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My Cash Is My Bond: Recognizing Rights to Cash Bail Forfeiture Exoneration in Washington

Olivia Hagel

MY CASH IS MY BOND: RECOGNIZING RIGHTS TO CASH BAIL FORFEITURE EXONERATION IN WASHINGTON

Olivia M. Hagel*

Abstract: When criminal defendants fail to appear for a court date after they are released on a bail bond or cash bail, Washington courts will likely forfeit their bail. And when the defendant reappears—whether a day, a month, or a year later—that same court might return, or "exonerate," the bail bond or cash bail.

But Washington does not treat cash bail and bail bonds similarly in the context of forfeiture exoneration. Commercial bail bond agents enjoy robust statutory and judicial avenues for the return of their forfeited bail bonds. A little over one-hundred years ago, the Supreme Court of Washington treated cash bail similarly to bail bonds when deciding whether to exonerate forfeited bail. Lower Washington appellate courts appear to be forgetting that precedent today. As such, cash bail depositors—the accused's loved ones, community bail funds, or the accused themselves—have increasingly been left to the whims of trial courts while bail bond agents have gained stronger exoneration rights.

Reform to cash bail forfeiture exoneration in Washington is overdue. The well-known socioeconomic and racial inequities of bail leave their mark on failures to appear and, thus, bail forfeiture. Further, cash bail forfeiture exoneration may become more critical as Washington reckons with a "third wave" of bail reform and reformers urge a move away from commercial bail bonds and toward community bail funds.

Washington should exonerate bail bonds and cash bail similarly. This Comment urges the Washington Legislature to enact certain statutory rights to cash bail exoneration. It further encourages Washington courts to realign cash bail forfeiture exoneration practices with precedent and to recognize the right to cash bail forfeiture exoneration whenever defendants reappear within sixty days.

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INTRODUCTION

In the United States, approximately one in five individuals miss a court date after they are released on bail[1] with a felony charge.[2] Individuals fail to appear in court for a variety of reasons: they were hospitalized,[3] they forgot about the court date,[4] they could not find a ride,[5] they were scared to show up,[6] and the list goes on. Regardless of individuals' reasons for missing a court date, Washington courts can forfeit their bail when they fail to appear.[7]

Most individuals who initially fail to appear in court later reappear.[8] They might attend another court date,[9] voluntarily surrender to authorities,[10] be apprehended by a bail bond recovery agent,[11] be arrested

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1. Today, "bail" often refers both to the defendant's actual release from custody and the security given to the court that the defendant will return to court for future appearances. *See Bail*, BLACK'S LAW DICTIONARY (11th ed. 2019). This Comment uses the term in both ways. In this instance, "bail" refers to the defendant's actual release from custody.

2. THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T OF JUST., PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 8 (2007), https://www.bjs.gov/content/pub/pdf/prfdsc.pdf [https://perma.cc/5JWK-XMCW]. This data is from 2004, but the Bureau of Justice Statistics's study of the period between 1990–2004 represents the most comprehensive statistics on national failure to appear rates to date.

3. Ethan Corey & Puck Lo, *The 'Failure to Appear' Fallacy*, THE APPEAL (Jan. 9, 2019), https://theappeal.org/the-failure-to-appear-fallacy/ [https://perma.cc/LS9A-V99Y] ("The judge stayed a bench warrant once—but when Broad, still hospitalized, missed his court date in August, the judge issued the warrant.").

4. Josh Kelety, *Locked Up and Poor*, SEATTLE WKLY. (Sept. 25, 2018, 5:55 PM), https://www.seattleweekly.com/news/locked-up-and-poor/ [https://perma.cc/VZ5P-EFKW] ("A lot of our clients are homeless and it is not easy for them to keep track of court dates.").

5. Kay Stephens, *Missing Trial Defendant Pleads Guilty*, ALTOONA MIRROR (Sept. 18, 2020), https://www.altoonamirror.com/news/local-news/2020/09/missing-trial-defendant-pleads-guilty/ [https://perma.cc/P5ZA-PLD5] ("He said he went to Pittsburgh and couldn't get a ride back.").

6. When asked, almost thirty-seven percent of individuals who voluntarily surrendered to the Fugitive Safe Surrender Program due to an outstanding warrant stated that they did not surrender previously because they were "afraid of what would happen" to them. Daniel J. Flannery & Jeff M. Kretschmar, *Fugitive Safe Surrender: Program Description, Initial Findings, and Policy Implications*, 11 CRIMINOLOGY & PUB. POL'Y 437, 449 (2012).

7. *See* WASH. REV. CODE § 10.19.090 (2020) (allowing forfeiture of bail bonds); WASH. SUPER. CT. CRIM. R. 3.2(o) (2020) (allowing forfeiture of cash bail in superior courts); WASH. CTS. OF LTD. JURISDICTION CRIM. R. 3.2(n) (2020) (allowing forfeiture of cash bail in courts of limited jurisdiction).

8. COHEN & REAVES, *supra* note 2, at 8 ("28% of the defendants who failed to appear in court and had a bench warrant issued for their arrest were still fugitives at the end of a 1-year study period.").

9. *See* State v. Sullivan, 172 Wash. 530, 534–35, 22 P.2d 56, 58 (1933).

10. *See* State v. Jackschitz, 76 Wash. 253, 254, 136 P. 132, 133 (1913).

11. *See* WASH. REV. CODE §§ 18.185.010(10), .280(3) (2020). "Bail bond recovery agent" is a sophisticated term for a bounty hunter. *See id.* Bounty hunting is alive and well in Washington, with some criticizing the State's lax oversight of the industry, which has been responsible for the injuries

for failing to appear,[12] or be arrested on suspicion of committing a crime.[13] What happens when the individual who previously failed to appear reappears in court? Will the forfeited bail money be returned? Or is it lost to Washington's coffers forevermore? The answer, perhaps surprisingly, will likely depend on whether the individual was released on cash bail or a bail bond.

Consider the following scenario: Washington authorities arrest both Jay and Kay on charges of theft in the third degree, a gross misdemeanor.[14] A judge sets each of their bail at $1,000.[15] Jay's family pays a bail bond agent[16] a nonrefundable $100 premium[17] to post a bail bond, and authorities release Jay from jail. Kay's grandparent pays $1,000 in cash from a savings account, and authorities release Kay from jail. Later, both Jay and Kay fail to appear for their scheduled court hearings. The judge orders that Jay and Kay's bail be forfeited and issues a bench warrant for their arrest. But a week later, Jay and Kay attend their next court hearings, and both Jay's bail bond agent and Kay's grandparent therefore ask for the return—or "exoneration"—of the forfeited bail.

Both Jay and Kay have relatively similar circumstances, though there is one notable difference: Jay used a bail bond while Kay used cash bail. So, what would result from the requests to exonerate the forfeited bail? It

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and deaths of Washingtonians. Daphne Congcong Zhang, *Lax Washington Oversight of Bounty Hunters Sets Stage for Mayhem, Tragedy*, SEATTLE TIMES (Jan. 11, 2019, 6:00 AM), https://www.seattletimes.com/seattle-news/times-watchdog/high-adrenaline-bounty-hunter-industry-operates-with-little-oversight-despite-concerns-over-training-tactics/ [https://perma.cc/7BW3-DL7K].

12. *See* State v. Ohm, 145 Wash. 197, 197, 259 P. 382, 383 (1927) (law enforcement apprehended defendant with warrant after failure to appear).

13. *See In re* Marriage of Bralley, 70 Wash. App. 646, 649, 855 P.2d 1174, 1175 (1993) (defendant arrested on "several outstanding warrants").

14. *See* WASH. REV. CODE § 9A.56.050 (2020).

15. *See* WASH. CTS. OF LTD. JURISDICTION CRIM. R. 3.2(o)(1) (indicating typical bail for gross misdemeanor).

16. In Washington, a bail bond agent is "a person who is employed by a bail bond agency and engages in the sale or issuance of bail bonds." WASH. REV. CODE § 18.185.010(7) (2020). Bail bond agents are often called "bail bondsmen" in common parlance. *See* Kene O. Okocha, *Nationwide Trend: Rethinking the Money Bail System*, WIS. BAR (June 1, 2017), https://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=90&Issue=6&ArticleID=25666 [https://perma.cc/2BVN-V57N] ("Bail bond agents, or bail bondsmen, are private actors who profit by acting as a surety for defendants who cannot afford to pay their bail."). To align with the statutory title and use gender-inclusive language, this Comment uses "bail bond agent."

17. The Washington State Department of Licensing website states that bonds cost a minimum of $50 plus fees and usually cost 10% of the bond for bonds over $1,000. *Bail Bonds: Consumer Rights*, WASH. STATE DEP'T OF LICENSING, https://www.dol.wa.gov/business/bailbonds/bbconsumer.html [https://perma.cc/3XL5-638Y]. Because bail bond agents may add additional fees to the 10% premium, Jay's family would likely end up paying the bail bond agent more than the $100 premium. *See id.*

is possible that Washington courts would grant both requests, exonerating both the bail bond and the cash bail.[18] However, it is also possible that Washington courts would exonerate the bail bond but not the cash bail.[19] In Jay's case, the judge must vacate the forfeiture and exonerate the bail to the bail bond agent pursuant to statute.[20] But in Kay's case, the judge has discretion to deny Kay's grandparent's exoneration request.[21] Put simply, Washington law treats Jay's bail bond and Kay's cash bail differently.

This Comment explores the different treatment of cash bail and bail bonds within forfeiture exoneration in Washington. Part I discusses bail's development since medieval England and how cash bail and bail bonds operate in Washington today. Part II outlines the socioeconomic and racial inequities of bail practices and situates cash bail forfeiture exoneration within contemporary bail reform efforts to eliminate those inequities.[22] Part III then compares the robust avenues to bail bond exoneration with the single, more limited avenue to cash bail exoneration in Washington. Finally, Part IV argues that Washington should formally recognize cash bail forfeiture rights and offers two proposed solutions. The Washington Legislature should enact statutory rights to cash bail forfeiture exoneration. Further, Washington courts should recognize the

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18. *See* State v. Kramer, 167 Wash. 2d 548, 552, 219 P.3d 700, 701–02 (2009) (discussing discretionary exoneration of bail bonds); *Bralley*, 70 Wash. App. at 656, 855 P.2d at 1179 (discussing discretionary exoneration of cash bail).

19. *See id.*

20. *See Kramer*, 167 Wash. 2d at 558–59, 219 P.3d at 705; WASH. REV. CODE § 10.19.105 (2020).

21. *See* State v. Olson, 127 Wash. 300, 302, 220 P. 776, 777 (1923).

22. This Comment advocates for increased cash bail forfeiture exoneration as a harm-reduction measure while larger bail reform efforts—which aim to address the systemic issues with money bail and increasing pretrial detention rates—are ongoing. André Gorz theorized three types of reform: reformist, non-reformist, and revolutionary. *See* Daniel G. Solórzanzo & Tara J. Yosso, *Maintaining Social Justice Hopes Within Academic Realities: A Freirean Approach to Critical Race/LatCrit Pedagogy*, 78 DENV. U. L. REV. 595, 611 (2001) (discussing ANDRÉ GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL (Martin A. Nicolaus & Victoria Ortiz trans., 1967)). Reformist reforms maintain the status quo and do not challenge systems of inequality. *Id.* Non-reformist reforms work within the system itself to bring about equitable changes to the system, but the system remains ultimately intact. *See id.* Revolutionary reforms replace existing systems with entirely different, more equitable systems. *Id.* This Comment's reform proposals are admittedly not revolutionary; increased opportunities for cash bail forfeiture exoneration cannot fundamentally alter money bail or pretrial detention systems. The proposals herein more squarely fit into the non-reformist reform category. With an eye toward disrupting a bail exoneration system that favors for-profit bail bond agents over the family, friends, and non-profit community bail funds that post cash bail for the accused, this Comment proposes to take money back from the state and return it to individuals and organizations. At its most hopeful and ambitious, this Comment aims to lessen the harshness of the cash bail landscape so that, in the short term, reliance on the commercial bail bond industry may become less ubiquitous. The ultimate goal should be to create a pretrial detention and bail system in which this Comment's proposals are irrelevant.

right to cash bail whenever individuals reappear within sixty days and otherwise exonerate cash bail when its purpose has been accomplished.

