Consumer Protection for Criminal Defendants: Regulating Commercial Bail in California

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ABSTRACT

Bail bond companies act as gatekeepers to freedom for thousands of people in California every day. Yet despite their ubiquitous role in our criminal justice system, the current framework regulating the commercial bail industry almost exclusively monitors the relationship between bail companies and the state; it fails to mitigate the wide variety of harms that bail agents can and often do inflict on their customers. Existing policies frame defendants simply as criminals, erasing their simultaneous position as consumers soliciting a commercial service. As a consequence, defendant-consumers, often poor individuals of color, and their families, remain vulnerable to an often-predatory commercial bail bond system.

This Note proposes a novel way to frame the interaction between a bail bond company and a criminal defendant or arrestee: as that between a merchant and a consumer. As a consequence, this relationship can and should be governed by a framework of consumer protection laws. This framework, properly crafted and enforced, would protect consumers of commercial bail bonds from abuse and generally encourage a well-functioning commercial bail industry.

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In an effort to encourage a less predatory and more beneficial commercial bail industry, the Note describes an avenue for pursuing claims against abusive bail bond companies and policy changes that could lay the groundwork for systemic improvement. In doing so, the Note argues (1) that commercial bail companies should be regulated by existing consumer protection law; (2) that consumers of these bail services can and should bring suit against bail companies for violations of state and federal consumer protection laws; and (3) that new legislation tailored to the industry is urgently needed to ensure a properly functioning industry free of exploitation and abuse.

Part I of the Note summarizes the process of pretrial detention and bail in California, illuminating the context in which consumers of bail services find themselves. Part I also summarizes qualitative research in order to help describe the variety of harms consumers of bail services often endure. Part II surveys existing consumer protection legislation available to consumers seeking relief, focusing primarily on the California Unfair Competition Law, the California Legal Remedies Act, and the California Fair Debt Collection Practices Act. Part II then analyzes their applicability to the commercial bail context. In Part III, the Note addresses the broader legal framework regulating the commercial bail industry, focusing on the areas that existing protections may not be able to reach and describing the possibility of enacting new legislation tailored to these deficiencies.

INTRODUCTION

Place yourself in the following situation:[1]

> You are arrested for possession of marijuana, taken to jail, and told that in order to regain your freedom, you have to pay $20,000.[2] Unable to pay, you stay detained in jail overnight. Sitting in your cell, slowly coming to terms with your situation, unsure of your legal rights, let alone of your immediate options, you spot an advertisement on the wall right outside your cell: "Get out now! Payment plans available! We'll come pick you up. We're on your side! Call us now! It's Free!! Bad Boys Bail Bonds." You know to some extent what bail is, and understand that bail bond companies like Bad Boys "bail" you out. But you don't know the process, how much you will owe, or any other details; all you really know is that you want to get out of jail. You may still be handcuffed as you contemplate contacting a bondsman. You may also have been subjected to body cavity searches and kept inside a dirty windowless cell, perhaps in isolation in an unconstitutionally overcrowded jail.[3]

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1. As explained further below, this hypothetical was created using aspects of stories of individuals affected by the commercial bail system that I encountered throughout my research for this Note.

2. This figure comes from the SUPERIOR COURT OF CAL. CTY. OF SACRAMENTO, FELONY AND MISDEMEANOR BAIL SCHEDULES 2 (2018), https://www.saccourt.ca.gov/criminal/docs/felony-misdemeanor-bail-schedule.pdf [https://perma.cc/XV5Z-G7HC]. Bail schedules are described below in more detail. Similar figures exist across the California, for example, in Orange County. *See* SUPERIOR COURT OF CAL. CTY. OF ORANGE, UNIFORM BAIL SCHEDULE (FELONY AND MISDEMEANOR) 11 (2018), https://www.occourts.org/directory/criminal/felonybailsched.pdf [https://perma.cc/G74J-TQNS]. *See infra* Part I for my discussion of bail schedules and the general process of bail.

3. Such conditions are not exaggerated or anomalous. *See generally* Kelly Davis, *Solitary In California Jails Still Hellish Despite State Reforms*, THE INTERCEPT, Oct. 29, 2015, https://theintercept.com/2015/10/29/solitary-in-california-jails-still-hellish-despite-state-reforms/

> That night, or perhaps the next morning, you ask to use the phone and are able to reach Bad Boys, for free, as if you were calling from your cellphone.[4] An agent picks up and asks, "What'd you do? How much is the bail? How much you got? Alright I'll come pick you up."

A few hours later, a representative from Bad Boys picks you up. At that moment, you owe Bad Boys $2,000; later you will have to accept all Bad Boys' terms[5]—a payment plan of one hundred dollars per week, weekly check-ins and electronic GPS monitoring—or face reincarceration.[6] You walk out of the Bad Boys office and go home. After a few months, your case is dismissed and Bad Boys is relieved of its obligations to secure your future appearances; however, you continue to owe Bad Boys.[7] When you miss a payment, Bad Boys threatens to reincarcerate you. Its agents call you, your friends, your family, and even your

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[https://perma.cc/6PXQ-GB3E]. Indeed, these conditions, pervasive as they are now, are also not new. Writing in 1970, Richard Cohen observed, "In contemporary America, however, the pretrial detainee is confronted with boredom, a lack of recreational facilities, poor food, unhygienic and crowded living conditions, strict discipline, and brutal guards." Richard A. Cohen, *Wealth, Bail, and the Equal Protection of the Laws*, 23 VILL. L. REV. 977, 1004 (1978) (citing *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L. J. 941, 943 (1969)).

4. The California Penal Code grants inmates "the right to make at least three completed telephone calls," subject to certain conditions, "no later than three hours after arrest." CAL. PEN. CODE § 851.5(a)(1). Calling a bail bondsman is specifically authorized. *Id.* at § 851.5(b)(2).

5. This is required by all of the bail contracts that I have seen and is also articulated on the websites of many California based bail bond companies. Many bail bond contracts are available online, all of which include this provision. *See, e.g.*, California Bail Bonds, *Bail Bond Agreement*, http://www.californiabailbonds.com/wp-content/uploads/2015/09/bail-bond-agreement.pdf [https://perma.cc/S9H6-Y6KJ] (stating that the premium "shall be regarded as fully earned immediately upon the filing of said Bail Bond, and . . . that the Defendant may have been improperly taken into custody or his Bail reduced, or his cause dismissed forthwith shall not obligate the Second Party to waive or return said premium or any portion thereof"); Family Bail Bonds, *Bail Bond Agreement Form #4477-4/98*, http://www.familybailbonds.com/wp-content/uploads/2016/05/bail_bond_agreement.pdf [https://perma.cc/GE25-AHS6] (same language); Financial Casualty & Surety, Inc., *Surety Bail Bond Agreement*, http://www.fcsurety.com/forms/FCS316.pdf [https://perma.cc/6VFT-N9W8] ("The premium is fully earned upon the release of Principal. The fact that Defendant may have been improperly arrested, or his bail reduced or his case dismissed, shall not obligate the return of any portion of said premium."); Vu Bail Bonds, *Surety Bail Bond Agreement*, http://www.vubailbonds.justalilevil.com/pdf/SuretyBailBondAgreement.pdf [https://perma.cc/JB36-QCWZ] (same language). Several contracts stating the same have been collected. Bail bond company websites also inform the public that payment to the bail company is unrelated to changes in a defendant's case or bail status. *See, e.g.*, *Frequently Asked Questions About Bail Bonds*, ABOUTBAIL, https://www.aboutbail.com/pages/frequently-asked-questions-about-bail-bonds. [https://perma.cc/C6EN-59XR] ("This fee is what allowed the defendant to get out of jail and is fully earned once the defendant is out of custody."); VENTURA BAIL BONDS, http://www.affordableventurabailbonds.com/ [https://perma.cc/MP3S-XK37] ("Typically the 10% premium is fully earned once the bail bond is posted with a jail or court.").

6. CAL. PEN. CODE § 1300(a) ("At any time before the forfeiture of their undertaking, or deposit by a third person, the bail or the depositor may surrender the defendant in their exoneration, or he may surrender himself, to the officer to whose custody he was committed at the time of giving bail . . . ."). As explained below, this provision grants bail bond companies wide latitude to surrender defendants back into custody, regardless of the terms of a particular bail contract, and certainly regardless of the perceived meaning of that contract by the defendant.

7. *See supra* note 5 for a review of the contract language with these provisions.

employer, demanding payment. Your friend, who had put up his car as collateral for the agreement, also gets a call from Bad Boys, threatening to take away his car. Though you continue to make payments when possible—often by delaying your car and rent payments and limiting your food purchases—the threats continue. As a consequence of Bad Boys' persistent calls to your employer, who was unaware of the initial charges against you, your employer fires you. And throughout this process, you are unsure of the bondsman's authority to put you back in jail. Although you attempt to renegotiate your arrangement with Bad Boys, the bondsman instead sends your account to collections and later initiates a lawsuit against you and your friend.

What recourse might you have to find relief from this experience? And what framework should regulate the interactions between you and your bondsman in order to prevent the story described above from occurring? Despite the pervasiveness of such stories, scholars have yet to rigorously scrutinize the relationship between bail bond companies and the individuals who use them.

Throughout the country, a wave of efforts to reform the bail system is growing, manifesting at different scales, from local county-based initiatives,[8] to

8. *See, e.g.*, Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 599–606 (2017) (describing the development of community bail funds across the country, with particular emphasis on the Bronx Defenders bail fund in New York City).

state[9] and nationwide[10] legislative and executive[11] efforts, to federal lawsuits.[12] These efforts are generally motivated by concerns about the discriminatory nature of the money bail system, which, as explored in this Note, produces significantly detrimental effects for the poor. The strategies currently pursued are diverse, as are the ultimate ends desired—from simple procedural changes to the bail setting process, to the complete elimination of the money bail system altogether. These efforts, though presently reaching a fever pitch, arise from a

9. For example, in November of 2016, New Mexico passed a constitutional amendment with 87 percent voter support, providing that a defendant cannot be denied bail because of an inability to pay. *See* J.B. Wogan, *Can't Afford Bail? In One State, That Doesn't Matter Anymore*, GOVERNING (Nov. 9, 2016), http://www.governing.com/topics/public-justice-safety/gov-new-mexico-bail-ballot-measure.html [https://perma.cc/LQ4Z-4N2E]. In 2017, a bill went into effect in New Jersey that prioritizes non-financial conditions of bail, decreasing its bail population by 27 percent. *See* Lisa W. Foderaro, *New Jersey Alters its Bail System and Upends Legal Landscape*, N.Y. TIMES (Feb. 6, 2017), https://www.nytimes.com/2017/02/06/nyregion/new-jersey-bail-system.html [https://perma.cc/KVM5-B67F]. On January 12, 2017, New Orleans City Council also voted on bail reform, requiring automatic release of defendants after booking for a variety of enumerated offenses. *See* Jessica Williams, *City Council Unanimously Passes Overhaul to Municipal Court Bail System*, NEW ORLEANS ADVOCATE (Jan. 12, 2017), http://www.theadvocate.com/new_orleans/news/courts/article_eb41d288-d90b-11e6-b99c-4bb3e5442d1b.html [https://perma.cc/3L6T-HCA6]. Of note, in 1976, Kentucky abolished its commercial bail industry, establishing a pretrial services program. It has since continued to pass further amendments to this general setup, leading to a pretrial system that released 70 percent of pretrial defendants in 2012. ARTHUR W. PEPIN, CONF. STATE CT. ADMINS., 2012–2013 POLICY PAPER: EVIDENCE-BASED PRETRIAL RELEASE 8 (2012). Illinois and Oregon currently prohibit release on surety bonds, which includes those bonds provided by commercial bail companies. *Id.* at 5.

10. See, for example, Congressman Ted Lieu's "No Money Bail Act of 2016," which seeks to eliminate money bail altogether. Press Release, Ted W. Lieu, Congressman, U.S. House of Representatives, Congressman Ted W. Lieu Introduces The "No Money Bail Act Of 2016" (Feb. 24, 2016), https://lieu.house.gov/media-center/press-releases/congressman-ted-w-lieu-introduces-no-money-bail-act-2016-0 [https://perma.cc/WN63-YUBC].

11. The Department of Justice has expressed considerable support for reforming bail. *See* Statement of Interest of the United States at 1, Varden v. City of Clanton, No. 2:15-CV-34-MHT-WC (M.D. Ala. Feb. 13, 2015), https://www.justice.gov/crt/file/761266/download [https://perma.cc/U9G8-WNBK] ("[A]s courts have long recognized, any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pre-trial release, without any regard for indigence, not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy."); Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellee, Walker v. City of Calhoun, No. 16-10521 (11th Cir. Aug. 18, 2016), https://www.justice.gov/crt/file/887436/download [https://perma.cc/UL88-KZ5U]. However, the Department of Justice's position may have shifted on this issue following the 2017 change in administration.

12. At least eleven recent lawsuits have challenged the bail systems of local jurisdictions in federal court, primarily under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See* Jones v. City of Clanton, No. 2:15CV34-MHT, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015); Cooper v. City of Dothan, No. 1:15-CV-425-WKW, 2015 WL 10013003 (M.D. Ala. June 18, 2015); Walker v. City of Calhoun, No. 4:15-CV-0170-HLM, 2016 WL 361612 (N.D. Ga. Jan. 28, 2016), *vacated*, 682 F. App'x 721 (11th Cir. 2017); Order and Judgment, Martinez v. City of Dodge City, No. 2:15-cv-09344-DDC-TJJ (D. Kan. Apr. 26, 2016); Snow v. Lambert, No. 15-567-SDD-RLB, 2015 WL 5071981 (M.D. La. Aug. 27, 2015); Thompson v. Moss Point, No. 1:15CV182LG-RHW, 2015 WL 10322003 (S.D. Miss. Nov. 6, 2015); Order, Powell v. The City of St. Ann, No. 4:15-CV-00840-RWS (E.D. Mo. Sept. 3, 2015); Order, Pierce et al. v. City of Velda, 4:15-cv-570-HEA (E.D.Mo. June 3, 2015), http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/04/Velda-City-Final-Judgment-and-Injunction.pdf [https://perma.cc/N72J-3VA6]; Rodriguez v. Providence Cmty. Corr., Inc., 155 F. Supp. 3d 758, 770 (M.D. Tenn. 2015).

long history of bail reform in this country.[13] In California in particular, a broad coalition of advocates is hoping to fundamentally reform the bail system and has announced a new bill for the 2016–2017 legislative session.[14] I am squarely in support of bail reform that seeks to eliminate the commercial bail system, though my support differs depending on the proposed alternatives.[15] This Note will not

13. Timothy Schnacke summarizes two prior waves of bail reform: the first wave "used research from the 1920s to the 1960s to find alternatives to the commercial surety system, including release on recognizance and nonfinancial conditional release." TIMOTHY R. SCHNACKE, NAT'L INST. OF CORR., FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 48 (2014), http://www.clebp.org/images/2014-09-04_Fundamentals_of_Bail.pdf [https://perma.cc/J35Q-MA4U]. The second wave, from the 1960s to the 1980s, "focused on the 'no bail' side, with a wave of research indicating that there were some defendants whom society believed should be detained without bail (rather than by using money) due to their perceived dangerousness . . . culminat[ing] with the United States Supreme Court's approval of a federal detention statute, and with states across America changing their constitutions and statutes to reflect not only a new constitutional purpose for restricting pretrial liberty—public safety—but also detention provisions that followed the Supreme Court's desired formula." *Id.* at 48–49.

14. *See* PRANITA AMATYA ET AL., UCLA LUSKIN SCHOOL OF PUBLIC AFFAIRS, BAIL REFORM IN CALIFORNIA (May 2017), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=835f283a-e9fc-9c56-28bb-073a9bcb1dbf [https://perma.cc/6Z55-SRKA].

15. In California, for example, proposed bail reform hinges entirely on the widespread use of risk assessment tools to resolve the pretrial conundrum, a practice that is not a panacea. These risk assessments tools aim to predict the behavior of an arrested person so that the conditions of bail and pretrial release—whether that be unqualified detention, electronic monitoring, supervision, or any other manifestation of detention—reflect those indicators. Though such tools have been developed throughout the twentieth century, the Public Safety Assessment Tool, a national model for risk assessment created in 2013 by the Laura and John Arnold Foundation (LJAF), has become very popular and is now used in over thirty cities across the country. Press Release, Laura and John Arnold Foundation, New Data: Pretrial Risk Assessment Tool Works to Reduce Crime, Increase Court Appearances (Aug. 8, 2016), http://www.arnoldfoundation.org/new-data-pretrial-risk-assessment-tool-works-reduce-crime-increase-court-appearances/ [https://perma.cc/XH8T-XRJJ].

When a jurisdiction like California moves from a money bail system to a risk-based bail system, it must decide what risks are relevant, how to measure that risk, and how to tailor the conditions of release to that risk. Several scholars have critiqued the use of actuarial risk assessment tools in the criminal justice system. Some scholars argue that risk assessments are flawed because they do not predict individual risk, but rather are founded on algorithms that derive their input from bulk data. Thus, they are only capable, at best, of predicting the average risk of a general person in a certain set of circumstances, not the actual risk of the individual being evaluated. As Kelly Hannah-Moffat argues, "[t]his means that decisions about community or custodial punishments, the conditions of probation, and levels of supervision are determined based not on what offenders did, but rather on how closely who they 'are' approximates subgroups of an offender population." Put another way, causation is confused with the correlation that a person shares characteristics with a group of individuals of a certain evaluated risk, or that the individual "is" a certain risk. Kelly Hannah-Moffat, *Actuarial Sentencing: An "Unsettled Proposition*, 30 JUST. Q. 270, 277–78 (2013).

Related criticisms focus on the ways in which these tools perpetuate racial inequalities in pretrial detention, either because of inherent flaws in the tools or because of systemic inequities in the criminal justice system. *See* Bernard E. Harcourt, *Risk as a Proxy for Race* (U. of Chi. Pub. L. & Legal Theory Working Paper No. 323, 2010); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490 (2018); WILLIAM DIETERICH, CHRISTINA MENDOZA & TIM BRENNAN, NORTHPOINTE INC. RESEARCH DEPARTMENT, COMPAS RISK SCALES: DEMONSTRATING ACCURACY

directly argue for the elimination of money bail, though it will present indirect support.

This Note is therefore meant to provoke those who assert that the commercial bail system should be maintained. If it should be maintained, how can it be improved? As described below, this question is not asked as often as it should be in reform circles, perhaps because avoiding the topic may serve strategic purposes for those who hope to eliminate the commercial bail system altogether. I hope to demonstrate that if the US is to keep such a system in any capacity—either as a consequence of failed reform efforts or the intentional pursuit of a commercial bail system—substantial protections must be afforded to its customers and the overall community that depends on it. Crucially, for-profit and commercial-based solutions to the needs created by our criminal justice system are numerous and proliferating, arising in some cases from deliberate partnerships between public agencies and corporate entities, and in other cases, from corporate entities attempting to fill in service gaps where they predict significant profit potential.[16] Most broadly, then, this Note should be understood as elucidating and proposing a solution to one manifestation—money bail—of the general class of problems arising from the long-standing[17] yet growing interplay between our criminal justice system and the commercially based services that arise to meet the needs of those affected by that system.

To that end, this Note seeks to reframe the interaction between a bail bond company and its customer as a fundamentally consumer interaction that should, like countless other goods and services, be governed by a consumer protection regime. This new regime should adequately protect individuals from abuse by bail bond companies and encourage a well-functioning commercial bail industry. The current framework regulating bail monitors the relationship between bail companies and the state but fails to mitigate the wide-ranging harms that bail agents inflict on their customers. In large part, this is because existing policies frame defendants[18] as simply criminals, ignoring their simultaneous position as

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EQUITY AND PREDICTIVE PARITY (2016), http://go.volarisgroup.com/rs/430-MBX-989/images/ProPublica_Commentary_Final_070616.pdf [https://perma.cc/7S7Z-EE6Q].

