania and Vermont included the rule directly in their state constitutions of the Revolutionary era.⁷⁷ In each constitution, the relevant section contained only two sentences. The first limited imprisonment for debt: “The person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison, after delivering up, *bona fide*, all his estate real and personal, for the use of his creditors.”⁷⁸ The second contained the state’s constitutional guarantee of bail: “All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident or presumption great.”⁷⁹ Those two constitutional guarantees appearing in the same clause is not an accident. Both are united by a common purpose of limiting unjustifiable incarceration.

2. Unbundling incarceration: “Liberty of the yard.”

A common recommendation of modern law and economics scholarship on regulatory reform is that policymakers should at least consider disaggregating, or “unbundling,” previously united elements in goods, services, regulations, and even legal institutions. In the last half century, such unbundling was implemented in energy⁸⁰ and telecommunications⁸¹ regulation. Articles in

⁷⁶ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 133 (William Peden ed., Univ. of N.C. Press 1954) (1787).

⁷⁷ PA. CONST., art. II, § 28 (1776); VT. CONST., ch. 2, § XXV (1777).

⁷⁸ PA. CONST., art. II, § 28 (1776); VT. CONST., ch. 2, § XXV (1777).

⁷⁹ PA. CONST., art. II, § 28 (1776); *see also* VT. CONST., ch 2, § XXV (1777).

⁸⁰ *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1126 (D.C. Cir. 1996) (describing regulations that required “mandatory unbundling of [natural gas] pipelines’ sales and transportation services”).

⁸¹ *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 370–74 (1999) (recounting the statutory and regulatory “unbundling” of telecommunications); *see also* Jerry A. Hausman

prominent law journals have suggested unbundling as a new approach to, or tool for analyzing, legal and regulatory problems in a host of fields including property rights,⁸² labor law,⁸³ constitutional analysis,⁸⁴ and criminal procedure.⁸⁵

Unbundling is, of course, not a panacea, and sometimes regulatory regimes suffer from excess fragmentation rather than excessive unification.⁸⁶ Nevertheless, the vast unbundling literature demonstrates that policymakers should consider whether rights, markets, and legal institutions might benefit from greater disaggregation or unbundling. Here we believe that both the old and the new point toward unbundling pretrial incarceration. Let's start with the old.

While the phrase “debtors’ prison” might evoke images of Dickensian dungeons filled with unspeakable privations, the actual conditions of U.S. debtors’ prisons did not necessarily match those of the debtors’ prisons of fiction. Keeping a debtor locked up twenty-four hours a day is not only socially costly but also counterproductive. Creditors seeking ultimate payment had little interest in preventing debtors from continuing to work to generate income for satisfying debts. Thus, at least by the nineteenth century, most jurisdictions allowed debtors the liberty or privilege of the jail “yard” or “limits,” which were expansively defined to include acres of land, entire towns, or often even the whole of the county in which the jail was located.⁸⁷ Such areas “stood as an

& J.G. Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 YALE L.J. 417, 426–35 (1999).

⁸² See generally Nicole Stelle Garnett, *Unbundling Homeownership: Regional Reforms from the Inside Out*, 119 YALE L.J. 1750 (2010) (reviewing LEE ANNE FENNELL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* (2009)).

⁸³ See generally Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 1 (2013).

⁸⁴ See generally Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079 (2013); Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008).

⁸⁵ See generally John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181 (2015).

⁸⁶ See, e.g., Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 679–80 (1998).

⁸⁷ See Ford, *supra* note 73, at 37 (describing the liberty of “the yard of the jail, which in legal contemplation is the county in which the jail stands”); Robert A. Feer, *Imprisonment for Debt in Massachusetts Before 1800*, 48 MISS. VALLEY HIST. REV. 252, 261 (1961) (noting that, as of 1785, the “liberty of the yard” allowed debtors in one Massachusetts prison to “roam about the center of the village” and that, by 1799, “the jail limits were extended to the ground within a quarter-mile of the prison in all directions”); PRISON DISCIPLINE SOC’Y, *supra* note 75, at 42 (describing an 1829 New Hampshire law extending the prison yard to the “boundaries of the town where the prison is”). While some

extension of the prison itself, but without the extreme constraints of bars and bolts.”⁸⁸ A debtor with yard privileges could go about freely in such areas—and sometimes even further⁸⁹—“follow[ing] his occupation by day” and “return[ing] to his prison ‘apartment’ at night.”⁹⁰ In later years, a nightly return to confinement was not necessarily required.⁹¹ Yard privileges were thus an example of what this Article’s Introduction termed the “middle-ground” custodial options, in which some elements of custody are coupled with substantial liberty.

Again, the modern commentators drawing an analogy to debtors’ prisons are missing the point that the current pretrial incarceration of nonviolent offenders in prisonlike jails may be significantly less enlightened than the law governing debtors’ prisons, which unbundled incarceration and kept only minimal elements limiting liberty.

Now let’s turn to the new. Modern technology makes such unbundled, middle-ground options even easier than two hundred years ago. A virtual jail “yard” can be expansively defined and easily monitored through ankle bracelets (an older, twentieth-century technology) or through more modern, less expensive technologies that use GPS-enabled cell phones coupled with facial recognition software to monitor defendants automatically.⁹² With such technologies, the jail “yard” into which a defendant could be bailed can be exceedingly broad, and yet meticulously tailored. Released defendants could be given the liberty of whole states or

jurisdictions required a bond to obtain the liberty of the yard, that requirement was not uniform. See Edwin T. Randall, *Imprisonment for Debt in America: Fact and Fiction*, 39 MISS. VALLEY HIST. REV. 89, 93 n.16 (1952) (noting that Connecticut sheriffs were required to grant liberty of the yard to all “who shall be in his custody, on civil process only”).

⁸⁸ Gustav Peebles, *Washing Away the Sins of Debt: The Nineteenth-Century Eradication of the Debtors’ Prison*, 55 COMP. STUD. SOC’Y & HIST. 701, 710–20 (2013) (noting that U.S. jurisdictions had expanded jail yards or “rules” to include whole towns and counties).

⁸⁹ Feer, *supra* note 87, at 261 (noting that “[s]ome prisoners who had the liberty of the yard found that the sheriff did not keep a close eye on them and that they could move about the town in which the prison was located and even go into adjoining towns with impunity”).

⁹⁰ PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607 - 1900*, at 41 (1974) (describing the practice in Massachusetts); see also *id.* at 87 (describing the same practice in Rhode Island).

⁹¹ Harold R. Medina, *Shall New York Surrender Leadership in Procedural Reform?*, 29 COLUM. L. REV. 158, 168 (1929) (noting that a debtor who obtained jail-limits privileges could obtain “the freedom of the whole county in New York County, Kings County and elsewhere” for up to “six months”).

⁹² See, e.g., U.S. Patent No. 10,008,099 (issued June 26, 2018).

even the whole country, excepting particular areas (such as international airports or the residences of alleged victims) that might increase flight risks or violate reasonable release conditions. Such modern technologies make it even easier to unbundle pretrial custody, keeping only the “friendly custody” of bail sureties who can maintain their principals on a virtual string at an extremely low cost.

3. Ending asymmetric subsidies: Forcing creditors to pay.

The history of debtor prison reform has one last and, we believe, most important lesson for bail reform: reformers should make sure that the public fisc is not subsidizing excessive restrictions on liberty.

One of the most important, and yet often overlooked, questions about debtors’ prison is: Who paid? Today, the jails and prisons of our criminal justice system, even private prisons, are generally paid for by the government.⁹³ That was not necessarily the case for debtors’ prisons, especially in some nineteenth-century jurisdictions.

While debtors themselves were sometimes responsible for their “food, fuel, and clothing,” which was “supplied from their own resources, the generosity of family or friends, begging, or the beneficence of a local relief society,”⁹⁴ governments in the late eighteenth century still paid for the capital costs of the jail and for the labor of the jailers. That subsidy favored incarceration because the state was not then supporting (as it does today) noncustodial mechanisms to enforce debt repayment (e.g., by maintaining a registry of secured credit claims on personal property). Moreover, because creditors were not charged even the maintenance costs associated with keeping debtors in prison, the creditor’s invocation of incarceration imposed substantial externalities on those friends, relatives, and charities that helped maintain the imprisoned.

Reformers in the nineteenth century discovered one powerful tool for curbing debtors’ prisons—forcing creditors to pay the costs of incarceration. In varying forms, that reform was applied in

⁹³ See *infra* Part III.D.3 (discussing the exceptions to this rule).

⁹⁴ BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 87 (2002) (describing conditions around the time of the Founding).

Delaware,⁹⁵ Pennsylvania,⁹⁶ Massachusetts,⁹⁷ Rhode Island,⁹⁸ Ohio,⁹⁹ Tennessee,¹⁰⁰ and Virginia.¹⁰¹ Overseas, such a “creditor-pays” system was implemented in Scotland, although not in England (even though English reformers pointed out that the upkeep of the debtor-prisoners often costs more than the outstanding debt for which they were imprisoned).¹⁰²

Some laws went even further in making sure that the creditors bore the full social cost of incarceration. Under the early nineteenth-century law of Delaware, if a debtor’s incarceration would make his “family . . . become a public charge,” the creditor had to “make provision for the support of such prisoner *and family*” or else the prisoner would be freed.¹⁰³ Such a law provides precedent for a key objective of modern reformers, who legitimately argue that government should consider the larger social costs of pretrial detention in formulating incarceration policies.¹⁰⁴

⁹⁵ PRISON DISCIPLINE SOC’Y, *supra* note 75, at 45.

⁹⁶ *Id.* at 46 (noting a Pennsylvania law providing that, for debtors unable to support themselves, creditors had to give debtors an allowance of twenty cents per day for their upkeep and that debtors could be released if the creditors did not pay the allowance).

⁹⁷ *Id.* at 43 (noting a Massachusetts law allowing towns to recover the costs of supporting poor prisoners from creditors).

⁹⁸ *Id.* at 44 (noting a Rhode Island law providing that debtors executing an oath attesting to their inability to pay a debt could be maintained in prison only if the creditors paid \$1 per week in advance to the jailer).

⁹⁹ *Gill v. Miner*, 13 Ohio St. 182, 197–98 (1862) (noting Ohio laws requiring creditors to pay jail fees “weekly in advance” and holding that, where a creditor has “resorted to the extreme remedy of imprisonment” to collect a debt, the jailer has the right to discharge the debtor if the creditor failed to pay the lawful jail fees).

¹⁰⁰ *Gale v. Snapp*, 9 Tenn. (1 Yer.) 85, 86 (1825) (noting that, under an 1817 law, creditors were bound every fifteen days to “pay the jailor the prison fees for the preceding fifteen days” or else the jailer could discharge the prisoner). The discussion in *Gale* shows that a 1796 statute required the jailer to feed the prisoner and that only in 1817 were creditors required to reimburse jailers.

¹⁰¹ *Zimmerman v. Buzzard’s Adm’rs*, 4 Va. (2 Va. Cas.) 406, 406–07 (1824) (describing an 1823 Virginia law that made creditors responsible for paying jail fees of imprisoned creditors).

¹⁰² G.R. Rubin, *Law, Poverty and Imprisonment for Debt, 1869-1914*, in *LAW, ECONOMY AND SOCIETY, 1750–1914: ESSAYS IN THE HISTORY OF ENGLISH LAW* 241, 251–52, 252 n.22 (G.R. Rubin & David Sugarman eds., 1984). Scotland’s nineteenth-century curtailment of government subsidies for debtors’ prisons might explain why Scotland was able to abolish debtors’ prisons in 1880, ninety years before their final abolition in England. Without government subsidies, incarceration likely became a less attractive option for creditors looking to collect on debts.

¹⁰³ PRISON DISCIPLINE SOC’Y, *supra* note 75, at 45 (emphasis added). Discharge from debtors’ prison did not extinguish the debts. Subsequently obtained property would still be attached, but the debtor was exempt from any further threat of imprisonment based on such debts. *Id.*

¹⁰⁴ *See, e.g., Yang, supra* note 1, at 1404.

Eliminating government subsidies for debtors' prisons appears to have been a very successful reform. Indeed, in the early nineteenth century, some debtors' prisons in Massachusetts saw their population "diminished [by] one half" after the enactment of a law "requiring the creditor to pay the board of the debtor."¹⁰⁵ The economic reason for that success is straightforward. As one commentator from the early twentieth century noted, the then-existing Michigan law requiring creditors to pay jail fees meant that creditors had to make "a further investment in a bad debt with only a gambling chance of ever recovering anything."¹⁰⁶ Such an investment was so unattractive that the "ordinary [legal] practitioner" found "little advantage" in seeking to imprison a client's debtors.¹⁰⁷

The appropriate theoretical lesson to be drawn from this history is that governments should not asymmetrically subsidize incarceration over alternatives that preserve more liberty. In the field of debtors' prisons, the government achieved that goal by withdrawing all subsidies from incarceration.

In the field of pretrial detention, the government cannot eliminate all subsidies for incarceration (some defendants should be jailed), but it can at least eliminate the asymmetric subsidy between jail and its more "friendly" cousin, bail. Indeed, if society were to favor subsidizing one over the other, the favored option should almost certainly be bail and not, as is currently the case, jail.

¹⁰⁵ PRISON DISCIPLINE SOC'Y, FOURTH ANNUAL REPORT OF THE BOARD OF MANAGERS OF THE PRISON DISCIPLINE SOCIETY 17 (Boston, Perkins & Marvin 1829); see also Matthew J. Baker, Metin Cosgel & Thomas J. Miceli, *Debtors' Prisons in America: An Economic Analysis*, 84 J. ECON. BEHAV. & ORG. 216, 220 (2012) (recognizing that one nineteenth-century jurisdiction noted a "roughly one-third" drop in the number of imprisoned debtors once the law held "the creditor responsible for jailing fees"); COLEMAN, *supra* note 90, at 86 (discussing a 1718 Rhode Island law requiring creditors "to pay sixpence a day in jail fees and to supply debtors with sufficient work to support themselves"); *id.* at 251 (noting that Massachusetts and Connecticut also obliged creditors "to pay jail fees and support costs"). Not every state imposed such costs on creditors. See MANN, *supra* note 94, at 80–81 (noting that the states differed in their "statutory mechanisms for freeing imprisoned debtors" and recognizing differences as to "who was responsible for maintaining [debtors] in prison").

¹⁰⁶ Ford, *supra* note 73, at 47. Michigan's law also provided that if a creditor stopped paying, the debt judgment would be deemed "satisfied." *Id.*

¹⁰⁷ *Id.* Even into the twentieth century, however, England continued to pay for debtors' prisons even where custody cost more than the debt. See Stephen J. Ware, *A 20th Century Debate About Imprisonment for Debt*, 54 AM. J. LEGAL HIST. 351, 369 (2014).

II. PRIOR BAIL REFORMS

The bail system has undergone extensive changes during the last century and a half, and many current proposals for reform are in fact very old. For example, a 1927 academic study of the then-existing bail system in Chicago made recommendations such as (i) “a general reduction in the amount of bail,” (ii) “extended use of the recognizance without sureties,” and (iii) the judicial employment of various “expert[]” services “to facilitate an intelligent exercise of the [courts’] wide discretionary powers” concerning pretrial detention and release.¹⁰⁸ All of these remain standard suggestions among modern reformers, although the expert services recommended now might use artificial (not human) intelligence.

Yet the history of reform is not one of constancy in the face of repeated suggestions for the same reforms. Most significantly, the twentieth century saw a transformation from the older notion of bail as custodial suretyship toward a notion of bail as simply a price that defendants must pay for their freedom. As recounted in Parts II.A and II.B below, two Supreme Court decisions—decided fifty-nine years apart and quite transparent about the ongoing changes in bail—provide good windows into distinct eras during the overall transformation. Each era had its Cassandra—an unheeded jurist who warned about the negative consequences of the changes supported by the reformers of the day.

