BAILING ON A BROKEN CASH BAIL SYSTEM: A COMPARATIVE ANALYSIS OF CASH BAIL REFORM IN NORTH CAROLINA, KENTUCKY, AND CALIFORNIA

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I. INTRODUCTION

Despite its historical reputation for individual liberty, the United States is the incarceration capital of the world.[1] With fewer than five percent of the world's population, the United States holds twenty-five percent of its prisoners.[2] The cause for this high percentage appears to be a combination of policy, policing, and related cultural trends.[3] While endless suggestions exist for reducing the prison population, making the criminal justice system run more effectively, and cutting the costs that accompany incarceration, an ideal starting point for reform is cash bail, a system that overwhelmingly controls persons entangled in the criminal justice system.

Thousands of defendants appear daily in U.S. courts to have pretrial release conditions set for them.[4] Defendants must satisfy these conditions to ensure their appearance for subsequent court dates.[5] One important condition is paying a cash bond in return for pretrial release.[6] The amount imposed is based on the seriousness of the crime, the defendant's criminal history, and other factors related to appearance in court.[7] However, calculation of the amount imposed almost always lacks any inquiry into the

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* J.D. Candidate, May 2020, University of Louisville Louis D. Brandeis School of Law; B.A. Peace and Social Justice, Berea College, 2017. Special thanks to my village for the unwavering support and encouragement. To the thousands behind bars because you are too poor to afford bail, you are the inspiration for this Note. To public defenders past, present, and future, you are fighting the best fight. I can't wait to join you.

[1] *See* Michelle Ye Hee Lee, *Does the United States Really Have 5 Percent of the World's Population and a Quarter of the World's Prisoners?*, WASH. POST (Apr. 30, 2015, 10:00 A.M.), https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/.

[2] *Id.*

[3] *Id.*

[4] *See Judicial Business 2019*, U.S. CTS., https://www.uscourts.gov/statistics-reports/judicial-business-2019 (last visited May 18, 2020) (stating that the "[c]ases opened in the pretrial services system, including pretrial diversion cases, increased 9 percent to 108,606"). These figures only account for defendants that are charged in the federal judiciary and does not consider defendants charged in each state's criminal justice system.

[5] *See, e.g.*, 18 U.S.C. § 3142(c) (2012).

[6] *See, e.g., id.* § 3142(b).

[7] *See, e.g., id.* § 3142(g).

defendant's ability to pay.[8] As a result, many remain incarcerated for extensive periods awaiting trial.[9] They are detained not because they are dangerous or unlikely to appear, but simply because they lack the funds to satisfy the bail amount set for them.[10] The current cash bail system is costly and ineffective for the incarcerated, their families, and the taxpayers who are ultimately paying for any lengthy pretrial detention.[11] In 2014, pretrial detainees accounted for over half of the local jail population nationwide.[12] Thus, inability to post cash bail leaves many defendants feeling punished before any proof against them is brought forth.[13]

The idea of looking into the cash bail system and bail reform first occurred to this author years ago as a result of daily visits to clients at a North Carolina jail during an undergraduate internship at the Guilford County Public Defender's Office. The experience of Harry Blankenship[14] paints an all-too clear and typical picture of the personal effect that the cash bail system has on people every day:

> As I walk into an attorney room at the Guilford County Jail, files and notepad in hand, a man in an orange jumpsuit is already seated on the other side of the glass waiting for me. As our eyes meet, I pick up on the uncertainty on Harry Blankenship's face. Mr. Blankenship is a client I have visited three times before who is being held on multiple misdemeanor charges. He is the primary caregiver for his elderly uncle whom he has not been able to contact since being incarcerated. He is the father of a young child for whom he is currently battling to have custody. And since he has been in police custody for a few weeks, he will most likely be released to discover that he has lost his job and been evicted from his housing. "Any news on my case?" he asks. Given his predicament, I prepare myself for an angry response, backlash even, when I answer, "I'm afraid not. I will keep trying to call your family members to see if anyone is able to bond you out," I reply. "If not, it looks like you'll be waiting in

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[8] Megan Stevenson & Sandra Mayson, *Pretrial Detention and Bail*, *in* 3 REFORMING CRIMINAL JUSTICE 21, 21 (Erik Luna ed., 2019), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_3.pdf.

[9] *Id.* at 23.

[10] *Id.*

[11] *Id.*

[12] TODD D. MINTON & ZHEN ZENG, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2014 (2015), https://www.bjs.gov/content/pub/pdf/jim14.pdf.

[13] *See* Jessia Silver-Greenberg & Shaila Dewan, *When Bail Feels Less Like Freedom, More Like Extortion*, N.Y. TIMES (Mar. 31, 2018), https://www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html.

[14] The defendant's name has been changed to protect his identity.

here until your court date in two weeks."[15]

Mr. Blankenship, like many other indigent defendants desperate to get out of jail, was never able to pay the bail amount set for him. He eventually took a plea deal, simply so he could be released.[16]

This Note compares three state cash bail systems: North Carolina, Kentucky, and California, each of which has unique bail practices at different locations along the reform continuum. Analyzing and comparing these practices will help determine which are the most effective reform methods. This Note ultimately proposes a model statute for cash bail that best serves the interests of defendants, community members, and officers of the court.

II. HISTORY

The concept of reasonable bail was on the minds of this nation's Founders and is still essential to how the criminal justice system functions today.[17] The U.S. Constitution includes a provision protecting citizens against "excessive bail," but it lacks an explicit "right to bail."[18] Most state constitutions assert a right to bail for all persons not charged with capital crimes, but that right fails to include monetary limits.[19]

It took more than 150 years for the U.S. Supreme Court to describe "excessive" bail under the Constitution.[20] The Court stated in *Stack v. Boyle* that a defendant's right to release before trial "is conditioned upon the accused giving adequate assurance to appear and submit" to sentencing if found guilty.[21] It held that any bail amount set higher than what is reasonably necessary to ensure a defendant's appearance is considered excessive.[22]

Legislative bail reform appeared at the federal level in 1966 with the Federal Bail Reform Act.[23] While the Act encouraged defendants' release, it

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[15] Kaylee Raymer, *My Part in a Noble Task: Reflections of an Attorney Case Support Intern*, SHEPHERD HIGHER EDUC. CONSORTIUM ON POVERTY (Sept. 7, 2016), https://www.shepherdconsortium.org/my-part-in-a-noble-task-reflections-of-an-attorney-case-support-intern/.