16. These solutions include jails, probation services, health care, pharmacies, food services, money transfer services, phone and video calls, commissary, extradition, ankle monitoring, and, of course, money bail. *See generally Private Companies Profit from Almost Every Function of America's Criminal Justice System*, IN THE PUBLIC INTEREST (Jan. 20, 2016), https://www.inthepublicinterest.org/private-companies-profit-from-almost-every/ [https://perma.cc/XG9H-F7Q9]. For a recent history of the growth of private prisons in particular, see André Douglas Pond Cummings & Adam Lamparello, *Private Prisons and the New Marketplace for Crime*, 6 WAKE FOREST J.L. & POL'Y 407, 415–19 (2016).

17. As described below, the use of money bail itself is not a new practice. Neither is the role of private enterprise in the criminal justice system, nor in service provision and regulation more generally. *See generally* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543 (2000).

18. Throughout this Note, I utilize the term "defendant" for all those individuals who are arrested and detained before trial or before the conclusion of a criminal proceeding and who may be released on bail. However, many consumers of bail bond services are not technically defendants because they have not been arraigned and formally charged. Though detained, those individuals are more

consumers soliciting a commercial service. As a consequence, consumers of the commercial bail bond system, which serves as the prevailing gatekeeper to freedom for most arrested individuals, remain vulnerable to a system ripe for abuse. Considering the tremendous vulnerability of those who are simultaneously defendants and consumers, the scarcity of legal protections afforded to them, the significant authority bail agents wield over them, and the monopoly of information that bond companies enjoy, the abuses that individuals endure at the hands of the commercial bail industry are hardly surprising.

In the absence of more sweeping reforms to the bail system, this Note provides an avenue for pursuing claims against abusive bail bond companies and suggests policy changes to create a better commercial bail industry. In doing so, this Note argues (1) that commercial bail companies offer a service that can and should be regulated by currently existing consumer protection law; (2) that although no such cases have yet been brought in California,[19] consumers can and should bring suit against bail companies for violations of state and federal consumer protection laws; and (3) that despite the availability of such claims, new legislation specifically tailored to the industry may be needed to ensure a properly functioning industry free of exploitation and abuse. Although the bail industry frequently claims that the commercial bail system best serves the needs of society via the private provision of an effective and safe pretrial release system,[20] countless consumers of bail services are mistreated in ways that would be regulated if they occurred in a different industry. This Note therefore seeks to imagine a commercial bail system that lives up to these claims.

To achieve this goal, this Note argues that the relationship between bail bond companies and consumers should be brought under the purview of consumer protection law. In Part I, this Note summarizes the process of pretrial detention and bail in California, explaining both the nature of the commercial bail industry generally and the specific process of soliciting services from a bail bond company. These two sections illuminate the context in which consumers of bail services find themselves. Part I also summarizes the activities of bail bond

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properly categorized as arrestees. However, because consumers of bail services generally become "defendants" at some stage in their criminal process, I employ the term here for ease of use.

19. A thorough legal database search reveals few such national cases, which are referenced in later sections of this Note. At the time of publication, there is one case in California alleging complaints, similar to those suggested in this Note, against a commercial bail company in an immigration proceeding. *See* Second Amended Class Action Complaint, Vasquez v. Libre by Nexus, Inc., No. 4:17-cv-00755-CW (N.D. Cal. Jun. 9, 2017).

20. The asserted goal of the commercial bail industry is "that justice is done, at no expense to taxpayers." Morgan Reynolds, *Privatizing Probation and Parole*, *in* ENTREPRENEURIAL ECONOMICS: BRIGHT IDEAS FROM THE DISMAL SCIENCE 124 (Alexander Tabarrok ed., 2002). Specifically, proponents argue that commercial bail (1) is superior to pretrial release at ensuring court attendance and controlling defendants; (2) is less expensive for taxpayers; (3) gives more people the opportunity to be free pretrial; and (4) helps courts run smoothly by apprehending bail jumpers effectively. *See* Holly J. Joiner, *Private Police: Defending the Power of Professional Bail Bondsmen*, 32 IND. L. REV. 1413, 1416–28 (1999). *See generally* MICHAEL K. BLOCK, THE EFFECTIVENESS AND COST OF SECURED AND UNSECURED PRETRIAL RELEASE IN CALIFORNIA'S LARGE URBAN COUNTIES: 1990–2000 (2005).

companies that are harmful to bail consumers, friends and families of those consumers, and society at large. The examples of such activity and resulting harms that are used throughout this Note originate from a variety of sources: (1) in-depth interviews, conducted in the Bay Area throughout the past year, with thirty-five individuals who have solicited bail bond services;[21] (2) sources detailing the industry outside of California; and (3) stories acquired from reports made by various local and state agencies that have begun working on commercial bail industry reform efforts. The harms described in these stories serve as the basis for Part II, which surveys existing consumer protection legislation available to consumers seeking relief. This Note focuses primarily on the possibility of utilizing the California Unfair Competition Law, the California Legal Remedies Act, and the California Fair Debt Collection Practices Act. Finally, in Part III, the Note addresses the regulation of the commercial bail industry more generally, focusing on the areas that existing protections may not be able to reach and suggesting new legislation tailored to these deficiencies.

I.
PRETRIAL DETENTION AND THE COMMERCIAL BAIL SYSTEM IN CALIFORNIA

A. Pretrial Detention in California

In California, defendants generally have a right to bail or some other form of pretrial release, unless they are charged with specific enumerated offenses.[22] Individuals arrested and booked may secure release from detention in two stages: (1) before a scheduled court appearance—via release by a sheriff—in the form of a money bail condition, a cite and release, or an un-sentenced capacity release; or (2) after a scheduled court appearance—via release by a court—in the form of money bail, supervision, own recognizance, or in the case of misdemeanors, pretrial diversion.[23] A bail-eligible defendant can be released by posting the required sum of money before his[24] first court appearance. This amount is set by

21. Interviews were conducted in person and over the phone. Interviewees were found primarily by visiting courthouses and bail company offices.

22. Defendants may be denied the right to bail when they are charged with a capital offense, a felony offense with "acts of violence," felony sexual assault, or felony with threat of great bodily harm, or after a judicial determination at a hearing held in open court. *See* CAL. CONST. art. I, § 12. Others not entitled to release on bail include defendants on parole or immigration holds and those with extradition warrants. *See* In re Law, 513 P.2d 621 (Cal. 1973) (parole hold); Gates v. Superior Court, 193 Cal. App. 3d 205 (Ct. App. 1987) (immigration hold).

23. CAL. PEN. CODE §§ 853.6, 1001, 1269, 1270, 1318–19.5. *See generally* SONYA M. TAFOYA, MIA BIRD, VIET NGUYEN & RYKEN GRATTET, PUBLIC POLICY INSTITUTE OF CALIFORNIA, PRETRIAL RELEASE IN CALIFORNIA (May 2017), http://www.ppic.org/content/pubs/report/R_0517STR.pdf [https://perma.cc/55BL-Z5FM].

24. This Note utilizes the male pronoun because 95 percent of the jail and prison population in California are male. For a regularly updated report on the prison population in California, see CALIFORNIA DEPARTMENT OF CORRECTIONS & REHABILITATION, OFFICE OF RESEARCH, SPRING 2017 POPULATION PROJECTIONS (May 2017),

the warrant initially authorizing the arrest or by the bail schedule, which lists a presumptive bail amount for each bailable offense and is set by each county's Superior Court.[25] At the defendant's first appearance in court, his arraignment, a judge will review this predetermined bail amount and make a further determination as to the amount and other conditions of release,[26] based on predetermined factors.[27] Bail cannot be set with the intent of punishing a defendant[28] nor can it be "excessive."[29] In California, the median bail amount is $50,000.[30] This is substantially higher than the national average of less than $10,000.[31] In cases where a defendant can afford to post the full bail amount himself, he will receive a full refund of the bail amount, minus fees, upon compliance with the terms of bail set by the judge, regardless of whether the defendant is later found guilty or the charges are dropped.[32]

If a defendant cannot afford to post the full amount of his bail, he may solicit the services of a commercial bail agent, who is then responsible for the

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http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Population_Reports.html [https://perma.cc/9GK3-9WYV].

25. CAL. PEN. CODE § 1269b(c). Bail schedules are available publically online for every county in California. For a compendium of all bail schedules, see *California Bail Schedule By County*, BAIL BONDS DIRECT, http://bailbondsdirect.com/california-bail-schedules/ [https://perma.cc/8DGP-LGRT]. From 2002 to 2012, average county bail levels for some of the most frequently committed felony offenses increased by an inflation-adjusted 22 percent. SONYA M. TAFOYA, PUBLIC POLICY INSTITUTE OF CALIFORNIA, ASSESSING THE IMPACT OF BAIL ON CALIFORNIA'S JAIL POPULATION 9 (2013) [hereinafter TAFOYA, ASSESSING THE IMPACT], http://www.ppic.org/content/pubs/report/R_613STR.pdf [https://perma.cc/X95J-9TVX].

26. After arraignment, the bail amount can only be changed with a showing of good cause. *See* CAL. PEN. CODE § 1289. After bail is set, the defendant is entitled to an automatic review of the bail amount within five days but can waive this review. *Id.* § 1270.2.

27. These factors are the protection of the public, the safety of the victim, the safety of the victim's family, the defendant's ties to the community, record of appearance at past court hearings, potential severity of the sentence, the defendant's wealth, the amount defendant gained from the crime, number of separate offenses charged, the defendant's fugitive status, and the seriousness of the offense. CAL. PEN. CODE §§ 1270.1(c), 1275. In assessing the seriousness of the offense, judges must consider any alleged threats or injury to victims or witnesses; alleged use of a firearm or other weapon; and alleged use or possession of controlled substances. *Id.* Judges can also issue arrests warrants, authorizing law enforcement to arrest an individual, and predetermine a bail amount for that arrest. *Id.* In cases involving drug-related offenses, the judge must also consider the amount of drugs involved and whether the defendant is currently released on bail for a similar offense. *Id.*

28. *See id.* §§ 1275(a)(2), (b); People v. Gilliam, 41 Cal. App. 3d 181 (Ct. App. 1974).

29. CAL. CONST. art. I, §§ 12, 28(f)(3). However, courts do not consider bail to be "excessive" merely because a defendant cannot post it. *See* In re Burnette, 35 Cal. App. 2d 358, 360 (1939); United States v. Salerno, 481 U.S. 739 (1987).

30. SONYA TAFOYA, PUBLIC POLICY INSTITUTE OF CALIFORNIA, PRETRIAL DETENTION AND JAIL CAPACITY IN CALIFORNIA 4 (2015) [hereinafter TAFOYA, PRETRIAL DETENTION AND JAIL CAPACITY IN CALIFORNIA], http://www.ppic.org/content/pubs/report/R_715STR.pdf [https://perma.cc/5HEW-GZJS]. Because schedules are set at the county level, amounts vary widely across the state; for example, the lowest average bail amount in 2012 was $15,000, and the highest bail amount was $64,000, with amounts also differing considerably across counties for individual offenses. *See* TAFOYA, ASSESSING THE IMPACT, *supra* note 25, at 15–17.

31. *See* TAFOYA, ASSESSING THE IMPACT, *supra* note 25, at 15–17.

32. CAL. PEN. CODE § 1269.

defendant's appearance at future court dates. The defendant will contract with the bail agent to post bond for the full bail amount determined by the court. Agents charge defendants a non-refundable fee, usually ten percent of the full bail amount. Bail agents secure bonds with collateral from either the defendants themselves or sometimes from family members or friends. Generally, if a defendant fails to appear in court after posting bail and does not have a sufficient excuse for the absence, he forfeits the entire amount set by the court. If a defendant used a bail agent, the agent may then be liable to the court for the forfeited bail.[33] Prior to the termination of the defendant's criminal proceedings, a bail agent can surrender the defendant back to the court.[34] Upon either the termination of criminal proceedings or the defendant's return to custody, the bail is exonerated and either the person who posted bail receives their money back, minus fees, or the bail company is relieved of its liability.

In the opening story, this Note described a typical solicitation of a bail bondsman. Generally, upon verbal agreement over the phone, a bondsman will pick up the detained person, submit an official bond agreement to the court, and transport the person to the bond company's office. Alternatively, the detained person may call a friend or family member who then arranges release with a bond company. According to most bail contracts, the premium that the bail company will charge for its services has generally already been earned upon the individual's release; the moment a bail agent coordinates an individual's release, that individual owes the bail company money and the individual must subsequently accept the specific terms of the contract or face reincarceration.[35]

The procedure described above is how California navigates the pretrial conundrum, perhaps best articulated by Caleb Foote: "Someone has to pay a price for the fact that we have to have a pretrial period between accusation and final adjudication."[36] Despite our widespread belief in the presumption of innocence[37] and the "obvious truth" that the poor must not be denied the right to counsel,[38] it is undeniable that our criminal justice system, which conditions

33. CAL. PEN. CODE §§ 1305(a), 1269b(h), 1195, 1043(e)(2).

34. CAL. PEN. CODE § 1300(b).

35. *See supra* note 5 for a sampling of bail contracts with relevant provisions.

36. Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 964 (1965). Foote goes on to describe this pretrial conundrum:

> Any resolution of the detention problem involves an allocation of inescapable costs. . . . If defendants are kept locked up, the cost is borne by those among them who are innocent or prejudiced by the detention. If they are all released, society pays in those cases where the defendant flees or commits new crimes. In theory our system inclines to the second alternative.

Id.

37. *See, e.g.*, Coffin v. United States, 156 U.S. 432, 452 (1895) ("The law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty . . . and this presumption stands as their sufficient protection unless it has been removed by evidence proving their guilt beyond a reasonable doubt.").

38. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair

pretrial freedom on the ability to pay sums of money, generally obligates the accused—and, as this Note demonstrates, the friends, families, and communities supporting the accused—to pay that price. Worse still, the amount of money charged via this mechanism is simply unaffordable and out of touch with the actual community which it intends to manage; as a consequence, an entire industry has proliferated to fill in the gaps of the criminal justice mill: the commercial bail industry.

B. The Growth of the Commercial Bail Industry

The commercial bail industry has grown substantially, both in size and influence within the last century, entrenching itself as an arm of our criminal justice machine. With this rise, the industry has proliferated unfair, abusive, and deceptive practices that victimize its consumers, all while enjoying substantial profits, political influence, and a firm grip on the chains of accused individuals throughout the country. This Section overviews the general structure of the industry, its history, and its present condition.

All bail bonds that agents submit to courts are underwritten by large insurance companies that offer a product called a surety, of which bail is one type. Thirty-two such insurance companies nationwide insure all bond agreements made between bail bond agents—who, although employed by bail bond companies like Bad Boys, are technically agents of the surety company—and the state.[39] These insurance agreements cover when defendants fail to appear to court hearings and agents fail to pay the resulting forfeited bail amount. In California, agents are required to insure every bail bond they submit to a court, for which they pay a fee to one of the large insurance companies, generally ten percent of the premium the agent charged the defendant for the underlying bail service. For example, for a $50,000 bail, a defendant will pay $5,000 to a bail bond agent, who will then pay the insurance company $500 for an insurance policy that is supposed to cover the original $50,000 bail in case it is forfeited due to the defendant's failure to appear in court. Unlike in markets such as property and auto insurance, where companies pay out forty to sixty percent of their revenues in losses, these surety companies pay virtually nothing in losses, because the agents themselves, not the surety companies, are primarily responsible for bail forfeitures after a defendant's failure to appear.[40]

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trial unless counsel is provided for him. This seems to us to be an obvious truth."); *see also* NATIONAL RIGHT TO COUNSEL COMMITTEE, THE CONSTITUTION PROJECT AND THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 2 (2009), http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf [https://perma.cc/LSL6-8UTL] ("The right to counsel is now accepted as a fundamental precept of American justice.").

39. *See* Shane Bauer, *Inside the Wild, Shadowy, and Highly Lucrative Bail Industry*, MOTHER JONES (May/June 2014), http://www.motherjones.com/politics/2014/06/bail-bond-prison-industry [https://perma.cc/9YW6-6CVF].

40. *See generally id.*

The only other country that shares a common law tradition and relies on a commercial bail bond system akin to the system in the U.S. is the Philippines.[41] In fact, countries with a common law tradition have been historically hostile to such industries: some outright criminalize commercial bail practices, while others inhibit the growth of such bail practices through non-criminal means.[42] Courts within common law countries have generally held that bail contracts that indemnify bondsmen, like the majority of bail contracts in California and nationally, tend to produce public mischief. These contracts decrease the bondsman's interest in securing the defendant's attendance for trial, because a bail agent can always pursue funds from the indemnitor to the contract if the agent is made liable for bail after a defendant fails to appear.[43] As a consequence, "by the early twentieth century, the principle was well and widely established in common law countries outside of the United States that payments to bail sureties, or agreements to pay, constituted illegal indemnification."[44] In contrast, the U.S. broke with this legal tradition early in the twentieth century, particularly after Justice Oliver Wendell Holmes' majority opinion in *Leary v. United States*. After *Leary,* "no effective defense against the commercialization of bail based on common law principles was possible," allowing for the subsequent proliferation of bail bondsmen.[45]

The industry has since grown exponentially, currently employing around 15,000 bail bond agents, collectively writing bonds for over $14 billion annually and making over $2 billion in revenue annually.[46] In California, as of the spring of 2018, there are approximately 3,200 licensed agents and organizations.[47] Historically, the rise of the commercial bail industry coincided with a rise in bail

41. *See* F.E. DEVINE, COMMERCIAL BAIL BONDING: A COMPARISON OF COMMON LAW ALTERNATIVES 15 (1991); Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES, Jan. 29, 2008, at A1.

42. F.E. Devine, *How American Commercial Bail Developed Differently from Other Common Law Countries*, 18 INT'L J. COMP. & APPLIED CRIM. JUST. 265 (1994) (discussing cases and secondary sources on bail practices in Australia, Ireland, New Zealand, South Africa, India, and Pakistan).

43. *Id.* at 269 (citing *R. v. Porter* in England).

44. *Id.*

45. *Id.* at 273–74.

46. In 2016, industry analysts estimated the bail industry's national revenue at $2.4 billion. PRNewswire, *IBISWorld Industry Market Research: The U.S. Bail Bond Services Industry is Expected to Earn Revenue of $2.4 billion in 2016* (Dec. 7, 2016), https://www.prnewswire.com/news-releases/ibisworld-industry-market-research-the-us-bail-bond-services-industry-is-expected-to-earn-revenue-of-24-billion-in-2016-300374583.html [https://perma.cc/6ABE-85DC]; SPIKE BRADFORD, JUSTICE POLICY INSTITUTE, FOR BETTER OR FOR PROFIT: HOW THE BAIL BONDING INDUSTRY STANDS IN THE WAY OF FAIR AND EFFECTIVE PRETRIAL JUSTICE 22 (2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/_for_better_or_for_profit_.pdf [https://perma.cc/LR7X-2UT9]; *The Commercial Bail Industry Shouldn't Profit Off Financial Desperation*, AMERICAN CIVIL LIBERTIES UNION, https://action.aclu.org/bail [https://perma.cc/RDN5-XDY9].

47. *See Bail Bonds*, CAL DEP'T OF INS., https://www.insurance.ca.gov/01-consumers/170-bail-bonds/ [https://perma.cc/Y96N-XPTZ].

amounts.[48] Indeed, beginning in the 1920s, the bail bond industry began to flourish as a result of rising bail amounts and the growing number of defendants unable to pay their own bail.[49] However, beginning in the 1960s, changing state and federal policies restructured pretrial detention, leading to the increase of own recognizance release and the development of pretrial services agencies.[50] This increased reliance on alternative methods of releasing pretrial detainees resulted in a shrinking reliance on commercial bondsmen, which in turn led to the bail industry's aggressive media and legislative efforts to roll back state and federal policies disfavoring commercial bail. For example, in 1988, the twelve major surety insurance companies underwriting bail throughout the U.S. joined together to form the National Coalition of Bail Insurance Companies.[51] Beginning in the 1990s, various bail industry associations worked together with the American Legislative Exchange Council (ALEC) to develop an initiative called "Strike Back!" that aimed to curtail the use of pretrial services and pretrial release without sureties.[52]

The commercial bail industry continues to engage in such efforts at all levels, working in cities, counties, states, and even at the federal level. At least twelve different bills in states across the country have been passed with support from bail bond organizations and ALEC.[53] Nationally, a conservative estimate found that the bail industry contributed more than $1.7 million combined to state-level candidates, committees, parties, or ballot measures in various election cycles from 2010 to 2016.[54] California is no exception;[55] between 2000 and 2012, the industry spent almost half a million dollars on lobbying in the state.[56]

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48. Thanithia Billings, *Private Interest, Public Sphere: Eliminating the Use of Commercial Bail Bondsmen in the Criminal Justice System*, 57 B.C. L. REV. 1337, 1351 (2016) (citing DEVINE, COMMERCIAL BAIL BONDING, *supra* note 41, at 26).