The history here is intended to demonstrate two points. First, current reformers’ characterization of bail as a wealth-based or resource-based system is clearly not the traditional conception of bail. At best, and to the extent the current practices can be viewed as selling pretrial freedom, those practices developed only in the twentieth century. A second lesson is that good intentions are not enough to produce good legal reforms. The reformers of earlier eras believed that their reforms would make pretrial release easier to obtain and more accessible to the poor, but they may have made matters worse.

Part II.C outlines some of the new reforms currently being introduced in our era and highlights two of them, each of which addresses what in our view is the crucial issue: the funding of measures granting pretrial release. Each of those contains at least the glimmerings of what Part III of this Article proposes in detail: subsidization for bail sureties.

¹⁰⁸ BEELEY, *supra* note 20, at 167.

A. Cash Bail and the Shift to Financial Suretyship

In the late nineteenth and early twentieth centuries, the traditional custodial nature of bail was dramatically de-emphasized. The intellectual flashpoint illustrating the change was the rather technical matter concerning whether a defendant's contract to indemnify a bail for any losses due to his nonappearance was void as contrary to public policy. The traditional rule had been that such indemnity agreements were void. As an 1855 English decision explained, an indemnity agreement was void because "it would be in effect giving the security of one person only, instead of two."¹⁰⁹

In 1884, that very passage was quoted by the Supreme Court to explain why it refused to imply a right of action by bail sureties against their principal (i.e., the defendant) to recover losses on a forfeited bail bond, even though sureties generally do have such implied rights.¹¹⁰ The traditional rule meant that sureties retained incentives to perform their sorting and monitoring functions (deciding which defendants were trustworthy enough for release and keeping track of them after release). As a contemporaneous English case explained, a bail surety protected by an indemnity agreement would have "no interest in taking care that the condition of the recognisance is performed."¹¹¹ Even as late as 1891, the federal circuit court for the Southern District of New York invoked similar reasoning in refusing to accept as bail two sureties whom the defendant agreed to indemnify.¹¹² "Bail," the court reasoned (referring to the human sureties), "become in law the custodians of the prisoner for the court," and the "court looks to their vigilance to secure the attendance and prevent the absconding of the [defendant]."¹¹³ The indemnity agreement undermined that purpose because "[w]hen persons offering themselves as bail have entered into a contract of indemnity with the accused, they have endeavored to relieve themselves of responsibility for him."¹¹⁴

¹⁰⁹ *Jones v. Orchard* (1855) 139 Eng. Rep. 900, 904; 16 C.B. 614, 624.

¹¹⁰ *United States v. Ryder*, 110 U.S. 729, 735 (1884) (quoting *Orchard*, 139 Eng. Rep. at 904).

¹¹¹ *Herman v. Jeuchner* [1885] 15 QBD 561, 563; see also Earl C. Arnold, *Indemnity Contracts and the Statute of Frauds*, 9 MINN. L. REV. 401, 409–10 (1924) (collecting cases on the public policy objections against agreements to indemnify bail sureties).

¹¹² *United States v. Simmons*, 47 F. 575, 577 (C.C.S.D.N.Y. 1891).

¹¹³ *Id.* at 577.

¹¹⁴ *Id.*

That traditional rule made less sense once defendants could dispense with sureties by posting purely cash bail. A watershed was the New York case *Maloney v. Nelson*,¹¹⁵ which permitted enforcement of an indemnity contract between two bail sureties.¹¹⁶ The indemnity agreement was offered by one bail surety to induce another to become the second surety¹¹⁷ for a prisoner who later absconded. The second surety sued to collect the agreed-upon indemnity and prevailed in the lower courts.

While reversing on procedural grounds, the New York Court of Appeals commented in dicta that “the claim that the [indemnity] contract . . . was void, as against public policy, does not impress us as being a good defense, at least in this state.”¹¹⁸ After the second surety again prevailed at trial in enforcing the indemnity agreement, the intermediate appellate court supplied more reasoning. The validity of such contracts, the court reasoned, could be “inferred” from the legislature’s allowance of bail not only “by sureties in the old manner, but also by the deposit of money by the accused.”¹¹⁹ That comparatively new method of bail—by “deposit of money by the accused”—demonstrated that the bail system “need not depend upon the personal responsibility of the surety.”¹²⁰

Two points are worth noting here. The first is the effect of New York’s cash bail statute. While that statute dated back to 1850,¹²¹ the use of cash bail was nonetheless not common in the last decade of the nineteenth century. Neighboring jurisdictions had only recently authorized the practice (e.g., Massachusetts in 1881) or would not do so until several years later (New Jersey in 1898;¹²² Connecticut in 1909;¹²³ and Pennsylvania in 1919¹²⁴). Moreover, in the underlying criminal litigation that gave rise to *Maloney*, the court did not permit bail by cash deposit but instead demanded not just one but two sureties. Even the appellate court in *Maloney* itself recognized cash bail as fundamentally new, a

¹¹⁵ 39 N.E. 82 (N.Y. 1894), *on remand*, 12 A.D. 545 (N.Y. App. Div. 1896).

¹¹⁶ See *Maloney*, 39 N.E. at 83.

¹¹⁷ The trial court in the criminal case demanded two bail sureties, which was not uncommon at the time. See *Maloney*, 12 A.D. at 546 (noting that “it was necessary to procure another surety” to secure the criminal defendant’s release).

¹¹⁸ *Maloney*, 39 N.E. at 84.

¹¹⁹ *Maloney*, 12 A.D. at 548–49.

¹²⁰ *Id.*

¹²¹ N.Y. CRIM. PROC. LAW pt. 4, tit. 11, ch. 1, art. 5, § 648 (1850).

¹²² 1898 N.J. Laws 875.

¹²³ 1909 Conn. Pub. Acts 1006.

¹²⁴ 1919 Pa. Laws 102, § 2.

change from the “old manner” of bail “by sureties.”¹²⁵ Yet the mere existence of New York’s statute gave the courts a justification for holding indemnity agreements enforceable in that state.

The second point to note here is the tremendous significance of the seemingly technical issue of indemnification. Even in jurisdictions with legislative authorization for cash bail, courts still had to be willing to accept it rather than by sureties of the “old manner.” As the underlying case in *Maloney* shows, some courts were not so willing. Indemnification agreements gave defendants a convenient way to turn a traditional bail relationship into a de facto cash bail. Defendants could simply agree to indemnify their sureties—even giving them collateral up-front if necessary—for any potential losses due to their position as sureties. The sureties would then, as English courts correctly surmised, become indifferent to whether the defendant appeared at trial. The sureties became mere window dressing, and defendants could put themselves into the same position economically as if they had deposited money with the court through a cash bail system.

The controversy over bail indemnification ultimately reached the Supreme Court in 1912. In an opinion by Justice Oliver Wendell Holmes, Jr., the Court in *Leary v. United States*¹²⁶ sided with New York’s approach.¹²⁷ *Leary* grew out of a massive criminal fraud involving U.S. contracts. Leary posted a bail bond for one defendant in the criminal case, and the bond was forfeited when the defendant absconded. Leary had been promised indemnity from railroad stocks held in trust by a third party, and she sought to collect that indemnity. The United States, however, also had a claim of ownership to the stocks, and it argued (inter alia) that Leary’s claim was invalid because the indemnity agreement was void as against public policy.

Justice Holmes dispatched the public policy argument with his typical panache and historical insight. The government’s position, succinctly summarized by Justice Holmes, was that the bail contemplated by federal statutory law was “common-law bail and that nothing should be done to diminish the interest of the bail in producing the body of his principal.”¹²⁸ Yet the very nature of bail had changed, Justice Holmes thought, with the “distinction

¹²⁵ *Maloney*, 12 A.D. at 549.

¹²⁶ 224 U.S. 567 (1912).

¹²⁷ *Id.* at 576.

¹²⁸ *Id.* at 575.

between bail and suretyship [being] pretty nearly forgotten.”¹²⁹ To Justice Holmes, the obligation to assure the defendant’s appearance in court was “impersonal and wholly pecuniary.”¹³⁰ The bond “sum was the measure of the interest on anybody’s part [in the defendant’s appearance], and it did not matter to the Government what person ultimately felt the loss so long as it had the obligation it was content to take.”¹³¹ For good measure, Justice Holmes cited New York’s *Maloney* decision and described it as “founded in good sense.”¹³²

Such a conception of bail radically de-emphasized the role of sureties in deciding whether defendants were trustworthy enough to be released and in monitoring them after release. Commentators in the first half of the twentieth century understood the significance of the shift. Looking back on earlier cases, one 1937 law review article recognized that, under that “old notion of bail” where a prisoner would be released only “to one who will have a personal and property interest in producing him for trial and thus be his jailer,” an indemnity agreement was sensibly declared contrary to public policy since it “eliminat[ed the bail’s] interest in producing the prisoner.”¹³³ Under the modern notion “where a prisoner may secure his release by means of a mere cash or property deposit,” the opposite was true because “the state has made clear that it is its policy not to rely on any supposed jailer but on the mere cash and property itself.”¹³⁴

The change even had an effect in the language used in describing bail. As previously mentioned, the most common meaning of the noun “bail” at the end of the nineteenth century was not things but people—bail meant the human sureties who took charge of the defendant. Half a century later, a legal commentator recognized that the very word “bail” had undergone “a verbal metamorphosis” as it even then meant “the bond which is given and no longer [] the sureties (persons) who are bound.”¹³⁵

The shift was controversial. Some observers welcomed the change on the grounds that “altered social conditions” inevitably

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Leary*, 224 U.S. at 575–76.

¹³² *Id.* at 576.

¹³³ Hayes, *supra* note 45, at 404.

¹³⁴ *Id.* The author of that article decried the change in the law and presciently predicted that the change could lead to a system in which bail was viewed as a way in which the rich were able to buy their way out of jail. *Id.* at 406–07.

¹³⁵ George F. Longsdorf, *Is Bail a Rich Man’s Privilege?*, 7 F.R.D. 309, 310 (1947).

“made bail impersonal.”¹³⁶ Another recommended that judges should be *more willing* to accept “cash . . . as security” in releasing defendants.¹³⁷ Yet going against the trend were doubters warning that “[n]ot everything new is better,” and that “[p]erhaps our forefathers were wiser in their generation than we are in ours” given the absence of evidence demonstrating the “older” system “worked any great injustice.”¹³⁸

Among judicial opinions, the best dissent from the dominant trend came from West Virginia Supreme Court Justice Ira Robinson, who openly worried that the new approach would allow rich defendants to “buy [their] freedom from answering the law”—a result “never contemplated” in the law on bail.¹³⁹ Justice Robinson argued that the traditional system allowed “[t]he poorest man, if honest, [to] find bail.”¹⁴⁰ Even if that assessment was unduly optimistic, Justice Robinson sounds prescient in warning that the new approach was “open[ing] the door to barter freedom from the law for money.”¹⁴¹ Yet that dissent was generally unheeded. Justice Holmes’s views carried the era.

B. Bail as the “Price” for Freedom

In Justice Holmes’s time, the distinction between bail and suretyship had been lost. Today, even the analogy between bail and suretyship seems to be largely forgotten, with bail now being viewed as a “price” for pretrial freedom.

Hints of the change could be seen even in the decade immediately following Justice Holmes’s opinion in *Leary*. For example, a 1927 academic study described defendants’ inability to obtain release from pretrial detention as due to their being “too poor to purchase [their] freedom pending trial.”¹⁴² That perspective on bail—i.e., viewing the system as a way to purchase pretrial freedom—lent itself naturally to reform recommendations such as “reducing the amount of the bond” and granting release on “personal recognizance.”¹⁴³ In other words, if bail is viewed as a price for freedom and society believes too many defendants are being

¹³⁶ Note, *Current Legislation: Criminal Bail Bonds*, 21 COLUM. L. REV. 592, 594 (1921).

¹³⁷ BEELEY, *supra* note 20, at 167.

¹³⁸ Hayes, *supra* note 45, at 406–07.

¹³⁹ Carr v. Davis, 64 W. Va. 522, 535 (1908) (Robinson, J., dissenting).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² BEELEY, *supra* note 20, at 157.

¹⁴³ *Id.* at 46.

incarcerated before trial, the most natural solution is to lower the price of freedom, or even to set it at zero (release on personal recognizance).

The view of bail as a way to purchase freedom was ultimately reflected in the 1971 Supreme Court decision *Schilb v. Kuebel*,¹⁴⁴ which explicitly described bail as the “price for [the defendant’s] pretrial freedom.”¹⁴⁵ The *Schilb* case arose as a constitutional challenge to an Illinois bail reform law that (i) eliminated private sureties for bail and instead (ii) required any defendant seeking pretrial freedom to execute a bond for the full bail amount, with that bond secured by depositing in cash 10% of the total bond amount with the clerk of the court.¹⁴⁶ Defendants who appeared for trial received a refund of 90% of the cash deposit, with the other 10% of the cash (1% of the bond amount) being retained by the court, purportedly to cover administrative costs.

The plaintiff in the case, who had appeared for his trial for certain traffic offenses and therefore received 90% of his case deposit back, sued the state for the return of the other 10% (on his own behalf and, to make the suit worthwhile, on behalf of the class of those similarly situated). The case reached the Supreme Court on the basis of the plaintiff’s federal due process and equal protection challenges to the system, but a 6–3 Court majority rejected those challenges.

Writing for the Court, Justice Harry Blackmun’s opinion began by noting the “paradoxical” nature of the challenge to the new system.¹⁴⁷ The plaintiff’s bail had been set at \$750 (about \$5,400 in 2020 dollars).¹⁴⁸ He was released after depositing \$75, and after his appearance at trial, he received back all but \$7.50 (about \$54 in current dollars). The plaintiff was better off under the new system, Justice Blackmun explained, because under the old system bail bond agents typically charged a fee equal to 10% of the bond amount, and so the “premium price for his pretrial freedom” would have been an “irretrievable” \$75.¹⁴⁹ Under the new system, “the cost of *Schilb*’s pretrial freedom . . . was only \$7.50.”¹⁵⁰ Justice

¹⁴⁴ 404 U.S. 357 (1971).

¹⁴⁵ *Id.* at 366.

¹⁴⁶ *See id.* at 360–62.

¹⁴⁷ *Id.* at 366.

¹⁴⁸ *See id.* The Department of Labor’s “inflation calculator” converts \$750 from 1969 (the time of the plaintiff’s arrest) into \$5,401.45 in 2020 dollars. *See CPI Inflation Calculator*, BUREAU OF LAB. STAT., <https://perma.cc/4LKT-3F5X>.

¹⁴⁹ *Schilb*, 404 U.S. at 366.

¹⁵⁰ *Id.*

Blackmun thus characterized Schilb's position as being that "the legislation must be struck down because it does not reform enough."¹⁵¹ Obviously, from that perspective, the plaintiff's challenges were doomed.

For purposes of this Article, the Court's conception of bail is more important than the outcome in the case. To the Court, bail was all about a price for freedom, and if judges did not respond to the reform by raising total bail amounts (a significant assumption), then the Illinois system was likely beneficial on net to criminal defendants by reducing the cost of pretrial freedom.