[16] *Id.*

[17] U.S. CONST. amend. VIII.

[18] *See id.*

[19] *See, e.g.*, CAL. CONST. art. I, § 12(c); KY. CONST. § 17; N.C. CONST. art. I, § 27.

[20] Stack v. Boyle, 342 U.S. 1, 5 (1951).

[21] *Id.* at 4.

[22] *Id.* at 5.

[23] Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214.

also allowed prolonged detention for defendants who could not meet prescribed conditions, so long as such detention "did not amount to unconstitutional punishment."[24]

Current federal bail policy is found in the Bail Reform Act of 1984,[25] which contains amendments to the original 1966 act.[26] "[D]anger to any other person or the community" is added to risk of flight as a category considered by judges in setting a bail amount for a defendant.[27] This "dangerousness" category includes danger to the safety of any alleged victims, possible witnesses, as well as potential danger to the community if the judge releases the defendant.[28] The 1984 Act also requires courts to impose the "least restrictive" conditions that are "reasonably necessary" to assure appearance and to assure the safety of any other person and the community.[29]

Money bail remains the primary method used by courts to ensure a defendant's appearance for subsequent court proceedings.[30] However, there are other methods available to a court, including releasing a defendant on a promise to reappear, either by imposing an unsecured bond or releasing the defendant on his or her own recognizance.[31]

When imposing the bail of its choice, the state has an obvious interest in preventing any future crime, as well as an interest in protecting its citizens.[32] The pretrial release and detention system seeks to balance these interests, while keeping in mind the interest in "minimizing intrusion to defendant's liberty" and the presumption of innocence.[33]

Procedurally, every arrested person is constitutionally entitled to appear before a judicial officer within forty-eight hours of arrest.[34] This appearance exists to determine whether there is probable cause that the defendant committed a crime, but even if the defendant was arrested with a warrant supported by probable cause, the judge will also make a determination

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[24] Richard F. Lowden, *Risk Assessment Algorithms: The Answer to an Inequitable Bail System*, 19 N.C. J.L. & TECH. 221, 226 (2018).

[25] 18 U.S.C. §§ 3142–3150 (2012).

[26] *Compare generally id.*, *with* Bail Reform Act of 1966.

[27] 18 U.S.C. § 3142(d)(2).

[28] *See id.*

[29] *Id.* § 3142(c)(1)(B), § 3142(c)(1)(B)(xiv).

[30] Stevenson & Mayson, *supra* note 8, at 24.

[31] *See* 18 U.S.C. § 3142(b). An unsecured bond releases the defendant without requiring the defendant to pay any money, but it does require the defendant who later fails to appear in court to pay the set amount. Moreover, a release on recognizance involves releasing a defendant simply after a signed promise by the defendant to make his or her future court appearances.

[32] Stevenson & Mayson, *supra* note 8, at 24.

[33] *Id.*

[34] County of Riverside v. McLaughlin, 500 U.S. 44, 58–59 (1991).

about pretrial release at this appearance.[35] If the judge imposes a monetary condition, the defendant must pay that specified amount to the court, essentially as a promise to appear for future proceedings in return for pretrial release.[36] If the defendant does appear, the defendant (or the surety who posts the monetary amount on defendant's behalf) will receive the amount posted at the end of all proceedings.[37] However, a defendant's failure to appear results in a forfeiture of any monetary amount.[38]

There are a few means by which a defendant may pay the monetary amount to secure release. In states that allow commercial bondsmen, the bail bondsman company will post the defendant's bond for a fee.[39] The commercial bail industry profits almost two billion dollars annually across the country.[40] Bail bondsmen typically charge a non-refundable fee that amounts to a certain percentage of the bond amount (usually ten percent) to post a defendant's bail.[41]

In some states, courts allow the defendant personally to deposit a percentage of the total bond amount to be released.[42] Finally, in the event that a defendant is still unable to pay for pretrial release, some communities have Community Bail Funds,[43] through which funds are generated by donations from individuals in the community to help pay the monetary amounts for those who cannot afford it themselves.[44] When the defendant's case concludes, the money returns to the community bail fund for another defendant to use.[45]

At the state level, while many states model their bail statutes after federal law, the use and application of cash bail may differ from state to state.[46] Nearly half of states guarantee a right to release if the defendant is charged with a non-capital offense, while the remaining states have much

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[35] *See* Stevenson & Mayson, *supra* note 8, at 25.

[36] *Id.* at 24.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 26.

[40] Silver-Greenberg & Dewan, *supra* note 13.

[41] Stevenson & Mayson, *supra* note 8, at 26.

[42] *Id.*

[43] *Id.*

[44] *Id.* (citing Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 600 (2017) (noting that community bail funds have proliferated recently, motivated by "beliefs regarding the overuse of pretrial detention")).

[45] *See generally* BAIL PROJECT, https://bailproject.org/ (depicting a flowchart of "how it works," with bail being set, paid for from the community bail fund, and the funds returned at the conclusion of the client's case—allowing for the money to be used to help another client) (last visited May 20, 2020).