49. Shadd Maruna et al., *Putting a Price on Prisoner Release: The History of Bail and a Possible Future of Parole*, 14 PUNISHMENT & SOC'Y 315, 329 (2014).

50. For a detailed overview of the development of bail in the United States, see SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 13, at 7–18.

51. For an extended history of the rise of bail bond associations, see Maruna et al., *supra* note 49, at 329 ("Faced with this growing crisis the industry has increased . . . its political lobbying efforts. New 'grassroots' organizations have formed to guide the debate over how to best deal with defendants awaiting trial. . . . these groups have been able to maintain the profitability of commercial bail against great odds . . . .") (internal citations omitted).

52. *Id.* at 320.

53. COLOR OF CHANGE & ACLU, SELLING OFF OUR FREEDOM: HOW INSURANCE CORPORATIONS HAVE TAKEN OVER OUR BAIL SYSTEM 40 (2017), https://d11gn0ip9m46ig.cloudfront.net/images/059_Bail_Report.pdf [https://perma.cc/5ZSZ-7NVZ].

54. *Id.* at 41.

55. *See generally* AMANDA GULLINGS, CENTER ON JUVENILE AND CRIMINAL JUSTICE, THE COMMERCIAL BAIL INDUSTRY: PROFIT OR PUBLIC SAFETY? (2012), http://www.cjcj.org/uploads/cjcj/documents/Profit_or_Public_Safety.pdf [https://perma.cc/Y2DZ-PWRF].

56. *Id.* at 7. The industry also made nearly $300,000 in contributions to statewide candidates and committees in the 2010 and 2016 election cycles, including in opposition to Proposition 47, which reduced penalties for low level drug and petty theft offenses, the "bread and butter" of the bail industry. COLOR OF CHANGE & ACLU, *supra* note 53, at 42.

Further, two large ALEC affiliated bail associations, the Golden State Bail Agents Association and the California Bail Agents Association, have formed within the state and aggressively lobby in support of legislation that benefits money bail.[57] The industry has also contributed to elect particular judges and to help defend against litigation challenging the constitutionality of the California bail system.[58]

As a consequence of these efforts across the country, the industry has exploded. The use of bail across the country has increased significantly at the state level since the 1990s, increasing by 32 percent between 1992 and 2006. During that time, the average bail amount also increased by $30,000 nationally.[59] From 2002 to 2012, for the most frequently committed felony offenses, the average bail amount increased by 22 percent in California.[60] Moreover, money bail is a required condition of release in 70 percent of felony cases nationwide,[61] a figure that rose by 65 percent between 1990 and 2009.[62] The reach of the commercial bail industry has thus become ubiquitous. Indeed, bail bond companies now surround criminal court buildings across the nation, lining adjacent streets and facilitating a walkable circuit that individuals make between company offices, criminal courts, and local jails.

C. The Effects of Money Bail

Many individuals arrested in California will need to make use of the commercial bail industry in order to avoid pretrial detention. This is because, while 80 percent of those arrested are indigent,[63] the median bail amount is

57. On its website, The California Bail Agents Association states that it works with "allies, industry supporters, bail agents, bail agencies, sureties, as well as the California Legislature to preserve and enhance the bail industry." *History*, CAL. BAIL AGENTS ASS'N (Feb. 27, 2016), https://www.cbaa.com/CBAA_History.html [https://perma.cc/5AGC-DSQ3]. On a post on its Facebook page, the Golden State Bail Agents Association (GSBAA) states that it is "California's only statewide trade group representing the bail industry in Sacramento." Golden State Bail Agents Association – Gsbaa, FACEBOOK (Sept. 2, 2015), https://www.facebook.com/goldenstatebail/photos/a.364947800253413.87319.337501959664664/908401625908025/?type=3&theater [https://perma.cc/3T7V-8987]. The post then lists eight different bail reform bills that GSBAA "successfully opposed on behalf of the bail industry," including bills that would have increased own recognizance release and made it easier for defendants to sue bail companies. *Id.*

58. COLOR OF CHANGE & ACLU, *supra* note 53, at 42.

59. *See* MELISSA NEAL, JUSTICE POLICY INSTITUTE, BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 10 (2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf [https://perma.cc/953D-RE6L].

60. *See* TAFOYA, ASSESSING THE IMPACT, *supra* note 25, at 9.

61. ABA, *Frequently Asked Questions About Pretrial Release Decision Making* (2016), http://www.ncjp.org/sites/default/files/Content_Images/ABA-FAQ_Pretrial_Justice.pdf [https://perma.cc/J9UH-GLW5].

62. *See* SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 13, at 24.

63. Nationally, 80 percent of criminal defendants qualify for a court appointed attorney based on indigence. *See* Alejandra de la Fuente, *The State of Public Defenders and Gideon's Army*, THE INNOCENCE PROJECT OF FLORIDA (Feb. 28, 2013), http://floridainnocence.org/content/?p=8565

currently $50,000[64]—an amount that most cannot afford. Therefore, the high price of bail virtually guarantees either pretrial detention of defendants or resorting to the services of the commercial bail industry. A bail company provides a method of release for a much smaller sum of money than the bail amount offered directly to a defendant by a court. Generally, a company's fee is ten percent of the bail amount set by a court. In California, for all those posting bail via a commercial bail company, their median payment is therefore $5,000. Yet even with the option of commercial bail, over 60 percent of those currently in jails throughout California are there pretrial or pre-sentencing,[65] many because they cannot afford bail.[66] It is not surprising then that those who do post bail must typically employ the services of a commercial bail bond company.

Our system of money bail may thus be understood as one that facilitates the systematic incarceration of the poorest and slowly extracts the limited resources of the slightly less poor in exchange for temporary freedom. These are predictable outcomes of a financially based system of pretrial release. Less obvious, however, are the "downstream" effects this system has on those detained pretrial. Study after study throughout the last century[67] has upheld the

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[https://perma.cc/3JFU-KN3D]; *see also* ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 4 (2010) ("It is estimated that 80-90 percent of those charged with criminal offenses qualify for indigent defense."), http://www.brennancenter.org/sites/default/files /legacy/Fees%20and%20Fines%20FINAL.pdf [https://perma.cc/4AXQ-NBQH].

64. *See* TAFOYA, PRETRIAL DETENTION AND JAIL CAPACITY IN CALIFORNIA, *supra* note 30, at 4.

65. In 2015, of the 73,000 inmates in California jails on an average day, 46,000 were un-sentenced. *See* Sonya M. Tafoya, *Testimony: Bail and Pretrial Detention*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (Feb. 19, 2016), http://www.ppic.org/main/blog_detail.asp?i=1957 [https://perma.cc/P755-LEMT]. In 2015, ten times as many people were held in U.S. jails on any given day as in California. *See* Ram Subramanian et al., *Incarceration's Front Door: The Misuse of Jails in America*, VERA INSTITUTE OF JUSTICE 1, 14 (2015), http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf.

66. In California, a recent Human Rights Watch study of six counties revealed that only 20 to 30 percent of detained bail-eligible individuals ended up posting bond. HUMAN RIGHTS WATCH, "NOT IN IT FOR JUSTICE": HOW CALIFORNIA'S PRETRIAL DETENTION AND BAIL SYSTEM UNFAIRLY PUNISHES POOR PEOPLE 20 (2017). In 2009, nine in ten detained felony defendants nationally had a bail amount set that they could not afford. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 –STATISTICAL TABLES 15 (2013). Statistics for misdemeanors are harder to come by. However, a Human Rights Watch report in 2010 revealed that, in New York, 87 percent of defendants who owed money bail amounts of $1,000 or less were unable to post these amounts. These defendants, three-quarters of whom were charged with non-violent, non-weapons-related offenses, remained detained throughout the pretrial period. *See* JAMIE FELLNER, HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 2 (2010), https://www.hrw.org/report/2010/12/02/price-freedom/bail-and-pretrial-detention-low-income-nonfelony-defendants-new-york [https://perma.cc/2NF3-6NK6]. *See generally* BERNADETTE RABUY & DANIEL KOPF, PRISON POLICY INITIATIVE, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME (2016), http://www.prisonpolicy.org/reports/incomejails.html [https://perma.cc/L5UE-AYRD].

67. Substantial research, produced largely through qualitative or correlational research methods, has demonstrated the detrimental effects of pretrial incarceration. For a representative sample from the

decades-old consensus that, as Caleb Foote remarked in 1956, "pretrial decisions determine mostly everything."[68] A rigorous investigation released this year further confirms this finding. Utilizing a quasi-experimental research method, economist Megan Stevenson demonstrated that pretrial detention has disastrous affects for the detained. According to the study, pretrial detention significantly increases the likelihood of being convicted, pleading guilty before trial, being sentenced to incarceration after conviction, and being required to pay hundreds or thousands of dollars in court fees throughout the disposition of a case.[69] For those detained pretrial, often due to the inability to afford bail, these are significantly harmful effects.

Yet those who *are* able to come up with the financial resources and achieve temporary freedom, whether through the efforts of the accused themselves or the friends and families who support them, are also harmed by a financially based system of pretrial release. Unfortunately, the effects of the money bail system on individuals who utilize commercial bail companies are much less studied, despite the fact that bail bond companies extract upwards of $2 billion annually from a predominantly indigent population.[70] However, some qualitative reports describe accused individuals' mounting debt from contracting with commercial bail bondsman in exchange for release. Mounting commercial bail debt results in well-documented psychological distress in defendants that spreads to friends, families, and communities.[71] Perhaps worse still, for this community, successful

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last fifty years, see KRISTIN BECHTEL ET AL., A META-ANALYTIC REVIEW OF PRETRIAL RESEARCH: RISK ASSESSMENT, BOND TYPE, AND INTERVENTIONS (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741635 [https://perma.cc/LFH8-LJMW]; CHRISTOPHER T. LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 10 (2013), http://www.arnold foundation.org/wp-content/uploads/2014/02/LJAFReport-state-sentencingFNL.pdf [https://perma.cc/8QLU-8MXX]; Marian R Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, 28 CRIM. JUST. REV. 299 (2003); Ralph A. Weisheit & John M. Klofas, *The Impact of Jail: Collateral Costs and Affective Response*, 14 J. OFFENDER COUNSELING SERVS. REHAB. 51 (1990); John S Goldkamp, *Questioning the Practice of Pretrial Detention: Some Empirical Evidence from Philadelphia*, 74 J. CRIM. L. & CRIMINOLOGY 1556 (1983); Arthur R. Angel et al., *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.–C.L. L. REV. 300 (1971); Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641 (1964).

68. Candace McCoy, *Caleb Was Right: Pretrial Decisions Determine Mostly Everything*, 12 BERKELEY J. OF CRIM. L. 135 (2007).

69. MEGAN STEVENSON, DISTORTION OF JUSTICE: HOW THE INABILITY TO PAY BAIL AFFECTS CASE OUTCOMES (2017), https://papers.ssrn.com/abstract=2777615 [https://perma.cc/9VRG-YR5Y]. Specifically, Professor Stevenson finds that "pretrial detention leads to a 13% increase in the likelihood of being convicted, mostly by increasing the likelihood that defendants, who otherwise would have been acquitted or had their charges dropped, plead guilty. Pretrial detainees will owe more in court fees and receive longer incarceration sentences than similarly situated releases." *Id.* at 26.

70. This is estimated by assuming that revenues are primarily comprised of money charged directly to customers. Another figure shows the industry as underwriting close to $14 billion worth of bonds every year. If using the ten percent premium figure, this suggests that at least $1.4 billion are charged as premiums to customers. *See* BRADFORD, *supra* note 46. Considering the pervasive use of additional fees, this is likely a conservative estimate.

71. *See generally* RABUY & KOPF, *supra* note 66.

payment of bail debt often comes at the expense of other financial obligations, such as rent, food, car payments, and child support. Indeed, as a recent national study demonstrated, 47 percent of Americans would either have to borrow money or sell property in order to be able to come up with $500 to cover an emergency expense.[72] Finally, unsuccessful payment of bail may result in damaged credit and lead to even further engagement with the criminal justice system.[73]

This is the context in which the bail bond industry operates. All evaluations of the possible regulatory frameworks that could govern the bail industry must take into account the specific community of consumers that make use of bail services.

D. The Emergence of the Defendant-Consumer

Currently, commercial bail is primarily regulated by the California Penal Code, Insurance Code, and Code of Regulations;[74] however, these statutes are insufficient for mitigating the wide variety of harms that bail consumers endure. Generally, these laws regulate when bail is available to defendants, the process of posting bail by individuals or bond companies, and the process of forfeiture and exoneration of bail. Further, these laws regulate the basic authority granted to bail agents—namely the power to arrest—the licensing requirements for agents and fugitive recovery persons, and bail bond companies' in-person advertising and solicitation of arrestees who are in jail.

Yet despite this regulatory framework, bail bond companies are able to engage in a significant number of harmful activities with surprising immunity. Though bail companies are indeed regulated in terms of their obligations to the state, bail companies have few legal obligations to their customers, and any regulations that may protect consumers are largely under-enforced. Structurally, the commercial bail bond system is thus ripe for abuse. Considering the customers' vulnerabilities, the scarcity of legal protections afforded to them, the bail agents' significant authority over customers, and the bond companies' monopoly of information, the ubiquity of stories demonstrating exploitation and abuse against bail customers is hardly surprising.

These abuses run the gamut, ranging from collusion with detained people to get them to help distribute advertising leaflets to incoming inmates, to

72. Maggie McGrath, *63% of Americans Don't Have Enough Savings to Cover A $500 Emergency*, FORBES (Jan. 6, 2016), http://www.forbes.com/sites/maggiemcgrath/2016/01/06/63-of-americans-dont-have-enough-savings-to-cover-a-500-emergency/ [https://perma.cc/K4M6-5FWC].

73. *See generally* Alexandra Shookhoff, Robert Constantino & Evan Elkin, *The Unintended Sentence of Criminal Justice Debt*, 24 FED. SENT'G REP. 62 (2011).

74. CAL. PEN. CODE §§ 1299–1317 (2018); CAL. INS. CODE §§ 1800–23 (2001); 10 CAL. CODE REGS. § 2051 (2013).

excessive use of force, sexual coercion, and financial exploitation.[75] A 2016 report by the Santa Clara Bail Reform Working group summarizes recent offenses in the Bay Area.[76] Bail agents in the Bay Area have, for example, made false statements to customers regarding eligibility for release without money bail in order to deceive customers into assuming that purchasing the agent's bail service was the only way to acquire freedom.[77] According to the study, bail agents have also prematurely posted bail despite contradictory instructions from defendants and families, resulting in unwanted financial obligations.[78] In December 2015, a bail agent in San Jose was arrested for charging a customer unwarranted fees and then attempting to foreclose on the family's home.[79] In Bakersfield, a bail agent was arrested for defrauding several clients, including an illiterate man and his 82-year-old mother who were tricked into signing documents that relinquished their home and truck as part of a payment scheme.[80]

Agents often wield the looming threat of returning a defendant to jail to exploit customers and force them to comply with additional conditions, including added payments as well as criminal and sexual acts. Though California law requires "good cause" for a company to return a defendant to jail without refunding the premium earned,[81] the prevailing lack of counsel and rights-consciousness among defendants renders this law ineffective in curtailing extortion through threats. Bail agents can thus brazenly wield their authority to reincarcerate an individual as leverage when interacting with their customers.

Under the right circumstances some of the worst forms of abuse, such as violence or threats of violence, can be addressed through criminal sanctions against bail agents. Indeed, as described above, bail agents are occasionally charged for serious crimes, such as criminal fraud or coercion, after defendants and families bring claims. Additionally, enforcement of the Insurance Code may also help regulate some abuses. In 2015, law enforcement personnel from the California Department of Insurance (DOI) engaged in a sweep of Bay Area bail bond companies, charging thirty-one agents with Insurance Code violations, resulting in the ultimate suspension of twenty-six bail licenses.[82] However, such far-reaching enforcement of existing regulation is extremely rare and a private

75. *See generally* BRADFORD, *supra* note 46, at 40–42. Despite regulations prohibiting such activity, bail agents have been found having paid inmates to both provide information about new inmates and to recommend the services of the paying bond company.

76. COUNTY OF SANTA CLARA BAIL AND RELEASE WORK GROUP, CONSENSUS REPORT ON OPTIMAL PRETRIAL JUSTICE (2016), https://www.sccgov.org/sites/ceo/Documents/bail-release-work-group.pdf [https://perma.cc/PC2P-VXB9].

77. *Id.* at 41.

78. *Id.*

79. *Id.*

80. *Id.*

81. CAL. PEN. CODE § 1300(b) (1999).

82. Press Release, California Department of Insurance, *Update: South Bay bail agents targeted in law enforcement sweep* (Sept. 9, 2015), https://www.insurance.ca.gov/0400-news/0100-press-releases/2015/release083-15.cfm [https://perma.cc/86FW-SBKZ].

right of action for violations of the Insurance Code does not currently exist.[83] Further, the DOI and the California legislature have made clear that there simply are not enough resources to enforce the existing laws.[84] Under-enforcement is particularly troubling given the rising number of complaints against bail bond companies submitted to the DOI. Complaints more than tripled between 2010 and 2015 with allegations of bribery, forged property liens, website spoofing,[85] kidnapping, extortion, misleading partnerships with attorneys, unlicensed solicitation at jails—including paying inmates to refer newly arrived detainees to certain bail companies—and stealing collateral.[86]

Therefore, relying on the Penal and Insurance Codes is insufficient for protecting consumers of commercial bail services. The narrow focus in policymaking around the bail industry described here is likely due to the ongoing framing of defendants as simply criminals, which ignores defendants' simultaneous position as consumers soliciting a commercial service. Such a framing has unsurprisingly prevented consumer protection principles from being applied to those who should equally be considered consumers and, thus, defendant-consumers. As explored above, regulation has developed to monitor the relationship between bail companies and the state, but not bail companies and their customers. As a consequence, significant harmful behaviors have become normalized in the interactions between bail bond companies and defendants that engage in consumer behavior that is not recognized as such.

E. Defendant-Consumer Harm

Harms facing defendant-consumers may be placed into three main categories: (1) Deceptive and Misleading Practices, (2) Unfair Contractual Terms, and (3) Harassment and Abuse. Although the details of some of these harms are explored in later sections, the general issues are summarized below:[87]

(1)Deceptive and Misleading Practices

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83. CAL. INS. CODE §§ 1800-1823 (2001).

84. *See* Press Release, California Department of Insurance, *supra* note 82. In order to address this underfunding of enforcement, AB 1406 was introduced in 2015 to increase enforcement capacity over the almost 3000 bail agents in California via a tax increase specifically for employing enforcement agents. However, this bill died in 2016. *See* A.B. 1406, 2015–16 Reg. Sess. (Cal. 2015), http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_1401-1450/ab_1406_bill_20150227_introduced.html [https://perma.cc/R46U-HUMB].

85. Spoofing involves redirecting from a different website to a bail industry website, which then collects information on the defendant and uses that information to reach out to family members and encourage them to co-sign with the bail company to bail the defendant out.

86. COLOR OF CHANGE & ACLU, *supra* note 53, at 36. This was also expressed publically at a hearing organized by the Department of Insurance by Kim Johnson-Woods, Division Chief, Investigation Division of the California Department of Insurance. Cal. Dep't of Ins., *Public Hearing on Bail System in California*, YOUTUBE (Feb. 1, 2017), https://www.youtube.com/watch?v=0b8WaGyF21I&feature=youtu.be [https://perma.cc/4DAF-THUJ].

