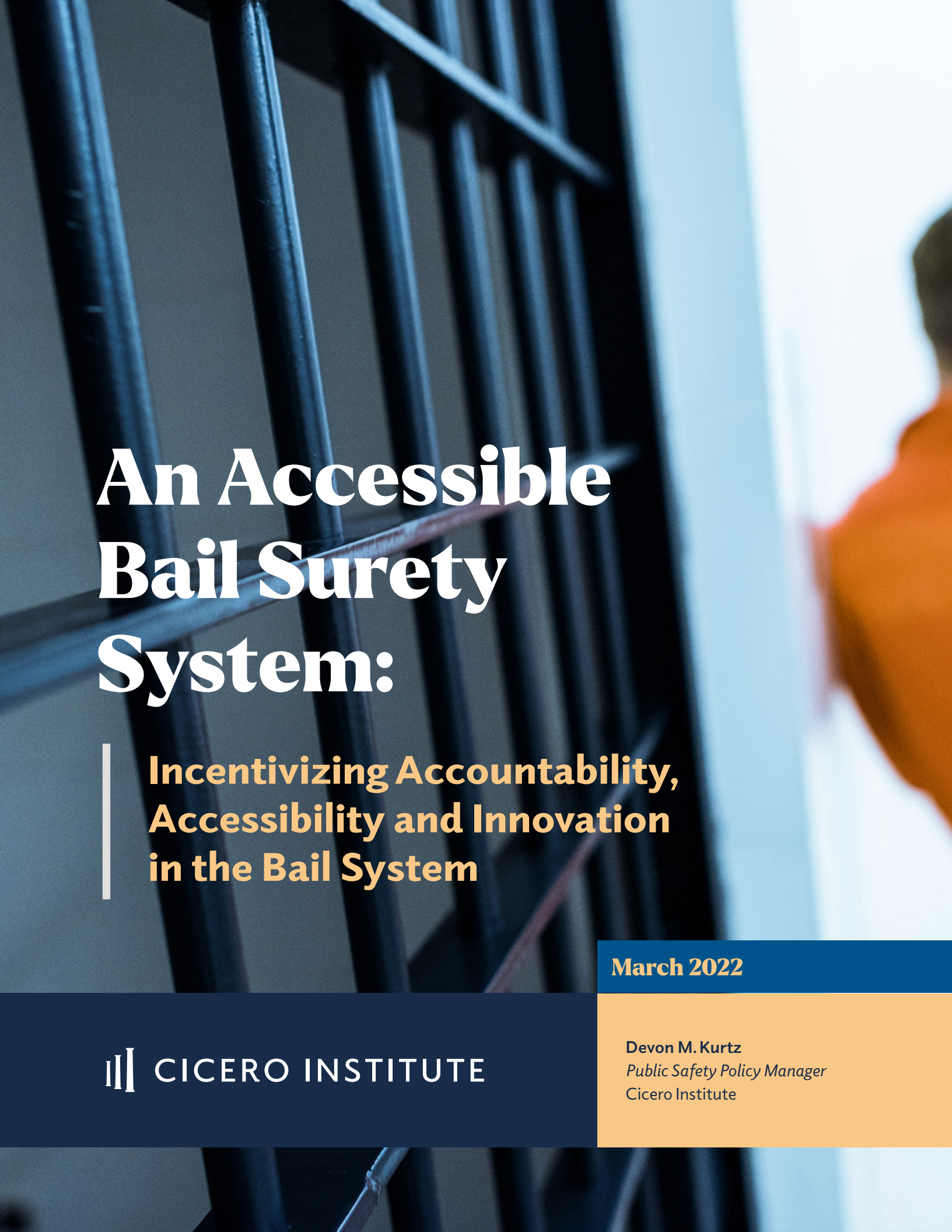

An Accessible Bail Surety System:

Incentivizing Accountability, Accessibility and Innovation in the Bail System

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Introduction

On any given day, approximately a half-million presumptively innocent individuals are held in pretrial detention.[1] For the vast majority of those individuals, the courts have set bail bond amounts that would justify release if someone were willing to become the defendant's bail "surety" for the bond amount—agreeing to forfeit the posted bond if the defendant does not abide by the conditions of release (e.g., refraining from committing new crimes, showing up for trial, etc.). The central function of such bail sureties is the same as for sureties generally: to guarantee or assure the fulfillment of certain obligations, with the sureties forfeiting the bond amounts if the obligations are breached. In short, bail sureties allow courts, in releasing defendants, to impose a sensible degree of responsibility and accountability.

In setting the bail bond amounts for defendants, courts are not guaranteeing that all of those defendants will be released. Some of those defendants are bad risks—they are likely to breach their obligations by violating their terms of release. No reasonable fee will entice parties to become sureties for such defendants. Those defendants should and do remain incarcerated.

Many defendants, however, are good risks—they are likely to abide by the terms of their release—and, for a reasonable fee, many sureties would be willing to post the bond and take responsibility for the defendant's conduct after release. Defendants having reasonable means will be able to pay those fees and will gain release. Yet defendants too poor to pay the fees will be stuck in jail, with the heavy costs of their incarceration being subsidized by the government to the tune of more than a thousand dollars per month for each incarcerated defendant. The result is excessive incarceration for defendants and excessive costs for taxpayers.

1 https://www.prisonpolicy.org/reports/pie2020.html.

POLICY PROPOSAL:

Accessible Bail Sureties

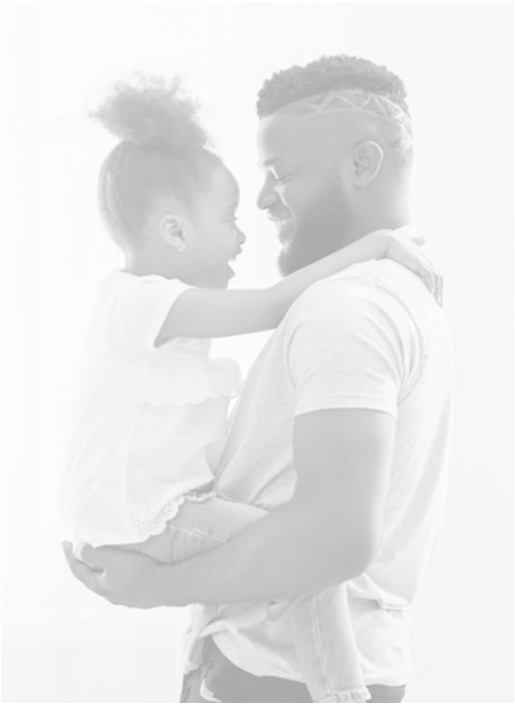
Our proposed solution addresses this problem by redirecting some of the massive public subsidies for jails to make bail sureties accessible even to the very poor. For defendants who are not bad risks, bail sureties typically charge fees of about 10 percent of the full bond amount to guarantee that the terms of release will not be breached. If public subsidies covered that small fee, poor defendants who are good risks could gain release (just as is true currently for defendants who are not so poor). But because bail sureties could be held liable for the full bond amounts for defendants who breached their conditions of release, sureties would not post bonds for defendants who are bad risks. Those defendants would stay in jail, as they should.

The level of the subsidy would be determined by competitive bidding, meaning sureties would submit the bond amounts that they are willing to pay based on the likelihood of the defendant committing new crimes or absconding, and the surety with the lowest bond amount would be selected.

For two reasons, it is important emphasize that the public subsidies in this system would be small. First, the system is designed to cost less, not more, than the present system. Currently, the public bears the full costs of jail (which are known to be huge) to keep in pretrial incarceration defendants who are good risks but simply too poor to pay bail surety fees. That's incredibly wasteful, and it leaves the criminal justice system open to legitimate criticism that the rich can obtain pretrial release, but the poor cannot. Subsidies small in relation to the cost of jail would save the public money and make bail accessible to the poor who are good risks.