That perspective also explains another feature of the opinion: the extreme hostility to "the professional bail bondsman system," which the Court described as being "in full and odorous bloom in Illinois," "with all its abuses" prior to the reform.¹⁵² Eliminating that "offensive situation" had been "[o]ne of the stated purposes" of the Illinois reform,¹⁵³ and the Court obviously thought the extermination of bail bond agents was highly desirable. Demonizing bail bondsmen was deeply consistent with the changed notion of bail. Bail bondsmen are, of course, the most common sureties of the modern bail system, but, as bail came to be viewed merely as a price placed upon pretrial freedom, the surety aspect of the older system was viewed not merely as outdated but as downright "offensive."

For Illinois's reform, Justice William Douglas played the role of Cassandra. He too had no love for the "commercial bail bondsman," whom he described as "ha[ving] long been an anathema to the criminal defendant seeking to exercise his right to pretrial release"¹⁵⁴ (an odd claim, since defendants seek out bail agents to arrange release from detention imposed by courts). But Justice Douglas's dislike of bail agents did not prevent him from seeing the ominous change in the Illinois reform: the government's withholding of 10% of the cash deposit (1% of the bond amount) applied even to "acquitted defendants."¹⁵⁵

Though Illinois defended the imposition of the fee on the grounds that it was necessary to administer the new system, Justice Douglas saw that such an expense, once it is being charged by the government, becomes "as much an element of the

¹⁵¹ *Id.*

¹⁵² *Id.* at 359.

¹⁵³ *Id.* at 360.

¹⁵⁴ *Schilb*, 404 U.S. at 373 (Douglas, J., dissenting).

¹⁵⁵ *Id.* at 378.

costs of conducting criminal cases as the prosecutor's salary, the fee for docketing an appeal, or the per diem paid to jurors."¹⁵⁶ In Justice Douglas's view, imposing on *acquitted* defendants any of those costs—any of the government's costs of running the criminal justice system—violated “the most rudimentary concept of due process.”¹⁵⁷

Justice Douglas's views went unheeded, and the Illinois system remains in place today.¹⁵⁸ From the perspective of this Article, the Illinois reform—though undoubtedly motivated by good intentions—was another step in the wrong direction. Illinois's system now overtly charges defendants for their freedom. Previously, Illinois may have been asymmetrically subsidizing jail over bail, but at least it was not charging a toll for leaving jail—i.e., affirmatively raising government revenue from criminal defendants, guilty and innocent alike.

C. Embryonic Development of Symmetric Subsidies

In contrast to Sections A and B, this part of the Article details two positive developments in the law of bail—ones that are particularly useful for setting the stage for Part III of the Article, which presents a proposed bail subsidy system in detail.

The first development came recently in the Arizona Supreme Court decision *Hiskett v. Lambert*,¹⁵⁹ which involved what this Article's Introduction described as the increasingly diverse middle ground between jail and unconditional release.¹⁶⁰ The trial court in the case initially exercised one of the middle-ground options: it allowed release of the defendant conditioned on his “wear[ing] a GPS monitoring device . . . and [being] responsible for all costs associated with it.”¹⁶¹ These costs were substantial—\$150 down and about \$400 per month.¹⁶²

After paying for the device for about four months, the defendant claimed that he could no longer afford to do so and asked the court to shift the costs to the county. The relevant statute

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 377.

¹⁵⁸ New Illinois legislation enacted in 2021 has scheduled the abolition of the current bail system for around January 1, 2023. SAFE-T Act, Pub. Act 101-0652, § 110-1.5 (Feb. 22, 2021) (amending 730 ILCS 5/3-14-1). The future Illinois system authorized in the new legislation is a variation on New Jersey's approach, discussed in Part IV, *infra*.

¹⁵⁹ 451 P.3d 408 (Ariz. 2019).

¹⁶⁰ *See id.* at 412–13.

¹⁶¹ *Id.* at 410.

¹⁶² *Id.*

authorized release with electronic monitoring where that technology was “available,” but it was silent as to who should pay for the monitoring. Because the county was unable or unwilling to pay the costs, the trial court held that electronic monitoring was unavailable. The court then asked the defendant to post a bail bond to remain out of jail. When the defendant failed to do so, he was incarcerated.

The Arizona Supreme Court reversed. In deciding that the county should pay the monitoring costs, the court relied on an earlier case that prohibited a lower court from imposing DNA testing fees upon a convicted felon. Quoting its earlier reasoning that “if the legislature wanted convicted felons to pay the cost of mandatory DNA testing, ‘we presume it would say so expressly as it has done so in other statutes,’” the court ruled that “the same reasoning applies here—and with greater force—where Petitioner is accused of certain crimes but has not yet been tried, much less convicted.”¹⁶³

As a matter of policy, we think the court reached the right result. Two other points are noteworthy, with the first being the lack of opposition to the outcome. The county took no position in the matter, and Arizona’s attorney general argued that the county should bear the costs and that other counties were already doing so.¹⁶⁴ A second point is a mere question posed by the procedural history of the case: If monitoring had been unavailable and the trial court had required a bail bond as security, why should the government not subsidize that middle-ground option too? As the facts of the case demonstrate, bail and monitoring are substitutes. If the government is subsidizing one, the case for subsidizing both is strong.

A second embryonic form of subsidized bail comes not from a new court decision or governmental policy but from private innovation that, in part, already demonstrates an emerging reality of subsidized bail. In the last several years, a number of charitable organizations have been started to post bail for defendants, with the most notable of these new organizations being the Bail Project.¹⁶⁵ These charities have adopted simple, innovative strategies to get defendants to appear for court dates (e.g., providing phone

¹⁶³ *Id.* at 412. The court left open whether a separate statute might authorize imposing pretrial monitoring fees retroactively on those who are ultimately convicted at trial. *Id.* at 412 n.4.

¹⁶⁴ *Hiskett*, 451 P.3d at 412–13, 413 n.5.

¹⁶⁵ *See, e.g.*, BAIL PROJECT, <https://perma.cc/6BQD-SWT4>.

reminders and transportation to court), and they have achieved excellent results in performing that task (which is the traditional task of bail sureties).¹⁶⁶

Two points are worth noting. First, some of these charities *are* currently a form of government-subsidized bail, albeit only partially so. The Bail Project and others are organized as 501(c)(3) organizations so that their donors can deduct donations from taxable income.¹⁶⁷ For donations from donors sufficiently wealthy to itemize their taxes, the implicit “tax subsidy” caused by the deductibility of the donations may be 40% or more.¹⁶⁸ Indeed, at least one city, New York, has gone a step further and actually contributed tax dollars to help establish and run a bail fund. In that instance, the city funds are used only for administrative costs; the actual money used to post bail comes from donations.¹⁶⁹ Still, such precedents show that the ideas in this Article are near to reality today and, perhaps with the theoretical basis detailed herein, could be reality tomorrow.

Second, while the leading academic article on these innovative funds is entitled *Bail Nullification*,¹⁷⁰ the funds might be better viewed as a form of “bail rejuvenation.” The funds do precisely what bail sureties should do (and traditionally did do): they screen defendants to make sure they are good risks,¹⁷¹ they maintain contact to help assure court appearances,¹⁷² and they are closely tied to the defendants’ communities.¹⁷³ As Professor Jocelyn Simonson has recognized, such bail funds “hark[] back to the

¹⁶⁶ See Simonson, *supra* note 1, at 603 (noting such strategies); *id.* at 607 (noting 90%–95% appearance rates).

¹⁶⁷ See, e.g., FAQ, BAIL PROJECT, <https://perma.cc/73JS-EB7N>; Donate, CHI. CMTY. BOND FUND, <https://perma.cc/JK7L-CWJ4>.

¹⁶⁸ For high-earning taxpayers in New York City, the implicit tax subsidy could approach 50% given that the top federal, state, and city tax rates are, respectively, 37%, 8.82%, and 3.876%. See SMARTASSET, <https://perma.cc/Z2U3-W3LU>.

¹⁶⁹ See Teresa Matthew, *Why New York City Created Its Own Fund to Bail People Out of Jail*, BLOOMBERG CITYLAB (Dec. 1, 2017), <https://perma.cc/4QY5-VCMN> (noting that the “\$1 million from the city council pays for overhead costs like staff and rent” of the Liberty Fund, while the fund “relies on money from a private donor for the bail costs”); see also *An Overview*, LIBERTY FUND, <https://perma.cc/87LZ-SNHA> (describing the funds as “New York City’s first city-wide charitable bail fund, founded in partnership with [a named private philanthropist]”). To be clear, our subsidization method, as detailed in Part III below, envisions not direct government funding of particular bail organizations but instead a competitive bidding process open to all bail sureties.

¹⁷⁰ Simonson, *supra* note 1.

¹⁷¹ See *id.* at 603 (noting the different decision-making processes of the funds).

¹⁷² See *id.* (discussing the involvement of the funds in assuring appearances).

¹⁷³ See *id.* at 604 (noting the origin of the funds in local communities).

origins of bail.”¹⁷⁴ They could be improved in one way: subsidization drawn from the immense resources currently being (wastefully) devoted to jail. To that process of subsidization, we now turn.

III. BAIL SUBSIDIES IN DETAIL

This Article’s overarching thesis is that society should not asymmetrically fund jail over bail and, as a corollary, that the unavailability of public support for jail (which is sometimes necessary) justifies public subsidies for bail sureties. This part of the Article focuses on precisely how such a bail subsidy system would work. The overarching goal is to construct a system capable of harnessing competition between bail agents to prevent excessive incarceration.

The first question is: What is the maximum price that the government should be willing to pay for bail as a substitute for jail? Even under the assumption that bail has no net social benefits vis-à-vis jail (including no benefits *even to bailed defendants*), that question yields a surprisingly high answer: the government should be willing to pay a price for bail—i.e., to subsidize bail—up to the expected cost for jail. In other words, if the government were soliciting bids to serve as bail sureties for individual defendants, the maximum price that the government would be willing to pay would be the cost of jail. Of course, competition among bidders should drive that amount downward if, as real-world data suggest, bail is typically much less expensive than jail.

Part III.A below explains this basic result and shows why, if it sets the amount of the bail bond correctly, the government can remain indifferent among various bail technologies and strategies and simply solicit bids for surety services and then purchase the services from the lowest bidder. Part III.B extends the analysis to demonstrate that subsidized bail can provide an easily administered check against irrational government decisions to jail defendants when it would be less socially costly simply to release them.¹⁷⁵

¹⁷⁴ *Id.* at 611.

¹⁷⁵ Many commentators have argued that governments are, in fact, jailing many impecunious defendants even when the social costs of releasing them would be lower than the costs of jailing them. See LIU ET AL., *supra* note 1, at 14 (comparing the decreased likelihood of crime pretrial and failure to appear with the costs to detainees and society and ultimately concluding that “28 percent fewer defendants could be detained pretrial without significant risk to the public, thereby generating substantial net social benefits”);

Parts III.C and III.D provide a more general analysis of, respectively, the optimal bail bond amount and the maximum subsidy that the government should be willing to provide to a bail surety for accepting liability in that amount. In general, the bond amount should be set at the full social costs that will occur if the defendant violates the terms of release, not the risk that such a violation will occur. The bond amount should also not be discounted for impoverished defendants if bail subsidies exist.

In setting the maximum subsidy, the government should *raise* the subsidy above its own costs for jail if, as a growing body of empirical research suggests, incarceration imposes social costs in addition to the mere cost of operating the jail.¹⁷⁶ The government may also want to *lower* its maximum allowable subsidy for wealthier defendants—i.e., means test the subsidy—although we argue that a government might rationally provide a full subsidy for all defendants who are ultimately acquitted at trial.

Part III.E discusses how the government should consider bids from potential sureties and, in particular, how the government should allow the defendant's preferences for particular bail agents to factor into determining the winner. Finally, Part III.F responds to an objection regarding how agency costs affect our proposal.

In reading the following sections, it is important to remember that the typical costs of jail are quite high—conservatively estimated in the range of \$50 to \$100 per day.¹⁷⁷ If pretrial detention lasts several weeks (as is common),¹⁷⁸ the total cost of jailing a defendant can easily run into the multiple thousands of dollars. If the government sets its maximum subsidy at that level, many

Yang, *supra* note 1, at 1436 (comparing private and social costs and benefits to conclude that “pre-trial detention may generate net welfare losses due to the over-detention of marginal defendants”).

¹⁷⁶ See, e.g., Heaton et al., *supra* note 1, at 767 (finding that pretrial “detention increases the share of defendants charged with new misdemeanors by 9.7% as of eighteen months post-hearing” and increases the likelihood of new felony charges by 32.2% over the same period); Leslie & Pope, *supra* note 3, at 550 (finding that “[p]retrial detention increases the probability of being rearrested within 2 years by 7.5 percentage points for the felony subsample and by 11.8 percentage points for the misdemeanor subsample”).

¹⁷⁷ PRETRIAL JUST. INST., *supra* note 7, at 1–2 (concluding that pretrial detention costs “may be conservatively estimated at \$85 a day” if “fixed building expenses” are excluded, but also noting that the costs of detaining a person in New York Rikers Island jail have been estimated at “about \$460 per day”).

¹⁷⁸ THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUST. STAT., SPECIAL REPORT: STATE COURT PROCESSING STATISTICS, 1990–2004, at 7 (2007) (“Released defendants waited a median of 127 days from time of arrest until adjudication, nearly 3 times as long as those who were detained (45 days).”).

poor defendants would likely get bail. Moreover, competitive bidding would often drive the price lower than the maximum that the government was willing to pay—saving the government money as compared to jail and releasing a large number of defendants who otherwise would remain incarcerated based only on their inability to pay for bail.

A. Setting the Maximum Bail Price at the Cost of Jail

To determine the maximum price that the government should be willing to pay for bail, we begin by assuming that the government has three pretrial options for defendants: (i) jail, (ii) bail, or (iii) release without restrictions (excepting the restriction that the defendant must appear at trial). Assume, for now, that the government bears all the social costs associated with release and jail and that those costs are the following:

Release: Releasing the defendant has no immediate cost, but 25% of defendants will fail to appear for trial. For each of those 25% of defendants, the government must spend \$10,000 to find and bring the defendant to trial.

Jail: Jailing a defendant costs \$2,000, on average, from arrest to trial (\$50 per day for 40 days) but eliminates the risk of nonappearance for trial.¹⁷⁹

TABLE 1: EXPECTED COST OF RELEASE VERSUS JAIL

	A	B	C	D	
Option	Average Cost of Precautions to Ensure Appearance	Rate of Failure to Appear for Trial	Cost to Find and Bring Defendant to Trial After Failure to Appear	Average Cost Due to Failures to Appear = $B \times C$	Average Cost to Secure Appearance = $A + D$
Release	\$0	25%	\$10,000	\$2,500	\$2,500
Jail	\$2,000	0%	\$10,000	\$0	\$2,000

Under these assumptions, and without bail as an option, a rational government will choose to jail defendants because the average cost of getting defendants to trial (last column of Table 1) is less using jail (\$2,000) than release (\$2,500).

Now assume that the government pays a bail surety as an alternative to jail. How much should it be willing to pay to the

¹⁷⁹ For simplicity, we do not include the (negligible) present-value adjustment to the jail costs.

surety? The first obvious answer is: “Certainly no more than \$2,000.” That answer is clearly correct because the government can achieve its goal of bringing all defendants to trial for an average cost of \$2,000. But should the government be willing to pay even that much?

1. Jail vs. “perfect” bail.

Let’s first consider the easy case where bail, like jail, leads to 100% of defendants appearing at trial (e.g., where the hypothetical bail surety can perfectly predict which defendants would appear for trial and offer bail only for them). It’s easy to see then that the government should be willing to pay up to \$2,000 because bail is a perfect substitute for jail.

