MATERIALS GERMANE TO THE PRESENTATION OF THE NEVADA BAIL AGENTS' ASSOCIATION TO THE NEVADA SUPREME COURT

COMMITTEE TO STUDY EVIDENCE - BASED PRETRIAL RELEASE

HONORABLE JAMES HARDESTY, CHAIRMAN
CHIEF JUSTICE, NEVADA SUPREME COURT
DECEMBER 3, 2015

STEPHEN B. KRIMEL, ESQ., PRESIDENT
NEVADA BAIL AGENTS' ASSOCIATION
812 E. MUSSER STREET
CARSON CITY, NEVADA 89701
(775) 883-6549
nevadabailagents@gmail.com

NEVADA BAIL AGENTS' ASSOCIATION

812 E. Musser St., Carson City, NV 89701 • Tel: (775) 883-6549 Fax: (775) 883-6769
nevadabailagents@gmail.com

CONTENTS

10. "Judge says Bail Reform Plan is an Insult to the Judiciary"; New York Supreme Court Justice Edward J. McLaughlin (w/ Letter to the Editor), October 13, 2015.

11. Miscellaneous Articles (3) from the Laura and John Arnold Foundation (LJAF), financiers of pro-pretrial services agencies causes and elimination of commercial/financial bail; (October 2015, June 2015).

EXHIBIT 1

RESEARCH REPORT

PRETRIAL RELEASE MECHANISMS IN DALLAS COUNTY, TEXAS:

DIFFERENCES IN FAILURE TO APPEAR (FTA), RECIDIVISM/PRETRIAL MISCONDUCT, AND ASSOCIATED COSTS OF FTA*

Prepared by:

Robert G. Morris, Ph.D.,
Associate Professor of Criminology
Director, Center for Crime and Justice Studies

The University of Texas at Dallas
800 West Campbell Rd, GR 31
Richardson, Texas 75080-3021

(972) 883-6728
morris@utdallas.edu

January 2013

* **This study was completed on behalf of the Dallas County (Texas) Criminal Justice Advisory Board (CJAB).**

DISCLAIMER
No attempt by the research investigator, Professor Robert Morris, or the University of Texas at Dallas, will be made to explain the reasons behind the findings presented within this report. Nor will recommendations be made as to how the county should, or should not, respond to these findings. The information presented is driven solely by the data provided by Dallas County and caution should be used in any attempt to generalize these findings to other counties. The computer programming written to extract the data for analysis, as well as those used to established model estimates, will be made publically available upon request to ensure research transparency and objectivity. Any audit of this programming by a qualified professional/s is welcomed. Contact Robert G. Morris, Ph.D. with questions: morris@utdallas.edu

Regarding recidivism (or pretrial misconduct), analyses were carried out for new crimes occurring within 9 and 12 months of release for the book-in of record. It is important to note that such crimes may or may not have occurred during the pretrial phase for the book-in of record as this data was not readily available. The findings for recidivism were mixed and more commonly null (i.e., no difference was found between release types). Note: Extreme caution should be used in interpreting the recidivism/pretrial misconduct analysis due to the situational factors associated with recidivism that are completely external to the associated release mechanism.

As to the costs associated with FTA across each release type, model estimates suggest that commercial bond releases were the most cost-effective in Dallas County, based on the group of defendants captured by the study. This finding was corroborated by the observed data, which suggested that for the 22,000+ defendants captured by this study, assuming a public cost of $1,775 per FTA[2], the use of commercial bonds saved over $7.6 million (or ~$350k per 1,000 defendants) among felony defendants and over $3.5 million (or $160k per 1,000 defendants) among misdemeanor defendants, as compared to attorney bonds, cash bonds, and pretrial services bonds. The largest differences in costs were seen between commercial bonds and pretrial services bonds.

[2] Estimate adjusted for inflation from 1997 dollars. Base estimate taken from Block and Twist (1997), who conduced a complete cost-benefit analysis of failure to appear in Los Angeles, CA.

STUDY HIGHLIGHTS

- The study explored failure to appear (FTA) and recidivism (at 9 and 12 months) based on longitudinal data for 22,019 defendants released from the county jail during 2008 for the first new offense occurring during that year.

- The analyses isolated the effect of particular bond types by statistically controlling for many correlates (i.e., predictors of) of FTA and recidivism/pretrial misconduct and approximating an experimental research design (see appendix for a complete listing and definitions).

- When comparing similarly situated defendants' probability of FTA for all case types, defendants released via a commercial bond (i.e., a bail bond company) were significantly and substantively less likely to fail to appear in court compared to attorney bonds, cash bonds, and pretrial services bonds, respectively. This finding held when analyzing all defendants simultaneously and when assessing felony and misdemeanor defendants separately.

- Regarding recidivism/pretrial misconduct (at 9 and 12 months) among misdemeanor defendants, no statistically/practically significant differences were found between any combination of the release mechanisms.

- Regarding recidivism/pretrial misconduct (9 and 12 months) for felony defendants, the findings supported cash and attorney bonds, however, there may be qualitative differences in how the recidivism relationship operates for these particular release mechanisms, as they are the most expensive form of financial bail.

- Differences for 12 month recidivism/pretrial misconduct were found between commercial bonds and pretrial services bonds for the model including running data for all charge categories combined, favoring pretrial services, however, the differences were nullified when assessing felonies and misdemeanors separately.

- Release on their own recognizance (OR) was rarely used for an initial release (less than 1% of defendants). For this reason, OR was excluded from the analysis.

- A basic cost-benefit analysis suggested that commercial bonds are the most cost effective release type in Dallas County, in terms of the court costs associated with FTA. Based on the observed data for the 22,000+ defendants captured by this study (all initial releases for a new crime in 2008), assuming a public cost (i.e., justice administration) of $1,775 per FTA[3], the use of commercial bonds saved over $7.6 million (or ~$350k per 1,000 defendants) among felony defendants and over $3.5 million (or $160k per 1,000 defendants) among misdemeanor defendants, as compared to attorney bonds, cash bonds, and pretrial services bonds. The largest differences in costs were seen between commercial bonds and pretrial services bonds.

- The strongest predictor variables of FTA across release mechanisms were also explored. Such variables were limited to those made available by Dallas County. The factors predicting FTA varied considerably across release mechanisms and are outlined within.

---

[3] Estimate adjusted for inflation from 1997 dollars. Base estimated taken from Block and Twist (1997), who conduced a complete cost-benefit analysis of failure to appear in Los Angeles, CA.

Descriptive Statistics for **Failure to Appear (FTA)** in Court

All Charge Types

	# of Defendants	% FTA
Attorney Bond	684	34.1
Cash Bond	4,219	29.2
Commercial Bond	14,705	23.0
Pretrial Services Bond	2,411	37.0

TOTAL 16,274 Overall FTA Rate = 26.1%

Felonies

	# of Defendants	% FTA
Attorney Bond	326	28.2
Cash Bond	339	30.7
Commercial Bond	5,048	16.6
Pretrial Services Bond	682	26.1

TOTAL 6,359 Overall FTA Rate = 19.0%

Misdemeanors

	# of Defendants	% FTA
Attorney Bond	342	37.4
Cash Bond	3,529	30.2
Commercial Bond	8,548	26.7
Pretrial Services Bond	1,589	39.6

TOTAL 14,008 Overall FTA Rate = 29.3%

ANALYTICAL FINDINGS

PROPENSITY SCORE MATCHING ANALYSIS: FAILURE TO APPEAR

The below findings represent an "apples-to-apples" approach to exploring differences in FTA rates among similarly situated defendants, across the release mechanisms. These estimates have been conditioned (i.e., statistically adjusted on other influence factors) based on the defendant/crime characteristics outlined in the technical appendix, by means of a counterfactual statistical modeling strategy known as propensity score matching (PSM).

PSM was used to assess the effect sizes of different combinations of release mechanisms on 1) whether a defendant fails to appear (FTA) in court and on 2) whether the defendant recidivated within a specified time period post-release (9 or 12 months). This counterfactual model approximates an experimental design by allowing for comparisons to be made between defendants that had an equivalent probability of receiving some treatment (here the treatment being a release mechanism) over an alternative treatment. Similar analytical designs where the focus has been on multiple treatment effects are not uncommon in the social sciences (see Lechner, 1999; 2001)

***NOTE: Prior to presenting the results, readers unfamiliar with PSM are encouraged to read the information provided in the technical appendix to get a basic idea of what the technique does and how to interpret the findings presented in the below tables.

The below table presents the statistically significant findings on FTA stemming from the propensity score matching analysis and using commercial bonds as a reference category (comparison) group. This approach was taken because significant differences were found only for comparisons that included similarly situated (matched) defendants released on a commercial bond defendants.

In short, the findings clearly demonstrate that when comparing similarly situated defendants against one another (apples-to-apples), commercial bonds were much less likely to fail to appear in court after release for the first time for a new offense. The differences are fairly consistent when analyzing all defendants and also when assessing felony and misdemeanor cases separately. Differences in FTA rates between defendants released via other release types (e.g., attorney bonds vs. pretrial bonds) were not statistically or substantively different from one another (i.e., FTA rates were equivalent for those comparison groups).

For felony defendants (among the matched pairs), those ***not*** released on commercial bond were between 39 and 56 percent more likely to fail to appear in court, with the largest difference between cash and commercial, followed by pretrial and then attorney bonds. For misdemeanors, difference were similar, ranging between 26 and 32 percent, with pretrial bonds being the most different from commercial, followed by attorney bonds, then cash bonds.

Failure to Appear Analysis – Propensity Score Matching Results

How are the below tables interpreted?

The below tables represent all differences between release types (unlike the above table which illustrates the same findings, but for statistically significant findings only). The PSM findings are presented to illustrate the differences in FTA rates between those treated and their matched controls for all releases, felonies, misdemeanors, and state jail felonies, respectively. On the diagonal of these tables are the unadjusted FTA rates for each release type. These statistics are presented for reference only. The off-diagonal statistics are the mean (average) difference in FTA rates (i.e., the treatment effect) between those released via a particular treatment (i.e., release mechanism)--which is identified by the left-hand column--compared to a particular alternative, identified by the top row of the table. Note that the percent range displayed (if statistically significant) reflects the estimated difference for matching based on an inverted treatment outcome (e.g., commercial vs. attorney compared to attorney vs. commercial)(Non-significant findings are indicated as such in the table).

As an example, looking at the top category, "Attorney Bond" on the far left column of the first table below, we can see that the unadjusted FTA rate for this release type is 34 percent. Following this row to the right, we see that there is no statistically significant difference in FTA rates between comparable (i.e., similarly situated) defendants released by an attorney bond compared to cash bonds. However, the conditioned difference in FTA rate for attorney bonds is 7-13% higher than for Commercial bonds. Further, we find no significant difference between attorney bond FTA rates and pretrial services bonds.

ALL DEFENDANTS - Average Treatment Effects: Failure to Appear (Unconditioned rates on the diagonal)

	Attorney Bonds	Cash Bonds	Commercial Bonds	Pretrial Services
Attorney Bond	***.34***	No Significant Difference	.07-.13 higher	No Significant Difference
Cash Bond		***.29***	.09-.10 higher	No Significant Difference
Commercial Bond			***.23***	.14-.15 lower
Pretrial Services				***.37***

Note: Unadjusted failure to appear (FTA) rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.

Recidivism/Pretrial Misconduct Analysis – Propensity Score Matching Results

12 Months

Note: Unadjusted Failure to appear (FTA) rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.

ALL DEFENDANTS - Average Treatment Effects: Recidivism/Pretrial Misconduct w/in12 months (Unconditioned rates on the diagonal)

	Attorney Bond	Cash Bond	Commercial Bond	Pretrial Services
Attorney Bond	***.22***	No Significant Difference	No Significant Difference	No Significant Difference
Cash Bond		***.14***	.02-.03 lower	No Significant Difference
Commercial Bond			***.27***	.14-.15 lower
Pretrial Services				***.29***

Note: Unadjusted recidivism rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.

FELONY DEFENDANTS - Average Treatment Effects: Recidivism/Pretrial Misconduct w/in 12 months (Unconditioned rates on the diagonal)

	Attorney Bond	Cash Bond	Commercial Bond	Pretrial Services
Attorney Bond	***.21***	No Significant Difference	.09-.13 lower	Partial support favoring Attorney
Cash Bond		***.12***	.06-.07 lower	.16-.19 lower
Commercial Bond			***.30***	No Significant Difference
Pretrial Services				***.29***

Note: Unadjusted recidivism rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.

Recidivism Analysis – Propensity Score Matching Results

9 Months

ALL DEFENDANTS - Average Treatment Effects: Recidivism/Pretrial Misconduct w/in 9 months (Unconditioned rates on the diagonal)

	Attorney Bond	Cash Bond	Commercial Bond	Pretrial Services
Attorney Bond	***.19***	No Significant Difference	No Significant Difference	No Significant Difference
Cash Bond		***.12***	.03 lower	No Significant Difference
Commercial Bond			***.24***	No Significant Difference
Pretrial Services				***.24***

Note: Unadjusted recidivism rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.

FELONY DEFENDANTS - Average Treatment Effects: Recidivism/Pretrial Misconduct w/in 9 months (Unconditioned rates on the diagonal)

	Attorney Bond	Cash Bond	Commercial Bond	Pretrial Services
Attorney Bond	***.19***	No Significant Difference	.08-.12 lower	Partial support favoring Attorney
Cash Bond		***.12***	.05-.08 lower	.16-.19 lower
Commercial Bond			***.24***	No Significant Difference
Pretrial Services				***.24***

Note: Unadjusted recidivism rate for first 2008 release on diagonal. Off diagonal statistics are between-release-type ESTIMATED TREATMENT EFFECT differences (row compared to column). All treatment effect differences shown are statistically significant.

COSTS OF FAILURE TO APPEAR

The below matrices represent a basic cost-benefit analysis based on the treatment effect of each release mechanism for treated versus matched controls. Since no exact figures were available on the cost of a single FTA, it was conservatively assumed that the public cost for an FTA is $1,775 per FTA (see Block and Twist (1997).

For this example, the below figures represent the costs associated with the processing of FTAs per 1,000 defendants. These numbers do not reflect the subsequent social costs that may stem from FTA. These differences (i.e., between release types) are based on the mean (average) treatment effect size differences presented in the propensity score matching analysis outlined above.

INTERPRETATION OF TABLES: The on-diagonal numbers are the costs for dollars spent on FTA processing for a particular release type, based on the FTA rates from the matched pairs of defendants resulting from the PSM analysis. The off-diagonals represent the *differences* in cost between release types (row versus column). Note that positive (+) numbers reflect extra costs and negative (-) numbers represent savings. For example, in the first row of the table immediately below, for every 1,000 defendants released by way of either an attorney bond or a commercial bond, we expect that an extra $117,683 will be spent on FTA processing for those released via an attorney bond. An alternative interpretation would be that if these same individuals were released via a commercial bond, the savings in FTA processing costs would have been -$117,683. Because there was no difference in the effect of release type on FTA between attorney bonds and cash bonds, the cost difference was $0.

COSTS of Failure to appear for 1,000 similar defendants released from jail.

All Charge Types

	Attorney	Cash	Commercial	Pretrial
Attorney	***$603,500***	$0	$117,683	$0
Cash	$0	***$514,750***	$48,901	$0
Commercial	-$117,683	-$48,901	***$408,250***	-$59,196
Pretrial	$0	$0	$59,196	***$656,750***

Felonies

	Attorney	Cash	Commercial	Pretrial
Attorney	***$514,750***	$0	$59,196	$0
Cash	$0	***$532,500***	$87,863	$0
Commercial	-$59,196	-$87,863	***$301,750***	-$31,684
Pretrial	$0	$0	$31,684	***$461,500***

Misdemeanors

	Attorney	Cash	Commercial	Pretrial
Attorney	***$656,750***	$0	$68,959	$0
Cash	$0	***$532,500***	$42,600	$0
Commercial	-$68,959	-$42,600	***$479,250***	-$59,906
Pretrial	$0	$0	$59,906	***$710,000***

Cost Estimates Based on Actual FTA Records

Other costs, based on the actual (historical) numbers may also be of interest. The below tables reflect the costs of FTA (assuming $1,775 per FTA) across each release mechanism observed for the inmates represented in the study (i.e., those entering jail for a new offense in 2008). Commercial bonds are used as a reference category (i.e., as compared to) for percent differences due to it being the most common release mechanism. NOTE: These numbers reflect only NEW CRIMES for 2008 and NOT ALL releases from jail or FTAs occurring during 2008.

All Charge Types

	# of Defendants	% FTA	Cost per 1000 Defendants	Rate Difference	$ Difference
Attorney Bonds	684	34.1	$605,275	+11	$197,025
Cash Bonds	4,219	29.2	$518,300	+6	$110,050
Commercial Bonds	14,705	23.0	$408,250	Ref. Category	Ref. Category
Pretrial Services	2,411	37.04	$656,750	+14	$248,500

Felonies

	# of Defendants	% FTA	Cost per 1000 Defendants	Rate Difference	$ Difference
Attorney Bonds	236	28.2	$500,550	+12	$205,900
Cash Bonds	339	30.7	$544,925	+14	$461,925
Commercial Bonds	5,048	16.6	$294,650	Ref. Category	Ref. Category
Pretrial Services	682	26.1	$463,275	+10	$380,275

Misdemeanors

	# of Defendants	% FTA	Cost per 1000 Defendants	Rate Difference	$ Difference
Attorney Bonds	342	37.4	$663,850	+11	$189,925
Cash Bonds	3,529	30.2	$536,050	+4	$62,125
Commercial Bonds	8,548	26.7	$473,925	Ref. Category	Ref. Category
Pretrial Services	1,589	39.6	$702,900	+13	$228,975

Commercial Bonds:

Felony (-)
Male (+)
Indigence (+)
Celerity (+)
Days in Jail (+)
Mental Illness (+)
Jail History (+)
Hispanic vs. all other (+)
Year of First Arrest (+)
Criminal History (+)
FTA History (+)

Recidivism/Pretrial Misconduct *among Absconders:*

Age (-)
Celerity (-)
Hispanic vs. White (-)
Criminal History (+)

Pretrial Services Bonds:

Felony (-)
Male (+)
Indigence (+)
Jail History (+)
Married (-)
Hispanic vs. all other (+)

Recidivism/Pretrial Misconduct *among Absconders:*

Felony (+)
Mental Illness (+)
US Born (-)
Criminal History (+)

(+) Positive association with FTA (i.e., increased odds of occurrence)
(-) Negative association with FTA (i.e., reduced odds of occurrence)

TECHNICAL APPENDIX

What is propensity score matching (PSM)?

PSM is a well-known statistical matching procedure that approximates an experimental design by matching cases, (i.e., defendants), based on a near equivalent probability of having been released from jail by way of one mechanism versus a possible alternative. (For this study, within a maximum difference of 0.1% probability, which is considered very conservative). Here, the varying release types can be considered treatments, just like in an experiment. Since there are multiple treatments under study (i.e., the four release types), comparisons are made from one release-type to another, for every possible combination of treatments, respectively. The goal is to end up with an estimate of the "treatment effect." This is the difference in average probability for defendants failing to appear, or recidivating, between two specific release mechanisms. Again, these comparisons are based on statistically matched (i.e., similarly situated) defendants equally likely to have received the treatment.

Restated, a series of predictor variables (outlined in the technical appendix) are used to estimate a defendant's probability of receiving one treatment over another particular treatment. This estimate is the conditioned probability of receiving the treatment–also known as the propensity score. Upon establishing the quality and robustness of the propensity score, mean (average) levels of a final outcome (e.g., failure to appear in court) can be compared between the treated (i.e., those receiving the treatment) and the matched controls (i.e., those who did not receive the treatment, but who had an equal probability of having received it). *In the end, comparisons are made not between all defendants released by way of a particular method, but only between statistically matched pairs.*

How robust are these findings and how was this determined?

The quality of the matching procedure was assessed in multiple ways, using contemporary statistical methods. These include 1) an assessment of balance on covariates between matched and unmatched samples, 2) a sensitivity analysis to determine how strong an unmeasured covariate (i.e., something not available in the data such as employment history) would need to be to change the results (Rosenbaum Bounds), and 3) a complementary weighted regression analysis that involved both matched and unmatched defendants (Inverse Probability of Treatment Weighting, IPTW).

These procedures resulted in a strong level of confidence that these PSM analysis findings are robust to the influence of unmeasured covariates and that the matching procedure was very good at finding suitable matches to those actually treated. The specific details on these diagnostics are available via the Center for Crime and Justice Studies webpage (www.utdallas.edu/epps/ccjs) and/or can be requested via email (morris@udallas.edu).

ANALYSIS OVERVIEW

There are four major types of release (bonds) used in Dallas County that are explored here. Such bonds include: (1) cash bonds, (2) attorney bonds, (3) commercial bonds, and (4) pretrial

bond is held "insufficient" when a defendant out on a personal bond does not appear in court. The specific terms used in the character extraction algorithm are available upon request (email morris@utdallas.edu).

Recidivism/Pretrial Misconduct is defined by a new arrest occurring after the offense of record for the study (i.e., an individual's first arrest occurring in 2008). The recidivism measures here specifically exclude re-arrest for failure to appear (absconding) only; only "new" crimes are counted as part of the measure. This issue is important because we should expect higher return to jail rates for absconders since either the system or a surety actively attempts to capture absconders. It is important to note that the measure of recidivism/Pretrial Misconduct here does not exclusively reflect pretrial misconduct as such data (i.e., court hearing dates) were not readily available. Recidivism researchers agree that differing lengths of time be used to assess any effect on recidivism, generally at no more than 36 months. However, since these release mechanisms should impact recidivism sooner rather than later (if ever), recidivism was assessed at 9 and 12 months, respectively, to help account for new crimes during the pretrial phase. The reason for this approach is that the context of a release mechanism stays with a defendant only to the disposition of a criminal case. After that point, the relationship is terminated.

Data for the recidivism/Pretrial Misconduct measure stem from supplementary data provided by the Texas Department of Public Safety (DPS), as well as those from Dallas County. DPS arrest data were required as Dallas County does not have in its possession arrest data for arrests occurring in other jurisdictions and are not tied to a Dallas County arrest. Using both of these data sources for the same set of defendants, recidivism represents any "new crime" arrest occurring in Dallas County or elsewhere, provided it is on file with DPS, which took place after the first 2008 book in and occurred prior to January 1st, 2012.

Control Measures

In addition to FTA, a series of variables serve as control variables for the present study. The variables outlined below are limited to what was available within the data provided by Dallas County. Definitions are provided as needed.

SOCIODEMOGRAPHIC VARIABLES

Age	(in years) at Time of Arrest
Age^2	Age squared (i.e., age as a non-linear effect)
Gender	(Female=1, Male=0)
Race	(Black, White, Hispanic) – Those indicated as "other" on race were less than 3% of all defendants.
Marital Status	(Married=1, otherwise=0)
Mental Illness History	(1=yes, 0=no)

Treatment Variables

There are four main categories of bonds (release mechanisms) explored here. These include attorney bonds, cash bonds, commercial bonds, and pretrial services bonds.

The 2012 Texas Association of Counties (TAC) Bail Bond Handbook (p. 9) provides a detailed explanation of the bond process in Texas, which may vary between counties and defines a bail bond as:

> *A "bail bond" is a written undertaking entered into by the defendant and the defendant's sureties for the appearance of the principal therein before a court or magistrate to answer a criminal accusation; provided, however, that the defendant on execution of the bail bond may deposit with the custodian of funds of the court in which the prosecution is pending current money of the United States in the amount of the bond in lieu of having sureties signing the same. Any cash funds deposited under this article shall be receipted for by the officer receiving the funds and, on order of the court, be refunded, after the defendant complies with the conditions of the defendant's bond, to:*
>
> *(1) any person in the name of whom a receipt was issued, in the amount reflected on the face of the receipt, including the defendant if a receipt was issued to the defendant; or*
>
> *(2) the defendant, if no other person is able to produce a receipt for the funds.*

Attorney Bond

In Texas Bail Bond Board Counties, a state licensed attorney may post bonds as a surety for official clients in a criminal case, without the need to be licensed as a bail bond agent. The Sheriff of a County may inquire as to the security of the attorney in his/her ability to write a bond in accordance with TEXAS Code of Crim. Proc. Ch 17.

Cash Bond

'A "cash bond" occurs when the criminal defendant executes the bond himself as principal and posts the entire amount of the bond in cash with the "custodian of funds of the court" in lieu of having sureties sign the bond.' A cash bond is "unsecured" and if the defendant fails to appear for trial, s/he is liable for the full bond amount.

Commercial Bond

A commercial bond is one type of surety bond wherein the bond is made by a corporate surety (an insurance company), via a bonding company. In Texas, only a specially licensed insurance company can write such bonds. This form of bond occurs when a jailed defendant contacts a bail bond company and applies for bail. If approved, the defendant is released to the bonding company for a fee (generally 10-20% of the bail amount set by the court).

Offenses Excluded by Pretrial Services Releases

1. Aggravated kidnapping
2. Aggravated Manufacture, Delivery or possessions of Controlled Substances
3. Aggravated Promotion of Prostitution
4. Aggravated Sexual Assault
5. Aggravated Robbery
6. Capital Murder
7. Criminal Solicitation
8. Aggravated Assault
9. Enticing a child
10. Prohibited Sexual Conduct
11. Indecency with a child
12. Injury to a child, elderly or disabled individual
13. Murder
14. Sexual assault
15. Parole violation
16. Sale, distribution or display of harmful materials to a minor
17. Sale or purchase of a child
18. Sexual performance by a child
19. Criminal solicitation of a minor
20. Any charge involving a firearm
21. Any charge involving assault with bodily injury
22. Stalking
23. Family violence
24. Violation of protective order or Magistrate's order; and
25. Harassment (includes telephone harassment)

Acknowledgements

The author of this study would like to thank Dallas County, Texas and its agents in providing cooperation in the data-gathering phase of this project. Special thanks to Dr. Elba Garcia (Dallas County Commissioner, District 4), Ron Stretcher (Director of Criminal Justice), Jill Reese (fmr. Jail Population Manager), Mark Crooks (Dallas Co. IT Department), and Leah Gamble for their time, support, and guidance. Mr. Crooks was particularly instrumental to the data collection component and deserves special recognition for his mastery of the County's data infrastructure, which was sufficiently complex. Thanks are also deserved by the Dallas County District Attorney, Craig Watkins, and his staff, particularly Mr. Gordon Hikel, for their support and cooperation in establishing an MOU between the County and the University so that this study could be made possible. Recognition is also deserved by the Texas Department of Public Safety, for expediting the delivery of statewide arrest records for Dallas County jail inmates. Ms. Amanda Russell, the graduate research assistant on the project, is also deserving of thanks for all of her time and effort with this project. Finally, thanks to the University of Texas at Dallas's School of Economic, Political and Policy Sciences (EPPS) and (former) Dean James Marquart for providing financial and graduate student support for the completion of this project.

CENTER FOR CRIME AND JUSTICE STUDIES
SCHOOL OF ECONOMIC, POLITICAL AND POLICY SCIENCES
The University of Texas at Dallas

PRETRIAL RELEASE MECHANISMS IN DALLAS COUNTY, TEXAS:

Differences in Failure to Appear (FTA), Recidivism/Pretrial Misconduct, and Associated Costs of FTA

Robert G. Morris, Ph.D.
Associate Professor of Criminology
Director, Center for Crime and Justice Studies

The University of Texas at Dallas
morris@utdallas.edu

July 2013

Rationale for the Study

- Dallas County spends over $100 million/year jailing defendants
- Vast majority of inmates are released before trial.
- Defendant success/disposition requires appearance in court.
  - Many defendants fail to appear (FTA).
    - More than 25% FTA
  - **The pretrial phase is arguably the most important period for defendant success.**
    - Little research focuses on this period
- Very Little GOOD science on release mechanisms and defendant success.
- FTA and recidivism entail heavy costs (public and social).

Data and Sample

Analyses limited to:

- All defendants jailed during 2008 for an offense in which they had not been previous arrested/jailed.

→ *The beginning of the justice process for a new criminal event (may involve multiple charges)*

Sample:

n = 22,019* (6,395 felonies; 14,008 misdemeanors)

* Total amount includes felonies, misdemeanors, JP court, and unknown case type.

Treatment Variables

Commercial Bonds

- Defendant is released to a licensed bonding company for a fee (e.g., 10-20% of bail amount).
- If FTA, defendant and/or *co-signers* could be liable for the full amount.

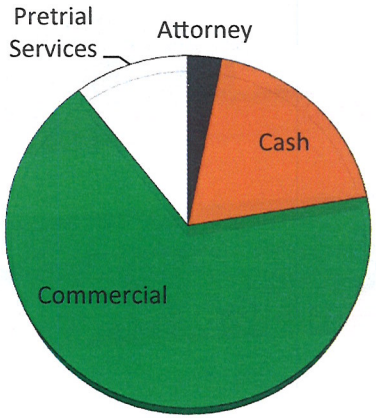
Pretrial Services

- Defendant is released to Pretrial Services at little or no cost to defendant.
- Reserved for low-risk offenses.
- In Dallas Co., pretrial defendants receive only phone call reminders, not formal supervision.

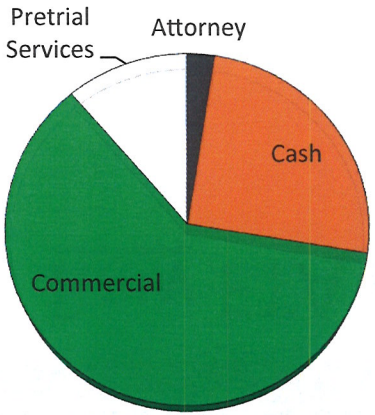
CENTER FOR CRIME AND JUSTICE STUDIES
SCHOOL OF ECONOMIC, POLITICAL AND POLICY SCIENCES
The University of Texas at Dallas

Defendant Proportions by Release and Case Type

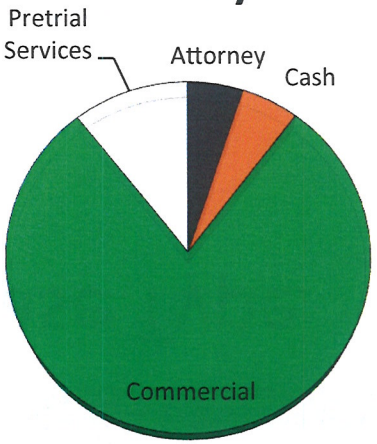
All Defendants



Misdemeanor



Felony



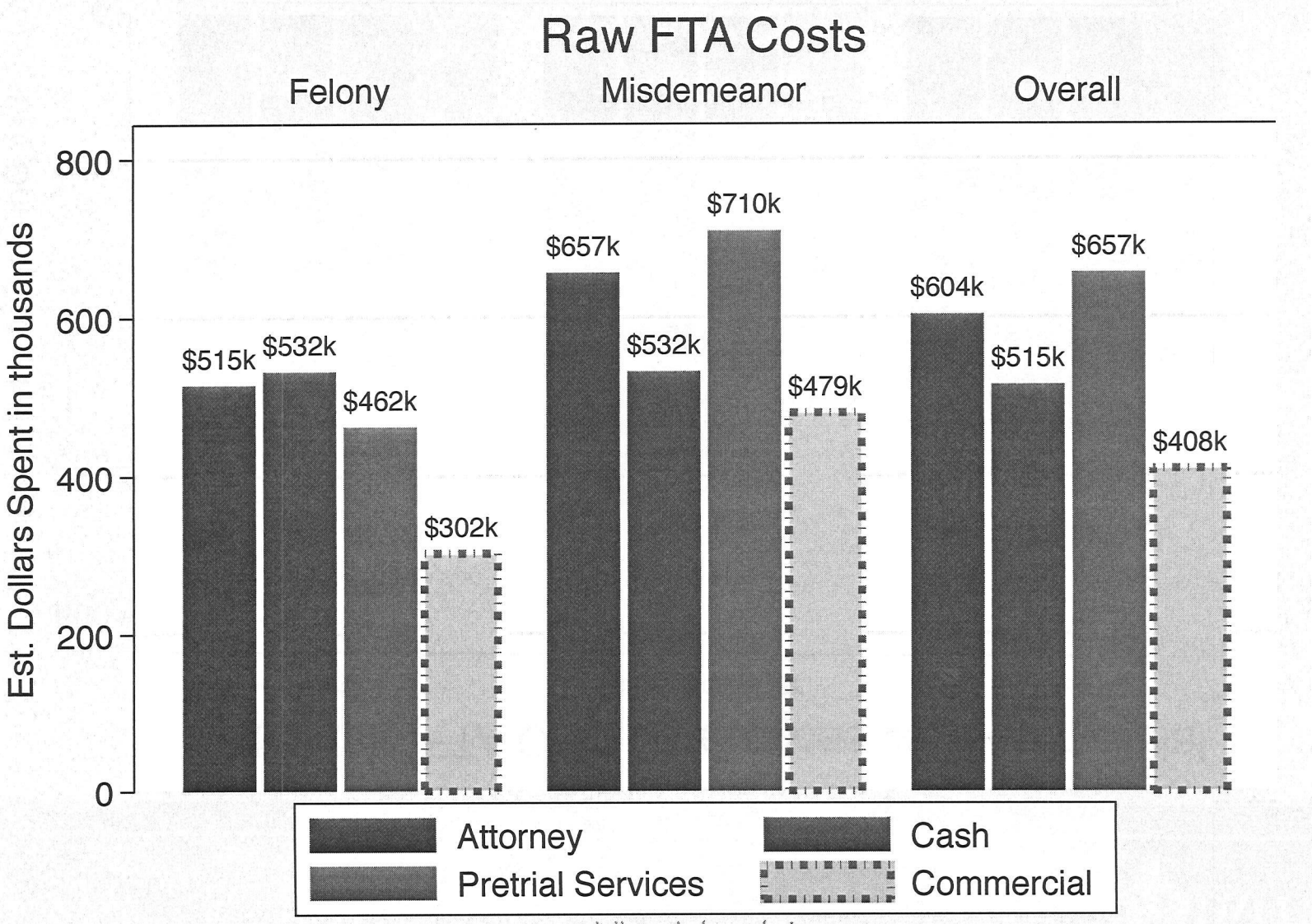
Useful, but not comparable…

- Raw FTA/Recidivism rates are NOT COMPARABLE across release mechanism types.
  - No equal probability of selection
  - Criminal charge/history may impact available release mechanisms
  - Cherry picking to varying degrees

General Findings on FTA and Recidivism

- **FTA results were very strong for one mechanism**
  - Commercial bonds more conducive to appearance in court among similar defendants.
  - No differences found for other comparisons, but there is partial support favoring pretrial services over cash bonds.

- **Recidivism findings were slim and inconsistent; tended to fall apart upon stratification by charge-type**
  - **Misdemeanor** – No impact from release mechanism (partial support for commercial and cash bonds over attorney bonds at 12 months)
  - **Felony defendants**: cash bonds less conducive to recidivism over commercial/pretrial. Attorney over commercial.
  - Criminal history accounted for, but not contextualized.


Raw FTA Costs
Felony
Misdemeanor
Overall
Est. Dollars Spent in thousands
800
600
400
200
0
$515k
$532k
$462k
$302k
$657k
$532k
$710k
$479k
$604k
$515k
$657k
$408k
Attorney
Pretrial Services
Cash
Commercial
www.utdallas.edu/epps/ccjs

"NEW" Findings Favor Commercial Bail

- Analyses re-run between specific charge categories.
- FTA Rates compared via Propensity Score Matching.

Analyses specific to drug charges, agg. Assault, burglary, larceny, obstructing justice, and DWI/DUI all favored commercial bail in terms of Court Appearance Rates.

Closing the Circle

- Why did the findings support Commercial Bail?
- Are the findings conclusive?
- The study provides a good baseline, but validation is needed.

Questions?

Contact Information:

Robert G. Morris, Ph.D.

Center for Crime and Justice Studies

University of Texas at Dallas

CCJS@UTDALLAS.EDU

WWW.UTDALLAS.EDU/EPPS/CCJS

972-883-6728

EXHIBIT 2

Bail Bondsmen and Criminal Courts
Mary A. Toborg
1983

The Justice Journal
Volume 8, Number 2

Bulleted Executive Summary

- Bondsmen play an important role in the pretrial processing of defendants

- Bondsmen facilitate court operations via:
  - Maintaining social control over defendant
  - Stressing importance of appearing in court and reminding defendants of court dates
  - Requiring 3rd party indemnitors (family and friends)
  - Locating defendants for failure to appear (FTA)

- Reliance on bondsmen to apprehend FTAs effectively transfers the cost of fugitive retrieval from the publicly funded system to the private system

- The use of bondsmen can:
  - Reduce burdens to the court that it would otherwise have to handle (court date changes, notifications)
  - Provide a buffer for Judges (adverse publicity of defendant commits a serious crime while awaiting trial)
  - Help relieve jail overcrowding through the use of a bond

- Bondsmen's decision-making process and the impact on the court are affected by the rules of the game:
  - State laws and regulations that govern bonding, local practices on the use of bonds, forfeiture collection practices, time required for disposition of a case, court notification procedures and the tradition in a jurisdiction on the use of bondsmen
  - Jurisdictions that have **more** favorable rules of the game allow bondsmen to operate more profitably and in turn, bondsmen are more willing to incur higher levels of risk, which reduce the detention of defendants who have bonds
  - Jurisdictions with **less** favorable rules of the game have lower profits, take fewer risks, bail decisions and terms are more conservative and results in a greater detention of defendants who have bonds

- Industry structure
  - In general, more competition should result in more bonds written with more favorable terms offered to defendants, thus resulting in less detention of defendants but higher FTA rates because riskier defendants will be given a bond
  - State laws and administrative regulations may restrict competition making it difficult for new bondsmen to enter the market
  - Financial requirements may limit bondsmen to those who are backed by an insurance company

- Forfeiture collection practices
  - Stringent policies will increase bondsmen's incentive to locate a defendant who has a FTA but reduce the incentive to write bonds for risky defendants
  - Increased detention may be an unanticipated consequence of tough forfeiture collection policies
  - Lax collection practices with no increased financial risk to bondsmen could lead to more bonds for riskier defendants

- The character of a defendant can also affect a bond decision; defendants with higher risks equals less bonds written and more stringent terms

- Overcrowded jails can lead to lower bonds and more lenient release practices

- Comparisons of four cities: Orlando, Florida; Fairfax, Virginia, Indianapolis, Indiana and Memphis, Tennessee - Conducted in 1979 and reviewed 1,200 inmates arrested for felony offenses of robbery, burglary, aggravated assault, larceny, fraud or distribution of drugs

Four-City Comparison of Factors Affecting Bail Bonding Decisions as Related to Criminal Justice Outcomes

Item	Virginia	Indiana	Tennessee	Florida
Regulatory Environment	Most favorable	Least favorable	Moderately favorable	Least favorable
Use of Bond by Judges	Low	High	Low	High
Bond Amounts	Moderate	High	Low	Low
Forfeiture Collection Practices	Most favorable	Least favorable	Least favorable	Most favorable
Time to Case Disposition	Short	Long	Moderate	Moderate
Extent of Competition Among Bondsmen	Low	Moderate	High	Moderate
Bond Terms for Defendants	Most favorable	N.A.	Moderately favorable	Least favorable
Detention Rates for Defendants with Bonds Set	Low	High	Low	High
Failure-to-Appear Rates	Low	High	Low	Low

Regulatory Environment

- Virginia had the more favorable regulatory environment; Tennessee had the 2nd most favorable; Florida and Indiana had the least favorable
- Sites with favorable regulatory environments and lenient forfeiture collection practices had lower failure-to-appear rates
- The regulatory environment and the length of case processing are important factors affecting bondsmen's operations

Use of Bail Bonds

- Where the use of bail was considered, Indiana and Florida had practices more favorable to bondsmen – surety bond was set for 95% of the cases where in Tennessee and Virginia, surety bond was set for only 67% of the cases
- Bond amounts were considerably higher in Indiana and somewhat lower in Florida vs. Virginia and Tennessee
- Indiana had both high use of bond with high bond amounts
- Tennessee had low use of bond with low bond amounts
- Florida and Virginia had mixed patterns of use for bonds and bond amounts
- Florida had extensive setting of bonds and low bond amounts
- Virginia had low use of bonds with moderate bond amounts
- Virginia had the highest degree of market concentration with the three largest bond agencies writing 85% of the bonds
- Indiana and Florida were exclusively insurance bondsmen while Virginia and Tennessee had substantial participation from property or professional bondsmen
- Across the states, 40% of bonds were written with no co-signers and an additional 40% had only one co-signer
- Bondsmen in Tennessee and Florida made greater use of multiple co-signers
- Collateral was most common in Florida
- There was some use of credit bonding except in Indiana where it was illegal; credit was extended more frequently in Tennessee and the average credit was 10% in Tennessee, Florida and Virginia
- In terms of bonds, Virginia was most favorable for defendants while Florida was the least favorable
- In Virginia, the low use of bond was offset by fast case processing and a favorable regulatory environment, which resulted in less detention of defendants with bonds
- In Tennessee, the low use of bond was offset by a reasonably favorable regulatory environment and a highly competitive market, which resulted in a low detention of defendants with bonds
- In Indiana, the high use of bond was offset by the least favorable regulatory environment and the slowest case processing system, which resulted in a high detention rate for defendants with bonds

Failure to Appear (FTA)

- There was only a 12% FTA rate across all states and vast majority that FTA were subsequently returned to court
- Only 19% of defendants who FTA remained fugitives
- Indiana had the highest FTA rate
- Two sites with the lowest use of bond (Virginia and Tennessee) had the lowest FTA rate
- Shorter case processing was associated with lower FTA rates

Forfeitures

- Florida and Virginia requested forfeiture payment more quickly (one month) but allowed for a longer period (12 months) to return a defendant to court
- Indiana and Tennessee requested forfeiture payment within six months, which was also the time allotted to return a defendant to court

Court/Detention

- There was little difference in court notification procedures among the states however, Tennessee did mention a problem in not routinely being notified of court dates after a first appearance
- Disposition of a case was shortest in Virginia (three months) and longest in Indiana (six months) with Florida and Tennessee falling in between
- Detention rates for defendants with bonds set was highest in Indiana and Florida and lowest in Virginia and Tennessee
- Length of detention was highest in Indiana, which also had the highest FTA rate
- Sites with low detention rates also had low failure-to-appear rates
- Two sites with the greatest use of bond (Florida and Indiana) had the highest detention rates
- Two sites with the lowest use of bond (Virginia and Tennessee) had the lowest detention rates
- Virginia and Tennessee had less detention of defendants with bonds
- Indiana had high detention rates for defendants with bonds

Summary

- The analysis of factors affecting bondmen's decisions suggest that certain trends may result in increased detention of defendants for whom bonds are set
  - Many jurisdictions are pursuing tougher release policies for defendants deemed dangerous or who have lengthy criminal histories
  - Tendency for the courts to more frequently require payment of bond forfeitures

- Jurisdictions that have reduced the reliance on the use of bondsmen by increasing the use of ROR or other release alternatives, can result in bondsmen perceiving that defendants with low bonds are viewed by Judges as posing greater that average risks; since low bonds results in lower profits, bondsmen are reluctant to write them

- Unanticipated problems can arise when combining bail reform measures with the continued use of a surety bond system; some jurisdictions have avoided problems by eliminating surety bonding (Kentucky and Wisconsin) and in states where the 10% deposit bond as a release has effectively ended surety bonding (Oregon and Illinois)

- Problems could be addressed by assuring the continued profitability of bail bonding
  - Increasing permissible fees on small bonds in jurisdictions where defendants with such bonds are detained at unnecessarily high rates
  - Bondsmen's costs for writing bonds could be reduced through lenient forfeiture collection practices

- Strengthening the surety bond system can have positive affects as it provides a way for defendants with sufficient resources to secure release quickly and easily

- Bail reform has tendency to focus on the release process rather than the outcome, without regard to the effects on detention and failure-to-appear rates

References

- AMERICAN BAR ASSOCIATION (1980) *Standards Relating to the Administration of Criminal Justice: Pretrial Release*. Boston: Little, Brown and Co.
- DILL, Forest (1975) "Discretion, Exchange and Social Control: Bail Bondsmen in Criminal Courts," 9 *Law and Society Review*, 639.
- FEELEY, Malcolm M. (1979) *The Process is the Punishment: Handling Cases in a Lower Criminal Court*. New York: Russell Sage Foundation.
- FLEMING, Roy B. (1982) *Punishment Before Trial: An Organizational Perspective of Felony Bail Processes*. New York: Longman, Inc.
- FREED, Daniel J. and Patricia M. WALD (1964) *Bail in the United States*. Washington, D.C.: U.S. Department of Justice.
- GOLDFARB, Ronald (1965) *Ransom: A Critique of the American Bail System*. New York: John Wiley and Sons.
- MURPHY, John J. (1971) "Revision of State Bail Laws," 32 *Ohio State Law Journal*, 451.
- NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES (1978) *Performance Standards and Goals for Pretrial Release and Diversion: Pretrial Release*. Washington, D.C.
- PRYOR, Donald E. (1982) *Practices of Pretrial Release Programs: Review and Analysis of the Data*. Washington, D.C.: Pretrial Services Resource Center.
- SUFFET, Frederic (1966) "Bail Setting: A Study of Courtroom Interaction," 12 *Crime and Delinquency*, 318.
- THOMAS, Wayne H., Jr. (1976) *Bail Reform in America*. Berkeley: University of California Press.
- WICE, Paul B. (1974) *Freedom for Sale*. Lexington, Mass.: Lexington Books.