I. HOW BAIL OPERATES: A BRIEF HISTORY AND CURRENT WASHINGTON PRACTICES

The United States bail system has a storied past tracing back to medieval England.[23] For most of bail's history, personal sureties secured the accused's pretrial release.[24] But secured financial conditions—cash bail and commercial bail bonds—eventually came to dominate pretrial release.[25] Today, Washington allows most defendants to secure pretrial release through bail bonds or cash bail.[26]

A. The Operational Shift in Bail from Medieval England to Twentieth-Century America: From Personal Sureties to Bail Bonds and Cash Bail

Bail administration today stems from English practices one thousand years ago.[27] Prior to 1066, criminal prosecutions were "private affairs"; a victim would bring suit against the alleged wrongdoer to collect a monetary penalty.[28] To secure pretrial release, a personal surety—typically a friend, employer, or relative of the accused individual—had to guarantee the accused's appearance and pledge payment of the monetary

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23. *See* TIMOTHY R. SCHNACKE, MICHAEL R. JONES & CLAIRE M. B. BROOKER, THE HISTORY OF BAIL AND PRETRIAL RELEASE 1 (2010), https://b.3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf [https://perma.cc/BF6C-L3A8].

24. *See id.* at 2, 6.

25. *See id.* at 6–7. Though this Comment focuses on cash bail and bail bonds, those are certainly not the only methods of pretrial release. There are numerous different types of pretrial release, both financial and nonfinancial. *See* BRIAN A. REAVES, U.S. DEP'T OF JUST., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009–STATISTICAL TABLES 35 (2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf [https://perma.cc/P2BR-Q3TL] (defining different types of pretrial release). Additional types of financial release include unsecured bonds, deposit bonds, and property bonds. *See id.* Unsecured bonds do not require any money upfront, but the defendant is liable for the full bail amount upon nonappearance. *See id.* Deposit bonds require the defendant to deposit a percentage of the full bail amount in cash with the court, and the defendant is liable for the remaining portion upon nonappearance. *See id.* In Washington, courts cannot require that defendants post a deposit bond rather than a commercial bail bond. *See* State v. Barton, 181 Wash. 2d 148, 331 P.3d 50 (2014). A property bond requires the defendant to post property valued at the full bail amount, with nonappearance resulting in forfeiture of the property. REAVES, *supra*, at 35. Property bonds are exceedingly rare, accounting for only 1% of all pretrial releases from 1990 to 2004. *See* COHEN & REAVES, *supra* note 2, at 8.

26. *See* WASH. SUPER. CT. CRIM. R. 3.2(b)(4)–(5), (d)(6) (2020); WASH. CTS. OF LTD. JURISDICTION CRIM. R. 3.2(b)(4)–(5), (d)(6) (2020).

27. *See* SCHNACKE, JONES & BROOKER, *supra* note 23, at 1.

28. *Id.*

penalty upon conviction.[29] In other words, if the accused did not appear at trial, the accused was deemed guilty and the surety paid the victim the full monetary penalty.[30] Personal sureties remained even as criminal prosecutions became public after 1066.[31]

In early American history, bail administration was clearly traceable back to pre-Norman times; personal sureties would pledge financial liability in the event of the defendant's nonappearance.[32] However, bail administration underwent remarkable changes in the United States from its founding to modern times. Between the late nineteenth and early twentieth centuries, the personal surety system eroded in the United States.[33] The rapid westward movement of Americans across the United States led to an insufficient number of community members willing and able to serve as personal sureties.[34]

Money bail—largely cash bail and bail bonds—arose to take the place of personal sureties. With the personal surety system crumbling, courts began relaxing historic prohibitions against sureties profiting off bail to "get bailable defendants out of jail."[35] This changed the financial nature of bail.[36] For much of bail's history, financial conditions for release were

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29. *See id.* at 2, 6; Jordan Gross, *Devil Take the Hindmost: Reform Considerations for States with a Constitutional Right to Bail*, 52 AKRON L. REV. 1043, 1070 (2018). *Black's Law Dictionary* defines a surety as "[s]omeone who is primarily liable for paying another's debt or performing another's obligation." *Surety*, BLACK'S LAW DICTIONARY (11th ed. 2019).

30. *See* SCHNACKE, JONES & BROOKER, *supra* note 23, at 2; June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 520 (1983).

31. SCHNACKE, JONES & BROOKER, *supra* note 23, at 2. To shed the "costly and troublesome burden" of pretrial responsibility for the accused, medieval sheriffs commonly released the accused on their own recognizances or upon a surety's guarantee of the accused's appearance at trial. *See Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 966 (1961).

32. *See* John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1733 (2018).

33. *See id.* at 1733 n.20.

34. *Id.* ("[T]he pace at which the United States grew diluted the important community ties that made the personal surety click.").

35. Timothy R. Schnacke, *A Brief History of Bail*, 57 JUDGES' J. 4, 7 (2018). Commercial bail bonding is a "very American invention." Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES (Jan. 29, 2008), https://www.nytimes.com/2008/01/29/us/29bail.html [https://perma.cc/9JLB-5NL3] ("America's open frontier and entrepreneurial spirit injected an innovation into the process . . . ."). The only other country that explicitly allows commercial bail bonding like the United States is the Philippines. Gross, *supra* note 29, at 1070. Many other jurisdictions outlaw commercial bail bonds; in Canada and England, for example, selling a bail bond is a criminal offense equivalent to bribing a juror or witness tampering. Liptak, *supra*; Shane Bauer, *Inside the Wild, Shadowy, and Highly Lucrative Bail Industry*, MOTHER JONES (May–June 2014), https://www.motherjones.com/politics/2014/06/bail-bond-prison-industry/ [https://perma.cc/478C-5L36].

36. *See* Schnacke, *supra* note 35, at 7.

unsecured, meaning they required only a promise to pay.[37] But secured financial conditions require most defendants to pay something in advance of their release.[38] Judges, aware of the lack of personal sureties, began ordering defendants to fulfill secured financial conditions throughout the 1800s hoping that the defendants could "self-pay."[39] Defendants typically met secured financial conditions by either depositing cash (cash bail) or obtaining a commercial surety bond (bail bond).[40] Hence, money bail in America was born.[41]

The commercial bail bond industry soon took the United States by storm. Its birthplace was late-1800s San Francisco.[42] Brothers Peter and Thomas McDonough began posting bail for defendants as favors for the lawyers who drank in their father's bar in San Francisco.[43] Eventually, the McDonough brothers began charging a fee for this service.[44] By 1898, they had an established business for underwriting bail bonds.[45] And in 1912, the Supreme Court of the United States announced: "The distinction between bail and suretyship is pretty nearly forgotten. The interest to produce the [defendant] in court is impersonal and wholly pecuniary."[46] By 2018, commercial bail bonding was legal in all but four states.[47] Today, large insurance companies back the commercial bail bond industry, which rakes in over two billion dollars in annual revenue from premiums and fees.[48] The commercial bail bond industry uses its financial resources to leverage political influence through lobbying, campaign

37. *Id.* Unsecured bonds still exist today but are underutilized, accounting for only 5% of all releases in 2009. *See* REAVES, *supra* note 25, at 15.

38. *See* Schnacke, *supra* note 35, at 7.

39. *Id.* at 6.

40. *See id.* at 7.

41. "Money bail is where the defendant must pay an amount of money to a court or to a commercial bondsman to be released before trial." Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 975 (2020); *see also* Nicholas P. Johnson, *Cash Rules Everything Around the Money Bail System: The Effect of Cash-Only Bail on Indigent Defendants in America's Money Bail System*, 36 BUFF. PUB. INT. L.J. 29, 35 (2019) ("In its most basic sense, bail today is known as an amount of cash or other security that a criminal defendant pays to be released before trial.").

42. *See* Gross, *supra* note 29, at 1070; SCHNACKE, JONES & BROOKER, *supra* note 23, at 6–7.

43. Gross, *supra* note 29, at 1070.

44. SCHNACKE, JONES & BROOKER, *supra* note 23, at 7.

45. *Id.*

46. Leary v. United States, 224 U.S. 567, 575 (1912).

47. Gross, *supra* note 29, at 1071.

48. Alex Kornya, Danica Rodarmel, Brian Highsmith, Mel Gonzalez & Ted Mermin, *Crimsumerism: Combating Consumer Abuses in the Criminal Legal System*, 54 HARV. C.R.-C.L L. REV. 107, 124 (2019); SPIKE BRADFORD, JUST. POL'Y INST., FOR BETTER OR FOR PROFIT: HOW THE BAIL BONDING INDUSTRY STANDS IN THE WAY OF FAIR AND EFFECTIVE PRETRIAL JUSTICE 26 (2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/_for_better_or_for_profit_.pdf [https://perma.cc/HYG4-WYHJ].

donations, and association with powerful anti-reform organizations.[49] As such, the commercial bail bond industry continues to maintain its preeminence despite widespread knowledge of its ineffectiveness, corruption, criminal collusion, use of coercion, and exploitation of low-income communities.[50]

Reliance on money bail has increased in recent years. In 1992, releases on recognizance—a type of nonfinancial release in which defendants sign an agreement that they will appear in court—were the most common type of release for defendants accused of felonies in state courts, representing 38% of all releases.[51] By 2009, releases on recognizance accounted for only 23% of all releases for the same category of defendants.[52] Meanwhile, financial conditions of release increased. In 1990, 37% of felony defendants in state courts were released with financial conditions,[53] but that rate increased to 61% by 2009.[54] America's widespread use of money bail, including commercial bail bonds and cash bail, has ultimately transformed the operation of bail since medieval England.

B. Washington's Current Bail Practices Mirror the Twentieth-Century Changes in Bail Administration

Today, accused individuals continue to use bail bonds and cash bail to secure pretrial release in Washington.[55] Individuals charged with misdemeanors may sometimes pay a specified amount in cash before appearing in court.[56] Otherwise, courts determine whether individuals are eligible for pretrial release, and if so, appropriate conditions of release.[57] Washington courts must release noncapital defendants[58] on their own

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49. BRADFORD, *supra* note 48, at 4, 26–27.

50. *See id.* at 3, 12–15.

51. BRIAN A. REAVES & PHENY Z. SMITH, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NO. NCJ 148826, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1992, at 17, 40 (1995), https://www.bjs.gov/content/pub/pdf/Feldef92.pdf [https://perma.cc/G3UL-W8JQ].

52. REAVES, *supra* note 25, at 15.

53. *Id.*

54. *Id.*

55. *See* WASH. SUPER. CT. CRIM. R. 3.2(b)(4), (b)(5), (d)(6) (2020) (allowing bail bond or a deposit of "cash in lieu thereof" in superior courts); WASH. CTS. OF LTD. JURISDICTION CRIM. R. 3.2(b)(4), (b)(5), (d)(6) (2020) (allowing the same in courts of limited jurisdiction).

56. *See* WASH. CTS. OF LTD. JURISDICTION CRIM. R. 3.2(b) (allowing courts of limited jurisdiction to set bail schedules); WASH. REV. CODE § 10.19.055 (2020) (requiring individual bail determinations for individuals charged with class A and B felonies).

57. *See* WASH. SUPER. CT. CRIM. R. 3.2(a)–(e); WASH. CTS. OF LTD. JURISDICTION CRIM. R. 3.2(a)–(e).