2. Jail vs. “imperfect” bail.

Now let’s consider the much more realistic case of an “imperfect” bail system in which 15% of the bailed defendants fail to show up for trial, and the government must spend \$10,000 to locate and bring to trial each of those defendants. Should the government be willing to pay the bail surety up to \$2,000 even though bail is not nearly as good as jail at securing the defendant’s appearance at trial?

Surprisingly, the answer is “yes”—given two crucial conditions: (i) the government sets the bail bond amount equal to \$10,000 (the cost to the government of recapturing an absconding defendant)¹⁸⁰ and (ii) the government collects the forfeited bond in every case of nonappearance.¹⁸¹ To see this, consider the costs to the government of such an imperfect bail system that satisfies those two conditions:

¹⁸⁰ See, e.g., Ayres & Waldfogel, *supra* note 27, at 996 (“In essence, these bond dealers sell the state ‘flight insurance.’”).

¹⁸¹ Although many jurisdictions now require bail agents to be backed by qualified insurance companies so that forfeitures are paid, bail critics have argued for nearly a century that governments often fail to collect forfeited bonds. See, e.g., BEELEY, *supra* note 20, at 54. Some apparent collection failures may be due to grace periods that excuse forfeitures where sureties quickly deliver defendants to courts. See Mary A. Toborg, Anthony M.J. Yezer, Tamara Hatfield, Rebecca L. Fillinger, Katherine H. Shouldice & B. Lynn Carpenter, *Commercial Bail Bonding: How It Works*, NAT’L INST. OF JUST. 21 (1986), <https://perma.cc/T5B3-T2FP>. Governments could also maintain an expected recovery of \$10,000 by increasing the bond amount. For example, if governments collect only half of the time, they can set the bond at \$20,000. Finally, if governments are unable to perform a basic task like collecting forfeitures, we see little reason to entrust them with more complex tasks such as running pretrial services programs that are currently being proposed as replacements for bail. See *infra* Part IV.

TABLE 2: EXPECTED COST OF BAIL

A	B	C	D	E	
Initial Cost of Bail Contract	Rate of Failure to Appear for Trial	Cost to Find and Bring Defendant to Trial After Failure to Appear	Amount Forfeited in Cases of Failure to Appear	Average Cost Due to Failures to Appear $= B \times (C - D)$	Average Cost for Defendant's Appearance $= A + E$
\$2,000	15%	\$10,000	\$10,000	\$0	\$2,000

Under these assumptions, the government should be willing to pay up to \$2,000 for the bail contract because the costs of non-appearance are canceled out by the bail agent's forfeitures to the government. Note also that an initial intuition—that the government should be willing to pay *less* for an imperfect bail system than for a perfect one—is not wrong. Though the government is paying \$2,000 in upfront costs on both the perfect and imperfect bail contracts, the perfect bail agent gets to keep all \$2,000 (because there are no forfeitures) while the imperfect bail agent keeps only an average of \$500 on each \$2,000 bail contract (because, on average, the imperfect bail agent forfeits 15% of \$10,000—or \$1,500—on each contract due to nonappearance). Thus, the government ultimately does pay less to imperfect bail agents, but, if the bond amount is set correctly, the government should be willing to pay the same amount up front.

3. Considering bids from differing bail agents.

This insight—that the government should be willing to pay up to the full cost of jail (i.e., the full \$2,000) as the up-front cost of a bail contract, whether perfect or imperfect—is also a crucial point for understanding why a rational government can choose between bids from competing bail agents each of which may be using different technologies. Consider four competing bail agents, each of which is using a different technology to sort and monitor defendants:

TABLE 3: EXPECTED COST OF DIFFERENT BAIL AGENTS

	A	B	C	D	E	
Bail Agent	Initial Cost of Bail Contract	Rate of Failure to Appear for Trial	Cost to Find and Bring Defendant to Trial After Failure to Appear	Amount Forfeited in Cases of Failure to Appear	Average Cost Due to Failure to Appear = $B \times (C - D)$	Average Cost for Defendant's Appearance = $A + E$
Perfect	\$2,000	0%	\$10,000	\$10,000	\$0	\$2,000
Very Good	\$2,000	5%	\$10,000	\$10,000	\$0	\$2,000
Good	\$2,000	10%	\$10,000	\$10,000	\$0	\$2,000
Fair	\$2,000	15%	\$10,000	\$10,000	\$0	\$2,000

Because the bond amount is set to equal the government's costs for nonappearance, the government can be indifferent between the bond agents, announce that it will pay a price as high as \$2,000, and reward the contract to the lowest bidder.

Which bidder will prevail? Although the government is indifferent between the four hypothetical bidders, each bidder will realize different amounts of profit from a bail contract depending upon (i) the costs of the bidder's technology and (ii) the forfeitures it has to pay the government due to nonappearance. Thus, if the government were to start the bidding at \$2,000, the four bidders would calculate the following profits on a \$2,000 contract if each has the sorting and monitoring costs shown in column B:

TABLE 4: EXPECTED PROFIT FOR DIFFERENT BAIL AGENTS

	A	B	C	D	E	
Bail Agent	Reservation Price for Bail Contract	Average Costs for Technology to Sort and Monitor Defendants	Rate of Failure to Appear	Amount Forfeited in Cases of Failure to Appear	Average Cost to Bail Agent Due to Failures to Appear = $C \times D$	Bail Agent's Profit on a \$2,000 Contract = $A - B - E$
Perfect	\$2,000	\$1,900	0%	\$10,000	\$0	\$100
Very Good	\$2,000	\$1,200	5%	\$10,000	\$500	\$300
Good	\$2,000	\$500	10%	\$10,000	\$1,000	\$500
Fair	\$2,000	\$300	15%	\$10,000	\$1,500	\$200

If the government starts the bidding at \$2,000, all four bail agents will be willing to accept such a contract. As the bidding progresses downward, the perfect bail agent is going to stop bidding at \$1,900 because its expensive technology means it would

lose money on any bid below \$1,900. The next bidder to drop out will be the agent with fair technology. Its costs are very low (\$300), but it has such a high average expected forfeiture on each contract (\$1,500) that it would lose money on any contract less than \$1,800. The final bidder to drop out will be the one with very good technology. It has low expected forfeitures (\$500) but relatively high technology costs (\$1,200). It will not bid on any contract less than \$1,700. The bail agent with good technology will win the bidding at some price incrementally below \$1,700—let's say \$1,699. The government will be better off by \$301 because the average cost for getting a defendant to trial will have dropped from \$2,000 (the cost of jail) to \$1,699 (the cost of bail). The bail agent will be better off because it will realize a \$199 profit. Society will be better off by the full \$500, which represents the decrease in real resources being expended, on average, to get each defendant to trial.

4. "Cream skimming" is a solution, not a problem.

One final note addresses the so-called cream-skimming effect, which can be a problem when private businesses compete with a governmental entity obligated to provide general service even where the private entities are unwilling to do so.

The basic intuition is that the private firms will serve the customers who are easiest to serve, and then the governmental entity will be left with especially high costs. One standard solution is to prohibit private firms from competing. A classic example is the U.S. Postal Service's statutory monopoly on private letter carriage, which was enacted "to prevent private mail services from 'cream-skimming' the most profitable mail services by undercutting the U.S. Postal Service on low cost, high-profit routes, thereby leaving the Service with less revenue to fulfill the requirement of providing service throughout the nation at uniform rates."¹⁸² Such examples are common, and the problem can extend to situations where a regulated entity has a universal service obligation.¹⁸³

Cream skimming may seem like a potential problem with bail, with private bail companies providing "friendly custody" to

¹⁸² *American Postal Workers Union v. U.S. Postal Serv.*, 891 F.2d 304, 310 (D.C. Cir. 1989), *rev'd on other grounds*, 498 U.S. 517 (1991).

¹⁸³ *See, e.g., Kleenwell Biohazard Waste v. Nelson*, 48 F.3d 391, 399–401 (9th Cir. 1995) (upholding the validity of regulations designed to prevent "cream-skimming" by unregulated entities in the medical waste disposal industry).

those least likely to flee and the governmental custodian (the jail) left with the greater flight risks. Yet cream skimming is exactly what the government wants to encourage through bail. Any bail system—including the current, unsubsidized bail system—is designed to get low-risk defendants out of jail. In other words, it is designed to encourage cream skimming. Because jail is such an expensive and burdensome option, the government wants to use that option only for those posing the greatest pretrial social costs (the greatest risk of flight or of some other pretrial violation of law). Allowing bail to cream skim the lesser risks fundamentally does not harm the government because it (i) decreases the government's costs for bailed defendants and (ii) does not increase the government's costs for jailed defendants.

Thus, bail agents are socially desirable even if they are good only at sorting defendants (finding the ones least likely to flee or otherwise to violate their release conditions) and not at all good at monitoring defendants. In short, if bail agents are good at cream skimming (as private entities tend to be), that's a solution, not a problem.

B. Subsidized Bail as a Check on Excessive Jail

In Section A, we considered a situation in which an efficiency-minded government should jail defendants rather than release them when jail and unconditional release were the only two options. We then considered how the government should solicit bids for bail services and demonstrated that the government's reservation price—the maximum price the government should be willing to pay for bail—should equal the costs of jail. In this part, we demonstrate that the very same approach will work even if jail costs more than release and the government is irrationally incarcerating defendants.

For this part, assume that the cost of jail is \$3,000 rather than \$2,000. That is, assume all the costs hypothesized in Section A are the same except that the per diem cost of jail is \$75 rather than \$50 (thus raising the total cost for 40 days of jail to \$3,000). The table of costs for bail and jail is thus:

TABLE 5: REVISED EXPECTED COST OF RELEASE VERSUS JAIL

	A	B	C	D	
Option	Average Cost of Precautions to Ensure Appearance	Rate of Failure to Appear for Trial	Cost to Find and Bring Defendant to Trial After Failure to Appear	Average Cost Due to Failures to Appear = $B \times C$	Average Cost to Secure Appearance = $A + D$
Release	\$0	25%	\$10,000	\$2,500	\$2,500
Jail	\$3,000	0%	\$10,000	\$0	\$3,000

Under these assumptions, the government should release rather than jail defendants, but what if (as the evidence suggests and as many commentators believe) it does not release them? Would the strategy developed in Section A—awarding the contract to the lowest bidder so long as this bid is below the price of jail—still work? The short answer here is “yes.” Indeed, that strategy produces efficient results even if bail agents are able to do nothing in terms of sorting or monitoring defendants.

To see this point, assume that the government announces that it is willing to pay up to \$3,000 for a bail bond of \$10,000 that will be forfeited to the government if the defendant fails to appear at trial. Even “do-nothing” bail agents who have no technology to sort and monitor defendants would accept the contract at that price: they will take the \$3,000, immediately release the defendants, and then pay the government \$10,000 in the 25% of cases where the defendant fails to appear for trial. The do-nothing bail agents would realize \$500 in profit on the transaction. Moreover, the do-nothing agents would still be serving a socially valuable function, for they would be saving society \$500 in resources spent on excessive jail. An economist would say that the bail transaction was Pareto optimal—the government is no worse off (it still is spending \$3,000), the bailed defendant is no worse off (likely better off), and the bail agent pockets a \$500 profit. Society as a whole is better off by \$500.

Realistically, one would expect that there would be more than one such do-nothing bail agent—after all, it’s not a hard job. Competition among multiple do-nothing bail agents would bid the contract price down to a level just slightly above \$2,500 (the slight amount above would be necessary to cover the transaction costs associated with the bidding process). Again, an economist would say that the transaction was Pareto optimal—the government is better off (it would spend only a small amount above \$2,500), the

bailed defendant is no worse off, and the do-nothing bail agent perhaps realizes a small profit. Society as a whole would be better off by nearly \$500 (specifically, \$500 minus the transaction costs of the bidding process).

The key result is that the bidding is a check on excessive jail. Competition among bail agents produces the result that the government itself should have reached—unconditional release of defendants. In effect, the competition harnesses market forces to prevent excessive incarceration. True, there will be some transaction costs associated with the bidding process, but those costs are serving the socially valuable function of ensuring that the government is not wasting money on excessive incarceration.

Furthermore, if some of the bail agents discussed in Section A are available—i.e., bail agents with sorting or monitoring technology capable of reducing the nonappearance rate of bailed defendants—then those bail agents will underbid the do-nothing agents. The result would then be an even greater social benefit than that detailed in Section A. For example, if the bail agent with “good” sorting and monitoring technology submitted a bid, the result would be a social savings of \$1,000 compared to unrestricted release of defendants and a full \$1,500 in savings as compared to irrationally excessive incarceration.

That last point suggests that the government may want to subsidize bail for some defendants even if it knows that it would not jail all of those defendants. If the government realizes that the social cost of jail (\$3,000) exceeds the average social cost of simply releasing a particular group of defendants (\$2,500) it may nonetheless want to see whether bail agents could still further lower costs. If the government subsidized bail and received a bid from the bail agents hypothesized in Section A, the bail agent with the good technology would still prevail with a winning bid just under \$1700. If that bail agent’s technology actually reduced the likelihood of nonappearance (in other words, it was not just a sorting technology),¹⁸⁴ society as a whole would be better off by \$1,000 (not counting, of course, any transaction costs of the bidding process). The bail agent would profit just under \$200 (as it

¹⁸⁴ The “friendly custody” of bail could reduce the nonappearance rate by sending reminders about mandatory court appearances, by providing transportation to the court, or even by monitoring the defendant’s location and sending a guard to escort the defendant to the court appearance. Even sorting alone could improve welfare as it identifies higher-risk defendants for whom costly government incarceration may be justified. *See infra* Part III.C.2.

did in the hypothetical in Section A), and the government would be better off by a bit more than \$800 as it sees its average costs for getting a defendant to trial declining from \$2,500 to just under \$1,700.

C. Setting the Right Bail Bond Amount

In the prior sections, we assumed that defendants cost the government \$10,000 each when they failed to appear and that such cost was the only cost imposed on society by released defendants. Under those assumptions, the government should set the bail bond amount equal to \$10,000 and award the bail contract to the lowest bidder.

The more general condition would be to have the government set the bond amount at the total social costs caused by a defendant violating the terms of release. If, for example, the average cost of recapturing a fleeing defendant is \$10,000 but third parties suffer an average additional cost of \$1,000 due to the recapture efforts (e.g., costs such as the disruption caused when the government agents execute search warrants on homes and businesses), then the government should set the bond at \$11,000. This result holds true even if the government does not compensate those third parties for their losses.

The key result here is that the government must set the bond high enough that the bond agent bears the full social costs of the defendant's violations of the terms of release. Such a strategy ensures that the government can select the lowest bidder and remain indifferent to whether the winning bidder (i) spends more on technology to prevent violations, and thus less on forfeitures due to violations, or (ii) spends less on technology and more on forfeitures. If the bond amount is set so that the bail agent covers the full social costs of the defendant's violations of the terms of release, then the bidding is a mechanism to find the bail agent who, as the lowest bidder, minimizes the social costs of release.

1. Considering poverty.

For a subsidized bail system, judges should not allow a defendant's poverty to be a factor militating in favor of reducing the bond amount. Rather, judges setting bail bond amounts should ask the straightforward question: How costly will it be if this defendant violates the terms of release? The judge should view the subsidy system as counterbalancing the defendant's poverty and

thus should not reduce the bond below the social costs of the violation.

Eliminating “poverty discounts” on the bond amount is important because too low of a bail bond could lead to rational but inefficient actions by the bail agent. For example, assume that the defendant’s flight would impose \$10,000 in social costs but that a judge reduces the bail bond amount to \$1,000 on the grounds that the defendant is too poor to afford a \$10,000 bond. If bail agents estimate the defendant’s flight risk at 10%, they will be willing to accept the bail contract for merely \$100.