EXHIBIT 3

Evaluation of Bail Reform Act of 1979 (AB2)
Report 2 – April 1983

Submitted by
Barry A. Krisberg, Ph.D. and James F. Austin, Ph.D.
National Council on Crime and Delinquency
San Francisco, CA

Bulleted Executive Summary

Chapter 1: Purpose of the Report

- The purpose of the report is to present research findings on the impact of the Bail Reform Act of 1979 (AB2); data is summarized on the effects of the legislatively established pretrial release procedures on rates of failure to appear (FTA) at court hearings and rates of pretrial crime as well as the fiscal impact of AB2 on local government

- A major product of the study is a detailed picture of how misdemeanor defendants are processed in California

- In 1979, California enacted Assembly Bill 2 as Chapter 873, Statutes of 1979 (*Berman*)
  - The new law, which took effect on January 1, 1981, sought to remove inappropriate financial burdens from certain defendants while not endangering public safety or disrupting the judicial process
  - Supporters of AB2 asserted that the new pretrial release procedures would not create new costs for local government and might even save money by reducing the need for expensive pretrial detention
  - Opponents of AB2 predicted local governments would lose substantial revenue and that FTA rates would increase dramatically
  - Because of the intense controversy and uncertainty surrounding AB2, the legislature limited its provisions to misdemeanors and mandated a multi-year evaluation of the impact of AB2

- The Office of Criminal Justice Planning (COCJP) was directed by the legislature to conduct the evaluation

Contents of AB2

- Prior to AB2, persons arrested for misdemeanors would be released if they caused the full bail to be deposited with the court clerk or if they paid a bail agent to execute a surety bond on their behalf (*PC 1269*); in addition, courts or magistrates could release misdemeanor defendants on their own recognizance (OR)

- Law enforcement officers and jailors also could release defendants with a citation or notice to appear at a court hearing (*PC 853.6*)

- No provisions existed for requiring conditions for pretrial release or requiring an appearance bond from the defendant; FTA in court was a separate misdemeanor offense only if the defendant was released on OR or a citation

- Now, under AB2 the following changes are in place:
  1. Own Recognizance
     A presumption in favor of OR release is established for misdemeanor defendants "unless the court makes a finding upon the record that an own recognizance release will not reasonably assure the appearance of the defendant as required." OR releases must file a slightly modified signed release agreement that now includes a promise not to leave the State without court permission

  2. Release on Appearance Bond
     An appearance bond is a written promise by the defendant to pay full bail if he/she fails to appear. The new instrument is the legal basis for a judgment against the individual who does not appear. According to AB2 a misdemeanor defendant may be released upon execution of an appearance bond alone

  3. Ten Percent Deposit Release
     Any misdemeanor defendant for whom a bail figure is established (exceeding $150) must be released upon deposit of ten percent of that amount and the execution of an appearance bond and a release agreement. The amount of bail is contained in the arrest warrant if one exists. Otherwise the bail amount is determined by the court bail schedule.

- AB2 specifies that the county retain 10 percent of the deposit (1% of the full bail amount) or $10, whichever is greater, and return the remainder of the deposit to the defendant after all required court appearances have been completed

Plan of the Report

- AB2 provides an excellent opportunity to rigorously monitor the course of bail reform in California

- The study design includes information/data on:
  - Descriptions of site selection, sampling of cases and measurement issues
  - Limitations of the research data
  - Characteristics of misdemeanants booked into jails in the study jurisdictions
  - Findings on how AB2 impacted methods of pretrial release in these locales will be reported
  - Defendants who were released on ten percent deposit in 1981
  - Rates of pre-trial crime, rates of FTAs and fugitive rates
  - Fiscal impact of AB2 on local government
  - Impact of the bail reform legislation on the private bail bond industry
  - Data on bail forfeitures, cost of implementing the percentage deposit system and costs associated with the effect of AB2 on pretrial jail populations
  - Research findings that require further monitoring or which hold future implications for legislative deliberation in the pretrial area

Chapter 2: Context of Bail Reform in California

- Statutes/Legislation
  - The basic bail statutes in California were enacted in 1871 and 1872
  - The first reference to bail bonds in penal code provisions occurred in 1927
  - In 1937, the first bail reform legislation elaborated qualifications and licensing of bail agents in the Insurance
  - This regulation opened opportunities for insurance companies to enter the bail bond business and make bail agents their agents
  - Amendments to California bail statutes were made in 1929, 1933, 1941, and 1945, plus several more in 1955

- Bail Procedures/Provisions
  - The first comprehensive criticism of California bail procedures was voiced in 1956 in an article in the California Law Review (*Gustafson 1956*)
  - Legislative attention urged the need for a uniform release system, simplification of forfeiture procedures, and classification of conditions under which sureties are released or cash refunded
  - The first significant changes in California's pretrial detention procedures were introduced in 1957 and 1959; these changes allowed police to use field release and station house release by means of citations for misdemeanors
  - By 1969 a new law required that police agencies explore the use of citations in lieu of arrests for misdemeanor defendants
  - Studies of these citation procedures showed that risks of non-appearance were minimal and that cost savings were considerable (*Feeney 1972*)

- Studies
  - Another major influence in California bail reform stemmed from the Vera Foundation's Manhattan Bail Project, which began in 1961 (*Areas, Rankin & Sturrs 1963*)
  - Equally important was a Washington, D.C. project modeled after the New York program (*McCarthy & Wahl 1965*)
  - Both programs asserted that it was possible to release "good-risk" defendants prior to trial without great adverse effects of increased failures to appear
  - At about this time there were attempts to begin an experimental pretrial release program for indigent criminal defendants in Oakland, California
    - Bail reformers argued that the local bail system was not working well and that the proposed program could save taxpayer's money
    - Resistance came from officials in the Oakland Police Department who feared increased danger to the public if criminal defendants were released before trial
    - Local bail agents joined the opposition echoing the negative police views and arguing that bail allowed punishment of criminal suspects who otherwise could not be successfully prosecuted because of evidentiary problems
    - The Oakland project, although well funded by the Ford foundation, did not produce impressive results
    - The number of defendants served by the project was less than two-thirds of original estimates
    - The Oakland project excluded felony defendants and drunk-driving cases

- The great bulk of eligible defendants were unaffected by the project and continued either to obtain bail, plead guilty at an early court appearance or remain in detention
- Close study of the Oakland project revealed that the free use of OR releases interfered with informal court practices surrounding plea negotiations

- A further symbolic liberalization of pretrial release came via a San Francisco County Superior Court that held that violations of due process existed in that county's bail system, which was later upheld in part (*Van Atta v. Scott, S.F. Supreme Court #662-928 1976; later upheld in part at 27C.3d 424 1980*)
  - This decision shifted part of the burden of proof in OR decisions from the defense to the prosecution
  - If challenged by the defense counsel, the prosecutor must now show why OR should not be granted, rather than release on bail
  - The decision did little to motivate compliance by defense attorneys and prosecutors:
    - Defense attorneys did not press strongly for OR release
    - District attorneys not able to assign additional personnel to appear and present evidence at bail hearings
    - Judges tended to respond that the decision would have little practical bearing on their rulings regarding bail or OR release

The Legislative History of AB2

- The legislative change in bail procedure was similar in aim to the nationwide bail reform movement; the goal of bail reformers was to ameliorate problems of inequality in pretrial release practices through new procedures that would not depend on discretionary use by police or judges

- The idea was first put forth in a New York law in the early 1960's (*NCCD 1982*); in 1964, Illinois adopted the ten percent plan and at the same time eliminated bail agents

- In 1966 the ten percent plan was incorporated into a federal Bail Reform Act with one exception: the federal law returns the entire deposit to defendants who appear at all court hearings, whereas the Illinois statute allows the court to retain a small portion of the deposit to cover administrative expenses

- The first California ten percent bail bill was introduced in 1971 by Assemblyman William Bagley

- Senator Arlen Gregorio also introduced a ten percent bail bill in 1971 and again in 1972 (*SB 329*); Bail agents were again strongly organized against the bill, and the balance of votes was held by conservative senators

- By this time arguments against the ten percent bail reform had crystallized around the following assertions:
  - In states where the procedure was installed there was an increase in failures to appear
  - Pretrial crime would increase
  - Ten percent bail was a boon to organized criminals
  - The plan shifts the costs of bail from the defendant to the taxpayer

- Forfeitures would be un-collectable
- Relatives would be reluctant to post bail if they stood to lose property
- Courts would react to the new systems by raising bail schedules

- In 1975 and again in 1976, Allen Sieroty introduced ten percent bail bills covering both felonies and misdemeanors; Howard Berman first submitted a bail reform bill in 1977 (*AB 1233*

- FTA for hearings after release on a misdemeanor charge was itself made a misdemeanor, and if a felony defendant failed to appear, he/she would be charged with another felony

- The 1977 legislative session witnessed four more bail reform bills introduced in addition to AB 1233; it was not until 1980 that the ten percent legislation passed both houses of the legislature

- But the passage of AB2, as it was known, proved to be one of the most controversial and fiercely fought pieces of legislation in the 1979-80 legislative session; lobbying among the bail bond industry was spread across a number of traditional and newer groups of bond agents; law enforcement was generally against AB2; the district attorneys supported the bill

- The legislative battle over AB2 pitted the strong sense of injustice and moral indignation of the bail reformers against the strong feelings of bail agents who saw a direct threat to their business livelihoods

- The bill finally reported out contained a major compromise forced by the opponents of AB2 to exclude felony cases from eligibility for ten percent bail; as it was, the Criminal Justice Committee vote was five to four in favor

- Ultimately the bail agents, faced with probable defeat, withdrew their total opposition in return for a provision that the bill would be limited to five years duration during which no effort would be made to amend it to include felonies

- It was observed that by 1981, when the bill went into effect, the public stance on crime had stiffened and the prospects for further liberal bail reforms seemed slight; AB2, plus increasing support for preventive detention policies (*Proposition 4 which passed overwhelmingly in 1982*), seems to have signaled at least a temporary halt to a decade of struggle over bail reform in California

Chapter 3: Study Approach

The research design for AB2 is separated into two major components: an impact design and a process design

- The impact design entails an intensive defendant-based case tracking data system; data were collected from a small number of municipal courts chosen to reflect key aspects of California's diversity

- The primary data collection effort involved examination of a random sample of defendants booked into jail for misdemeanor offenses and processed through the municipal courts

- Data on the following items were gathered for each defendant for 1981-1983:
  - arrest and charge data
  - methods of release
  - defendant socio-economic characteristics
  - final court depositions
  - number of pretrial court appearances
  - number of bench warrants issued for failure to appear
  - length of time from arrest to final court disposition(s)
  - amount of pretrial jail time
  - number and type of pretrial arrests.

- The legislature requested a five-year analysis of AB2 with annual updates because of past experience with the relatively slow statewide implementation of new criminal justice legislation

Selecting the Study Jurisdictions

- The diversity of California's 58 counties and its 83 (*as of June 1980*) municipal courts presented a formidable challenge to researchers; selection of a few counties and their municipal courts to stand for the many was decided upon as the most practical approach for the evaluation

- The selection of Los Angeles County and three other counties were recommended to reflect demographic differences in the state's population and north/south locations

- One striking finding was the number of municipal courts that exist within large urban counties; for example, Los Angeles County alone contains 24 separate municipal courts, as opposed to rural Yolo County which has one municipal court

- The final site selection was as follows:
  - Los Angeles County (Southern/Urban-Suburban)
    - Citrus , Pomona and Whittier
  - Alameda County (Northern/Urban-Suburban)
    - Oakland and Piedmont
  - Santa Cruz County (Northern/Suburban-Rural)
  - Yolo County (Northern/Rural)

- Table 3.1 shows the volume of misdemeanor filings in the selected courts during 1978-1980

Table 3.1
California Municipal Courts
Summary of Non-traffic Misdemeanors and Infractions
FY 1978-1979 and 1979-1980 (excludes Felonies reduced to Misdemeanors)

County/District	Total Filings		Total Dispositions	
	1979-80	**1978-79**	**1979-80**	**1978-79**
Los Angeles				
▪ LA-MCD	67,060	62,650	60,344	60,242
▪ Citrus	8,638	8,804	7,490	7,223
▪ Pomona	3,315	3,640	2,469	2,902
▪ Whittier	3,927	4,600	3,575	4,047
Alameda				
▪ Oakland/Piedmont	12,106	13,505	12,817	11,622
Santa Cruz	8,374	5,759	6,260	5,650
Yolo	3,302	3,087	2,707	2,328
Totals	**106,722**	**102,045**	**95,662**	**94,014**
% of State Totals	17.9%	17.3%	18.1%	17.5%

Source: Judicial Council: Part 1, 1981 Annual Report to the Governor and Legislature

Selection of the Defendant-Based Impact Samples

- To answer the evaluation questions on rates of FTA and pretrial crimes and to determine the types of defendants choosing the ten percent deposit release option requires tracking misdemeanor cases through municipal court processing

- Cases were selected at the point of booking and followed through final case disposition; the universe to be sampled consisted of all persons arrested and booked into jail for misdemeanors from the seven municipal court jurisdictions

- Basic arrest, offender and release data were recorded from existing jail records; FTAs and case dispositions were tracked through municipal court files; criminal justice histories (i.e., rap sheets) were provided by the California Department of Justice to record pretrial arrests

- FTA rates, defendant characteristics, and case dispositions could be compared across release options such as OR, sheriffs citation, traditional bail bonding, and ten percent deposit; analysis of the valid cases for 1980 produced the first estimate of the utilization of each release option

- It was learned that some of the release methods, especially financial release options, were employed relatively infrequently

Table 3.2
Sample Sizes for all Sites – 1980 and 1981

	1980	1981
Original Random Sampling Frame	2,200	1,250
Actual Random Sample	1,664	1,246
Augmented Stratified Sample	362	543
Total Cases Available for Analysis	2,026	1,789

Measuring Failures to Appear (FTA)

- A large concern about AB2 was the potential effect on rates of FTA for court appearances; while data from a number of other jurisdictions (*Philadelphia, PA, Wayne County, ME, Kentucky and Illinois*) reveal low rates of FTA for ten percent deposit clients (*Henry 1980*); these findings should be carefully examined since they are based on a variety of definitions (*Kirby 1979*)

- Problems in the definition and measurement of FTA have been long recognized in the pretrial field; to minimize definitional or measurement error, this study defined an FTA as a missed court appearance, whatever the reason, resulting in the issuance of a bench warrant

- FTA rates presented in this report are defendant-based rates meaning that an FTA is recorded if the defendant misses any one or all court appearances

Measuring Pretrial Crime

- Initial study plans called for gathering crime data from the California Department of Justice Criminal History Information; during the course of the study it was learned that statewide criminal records have "emphasized felonies" in the last several years due to budget cutbacks at the Department of Justice; thus, the statewide criminal history files do not contain a complete listing of misdemeanor arrests of pretrial defendants

- A decision was made to rely on the Department of Justice records, in part, because local criminal record systems were uneven thus, the data on pretrial crime are primarily limited to felonies and serious misdemeanors committed by the persons in the dependant-based samples

Quality of Jail and Court Records

- Jails and municipal courts have rarely been the subject of intensive research efforts; their data systems, whether manual or automated, are not structured to facilitate policy research and at best these systems are designed to assist day-to-day docket management tasks

- The research on AB2 was greatly enhanced by the automated jail data systems in Los Angeles and the Corpus System in Alameda County; however, much of the data collection depended on examining manual records

- In general, criminal court docket files were the principal source document, since they contained accurate and comprehensive; by contrast, docket files for traffic offenses and municipal infractions were more casually kept and harder to locate

- For traffic cases, a copy of the original citation was often used to record sentencing information and these data were rarely fully recorded; jail records were likewise of uneven quality across the study jurisdictions

- The uneven quality of jail and municipal court records posed many serious problems for the research team; the ultimate data used for the evaluation of AB2 were relatively "clean" and the research results presented in subsequent chapters attest to the policy utility of research using existing jail and municipal court data sources

The Process Study

- A process study of AB2 was conducted in the selected jurisdictions; in addition, a telephone survey was conducted with samples of bail agents, jail administrators and municipal court clerks in other jurisdictions to assess their perceptions of AB2; open-ended interviews were completed with key statewide figures who were intimately involved in the debate and passage of AB2

Chapter 4: Who Comes to Jail and How They Are Released: Misdemeanor Pretrial Admissions, Releases, Dispositions

- Much of the debate over AB2 was clouded by the lack of hard information about the potential defendant population to be reached by the new law

- Proponents of AB2 described large pools of indigent defendants languishing in jails for lack of bail money; opponents of bail reform asserted that most misdemeanor defendant were already being released pretrial and the remaining group were either felons, repeat offenders or persons with outstanding bench warrants

- Controversy also raged over lengths of jail stay and other basic data about jail pretrial populations

Table 4.1
Offense Characteristics of Misdemeanor Pretrial Bookings (all sites)
1980 and 1981

	1980	1981
Background Variable	**N = 1,663**	**N = 1,246**
Arresting Agency		
▪ Police	50.1	57.7
▪ Sheriff	24.9	18.4
▪ CHP	17.9	16.1
▪ Other	7.1	7.7
Number of Charges		
▪ 1	54.9	58.5
▪ 2	29.6	27.6
▪ 3+	15.6	13.9
Primary Offense at Booking		
▪ Assault	3.3	3.7
▪ Property	11.0	13.0
▪ Prostitution/Pandering	1.4	3.1
▪ Weapons/Alcohol	2.5	1.5
▪ Drugs	2.4	3.6
▪ Public Drunk	17.4	14.4
▪ City Ordinance	2.4	3.6
▪ Traffic	6.7	4.5
▪ DUI	30.8	30.8
▪ FTA	18.5	19.8
▪ Other	3.9	3.0

Note: Sample sizes within variables will vary due to missing values; numbers refer to percentages rounded to the nearest 10th; totals may not equal 100% due to rounding

- Table 4.2 presents the charge distribution of defendants for each site for both 1980 and 1981

Table 4.2
Primary Charge for Pretrial Misdemeanor Bookings (by site)
1980 and 1981 Combined

Charge	All Sites N = 2,913	Yolo N = 629	LA/CPW N = 610	LA/MCD N = 540	Oakland N = 565	Santa Cruz N = 569
Assault	3.4	1.8	2.0	4.3	5.7	3.9
Property	11.8	10.2	10.3	14.4	10.8	13.9
Prostitution/Pandering	2.1	0.2	2.3	4.8	3.5	0.2
Weapons/Alcohol	2.1	2.7	3.0	0.7	2.1	1.6
Drugs	2.5	1.6	1.2	5.6	0.9	3.7
Public Drunk	16.1	35.6	10.7	2.2	3.0	6.1
City Ordinance	2.9	1.8	1.6	2.0	3.0	6.1
Traffic	5.7	4.5	4.1	2.8	12.2	5.3
DUI	30.7	29.3	51.5	20.2	15.0	35.8
FTA	19.0	9.1	10.5	41.2	29.4	7.7
Other	3.4	3.5	2.6	1.3	6.4	3.2

Note: Numbers refer to percentages rounded to the nearest 10th; totals may not equal 100% due to rounding

Defendant Characteristics

- The basic personal characteristics of defendants from all five sites for 1980 and 1981 are summarized in Table 4.3

Table 4.3
Personal Characteristics of Pretrial Misdemeanor Bookings (all sites)
1980 and 1981

Personal Characteristic	1980 N = 1,664	1981 N = 1,252
Race		
▪ White	46.7	48.6
▪ Black	24.4	24.8
▪ Hispanic	25.8	24.3
▪ Other	3.1	2.3
Sex		
▪ Male	86.8	86.6
▪ Female	13.2	13.4
Median Age	30	29
Residency		
▪ County resident	74.9	77.7
▪ Non-county resident	18.9	14.6
▪ Transient	4.6	6.8
▪ Unknown	1.6	0.8
Employment		
▪ Employed	47.7	48.8
▪ Unemployed	49.3	47.5
▪ Student/Other	3.0	3.8
Occupation		
▪ Professional/Managerial/Sales	13.7	14.0
▪ Laborer/Craftsman/Machine Operator/Service Worker	62.6	61.0
▪ Disabled/None	14.7	16.2
▪ Student/Other	9.0	8.8

Note: Sample sizes within variables will vary due to missing values; numbers refer to percentages rounded to the nearest 10th; totals may not equal 100% due to rounding

Table 4.4
Personal Characteristics of Pretrial Misdemeanor Bookings (all sites)
1980 and 1981 Combined

	All Sites N = 2,913	Yolo N = 629	LA/CPW N = 610	LA/MCD N = 540	Oakland N = 565	Santa Cruz N = 569
Race						
▪ White	47.5	65.2	45.4	23.6	19.2	81.3
▪ Black	24.5	4.0	9.2	44.2	67.0	2.7
▪ Hispanic	25.1	26.8	43.3	29.9	9.9	14.3
▪ Other	2.8	4.0	2.1	2.2	3.7	1.8
Sex						
▪ Male	86.8	87.6	88.4	83.8	85.4	88.2
▪ Female	13.2	12.4	11.6	16.2	14.6	11.8
Median Age	30	33	28	29	30	29
Residency						
▪ County resident	76.2	62.4	86.6	88.5	82.6	66.4
▪ Non-county resident	17.1	28.2	9.1	2.9	15.0	26.4
▪ Transient	5.6	8.3	2.4	7.4	1.5	6.3
▪ Unknown	1.2	1.1	2.0	1.2	0.9	0.9
Employment						
▪ Employed	47.7	39.9	60.7	40.1	43.9	53.6
▪ Unemployed	49.3	56.9	37.8	57.5	50.9	41.8
▪ Student/Other	3.0	3.2	1.5	2.4	5.3	4.6
Occupation						
▪ Professional/Managerial/Sales	13.8	9.0	17.4	12.1	11.1	20.0
▪ Laborer/Craftsman/ Machine Operator/ Service Worker	61.9	56.2	70.8	63.8	51.0	68.3
▪ Disabled/None	15.4	25.1	2.5	18.8	26.1	3.1
▪ Student/Other	8.9	9.6	9.3	5.5	11.8	8.6

Note: Sample sizes within variables will vary due to missing values; numbers refer to percentages rounded to the nearest 10th; totals may not equal 100% due to rounding

WAYS OUT OF PRETRIAL DETENTION

Bail Amount

- Many of those interviewed in the process study speculated that bail amounts would be either (1) lowered below $149 to exempt certain defendants from the provisions of AB2 or (2) boosted by judges to ensure certain levels of revenue from ten percent clients who might FTA; the median amount of bail set for all defendants for 1980 and 1981 remained fairly stable ($320 in 1980 to $325 in 1981)

Table 4.5
Median Bail Amounts for Pretrial Misdemeanor Bookings (by site)
1980 and 1981

Year	All Sites	Yolo	LA/CPW	LA/MCD	Oakland	Santa Cruz
1980	$320	$320	$410	$300	$285	$300
1981	$325	$320	$410	$500	$198	$250

Table 4.6
Proportion of Cases Bail Amounts Less Than $151 (by site)
1980 and 1981

Year	All Sites	Yolo	LA/CPW	LA/MCD	Oakland	Santa Cruz
1980	35.3%	35.2%	22.7%	47.9%	39.0%	34.5%
1981	31.7%	36.3%	11.8%	24.4%	44.6%	43.9%

Methods of Release in 1980

- One of the main criticisms of AB2 was that ten percent deposit was not needed because most misdemeanor defendants were already being released from jail via OR or citation procedures

- Table 4.7 presents data for each county on the proportion of defendants released by various methods in 1980

Table 4.7
Method of Pretrial Release (all sites)
1980

Method of Release	All Sites N = 2,913	Yolo N = 629	LA/CPW N = 610	LA/MCD N = 540	Oakland N = 565	Santa Cruz N = 569
Race						
▪ White	47.5	65.2	45.4	23.6	19.2	81.3
▪ Black	24.5	4.0	9.2	44.2	67.0	2.7
▪ Hispanic	25.1	26.8	43.3	29.9	9.9	14.3
▪ Other	2.8	4.0	2.1	2.2	3.7	1.8
Sex						
▪ Male	86.8	87.6	88.4	83.8	85.4	88.2
▪ Female	13.2	12.4	11.6	16.2	14.6	11.8
Median Age	30	33	28	29	30	29
Residency						
▪ County resident	76.2	62.4	86.6	88.5	82.6	66.4
▪ Non-county resident	17.1	28.2	9.1	2.9	15.0	26.4
▪ Transient	5.6	8.3	2.4	7.4	1.5	6.3
▪ Unknown	1.2	1.1	2.0	1.2	0.9	0.9
Employment						
▪ Employed	47.7	39.9	60.7	40.1	43.9	53.6
▪ Unemployed	49.3	56.9	37.8	57.5	50.9	41.8
▪ Student/Other	3.0	3.2	1.5	2.4	5.3	4.6

Note: Numbers refer to percentages rounded to the nearest 10th; totals may not equal 100% due to rounding

- These data clearly show that prior to AB2 non-financial release procedures were already extensively utilized for misdemeanor defendants; however, the data also show that large numbers of defendants (*principally in either Oakland and LA-MCD*) were not being released pretrial

- Significantly, bail bonding, the chief target of AB2, accounted for only 11% of all misdemeanor cases in 1980

Table 4.8
Method of Pretrial Release for Misdemeanor Bookings
Bail Amount Greater Than $150 (all sites)
1980

Method of Release	All Sites N = 1,039	Yolo N = 245	LA/CPW N = 269	LA/MCD N = 149	Oakland N = 175	Santa Cruz N = 201
Non-Financial	53.3	55.1	68.8	18.8	37.1	70.2
▪ O.R.	12.6	14.3	10.8	14.8	15.4	9.0
▪ Citation	40.7	40.8	58.0	4.0	21.7	61.2
Financial						
▪ Self Bail	4.6	4.1	5.2	4.7	5.1	4.0
▪ Bail Bond	15.7	18.8	8.9	15.4	21.1	16.4
Not Released	23.0	18.4	11.2	59.7	34.3	7.5
Other	3.4	3.7	6.0	1.3	2.3	2.0

Note: Numbers refer to percentages rounded to the nearest 10th; totals may not equal 100% due to rounding

Table 4.9
Method of Pretrial Release for Misdemeanor Bookings (all sites)
1980

Method of Release	1980 N = 1,660	1981 N = 1.230
Non-Financial	44.2	47.1
▪ O.R.	9.3	9.0
▪ Citation	34.8	38.1
Financial	18.3	15.8
▪ Self Bail	7.0	5.7
▪ Bail Bond	11.3	3.7
▪ Ten Percent	--	6.4
Not Released	34.8	36.1
Other	2.8	1.0

Note: Numbers refer to percentages rounded to the nearest 10th; totals may not equal 100% due to rounding

Table 4.10
Method of Pretrial Release for Misdemeanor Bookings by Site
1980 and 1981

Method of Release	All Sites		Yolo		LA/CPW		LA/MCD		Oakland		Santa Cruz	
	1980 N=1,660	1981 N=1,230	1980 N=381	1981 N=248	1980 N=355	1981 N=254	1980 N=298	1981 N=243	1980 N=316	1981 N=228	1980 N=310	1981 N=257
O.R.	9.3	9.0	11.3	10.5	9.3	11.4	8.4	9.5	10.4	6.6	6.5	7.0
Citation	34.8	38.1	38.6	50.0	48.5	48.4	2.0	5.4	13.9	20.2	67.4	63.0
Self Bail	7.0	5.7	5.0	3.2	7.0	5.1	10.4	9.1	9.5	8.8	3.6	2.7
Bail Bond	11.3	3.7	15.5	4.8	6.8	3.2	7.7	4.5	15.2	2.6	11.0	3.1
Ten Percent	--	6.4	--	7.7	--	2.4	--	7.4	--	8.3	--	6.6
No Release	34.8	36.1	26.0	22.2	23.4	28.4	70.1	63.4	48.4	51.8	10.6	17.5
Other	2.8	1.0	3.7	1.6	5.1	1.2	1.3	0.8	2.5	1.8	1.0	0.0

Note: Numbers refer to percentages rounded to the nearest 10th; totals may not equal 100% due to rounding

Changes in Methods of Release After AB2

- Tables 4.9 and 4.10 present the proportions of defendants released in 1980 and 1981 to measure the impact of AB2 on methods of release for the entire sample; these data reveal that the ten percent deposit system was utilized by 6% of misdemeanor defendants in 1981, the first year of AB2

- The AB2 release procedure was employed by roughly 10% of defendants whose bail was greater than $150; the low proportion is not surprising given (1) the generally slow pace of criminal justice reform, (2) the specific problems of implementing AB2, and (3) the already widespread use of non-financial release methods

- During the early months of 1981, counties did not possess uniform criteria for use of AB2; there were a number of local procedural tests of AB2 and considerable confusion about which defendants were eligible for AB2 as well as the responsibilities of jail staff to inform defendants about this new release procedure; likewise, neither defendants nor the defense bar were completely familiar with the provisions of AB2

- These factors led to a limited use of the ten percent deposit system in 1981

- Apparently the rates of non-financial release remained essentially stable in the first year of AB2; interviews with bail agents conducted in 1981 confirmed the statistical finding of the declining use of bail bonds by misdemeanor defendants

- Although the quantitative and qualitative data confirm the decline in bail bond releases post-AB2, it is crucial to note that the proportion of defendants not released pretrial was not lowered after the implementation of AB2

Table 4.11
Method of Pretrial Release for Misdemeanor Bookings
Bail Amount Greater Than $150 (all sites)
1980 and 1981

Method of Release	All Sites		Yolo		LA/CPW		LA/MCD		Oakland		Santa Cruz	
	1980 N=1,039	1981 N=816	1980 N=245	1981 N=158	1980 N=269	1981 N=224	1980 N=149	1981 N=183	1980 N=175	1981 N=108	1980 N=201	1981 N=143
O.R.	12.6	11.4	14.3	12.7	10.8	12.1	14.8	10.9	15.3	9.7	9.0	11.2
Citation	40.8	39.5	40.8	49.4	58.0	52.2	4.0	7.1	21.6	28.3	67.1	57.3
Self Bail	4.6	3.7	4.1	2.5	5.2	4.9	4.7	2.7	5.1	4.4	4.0	4.9
Bail Bond	15.7	5.2	18.8	6.3	8.9	3.6	15.4	6.0	21.0	4.4	16.4	5.6
Ten Percent	--	9.4	--	12.0	--	2.7	--	9.8	--	16.8	--	11.9
No Release	23.0	29.9	18.4	15.2	11.2	23.7	59.7	62.3	34.7	35.4	7.5	9.1
Other	3.4	1.0	3.7	1.9	6.0	0.9	1.3	1.1	2.3	0.9	1.5	0.0

Note: Numbers refer to percentages rounded to the nearest 10th; totals may not equal 100% due to rounding

Duration of Criminal Justice Processing for Misdemeanor Defendants

- The amount of time defendants spend in jail is especially relevant to fiscal concerns as it directly impacts the size of a jail's pretrial population; proponents of AB2 argued that the costs of the new law would be partially offset by reducing the length of expensive pretrial detention

- Further, researchers have reported that the time between jail release and final disposition is an important factor in rates of FTA, pretrial crime and case disposition (*Toborg et al 1979*)

- Tables 4.12 and 4.13 summarize the 1980 (and 1981) data on duration of defendant processing by site

Table 4.12
Median Days of Pretrial Decisions for Misdemeanor Bookings (all sites)
1980 and 1981

Pretrial Processing Decision	1980	1981
Booking to Jail Release	1 day	1 day
Booking to First Court Appearance	7 days	6 days
First Court Appearance to Final Disposition	7 days	3 days
Booking to Final Disposition	23 days	20 days
Jail Release to Final Disposition	27 days	23 days

Table 4.13
Median Days of Pretrial Decisions for Misdemeanor Bookings (by sites)
1980 and 1981

Pretrial Processing Decision	All Sites		Yolo		LA/CPW		LA/MCD		Oakland		Santa Cruz	
	1980	1981	1980	1981	1980	1981	1980	1981	1980	1981	1980	1981
Booking to Jail Release	1	1	1	0	0	1	4	4	1	1	0	0
Booking to First Court Appearance	7	6	10	10	8	6	2	1	3	3	17	19
First Court Appearance to Final Disposition	7	3	16	6	30	17	0	0	0	0	16	14
Booking to Final Disposition	23	20	25	18	42	29	4	8	11	7	31	33
Jail Release to Final Disposition (includes non-releases)	27	23	33	23	49	34	0	13	8	7	34	34

1981 Criminal Justice Processing Durations

- The 1981 data also summarized in Tables 4.12 and 4.13 show a gradual change after the passage of AB2; the median processing times for all decision points decreased in 1981 with the exception of booking to jail release

- Why durations decreased in 1981 is also probably related to other historical factors such as jail crowding rather than AB2; AB2 cases had the longest period of pretrial supervision compared to other release groups; the differences in defendant processing time among the counties are highly related to their different patterns of pretrial release

Table 4.14
Median Days of Pretrial Detention by Release and Disposition (all sites)
1980 and 1981

Release Disposition	1980 N = 1,652	1981 N = 1,183
Released	0 days	0 days
Not Released – Case Dismissed	1 day	1 day
Not Released – Credit Time Served	4 days	4 days

Table 4.15
Median Days of Pretrial Decisions for Pretrial Releases and all Misdemeanor Bookings (all sites) 1980 and 1981

	Pretrial Releases		All Misdemeanor Bookings	
Pretrial Processing Decision	**1980**	**1981**	**1980**	**1981**
Booking to Jail Release	0 days	0 days	1 day	1 day
Booking to First Court Appearance	13 days	14 days	7 days	6 days
First Court Appearance to Final Disposition	29 days	22 days	7 days	3 days
Booking to Final Disposition	42 days	36 days	23 days	20 days
Jail Release to Final Disposition	41 days	35 days	27 days	23 days

How Cases Were Finally Disposed Of

- Table 4.16 shows the dispositions of the primary charge for each study site in 1980 and 1981

Table 4.16
Disposition of Primary Charge for Pretrial Misdemeanor Bookings(all sites)
1980 and 1981

Disposition	All Sites		Yolo		LA/CPW		LA/MCD		Oakland		Santa Cruz	
	1980 N=1,595	1981 N=1,198	1980 N=370	1981 N=243	1980 N=333	1981 N=242	1980 N=294	1981 N=239	1980 N=310	1981 N=240	1980 N=288	1981 N=234
Dismissed/ Not Filed	28.6	27.5	21.4	16.9	36.0	31.0	14.0	14.6	41.3	37.1	30.6	38.0
Probation *	32.0	36.6	34.3	44.0	30.6	32.7	37.8	20.5	21.0	50.8	36.8	34.6
Probation And Jail	11.0	14.4	11.6	5.4	9.3	15.3	14.3	38.1	2.9	2.5	9.0	10.7
Jail	17.2	12.0	19.5	21.0	13.5	12.0	22.8	16.7	26.8	4.2	11.5	6.0
Fine and/or Restitution	10.1	8.3	13.0	12.8	9.9	7.0	11.2	9.2	6.8	5.4	9.0	6.8
Other	1.0	1.3	0.3	0.0	0.6	2.1	0.0	0.8	1.3	0.0	3.1	3.9

** Includes suspended sentences – Note: Numbers refer to percentages rounded to the nearest 10th; totals may not equal 100% due to rounding*

Major Findings

- The dominant offense in misdemeanor bookings is DUI, accounting for 31% of defendants in 1980 and 1981; DUI, FTA and public drunkenness comprise two-thirds of misdemeanor jail bookings

- The typical jailed misdemeanor pretrial defendant is a male, aged 30 years and likely to be a resident of the county of booking; defendants were either unemployed or held working class jobs

- The median bail amount was $320; about 31% of defendants had bail set at less than $151 and were ineligible for the ten percent deposit release option

- The most frequent method of pretrial release was sheriffs citation (35% of defendants); non-financial releases (citation and OR) accounted for 44% of all cases in 1980

- Prior to AB2 bail bonds were used by 11 percent of the misdemeanor defendants; 35% of defendant bookings were not released pretrial

- The ten percent system was used infrequently in 1981; 10% of defendants with bail set at over $150 used the new release option; there are reports that the ten percent system is being used more frequently in 1982

- The proportion of misdemeanor defendants using bail bonds dropped sharply in 1981 but the percentages of defendants not released pre-trial increased slightly

- Misdemeanor defendants released pretrial have a median jail stay of less than one day compared to those not released who have a median jail stay of four days; these median jail stays did not change significantly after AB2

- The median time from jail release to final case disposition was 27 days; after AB2 the median time decreased to 23 days; most defendants have one or two court appearances and the vast majority plead guilty; prior to AB2 the most frequent sentences were probation, or probation and jail, followed by jail; 10% of the defendants received fines or restitution as a sole sanction; these rates did not change significantly after AB2

There exists great diversity among the study sites in (1) characteristics of jail bookings, (2) pretrial release practices, and (3) methods of processing misdemeanor defendants; the implementation of AB2 in 1981 did not alter these differences among jurisdictions, however the impact of local practices may exert a profound influence on the success or failure of AB2 in the future

Chapter Five: Who Chose the Ten Percent Deposit System in 1981

- Characteristics of defendants released via AB2 in 1981 are summarized in Table 5.1

Table 5.1
Characteristics of Stratified Sample of Misdemeanor Defendants Released via Ten Percent System – 1981
(Background Variable N = 260; sample sizes vary due to missing values; numbers refer to percentages rounded to nearest 10th; totals may not equal 100% due to rounding)

Primary Charge	
- Assault	5.4
- Property	16.5
- Prostitution/pandering	15.4
- Weapons/alcohol	4.6
- Drugs	5.8
- Public Drunk	1.2
- City ordinance	3.1
- Traffic	4.2
- DUI	36.5
- FTA	3.9
- Other	3.5
Number of Charges	
- 1	70.4
- 2	21.0
- 3	6.2
- 4 or more	2.3
Race	
- White	48.8
- Black	26.4
- Hispanic	23.6
- Other	1.2
Sex	
- Male	78.0
- Female	22.0
Residence	
- County	76.1
- Non-county	20.8
- Transient	2.8
- Unknown	0.4
Employment Status	
- Employed	45.2
- Unemployed	51.1
- Student	3.8
Occupational Level	
- Professional/Managerial/ Sales	13.2
- Laborer/Machine Operator/ Craftsman/Service Worker	56.3
- Disabled/none	22.4
- Student/other	8.1
Median age	28
Median bail amount	$500

Offense Differences Between AB2 and Other Pretrial Releases

- Table 5.2 first compares AB2 releases with other release groups on their offense characteristics; at the outset, it is clear that both the self bail and citation groups are fairly unique in their offense characteristics

Table 5.2
Offense Characteristics of Misdemeanor Pretrial Bookings by Method of Release – 1981

	Ten Percent (N=260)	Bail Bond (N=250	Self Bail (N=73)	O.R (N=247)	Sheriff Citation (N=484)	Not Released (N=442)	Total (N=1,748)
Charge							
- Assault	5.4	6.8	1.4	6.1	2.5	3.4	4.2
- Property	16.5	22.4	2.7	17.8	9.7	16.1	15.0
- Prostitution/ pandering	15.4	4.0	1.4	1.2	1.2	3.9	4.4
- Weapons/alcohol	4.6	6.8	1.4	2.8	1.2	1.1	2.7
- Drugs	5.8	8.4	1.4	6.9	1.9	3.4	4.4
- Public drunk	1.2	2.8	4.1	6.1	14.9	19.9	10.8
- City ordinance	3.1	0.8	0.0	2.8	4.6	3.6	3.1
- Traffic	4.2	3.6	9.6	4.9	3.9	2.9	4.1
- DUI	36.5	18.0	24.7	28.7	54.8	8.1	30.0
- FTA	3.9	22.4	46.6	20.2	2.1	35.8	18.2
- Other	3.5	4.0	6.9	2.4	3.3	1.8	3.1
Number of Charges							
- One	70.4	44.1	34.7	44.1	76.8	50.8	58.2
- Two	21.0	33.6	40.3	34.4	16.6	34.9	27.8
- Three	6.2	12.2	20.8	11.3	4.1	8.7	8.4
- Four or more	2.3	10.1	4.2	10.1	2.6	5.6	5.5
Median Bail	$500	$500	$150	$500	$320	$320	$325

Note: sample sizes vary due to missing values; numbers refer to percentages rounded to nearest 10th; totals may not equal 100% due to rounding

Table 5.3
Personal Characteristics of Misdemeanor Pretrial Bookings by Method of Release – 1981

	Ten Percent (N=260)	Bail Bond (N=250)	Self Bail (N=73)	O.R (N=247)	Sheriff Citation (N=484)	Not Released (N=442)	Total (N=1,748)
Sex							
- Male	78.0	80.8	79.5	85.5	86.8	91.5	85.3
- Female	22.0	19.2	20.6	14.5	13.3	8.5	14.7
Race	15.4	4.0	1.4	1.2	1.2	3.9	4.4
- White	48.8	41.7	39.8	44.7	62.9	35.8	47.4
- Black	26.4	30.8	38.4	28.9	10.4	36.7	26.0
- Hispanic	23.6	26.3	15.1	24.8	23.9	25.7	24.4
- Other	1.2	1.3	6.9	1.6	2.9	1.8	2.1
Residency	4.2	3.6	9.6	4.9	3.9	2.9	4.1
- County	76.1	86.6	84.8	82.3	78.8	75.4	79.4
- Out of county	20.8	11.7	15.2	15.6	17.9	9.2	15.0
- Transient	2.8	1.7	0.0	1.7	3.0	14.1	5.1
Employment							
- Employed	45.2	56.4	66.7	43.0	60.1	27.0	48.4
- Unemployed	51.1	39.7	21.2	52.5	36.6	70.0	47.8
- Student	3.8	3.9	12.1	4.5	3.4	3.0	3.8
Occupation	2.3	10.1	4.2	10.1	2.6	5.6	5.5
- Professional/ managerial/sales	13.2	15.0	17.2	11.7	17.8	11.2	14.4
- Labor/crafts/ operators/service	56.3	65.3	55.2	61.3	64.5	57.6	61.2
- Disabled/none	22.4	14.3	10.3	17.2	8.2	24.9	15.9
- Student/other	8.0	5.4	17.2	9.8	9.6	6.3	8.4
Median age	28	27	27	29	30	29	29

Note: sample sizes vary due to missing values; numbers refer to percentages rounded to nearest 10th; totals may not equal 100% due to rounding

- The relative absence of AB2 releases charged with FTAs is consistent with statutory language making these defendants ineligible for the ten percent system; that any defendants charged with FTAs were released in 1981 via ten percent reflects ambiguity in the original legislation that led to confusion over its early implementation

- In July 1982, the legislature enacted AB298 and AB2558 (*Chapters 1376 and 1386 of the California Penal Code*) that clarified the wording of AB2 on the ineligibility of defendants charged with FTAs for ten percent release

- If one only compares AB2 releases with bail bond releases on all offense-related factors, AB2 defendants differ from bail bond releases on the following variables:
  - Higher proportion of prostitution charges (15% vs. 4%)
  - Higher proportion of DUI charges (37% vs. 18%)
  - Lower proportion of FTA charges (4% vs. 22%)
  - Higher proportion of single charge cases (70% vs. 44%)

Socio-Economic Difference Between AB2 and Other Pretrial Releases

- In general, there are few significant differences between ten percent releasees and other releasees on personal characteristics
  - AB2 release defendants are less likely to be county residents (76%) than those released via bail bonds (87%)
  - A greater proportion of the AB2 release group were unemployed (51%) compared with the bail bond releases (40%)
  - These two factors are frequently associated with FTA risk prediction models (*Ozanne et al. 1980*)
  - OR releases have a high unemployment rate among its release group (53%), which may also negatively impact its expected FTA rate
  - The not released group contains disproportionate rates of unemployed defendants (70%) and transient (14%) defendants

Criminal Justice Processing Time

- Misdemeanor pretrial bookings spent very little time in pretrial detention (*Table 5.4*); the median length of pretrial detention never exceeded one day for all groups excluding the not released group

- It is noteworthy that AB2 and citation releases exited faster than either bail bond or OR releases; these slight differences in processing time may simply reflect the minimal amount of time required to process AB2 and citation cases; the not released cases are eventually released from jail within a three day period

Pleas and Sentences

- Most defendants pled guilty, with the highest percentage (90%) occurring among the not released group and the lowest (77%) among AB2 releases; conversely, bail bond releases were most likely to plead innocent to their charges (9%)

- All releases were most likely to either have their charges dismissed (28%), or if convicted be placed on probation with or without jail (51%)

- Among release groups AB2 (53%) and citation (58%) cases had the highest rates of probation (with or without jail), whereas bail bond and OR cases had higher rates of dismissal (40% and 35% respectively)

- The not released group was most likely to receive a straight jail sentence (21%), they also had a probation rate equal to AB2 dispositions (54%)