87. The harms presented in this Section are sourced directly from the interviews I conducted as research for this Note.

> Defendants often express extreme confusion and a general sense of vulnerability while incarcerated and contemplating bail. Advertisements for bail services placed in jails are often misleading, and perhaps, by their very placement, unduly influential on defendants who may be unaware that those companies have not been adequately vetted by the government.
>
> Phone conversations with bail agents may also be misleading and deceptive because agents have few obligations to disclose important information yet are often entrusted by defendants to inform them of their rights due to the lack of alternative authoritative sources of information, such as from government officials.
>
> Furthermore, individuals have almost no opportunity to engage in an analysis of their best options for bail. For example, they cannot compare prices or terms, and they are generally desperate to return to their jobs and families and escape the largely deplorable conditions of incarceration. This desperation facilitates deception on the part of bail bond companies who can easily frame their services as an immediate cure-all. When we frame the defendant as a consumer deliberating between potential purchases, it becomes easier to see the way in which a defendant is tremendously vulnerable with almost zero bargaining power.
>
> Worse still, bail agents often make many potentially deceptive and often intentionally misleading claims. For example, bail agents sometimes advertise premium rates that do not adequately disclose the full price a consumer may have to pay. Consumers are also often unaware under what circumstances they will have to continue paying their premium and are surprised, for example, when they are obligated to make payments even when their case is dismissed. Bail agents also often use language that falsely indicates they have legal authority, such as implying that they can help a defendant's case be dismissed.

(2) Unfair Contract Terms

> Contracts utilized in the bail context between agents and consumers are not only complicated and easily misunderstood, but also incorporate terms, many described below, that may be so vague or discretionary as to be inherently misleading or so one-sided as to be unconscionable.
>
> Generally, the contracts provided to detained or recently freed individuals are contracts of adhesion. These are standard form contracts, the terms of which have already been decided, which vary little between bond companies, and offer individuals virtually zero capacity to negotiate.[88] These contracts generally include the

88. These descriptions of bail contracts are based on various contracts available on bail bond company websites, contracts my interviewees provided, and sample contracts I requested from companies. For a comprehensive overview of bail bond contracts and their terms, see UCLA CRIMINAL

following: an agreement to (1) pay the premium for the bond service, generally ten percent of the court ordered bail amount; (2) appear at all future court dates; (3) contact the bond company after each hearing; (4) inform the bond company of changes to one's residence, employment, or contact information; (5) pay for a variety of fees, including possible attorney's fees and all fees arising out of the execution of the bail bond, in addition to the agreed to premium; (6) pay the entire bail amount if one makes any misrepresentation, or if the bond company has "reasonable cause."[89] In addition, the defendant or a third party (usually a friend or relative) must sign an indemnity agreement promising to pay all costs associated with returning the defendant to court if necessary. Additionally, the indemnitor must pay all fees (the premium, expenses, attorneys' fees, and the full bail amount set by the court) if the defendant cannot be returned to court. Furthermore, bond companies may also require collateral, for which a separate agreement must be signed. Finally, the defendant and indemnitors may need to agree to a payment plan to divide the overall owed premium into monthly or weekly installments. Interest may occasionally be charged on payment plans.[90]

(3) Harassment and Abuse

Bail agents are notorious for engaging in harassment after a contract is signed.[91] They are allowed to call defendant-consumers at any time of the day and communicate with a defendant's friends, family, and even employers. Bail agents may invade the defendant's privacy while trying to communicate with the defendant or gather his information. Agents may call repeatedly at odd hours of the day, disclose the defendant's sensitive information to strangers, and use obscene language. This harassment is not limited to instances where the defendant is in breach of contract, such as when he has missed a payment. In fact, a bail agent's capacity to engage in such behavior regardless of breach may even be referenced in the contract.

JUSTICE REFORM CLINIC, THE DEVIL IN THE DETAILS: BAIL BOND CONTRACTS IN CALIFORNIA (2017), https://static.prisonpolicy.org/scans/UCLA_Devil%20_in_the_Details.pdf [https://perma.cc/CY6F-3ZG9].

89. *See supra* note 5 for relevant bail contract provisions.

90. *See* Bondsman Margie, *Will I Be Charged Interest on a Bail Bond Payment Plan?*, FAMILY BAIL BONDS, http://www.familybailbonds.com/blog/2016/08/will-i-be-charged-interest-on-a-bail-bonds-payment-plan [https://perma.cc/S568-NPT5]; *Chapter 17 / Are Bail Bond Payment Plans a Good Idea?*, BAIL BOND WOMAN (Nov. 12, 2011, 9:56 PM), https://bailbondwoman.wordpress.com/2011/11/12/chapter-17-are-bail-bond-payment-plans-a-good-idea [https://perma.cc/Z9YJ-3HFZ]; SANTA CLARA BAIL AND RELEASE WORK GROUP, *supra* note 76.

91. Examples of this are highlighted throughout this Note and further corroborated by the DOI. Examples of similar harassment by bail companies can be found across the country. *See, e.g.*, Curtis Waltman, *Five Heartbreaking Examples of Why the Bail Bonds Industry is Badly in Need of Reform*, MUCKROCK (July 31, 2017), https://www.muckrock.com/news/archives/2017/jul/31/bounty-hunter-nevada/ [https://perma.cc/B4FR-76BJ].

Such harassment may border on abuse and frequently manifest as subtle forms of coercion and exploitation. This is significantly exacerbated because agents can surrender a defendant back into custody at any time. Agents may leverage this authority to demand additional payments or make spontaneous changes to terms. Such coercion can ensnare not only the defendant, but also the friends and family of the defendant.

II.
BRINGING EXISTING CONSUMER PROTECTION LAW TO BEAR ON THE BAIL INDUSTRY

To mitigate the harms described above, claims against bail bond companies can and should be pursued using existing consumer protection law. This Section evaluates the possibility of applying the Consumers Legal Remedies Act (CLRA),[92] the Unfair Competition Law (UCL),[93] and the California Fair Debt Collection Act (CFDCA) to that end.[94] Overall, these statutes can and should be used to promote a bail industry that better serves their stated purpose of providing individuals alternatives to incarceration, while ensuring defendants make their court appearances at no cost to the taxpayer.[95] And if our system of bail remains "user-funded" as claimed,[96] it should also be user-protective. Just like other consumers protected by consumer protection law, consumers of bail services should have the right to avoid harassment; negotiate terms of communication with bail companies; and be protected from misleading advertising, verbal misrepresentations, and vague and unconscionable contract provisions. Therefore, defendant-consumers should be afforded the right to file suit against bail companies that violate the existing consumer protection framework.

Although there is little guidance from existing case law, this Note draws on cases bearing on the issue to argue that existing California consumer protection statutes apply to the bail context and can be utilized by plaintiffs seeking relief. These statutes are then applied to specific experiences of bail bond consumers, drawing on a set of interviews collected over the last year in addition to stories

92. CAL. CIV. CODE §§ 1750–84.

93. CAL. BUS. & PROFS. CODE §§ 17200–09 [hereinafter UCL].

94. CAL. CIV. CODE § 1788 et seq. This act is also known as the Rosenthal Fair Debt Collection Practices Act.

95. *See generally The American Bail Coalition's Iliad*, NEWSLETTER (American Bail Coalition, Franklinville, N.J.) Oct. 2010, at 3, 8, http://www.asc-usi.com/userfiles/BailResources/ABC_Newsletter 20V1.pdf [https://perma.cc/S8HJ-LQBL] (explaining how the private bail industry has helped ensure defendants show up to court without taxpayer money, which has also decreased the risk of reoffending thereby preventing future victims).

96. This language is used by several of the bail bond associations. *See, e.g.*, *Facts Regarding Surety Bail*, PROFESSIONAL BAIL AGENTS OF THE UNITED STATES http://c.ymcdn.com/sites/www.pbus.com/resource/resmgr/files/pbus_facts_regarding_surety_.pdf [https://perma.cc/S2LD-QCLC] ("Surety bail is user-funded with no financial burden on the taxpayer. The bail agent is physically and financially responsible for a defendant from the time released on bail until disposition of the case; the full amount of the bond must be paid for a failure to appear.").

compiled from various sources, as described in the Introduction. This analysis focuses on the most viable provisions of law and describes solutions from the perspective of a plaintiff seeking relief. This Section is informed by the categories of harms described above, but is organized by the likely chronology of experiences that defendant-consumers and their friends and family may experience beginning at the moment of initial incarceration. This Section first addresses preliminary issues regarding the application of consumer specific laws to the bail context and then applies those laws to defendant-consumers' experiences.

A. Regulatory Gaps and the Need for Consumer Protection

Consumer protection law offers a potential path to hold bail companies accountable for their deceptive, misleading, and abusive practices against defendants-consumers. Admittedly, proactive lawsuits brought by individuals under criminal and tort law may mitigate more aggressive manifestations of some of the bail industry's deceptive, misleading, and abusive practices. For example, defendant-consumers could bring claims of threats of violence, infliction of emotional distress, and fraud against bail companies. However, such measures are insufficient for addressing the specific nature of the interactions between bail agents and defendant-customers; after all, the industry has tailored the general terms of the relationship. Even in egregious circumstances in which defendants would have legal recourse, defendants often have a difficult time identifying the specific conduct of a bail agent that constitutes a criminal violation under a given law, making legal action unlikely. Furthermore, in cases where the actions of bail agents do not rise to the level required for criminal and tort claims, significant harms are consequently swept under the rug. This Section explores how existing consumer protection law could mitigate these harms.

Existing consumer protection law can address the gaps between available protections and the harms frequently experienced by defendant-consumers. This insight arises from the realization that many of the harms produced by bail agents mirror those behaviors that existing consumer protection law seeks to address in other contexts. Indeed, the two main categories of harm described above—deceptive and misleading practices and abuse and harassment—are consumer protection law's bread and butter. Therefore, existing consumer protection law should be directly applied to the bail context.

Before exploring this possible reform, however, it is important to ask why consumer protection law has not yet been applied to the bail context. In California, despite the substantial consumer protection framework available to individuals, no suits have been brought against bail companies under available consumer protection statutes—particularly the UCL, CLRA, and CFDPCA.[97]

97. I have confirmed this absence by thoroughly reviewing cases nationwide and speaking with attorneys in the Bay Area. Scott Maurer, a supervising attorney at both the Santa Clara Law Katherine

Despite the similarities between the harms consumer protection law generally seeks to mitigate and those experienced in the bail context, there has apparently been little effort to actively extend consumer protection law to the bail context.[98]

The analysis in this Note suggests that applying current consumer protection laws to the bail context is viable. But why then have defendant-consumers and their counsel not brought such claims? One possibility, suggested above, is that defendants have not generally been considered "defendant-consumers," but are more commonly treated in literature as simply alleged criminals, defendants, detainees, or arrestees. Additionally, as suggested below, some potential claims can be pursued under consumer protection provisions that are only available in certain states. The California statutes applied in this Note are particularly protective and apply more broadly than in many other states. This may partially explain the wide-spread absence of consumer protection litigation within the bail context nationally.

Further, and perhaps most importantly, we should not underestimate the particularly vulnerable position of defendants as consumers as itself a cause of this absence. Indeed, it is that very vulnerability that forms the basis of the consumer protection claims proposed in this Note. In addition to the normal inequities in access to legal remedies, the looming threat of incarceration underpinning the relationship between defendants and bail agents likely further stifles the assertion of any existing rights-consciousness by defendants. Defendant-consumers are even less likely to assert their rights if they are incarcerated after being found guilty and therefore unable to seek legal remedies for their consumer claims. If *defendant*-consumers are currently afforded so few protections before incarceration, *criminal*-consumers are likely afforded even less. It is likely for these reasons that even consumer protection attorneys—those who would be most likely to understand the possibility of applying the statutes suggested in this article—have failed to bring cases. Ultimately, the salient fact remains that the potential consumer protection solutions presented here have not been exercised in the commercial bail context

B. Applying Existing Consumer Protection in California

California affords consumers outside the bail context substantial protections against a variety of business practices and provides individuals private rights of action to enforce various statutes that, taken together, seek to produce well-functioning markets. This Section will examine the three major

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and the George Alexander Community Law Center, also confirmed this absence in a separate interview. *See Feeling Misled? How to Fight Back Legally*, CRIM. L. & POL'Y (May 4, 2016), https://crimlawandpolicy.wordpress.com/2016/05/04/feeling-misled-how-to-fight-back-legally/ [https://perma.cc/236A-3HBR] ("Mr. Maurer confirmed . . . that he had not seen any cases where a consumer protection violation was asserted with respect to a bail bonds contract.").

98. *Id.* As of the time of this publication, there is a small movement of lawyers known to the author attempting to begin to use consumer protection law against abusive bail companies.

statutes that protect consumer rights in California—the UCL, the CLRA, and the CFDCPA—that could also be applied to the bail context. Each act covers different conduct, although certain practices may violate multiple statutes.

First, the UCL prohibits "unlawful, unfair or fraudulent" business conduct, as well as "unfair, deceptive, untrue or misleading advertising."[99] The UCL applies to single or multiple acts, whether ongoing or in the past[100] and is intended to "permit courts to enjoin ongoing wrongful business conduct in whatever context such activity might occur."[101] The CLRA similarly was enacted in order to "alleviate social and economic problems stemming from deceptive business practices"[102] and arose out of a "desire to protect California consumers."[103] Accordingly, it prohibits twenty-seven enumerated business acts or practices,[104] and it is to be construed liberally.[105] It provides a private right of action to "consumers" seeking relief from "unfair methods of competition" and "unfair or deceptive acts or practices" arising from "a transaction intended to result or that results in the sale or lease of goods or services."[106] Finally, the CFDCPA seeks to address "unfair or deceptive collection practices [that] undermine the public confidence," arising out of a "need to ensure that debt collectors and debtors exercise their responsibilities to one another with fairness, honesty and due regard for the rights of the other."[107] Taken together, these statutes substantially empower individuals to seek relief from harms arising out of their interactions with businesses.

Despite this protective framework, in order for potential plaintiffs to file suit, they must meet certain threshold criteria for each particular statute. For consumers of bail services, these barriers could serve to limit the availability of the statutes' protections. Based on the specific language in each statute and the interpretation given to that language by California courts, threshold inquiries govern who may sue, who may be sued, and under what circumstances.

1. Threshold Hurdles for the Application of the UCL, CLRA, and CFDCPA

In order for potential plaintiffs to file suit against a bail bond company under any of these laws, they will have to pass a series of threshold hurdles specific to the consumer protection context, which have not been litigated in

99. UCL § 17200.

100. The UCL amendment in 1992 expanded coverage to singular acts. *See* Carlton A. Varner & Thomas D. Nevins, CALIFORNIA ANTITRUST & UNFAIR COMPETITION LAW 20 (Sheppard, Mullin, Richter & Hampton LLP 2003), http://www.sheppardmullin.com/media/article/84_pub209.pdf [https://perma.cc/9C9T-57NR].

101. Comm. on Children's Television, Inc. v. Gen. Foods Corp., 673 P.2d 660, 667 (Cal. 1983).

102. Broughton v. Cigna Healthplans, 988 P.2d 67, 74 (Cal. 1999).

103. America Online, Inc. v. Superior Court, 108 Cal. Rptr. 2d 699, 710 (Ct. App. 2001).

104. CAL. CIV. CODE § 1770(a).

105. CAL. CIV. CODE § 1760.

106. CAL. CIV. CODE § 1770(a).

107. CAL. CIV. CODE § 1788.1(a)

California in the context of bail, and which have only been litigated a few times under similar laws in other states. However, though seldom attempted, a bail consumer would likely pass these threshold inquiries, as discussed below. Though other threshold questions exist generally for the application of these statutes, I focus on those issues that I consider to be the most potentially problematic for potential plaintiffs. After establishing the viability of utilizing these statutes, the following Section will apply the statutes to specific harms arising out of the bail context to demonstrate that these statutes may offer a significant method for relief.

a. The California Unfair Competition Law (UCL)

The UCL offers the most generous standards defining who may sue, for what activity, and under what circumstances. It permits claims to be brought by any "person," which includes "natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons."[108] Despite this far-reaching definition of "who can sue," a 2004 ballot initiative tightened the UCL's standing requirement, limiting its availability to any person who has suffered an injury in fact and further requiring cases involving aggregate claims to comply with California's general class-action standards.[109] As described below in more detail, these additional standing requirements may be a significant hurdle for consumers of bail services seeking relief. Relative to the CLRA and the CFDCPA, however, the UCL requires the least from potential plaintiffs.

b. The Consumer Legal Remedies Act (CLRA)

Unlike the UCL, the CLRA tailors the pool of potential plaintiffs substantially, limiting claims to "consumer[s]," defined as "individual[s] who seek[] or acquire[], by purchase or lease, any goods or services for personal, family, or household purposes."[110] California courts have further limited the CLRA in significant ways. For example, potential plaintiffs must have actually purchased the good or service in question, as opposed to, for example, having

108. UCL §§ 17201, 17204.

109. Proposition. 2004: 64 (Cal.) This amendment also states that a plaintiff must have "lost money or property as a result of a violation" of the statute. *Id.* The California Supreme Court later clarified this particular language as requiring "economic injury" that is "caused by" the conduct in question. Kwikset Corp. v. Superior Court, 246 P.3d 877, 885 (Cal. 2011). However, the Court defined "economic injury" quite broadly and emphasized that the primary intention of the proposition is to distinguish between opportunists engaging in "shakedown lawsuits" and actual victims of deception and other acts of unfair competition. *Id.* at 881.

110. CAL. CIV. CODE § 1761(d). The California Supreme Court has clarified, "Rather than applying to all businesses, or to business transactions in general, the [CLRA] applies only to transactions for the sale or lease of consumer 'goods' or 'services' as those terms are defined in the act." Fairbanks v. Superior Court, 205 P.3d 201, 206 (Cal. 2009).

received a gift.[111] Further, a potential plaintiff must have suffered actual damages as a result of the unlawful practice, not merely been exposed to the unlawful practice.[112] However, the most significant hurdle for any consumer of bail services hoping to take advantage of the CLRA arises from the interpretation given to "goods or services,"[113] which has left many forms of transactions—such as insurance purchases,[114] mortgage loans,[115] apartment leases,[116] credit transactions of diverse kinds,[117] and software purchases[118]—outside the protection of the CLRA. Therefore, the critical threshold question for any potential plaintiff with a claim against a bail bond company is whether the bail service is considered a "good" or "service" under the CLRA.

Determining whether the bail service is considered a "good" or a "service" under the CLRA turns on analyzing what a bail consumer actually receives. The primary reason a consumer utilizes a bail service is to gain freedom from incarceration. A consumer agrees to a set of terms in exchange for the bail bond company's promise to post bond at the jail. This bond obligates the company to ensure that the defendant will return for all required court dates and makes the

111. *See* Schauer v. Mandarin Gems of Cal., Inc., 23 Cal. Rptr. 3d 233, 238–39 (2005) (denying plaintiff's standing under the CLRA claim because good in question was a gift). This may complicate claims brought by a defendant against a bail bond company where a defendant was bailed out by another person and all payment was made by that person. Although the CLRA generally prohibits conduct that would attach to the transaction between the bail agent and the person purchasing the bail service, some provisions of the CLRA would apply to the defendant. For example, the defendant will likely have agreed to many terms regulating his conduct within the bail contract. Insofar as some of those terms are unconscionable under the CLRA, the defendant may not have standing because he received the bail service as a gift.

112. Meyer v. Sprint Spectrum L.P., 200 P.3d 295, 302 (Cal. 2009). However, "damage" is not limited to economic losses; rather, the CLRA sets "a low but nonetheless palpable threshold of damage." *Id.* at 303.

113. CAL. CIV. CODE § 1770(a) (stating that "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of *goods or services* to any consumer are unlawful") (emphasis added). "Goods" are defined as "tangible chattels bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods, and including goods that, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of real property, whether or not they are severable from the real property." CAL. CIV. CODE § 1761(a). The definition of "services" is explored below.

114. *See* Fairbanks, 205 P.3d at 204 (concluding that "the Legislature did not consider insurance itself to be a service for purposes of consumer protection legislation"); *see also* Alajayan v. Fed. Ins. Co., No. B263203, 2016 WL 4402227, at *7 (Cal. Ct. App. Aug. 18, 2016) (expanding *Fairbanks* to homeowner's insurance).

115. *See* Alborzian v. JPMorgan Chase Bank, N.A., 185 Cal. Rptr. 3d 84, 93 (2015).