Second, the subsidies contemplated would be small in comparison to the total bond amount so that the bail sureties would bear substantial losses if they post bonds for risky defendants who then breach the obligations imposed as conditions for release. The system thus makes bail accessible and also preserves bail's traditional function of ensuring the accountability needed to protect the public's legitimate interests in having defendants abide by the conditions of their release.

The proposal has numerous theoretical and practical strengths, including:



- it maintains the traditions of the bail system, including judges' powers to set high bail bond amounts where necessary to protect the public's legitimate interests;
- it holds sureties accountable where they make bad decisions to post bonds for untrustworthy defendants who then violate the terms of their release;
- it solves the problem of overincarceration of poor defendants without compromising public safety;
- it can save taxpayers enormous amounts of money (perhaps billions of dollars annually);
- it preserves cherished constitutional rights to bail; and
- it maintains a private, decentralized bail system that is far more likely than a centralized system run by a government bureaucracy to be capable of both (i) working with local communities to reduce the risks posed by released defendants and (ii) harnessing new technologies and innovations for predicting defendants' riskiness and monitoring their behavior if released.

Historical Context

Understanding the strength of our proposal requires an appreciation of two points about the Anglo-American traditions of bail that have been largely lost in the last half century.

First, it is completely wrong to believe, as many modern commentators do, that bail has traditionally been based on the idea that defendants should be required to post bonds to incentivize them to adhere to the conditions of their release. The traditional law of bail explicitly and emphatically barred defendants from ever posting their own bail bonds or from shouldering in any way the financial risk of loss due to a bond forfeiture.[2] Rather, a defendant had to have bail sureties, and the sting of loss due to the defendant's failure to comply with the conditions of release had to operate always on the sureties, never on the defendant. Thus, it is just wrong to criticize the tradition of bail in this country (as many modern commentators do) as establishing a "wealth-based system" governing pretrial release because, traditionally, defendants no matter how wealthy could never post their own bail.

The second point essential to understanding our proposal is that bail should not be viewed as the opposite of jail or as the "price" that the government charges defendants to get out of jail. For centuries, bail was thought of as a substitute for jail. As William Blackstone explained it, bailed prisoners are maintained in the "friendly custody" of their sureties.[3] As another eighteenth-century treatise put it, bail allows a defendant to have jailers "of his own choosing," with "the end of the Law" being for bail agents to "put [a bailed defendant] as much under the Power of the Court as if he had been in Custody."[4] As Justice Ruth Bader Ginsburg explained, the common law distinction between jail and bail is "a distinction between methods of retaining control over a defendant's person, not one between seizure and its opposite."[5]

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2 Duffy, John F. and Richard M. Hynes. "Asymmetric Subsidies and the Bail Crisis," in University of Chicago Law Review. October 2021. 1293. Professors Duffy and Hynes provided comments on a draft of this white paper.

3 Ibid. 1299.

4 Ibid. 1291.

5 Ibid. 1292.

Returning To Traditional Forms Of Bail

The more bail is viewed traditionally—as the "friendly custody" by a jailer of the defendant's own choosing—the more the dramatic difference in funding for the two forms of pretrial custody (nearly 100% for jail and 0% for bail) seems fundamentally wrong and in need of a new approach. Thus, a key to appreciating the case for our proposal is to recognize that, in paying for a defendant's bail surety fees, the government is not buying the defendant's freedom—it could give that to the defendant for free. Rather, the government is paying for sureties who will evaluate the riskiness of release, take some responsibility for the defendant, and pay the government a potentially hefty price (the full bail bond amount) if the defendant violates the terms of his release. In short, bail is a surety system, and sureties cost money.