Table 5.4
Median Days for Pretrial Decisions by Method of Release – 1981

Pretrial Processing Decision	Ten Percent (N=260)	Bail Bond (N=248)	Self Bail (N=73)	O.R (N=247)	Sheriff Citation (N=479)	Not Released (N=405)	Total (N=1,753)
Booking to Jail Release	Less than one day	1	Less than one day	1	Less than one day	3	1
Booking to First Court Appearance	12	9	12	2	16	1	7
First Court Appearance to Final Disposition	37	35	0	46	15	0	17
Jail Release to Final Disposition ("at risk time")	51	44	21	47	34	0	31

Note: sample sizes vary due to missing values; total includes small number of defendants released through other methods

Table 5.5
Case Disposition of Misdemeanor Pretrial Bookings by Method of Release – 1981

	Ten Percent (N=177)	Bail Bond (N=153)	Self Bail (N=59)	O.R (N=146)	Sheriff Citation (N=350)	Not Released (N=354)	Total (N=1,239)
Plea *							
- Guilty	76.8	77.1	86.4	79.5	80.9	89.8	82.5
- No contest	20.9	14.4	8.5	17.8	13.7	9.3	13.8
- Innocent	2.3	8.5	5.1	2.7	5.4	0.8	3.7
Sentence	N=244	N=244	N=71	N=230	N=451	N=443	N=1,683
- Dismissed/not filed	23.3	39.3	26.8	34.8	25.7	22.1	27.7
- Fine/restitution	3.7	7.4	38.0	4.8	11.1	2.7	7.5
- Probation or suspended sentence	42.2	28.3	25.4	27.4	49.2	31.4	36.5
- Jail/probation	10.7	12.3	5.6	17.4	9.1	22.3	14.3
- Jail	11.9	9.0	2.8	10.9	4.7	21.4	11.5
- Other	8.2	3.7	1.4	4.8	0.2	0.0	2.5

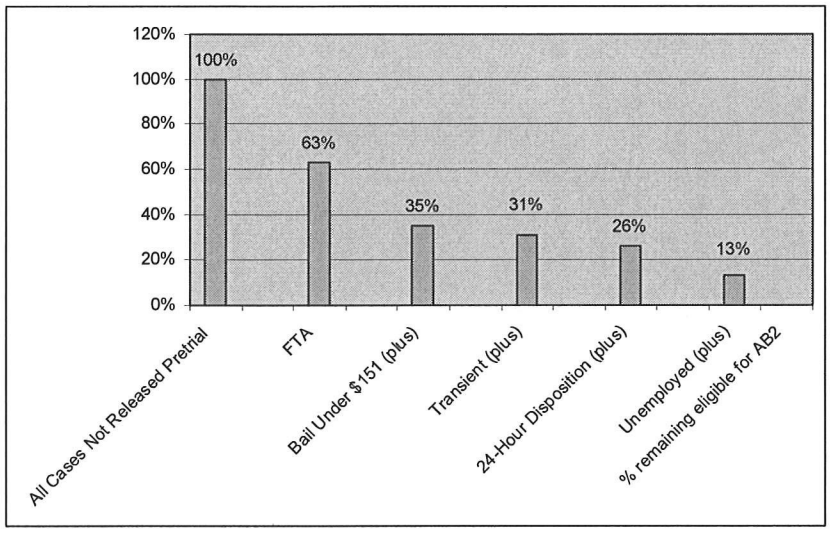
** Variable "plea" excludes defendants whose sentence was dismissed or not filed*
Note: sample sizes within variables will vary due to missing values; numbers refer to percentages rounded to the nearest 10th; totals may not equal 100% due to rounding

AB2 and the Not Released Population

- A computerized simulation analysis was conducted, which progressively applied several AB2 restrictions upon the not released population (*Table 5.6*)

- The analysis shows that AB2 as structured could impact only a small proportion of the pretrial not released population

Table 5.6
Simulated Application of the Current AB2 Criteria to the Not Released Pretrial Population – Type of Restrictions Applied



- Although a number of potential interesting trends were noted, those which relate directly to the impact of AB2 on pretrial practices are as follows:
  - AB2 releases are most similar to bail bond or OR releases in terms of offense and socio-economic characteristics
  - AB2 releases differ from bail bond releases on the following characteristics:
    - Higher proportion of prostitution and DUI charges
    - Lower proportion of FTA charges
    - Higher proportion of single charge cases
    - Higher proportion of out of county residents
    - Higher proportion of unemployed defendants
    - Lower proportion of innocent pleas and dismissals
    - Higher proportion of probation-type sentences
    - Longer time periods under pretrial release
    - Slightly shorter time periods under pretrial detention
  - The not released cases, by virtue of their offenses and socio-economic factors, are unlikely to gain pretrial release via AB2 and other methods of pretrial release

Chapter 6: Public Safety Consequences of AB2

- Critics of AB2 expressed major concerns about the effects of the new law on public safety, both in terms of FTA and pretrial crime rates

- Representatives of the bonding industry claimed that FTA rates would increase dramatically; they also asserted that the numbers of defendants who permanently escape prosecution ("fugitives") would increase; there were also claims that AB2 would contribute to an increase in crime by releasing defendants without suitable supervision (by bail agents)

- Table 6.1 illustrates the differing perceptions of three survey groups on the public safety consequences of AB2

Table 6.1
Summary Table of Survey Responses by Organizational Affiliation

Survey Question	Bondsmen N = 70	Jail Administrators N = 53	Clerks N = 68
Percent opposed to 10% bail	78.3	35.8	59.3
Percent reporting increases in misdemeanor FTA rates	95.6	37.1	49.1
Percent reporting higher FTA rates for 10% cases compared to OR cases	94.9	50.1	58.2
Percent reporting higher FTA rates for 10% cases compared to bail bond cases	73.6	28.9	20.3
Percent reporting increases in pretrial arrests	20.3	44.1	56.9

Rates of Failure to Appear

- Table 6.2 presents data on defendant-based rates of failure to appear for each method of release in 1980 and 1981

Table 6.2
FTA Rates for Pretrial Misdemeanor Bookings by Method of Release
1980 and 1981 *

	Ten Percent	Bail Bond	OR	Citation	Self Bail	Total
1980	--	22.0 N=246	30.8 N=260	22.1 N=596	14.0 N=150	22.9 N=1,252
1981	22.5 ** N=258	16.5 ** N=248	24.1 N=241	19.1 N=465	8.2 N=73	19.6 N=1,285

** FTA rates defined as the proportion of defendants with one or more FTAs regardless of the number of court appearances*
*** Chi-square statistics for 2-way table P=.0918*

Fugitive Rates

- The image of the fugitive, to the media and public, is a defendant purposely fleeing the jurisdiction to escape prosecution and punishment; in research terms the concept of fugitive is difficult to operationalize

- While one can readily measure the issuance of bench warrants for FTAs by the court, it is virtually impossible to ascertain if these defendants are purposefully avoiding all future court contacts

- To approximate the concept of "fugitive," cases were examined in which a bench warrant was issued for an FTA and the case was still not disposed of one year after the initial date of pretrial booking

- Table 6.3 presents the proportions of defendants with outstanding bench warrants and non-final court dispositions in 1980 and 1981 by pretrial release method

Table 6.3
Fugitive Rates for Pretrial Misdemeanor Bookings by Method of Release
1980 and 1981 *

	Ten Percent	Bail Bond	OR	Citation	Self Bail	Total
1980	--	6.4 N=251	10.5 N=267	6.8 N=607	1.3 N=151	6.8 N=1,276
1981	5.4 N=260	4.4 N=250	6.0 N=248	6.6 N=484	2.7 N=73	5.6 N=1,315

Note: fugitive rates defined as the proportion of defendants with an outstanding bench warrant and not court disposition one year after initial pretrial booking

Table 6.4
Proportion of Defendants with a FTA who Ultimately Appear within One Year
By Method of Release – 1980 and 1981

	Ten Percent	Bail Bond	OR	Citation	Self Bail	Total
1980	--	70.4 N=54	65.0 N=80	69.0 N=132	90.5 N=21	69.7 N=287
1981	75.9 N=58	73.2 N=41	74.1 N=58	64.0 N=89	66.7 N=6	70.6 N=252

FTA and Fugitive Rates for Defendants Charged with Prostitution/Pandering

- A final comment should be made about FTA and fugitive rates for defendants charged with prostitution/pandering; these defendants disproportionately selected the ten percent deposit system because this release could be selected at the defendant's option rather than through the screening decisions of bail agents or criminal justice officials

- During the process study, frequent "horror stories" of large rates of FTA and of frequent flight from jurisdiction prosecution by prostitutes were reported in the media; of the 93 defendants charged with prostitution/pandering in the 1981 sample, all (100%) had final court dispositions

- The FTA rate for this group was 24%, which was comparable to the FTA rates of all defendants released in 1981

- In 1981 law enforcement agencies in Oakland and Los Angeles launched vigorous campaigns to arrest the clients of prostitutes as a means to curb prostitution; these enforcement policies resulted in males comprising 45% of the defendants charged with prostitution/ pandering; however the majority of male defendants were customers

Rates of Pretrial Crime

- Related to concerns about increased FTA rates are fears that AB2 would contribute to increases in crime by releasing defendants without suitable supervision (by bail agents)

- Table 6.5 summarizes these data for the major release categories in the 1981 defendant-based sample

Table 6.5
Proportion of Defendants with a Pretrial Arrest by Method of Release – 1981

Ten Percent N = 260	Bail Bond N = 250	OR N = 247	Citation* N = 256	Total ** N = 1,013
12.3	9.2	11.7	2.3	8.8

* *Represents random sample of approximately one half of citation cases available for analysis*
** *BCS was able to respond to 97% of requests for records for ten percent, bail bond and OR releases*

- Table 6.6 presents data on the number of defendants with single or multiple arrests; of the entire group with pretrial arrests (N = 90), nearly three-fourths (76%) had only one pretrial arrest

Table 6.6
Number of Arrests for Defendants with Pretrial Arrests by Method of Release – 1981

Number of Arrests	Ten Percent N = 32	Bail Bond N = 23	OR N = 29	Citation N = 6	Total N = 90
1	78.1	73.9	75.9	66.7	75.6
2	15.6	12.5	21.7	--	17.2
3 or more	9.3	4.4	6.9	33.3	8.9

Table 6.7
Charge Level of Most Serious Offense for Defendants with Pretrial Arrest by Method of Release – 1981

Charge Level	Ten Percent N = 32	Bail Bond N = 23	OR N = 29	Citation N = 6	Total N = 90
Misdemeanor	43.8	30.4	37.9	33.3	37.8
Felony	6.3	34.8	3.4	50.0	15.5
"Wobbler"	50.0	34.8	58.6	16.7	46.7

Summary

- Prior to the enactment of AB2, the 1980 FTA rates for bail bond and citation cases were relatively equal at 22%; the highest FTA rates were possessed by OR clients at 31% and self bail release had the lowest FTA rate at 14%

- AB2 FTA rates (23%) were higher than self-bail (8%), bail bond (17%), and citation (19%) but lower than OR releases (24%); fugitive rates for the primary release groups for both years ranged from 2% to 8%

- In 1981 the lowest pretrial crime rate was for citation releases (2%) compared to 12% for the AB2 and OR groups; bail bond releases had a pretrial arrest rate of 9%

Chapter 7: Economic Consequences of AB2

- Cost analysis of criminal justice reforms is always a difficult enterprise; in the case of AB2 the calculation of costs is exceedingly complex

- Lacking reliable and valid accessible fiscal information, the evaluation of AB2 often had to rely on the estimates of persons knowledgeable about the misdemeanor pretrial process in the study locations

- Of special assistance was a previous cost study produced by the Center on Administration of Criminal Justice at the University of California, Davis (*1979*); this study provided a thorough listing of fiscal factors related to pretrial release in California and permitted us to compare pre-AB2 assumptions with empirical data collected at five study sites

Potential Costs to Local Governments

- In the post-Proposition 13 era, local governments in California were extremely concerned that new legislation would create additional fiscal drains on scarce tax revenues

- Supporters of AB2 argued that it would actually produce revenue for local governments and allow counties to save money on criminal justice expenditures; they explained that the ten percent fee would go to the court instead of the bonding industry and these fees could be invested in interest-bearing accounts

- Proponents of AB2 also claimed that the new law would reduce jail admissions, and thus somewhat reduce the costs of operating county jails; critics of AB2 predicted that counties would have to spend $250 million per year to replace the private bail system with county-funded release agents

- Another area of fiscal concern was the potential loss of local revenue from bail bond forfeitures; the bail bond industry estimated that $3-5 million per year were paid to counties in misdemeanor summary judgments

- The California Department of Finance estimated that the statewide annual net revenue loss to the counties under AB2 would be approximately $235,000

Potential Cost to the Private Bail Bond Industry

- There were over 1,000 licensed bail agents in California regulated by the State Insurance Commission; in 1978 the face amount of bonds written was $300 million

- Three major companies handled about 80% of penal bonds in California providing collateral and underwriting services for smaller bonding companies; Bail agents feared that after ten percent became law only bad risks would come to them

- In jurisdictions where the ten percent deposit system had been adopted, the private bail bonding system virtually disappeared (*Henry: 1980:11*); in those instances reform legislation included felons as well as misdemeanants; AB2 only affected misdemeanors

Potential Cost to Defendants

- Proponents of AB2 argued that the new law would eliminate most of the "private tax" on defendants involved in the private bond premiums; AB2 permitted the defendant who appears at all court hearings to receive up to 90% of the deposit left with the court

- In the private bail bond system, the bail agent retains the 10% of the bond as a premium for insuring the defendant's appearance; a defendant with bail set at $500 would pay either $50 to a bail agent or deposit this amount with the court

- After completing all scheduled court appearances, the AB2 client would receive a refund of $40 (the court keeps one percent of the total bail or at least $10 as a fee); the net financial cost to the defendant is $10; by contrast, the client of the private bail agent would receive no refund even if all court hearings were attended

- Advocates of AB2 argued that the differential in costs would be especially meaningful to indigent defendants; bail agents responded that they often help low-income persons out of jail by extending credit, whereas municipal courts could not extend credit to defendants choosing the ten percent system

Costs of AB2 to Local Government

- Ascertaining the costs to local government associated with administering AB2 is a challenging task for the evaluation; gathering data would require going into individual case records at some sites or hand-tabulating manual bookkeeping systems in others

- Obtaining data on the costs associated with processing AB2 and bail bond cases were likewise difficult; few local agencies could separate out special costs attributable to AB2

- In a statewide survey, most jail administrators (77%) and court clerks (79%) reported increased duties for their staff because of AB2, and there were complaints of excessive paperwork at all study sites; yet, despite these reports of increased workload, there were no reports of additional staff being hired to handle the new AB2 processing activities

- It remains unclear whether these processing costs exceeded revenues generated by AB2 or if these costs would increase as the ten percent system was used more frequently

- One area in which cost figures were hotly debated was the amount of bail forfeiture revenue before and after AB2; some local officials estimated their fiscal losses at millions of dollars; they calculated these lost revenue figures by adding up the total bail amount of AB2 clients who had failed to appear in court; these high estimates of lost forfeiture revenues, however, rested on the questionable assumptions (1) that all AB2 defendants who FTA become final forfeitures, and (2) that no exonerations occur for bail agents

- By this same logic, OR and citation programs would be even more costly than the ten percent system since OR and citation clients have similar or higher FTA rates, but in these non-financial release methods there are no deposits held by the court or non-refundable processing fees as exist for AB2 cases

- Using data from the U.C. Davis study, advocates of AB2 asserted that the ten percent system would actually save money for local governments because of the alleged high costs of collecting bail bond forfeitures; they further assumed that courts would not attempt to collect the remaining 90 percent of the bail amount for AB2 defendants who FTA

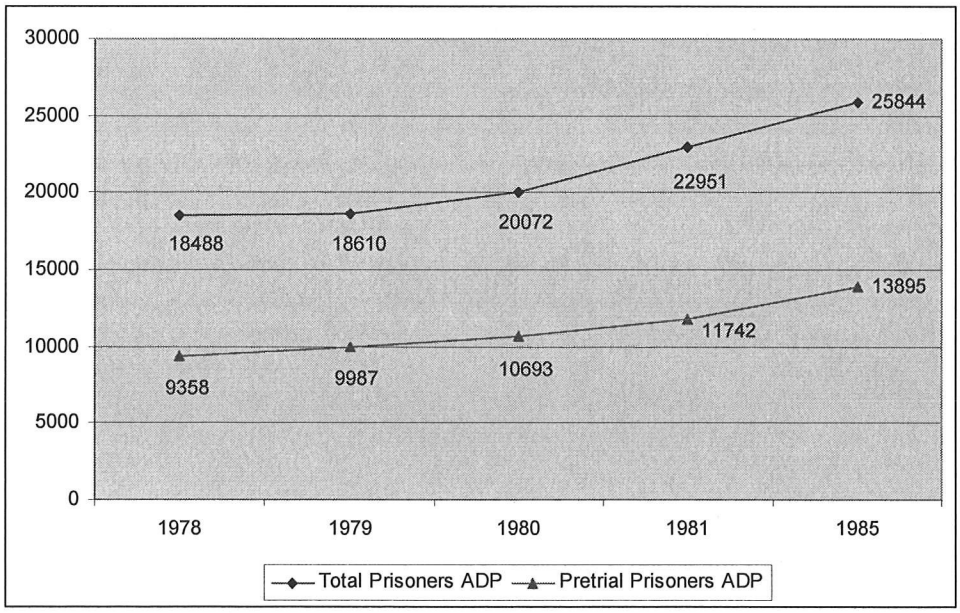
- In Court Clerks' views, AB2 constituted an unenforceable law because overburdened law enforcement agencies would not actively pursue misdemeanor bench warrants for FTA; similarly, county collection procedures were too cumbersome and the collection units too understaffed to handle the new AB2 workload

- Reduction in jail populations was another potential source for cost savings after AB2 was enacted; the U.C. Davis study used an estimate of a 10 percent reduction in pretrial detention attributable to AB2; this cost-savings estimate was projected to total $1.7 million; however, data collected during AB2's first year evaluation do not support these estimated jail savings

- The proportion of misdemeanor defendants detained pretrial was unchanged in the AB2's first year of implementation

- Two additional sources of revenue and cost savings expected from AB2 were (1) interest income derived by depositing ten percent payments in interest-bearing accounts and/or (2) the use of ten percent payments to ensure partial payments of fines levied against AB2 defendants who were later convicted; data in the study jurisdictions could not be found which could summarize the amounts of interest or fines directly attributable to AB2

Figure 7.1
Jail Population Trends in 20 California Counties *



Source: California Board of Corrections Note: total board-rated capacity is 22,304

Costs to the Bail Bond Industry

- Data from the 1981 defendant-based sample suggest that bail agents lost nearly 65% of their misdemeanor clients after AB2; bail bonds accounted for 11% of misdemeanor defendants in 1980, compared with 4% in 1981

- This business decline had enormous impacts on small agencies specializing only in misdemeanor bonds; for the larger and diversified bonding agency the loss of misdemeanor bail bond premiums was noted, but many bail agents reported associated increases in the writing of felony bail bonds

- Bail agents claimed that misdemeanor bail bonds produced low premiums and high rates of forfeiture compared with felony defendants who paid substantially higher premiums and had much lower FTA rates; the bail agents observed that AB2 may have actually increased profits by allowing them to transfer their higher and less profitable risks to the counties

- The passage of AB2, while reducing somewhat the total revenues of many bonding agencies, had a profound economic impact on those agencies specializing in misdemeanor defendants

Economic Impact of AB2 on Defendants

- The direct net financial benefit to the AB2 client who did not FTA was approximately $40; this amount is calculated by comparing the non-refundable premiums paid to bail agents to the provisions of AB2 permitting a return of the ten percent deposit, less a $10 non-refundable fee for AB2 releases who do not FTA; whether this amount represents a significant economic benefit to misdemeanor defendants is open to individual judgment

- Had AB2 been applicable to felony defendants, this economic benefit would be substantially greater due to the much higher average bail amounts in felony cases; proponents of AB2 asserted that additional defendant economic benefits would be gained by reducing their pretrial detention

- Released defendants who were employed would be less likely to lose pay for missed work; if AB2 had greatly reduced pretrial jailing, a range of personal and family financial costs might have accrued to ten percent clients; this argument seems difficult to support based on the 1981 defendant-based sample

Summary

- Despite extravagant claims of millions of dollars of additional costs or savings attributable to AB2, there are little data to support these claims

- Respondents in a statewide survey of jail administrators and court clerks reported significantly increased duties for their staffs due to AB2, but there were no reports of additional staff hired to handle the increased caseload in 1981

- In 1981 there was little evidence that AB2 reduced pretrial detention populations and costs

- Bail agents lost nearly 65% of their misdemeanor clients after the enactment of AB2; this business decline had enormous effects on small agencies specializing in misdemeanor bonds; the larger agencies reported writing more felony bail bonds and many bail agents reported that the reduced misdemeanor activity may have reduced revenues but actually increased business profits

- The direct financial benefit to the average AB2 client was approximately $40, due to the refundable part of the ten percent deposit

Chapter 8: Future Research Agenda for AB2

- The 1980-1981 defendant-based samples generated a rich data base on the first year's implementation of bail reform in California; but the impact findings based on the initial 12-month experience with the new legislation cannot be taken as a true test of the results of AB2

- Widespread confusion existed on (1) eligibility for AB2, (2) procedures for handling deposits, (3) methods of collecting forfeitures and (4) bookkeeping methods for transfer and ultimate return of up to 90 percent of the deposits

- Jail staff were not always clear on how to acquaint defendants with the new release mechanism; members of the defense bar and defendants were not always well informed about the provisions of AB2; local legal opinions and early court tests of the ten percent system further impeded its rapid implementation

- These factors contributed to the limited use of AB2 in 1981, and perhaps the unchanged proportions of misdemeanor defendants not released pretrial

- During the process study there were numerous reports that the ten percent system was more widely utilized in 1982; the legislature recognized this fact by mandating a four-year evaluation of AB2

- The prioritized issues to be explored in the next phase of the study include:
  - Changes in the use of various pretrial release options
  - Changes in the costs and savings associated with AB2
  - Changes in rates of FTA, fugitives and pretrial crime
  - Changes in the bail reform law
  - Changes in the political climate for bail reform in California

References

- Areas, Charles; Rankin, Anne and Sturrs, Herbert – 1963: "The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole." New York University Law Review, 38:67-95

- Austin, James and Lemert, Edwin – 1982: "Bail Reform in California: The Passage of AB2." Pretrial Services Annual Journal, 5 4-23

- Center on Administration of Criminal Justice – 1979: Cost Analysis: Ten Percent Deposit Plan (AB2). Davis, California: University of California, Davis

- Contra Costa County Board of Supervisors – 1982: Adult Correctional Facilities Master Plan. Martinez, CA: Contra Costa County Board of Supervisors

- Dill, Forrest – 1972: Bail and Bail Reform: A Sociological Study (Dissertation). Berkeley, CA: University of California, Berkeley

- Feeney, Floyd – 1972: "Citation in Lieu of Arrest: The New California Law." Vanderbilt Law Review, 25:367-394

- Field Institute – 1981: Attitudes of Californians Towards Prisons, Jails, Punishment and Other Aspects of the Criminal Justice System. San Francisco, Field Institute

- Frazier, Charles; Bock, E. Wilbur and Henretta, John – 1980: "Pretrial Release and Bail Decisions." Criminology, 18:162-181

- Gustafson, Roy – 1956: "Bail in California." California Law Review, 44:815-832

- Henry, D. Alan – 1980: Ten Percent Deposit Bail. Washington, D.C.: Pretrial Services Resource Center

- Kirby, Michael – 1979: What Is An FTA? Washington, D.C.: Pretrial Services Resource Center

- McCarthy, David and Wahl, Jeanne – 1965: "The District of Columbia Bail Project: An Illustration of Experimentation and a Brief for Change." Georg etown Law Journal, 53:675-748

- NCCD – 1982: Evaluation of the Bail Reform Act of 1979: Report No. 1. San Francisco: NCCD Research Center

- Ozanne, Marq; Wilson, Robert and Gedney, Dewaine – 1980: "Towards a Theory of Bail Risk." Criminology, 18:147-161

- Rubin, Hal – 1979: "The Drive to Kill the Bail Bond Business." California Journal, (March): 109-111

- Toborg, Mary; Sorin, Martin and Silver, Nathan – 1979: "Pretrial Release: An Evaluation of Defendant Outcomes and Program Impact." Pretrial Services Annual Journal, 1:93-126

EXHIBIT 4

Effectiveness and Cost of Secured and Unsecured Pretrial Release in California's Large Urban Counties 1990 – 2000

Michael K. Block, Ph.D.
Professor of Economics and Law
University of Arizona
March 2005

Bulleted Executive Summary

- When an individual is released pending trial, he or she must promise to appear at all required hearings and at trial; the promise to appear may be financially secured or it may be unsecured

- The most common form of financially secured release is referred to formally as a Surety Bond

- In California, the most common forms of unsecured release are called Release on Own Recognizance (ROR) and Conditional or Supervised Release (CR)

- In this study, data from the U. S. Bureau of Justice Statistics (BJS) was used (State Court Processing Statistics) for all of California's 12 large urban counties during 1990 to 2000 to analyze pretrial releases; in particular, the characteristics and performance of Surety Bond releases and ROR/CR releases were compared

- The primary focus was the relative effectiveness of these two approaches in guaranteeing appearance at scheduled court proceedings and in preventing defendants from becoming fugitives

- Data was analyzed from over 20,000 cases; this data was collected by BJS in six surveys over an 11 year period from California's largest counties

- The findings from this analysis include the following:
  - The proportion of defendants released before trial in these California counties was at 44%, substantially below the national average of 62%
  - The proportion of releases on Surety Bond averaged 40% over the period while the proportion released on ROR/CR averaged 57%
  - In 2000 these percentages stood at 46% and 53% respectively for the California counties included in the BJS sample
  - A defendant released on ROR/CR was about 60% more likely to have failed to appear for a scheduled court appearance as a defendant released on Surety Bond – 32% vs. 20%
  - A defendant who failed to appear for a scheduled court appearance was approximately two-and-a-half-times more likely to remain a fugitive if he/she was released on ROR/CR than if he/she was released on Surety Bond

- If the proportions released on Surety Bond and ROR/CR was reversed, it is estimated that there would have been over 1,000 fewer failures to appear
- If Surety Bond had completely replaced ROR/CR as a release option, it is estimated that there may have been over 6,000 fewer failures to appear
- A more aggressive use of Surety Bond could save taxpayers between $1.3 million and $10 million per year in budget outlays, depending on exactly how aggressive these counties are in replacing release on ROR/CR with release on Surety Bond
- Total cost savings, including the social costs of failures to appear, could range from $14 million to over $109 million per year in these counties, again depending on how aggressive they are in replacing ROR/CR with release on Surety Bond

Figure A
Percentage of Defendants Who Failed to Make a Court Appearance on Surety Bond and ROR/CR Release Options in California's Large Urban Counties
1990-2000

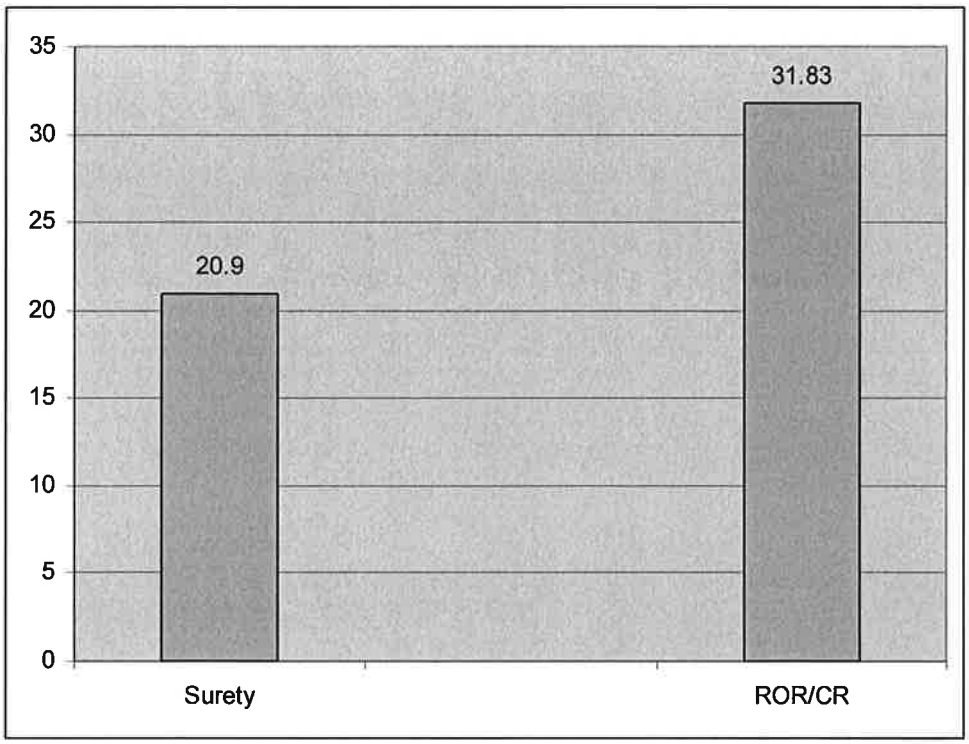
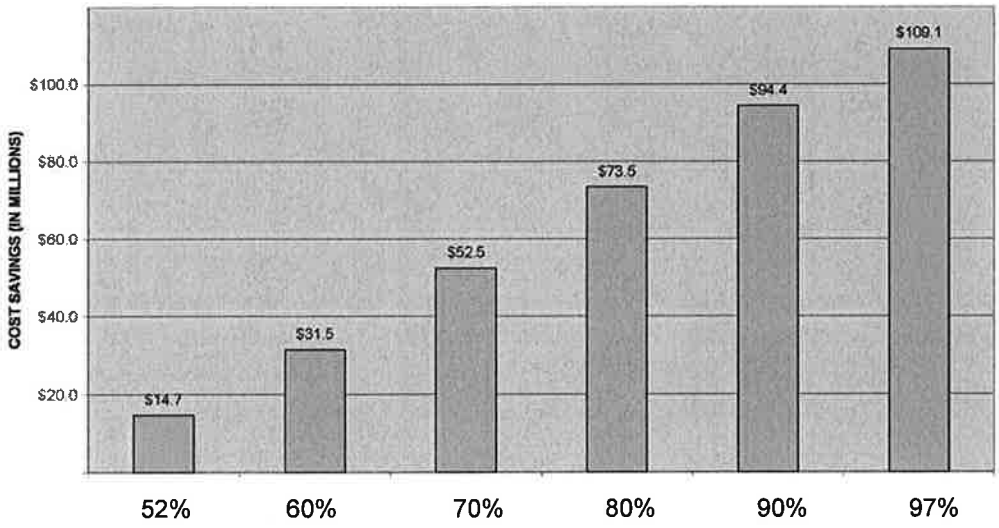


Figure B
Estimated Total Cost Savings That Would Have Resulted from Increased Use of Surety Bond in California's Large Urban Counties
2000



Introduction of Study

- California's constitution provides that "a person shall be released on bail by sufficient sureties . . ." and "may be released on his or her own recognizance in the court's discretion"
- The vast majority of those arrested in California are eligible for release pending trial
- When an individual is released pending trial he or she must promise to appear at all required hearings and at trial; this promise to appear may be financially secured or it may be an unsecured promise to a government official
- Financially secured release is referred to as "bail" and in California, may take the form of Surety Bond, full cash bail and property bail
- Under unsecured release, the Court makes a decision, either on its own or with the assistance of other public officials, to waive the requirement of financial security, and in essence assumes responsibility for the appearance of the defendant at all required proceedings
- The most common forms of unsecured release in California are: Release on Own Recognizance (ROR); Conditional or Supervised Release (CR); Release on Citation; and Emergency Jail Release

- The purpose of this study is to compare and contrast the performance of secured release and unsecured release programs; of particular interest is the relative performance of the most common release options: Surety Bond and ROR/CR

- The study focus will be on the effectiveness of these two approaches in preventing failures to appear (FTA) at required Court proceedings; the prevention of FTAs is important in both assuring the integrity of the judicial system and controlling the costs of the system; FTAs undermine the efforts of local government to assure the safety of persons and property and they impose a significant cost on taxpayers

Methodology

- On a biannual cycle, the U. S. Bureau of Justice Statistics (BJS) collects a sample of felony cases filed during one month (May) in 40 of the nation's largest 75 counties; of the 40 counties sampled, six to nine, depending on the year, are among the 12 largest counties in California (the number has grown from six in 1990 to nine in 2000)

- These California counties make up the study sample; while the sample does not contain all of the large urban counties it always includes Los Angeles County, Santa Clara County, San Bernardino County and a representative sample of the other large urban counties in the state

- In 2000, the most recent year for which we have data, the BJS sample counties represented 89% of the population and 87% of the FBI Part I Modified Index Crimes reported in California's 12 largest counties, which themselves represented 77% of the State's population and 76% of the Modified Index Crimes reported in the State as a whole

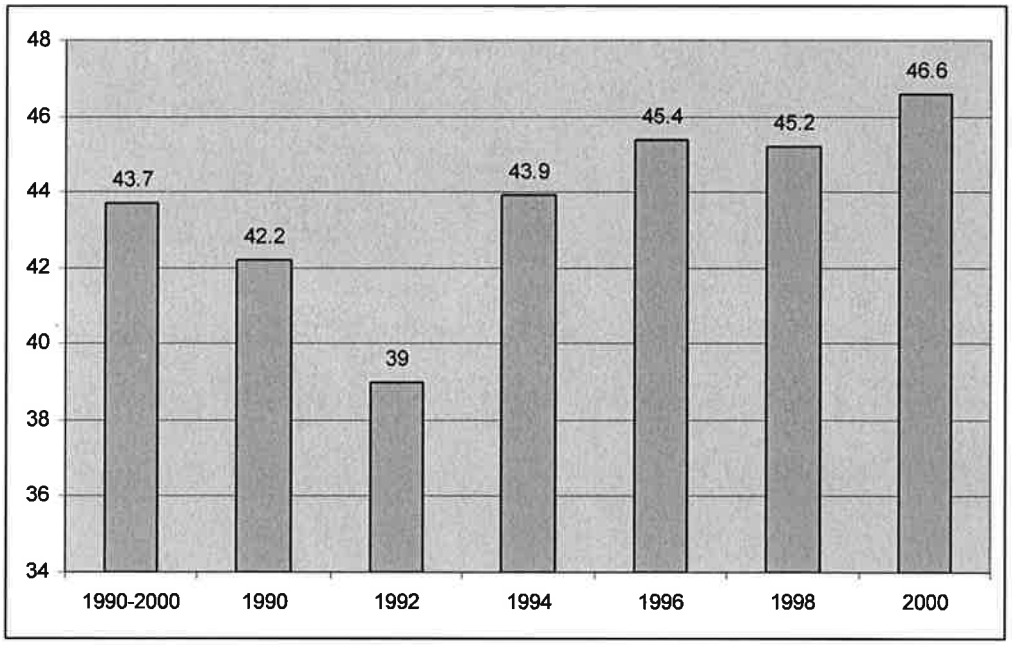
- The years covered in this study are from 1990 to 2000; the study stops in 2000 because it is the last year for which BJS data is currently available; the number of cases BJS sampled over the ten-year period in California was 20,811; all of these cases are included in this study

- As part of the information collected on felony cases, BJS records information on pretrial release, including the type of release (e.g., Surety Bond, ROR, CR, etc.); BJS also follows the case for up to one year after filing

- The "State Court Processing Statistics", which is BJS's name for the data series used in this report, contains rather detailed information on who gets released before trial, how they get released and whether they appear for all required proceedings

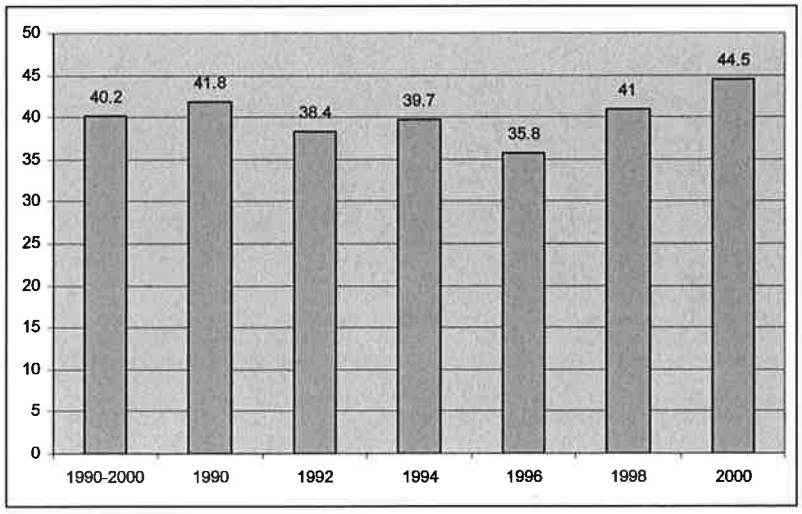
Pretrial Release Rates

Figure 1
Percentage of Defendants Released Before Trial in California's Large Urban Counties 1990-2000



- In California the percentage of defendants in large urban counties released before trial is about 44%; nationwide the pretrial release rate in such counties is about 62%
- It appears that the proportion of defendants released before trial in California's large urban counties was relatively stable in the 1990's; only in 1992, did the release rate fall below 40% and in no year did the rate exceed 45%
- However, because the number and identity of the California counties included in the BJS sample varies from year-to-year, the data in Figure #1 may not be a very accurate indicator of trends over time
- To supplement the analysis, the same series of information was constructed using only the counties (Los Angeles, San Bernardino, Santa Clara) that were in the BJS sample every year

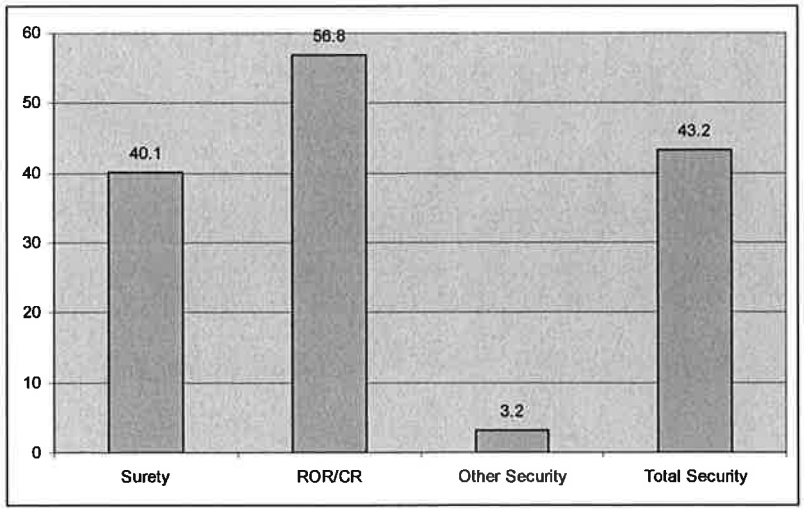
Figure 1 A
Percentage of Defendants Released Before Trial in California's Large Urban Counties
1990-2000



- While the pattern over the decade is slightly different for these counties, the magnitudes are similar and there is the same evidence of relative stability, with perhaps a bit more significant of an increase in the release rate by the beginning of the 21st century

Secured and Unsecured Release

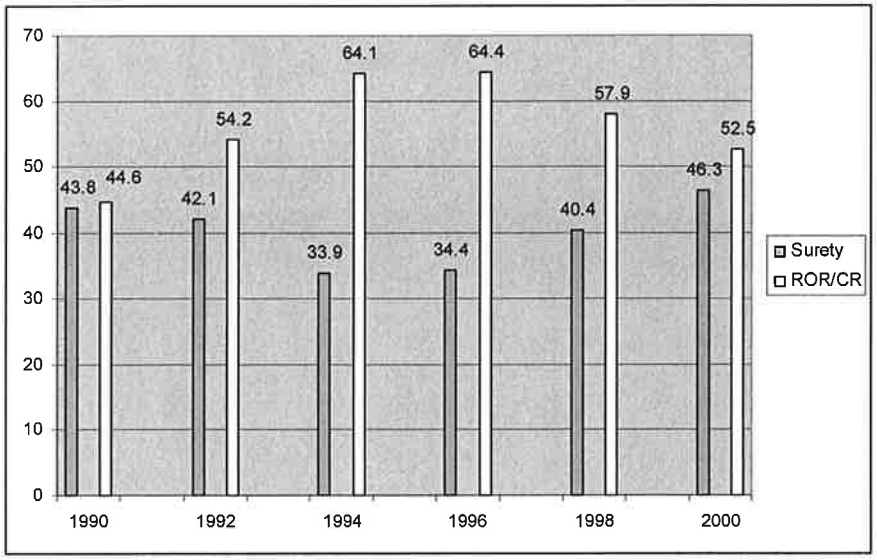
Figure 2
Relative Incidence of Secured and Unsecured Pretrial Release Mechanisms in Large Urban Counties in California
1990-2000



- If we consider the entire period 1990-2000, the BJS data reveals that in California's large urban counties about 40% of all released defendants were released on Surety Bond

- The proportion released on all forms of secured release over the same period was approximately 43%; the latter was obtained by adding releases guaranteed by Surety Bond, Full Cash Bond, Deposit Bond and Property Bond; the remaining 57% of all released defendants were released under the unsecured government release options of ROR and Conditional Release (CR)

Figure 3
Recent Trends in the use of Surety Bond and Unsecured Release Options in Large Urban Counties in California
1990-2000



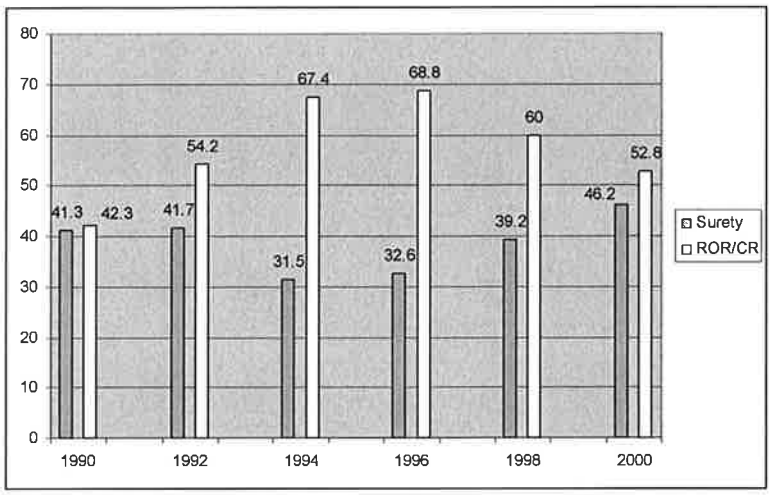
- The trend during the early to mid-1990's of increased reliance on unsecured release has abated and to some extent been reversed; nonetheless, unsecured release was still somewhat more common in 2000 than it was in 1990

- In 1990 about 45% of all releases were ROR or Conditional Releases; by 1996 this percentage had grown to 65%; by 2000 it was back down to 53%, which was still quite a bit higher than it had been in 1990

- Conversely, while Surety Bonds secured nearly 44% of all releases in 1990, this percentage had fallen to 34% by 1994; in 1996 this trend reversed itself so that by 2000 the percentage of releases secured by Surety Bond was 46%, which was also somewhat higher than it had been at the beginning of the decade

- Releases on ROR/CR grew more rapidly during this period than did releases on Surety Bond; by 2000 all other forms of privately secured release had virtually disappeared; surety Bond and ROR/CR accounted for 98.8% of all releases in the California counties in the BJS sample

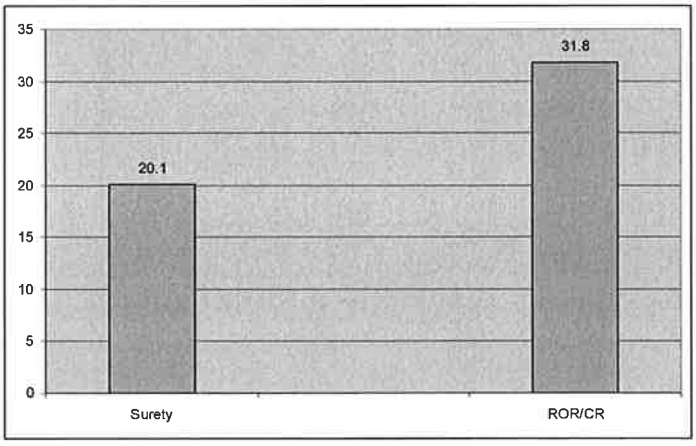
Figure 3 A
Recent Trends in the use of Surety Bond and Unsecured Release Options in Large Urban Counties in California
1990-2000



- Since the counties in the BJS sample change from year to year, the data from figure 3 was supplemented with a series on release that used only those California counties in all the BJS samples; the data in this figure have virtually the same pattern as those in figure #3

Relative Performance of Secured and Unsecured Pretrial Release

Figure 4
Percentage of Defendants who Failed to Make a Court Appearance on Surety Bond and ROR/CR Release Options in Large Urban Counties in California
1990-2000