116. *See* Cornu v. Norton Cmty. Apartments, No. B207802, slip op. at 7 (Cal. App. July 9, 2009) (unpublished).

117. *See, e.g.*, Berry v. Am. Express Publ'g, Inc., 54 Cal. Rptr. 3d 91, 94–97 (Ct. App. 2007) (holding that a credit card, or the extension of credit generally, does not constitute a "good" under the CLRA); Consumer Sols. REO, LLC v. Hillery, 658 F. Supp. 2d 1002, 1016 (N.D. Cal. 2009) ("*Fairbanks* thus indicates that loans are intangible goods and that ancillary services provided in the sale of intangible goods do not bring these goods within the coverage of the CLRA.").

118. *See, e.g.*, Rojas-Lozano v. Google, Inc., 159 F. Supp. 3d 1101, 1116–17 (N.D. Cal. 2016) (holding that software does not constitute a "good" under the CLRA).

company liable for the full bail amount given to the defendant if the defendant fails to appear. Although further activity may be required of the bail bond company, this simple exchange is the primary transaction.

The CLRA defines a service as "work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods."[119] In a bail transaction, the bail bond company procures an agreement with a court, which has allowed them to temporarily take custody of a defendant without paying anything. The company can then make a profit by charging a fee, the premium, to the defendant for the procurement of the court agreement, known as the bail bond, the custodial services promised by the company that forms the basis of that bail bond and the risk associated with potential foreclosures that may require the company's full payment of the underlying bail amount. These characteristics of the bail transaction bring bail services into the purview of the CLRA as a hybrid of a service and a good.

Although bail services incorporate elements of a loan and of an insurance policy[120]—both characteristics suggesting the inapplicability of the CLRA[121]—bail transactions are more appropriately understood, under the CLRA, as a hybrid of a good and a service. It is helpful to examine again the web of obligations that the practice of bail creates. It is true that to the court and the bail bond company, bail is a form of surety, an insurance policy akin to life insurance or a construction bond. The bond submitted to the court by a bail bond company is an insured promise to the court that a defendant will show up or else be liable for the underlying bail. Such policies were arguably deemed ineligible as a good or service under the CLRA in *Fairbanks v Superior Court*.[122] However, for the consumer transacting with a bail company, the underlying product is not insurance, defined in *Fairbanks* as "a contract of indemnity under which, in exchange for the payment of premiums, the insurer promises to pay a sum of money."[123] Rather, the bail consumer contracts with the bail bond company for an entirely different product that is a hybrid between a good and a service: the bail bond the company provides to the court combined with the service of acquiring those relationships with the court and the custodial services the company promised the court that it would fulfill.

Furthermore, commercial bail services are not loans or simple extensions of credit. Bail bond companies are not giving consumers loans to pay off their bail to the court. Rather, as explained above, bail bond companies have procured

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119. CAL. CIV. CODE § 1761(b).

120. Indeed, bail bond companies are predominantly governed by the DOI.

121. *See supra* notes 114–117 for cases precluding the application of the CLRA to insurance and loans.

122. Fairbanks v. Superior Court, 205 P.3d 201, 203 (Cal. 2009) (stating that life insurance is a contract of indemnity that, because it is not a "tangible chattel," it is not a "good;" and further, that the contractual obligation to pay money under a life insurance policy is not work or labor, or related to the sale or repair of any tangible chattel, and therefore it is not a service either under the CLRA).

123. *Id.*

an agreement with the courts that results in release of a defendant from incarceration; it is that agreement, a good procured by the bail bond company and then offered to the consumer as a service, that the consumer is contracting for.

Bail services should therefore fulfill the "goods and services" requirement of the CLRA. Thus, a consumer of bail services filing suit against a bail bond company passes the threshold requirements of the CLRA.

c. The California Fair Debt Collection Practices Act (CFDCPA)

Even more narrowly applicable than the CLRA, the CFDCPA regulates "debt collector[s]," defined as "any person who . . . on behalf of himself or herself or others, engages in . . . the collection of consumer debts."[124] These debts are defined as "money, property or their equivalent, due or owing or alleged to be due or owing from a natural person by reason of a consumer credit transaction," in which "property, services or money is acquired on credit . . . primarily for personal, family, or household purposes."[125] The California Court of Appeal clarified this language by articulating that "there is a consumer credit transaction when the consumer acquires something without paying for it."[126] Further, the CFDCPA incorporates the requirements and available remedies of its federal counterpart, the Fair Debt Collection Practices Act (FDCPA),[127] while retaining a much broader definition of "debt collector" than the FDCPA by including those entities that both originated the debt and then collect debts on their own behalf.[128]

Taken together, the threshold inquiries underpinning the CFDCPA, despite its relatively narrow applicability, suggest that a bail bond consumer may be eligible to sue a bail bond company acting as a debt collector. In circumstances where a bail bond company is attempting to collect money owed to it, it must comply with the CFDCPA, including incorporated provisions of the FDCPA.

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124. CFDCPA §§ 1788.2(c)–(f). Remedies under the UCL are limited to restitution and injunctive relief. UCL § 17203 ("The court may make such orders . . . as may be necessary to restore to any person in interest any money or property . . . which may have been acquired by means of such unfair competition.").

125. §§ 1788.2(c)-(f).

126. Gouskos v. Aptos Vill. Garage, Inc., 114 Cal. Rptr. 2d 558, 561 (Ct. App. 2001).

127. *See* CAL. CIV. CODE § 1788.17; *see also* Riggs v. Prober & Raphael, 681 F.3d 1097, 1100 (9th Cir. 2012) ("The Rosenthal Act mimics or incorporates by reference the FDCPA's requirements, including those described above, and makes available the FDCPA's remedies for violations.").

128. *See* Moya v. Chase Cardmember Serv., 661 F. Supp. 2d 1129, 1132 (N.D. Cal. 2009). Under the CFDCPA, this is crucial for any potential plaintiff pursuing claims against a bail bond company with regard to its conduct relating to debt collection. The protections and remedies under the FDCPA would not be available in such cases because in most situations, the bail bond company originated the debt itself and would therefore be exempted under the "originator" exemption of the FDCPA. *See* 15 U.S.C. § 1692a(6)(F)(ii) (2012); *see also* Buckman v. Am. Bankers Ins. Co. of Fla., 115 F.3d 892, 895 (11th Cir. 1997) ("As Ace, the bail bondsman, played a significant role in originating the bail bond transaction—including the indemnification agreement and contingent note—we hold that it is covered by the originator exception to the FDCPA.").

This may arise in two common scenarios: (1) when a consumer—either the defendant or his friends or family—owes a bail bond company money under an established payment plan; or (2) when a consumer—in this case, the defendant or the indemnitor on the contract—owes the company the full bail amount assessed after the defendant fails to appear in court or otherwise breaches the underlying agreement. In both of these situations, the bail company is acting as a debt collector. In the first scenario, where there is a payment plan, the consumer has acquired a service—the posting of a bail bond with the court to release the consumer from jail—without yet having paid the premium in full, which is owed upon release.[129] The second scenario, though more complicated, should be understood as follows. The defendant and indemnitor have received the same service—the posting of the bail bond—but the terms of the service agreement have changed due to a breach of contract, increasing the amount of money now owed. In either scenario, when a bail bond company is attempting to collect money owed to it for its bail bond service, its conduct should be regulated by the CFDCPA.[130]

However, applying the CFDCPA in the bail context presents hurdles since there is no directly relevant case law in California. Still, analysis of case law in Texas addressing a statute similar to the CFDCPA and in Louisiana addressing the FDCPA demonstrates how California courts may apply the CFDCPA. For example, a potential plaintiff may have purchased bail services on behalf of someone else, often a friend or family member. In *Monroe v Frank*, a bail bond company argued that the plaintiff was not a "consumer" under the Texas Debt Collection Practices Act, because he obtained the bail bond for someone else, and therefore, the resulting debt was not "personal" under the act.[131] A bail company could make a similar argument under the CFDCPA in California, where a plaintiff must have acquired a service "primarily for personal, family, or household purposes."[132] The Court in *Monroe* rejected the defendant's argument, holding that, although the bail service was not directly for plaintiff's sake, a "reasonable factfinder could have found that [the plaintiff] derived benefit for himself from the transaction" and, thus, the plaintiff "incurred the debt for personal purposes."[133]

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129. *See supra* note 5 for relevant bail contract provisions.

130. *Cf.* London v. Gums, No. CIV.A. H-12-3011, 2014 WL 546914, at *5 (S.D. Tex. Feb. 10, 2014) (holding that a bail bond company is a debt collector under the Texas Debt Collection Practices Act).

131. Monroe v. Frank, 936 S.W.2d 654, 660–61 (Tex. App. 1996), *writ dismissed w.o.j.* (June 12, 1997).

132. CAL. CIV. CODE § 1788.2(e).

133. *Monroe*, 936 S.W.2d at 660. The court also argued that in actuality, given other language within the statute, the plaintiff did not even have to show that he incurred debt for personal purposes. *Id.* However, this is not the case under the CFDCPA, which states, "Any debt collector who violates this title with respect to any debtor shall be liable to that debtor only in an individual action . . . ." CAL. CIV. CODE § 1788.30(a).

In Louisiana, an analogous claim was also made in reference to the FDCPA in *Barlow v. Safety National Casualty Corporation*, where a bail bond company argued that money owed from an indemnity agreement, executed as part of a bail bond transaction by a mother on behalf of her son, did not constitute "debt" within the meaning of the FDCPA.[134] The Court rejected this argument, holding that the underlying service was acquired for personal purposes and therefore constituted "debt."[135] Further, the company being sued in *Barlow* was not the bail bond company—the originating creditor—but rather the larger surety for which the bail bond company was an agent. The court in *Barlow* held that the FDCPA applied in situations that may thus prove beneficial for any potential plaintiff, or class of plaintiffs, who wishes to seek a remedy from the much larger surety company.[136] The approaches that other jurisdictions take to consumer protection in the bail context therefore suggest that a consumer of bail services in California may similarly pursue claims against a bail bond company under the CFDCPA.

2. Bringing Claims Against Bail Bond Companies under the CLRA, UCL, and CFDCPA

Assuming, as argued above, that the CLRA, UCL, and CFDCPA are available to potential consumers of bail services filing suit against bail bond companies, this Note now turns to the content of such claims. The prior analysis of threshold inquiries was guided by legal questions related to who may sue, who may be sued, and under what circumstances. This Section, on the other hand, is organized around the life cycle of the typical bail bond consumer transaction, making reference to the harms articulated in Part I in order to help conceptualize the kinds of claims potential plaintiffs may want to bring, depending on the facts of their circumstances.

This Section analyzes how the specific experiences of bail consumers may trigger legal claims under the consumer protection statutes discussed above.[137] To that end, it is useful to divide the typical bail consumer experience into three phases. The first phase consists of the time leading up to the agreement to purchase the bail bond service. Typically, the defendant-consumer is in jail and

134. 856 F. Supp. 2d 828, 835 (M.D. La. 2012).

135. *Id.* at 836.

136. *Id.* The reverse situation, where a bail bond company is sued after selling its debt to a third-party collection agency, occurred in Texas in *London v Gums*. London v. Gums, No. CIV.A. H-12-3011, 2014 WL 546914 (S.D. Tex. Feb. 10, 2014). There, the plaintiff argued that the bail bond company gave the third-party collection agency express and implied authority to act as its agent and could therefore be liable for the collection agency's actions under the agency/ratification theory. The court rejected this argument, holding that a "non-debt collector generally cannot be vicariously liable for a debt collector's FDCPA violations." *Id.* at *5.

137. As a general matter, some of the specific legal issues that attach to the pursuit of those claims are outside of the scope of this Note. Rather, because the purpose of this section is to bridge the experiences of bail consumers to the relief afforded by existing statutes, this section is primarily concerned with clarifying those connections and is therefore organized around consumers' experiences.

makes a phone call to a bail bond company or the defendant-consumer notifies a friend or family member who then purchases the bail service on behalf of the defendant. The second phase is the signing of the bail contract itself. At this step, either the defendant-consumer has been taken to the bail office after getting released, or the friend or family member signs the contract and afterwards the defendant is brought in to sign the contract as well. Finally, the third phase is after the agreement has been made and the consumer is making payments toward the premium and complying with the additional terms of the contract.

a. Leading Up to the Bail Agreement

The period during which an individual is in jail and awaiting arraignment is likely the most vulnerable period within the lifecycle of the consumer bail transaction. As described in Part III, bail companies often have a stranglehold over the kind of information available to defendants during this period. This is exemplified by the advertising agreements that bail companies have procured with jails, which allow bail companies to be one of the only parties providing information. Defendants are bombarded with signs posted on walls within and around their cells, promising immediate freedom at low costs. In this space, defendants receive very little information about their rights or the criminal justice process, in large part because defendants at this stage have no right to a public attorney.[138] Although defendants are allowed to make a free phone call to a relative or friend,[139] a call with a bail agent will likely provide the defendants with the most information relative to the other available sources regarding their situation and how the criminal process works. As repeat players, bail agents have intimate knowledge of the criminal justice process and, as providers of the very thing a defendant likely desires—freedom—agents are the closest thing a defendant will have to an advocate, at least before acquiring counsel. This situation is precisely what generates the likelihood of abuse and exploitation.[140]

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138. *See* Maura Ewing, *When Does the Right to an Attorney Kick In?*, ATLANTIC (Sept. 15, 2017), https://www.theatlantic.com/politics/archive/2017/09/when-does-the-right-to-an-attorney-kick-in/539898/ [https://perma.cc/GV8F-ADPS]. Although some counties in California do provide counsel at arraignment, others do not. In my observations in Alameda, Solano, Marin, and Contra Costa counties in 2016 through 2017, I witnessed numerous arraignments and bail hearings without counsel being provided to defendants.

139. CAL. PEN. CODE § 851.5 ("The arrested person shall be entitled to make at least three calls at no expense if the calls are completed to telephone numbers within the local calling area . . . .").

140. In his ethnographic work on the bail industry, Joshua Page details the way in which consumers of bail bonds come to rely on agents as a source of knowledge about the criminal justice process. Though he finds that consumers are at times resentful, some also come to appreciate agents who frequently act as "legal guides," providing information that is otherwise unavailable or difficult to attain. Indeed, Page writes that these extra services often provide competitive advantages to particularly helpful bail bond companies struggling to compete with other companies. This reliance on bail bond companies and the lengths companies will go to get a leg up in a cutthroat market demonstrates the potential for abuse in a system that pushes defendants to rely on outside companies. *See* Joshua Page, *Desperation and Service in the Bail Industry*, 16 CONTEXTS 30 (2017).

Can existing consumer laws reach this situation?[141] The advertisements themselves may constitute violations of the UCL's prohibition on "unfair . . . deceptive, untrue or misleading advertising"[142] and several provisions of the CLRA.[143] For example, advertisements offering discounted rates, rebates, or other economic incentives may be misleading because such rates may be contingent on another event or specific future conduct, potentially violating the "bait and switch" provisions of the CLRA.[144] Some advertisements offer different rates, which may falsely incentivize a defendant to call a particular bail company on the basis of that rate; however, those rates may be contingent upon, for example, referral by an attorney.[145] Advertisements may also offer the possibility of payment via a payment plan. However, it may later be revealed that the terms or even the availability of those payment plans are entirely dependent on credit or risk assessments performed at the bail office after release. Often these advertisements, and no others apart from those for defense

141. There may be other consumer protection laws not discussed here that apply, such as the Contracts Translation Act, CAL. CIV. CODE § 1632, requiring the translation of contracts to enumerated languages, and CAL. CIV. CODE § 1799.91, requiring notices to be given to cosigners before a contract is signed. I do not discuss these because they address smaller, specific issues. The False Advertising Law, CAL. BUS. & PROFS. CODE § 17500, may also be available to consumers in these situations. However, because the claims are largely duplicative of the fraudulent prong under the UCL, as described below, I avoid a full discussion of those possible claims.

142. *See* Lavie v. Procter & Gamble Co., 129 Cal. Rptr. 2d 486, 495–99 (2003) (holding that although, under the UCL, claims involving misleading advertising must generally use the "ordinary consumer acting reasonably under the circumstances" standard, rather than a "least sophisticated consumer" standard, "[w]here the advertising or practice is targeted to a particular group or type of consumers, either more sophisticated or less sophisticated than the ordinary consumer, the question whether it is misleading to the public will be viewed from the vantage point of members of the targeted group, not others to whom it is not primarily directed."); *see also* Consumer Advocates v. Echostar Satellite Corp., 8 Cal. Rptr. 3d 22, 29 (2003) ("[U]nless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer."). Here, bail advertisements are directed to a vulnerable population. Therefore, the analysis of whether bail advertisements are likely to mislead should be performed from the perspective of an incarcerated defendant.

143. Importantly, the reasonable consumer standard required for the UCL, as described in *Lavie*, 129 Cal. Rptr. 2d 486, equally applies to the CLRA. *See* Colgan v. Leatherman Tool Grp., Inc., 38 Cal. Rptr. 3d 36, 46 (2006) ("Conduct that is 'likely to mislead a reasonable consumer' thus violates the CLRA.").

144. *See, e.g.*, CLRA, CAL. CIV. CODE § 1770(a)(17) (listing as an unlawful practice "[r]epresenting that the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction"); *see also* Kramer v. Intuit Inc., 18 Cal. Rptr. 3d 412, 416–17 (2004) (stating that "the Legislature intended to prohibit merchants from advertising a rebate or discount when they conceal from consumers the conditions to be satisfied to receive the rebate or discount"); Pollard v. Ericsson, Inc., 22 Cal. Rptr. 3d 496, 501 (2004) (stating that CLRA § 1770(a)(17) "prohibits bait-and-switch rebate offers that cannot be performed before or at the time of purchase").

145. This is a common practice. Bail agents will often charge eight percent in these situations. *See, e.g.*, Gregory Fox, *California Bail Law*, THE LAW OFFICE OF GREGORY W. FOX (Oct. 18, 2015), http://foxlawfresno.com/blog/california-bail-law/ [https://perma.cc/YFX5-ZYC5] ("For example, if an attorney referred you to a specific bail bond agent you may be offered a lower premium as a result, typically 8% instead of 10%.").

attorneys,[146] are promoted in jail. This may mispresent that these advertisements, and therefore the featured bail companies, have the approval of the state. Insofar as any particular advertisement capitalizes on this situation and misrepresents the company's services either intentionally with language indicating state approval or simply by the advertisement's very context, the company may also be violating the CLRA.[147] Insofar as an advertisement fails to disclose the likely need for indemnitors, co-signors or generally engagement with other parties, or that the advertised premium may be assessed interest if paid via a payment plan, those advertisements would be similarly misleading.[148]

These examples are not as egregious as when bail companies maliciously attempt to deceive customers. However, these circumstances produce precisely the kind of confusion regarding the true nature of any bail transaction that consumer-based laws are intended to prevent. Therefore, the application of the CLRA and UCL[149] in this context is warranted.

Defendants also may be victims of possible consumer protection violations during the phone call they make after they have seen the advertisements and decided which bail company to call. Those phone calls are often brief: the bail agent will ask what the defendant has done, how much his bail is, and how much

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146. *See* Ruby Renteria, *A Monopoly on Information: How Advertising In Jails Is Problematic for Defendants*, CRIM. L. & POL'Y (Apr. 15, 2016), https://crimlawandpolicy.wordpress.com/2016/04/15/a-monopoly-on-information-how-advertising-in-jails-is-problematic-for-defendants/ [https://perma.cc/PBH9-KD9A] (describing how, in an agreement between Santa Clara County and the Jail Advertising Network, "the only people/entities eligible to purchase advertising space are bail bond agencies and private defense attorneys").

147. CAL. CIV. CODE § 1770(a)(2) ("Misrepresenting the source, sponsorship, approval or certification of goods or services"); *id.* at § 1770(a)(3) ("Misrepresenting the affiliation, connection or association with, or certification by, another"); *id.* at § 1770(a)(5) ("Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have."). With respect to these provisions, courts have interpreted the prohibition to apply to "both fraudulent omissions and fraudulent affirmative misrepresentations." *See, e.g.*, Herron v. Best Buy Co., 924 F. Supp. 2d 1161, 1169 (E.D. Cal. 2013) (interpreting § 1770(a)(5)).