Yet while sureties cost money, they cost a lot less than incarceration.[6] Thus, our system would almost certainly save taxpayers a lot of money because it calls not so much for new subsidies, but rather for redirecting some of the massive existing subsidies for jail. Extensive prior research demonstrates that jail is a very expensive way of ensuring that defendants do not commit new crimes pretrial and then show up for trial. Conservative estimates place that cost at well over $1,000 per month, and pretrial detention can easily last months. Many of those sitting in jail have already had the amount of bail sureties necessary for their release set by judges, and those amounts are often not exorbitantly high — perhaps in the range of several thousands of dollars. With a subsidy of a thousand dollars or less, private firms are highly likely to accept the

6 https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/01/local-spending-on-jails-tops-$25-billion-in-latest-nationwide-data.

responsibility of becoming sureties for many defendants. Not all defendants of course. The riskiest will remain in jail, but that's precisely the result society should want. The most socially expensive measure for controlling defendants during the pretrial timeframe (jail) should be reserved for the cases in which it's truly necessary. For other defendants—those who are better risks—society should use less expensive measures, like bail sureties. The end result will be significant gains in efficiency. Society can preserve public safety, reduce excessive restraints on liberty, and also save a great deal money—perhaps billions annually.

The strength of our proposal can also be seen by comparing it to two current alternative approaches for addressing the problem of overincarceration of poor but not especially dangerous defendants. The first approach is to lower the cost of bail across the board so that even relatively poor defendants can afford it. In the extreme, reformers argue for increased release upon "own recognizance," which is the same as setting the bail bond required at $0.[7] The fatal problem with that approach is that, as the amount of bail is lowered down to zero or near zero, all or almost all defendants can gain release—both the good and the bad risks alike. Extreme reductions in bail amounts undermine the basic, classic function of bail sureties, which is to make sure that someone bears responsibility for the defendant's behavior upon release. One predictable result of such an approach is that it compromises public safety. It also ends up being self-defeating because, when a bad risk is released via low bail and then causes great harm, there is a (quite reasonable) political backlash against bail amounts being set "too low."

That very dynamic can be seen in the recent case of Darrell Brooks, whom the Wisconsin courts released on a mere $1,000 bail even though he was accused of running over his girlfriend with the very car that he later used to kill several people in a Christmas parade.[8] In that case, even the quite liberal Milwaukee County District Attorney John Chisholm had to concede that the bail amount was set "inappropriately low." The Brooks case and reactions to it show that simply lowering bail is not a stable or long-run solution to the problem. Rather, that reform leads to an endless back-and-forth. Reasonable concerns about overincarceration of the poor lead to reductions in bail amounts, but then reasonable concerns about bail being set too low for dangerous defendants lead to increases in bail amounts. It's a cycle, not a solution.

Our proposed reform does not suffer from the problems associated with merely reducing bail bond amounts. We propose maintaining relatively high required bond amounts but then having the government provide relatively small subsidies (small in relation to the total bond amount) to incentivize sureties to post bonds for defendants who are good risks only. The subsidies will not induce sureties to post bonds for defendants who are bad risks because, crucially, the system will leave the sureties exposed to significant downside risk if defendants violate the terms of their release (either by failing to appear or by committing new crimes while on release). Thus, for example, the government might provide a $1,000 subsidy for a surety willing to post a $10,000 bail bond. Sureties will then have strong incentives to both avoid posting bonds for bad risks and, for the bonds they do post, to monitor those defendants to ensure that they abide by the conditions of their release (lest the surety lose the $10,000 bond). Subsidies will make bail accessible to the poor, but financial risks to bail sureties will prevent defendants who are bad risks from gaining release.