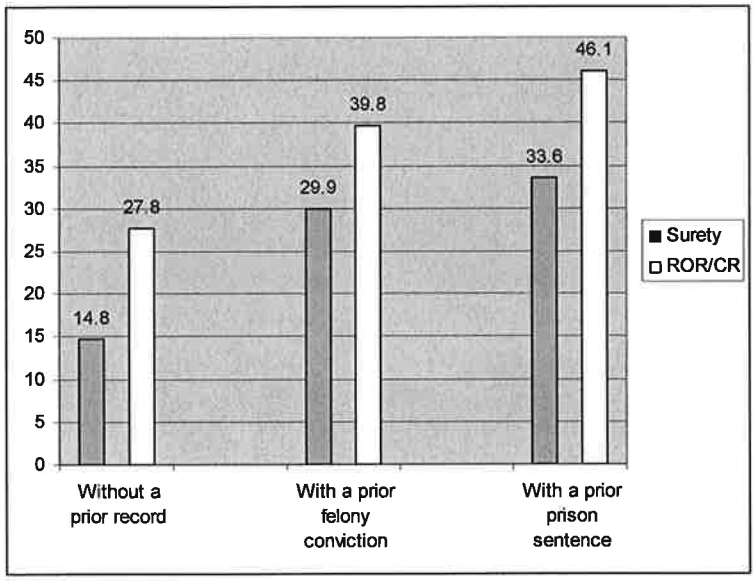


- It is apparent that Surety Bond is a much more effective mechanism for preventing FTA at required proceedings

- Over the period 1990-2000, approximately 20% of all defendants on Surety Bond secured release failed to make a court appearance in California's large urban counties; during the same period, about 32% of the defendants released on ROR/CR failed to make a required court appearance

- It is striking that even though the defendants released on Surety Bond had more serious criminal histories than those released on ROR/CR, their failure to appear rate was about 60% lower than that of defendants released on ROR/CR

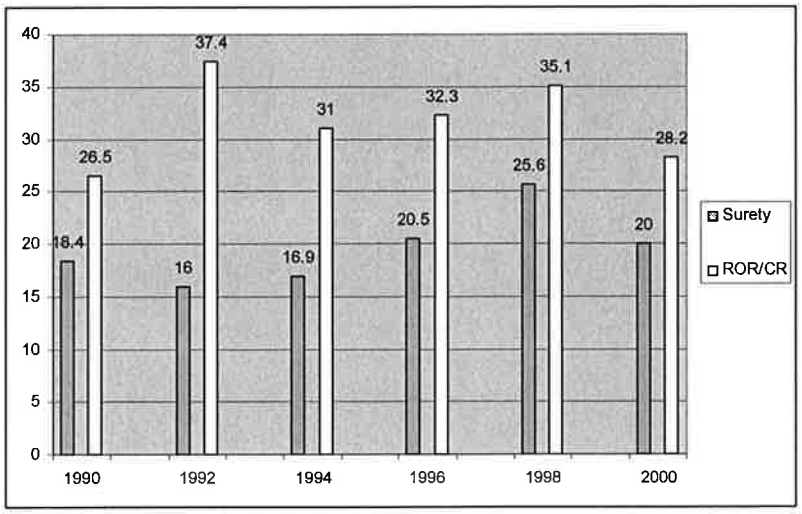
Figure 5
Percentage of Defendants who Failed to Make a Court Appearance by Criminal Justice History and Type of Release in Large Urban Counties in California 1990-2000



- The fact that Surety Bond has been a more effective method of assuring appearance at Court proceedings than ROR/CR for a rather wide range of defendants is clearly evident in Figure #5

- While Surety Bond has proven particularly effective relative to ROR/CR in assuring appearance of defendants without any prior criminal convictions (14.8% vs. 27.8%), it has also proven substantially more effective in preventing FTAs among more "hardened" defendants such as those with prior prison incarcerations

Figure 6
Recent Trends in the Percentage of Defendants who Failed to Make a Court Appearance on both Surety Bond and ROR/CR in Large Urban Counties in California 1990-2000



- The FTA rate of both Surety Bond and ROR/CR appears to have increased since 1990

- If one considers the failure to appear history during the 1990s in the counties that are in all BJS samples, the situation is somewhat different; as shown in Figure #6a, it is only the releases on Surety Bond that have experienced an increase in the failure to appear rate over the decade

Figure 6 A
Recent Trends in the Percentage of Defendants who Failed to Make a Court Appearance on both Surety Bond and ROR/CR in Selected Large Urban Counties in California 1990-2000

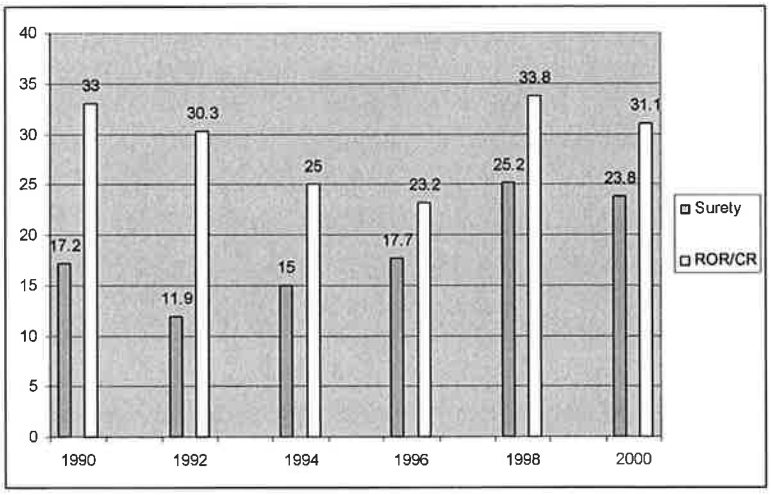
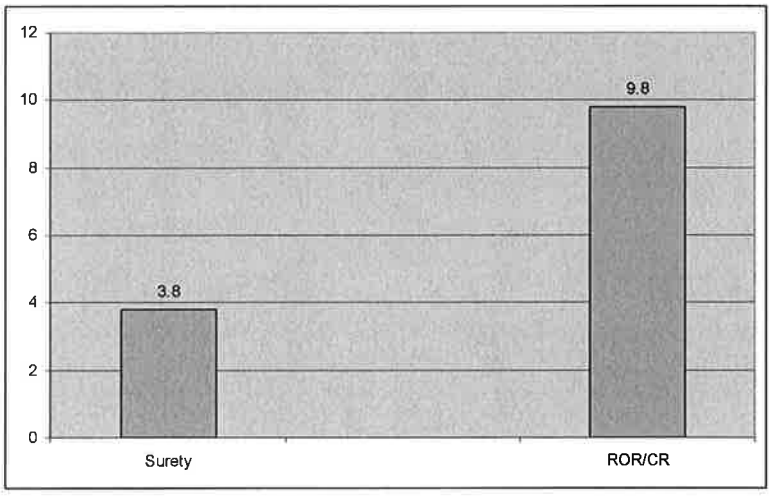


Figure 7
Percentage of Releases who Remain a Fugitive in Large Urban Counties in California 1990-2000



- Surety Bond has not only been more effective than government secured pretrial release in assuring appearance at court proceedings it has also been better at eventually returning defendants who FTA to custody

- Only about 4% of defendants released on Surety Bond remained fugitives after one year in California's large urban counties; the comparable percentage for ROR/CR was approximately 10%

What If?

- Since pretrial release secured by a Surety Bond appears to have been so much more effective than ROR/CR in assuring appearance in California's large urban counties during the 1990's, it is both interesting and relevant to ask the question: What would have been the failure to appear situation in California's 12 largest urban counties in 2000 if greater use had been made of Surety Bond releases?

- Employing the BJS data for the entire time period and using standard statistical techniques that controlled for defendants' characteristics, criminal histories, location and other relevant variables, it was estimated what the failure to appear rate would have been if greater use had been made of release on Surety Bond

Table 1
Estimated Failure to Appear Rates in California's Largest 12 Urban Counties at Selected Higher Levels of Surety Bond Utilization: 2000

	Proportion of all Estimated Releases on Surety Bond	FTA Rate
Actual	45%	29%
Increased Utilization	52%	28%
	60%	27%
	70%	26%
	80%	25%
	90%	24%
	97%	23%

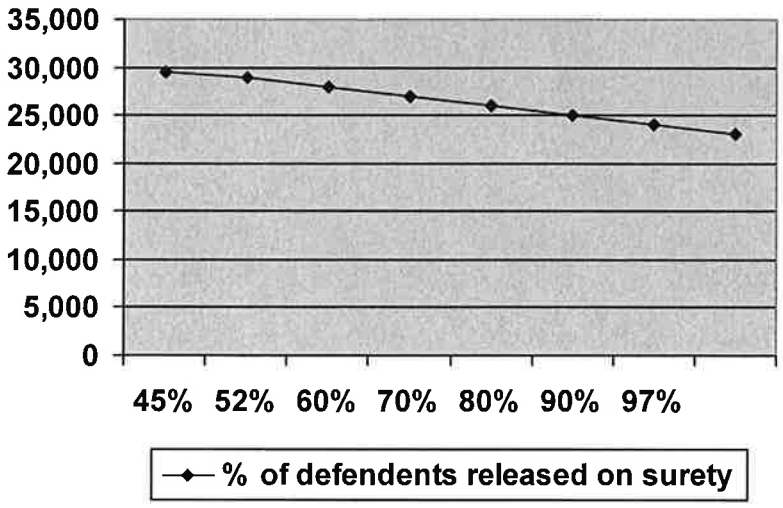
- The first estimate in Table #1 (second entry in table) corresponds to the level of Surety Bond releases that would have been obtained if the proportion of releases on Surety Bond and ROR/CR were reversed in 2000
- Instead of 52% of all releases in 2000 being ROR/CR, 52% were secured by Surety Bond; conversely instead of 45% being secured by Surety Bond 45% were released ROR/CR
- It is estimated that in this case, the average failure to appear rate in California's 12 largest urban counties in 2000 would have been 28% instead of 29%; even this very modest increase in the use of Surety Bond would have lowered the FTA rate by 3%
- On the other hand, if Surety Bond releases were used much more aggressively, and in fact replaced all ROR/CR releases over the period, the failure to appear rate would have been 23%, or 21% below its actual level

Table 2
Estimated reduction in number of failures to appear in California's largest 12 urban counties at selected higher levels of Surety Bond utilization: 2000

Surety Bond Utilization Level	Estimated Reduction in FTAs
52%	1,018
60%	2,035
70%	3,053
80%	4,071
90%	5,089
97%	6,106

- As indicated in Table #2, it is estimated that if the proportion of releases on Surety Bond and ROR/CR were reversed in 2000, there would have been 1,018 fewer FTAs in California's 12 largest urban counties in 2000; in the extreme, if Surety Bond had completely replaced ROR/CR in 2000 there would have been more than 6,100 fewer FTAs in these California counties

Figure 9 *(no figure 8)*
Estimated Reduction in Number of Failures to Appear in California's Largest 12 Urban Counties at Selected Higher Levels of Surety Bond Utilization: 2000



- In Figure #9 and Table #2 the "What if" failure rate information is taken and translated into estimates of what the number of failures to appear would have been if the proportion of defendants released on Surety Bond had been greater in 2000
- Figure #9 gives the estimated FTA levels and Table #2 the estimated reduction in FTA levels; for reference, Figure #9 includes the actual failure to appear rate (.29) and the corresponding number of failures to appear (29,514)

Consequences of a Failure to Appear

- When a defendant FTA for a required proceeding, the presiding Judge or Magistrate generally issues a Bench Warrant for his or her arrest
- The defendant may remain a fugitive, or more likely, he/she may return to Court either by surrender or apprehension; if the defendant surrenders to the Court, the Court will re-call the warrant, the defendant will be re-booked and a new proceeding may be held to re-determine the conditions of release
- If the defendant is arrested, he will be booked and detained; upon booking, the defendant appears in Court where a new determination of release conditions will be made
- A hearing may be held to determine whether the original bail bond, if there was one, is to be re-instituted or forfeited

- It is clear that an FTA imposes additional costs on the taxpayers and on the general population; the scale of the problem is suggested by the fact that in 2004 there were almost 2.5 million un-served felony and misdemeanor warrants in the state of California

- Even if the individual surrenders, there are additional process and detention costs; re-arrest of a defendant imposes even greater costs on the taxpayer

- If the defendant remains a fugitive, all of the original booking and hearing costs are wasted and the integrity of the criminal justice system is further compromised; every defendant that remains a fugitive undermines the crime control efforts of local government

Costing the Consequences of Failure to Appear

- In order to gain some appreciation of the magnitude of the costs that every FTA imposes on taxpayers and on society in general, it is helpful to attach dollar values to both their relatively straight-forward budgetary impacts, as well as to their more difficult to assess social costs

- A very brief summary of our estimates appears in Tables #3 and #4; in both cases the costs have been re-indexed and expressed in current (Year 2005) dollars

Table 3
Estimated Budgetary Costs of Failure to Appear by Type of Eventual Return – Current Dollars

Return Method	Budgetary Cost
Surrender	$ 517
Arrest on bench warrant	$ 927
Arrest on new crime	$3,009
Fugitive/no return	$2,385

Table 4
Estimated Average budgetary and Social Costs of Failure to Appear by Release Type – Current Dollars

Type of Release	Average Budgetary Cost	Average Social Cost	Average Total Cost
Surety Bond	$1,230	$ 7,260	$ 8,490
ROR/CR	$1,409	$10,560	$11,969

- In Table #4 under "Average Budgetary Costs", the results are obtained by taking the costs reported in Table #3 and weighting them by the proportion of defendants who are returned by each method; this weighting generates an estimate of the average budgetary cost of an FTA

- Because Surety Bond releases and ROR releases have different return profiles they have different estimated budgetary costs; since counting only the budgetary cost of an FTA that ends with the defendant in fugitive status seriously underestimates the impact on society of that event, also calculated is a social cost of fugitive status

- This social cost calculation (based again on our previous study of Los Angeles County) attempts to attribute to fugitives the reduction in crime control that results from their status and the increased costs of crime associated with that reduction in crime control

- A previous study by this author and Mr. Steven Twist, suggests that every fugitive costs society more than $33,000 in lost crime control benefits; hence since the average FTA in these large urban counties has between a 22% and 33% chance of ending in fugitive status after 1 year, it is estimated that the social cost is likely to be between $7,260 and $10,560 per FTA

Potential Cost Savings from Increased Use of Surety Bond Releases

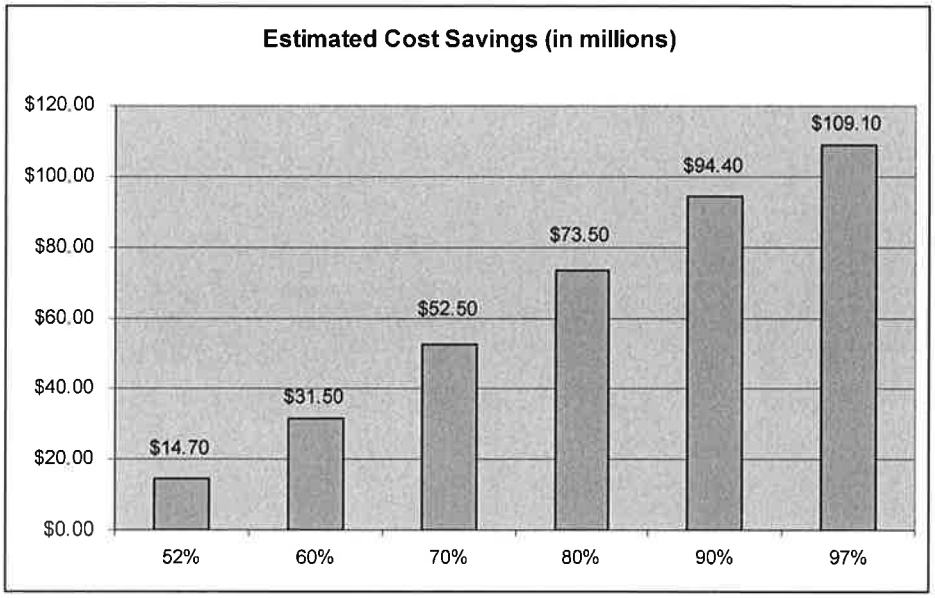
Table 5

Estimated budgetary and Social Cost Savings that would have Resulted from Increased Use of Surety Bond in the 12 Largest Urban Counties in California: 2000 – Current Dollars

Surety Bond Utilization Level	Estimated Reduction in FTAs	Budge Cost Savings	Social Cost Savings (millions)	Total (millions)
45%	0	$ 0	$ 0	$ 0
52%	1,018	$ 1.3	$13.3	$ 14.7
60%	2,035	$ 2.9	$28.6	$ 31.5
70%	3,053	$ 4.8	$47.7	$ 52.5
80%	4,071	$ 6.7	$66.7	$ 73.5
90%	5,089	$ 8.7	$85.8	$ 94.4
97%	6,106	$10.0	$99.1	$109.1

- Table #5 (and Figure #10 below), bring together the information on reduced failure rate possibilities from the "What if" calculation and the estimated costs of a failure to appear

- Table #5 shows, assuming that the cost estimates based on Los Angeles County are at least indicative of costs in other large urban counties, the potential savings in terms of both budgetary costs and social costs, that would have resulted from a range of increased levels of Surety Bond utilization in California's 12 largest urban counties



- Figure #10 displays the total cost savings graphically and shows the results of a very modest increase in the role of Surety Bond implied by reversing percentages with ROR/CR in 2000, as well as the cost savings of a complete replacement of ROR/CR with Surety Bonds

- Specifically, shown are the cost savings in 2000 that would have resulted from reversing the proportions of releases on Surety Bond and ROR/CR, which would have involved raising the proportion on Surety Bond to 52%; also shown are the cost savings for higher levels of Surety Bond utilization all the way up to completely replacing ROR with Surety Bond releases (97%)

- If Surety Bond releases comprised 52% rather than 45% of all releases in California's 12 largest counties in 2000, the budget savings in these urban counties would have been over $1.3 million, without counting the budgetary reductions due simply to lower levels of pretrial program staffing

- In addition, it is estimated there would have been a savings in social costs due to a reduction in the number of fugitives of about $13.3 million; the overall savings of this very modest increase in the role of Surety Bond releases would have resulted in over $14.7 million

- At the other extreme, if Surety Bond had completely replaced ROR/CR total cost savings would have been close to $109 million; budgetary savings alone of this radical restructuring of pretrial release would have been over $10,000,000

- Of course Surety Bond could not actually replace ROR/CR, if only for the reason that some defendants could not qualify for a Surety Bond; however release on Surety Bond could have been used more often than it was in these California counties, and Figure #10 indicates what the savings would have been had it been used more frequently

Glossary

Terms Related to Pretrial Release

- **Released Defendant**: Includes any defendant who was released from custody prior to the disposition of his or her case by the court. Includes defendants who were detained for some period of time before being released and defendants who were returned to custody after being released because of a violation of the condition of pretrial release.
- **Detained Defendant**: Includes any defendant who remained in custody from the time of arrest until the disposition of his or her case by the court.
- **Failure to Appear**: Occurs when a court issues a bench warrant for a defendant's arrest because he or she has missed a scheduled court appearance.

Financial Release Mechanisms

- **Surety Bond**: A bail bond company signs a promissory note to the court for the full bail amount and charges the defendant a fee for the service (usually 10% of the full bail amount). If the defendant fails to appear, the bond company is liable to the court for the full bail amount. Frequently the bond company requires collateral from the defendant in addition to the fee.
- **Deposit Bond**: The defendant deposits a percentage (usually 10%) of the full bail amount with the court. The percentage of the bail is returned after the disposition of the case, but the court often retains a small portion for administrative costs. If the defendant fails to appear in court, he or she is liable to the court for the full amount of the bail.
- **Full Cash Bond**: The defendant posts the full bail amount in cash with the court. If the defendant makes all court appearances, the cash is returned. If the defendant fails to appear in court, the bond is forfeited.
- **Property Bond**: Involves an agreement made by a defendant as a condition of pretrial release requiring that property valued at the full bail amount be posted as an assurance of his or her appearance in court. If the defendant fails to appear in court, the property is forfeited. Also know as "collateral bond".

Non-financial Release Mechanisms

- **Release on Recognizance (ROR)**: The court releases the defendant on a signed agreement that he or she will appear in court as required.
- **Unsecured Bond**: The Defendant pays no money to the court but is liable for the full amount of bail should he or she fail to appear in court.
- **Conditional Release**: Defendants are released under conditions and are usually monitored or supervised by a pretrial services agency. In some cases, such as those involving a third-party custodian or drug monitoring and treatment, another agency may be involved in the supervision of the defendant. Conditional release sometimes includes an unsecured bond.

Weighing Technique

The pretrial release data used in this report was collected from large urban counties in California by BJS for one, two, three, or four weeks out of a year, depending on their relative size. The largest counties were sampled for one week, the smallest for four weeks, and counties with relatively moderate populations were sampled for two or three weeks. Frequency weights were assigned to the data so that the sample would be representative of the population, from which it was drawn, reflecting a whole month of data collection.

Appendix Figures

Figure 1
Criminal Justice Histories of Defendants Released or Detained in Large Urban Counties in California: 1990-2000

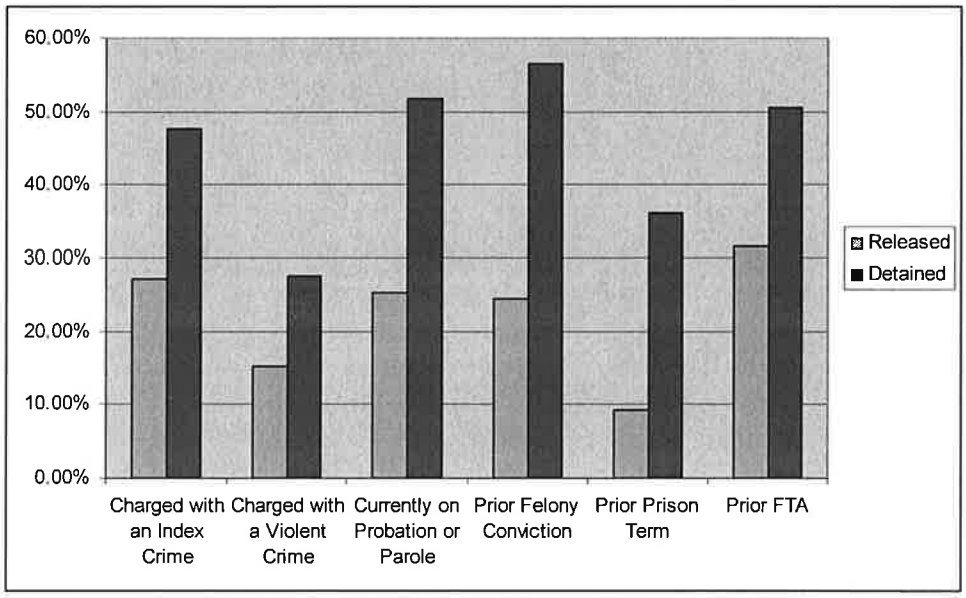


Figure 2
Recent Trends in Criminal Justice Histories of Released Defendants in Large Urban Counties in California: 1990-2000

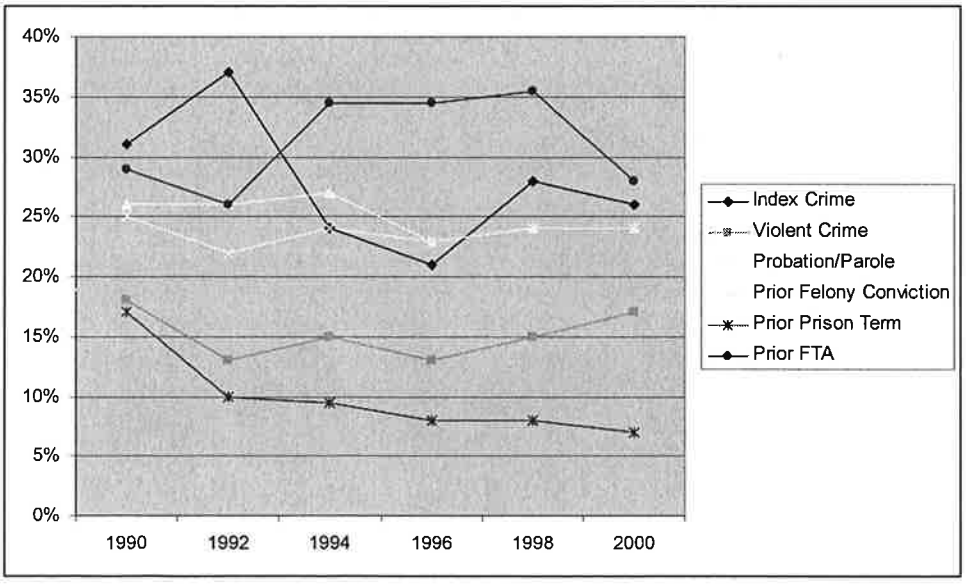


Figure 3
Criminal Justice Histories of Defendants on Surety and ROR/CR in Selected Large Urban Counties in California: 1990-2000

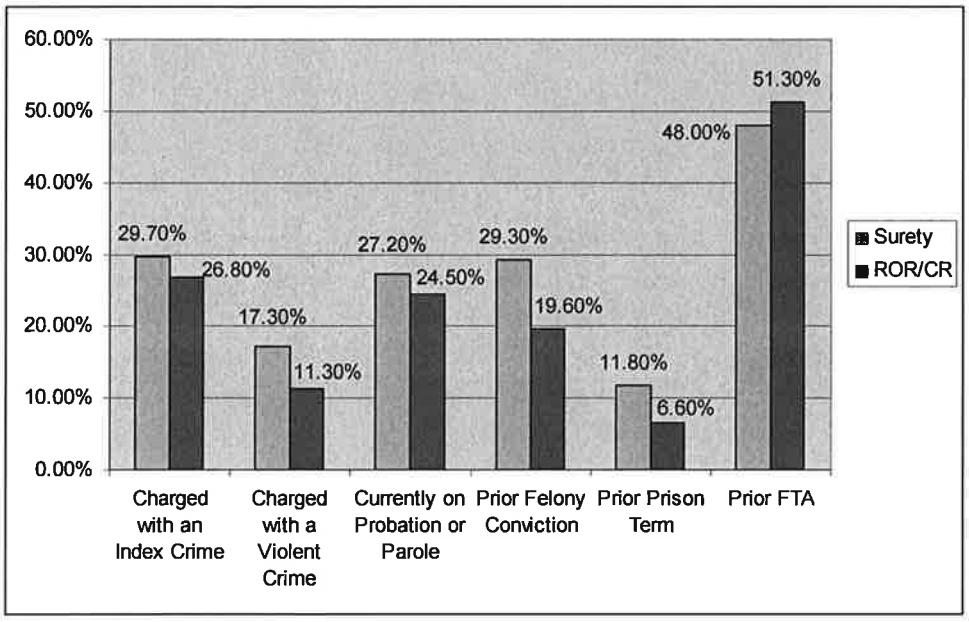


Figure 4
Recent Trends in Criminal Justice Histories of Defendants Released on Surety in Selected Large Urban Counties in California: 1990-2000

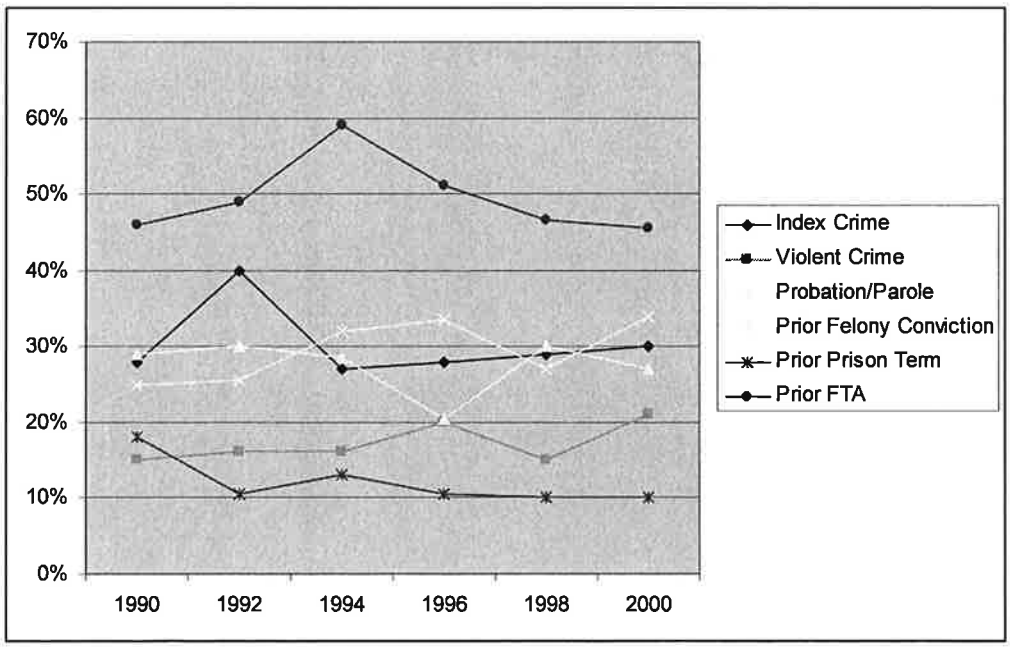


Figure 5
Recent Trends in Criminal Justice Histories of Defendants Released on ROR/CR in Selected Large Urban Counties in California: 1990-2000

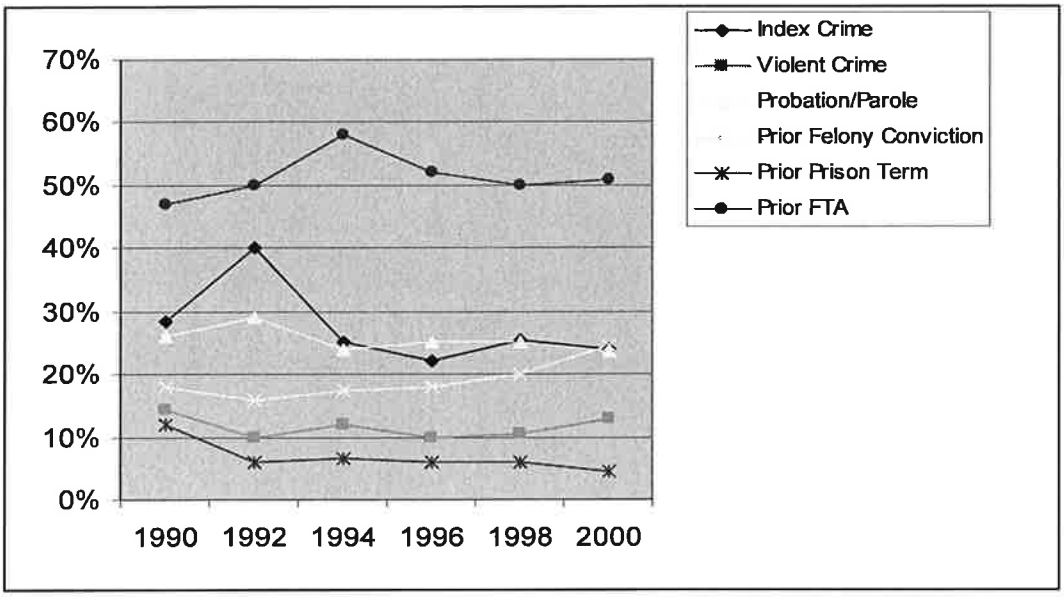


Figure 6
Independent Variables Used in Statistical Analysis

Independent Variable	Includes	Excludes
Time in days to adjudication	0-59; 60-119; 120-179; 180-240; over 240	Pending cases
Clearance rate	All applicable	See County and year
County	Alameda; Contra Costa; Los Angeles; Orange County; Riverside; Sacramento; San Diego; San Francisco; San Mateo; Santa Clara; Ventura	San Bernardino
Year	1992; 1994; 1996; 1998; 2000	1990
Arrest charge	Rape; robbery; assault; other violent; weapons related; burglary; larceny and theft; other property; drug sales; other drug; driving	Murder; other public order
Age in years of arrestee	All applicable	N/A
Gender	Female	Male
Active criminal justice status	-	N/A
Prior failure to appear	-	N/A
Release type	Surety; other financial	ROR/CR; N/A

References

- Felony Defendants in Large Urban Counties, 2000. Bureau of Justice Statistics, U.S. Department of Justice. 2003 (NUJ – 202021)
- Bureau of Justice Statistics, U.S. Department of Justice – 1990/2000 Data
- Runaway Losses: Estimating the Costs of Failure to Appear in the Los Angeles Criminal Justice System – pp 23-25
- FBI – Modified Index Crimes

EXHIBIT 5

Public vs. Private Law Enforcement – Evidence from Bail Jumping

Eric Helland and Alexander Tabarrok
2002

Bulleted Executive Summary

Abstract

- After being arrested and booked, most felony defendants are released to await trial; a substantial percentage FTA
- If the FTA is not quickly explained, warrants are issued and two quite different systems of pursuit and re-arrest are put into action; public police have the primary responsibility for pursuing and re-arresting defendants who were released on their own recognizance or on cash or government bail; when a defendant who has borrowed money from a bondsman skips trial, the bond dealer forfeits the bond unless the fugitive is soon returned
- As a result, bond dealers have an incentive to monitor their charges and ensure that they do not skip; when a defendant does skip, bond dealers hire bail enforcement agents, more colloquially known as bounty hunters, to pursue and return the defendants to custody
- We compare the effectiveness of these two different systems by examining FTA rates, fugitive rates and capture rates of felony defendants who fall under the respective systems

Introduction

- Approximately one quarter (200,000) of all released felony defendants fail to appear (FTA) at trial each year; after one year, 30% (60,000) who initially FTA remain fugitives; defendants who FTA are more likely to commit additional crimes
- Defendants who FTA impose significant costs on others; direct costs include the costs of rearranging and rescheduling court dates, the wasted time of Judges, lawyers and other court personnel and the costs necessary to find and apprehend or re-arrest fugitives; other costs include the additional crimes that are committed by fugitives
- In 1996, 16% of released defendants were rearrested *before* their initial case came to trial; the percentage of felony defendants who commit additional crimes is considerably higher than their re-arrest rate
- The dominant forms of release are by surety bond and non-financial release; just over one-quarter of all released defendants are released on surety bond; a very small percentage pay cash bail or put up their own property with the court (less than 5 percent combined); most of the rest are released on their own recognizance or on some form of public bail in which the defendant posts a small fraction, typically 10% or less of the bail amount with the court

History of Pretrial Release

- By the end of the 19th century, commercial sureties were the norm; bail began as a progressive measure to get people out of jail; money bail has been seen as "keeping the poor in jail"

- In the 60's there was pressure to develop alternatives to money bail; in 1966 President Lydon Johnson signed into law the first reform of the federal bail system since 1789 – this federal bail reform act created presumption in favor of releasing on own recognizance

- Illinois, Kentucky, Oregon and Wisconsin have outlawed commercial bail and replaced it with a cash bail or deposit system; a defendant posts with court 10% of face value of a bond and if they FTA, the deposit is lost and defendant is liable for full bond amount; if appears, the deposit is returned less a service Court fee

- One quarter of all released defendants are done so on a surety bond; by law Judges must release defendants on the least restrictive conditions they believe are compatible for appearance at trial

- When jails become overcrowded Judges are pressured to release individuals on ROR rather than run the risk of setting a bail the defendant can't secure

- FTA rates:
  - Increases for ROR
  - Higher bail amounts reduces FTA
  - Emergency releases have a 45% FTA
  - Surety bonds have the lowest FTA
  - Defendants released on a surety bond are 28% less likely to FTA than those released on ROR
  - If they do FTA they are 53% less likely to remain at large for extended periods of time
  - Deposit bonds are only marginally more secure than ROR
  - A person released on ROR has little to lose by FTA
  - FTA rates are 30% higher under deposit and ROR compared to what they would have been if the same individual was released on a surety bond

Incentive Effects of Different Release Types

- The pretrial release system is designed to ensure that defendants appear in court; it's often asserted that the commercial bail system *discourages* appearance because those released on surety bond are given few incentives to show up for trial

- In light of the persistent criticism that surety bail encourages FTA, the data consistently indicate that defendants released via surety bond have lower FTA rates than defendants released under other methods

- Part of this might be explained by selection; FTA rates may be higher for those defendants charged with minor crimes as these defendants reason that police will not pursue a FTA when the underlying crime is minor; defendants charged with minor crimes are more likely to be released on their own recognizance than on surety release

- A second reason, however, is that bond dealers, just like other lenders, have numerous ways of creating appropriate incentives for borrowers; a defendant who skips town will owe the bond dealer the entire amount of the bond; bond dealers often ask defendants for collateral and family cosigners to the bond

- If a defendant does FTA the bond dealer is granted some time to recapture him before the bond dealer's bond is forfeited; thus, bond dealers have a credible threat to pursue and re-arrest any defendant who flees

- Bond dealers report that to break even, 95% of their clients must show up in court; clients are monitored and reminded of court dates by bond dealers

- Bond dealers and their agents have powerful legal rights over any defendant who FTA; the right to break into a defendant's home without a warrant; make arrests using all necessary force including, deadly force if needed; temporarily imprisonment defendants; and pursue and return a defendant across state lines without necessity of an extradition process

- Bond agents can devote the time necessary to make sure pursuits are successful as police are overburdened and give FTA low priority

- The flow of arrest warrants for FTA has overwhelmed many police departments so that many counties are faced with a massive stock of un-served arrest warrants; police departments offer amnesty periods where defendants can turn themselves in

Summary

- By law, Judges must release defendants on the *least restrictive* conditions that they believe are compatible with ensuring appearance at trial; own recognizance is the least restrictive form of release followed by release on deposit bond

- Although defendants released on deposit bond must put up some cash, which they will forfeit if they FTA, the amount of the cash is typically less than $500; few people are ever held because of a failure to raise cash for a deposit bond

- Defendants who were offered financial release (but not a deposit bond) and who paid their bonds in cash are the third category of release; cash bond is more expensive than a deposit bond but does not involve the monitoring of sureties

- Defendants released via surety bond are the fourth category; although the Constitution guarantees that excessive bail shall not be required, it does not require that bail should always be set low enough for a defendant to be able to afford release

- Fugitive rates
  - 30% of felony defendants who FTA remain at large after one year become fugitives
  - Fugitive rate for a FTA is higher for cash bond vs. ROR
  - Fugitive rate is lower for those released on a surety bond than for other releases
  - The probability of being a fugitive is 64% lower on a surety bond compared to a cash bond

References

- American Bar Association. *Criminal Justice Standards.* Washington, D.C.: American Bar Association, 1985
- Augurzky, Boris, and Schmidt, Christopher M. "The Propensity Score: A Means to an End." IZA Discussion Paper No. 271. Bonn: IZA, March 2001
- Ayres, Ian, and Waldfogel, Joel. "A Market Test for Discrimination in Bail Setting." *Stanford Law Review* 46 (1994): 987–1047
- Burton, Bob. *Bail Enforcer: The Advanced Bounty Hunter.* Boulder, Colo.: Paladin Press, 1990
- Chamberlin, John A. "Bounty Hunters: Can the Criminal Justice System Live without Them?" *University of Illinois Law Review* (1998): 1175–1205
- Clarke, Stevens H.; Freeman, Jean L.; and Koch, Gary G. "Bail Risk: A Multivariate Analysis." *Journal of Legal Studies* 5 (1976): 341–85
- Clines, Francis X. 2001. "Baltimore Gladly Breaks 10-Year Homicide Streak." *New York Times,* January 3, 2001
- Dehejia, Rajeev H., and Wahba, Sadek. "Causal Effects in Non-experimental Studies: Re-evaluating the Evaluation of Training Programs." Working Paper No. 6586. Cambridge, Mass.: National Bureau of Economic Research, June 1998
- Drimmer, Jonathan. "When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System." *Houston Law Review* 33 (1996): 731–93
- Feeney, Floyd. "Foreword." Pages ix–xiii in *Bail Reform in America*, edited by Wayne H. Thomas, Jr. Berkeley: University of California Press, 1976
- Freed, Daniel J., and Wald, Patricia M. *Bail in the United States: 1964.* Washington, D.C.: National Conference on Bail and Criminal Justice, 1964
- Goldkamp, John S., and Gottfredson, Michael R. *Policy Guidelines for Bail: An Experiment in Court Reform*. Philadelphia: Temple University Press, 1985
- Greene, William H. *Econometric Analysis.* 4th ed. Upper Saddle River, N.J.: Prentice Hall, 2000
- Heckman, James J.; Ichimura, Hidehiko; and Todd, Petra E. "Matching as an Econometric Evaluation Estimator: Evidence from Evaluating a Job Training Programme." *Review of Economic Studies* 64 (1997): 605–54
- Heckman, James J.; Ichimura, Hidehiko; and Todd, Petra. "Matching As an Econometric Evaluation Estimator." *Review of Economic Studies* 65 (1998): 261–94
- Helland, Eric, and Tabarrok, Alexander. "Public versus Private Law Enforcement: Evidence from Bail Jumping." Working paper. Fairfax, Va.: George Mason University, 2003
- Howe, Kenneth. "Massachusetts Undertakes Sweeping Reform of Its Warrants System." *San Francisco Chronicle,* June 23, 1999
- Howe, Kenneth, and Hallissy, Erin. "When Justice Goes Unserved: Thousands Wanted on Outstanding Warrants—but Law Enforcement Largely Ignores Them." *San Francisco Chronicle,* June 22, 1999
- Imbens, Guido W. "The Role of the Propensity Score in Estimating Dose-Response Functions." Technical Working Paper No. 237. Cambridge, Mass.: National Bureau of Economic Research, April 1999

- Kennedy, Spurgeon, and Henry, D. Alan. "Commercial Surety Bail: Assessing Its Role in the Pretrial Release and Detention Decision." Washington, D.C.: Pretrial Services Resource Center, 1997
- Kimbrough, Carla J. "Crowded Jails Put Squeeze on Bondsmen." *Arkansas Democrat-Gazette,* June 7, 1989
- Landes, William M. "The Bail System: An Economic Approach." *Journal of Legal Studies* 2 (1973): 79–105
- Landes, William M. "Legality and Reality: Some Evidence on Criminal Procedure." *Journal of Legal Studies* 3 (1974): 287–337
- Lechner, Michael. "Identification and Estimation of Causal Effects of Multiple Treatments under the Conditional Independence Assumption." IZA Discussion Paper No. 971. Bonn: IZA, December 1999
- Lechner, Michael. "Programme Heterogeneity and Propensity Score Matching: An Application to the Evaluation of Active Labour Market Policies." Econometric Society World Congress 2000 Contributed Paper No. 647. St. Gallen: University of St. Gallen, Swiss Institute for International Economics and Applied Economic Research, 2000
- Lecky, George. "Police Name '200 Most Wanted.'" *Cincinnati Post,* September 5, 1997
- Lee, Henry K., and Howe, Kenneth. "Plan to Clear Backlog of Warrants: Santa Clara County Offering Amnesty to Some." *San Francisco Chronicle,* January 12, 2000
- Leuven, Edwin, and Sianesi, Barbara. "PSMATCH2: Stata Module to Perform Full Mahalanobis and Propensity Score Matching, Common Support Graphing, and Covariate Imbalance Testing." Statistical Software Components, No. S432001. Boston: Boston College, Department of Economics, 2003
- Myers, Samuel L., Jr. "The Economics of Bail Jumping." *Journal of Legal Studies* 10 (1981): 381–96. National Association of Pretrial Service Agencies. *Performance Standards and Goals for Pretrial Release.*" 2d ed. Wauwatosa, Wis.: National Association of Pretrial Service Agencies, September 1998
- Prendergast, Jane. "Warrant Amnesty Offered for 1 Day." *Cincinnati Enquirer,* November 19, 1999
- Reynolds, Morgan. "Privatizing Probation and Parole." Pages 117–28 in *Entrepreneurial Economics: Bright Ideas from the Dismal Science*, edited by Alexander Tabarrok. New York: Oxford University Press, 2002
- Romano, Jay. "Defendants Increasingly Skip Bail." *New York Times,* December 22, 1991
- Rosenbaum, Paul R., and Rubin, Donald B. "The Central Role of the Propensity Score in Observational Studies for Causal Effects." *Biometrika* 70 (1983): 41–55
- Rosenbaum, Paul R., and Rubin, Donald B. "Reducing Bias in Observation Studies Using Sub-classification on the Propensity Score." *Journal of the American Statistical Association* 79 (1984): 516–24
- Rubin, Donald B. "Estimating Causal Effects of Treatments in Randomized and Nonrandomized Studies." *Journal of Educational Psychology* 66 (1974): 688–701
- Rubin, Donald B. "Assignment to Treatment Group on the Basis of a Covariate." *Journal of Educational Statistics* 2 (1977): 1–26
- Thomas, Wayne H., Jr. *Bail Reform in America.* Berkeley: University of California Press, 1976
- Toborg, Mary A. "Bail Bondsmen and Criminal Courts." *Justice System Journal* 8 (1983): 141–56. 122 the journal of law and economics U.S. Department of Justice, Bureau of Justice Statistics. "Felony Defendants in Large Urban Counties, 1996." Washington, D.C.: Bureau of Justice Statistics, 1999

THE FUGITIVE: EVIDENCE ON PUBLIC VERSUS PRIVATE LAW ENFORCEMENT FROM BAIL JUMPING*

ERIC HELLAND and *ALEXANDER TABARROK*
Claremont-McKenna College *George Mason University*

ABSTRACT

On the day of their trial, a substantial number of felony defendants fail to appear. Public police have the primary responsibility for pursuing and rearresting defendants who were released on their own recognizance or on cash or government bail. Defendants who made bail by borrowing from a bond dealer, however, must worry about an entirely different pursuer. When a defendant who has borrowed money skips trial, the bond dealer forfeits the bond unless the fugitive is soon returned. As a result, bond dealers have an incentive to monitor their charges and ensure that they do not skip. When a defendant does skip, bond dealers hire bounty hunters to return the defendants to custody. We compare the effectiveness of these two different systems by examining failure-to-appear rates, fugitive rates, and capture rates of felony defendants who fall under the various systems. We apply propensity score and matching techniques.