58. Individuals convicted of aggravated first-degree murder could be sentenced to death in

recognizance to await their trial except in certain circumstances.[59] Specifically, the court may impose further conditions if it finds that the accused is unlikely to appear when required or that there is a likely danger that the defendant will commit a violent crime, intimidate a witness, or interfere with the administration of justice upon release.[60] Courts may impose a variety of release conditions,[61] including secured financial conditions.[62] And to meet those secured financial conditions, Washington defendants can choose between a bail bond or cash bail.[63] National data suggests that defendants most often choose bail bonds.[64]

When a defendant fails to appear in court after release on a bail bond or cash bail, the court may forfeit the cash bail[65] or demand that the bail

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Washington prior to October 2018. *See* WASH. REV. CODE § 10.95.030(2). However, the Supreme Court of Washington held in 2018 that Washington's death penalty, as administered, was unconstitutional under article I, section 14 of the Washington Constitution because it was imposed in an arbitrary and racially biased manner. *See* State v. Gregory, 192 Wash. 2d 1, 35–36, 427 P.3d 621, 642 (2018). Nevertheless, it is likely that aggravated first-degree murder is still a "capital offense" for bail purposes. *See* State v. Haga, 81 Wash. 2d 704, 708, 504 P.2d 787, 789 (1972) ("[A]bolishment of the death penalty . . . in no way affected the purpose and intentions of our legislature in limiting the right to bail on appeal.").

59. *See* WASH. SUPER. CT. CRIM. R. 3.2(a); WASH. CTS. OF LTD. JURISDICTION CRIM. R. 3.2(a).

60. *See id.*

61. Other conditions that courts may impose for flight risk include travel restrictions and electronic monitoring. *See* WASH. SUPER. CT. CRIM. R. 3.2(b)(1), (2), (6), (7); WASH. CTS. OF LTD. JURISDICTION CRIM. R. 3.2(b)(1), (2), (6), (7). When courts determine that a defendant presents a "substantial danger," they may impose non-financial conditions such as electronic monitoring and prohibitions on contact, travel, weapons, and drugs. *See* WASH. SUPER. CT. CRIM. R. 3.2(d)(1)–(5), (7)–(10); WASH. CTS. OF LTD. JURISDICTION CRIM. R. 3.2(d)(1)–(5), (7)–(10).

62. *See* WASH. SUPER. CT. CRIM. R. 3.2(b)(4), (b)(5), (d)(6); WASH. CTS. OF LTD. JURISDICTION CRIM. R. 3.2(b)(4), (b)(5), (d)(6). Courts may also impose unsecured financial conditions. *See* WASH. SUPER. CT. CRIM. R. 3.2(b)(3), (d)(6); WASH. CTS. OF LTD. JURISDICTION CRIM. R. 3.2(b)(3), (d)(6). Unsecured bonds do not require any money upfront, but the defendant is liable for the full bail amount upon failure to appear in court. *See* REAVES, *supra* note 25, at 35.

63. *See* WASH. SUPER. CT. CRIM. R. 3.2(b)(4), (b)(5), (d)(6) (2020) (allowing bail bond or a deposit of "cash in lieu thereof" in superior courts); WASH. CTS. OF LTD. JURISDICTION CRIM. R. 3.2(b)(4), (b)(5), (d)(6) (2020) (allowing the same in courts of limited jurisdiction). However, socioeconomic factors often reduce the practical choices of defendants. *See* ACLU WASH., NO MONEY, NO FREEDOM: THE NEED FOR BAIL REFORM 4 (2016), https://www.aclu-wa.org/bail [https://perma.cc/KUY2-BJ6M] ("The bail amounts for most criminal cases—and the amounts required by a bail bondsman—are out of reach for much of the population."); Kelety, *supra* note 4 ("The biggest problem for our clients isn't that it's $1,000 or less . . . . Our clients generally can't pay any amount.").

64. *See* COHEN & REAVES, *supra* note 2, at 2. While Washington-specific data is hard to come by, a national study that included King County, Washington, indicated that 33% of felony defendants released pretrial used a bail bond from 1990 to 2004, whereas only 5% used cash bail. *Id.*

65. State v. Jeglum, 8 Wash. App. 2d 960, 965, 442 P.3d 1, 3 (2019) (holding that cash bail is forfeitable if the accused fails to appear or otherwise violates a condition of release); WASH. SUPER. CT. CRIM. R. 3.2(o) (allowing forfeiture of cash bail upon failure to appear); WASH. CTS. OF LTD. JURISDICTION CRIM. R. 3.2(n) (allowing forfeiture of cash bail upon failure to appear).

bond agent pay the full amount of the bond.[66] If a defendant then reappears later, both bail agents and those who post cash bail may recover, or exonerate, the forfeited money under certain circumstances.[67]

II. IMPACTS OF CURRENT BAIL PRACTICES AND CONTEMPORARY REFORM EFFORTS

The socioeconomic and racial inequities of pretrial detention and bail are no secret.[68] And these inequities infect the very conduct that leads to bail forfeiture—failure to appear.[69] A "third wave" of bail reform efforts across the country urge states to confront socioeconomic and racial inequities by moving away from money bail.[70] While bail reform may be on the horizon in Washington, entirely eliminating money bail in the state is unlikely in the short term.[71] In the meantime, reform proponents encourage a shift away from the commercial bail bond industry and toward non-profit community bail funds, which contribute to reform efforts and rely on cash bail exoneration to function.[72] Efforts to shift away from bail bonds and toward cash bail would make reform to cash bail forfeiture exoneration practices all the more pressing. More cash bail

66. *See* WASH. REV. CODE § 10.19.090 (2020) (allowing forfeiture of bail bonds and forfeiture judgment against surety); WASH. SUPER. CT. CRIM. R. 3.2(o) (allowing forfeiture of bail bonds upon failure to appear); WASH. CTS. OF LTD. JURISDICTION CRIM. R. 3.2(n) (allowing forfeiture of bail bond upon failure to appear).

67. *See* State v. Kramer, 167 Wash. 2d 548, 552, 219 P.3d 700, 701–02 (2009) (discussing discretionary exoneration of bail bonds); *In re* Marriage of Bralley, 70 Wash. App. 646, 656, 855 P.2d 1174, 1179 (1993) (discussing discretionary exoneration of cash bail).

68. *See* Muhammad B. Sardar, *Give Me Liberty or Give Me . . . Alternatives? Ending Cash Bail and Its Impact on Pretrial Incarceration*, 84 BROOK. L. REV. 1421, 1423 (2019) ("From a societal perspective, these bail policies continue to strengthen the firm grip of institutional racism in the U.S. criminal justice system, with money bail disproportionately affecting minorities."); Johnson, *supra* note 41, at 83 ("The result of such [bail] practices . . . has led to many poor defendants awaiting trial from a jail cell instead of being with their families, working, or preparing their criminal cases."); Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 709 (2019) ("[B]ond administration in this country continues to be characterized by the over-incarceration of the poor and the disparate treatment of people of color—particularly black people."); OFF. OF THE WASH. STATE AUDITOR, REPORT NO. 1023411, PERFORMANCE AUDIT: REFORMING BAIL PRACTICES IN WASHINGTON 7 (2019), https://sao.wa.gov/wp-content/uploads/Tabs/PerformanceAudit/PA_Reforming_Bail_Practices_ar1023411.pdf [https://perma.cc/NEK5-PGJ8] ("[C]urrent bail practices result in those who cannot afford bail remaining in jail until their trials are completed, while defendants who qualify and can afford bail are released."); ACLU WASH., *supra* note 63, at 5 ("A money-based pretrial system poses inherent disadvantages to people of color and people with disabilities living in poverty.").

69. *See infra* section II.B.

70. *See infra* section II.C.

71. *See id.*

72. *See id.*

would mean more cash bail forfeiture and a greater need for cash bail forfeiture exoneration.

A. Contemporary Bail Practices Disproportionately Impact Individuals of Color and Low-Income Individuals

Pretrial detention negatively impacts detained defendants. Individuals detained while awaiting trial often experience separation from their children, a higher risk of death, and financial problems due to loss of employment, housing, education, and public benefits.[73] Further, "a growing body of research indicates that pretrial detention *itself* directly increases the probability of worse case outcomes for the defendant—meaning a guilty plea or conviction at trial."[74] Individuals jailed on lower-level criminal charges tend to focus on their immediate release; that focus often leads individuals to plead guilty despite weak cases against them or low prosecutorial ambition to proceed to trial.[75]

An increasing number of low-income individuals are unable to afford bail across the United States, including in Washington. The amount that judges set for bail has risen dramatically; between 1992 and 2006, the national average bail amount in felony cases doubled from $25,400 to $55,500.[76] "The bail amounts for most criminal cases—and the amounts required by a bail bondsman—are out of reach for much of the population."[77] Accordingly, the rates of pretrial detention have increased in Washington. From 2000 to 2015, the pretrial incarceration rate in Washington jails rose 34% in the state's eighteen rural counties, 27% in the state's four suburban counties, and 15% in the state's sixteen small to

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73. *See* ACLU WASH., *supra* note 63, at 7–9*; see also* COLUMBIA LEGAL SERVS., GONE BUT NOT FORGOTTEN: THE UNTOLD STORIES OF JAIL DEATHS IN WASHINGTON (2019), https://columbialegal.org/wp-content/uploads/2019/ 05/Gone-But-Not-Forgotten-May2019.pdf [https://perma.cc/2C2X-RNQH].

74. Koepke & Robinson, *supra* note 32, at 1746 (emphasis in original); *see also* OFF. OF THE WASH. STATE AUDITOR, *supra* note 68, at 3 ("Pretrial detention can have negative consequences for defendants, including an increased likelihood of reoffense and worse case outcomes.").

75. *See* ACLU WASH., *supra* note 63, at 6 ("People who are detained on low-level misdemeanor charges face great pressure to plead guilty just to get out of jail."); OFF. OF THE WASH. STATE AUDITOR, *supra* note 68, at 7 ("In some cases, defendants may plead guilty to crimes in order to secure release, even if they are innocent, rather than wait in jail for a court date.").

76. *See* JUST. POL'Y INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 10 (2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf [https://perma.cc/P45K-L24C]. This 118.5% increase in bail amounts far outpaced inflation, which was 38.6% over the same period. *See* Kimberly Amadeo, *US Inflation Rate by Year from 1929 to 2023*, THE BALANCE (Dec. 17, 2020), https://www.thebalance.com/u-s-inflation-rate-history-by-year-and-forecast-3306093 [https://perma.cc/8W54-XNPS].

77. ACLU WASH., *supra* note 63, at 4.

medium counties.[78] The Washington State Auditor's office reported that, as a consequence of current bail practices in Washington, "cities and counties hold a disproportionate number of low-income defendants awaiting trial."[79] The negative effects of pretrial detention traverse the socioeconomic ladder in theory. But the fact that a disproportionate number of low-income individuals sit in jail awaiting trial in Washington[80] means that a disproportionate number of low-income Washingtonians experience the negative impacts of pretrial detention.

Bail practices also disproportionately impact individuals of color.[81] In 2015, the state of Washington jailed Black individuals at 2.8 times the rate of White individuals and jailed Native American individuals at 3.8 times the rate of White individuals.[82] One study indicates that courts are less likely to release Black individuals than White individuals on their own recognizance and more likely to impose significantly higher bail amounts on Black individuals than individuals of any other race.[83] Like low-income individuals, a disproportionate number of individuals of color experience the negative effects of pretrial detention in Washington.

B. Socioeconomic and Racial Inequities Also Impact Bail Forfeiture

Even if an individual is released on bail, socioeconomic and racial inequities continue to impact outcomes, including failure to appear rates. And because failure to appear leads to bail forfeiture,[84] socioeconomic and racial inequities infect bail forfeiture.