148. This may violate CAL. CIV. CODE § 1770(a)(20) (prohibiting "Advertising that a product is being offered at a specific price plus a specific percentage of that price . . ." except under certain circumstances). *See* Peralta v. Hilton Hotels Corp., No. D039510, 2003 Cal. App. LEXIS 2345, at *25 (Mar. 11, 2003) (stating that § 1770(a)(20) applies where consumers may be "unduly confused about the price of a certain product by misleading shelf tags, displays, and media advertising"). This is precisely the kind of situation that frequently occurs as incarcerated individuals attempt to figure out who to call.

149. In particular, with respect to the UCL, the "unfair" prong may be utilized, as it allows for significant judicial discretion in curtailing negative business practices. However, there is currently a split in the California courts as to what test is used to adjudicate such a claim, and a detailed discussion of the nature of a potential claim under this prong is beyond the scope of this Note. To resolve this court split, the legislature could explicitly state a policy of expanding consumer protections to bail consumers, as suggested below, thereby satisfying the California Supreme Court's "tethering test." Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 543–44 (1999) ("We thus adopt the following test: . . . the word 'unfair' in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law . . .").

money he generally has. The bail agent will then tell the defendant to hold tight because they'll be there soon to release the defendant. It is important to remember that, according to bail contracts, the premium is earned by the bail agent upon release of the defendant.[150] Further, if the defendant does not sign the ultimate contract at the bail bond office after his release, he will be taken back to jail. Therefore, the defendant-consumer is again in a vulnerable situation, reliant on the good faith behavior of a bail agent. Importantly, the defendant is only entitled to three phone calls, total, in California.[151] Defendants generally are not able to "shop around" for the best bail service agreement. Thus, the contents of that initial conversation with a bail agent—the information disclosed, the nature of the agreement, etc.—are critical. As before, under these circumstances, the stage is set for rampant abuse of a defendant's vulnerability in the form of misinformation, false promises, and exploitation of his urgency to make a deal. Here, the CLRA and UCL may both be used to protect against some of this verbal misconduct, particularly to the extent that the verbal communications deviate from the final terms of the bail contract.[152]

b. At the Signing of the Bail Contract

The signing of the bail service contract presents another quintessential consumer transaction, aspects of which may violate existing consumer protection law. Usually, either a friend or family member first agrees to utilize a bail bond company, after which the bail agent goes to the jail to release the defendant. The defendant then signs his portion of the agreement. In other cases, the defendant calls the agent from jail, is released, and then taken back to the office to sign the contract. Regardless of whether this process involves the friend, family member, or defendant himself, the moment of signing the bail service contract is filled with intense urgency. Significant sums of money are often involved, and the defendant's liberty is at stake. The situation is even more desperate for the newly released defendant who is sitting at an office deciding whether to sign a contract or go back to jail. Because of this pressure and leverage, the terms of the bail agreement are almost never negotiable.[153]

150. *See supra* note 5 for representative bail contracts with clauses to this effect.

151. CAL. PEN. CODE § 851.5 entitles defendants at least three free local calls. Any additional calls are subject to the discretion of the jail.

152. The CLRA applies directly to such circumstances. *See* Wang v. Massey Chevrolet, 118 Cal. Rptr. 2d 770, 779 (2002) (the CLRA "contemplates the existence of collateral oral promises, representations or agreements which may be inconsistent with the rights, remedies, or obligations set out in a written contract; the statute makes such misrepresentations unlawful"); *see also* Diacakis v. Comcast Corp., No. C 11-3002 SBA, slip op. at 5 (N.D. Cal. Jan. 9, 2012) ("[V]arious consumer protection claims can be predicated on collateral representations that differ from contractual language.").

153. This lack of negotiation was described to me by many interviewees. One aspect that may be negotiable, however, are the terms of the payment plan, specifically how much each payment will be.

These circumstances suggest that certain bail contracts could be unconscionable under the CLRA.[154] In California, the test for unconscionability has taken on several forms; however, generally, the purpose of the unconscionability doctrine in California, as articulated in California Civil Code section 1670.5, is the "prevention of oppression and unfair surprise,"[155] particularly in contexts where there is an "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[156] This standard incorporates "both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power and the latter on overly harsh or one-sided results."[157]

Where a defendant signs the bail contract, the procedural prong to this test is easily met in most cases, given the circumstances described above. Even in the case of a friend or family member, a consumer of bail services will seldom have any meaningful choice regarding the terms of a subsequent bail agreement. And due to the high cost of bail, a defendant may have no choice but to use a bail company in the first place. Considering the lack of opportunity of any bail consumer to negotiate, bail contracts should generally be understood as contracts of adhesion, a type of contract that may suggest procedural unconscionability.[158] Indeed, the bail context could be considered the textbook case for the procedural prong.[159] In addition to the tremendous confusion that bail consumers, particularly defendants themselves, may experience upon arriving at the bail office, bail consumers are undeniably presented with a "take-it-or-leave-it" situation in which they have no reasonable alternative. There are no alternatives to commercial bail provided by the state to facilitate a financially based system of release. In fact, all bail contracts are remarkably similar and, ultimately, the alternative to purchasing the bail service is incarceration.

In terms of the substantive prong, bail contracts frequently bury terms that are one-sided, deceptive, harsh, and even exploitative. Contracts may, for example, fail to articulate the precise conduct that constitutes a defendant's

154. *See* CAL. CIV. CODE § 1770(a)(19) ("Inserting an unconscionable provision in the contract.").

155. Freeman v. Wal-Mart Stores, Inc., 3 Cal. Rptr. 3d 860, 866 (2003) (internal citation omitted).

156. A & M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 121–22 (1982) (internal citation omitted).

157. Armendariz v. Found. Health Psychcare Servs., Inc., 99 Cal. Rptr. 2d 745, 767 (2000) (internal quotation marks omitted) (internal citations omitted).

158. *See, e.g.*, Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 605–06 ("A contract or clause is procedurally unconscionable if it is a contract of adhesion. A contract of adhesion, in turn, is a 'standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'") (citing Comb v. Paypal, Inc., 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002)).

159. *Cf. Freeman*, 3 Cal. Rptr. 3d at 867 (In assessing the unconscionability of specific fees within a shopping card contract, the court held, "The shopping card also was not an adhesion contract. Plaintiff was not subjected to a take-it-or-leave-it situation in which there was no reasonable alternative but to accept the shopping card terms. Plaintiff could simply decline to purchase a shopping card and make purchases by other means."). The bail context is precisely the opposite kind of situation.

breach, which will allow the bail agent to reincarcerate the defendant. The conditions of reincarceration are likely the most important aspects of the bail service, and yet these conditions frequently confuse consumers. Moreover, defendants may be subject to reincarceration for relatively trivial conduct either because of the immense discretion that agents have or because the contract specifies such conditions. For example, defendants could be incarcerated for missing a phone call, failing to let the agent know of a change of address or employment, or failing to change the batteries on an electronic monitoring device.[160] Also, there may be provisions that specify that consumers will have to pay the entire bail amount if any misrepresentation has been made or if the bond company has "reasonable evidence."[161] Contracts often state that premiums will be charged annually indefinitely,[162] a fact that several consumers expressed to me was never spoken about during initial conversations or negotiations, nor even acknowledged at the contract signing. Because so many cases end up taking more than a year to run through the courts, such provisions are significant because they allow companies to assess premiums several times over against a consumer awaiting proceedings for a single offense. Further, many contracts tack on certain fees, listed as "actual expenses," which often include attorneys' fees and fees arising out of the execution of the bail bond or "as a result of information concealed or misrepresented."[163] Overall, these provisions are tremendously vague and give bail bond companies significant authority while disempowering and failing to adequately inform their consumers. Contracts may also require additional surveillance [164] and check-in requirements, ranging from simple daily

160. *See, e.g.*, Family Bail Bonds, *supra* note 5 (stating than an applicant for a bail bond warrants all statements made on the application and that a failure to notify of any changes "shall be cause for the immediate surrender of the Defendant").

161. *See, e.g.*, Fausto's Bail Bonds, *Bail Bond Application and Agreement*, http://www.faustosbailbonds.com/var/m_4/47/472/11187975/1356270-Bail-Bond-App-Agreement.pdf [https://perma.cc/H42S-MAQK] (stating that committing "any act that constitutes reasonable evidence" of an intention to cause a forfeiture of the bond shall constitute a breach of contract allowing the bail company to apprehend, arrest or surrender the defendant).

162. *See, e.g.*, California Bail Bonds, *supra* note 5 ("[T]he First Party . . . agree . . . TO PAY . . . $_____ as premium . . . and a like sum annually in advance each year hereafter until the Surety shall be legally discharged from all liability thereunder, and to pay to the Second Party charges for extraordinary services, if any."); *see also* Vu Bail Bonds, *supra* note 5 ("To pay 'stated amount' per annum for this Bail Bond. The fact that Defendant may have been improperly arrested, his bail reduced, or his case dismissed, shall not obligate the return of any portion of said premium.").

163. Such fees are supposedly regulated by California Code of Regulations, 10 CAL. CODE REGS. §§ 2081–83, which specifies that agents can only charge expenses that are "actual, necessary and reasonable," and must enumerate these added costs explicitly. However, because few details are articulated in the code, contracts generally preserve substantial discretion for bail agents. *See generally Are Bail Companies Following the Law?*, CRIM. L. & POL'Y (Apr. 27, 2016), https://crimlawandpolicy.wordpress.com/2016/04/27/are-bail-companies-following-the-law/ [https://perma.cc/46FV-WVCQ].

164. *See* UCLA CRIMINAL JUSTICE REFORM CLINIC, *supra* note 88, at 11 (citing a Gotham Bail Bonds contract: "You agree that Surety may attach a location tracking device on any vehicle owned or driven by you, at any time, without notice . . . [and] may use location technologies to locate your wireless

or weekly phone calls to drug testing. Furthermore, contracts may require defendants to waive legal claims, privacy at home, and protection from the use of force. Contracts may also require the disclosure of substantial private information, such as employment history, credit history, criminal history, and even email and Facebook passwords.[165] However, these intrusive provisions are just the tip of the iceberg.[166]

In light of the circumstances described above, the unconscionability provision of the CLRA should apply to a substantial number of bail contracts because both the procedural and substantive prongs are likely to be met. If a bail contract is found to be unconscionable, the CLRA provides not only for protection from enforcement of such a contract, but also permits a consumer to bring an action for damages and injunctive relief based on the insertion of an unconscionable provision into the contract.[167]

c. After the Agreement

Even after the signing of the bail contract, consumers of bail services frequently experience substantial abuses. Indeed, the enforcement of the contract provisions may constitute violations under the CLRA, which could provide a remedy based on the unconscionability of the underlying contract. However, the most frequent form of abuse that consumers face in the period after their release is harassment. Because this harassment generally arises from bail agents' attempts to collect payments, their conduct is regulated by the CFDCPA. The harassment may come in the form of repeated phone calls by the agent at odd hours of the day. Or it may come in the form of bail agents calling friends, family members, and employers; engaging with the consumers via the internet; or perhaps disclosing sensitive information. The nature of the communication by bail agents to their consumers may border on abuse, including the use of obscene language and threats. Agents may also fail to disclose who they are, refuse to respect the consumer's privacy, or his requests for particular forms of communication. Some agents may lie about the kind of authority they have, again relying on consumers' lack of information and unique vulnerability. These kinds of conduct are specifically prohibited by the CFDCPA and would form the legal basis for plaintiffs bringing suit against abusive bail companies.[168]

Finally, it is worth noting that as of 2013, consumers can bring claims relating to violations of the Insurance Code under the UCL's unlawful provision, even though the Insurance Code does not explicitly provide for a private right of

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device at any time . . . and the Bond is conditioned upon your full compliance with the following terms and conditions . . .").

165. *See generally id.* at 9–11. This was also described to me in detail by several interviewees.

166. *Id.*

167. *See* Cal. Grocers Assn. v. Bank of America, Natl. Trust & Savings Assn., 27 Cal. Rptr. 2d 396, 403–04 (1994).

168. *See* CAL. CIV. CODE §§ 1788.10–14.

action.[169] Therefore, if consumers finds out that the bail company they utilized is, for example, not licensed by the DOI, consumers may pursue claims directly against the bail bond company, so long as other claims under the UCL, such as false advertising, are also pursued. As described below, although it is unlikely that an individual consumer will become aware of the licensing status of a bail company, this could prove particularly useful for potential plaintiffs in some cases, particularly if licensing information becomes more widely available.

III.
DEVELOPING NEW DEFENDANT-CONSUMER PROTECTION LAW FOR THE BAIL CONTEXT

Commercial bail is best understood as an instance of the government contracting out an essential aspect of the criminal justice cycle: the pretrial process. As a result of the government's consistent negligence in maintaining a pretrial system that accords with our basic notions of fairness and the presumption of innocence, the commercial bail industry has ironically become indispensable to the average individual interacting with the criminal justice system. By over-relying on money bail and raising the cost of bail to untenable levels, the government has ensured the proliferation of the commercial bail industry to respond to the obvious needs of defendants. Yet the government has simultaneously failed to regulate that industry, thereby leaving countless individuals—who are largely poor and of color—at the mercy of an industry that has flexed its muscles to create a profound market imbalance and exploit its customers with relative immunity.

This Note reframes the individual who utilizes a bail service, whether a defendant awaiting trial or a friend or family member doing so on her behalf, as a consumer who is entitled to the full protections afforded all consumers under existing consumer protection laws. Rampant forms of abuses perpetrated by the bail bond industry against a substantial number of its customers, some of whose stories have been referenced in this Note, suggest that consumer protection statutes should be employed to regulate this industry. In an environment where the industry enjoys substantial leverage—because of the marked vulnerability of its customers and the state's complete reliance on the industry—the utility of using consumer protection laws should be apparent.

However, even an aggressive campaign to utilize existing laws to protect bail consumers will likely be insufficient to protect those consumers. Many

169. *See* Zhang v. Superior Court, 57 Cal. 4th 364, 383–84 (2013) (holding that plaintiff's cause of action was supported by her false advertising claim); *see also* Two Jinn, Inc. v. Gov't Payment Serv., Inc., No. 09CV2701 JLS BLM, 2010 WL 1329077, at *5–6 (S.D. Cal. Apr. 1, 2010) ("The UCL plainly authorizes private litigants to maintain private actions under the UCL for violations of a statute even if that statute does not itself create a private right of action."). Ironically, in *Two Jinn*, a bail bond company brought precisely the kind of UCL claim a bail consumer may desire to bring against a bail bond company that is out of compliance with the Insurance Code.

harms fall outside the reach of existing laws and their remedies, and consumers are unlikely to make full use of such laws because of their particularly vulnerable position. This could be made worse if courts do not follow the analysis above by refusing to apply these consumer laws to the bail industry. Further, the unequal power dynamic between the industry and its customers indicates the need for additional affirmative legislation. This section therefore proposes additional legislation to extend protections explicitly to the bail context. After articulating some underlying reasoning for additional legislation, this section addresses the particularities of the bail context that suggests that the straightforward expansion of protection to consumers may not be appropriate. After this introduction, this Section concludes with an overview of potential legislative proposals.

A. Why Are Additional Protections Needed For Consumers Of Bail?

1. Consumers Of Bail Services Are Particularly Vulnerable

The primary motivation for the development of new regulation is the sheer vulnerability of the majority of bail consumers: people who are largely indigent, already wrapped up in the criminal justice system, significantly uninformed and often misinformed about their rights, and in fear of reincarceration. This vulnerability renders this population particularly susceptible to abuse at various stages of interaction with bail bond companies. Much of this vulnerability has been described in detail in this Note. However, in addition to the stories of individuals' experiences described here, other evidence is available suggesting the way in which the entire bail context renders individuals detained pretrial, even for small periods of time, particularly susceptible to exploitation and coercion.

For example, studies have repeatedly demonstrated the ways that pretrial detention contributes to guilty pleas, particularly among those who would have been acquitted or had their charges dropped. These studies link the conditions of incarceration for pretrial detention directly to defendants' increased willingness to plead guilty.[170] A 2017 Human Rights Watch report found that in the six counties they studied, 71 to 91 percent of all misdemeanor defendants and 77 to 91 percent of felony defendants plead guilty between 2014 and 2015.[171] Indeed, even the California Chief Justice, Tani Cantil-Sakauye, acknowledged the coercive effect of pretrial detention on defendants primarily concerned with

170. *See, e.g.*, STEVENSON, *supra* note 69. Substantial research exists demonstrating the effects of pretrial detention on a host of other outcomes, generally demonstrating the connection between pretrial detention and worse case outcomes for defendants. For a representative sample from the last fifty years, see, for example, BECHTEL ET AL., *supra* note 67; LOWENKAMP ET AL., *supra* note 67; Williams, *supra* note 67, at 299–316; Weisheit & Klofas, *supra* note 67, at 51–65; Goldkamp, *supra* note 67, at 1556–88; Angel et al., *supra* note 67; Rankin, *supra* note 67.

171. HUMAN RIGHTS WATCH, *supra* note 66, at 4.

getting out as soon as possible.[172] This provides further evidence of the defendant's vulnerability, suggesting that his ability to make reasoned decisions about his consumption of bail services is likely to be significantly diminished.

2. The Bail Industry Has Stacked the Deck in its Favor to the Detriment of Bail Consumers.

Consumer protection laws should also be extended to the bail industry, because it has shaped the terms of its relationship with the government in a way that specifically incentivizes behavior against the public interest. This influence is due to an extremely powerful lobbying effort by the bail industry both in California and other parts of the country.[173] The industry, after forming the American Bail Coalition and partnering with the American Legislative Exchange Council in 1994, has successfully promoted the growth of commercial bail across the country by lobbying vigorously to promote money bail-friendly legislation. This powerful coalition has strategically engaged in widespread legislative efforts to induce decision makers to support policies favorable to the industry under the guise of taxpayer savings and public safety propaganda.[174] Generally, the industry has drafted model bills to defund pretrial services and limit the populations eligible to participate in alternative bail programs—thereby increasing the population dependent on commercial bail services.[175] Other model bills aimed to reduce regulation and oversight of bail agents and to promote higher bail amounts in bail schedules.[176] Bail companies also aggressively engage in efforts to obstruct bail reform campaigns across the country.[177] Their efforts have additionally led to policies regarding bond forfeiture and exoneration that are extremely beneficial to bail companies and create incentives counter to the public interest.[178] Despite their arguments to the contrary,[179] bail

172. *See* Editorial Board, *Bail, the Next Frontier of Criminal Justice Reform*, SACRAMENTO BEE (Mar. 25, 2016), http://www.sacbee.com/opinion/editorials/article68311437.html [https://perma.cc/Z7LD-6UXS].

173. *See generally supra* Part I.B.

174. *See generally* Lydia D. Johnson, *The Politics of the Bail System: What's the Price for Freedom*, 17 SCHOLAR 171, 186–90 (2015).

175. *Id.* at 190–95.

176. *See The Commercial Bail Industry*, *supra* note 46 ("The American Bail Coalition—a lobbying group that represents the bail bondsmen, powerful insurance companies and wealthy investors—is working hard to make sure these profits keep coming in. They spent $3.1 million lobbying state lawmakers between 2002 and 2011 and drafted twelve bail bills that encourage judges to set high bail amounts and give the bail industry more leeway to profit off incarceration."). *See generally* BRADFORD, *supra* note 46, at 8 (providing an overview of such efforts and the rise of the commercial bail lobby).

177. *See* Russell Nichols, *States Struggle to Regulate the Bond Industry*, GOVERNING (Apr. 2011), http://www.governing.com/topics/public-justice-safety/States-Struggle-to-Regulate-the-Bond-Industry.html [https://perma.cc/G8C3-EUVN].

178. *Id.*

179. *See, e.g.*, Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. & ECON. 93 (2004). Although the authors are academics, they adopt positions identical to members of the commercial bail industry.

bond companies actually take on very little economic risk and are seldom held accountable for the few responsibilities they do have.