I. INTRODUCTION

APPROXIMATELY one-quarter of all released felony defendants fail to appear at trial. Some of these failures to appear are due to sickness or forgetfulness and are quickly corrected, but many represent planned abscondments. After 1 year, some 30 percent of the felony defendants who initially fail to appear remain fugitives from the law. In absolute numbers, some 200,000 felony defendants fail to appear every year, and of these, approximately 60,000 will remain fugitives for at least 1 year.[1]

* The authors' names are in alphabetical order. We wish to thank Jonathan Guryan, Steve Levitt, Lance Lochner, Bruce Meyer, Jeff Milyo, Christopher Taber, Sam Peltzman, and seminar participants at Claremont McKenna College, the American Economic Association annual meetings (2002), George Mason University, Northwestern University, and the University of Chicago.

[1] These figures are from the State Court Processing Statistics (SCPS) program of the Bureau of Justice Statistics and can be found in U.S. Department of Justice, Bureau of Justice Statistics, Felony Defendants in Large Urban Counties (various years). We describe the data at greater length below. The SCPS program creates a sample representative of 1 month of cases from the 75 most populous counties (which account for about half of all reported crimes). In 1996, the sample represented 55,000 cases, which in turn represent some 660,000 filings in a year and 1,320,000 filings in the nation. The absolute figures are calculated using this total, and

[*Journal of Law and Economics*, vol. XLVII (April 2004)]

Defendants who fail to appear impose significant costs on others. Direct costs include the costs of rearranging and rescheduling court dates, the wasted time of judges, lawyers, and other court personnel, and the costs necessary to find and apprehend or rearrest fugitives. Other costs include the additional crimes that are committed by fugitives. In 1996, for example, 16 percent of released defendants were rearrested before their initial case came to trial.[2] We can be sure that the percentage of felony defendants who commit additional crimes is considerably higher than their rearrest rate. We might also expect that the felony defendants who fail to appear are the ones most likely to commit additional crimes. Indirect costs include the increased crime that results when high failure-to-appear (FTA) and fugitive rates reduce expected punishments.[3]

The dominant forms of release are by surety bond, that is, release on bail that is lent to the accused by a bond dealer, and nonfinancial release. Just over one-quarter of all released defendants are released on surety bond, and a very small percentage pay cash bail or put up their own property with the court (less than 5 percent combined); most of the rest are released on their own recognizance or on some form of public bail (called deposit bond) in which the defendant posts a small fraction, typically 10 percent or less, of the bail amount with the court.

Estimating the effectiveness of the pretrial release system in the United States can be characterized as a problem of treatment evaluation. Treatment evaluation problems can be difficult because treatment is rarely assigned randomly. Release assignment, for example, is based on a judge's assessment of the likelihood that a defendant will appear in court as well as on considerations of public safety. Correctly measuring treatment effects requires that we control for treatment assignment. In this paper, we control for selection by matching on the propensity score.[4]

We estimate the treatment effect for three outcomes—the probability that

---

the release, failure-to-appear (FTA), and fugitive (defined as FTA for 1 year or more) rates from the random sample. See note 2 *infra*.

[2] U.S. Department of Justice, Bureau of Justice Statistics, Felony Defendants in Large Urban Counties, 1996 (1999) (http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc96.pdf).

[3] Justice delayed can mean justice denied in practice as well as in theory. Thousands of cases are dismissed on constitutional grounds every year because police fail to serve warrants in a timely manner. See Kenneth Howe & Erin Hallissy, When Justice Goes Unserved: Thousands Wanted on Outstanding Warrants—but Law Enforcement Largely Ignores Them, S.F. Chron., June 22, 1999, at A1.

[4] For the matching method, see Donald B. Rubin, Estimating Causal Effects of Treatments in Randomized and Nonrandomized Studies, 66 J. Educ. Psychol. 688, 701 (1974); Donald B. Rubin, Assignment to Treatment Group on the Basis of a Covariate, 2 J. Educ. Stat. 1, 26 (1977); Paul R. Rosenbaum & Donald B. Rubin, Reducing Bias in Observation Studies Using Subclassification on the Propensity Score, 79 J. Am. Stat. Assoc. 516, 524 (1984); Rajeev H. Dehejia & Sadek Wahba, Causal Effects in Non-experimental Studies: Re-evaluating the Evaluation of Training Programs (Working Paper No. 6586, Nat'l Bur. Econ. Res. 1998); James J. Heckman, Hidehiko Ichimura, & Petra Todd, Matching As an Econometric Evaluation Estimator, 65 Rev. Econ. Stud. 261, 294 (1998).

a defendant fails to appear at least once, the probability that a defendant remains at large for 1 year or more conditional on having failed to appear (what we call the fugitive rate), and the probability that a defendant who failed to appear is recaptured as a function of time.

The earlier economic studies of the bail system examine the role of the bail amount in the decision to fail to appear, generally finding that higher bail reduces FTA rates.[5] These studies did not focus on the central issue of this paper—the different incentive effects of the various release types.[6]

II. History of Pretrial Release and Incentive Effects of Release Systems

Although money bail is still the most common form of release, money bail and especially the commercial surety industry have come under increasing and often virulent attack since the 1960s.[7] Bail began as a progressive measure to help defendants get out of jail when the default option was that all defendants would be held until trial. In the twentieth century, however, the default option was more often thought of as release, and thus money bail was reconceived as a factor that kept people in jail. In addition, the greater burden of money bail on the poor elicited growing concern.[8] As a result,

[5] William M. Landes, The Bail System: An Economic Approach, 2 J. Legal Stud. 79, 105 (1973); William M. Landes, Legality and Reality: Some Evidence on Criminal Procedure, 3 J. Legal Stud. 287 (1974); Stevens H. Clark, Jean L. Freeman, & Gary G. Koch, Bail Risk: A Multivariate Analysis, 5 J. Legal Stud. 341, 385 (1976); Samuel L. Myers, Jr., The Economics of Bail Jumping, 10 J. Legal Stud. 381, 396 (1981).

[6] Ian Ayres & Joel Waldfogel, A Market Test for Discrimination in Bail Setting, 46 Stan. L. Rev. 987, 1047 (1994), demonstrates the subtlety of the distinctions made by bond dealers in setting bail bond rates. Although the courts (in New Haven, Connecticut, in 1990) set higher bail amounts for minority defendants than for whites, Ayres and Waldfogel find that bond dealers acted in precisely the opposite manner. What this pattern suggests is that judges set higher bail for minority defendants than for white defendants with the same probability of flight. Bond dealers are then induced by competition to charge minorities relatively lower bail bond rates.

[7] Floyd Feeney, Foreword, in Bail Reform in America, at ix (Wayne H. Thomas, Jr., ed. 1976), for example, writes that "the present system of commercial surety bail should be simply and totally abolished. . . . It is not so much that bondsmen are evil—although they sometimes are—but rather that they serve no useful purpose." American Bar Association, Criminal Justice Standards, ch. 10, Pretrial Release, Standard 10–5.5, Compensated Sureties, 114–15 (1985), refers to the commercial bond business as "tawdry" and discusses "the central evil of the compensated surety system." When Oregon considered reintroducing commercial bail, Judge William Snouffer testified, "Bail bondsmen are a cancer on the body of criminal justice" (quoted in Spurgeon Kennedy & D. Alan Henry, Commercial Surety Bail: Assessing Its Role in the Pretrial Release and Detention Decision (1997)). Supreme Court Justice Harry Blackmun called the commercial bail system "offensive" and "odorous." See Schilb v. Kuebel, 404 U.S. 357 (1971).

[8] In order to provide appropriate incentives, money bail is typically higher for the rich than the poor. Thus, it is not a priori necessary that money bail should discriminate against the poor, although in practice this does occur owing to nonlinearities and fixed costs in the bail process. Assume that money bail is set so as to create equal FTA rates across income classes. In such a case, there is no discrimination against the poor in the setting of bail. But if the bail

significant efforts were made, beginning in the 1960s, to develop alternatives to money bail, and four states—Illinois, Kentucky, Oregon, and Wisconsin—have outlawed commercial bail altogether.

In place of commercial bail, Illinois introduced the Illinois Ten Percent Cash Bail or "deposit bond" system. In a deposit bond system, the defendant is required to post with the court an amount up to 10 percent of the face value of the bond. If the defendant fails to appear, the deposit may be lost and the defendant held liable for the full value of the bond. If the defendant appears for trial, the deposit is returned to the defendant, less a small service fee in some cases.[9] Some counties will also release defendants on unsecured bonds. Unsecured bonds are equivalent to zero-percent deposit bonds. That is, defendants released on an unsecured bond are liable for the full bail amount if they fail to appear, but they need not post anything to be released.

The pretrial release system is designed to ensure that defendants appear in court. It is often asserted that the commercial bail system discourages appearance. In a key Supreme Court case, for example, Justice Douglas argued that "the commercial bail system failed to provide an incentive to the defendant to comply with the terms of the bond. Whether or not he appeared at trial, the defendant was unable to recover the fee he had paid to the bondsman. No refund is or was made by the professional surety to a defendant for his routine compliance with the conditions of his bond."[10]

Similarly, Jonathan Drimmer said, "Hiring a commercial bondsman removes the incentive for the defendant to appear at trial."[11] John S. Goldkamp and Michael R. Gottfredson suggest that the "use of the bondsman defeated the rationale that defendants released on cash bail would have an incentive to return,"[12] and in their influential set of performance standards for pretrial release, the National Association of Pretrial Service Agencies[13] said that under commercial bail, "the defendant has no financial incentive to return to court."[14]

In light of the persistent criticism that surety bail encourages failure to appear, it is perhaps surprising that the data consistently indicate that defendants released via surety bond have lower FTA rates than defendants released under other methods. Part of this might be explained by selection—FTA

---

amounts necessary to ensure equal FTA rates are not linear in wealth, then such rates can generate unequal rates of release across income classes.

[9] National Association of Pretrial Service Agencies, Performance Standards and Goals for Pretrial Release (2d ed. 1998).

[10] Schilb v. Kuebel, 404 U.S. at 373.

[11] Jonathan Drimmer, When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System, 33 Hous. L. Rev. 731, 742 (1996).

[12] John S. Goldkamp & Michael R. Gottfredson, Policy Guidelines for Bail: An Experiment in Court Reform 19 (1985).

[13] See note 9 *supra.*

[14] See also Thomas, ed., *supra* note 7, at 13. Because of this issue, Thomas calls the surety system "irrational."

rates, for example, may be higher for those defendants charged with minor crimes—perhaps these defendants reason that police will not pursue a failure to appear when the underlying crime is minor—and defendants charged with minor crimes are more likely to be released on their own recognizance than on surety release. A second reason, however, is that bond dealers, just like other lenders, have numerous ways of creating appropriate incentives for borrowers.

Most obviously, a defendant who skips town will owe the bond dealer the entire amount of the bond. Defendants are often judgment proof, however, so bond dealers ask defendants for collateral and family cosigners to the bond (which is not done under the deposit bond system). If hardened criminals do not fear the law, they may yet fear their mother's wrath should the bond dealer take possession of their mother's home because they fail to show up for trial. In order to make flight less likely, bond dealers will also sometimes monitor their charges and require them to check in periodically. In addition, bond dealers often remind defendants of their court dates and, perhaps more important, remind the defendant's mother of the son's court date when the mother is a cosigner on the bond.[15]

If a defendant does fail to appear, the bond dealer is granted some time, typically 90–180 days, to recapture him before the bond dealer's bond is forfeited. Thus, bond dealers have a credible threat to pursue and rearrest any defendant who flees. Bond dealers report that just to break even, 95 percent of their clients must show up in court.[16] Thus, significant incentives exist to pursue and return skips to justice.

Bond dealers and their agents have powerful legal rights over any defendant who fails to appear, rights that exceed those of the public police. Bail enforcement agents, for example, have the right to break into a defendant's home without a warrant, make arrests using all necessary force including deadly force if needed, temporarily imprison defendants, and pursue and return a defendant across state lines without the necessity of entering into an extradition process.[17]

At the time they write the bond, bond dealers prepare for the possibility of flight by collecting information that may later prove useful. A typical application for bond, for example, will contain information on the defendant's residence, employer, former employer, spouse, children (names and schools), spouse's employer, mother, father, automobile (description, tags, financing),

[15] See Mary A. Toborg, Bail Bondsmen and Criminal Courts, 8 Just. Sys. J. 141, 156 (1983). Bail jumping is itself a crime that may result in additional penalties.

[16] Drimmer, *supra* note 11, at 793 (1996); Morgan Reynolds, Privatizing Probation and Parole, in Entrepreneurial Economics: Bright Ideas from the Dismal Science 117, 128 (Alexander Tabarrok ed. 2002).

[17] Drimmer, *supra* note 11. See also Taylor v. Taintor, 83 U.S. (16 Wall.) 366 (1873).

union membership, previous arrests, and so on.[18] In addition, bond dealers have access to all kinds of public and private databases. Bob Burton,[19] a bounty hunter of some fame, for example, says that a major asset of any bounty hunter is a list of friends who work at the telephone, gas, or electric utility, the post office, or welfare agencies or in law enforcement.[20]

Bond dealers, however, recognize that what makes their pursuit of skips most effective is the time they devote to the task. In contrast, public police are often strained for resources, and the rearrest of defendants who fail to show up at trial is usually given low precedence.

The flow of arrest warrants for FTA has overwhelmed many police departments, so today many counties are faced with a massive stock of unserved arrest warrants. Baltimore alone had 54,000 unserved arrest warrants as of 1999.[21] In recent years, Cincinnati has had over 100,000 outstanding arrest warrants stemming from failures to appear in court. One Cincinnati defendant had 33 pending arrest warrants against him.[22] In response to the overwhelming number of arrest warrants, most of which will never be served because of lack of manpower, some counties have turned to extreme measures such as offering amnesty periods. Santa Clara County in California, for example, has a backlog of 45,000 unserved criminal arrest warrants and in response has advertised a hotline that defendants can use to schedule their own arrests.[23]

Although national figures are not available, it is clear that the problem of outstanding arrest warrants is widespread. Texas, for example, is relatively well off with only 132,000 outstanding felony and serious misdemeanor warrants, but Florida has 323,000, and Massachusetts, as of 1997, had around 275,000.[24] California has the largest backlog of arrest warrants in the nation. The California Department of Corrections estimated that as of December 1998, there were more than 2.5 million unserved arrest warrants.[25] Many of these arrest warrants are for minor offenses, but tens of thousands are for

[18] We thank Bryan Frank of Lexington National Insurance Corporation for discussion and for sending us a typical application form.

[19] Bob Burton, Bail Enforcer: The Advanced Bounty Hunter (1990).

[20] Good bond dealers master the tricks of their trade. One bond dealer pointed out to us, for example, that the first three digits in a social security number indicate in what state the number was issued. This information can suggest that an applicant might be lying if he claims to have been born in another state (many social security numbers are issued at birth or shortly thereafter), and it may provide a lead for where a skipped defendant may have family or friends.

[21] Francis X. Clines, Baltimore Gladly Breaks 10-Year Homicide Streak, N.Y. Times, January 3, 2001, at A11.

[22] George Lecky, Police Name "200 Most Wanted," Cincinnati Post, September 5, 1997, at 1A.

[23] See Jane Prendergast, Warrant Amnesty Offered for 1 Day, Cincinnati Enquirer, November 19, 1999, for description of a similar program in Kenton County, Kentucky. See also Henry K. Lee & Kenneth Howe, Plan to Clear Backlog of Warrants: Santa Clara County Offering Amnesty to Some, S.F. Chron., January 12, 2000, at A15.

[24] Howe and Hallissy, *supra* note 3.

[25] *Id.*

people wanted for violent crimes, including more than 2,600 outstanding homicide warrants.[26] Kenneth Howe and Erin Hallissy report that "local, state and federal law enforcement agencies have largely abandoned their job of serving warrants in all but the most serious cases." Explaining how this situation came about, they write, "As arrests increased, jails became overcrowded. To cope, judges, instead of locking up suspects, often released them without bail with a promise to return for their next court date. For their part, police, rather than arrest minor offenders, issued citations and then released the suspects with the same expectation. When suspects failed to appear for their court dates, judges issued bench warrants instructing police to take the suspects into custody. But this caused the number of warrants to balloon, and the police did not have the time or staff to serve them all."[27]

III. The Matching Model with Multiple Treatments

Ideally, in a treatment evaluation we would like to identify two outcomes: one if the individual is treated, Y_T, and one if no treatment is administered, Y_{NT}. The effect of the treatment is then $Y_T - Y_{NT}$. But we cannot observe an individual in both states of the world, making a direct computation of $Y_T - Y_{NT}$ impossible.[28] All methods of evaluation, therefore, must make some assumptions about "comparable" individuals. An intuitive method is to match each treated individual with a statistically similar untreated individual and compare differences in outcomes across a series of matches. Thus, two statistical doppelgangers would function as the same individual in different treatments.

An important advantage of matching methods is that they do not require assumptions about functional form. When the research question is about a mean treatment effect, as it is here, matching methods also allow for an economy of presentation because they focus attention on the question of interest rather than on a long series of variables that are used only for control purposes. Unfortunately, matching methods typically founder between a rock and a hard place. The technique works best when individuals are matched across many variables, but as the number of variables increases, the number of distinct "types" increases exponentially, so the ability to find an exact match falls dramatically.

In an important paper, Paul Rosenbaum and Donald Rubin go a long way to surmounting this problem.[29] They show that if matching on X is valid, then so is matching on the probability of selection into a treatment conditional on X. The multidimensional problem of matching on X is thus trans-

[26] *Id.*

[27] *Id.*

[28] Rubin, Estimating Causal Effects of Treatments, *supra* note 4.

[29] Paul R. Rosenbaum & Donald B. Rubin, The Central Role of the Propensity Score in Observational Studies for Causal Effects, 70 Biometrika 41, 55 (1983).

formed into a single-dimension problem of matching on $\Pr(T = 1|X)$, where $T = 1$ denotes treatment.[30] The probability $\Pr(T = 1|X)$ is often called the propensity score, or p-score.

The matching technique extends naturally to applications with multiple treatments through the use of a multivalued propensity score with matching on conditional probabilities.[31] Assume that there are M mutually exclusive treatments, and let the outcome in each state be denoted Y_1, Y_2, and so forth. As before, we observe only a specific outcome but are interested in the counterfactual: what would the outcome have been if this person had been assigned to a different treatment? Rather than a single comparison, we are now interested in a series of pairwise comparisons between treatments m and l. The treatment effect on the treated is written

$$\theta_0^{m,l} = E(Y^m - Y^l|T = m) = E(Y^m|T = m) - E(Y^l|T = m), \qquad (1)$$

where $\theta_0^{m,l}$ denotes the effect of treatment m rather than l.

Identification of (1) can occur under appropriate conditions, the most important being that treatment outcomes are independent of treatment selection after conditioning on a vector of attributes, X (the conditional independence assumption). Formally,

$$Y^1 \ldots Y^M \perp T|X = x. \qquad (2)$$

If this assumption is valid, we can use the conditional propensity score to identify the treatment effect,[32]

$$\theta^{m,l} = E(Y^m|T = m) - E_{p^{m|ml}}[E(Y^l|p^{m|ml}(X), T = l)|T = m]. \qquad (3)$$

In practice, the conditional propensity score, $p^{m|ml}(x)$, is computed indirectly

[30] Matching methods are common among applied statisticians and natural scientists but have only recently been analyzed and applied by econometricians and economists. Papers on the econometric theory of matching include Heckman, Ichimura, & Todd, *supra* note 4; and Guido W. Imbens, The Role of the Propensity Score in Estimating Dose-Response Functions (Technical Working Paper No. 237, Nat'l Bur. Econ. Res. 1999). More applied work includes James J. Heckman, Hidehiko Ichimura, & Petra E. Todd, Matching as an Econometric Evaluation Estimator: Evidence from Evaluating a Job Training Program, 64 Rev. Econ. Stud. 605, 654 (1997); Dehejia & Wahba, *supra* note 4; Michael Lechner, Programme Heterogeneity and Propensity Score Matching: An Application to the Evaluation of Active Labour Market Policies (Contributed Paper No. 647, Econ. Soc'y World Congress 2000). Our multitreatment application is closest to that of Michael Lechner, Identification and Estimation of Causal Effects of Multiple Treatments under the Conditional Independence Assumption (Discussion Paper No. 91, IZA 1999).

[31] Lechner, Identification and Estimation of Causal Effects, *supra* note 30; Imbens, *supra* note 30.

[32] Lechner, Identification and Estimation of Causal Effects, *supra* note 30.

from the marginal probabilities $p^l(x)$ and $p^m(x)$ estimated from a discrete-choice model. In this case,

$$E[p^{m|ml}(x)|p^l(x), p^m(x)] = E\left[\frac{p^m(x)}{p^l(x) + p^m(x)} |p^l(x), p^m(x)\right] = p^{m|ml}(x). \tag{4}$$

We use an ordered probit model (see further below) to generate propensity scores.

It is important to emphasize that the propensity scores are not of direct interest but rather are the metric by which members of the treated group are matched to members of the "untreated" group ("differently" treated in our context). After matching, and given the conditional independence assumption, the treated and untreated groups can be analyzed as if treatment had been assigned randomly. Thus, differences in mean FTA rates across matched samples are estimates of the effect of treatment.

Less formally, matching on propensity scores can be understood as a pragmatic method for balancing the covariates of the sample across the different treatments.[33] Note that the covariates that we care most about balancing are those that affect the treatment outcome. Assume, for example, that X influences treatment selection but does not independently influence treatment outcome. If the goal of the selection model were to consistently estimate the causes of treatment selection, we would want to include X in the model, but it is not necessarily desirable to include it when the purpose is to create a metric for use in matching.[34] A simple example occurs when X predicts treatment exactly. Inclusion of X would defeat the goal of matching because all propensity scores would be either zero or one. Similarly, we will include model variables in the propensity score that may affect the treatment outcome even if they do not casually affect treatment selection.

IV. Data and Descriptive Statistics

We use a data set compiled by the U.S. Department of Justice's Bureau of Justice Statistics called State Court Processing Statistics, for 1990, 1992, 1994, and 1996 (Inter-university Consortium for Political and Social Research [ICPSR] study 2038). We supplement these data with an earlier version of the same collection, the National Pretrial Reporting Program, for 1988–89 (ICPSR study 9508). The data are a random sample of 1 month of felony filings from approximately 40 jurisdictions, where the sample was designed to represent the 75 most populous U.S. counties. The data contain detailed information on arrest charges, criminal background of the defendant (for

[33] Dehejia & Wahba, *supra* note 4.

[34] Boris Augurzky & Christoph M. Schmidt, The Propensity Score: A Means to an End (Discussion Paper No. 271, IZA 2001).

example, number of prior arrests), sex and age of the defendant,[35] release type (surety, cash bond, own recognizance, and so on), rearrest charges for those rearrested, whether the defendant failed to appear, and whether the defendant was still at large after 1 year, among other categories.

In addition to the main release types, there are minor variations. Some counties, for example, release on an unsecured bond for which the defendant pays no money to the court but is liable for the bail amount should he fail to appear. Because the incentive effects are very similar, we include unsecured bonds in the deposit bond category.[36] Instead of a pure cash bond, it is sometimes possible to put up property as collateral. Since property bonds are rare (588 observations in our data, less than 2 percent of all releases), we drop them from the analysis.[37] Finally, some counties may occasionally use some form of supervised release. In the first year of our data set, supervised release is included in the own-recognizance category. Supervised release often means something as simple as a weekly telephone check-in, so including these with own recognizance is reasonable. Supervised release is not a standard term, however, and other forms, such as mandatory daily attendance of a drug treatment program, are likely to be more binding. To maintain comparability across years, we follow the practice established in the first year of the data set by classifying supervised release with own recognizance. Because supervised release is more binding than pure own recognizance, this can only lower FTA rates and other results in the own-recognizance sample, thus biasing our results away from finding significant differences among treatments.[38]

In Table 1, the mean FTA rates for release categories are along the main diagonal, with the number of observations in square brackets. The preliminary analysis suggests that FTA rates are lower under surety bond release than under most other types of release. Off-diagonal elements are the difference between the FTA rate for the row category and the FTA rate for the column category. The FTA rate for those released under surety bond is 17 percent. Compared with surety release, the FTA rate is 3 percentage points higher under cash bonds, 4 percentage points higher under deposit bonds, and 9 percentage points higher under own recognizance (all these differences are

[35] The State Court Processing Statistics data are more complete and better organized than the National Pretrial Reporting Program data. The former, for example, include information on the race of the defendant that the latter do not.

[36] We drop observations missing data on the bail amount.

[37] Another reason to drop property bonds is that it is difficult to compare the bail for these releases to other release types. A defendant, for example, may put up a $250,000 house as collateral for $25,000 in bail. Although we know the bail amount, we do not know the value of the collateral property other than that it must, by law in many cases, be higher than the value of the bail amount. A cash or surety bond, therefore, is not equivalent to a property bond for the same bail amount.

[38] We find similar results by restricting the data set to the years in which supervised release is given a distinct category.

TABLE 1

MEAN FAILURE-TO-APPEAR RATES BY RELEASE CATEGORY, 1988–96

	Own Recognizance	Deposit Bond	Cash Bond	Surety Bond	Emergency Release
Own recognizance	26 [20,944]	5**	6**	9**	−19**
Deposit bond		21 [3,605]	1	4**	−23**
Cash bond			20 [2,482]	3**	−25**
Surety bond				17 [9,198]	−28**
Emergency release					45 [584]

NOTE.—Mean failure-to-appear (FTA) rates (in %) for release categories, rounded to the nearest integer, are along the main diagonal, with the number of observations in square brackets. Off-diagonal elements are the difference between the mean FTA rate for the row category and the mean FTA rate for the column category.

** Statistically significant at the greater than 1% level.

statistically significant at greater than the 1 percent level). Put slightly differently, compared with surety release, the FTA rate is approximately 18 percent higher under cash bond, 33 percent higher under deposit bond, and more than 50 percent higher under own recognizance.

Table 1 also presents some information on emergency release. Emergency releasees are defendants who are released solely because of a court order to relieve prison overcrowding. Emergency release is not a treatment—the treatment is own recognizance—but rather an indication of what happens when neither judges nor bond dealers play their usual role in selecting defendants to be released.[39] One would expect that relative to those released under other categories, these defendants are likely to be accused of the most serious crimes, have the highest probability of being found guilty, and have the fewest community ties. In addition, these defendants have neither monetary incentive nor the threat of being recaptured by a bounty hunter to induce them to return to court. As a result, a whopping 45 percent of the defendants who are given emergency release fail to appear for trial. The large differences between the FTA rates of those released on emergency release and every other category indicate that substantial and successful selection occurs in the decision to release. Emergency release is thus of some special interest, although not directly related to the focus of this paper.

Although the preliminary data analysis is suggestive, the difference-in-means analysis could confound effects due to treatment with effects due to selection on, for example, defendant characteristics such as the alleged crime.

[39] Even under emergency release, some selection can occur. Judges and jailers, for example, could order that more inmates be paroled to make room for the most potentially dangerous accused defendants, inmates could be shipped out of state, or the court order could be (temporarily) ignored. The costs of selection, however, clearly rise substantially when jail space is tightly constrained.

V. Results

A. *Propensity Scores from Ordered Probit*

We generate propensity scores for matching using an ordered probit model. By law, judges must release defendants on the least restrictive conditions they believe are compatible with ensuring appearance at trial. Own recognizance, the least restrictive form of release, is our first category, followed by release on deposit bond. Although defendants released on deposit bond must put up some cash, which they will forfeit if they fail to appear, the amount is typically less than $500.[40] Few people are ever held because of a failure to raise cash for a deposit bond. Defendants who were offered financial release (but not a deposit bond) and who paid their bonds in cash are the third category of release. Cash bond is more expensive than a deposit bond but does not involve the monitoring of sureties. Defendants released via surety bond are the fourth category. Although the Constitution guarantees that excessive bail shall not be required, it does not require that bail should always be set low enough for a defendant to be able to afford release. Indeed, judges sometimes set bail in the expectation (and hope) that the defendant will not be able to raise bail. Thus, we include defendants held on bail or detained without bail as the final, most restrictive category, not released. Emergency releases are also included in the final category because, had it not been for the emergency, these individuals would have not have been released. From the ordered probit, we generate conditional propensity scores for each possible pairwise comparison.[41]

Variables in the ordered probit specification include individual-specific indicators that denote whether the defendant has been accused of murder, rape, robbery, assault, other violent crime, burglary, theft, other property offense, drug trafficking, other drug-related offense, or driving-related offense (with misdemeanors and other crimes in the constant). We also include variables for past experience with the criminal justice system. Three binary variables are set equal to one if the defendant had some active criminal justice status at the time of the arrest (for example, was on parole or probation), had prior felony arrests, or failed appear at trial in the past. The defendant's sex and age are also included. Note that these variables are exactly the sorts of variables that judges use to make treatment selection

[40] The median deposit bond amount is $5,000, and releasees typically must deposit 10 percent or less of the bond amount.

[41] We have also estimated the results using a multivariate logit model. The results are substantively similar (on the ordered probit model, see, for example, William H. Greene, Econometric Analysis (4th ed. 2000)).

decisions.[42] Other, nonindividual variables include the police clearance rate, defined as the number of arrests divided by the number of crimes per county. The clearance rate provides a crude measure of police availability that may affect FTA rates. County and year effects are included in the selection equation (county 29 and 1988 are excluded to prevent multicollinearity).[43] The results of the ordered probit estimation are presented in Appendix Table A1.

B. Matching Quality

A match is defined as the pair of observations with the smallest difference in propensity scores so long as the difference is less than a predefined caliper. If a match cannot be made within the caliper distance, the observations are dropped. We use matching with replacement, so the order of matching is irrelevant, and every untreated observation is compared against every treated observation.[44]

The match quality is good, as we match large proportions of the sample despite using a caliper of only .0001.[45] Figure 1*A* presents a box-and-whiskers plot of the propensity scores for each treatment category (including the "treatment" of not released) conditional on the actual treatment. The leftmost part of the graph, for example, gives the box-and-whiskers plot for the propensity of being in the own-recognizance, deposit, cash, surety, and not-released treatments for all defendants in the own-recognizance treatment.[46]

[42] Ayres & Waldfogel, *supra* note 6, identifies eight characteristics that judges may consider in setting bail: (1) the nature and circumstances of the offense (if relevant), (2) the evidence against the defendant, (3) the defendant's prior criminal record, (4) the defendant's prior FTA record, (5) the defendant's family ties, (6) the defendant's employment record, (7) the defendant's financial resources, and (8) the defendant's community ties. Although Ayers and Waldfogel's study deals only with Connecticut, the criteria are similar in other states.

[43] The use of county effects in the selection equation is noteworthy because it implies that matching will occur with "quasi"-fixed effects. A true fixed-effects estimator would require that comparable observations come from within the same county. The matching estimator takes into account county effects when seeking a match but does not insist that every match must be within county. In particular, some counties do not release on deposit bond, and others do not release on surety bond. A fixed-effects estimator would not use information from these counties in estimating the effect of the deposit and surety treatments. The matching estimator will use information from these counties if matching is strong on other variables. A pure fixed-effects estimator may also be important, however, and in the working version of this paper, Eric Helland & Alexander Tabarrok, Public versus Private Law Enforcement: Evidence from Bail Jumping (Working paper, George Mason Univ. 2003), we pursue this alternative approach. Results are consistent with those discussed here.

[44] Dehejia & Wahba, *supra* note 4, finds that matching with replacement is considerably superior to matching with nonreplacement.

[45] When matching on variables with fewer observations, such as fugitive rates conditional on failure to appear as we do below, we match using a caliper of .001. The caliper size makes little difference to the results.

[46] In a box-and-whiskers plot, the box contains the interquartile range (IQR): the observations between the 75th percentile (the top of the box) and the 25th percentile (the bottom of the box). The horizontal line toward the center of each box is the median observation. The whiskers are the so-called adjacent values that extend from the largest observation less than or equal

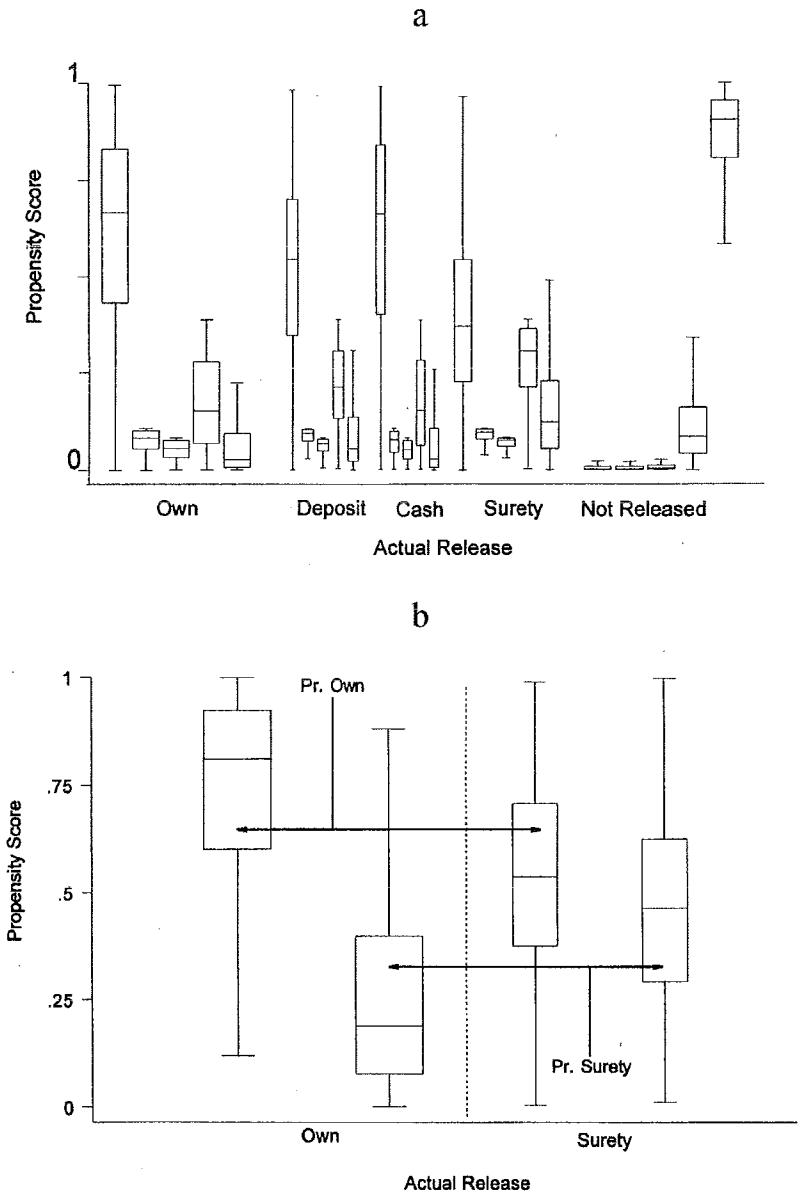


FIGURE 1.—*A*, *p*-score distribution for each release type conditional on actual release (the order within type is own recognizance, deposit, cash, surety, not released); *B*, pairwise *p*-score distributions for own recognizance versus surety.

Figure 1*B* gives the box-and-whiskers plot for the pairwise (conditional) probabilities for the own versus surety comparison. The "Pr. Own" and "Pr. Surety" arrows indicate that we can find comparable observations, statistical doppelgangers, for individuals released under either treatment. Many of the defendants released on surety bond, for example, were as likely to have been released on their own recognizance (third box from the left) as those who actually were released on their own recognizance (first box from the left). Similarly, many of the defendants who were released on their own recognizance were as likely to have been released on surety bond (second box from the left) as those who actually were released on surety bond (fourth box from the left). Note that it is important that the boxes overlap across treatments, not that they overlap within treatments—that is, the fact that in Figure 1*A* the propensity to be in the deposit bond treatment is everywhere lower than the propensity to be in the own-recognizance treatment simply reflects the fact that the deposit bond treatment is a low-probability event. More important is that the deposit bond treatment is a low-probability event regardless of actual treatment—we can thus find comparable observations across the treatments. Alternatively stated, the overlap in the boxes across treatments indicates that random factors play a large role in treatment selection, thus aiding our effort to find true comparable observations.[47]

Although we can find comparable observations across the release treatments, we cannot find good comparable observations for those who were not released. Indeed, the Figure 1*A* box-and-whiskers plot of the propensity not to be released among those who in fact were not released does not overlap at all with the propensity not to be released for those who were released. Defendants who are not released differ greatly from released defendants.[48] (This is consistent with the very high FTA rates that we found for emergency releasees in Table 1.) The fact that the model is capable of finding large selection effects if they exist, as they apparently do for those not released, bolsters the finding that selection on observable characteristics is not overly strong among the release treatments.

---

to the 75th percentile plus 1.5 × IQR and the smallest observation greater than or equal to the 25th percentile minus 1.5 × IQR. Points outside the box and whiskers are called extreme values or outside points and for clarity are not plotted in this graph. In this plot, the width of the box is proportional to the square root of the number of observations in that category.

[47] Another interesting aspect of the box-and-whiskers plot is that it suggests that almost everyone can be released on their own recognizance, even those who might in another time and place be released only with high bail. Thirty percent of released defendants accused of murder, for example, were released on their own recognizance.

[48] It is possible to find defendants who were released who might not have been released—thus, the data are consistent with the adage that it is better to let 10 guilty men go free than jail one innocent man.

TABLE 2

TREATMENT EFFECTS OF ROW VERSUS COLUMN RELEASE CATEGORY ON FAILURE-TO-APPEAR RATES USING MATCHED SAMPLES, 1988–96

	Own Recognizance	Deposit Bond	Cash Bond	Surety Bond
Own recognizance	26	3.2** (1.0; 1.1)	4.8** (1.1; 1.2)	6.5** (.78; .78)
Deposit bond	−3.1** (1.1; 1.2)	21	4.1** (1.5; 1.6)	3.1** (1.1; 1.3)
Cash bond	−5.8** (1.3; 1.6)	−1.5 (1.6; 2.0)	20	1.8; 2.0 (1.4; 1.8)
Surety bond	−7.3** (.78; .89)	−3.9** (1.1; 1.2)	1.7 (1.3; 1.4)	17

NOTE.—Mean failure-to-appear rates (in %) for release categories for the full sample are along the main diagonal. Off-diagonal elements are the estimated treatment effects of the row category versus the column category. Standard errors are in parentheses—the first standard error assumes that the p-score is estimated with certainty; the second uses bootstrapping to estimate the standard error including uncertainty of the p-score. Matching caliper = .0001.

** Statistically significant at the greater than 1% level (two sided).

C. *Estimated Treatment Effects: Failure to Appear*

In Table 2, the row variable denotes the treated variable and the column the untreated variable.[49] For reference, the main diagonal includes the mean FTA rate in that category from the full sample.[50] Reading across the surety bond row, for example, we see the estimated difference in FTA rates caused by the surety treatment relative to the column treatment—that is, the estimate of the effect of treatment on the treated. The matching estimator suggests that similar individuals are 7.3 percentage points, or 28 percent, less likely to fail to appear when released on surety bond than when released on their own recognizance. Similar individuals are also 3.9 percentage points, or 18 percent, less likely to fail to appear when released on surety bond than when released on deposit bond. The estimated treatment effect for those on surety bonds versus cash is small and not statistically significant.[51]

[49] Two standard errors are presented in Table 2. The first takes into account uncertainty in the matched samples but assumes that the propensity score is known with certainty. The second estimate is a bootstrapped standard error that takes into account uncertainty that propagates from the estimation of the propensity score. The "regular" and bootstrapped standard errors are close, with the bootstrapped errors being approximately 8–20 percent higher. All the statistically significant results are significant at greater than the 1 percent level using either standard error. Since the estimation of the propensity score adds very little uncertainty to the matching estimators and because calculating bootstrapped errors is very time and resource intensive, we present only the regular standard errors in future results and leave adjustments to the reader. The bootstrapped errors were calculated using 100 replications of the model. The procedure took over 48 hours on a reasonably fast Pentium computer.

[50] The mean FTA rate for the full sample is included as rough guide to absolute effects. Note, however, that the matched sample is usually smaller than the full sample, so the mean FTA rate for the matched and full samples can be slightly different.

[51] As a test of matching quality, we also ran a linear regression on the matched samples that included surety bond and all the variables in Table 3. The results are similar, as they should be if the matched samples divide other covariates as if they were assigned randomly. The coefficient on surety bond in the surety versus own recognizance regression, for example, is

Unlike Table 1, both the top and bottom halves of Table 2 are filled in; this is because the estimate of the treatment on the treated is conceptually different from the estimate of the treatment on the untreated (differently treated). For example, the effect of the surety treatment relative to own recognizance for those who were released on surety bond is not necessarily the exact opposite of the effect of own recognizance relative to surety bond on those who were released on their own recognizance. As it happens, however, our estimates of these effects are similar. The estimate of the effect of own recognizance relative to surety on those who were released on their own recognizance, for example, is 6.5 percentage points, similar in size but opposite in sign to the −7.3 surety effect relative to own recognizance of those who were released on surety bond. The similarities across diagonals suggest that either (or both) treatment selection or treatment effect does not interact strongly with defendant characteristics. One possible exception is that the deposit bond treatment relative to cash is estimated at 4.1 percentage points, while the cash bond treatment relative to deposit is estimated at −1.5 percentage points.

D. Estimated Treatment Effects: The Fugitive

A surprisingly large number of felony defendants who fail to appear remain at large after 1 year, approximately 30 percent. Alternatively stated, some 7 percent of all released felony defendants skip town and are not brought back to justice within 1 year. Those who remain at large more than 1 year are called fugitives.

The surety treatment differs most from other treatments when a defendant purposively skips town, because this is when bounty hunters enter the picture.[52] If the surety treatment works, therefore, we should see it most clearly in the apprehension of fugitives. Given that a defendant fails to appear, we ask what the probability is that the defendant is not brought to justice within 1 year and how this varies with release type. It is important to note that once a defendant has decided to abscond, there is no reason why anything other than the different effectiveness of public police and bail enforcement agents should have a systematic effect on the probability of being recaptured.

Table 3 provides strong evidence that bounty hunters are highly effective at recapturing defendants who attempt to flee justice—considerably more so than the public police. The main diagonal of Table 3 contains the mean fugitive rate conditional on FTA along with the number of observations in

---

−6.5, which is within 1 standard deviation of the −7.3 matching estimate. We do a more detailed comparison of linear regression and matching results further below.

[52] We use the term "bounty hunter" or "bail enforcement agent" to refer to private pursuers of felony defendants. Bond dealers typically pursue their own skips. Literal bounty hunters are typically not called in unless the skip is thought to have crossed state or international lines. Services like Wanted Alert (http://www.wantedalert.com) regularly post ads in *USA Today* that list fugitives and their bounties.

TABLE 3

TREATMENT EFFECT OF ROW VERSUS COLUMN RELEASE CATEGORY ON THE FUGITIVE RATE USING MATCHED SAMPLES, CONDITIONAL ON FAILURE TO APPEAR, 1988–96

	Own Recognizance	Deposit Bond	Cash Bond	Surety Bond
Own recognizance	32 [5,440]	−3** (2.6)	−4.9** (2.9)	9.4** (2.1)
Deposit bond	−.2 (2.6)	33 [766]	−6.2 (4.1)	12.1** (2.7)
Cash bond	11.9** (3.0)	−3.8 (4.4)	40 [506]	18.6** (3.7)
Surety bond	−17** (2.0)	−15.5** (2.9)	−25.6** (4.2)	21 [1,537]

NOTE.—Mean fugitive rates (in %), defined as failures to appear that last longer than a year, for release categories for the full sample are along the main diagonal, with the number of observations in that category conditional on a failure to appear in square brackets. Off-diagonal elements are the difference between the mean fugitive rate for the row category and the mean fugitive rate for the column category estimated using matching. Standard errors are in parentheses. Matching caliper = .001.

** Statistically significant at the greater than 1% level (two sided).

each category. The estimated treatment effects for the row versus column variables are shown in the off-diagonals with standard errors in parentheses. The probability of remaining at large for more than a year conditional on an initial FTA is much lower for those released on surety bond. The surety treatment results in a fugitive rate that is lower by 17, 15.5, and 25.6 percentage points compared with the own-recognizance, deposit bond, and cash bond treatments, respectively. In percentage terms, the fugitive rates under surety release are 53, 47, and 64 percent lower than the fugitive rates under own recognizance, deposit bond, and cash bond, respectively. Similarly, the own recognizance, deposit, and cash bond treatments result in fugitive rates that are 29, 47, and 47 percent higher than under the surety treatment.