Many individuals fail to appear for their court dates. In Yakima County, Washington, 27% of all individuals released pretrial failed to appear in 2014.[85] In Spokane County, Washington, 38% of individuals failed to appear after the introduction of pretrial services in 2016.[86] From 1990 to 2004, state court felony defendants nationwide had average failure to

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78. VERA INST. OF JUST., INCARCERATION TRENDS IN WASHINGTON 3 (2019), https://www.vera.org/downloads/ pdfdownloads/state-incarceration-trends-washington.pdf [https://perma.cc/R4HC-GBLS]. In Washington's largest urban county, King County, the pretrial detention rate decreased 29% from 2005 to 2015. *Id.*

79. OFF. OF THE WASH. STATE AUDITOR, *supra* note 68, at 7.

80. *See id.*

81. *See* Sardar, *supra* note 68, at 1423.

82. VERA INST. OF JUST., *supra* note 78, at 2.

83. *See* JUST. POL'Y INST., *supra* note 76, at 15.

84. *See* WASH. SUPER. CT. CRIM. R. 3.2(o) (2020) (allowing forfeiture of cash bail upon failure to appear); WASH. CTS. OF LTD. JURISDICTION CRIM. R. 3.2(n) (2020) (allowing forfeiture of cash bail upon failure to appear).

85. OFF. OF THE WASH. STATE AUDITOR, *supra* note 68, at 13.

86. *Id.* In 2011, before the introduction of pretrial services, the failure to appear rate in Spokane County was 53%. *See id.*

appear rates between 21% and 24%.[87] Of those individuals released on a commercial bail bond, 18% failed to appear.[88] Individuals released on cash bail failed to appear at a similar rate of 20%.[89]

But who fails to appear? Factors that correlate with failure to appear rates include gender, race, offense type, prior criminal history, living conditions, and employment.[90] Indigent individuals are more likely to fail to appear across all gender and racial groups.[91] Lack of access to resources and struggles with mental health may contribute to this relationship.[92] Additionally, young Black and Hispanic individuals have higher failure to appear rates than White individuals and other non-Hispanic individuals of color.[93] The criminal legal system's production of race and class disparities and a credible lack of trust in the institution may explain these rates.[94]

Failing to appear does not always boil down to individual choice. Some individuals fail to appear in court because they want to evade the legal system or fear potential criminal penalties.[95] But others fail to appear in court inadvertently due to unreliable transportation, competing responsibilities for childcare or work, illness, personal emergencies, forgetfulness, or lost court documents.[96] The number of defendants who

87. COHEN & REAVES, *supra* note 2, at 8.

88. *Id.* at 9.

89. *Id.*

90. Haley R. Zettler & Robert G. Morris, *An Exploratory Assessment of Race and Gender-Specific Predictors of Failure to Appear in Court Among Defendants Released via a Pretrial Services Agency*, 40 CRIM. JUST. REV. 417, 418 (2015).

91. *Id.* at 426.

92. *See* Aleksandrea E. Johnson, Comment, *Decriminalizing Non-Appearance in Washington State: The Problem and Solutions for Washington's Bail Jumping Statute and Court Nonappearance*, 18 SEATTLE J. FOR SOC. JUST. 433, 442 (2020).

93. *See* COHEN & REAVES, *supra* note 2, at 9 tbl.7.

94. *See* Johnson, *supra* note 92, at 442–43; Brian H. Bornstein, Alan J. Tomkins, Elizabeth M. Neeley, Mitchel N. Herian & Joseph A. Hamm, *Reducing Courts' Failure-to-Appear Rate by Written Reminders*, 19 PSYCH. PUB. POL'Y & L. 70, 70 (2013).

95. *See* Johnson, *supra* note 92, at 441; DANIEL J. FLANNERY, WANTED ON WARRANTS: THE FUGITIVE SAFE SURRENDER PROGRAM 34 (2013).

96. *See* Johnson, *supra* note 92, at 441; Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 729–30 (2018). Professor Lauryn P. Gouldin proposes three distinct failure to appear categories: true flight, local absconding, and low-cost nonappearance. *See id.* at 683. True flight includes nonappearance because the individual has fled the jurisdiction of arrest. *See id.* at 725. Low-cost nonappearance includes individuals who fail to appear for a variety of reasons, like being unaware of or forgetting their court date, illness or other unforeseen personal emergencies, external logistical challenges, lack of capacity to navigate the process, fear of punishment related to the charge, or inability to pay the fines and fees owed at the courthouse. *See id.* at 729. Low-cost nonappearance is more preventable than other types of nonappearance and has lower associated costs. *See id.* at 731–34. Local absconders remain in the jurisdiction of arrest yet willfully avoid court and hide from law

truly flee is small.[97] Further, punishments for failing to appear may actually contribute to persistent nonappearance.[98]

No comprehensive data exists regarding bail forfeiture rates nationally or in Washington. However, failures to appear lead to bail forfeiture,[99] so the socioeconomic and racial inequities that impact failures to appear necessarily impact bail forfeiture in Washington.

C. Current Reform Efforts Focus on Reducing Reliance on Bail Bonds

In response to the ills of money bail, a "third generation" or "third wave" of bail reform is growing in many jurisdictions across the nation.[100] The crux of many of these bail reforms are efforts to increase the use of pretrial risk-assessment tools[101] and simultaneously decrease or eliminate reliance on money bail.[102]

Recent events indicate that Washington may join this third generation of bail reform. Organizations like the American Civil Liberties Union of Washington have urged Washington legislators and courts to decrease the

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enforcement; their failure to appear is typically more persistent and has higher costs than low-cost nonappearance. *See id.* at 735–37. Gouldin argues that "[t]he problem with an overly broad definition of nonappearance is that it lumps comparatively minor forms of nonappearance together with much more serious and costly nonappearance problems." *Id.* at 729. Each category of nonappearance has "distinct systemic costs and call for different types of supervision and management." *Id.* at 683.

97. *See* Corey & Lo, *supra* note 3 ("In fact, the percentage of FTAs resulting from defendants absconding is exceedingly low . . . .").

98. *See* Gouldin, *supra* note 96, at 695 ("Fear of additional punishment for failing to appear, including fines and fees, reinforces a defendant's desire or need to avoid court. Even initially inadvertent nonappearances can quickly become a persistent problem.").

99. *See* WASH. SUPER. CT. CRIM. R. 3.2(o) (2020) (allowing forfeiture of cash bail upon failure to appear); WASH. CTS. OF LTD. JURISDICTION CRIM. R. 3.2(n) (2020) (allowing forfeiture of cash bail upon failure to appear).

100. *See* Gouldin, *supra* note 96, at 714–16 (describing recent bail reform in New Jersey, New Mexico, Connecticut, and Maryland); Koepke & Robinson, *supra* note 32, at 1746–50 (describing recent bail reforms in Connecticut, New Jersey, Illinois, New Orleans, Maryland, and California); Sardar, *supra* note 68, at 1441–42 (describing recent bail reform in California, the first state to fully eliminate cash bail).

101. Pretrial risk-assessment tools are actuarial tools that use data to determine a defendant's risk of failure to appear and risk of committing a violent offense upon release. *See* INTISAR SURUR & ANDREA VALDEZ, PRETRIAL REFORM TASK FORCE: FINAL RECOMMENDATIONS REPORT 14 (2019), https://www.courts.wa.gov/subsite/mjc/docs/PretrialReformTaskForceReport.pdf [https://perma.cc/B9UF-DPN4]; Koepke & Robinson, *supra* note 32, at 1729 ("[Pretrial risk-assessment] tools use historical data to describe how often defendants similar to the current one failed to appear for a court date, or were rearrested pending resolution of their cases.").

102. *See* Gouldin, *supra* note 96, at 714 ("The rise of risk assessment has occurred alongside another pretrial reform agenda: the effort to end reliance on money bail as a means of managing pretrial risk."); Koepke & Robinson, *supra* note 32, at 1746 ("A central goal of most of these efforts is to end the wealth-based system, and move pretrial justice systems toward a risk-based model."); Sardar, *supra* note 68, at 1441 ("There has been a growing movement to end the system of cash bail at both a federal and state level.").

use of money bail in the state.[103] And government officials may be listening. Guided by principles of socioeconomic and racial justice, the Washington Pretrial Reform Task Force issued a report in 2019 recommending reform to pretrial practices in the state.[104] Those recommendations focus on increasing pretrial services, such as court reminders and transportation support,[105] and collecting better data across the state.[106]

However, the Task Force's recommendations are missing key ingredients that are common in the third wave of bail reform efforts nationwide. The Task Force did not recommend changes to the use of money bail in Washington beyond increased use of pretrial services.[107] This is likely for good reason. The Washington Constitution requires that, with certain exceptions, "[a]ll persons charged with crime shall be bailable by sufficient sureties."[108] In 2014, the Supreme Court of Washington interpreted the phrase "bailable by sufficient sureties" to require that defendants have the option of obtaining bail via a surety, which "involves a third party promise to fulfill a financial burden in the event of nonperformance."[109] In other words, money bail is baked into the Washington Constitution. Eliminating money bail in Washington would thus require a constitutional amendment abrogating the right to bail by sufficient sureties.[110] Recently retired King County Superior Court Judge

103. *See* ACLU WASH., *supra* note 63, at 9.

104. *See* SURUR & VALDEZ, *supra* note 101, at 7–8 ("Accused individuals should not be detained pretrial solely because of their inability to post a bond or pay for their release. . . . Every entity in the criminal justice system should take steps to ensure that the systems in place and the reforms to be implemented do not have a disproportionate impact on a person because of [their] race, ethnicity, gender, socioeconomic position, or otherwise.").

105. *See id.* at 4–5.

106. *See id.* at 6.

107. Additionally, the Task Force did not make a final recommendation about whether jurisdictions throughout Washington should adopt risk-assessment tools. *See id.* at 16 ("The Task Force takes no position on whether [pretrial risk-assessment tools] are appropriate for any one jurisdiction or whether they should be employed uniformly statewide."). The Task Force noted the popularity of pretrial risk-assessment tools, with the majority of states having adopted some type of risk-assessment tool. *See id.* at 14–15. However, the Task Force had "concerns associated with the use of [pretrial risk-assessment] tools." *Id.* at 15. Namely, some compellingly argue that pretrial risk-assessment tools incorporate the systemic racial bias that exists in the criminal legal system. *See id.*

108. WASH. CONST. art. 1, § 20 (amended 2010).

109. State v. Barton, 181 Wash. 2d 148, 156, 331 P.3d 50, 54 (2014).

110. *See* Gross, *supra* note 29, at 1093 ("Abrogating an absolute constitutional right to bail, of course, requires a constitutional amendment."); Kelety, *supra* note 4 ("Amendments to the Washington state constitution—which is what would be required to eliminate the money bail entirely—require the approval of two-thirds of the Legislature and a vote of the people."). Professor Jordan Gross argues that it is possible to address concerns about money bail without a constitutional amendment, including the introduction of pretrial risk-assessment tools and decreased use of money

Teresa Doyle spoke about the likelihood of eliminating money bail in 2018, stating that "[f]or all practical purposes money bail is here to stay in Washington state."[111]

While money bail still reigns, proponents of bail reform have in the meantime "sought to change who pays bail" by promoting an end to commercial bail and increased use in community bail funds.[112] In the last five years, formal charitable bail funds have grown in prominence nationwide.[113] Bail exoneration is vital to community bail fund operations. They use a rotating pool of money to bail out multiple defendants over time.[114] This means that once a court exonerates bail in one case, the community bail fund uses the returned money to bail out more individuals. Community bail funds typically do not operate from personal connections with the defendant, but from ideological qualms with "the overuse of pretrial detention among particular racial or socioeconomic groups, or political organizations."[115]

Many community bail funds actively strive to make themselves irrelevant through their bail reform efforts. For example, the Seattle-based Northwest Community Bail Fund's end goal is "to end the use of money bail and reform bail as a whole."[116] And the Chicago Community Bond Fund endeavors "to put [itself] out of operation."[117] While community bail funds are currently essential, they do not need to remain essential.[118] Sharlyn Grace, Executive Director of the Chicago Community Bond Fund, explained: "We have over a million dollars in the custody of the court system. What could that resource be doing for the movement if it weren't being used to pay ransom to the state?"[119]

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bail. *See* Gross, *supra* note 29, at 1099. The Washington Pretrial Reform Task Force's recommendations reflect the alternative of decreasing use of money bail through increased pretrial services. *See* SURUR & VALDEZ, *supra* note 101, at 4–5.