Nationwide, the relationship between prosecutors, judges, and bail bondsman tends to skew several aspects of the bail process, from the charges brought against the defendant to the amount of bail set by the judge, to the ultimate payment required for release.[180] In California, to require a bail company to pay a court after a defendant's failure to appear, the court must follow strict rules.[181] As a result of these burdens, courts seldom pursue forfeiture. Bail companies can therefore shirk their responsibilities to deliver a defendant to the court, without paying the money promised for breach of the original bond contract with the state. Indeed, California courts generally express strong disfavor of forfeitures.[182] Although this may be framed as protecting individuals who have signed the bail contract as indemnitors—generally family of the defendant—avoiding forfeiture primarily insulates bail companies from their only source of liability, payment of bail. And in those cases where bail forfeiture is executed, courts often fail to demand payment. In Los Angeles alone, millions of dollars from forfeitures owed to local governments by bail companies go uncollected.[183] This is not a new phenomenon. Since at least the middle of the

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180. *See* Johnson, *supra* note 174, at 194 ("reviewing several factors that contribute to the collusion such as bondsmen paying a reduced percent back to the county if the client runs, allowing the bail bondman to profit even when no effort is made to apprehend the absconder, and judges setting bond 'ten times higher than what people can afford'") (quoting Laura Sullivan, *Bondsman Lobby Targets Pretrial Release Programs*, NATIONAL PUBLIC RADIO (Jan. 22, 2010, 2:00 PM)).

181. According to the Santa Clara Bail Reform Working Group, the process in California is as follows:

- The court may forfeit cash bonds of less than $500 immediately upon an FTA; and for greater amounts, after a 10-day notice and 180-day recovery period.
- The court may forfeit bail bonds after the 10-day FTA notice/180-day recovery period if it follows all legal steps without exception, but often the recovery period is extended 180 days or more if, in the court's discretion, it accepts a bail bond agent's claims of diligent recovery efforts, or if any other technicality arises. The court must exonerate the bond if, within the 180-day or extended recovery period:
  - The defendant is arrested, taken to court, or surrendered by a bond agent, bounty hunter, or any other person; . . .
  - The court fails to issue a proper FTA and intent to forfeit notice to all parties within 10 days; . . .
  - The court fails to set and properly notice a hearing within 30 days after the 180-day recovery period; . . .
  - The defendant is recovered by warrant arrest (most frequent) and the bond agent shows diligent recovery efforts; or
  - Any of many other statutory technicalities arises.

SANTA CLARA BAIL AND RELEASE WORK GROUP, *supra* note 76, at 39 n.139; *see also* CAL. PEN. CODE §§ 1305, 1305.4-1305.6, 1306, 1308.

182. *See* People v. Intl. Fidelity Ins. Co., 204 Cal. App. 4th 588, 595 (2012) ("Our conclusion that the bond was void is consistent with the policy disfavoring forfeitures in general and forfeitures of bail in particular.").

183. *See, e.g.*, Wendy Thermos & Anna Gorman, *Probes Target Bail Bond Firms*, L.A. TIMES (July 25, 2004), http://articles.latimes.com/2004/jul/25/local/me-bail25 [https://perma.cc/XPA3-7HW9] ("[A] review by The Times of records at the downtown Los Angeles criminal courts building

twentieth century, court systems have collected from bail bond companies a very small percentage of the forfeitures that courts declare.[184]

Further, when bail agents avoid forfeiture by delivering defendants to the court, it is often law enforcement, and not the bail companies or their bounty hunters, that actually apprehends defendants and pays the bill. In some counties, even when a defendant offers money bail as an option for pretrial release, the defendant may also be required to be supervised by a pretrial service officer who is actually responsible for the defendant's appearance.[185] In this situation, the bondsman is able to extract premiums from defendant-consumers while carrying virtually zero responsibilities to them, the state, or society at large. Indeed, it is this very scenario, already pervasive due to use of indemnification and collateral, that has led countries worldwide to abandon commercial money bail.[186] These practices, frequently the product of extensive lobbying efforts by bail companies to ensure beneficial regulatory frameworks nationwide, work to frustrate the stated aims of the industry itself.

Perhaps most shocking to bail consumers is that they are still liable for the entire premium charged by a bail company even if their case is ultimately dismissed or bail amount reduced. This is not a rare event, as a national study by the Department of Justice shows that close to one in five detained defendants nationwide eventually had their case dismissed or were acquitted.[187] Between 2011 and 2015, about one-third of individuals arrested for felonies were never found guilty of a crime and, in almost 20 percent of those cases, prosecutors did not even file charges.[188] It is difficult to understand why one has to pay for a service that arose when the government had no grounds to legitimately charge

showed that the county had been unable to collect at least $9.1 million in bail forfeitures during the two years ending in August 2003.").

184. Editors, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1035 (1954) (citing a 20 percent collection rate on forfeited bonds); *see also* Patrick J. Duffy III, *The Bail System and Equal Protection*, 2 LOY. L.A. L. REV. 71, 79 (1969) (detailing statistics of uncollected bond forfeitures across the country between 1950–1960).

185. *See, e.g.*, SANTA CLARA BAIL AND RELEASE WORK GROUP, *supra* note 76, at 61.

186. *See* DEVINE, COMMERCIAL BAIL BONDING, *supra* note 41; *see also* Bauer, *supra* note 39 (describing how "[i]n Canada, selling bail bonds can earn you two years in prison on a charge equivalent to bribing a juror" and "[i]n Australia, a government commission rejected the idea of introducing commercial bail in part because 'it lends itself to abuses such as collusive ties between bondsmen and organized crime or police, lawyers, and court officials'").

187. THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 7 (2007). Statistics regarding the rate of dismissal and acquittal in California are hard to acquire; however, this nationwide story is corroborated by similar studies in Brooklyn and in Massachusetts. *See* BROOKLYN COMMUNITY BAIL FUND, 2015–2016 ANNUAL REPORT 5 (2016) (where one-third of the clients utilizing the bail fund eventually had all charges dropped); *Massachusetts Bail Fund News*, MASS. BAIL FUND (Nov. 29, 2016), http://www.massbailfund.org/newsletter [https://perma.cc/NN7Q-ZCVB] (showing that 52 percent of all closed cases were dismissed). The discrepancy between the two latter figures and the nationwide statistics supports the overwhelming research suggesting that those individuals who are able to post bail can mount a better defense in their cases. *See supra* note 67 for a survey of this research.

188. COHEN & REAVES, *supra* note 187.

you with a crime in the first place and that ultimately created no risk or continuing obligation on the part of the bail bond company that charged the fee. This circumstance evidences the tremendous market imbalance that bail companies enjoy.[189]

This Note has primarily focused on bail companies, as opposed to the larger surety companies that underwrite all bail bonds. This is because, unlike bail bond companies, surety companies do not directly interact with defendant-consumers and so have fewer opportunities to engage in the forms of abuse detailed here. However, those larger insurers are likely the biggest benefactors of the money bail system. Unlike property and auto insurance companies—which generally pay 40 to 60 percent of their revenues in losses—in 2012, surety insurance companies paid less than one percent of their revenues in losses.[190] Rather, these insurance companies simply skim off ten percent of the premiums paid to the bail companies for every bond written and are generally immunized from all risk. Insurance companies become liable only if the bail bond companies themselves are forced to pay after a forfeiture and cannot—which, as described, is an unlikely occurrence. Generally, insurers also require bond companies to pay into a reserve fund to further mitigate costs generated after forfeitures.[191]

3. The Uncertainty Regarding the Viability of Existing Consumer Protection Law Without Broader Legislative Changes

Underlying the circumstances that give rise to the abuse of consumers is a fundamental tension. On one hand, bail companies enjoy a wide latitude under criminal law regarding their authority to surrender defendants back into custody. On the other hand, bail companies' contractual obligations to those consumers create the assumption that the freedom obtained by purchasing that service is in some way protected.[192] A defendant-consumer contracting with a bail bond company reasonably believes that they have purchased their pretrial freedom and that, so long as they have complied with the underlying contract terms, that freedom is guaranteed. However, under criminal law, bail companies can surrender defendants at any time, regardless of their agreement with their customer. At best, this generates the wide degree of harms described in detail in

189. Bail bond companies may oppose this framing, arguing that although no continuing obligations may exist after the dismissal of a case, the company still engaged in some compensable work when getting the customer out of jail and posting bond. Bail bond companies may further argue that the premium underlying the bail contract represents the assumptions of risk taken on by both the company and the customer. However, the premium ultimately charged is, in fact, based on the bail amount, not some calculation of an assumption of risk or on some valuation of the work the company engaged in. This is, in fact, how those rates are justified with the DOI. Regardless, the primary purpose of this paragraph is to demonstrate that, in the eyes of the consumer, it is absurd and surprising to remain on the hook for premiums in the case of a dismissal.

190. Bauer, *supra* note 39.

191. *See* Dan Kopf, *America's Peculiar Bail System*, PRICEONOMICS (May 26, 2015), http://priceonomics.com/americas-peculiar-bail-system/ [https://perma.cc/CE5V-3MTE].

192. *See supra* note 5 for bail contract provisions.

this Note and, at worst, this makes a joke of the entire commercial bail enterprise. Without further legislative changes addressing this, potential plaintiffs attempting to use existing consumer laws are fighting a substantially lopsided battle.

A less fundamental approach is for the legislature to address issues directly bearing on the applicability of existing consumer protection laws to the bail context. Although the threshold inquiries to access existing consumer protection statutes are met within the bail context, there are certain general defenses to those claims which may limit the viability of the claims laid out in Part II. For example, bail agents might defend themselves against claims brought under the UCL by referencing the principle of judicial abstention or primary jurisdiction. This could prevent a court from engaging in areas largely regulated by other parts of the government—in this case the DOI[193] or the criminal justice system overall—or that involve highly complex economic matters.[194] The California Legislature should also affirmatively declare its intention to expand consumer protections to the bail context by specifying that the CLRA, UCL, and CFDCPA cover bail transactions. This would help solidify the availability of existing consumer laws in the bail context, as envisioned in Part II. [195] Although the primary purpose of this Note is to argue that these matters are distinctly consumer related, and therefore should not be subject to these defenses, the lack of precedent authorizing the kinds of claims suggested in Part II motivates a push for additional legislation.[196]

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193. *See, e.g.*, Farmers Ins. Exch. v. Superior Court, 6 Cal. Rptr. 2d 487, 498 (1992) (staying a UCL claim until review by the California Insurance Commissioner).

194. *See id.* at 496 ("[T]he primary jurisdiction doctrine advances two related policies: it enhances court decisionmaking and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws."); *see also* Desert Healthcare Dist. v. PacifiCare, FHP, Inc., 114 Cal. Rptr. 2d 623, 633 (2001) (summarizing the long-standing use of the abstention doctrine in matters of "complex economic policy").

195. For example, it would help consumers pursue claims under the "unfair" prong of the UCL that depends on affirmative legislative declarations to satisfy the "tethering test." *See* Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 543 (1999).

196. Another relevant defense to claims based on the UCL that bail companies could utilize, is the filed rate doctrine, which can protect defendant bail companies that charge rates that are required to be filed by a regulatory agency. However, I do not mention this within the text because it does not relate directly to the kinds of claims potential plaintiffs would likely bring. Under this doctrine, suits that challenge those rates or that would have the consequence of imposing rates different than the filed rates, are precluded. *See* Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 18 (2d Cir. 1994) ("Simply stated, the doctrine holds that any 'filed rate'—that is, one approved by the governing regulatory agency—is per se reasonable and unassailable in judicial proceedings brought by ratepayers."). This could apply directly to the bail context because bail agents are required to pre-approve the bail premiums they charge. It's unclear how prohibitive this doctrine would be in the bail context because the suggested UCL claims in this Note vary considerably with regards to the underlying complaints. Insofar as the claim is directed at the rate itself or seeks to change how much a bail agent charges, the claim might be barred. However, if the underlying claim involves deceptive advertising, those claims may survive. *See generally* STROOCK & STROOCK & LAVAN LLP, 2016 ANNUAL OVERVIEW OF CALIFORNIA'S UNFAIR COMPETITION LAW AND CONSUMERS LEGAL REMEDIES ACT 45–47 (March 2016), http://www.stroock.com/siteFiles/Publications/2016Overview.pdf [https://perma.cc/N7Y2-BZ8F].

B. Constructing New Legislation

Given the foregoing, new policies are needed to adequately protect bail consumers and to promote a well-functioning commercial bail system. These policies must be tailored to the specific characteristics of the bail context and sensitive to range of experiences that consumers have when purchasing bail services. Therefore, this section is informed by the characteristics that comprise the same three periods of the bail transaction described in the previous section: (1) Leading Up to the Bail Agreement; (2) At the Signing of the Bail Contract; (3) After the Agreement. In some cases, these characteristics suggest the need for increased protections as a result of the heightened vulnerability of defendant-consumers. In other cases, the complexity arising out of the relationship between the various stakeholders to the bail interaction—the state, the public, the defendant-consumer, friends and relatives, victims of crimes, society at large, and the bail companies—suggests the need to balance protections for the defendant-consumers with protections for other stakeholders.

Indeed, many of these suggested policies can be implemented at local levels via engagement with community stakeholders, including sheriffs' offices, county departments of corrections, jails, and individual judges. Strategically, it may be beneficial to pursue changes at these levels. Overall, however, new legislation is needed that both affirmatively sanctions the application of existing laws to the bail context and expands protections tailored to this context.

There is a fine line between policy ideas rooted in expanding protections to the consumer and those rooted in expansion of criminal or insurance code regulation. Here, the goal is not to cover the entire landscape of bail reform, much of which is being vigorously pursued across the country, especially in California.[197] Rather, this section suggests policy reform that is motivated by the particular consumer-related harms presented throughout the Note. This effort is rooted in the larger goal of framing defendant customers of bail services as consumers entitled to the regulatory protection of consumer related laws, not simply laws regulating those individuals as criminals or bail companies as insurance companies contracting with the state.

Here again it is useful to divide suggestions for new legislation by general goals, all of which aim to remedy the harms described throughout this Note.

1. Regulating Reincarceration and Preventing Arbitrary Discretion

Perhaps most importantly, bail companies enjoy tremendous discretion with respect to when they can arrest their customers and take them back to jail. Although there is significant confusion regarding the circumstances under which a bail agent can do this—and indeed this confusion is leveraged by agents against their customers—the penal code suggests that a bail agent can return a customer

197. *See supra* notes 8–12 for discussion of bail reform efforts.

to jail at any time and for any reason.[198] If a bail agent returns a customer to jail, the premium that was paid to the agent by the customer will only be returned to the customer if the bail agent fails to show a "good cause" for the defendant's return.[199] This is a relic of the historical function of bail in this country that considered a defendant out on bail to be in the custody of the bail agent.[200] However, this treatment of the defendant-bail company relationship is wholly inappropriate when commercial bail is understood within the framework of a consumer relationship governed by a contract between a bail company and its customer. Consumers who purchase a bail service expect their contract to be honored and regulations extended to protect their rights as consumers. Sending them back to jail for arbitrary reasons, or even for a breach of the contract terms, should not occur. Also, when a bail agent does so for a consumer's failure to pay, this is akin to debtor's prison. In the same way that housing laws provide for extensive opportunities to defend oneself before the execution of an eviction caused by a tenant's breach of a lease,[201] our laws should similarly position pretrial reincarceration as the last of possible remedies for supposed breaches by defendant-consumers.

Furthermore, in some situations bail companies can deny their services to a defendant in an unregulated fashion. California prohibits excessive, inadequate, and unfairly discriminatory rate setting by insurers.[202] However, these provisions do not sufficiently regulate when and for what reasons a bail agent may deny services to an individual. Currently, bail agents are able to deny their services almost entirely at their own discretion. This may lead to discriminatory or arbitrary justifications for denying services to particular individuals. Indeed, in an interview, one bail agent explained that agents frequently use a variety of indicators to determine whether to sell their bail service to a potential customer. These may include credit checks or job verification in addition to less transparent or objective indicators like "looking someone up and down," looking at neighborhoods where customers live on Google Maps, paying attention to how many questions they asked regarding their contracts, and observing how they "carried" themselves or what kind of words they used.

Further, as agents occasionally offer "rebates" under Proposition 103, which authorized rebates in insurance premiums, agents have additional

198. *See* CAL. PEN. CODE § 1300(a).

199. CAL. PEN. CODE § 1300(b).

200. *See, e.g.*, Taylor v. Taintor, 83 U.S. 366, 371 (1872) ("When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment . . . [and] they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done.").

201. *See generally* Beth Dillman, *Tenant Defenses to Eviction in California*, NOLO (2018), https://www.nolo.com/legal-encyclopedia/tenant-defenses-evictions-california.html [https://perma.cc/A5VX-V6VX]; MYRON MOSKOVITZ & SONYA B. MOLHO, CALIFORNIA EVICTION DEFENSE MANUAL (Bonnie C. Maly, ed., 2d ed. 2017).

202. *See, e.g.*, CAL. INS. CODE §§ 1861.05(a), 1861.137(b), 11732.5, 12120, 12401.3(a) (2013).

discretion to occasionally modulate the premiums they charge on a case-by-case basis, even when the official premium has already been pre-approved through the normal process.[203] These rebates may often be beneficial to low-income customers looking for a rate reduction. However, though these rebates must not be applied in a discriminatory fashion, agents retain a high level of discretion to condition these rebates in a potentially discriminatory way.

As noted above, the DOI's regulations regarding the expenses a bail agent is able to charge in addition to the premium fee is currently vague. Many contracts tack on certain fees listed as "actual expenses." This extra charge often includes possible attorney's fees and all other fees arising out of the execution of the bail bond, such as costs associated with contacting defendants, seeking payments, or arising "as a result of information concealed or misrepresented" within the contract. The DOI should look at these regulations and clarify precisely the kinds of expenses a consumer may have to pay in addition to the premium.[204] Further, it should require bail companies to provide estimates to potential consumers regarding likely or potential additional expenses that may be incurred under certain conditions. Consumers should not be charged for arbitrary, vague, or unknown expenses.

Finally, I interviewed several individuals who were charged interest on their premiums when utilizing a payment plan. According to one DOI representative, it is not clear whether charging interest is legal. This ambiguity should be definitively clarified and, if interest on payment plans is permitted, the criteria for setting those interests rates should also be regulated.

These aspects of bail services must be adequately regulated to ensure that bail agents do not act in discriminatory or arbitrary ways when providing bail services.

2. Empowering Bail Consumers and Preventing Deception

The second most important goal for reforming the consumer bail context involves actively educating those consumers and preventing deception by bail agents. Perhaps the most viable and effective method of promoting this goal is to require jails to distribute informational pamphlets to defendants navigating the bail process. Many jails currently receive significant amounts of money selling advertising space to bail bond companies,[205] yet jails make little effort to inform

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203. *See* AD HOC COMMITTEES, 2012–2013 SAN BERNARDINO COUNTY GRAND JURY FINAL REPORT 71–72 (2013), http://www.insurance.ca.gov/0400-news/0100-press-releases/2015/upload/SBGrandJuryReport-BailSolicitation.pdf [https://perma.cc/CS4T-KRP7].

204. *See* CAL. CODE REGS. tit.10. §§ 2081–83 (specifying that agents can only charge expenses that are "actual, necessary, and reasonable," and must enumerate these added costs explicitly. However, because few details are articulated in the code, contracts generally preserve substantial discretion for bail agents); *see generally Are Bail Companies Following the Law?*, *supra* note 163.

