

Interest Groups and Criminal Justice Policy

The Commercial Bail Industry: Profit or Public Safety?

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Introduction

Criminal justice special interest groups have the ability to significantly influence the political process in California. The conservative criminal justice lobby shape policy making through strategies such as producing white papers, contributing to elections, and donations to political campaigns.¹ This political strategy is one that the bail bondsmen industry has mastered in California. The consequences of their power to influence criminal justice policy have contributed to the state's overcrowded jail population.

The purpose of this publication is to demonstrate that the bail industry's political agenda in California's criminal justice policy-making process is profit driven. It will also demonstrate that it is through their lobbying practices, campaign contributions, and associations with conservative special interest groups like the American Legislative Exchange Council (ALEC) that bail bondsmen have been able to influence criminal justice policies that ensure their market share of the profits. While these policies might be profitable for the bail industry because they preserve the overcrowding jail population, it comes at a high cost to California taxpayers, conflicts with the objectives of Assembly Bill 109, and is a danger to public safety.

Assembly Bill 109

The recent passing and implementation of Assembly Bill 109 (commonly referred to hereafter as "realignment") mandated the reduction of the state prison population by 33,000 inmates by May 2013. The purpose of realignment is to implement changes to California's correctional system which shifts responsibility from the state level to individual counties for those individuals who are newly convicted of low-level and non-serious offenses. Realignment also mandates post-release supervision responsibilities to counties for certain non-violent offenders. The primary purpose of realignment is to acknowledge that state prison should only be reserved for those offenders who are convicted of serious crimes and to motivate counties to implement and develop programs that are alternatives to incarceration. Realignment ascribes to the evidence-based belief that counties are better equipped than the state to include public health and social services as components of rehabilitation and reintegration.

¹ For more information about the lobbying process in California see:
www.cjcj.org/files/Sacramento%27s_K_Street_Lobbyists.pdf

Successful implementation of realignment is essential for several reasons, but most importantly, California is required by Supreme Court mandate to reduce its exceedingly high prison population. This is essential because the state's current criminal justice policies contribute to high incarceration rates, which not only threaten public safety, but are also not fiscally sustainable. California's recidivism rate is among the highest in the nation at 67.5 percent (ACLU, 2012, p.3). With our state and local governments experiencing one of the most momentous budget crises of our time, it is crucial that California implement evidence-based criminal justice policies that cease to rely only on incarceration to address public safety.

Realignment thus has significant implications for counties' use of jails. In 2010, 71 percent of the California jail population were those who were unsentenced and awaiting resolution of their cases. California's pretrial jail population exceeds the national average of 61 percent. On average 50,000 of the 71,000 (71%) California inmates held in county jails have not yet been convicted of a crime and are simply awaiting their trial date (ACLU, 2012). This is a major shift away from traditional utilization of jails where inmates are detained as a form of punishment. Jails are now more often utilized as a facility to house those awaiting resolution of the charges filed against them, as opposed to sentenced offenders who are serving their time. The commercial bail system has significantly led to this increase of the unsentenced jail population.

Moreover, the commercial bail system has discriminated against poor and middle class defendants and the monetary terms of bail imposed results in racially disparate detention. For instance, Latino and African American defendants are more likely to be held in jail than whites because they cannot afford to post bail. The mortgage crisis has further exacerbated the disparate detention of the poor and people of color. Historically, individuals and families used their homes as collateral to raise funds to pay for bail. Unfortunately, high rates of bankruptcy, foreclosure, and plunging home values in low-income communities mean that fewer people are able to use their homes as collateral to post bond (ACLU, 2012).