111. Kelety, *supra* note 4 (quoting King County Superior Court Judge Theresa Doyle's statement to *Seattle Weekly*).

112. Gouldin, *supra* note 96, at 715–16.

113. Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 600–02 (2017) (describing the efforts of the Bronx Freedom Fund, Baltimore Protestors Bail Bond Fund, Chicago Community Bond Fund, and Lorena Borjas Community Fund).

114. *See id.* at 600.

115. *Id.*

116. *What We Do*, NW. CMTY. BAIL FUND, https://www.nwcombailfund.org/what-we-do/ [https://perma.cc/S878-SX6K].

117. Jia Tolentino, *Where Bail Funds Go from Here*, NEW YORKER (June 23, 2020), https://www.newyorker.com/news/annals-of-activism/where-bail-funds-go-from-here [https://perma.cc/EA4B-P5PJ] (quoting Sharlyn Grace, executive director of the Chicago Community Bond Fund).

118. *See id.*

119. *Id.* (quoting Sharlyn Grace, executive director of the Chicago Community Bond Fund).

Community bail funds were, as one *Washington Post* article puts it, "having a moment in 2020."[120] After police officer Derek Chauvin murdered George Floyd on May 26, 2020, in Minneapolis, community members took to the streets to protest police brutality against individuals of color.[121] As law enforcement "cracked down" on protestors, individuals began sharing a link to the Minnesota Freedom Fund on Twitter and urging donations to the community bail fund.[122] Unrest about the murder of Floyd and other Black individuals at the hands of law enforcement spread across the nation, and bail funds in other cities also saw an increase in donations.[123] For example, Seattle-area media outlets began encouraging donations to the Black Lives Matter Seattle Freedom Fund and the Northwest Community Bail Fund.[124] In a two-week period during the summer of 2020, bail funds around the nation received a combined $90 million in donations.[125]

Community bail funds in Washington operate within the confines of cash bail,[126] so they are not immune to difficulties in getting their bail money back. Pilar Weiss, director of the National Bail Fund Network, stated that courts do not close a case and automatically return bail money.[127] Weiss believes that states expect individuals to get "ground down by the effort to get their bail money back" so that they eventually just give up.[128]

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120. Melanie Newport, *Bail Funds Are Having a Moment in 2020*, WASH. POST (June 17, 2020, 3:00 AM), https://www.washingtonpost.com/outlook/2020/06/17/bond-funds-are-having-moment-2020/ [https://perma.cc/D9PS-ADUV].

121. *See* Tolentino, *supra* note 117.

122. *Id.*

123. *See id.*

124. *These Seattle Bail Funds Need Your Donations*, CURIOCITY (June 2, 2020), https://curiocity.com/seattle/lifestyle/these-seattle-bail-funds-need-your-donations/ [https://perma.cc/8XR3-GZRB]; *Where You Can Donate to Support Seattle's George Floyd Protestors*, SEATTLE MET (June 2, 2020, 8:19 AM), https://www.seattlemet.com/news-and-city-life/2020/06/where-you-can-donate-to-support-seattle-s-george-floyd-protesters [https://perma.cc/D27H-3Q92].

125. *See* Shane Goldmacher, *Racial Justice Groups Flooded with Millions in Donations in Wake of Floyd Death*, N.Y. TIMES (June 16, 2020), https://www.nytimes.com/2020/06/14/us/politics/black-lives-matter-racism-donations.html [https://perma.cc/XU3P-A4GA].

126. *See What We Do*, *supra* note 116; *The BLM Seattle Freedom Fund*, BLACK LIVES MATTER SEATTLE KING CNTY., https://blacklivesseattle.org/bail-fund/ [https://perma.cc/FTD6-NQXN]. In Washington, a bail bond agency "means a business that sells and issues corporate surety bail bonds or that provides security in the form of personal or real property to ensure the appearance of a criminal defendant before the courts of this state or the United States." WASH. REV. CODE § 18.185.010(5) (2020). Under this definition, it seems unlikely that a non-profit community bail fund could become a bail bond agency and operate using bail bonds.

127. *See* Tolentino, *supra* note 117.

128. *Id.*

Despite the importance of exoneration to the individuals and community bail funds that post cash bail, bail exoneration does not currently appear on bail reformers' short lists, or even their radar. But attempts to move away from the commercial bail bond industry and toward community bail funds—which have recently seen massive budget increases—should encourage reformers to add cash bail exoneration protections to their agenda in Washington State.

III. FORFEITURE EXONERATION IN WASHINGTON

Recall that a defendant's failure to appear in court allows the court to forfeit the cash bail[129] or demand that the bail bond agent pay the full amount of the bond.[130] Upon a defendant's reappearance in court, both bail bond agents and cash bail depositors may recover, or exonerate, the forfeited money under certain circumstances.[131] But the theoretical ability to exonerate forfeited bail does not mean that Washington courts equally exonerate cash bail and bail bonds. At least five avenues for bail bond forfeiture exoneration exist,[132] whereas courts may exonerate cash bail through only a single avenue.[133] Further, Washington's intermediate appellate courts have seemed to erode the protections of that single avenue to cash bail forfeiture exoneration in the lasty thirty years.[134]

A. Five Avenues to Bail Bond Forfeiture Exoneration

Bail bond agents have at least five avenues to exonerate forfeited bail bonds after a defendant fails to appear. Four of the five avenues are statutory.[135] The final avenue stems from the court's inherent

129. State v. Jeglum, 8 Wash. App. 2d 960, 965, 442 P.3d 1, 3 (2019) ("Cash bail is forfeitable if the accused fails to appear or otherwise violates a condition of release."); WASH. SUPER. CT. CRIM. R. 3.2(o) (allowing forfeiture of cash bail upon failure to appear); WASH. CTS. OF LTD. JURISDICTION CRIM. R. 3.2(n) (allowing forfeiture of cash bail upon failure to appear).

130. *See* WASH. REV. CODE § 10.19.090 (2020) (allowing forfeiture of bail bonds and forfeiture judgment against surety); WASH. SUPER. CT. CRIM. R. 3.2(o) (allowing forfeiture of bail bonds upon failure to appear); WASH. CTS. OF LTD. JURISDICTION CRIM. R. 3.2(n) (allowing forfeiture of bail bonds upon failure to appear).

131. *See* State v. Kramer, 167 Wash. 2d 548, 552, 219 P.3d 700, 701–02 (2009) (discussing discretionary exoneration of bail bonds); *In re* Marriage of Bralley, 70 Wash. App. 646, 656, 855 P.2d 1174, 1179 (1993) (discussing discretionary exoneration of cash bail).

132. *See infra* section III.A.

133. *See infra* section III.B.

134. *Compare* State v. Jackschitz, 76 Wash. 253, 256–57, 136 P. 132, 133–34 (1913) (treating cash bail similarly to bail bonds in exoneration context), *with Bralley*, 70 Wash. App at 656, 855 P.2d at 1179 (treating cash bail differently than bail bonds in exoneration context).

135. *See* WASH. REV. CODE §§ 10.19.090, .100, .105, .140.

discretionary authority.[136] Through the majority of these avenues, the Washington Legislature and Washington courts seek to provide bail bond agents a financial incentive to apprehend defendants who fail to appear in court.[137]

1. The Statutory Avenues to Bail Bond Forfeiture Exoneration

The first two avenues to bail bond forfeiture exoneration are relatively straightforward. First, sureties receive procedural protection: if the court does not notify the surety of the defendant's failure to appear within thirty days, the forfeiture is "null and void," and the bond is automatically exonerated.[138] Second, a bail bond agent may effectively press pause on the forfeiture: once a court enters a forfeiture judgment, the surety may obtain a stay of execution on the judgment for sixty days.[139] This second avenue provides "temporary relief from the harshness of forfeiture."[140]

A third avenue of relief comes from a court vacating the forfeiture judgment upon the defendant's reappearance.[141] The statute allows courts to exercise discretion; they may vacate forfeiture judgments when the defendant reappears within sixty days "upon such terms as may be just and equitable."[142] However, the Supreme Court of Washington effectively constrained courts' discretion under this statute in *State v. Kramer*,[143] holding that it is an abuse of discretion to refuse exoneration whenever the defendant reappeared within sixty days.[144] In other words, the Supreme Court of Washington recognized a "right to exoneration" upon reappearance within sixty days.[145]

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136. *See Jackschitz*, 76 Wash. at 254–55, 136 P. at 133.

137. *See* State v. Kramer, 167 Wash. 2d 548, 559, 219 P.3d 700, 705 (2009) (Fairhurst, J., dissenting); *Jackschitz*, 76 Wash. at 256, 136 P. at 133.

138. *See* WASH. REV. CODE § 10.19.090.

139. *See id.* § 10.19.100. To obtain the stay, the bail bond agent must provide an additional bond. *Id.*

140. *Kramer*, 167 Wash. 2d at 556, 219 P.3d at 704 (quoting State v. Hampton, 42 Wash. App. 130, 135, 709 P.2d 1221, 1224 (1985), *rev'd on other grounds*, 107 Wash. 2d 403, 728 P.2d 1049 (1986)). While this avenue does not, by itself, result in bail bond forfeiture exoneration, it provides bail bond agents time to locate defendants, which could result in forfeiture exoneration. *See* WASH. REV. CODE §§ 10.19.100, .105.

141. *See* WASH. REV. CODE § 10.19.105.

142. *Id.* Courts review bail bond forfeiture exoneration decisions for abuse of discretion. *See Kramer*, 167 Wash. 2d at 552, 219 P.3d at 701–02; State v. Jimas, 166 Wash. 356, 359–60, 7 P.2d 15, 16 (1932).

143. 167 Wash. 2d 548, 219 P.3d 700 (2009).

144. *See id.* at 558–59, 219 P.3d at 705.

145. *See id.* at 554, 219 P.3d at 703. Language in the statute indicates that exoneration is available if "execution [is] stayed" as provided by the third avenue to exoneration discussed above. *See* WASH.

This right exists "*irrespective of who was responsible* for the defendant's return."[146] For example, in *Kramer*, the defendant and bail bond agent agreed that the defendant would not reappear in court so the defendant could spend the Christmas holiday with family.[147] The police ultimately apprehended the defendant without the bail bond agent's assistance.[148] Dissenting from the majority, Justice Fairhurst stated that "a surety is now free to ignore, or even be complicit in, a defendant's failure to show up for court-ordered appearances for a 60-day period without concern that his bond moneys will not be returned."[149]

Unlike the third avenue, a bail bond agent must be involved in the defendant's return to court under the fourth avenue.[150] Bail bond agents enjoy forfeiture exoneration—minus law enforcement's costs for transportation, location, apprehension, and processing—if they are "directly responsible" for the defendant's apprehension by law enforcement within twelve months of forfeiture.[151]

2. The Discretionary Avenue to Bail Bond Forfeiture Exoneration

A fifth avenue to bail bond forfeiture exoneration is courts' inherent discretionary powers.[152] Over a century ago in *State v. Jackschitz*,[153] the Supreme Court of Washington established that Washington courts have inherent authority to exonerate bail bonds.[154] Thus, even if a bail bond

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REV. CODE § 10.19.105 (2020). However, the Supreme Court of Washington stated that the lower court should have exonerated the bond despite the bail bond agent's failure to previously request a stay of the forfeiture judgment's execution. *See Kramer*, 167 Wash. 2d at 555–58, 219 P.3d at 703–05. The Court stated that staying execution of a forfeiture judgment is permissive and not necessary when the defendant returns within sixty days. *Id.*

146. *Kramer*, 167 Wash. 2d at 554, 219 P.3d at 703 (emphasis in original) (quoting State v. Mullen, 66 Wash. 2d. 255, 259, 401 P.3d 991, 994 (1965)).