[46] *See* Stevenson & Mayson, *supra* note 8, at 28.

broader rules for allowing defendants to be held without bail.[47] Almost every state also looks into public safety and other conditions when setting pretrial conditions for release.[48]

A. North Carolina

In North Carolina, like many other states, the cash bail system operates through bonding companies to ensure defendants appearing for court is a lucrative, privatized industry.[49] State law governs the North Carolina bail bond industry.[50] The state's Commissioner of Insurance must license all bail bondsmen.[51] As surety for their defendant consumers, bail bondsmen have the power to physically detain defendants who fail to appear at their court dates and thus may cause the bondsmen to forfeit money.[52] In order to avoid forfeiture of the money that the bondsmen has used to obtain the defendant's release, it is common for bail bond companies to use bounty hunters to apprehend defendants and turn them over to the court.[53]

B. Kentucky

Unlike North Carolina, it is illegal in Kentucky to profit from the bail system.[54] In 1976, Kentucky became a national leader in bail reform when its legislature created the Pretrial Services Agency and made for-profit bail illegal.[55] The 1976 law completely eliminated the commercial bail industry within Kentucky.[56] It also required that any out-of-state bondsman seeking

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[47] *Id.*

[48] *See id.* at 24.

[49] Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1407 (2018) (citing Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last A Lifetime*, WALL STREET J. (Aug. 18, 2014), https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402).

[50] *See* N.C. GEN. STAT. § 15A-531 (LEXIS through Sess. L. 2020-1 of the 2019 Reg. Sess. of the Gen. Ass.)

[51] *Id.* § 15A-531(4).

[52] *Id.* § 58-71-30.

[53] *See id.* § 58-71-1(9) (defining a "runner" as "[a] person employed by a bail bondsman for the purpose of . . . assisting in the apprehension and surrender of defendant to the court").

[54] *Compare id.* § 15A-531(1), *with* KY. REV. STAT. ANN. § 431.510 (LEXIS through Ch.128 of the 2020 Reg. Sess.).

[55] Robert Veldman, Note, *Pretrial Detention in Kentucky: An Analysis of the Impact of House Bill 463 During the First Two Years of Its Implementation*, 102 KY. L.J. 777, 780 (2014); *see also* § 431.510.

[56] Alysia Santo, *Kentucky's Protracted Struggle to Get Rid of Bail*, MARSHALL PROJECT (Nov. 12, 2015, 7:15 A.M.), https://www.themarshallproject.org/2015/11/12/kentucky-s-protracted-struggle-to-get-rid-of-bail.

to seize someone in Kentucky who failed to appear for court elsewhere must obtain a warrant in order to legally apprehend the person.[57] To replace the bail bond industry, the legislature created a statewide agency that relies on a risk assessment of the defendant to evaluate whether pretrial release is appropriate on a case-by-case basis.[58] The creation of the Kentucky Pretrial Service Agency was also revolutionary, as it was the only state-funded program of its kind available to all 120 counties in the state.[59]

The pre-trial services risk assessment tool consists of a series of questions about a defendant's history and other factors.[60] Some of the factors include an inquiry into "whether [the] defendant constitutes a flight risk, is unlikely to appear for trial, or is likely to be a danger to the public if released."[61] This analysis may also involve assigning scores to the defendant which the judge uses to analyze and set monetary release conditions.[62] The law mandates that a monetary amount be "sufficient to ensure compliance with the conditions of release set by the court,"[63] "not oppressive,"[64] related to the "nature of the offense charged,"[65] "considerate of the past criminal acts and the reasonably anticipated conduct of the defendant if released,"[66] as well as "considerate of the financial ability of the defendant."[67]

Since 2011, Kentucky law has encouraged judges to first consider releasing low-level and low-risk offenders without requiring money, and where money was a requirement, the judge is to explain why.[68] Because the law does not require a detailed explanation, many judges who choose to require a monetary payment in return for release simply give very brief explanations for the record to justify the use of cash.[69]

While Kentucky's risk assessment model has been adopted by other states, it is imperfect because judges have excessive discretion to account for the broad range of defendants whose record of court appearances is unpredictable. "You're not going to find a judge in this country that would

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[57] KY. REV. STAT. ANN. § 440.270 (LEXIS through Ch.128 of the 2020 Reg. Sess.).
[58] *Id.*
[59] Veldman, *supra* note 55, at 780.
[60] Santo, *supra* note 56.
[61] KY. REV. STAT. ANN. § 431.066(2).
[62] *Id.*
[63] *Id.* § 431.525(1)(a).
[64] *Id.* § 431.525(1)(b).
[65] *Id.* § 431.525(1)(c).
[66] *Id.* § 431.525(1)(d).
[67] *Id.* § 431.525(1)(e).
[68] *See id.* § 431.066(6).
[69] Santo, *supra* note 56.

get it right every time," said circuit court Judge William Clouse of Clark County.[70] In fact, the model has even come under scrutiny when judges set low bail amounts or lenient release conditions for defendants who commit additional crimes after being released.[71]

C. California

In the world of cash bail reform, California recently placed itself in the centerstage spotlight when its legislature passed a bill that would outlaw cash bail entirely.[72] However, after the bill was signed into law, a coalition of bail industry groups successfully garnered the requisite 40,000 signatures to have a statewide referendum on the law in November 2020.[73] The legislation, which was set to go into effect October 2019, completely eliminates the exchange of money as a means of pretrial release.[74] Although the reform is not yet official, this legislative development is especially intriguing because California still allowed commercial bondsmen prior to the passage of the bill.[75]

Under the new law, state employees are to conduct a pretrial risk assessment to determine a defendant's "risk" level.[76] The risk, which will ultimately be either low, medium, or high comes from the defendant's likelihood to appear for subsequent proceedings.[77] Those whom the court determines are high risk are not released pretrial.[78] Given the unprecedented nature of this bill, its implications and the impact it will have if it survives the 2020 referendum are unknown.

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[70] *Id.*

[71] *Id.* In one instance, there was a public uproar about a $10,000 bail set for a low risk offender despite the fact that he was charged with murder. *Id.*

[72] Vanessa Romo, *California Becomes First State to End Cash Bail After 40-Year Fight*, NPR (Aug. 28, 2018, 10:49 P.M.), https://www.npr.org/2018/08/28/642795284/california-becomes-first-state-to-end-cash-bail.