Furthermore, the greatest problem that the commercial bail system fails to address is the public safety risk of the pretrial population. An individual's ability to post bail does not reflect their potential threat to public safety. Research indicates that there are several factors that judges and pretrial services can consider when assessing an individual's risk to the community and to predict attendance to future court dates. However, the commercial bail system uses bail amounts from predetermined bail schedules which do not take consider any of the possible risk factors. An individual's release is monetarily based, not rooted in a risk and needs assessment.²

Realignment attempts to address counties' over-use of pretrial detention by giving individual county sheriffs the ability to control pretrial populations and to utilize incarceration only for those offenders who are a risk to society or who fail to appear in court. Moreover, realignment also added a section to the California Penal Code which allows home detention as an option for pretrial inmates as an alternative to bail. Reforming California's pretrial system, in addition to expanding and creating new pretrial service programs is vital in order to reduce the significant number of individuals currently held in jails awaiting trial. Reducing this pretrial detainee

² For more information see: Sheldon, R. G., W.B. Brown, K. Miller and R. Fritzler (2008). *Crime and Criminal Justice in American Society*. Long Grove, IL: Waveland Press.

population is an efficient approach, as well as cost saving measure, to alleviate jail bed space while not jeopardizing public safety. However, opposition by the commercial bail industry continues to put the future of pretrial services in jeopardy.

Historical Overview and Critiques of the Commercial Bail Industry

The rise of the commercial bail industry in the American criminal justice system began as a result of the increasing number of defendants who were unable to pay arbitrary bail amounts. Research indicates that the first true commercial bail bondsmen were Peter and Thomas McDonough of San Francisco. The McDonough brothers began underwriting bonds as a favor to attorneys who frequently drank at their father's bar. By 1898 the McDonough brothers founded the first official surety bond company, "The Old Lady of Kearny Street" (Schnacke, Jones, & Brooker, 2010). While this first American commercial bail bondsman firm lasted only fifty years, it opened the door for numerous commercial bail bond firms that continue to replicate their practices today.³

The commercial bail industry has been critiqued several times throughout its existence for its discriminatory implications, the most profound of which eventually led to the bail reform movement of the 1960s; based on the studies conducted by Arthur Beeley (1927) and Caleb Foote (1954). Beeley found that bail amounts were based only on alleged offenses rather than criminal history or other risk factors. Major findings included that approximately 20 percent of defendants were unable to post bail and that bondsman played too important a role in the administration of the criminal justice system. The study also found several abuses by bondsmen such as failing to pay off forfeited bonds. Beeley's concluding thoughts on the commercial bail industry was that system did not guarantee the security of society from the accused. Similarly, Foote also found that defendants who remained incarcerated during pretrial were mostly those who could not afford to post bail. Moreover, Foote also found that those who were unable to post their bail amounts were more likely to be convicted and to receive harsher sentences than those who were able to post bail (Schnacke, Jones, & Brooker, 2010).

As a result of several complaints from courts and corrections departments about the abusive and dishonest practices of commercial bail bondsmen coupled with the major findings of several studies, U.S. Attorney General Robert Kennedy called for the first National Conference on Bail and Criminal Justice in 1964 (Schnacke, Jones, & Brooker, 2010). The conference included judges, prosecutors, defense attorneys, police, prison officials, and the bail industry to discuss alternatives to bail. As a result of this conference, Attorney General Kennedy concluded that:

Our present attitudes toward bail are not only cruel, but really illogical. What has been demonstrated here is that usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have? (Schnacke, Jones, & Brooker, 2010, p.12).

³ For more information see: www.sheldensays.com/poorhousetojails.htm

The findings of the 1964 conference led to the 1966 Federal Bail Reform Act, which formally established the practice of releasing defendants on their own recognizance, thus posting bail was no longer the only means for pretrial release. By the early 1970s almost half of the states had passed statutes authorizing release on their own recognizance, and by the 1990s almost all states had passed statutes authorizing the practice of supervised pretrial release. In the 1970s, an additional movement for bail reform developed as a result of increased public concern over crime because of multiple publicized accounts of defendants committing violent crimes while out on release on own recognizance. This led to increased sentiment that the Bail Reform Act of 1966 did not focus enough on public safety and only focused on those who were accused of capital offenses, and whether or not they would flee or pose a danger to the community. This outcry of public concern over offenders who were considered a danger to society released on own recognizance led the Bail Reform Act of 1984.

While several scholars and credible criminal justice agencies have critiqued several elements of the commercial bail industry which have led to several bail reforms over the last century, the fact remains that “It’s really the only place in the criminal justice system where a liberty decision is governed by a profit-making businessman, who will or will not take your business” (Liptak, 2008, p.1). The bail industry has been critiqued by the American Bar Association, National District Attorney’s Association, American Probation and Parole Association, National Institute of Corrections, and the American Jail Association who all publicly support bail reform and pretrial supervision services.