Now assume that a monitoring technology costing \$75 would reduce the defendant’s flight risk from 10% to 4%. Clearly, it would be socially efficient to use the technology because it decreases social costs by \$600 (the avoided 6% in flight risk times the \$10,000 cost for each flight). The bond agent would employ the technology if she were liable \$10,000 for each flight: her private benefit from the technology would be \$600, and her private cost would be \$75. If, however, the bond agent is liable for only \$1,000 for the defendant’s flight, her private benefit from the technology would be only \$60, which is insufficient to justify the technology’s \$75 cost. The bond agent will rationally forgo the technology, but that’s inefficient from a social perspective.

Eliminating any discount to bail based on poverty may seem to be a significant change from current practices, but it is in fact just a modest adjustment to account for the presence of the governmental subsidy. In most states, statutory law or case law requires judges to consider the defendant’s “financial resources” in setting bail.¹⁸⁵ The existence of bail subsidies is merely a new “financial resource” available to defendants, and considering it thusly is not so much a change to current practice as it is a different result due to the subsidy.¹⁸⁶

In practice, the existence of the subsidy will make the task of setting bail easier, not harder, for trial judges and magistrates. While there is generally no constitutional right to affordable

¹⁸⁵ *E.g.*, VA. CODE ANN. § 19.2-121 (2021) (requiring consideration of the defendant’s “financial resources” in setting bail); FLA. STAT. § 903.046 (2020) (same); 725 ILL. COMP. STAT. 5/110-5(a) (2020) (same); *see also, e.g.*, N.Y. CRIM. PROC. LAW § 510.30(1)(f) (Consol. 2020) (same); *Brangan v. Commonwealth*, 477 Mass. 691, 697–98 (2017) (requiring consideration of the “defendant’s financial resources . . . as a matter of common law”).

¹⁸⁶ Adoption of the subsidy system would not require any change in the current practice of requiring much larger bonds or even substantial cash deposits from the very wealthy.

bail,¹⁸⁷ current law in some states and some federal circuits requires, as a matter of due process, that defendants be afforded more procedural protections if bail is to be set at an amount unaffordable to that particular defendant.¹⁸⁸ Such situations of unaffordable bail will arise far less frequently under a system that provides subsidies up to the cost of jail. As previously discussed, even a low estimate for the per-day cost of detention (\$50) multiplied by the likely number of days for pretrial detention (weeks for some crimes, and months for serious felonies) will produce hundreds or even thousands of dollars as the maximum subsidy that the government should be willing to pay for a bail surety. If a defendant's risk of flight is low or even moderate, such amounts should induce bail agents to be sureties on the bail bonds in the amounts typically ordered under current practice. Moreover, if bail agents are willing to accept such subsidies to be sureties on bonds generally but are unwilling to do so for a particular defendant, the courts would then have good evidence that the defendant's inability to obtain release is due to riskiness, not poverty.

2. Considering dangerousness.

The full social costs of release may, however, include not merely the costs of flight but also the costs of additional pretrial crimes. Back even in the time of Blackstone, governments refused to release on bail defendants who reached a certain high degree of dangerousness.¹⁸⁹ A subsidized bail system need not change

¹⁸⁷ See *United States v. McConnell*, 842 F.2d 105, 107 (5th Cir. 1988) (collecting cases); *Brangan*, 477 Mass. at 702 (concluding that “a defendant is not constitutionally entitled to an affordable bail”).

¹⁸⁸ See, e.g., *Brangan*, 477 Mass. at 705:

[W]here a judge sets bail in an amount so far beyond a defendant's ability to pay that it is likely to result in long-term pretrial detention, it is the functional equivalent of an order for pretrial detention, and the judge's decision must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty.

See also *State ex rel. Torrez v. Whitaker*, 410 P.3d 201, 219 (N.M. 2018) (similar); *Valdez-Jimenez v. Eighth Jud. Dist. Ct. in and for Cnty. of Clark*, 460 P.3d 976, 987 (Nev. 2020) (holding that “when bail is set in an amount that results in continued detention,” due process requires substantial procedural protections, including proof “by clear and convincing evidence that no less restrictive alternative will satisfy [the government's] interests in ensuring the defendant's presence and the community's safety”); *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) (similar); Mayson, *supra* note 6, at 1658–60 (collecting authorities).

¹⁸⁹ See, e.g., Mayson, *supra* note 1, at 502 (noting that “[c]apital defendants have been excluded from bail since colonial days” and that “there is some evidence that this exclusion was a public-safety measure” but also that there is some “evidence to the contrary”).

that traditional (and sensible) limit on bail. But what about defendants of only moderate dangerousness? A defendant charged with robbery or with simple assault would be eligible for bail in most jurisdictions, yet many such defendants may pose some substantial risk of committing new crimes during their release period. Should the bail bond (or some portion of it) for such a defendant be set to cover the social costs of additional crimes and then be forfeited if such crimes occur?

Traditionally, bail bonds have been subject to forfeiture only where the defendant fails to appear for trial.¹⁹⁰ However, there is strong evidence that courts have long considered the risk of additional crime—i.e., the defendant’s dangerousness—when setting bail amounts.¹⁹¹ During the 1970s and 1980s, reforms in many jurisdictions expressly endorsed that practice.¹⁹² Still, state bail systems continue to vary as to whether defendant’s dangerousness is considered in setting bail bond amounts and whether subsequent arrests or crimes trigger bail forfeitures.¹⁹³

The variation in state practice reflects the difficulty of the issue. From the perspective of economic efficiency, bail forfeitures for other pretrial crimes would, in the words of Professors Ian

¹⁹⁰ See, e.g., Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 864 (noting that many jurisdictions still condition bail forfeitures solely “on a failure to appear, not on the commission of a new offense” and that such an approach is “consistent with a long history that makes clear that money bail is a tool for managing flight risk, not a legitimate means of managing danger”); Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 6–7 (2008) (explaining that the Bail Reform Act of 1984’s legislative history “demonstrated that Congress knew it was changing the fundamental premise of bail, which theretofore had been designed only to ensure appearance at trial, to now also prevent dangerous criminals from re-offending while their cases were pending”); Mayson, *supra* note 1, at 502 (noting that, with the exception of defendants charged in capital crimes, “U.S. pretrial law was at least purportedly centered on ensuring appearance until the 1960s, when the system underwent a profound shift”).

¹⁹¹ See William M. Landes, *Legality and Reality: Some Evidence on Criminal Procedure*, 3 J. LEGAL STUD. 287, 288 (1974) (“Our empirical analysis reveals that [the hypothesis judges use the bail process as a means of preventing future crimes by defendants] is more consistent with actual behavior [than the hypothesis that they use bail to ensure the defendant’s appearance at trial].”).

¹⁹² See Gouldin, *supra* note 190, at 848 (observing that dangerousness was already used by judges to make decisions about pretrial release and that, “[b]eginning in the 1970s and 1980s, Congress and most state legislatures, amended or rewrote bail statutes to adapt to what had been happening at bail hearings for decades”); see also, e.g., Karnow, *supra* note 190, at 6 (noting that, in the second half of the twentieth century, “the law changed at both the federal and state levels to allow judges at bail hearings to consider the potential danger posed by the defendant’s release to the community”).

¹⁹³ For a discussion of which states allow forfeiture for crime, see Rebecca Pirus, *Pretrial Release Violations & Bail Forfeiture*, NAT’L CONF. OF STATE LEGISLATURES (June 28, 2018), <https://perma.cc/U9M6-T2X9>.

Ayres and Joel Waldfogel, give bail agents “a greater interest in deterring pretrial misconduct” and thus “more fully price” the social costs of releasing a defendant on bail.¹⁹⁴ On the other hand, governments generally do not incarcerate individuals merely due to their risk of committing future crimes. Thus, some commentators, such as Professor Sandra Mayson, have argued on normative grounds against “subjecting defendants to preventive restraint that we would not tolerate for equally dangerous people not accused of any crime.”¹⁹⁵ That normative objection applies even outside the context of bail decisions, as states abolishing bail must also decide how to consider whether to release dangerous defendants, what conditions to impose on release, and what to do if those conditions are violated.¹⁹⁶

A subsidized bail system is compatible with either an economic approach that considers dangerousness or a normative approach that does not. If a state is willing to consider dangerousness in its release decisions, it could consider the costs of those crimes when setting bond amounts and impose corresponding bond forfeitures if defendants commit the crimes. Subsidizing bail up to the cost of jail would then accomplish one important goal articulated in this Article: it would ensure that any imposition of jail was cost justified (or, equivalently, that low-risk defendants were bailed rather than jailed).

Alternatively, if a state has normative concerns about jailing defendants based merely on relatively low probability risks (risks lower than what would justify civil detention of a person not yet accused of any crime), it should not consider the cost of these crimes when setting bail amounts and limit bail forfeitures to situations of nonappearance. The prices bid by sureties would then not reflect the true social cost of bail relative to jail. Below we

¹⁹⁴ See, e.g., Ayres & Waldfogel, *supra* note 27, at 1028 n.147. Some scholars have argued that bail forfeitures based on subsequent crimes are unwise because forfeitures are unlikely to provide much additional deterrence *to the defendants* beyond the criminal sanctions for the additional crimes. See, e.g., Gouldin, *supra* note 190, at 864. Such arguments, however, ignore the incentives for *the bail sureties*, who will be motivated by the risk of forfeitures to screen defendants (so that the most dangerous cannot obtain bail) and to monitor them (so that the defendants know the odds of apprehension are high). Bail forfeitures would make little economic sense if bail agents are not good at screening defendants for their risks of committing new crimes or at monitoring them to reduce those risks, but there's no reason to think that sureties cannot do those tasks.

¹⁹⁵ See Mayson, *supra* note 1 at 499.

¹⁹⁶ See *id.* at 518 (noting that, in eliminating or curbing bail, the recent reform movement “crystallizes fundamental questions about pretrial policy,” including the degree of dangerousness that should justify pretrial restraint).

discuss a possible remedy for this problem—adjusting the bail subsidy.

D. Setting the Correct Subsidy

In Section A, we showed that one good baseline for the maximum subsidy that the government should be willing to provide for bail is the government's cost of jail. That baseline, however, assumes that the cost to the government is the full social costs of jail. Eliminating that assumption produces two important insights, and we also consider below the more difficult issue of whether the subsidy should be means tested.

1. Other social costs or benefits of jail.

If there are additional social costs or benefits of jail as compared to bail (excluding any costs borne by the defendant alone), then the government should adjust its maximum subsidy to take account of those costs or benefits. In other words, the government should be willing to asymmetrically subsidize jail and bail, although possibly bail should be funded more heavily.

Consider the numerical example set forth in Section A and assume that jail imposes an additional social cost of \$400 (due to, for example, the increased level of subsequent crime by jailed versus bailed defendants after their ultimate release).¹⁹⁷ In that case, the government should be willing to subsidize bail up to \$2,400, not merely the \$2,000 cost of jail. For some defendants, that policy could mean that the government spends more on bail than it would on jail, but society would be better off.

Conversely, if jail has social benefits as compared to bail—due to, for example, reducing defendants' crimes while awaiting trial—then the government could adjust the maximum subsidy downward. Again, consider the numerical example set forth in Section A and assume that jail has \$400 of additional social benefits as compared to bail because it reduces additional pretrial crimes. In that case, the government should be willing to subsidize bail up to only \$1,600.

Alternatively, however, the government could keep the maximum subsidy the same but impose forfeitures on the bail agents if defendants commit additional crimes (the option described in Section C.2). Note that such an expansion of forfeitures also has

¹⁹⁷ See *supra* note 176.

the practical effect of reducing the government's subsidy for bail because, while the maximum price the government is willing to pay the bail agent does not change (i.e., it stays at \$2,000), the government collects more forfeitures, which function like rebates on the government's initial subsidy for bail. That approach is probably better from an economic standpoint because, unlike an across-the-board reduction in the subsidy, the increased forfeitures enlist the bail agents in pricing and controlling the risk of crime posed by particular defendants.

Finally, a mathematically savvy reader might notice that the status quo—where the government funds jail at 100% and bail at 0%—could theoretically be justified under the analysis in the prior paragraphs if jail, as compared to bail, always has positive social benefits that precisely equal the cost of jail. Consider once again the numeric example in Section A and make the additional assumption that jail always has \$2,000 of social benefits as compared to bail. In that case, the government should subsidize bail at \$0, which is the status quo. But the sheer implausibility of that assumption—that jail has such a high level of social benefits as compared to bail *and* that those benefits just happen to precisely equal the costs of jail—underscores the irrationality of the current asymmetric funding of jail over bail.¹⁹⁸

2. Costs imposed on the defendant.

Bail subsidies should generally *not* be increased to account for the costs that jail imposes on defendants if (and this is a crucial assumption) defendants have the ability to pay to avoid those costs (i.e., they are not “liquidity constrained”). The problem here is, again, one of duplication. If the defendant is able, and is permitted,¹⁹⁹ to pay additional money because jail is personally costly, and the government also increases its subsidy to bail to account for the costs on the defendant, then bail could be overly subsidized.

¹⁹⁸ Assuming that jail's benefits more than exceed its costs does not justify the status quo. Rather, it suggests that the government should impose a tax (a negative subsidy) on bail.

¹⁹⁹ We assume here that it would be very difficult to stop defendants from paying additional funds to bail agents. Even if the government tried to prohibit such additional payments, defendants would likely be able to arrange side payments through relatives or friends. Moreover, there is no good reason to prevent defendants from paying additional amounts on top of the government's bail subsidy. As long as the government does not also increase its subsidy due to the costs imposed on the defendant, the defendant's supplemental payments for bail increase efficiency.

This point can be understood by again using the numerical example in Section A and assuming that jail imposes an additional \$400 of costs on a particular defendant so that the full social cost of jail is \$2,400. Because the social cost of nonappearance is \$10,000, the defendant should be released if her flight risk is less than 24% and jailed if it is above 24%. However, if the government increases its maximum bail subsidy to \$2,400 and the defendant still adds an additional \$400 (again, that's based on the crucial assumption that the defendant is able to pay), then the defendant could be inefficiently released where she has a flight risk over 24% (though below 28%).

3. Means testing the subsidy.

The last point—that the government should not *increase* bail subsidies when jail imposes costs on defendants and they have the means to pay—leads naturally into a discussion of whether the government should *decrease* bail subsidies whenever defendants have the means to pay to avoid jail. In other words, should the government means test bail subsidies? This is a hard question.

The general thesis of this Article—that governments should fund jail and bail *symmetrically*—might seem to suggest that bail subsidies should not be means tested where, as has often been the case in the last two centuries, the government bears all the costs of jail without regard to the wealth of the defendant. Nevertheless, a strong case can be made for means testing bail subsidies.

First, most governmental subsidies are means tested. For example, governments subsidize trial counsel for poor but not rich criminal defendants.²⁰⁰ Means testing bail subsidies would, therefore, be generally consistent with legal traditions.

Second, means testing bail subsidies would likely reduce total government expenditures spent on pretrial options (jail plus bail). That's because, without bail subsidies, poor defendants are likely to remain in jail, costing the government more than it would cost to subsidize bail. However, extending bail subsidies to the wealthy and middle class may increase government expenditures

²⁰⁰ See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (requiring that, in a felony case, a state must provide a lawyer to any defendant “who is too poor to hire a lawyer”); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (extending that right to any criminal case that could result in incarceration); John P. Gross, *Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of Their Sixth Amendment Right to Counsel*, 70 WASH. & LEE L. REV. 1173, 1193–1204 (2013) (discussing federal and state eligibility requirements for assigned counsel).

above current levels. Even without bail subsidies, wealthier defendants are likely to post bail to avoid the costs that jail imposes on them. Subsidizing their bail would, therefore, raise government expenditures on bail but have no offsetting decrease of expenditures on jail. Thus, extending bail subsidies to wealthier defendants would be merely a transfer of wealth from the government to those defendants.