[73] Jazmine Ulloa, *California's Historic Overhaul of Cash Bail Is Now on Hold, Pending a 2020 Referendum*, L.A. TIMES (Jan. 16, 2019), https://www.latimes.com/politics/la-pol-ca-bail-overhaul-referendum-20190116-story.html.

[74] *Id.*

[75] *Id.*

[76] Madison Park, *California Eliminates Cash Bail in Sweeping Reform*, CNN, https://www.cnn.com/2018/08/28/us/bail-california-bill/index.html (last updated Aug. 28, 2018, 11:08 P.M.).

[77] *Id.*

[78] *Id.*

III. ANALYSIS

This section will analyze the impact of the cash bail system on a closer level, specifically looking at its impact in North Carolina, Kentucky, and California. Further, this Part examines existing alternatives to cash bail. Ultimately, the purpose of the Note is to determine the most effective method of reform. This analysis will lead to the proposal of a model statute for implementation at the state level.

A. Cash Bail by Its Very Nature Disadvantages the Poor and the Over-Policed

It is a common sentiment that a person charged with a crime in America is better off being rich and guilty than poor and innocent.[79] This phrase seems to suggest that money plays a powerful role in the ability of a defendant to obtain fair treatment in the criminal justice system. It also represents an undeniable truth when it comes to cash bail, because incorporating money as a condition of release undoubtedly disadvantages those with limited financial resources.

As previously discussed, the purpose of bail is not punitive.[80] Rather, bail exists to ensure a defendant's appearance for future court proceedings.[81] For indigent defendants, however, the cash bail system certainly feels punitive since poor defendants are less likely to have the financial resources to post bail and thus, they are less likely to be released.[82] In addition to the inability to post bail, many poor defendants who might not face prison time if they went to trial are likely to enter guilty pleas just to be able to go home.[83] Poor defendants who remain in jail pretrial also

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[79] *See Equal Justice for the Poor, Too; Far Too Often, Money—or the Lack of It—Can Be the Deciding Factor in the Courtroom, Says Justice Goldberg, Who Calls for a Program to Insure Justice for All Americans*, N.Y. TIMES (Mar. 15, 1964), https://www.nytimes.com/1964/03/15/archives/equal-justice-for-the-poor-too-far-too-often-moneyor-the-lack-of.html; Michael Gordon, *Yes, Rich People Have a Better Chance of Getting Off in Court, Public Defender Says*, CHARLOTTE OBSERVER (Sept. 21, 2017, 6:45 P.M.), https://www.charlotteobserver.com/news/politics-government/article174707216.html. As Justice Hugo Black opined, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Griffin v. Illinois, 351 U.S. 12, 19 (1956).

[80] *See* 18 U.S.C. § 3142 (2012); *see also How Courts Work*, ABA (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail/ ("The purpose of bail is simply to ensure that defendants will appear for trial and all pretrial hearings for which they must be present.").

[81] 18 U.S.C. § 3142(c)(1)(B)(xi)–(xii).

[82] *See* Alex Petrossian, Note, *Finally Some Improvement, But Will it Accomplish Anything? An Analysis of Whether the Charitable Bail Bonds Bill Can Survive the Ethical Challenges Headed Its Way*, 40 FORDHAM URB. L.J. 2013, 2019 (2013).

[83] *Id.*

suffer from other unintended consequences such as loss of housing, custody of children, and jobs, as well as a limited capacity to assist in their own defense while incarcerated.[84]

Aside from personal observation and anecdotes, it is difficult to know the number of people who remain in jail simply because they cannot afford to post the monetary amount set by the court. No such statistical data exists. Many defendants, such as Harry Blankenship, eventually decide to accept a plea bargain from the prosecution, regardless of their actual guilt, because they would rather go home than wait in jail and fight their charges.[85] Pre-trial incarceration is undoubtedly a factor that leads poor defendants to take plea deals, as their confinement leaves them with little bargaining power.[86]

Aside from its impact on indigent defendants, reform of the cash bail system cannot be fully examined if one does not mention the racial factor that plagues the criminal justice system. Statistics support the widespread impression that people of color experience incarceration at rates much higher than their white counterparts.[87] While incarceration and bond determinations for people of color vary depending on geographic location, criminal charge, trial judge, and other factors, thirty-five percent of black defendants—who make up only thirteen percent of the nation's overall population—are detained pretrial.[88]

Issues surrounding the cash bail system are more complicated than just bond amount and race. For instance, racially-motivated practices that harm people of color, as well as increased policing in certain areas or communities, may be factors in why so many people enter the criminal justice system to begin with.[89] Yet, analyzing a cash bail system and the lives of those it harms would be incomplete without any mention of race. Being aware of explicit and implicit bias on the part of judges and all stakeholders is necessary for the furtherance of any valuable conversation on bail reform, especially in a system that allows judges to the option to grant either a release on one's own recognizance or set cash bail.

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[84] *Id.* The Supreme Court has stated that one of the "most critical period[s] of the proceedings" is the time period between arraignment and trial, where a defendant would be able to assist in their own defense with counsel. Powell v. Alabama, 287 U.S. 45, 57 (1932).

[85] *See* Raymer, *supra* note 15.

[86] Petrossian, *supra* note 82, at 2019.

[87] Stevenson & Mayson, *supra* note 8, at 29.

[88] *Id.*

[89] *See* Drew Desilver et al., *10 Things We Know About Race and Policing In the U.S.*, PEW RES. CTR. (June 3, 2020), https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/.

B. The Privatized Bail Industry Operates in Clear Opposition of Bail's Purpose

Both law and history support the conclusion that the purpose of bail is to ensure a defendant's appearance at future proceedings, with added determinations about safety concerns and flight risk.[90] On its face, bail's purpose does not leave room for commercialization. However, the bail bond industry links the criminal justice system to private, for-profit companies.