There are also some interesting nonsurety effects in Table 3. Note that the fugitive rate conditional on an FTA is higher for cash bond than for release on own recognizance. Earlier (see Table 2) we had found that the FTA rate was lower for cash bond than for release on own recognizance. This suggests that defendants on cash bond are less likely to fail to appear than those released on their own recognizance, but if they do fail to appear, they are less likely to be recaptured. The result is pleasingly intuitive. A defendant released on his own recognizance has little to lose from failing to appear and thus may fail to appear for trivial reasons. But a defendant released on cash bond has much to lose if he fails to appear, and thus those who do fail to appear do so with the goal of not being recaptured.

The propensity score method can be very informative about the entire distribution of treatment effects. In Figure 2, we graph smoothed (running-mean) FTA and fugitive rates against surety p-scores for the own-recognizance and surety treatments (conditional on being in either the surety or own-recognizance treatment). (We omit graphs for the other treatment comparisons for brevity.) The two downward-sloping, thinner curves graph smoothed FTA rates against the p-scores for those defendants released on

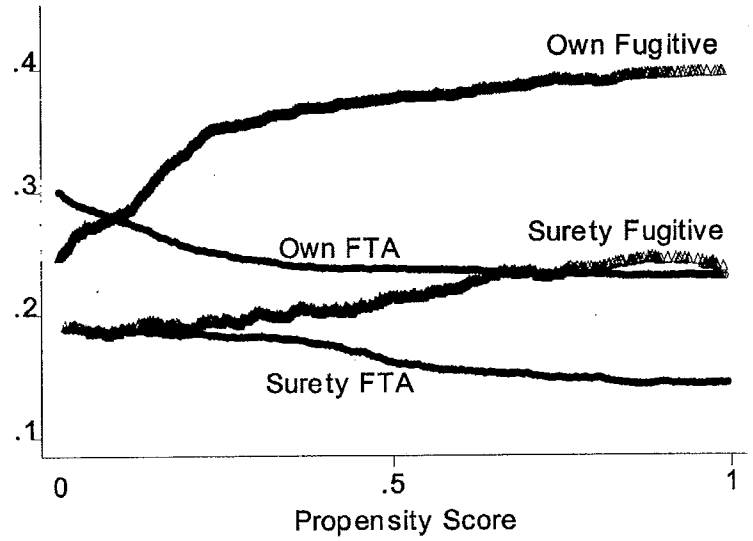


FIGURE 2.—Failure-to-appear and fugitive rates by own recognizance versus surety treatment plotted against *p*-scores.

their own recognizance or surety bond. The slope of each line indicates the direction and strength of the effect of observable characteristics on selection in that treatment. The difference between the own-recognizance and surety lines at any given propensity score is an estimate of the treatment effect, controlling for observable characteristics. The difference is roughly constant, which indicates that despite some mild selection, the treatment effect is roughly independent of observable characteristics.

For both the own-recognizance and surety treatments, FTA rates decrease as the propensity for being in the surety treatment increases. That is, FTA rates decrease as observable characteristics move in the direction of predicting surety release. The decline is gentle; moving from a near-zero propensity to a near-one propensity reduces the FTA rate by approximately 5 percentage points. The effect is sensible if we recall that many FTAs are short term—the defendant forgets the trial date or has another pressing engagement. These sorts of FTAs are likely to be more common for defendants with observable characteristics that predict low *p*-scores because judges release most defendants on their own recognizance and reserve surety release for defendants accused of more serious crimes. Few people will forget to show up for their murder trial, but some may do so if the trial involves a driving offense. At the same time, however, we expect that defendants accused of more serious crimes—who have more to lose from being found guilty—are more likely

to purposively abscond. If this is correct, we ought to see a positive correlation between the surety propensity score and the fugitive rate conditional on having failed to appear.

The two upward-sloping, thicker lines plot smoothed fugitive rates against the surety propensity score. As before, the slope of the plots gives the direction and strength of effects caused by selection on observable characteristics, and the vertical difference is the treatment effect for any given propensity score. As observable characteristics move in the direction of a greater propensity to be selected for surety release, the fugitive rate increases. It is interesting to note that the effect of selection on defendants released on surety bond is less than that on defendants released on their own recognizance (that is, the "slope" of the plot is less). This suggests that the surety treatment works well even for those defendants whose observable characteristics would predict higher FTA rates.

We examine the issue of unobservable characteristics at length below, but since selection by observable characteristics has little influence on fugitive rates, Figure 2 already suggests that observables would have to be very different from observables in order to greatly affect the results.

E. Kaplan-Meier Estimation of Failure-to-Appear Duration

The higher rate of recapture for those released on surety bond compared with other release types can be well illustrated with a survival function. For a subset of our data, just over 7,000 observations, we have information on the time from the failure to appear until recapture (return to the court). A survival function graphs the percentage of observations that survive at each time period. We estimate a survival function for each release type using the nonparametric Kaplan-Meier estimator. Typically, the Kaplan-Meier estimator is used only for preliminary analysis and is then followed by a parametric or semiparametric model. Although parametric and semiparametric models allow for covariates, they require sometimes tenuous assumptions about functional form. Instead, we follow our earlier approach of creating matched samples. Thus, using the same procedure, we create three matched samples: surety versus own recognizance, surety versus deposit, and surety versus cash. We then compare the survival function across each matched sample. The matching procedure ensures that covariates are balanced across the matched samples, so it is not necessary to include additional controls for covariates.

Figure 3 presents the survival functions. In each case, the survival function for those released on surety bond is markedly lower than that for those released on their own recognizance, deposit bond, or cash bond. The ability of bail enforcement agents relative to police to recapture defendants who

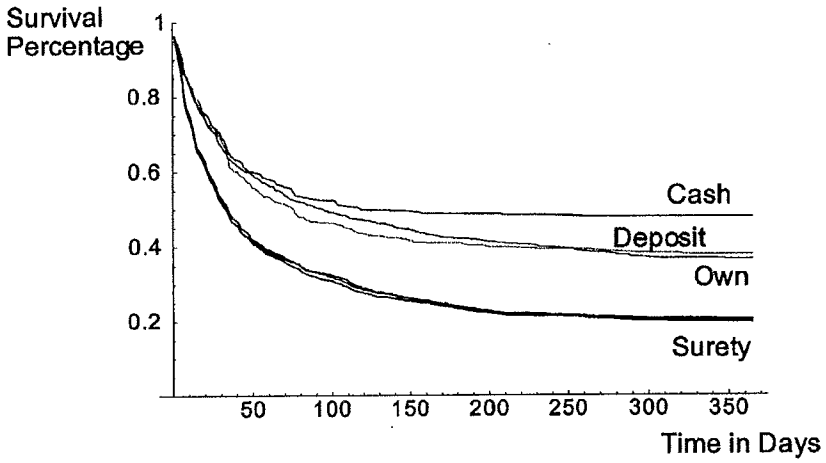


FIGURE 3.—Kaplan-Meier survival function for defendants on surety bond versus those released on cash bond or deposit bond or released on their own recognizance—using matched samples.

skip bail is evident within a week of the failure to appear.[53] By 200 days, the surety survival rate is some 20–30 percentage points, or 50 percent, lower than the survival rate for those out on cash bond, deposit bond, or their own recognizance; that is, the probability of being recaptured is some 50 percent higher for those released on surety bond relative to other releases. (Note that there are three surety bond survival functions, one for each comparison group, but these are nearly identical.)

A log-rank test confirms Figure 3; we can easily reject the null hypothesis of equality of the survivor functions—defendants released on surety bond are much more likely to be recaptured (that is, less likely to remain at large, or "survive") than those released on their own recognizance, deposit bond, or cash bond.[54]

[53] A number of estimates have been made that bounty hunters take into custody between 25,000 and 35,000 fugitives a year, depending on the year (see various sources in Drimmer, *supra* note 11; and also W. P. Barr, letter to Charles T. Canady on the Bounty Hunter Responsibility Act, NABIC Bull., March 2000). These figures are consistent with a recapture rate of over 95 percent and are consistent with the number of fugitives on surety bond. It appears, therefore, that almost all fugitives on surety bond are recaptured by bail enforcement agents and not by the police. Bounty hunters, however, will sometimes track down defendants and then tip police as to their whereabouts, so police will sometimes be involved in some aspects of recapture.

[54] The exact results of the log-rank test and similar results matching on propensity score and bail can be found in Helland & Tabarrok, *supra* note 43.

TABLE 4

EFFECT OF ALTERNATIVE TREATMENT VERSUS SURETY BOND ON FAILURE-TO-APPEAR AND FUGITIVE RATES (Conditional on Failure to Appear), 1988–96

	Own Recognizance versus Surety Bond	Deposit versus Surety Bond	Cash versus Surety Bond
Treatment effect on failure-to-appear rates	+7.8** (1.6)	+6.2** (1.8)	−1.6 (4.4)
Treatment effect on fugitive rates	+14.8** (2.3)	+19.8** (2.9)	+35.7** (8.0)

NOTE.—Individuals from states that have banned surety bonds are matched with similar individuals released on surety bond. Standard errors are in parentheses. The matching caliper is .0001.

** Statistically significant at the greater than 1% level (two sided).

F. Comparison with Counties in States That Have Banned Commercial Bail

Some states have banned commercial bail. It seems plausible that matching can find two individuals who are comparable but for the fact that one individual could not have been assigned surety bail while the other could and was assigned surety bail. Comparing these individuals gives us a measure of what would happen if a county lifted its ban on commercial bail.[55]

Table 4 demonstrates that states that ban commercial bail pay a high price. We estimate that FTA rates are 7–8 percentage points, or approximately 30 percent, higher for individuals released on deposit or own recognizance than if the same individuals were released on surety bond.[56] As before, we find that cash bond is about as effective as surety bond at controlling FTA rates. The fugitive rate conditional on FTA is much higher under own recognizance, deposit, or cash release than under surety—higher by some 15, 20, and 36 percentage points, or 78, 85, and 93 percent, respectively—figures even larger than we found earlier.

VI. LOOKING FOR UNOBSERVABLE VARIABLES

Matching is a powerful and flexible tool, but it is not a research design that magically guarantees the identification of causal effects. In this section, we test for robustness and attempt to rule out the potentially confounding effects of unobservable characteristics. We focus on two identification strat-

[55] Since we are interested in the cross-county variation, the propensity scores for these tests were generated from an ordered probit that did not include county fixed effects but was otherwise identical to that used earlier.

[56] Note that in Table 4, we examine the treatment effect of own recognizance, deposit, and cash relative to surety because this is the relevant comparison when considering the experiment of lifting the ban on commercial bail. As noted earlier, the treatment effect on the treated and untreated groups are similar, so we could also have examined the surety treatment effect relative to the alternative release types.

TABLE 5

MEAN REARREST RATES BY RELEASE CATEGORY, 1988–96

	Rate (%)	*N*
Own recognizance	14.9	20,945
Deposit bond	13.3	3,605
Cash bond	14	2,482
Surety bond	12	9,202

egies; a number of alternative strategies, described briefly below, are developed in the working paper.

Our first identification strategy takes advantage of the fact that some 14 percent of defendants out on pretrial release are arrested for another crime before they are sentenced for the first crime. It is plausible that the probability of being rearrested is positively correlated with the probability of becoming a fugitive. Assume, for example, that guilty defendants are less likely to show up for trial than innocent defendants and that innocent defendants are less likely to be rearrested than guilty defendants. There is good evidence for some such assumption because in the raw data, defendants who are never rearrested have an FTA rate of 11 percent, but defendants who are rearrested for another crime have an FTA rate of 43 percent.

If rearrest is positively correlated with the probability of becoming a fugitive and if treatment does not influence rearrest rates, then rearrest rates by treatment will track unobserved characteristics. Table 5 provides evidence for the second clause—in the raw data, there is very little variation in rearrest rates across treatment categories.[57] Thus, Table 6 (matching on propensity score and bail) presents faux "treatment effects" for the effect of various release types on rearrest rates. We emphasize that our hypothesis is that treatment does not influence rearrest—the faux treatment effects, therefore, are indications of the influence of unobserved variables.

In Table 6, the surety versus own recognizance and surety versus deposit comparisons show positive but very small and statistically insignificant effects, which suggests that unobserved variables have little influence on FTA and fugitive rates across these comparisons. The surety versus cash bond comparison suggests that the surety treatment increases rearrest rates by 4.5 percentage points, which implies that unobserved variables operate in a direction that offsets the true treatment effect of surety on FTA and fugitive

[57] In the raw data, there appears to be a slight decrease in rearrest rates for those released on commercial bail. Although the rearrest of a defendant is not usually grounds for the forfeiture of the bond dealer's bond, bond dealers do monitor their charges, and such monitoring might reduce rearrest rates. Bond dealers might be also be able to select defendants who are unlikely to flee and thus also unlikely to be rearrested. Once we control for observable characteristics, however, the slight decrease in arrest rates for those on commercial bail disappears and in some cases reverses (see Table 6).

TABLE 6

EFFECT OF SURETY TREATMENT EFFECT VERSUS OTHER RELEASE TYPES ON REARREST RATES USING SAMPLES MATCHED ON *p*-SCORE AND BAIL, 1988–96

	Surety versus Own Recognizance	Surety versus Deposit Bond	Surety versus Cash Bond
Surety bond	.7 (.6)	.58 (1.0)	4.5** (1.3)
Matched observations	14,925	9,740	7,064

NOTE.—The matching caliper is .001.
** Statistically significant at the greater than 1% level (two sided).

rates. Recall from Table 2 that we found that FTA rates were slightly higher under surety than under the cash bond treatment. The evidence from rearrest rates suggests that unobservable characteristics may be responsible for part of this and that the true treatment effect is somewhat lower. Similarly, although we found large negative effects on fugitive rates from the surety treatment (relative to cash treament), the evidence suggests that, if anything, the true treatment effects are even more negative.[58]

The rearrest data allow for another interesting comparison. For a small subset of our data, 1,331 observations from 1988 and 1990, we know the rerelease type for those individuals who are arrested and released on a second charge. We do not know whether the individual failed to appear on the second charge, which is why we do not have repeated observations. Nevertheless, the second arrest and release data may be revealing.

Suppose that the initial release is own recognizance and the second release is via surety bond. By monitoring and possibly recapturing the defendant if he skips on the second trial, bail bondsmen and their agents create a positive externality with respect to fugitive rates on the first trial. This potential externality means that we need not compare own-recognizance to surety releases to measure a surety treatment effect. Instead, we can compare defendants released on their own recognizance with other defendants released on their own recognizance in their first release and on surety bond in their second release. Similarly, we can compare fugitive rates on the first trial for defendants whose first and second releases were own recognizance and own recognizance with those whose first and second releases were own recognizance and surety bond. With this comparison, we control for selection effects on the first release.

The unconditional fugitive rate of defendants who are released on their

[58] Since we find that rearrest rates vary little by treatment category, we should also find that treatment effects measured in the rearrest sample, that is, using only those defendants who were subsequently arrested for a second crime, should be similar to those found in the one-arrest sample. We have run these matching tests on propensity score and bail and do find similar results, which we omit for brevity.

TABLE 7

UNCONDITIONAL FUGITIVE RATES BY ARREST-REARREST CATEGORY, 1988, 1990

Category	Rate
1. Own and not rearrested	8.48 [17,828]
2. Own-own	8.04 [191]
3. Own-surety	1.49 [134]
4. t-test (row 1 − row 3)	2.9; $p(1 > 3 = .0019)$
5. t-test (row 2 − row 3)	2.6; $p(2 > 3 = .0047)$

NOTE.—Own-own indicates first release on own recognizance and second release on own recognizance. Own-surety indicates first release on own recognizance and second release on surety bond.

own recognizance and not rearrested is 8.48 percent.[59] The fugitive rate of defendants who are released on their own recognizance and who are rearrested and then released again on their own recognizance is almost identical, 8.04 percent. But the fugitive rate for those defendants initially released on their own recognizance but then rearrested and rereleased on surety bond is just 1.9 percent. The difference between the own-recognizance and the own-recognizance+surety fugitive rate is statistically significant at the greater than 1 percent level. The difference between the own-recognizance+own-recognizance and own-recognizance+surety rate, which controls for rearrest, is also statistically significant at the greater than 1 percent level. Table 7 summarizes.

In the working paper,[60] we supplement the above analysis in a variety of ways to control for county effects, individual effects observed by judges but unobserved by us, and pure unobserved effects of a very general nature. [61] Most generally, the cream that judges skim are released on their own recognizance and deposit bond, while the skim are released on cash or surety bond. Consistent with this, observable selection effects on fugitive rates are positive, and the evidence from a variety of independent tests suggests that unobservable characteristics are not biasing our results upward. Taken to-

[59] Earlier we focused on fugitive rates conditional on having FTA. We focus on unconditional fugitive rates here because we have fewer observations. We have data on rearrest and rerelease type for 1988 and 1990.

[60] Helland & Tabarrok, *supra* note 43.

[61] One of our supplementary tests is a completely independent test using instrumental variables. When jails become overcrowded, judges are pressured to release individuals on their own recognizance rather than run the risk of setting a bail amount that the defendant might not be able to secure. (We present evidence in the working paper that bond dealers understand that overcrowded jails mean less surety business.) We define Ratio as the county jail population divided by the official jail capacity. A value of Ratio greater than one indicates overcrowding. We suggest that jail overcrowding is not likely to be correlated with unobservables that affect FTA and fugitive rates. Using Ratio as an instrumental variable, we again find that surety bail significantly reduces fugitive rates. For details, see Helland & Tabarrok, *supra* note 43.

gether, the evidence suggests that we have good estimates that surety release reduces FTA rates, survival times, and fugitive rates.

VII. Conclusions

When the default was for every criminal defendant to be held until trial, it was easy to support the institution of surety bail. Surety bail increased the number of releases relative to the default and thereby spared the innocent some jail time. Surety release also provided good, albeit not perfect, assurance that the defendant would later appear to stand trial. When the default is that every defendant is released, or at least when many people believe that "innocent until proven guilty" establishes that release before trial is the ideal, support for the surety bail system becomes more complex. How should the probability of failing to appear and all the costs this implies, including higher crime rates, be traded off against the injustice of imprisoning the innocent or even the injustice of imprisoning the not-yet-proven guilty? We cannot provide an answer to this question, but we can provide a necessary input to this important debate.

Defendants released on surety bond are 28 percent less likely to fail to appear than similar defendants released on their own recognizance, and if they do fail to appear, they are 53 percent less likely to remain at large for extended periods of time. Deposit bonds perform only marginally better than release on own recognizance. Requiring defendants to pay their bonds in cash can reduce the FTA rate similar to that for those released on surety bond. Given that a defendant skips town, however, the probability of recapture is much higher for those defendants released on surety bond. As a result, the probability of being a fugitive is 64 percent lower for those released on surety bond compared with those released on cash bond. These finding indicate that bond dealers and bail enforcement agents (bounty hunters) are effective at discouraging flight and at recapturing defendants. Bounty hunters, not public police, appear to be the true long arms of the law.

APPENDIX

TABLE A1

ORDERED PROBIT ON STRINGENCY OF RELEASE

Variable	Coefficient	
Local conditions:		
Time, in days, to scheduled start of trial	−.5821	(.0038)
Local clearance rate (total arrest/total crime)	.3957	(.1799)
Defendant is charged with:		
Murder	.35915**	(.051044)
Rape	.376661**	(.032135)
Robbery	.146899**	(.028193)
Assault	.208538**	(.039397)
Other violent crime	.048705+	(.02932)
Burglary	−.10109**	(.027554)
Theft	−.16676**	(.029142)
Other property crime	.212824**	(.026824)
Drug trafficking	−.1147**	(.027033)
Other drug crime	−.01139	(.041254)
Driving-related crime	−.18755**	(.016514)
Defendant characteristics:		
Age	.000854	(.000653)
Female (yes = 1)	.873055**	(.080055)
Active criminal justice status	.191588**	(.013974)
Previous felonies	.244761**	(.013558)
Previous failure to appear	.123918**	(.015137)

NOTE.—The model includes county and year effects (not shown). Asymptotic standard errors are in parentheses. There are 58,585 observations.

+ Statistically significant at the greater than 10% level.

** Statistically significant at the greater than 1% level (two-sided test).

BIBLIOGRAPHY

American Bar Association. *Criminal Justice Standards.* Washington, D.C.: American Bar Association, 1985.

Augurzky, Boris, and Schmidt, Christoph M. "The Propensity Score: A Means to an End." IZA Discussion Paper No. 271. Bonn: IZA, March 2001.

Ayres, Ian, and Waldfogel, Joel. "A Market Test for Discrimination in Bail Setting." *Stanford Law Review* 46 (1994): 987–1047.

Burton, Bob. *Bail Enforcer: The Advanced Bounty Hunter.* Boulder, Colo.: Paladin Press, 1990.

Chamberlin, John A. "Bounty Hunters: Can the Criminal Justice System Live without Them?" *University of Illinois Law Review* (1998): 1175–1205.

Clarke, Stevens H.; Freeman, Jean L.; and Koch, Gary G. "Bail Risk: A Multivariate Analysis." *Journal of Legal Studies* 5 (1976): 341–85.

Clines, Francis X. 2001. "Baltimore Gladly Breaks 10-Year Homicide Streak." *New York Times,* January 3, 2001.

Dehejia, Rajeev H., and Wahba, Sadek. "Causal Effects in Non-experimental Studies: Re-evaluating the Evaluation of Training Programs." Working Paper No. 6586. Cambridge, Mass.: National Bureau of Economic Research, June 1998.

Drimmer, Jonathan. "When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System." *Houston Law Review* 33 (1996): 731–93.

Feeney, Floyd. "Foreword." Pages ix–xiii in *Bail Reform in America*, edited by Wayne H. Thomas, Jr. Berkeley: University of California Press, 1976.

Freed, Daniel J., and Wald, Patricia M. *Bail in the United States: 1964.* Washington, D.C.: National Conference on Bail and Criminal Justice, 1964.

Goldkamp, John S., and Gottfredson, Michael R. *Policy Guidelines for Bail: An Experiment in Court Reform.* Philadelphia: Temple University Press, 1985.

Greene, William H. *Econometric Analysis.* 4th ed. Upper Saddle River, N.J.: Prentice Hall, 2000.

Heckman, James J.; Ichimura, Hidehiko; and Todd, Petra E. "Matching as an Econometric Evaluation Estimator: Evidence from Evaluating a Job Training Programme." *Review of Economic Studies* 64 (1997): 605–54.

Heckman, James J.; Ichimura, Hidehiko; and Todd, Petra. "Matching As an Econometric Evaluation Estimator." *Review of Economic Studies* 65 (1998): 261–94.

Helland, Eric, and Tabarrok, Alexander. "Public versus Private Law Enforcement: Evidence from Bail Jumping." Working paper. Fairfax, Va.: George Mason University, 2003. http://mason.gmu.edu/~atabarro/PublicvsPrivate.pdf.

Howe, Kenneth. "Massachusetts Undertakes Sweeping Reform of Its Warrants System." *San Francisco Chronicle,* June 23, 1999.

Howe, Kenneth, and Hallissy, Erin. "When Justice Goes Unserved: Thousands Wanted on Outstanding Warrants—but Law Enforcement Largely Ignores Them." *San Francisco Chronicle,* June 22, 1999.

Imbens, Guido W. "The Role of the Propensity Score in Estimating Dose-Response Functions." Technical Working Paper No. 237. Cambridge, Mass.: National Bureau of Economic Research, April 1999.

Kennedy, Spurgeon, and Henry, D. Alan. "Commercial Surety Bail: Assessing Its Role in the Pretrial Release and Detention Decision." Washington, D.C.: Pretrial Services Resource Center, 1997.

Kimbrough, Carla J. "Crowded Jails Put Squeeze on Bondsmen." *Arkansas Democrat-Gazette,* June 7, 1989.

Landes, William M. "The Bail System: An Economic Approach." *Journal of Legal Studies* 2 (1973): 79–105.

Landes, William M. "Legality and Reality: Some Evidence on Criminal Procedure." *Journal of Legal Studies* 3 (1974): 287–337.

Lechner, Michael. "Identification and Estimation of Causal Effects of Mul-

tiple Treatments under the Conditional Independence Assumption." IZA Discussion Paper No. 971. Bonn: IZA, December 1999.

Lechner, Michael. "Programme Heterogeneity and Propensity Score Matching: An Application to the Evaluation of Active Labour Market Policies." Econometric Society World Congress 2000 Contributed Paper No. 647. St. Gallen: University of St. Gallen, Swiss Institute for International Economics and Applied Economic Research, 2000.

Lecky, George. "Police Name '200 Most Wanted.'" *Cincinnati Post,* September 5, 1997.

Lee, Henry K., and Howe, Kenneth. "Plan to Clear Backlog of Warrants: Santa Clara County Offering Amnesty to Some." *San Francisco Chronicle,* January 12, 2000.

Leuven, Edwin, and Sianesi, Barbara. "PSMATCH2: Stata Module to Perform Full Mahalanobis and Propensity Score Matching, Common Support Graphing, and Covariate Imbalance Testing." Statistical Software Components, No. S432001. Boston: Boston College, Department of Economics, 2003. http://ideas.repec.org/c/boc/bocode/s432001.html.

Myers, Samuel L., Jr. "The Economics of Bail Jumping." *Journal of Legal Studies* 10 (1981): 381–96.

National Association of Pretrial Service Agencies. *Performance Standards and Goals for Pretrial Release.*" 2d ed. Wauwatosa, Wis.: National Association of Pretrial Service Agencies, September 1998.

Prendergast, Jane. "Warrant Amnesty Offered for 1 Day." *Cincinnati Enquirer,* November 19, 1999.

Reynolds, Morgan. "Privatizing Probation and Parole." Pages 117–28 in *Entrepreneurial Economics: Bright Ideas from the Dismal Science*, edited by Alexander Tabarrok. New York: Oxford University Press, 2002.

Romano, Jay. "Defendants Increasingly Skip Bail." *New York Times,* December 22, 1991.

Rosenbaum, Paul R., and Rubin, Donald B. "The Central Role of the Propensity Score in Observational Studies for Causal Effects." *Biometrika* 70 (1983): 41–55.

Rosenbaum, Paul R., and Rubin, Donald B. "Reducing Bias in Observation Studies Using Subclassification on the Propensity Score." *Journal of the American Statistical Association* 79 (1984): 516–24.

Rubin, Donald B. "Estimating Causal Effects of Treatments in Randomized and Nonrandomized Studies." *Journal of Educational Psychology* 66 (1974): 688–701.

Rubin, Donald B. "Assignment to Treatment Group on the Basis of a Covariate." *Journal of Educational Statistics* 2 (1977): 1–26.

Thomas, Wayne H., Jr. *Bail Reform in America.* Berkeley: University of California Press, 1976.

Toborg, Mary A. "Bail Bondsmen and Criminal Courts." *Justice System Journal* 8 (1983): 141–56.

U.S. Department of Justice, Bureau of Justice Statistics. "Felony Defendants in Large Urban Counties, 1996." Washington, D.C.: Bureau of Justice Statistics, 1999. http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc96.pdf.

EXHIBIT 6

The Crime and Justice Institute and
the National Institute of Corrections, Community Corrections Division

LEGAL AND EVIDENCE BASED PRACTICES: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services

April 2007

Authored by Marie VanNostrand, Ph.D.
Luminosity, Inc.

for the Crime and Justice Institute and the National Institute of Corrections

This paper was developed as part of a set of papers focused on the role of system stakeholders in reducing offender recidivism through the use of evidence-based practices in corrections.

Dot Faust, Correctional Program Specialist
National Institute of Corrections
Community Corrections Division
dfaust@bop.gov
(202) 514-3001
www.nicic.org

Elyse Clawson, Executive Director
Crime and Justice Institute
eclawson@crjustice.org
(617) 482-2520
www.cjinstitute.org

Author's Contact Information:
Marie VanNostrand Ph. D.
Luminosity, Inc.
1767 Tanglewood Drive NE
St. Petersburg, FL 33702
results@luminosity-solutions.com
(727) 525-8955
www.luminosity-solutions.com

This paper was developed under a cooperative award from the National Institute of Corrections, Community Corrections Division, U.S. Department of Justice. Points of view in this document are those of the author and do not necessarily represent the official position of the U.S. Department of Justice.

INTRODUCTION AND BACKGROUND

Approximately 14 million arrests for criminal offenses (excluding traffic offenses) are made each year in the United States.[1] Each time a person is arrested and accused of a crime a decision must be made as to whether the accused person, known as the defendant, will be released back into the community or detained in jail pending trial. Although the percentage of defendants detained pending trial is unknown, a study of felony defendants processed through the court systems in 75 of the largest urban counties in the U.S. revealed that 38% of all defendants charged with a felony were detained (held in confinement) until the disposition of their court case.[2] In addition, there are nearly 750,000 persons incarcerated in local jails on an average day in this country and of those 62% are defendants being detained pending trial.[3]

The bail decision, to release or detain a defendant pending trial and the setting of terms and conditions of bail, is a monumental task which carries enormous consequences not only for the pretrial defendant but also for the safety of the community, the integrity of the judicial process, and the utilization of our often overtaxed criminal justice resources. The bail decision is the responsibility of the Court and is usually made by a judicial officer - either a Judge or designee such as a Magistrate or Bail Commissioner. In most states the risk of failure to appear in court and danger to the community are the two considerations when a judicial officer is faced with a pretrial release/detention decision.

Consideration of danger to the community during the bail decision was not widespread until the passage of the Comprehensive Crime Control Act in 1984 which amended the Bail Reform Act of 1966 by expanding the consideration to include danger to the community. Although these Acts only apply to the federal courts, most states have followed suit and currently there are at least 44 states and the District of Columbia that have statutes listing both community safety and the risk of failure to appear as appropriate considerations in the bail decision.[4] A few states, like New York, only allow for the consideration of court appearance.

Until the 1960s, the Courts relied almost exclusively on the traditional money bail system. The basic principle of the money bail system is that a defendant can secure his/her release if he or she can arrange to have bail posted in the amount of money set by the judicial officer.[5] The inequities of the money bail system were exposed in two landmark studies – Arthur Beeley's

[1] Federal Bureau of Investigation, *Crime in the United States 2005* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 2006) Table 29

[2] Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2002* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 2006) p. 16

[3] Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2005* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 2006) pp. 1 & 8

[4] Pretrial Services Resource Center, *The Pretrial Services Reference Book* (Washington, D.C.: Pretrial Services Resource Center, 1999) p. 12

[5] National Institute of Justice, *Pretrial Services Programs: Responsibilities and Potential* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 2001) p. 7

study of bail in Chicago in 1927[6] and Caleb Foote's study of the bail system in Philadelphia in 1954.[7] These studies revealed, as others have since confirmed, that release pending trial was secured by those with financial resources while those without financial resources, mostly the poor, remained incarcerated. Research has shown that the poor were more likely to be held pending trial regardless of the actual risk posed by the defendant and that being incarcerated pending trial led to a greater likelihood of a harsher sentence if convicted.[8]

The field of pretrial services emerged in response to the inequities of the money bail system as well as judicial officers' needs for reliable information to make bail decisions.[9] Pretrial services programs perform critical functions related to the bail decision. They serve as providers of the information necessary for judicial officers to make the most appropriate bail decision. They also provide monitoring and supervision of defendants released with conditions pending trial. The Manhattan Bail Project, a project initiated by the Vera Institute of Justice in 1961, was one of the first and potentially best known pretrial services programs in the United States. Since that time pretrial services programs have been developed across the country and there are now programs operating in more than 300 counties and all 94 districts in the federal court system.[10]

The field of pretrial services contains two primary sub-fields; pretrial release and pretrial diversion. Pretrial release generally involves the provision of information to judicial officers to assist them in making the pretrial release/detention decision, as well as the monitoring and supervision of persons released from custody while awaiting disposition of criminal charges. Pretrial diversion is a dispositional alternative for pretrial defendants. Defendants voluntarily enter into a diversion program in lieu of standard prosecution and court proceedings. When a defendant successfully completes the diversion program the result is a dismissal of charges, or its equivalent.

The primary distinction between pretrial release and diversion is the nature of participation on the defendant's part. Participation in pretrial diversion is voluntary whereas the pretrial release decision and the setting of terms and conditions of release are a result of a judicial decision regarding the defendant. Pretrial release allows for the defendant to be monitored in the community while following the standard court process pending trial, whereas pretrial diversion allows the defendant to voluntarily enter into a diversion program and avoid standard prosecution. Should a defendant fail diversion, however, he will be returned to the court process for prosecution. The distinctions between the two sub-fields are important and the unique

[6] Arthur Beeley, *The Bail System in Chicago* (Chicago, IL: University of Chicago Press, original 1927; reprint 1966)

[7] Caleb Foote, "Compelling appearance in Court: Administration of bail in Philadelphia" *University of Pennsylvania Law Review*, 1031 (1954)

[8] Patricia Wald, "The right to bail revisted: A decade of promise without fulfillment" in *The Rights of the Accused, Sage Criminal Justice System Annuals*, Vol. 1 (1972), p. 178

[9] See Supra note 5, pp. 7-13 and Appendix A for a thorough review of the history of bail and pretrial services.

[10] Supra note 5, p.8

challenges for diversion programs will be explored in a separate publication.[11] For the purposes of this paper, pretrial services refer to the area of pretrial release and may not be applicable to pretrial diversion.

There are numerous critical points and stages along the criminal case process continuum. The law governs the application of distinct legal principles at varying stages along this continuum. The period of time between arrest and case adjudication is known as the pretrial stage. During this stage defendants enjoy certain inalienable rights as found in the law. As a result, there are critical legal principles applicable to defendants during the pretrial stage. These principles, as applied to specific pretrial practices, serve as the legal foundation on which pretrial services programs must operate. A clear grasp of these legal tenets is necessary to build a framework for appropriate delivery of pretrial services.

PRETRIAL LEGAL FOUNDATION

The legal foundation for case processing during the pretrial stage can be found in the Constitution of the United States, case law, and state and federal statutes. There are six critical principles found in the law that serve as the framework for the operation of pretrial services programs:

1. Presumption of Innocence
2. Right to Counsel
3. Right Against Self-incrimination
4. Right to Due Process of Law
5. Right to Equal Protection Under the Law
6. Right to Bail that is Not Excessive

The six legal principles are not fully inclusive of all of the rights afforded to a defendant during the pretrial stage. There are many other legal protections provided to defendants during this stage, including but not limited to, the requirement of a probable cause hearing within 48 hours,[12] the right to confront witnesses,[13] and the right to a fair and speedy trial.[14] For the purposes of this paper the scope of legal principles has been narrowed to include the principles that have the

[11] The National Association of Pretrial Services Agencies has secured a cooperative agreement (No. 2006-LD-BX-K070) with the Bureau of Justice Assistance (BJA), Office of Justice Programs, U.S. Department of Justice to publish a Pretrial Diversion Best Practices Monograph to Support Community-Based Problem-Solving Criminal Justice Initiatives.

[12] See *Gerstein v. Pugh,* 420 U.S. 103 (1975) at 114 where the Court found "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." The timeliness requirement of the *Gerstein* opinion was subsequently refined by the Court in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) to place a maximum limit of 48 hours on the time that a person can be held in custody before a probable cause determination is made by a judicial officer.

[13] This right is found in the Sixth Amendment to the United States Constitution as applied to the States in the Fourteenth Amendment.

[14] Ibid., footnote 13

greatest impact on the operation of pretrial services programs. Any person working in the field of pretrial services or any part of the criminal justice system that manages pretrial defendants must have a complete understanding of these guiding principles. A discussion of each principle and its basis in law is provided below.

PRESUMPTION OF INNOCENCE

The presumption of innocence dictates that a formal charge against a person is not evidence of guilt; in fact, a person is presumed innocent and the government has the burden of proving the person guilty beyond a reasonable doubt. This fundamental principle can be found in case law dating back to 1895 when Justice White wrote in his opinion for the Supreme Court in *Coffin v. United States* "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[15] Although the presumption of innocence is the only principle without a foundation in the Bill of Rights of the United States Constitution, it is considered an undisputed and fundamental principle of American jurisprudence.

RIGHT TO COUNSEL

The right to counsel in criminal proceedings is found in the Sixth Amendment to the U.S. Constitution which states that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial … and to have the assistance of counsel for his defense." The Sixth Amendment right to counsel was extended to the states in 1963 by the U.S. Supreme Court in *Gideon* v. *Wainwright.*[16] In this case the Court held that the Sixth Amendment's guarantee of the right to state-appointed counsel, firmly established in federal-court proceedings in *Johnson* v. *Zerbst* (1938),[17] applies to state criminal prosecutions through the Fourteenth Amendment. The Supreme Court clarified the scope of that right in 1972 in *Argersinger v. Hamlin,*[18] holding that an indigent defendant must be offered counsel in any misdemeanor case "that actually leads to imprisonment." In essence, a pretrial defendant has the right to counsel if there is a threat of any length of incarceration.

RIGHT AGAINST SELF-INCRIMINATION

The Fifth Amendment of the U.S. Constitution states that "No person … shall be compelled in any criminal case to be a witness against himself…" This amendment gives individuals the right to decline to answer any questions or make any statements, when doing so would help establish that the person committed a crime or is connected to any criminal activity. This right is also

[15] *Coffin v. United States*, 156 U.S. 432 (1895) at 545

[16] *Gideon v. Wainwright*, 372 U.S. 335, 344 - 345 (1963)

[17] *Johnson v. Zerbst*, 304 U.S. 458 (1938)

[18] *Argersinger v. Hamlin*, 407 U.S. 25 (1972)

known as the Fifth Amendment right against self-incrimination. The U.S. Supreme Court clarified this right in 1966 in *Miranda v. Arizona* finding that "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege."[19] The procedural safeguards detailed by the Court are well known in the United States as "Miranda Warnings." It should be noted that *Miranda v. Arizona* also reinforced the right to counsel, finding that "The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel."[20]

RIGHT TO DUE PROCESS OF LAW

The Fifth Amendment of the U.S. Constitution states that "No person shall be...deprived of life, liberty, or property, without due process of law ...." while section one of the Fourteenth Amendment states that "No State shall ... deprive any person of life, liberty, or property, without due process of law..." The Due Process Clause of the Fifth Amendment applies to the Federal Government and the Fourteenth Amendment applies to the States. Both amendments provide that the government shall not take a person's life, liberty, or property without due process of law.

A clear definition of due process is lacking; however, Justice Frankfurter paints a picture of due process in his 1950 dissenting opinion for the Supreme Court in *Solesbee v. Balkcom* which states "It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just."[21] As it relates to restricting a pretrial defendant's liberty, due process requires, at a minimum, an opportunity for a fair hearing before an impartial judicial officer, that the decision to restrict liberty is supported by evidence, and that the presumption of innocence is honored.

RIGHT TO EQUAL PROTECTION UNDER THE LAW

The right to equal protection under the law is found in section one of the Fourteenth Amendment which states that "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." Although the equal protection clause does not list specific forms of discrimination, it has been applied consistently on the basis of race, ethnicity, gender and religious beliefs.

[19] *Miranda v. Arizona*, 384 U.S. 436 (1966)

[20] Ibid., footnote 19

[21] *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950)

As it applies to pretrial defendants equal justice has been extended to include a person's financial status. The courts have ruled that release pending trial (pretrial freedom) should not be based solely on a person's ability to pay and to do so is a violation of equal protection.[22] This protection further applies to criminal trials. Justice Black makes this clear in the 1956 U.S. Supreme Court opinion in *Griffin v. Illinois* in which he writes "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial."[23]

RIGHT TO BAIL THAT IS NOT EXCESSIVE

The right to bail that is not excessive was established in the Judiciary Act of 1789 and the Eighth Amendment of the U.S. Constitution which states "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The scope and intent of 'excessive bail' has been clarified over time with a few critical changes in law and U.S. Supreme Court case decisions. A brief review of the history of bail reform is necessary to understand today's interpretation of 'excessive bail' as well as the current state of bail.

You may recall that for the majority of our history the sole consideration when deciding bail was the risk of failing to appear in court. This was reiterated in the U.S. Supreme Court case of *Stack v. Boyle* decided in 1951, likely the most notable court case that addresses the Eighth Amendment right to bail that is not excessive. Chief Justice Vinson writes in his opinion for the Court that "From the passage of the Judiciary Act of 1789 to the present Federal Rules of Criminal Procedures, Rule 46(a) (1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction ... The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty ... Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."[24]

The first major federal bail reform since the Judiciary Act of 1789 occurred approximately 15 years after *Stack v. Boyle* in the form of the Bail Reform Act of 1966. The key provisions of the Act that relate directly to understanding bail today include:

1. The presumption of release on recognizance for defendants charged with non-capital crimes unless the Court determined that such release would not assure court appearance.

[22] See generally *Bandy v. United States* 82 S.Ct. 11 (1961), *Pugh v. Rainwater*, 557 F.2d 1189 (5th Cir. 1977), *Ackies v. Purdy*, 322 F. Supp. 38, 42 (S.D. Fla. 1970)

[23] *Griffin v. Illinois*, 351 U.S. 12 (1956)

[24] *Stack v. Boyle*, 342 U.S. 1 (1951)

2. Conditional pretrial release, supervision of released defendants, with conditions imposed to address the risk of flight.

3. Restrictions on money bail, which the Court could impose only if non-financial release options were not enough to assure appearance.[25]

The Bail Reform Act of 1966 reinforced that the sole purpose of bail was to assure court appearance and that the law favors release pending trial. In addition, the Act established a presumption of release by the least restrictive conditions with an emphasis on non-monetary terms of bail.

In the early 1970s, the District of Columbia became the first jurisdiction to experiment with detaining defendants due to their potential danger to the community if released pending trial. Under D.C. Code 1973, 23-1322, a defendant charged with a dangerous or violent crime could be held before trial without bail for up to sixty days; this practice became known as preventive detention. This detention scheme was upheld by the District of Columbia Court of Appeals in *United States v. Edwards.*[26] The change in law in the District of Columbia followed by *United States v. Edwards* paved the way for the next major bail reform.

The Bail Reform Act of 1984 was, in part, created in response to the growing concern over the potential danger to the community posed by certain defendants released pending trial. Following the lead of the District of Columbia as upheld in *United States v. Edwards*, the 1984 Act retained the presumption of release on the least restrictive conditions found in the 1966 Act while allowing for detention of pretrial arrestees based on both court appearance and danger to the community. Preventive detention as detailed in the Act allows for pretrial detention in cases when a judicial officer finds that no conditions or combination of conditions will reasonably assure the appearance of the person in court and the safety of any other person and the community.

The preventive detention aspect of the Bail Reform Act of 1984 was challenged in the U.S. Supreme Court case *United States v. Salerno* in 1987. The United States Court of Appeals for the Second Circuit initially struck down the preventive detention provision of the Act as facially unconstitutional, because, in that Court's words, this type of pretrial detention violates "substantive due process." As a result, the Supreme Court granted certiorari because of a conflict among the Court of Appeals regarding the validity of the Act. The Supreme Court then reversed the Court of Appeals and held that the Act fully comported with constitutional requirements. The Court decided that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. What is just as important as upholding preventive detention is the context in which the decision was made. The Court noted that "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[27] In addition, the opinion for the Court provided by Chief Justice Rehnquist

[25] Supra note 4, p. 10

[26] *United States v. Edwards*, 430 A.2d 1321, (1981), cert. denied, 455 U.S. 1022 (1982)

[27] *United States v. Salerno*, 481 U.S. 739 at 755 (1987)

emphasized that the federal statute limits the cases in which detention may be sought to the most serious crimes; provides for a prompt detention hearing; provides for specific procedures and criteria by which a judicial officer is to evaluate the risk of "dangerousness"; and (via the provisions of the Federal Speedy Trial Act) imposes stringent time limits on the duration of the detention.[28]

The Bail Reform Acts of 1966 and 1984 only apply to the federal system but as stated previously, most states have followed suit and emulated the essence of these two Acts. Bail, as it stands today in most states and in the federal government, serves to provide assurance that the defendant will appear for court and not be a danger to the community pending trial. Bail set at an amount higher, or conditions more restrictive than necessary to serve those purposes, is considered excessive. There remains a legal presumption of release on the least restrictive terms and conditions, with an emphasis on non-financial terms, unless the Court determines that no conditions or combination of conditions will reasonably assure the appearance of the person in court and the safety of any other person and the community.

SUMMARY OF LEGAL PRINCIPLES

The six legal principles of the presumption of innocence, the right to counsel, the right against self-incrimination, the right to due process of law, the right to equal protection under the law, and the right to bail that is not excessive serve as the pretrial legal foundation. Pretrial services programs are guided by this set of principles that are unique to defendants at the pretrial stage and programs must ensure that these principles and all of the rights provided for a pretrial defendant are respected and honored in every aspect of program operation.

EVIDENCE-BASED PRACTICES

The term evidence-based practice (EBP) is widely used in numerous fields including medicine, social services, education, mental health, and others – including criminal justice. EBP is used to describe the adoption of interventions and practices that are informed by research. The history of the term can be traced back to the early 1970's in the healthcare field. EBP has become a common term in the criminal justice system over the past decade and has recently experienced widespread use in community corrections (the post-conviction field also referred to as post-trial).