147. *Id.* at 560, 219 P.3d at 706 (Fairhurst, J., dissenting).

148. *Id.*

149. *Id.* at 559, 219 P.3d at 705.

150. *See* WASH. REV. CODE § 10.19.140.

151. *See id.*

152. *See* State v. Sullivan, 172 Wash. 530, 535, 22 P.2d 56, 58 (1933) ("[A]n application to set aside an order forfeiting a bail bond is addressed to the sound discretion of the court, and is analogous to a proceeding in equity.").

153. 76 Wash. 253, 136 P. 132 (1913). The case name is spelled "Jakshitz" in the Pacific Reporter and "Jackschitz" in the Washington Reporter. *See id.* at 253, 136 P. at 132. It remains unclear whether "Jackschitz" or "Jakshitz" is the correct spelling. This Comment uses the Washington Reporter's spelling of "Jackschitz."

154. *See id.* at 254–55, 136 P. at 133. The Court addressed the county's argument that Washington courts do not have the authority to exonerate bail after its forfeiture except as statute allows. *See id.* In response, the *Jackschitz* Court responded that "courts are constantly granting relief in such cases, and that the order of the court will not be reversed on appeal except for a manifest abuse of discretion." *Id.*

agent cannot obtain exoneration via statute, a court may exonerate a forfeited bond at its discretion.[155]

Courts consider a wide range of factors when exercising their inherent discretionary powers to exonerate a bail bond.[156] The Supreme Court of Washington indicated some relevant factors in 1932, including the timing of reappearance, and the good faith (or lack thereof) of the parties.[157] More recently, Justice Fairhurst's dissent in *Kramer* explained that Washington courts primarily consider the reasons for the defendant's reappearance and the bail bond agent's actions in returning the defendant to court.[158] Other factors include the surety's diligence in locating and apprehending the defendant, the defendant's reason for failing to appear, whether the surety and defendant colluded, whether the surety or law enforcement were responsible for the defendant's return to court, and whether the defendant returned within a reasonable time.[159]

Courts have historically exercised their discretion to exonerate bail bonds liberally.[160] While courts do not always grant bail bond agents' exoneration requests,[161] *Jackschitz* indicated that courts always exercise "broad discretion," and preserve fairness to the public by deducting any law enforcement expenses from the exonerated funds.[162]

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155. *See* State v. Hampton, 107 Wash. 2d 403, 407–08, 728 P.2d 1049, 1051–52 (1986) (noting that the common law power to vacate forfeiture of a bail bond exists in addition to the statutory protections against forfeiture).

156. *See* State v. Kramer, 167 Wash. 2d 548, 568, 219 P.3d 700, 709–10 (2009) (Fairhurst, J., dissenting); State v. Jimas, 166 Wash. 356, 360, 7 P.2d 15, 16 (1932) ("The test in such cases is not alone one of time, whether prompt or otherwise; nor good faith, or the lack of it; nor compensation, or lack of it, to the bondsmen or surety; nor whether there are organized, undisclosed principals in procuring the business of furnishing bail; nor distribution, or lack of it, of the money forfeited to public funds . . . . On the contrary, the test is the judicial discretion of the trial judge, who, in formulating and arriving at his judgment, may look to all such things . . . and others, if there are any . . . .").

157. *See Jimas*, 166 Wash. at 360, 7 P.2d at 16.

158. *See Kramer*, 167 Wash. 2d at 568, 219 P.3d at 709–10 (Fairhurst, J., dissenting).

159. *See id.*

160. *See* State v. Jackschitz, 76 Wash. 253, 256, 136 P. 132, 133 (1913).

161. For example, in *State v. Jimas*, the Supreme Court of Washington refused to overturn the denial of a surety's motion to vacate a bond forfeiture despite the surety's initiative in securing the defendant's return from another state a year later. 166 Wash. 356, 359–60, 7 P.2d 15, 16 (1932). Only Chief Justice Tolman dissented, stating, "[i]n the light of its probable influence upon bonding companies in the future, it was, in my opinion, an abuse of discretion not to set aside the forfeiture." *See id.* at 362, 7 P.2d at 17 (Tolman, C.J., dissenting).

162. *Jackschitz*, 76 Wash. at 256, 136 P. at 133*; see also* State v. Ohm, 145 Wash. 197, 198, 259 P. 382, 383 (1927) ("[C]ourts are lenient in relieving bondsmen from a forfeiture, where they have been diligent in returning the person who has forfeited his bail to the processes of the courts.").

3. Financial Incentives Underlie the Robust Avenues to Bail Bond Forfeiture Exoneration

The numerous avenues to recover forfeited bonds beg the question: why so much protection for bail bond agents? The Supreme Court of Washington has explained that bail should be encouraged to relieve the State of the burden of pretrial detention, to avoid pretrial detention of innocent individuals, and to recapture fleeing defendants with the aid of bail bond agents.[163] The theory is that if bail bond agents can prevent forfeiture or exonerate the forfeited bail by apprehending defendants who have failed to appear, they will do so.[164] Bail bond forfeiture exoneration is therefore a tool to financially incentivize bail bond agents "to ensure defendants comply with the terms of bail."[165]

But commercial bail bonds may lessen a defendant's financial incentive to show up to court in the first place.[166] The Supreme Court of Illinois indicated that financial types of bail assume that the threat of economic loss to accused individuals or their family and friends "will assure [their] appearance for trial."[167] In reality, however, it is bail bond agents and insurance companies that suffer specific financial losses due to nonappearance; defendants must pay nonrefundable bond premiums regardless of their future appearance or nonappearance.[168]

Efforts to financially incentivize bail bond agents help explain the myriad ways a bail bond agent in Washington can obtain exoneration of their forfeited bail bonds. But the financial incentive rationale is not unblemished. Recall that in *Kramer*, the Supreme Court of Washington recognized a right to bail bond forfeiture exoneration regardless of the bail bond agent's actions.[169] Justice Fairhurst believed that the majority's decision in *Kramer* "dangerously undercuts the financial incentive for sureties to ensure defendants comply with the terms of bail."[170] Despite this blemish on the financial incentive rationale, the five statutory and discretionary avenues to bail bond forfeiture exoneration in Washington provide robust protection against bail bond forfeiture.

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163. *See Jackschitz*, 76 Wash. at 256, 136 P. at 133.

164. *See Kramer*, 167 Wash. 2d at 554, 219 P.3d at 702 (quoting *Jackschitz*, 76 Wash. at 256, 136 P. at 133).

165. *Id.* at 559, 219 P.3d at 705 (Fairhurst, J., dissenting).

166. *See* People *ex rel.* Gendron v. Ingram, 217 N.E.2d 803, 805 (Ill. 1966).

167. *Id.*

168. *Id.*

169. *See Kramer*, 167 Wash. 2d at 555, 219 P.3d at 703.

170. *Id.* at 559, 219 P.3d at 705 (Fairhurst, J., dissenting).

B. The Single Avenue to Cash Bail Forfeiture Exoneration

Those who post cash bail do not have all of the same avenues to forfeiture exoneration that bail bond agents do. In fact, cash bail depositors do not have any statutory relief from forfeiture.[171] Cash bail depositors share only one avenue of forfeiture exoneration with bail bond agents—the court's inherent discretionary powers.[172] While older decisions from the Supreme Court of Washington typically erred on the side of cash bail forfeiture exoneration if the purpose of bail was accomplished, more recent decisions from Washington's intermediate appellate courts appear to treat cash bail less favorably.[173]

1. The (Lack of) Statutory Avenues to Cash Bail Forfeiture Exoneration

None of the statutory avenues available to bail bond agents are available to those who deposit cash in lieu of posting a bail bond.[174] Unlike the first avenue of bail bond exoneration described above, a forfeiture order remains in full effect if the court fails to notify the cash bail depositor of forfeiture.[175] Further, neither the second nor the third avenue of bail bond forfeiture exoneration apply to cash bail; cash bail depositors may neither request a stay of execution of the forfeiture nor receive automatic exoneration upon the defendant's reappearance within sixty days.[176] The fourth avenue, which allows bail bond exoneration within one year of forfeiture, is also inapplicable to cash bail.[177] Cash bail depositors therefore cannot rely on statutory avenues to exonerate forfeited cash bail.

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171. *See infra* section III.B.1.

172. *See* State v. Jackschitz, 76 Wash. 253, 254–55, 136 P. 132, 133 (1913); *In re* Marriage of Bralley, 70 Wash. App. 646, 656, 855 P.2d 1174, 1179 (1993).

173. *Compare Jackschitz*, 76 Wash. at 255, 136 P. at 133 (affirming exoneration of cash bail forfeiture), *with Bralley*, 70 Wash. App. at 652–54, 855 P.2d at 1177–78 (affirming denial of cash bail forfeiture exoneration), *and* State v. Navarro, No. 28230–0–III, 2010 WL 610758, at *2 (Wash. Ct. App. Feb. 23, 2010) (affirming denial of cash bail forfeiture exoneration).

174. *See Jackschitz*, 76 Wash. at 256, 136 P. at 133 ("The point is made that the statute has no reference to the forfeiture of cash bail . . . ."); State v. Paul, 95 Wash. App. 775, 778, 976 P.2d 1272, 1274 (1999) ("The person who puts up the cash is not a bondsman, and RCW 10.19 does not apply.").

175. *See Bralley*, 70 Wash. App. at 652, 855 P.2d at 1177; WASH. REV. CODE § 10.19.090 (2020).

176. *See Paul*, 95 Wash. App. at 778, 976 P.2d at 1274; *Navarro*, 2010 WL 610758, at *1.

177. *See Paul*, 95 Wash. App. at 778, 976 P.2d at 1274; *Bralley*, 70 Wash. App. at 650–51, 855 P.2d at 1176; *Navarro*, 2010 WL 610758, at *1.

2. The Discretionary Avenue to Cash Bail Forfeiture Exoneration

The only remaining avenue available for cash bail forfeiture exoneration is courts' inherent discretionary powers.[178] *Jackschitz* established courts' inherent discretionary power to exonerate bail bonds,[179] but it also established the same power for cash bail.[180] In fact, *Jackschitz* involved cash bail.[181] The Court acknowledged that the sixty-day exoneration statute[182] made "no reference to the forfeiture of cash bail" and applied only to bail bond forfeiture judgments.[183] But the Court had no trouble resting its decision affirming the exoneration of cash bail "upon the broader principles of the law."[184]

The *Jackschitz* Court outlined some of these broader principles of bail forfeiture and exoneration.[185] The Court indicated that bail is meant to ensure the defendant's presence, and forfeiture is not meant to "fill the state coffers"[186] or punish the defendant for nonappearance.[187] If the accused fails to appear without the intent of evading justice and later reappears voluntarily, then "no injury is done."[188] While the state may accrue revenue via forfeiture, the *Jackschitz* Court urged that revenue "should not be insisted upon" when the purpose of bail has been accomplished.[189] Since *Jackschitz*, Washington courts have consistently recognized their inherent power to exonerate forfeited cash bail at their discretion.[190]

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178. *See Jackschitz*, 76 Wash. at 254–55, 136 P. at 133; *Bralley*, 70 Wash. App. at 656, 855 P.2d at 1179.