Not only do bail bond companies make money from providing services, they also have a heightened incentive to make sure defendants appear in court. If defendants fail to appear, the company loses money and may risk trouble with their own insurers, as the industry requires companies to have "build up" funds of certain amounts by their insurers.[91] When a defendant does not show up to court, also known as "skipping" or "jumping" bail, the company must dip into that "build up" fund to account for the loss of money forfeited to the court as a result of the defendant's failure to appear.[92] Naturally, the more defendants who fail to appear in court, the more money the bail bond company loses.[93] The loss of money explains why the companies often hire bounty hunters, taking matters into their own hands, and try to track defendants down.[94] It is necessary for companies to take on this role because local police often lack the resources and time to spend actively tracking down defendants who do not appear.[95]

1. North Carolina

In North Carolina—the only state in this analysis whose laws still permit a private bail bond industry—those authorized to practice as bail bondsmen personally have the authority to detain defendants who owe them money from skipping on bail.[96] In addition, the commercial bail industry is not a system that is free from bribery or bias. Because bail bondsmen rely on the continual setting of high bonds for their livelihood, there is also an increased possibility of corruption involving the relationships such

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[90] *See* 18 U.S.C. § 3142 (2012).

[91] *See* Petrossian, *supra* note 82, at 2021.

[92] *Id.*

[93] *Id.* at 2022–23.

[94] *See id.*

[95] *Id.* at 2021.

[96] *See* N.C. GEN. STAT. § 58-71-30 (LEXIS through Sess. L. 2020-1 of the 2019 Reg. Sess. of the Gen. Ass.).

companies have with other stakeholders in the criminal justice system, especially when both prosecutors and judges take office by election.[97]

2. Kentucky

Kentucky finds itself on the opposite end of the spectrum with this issue as the first state to abolish for-profit bond industries.[98] A legislative act in 1976 outlawed for-profit bond industries altogether.[99] While advocates of bail reform usually support such abolition, what is unique, and perhaps most notable, about Kentucky's reform is *how* it replaced the bail bond industry. The same legislation also created the Pretrial Services Program, resulting in roughly ninety percent of defendants released before trial making future appearances and ninety-two percent not returning to jail.[100]

Completely outlawing the cash bail industry had clear, unavoidable effects on those who chose the cash bail system as their livelihood. However, it seems Kentucky chose the integrity of its criminal justice system over the concern of losing the private bail bond industry. As for those practicing in the bail bond industry, there is always the possibility to relocate to another state where the practice is still legal.

Conversely, the bail bond industry is not all bad. For some defendants, the availability of a bail bondsman who is willing to post their bond is the only opportunity for release available.[101] That said, Kentucky's post-bondsmen experiences show that reducing the reliance on money bail as a whole creates less of a need for such an industry.[102]

C. Alternatives and Substitutes to the Current System

For many, it might seem radical, unrealistic, and perhaps even impossible to imagine a state system that does not use money in pretrial

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[97] *See, e.g.*, John Simerman, *Orleans Judges to Testify in Federal Trial Now Underway in Bond-Rigging Scheme*, NOLA (Apr. 11, 2017, 11:03 A.M.), https://www.nola.com/news/courts/article_57e8ab48-1ea7-5bb2-889f-2a89a3c71602.html; *see also* Caitlin Liu, *Bail Bondsman Gets 3 Years in Corruption Case*, L.A. TIMES (Apr. 12, 2005), https://www.latimes.com/archives/la-xpm-2005-apr-12-me-bail12-story.html.

[98] *See* KY. REV. STAT. ANN. § 431.510 (LEXIS through Ch.128 of the 2020 Reg. Sess.).

[99] *Id.*

[100] Samantha Young, *To Fix 'Unfair' Bail System, Will California Copy Kentucky?*, CAL MATTERS (Aug. 9, 2017), https://calmatters.org/articles/fix-unfair-bail-system-will-california-copy-kentucky/.

[101] Silver-Greenberg & Dewan, *supra* note 13 ("Had Mr. Egana been wealthier, he might have been able to post his full bail of $26,000, then gotten it back when he returned for court. But like most defendants, Mr. Egana had to turn to a commercial bail bond agent that charges a nonrefundable fee for the service of guaranteeing the bond.").

[102] *See* Young, *supra* note 100.

release determinations. Multiple alternatives to the cash bail system are already in place around the country. This section discusses such alternatives and their merits.

1. Home Incarceration Programs

Home incarceration programs allow release from custody, requiring defendants to wear an electronic monitoring device on their ankle tracking their location.[103] Kentucky, North Carolina, and California each have home incarceration programs, but the state programs vary in how they operate.[104] In North Carolina, although home incarceration is used pretrial, the governing statute fails to provide guidance determining a defendant's eligibility.[105] The result is that a large amount of discretion is given to judges to set their own policies for using home incarceration release.[106]

In Kentucky, judges also have wide discretion regarding when to permit or order home incarceration, and the determination can be made regardless of the violence of a crime so long as "the defendant would not pose a threat to society."[107]

In California, the requirements are more detailed. The court may use home incarceration if the defendant is not a risk to public safety,[108] has been in custody for more than sixty days after arraignment on a felony charge,[109] or has been in custody for at least thirty days after arraignment on a misdemeanor.[110] The California statute also governs the relationship between private monitoring companies and the state.[111]

For criminal defendants and other stakeholders, home incarceration offers advantages over cash bail. For the criminal defendant, home incarceration offers fewer limitations on a defendant's liberty than physical incarceration.[112] While on home incarceration, defendants may still go to their job site and attend medical appointments and religious ceremonies.[113] For defense counsel, the defendant is better able to assist in defense

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[103] Stevenson & Mayson, *supra* note 8, at 43, 46.

[104] *Compare* KY. REV. STAT. ANN. § 431.517 (LEXIS through Ch.128 of the 2020 Reg. Sess.), *with* N.C. GEN. STAT. § 15A-534(a)(5) (LEXIS through Sess. L. 2020-1 of the 2019 Reg. Sess. of the Gen. Ass.), *and* CAL. PENAL CODE § 1203.018(a) (LEXIS through Chapter 3 of the 2020 Reg. Sess.).