The other approach to bail reform currently being implemented in some states is to abolish the bail system entirely and place unchecked authority in the hands of a government bureaucracy to determine whether any particular defendant should be jailed or released. Both conservatives and civil libertarians should be deeply skeptical of that proposed reform. First, such a reform destroys a system so deeply ingrained in our country's traditions that it has constitutional recognition at both the state and federal levels. For policymakers who value some degree of continuity with the wisdom of the past, bail abolition should not be a first-choice policy solution. Second, bail abolition is not only untraditional; it is also an utterly upside-down solution. Overincarceration of presumptively

7 https://bailproject.org/faq/.
8 https://www.fox6now.com/news/darrell-brooks-freed-on-bond-before-parade-no-record-of-hearing.

innocent defendants is a serious problem, but it's a problem of too much governmental power. Aggrandizing governmental power even further—by eliminating a traditional check on the government's ability to jail defendants before trial—is not the right direction to go. Moreover, as the voters of California resoundingly demonstrated in the state's November 2020 referendum, the total elimination of constitutional rights to bail is deeply unpopular among ordinary citizens even in a state with a quite liberal electorate.[9]

There are also strong law-and-economics reasons for favoring bail subsidies over bail abolition. From an economic perspective, the choice between an accessible bail surety system and a government-run system for making all release/detention decisions is what the Nobel Prizing winning economist Ronald Coase identified as a "make-or-buy" decision. The government needs certain services—(i) evaluating the riskiness of defendants, (ii) possibly monitoring them during the pretrial period, and (iii) taking precautions to minimize socially costly behavior (e.g., failing to show up for trial or committing new crimes). The government can either "make" those services internally in a centralized fashion or "buy" them from a decentralized set of outside entities such as bail agents.

Two factors make the centralized governmental solution likely inferior to the decentralized solution. First, one of the widely acknowledged truths in the debate over pretrial detention is that rapid advances in electronic and computer technologies are having profound effects in the field. Our proposal allows private innovation to continue flourishing in the area. The alternative cedes the field to governmental actors—judges, magistrates, and bureaucrats in the criminal justice system—who, one might reasonably worry, could be less receptive to new technology and innovation than private actors in an open and competitive marketplace would be. Private actors who fail to adjust could be driven from the market, but government actors who fail to adapt face, at most, the weaker disciplining device of the ballot box (and perhaps not even that for appointed judges).

A second point is that the decision to release or detain a defendant requires good information, and a decentralized, competitive system might be better at generating information than a centralized governmental system. Ever since the Nobel prize winning work of Friedrich Hayek, economists have appreciated the ability of markets and other decentralized, competitive systems to aggregate and harness information. Here information is crucial, and local bail sureties might have far better access than judges to information about an individual defendant's reputation in the community. Indeed, judges have limited ability to gather information through formal and time-consuming court proceedings, whereas local bail sureties could, for example, talk informally to mutual friends, family, and employers to find out whether the defendant has a good or bad reputation in the community. The very strength of bail traditions in our legal system seems to reflect this wisdom, as courts have looked to bail sureties to take responsibility for sorting the good risks from the bad.

9 https://www.latimes.com/california/story/2020-11-03/2020-california-election-prop-25-results.

Conclusion

Incarcerating low-risk people who could otherwise get out of jail on bail before trial is an expensive and imprecise way to uphold public safety. But most bail reform proposals are worse for society than the status quo. A better bail system would incentivize private bail sureties to sort the "good risks" from the "bad risks," irrespective of an individual defendant's ability to pay for a surety's services, and would hold those sureties accountable if defendants breach the terms of their release. An accessible system of bail sureties is an affordable, effective, and decentralized way to address the problems in America's bail system while balancing concerns about access and accountability.

Author

Devon Kurtz is the Public Safety Policy Manager at the Cicero Institute. He studied Classics at Dartmouth College, where he also served as Editor-in-Chief of The Dartmouth Review. Prior to joining Cicero, Devon worked at the American University of Kuwait in Kuwait City. Beyond his professional role, Devon also mentors men coming out of Vermont's prison system through the Hartford Restorative Justice Center. His writing on crime, police, and prisons has been featured in The Wall Street Journal, The Hill, City Journal, and The Boston Herald.

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