179. *See supra* section III.A.2.

180. *See Jackschitz*, 76 Wash. at 254–56, 136 P. at 132–33.

181. *See id.* at 254, 136 P. at 132–33. The defendant was released on a bail bond pending a motion for a new trial. *Id.* When the defendant fled, the bail bond agent paid $2,000 in lieu of personal liability, converting the bail bond into cash bail. *See id.* The Court then forfeited that $2,000 in cash bail. *Id.* When the defendant reappeared ten months later, the lower court exonerated the cash bail, and the Supreme Court of Washington affirmed the exoneration. *See id.* at 245, 257, 136 P. at 133, 134.

182. The statute the *Jackschitz* Court references is virtually identical to Revised Code of Washington section 10.19.105. *See id.* at 254, 136 P. at 133; WASH. REV. CODE § 10.19.105 (2020).

183. *Jackschitz*, 76 Wash. at 256, 136 P. at 133–34.

184. *Id.* at 256, 136 P. at 134.

185. *See id.* at 255–56, 136 P. at 133.

186. *Id.* at 255, 136 P. at 133 (citing Louisiana v. Williams, 37 La. Ann. 200, 202 (1885)).

187. *See id.* at 256, 136 P. at 133 (citing United States v. Feely, 25 F. Cas. 1055, 1057 (C.C.D. Va. 1813) (No. 15,082)).

188. *Id.*

189. *See id.* at 255, 136 P. at 133.

190. *See* State v. Olson, 127 Wash. 300, 302, 220 P. 776, 777 (1923) ("The return of the bail is made to rest . . . upon such terms as shall be just and equitable . . . ."); State v. Paul, 95 Wash. App

Following *Jackschitz*, the Supreme Court of Washington refined courts' discretionary powers to exonerate cash bail over the next decade and a half.[191] Three important developments occurred. First, the Court held in 1922 that the cash depositor was entitled to exoneration when the defendant reappeared within sixty days of forfeiture.[192] Second, the Court held in 1923 that it was not an abuse of discretion for the trial court to exonerate only part of the forfeited cash bail.[193] Third, the Court held in 1927 that the trial court did not abuse its discretion by refusing cash bail forfeiture exoneration when the defendant posted cash bail merely to flee and was arrested ten months later.[194] Notably, *Jackschitz* and its progeny treated cash bail similarly to bail bonds during this time period; the Court's focus was not on the type of bail posted.[195]

3. Modern Developments in the Discretionary Avenue to Cash Bail Forfeiture Exoneration

In re Marriage of Bralley,[196] a 1993 decision from the Court of Appeals

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775, 778, 976 P.2d 1272, 1274 (1999) ("If the defendant is subsequently apprehended, the court has the discretion to vacate the [cash] bail forfeiture or not."); *In re* Marriage of Bralley, 70 Wash. App. 646, 656, 855 P.2d 1174, 1179 (1993) ("Of course, a court *may* exercise its discretion and its equity powers to give relief to the third party depositor." (emphasis in original)).

191. *See generally* State v. Ohm, 145 Wash. 197, 259 P. 382 (1927); *Olson*, 127 Wash. 300, 220 P. 776; State v. Bailey, 121 Wash. 413, 209 P. 847 (1922).

192. *See Bailey*, 121 Wash. at 417, 209 P. at 848. *Bailey* refers to the bail involved in the case as both "cash" and a "bond." *See id.* at 414, 209 P. at 847. More recent Washington decisions that reference *Bailey* seem to indicate that the case involved a bail bond, or at least confusion about the type of bail posted. *See* State v. Kramer, 167 Wash. 2d 548, 554, 219 P.3d 700, 703 (2009); State v. French, 88 Wash. App. 586, 593–94, 945 P.2d 752, 756 (1997); *Bralley*, 70 Wash. App. at 657 n.7, 855 P.2d at 1179 n.7; State v. Molina, 8 Wash. App. 551, 553–54, 507 P.2d 909, 911 (1973). However, *Bailey* more strongly indicates that the case involved cash bail. The Court recounted how the defendant called his attorney asking for a bond or bail money to secure pretrial release. *See Bailey*, 121 Wash. at 414, 209 P. at 847. In response, the attorney sent cash to pay the bonds fixed at $1,500 cash. *See id.* Despite the term "bond" appearing in the case, there is no indication that the attorney did not post cash bail. *See id.* The term "bond" is not inapplicable to cash bail; even today, some refer to cash bail as a "cash bond." *See* COHEN & REAVES, *supra* note 2, at 3 (describing "full cash bond" as a type of financial pretrial release in which the defendant posts the full bail amount with court).

193. *See Olson*, 127 Wash. at 302, 220 P. at 777. Like in *Bailey*, the language in *Olson* regarding the type of bail posted is somewhat difficult to parse, but it is clear that the case involved cash bail. *See id.* The Court states that the defendant's father deposited the bail amount in cash. *See id.* at 300, 220 P. at 776. The dissenting Justice Tolman referred to "cash bail." *See id.* at 303, 220 P. at 777 (Tolman, J., dissenting). However, the Court also called the defendant's father a "bondsman." *See id.* at 302, 220 P. at 777 (majority opinion). It is possible that the Court in 1923 referred to any third party who posted bail—whether cash bail or a bail bond—as a "bondsman."

194. *See Ohm*, 145 Wash. at 198, 259 P. at 383.

195. *See id.*; *Olson*, 127 Wash. at 302, 220 P. at 777; *Bailey*, 121 Wash. at 417, 209 P. at 848; State v. Jackschitz, 76 Wash. 253, 256, 136 P. 132, 133–34 (1913).

196. 70 Wash. App. 646, 855 P.2d 1174 (1993).

of Washington, represents a shift away from the *Jackschitz* line of cases. Authorities arrested David Bralley on a civil warrant for failing to appear at a child support hearing.[197] A third party deposited cash bail to secure Bralley's release, but the court forfeited the bail and applied it to Bralley's outstanding child support obligations after Bralley subsequently failed to appear.[198] After Bralley's reappearance, the third party requested the return of the cash bail, but the trial court denied exoneration.[199]

On appeal, the Court of Appeals affirmed the lower court's decision.[200] The court indicated that *Jackschitz* stands for the proposition that while courts have the power to exonerate cash bail, exoneration is not mandatory because the bail bond statutes do not apply.[201] The Court of Appeals's characterization of *Jackschitz* is not incorrect *per se*; the bail bond statutes do not apply to cash bail and cash bail exoneration is in fact discretionary.[202] But the court failed to reckon with *Jackschitz*'s broader holding regarding discretionary exoneration based "upon the broader principles of the law."[203] Specifically, *Bralley* failed to explicitly engage with the principle that courts should not insist on forfeiture when the purpose of bail has been accomplished.[204]

Instead, *Bralley* suggested that bail bonds and cash bail should be treated differently within forfeiture exoneration.[205] The court pointed to the different theories underlying bail bonds and cash bail.[206] A bail bond looks to the commercial surety's promise to guarantee the defendant's

197. *See id.* at 649, 855 P.2d at 1175.

198. *See id.* at 649–50, 855 P.2d at 1175.

199. *See id.* at 650, 855 P.2d at 1175.

200. *Id.* at 659, 855 P.2d at 1180.

201. *See id.* at 653–54, 855 P.2d at 1177.

202. State v. Jackschitz, 76 Wash. 253, 254–55, 256, 136 P. 132, 133–34 (1913).

203. *See id.* at 255–56, 136 P. at 133–34.

204. *See id.* at 255, 136 P. at 133. But *Bralley* did engage with *State v. Bailey*. *See Bralley*, 70 Wash. App. at 657 n.7, 855 P.2d at 1179 n.7. *Bralley* held that cash bail is conclusively presumed the property of the accused rather than the depositor. *See id.* at 655, 855 P.2d at 1178. While the court acknowledged that, "at first blush," its holding seemed at odds with *Bailey*, it was unsure whether *Bailey* applied to cash bail. *See id.* at 657 n.7, 855 P.2d at 1179 n.7. The reference in *Bailey* to a cash "bond" apparently flummoxed the court. *See id.* However, *Bailey* more likely involves cash bail than a bail bond. *See supra* note 192 and accompanying text. *Bralley* also distinguished its holding regarding ownership of civil cash bail from the ownership of criminal bail at issue in *Bailey*. *See Bralley*, 70 Wash. App. at 657 n.7, 855 P.2d at 1179 n.7. Nevertheless, Washington courts have cited *Bralley* in criminal cases without citing or discussing *Bailey*. *See* State v. Paul, 95 Wash. App. 775, 778, 976 P.2d 1272, 1274 (1999); State v. Navarro, No. 28230–0–III, 2010 WL 610758, at *1 (Wash. Ct. App. Feb. 23, 2010).

205. *See Bralley*, 70 Wash. App. at 652, 855 P.2d at 1177 ("[Bail bonds and cash bail] have different purposes, and rules governing notification of bond sureties do not logically apply to situations involving cash bail.").

206. *See id.*

appearance in court.[207] Cash bail, on the other hand, displaces the need for a surety because it "looks to the money already in the hands of the state" to secure appearance.[208] As the saying goes, a Washington bail bond agent's word is their bond.[209] In contrast, a cash bail depositor's cash is their bond. The court in *Bralley* stated that these differences between bail bonds and cash bail mean that a surety "has a special role in the production and security of the accused."[210] But the cash bail depositor has no special role in the process.[211] There is simply no need for protection against cash bail forfeiture if the depositors of cash bail are not meant to aid in the defendant's return to court.[212]

But it is not entirely clear that bail bond agents play a "special" role in assuring appearance and apprehending defendants as a practical matter. Individuals released on cash bail and bail bonds fail to appear at similar rates.[213] And the commercial bail bond industry "is unable to effectively manage people who are released pretrial" compared to other pretrial mechanisms.[214] After a failure to appear, bail bond agents can, like cash bail depositors, accept a forfeiture and move on. For example, if the bond amount is relatively small, bail agents may decide that locating the defendant would expend more resources than exoneration would recover.[215] Further, cash bail depositors do, at times, aid in the defendant's return to court.[216] Finally, as the Supreme Court of Illinois has acknowledged, commercial sureties may in fact lessen the economic loss deterrent for those with arguably the most special role in defendants' appearances—defendants themselves.[217]

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207. *See id.* at 653, 855 P.2d at 1177 (first citing 8 C.J.S. *Bail* §§ 88, 89 (1988); and then citing *Jackschitz*, 76 Wash. at 256, 136 P. at 133).

208. *Id.*

209. *My Word Is My Bond*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/mywordismybond [https://perma.cc/XS2P-2CW6].

210. *Bralley*, 70 Wash. App. at 653, 855 P.2d at 1177.

211. *See id.*

212. *See id.* at 654, 855 P.2d at 1178 ("[B]ecause cash bail provides security for a fugitive in a civil action, notification of the poster of the cash bail is not required or necessary . . . .").

213. *See* COHEN & REAVES, *supra* note 2, at 9.

214. *See* BRADFORD, *supra* note 48, at 3.

215. *See* State v. Deasis, No. 39353–7–I, 1997 WL 785645, at *2 (Wash. Ct. App. Dec. 22, 1997) ("[T]he approximate amount expended in returning the defendant to the state less the expenses incurred by the State in the same endeavor, was such that it would have been better off not to have spent any money to return the defendant.").

216. *See* State v. Olson, 127 Wash. 300, 300–01, 220 P. 776, 776–77 (1923) (defendant's father posted cash bail, procured the defendant's release from federal authorities and convinced the defendant to return to serve his sentence); *Bralley*, 70 Wash. App. at 650, 855 P.2d at 1175–76 (cash bail depositor argued she produced and apprehended the defendant).

217. *See* People *ex rel.* Gendron v. Ingram, 217 N.E.2d 803, 805 (Ill. 1966).