[105] *See generally* N.C. GEN. STAT. § 15A-534.

[106] *See generally id.* § 15A-534(c).

[107] KY. REV. STAT. ANN. § 431.517(2).

[108] CAL. PENAL CODE § 1203.018(c)(1)(C).

[109] *Id.* § 1203.018(c)(1)(B).

[110] *Id.* § 1203.018(c)(1)(A).

[111] *Id.* § 1203.018(o).

[112] *See generally* Stevenson & Mayson, *supra* note 8, at 43.

[113] *Id.*

preparation.[114] The defendant can locate and contact possible witnesses, gather documents, and meet with defense counsel about the case without fear of others eavesdropping on jailhouse conversations.[115]

On the other hand, home incarceration is not a perfect alternative to cash bail. Although less of a restriction on liberty than jailhouse incarceration, a defendant's liberty may still be severely limited by the court's home incarceration order.[116]

Moreover, home incarceration is often accompanied by fees and conditions. For example, in Greensboro, North Carolina, all defendants released on probation must pay a weekly fee to the state.[117] In Kentucky, defendants have to live in a residence that maintains a phone.[118] Such financial requirements may make it difficult or impossible for poor defendants to comply.[119]

States incur costs related to home incarceration as well. The monitoring ankle bracelets themselves cost money, as does paying public employees to monitor defendants' locations and ensure their compliance with other release terms.[120] For judges, there is also a risk that home incarceration may be overused, possibly leading to a shortage of the equipment or a dilemma over which defendants are most deserving of it.[121]

2. Drug Testing

Drug testing is a common alternative or condition of pretrial release.[122] Despite its wide use, studies show that the implementation of drug testing does not lead to a substantial improvement in the appearance of defendants for court proceedings.[123] As an alternative to bail, it does not seem to be effective.

Ordering drug testing also may create a substantial burden for the defendant.[124] A defendant must appear and submit to testing at a probation

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[114] Petrossian, *supra* note 82, at 2019.

[115] *Id.*

[116] *See generally* Tindell v. Commonwealth, 244 S.W.3d 126 (Ky. Ct. App. 2008).

[117] Raymer, *supra* note 15.

[118] KY. REV. STAT. ANN. § 532.220(6) (LEXIS through Ch.128 of the 2020 Reg. Sess.).

[119] *See* Silver-Greenberg & Dewan, *supra* note 13.

[120] *See* KY. REV. STAT. ANN. § 532.220(9).

[121] *See* Matthew Hendrickson, *Cook County Sheriff's Office Runs Out of Electronic Monitoring Bracelets*, CHI. SUN TIMES, https://chicago.suntimes.com/2020/5/7/21251007/cook-county-sheriff-electronic-monitoring-bond (last updated May 7, 2020, 7:30 P.M.).

[122] Stevenson & Mayson, *supra* note 8, at 44.

[123] *Id.*

[124] *Id.* at 45.

office whenever a probation officer contacts the defendant.[125] Failure to appear for the test within a reasonable time puts the defendant at risk of being re-arrested and incarcerated.[126] Appearing on demand for drug testing may not be a realistic requirement for defendants with demanding job schedules, children, or without reliable transportation.[127] Despite these concerns, drug testing still remains a popular condition of release imposed by judges, perhaps because of the large number of drug-related offenses.[128]

3. Community Bail Funds

Community bail funds are essentially pots of money kept in an account that is used to pay the bail of incarcerated community members and then replenished.[129] These funds differ from other alternatives, because they exist apart from the exercise of judicial discretion.[130] Laypeople in a community voluntarily create community bail funds for other members of that community simply because someone recognized a need and decided to help.[131] Upon release, when defendants appear for subsequent court proceedings and ultimately have their cases resolved by the court, the bail money that came from the community bail fund is returned for use by the next person in that community who needs it.[132]

While a notable grassroots approach, community bail funds only provide a temporary fix for the cash bail system, rather than a permanent solution. Community members should not have to take on the responsibility of combatting a system that was put in place by and should thus be reformed by legislation.

4. Risk Assessment Tools

As explained in the Part II of this Note, Kentucky's risk assessment tool was one of the first of its kind and has been incorporated to some degree by other states.[133] This tool looks at the defendant's history and connection to

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[125] *Id.*; *Probation Drug Testing*, U.S. DRUG TEST CTRS., https://www.usdrugtestcenters.com/probation-drug-testing.html (last visited May 24, 2020).

[126] *Probation Drug Testing*, *supra* note 125.

[127] *See generally id.*

[128] *See* Stevenson & Mayson, *supra* note 8, at 44.

[129] Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 587 (2017); *see also* THE BAIL PROJECT, *supra* note 45.

[130] Simonson, *supra* note 129, at 587.

[131] *See id.* at 587–88.

[132] THE BAIL PROJECT, *supra* note 45.

[133] *See* Young, *supra* note 100.

the community to analyze both flight risk and likelihood of appearance.[134] Like its federal equivalent, the Kentucky state statute mandates that the bail amount be "sufficient to ensure compliance with the conditions of release set by the court,"[135] but "not oppressive."[136]

One reason for the praise given for Kentucky's risk assessment tool is that it requires judges to consider factors outside of a defendant's likelihood to appear when making a pretrial release determination.[137] The analytical tool also places substantial discretion in the hands of judges.[138] Given the unpredictable behavior of defendants, the risk assessment tool is subject to criticism when defendants commit other crimes after release from custody.[139]

Ultimately, the cash bail system, as it functions today, disadvantages the poor by its nature, and for-profit bail industries exist in clear opposition with bail's main purpose. While alternatives or substitutes for cash bail already exist in the form of home incarceration, drug testing, community bail funds, and risk assessment, each has notable negative aspects and results.[140] Perfection of alternative solutions need not be the goal, as some small degree of recidivism is inevitable. If perfection were the goal, the only solution would be pretrial incarceration without any pretrial release. There is an apparent need for a more comprehensive cash bail reform plan.