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(Liptak, 2008, p.1)

Some of the major critiques of the bail industry include that a defendant’s ability to post bail is unrelated to the potential risks to the community and that bail bondsmen are not obligated to try and prevent any criminal activity of their clients. Deciding who poses a risk to society should be determined by judges considering the defendant’s criminal history, flight risk, and the facts of the case. Rather, judges often only refer to bail schedules which automatically assign the bail amounts based on the crime. Consequently, a system that is reliant on commercial bail shifts release decisions from the judge to the bondsman. Often times the fees set by the bail schedule are exceedingly high, which results in a commercial bail system that discriminates against the poor and middle class detainees with little consideration for ensuring public safety (Schnacke, Jones, & Brooker, 2010).

The commercial bail industry has been negatively critiqued for nearly one hundred years and the criticisms have largely remained the same: commercial bail does not ensure public safety and discriminates against those who cannot afford it. In spite of this, commercial bail remains the primary avenue for pretrial release, due in part to the political power it wields through extensive lobbying activities.

Bail Agent Interest Groups and Hierarchal Structures

Unlike other criminal justice special interest groups who generally establish political allies in order to advocate for policies that are driven by concerns for public safety; the bail industry has established political relationships which gives the bondsmen a unified voice with powerful political influence to advocate for policies that will result in higher profits. The bail industry's political network is divided into federal, state, and local entities and coalitions, all of whom advocate the same for-profit political agenda.

American Legislative Exchange Council

The American Legislative Exchange Council (referred to hereafter as ALEC), is a conservative organization that was established in 1973 to assist policymakers in passing legislation. ALEC has, and continues to lobby for conservative policies that encourage limited government, free markets, and federalism. However, these policies tend to "...be significantly more punitive than liberals. Since virtually all members of ALEC are conservatives it is only logical that their legislation would be punitive, which has been historically demonstrated by this organization" (CJ CJ, 2011). Unfortunately, what enables ALEC to be effective at advocating their free market conservative ideology in the state legislator is that their fiscal investment provides them the power to make their political agendas louder than that of other constituents. An examination of ALEC's membership, demonstrates the association's ability to create and maintain such a powerful lobby in American politics. Membership includes "State legislators, private corporation executives and criminal justice officials. Corporate membership dues range from \$5,000 to \$50,000 annually and include some of the most powerful corporations in America" (CJ CJ, 2011). Corporations such as Bayer, Reynolds American Inc., ExxonMobil, Wal-Mart Stores Inc., and State Farm Insurance Co. are among some of the members of ALEC.

Specific to the bail industry, key members of ALEC include Jerry Watson, Dennis Bartlett, and William Carmichael. Jerry Watson is the Senior Legal Counsel for the American Bail Coalition, the previous chairman of ALEC's Private Enterprise Board of Directors, and the current Chairman Emeritus on ALEC's Private Enterprise Board. Dennis Bartlett is the Executive Director of the American Bail Coalition; he has been a member of ALEC since 1998 and currently sits on the corporate Executive Committee of ALEC's Public Safety and Elections Task Force. William Carmichael is the President and Chief Executive Officer of the American Bail Coalition as well as the bail bond corporation, the American Surety Company, and currently sits on ALEC's Private Enterprise Board (ALEC, 2011). The intersection of these key stakeholders enables ALEC's free market ideology to become closely intertwined with the national bail policy agenda.

American Bail Coalition

The American Bail Coalition (ABC), formally called the National Association of Bail Insurance Companies, is a national organization comprised of the premier underwriters of criminal court bonds. The coalition also includes statewide bail bondsmen associations, such as the California Bail Agents Association and the Golden State Bail Agents Association. The ABC's stated mission is "Dedicated to the long term growth and continuation of the surety bail bond industry" (Source Watch, 2011). The American Bail Coalition became a member of ALEC in 1993 and refers to ALEC as their life preserver (Source Watch, 2011). ALEC supports the American Bail

Coalition and the practices of commercial bail because it is a for-profit industry that depends on the advancement of free markets and private enterprise ideologies.