Third, even our general thesis—that jail and bail should be funded symmetrically—does not necessarily point against means testing. If we exclude the category of unbailable defendants (highly dangerous defendants who are ineligible for bail now and would also be ineligible under a subsidized system), the government’s current funding for jail is directed almost exclusively toward jailing the poor. Among the rich and middle-class defendants eligible for bail, there’s no evidence that substantial numbers forgo bail to remain in jail. Thus, while a symmetry principle strongly supports funding bail for the poor (because governments are currently funding their jail), it is ambiguous with respect to the rich (because governments are not, as a practical matter, funding their jail).

Fourth, while some governments do not even attempt to impose the costs of jail on defendants, a fair number of modern governments do.²⁰¹ At least some of the statutes authorizing these “pay-to-stay” programs have explicit provisions that allow a judge to waive the fees for indigent defendants,²⁰² and such provisions obviously authorize *de jure* means testing.

Moreover, means testing of jail fees is a practical reality simply because governments cannot collect from the indigent and very poor. After all, governments do not simply release defendants who cannot pay for their jail. Governments finance the jail fees, paying them up-front and billing the defendant for the charge. Such financing is an implicit subsidy in the (many) cases where the prisoner is not a good credit risk. For example, until recently,

²⁰¹ See *Jones v. Clark County*, No. 001710-MR, 2020 WL 757095, at *14 (Ky. Ct. App. Feb. 14, 2020) (holding that KY. REV. STAT. ANN. § 441.265 (West 2021) authorizes state jails to “assess fees associated with incarceration” against persons who are “incarcerated upon criminal charges but not convicted thereof”). For other statutes authoring fees to be imposed on defendants to cover the costs of pretrial detention, see N.C. GEN. STAT. § 7A-313 (2021); OKLA. STAT. tit. 22, § 979a (2021); UTAH CODE ANN. § 76-3-201(6) (West 2021); VA. CODE ANN. § 53.1-131.3 (2021); WIS. STAT. § 302.372(2)(a) (2021); WYO. STAT. ANN. § 7-13-109 (2021).

²⁰² See, e.g., KY. REV. STAT. ANN. § 441.265 (West 2021); UTAH CODE ANN. § 76-3-201(6) (West 2021); WYO. STAT. ANN. § 7-13-109 (2021).

Nashville charged its pretrial detainees \$44 per day for jail, but the city did not get payment up-front. The city financed the charges and thereafter was able to collect just 4.7% of the more than \$11 million in jail fees levied between 2015 and 2017.²⁰³ That's a 95.3% subsidy for the jail fees generally, which almost certainly meant a 100% subsidy for the (very many) poor defendants and perhaps no subsidy for the (few) middle-class and wealthy defendants.²⁰⁴ In such jurisdictions, a symmetric approach to bail would require that the government finance bail (paying for it initially and thereafter billing defendants for the cost). The end result would be de facto means-tested bail subsidies because the government could collect from the rich but not the poor.

Perhaps the best solution would be for wealthier defendants to bear the cost of both bail and jail, but only if they are found guilty. Currently, North Carolina and Virginia take that approach with respect to pretrial jail fees.²⁰⁵ The same approach could be extended to bail. That approach would uphold a principle of symmetry (bail and jail would be subsidized for the innocent, not the guilty). It would cut the costs of a fully subsidized bail system by more than half (because more than 50% of defendants

²⁰³ See Steven Hale, *Pretrial Detainees Are Being Billed for Their Stay in Jail*, APPEAL (July 20, 2018), <https://perma.cc/X4YU-NNEX>. One among the many challenges that governments have in collecting jail fees is that such fees are dischargeable in bankruptcy because they are, in theory, fees for services (maintenance in jail), not governmental fines (like a criminal fine). See 11 U.S.C. § 523(a)(7) (exempting governmental fines, but not fees, from discharge in bankruptcy).

²⁰⁴ Nashville decided that the game wasn't worth the candle and abandoned pretrial jail fees in 2018. See Hale, *supra* note 203 (describing the fees as "both punitive and hardly worth the trouble in financial terms" and noting the city's decision to abandon them).

²⁰⁵ N.C. GEN. STAT. § 7A-313 (2021) (providing that a pretrial detainee is not liable for jail fees "if the case or proceeding against him is dismissed, or if acquitted, or if judgment is arrested, or if probable cause is not found, or if the grand jury fails to return a true bill"); VA. CODE ANN. § 53.1-131.3 (2021) (similar). However, the acquitted appear to get no such exemption in Wisconsin and Kentucky. See WIS. STAT. § 302.372(2)(a) (2021) (authorizing counties to seek reimbursement for "any" expenses incurred for "any" period of pretrial detention); *Jones*, 2020 WL 757095, at *14 (holding that the county could bill a pretrial detainee \$10 per day for his fourteen-month pretrial detention even though all charges against him were ultimately dismissed); see also Jason Riley & Katrina Helmer, *Kentucky Appeals Court Rules Jails Can Force Inmates to Pay for Stay Even If Not Guilty*, WDRB (Feb. 7, 2020), <https://perma.cc/5L55-SA9U>; Izabela Zaluska, *Paying to Stay in Jail: Hidden Fees Turn Inmates into Debtors*, CRIME REP. (Sept. 17, 2019), <https://perma.cc/485T-J8PE>. Justice Douglas in *Schilb* would have held levying such fees on the acquitted unconstitutional on due process grounds. *Schilb*, 404 U.S. at 378 (Douglas, J., dissenting).

are ultimately convicted).²⁰⁶ It would be *de facto* means testing (because, as a practical matter, the poor cannot be made to pay for jail or bail even if they are guilty). And the approach would further the general principle that the criminal justice system should strive to punish only the guilty, not the innocent.²⁰⁷ While the motive for demanding that defendants pay for their bail (or jail) may not be punitive,²⁰⁸ the practice does impose a very high cost on them. Imposing these costs may make some sense when the defendant is guilty,²⁰⁹ but the practice is more troubling when the defendant is acquitted.

E. Soliciting and Considering Bids for Surety Services

We have generally assumed that governments should solicit bids for surety services and award contracts to the lowest bidders, but there may be reasons to deviate from that baseline. For example, assume that two bail sureties use different monitoring technologies that are equally effective in terms of preventing defendants from violating the terms of release, but one technology costs \$40 more and is much more comfortable for defendants than the other. If the government awards the bail contract to the lowest bidder, the bail surety with the less expensive (and less comfortable) technology is likely to win. That result, however, might be socially inefficient where defendants find the more comfortable technology to be so much better that they are willing to pay \$50 to be bailed to the surety using that technology.

The obvious solution to this problem is to allow a defendant to chip in \$50 toward paying the bail surety with the comfortable technology. Thus, if bail surety *A* uses the comfortable technology and bids \$1,640, while bail surety *B* uses the other technology and bids \$1,600, the government should award the contract to *A* because the net cost to the government ($\$1,640 - \$50 = \$1,590$) is

²⁰⁶ *FAQ Detail: What Is the Probability of Conviction for Felony Defendants?*, BUREAU OF JUST. STAT., <https://perma.cc/VA7P-UD7Y>.

²⁰⁷ An additional benefit of subsidizing the acquitted is that it reduces the incentive for the innocent to plead guilty. See Murat C. Mungan & Jonathan Klick, *Reducing False Guilty Pleas and Wrongful Convictions Through Exoneree Compensation*, 59 J.L. & ECON. 173, 178–80 (2016) (arguing for “greater exoneree compensation”).

²⁰⁸ See *Slade v. Hampton Rds. Reg'l Jail*, 407 F.3d. 243, 250–51 (4th Cir. 2005); *Barnes v. Brown County*, No. 11-CV-00968, 2013 WL 1314015, at *8–10 (E.D. Wis. 2013).

²⁰⁹ Indeed, imposing these costs on guilty defendants may be desirable because monetary sanctions generally impose lower social costs than incarceration. See Louis Kaplow & Steven Shavell, *Economic Analysis of Law*, in 3 HANDBOOK OF PUBLIC ECONOMICS, 1747–52 (A.J. Auerbach & M. Feldstein eds., 2002).

lower. Allowing defendants to chip in incremental amounts based on their preferences mimics an unsubsidized marketplace, in which bail sureties would avoid imposing excessively burdensome conditions on defendants lest they choose another bail agent.

That solution works for defendants who have some funds (even if those funds are insufficient to pay the full costs of bail), but what of truly penniless defendants? One solution is for the government to prohibit technologies and bail practices that impose very high costs on the defendant. Another is to allow certain technologies or practices only with the defendant's consent (which the defendant would likely not give if other bail sureties were available). A final solution would be for the government to use an algorithm that selected the winning bidder based not only on the price demanded but also on other factors, including the defendant's preferences for some bail sureties and not others. Such incremental adjustments to the bidding process would help to ensure that the "friendly custody" of bail remained somewhat friendly to defendants' interests and that the sureties selected would be, at least in part, of a defendant's "own choosing."

F. Agency Costs

If jail is so much more expensive than bail, why does the government now incarcerate so many defendants? One answer may be that, while private sector actors who stubbornly cling to their poor choices should be driven from the market, government actors face the far weaker discipline of the ballot box. We are by no means the first to argue that current incarceration rates are inefficient both in terms of total social costs and costs imposed on the public fisc.²¹⁰ The novelty of our Article comes from our proposed solution.

Agency costs provide a second reason for excessive incarceration. Judges "face the possibility of public scorn (and for elected judges, lost votes) for releasing defendants who flee or commit crimes" and "do not internalize the enormous costs to society of detaining millions of defendants pretrial."²¹¹ As a result, judges may set excessively high bail. Our proposal is indeed vulnerable to these agency costs. A judge who wants to incarcerate a defendant might set bail arbitrarily high so that the subsidy offered

²¹⁰ See *supra* note 1.

²¹¹ Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 417 (2016).

by the government is insufficient to induce any surety to accept the risk of flight.

We have three responses. First, federal and state constitutional protections against excessive bail provide some check against arbitrarily high bail amounts;²¹² in our current system, many defendants sit in jail because they cannot afford bail set at a few hundred dollars.²¹³ Second, our proposed system may limit the damage caused by judges who intentionally set arbitrarily high bail by reducing the need for judicial discretion. As we noted above, our proposed subsidy lessens the need for a judge to make an individualized determination of a defendant's ability to pay.²¹⁴ Indeed, our proposed system relies on the private sector to estimate the probability that the defendant will flee or otherwise misbehave; the government need only estimate the likely cost of this misbehavior should it occur and ensure that the surety assumes liability for this cost. Thus, there is much less need for an individualized determination of the appropriate bail amount, and courts could make greater use of scheduled bail amounts set in advance. Finally, as discussed more thoroughly in the next Part, the fact that it is the sureties, and not judges or other government actors, who will estimate the risk of misbehavior makes our proposal less vulnerable to agency costs than the primary modern alternative—government-run pretrial release systems.

IV. PRIVATE BAIL VERSUS GOVERNMENT-RUN SYSTEMS

In this final Part of our Article, we compare our proposal for subsidized bail to a government-run system of risk assessment and monitoring of released defendants, which appears to be the alternative to the current bail system favored by reform-minded legislators, courts, and commentators. Such a “pretrial services” approach²¹⁵ is essentially a replacement of private bail with a

²¹² See *infra* Part IV.A.

²¹³ See *supra* note 30 and accompanying text.

²¹⁴ See *supra* Part III.C.1.

²¹⁵ We use the term “pretrial services” to cover both risk assessment and monitoring—i.e., to cover the entire system typically proposed for replacing private bail. That same convention is followed in some jurisdictions. For example, the D.C. Pretrial Services Agency performs both risk assessments and monitoring. See *Court Support*, PRETRIAL SERVS. AGENCY FOR D.C., <https://perma.cc/WR9J-FA9D>; *Defendant Supervision*, PRETRIAL SERVS. AGENCY FOR D.C., <https://perma.cc/Y79Z-7CZN>. Other jurisdictions, such as New Jersey, use the term to refer only to postrelease monitoring. See *Pretrial Services Program*, N.J. JUDICIARY (May 2017), <https://perma.cc/4FUT-TNKR> (describing the establishment

government-run system designed to accomplish the functions traditionally performed by bail sureties (sorting and monitoring). The result would be that the middle-ground options between jail and unconditional release—territory traditionally dominated by private bail—would be ceded to governmental actors.

The comparison leads to an obvious first question: Why should the law preserve private bail sureties? After all, if the government is paying for both jail and its alternative, perhaps the government should run both. That, essentially, is the approach taken by jurisdictions like New Jersey, which have eliminated or dramatically curtailed the use of bail in favor of a system that has (i) judges and magistrates assessing the risks of releasing defendants (often with newly developed computer tools) and (ii) government-run monitoring systems to keep track of defendants and to make sure that they show up for court dates.

We offer two arguments for preserving a role for the private sector in this middle ground. In Section A we argue that private sureties should be preserved as a traditional check on government abuse, bias, or simple incompetence. Part of the argument here is deeply traditionalist—that cherished constitutional rights should not be quickly sacrificed without considering alternatives (such as subsidized bail) that preserve rights while addressing current problems (excessive pretrial jailing of the poor). Part of the argument is also based on the reason underlying the right to bail—that the right empowers private actors to “limit[] government power.”²¹⁶ Such private checks are valuable tools for assuring the proper functioning of government and are worthwhile even if not deeply traditional.

Section B below sets forth the economic case for preserving some role for private actors, and that case begins with the same insight at the heart of Professor Ronald Coase’s theory of the firm.²¹⁷ The question of whether the government should allow private sureties to assist in sorting pretrial defendants and monitoring those released or to perform those tasks itself is fundamentally a “make-or-buy” decision. The question is whether the organization should obtain needed goods and services by

of the state’s “Pretrial Services Unit to conduct the pretrial monitoring” of defendants). The broader meaning of “pretrial services” is being used solely for convenience.

²¹⁶ *State v. Brooks*, 604 N.W.2d 345, 352 (Minn. 2000) (holding that the state’s constitutional right to bail by “sufficient sureties” precludes a court from requiring cash-only bail).

²¹⁷ See generally R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

contracting with outside entities (which makes the organization marginally smaller) or by supplying them internally (which makes the organization marginally larger).²¹⁸ In short, the question is ultimately one about the optimal size of the organization. In Section B, we marshal theoretical and empirical evidence for maintaining a limited governmental presence and preserving private actors in the area of middle-ground options between jail and unconditional release.

A. Bail as a Fundamental Private Check on Government

While the Eighth Amendment to the U.S. Constitution does not protect a distinct right to bail (only a right against “excessive bail,” if bail is available),²¹⁹ the right to bail is expressly protected in a large number of state constitutions. In those states, the right to bail has in the past been viewed as a “fundamental”²²⁰ and “cherished”²²¹ right that “limits government power,”²²² especially “the scope and power of judicial institutions.”²²³ Indeed, even at the federal level, the Supreme Court has extolled statutory rights to bail as important to preserve lest “the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”²²⁴

As mentioned in this Article’s Introduction, state constitutions securing the right to bail most commonly use language providing that, subject to very limited exceptions, all criminal defendants “shall be bailable by sufficient sureties.”²²⁵ Not surprisingly, multiple state supreme courts have held that the “sufficient sureties” language protects the right of criminal defendants to be released upon the delivery of a private surety bond.²²⁶ Indeed,

²¹⁸ Coasean analysis has previously been applied to assess whether the government should use private firms for certain functions or perform those functions itself. See David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CALIF. L. REV. 393, 407–13 (2008) (applying analysis in the context of social assistance).