IV. RESOLUTION

North Carolina, Kentucky, and California all currently have statutory regulations for bail.[141] This section provides model statutory language for states to consider to improve current bail provisions. The proposed statutory sections include the following: definitions of terms, prohibition of for-profit bail, factors for setting bail, and cash bail alternatives. Additionally, the model statute will describe the legal provisions for cash bail reform, followed by a detailed explanation supporting the need to implement each provision. The goal of this proposed statute is to best serve the interests of defendants, community members, and officers of the court.

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[134] KY. REV. STAT. ANN. § 431.525(6) (LEXIS through Ch.128 of the 2020 Reg. Sess.).

[135] *Id.* § 431.525(1)(a).

[136] *Id.* § 431.525(1)(b).

[137] *Id.* § 431.525(1)(a).

[138] *See generally id.* at § 431.525(7).

[139] Santo, *supra* note 56.

[140] *See generally supra* Part III.C.

[141] KY. REV. STAT. ANN. § 431.525; N.C. GEN. STAT. § 15A-534 (LEXIS through Sess. L. 2020-1 of the 2019 Reg. Sess. of the Gen. Ass.); CAL. PENAL CODE § 1203.018(a) (LEXIS through Chapter 3 of the 2020 Reg. Sess.).

A. Definitions of Terms

1. Model Statutory Provision

(1) "Defendant" refers to any person against whom a criminal legal action is pending.
(2) "Bail bondsman" refers to any person, partnership, professional corporation, or legal entity engaged in a for-profit business of furnishing bail for defendants.[142]
(3) "Home incarceration with electronic monitoring" refers to the use of an electronic monitoring device affixed to a defendant's body, allowing the defendant's location to be confirmed by court personnel, either in the defendant's home or any other authorized location, instead of jailhouse incarceration.[143]
(4) "Drug testing" refers to screening for the presence of illegal substances in defendant's body via a urine sample from the defendant.

2. Reasoning for Statutory Language

The definitions provide a foundation for the subsequent provisions of the Model Statute. Specifically, the "bail bondsman" definition is more broad, combining both Kentucky and North Carolina statutory language to encompass both the individuals and the professionals engaged in the for-profit bail practice.[144] While there are companies engaged in the business of commercial bail, local individuals using commercial-like bail practices may conduct essentially the same activity.

Further, the definition for "home incarceration" includes the defendant's compliance with other release terms. The distinction to allow compliance with other release terms is an important addition because the trial court often allows release on home incarceration so that, with permission, a defendant may continue employment or attend certain meetings or appointments.[145]

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[142] *See* KY. REV. STAT. ANN. § 431.510(3); *see also* N.C. GEN. STAT. § 58-71-1(3).
[143] *See* KY. REV. STAT. ANN. § 532.200(2).
[144] *See id.* § 431.510(3); *see also* N.C. GEN. STAT. § 58-71-1(3).
[145] *See generally* Stevenson & Mayson, *supra* note 8, at 43.

B. Prohibition of For-Profit Bail Companies

1. Model Statutory Provision

It shall be unlawful for any person, group of people, or legal entity to engage in the practice of acting as a commercial bail bondsman for any defendant before any court of this state, including city courts.[146]

2. Reasoning for Statutory Language

The language is quite similar to the Kentucky statutory language that prohibits for-profit bail within the state.[147] The language choice is intentional because Kentucky effectively outlawed the for-profit bail system in 1976 and has served as a model for other states.[148] The provision goes on to include city courts, to be sure that the practice is illegal in any courts operating as the statutory extension of the state's jurisdiction.

The model statute completely prohibits for-profit bail activity. The purpose of bail does not permit room for commercialization. The model statute seeks to reinforce the principle that the main purpose of bail is to ensure defendants' appearance and protect the safety of individuals and the community, not to contribute to the commercialization of freedom or increased possibility of corruption within the criminal justice system.[149]

C. Inquiries when Setting Bail

1. Model Statutory Provision

(1) All defendants charged with a bailable offense shall be considered by the court for pretrial release.[150]

(2) The court shall consider nonmonetary alternatives to cash bail prior to imposing cash bail for a defendant.

(3) If the court determines that a cash bail alternative is insufficient or inappropriate. Following that determination by the trial court, and

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[146] *See* KY. REV. STAT. ANN. § 431.510(1).

[147] *See id.*

[148] *See generally* Veldman, *supra* note 55; *see also* Young, *supra* note 100.

[149] *See* 18 U.S.C. § 3142 (2012).

[150] KY. R. CRIM. P. 4.02.

being mindful of each of the subsections below, the amount of bail shall be:
(a) sufficient, with the main purpose being to ensure the defendant's appearance at the next court appearance,[151]
(b) appropriate to the defendant's criminal charge(s),[152]
(c) considerate of the defendant's criminal history, including prior obligations to appear in criminal proceedings as a defendant,[153]
(d) considerate of the defendant's current ties to the community,
(e) considerate of the defendant's current employment and living situation,
(f) not oppressive,[154] and
(g) considerate of the defendant's ability to pay.[155]

(4) If the court determines a cash bail alternative is insufficient or inappropriate, the court must explain its reasons for that determination.[156] The explanation shall be both on the record and in writing.

2. Reasoning for Statutory Language

The language in provision (1) requires that the judge make a release determination for defendants who qualify while considering alternatives to cash bail. Neither North Carolina, Kentucky, or California has identical, or even similar, provisions. Though unique, the language allows judges the discretion to set cash bail where appropriate, but to encourage judges to consider other non-cash options before doing so. As previously stated, this balance allows bail determinations to be less arbitrary and more fitting to the individual defendant's circumstances.

While recognizing the important role cash plays in the bail system, the statute still encourages judicial discretion by requiring consideration of cash bail alternatives such as drug testing and home incarceration, where appropriate. The factors laid out in subsection (3) provide assistance to the court in deciding whether alternatives are appropriate.