The Crime and Justice Institute, in partnership with the National Institute of Corrections, provides guidance for evidence-based practice for the community corrections field in the 2004 publication "Implementing Evidence-Based Practice in Community Corrections: The Principles of Effective Intervention".[29] There are many similarities between the pretrial and post-conviction fields; however, there are three primary distinctions between these fields that require evidence-based practices for pretrial services programs to vary in some instances from those

[28] Ibid. at 747

[29] See "Implementing Evidence-Based Practice in Community Corrections: The Principles of Effective Intervention" (Crime and Justice Institute, 2004)

identified for community corrections. First, pretrial services programs deal with defendants who are pending trial (during the pretrial stage) and are therefore presumed innocent while community corrections programs deal with post-trial convicted offenders (during the post-trial stage).[30] In essence, the pretrial and post-conviction fields differ by the very nature of the status of the people whom they serve; defendants presumed innocent versus convicted offenders. One primary difference between these two fields is that the rationales of rehabilitation and punishment often applied to convicted persons are inappropriate and inapplicable to pretrial defendants.[31]

Second, pretrial and post-conviction programs differ in their intended outcomes. Evidence-based practices are considered effective for the post-conviction (community corrections) field when they reduce offender risk and subsequent recidivism and as such make a positive long-term contribution to public safety.[32] The intended outcome of pretrial services programs is to reduce pretrial failure (failure to appear and danger to the community) pending trial. The post-conviction field seeks to impact long-term criminal behavior while the pretrial field is limited to impacting criminal behavior and court appearance solely during the pretrial stage. The intended outcomes for the pretrial and post-conviction fields are distinct and these distinctions must be taken into consideration when applying evidence-based practices to the pretrial services field.

Finally, evidence-based practices for pretrial services must be consistent with the pretrial legal foundation and related principles discussed previously in order to maintain certain inalienable rights afforded to each defendant during the pretrial stage. Due to the three primary distinctions of the pretrial services field EBP for pretrial services may be more accurately referred to as legal and evidence based practices (LEBP). LEBP is defined as interventions and practices that are consistent with the pretrial legal foundation, applicable laws, and methods research has proven to be effective in decreasing failures to appear in court and danger to the community during the pretrial stage. The term is intended to reinforce the uniqueness of the field of pretrial services and ensure that criminal justice professionals remain mindful that program practices are often driven by law and when driven by research, they must be consistent with the pretrial legal foundation and the underlying legal principles.

We will begin our discussion of LEBP by examining the legal and evidence based practices identified for pretrial services. Admittedly, research related to pretrial services specific practices is significantly limited. Available pretrial specific research focuses on risk assessment, bail recommendations, and a few aspects of supervision. The existing pretrial research has made a significant contribution to the field, however, substantially more research is needed in all areas – even those mentioned above. Due to the limited pretrial specific research as well as the similarities between the pretrial services and post-conviction fields the LEBP discussion is followed by a review and consideration of the applicability of community corrections EBP.

---

[30] For the purpose of this paper convicted offender refers to any person who has had a sentenced imposed, received community supervision or deferred adjudication, or the court deferred final disposition of the case.

[31] *United States v. Cramer*, 451 F.2d 1198 (5th Cir. 1971)

[32] Supra note 29, p. 1

Although there are general EBP identified through research, the 8 principles of effective intervention mentioned previously are used for this discussion.

PRETRIAL SERVICES LEGAL AND EVIDENCE BASED PRACTICES

Policies and practices for programs must be guided by the pretrial legal foundation, applicable laws, and methods that research has proven to be effective. Standards related to pretrial release and pretrial services which are based on pretrial legal principles have been issued by the American Bar Association,[33] the National District Attorney's Association,[34] and the National Association of Pretrial Services Agencies.[35] A discussion of the standards is beyond the scope of this paper; however, a review of these standards is highly recommended.

Pretrial investigation and pretrial supervision are the primary mechanisms for providing information to judicial officers to assist with the bail decision and monitoring and supervision of pretrial defendants released pending trial. In recent years the National Institute of Justice,[36] the Bureau of Justice Assistance,[37] and the National Association of Pretrial Services Agencies[38] have released comprehensive publications which provide detailed guidance related to pretrial investigations and pretrial supervision. It would be duplicative and beyond the scope of this paper to review in great detail the related suggested best practices. General overviews of the components of pretrial investigation and supervision are presented below followed by detailed discussions of the pretrial services specific legal and evidence based practices.

Pretrial Investigation

The pretrial investigation is the mechanism for relaying the necessary information to judicial officers so that they can make the most appropriate pretrial release/detention decision. Components of a pretrial investigation should include an interview with the defendant, verification of specified information, a local, state and national criminal history record, an objective assessment of risk of failure to appear and danger to the community, and a recommendation for terms and conditions of bail. The two primary components of a pretrial investigation that are supported by LEBP are the risk assessment and bail recommendation.

---

[33] American Bar Association Standards for Criminal Justice *Standards on Pretrial Release, Third Edition* (2002)

[34] National District Attorney's Association *National Prosecution Standards, Second Edition* (1991) pp: 138-150

[35] National Association of Pretrial Services Agencies *Standards on Pretrial Release, Third Edition* (2004)

[36] Supra note 5

[37] Bureau of Justice Assistance, *Pretrial Services Programming at the Start of the 21st Century: A Survey of Pretrial Services Programs* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 2003)

[38] Supra note 35

Risk Assessment

The purpose of a pretrial risk assessment instrument is to identify the likelihood of failure to appear and the danger to the community posed by a defendant during the pretrial stage. A pretrial risk assessment instrument should use research-based objective criteria to identify the likelihood of failure to appear in court and danger to the community pending trial.[39]

The use of an objective and research-based risk assessment instrument by pretrial services programs to assist the judicial officer in making the bail decision is strongly recommended by both ABA and NAPSA Standards and has proven effective through research. Pretrial risk assessment research conducted over the past 30 years has identified common factors that are good predictors of court appearance and/or danger to the community as follows:

- Current Charge(s)
- Outstanding Warrants at Time of Arrest
- Pending Charges at Time of Arrest
- Active Community Supervision at Time of Arrest (e.g. Pretrial, Probation, Parole)
- History of Criminal Convictions
- History of Failure to Appear
- History of Violence
- Residence Stability
- Employment Stability
- Community Ties
- History of Substance Abuse

1. *A pretrial risk assessment instrument should be proven through research to predict risk of failure to appear and danger to the community pending trial* – An appropriate risk assessment instrument for pretrial services is one that is developed using generally accepted research methods to predict the likelihood of failure to appear and danger to the community pending trial. A pretrial risk assessment instrument should be validated to ensure it is an accurate predictor of pretrial risk in the community or communities in which it is being applied. Pretrial risk assessment instruments developed using generally accepted research methods that are specific to the field of pretrial services include: Harris County, Texas;[40] New York City, New York;[41] Commonwealth of Virginia;[42] Hennepin County, Minnesota;[43] and Philadelphia, Pennsylvania.[44]

[39] Supra Note 5, pg.46 "Programs that assess risks of pretrial misconduct in an exclusively subjective manner are more than twice as likely to have a jail population that exceeds its capacity than those programs that assess risk exclusively through an objective risk assessment instrument—56 percent, compared to 27 percent. Forty-seven percent of programs that add subjective input to an objective instrument are in jurisdictions with overcrowded jails."

[40] See Steven Jay Cuvelier and Dennis W. Potts, *Bail Classification Profile Project: Harris County, Texas* (Alexandria, VA: State Justice Institute, 1993) and Steven Jay Cuvelier and Dennis W. Potts, *A Reassessment of the Bail Classification Instrument and Pretrial Practices in Harris County, Texas* (Huntsville, TX: Sam Houston State University, 1997)

[41] See Qudsia Siddiqi, *Assessing Risk of Pretrial Failure to Appear in New York City* (New York City, NY: New York City Criminal Justice Agency, 1999) and Qudsia Siddiqi, *Prediction of Pretrial Failure to Appear and an Alternative Pretrial Release Risk-Classification Scheme in New York City: A Reassessment Study* (New York City, NY: New York City Criminal Justice Agency, 2002)

2. *The instrument should equitably classify defendants regardless of their race, ethnicity, gender, or financial status* – An instrument that is proven through research to effectively predict the likelihood of failure to appear and danger to the community for an entire population may also be found to result in disparate classification and treatment of certain defendants. For an example, an instrument may accurately categorize defendants generally, but may also over-classify defendants of a particular race or socioeconomic status. Over-classification involves the classification of a group of defendants into higher risk levels than the actual risk level of the group. The result of such over-classification is the unequal and unfair treatment of certain defendants; frequently minorities and the poor. A risk assessment instrument should be proven through research methods to equitably classify defendants regardless of their race, ethnicity, gender or financial status.[45]

3. *Factors utilized in the instrument should be consistent with applicable state statutes* – Bail statutes and pretrial services acts, if applicable, should be consulted to ensure that factors included in a pretrial risk assessment instrument are allowable for the purposes of bail consideration.

4. *Factors utilized in the instrument should be limited to those that are related either to risk of failure to appear or danger to the community pending trial* – Remembering the purpose of a pretrial risk assessment instrument, factors utilized in an instrument should relate to either the likelihood of failure to appear or danger to the community during the pretrial stage. Factors that are often considered for post-conviction offenders, such as those related solely to recidivism or criminogenic needs, which do not demonstrate a relationship to predicting pretrial risk (court appearance or danger to the community) should not be included in pretrial risk assessment instruments.

Bail Recommendation

A recommendation regarding bail is the final component of a pretrial investigation and is founded upon information collected during the investigation process which includes the criminal history record, defendant interview, verification of information, and the risk assessment. Pretrial services programs are tasked with identifying the least restrictive terms and conditions of bail that will reasonably assure a defendant will appear for court and not present a danger to the

[42] See Marie VanNostrand, *Assessing Risk Among Pretrial Defendants in Virginia: The Virginia Pretrial Risk Assessment Instrument* (Richmond, VA: Virginia Department of Criminal Justice Services, 2003)

[43] See Rebecca Goodman, *Hennepin County Bureau of Community Corrections Pretrial Release Study* (Minneapolis, MN: Planning and Evaluation Unit, 1992)

[44] See John Goldkamp and Michael White, *Charge Seriousness, Risk Classification, and Resource Implications: Three Outstanding Issues in Implementing Pretrial Release Guidelines* (Philadelphia, PA: Crime and Justice Research Institute, 1994) and John Goldkamp and Michael White, *Pretrial Release and Detention During the First Year of Pretrial Release Guidelines in Philadelphia: Review and Recommendations* (Philadelphia, PA: Crime and Justice Research Institute, 1997)

[45] See Supra note 42, pp. 11-14 for a research methods model of ensuring equitable classification of groups

community during the pretrial stage. Terms and conditions of bail are intended to mitigate the risk of failure to appear and potential danger to the community posed by the defendant.

There are three primary terms of bail utilized by defendants to secure release pending trial:

1. Release on Own Recognizance (OR) – A defendant can be required to provide a promise to appear in court, signed or unsigned, to secure his/her release pending trial. A defendant is said to be released on his or her own recognizance, also known as Personal Recognizance (PR).

2. Unsecured Bail – A defendant can be required to sign a bond stating that they promise to appear in court and agree that if they fail to appear, they will pay the Court an agreed upon bail bond amount. An unsecured bail does not require money be offered up front; payment is required only if the defendant fails to appear in court.

3. Secured Bail – A defendant can be required to pay the Court a designated amount of money or post security in the amount of the bail in order to secure release pending trial. Security can be in the form of cash or property and may be posted by the defendant or by someone on his/her behalf, e.g., a relative or a private surety (not all states allow private sureties to post security on behalf of defendants).

In addition to the terms of bail, conditions of bail may be required to further assure court appearance and safety to the community. State bail statutes usually provide guidance regarding appropriate conditions of release pending trial. The U.S. Criminal Code offers an example of release conditions that can be required to mitigate the risk posed by a defendant as follows:

If the judicial officer determines that the release on promise to appear or unsecured bond will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person—

> (A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release; and
>
> (B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—
>
> > (i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the Court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;
> >
> > (ii) maintain employment, or, if unemployed, actively seek employment;

(iii) maintain or commence an educational program;

(iv) abide by specified restrictions on personal associations, place of abode, or travel;

(v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) comply with a specified curfew;

(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance … without a prescription by a licensed medical practitioner;

(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, property …;

(xii) execute a bail bond with solvent sureties…;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community. [46]

It is also important to distinguish between the bail decision and the bail outcome. The decision to release or detain a person pending trial and the identification of the terms and conditions a defendant must meet to secure release is the bail decision. Whether the person secures his/her release or is detained pending trial is the bail outcome. The bail decision and bail outcome can be different. When a judicial officer sets a financial term of bail the bail decision is release; however, if the defendant remains detained due to his/her inability to meet the term the bail outcome is detention.

[46] U.S. Code Title 18, Part II, Chapter 207, § 3142.C Release or detention of a defendant pending trial: Release on Conditions

Research has identified financial terms of bail as resulting in disparate outcomes due to a person's financial status and may be a form of de facto racial and ethnic discrimination.[47] One such study examined the effects of race and ethnicity on both bail decisions and bail outcomes and found that Hispanic and black defendants are more likely than white defendants to be held on bail because of an inability to post bail. The defendant's financial status and ability to post bail accounted for the majority of black and Hispanic defendants' overall greater likelihood of pretrial detention.[48] For these reasons, pretrial services programs must be mindful of not only the potential resulting bail decision but also the potential bail outcome based on the bail recommendation.

Additionally, the implications of detention pending trial deserve consideration by pretrial services programs when making a bail recommendation. Detention pending trial can reduce a defendant's ability to prepare an adequate defense and be disruptive to family, employment, and community ties and negatively stigmatize the defendant.[49] Research has shown that defendants who are detained pending trial are more likely to plead guilty and receive more severe sentences if convicted (including being sentenced to prison) when compared to defendants who are released pending trial. These facts remain true even when other relevant factors are controlled for including the current charge, prior criminal history, family ties, and type of counsel.[50]

The bail recommendation, including the terms and conditions of bail, must be guided by the pretrial legal foundation and principles with an emphasis on the right to bail that is not excessive and the right to equal protection under the law. Pretrial detention is allowable only in cases when a judicial officer finds that no term or conditions of bail will reasonably assure the appearance of the person in court and the safety of the community. The Supreme Court in *United States v. Salerno* reminds us that liberty is the norm and detention prior to trial the carefully limited exception.

1. *Bail recommendations should be based on an explicit, objective, and consistent policy for identifying appropriate release conditions*[51] – The identification of the bail recommendation, including release options and conditions, should be based on detailed policies and be supported by objective and consistently applied criteria. The use of an

[47] Stephen Demuth, "Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A comparison of Hispanic, Black, and White Felony Arrestees," *Criminology*, 41 (2003), pp.873-907

[48] Ibid., p. 899

[49] Ibid., p. 876

[50] See Stephen Demuth, "Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A comparison of Hispanic, Black, and White Felony Arrestees," *Criminology*, 41 (2003), pp.873-907; E. Britt Patterson and Michael J. Lynch, "Bias in formalized bail procedures," *Race and Criminal Justice* (1991); S.H. Clark and S.T. Kurtz "The Importance of Interim Decisions to Felony Trial Court Dispositions" *Journal of Criminal Law and Criminology,* 74 (1983), pp. 476-518; A. Rankin, "The Effects of Pretrial Detention," *New York University Law Review*, 39 (1964); Caleb Foote, "Compelling Appearance in Court – Administration of Bail in Philadelphia," *University of Pennsylvania Law Review* 102 (1954), pp. 1031-1079

[51] Supra note 35, pp. 60-61

explicit and objective policy to develop the bail recommendation is intended to remove subjectivity and reduce the potential for disparity in bail recommendations.

2. *Conditions of bail should be the least restrictive reasonably calculated to assure court appearance and community safety*[52] –Release on personal recognizance or promise to appear should first be considered for all defendants. Additional conditions may be recommended only if the information contained in the pretrial investigation, primarily the results of the risk assessment, indicate that this type of release is not sufficient to assure court appearance and community safety.

3. *Financial terms of bail should only be recommended when no other term will reasonably assure court appearance*[53] – If a financial term of bail is to be recommended, it should be based on the minimum amount reasonably calculated to assure court appearance and upon consideration of the defendant's ability to post the bail. Under no circumstances should a financial term be used to address risk to the community or to detain a person, and should not result in pretrial detention solely due to the defendant's inability to pay.

4. *Conditions of bail should be restricted to those that are related to the risk of failure to appear or danger to the community posed by the defendant*[54] – Since the purpose of bail is to assure court appearance and community safety during the pretrial stage, bail conditions should be related to the risk posed by an individual defendant and intended to mitigate pretrial risk. Bail conditions that are not related to mitigating pretrial risk, including those that are punitive or solely rehabilitative in nature, should not be recommended. It should be noted that research related to drug testing as a condition of bail has produced inconsistent results.[55] Some research has concluded that providing drug testing randomly to pretrial defendants as a condition of bail, regardless of any individually identified risk, does not have an impact on reducing pretrial crime or failure to appear.[56] Similarly, providing services to defendants that are not based on an individually identified risk does not have an impact on reducing pretrial crime or failure to appear.[57]

---

[52] This practice is consistent with the legal principle of the right to bail that is not excessive

[53] Ibid., footnote 52

[54] Ibid., footnote 52

[55] See supra note 5, p. 43; National Institute of Justice, *Research in Brief: Predicting Pretrial Misconduct with Drug Tests of Arrestees* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 1996); National Institute of Justice, *The Impact of Systemwide Drug Testing in Multnomah County, Oregon* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 1995)

[56] Chester Britt, III, Michael R. Gottfredson, and John S. Goldkamp, " Drug Testing and Pretrial Misconduct: An Experiment on the Specific Deterrent Effects of Drug Monitoring Defendants on Pretrial Release," *Journal of Research in Crime and Delinquency*, 29 (1992), pp. 62-78

[57] James Austin, Barry Krisberg, and Paul Litsky, "The Effectiveness of Supervised Pretrial Release," *Crime & Delinquency*, 31 (1985), pp. 519-537

Pretrial Supervision

Pretrial supervision can be ordered by a judicial officer as a condition of bail. Remembering that the purpose of bail is to provide reasonable assurance of court appearance and community safety during the pretrial stage, pretrial supervision serves as a mechanism to monitor bail conditions for released defendants.

1. *Defendant contacts should be required at a frequency that is reasonably necessary to monitor the conditions of release*[58] – Contacts with the defendant, usually face-to-face or by phone, should be required as often as is deemed necessary to effectively monitor the conditions of bail. Contact with the defendant that is required more frequently than necessary to serve this purpose may be considered excessive. There is a dearth of research on the most effective frequency and types of contacts to monitor bail conditions. One research study concluded that pretrial supervision generally made a positive contribution in minimizing pretrial failure; however, variations in the frequency of contacts with the defendant produced no statistically significant difference in pretrial failure.[59] More research is needed in the area of effective pretrial supervision related to the types and frequencies of defendant contacts.

2. *Defendants should be reminded of their court date(s)* – Reminding defendants of their court dates either by phone, mail, e-mail, or during face-to-face contacts has been proven through research to reduce the incidence of failure to appear.[60]

Summary and Discussion of Pretrial Services Legal and Evidence Based Practices

Pretrial services programs conduct pretrial investigations, including risk assessments and bail recommendations, for the purpose of providing information to judicial officers so that they can make appropriate pretrial release/detention decisions. Pretrial supervision serves as a mechanism to monitor conditions of bail for defendants released pending trial. When providing pretrial investigations and supervision it is critical for programs to remember that these services are not intended to be punitive or solely rehabilitative in nature, instead, the purpose is to meet the intended outcomes - provide reasonable assurance of court appearance and community safety pending trial.

The research supporting pretrial services LEBP should be expanded significantly and much work is needed in the area of risk assessment and supervision. There are two areas relating to risk assessment that are critical yet to date have been relatively unexplored; the nature and severity of the danger to the community being assessed and the potential portability of an instrument from one jurisdiction to another.

---

[58] Supra note 52

[59] John S. Goldkamp and Michael D. White, *Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments*, (Philadelphia, PA: Crime and Justice Research Institute, 1998)

[60] Supra note 4, pp. 25 – 26

Although pretrial risk assessment instruments in most instances do well in predicting the likelihood of danger to the community (often measured by a new arrest pending trial) there is no known research that explores the nature and severity of the new arrest. For example, a person might be a high risk for being arrested for a new offense pending trial; however, what is not known is whether the new arrest is likely to be for a low level traffic offense or a high level violent offense. This is a critical area to be explored in future pretrial risk assessment research.

The potential portability of an instrument from one jurisdiction to another has only recently been tested. Until the late 1990's it was generally accepted that a pretrial risk assessment instrument developed in one jurisdiction would not be valid in another. The Virginia Pretrial Risk Assessment Instrument was the first research-based multi-jurisdictional instrument that was proven to be valid in multiple and varying jurisdictions.[61] The argument for the potential portability of a pretrial risk assessment instrument was strengthened when the Virginia Pretrial Risk Assessment Instrument, known as the "Virginia Model", was implemented in Summit County, Ohio and recently validated for that population.[62] More research in this area is also needed.

Effective supervision practices for pretrial services are relatively unknown with the exception of those documented above. Until additional research can be conducted on the most effective LEBP for pretrial services we will look to another stage in the criminal justice system, the post-trial stage, to examine the potential applicability of their evidence-based practices.

PRINCIPLES FOR EBP IN COMMUNITY CORRECTIONS

Research in the field of community corrections has identified eight evidence-based principles for effective intervention.[63] This research indicates that certain programs and intervention strategies, when applied to a variety of offender populations, reliably produce sustained reductions in recidivism. Although the field of pretrial services has some unique legal and evidence based practices as described previously, it may be possible to benefit from the research conducted for community corrections to supplement pretrial services specific LEBP. The following section contains brief descriptions of the principles for EBP in community corrections along with considerations for the application of these principles based on the pretrial legal foundation and distinctions of the pretrial services field discussed previously.[64] It should be noted that research is needed to determine the effectiveness of these principles in producing the intended outcomes for pretrial services.

---

[61] Supra note 42

[62] Christopher T. Lowenkamp and Kristin Bechtel, *A Validation of the Summit County Pretrial Risk Assessment Instrument* (Cincinnati, OH: University of Cincinnati, 2007)

[63] Supra note 29

[64] See "Implementing Evidence-Based Practice in Community Corrections: The Principles of Effective Intervention" (Crime and Justice Institute, 2004) and "Implementing Evidence-Based Practice in Community Corrections: Quality Assurance Manual" (Crime and Justice Institute, 2005) for comprehensive discussions on EBP in community corrections.

Principle One: Assess Actuarial Risk/Needs

> *Community Corrections programs are encouraged to develop and maintain a complete system of ongoing offender risk screening/triage and needs assessments. Screening and assessment tools that focus on dynamic and static risk factors, profile criminogenic needs, and have been validated on similar populations are preferred.*

Similar to community corrections, pretrial services programs are encouraged to use actuarial risk assessment instruments which have been validated on similar populations. The significant distinction between the two types of assessments is the intended outcome. A pretrial risk assessment instrument is intended to identify the likelihood of pretrial failure (failure to appear and danger to the community) posed by a defendant during the pretrial stage. A pretrial risk assessment instrument should meet the following criteria:

1. be proven through research to predict risk of failure to appear and danger to the community pending trial;

2. equitably classify defendants regardless of their race, ethnicity, gender, or financial status;

3. only utilize factors which are consistent with applicable state statutes; and

4. only utilize factors that relate either to risk of failure to appear or danger to the community pending trial.

Both the community corrections and pretrial services fields are encouraged to use actuarial risk assessment instruments which have been validated on similar populations; however, the pretrial risk assessment instrument will likely vary due to the intended outcome and in order to ensure compliance with the pretrial legal foundation and underlying legal principles.

Principle Two: Enhance Intrinsic Motivation

> *Community corrections staff should relate to offenders in interpersonally sensitive and constructive ways to enhance intrinsic motivation in offenders. Feelings of ambivalence that usually accompany change can be explored through motivational interviewing, a style and method of communication used to help people overcome their ambivalence regarding behavior changes. Research strongly suggests that motivational interviewing techniques, rather than persuasion tactics, effectively enhance motivation for initiating and maintaining behavior changes.*

Motivational interviewing has been proven effective in producing intended outcomes in community corrections and many other non-criminal justice related fields. Motivational interviewing in pretrial services may be a beneficial technique for staff during supervision when attempting to enhance motivation for compliance with conditions, court appearance, and a reduction in danger to the community. Care should be taken by staff to ensure motivational interviewing techniques are used in such a way that the pretrial legal principles, specifically the

presumption of innocence and the right against self-incrimination, are honored. A motivational interviewing training curriculum may need to be modified to ensure compliance with the pretrial legal foundation.

Principle Three: Target Interventions

> *The third principle for evidence-based practices in community corrections has several underlying principles as follows:*
>
> - *Risk Principle: Prioritize supervision and treatment resources for higher risk offenders.*
> - *Need Principle: Target interventions to criminogenic needs.*
> - *Responsivity Principle: Be responsive to temperament, learning style, motivation, culture, and gender when assigning programs.*
> - *Dosage: Structure 40-70% of high-risk offenders' time for 3-9 months.*
> - *Treatment: Integrate treatment into the full sentence/sanction requirements.*

The application of this principle should be modified due to the pretrial legal foundation. Remember that conditions of bail should be related to the risk of failure to appear or danger to the community posed by the defendant during the pretrial stage, be the least restrictive reasonably calculated to assure court appearance and community safety, and be related to the risk posed by an individual defendant and intended to mitigate pretrial risk.

The application of the *risk principle* to pretrial services, prioritizing supervision and treatment resources for higher risk defendants, is consistent with the intended outcome. Modifications to the application of the *need principle* are recommended for pretrial services to ensure the principle does not violate the pretrial legal foundation. Conditions of bail, including supervision and treatment, must relate to the risk of pretrial failure. Criminogenic needs should be targeted only when they are related to a risk of pretrial failure. This qualification is necessary because of the distinctions between the intended outcomes of pretrial services and community corrections. It appears that the *responsivity principle* is generally applicable to pretrial services. The *dosage and treatment principles* must be modified due to the general length of the pretrial stage, the purpose of pretrial supervision and the legal rights of the defendant. Treatment should be required and a defendant's time structured based on the specific risk posed and be the least restrictive reasonably calculated to assure court appearance and community safety pending trial.

Principle Four: Skill Train with Directed Practice (use Cognitive Behavioral treatment methods)

> *Community corrections programs are encouraged to provide evidence-based programming that emphasizes cognitive behavioral strategies. To successfully deliver treatment to offenders, staff must understand antisocial thinking, social learning, and appropriate communication techniques. Skills are not just taught to the offender, but are practiced or role-played and the resulting pro-social attitudes and behaviors are positively reinforced by staff.*

Programs that utilize cognitive behavioral strategies should be recommended by pretrial services and/or ordered by the Court with one caveat - participation in some programs may be seen as an admission that the defendant has committed the behavior of which he or she has been accused.[65] When applying this principle to pretrial services modifications to the cognitive behavioral strategies used in programs may be necessary to ensure they honor the defendant's rights to the presumption of innocence and against self-incrimination. It is common for a cognitive behavioral based anger management program, for example, to require a participant to admit guilt related to the crime for which they have been convicted. Failure to admit guilt results in the unsuccessful completion of the program. Consistent with the legal principles of pretrial services, behavioral modification programming should not require an admission of guilt as a program component nor should a defendant have his/her bond revoked for failing to admit guilt related to the current charge.

Principle Five: Increase Positive Reinforcement

> *Behaviorists recommend applying a much higher ratio of positive reinforcements to negative reinforcements in order to better achieve sustained behavioral change. Research indicates that a ratio of four positive to every one negative reinforcement is optimal for promoting behavior changes. With exposure to clear rules that are consistently (and swiftly) enforced with appropriate graduated consequences, offenders and people in general, will tend to comply in the direction of the most rewards and least punishments.*

This principle has been applied to many fields outside of community corrections and it is reasonable to believe that it could also be effectively applied to pretrial services supervision. Pretrial services programs need to be cautious, however, with the application of "appropriate graduated consequences". The modification of bail conditions should only be made by, or with the approval of, a judicial officer. Certain sanctions/consequences may require the approval of the Court before they can be applied to a defendant.

Principle Six: Engage Ongoing Support in Natural Communities

> *Community corrections staff are encouraged to realign and actively engage pro-social supports for offenders in their communities. Research indicates that many successful interventions with extreme populations (e.g., inner city substance abusers, homeless, dual diagnosed) actively recruit and use family members, spouses, and supportive others in the offender's immediate environment to positively reinforce desired new behaviors.*

The application of this principle to defendants during pretrial supervision should be done so with caution. Notification of the arrest to family members or other people in the community may cause harm to a defendant who is presumed innocent. It is recommended that the use of family members, spouses, and supportive others in the defendant's immediate environment to positively reinforce desired new behaviors be done so with the permission of the defendant. To do otherwise would arguably be beyond that which is reasonably necessary to monitor the conditions of bail and may impinge on the rights afforded to defendants during the pretrial stage.

[65] Supra note 5, p. 46

Principle Seven: Measure Relevant Processes/Practices

> *Community corrections programs should maintain accurate and detailed documentation of case information, along with a formal and valid mechanism for measuring outcomes. Programs must routinely assess offender change in cognitive and skill development, and evaluate offender recidivism, if services are to remain effective. In addition to routinely measuring and documenting offender change, staff performance should also be regularly assessed.*

Measuring relevant processes, practices, and outcomes is advisable for programs of all kinds and pretrial services programs are no exception. The measures, including the desired outcomes, vary for pretrial services. Pretrial services programs should measure the results of bail recommendations, defendant compliance with bail conditions, and the impact of interventions, programs, and services in relation to the intended outcomes (court appearance and community safety during the pretrial stage). Staff performance should also be regularly assessed.

Principle Eight: Provide Measurement Feedback

> *Once a method for measuring relevant processes and practices is in place (principle seven) the information must be used to monitor process and change. Providing feedback to offenders regarding their progress builds accountability and is associated with enhanced motivation for change, lower treatment attrition, and improved outcomes. The same is true within an organization. Monitoring delivery of services and fidelity to procedures helps build accountability and maintain integrity to the agency's mission.*

There are no special considerations when applying this principle to pretrial services.

Summary and Discussion of Evidence-based Practices in Community Corrections

It appears that many of the principles of effective intervention developed for community corrections could be applied to pretrial services if the appropriate modifications are made and cautions adhered to. The recommended modifications to the application of these principles are consistent with the pretrial legal foundation and in recognition of the distinctions between the pretrial and post-conviction fields. The uniqueness of the pretrial services field should not inhibited the modification of these principles to pretrial services, in fact, research as to the effectiveness of these principles in producing the intended pretrial outcomes is strongly encouraged.

SUMMARY AND CONCLUSIONS

Bail decisions, to release or detain defendants pending trial, carry enormous consequences for accused persons, the safety of the community, and the integrity of the judicial process. Pretrial services programs perform two critical functions related to bail. They provide information to judicial officers to assist with bail decisions and monitor and supervise defendants released with bail conditions pending trial when Court ordered.

It is critical to recognize that pretrial services programs deal with defendants during the pretrial stage. Pretrial defendants enjoy many legal protections during this stage and programs must respect these protections and operate within the framework provided by the pretrial legal foundation. The six legal principles that constitute the pretrial legal foundation include the presumption of innocence, right to counsel, right against self-incrimination, right to due process of law, right to equal protection under the law, and the right to bail that is not excessive. These rights, as well other legal protections provided to pretrial defendants, must be honored during all aspects of pretrial services program operations.

Pretrial services legal and evidence based practices are interventions and practices that are consistent with the pretrial legal foundation, applicable laws, and methods that research has proven effective in decreasing failures to appear in court and danger to the community during the pretrial stage. Pretrial services related research has identified a number of risk assessment, bail recommendation, and supervision related practices and interventions that are consistent with the pretrial legal foundation and have been proven effective in producing reductions in pretrial failure. There is a dire need to add to the existing body of research and to expand the research into relatively unexplored areas including, but not limited to, refining risk prediction to include the potential severity of the danger to the community posed by pretrial defendants as well as the potential portability and universal application of a pretrial risk assessment instrument.

Evidence-based practices have been identified for community corrections as detailed in the eight principles of effective intervention. Although there are significant distinctions between the pretrial services and post-convictions fields, it is reasonable to believe that pretrial services could potentially benefit from this body of research. Modifications to the application of some of these principles are needed in light of the distinctions between these fields including the legal status of the defendant, the intended outcomes of pretrial services, and the pretrial legal foundation. Additional research is needed to determine the effectiveness of the eight principles of effective intervention as modified for pretrial services in producing reductions in failures to appear in court and danger to the community during the pretrial stage.

The pretrial services field is challenged with striking a balance between honoring the rights of the accused and protecting the safety of our communities. Chief Justice Rehnquist reminds us in U.S. v. Salerno that, as it relates to pretrial defendants, "in our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Yet we also know from this Supreme Court case decision that we must detain pretrial defendants "charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community to which no condition of release can dispel."

Pretrial services programs strive to identify those defendants who can safely be released into the community pending trial with the least restrictive conditions necessary to assure court appearance and the safety of the community while simultaneously identifying the "carefully limited exception" – defendants who must be detained pending trial for the safety of individuals and our community. The pretrial services legal and evidence based practices discussed here provide much needed direction to programs attempting to strike this delicate balance. Additional research is necessary to clarify existing practices and to identify new practices and interventions that are consistent with the pretrial legal foundation and are proven effective in decreasing failures to appear in court and danger to the community during the pretrial stage. It is this vital research that will guide pretrial services future practices and further illuminate the path to pretrial justice.

EXHIBIT 7

Kentucky Pretrial

Risk Assessment Instrument Validation

Prepared by

James Austin
Roger Ocker
Avi Bhati

The JFA Institute

October 29, 2010

This project was supported by Grant No. 2009-DB-BX-K021 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the SMART Office, and the Office for Victims of Crime. Points of view or opinions in this document are those of the author and do not represent the official position or policies of the United States Department of Justice.

Introduction

In 2009, the Kentucky Pretrial Services Agency (KPSA) made a request to the Pretrial Justice Institute (PJI) to receive technical assistance on its risk assessment instrument. PJI has an award from the Bureau of Justice Assistance, U.S. Department of Justice, to provide technical assistance for a wide variety of correctional agencies. The primary partner with PJI is the JFA Institute, which responds to all referrals made by PJI. One of JFA's organizational capabilities is to conduct validation studies of risk assessment instruments. For this reason the KPSA request was forwarded to JFA to complete.

The KPSA has been using a risk assessment instrument for a number of years. The instrument itself was designed based on other pretrial risk assessment instruments that have been validated in other jurisdictions. But the KPSA instrument had never been tested by an external agency on people who had been arrested, detained and subsequently released on pretrial status. Thus the task of this study was to determine the extent to which the current instrument was valid.

Research Methods

Kentucky created pretrial services in 1976 to replace for-profit commercial bail bonding services and is one, of only a few states, that has outlawed commercial bail bonding. Unlike many other jurisdictions, KPSA is part of the state's court system. Furthermore, because it is a statewide agency, all of the its functions and data are standardized. Such a statewide structure greatly enhances the ability to conduct a meaningful validation effort.

Data on the Kentucky pretrial release population were obtained and analyzed to assess the extent to which the instrument needed to be modified and, if so, what items needed to be dropped and what additional items needed to be introduced into a modified instrument.

The data used to complete this analysis were based on all cases where a pretrial interview was conducted by the various pretrial services agencies that are located throughout Kentucky. Specifically, there were 52,344 interviews conducted between July 1, 2009 and September 30, 2009. For these interviews, 38, 478 or 74% were released pre-trial. For each case, it was recorded where the person was re-arrested or failed to appear (FTA).

Table 1 shows the basic demographic attributes of the persons who were interviewed and released pretrial. Also included are the FTA, pretrial re-arrest rates, and a composite FTA/re-arrest rate. As in most jurisdictions, the FTA, re-arrest and combined rates are relatively low. Specifically, the FTA rate is 8%, the re-arrest rate 7%, and the combined rate 14%. The table also shows relative associations of each item and the three measures of success/failure on pretrial release.

Tables 2, 3, 4 and 5 repeat this type of analysis for measures that reflect the current charge (Table 2), substance abuse measures (Table 3), and mental health (Tables 4 and 5). In all of these tables there are some items that have no meaningful statistical relationships and others that do have a statistically significant relationship. However, it should be emphasized that because the base rates are so low, there will be few items that have very strong relationships with pretrial release outcomes.

Tables 6, 7, and 8 summarize this same analysis for the 13-item risk instrument. Here, one can see that the current instrument items and scale are associated with pretrial arrest and FTA rates. There are some items that either have a very modest association or have little variance in the scoring results. For example, item 3. ("Reference verified willingness to attend court or

sign surety bond") has little if any statistical association with the failure rates. The table also shows two additional items (14 and 15), which were test items to see if that would add to the overall risk assessment instrument's predictive capabilities. As indicated, they show that less than 2% of the assessed cases are being scored into one of the two categories. With such a lack of variance they are unlikely to have much predictive abilities.

In summary, the current 13-item instrument is producing a strong association between the risk levels of low, moderate and high and FTA and pretrial arrest rates. It is also noteworthy that the vast majority of the released defendants are either low (45%) or moderate risk (22%) to either Fail To Appear (FTA) or be re-arrested for a new crime while under pretrial release status.

Use of Special Conditions

The data files also contained information on the use of special conditions. Table 9 shows the extent to which they are being used with most of the conditions being drug testing and special monitoring requirements. We also looked at those persons who received the special conditions of drug testing, special monitoring and notification requirements but are low risk cases. These three conditions have the most low risk cases to do such an analysis. As shown in Table 10, about half of the special condition populations are scored as low risk. More significantly, these low risk cases have higher failure rates than the "average" low risk pretrial releasee. While one cannot say that the special conditions caused the higher rates, the statistical association suggests that imposing such conditions is not beneficial.

Can The Current Instrument Be Improved?

There are two areas to be explored here. First is whether the current instrument can be made more efficient by reducing the number of items being used by the staff? Making the instrument more parsimonious would reduce the burden to staff without jeopardizing the validity of the instrument. Second, are there any items that are not being used that might enhance the validity of the instrument?

To answer these two questions required more sophisticated multivariate analysis. The first task was to re-weight the items included in the current instrument. In doing so, a few considerations should be pointed out:

1. When there was a conflict among the risk models, e.g., a variable has a negative effect on FTA but a positive effect on re-arrest, the re-arrest risk measure model was used to trump the FTA risk model. Examples include items #1 and #4.
2. In some cases, a slight change in the statistical significance cut-off value of 95% would have brought an item into the model (e.g., Risk Item 15). In such cases, the variable was included in the item in accordance with consideration 1 noted above.

Once a modified instrument was constructed, additional variables were included in the analysis—one variable group at a time—to assess their contribution to the discriminating power of the instrument. These additional variables included the following:

1. *Substance abuse related questions*: These variables did not add sufficiently to the model's predictive power and were therefore ignored.
2. *Mental health related questions*: These variables did not add sufficiently to the model's predictive power and were therefore ignored.
3. *Mental health history related questions*: As a group, mental health history related questions improved the explanatory power of the model. However, individually only two of them were found to be statistically significant. These include "Received special

education services in school for emotional/behavioral problems?" and "Spoken to counselor or psychologist about personal problem?".

4. *Domestic violence related questions*: As a group, domestic violence related questions did improve the models. However, only two of them were statistically significant individually. These included "Any record of prior DV restraining order") and "Was a weapon used?". However, only a handful (1.2%) of suspects in the sample had affirmative responses to these questions.
5. *Removal of current risk instrument items*: The current risk instrument included items 1 through 13. Items 14 and 15 "Violated conditions of release in past 12 months—and if so, was bond revoked?" were deleted from the revised current instrument. These items were either statistically insignificant or had incorrect effect directions. Similarly, item 3 added little to the predictive attributes of the instrument. So all three can be removed from further consideration.

Based on the above considerations, one new version of the instrument was developed which simply removed item 3 and re-weighted the remaining 12 items. In addition to new weights for the revised risk assessment instruments, the cut-points needed to classify suspects as low, moderate, or high risk were modified as well. Tables 10 and 11 show these changes and provide the cut-points for the 12-item instrument.

Finally, Figures 1, 2, and 3 provide a side-by-side comparison of the current and the revised instruments on risk measures. In general, the modified version performs basically the same as the current version of the risk assessment instrument but without using item 3. It should also be emphasized that although some of the other items that have a significant bi-variate relationship but were excluded form the final instrument can be used as a basis for over-riding the risk level or making a final risk recommendation.