California Bail Agents Association and Golden State Bail Agents Association

The California Bail Agents Association (CBAA) was founded in 1979 in order to unify the bail profession and stop the passing of a 10 percent bail reform that was being considered in the state legislature. CBAA is intended to represent California bail licensees at the local, state, and federal levels in order to increase professionalism and the health of their business (CBAA, 2010).

The Golden State Bail Agents Association (GSBAA) was founded in 1978 to lobby for increases in the bail fees and because many bail agents felt as though they were not being represented in their local and state governments (GSBAA, 2008).

Both the California Bail Agents Association and Golden State Bail Agents Association are members of the American Bail Coalition, which align them with the larger political agenda of the bail industry at the national level. These federal, state, and local entities and coalitions coordinate their lobbying activities to promote their for-profit agenda and to broaden their political reach.

Lobbying Practices of the Commercial Bail Industry

Since the 1990s commercial bail associations have unified to advocate bail policies at state and federal levels which will work to ensure market stability for the bail industry. The national agenda of the commercial bail industry is generally first written and declared by ALEC. This “model bill” is then lobbied for nationally with collaborative efforts from both ALEC and the American Bail Coalition. It is then provided to the state associations, like the California Bail Agents Association and the Golden State Bail Agents Association to lobby for in the state legislature. Furthermore, bail policy is lobbied for at the local level of government, such as in individual counties. To exemplify how this process works:

Both ALEC and the for-profit bail bonding industry have attempted to push nationally a model bill titled the ‘Citizens Right to Know: Pretrial Release Act,’ which would place numerous (and in most cases, additional) reporting requirements on pretrial release service agencies. In support of this and other bills, in April 2010, AIA and ALEC sent copies of the publication, *Taxpayer Funded Pretrial Release – A Failed System*, to 2,500 legislatures across the country (Schnacke, Jones, & Brooker, 2010, p.25).

In addition to writing, distributing, and lobbying for criminal justice policies to expand their profits, the commercial bail industry has consistently worked in direct opposition against publicly funded pretrial service agencies. Bail bondsmen across the country have prioritized limiting the amount of funding that is allocated to pretrial service agencies. Furthermore, bail bondsmen have openly opposed publicly funded pretrial release programs. In fact, the American Bail Coalition, California Bail Agents Association, and the Golden State Bail Agents Association all declare opposition to these publicly funded pretrial release programs in their mission statements. From a business perspective, publicly funded pretrial release programs are the only

competition the bail industry faces; therefore, they are the only substantial threat to their ability to profit from an offender's pretrial release. In response to this competition, the bail industry has worked ardently to undermine the accountability and funding of pretrial release programs.

Many individual bail bond companies have hired their own lobbyists to advocate for local legislation, such as county ordinances which will limit pretrial service programs. These individual business owners have also united to form statewide associations (like CBAA and GSBAA), and even nationwide associations, like the American Bail Coalition, to advocate for state legislation. These statewide associations have also recruited assistance from the powerful conservative think tank, ALEC, to advance their political agenda and opposition to pretrial release programs at both the state and national levels.

Unfortunately, despite the success rates of many pretrial release programs across the country, the bail bondsmen are able to purchase a more powerful lobby to persuade state legislatures to support their political agenda. Bondsmen are able to gain this political support through large campaign contributions, sponsoring legislation (such as ballot measures) which establishes political allies, and donating to political parties. Pretrial service programs on the other hand, because they are publicly funded, do not have the organizational capacity or the fiscal resources to lobby for their programs in the same fashion that the bail industry has been able to. Through its lobbying practices, the commercial bail industry ensures the status quo is maintained within the criminal justice system.