The language in provision (3) requires the judge to consider more factors than ordinarily included in setting a defendant's bail. The purpose of

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[151] *See* 18 U.S.C. § 3142 (2012).
[152] KY. REV. STAT. ANN. § 431.525(1)(c) (LEXIS through Ch.128 of the 2020 Reg. Sess.).
[153] *Id.* § 431.525(1)(d).
[154] *Id.* § 431.525(1)(b).
[155] *Id.* § 431.525(1)(e).
[156] *See id.* § 431.066(6).

including more factual inquiries is to improve the bail-setting process and make that process less arbitrary and more personalized to the defendant and the criminal charge(s). First, the language encourages the exploration of other options before imposing cash bail. In addition to the factors under Kentucky law,[157] part (a) explicitly states that the main purpose of the bail is to ensure defendant's appearance.[158] Language about the purpose of bail is to remind stakeholders that the sole purpose of providing bail is not punitive.[159]

Subsection (b) requires that the court's bail determination be proportional to the alleged crime. This provision exists because it not only relates to the proportionality of the bail, but it seeks to solve a problem that has brought the Kentucky risk assessment under attack previously.[160] This provision would not allow a judge to simply set a small bond based only on a defendant's criminal background when the charge is something serious like murder. The statutory language seeks to promote a more holistic risk assessment.

Subsection (c) considers the defendant's ties to the community. This provision, along with subsection (e), which considers defendant's employment and living situation, exist mostly to evaluate the defendant's risk of flight. Since the main purpose of bail is to assure subsequent appearance, whether or not a defendant is a flight risk is of greatest importance.[161] Inquiry into defendant's ties to the community, how long the defendant has resided in the community, place and type of employment, and housing stability can be clues related to flight risk and, therefore, likelihood of future appearance.

Subsection (f) prohibits excessive bail, reflecting state constitutional provisions that are already in place. Bail determinations must occur in conjunction with the other factors to be appropriate to the defendant and the defendant's current circumstances.

Finally, subsection (g) requires the court to consider the defendant's ability to pay the cash bail amount. While this provision mirrors Kentucky law, judges usually set monetary bail amounts without considering this factor.[162] Thus, this would require the judge to read it into the record whether the judge thinks the defendant can afford the amount set. This provision is in the model statute because, as previously discussed, cash bail

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[157] KY. REV. STAT. ANN. § 431.525(1).

[158] *See* 18 U.S.C. § 3142 (2012).

[159] *Id.*

[160] *See* Santo, *supra* note 56.

[161] See KY. REV. STAT. ANN. § 431.066(2).

[162] *See* KY. REV. STAT. ANN. § 431.525 (1)(e).

often disproportionately impacts poor defendants simply because they lack the resources to post bail.[163]

Ultimately, *all* provisions are to be considered and weighed by the judge to determine what an appropriate amount of cash bail is in each specific case.

Subsection (4) requires judges who set cash bail to provide in the record reasoning why a bail alternative is deemed inappropriate for the case at bar. The inspiration for this requirement comes from a Kentucky law that lacked guided execution.[164] The model provision requires that the judge provide an explanation, both on the record and in writing. Ideally, this provision would hold judges accountable and allow defendants and defense counsel the ability to better understand the reasoning that resulted in the judicial determination of bail and the amount set. The subsection promotes transparency and is intended to make such determinations less arbitrary. Ideally, the judge's analysis will incorporate analysis of the subsection (3) factors.

D. Cash Bail Alternatives

1. Model Statutory Language

(1) The following are recognized alternatives to cash bail, applicable when the court deems appropriate:
   (a) Home incarceration with electronic monitoring; OR
   (b) Drug testing at the discretion and time of the court; OR
   (c) Any other condition that the court reasonably believes would ensure defendant's appearance.

(2) If a defendant is found to be indigent, the court shall waive or reduce monitoring and treatment fees related to defendant's ability to pay.

2. Reasoning for Statutory Language

In the previous section, the model statute requires judges to consider alternatives to cash bail before imposing cash bail in each case. This section lists those alternatives and encourages application where appropriate. First, provision (1)(a) discusses home incarceration by use of electronic

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[163] *See* Santo, *supra* note 56.

[164] *See generally* KY. REV. STAT. ANN. § 431.066.

monitoring. While home incarceration has positive and negative aspects, it can serve as an alternative to jailhouse incarceration. The language closely resembles the North Carolina statutory language, allowing the judge a large amount of discretion to decide when that alternative is appropriate.[165]

The second alternative is drug testing. While this alternative may present practical difficulties for many defendants, it is appropriate to allow the court the discretion to order drug testing, especially when the alleged crime involves the use of illegal drugs or some underlying substance abuse issue.

Finally, the statute includes a "catch all" provision which allows a judge the discretion to order any other condition that would reasonably assure the defendant's appearance. Again, this language is important to maximize judicial discretion, as well as to remind stakeholders about the purpose of bail.

Subsection (2) is unique and not based on any current state statute but allows indigent defendants the opportunity to have the court waive or reduce any and all fees related to these alternatives. A defendant's ability to afford home incarceration, drug testing, or another alternative bears no documented relation to that defendant's likelihood of subsequent court appearance and therefore should not prevent imposition of such an alternative. The court can also have discretion to waive such fees for those who almost qualify for legal indigency status, but for whom such fees still would be a strong hardship.

V. CONCLUSION

As the incarceration capital of the world,[166] any conversation about reforming America's criminal justice system is incomplete without first talking about bail. And while alternatives to cash bail exist, such alternatives deserve consideration alongside the conversation about abolishing cash bail entirely. A cash bail system that adequately gives judges the discretion to make case-specific determinations, while making cash bail the last option to consider, will function most effectively for all stakeholders.

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[165] *See* N.C. GEN. STAT. § 15A.1340.11 (LEXIS through Sess. L. 2020-1 of the 2019 Reg. Sess. of the Gen. Ass.).

[166] *See* Ye Hee Lee, *supra* note 1.