²¹⁹ *United States v. Salerno*, 481 U.S. 739, 752 (1987).

²²⁰ *State v. Johnson*, 294 A.2d 245, 248 (N.J. 1972).

²²¹ *Fry v. State*, 990 N.E.2d 429, 434 (Ind. 2013) (quoting *Bozovichar v. State*, 103 N.E.2d 680, 681 (Ind. 1952)).

²²² *Brooks*, 604 N.W.2d at 352.

²²³ *Id.* at 350.

²²⁴ *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

²²⁵ See, e.g., WASH. CONST. art. I, § 20.

²²⁶ See, e.g., *State v. Barton*, 331 P.3d 50, 56–57 (Wash. 2014) (citing cases from the supreme courts of Idaho, Vermont, Ohio, Minnesota, and Louisiana interpreting their states’ “sufficient sureties” clauses to “support the notion that a defendant must be allowed

while some state courts hold that “sufficient sureties” clauses do permit courts to designate cash as the only acceptable surety in particular cases, no state court has ever held that such clauses permit a state to designate governmental officers and agencies as the only acceptable sureties for all cases.²²⁷

Demonstrating that many states would face constitutional barriers to replacing bail with a government-run system does not, however, prove very much. New Jersey had such a constitutional provision guaranteeing bail by “sufficient sureties,” and the state supreme court interpreted it broadly.²²⁸ None of that prevented reformers from having the constitutional protection repealed so that a pretrial services model could replace bail. The New Jersey Constitution now states merely that defendants will be “eligible for pretrial release” and then specifies the circumstances when “[p]retrial release may be *denied*.”²²⁹ There’s no longer a constitutional guarantee of a right.

The ACLU celebrated New Jersey’s passage of the legislation that paved the way for the constitutional change as a “historic day for civil rights.”²³⁰ Yet the repeal of longstanding constitutional rights should not normally be a cause for celebration. While it’s true that New Jersey’s current statutes governing pretrial release do not seem especially draconian, they can be changed through the ordinary legislative process to become much less favorable toward the release of defendants.

In noting this concern, we are not arguing that states should never change their constitutional provisions governing individual rights. There is an entire literature devoted to the advantages and disadvantages of constitutional entrenchment.²³¹ At a minimum, that literature leads to the more modest proposition that entrenchment is sometimes good, and that’s enough to support

the option of accessing a third party surety” to post bail); *see also id.* at 57 (reaching the same conclusion under the Washington State Constitution).

²²⁷ *See, e.g., State v. Briggs*, 666 N.W.2d 573, 583 (Iowa 2003) (sustaining the legality of a cash-only bail requirement “so long as the accused is permitted access to a surety in some form”).

²²⁸ *See Johnson*, 294 A.2d at 247–48.

²²⁹ N.J. CONST. art. I, ¶ 11 (emphasis added).

²³⁰ *ACLU-NJ Hails Passage of NJ Bail Reform as Historic Day for Civil Rights*, ACLU (Aug. 4, 2014), <https://perma.cc/XJA2-33K3>.

²³¹ For an essay strongly opposing constitutional amendments, *see generally* Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 *CARDOZO L. REV.* 691 (1996). For a more nuanced law and economics approach to the issue, plus an entry into the modern literature, *see* Michael D. Gilbert, *The Law and Economics of Entrenchment*, 54 *GA. L. REV.* 61, 69–74, 83–89 (2019).

the more modest argument that bail reformers should hesitate to eliminate centuries-old rights. Other, less disruptive options should be explored first, and the subsidized bail proposed herein is one such alternative—one that needs no constitutional changes.

Beyond that traditionalist argument, there is also another major difference between a subsidized bail system and a government-run system. The traditional bail system was designed to impose a private check on government, particularly on the “scope and power of judicial institutions.”²³² Subsidized bail preserves that check. Indeed, as discussed in Part III, even do-nothing bail agents can be effective checks on governmental impulses toward excessive incarceration. Traditional bail systems also afforded criminal defendants the ability to select jailers of their “own choosing.”²³³ Again, subsidized bail preserves that traditional check to the maximum extent possible.²³⁴

By comparison, a government-run system such as New Jersey’s does the opposite—it aggrandizes governmental power, specifically judicial power. The value of the traditional check provided by bail is demonstrated empirically in an article by Ayres and Waldfogel showing that market competition among bail agents can both reveal one form of governmental abuse—judicial discrimination against minorities—and also counterbalance the discrimination to some degree.²³⁵

Specifically, the article showed that New Haven judges set “significantly higher bail *amounts* for black defendants,” but that bail bond agents “charged significantly *lower* rates to minority defendants than to whites.”²³⁶ The existence of the private bail market allowed the authors to collect “powerful market evidence of unjustified racial discrimination in bail setting” by judges.²³⁷ And as an additional benefit, the competition within the bail market also served to “mitigat[e] the effects of state discrimination.”²³⁸

²³² *Brooks*, 604 N.W. at 350.

²³³ 2 HAWKINS, *supra* note 22, at 115.

²³⁴ See *supra* Part III (discussing a mechanism for allowing even poor defendants to retain some control over the bail system by favoring some bail agents over others).

²³⁵ See Ayres & Waldfogel, *supra* note 27, at 993–94.

²³⁶ *Id.* at 993 (emphasis in original).

²³⁷ *Id.*

²³⁸ *Id.* at 994. To see this point, consider the effects that higher bail amounts would have in a state like Illinois, where the court system itself provides de facto bail by charging a flat 10% deposit of the amount set by the judge. Discriminatory bail amounts then translate directly into discriminatory deposits for release. By contrast, competition in the New

A subsidized bail system can provide the same benefits detected by Ayres and Waldfogel. In a subsidized market, competition by bail agents can drive the bail rates for minority defendants down, just as happened in the New Haven market. The lower rates will still provide transparent, market-based evidence to detect judicial discrimination. The only difference is that the lower rates will redound to the benefit of the taxpayer. Such competitive revelations of discrimination, and mitigations thereof, remain important even in—perhaps, especially in—an era where, in setting bail, judges are increasingly relying on algorithmic risk-assessment tools that some critics worry may also be racially biased.²³⁹ Competition among a multitude of private bail agents can help reveal such problems. Centralized systems dominated by governmental actors cannot.

Finally, our point can be made concrete by the extremely unfortunate case of Kalief Browder—a case that is often used in arguing for the elimination of cash bail.²⁴⁰ Browder was a sixteen-year-old child arrested on May 15, 2010, for allegedly stealing a backpack.²⁴¹ Though the charges against Browder were ultimately dismissed, he spent three years in pretrial detention on New York’s Rikers Island and ultimately committed suicide after his release.²⁴² Recent scholarship on bail as well as prominent news reporting have incorrectly asserted that Browder was “held on bail for three years” “because he could not afford the \$3000 bail necessary for his pretrial release.”²⁴³ Yet Browder’s family *did* raise the money for a bail bond only to discover that, just a few weeks after the arrest in the case, the combined actions of New

Haven market resulted in the bail agents “charg[ing] black male defendants rates that were almost 19 percent lower than the rates charged to white male defendants.” *Id.* at 993.

²³⁹ See Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043, 1045–49, 1076–82 (2019) (noting the critics’ concerns but finding the current evidence inconclusive).

²⁴⁰ See Jesse McKinley & Ashley Southall, *Kalief Browder’s Suicide Inspired a Push to End Cash Bail. Now Lawmakers Have a Deal.*, N.Y. TIMES (Mar. 29, 2019), <https://perma.cc/VH2G-4S52> (reporting that, “[f]or many in New York, the inequities in the cash bail system were crystallized [by the case of] a Bronx teenager named Kalief Browder”).

²⁴¹ See Jennifer Gonnerman, *Before the Law*, NEW YORKER (Sept. 29, 2014), <https://perma.cc/6KCJ-XY9C>.

²⁴² See Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), <https://perma.cc/N8S9-FVD3>.

²⁴³ Liana M. Goff, *Pricing Justice: The Wasteful Enterprise of America’s Bail System*, 82 BROOK. L. REV. 881, 884 & n.12 (2017); see also McKinley & Southall, *supra* note 241, (asserting incorrectly that “Kalief Browder spent three years on Rikers Island because his family could not raise \$3,000”).

York's Department of Probation and the presiding judge had remanded Browder to jail "without bail."²⁴⁴ Thus, while the first few weeks of Browder's pretrial incarceration *do* show the harsh effects of an unsubsidized bail system on the poor (and subsidies could clearly have freed Browder sooner²⁴⁵), it was not an unsubsidized bail system that kept Browder in custody for years. Rather, it was a modern governmental bureaucracy that classified him as unbailable. Giving even more power to such a bureaucracy and removing any private check on it does not seem like a step forward.

B. The Coasean Perspective

Just as a Coasean firm must choose which goods to buy and which to produce itself, so too must a government decide which functions to purchase and which to do itself. All-or-nothing answers are unlikely to be correct. That, however, is only the beginning of the analysis, because the government could obtain the services of private actors through two quite different structures: (i) it could use long-term contracts to obtain services from one or a few private providers, or (ii) it could buy services through something akin to a spot market—a single contract covering one instance. Our proposal for subsidized bail sureties falls into the second option, not the first.

²⁴⁴ See Gonnerman, *supra* note 242; see also Candace White, Note, *Bias and Guilt Before Innocence: How the American Civil Liberties Union Seeks to Reform a System That Penalizes Indigent Defendants*, 83 ALB. L. REV. 657, 665 (2019) (noting that after "[s]everal days," Browder's family "procured the \$900 needed for his release" but that "the judge revoked Browder's eligibility for bail as he was on probation at the time of his arrest"); Alysia Santo, *No Bail, Less Hope: The Death of Kalief Browder*, MARSHALL PROJECT (June 9, 2015), <https://perma.cc/2TRW-654F> (stating that, seventy-four days after Browder's arrest, "the [trial] judge remanded him without bail" so that "paying for his release was no longer an option"). In a Netflix documentary film, Browder's mother describes in detail raising the \$900 to obtain a \$3,000 bail bond but then being surprised to learn from the bail bond agent that the courts had classified Browder as unbailable. See *Time: The Kalief Browder Story: Part 1—The System* (Spike Mar. 1, 2017) (time index 40:15 to 40:49). In the same documentary, Browder's lawyer states that the Department of Probation "put a hold" on Browder's case so that he could not "leave jail until this case [was] resolved." *Id.* (time index 41:10 to 41:20). Browder's lawyer has confirmed with the authors that the hold was placed on Browder "in June of 2010" and that the hold meant he could not leave jail even if bail had been posted. Email from Paul Prestia to John Duffy, (April 23, 2021) (on file with the author).

²⁴⁵ We can confidently assert that Browder would have been released—and released quickly—through a subsidized bail system because, as discussed in note 245, *supra*, a bail bond agent was willing to be a surety on Browder's \$3,000 bail in exchange for \$900.

To understand what that first option would look like, consider a government that agrees that jail should not be asymmetrically subsidized over other pretrial options but that also decides against subsidizing pretrial monitoring through bail sureties. Instead, the government decides to contract with (and, importantly, *pay*) a single ankle-bracelet provider to monitor released defendants and to ensure that they make their court appointments. In other words, the government agrees to pay for one of what we have described as the middle-ground pretrial options (those between full incarceration and unrestricted release), but it will pay only a single entity to occupy the field.

Such a system might well be superior to today's system because, by paying for the ankle-bracelet monitoring, the government would be reducing the current asymmetrical funding between jail and the middle-ground pretrial options that are likely both less expensive and more defendant-friendly. In our view, however, the system would likely be suboptimal for multiple reasons, including (i) that there would be no easy way to determine whether another provider would perform better and (ii) that the system would likely leave more decisions inside the government (e.g., whether an ankle bracelet is cost-justified).

Under our proposal, multiple private sureties would compete for government subsidies in a market where performance is easily measured. In addition, as discussed in Part III, those competing private sureties would get to make decisions about which technologies and monitoring techniques to use, both generally and with respect to particular defendants. Competition would push private sureties to find better approaches, and those that perform poorly would suffer losses and be driven from the market.

That's the theory anyway. Below we discuss two points frequently raised in the literature on bail and pretrial detention: (i) the empirical evidence about the effectiveness of bail sureties and (ii) the current rapid technological progress affecting the field.

1. Existing empirical evidence.

Any proposal to maintain private bail sureties should be accompanied by evidence that those sureties perform their basic functions well. Compelling evidence is difficult to find, however, because courts do not make pretrial release decisions randomly. Rather, lower-risk defendants are released on their own recognizance or qualify for government-run pretrial release programs

while higher-risk defendants must post bail.²⁴⁶ Thus, simple comparisons of outcomes are biased against bail. Among more sophisticated peer-reviewed articles, surprisingly few attempt both to control for this selection bias and to compare bail sureties to other forms of release.²⁴⁷

Perhaps the strongest evidence supporting commercial sureties comes from Professors Eric Helland and Alexander Tabarrok. Using a matching model, they estimate that

similar individuals are 7.3 percentage points, or 28 percent, less likely to fail to appear when released on surety bond than when released on their own recognizance. Similar individuals are also 3.9 percentage points, or 18 percent, less likely to fail to appear when released on surety bond than when released on deposit bond.²⁴⁸

They further find that “the fugitive rates under surety release are 53, 47, and 64 percent lower than the fugitive rates under own recognizance, deposit bond, and cash bond, respectively.”²⁴⁹ They conclude that “states that ban commercial bail pay a high price”²⁵⁰ and that “[b]ounty hunters, not public police, appear to be the true long arms of the law.”²⁵¹

Two studies suggest that well-managed government-run pre-trial service programs achieve higher appearance rates. Professor

²⁴⁶ See, e.g., Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. & ECON. 93, 94 (2004).

²⁴⁷ A recent literature review laments “a distinct lack of research that utilizes any amount of methodological rigor,” but concludes that “[i]t appears that more restrictive bond types are associated with lower [failure to appear] rates.” See Kristin Bechtel, Alexander M. Holsinger, Christopher T. Lowenkamp & Madeline J. Warren, *A Meta-Analytic Review of Pretrial Research: Risk Assessment, Bond Type, and Interventions*, 42 AM. J. CRIM. JUST. 443, 460 (2017). While not comparing surety bonds to other release conditions, some papers find that larger bond amounts increase appearance rates. See Landes, *supra* note 191, at 322; Samuel L. Myers, Jr., *The Economics of Bail Jumping*, 10 J. LEGAL STUD. 381, 396 (1981). Three recent papers focus on Philadelphia, which follows a system similar to that of Illinois—including granting release based on 10% deposit bonds. See David S. Abrams & Chris Rohlf, *Optimal Bail and the Value of Freedom: Evidence from the Philadelphia Bail Experiment*, 49 ECON. INQUIRY 750, 762 (2011); Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 471 (2016); Aurélie Ouss & Megan Stevenson, *Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors 13–31* (June 20, 2020) (working paper), <https://perma.cc/5KQF-EKEU>.

²⁴⁸ See Helland & Tabarrok, *supra* note 247, at 108. For criticism of the Helland & Tabarrok study, see Bechtel et al., *supra* note 247, at 448.

²⁴⁹ Helland & Tabarrok, *supra* note 247, at 110.

²⁵⁰ *Id.* at 114.

²⁵¹ *Id.* at 118.