In 2010 the American Bail Coalition spent \$80,000 on lobbying at the federal level (ABC, 2011). Furthermore, in California the total amount spent on bail industry lobbying from 2000 to 2012 was \$456,480⁴ (Follow the Money, 2011; Secretary of State, 2012). The vast majority of these contributions were to individual candidate campaigns, not ballot measures. This implies that the

Santa Clara County: The Domino Effect

In California, the CBAA and GSBAA have specifically targeted Santa Clara County Pretrial Services in white papers and to garner support for their campaign, the California Coalition for Pretrial Accountability, which publicly opposes funded pretrial service programs. Despite the bail industry's allegations of Santa Clara's program being inefficient, the findings of the professional audit found much different results. According to a 2012 Management Audit:

"Santa Clara County appears to have the most comprehensive Pretrial Services Department in consideration of the number of Pretrial Services staff, number of Pretrial Services officers that appear in Court, the number of recommendation for release that are both provided to and accepted by Judges, the supervision of caseload, and the sophistication of data systems" (BSAMD, 2012, p. 8).

The bail bondsmen associations have specifically targeted Santa Clara's program in an effort to discredit them; initiating the domino effect of undermining the effectiveness of all California pretrial service programs.

⁴ This figure includes monetary contributions from the American Bail Coalition, California Bail Agents Association, Golden State Bail Agents Association, and Bad Boys Bail Bonds.

bail bondsmen associations contribute financially to the candidates who will favor their bail policy legislation, regardless of the candidate's partisan affiliation.

Thus while the commercial bail industry has a strong influence in criminal justice policymaking, it is not rooted in public safety like that of other criminal justice systems. Rather, it is an industry whose primary purpose is to generate revenue. Now, in light of the severe jail overcrowding and the current economic climate in California, major bail reforms are necessary from both a cost management perspective and evidence-based research. The well-financed commercial bail industry has been victorious in convincing state and local policymakers that the money bail system saves taxpayer dollars. In reality, the bail industry lobbies for the continued use of the money bail system not because it saves taxpayers dollars, but because it ensures that their business will continue to be profitable.

In fact, the cost to keep an individual incarcerated while they are awaiting trial is \$100 per day, versus \$2.50 per day to monitor them through pretrial service programs (ACLU, 2012). In addition, the human impact of having a California pretrial detainee population of nearly 71% results in expansive social costs. Pretrial detention can last up to a year before the individual goes to trial to resolve their case and during this time period the social consequences affect not just the person detained, but also impose significant hardship on their families, children, spouses, friends, and work associates. Moreover, the consequences may include loss of stable employment, loss of custody of their children, and loss of housing and health insurance. The hardships pretrial detainees incur drastically affect the individual's likelihood of successful re-entry into their communities upon release and thus are a fundamental public safety concern.

At \$100 per day, California's pretrial detainee population costs taxpayers approximately \$1.8 billion annually.

That is more than half of California's \$3 billion budget shortfall (LAO, 2012).

Conclusion

The primary purpose of realignment is to acknowledge that state prison should only be reserved for those offenders who are convicted of serious crimes and to motivate counties to implement and develop programs that are alternatives to incarceration. To ignore the large pretrial detainee population in California's overcrowded jails by not developing alternatives to incarceration will only replicate at the county level the same problems the state prison system has been facing for the past several years. California needs to stop protecting the status quo of outdated practices and over-incarceration. Instead, state and county criminal justice policies should focus and finance practices which are proven to effectively manage jail populations, ensure public safety, and equality.

In order to reduce the pretrial detainee population in California, jurisdictions must reduce the overuse of the money-based bail system and instead base release decisions on individualized risk assessments. In conjunction with the Pretrial Justice Institute's model for a rational bail process, CJCJ supports the recommendations for statewide pretrial reform to address jail overcrowding presented by PJI, the ACLU, and Senate Bill 1180 (2012) as fiscally and practically sound public

policy. Counties should make a commitment to utilize risk assessment tools and pretrial service programs, and also ensure that these programs are adequately funded so that they can function safely, efficiently, and sufficiently supervise a large number of defendants.

It is time for the California criminal justice system to stop perpetuating the myth that the commercial bail system saves taxpayer dollars; in reality the cost of jail overcrowding caused by detainees who cannot afford to post bail, far exceeds any cost-savings for the few individuals who are able to privately fund their bail release. CJCJ encourages counties to continue to develop solutions to reduce pretrial detainee jail populations. As California continues to move towards evidence-based practices to reduce incarceration rates and re-offending, it is essential that counties implement community-based alternatives to detention in order to safely reduce jail overcrowding and improve public safety.

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