Bralley ultimately signals a risk that Washington courts might lose sight of *Jackschitz* and its progeny. And there is some cursory evidence to indicate that this risk is coming to pass. In 2010, the Washington State Court of Appeals affirmed the forfeiture of cash bail in *State v. Navarro*.[218] Citing *Bralley*, *Navarro* indicated that the trial court could have decided to not forfeit the cash bail, but was not required to do so.[219] Noticeably missing from *Navarro* is any reference to *Jackschitz*.

In Washington, there has never been equal access to forfeiture exoneration for bail bonds and cash bail because the bail bond statutes do not apply to cash bail.[220] But *Jackschitz* treated bail bonds and cash bail similarly within forfeiture exoneration because both types of pretrial release share the same broader principles.[221] *Jackschitz* counsels that courts should not insist upon forfeiture when the purpose of bail is accomplished.[222] *Bralley* and *Navarro* suggest that this precedent may become lost amongst Washington courts.

IV. METHODS FOR RECOGNIZING CASH BAIL FORFEITURE EXONERATION RIGHTS IN WASHINGTON

Cash bail exoneration puts money back into the pockets of individuals who post bail for loved ones and keeps money flowing for community bail funds.[223] As such, Washington should recognize certain rights to cash bail forfeiture exoneration. This Part proposes two paths to cash bail forfeiture exoneration reform: one legislative and one judicial. First, the Washington Legislature should enact statutory rights to cash bail forfeiture exoneration like it has for bail bonds. Second, even if the Washington Legislature fails to act, Washington courts should recognize a right to cash bail forfeiture exoneration whenever defendants reappear within sixty

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218. No. 28230–0–III, 2010 WL 610758 (Wash. Ct. App. Feb. 23, 2010). In *Navarro*, the defendant's mother posted $1,000 in cash bail, but the defendant failed to appear at a future court hearing. *Id.* at *1. The trial court did not forfeit the bail at that time, and the defendant later reappeared and pleaded guilty. *See id.* Both parties "forgot" about the cash bail until the prosecutor eventually asked the trial court to forfeit the cash bail two years later. *Id.* The court forfeited the bail. *Id.* Even though *Navarro* involved an appeal to a forfeiture decision, it implicated cash bail forfeiture exoneration due to the unique timing of the forfeiture. Navarro argued that he was entitled to exoneration after returning to court within sixty days. *Id.*

219. *See id.* at *2.

220. *See* State v. Jackschitz, 76 Wash. 253, 256, 136 P. 132, 133 ("The point is made that the statute has no reference to the forfeiture of cash bail. . . ."); State v. Paul, 95 Wash. App. 775, 778, 976 P.2d 1272, 1274 (1999) ("The person who puts up the cash is not a bondsman, and RCW 10.19 does not apply.").

221. *See Jackschitz*, 76 Wash. at 256, 136 P. at 134.

222. *See id.* at 255, 136 P. at 133.

223. *See supra* section III.C.

days. Beyond sixty days, courts should exonerate forfeited cash bail if the purpose of bail has been accomplished.

A. The Washington Legislature Should Extend Protections Against Cash Bail Forfeiture via Statute

The Washington Legislature has codified four of the five avenues to bail bond forfeiture exoneration and it should do the same for cash bail.[224] Both the *Bralley* and *Navarro* courts treated cash bail less favorably than bail bonds due to the lack of statutory protection for cash bail.[225] This Comment calls upon the Washington Legislature to regulate cash bail in the forfeiture exoneration context.

The Legislature could add references to cash bail in some of the existing bail bond statutes. For example, Revised Code of Washington (RCW) section 10.19.090,[226] which renders forfeitures null and void if the surety does not receive notification within thirty days, could also require notification to "the owner of the cash deposit named on the deposit receipt."[227] And RCW section 10.19.140,[228] which requires exoneration to sureties who are responsible for the defendant's apprehension within one year,[229] could similarly include exoneration to "the owner of the cash deposit named on the bail receipt."

Other existing statutory protections are not as readily transferrable to cash bail. RCW section 10.19.100,[230] for example, requires additional bail bonds to stay the forfeiture's execution, which would be inapplicable to cash bail.[231] Such statutes would warrant separate statutory provisions. A

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224. *See supra* section III.A.1.

225. *See In re* Marriage of Bralley, 70 Wash. App. 646, 654, 855 P.2d 1174, 1178 (1993) ("Thus, Gibson is not protected by RCW 10.19.090, not only because we are dealing with civil bail, but also because, in spite of her representations otherwise and her no doubt sincere belief, Gibson did not post a *bond*. She is not a *surety*." (emphasis in original)); State v. Navarro, No. 28230–0–III, 2010 WL 610758, at *1 (Wash. Ct. App. Feb. 23, 2010) ("The Legislature has enacted a comprehensive scheme regulating bail bonds . . . . The Legislature has not similarly chosen to regulate cash bail . . . . The bond statutes do not apply to cash bail.").

226. WASH. REV. CODE. § 10.19.090 (2020).

227. *See id.* This language would require the bail depositor to conclusively designate the owner when posting bail, thus avoiding situations of confused ownership like in *Bailey* and *Bralley*. *See* State v. Bailey, 121 Wash. 413, 415, 209 P. 847, 848 (1922) ("The first question to be determined is whether the money deposited was that of Bailey or Tidball."); *Bralley*, 70 Wash. App at 657 n.7, 855 P.2d at 1179 n.7 (deciding that *Bailey* does not apply where there is no clear record of the ownership interest of the posted funds).

228. WASH. REV. CODE § 10.19.140 (2020).

229. *See id.*

230. *Id.* § 10.19.100.

231. *See id.*

statutory provision similar to RCW section 10.19.105,[232] which requires exoneration upon the defendant's return within sixty days,[233] could read: "If the person for whose appearance cash was deposited in lieu of a bond shall be produced in court before the expiration of sixty days, the judge shall vacate any forfeiture judgment upon such terms as may be just and equitable."[234]

The Washington Legislature can and should take steps to enact forfeiture exoneration rights for cash bail. Increasing the use of community bail funds and reducing socioeconomic and racial inequities are priorities during the "third wave" of bail reform.[235] Failures to appear—and thus bail forfeiture—disproportionately impact low-income individuals and individuals of color.[236] Further, community bail funds that push for bail reform and aim to reduce the socioeconomic and racial inequities of bail in Washington rely on cash bail exoneration to continue their work.[237]

B. Washington Courts Should Recognize Rights to Cash Bail Forfeiture Exoneration and Align Practices with Precedent

Regardless of whether the Washington Legislature extends statutory exoneration protections for cash bail, Washington courts should do two things. First, they should recognize the right to cash bail forfeiture exoneration whenever defendants reappear within sixty days, regardless of who was responsible for the reappearance. Second, they should exonerate cash bail when the purpose of bail has been accomplished.

Together, the *Jackschitz* line of cases and *Kramer* indicate that a right to cash bail forfeiture exoneration exists whenever defendants return to court within sixty days of forfeiture. A case following *Jackschitz* stated that the cash bail owner is entitled to the return of bail money upon

232. *Id.* § 10.19.105.

233. *See id.*

234. This provision would align with *Kramer* in that it does not require a stay of execution prior to exoneration upon the defendant's return within sixty days. *See* State v. Kramer, 167 Wash. 2d 548, 555–56, 219 P.3d 700, 703–04 (2009) ("When a defendant is returned to custody within the statutory 60 days, the default created by his prior absence has been repaired and there is no need for the bondsmen to request a stay.") Alternatively, to move away from the complicated and dated language of RCW section 10.19.105, a similar statutory provision could read: "A judge shall vacate any forfeiture judgment against cash bail if the person for whose appearance cash was deposited reappears in court within sixty days of the failure to appear resulting in forfeiture."

235. *See supra* section II.C.

236. *See supra* section II.B.

237. *See supra* section II.C.

reappearance within sixty days of forfeiture.[238] And *Kramer* stated that reappearance within sixty days of forfeiture repairs the default created by the prior absence.[239] Washington courts should recognize this right to cash bail forfeiture exoneration upon reappearance within sixty days explicitly. Doing so would curb the emerging trend that *Bralley* and *Navarro* represent.[240]

The difference between bail bonds and cash bail is irrelevant in the forfeiture exoneration context. The Supreme Court of Washington did not find the difference between bail bonds and cash bail persuasive in *Jackschitz*.[241] Further, in *Kramer*, the surety's role in producing the defendant had no bearing on the absolute right to forfeiture exoneration within sixty days.[242] It is unclear how it could be an abuse of discretion to refuse exoneration of a bail bond upon reappearance within sixty days, but not an abuse of discretion to do the same for cash bail.

Even when defendants reappear after sixty days, Washington courts should exonerate cash bail when the purpose of bail has been accomplished.[243] Appellate courts should find it is an abuse of discretion to deny exoneration of cash bail when defendants inadvertently fail to appear and when defendants voluntarily reappear in court.[244] Courts should keep in mind that bail forfeiture is not meant to provide revenue to the state or to punish defendants.[245] Ultimately, Washington courts should follow the longstanding precedent announced in *Jackschitz* and

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238. *See* State v. Bailey, 121 Wash. 413, 417, 209 P. 847, 848 (1922) ("Within sixty days after the bail was forfeited . . . the assignee of Tidball was entitled to the return of the money unless he had acquiesced in the turning over of the $545 to the sheriff and the $205 to the attorney.")

239. *See Kramer*, 167 Wash. 2d at 556, 219 P.3d at 704. Though the *Kramer* Court was talking about bail bonds, it is unclear how this principle could possibly apply when a person is released pretrial on a bail bonds but not on cash bail.

240. *See supra* section III.B.3.

241. *See* State v. Jackschitz, 76 Wash. 253, 256, 136 P. 132, 133–34 (1913).

242. *See Kramer*, 167 Wash. 2d at 554, 219 P.3d at 703.

243. *See Jackschitz*, 76 Wash. at 255, 136 P. at 133 ("[Revenue to the state] may result [from forfeiture] but should not be insisted upon when the purpose of the law (that is, the surrender, conviction, and incarceration of the principal) has been accomplished.")

244. *See id.* at 255–56, 136 P. at 133 ("If the accused has, under circumstances which show there was no design to evade the justice of his country, forfeited his recognizance but repairs the default as much as is in his power by appearing at the succeeding term and submitting himself to the law, the real intention and object of the recognizance are effected, and no injury is done."); State v. Ohm, 145 Wash. 197, 198, 259 P. 382, 383 (1927) ("But the law is rigorous where it appears that the object of giving bail is to escape the penalties of a crime.").

245. *See Jackschitz*, 76 Wash. at 255–56, 136 P. at 133 ("There should be no suggestion of bounty or revenue to the state or of punishment to the surety . . . . If he be found guilty, he must suffer the punishment intended by the law for his offense, and it would be unreasonable to superadd the penalty of an obligation entered into only to secure a trial." (citing United States v. Feely, 25 F. Cas. 1055, 1057 (C.C.D. Va. 1813) (No 15,082))).

its progeny.

CONCLUSION

Washington community bail funds and the Washingtonians who post cash bail for their loved ones should have the same access to forfeiture exoneration as bail bond agents. The Washington Legislature should rectify the differential treatment of cash bail and bail bonds within forfeiture exoneration by statute. Further, Washington courts should recognize the right to cash bail forfeiture exoneration whenever defendants reappear within sixty days and regardless of who is responsible for their reappearance. Beyond sixty days, Washington courts should exonerate forfeited cash bail when its purpose has been accomplished. This Comment's proposals alone cannot possibly put a dent in the major, systemic overhaul that needs to happen to the pretrial detention and money bail systems in Washington. But while money bail still exists and reform efforts are underway, cash bail forfeiture exoneration practices in Washington deserve a makeover.