Stevens Clarke, Jean Freeman, and Professor Gary Koch find that “[pretrial service] releasees were much less likely to fail to appear in court or be rearrested, controlling for criminal history and court disposition time, than the bondsman releasees.”²⁵² Similarly, Matt Barno, Deyanira Nevárez Martínez, and Professor Kirk Williams find that “defendants who received supervised release under [a pretrial release] program were significantly less likely to [fail to appear] than similarly situated defendants who were released on cash bail.”²⁵³ The pretrial release programs were, however, selective. For example, in the Barno et al. study, judges approved just 37% of defendants recommended for the program by a probation officer,²⁵⁴ and the judicial decisions appeared to be based on information unobservable by the researchers.²⁵⁵ As a result, the apparent success of the pretrial programs could be due to selection bias.

Moreover, a high appearance rate is not the only relevant metric. One must also consider the costs that a pretrial release mechanism imposes on defendants, the government, and society more generally. A pretrial services program could undoubtedly yield very high appearance rates by subjecting defendants to curfews, intrusive and expensive monitoring, and threats of severe sanctions for noncompliance. For example, in the jurisdiction studied by Clarke et al., defendants released on bond lost their bond but faced no further sanction when they failed to appear, while defendants released under the pretrial services program who failed to appear faced a possible two-year prison sentence.²⁵⁶

In sum, the empirical literature, while thin, supports the view that bail sureties perform their functions well enough to have substantial positive effects on court-appearance rates. The literature comparing sureties to pretrial services is even more limited and appears not yet to contain any study that convincingly accounts for selection effects and other differences (like the differential collateral sanctions for nonappearance). The

²⁵² Stevens H. Clarke, Jean L. Freeman & Gary G. Koch, *Bail Risk: A Multivariate Analysis*, 5 J. LEGAL STUD. 341, 368 (1976).

²⁵³ Matt Barno, Deyanira Nevárez Martínez & Kirk R. Williams, *Exploring Alternatives to Cash Bail: An Evaluation of Orange County’s Pretrial Assessment and Release Supervision (PARS) Program*, 45 AM. J. CRIM. JUST., 363 (Dec. 6, 2019).

²⁵⁴ *Id.* at 375.

²⁵⁵ See *id.* at 372 & tbl.3 (reporting the observable variable explained just four percent—i.e., a pseudo- R^2 of .043—of the judge’s decisions to follow the probation officer’s recommendations).

²⁵⁶ See Clarke et al., *supra* note 253, at 351.

literature also does not try to determine whether pretrial release programs are cost-justified in comparison to a bail surety system.

Finally, some of the most dramatic evidence comes from recently launched community bail funds, which, as previously mentioned, have reported achieving very high appearance rates (e.g., 95%) at low cost.²⁵⁷ If verified through peer-reviewed empirical studies, such results may demonstrate that innovative approaches to bail suretyship can produce better results than both extant commercial sureties and government-run pretrial services programs.

2. New technologies and the crucible of competition.

Bail opponents may dismiss the empirical evidence we present above by arguing that new technologies have made bail “archaic.”²⁵⁸ For example, Samuel Wiseman argues that “electronic monitoring will present a superior alternative to money bail for addressing flight risk.”²⁵⁹ Private sureties, however, can use those technologies too.

Again, the crucial issue here is which actor or actors should control the vast middle ground of options lying between incarceration and unconditional release. The existence of this middle ground is not new. It’s the string on which bail sureties have held bailed defendants; it’s the liberty of the yard in debtors’ prisons; and it’s simply unbundled incarceration from an economic perspective. The technology operating in this space is new, but any argument that the possibility of vibrant innovation favors governmental control is precisely backward.

In comparing the advantages and disadvantages of governmental control versus market competition in a field, modern economic literature generally concludes that innovation and technological progress will be dampened by eliminating competitive enterprises in favor of governmental provision of goods and services. Professor Andrei Shleifer, for example, writes that it has “become[] clear that private ownership is the crucial source of incentives to innovate and become efficient, which accounts for what [Nobel laureate Paul Samuelson] called the ‘tremendous

²⁵⁷ See *supra* Part II.C; see also, e.g., *FAQ*, BAIL PROJECT, <https://perma.cc/73JS-EB7N> (reporting a 95% appearance rate during first ten years of the Project’s predecessor organization).

²⁵⁸ Wiseman, *supra* note 1, at 1352.

²⁵⁹ *Id.* at 1344.

vitality’ of the free enterprise system.”²⁶⁰ Indeed, even though there is a longstanding debate over whether large or small firms are better at innovating, both sides of the debate rely on competitive incentives as the force driving firms to innovate—with atomistic firms spurred to innovate by short-term price competition and large firms motivated by long-term competition to gain market power.²⁶¹ Thus, even scholars who accept the possibility that large firms could be more innovative than small ones are willing to endorse a presumptive rule that a merger to monopoly is likely to harm innovation.²⁶²

The absence of competitive pressures on government institutions is the central reason why they often are not as innovative as private firms. Even counterexamples of dramatic government innovations—e.g., the Manhattan Project and NASA’s space program of the 1960s—may have been spurred on by intense competition among world superpowers at the time. The coronavirus pandemic has also delivered vivid reminders of just how *uninnovative* the ordinary processes of government bureaucracies are, as news reports document multiple states (including, coincidentally, New Jersey) struggling to update computerized unemployment systems that were maintained in a “nearly extinct” computer coding language considered “outdated” in the 1980s.²⁶³ If innovation is important to modernizing pretrial sorting and monitoring, heavy reliance on state bureaucracies may be unwise.

Having established why private actors are generally preferable in fields of rapid innovation, we address three new technologies that should favor more reliance on private actors in the middle-ground pretrial options. The first is electronic procurement, including computerized reverse auctions. While that

²⁶⁰ Andrei Shleifer, *State Versus Private Ownership*, 12 J. ECON. PERSPS. 133, 135 (1998).

²⁶¹ The historical debate is classically framed as one between Professor Kenneth Arrow (advocating that small firms and short-term competition drive innovation) and Professor Joseph Schumpeter (championing large firms and long-term competition as better). See Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull’s Eye?*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED 361, 362–63 (Josh Lerner & Scott Stern eds., 2010) (succinctly summarizing the Arrow-Schumpeter debate). As Professor Shapiro concludes, the Arrow and Schumpeter positions are fundamentally consistent in that both agree that “innovation, broadly defined, is spurred if the market is contestable; that is, if multiple firms are vying to win profitable future sales.” *Id.* at 401.

²⁶² See Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 6 (2007).

²⁶³ Patrick McGeehan, *He Needs Jobless Benefits. He Was Told to Find a Fax Machine.*, N.Y. TIMES (Apr. 16, 2020), <https://perma.cc/F2QF-9F25>; see also Elena Botella, *Why New Jersey’s Unemployment Insurance System Uses a 60-Year-Old Programming Language*, SLATE (Apr. 9, 2020), <https://perma.cc/4HMR-DCQY>.

technology has not previously been mentioned in the literature on pretrial detention, it is important because it provides a structural change to markets generally. Such electronic procurement arose late in the twentieth century, but it has already become an important mechanism by which both public and private entities interact with decentralized markets for goods and services.²⁶⁴ Because the emergence of such a new technology shifts downward the costs of relying on decentralized markets, Coasean theory suggests that public and private entities should be more willing to substitute such markets in place of the alternatives of self-provision or long-term contracts.

Two other technologies—algorithmic predictive software and new monitoring technologies—are mentioned much more frequently in the pretrial detention literature because they are directly relevant to the functions traditionally performed by bail sureties. Each technology remains controversial for various reasons, each remains a field of continuing development, and each may not necessarily be the right approach in many situations.

In predicting which defendants are riskier, algorithmic technologies might, as some scholars argue, “perform better than the intuitive methods used by judges or other experts”²⁶⁵ and thereby produce tremendous benefits.²⁶⁶ Yet while the literature usually assumes that judges or magistrates will use such technologies in directly determining which defendants should get released, private actors can also use them. Bail sureties have traditionally attempted to grant bonds only to good risks; new software may allow them to perform that function much more efficiently.

Moreover, algorithmic technologies remain controversial and uncertain. They could be discriminatory, though the evidence so far seems inconclusive.²⁶⁷ Judges might also be unreceptive to algorithms—following them initially but then slipping back to their old habits, as one study found.²⁶⁸ And it might also be that assessing the riskiness of defendants is not amenable to *Moneyball*-style analysis of hard data but instead needs to rely on what

²⁶⁴ Ching-Chung Kuo, Pamela Rogers & Richard E. White, *Online Reverse Auctions: An Overview*, 13 J. INT'L TECH. & INFO. MGMT. 275, 276–77 (2004).

²⁶⁵ See Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 321 (2018) (summarizing other scholars' views).

²⁶⁶ See Jon Kleinberg, Himabindu Lakkaraju, Jure Leskovec, Jens Ludwig & Sendhil Mullainathan, *Human Decisions and Machine Predictions*, 133 Q.J. ECON. 237, 270–71 (2018) (offering evidence to support high benefits from such algorithms).

²⁶⁷ See Huq, *supra* note 240, at 1076–82.

²⁶⁸ See Stevenson, *supra* note 266, at 352–59.

information theorists call “tacit knowledge,”²⁶⁹ which is difficult or impossible to encode into a database.²⁷⁰ Finally, even if algorithmic technologies ultimately succeed, no one is yet sure which algorithms will work best.

Monitoring technologies are subject to similar controversies and uncertainties. While it’s likely true, as some scholars argue, that electronic monitoring is “a far less burdensome means [as compared to jail] of achieving the government’s aims” in pretrial control of defendants,²⁷¹ that’s not necessarily the right comparison. The government can also release defendants on bail or grant them release subject to much less onerous conditions. As compared to those other options, several scholars have found that electronic monitoring is unnecessary or not cost-justified in many cases.²⁷² Moreover, many defendants seem to fail to appear merely because they forget, so simple, low-tech innovations like reminder calls or postcards can substantially raise appearance rates.²⁷³ Compared to these other options, electronic monitoring is not cheap in either the monetary costs²⁷⁴ or the nonmonetary costs

²⁶⁹ See generally, e.g., MICHAEL POLANYI, *THE TACIT DIMENSION* (1966) (originating the vast literature on tacit knowledge).

²⁷⁰ L. Jay Rabe & Jerry Watson, *Commercial Bail Bonds*, CAL. CTS. 11–12 (2016), <https://perma.cc/RR2D-WKAM> (instructing bail bond agents that risk analysis is “more an art than a science” and urging them, as part of their risk analysis, to gather extensive information about the defendant’s “tattoos, hobbies, favorite pastimes, work and address histories and best friends”).

²⁷¹ Wiseman, *supra* note 1, at 1404.

²⁷² See, e.g., Brook Hopkins, Chiraag Bains & Colin Doyle, *Principles of Pretrial Release: Reforming Bail Without Repeating Its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679, 699 (2019) (stating that the existing research has not found electronic monitoring to improve pretrial outcomes); INTISAR SURUR & ANDREA VALDEZ, *PRETRIAL REFORM TASK FORCE: FINAL RECOMMENDATIONS REPORT 12* (2019) (stating that “electronic home monitoring, as a condition of pretrial release, has not been shown to reduce pretrial failure”); CRIM. JUST. POL’Y PROGRAM, HARV. LAW SCH., *MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 17* (2016) (similar); MARIE VANNOSTRAND, KENNETH J. ROSE, & KIMBERLY WEIBRECHT, *PRETRIAL JUST. INST., STATE OF THE SCIENCE OF PRETRIAL RELEASE RECOMMENDATIONS AND SUPERVISION 27* (2011) (similar).

²⁷³ See David I. Rosenbaum, Nicole Hutsell, Alan J. Tomkins, Brian H. Bornstein, Mitchel N. Herian & Elizabeth M. Neeley, *Court Date Reminder Postcards*, 95 JUDICATURE 177, 178 (2012) (finding that “[m]any defendants lead disorganized lives, forget, lose the citation and do not know whom to contact to find out when to appear” and that sending postcards significantly raised appearance rates).

²⁷⁴ See Christopher Coble, *5 Things to Know About Ankle Monitors*, FINDLAW (Apr. 13, 2015), <https://perma.cc/R72D-KEST> (reporting the costs of bracelets at \$5 to \$15 per day plus a setup fee of around \$200); Anne Jungen, *GPS Ankle Bracelet Monitoring of Low-Risk Offenders Costs More than Anticipated*, GOV’T TECH. (May 3, 2016), <https://perma.cc/4TTD-VMHR> (discussing additional costs where the bracelets are damaged).

imposed on the defendant.²⁷⁵ Electronic monitoring is also developing into multiple forms, including basic ankle bracelets based on decades-old technology, more sophisticated bracelets that perform new functions (such as continuously monitoring for intoxication),²⁷⁶ and even cutting-edge innovations relying on GPS-enabled cell phones, automated video calls, and facial recognition software.²⁷⁷

All these uncertainties justify keeping monitoring and risk assessments decentralized, with private actors experimenting with different approaches and perhaps counterbalancing flawed governmental choices. If decisions are instead centralized within the government, bureaucratic actors will likely have insufficient incentive to run these experiments and to try new approaches. The promise and perils of new technologies provide a strong justification for maintaining competition in the area.

CONCLUSION

The current criminal justice system jails too many poor defendants, but the root cause is not bail. The poor suffer excessive pretrial incarceration for the simple reason that governments massively fund jail but not bail. Eliminating that asymmetry—having the government pay for bail sureties up to the costs of jail—would increase the liberty of presumptively innocent defendants and, because bail sureties usually are much less expensive than jail cells, save billions of dollars each year.

If subsidizing bail sounds odd to the modern ear, it is only because our legal culture has forgotten the traditional concept of bail as a surety system. Common modern notions about bail—e.g., that bail allows defendants to purchase freedom from jail or that bail gives defendants incentives to appear at trial by threatening them with financial forfeitures—are anathema to the traditions of bail. Indeed, defendants traditionally could not leave jail at any price without sureties and were prohibited from using indemnity agreements to insulate their sureties from bond forfeitures.

To the extent that many poor defendants today cannot afford bail sureties, the straightforward modern solution is for

²⁷⁵ NAT'L INST. OF JUST., *ELECTRONIC MONITORING REDUCES RECIDIVISM 2* (Sept. 2011) (finding that bulky, hard-to-hide ankle bracelets impair defendants' ability to obtain and retain employment).

²⁷⁶ See Emily Keener, *When Do DUI Courts Require SCRAM Bracelets and How Do They Work?*, LAWYERS.COM (Apr. 2, 2019), <https://perma.cc/ND5P-29Y5>.

²⁷⁷ See, e.g., U.S. Patent No. 10,008,099 (issued June 26, 2018).

governments to subsidize the sureties. That approach becomes even more sensible once bail is viewed as Blackstone viewed it—as a somewhat more “friendly” substitute for the four walls of a jail. Subsidizing bail sureties is thus simultaneously novel and deeply historical. It takes the traditional notion of bail as a surety system—a notion still expressly enshrined in many state constitutions—and updates it quite modestly with a modern, law and economics approach to governmental subsidies.

Finally, as a solution to the modern problem of the over-jailing (and under-bailing) of poor defendants, ending the asymmetric subsidies for jail versus bail is a far better approach than the currently popular reform proposal of abolishing bail altogether and relying more heavily on governmental actors and institutions. The current problem with excessive pretrial detention arises from too many resources being devoted to the governmental institution known as jail. Attempting to solve that problem by shifting even more power to government institutions is a deeply troubling step. Subsidizing bail sureties preserves a time-honored way for private actors to check governmental abuse, bias, and incompetence, and the bidding process proposed in this Article holds out the hope of harnessing innovation and competition to curb excessive incarceration.