205. Frequently in California, jails contract with the Jail Advertising Network which organizes advertising from most of the primary bail bond companies in the state. *See generally* Renteria, *supra* note 146.

defendants, who have no right to an attorney before arraignment, of the pretrial detention process and the commercial bail industry. As a consequence, defendants are frequently unaware that they can request a hearing to assess their eligibility for being released.[206] Defendants are also unaware that they can request a reduction in bail with the court.[207] Further, defendants do not have any reason to know that if they agree to wait until pretrial services assesses them, which sometimes occurs within hours of arrest, they may be recommended for release by a judge without bail.[208] Additionally, many defendants do not know that that if they are charged with a misdemeanor, they are generally entitled to release.[209] Instead, defendants will likely assume that soliciting a bail bond company is the only path to freedom.[210]

A pamphlet could describe to defendants how commercial bail bond companies work; specify the kinds of rates that agents charge and the conditions defendants are usually required to accept; and provide other information, such as the fact that even if one's case is later dismissed, any premiums charged by a bail agent must be paid. Considering the vulnerabilities and subsequent harms faced by defendant-consumers as articulated in Part I, this disclosure could go a long way to empower defendants as consumers. Further, in addition to a pamphlet, bail agents should be required to disclose important information when arranging transactions over the phone while a defendant is incarcerated. A mandatory disclosure could come in the form of a short script for agents or even an automatic recording that is played before the beginning of a call and that is created by a third party, such as a city's legal department. Indeed, many companies comply with similar requirements to disclose information, such as

206. This is a hearing to request release on one's own recognizance. *See* CAL. PEN. CODE § 1270.1(b) ("The prosecuting attorney and defense attorney shall be given a two-court-day written notice and an opportunity to be heard on the matter. If the detained person does not have counsel, the court shall appoint counsel for purposes of this section only."). According to Section 825, the requested hearing to assess eligibility for release shall take place within 48 hours. However, if you do not wait for your arraignment before posting bail, you will not be given counsel, and will therefore be unlikely to know of this opportunity. According to my interviews, very little information is provided at jails after booking. Further, in some counties, counsel is not guaranteed during arraignment.

207. *See* Administrative Office of the Courts, California Judges Benchguides: Bail and Own-Recognizance Release 55–13 (2013) ("A defendant who is arrested without a warrant for a bailable felony offense . . . *may, before arraignment and any other judicial determination of bail, apply for release on bail lower than that indicated in the schedule of bail or release on own recognizance* . . . by the defendant or the defendant's attorney, friend, or family member.") (emphasis added), http://www.sblawlibrary.org/uploads/7/3/1/1/7311175/bg55.pdf [https://perma.cc/B7V2-9359].

208. *See* SANTA CLARA BAIL AND RELEASE WORK GROUP, *supra* note 76, at 25.

209. CAL. PEN. CODE § 1270(a) ("A defendant who is in custody and is arraigned on a complaint alleging an offense which is a misdemeanor . . . shall be entitled to an own recognizance release unless . . . an own recognizance release will compromise public safety or will not reasonably assure the appearance of the defendant as required.").

210. *See* SANTA CLARA BAIL AND RELEASE WORK GROUP, *supra* note 76, at 7 ("The Department of Correction currently posts advertising for bail bond agents in County jail facilities to assist defendants in finding bail agents and posting bond. But information is not consistently posted about alternatives to bail bonds . . . . Thus, some defendants may post bond simply because they are unaware of other options . . . .").

when phone calls are recorded.[211] These verbal disclosures can mirror the kind of information the pamphlet would include.

Further, defendants should be able to call as many bail companies as desired free of charge. Because defendants are not affirmatively entitled to unlimited phone calls to bail bond companies, defendants are substantially disempowered as consumers. Defendants have no ability to shop around. To a large extent, they are pushed to simply accept the first person they call, regardless of the underlying deal. And in the same way that jails contract with bail companies for advertising, jails could similarly pass on charges of those calls to the bail companies themselves.

Also, instead of allowing bail agents to escort defendants back to their offices, bail agents should be required to present their contracts to defendants at the jails. Although agents are not allowed to solicit at jails in person,[212] perhaps they should be required to conduct some of their business at the jail before acquiring a defendant's release, after which a defendant is already indebted to the bail company and thus inclined to accept any and all terms. Preliminary transactions occurring in jails could further be monitored or supervised by jail staff. The overall purpose of such a requirement is to further level the playing field between the defendant-consumer and the bail agent.

Moreover, as noted above, the DOI currently regulates the solicitation of bail services by representatives of a bail bond company within jails.[213] However, print advertisements are the primary method of solicitation for defendants seeking bail services within jails. Because pretrial detainees have no right to legal representation at the bail setting stage, these advertisements serve as a primary source of information for defendant-consumers' expectations regarding the terms of a bail service agreement, particularly while they are detained and unable to access alternative information. Thus, they are vulnerable to misleading advertisements that suggest specific terms of a bail service agreement—such as premium rates, payment plans, security deposits, and collateral requirements—that may later turn out to be false, incorrect, or conditional. Advertisements may also fail to articulate certain terms that could later be required, such as weekly checkups, credit checks, and employment verifications. Because bail companies have no incentive to be upfront with such terms and prefer instead to reveal them later—when a potential customer must either agree to them or be surrendered back into custody—advertisements can lead to significant consequences. Given this context in which defendants contract with bail companies,[214] bail

211. Federally, see 18 U.S.C. § 2511(2)(d) (2012). In California, see CAL. PEN. CODE § 632(a).

212. *See* People v. Dolezal, 163 Cal. Rptr. 3d 901, 910 (2013).

213. 10 CAL. CODE REGS. §§ 2074, 2079, 2079.1; *see generally* Letter from Dave Jones, Insurance Commissioner, California Department of Insurance, to Bail Licensees, Reminder of Bail Solicitation Laws (Nov. 13, 2013), http://www.insurance.ca.gov/0200-industry/0120-notices/upload/NoticeBailSol.pdf [https://perma.cc/7HHX-98PC].

214. *See supra* Part I.E.

advertisements merit stricter regulation, such as mandatory disclosures, prohibited words, or a prohibition on the use of emotionally charged graphics.[215]

Stricter regulation could also apply to the very targeted advertising campaigns that bail bond companies engage in outside of the jail context. Through these efforts, bail bond companies frequently communicate that they "have your back" no matter what you have done or who you are.[216] Bad Boys Bail Bonds, for example, goes further in their advertising efforts with a series of posters, videos, and radio spots[217] that glorifies "being bad" and attempts to normalize deviance. Other companies, such as Bike Mike Bail Bonds, take on a different tactic, claiming they exist for when "bad things happen to good people."[218] East Coast Bail Bonds distributes shirts within communities from which it hopes to gain customers.[219] These are targeted branding efforts aimed to garner goodwill from communities likely in need of the bail companies' services. As such, the advertisements should at minimum be scrutinized to ensure they do not promote misinformation. Better yet, such advertisement efforts could be actively regulated in order to effectively educate individuals about the bail process and their rights.

Overall, advertisements, like solicitation rules more generally, should be precisely regulated by the DOI and other agencies to ensure that potential consumers within jails are as empowered as possible to make informed decisions regarding the bail service they would like to purchase.[220]

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215. Increasingly, the first amendment is being used to limit such prohibitions on what is known as corporate speech. *See* Joe Pinsker, *How Corporations Took Over the First Amendment*, ATLANTIC (Apr. 1, 2015), https://www.theatlantic.com/business/archive/2015/04/how-corporations-took-over-the-first-amendment/389249/ [https://perma.cc/MR47-LSKU]. Although not expanded on here, I hope that my analysis of the particularities of this advertisement context will serve as the basis to overcome any first amendment based objections to my suggestions requiring bail companies to disclose certain information.

216. See, for example, advertisements from Absolute Bail Bonds which state, "Our bail agents at will always have your back. Our professional agents have years of training and experience with helping people bail their friends or family members out of jail. No other bail company can help you better than we can. We know how to make bail bonds easy for all of our clients." *Bail Bonds Services in Vista Will Make Bailing Your Loved One Out of Jail Easy and Affordable*, ABSOLUTE BAIL BONDS (2018), http://www.absolutebailbonds.com/bail-bonds-services-in-vista-will-make-bailing-your-loved-one-out-of-jail-easy-and-affordable/ [https://perma.cc/WV67-EPWB]. Similar messages are expressed by All About Bail Bonds, Los Angeles Bail Bonds, HB Bail Bonds, and countless other companies.

217. For an example video, see BadBoys1299, *Bad Boys Bail Bonds 1*, YOUTUBE (Aug. 13, 2007), https://www.youtube.com/watch?v=u9yZnFhLcHA [https://perma.cc/A6ZT-FS92].

218. *See* BIG MIKE BAIL BONDS, http://www.bigmikebailbonds.com/bad-things-happen-good-people [https://perma.cc/8XRV-6K5F].

219. *See* Vice, *Inside America's For-Profit Bail System*, YOUTUBE (Jan. 21, 2016), https://www.youtube.com/watch?v=TGomdoO368g [https://perma.cc/E547-VPVY].

220. Stricter regulation of bail bond advertising may raise some legal issues. However, bail solicitation regulations are generally permissible, and the DOI may be able to increase regulations of print advertising within jails. *See* People v. Dolezal, 163 Cal. Rptr. 3d 901, 908 (2013) (holding that, because of the lack of sophistication among defendants detained pretrial, restrictions on solicitation "directly advance[] respondent's substantial interest in protecting arrestees from invasions of privacy and potentially intimidating, overreaching or fraudulent sales tactics by bail agents[,]" and thereby

3. Preventing Market Manipulation

Relatedly, bail companies have successfully promulgated the myth that they are not allowed to charge rates other than ten percent or, occasionally, eight percent.[221] In actuality, there is no specific statutory requirement to charge ten percent; the prevalence of this rate is due to market forces.[222] However, bail, which is a surety-type of insurance product, is subject to Proposition 103, which was passed in 1988 and established requirements for all insurers to file and obtain prior approval for their proposed rates before charging those rates to consumers.[223] Thus, insurers can decide for themselves what rate they want to charge, so long as the rate is first filed with the DOI and it approves the proposed rate. There is a contentious debate regarding whether such a regulatory framework promotes anti-competitive behavior.[224] However, it is likely that the bail companies' lies about the true nature of their obligations promote an anti-competitive situation that allows bail companies to rig the market forces that may otherwise have made bail more affordable for individuals. Since no one thinks bail companies can charge lower rates, bail companies do not have to compete with each other by pushing rates down. Admittedly, pushing rates down might produce other negative effects. Companies might, for example, simply establish fees elsewhere. However, bail companies should not be allowed to artificially solidify their rates by falsely claiming they are being regulated to charge specific

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passes the requisite intermediate scrutiny that attach to such regulations); *see also* Letter from Dave Jones, *supra* note 213.

221. *See, e.g.*, *The Cost of Bail in California*, TONYA PAGE-RYNERSON BAIL BONDS, http://www.familybailbonds.com/cost/ [https://perma.cc/G82A-B45W] (company charging a ten percent premium); *California's Legal Bail Interest Rate*, WAVE BAIL BONDS, http://www.wavebailbonds.com/article-california-interest-rate.php [https://perma.cc/RBB3-MNDL] (describing how the California Department of Insurance regulates bail bonds companies and allows charging only 10 percent, but sometimes 8 percent after rebates under Proposition 103. "At the lowest, an 8% rate after rebate is the very least a bail bonds company can charge for a premium, and any less is illegal." Therefore, even though "a lower premium may be tempting, paying less is not worth the risk of doing business with a company issuing bail bonds illegally.").

222. This was articulated to the author by Bryant Henley, Assistant Chief Legal Counsel in the Government Law Bureau of the California Department of Insurance, Nov. 23 2016.

223. *See generally* CAL. INS. CODE § 1861.01 (2013).

224. In support of Proposition 103, advocating that rate regulation has lowered rates and improved competition by preventing insurers from raising rates beyond reasonable levels. *See, e.g.*, J. ROBERT HUNTER ET AL., WHAT WORKS: A REVIEW OF AUTO INSURANCE RATE REGULATION IN AMERICA AND HOW BEST PRACTICES SAVE BILLIONS OF DOLLARS (2013), http://www.consumerfed.org/pdfs/whatworks-report_nov2013_hunter-feltner-heller.pdf [https://perma.cc/LG7N-2WJF]. In contrast however, opponents of Proposition 103 argue that such a framework harms rather than furthers market competition. The insurers' argument is that it is very difficult for an insurer to change its rates quickly because the regulatory scheme includes procedural delays to allow for public participation, hearings, etc. before a rate can take effect. Insurers also contend that it is easier to seek approval for a "high" rate rather than risk obtaining approval for a "low" rate, because if the "low" rate becomes too low, it takes too long to make up for the company's shortfall by filing and obtaining approval for a new rate. *See, e.g.*, IAN ADAMS, R STREET, THE TROUBLESOME LEGACY OF PROP 103 (2015), https://www.rstreet.org/wp-content/uploads/2015/10/RSTREET43.pdf [https://perma.cc/38MF-5GWL].

amounts. In reality, bail companies have substantial control over their pricing because they can simply file alternative rates with the DOI.[225]

4. Preventing Misconduct

The Insurance Code specifies certain requirements bail agents must comply with in order to operate legally.[226] Although these requirements are minimal, the failure to effectively regulate the licensing of bail agents and to adequately keep track of misbehaving bail companies renders consumers consistently susceptible to abusive conduct. Unfortunately, as described above, the DOI lacks the resources to ensure compliance, and measures to increase their funding have unfortunately been met with staunch opposition.[227]

However, compliance with Insurance Code regulations is achievable through other means. For example, the courts should play an expanded role in ensuring that defendant-consumers are only interacting with bail companies that are licensed. Without much difficulty or increased costs, courts should be able do two things. First, before accepting any bond by a bail company, the court should check with the DOI registry enumerating which agents are licensed. If an unlicensed bail agent attempts to post bond, the Court should reject the bond, assist the defendant in acquiring a new bond, and report the unlicensed agent to the DOI. Second, courts should actively report information to the DOI regarding those companies that failed to retrieve defendants after they did not appear or failed to pay the court money owed after a forfeiture. This reporting could help the DOI better determine who should continue being licensed, as is done in many other states.[228]

The DOI should also upgrade and make better use of its online license status checker.[229] The website should be redesigned in order to better facilitate its use by law enforcement, courts, and individual consumers. Consumers should be able to, for example, easily verify whether a particular agent is licensed, find licensed bail bond companies around them, and have quick access to complaints filed against a company.

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225. *See* CAL. INS. CODE § 1861.01 (2013).

226. *See generally Bail Agent*, CALIFORNIA DEPARTMENT OF INSURANCE, https://www.insurance.ca.gov/0200-industry/0050-renew-license/0200-requirements/bail-agent.cfm [https://perma.cc/HU9Q-HCDP].

227. COLOR OF CHANGE & ACLU, *supra* note 53, at 36.

228. *See* Amber Widgery, *Bail Forfeiture Procedures*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/civil-and-criminal-justice/bail-forfeiture-procedures.aspx [https://perma.cc/E6ZD-SD4T] (In Arkansa, "once a bail bonding company's pending debts exceed $100,000, or the amount of their posted security deposit, their license is suspended." Similarly, "Connecticut's code enables . . . suspend[ing] any license of a professional bondsman if they fail to pay a forfeited bond," and "[m]any other states enumerate failure to pay forfeiture as a reason that the license for a bail agent or insurer may be suspended.").

229. *See Check License Status*, CALIFORNIA DEPARTMENT OF INSURANCE, http://www.insurance.ca.gov/license-status/ [https://perma.cc/U7Q5-ZDMU].

The DOI currently has a process for filing complaints against insurance companies, which would include bail agents. This can be done via a hotline, mail, or the internet. The DOI is required to open up a file for each and every written complaint it receives.[230] However, the DOI should produce reports summarizing the array of complaints received and make these reports available to the public. This improvement is easily achievable, as these types of reports are already available for auto[231] and other forms of insurance.[232] Although the DOI makes available limited information regarding bail companies currently being investigated, this information is hard to find and too vague to be helpful to potential consumers.[233]

Finally, the DOI should actively encourage private suits brought by aggrieved consumers against unlicensed agents under the UCL.[234] The DOI should disseminate advisory documents aimed to help consumers self-advocate when dealing with potentially abusive bail agent practices. Overall, in the absence of additional funding to increase active enforcement of regulations by the DOI, the agency can still promote compliance and prevent misconduct at a limited cost.

CONCLUSION

It is time for California to cease abandoning consumers of bail services to the ravages of abusive conduct from bail companies. Despite substantial regulation of bail within the criminal and insurance context—regulating individuals as defendants and bail companies as sureties—the relationship

230. *See generally Getting Help*, CALIFORNIA DEPARTMENT OF INSURANCE, https://www.insurance.ca.gov/01-consumers/101-help/ [https://perma.cc/W4DU-P257].

231. *See Automobile Complaint Composite Report*, CALIFORNIA DEPARTMENT OF INSURANCE, https://www.insurance.ca.gov/01-consumers/120-company/03-concmplt/autocomposite.cfm [https://perma.cc/398B-S37H].

232. *See Homeowners Complaint Composite Report*, CALIFORNIA DEPARTMENT OF INSURANCE, https://www.insurance.ca.gov/01-consumers/120-company/03-concmplt/homecomposite.cfm [https://perma.cc/2D2V-CQ36].

233. According to conversations with DOI staff, no annual reports are provided publically detailing consumer complaints against bail bond companies. Nor are reports made available detailing which companies are being investigated. Online, an individual can search for a particular company, by name, in order to find out if it is being investigated, though even there, the information is limited. *See Company Profile Search*, CAL. DEP'T OF INS., https://interactive.web.insurance.ca.gov/companyprofile/companyprofile [https://perma.cc/2A7H-RL2N].

234. As of 2013, though the Insurance Code does not explicitly provide for a private right of action, consumers can bring claims relating to violations of the Insurance Code under the UCL's unlawful provision. Therefore, if consumers find out that their bail company is not licensed by the DOI pursuant the Insurance Code, consumers may pursue claims directly against the bail bond company, so long as other claims under the UCL are also pursued. *See* Zhang v. Superior Court, 57 Cal. 4th 364, 384 (2013) (holding that claims under UCL's "unlawful" prong claims that are predicated on violations of the Insurance Code are permissible); *see also* Two Jinn, Inc. v. Gov't Payment Serv., Inc., No. 09CV2701 JLS BLM, 2010 WL 1329077, at *5–6 (S.D. Cal. Apr. 1, 2010) (finding that a bail bond company brought a UCL claim against another company claiming it had violated the Insurance Code provisions regarding the licensing). *See also supra* note 170.

between bail companies and bail consumers urgently needs oversight. Reframed as consumers, individuals utilizing bail services should be entitled to the full protections afforded all consumers under existing consumer protection laws; and yet further, because of the existing stranglehold that bail companies enjoy over their customers, the government must affirmatively declare its support for the proper regulation of this market by enacting additional protections.

Insofar as we retain the existence of a money bail industry in our pretrial criminal justice system, it is clear that the industry as it exists inflicts substantial harm to defendant-consumers, their friends and families, and society at large. Indeed, it is hard to argue that the money bail industry should simply be abolished without reforming the overall pretrial detention system. After all, as long as bail amounts remain high, without a commercial bail system, most defendants will simply be incarcerated pretrial due to their inability to post bail. Understood this way, the bail industry is the byproduct of a criminal justice system that discriminates against the poor. This situation, however, does not mean that in the absence of comprehensive reform, we must live with an industry that can, with immunity, flagrantly exploit and abuse its consumers. In fact, this is ever more reason to establish a legal framework that extends protections that commonly attach to consumer interactions generally to those who utilize bail services, who are by design consumers of a commercial system due to the high price of bail and the lack of alternatives.

Even in the face of the growing movement to reform bail around the country, the bail industry is unlikely to fall away silently. In fact, it is already making plans to insert itself in developing markets for electronic monitoring and other forms of conditional supervision.[235] The industry is already designing plans to refashion itself as a generally applicable tool for solving the crisis of overcrowded jails. The bail industry hopes to do this by exporting the pretrial bail model to other phases of the criminal justice system, such as parole.[236] Some scholars believe that bail companies will successfully adapt to whatever changes to our bail system may occur.[237] Indeed, the industry will likely be highly influential in the process of those transformations.

Therefore, it is imperative that we make strides toward solidifying the protections that need to be afforded to bail consumers. Unlike the vast framework that regulates the relationship between bail companies and the state and between defendants and the state, defendants as consumers of bail companies have largely been ignored. We have already seen the widespread corrosive effects of such under-regulation has had on individuals across the country and within California.

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235. *See* Max Ehrenfreund, *What's Wrong With Making People Post Bail After Trial*, WASHINGTON POST (MAR. 16, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/03/16/whats-wrong-with-making-people-post-bail-after-trial/ [https://perma.cc/YW5Z-5HP3].

236. *Id.*

237. *See generally* Maruna et al., *supra* note 49, at 325.

As bail companies further embed themselves into the fabric of our criminal justice system, we must simultaneously carve out a proper haven in our laws for their consumers.