TABLE 1
FAILURE RATE BY DEMOGRAPHICS

Item	N	%	FTA rate	Rearrest Rate	Either FTA or Rearrest
Base	**38,478**		**8.0%**	**7.0%**	**14.1%**
Sex					
Female	10,678	27.8%	7.7%	6.5%	13.3%
Male	27,695	72.0%	8.2%	7.3%	14.4%
Unknown	105	0.3%	3.8%	2.9%	5.7%
Race					
American Indian	117	0.3%	6.0%	3.4%	9.4%
Asian	64	0.2%	4.7%	3.1%	7.8%
Black	6,854	17.8%	9.8%	7.2%	16.0%
Other	738	1.9%	11.5%	2.0%	13.3%
Unknown	448	1.2%	5.8%	1.8%	7.4%
White	30,257	78.6%	7.6%	7.2%	13.8%
Marital Status					
Divorced	5,810	15.1%	7.6%	7.4%	13.9%
Married	7,889	20.5%	6.8%	6.2%	12.1%
Separated	2,501	6.5%	8.9%	8.3%	15.9%
Single	20,714	53.8%	8.5%	7.3%	14.9%
Unknown	1,112	2.9%	6.6%	3.1%	9.4%
Widowed	452	1.2%	8.8%	8.2%	15.7%
Education					
AA	607	1.6%	8.7%	6.1%	13.5%
BA/BS	906	2.4%	5.5%	4.0%	8.5%
Vocational	328	0.9%	7.6%	5.2%	11.9%
GED	3,760	9.8%	8.9%	8.9%	16.2%
HS	9,939	25.8%	7.4%	6.7%	13.3%
Less than HS	10,369	26.9%	9.1%	8.9%	16.8%
Null	6,782	17.6%	7.8%	4.8%	11.9%
Post graduate	334	0.9%	3.6%	3.6%	7.2%
Some college	5,453	14.2%	7.4%	6.6%	13.2%
On Supervised Probation					
No	36,379	94.5%	8.0%	6.8%	13.9%
Yes	2,099	5.5%	8.6%	10.5%	17.8%
Supplied an email address					
No	30,215	78.5%	7.9%	6.6%	13.5%
Yes	8,263	21.5%	8.7%	8.6%	16.0%
Verified Address					
No	11,492	29.9%	8.9%	5.7%	13.3%
Yes	26,986	70.1%	7.7%	7.9%	14.4%
Verified Occupation					
No	12,504	32.5%	9.1%	5.5%	13.8%
Yes	25,974	67.5%	7.5%	7.8%	14.2%

TABLE 2
FAILURE RATE BY CHARGE

Item	N	%	FTA rate	Rearrest Rate	Either FTA or Rearrest
Base	**38,478**		**8.0%**	**7.0%**	**14.1%**
Charge Level					
Felony	9,122	23.7%	6.0%	10.1%	15.2%
Misdemeanor	26,346	68.5%	8.8%	6.4%	14.1%
O	1,512	3.9%	5.6%	2.8%	8.1%
V	1,356	3.5%	9.5%	5.0%	13.6%
Unknown	152	0.4%	9.9%	3.3%	12.5%
Charge Class					
A	14,388	37.4%	7.5%	6.9%	13.3%
B	12,650	32.9%	9.9%	6.0%	14.9%
C	2,091	5.4%	4.7%	11.0%	14.5%
D	6,317	16.4%	6.7%	9.7%	15.5%
X	2,880	7.5%	7.5%	3.9%	10.7%
Unknown	152	0.4%	9.9%	3.3%	12.5%

TABLE 3
FAILURE RATE BY SUBSTANCE ABUSE ITEMS

Item	N	%	FTA rate	Rearrest Rate	Either FTA or Rearrest
Base	**38,478**		**8.0%**	**7.0%**	**14.1%**
Have you ever felt you should cut down on your drinking?					
No	25,182	65.4%	8.1%	7.2%	14.3%
Yes	8,007	20.8%	7.8%	8.8%	15.4%
Null	5,289	13.7%	7.8%	3.7%	10.9%
Have people annoyed you criticizing your drinking/drug use?					
No	29,230	76.0%	8.0%	7.2%	14.1%
Yes	3,959	10.3%	8.2%	10.3%	17.0%
Null	5,289	13.7%	7.8%	3.7%	10.9%
Have you felt guilty about your drinking/drug use?					
No	26,649	69.3%	8.0%	7.1%	14.1%
Yes	6,540	17.0%	8.2%	9.5%	16.4%
Null	5,289	13.7%	7.8%	3.7%	10.9%
Drink in the morning to get rid of hangover/use drugs to change effects of other drugs					
No	30,997	80.6%	7.9%	7.4%	14.3%
Yes	2,165	5.6%	9.6%	10.4%	18.3%
Null	5,316	13.8%	7.8%	3.7%	10.9%
Willing to participate in residential treatment					
No	27,179	70.6%	8.1%	7.1%	14.2%
Yes	6,008	15.6%	7.9%	9.8%	16.4%
Null	5,291	13.8%	7.8%	3.7%	10.9%

TABLE 4
FAILURE RATE BY MENTAL HEALTH ITEMS

Item	N	%	FTA rate	Rearrest Rate	Either FTA or Rearrest
Base	**38,478**		**8.0%**	**7.0%**	**14.1%**
Past 30 days how often do you feel nervous					
None of the time	21,046	54.7%	8.1%	6.9%	14.1%
A little of the time	3,856	10.0%	7.7%	8.1%	14.6%
Some of the time	3,831	10.0%	7.9%	8.5%	15.2%
Most of the time	1,716	4.5%	7.4%	9.1%	15.2%
All of the time	2,737	7.1%	8.6%	10.0%	17.2%
Null	5,292	13.8%	7.8%	3.7%	10.9%
Past 30 days how often do you feel hopeless					
None of the time	27,050	70.3%	8.0%	7.3%	14.3%
A little of the time	2,195	5.7%	7.5%	8.0%	14.5%
Some of the time	1,972	5.1%	8.6%	9.4%	16.7%
Most of the time	870	2.3%	7.8%	8.6%	15.2%
All of the time	1,099	2.9%	9.3%	10.3%	18.5%
Null	5,292	13.8%	7.8%	3.7%	10.9%
Past 30 days how often do you feel restless or fidgety					
None of the time	23,839	62.0%	8.2%	7.2%	14.3%
A little of the time	2,839	7.4%	6.8%	7.7%	13.5%
Some of the time	3,180	8.3%	8.1%	8.7%	15.6%
Most of the time	1,364	3.5%	7.6%	9.0%	15.5%
All of the time	1,964	5.1%	8.9%	9.4%	16.8%
Null	5,292	13.8%	7.8%	3.7%	10.9%
Past 30 days how often do you feel so depressed nothing cheers you up					
None of the time	26,819	69.7%	8.1%	7.2%	14.3%
A little of the time	2,088	5.4%	8.0%	9.2%	16.2%
Some of the time	2,065	5.4%	7.5%	8.7%	15.5%
Most of the time	939	2.4%	6.8%	9.4%	15.1%
All of the time	1,275	3.3%	9.3%	8.5%	16.6%
Null	5,292	13.8%	7.8%	3.7%	10.9%
Past 30 days how often do you feel everything was an effort					
None of the time	27,194	70.7%	8.0%	7.3%	14.3%
A little of the time	1,742	4.5%	7.0%	9.8%	15.8%
Some of the time	2,016	5.2%	9.1%	8.7%	16.4%
Most of the time	908	2.4%	8.4%	8.1%	15.4%
All of the time	1,326	3.4%	8.1%	8.7%	15.7%
Null	5,292	13.8%	7.8%	3.7%	10.9%
Past 30 days how often do you feel worthless					
None of the time	28,903	75.1%	8.1%	7.3%	14.4%
A little of the time	1,344	3.5%	6.8%	10.5%	16.3%
Some of the time	1,445	3.8%	8.7%	8.0%	15.6%
Most of the time	598	1.6%	6.9%	8.9%	14.2%
All of the time	896	2.3%	9.4%	9.6%	17.6%
Null	5,292	13.8%	7.8%	3.7%	10.9%

TABLE 5
FAILURE RATE BY MENTAL HEALTH HISTORY

Item	N	%	FTA rate	Rearrest Rate	Either FTA or Rearrest
Base	**38,478**		**8.0%**	**7.0%**	**14.1%**
Has doctor prescribed meds for emotional problem					
No	24,337	63.2%	8.0%	7.0%	14.1%
Yes	8,547	22.2%	8.0%	9.3%	15.9%
Have you been hospitalized for emotional problem					
No	29,448	76.5%	8.0%	7.3%	14.2%
Yes	3,443	8.9%	8.7%	10.0%	17.3%
Did you have special schooling for emotional problems					
No	30,953	80.4%	8.0%	7.3%	14.3%
Yes	1,937	5.0%	9.6%	11.6%	20.0%
Ever spoken to a counselor or psychologist					
No	24,335	63.2%	8.0%	6.9%	14.0%
Yes	8,551	22.2%	8.2%	9.4%	16.3%
Ever received treatment for drug/alcohol abuse					
No	26,476	68.8%	8.0%	7.1%	14.1%
Yes	6,417	16.7%	8.3%	9.8%	16.7%

TABLE 6
FAILURE RATE BY RISK ASSESSMENT SCORE ITEMS

Item	N	%	FTA rate	Rearrest Rate	Either FTA or Rearrest
1. Verified local address & lived in area for past 12 months					
No	2,856	7.4%	11.1%	6.3%	16.5%
Yes	24,227	63.0%	7.2%	8.1%	14.2%
2. Verified sufficient means of support					
No	13,798	35.9%	8.4%	9.1%	16.2%
Yes	13,287	34.5%	6.9%	6.7%	12.7%
3. Reference verified willingness to attend court or sign surety bond					
No	2,195	5.7%	8.7%	9.2%	16.5%
Yes	24,889	64.7%	7.6%	7.8%	14.3%
4. Current charge class A, B or C felony					
No	24,404	63.4%	8.0%	7.5%	14.4%
Yes	2,677	7.0%	4.6%	11.3%	14.8%
5. Charged w/ new offense while case pending					
No	21,258	55.2%	6.9%	5.6%	11.7%
Yes	5,822	15.1%	10.5%	16.4%	24.5%
6. Active warrant or prior FTA					
No	22,325	58.0%	6.6%	7.5%	13.2%
Yes	4,753	12.4%	12.5%	9.7%	20.3%
7. Prior FTA for traffic violation					
No	22,465	58.4%	6.9%	7.4%	13.4%
Yes	4,614	12.0%	11.5%	10.1%	19.7%
8. Prior misdemeanor conviction					
No	8,769	22.8%	6.3%	4.7%	10.4%
Yes	18,311	47.6%	8.3%	9.4%	16.4%
9. Prior felony conviction					
No	20,416	53.1%	7.1%	6.9%	13.1%
Yes	6,664	17.3%	9.3%	10.9%	18.6%
10. Prior violent crime conviction					
No	21,770	56.6%	7.4%	7.0%	13.4%
Yes	5,309	13.8%	8.7%	11.6%	18.8%
11. History of drug/alcohol abuse					
No	23,865	62.0%	7.5%	7.2%	13.7%
Yes	3,214	8.4%	9.1%	13.0%	20.4%
12. Prior conviction of felony escape					
No	26,536	69.0%	7.6%	7.8%	14.2%
Yes	541	1.4%	12.6%	14.4%	25.0%
13. On probation/parole for felony conviction					
No	24,933	64.8%	7.5%	7.6%	14.0%
Yes	2,142	5.6%	9.6%	11.0%	19.4%

Item	N	%	FTA rate	Rearrest Rate	Either FTA or Rearrest
14. Test Item: Violated conditions of pretrial release in last 12 mos.					
No	32,516	84.5%	8.1%	7.4%	14.5%
Yes	671	1.7%	7.6%	14.0%	20.3%
15. Test Item: If yes, was bond revoked?					
No	32,383	84.2%	8.0%	7.6%	14.6%
Yes	153	0.4%	5.2%	11.1%	15.7%

TABLE 7
FAILURE RATE BY RISK ASSESSMENT SCORE

Risk Score	N	%	FTA rate	Rearrest Rate	Either FTA or Rearrest
Base	**38,478**		**8.0%**	**7.0%**	**14.1%**
0	2,898	7.5%	4.0%	2.9%	6.8%
1	4,909	12.8%	4.9%	3.9%	8.4%
2	3,863	10.0%	6.5%	5.0%	10.8%
3	2,143	5.6%	7.0%	6.8%	12.7%
4	1,780	4.6%	7.1%	6.1%	12.1%
5	1,838	4.8%	8.9%	8.3%	16.4%
6	2,066	5.4%	8.9%	9.8%	17.4%
7	1,887	4.9%	9.9%	11.3%	19.3%
8	1,292	3.4%	10.8%	13.1%	22.0%
9	1,074	2.8%	11.6%	14.5%	23.9%
10	878	2.3%	10.6%	13.8%	22.0%
11	798	2.1%	12.4%	15.2%	24.6%
12	620	1.6%	12.1%	14.5%	25.0%
13	360	0.9%	11.7%	17.5%	26.9%
14	261	0.7%	13.0%	16.9%	26.8%
15	166	0.4%	10.2%	12.1%	28.3%
16	123	0.3%	15.4%	18.7%	30.9%
17	79	0.2%	11.4%	20.3%	29.1%
18	36	0.1%	11.1%	13.9%	25.0%
19+	18	0.0%	7.1%	35.7%	39.9%
Null	11,389	29.6%	8.9%	5.0%	13.2%

TABLE 8
FAILURE RATE BY SCORED RISK LEVEL

Risk Level	N	%	FTA rate	Rearrest Rate	Either FTA or Rearrest
Base	**38,478**		**8.0%**	**7.0%**	**14.1%**
Low	17,311	45.0%	6.0%	5.0%	10.4%
Moderate	8,519	22.1%	10.4%	12.5%	20.9%
High	1,031	2.7%	12.1%	18.3%	57.8%
Ineligible	5,722	14.9%	8.4%	4.0%	11.8%
Not Verified	5,895	15.3%	9.4%	6.2%	14.8%

TABLE 9
FAILURE RATE BY RELEASE CONDITIONS

Item	N	%	FTA rate	Rearrest Rate	Either FTA or Rearrest
Base	**38,478**		**8.0%**	**7.0%**	**14.1%**
Condition - Drug test					
No	37,621	97.8%	8.0%	6.9%	13.9%
Yes	857	2.2%	7.4%	14.6%	20.3%
Condition – Reporting					
No	37,253	96.8%	8.0%	6.8%	13.9%
Yes	1,225	3.2%	8.5%	13.1%	20.4%
Condition - Court Notify					
No	38,304	99.5%	8.0%	7.0%	14.1%
Yes	174	0.5%	10.3%	10.3%	17.8%
Condition – Curfew					
No	38,339	99.6%	8.0%	7.0%	14.1%
Yes	139	0.4%	6.5%	13.7%	17.3%
Condition - Home incarceration					
No	38,455	99.9%	8.0%	7.0%	14.1%
Yes	23	0.1%	8.7%	8.7%	17.4%
Condition - Mental health treatment					
No	38,471	100.0%	8.0%	7.0%	14.1%
Yes	7	0.0%	14.3%	28.6%	28.6%
Condition - drug/alcohol treatment					
No	38,455	99.9%	8.0%	7.0%	14.1%
Yes	23	0.1%	4.3%	17.4%	21.7%
Condition – Other					
No	38,251	99.4%	8.0%	7.0%	14.0%
Yes	227	0.6%	17.2%	12.3%	25.6%

Table 10
SUPERVISION CONDITIONS VS. RISK LEVEL

Yes Condition	N	% of Special Conditions	FTA rate	Rearrest Rate	Either FTA or Rearrest
All Low Risk	**17,311**		**6.0**	**5.0**	**10.4**
Low Risk Condition - Drug test	419	49%	7.2%	8.1%	14.3%
Low Risk Condition - Reporting	565	46%	3.4%	8.1%	13.6%
Low Risk Condition - Notification	82	47%	7.3%	6.1%	11.0%

Table 11
The Current And New Weighting Rules For The Revised Pretrial Risk Assessment Instrument.

	Scoring Items	Current		Modified	
		Yes	No	Yes	No
1	Does the defendant have a verified local address and has the defendant lived in the area for the past twelve months?		1		2
2	Does the defendant have verified sufficient means of support?		1		1
3	Did a reference verify that he or she would be willing to attend court with the defendant or sign a surety bond?		1	Removed	
4	Is the defendant's current charge a Class A, B, or C Felony?	1		1	
5	Is the defendant charged with a new offense while there is a pending case?	5		7	
6	Does the defendant have an active warrant(s) for Failure to Appear prior to disposition? If no, does the defendant have a prior FTA for felony or misdemeanor?	4		2	
7	Does the defendant have prior FTA on his or her record for a criminal traffic violation?	1		1	
8	Does the defendant have prior misdemeanor convictions?	1		2	
9	Does the defendant have prior felony convictions?	1		1	
10	Does the defendant have prior violent crime convictions?	2		1	
11	Does the defendant have a history of drug/alcohol abuse?	2		2	
12	Does the defendant have a prior conviction for felony escape?	1		3	
13	Is the defendant currently on probation/ parole from a felony conviction?	2		1	
	Did you receive special education services in school for an emotional or behavioral problem?	Not Used			
	Have you ever spoken to a counselor or psychologist about a personal problem?	Not Used			
	Violated conditions of pretrial release in last 12 mos	Not Used			
	If yes, was bond revoked?	Not Used			

Table 12:
The Current And New Cut-Points For The Revised Pretrial Risk Assessment Instrument

	Current	Modified
Low	0-5	0-5
Moderate	6-12	6-13
High	13-High	14-High

EXHIBIT 8

COMMERCIAL SURETY BAIL

Studies Supporting the Success of Commercial Surety Bail

- ***Bureau of Justice Statistics: Pretrial Release of Felony Defendants in State Courts (1990-2004) – Brian Reaves, Ph.D. and Thomas Cohen, Ph.D. (November 2007)***
  - Between 1990-2004, 62 percent of felony defendants in state courts in the 75 largest counties were released prior to case disposition
  - An estimated 14,000 commercial bail agents nationwide secure release of more than two million defendants annually (Professional Bail Agents of the United States)
  - Beginning in 1998, financial pretrial release was more prevalent than non-financial release; this was mostly due to a decrease in the use of release on recognizance coupled with an increase in the use of commercial surety bonds
  - Surety bond surpassed release on recognizance in 1998 as the most common type of pretrial release
  - For 2004, two-thirds of defendants had financial conditions required for release compared to half in 1990
  - Compared to release on recognizance, defendants released on financial release were more than likely to make all scheduled court appearances
  - Defendants released on unsecured bond or emergency release were most likely to have a bench warrant issued because of failure to appear

- ***Bureau of Justice Statistics: Violent Felons in Large Urban Counties (1990-2002) – Brian Reaves, Ph.D. (July 2006)***
  - These findings are based on data from the BJS State Court Processing Statistics (SCPS) program; the multi-year SCPS dataset includes a sample of felony cases filed during selected months in the 75 largest counties from 1990 through 2002
  - Convicted violent felons are among the most serious offenders in the criminal justice system; they are convicted of violent offenses such as murder, rape, robbery, and assault, and given the most severe sanctions
  - From 1990 to 2002, 18 percent of felony convictions in the 75 largest counties were for violent offenses, including seven percent for assault and six percent for robbery
  - An estimated 70 percent of violent felons in the 75 largest counties had been arrested previously; 73 percent of those convicted of robbery or assault had an arrest record, as did 67 percent of murderers and 53 percent of rapists
  - 60 percent of violent felons had multiple prior arrest charges, including 40 percent with five or more, and 23 percent with ten or more; about a fourth of those convicted of robbery (26 percent) or assault (24 percent) had ten or more prior arrest charges, as did about a fifth of murderers (21 percent) and a tenth of rapists (10 percent)
  - A BJS analysis of felony convictions in the 75 most populous counties found that a majority of those committing violent felonies had multiple prior arrests, at least one prior felony arrest and one prior conviction
  - An estimated 38 percent of violent felons were released from custody pending disposition of the case that resulted in their conviction; 50 percent were held on bail and 11 percent were denied bail
  - Among violent felons who had a bail amount set, about two-thirds were released when their bail was set at under $5,000, compared to just four percent when it was set at $100,000 or more

- About three-fourths (73 percent) of those eventually convicted of murder were denied bail or had their bail set at $100,000 or more; one of these conditions was applied to less than a fourth of other violent felons
- As a result of these bail conditions, murderers (12 percent) had the lowest rate of pretrial release; about two-fifths of those eventually convicted of assault (43 percent) or rape (38 percent) were released prior to case disposition, compared to about a fourth (28 percent) of those eventually convicted of robbery
- About 1-in-4 released violent felons committed one or more types of misconduct while in a release status; this misconduct usually involved a re-arrest for a new offense (14 percent) or a failure to appear in court (13 percent)

■ ***Public vs. Private Law Enforcement: Evidence from Bail Jumping – Eric Helland and Alexander Tabarrok (2002)***

- This study compares the effectiveness of release on recognizance, cash or government bail vs. surety bail by examining failure to appear rates, fugitive rates and capture rates of felony defendants who fall under the respective systems
- Defendants who fail to appear cause significant costs to the criminal justice system
- If the failure to appear is not quickly explained, warrants are issued and two quite different systems of pursuit and re-arrest are put into action; public police have the primary responsibility for pursuing and re-arresting defendants who were released on their own recognizance or on cash or government bail; when a defendant who has borrowed money from a bondsman skips trial, the bond dealer forfeits the bond unless the fugitive is soon returned
- As a result, bondsmen have an incentive to monitor their charges and ensure that they do not skip; when a defendant does skip, bondsmen are responsible for pursuing and returning defendants to custody
- Conclusions:
  - The data consistently indicate that defendants released via surety bond have lower failure to appear rates than defendants released under other methods
  - Bondsmen have numerous ways of creating appropriate incentives for borrowers; a defendant who skips town will owe the bondsmen the entire amount of the bond and often family members of the bond are cosigners increasing the incentive to appear
  - Bondsmen can devote the time necessary to make sure pursuits are successful as police are overburdened and give failure to appear a low priority
  - The fugitive rate for a failure to appear is higher for cash bond vs. release on recognizance
  - The fugitive rate is lower for those released on a surety bond than for other releases
  - The probability of being a fugitive is 64 percent lower on a surety bond compared to a cash bond

■ ***Effectiveness and Cost of Secured and Unsecured Pretrial Release in California's Large Urban Counties (1990-2000) – Michael K. Block, Ph.D.***

- The purpose of this study is to compare and contrast the performance of secured release and unsecured release programs; of particular interest is the relative performance of the most common release options: Surety Bond and ROR/CR
- The most common form of financially secured release is referred to as a Surety Bond
- In California, the most common forms of unsecured release are called Release on Own Recognizance (ROR) and Conditional or Supervised Release (CR)
- A defendant released on ROR/CR was about 60% more likely to have failed to appear for a scheduled court appearance as a defendant released on Surety Bond – 32 percent vs. 20 percent

- A defendant who failed to appear for a scheduled court appearance was approximately two-and-a-half-times more likely to remain a fugitive if he/she was released on ROR/CR than if he/she was released on Surety Bond
- If the proportions released on Surety Bond and ROR/CR was reversed, it is estimated that there would have been over 1,000 fewer failures to appear
- If Surety Bond had completely replaced ROR/CR as a release option, it is estimated that there may have been over 6,000 fewer failures to appear
- A more aggressive use of Surety Bond could save taxpayers between $1.3 million and $10 million per year in budget outlays, depending on exactly how aggressive these counties are in replacing release on ROR/CR with release on Surety Bond
- Total cost savings, including the social costs of failures to appear, could range from $14 million to over $109 million per year in these counties, again depending on how aggressive they are in replacing ROR/CR with release on Surety Bond

■ ***The Impact of Failure to Appear Upon Florida's Criminal Justice System – Roger Handberg, Ph.D. (1990)***

- The results reported in this report are drawn from three counties: Alachua in the Eighth Circuit, Broward in the Seventeenth, and Orange in the Ninth Circuit
- Failure to appear is a hidden cost of doing business within the criminal justice process; when defendants fail to make mandatory Court appearances, the entire process is disrupted at great cost and inconvenience to the Court system and ultimately the people of Florida
- The incentives are clear for a defendant with a failure to appear: run and likely nothing will happen; if apprehended after about a two year time gap, there is a strong likelihood that the case will have gone cold with loss of witnesses and other important participants
- For the defendant, no cost appears to be attached for failure to meet his or her obligation to the Court system
- The transitory nature of Florida's population means that for routine lesser felony cases, witnesses, including police officers, are rapidly lost as reliable witnesses if the case is excessively delayed; the result is that the defendant may well have the case dismissed or be allowed to plead to a much lesser offense if apprehended later
- The use of surety bail bond is allowable in all three counties but the degree of its use is affected by factors related to local judicial policies and the case load environment within which the local criminal justice agencies function
- Due to jail overcrowding and relatively easy release on recognizance programs, misdemeanor offenders are unlikely to be aware that surety bail bond exists or is applicable to their cases
- Bail as a release mechanism has evolved through several historical stages from a highly personalized individualized release process to one where the commercial insurance industry provides much of the surety bond money available for detainees
- The sole purpose of bail use to be to ensure the delivery of the accused at the various stages in the process; this is no longer true as now the protection of the community is a valid purpose as well
- There is an ideological chasm between the government components of the pretrial release system and the private sector represented by the bail bondsmen; the bondsmen generally are more positively perceived by the trial Court judges than any other component of the system due to the Judges' perception of the bondsmen's ability to ensure the appearance of the defendant
- The ideological chasm between the public sector and the private sector must be addressed if Florida is to develop the most effective pretrial release process possible; at present, the system is a hybrid with little explicit coordination between the two sectors
- Reducing the failure to appear rate in Florida Courts is a matter of political will; the continuing fiscal crisis in Florida's public sector makes reduction of the failure to appear rate a priority because even partial success in that effort will be the equivalent of a budget increase of 10-20 percent

- The pretrial release process is being overrun by the sheer volume of defendants, especially defendants whose links to the community are tenuous and virtually nonexistent in many cases
- For Orange County specifically:
  - The failure to appear rate is exceptionally high at the misdemeanor level with some spill over into the felony level (approximately 10% at the felony level was the best estimate)
  - A large group of minor offenders (approximately 2,000 or more a month) are released under federal court guidelines to prevent Jail overcrowding; these individuals are processed and released at Central Booking within a two-to-three hour time span
  - As a result, many are released with only minimal information as to their actual identity and with a large group released on the basis of a "General Delivery Orlando" address; the probability of these individuals appearing back in the system in large numbers is relatively low; some do re-appear despite their transient or homeless status
  - Because the identification process is so haphazard, individuals can re-appear in the system a number of times without any action taken regarding their earlier failures to appear
  - Failures to appear are normally not prosecuted except in rare instances; as is common, warrants are served if possible, but practically speaking if the failure to appear is not found fairly quickly there is a severely reduced likelihood of any significant punishment by the courts
  - Surety bail bonds are used for felony defendants but the bulk are released through other mechanisms, including the prison population reduction procedures
  - Bail bondsmen are active and aggressive in their activities in the county, with trial Court judges generally supportive of their activities
  - Surety bond is seen by the Judges as an effective alternative pretrial release mechanism for ensuring defendant appearances in Court, especially in a system plagued by high case loads for the other alternative programs
  - The County's pretrial release program operates on the basis of explicit guidelines, which determine which individuals are eligible; Judges are much less involved in this program

- ***Oregon's 10% Deposit Bail System: Rethinking the Professional Surety's Role – Oregon Law Review (1988): Robert Kaye, University of Oregon School of Law Graduate***
  - In 1973, the State of Oregon comprehensively revised its criminal procedure code and radically changed the system by which those accused of crimes secure their release pending trial
  - In 1973, the State of Oregon comprehensively revised its criminal procedure code and radically changed the system by which those accused of crimes secure their release pending trial
  - Under Oregon's current pretrial release system, a defendant can be released on his personal promise to attend all future Court appearances with no money bail required; if money bail is required as security for release, a defendant deposits only ten percent of the total security amount with the Court and receives eighty-five percent of that back if he makes all future Court appearances
  - A comprehensive study has not been conducted of the ten percent deposit system's effect on Oregon's criminal justice system since the law came into effect; however, during the past fourteen years Judges, Court administrators, district attorneys, and law enforcement officials have become increasingly aware of the high rate at which defendants fail to appear in both circuit and district Courts
  - Officials have questioned whether the ten percent deposit system has reduced the number of incarcerated defendants awaiting trial as promised by proponents of bail reform; they also question whether the economic and social costs of administering Oregon's Security Release Program are a net benefit such that it should continue to supplant private enterprise

- Conclusions:
  - Oregon's pretrial release system remained virtually unchanged since 1973, when the legislature adopted a ten percent deposit system and bail bondsmen were excluded from the pretrial process after more than 100 years of surety bail participation
  - These sweeping changes were made during a period of fundamental philosophical change regarding the criminal justice system's approach to the pretrial release of defendants
  - The federal judicial system had greatly restricted the rights of defendants prior to trial, especially those who were perceived as posing a danger to society if released while awaiting trial
  - The findings of the study of Oregon's pretrial release system indicated that substantial problems existed in motivating defendants to make their scheduled Court appearances; reintroduction of a surety bail option into Oregon's pretrial release scheme was suggested as one means of improving the situation

■ ***Bail Bondsmen and the Criminal Courts – Mary Toborg (1983)***
- Bondsmen play an important role in the pretrial processing of defendants
- Bondsmen facilitate court operations via:
  - Maintaining social control over defendant
  - Stressing importance of appearing in court and reminding defendants of court dates
  - Requiring 3rd party indemnitors (family and friends)
  - Locating defendants for failure to appear (FTA)
- Reliance on bondsmen to apprehend failure to appears effectively transfers the cost of fugitive retrieval from the publicly funded system to the private system
- The use of bondsmen can:
  - Reduce burdens to the court that it would otherwise have to handle (court date changes, notifications)
  - Provide a buffer for Judges (adverse publicity of defendant commits a serious crime while awaiting trial)
  - Help relieve jail overcrowding through the use of a bond
- Strengthening the surety bond system can have positive affects as it provides a way for defendants with sufficient resources to secure release quickly and easily

EXHIBIT 9

PRIVATE POLICE: DEFENDING THE POWER OF PROFESSIONAL BAIL BONDSMEN

HOLLY J. JOINER*

Five masked men enter a Phoenix residence under cloak of night and begin shooting. When the chaos clears, a young couple who had been sleeping in the home is dead. The masked men claim to have been trying to apprehend a bail jumper. The bail jumper, however, did not live there. Though it is later revealed that the men were not legitimately working for a bail bondsman, an old debate has once again been revived.[1] The United States has long struggled with the system of criminal bail and its management. The use of a qualified person as a surety to guarantee the return of a bailed prisoner was accepted in England long before the formation of the United States.[2] The use of professional bail bondsmen in the U.S. criminal justice system, however, sparks considerable controversy.[3]

Media and political attention on professional bail bondsmen has focused only on their failures and not on the essential social functions they serve. Sensational stories detailing violence during the recapture of bail jumpers have dominated coverage. Based on this limited perspective, there have been efforts in some states[4] and in the federal government to limit or eliminate the role of professional bail bondsmen. Hasty efforts to address the perceived problems in the system are unwise and have the effect of decreasing control over bailed defendants.

Part I of this Note discusses the background of the professional bail bonds system and points out some common criticisms of the system. Part II addresses professional bail bondsmen and their valuable role in the criminal justice system, advocating a private, profit-driven bail bonds process. Part III addresses the need to have broad powers for professional bail bondsmen in order that they may continue to perform the many socially desirable tasks that they currently serve. Reducing the power of bail bondsmen only decreases the ability of defendants to make bail and secure release from jail. Additionally, the profitability and even the existence of the professional bail bonds system would be jeopardized. These

---

* J.D. Candidate, 1999, Indiana University School of Law—Indianapolis; B.S., 1995, Ball State University.

1. *See* David D. Minier, *Bounty Hunters Currently the Target of Much Misplaced Outrage*, FRESNO BEE, Sept. 28, 1997, at B7. Mr. Minier is a Chowchilla Municipal Court judge. *See id.*

2. *See* Peggy Tobolowski & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditions*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 267, 274 (1993). A reputable person was qualified to serve as the surety. Typically, however, the surety was a relative or friend of the defendant. *See id.*

3. The rights and liabilities of bail bondsmen discussed in this Note also apply to agents of bail bondsmen commonly called bounty hunters, skip tracers, bail enforcement agents, and bail enforcement officers.

4. *See* MICHAEL D. KANNENSOHN & DICK HOWARD, BAIL BOND REFORM IN KENTUCKY AND OREGON (1978). Oregon and Kentucky have prohibited the use of professional bail bondsmen, and have instead adopted a system requiring defendants to either personally produce a percentage of the bail or find a relative who will pay a percentage of the bail to secure release. *See id.* at 5, 14.

disadvantages outweigh the advantages of changing the long-established power of sureties.

I. BACKGROUND OF THE PROFESSIONAL BAIL BONDS SYSTEM

A. History

The system of bail originated in medieval England as a way to free prisoners before trial.[5] "Bail literally meant the bailment or delivery of an accused to jailors of his own choosing."[6] The decision to grant bail was within the discretion of the local sheriff who could take the word of the accused that he would return or could require that an acceptable third party vouch for the defendant.[7] By the Thirteenth Century, the granting of bail was regulated by law and only certain offenses were bailable.[8] Third parties continued to serve as sureties, and the law required them to either surrender money[9] or themselves[10] if the defendant did not return to face judgment. The sheriff granted the surety custody over the accused, which the law viewed as a continuation of imprisonment though outside the jail.[11] This gave sureties broad power to regulate the activity of the accused.

Sureties were typically landowners who were friends or relatives of the accused because local sheriffs considered them capable of taking custody.[12] The fact that a defendant could produce a local landowner to guarantee his return at the time of trial was sufficient insurance against flight. Additionally, life in English society at that time did not often involve travel, and most defendants were without means to flee or places to go.[13] Defendants rarely fled because of the custodial powers of the surety, and because effective social control was maintained through personal relationships among the sheriff, the accused, and the

---

5. *See* DANIEL J. FREED & PATRICIA M. WALD, BAIL IN THE UNITED STATES: 1964, at 1 (1964).

6. *Id.*

7. *See id.*

8. *See* Statute of Westminster, 1275, 3 Edw. 1, ch. 15 (Eng.). The Statute of Westminster regulated discretionary bail power of local sheriffs in an attempt to avoid corruption. Sheriffs with complete discretionary power were known to extort money from prisoners or sureties. *See* FREED & WALD, *supra* note 5, at 1.

9. *See* FREED & WALD, *supra* note 5, at 1.

10. Sureties could be made to suffer the penalty that the accused would have suffered if the accused failed to appear and the surety could not produce him. *See* FREED & WALD, *supra* note 5, at 1; 2 FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 590 (2d ed. 1923).

11. *See* William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 70 (1977).

12. *See* FREED & WALD, *supra* note 5, at 1.

13. *See id.* at 1-2.

surety.[14] Both the sheriff and the surety had custodial rights over the accused,[15] and therefore, either could apprehend an escaped defendant[16] using any reasonably necessary means.[17]

The American system of bail was originally similar, though not identical, to its English predecessor. Stopping short of guaranteeing a right to bail, the U.S. Constitution only guards against excessive bail.[18] The right to bail was secured by federal law in the Judiciary Act of 1789,[19] which required bail for offenses not punishable by death.[20] Most states incorporated a right to bail into their constitutions or passed statutes guaranteeing bail.[21] The guarantee of bail in most states mirrors the federal law.[22]

Over time, America outgrew the traditional bail system. Rapid population growth made it less likely that a sheriff or judge would be personally acquainted with either the defendant or the surety. The criminal justice system needed a new way of finding and evaluating sureties to enable the bail system to function as intended.[23]

> As a result, the institution of the bondsman arose to take over the function of posting bail. In return for a money premium, he guaranteed the defendant's appearance at trial. In the event of nonappearance, the bondsman stood to lose the entire amount of his bond. Selling bail bonds became a thriving commercial adjunct to the judicial function of setting bail.[24]

While sureties were changing, early American courts did not change their views as to the rights of the surety. By stepping forward as surety, the bondsman took "custody" of the defendant. U.S. courts continued to view bail as imprisonment outside the jail, and therefore, custodial rights also remained

---

14. The sheriff was likely to know everyone in town, and this provided an additional incentive to honor the commitment to appear because hiding was infeasible. *See id.* at 2.

15. *See id.* at 1.

16. *See* Herman v. Jeuchner, 15 Q.B.D. 561 (1885).

17. Reasonable means included apprehension in the middle of the night, on Sundays, or inside the home. *See* Duker, *supra* note 11, at 71-72.

18. The Eighth Amendment states that: "Excessive bail shall not be required." U.S. CONST. amend. VIII.

19. 1 Stat. 73, 91 (1789).

20. The Judiciary Act of 1789 made bail in capital cases discretionary depending on the "nature and circumstances of the offence [sic], and of the evidence, and usages of law." *Id.*

21. *See* FREED & WALD, *supra* note 5, at 2-3 & n.8.

22. Some states provide for rights different than the federal law. Indiana, Michigan, Nebraska and Oregon limit the power to deny bail to treason and murder. Georgia, Maryland, and New York grant an absolute right to bail only in misdemeanor cases. Massachusetts, North Carolina, Virginia, and West Virginia allow almost complete discretion to judges in almost all cases. *See* FREED & WALD, *supra* note 5, at 2 n.8.

23. *See id.* at 2-3.

24. *Id.* at 3.

largely the same. Certain rights accompanied the responsibility of custody including the right to surrender the defendant at any time before trial, thereby releasing liability,[25] the right to apprehend a fleeing defendant,[26] and the ability to exercise those rights at any time.[27]

By acting as surety, not only did the bondsman have the right to exercise the privileges of custody, but he also had a duty to deliver the defendant to trial or face forfeiture.[28] This duty was similar to the duty of early sureties in England who were required to turn themselves in or to forfeit money and land if the accused did not appear.

Initially, the use of professional bail bondsmen was a compromise between the need to have acceptable sureties and the importance of bail. The inability of a judge to ascertain the reliability of sureties he did not know threatened to undermine the entire system of bail. Professional sureties helped solve this problem because their fitness as a surety could be evaluated once by the court, and they could then serve many defendants. Though it was not and is not a perfect solution, it allowed the bail system to continue.

Even though bail is not guaranteed by the U.S. Constitution, it has long been considered too important a right to be abandoned.

> From the passage of the Judiciary Act of 1789 to the present Federal Rules of Criminal Procedure, federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[29]

B. Criticisms of the Professional Bail Bonds System

The use of professional bondsmen and the changes it brought caused and

---

25. *See, e.g.*, State v. Lingerfelt, 14 S.E. 75, 77 (N.C. 1891) (recognizing the right of the bondsman to arrest the defendant before trial if the bondsman feels there is a risk of nonappearance).

26. *See, e.g.*, Parker v. Bidwell, 3 Conn. 84 (1819) (stating that a bondsman may catch and detain prisoners as he pleases); Respublica v. Gaoler, 2 Yeates 263, 264 (Pa. 1798) (recognizing the right of a bondsman to cross state lines to seize a defendant). *See also* Annotation, *Surrender of Principal by Sureties on Bail Bond*, 73 A.L.R. 1369 (1931).

27. *See, e.g.*, Reese v. United States, 76 U.S. 13 (1869) (stating that the principal is within the custody of the surety, and the surety can surrender or apprehend him at any time); Nicolls v. Ingersoll, 7 Johns. 145, 155 (N.Y. 1810).

28. *See* Taylor v. Taintor, 83 U.S. 366 (1872) (stating that the bondsman is obligated to return the defendant); Clark v. Gordon, 9 S.E. 333 (Ga. 1889) (stating that the bondsman has a duty to catch and return the defendant to escape liability on the bail bond).

29. Stack v. Boyle, 342 U.S. 1, 4 (1951) (citations omitted).

continue to cause considerable debate. Today's critics of the private bail bonds system contend that with the prevalence of professional sureties there is little incentive for defendants to return for trial because it is not the defendant's or his family's money at stake.[30] A defendant typically pays a fee to the bail bondsman equal to ten percent of the amount of bail,[31] and this fee is nonrefundable so it cannot provide a financial incentive to return.

> The theory behind money bail is simple: "It is assumed that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to break the conditions of one's release." However, "under the professional bondsman system the only one who loses money for nonappearance is the professional bondsman, the money being paid to obtain the bond being lost to the defendant in any event."[32]

Additionally, the defendant and the bail bondsmen have only a contractual relationship, not a personal one. Privatization of suretyship arguably sacrificed family influence, a convenient source of social control.[33] Bail bondsmen and defendants meet briefly at the time of contracting and may have periodic contact, but the fear of harming the wealth of the defendant's family is no longer a significant deterrent to jumping bail because it is the professional bail bondsman whose money will be subject to forfeiture, not the defendant's family or friends' money.

Professional sureties are also criticized for disadvantaging the poor who cannot afford the bondsman's fee. "In a system which grants pretrial liberty for money, those who can afford a bondsman go free; those who cannot, stay in jail."[34] While this seems to be more of an indictment of the entire idea of monetary bail, arguably bail bondsmen have a significant amount of control over who stays in jail and who is released.[35]

A bail bondsman has complete discretion as to which clients he accepts and which he does not. Some critics of professional bail bondsmen believe that too much control lies outside the reach of the court.

---

30. *See* Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring) (reasoning that with a professional bondsman, the defendant has no personal stake and is less likely to take the responsibility seriously).

31. *See* Mary A. Toberg, *Bail Bondsmen and Criminal Courts*, 8 JUST. SYS. J. 141, 142 (1983).

32. Pugh v. Rainwater, 557 F.2d 1189, 1199 (5th Cir. 1977) (quoting Bandy v. United States, 81 S. Ct. 197, 197 (1960); Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring)).

33. Bail bondsmen have, however, developed methods to exert social control over their clients after those clients are released from jail. *See infra* Part II.B.

34. *Pugh*, 557 F.2d at 1196 (quoting FREED & WALD, *supra* note 5, at 21).

35. The system of setting bail can in and of itself seem to disadvantage the poor who must pay someone to be released before trial, be it bail bondsman or the courts. *See Bandy*, 81 S. Ct. at 198. "[I]n the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release." *Id.*

> The extent to which the accused is financially committed to appear is determined by the amount of collateral the bail bondsman requires for writing the bond. The ultimate effect of such a system . . . is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety—who in their judgment is a good risk. The bad risks, in the bondsman's judgment, and the ones who are unable to pay the bondsman's fee, remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.[36]

While most bail bondsmen use logical criteria such as community ties, family, and employment to evaluate a prospective client, some bondsmen use instinct or other less desirable criteria.[37] As a private party, the bondsman is free to refuse any client for nearly any reason. Critics have accused bondsmen of refusing to work with defendants whose bail is small based on the fact that the profit would be small.[38] This can work to disadvantage the poor who can neither pay the small amount of bail nor contract with a bail bondsman to secure release.

By far the most criticism comes from those who oppose the ability of professional bail bondsmen to exercise powers of custody. To protect his investment, a professional bondsman can surrender a defendant at any time and can apprehend a fleeing defendant using "reasonable means necessary to effect rearrest."[39] Highly publicized incidents of violence, such as a shooting in Phoenix,[40] and the glamorization of television[41] dominate the popular view of bail

---

36. *Pugh*, 557 F.2d at 1199.

37. *See* FREED & WALD, *supra* note 5, at 33. Bondsmen have been known to make decisions about which clients they will take based on instinct about the defendant's character or based on the type of crime with which a defendant is charged. For example bail bondsmen have avoided narcotics defendants because they don't wake up early enough in the day to make it to court, prostitutes because they have no community roots, forgers because they travel around too much. *See id.*

38. *See id*; *but see infra* Part II (discussing the advantages of the profit motive).

39. Lopez v. McCotter, 875 F.2d 273, 277 (10th Cir. 1989).

40. *See, e.g.*, Stacy H. Adams, *Bounty Hunter from Hopewell Gets 18 Years*, RICHMOND TIMES-DISPATCH, Dec. 20, 1994, at B5 (stating that bounty hunters kicked a handcuffed defendant and pulled his gold tooth out with pliers); Paula Barr, *Force, Authority of Bounty Hunters Come into Question*, TIMES-PICAYUNE, Jan. 4, 1995, at A2 (reporting that two children were maced during an arrest by a bounty hunter); Donald Bradley, *More Than Fugitives Fear Bounty Hunters*, KANSAS CITY STAR, Feb 21, 1993, at B1 (stating that bystanders were injured during high speed chase of defendant by bounty hunters); Peter Hermann, *Bondsman Shoots Man in Chase*, BALTIMORE SUN, July 8, 1995, at B2 (reporting that bondsman shot a fleeing man); John Woolfolk, *Bounty Hunters Get Wrong Guy*, S.F. CHRONICLE, Dec. 15, 1993, at C3 (stating that bounty hunters arrested the former classmate of a defendant).

41. For example, *Bounty Hunters* (Fox Television broadcast), lets viewers ride along as professional bondsmen and their bail recovery agents attempt to apprehend bail jumpers. Additionally, the 1980 movie, *The Hunter* starring Steve McQueen as legendary bounty hunter

bondsmen, who are widely seen as ruthless bounty hunters.

C. States Increasingly Rely on the Private Sector

Despite the criticisms of professional bondsmen, states, straining under the increasing cost of law enforcement, are relying heavily on these private actors to help keep the criminal justice system functioning. Political pressure to "get tough" on crime has led to the need for more law enforcement action and more jails and prisons. There has also been a substantial price tag. In 1994, *U.S. News and World Reports* estimated that the annual cost of crime in the United States totaled approximately $674 billion.[42] The cost to house one jail inmate has been estimated at $17,000 per year.[43] This country spends $60,000 for each police officer on the street.[44] The skyrocketing cost of crime has led many states to rely on the private sector to carry out functions traditionally performed by the states.[45] More and more police are relying on bail bondsmen to shoulder the responsibility to find those who jump bail and return them to the court.

II. PROFESSIONAL BAIL BONDSMEN SERVE VITAL SOCIAL FUNCTIONS

As a private individual,[46] the bondsman does not necessarily set out to perform a public service,[47] but instead sets out to make a living. The result,

---

Ralph "Papa" Thorson glamorized bail enforcement. THE HUNTER (Warner Bros. 1980).

42. Sara Collins, *Cost of Crime: $674 Billion*, U.S. NEWS & WORLD REP., Jan. 17, 1994, at 40.

43. *See* Lynn S. Branham, *A Federal Comprehensive Community-Corrections Act: Its Time Has Come*, 12 COOLEY L. REV. 399, 403-04 (1995).

44. *See* Todd R. Clear, *"Tougher" is Dumber*, N.Y. TIMES, Dec. 4, 1993, at A2.

45. *See* Philip E. Fixler Jr. & Robert W. Poole Jr., *Can Police Services be Privatized?*, 498 ANNALS AM. ACAD. POL. & SOC. SCI. 108, 109 (1988) (discussing the push to privatize police services); Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41, 42 (1995) (discussing financial troubles of U.S. cities and the growing view that privatization is the answer); Larry Carson, *Plan Afoot to Privatize Police Jobs*, BALTIMORE SUN, Jan. 17, 1994, at B1 (discussing the nationwide move toward privatization of police services and one county's plans to join in).

46. There have been many efforts to have professional bail bondsmen declared state actors for the purposes of requiring their compliance with Fourth Amendment guarantees and subjecting them to liability under 42 U.S.C. § 1983. *See* Landry v. A-Able Bonding, Inc., 75 F.3d 200 (5th Cir. 1996) (holding that the fact that there was an arrest warrant issued for the defendant does not make a bondsman who apprehends the defendant a state actor); Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547 (9th Cir. 1974) (holding that purely private conduct such as the actions of a bail bondsman do give rise to a cause of action under 42 U.S.C. § 1983); State v. Tapia, 468 N.W.2d 342 (Minn. Ct. App. 1991) (stating that a bondsman has the same power to arrest others as a private citizen).

47. For a discussion of the bondsman as a state actor, see *infra* notes 131-48 and accompanying text. *See also* Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731 (1996); Emily

however, is something of a private police force that chases defendants who flee and delivers them back to court.

The bail bondsman's solicitation of business from criminals and constant contact with the criminal element has led to the misconception that the professional bondsman is somehow corrupt or shady.[48] The bondsman has been described as "an unappealing and useless member of society . . . [who] lives on the law's inadequacy and his fellowman's troubles."[49] A more accurate view, however, is that professional bail bondsmen, through the normal course of business, perform a variety of important social functions.

A. More People Are Able to Make Bail

Not the least of these functions is providing a way for accused persons to be free until trial.[50] One New York judge defended solicitation of business by bondsmen saying:

> There is a general misconception . . . that solicitation of business by bondsmen is illegal. It is entirely lawful—just as lawful as solicitation by life insurance agents. . . .
>
> It is even necessary and desirable that this should be so—under proper regulation. Otherwise the casual offender, the inexperienced offender, the offender charged with minor crimes, would be confined in jail while the professional criminal with his outside contacts, experienced little difficulty in arranging bail. In this [c]ourt . . . I have found many defendants ignorant of the fact that bail has been fixed by the magistrate, ignorant of the amount of bail fixed and the method and cost of obtaining release on bail. And it is generally the minor or low bail offender, whose even temporary detention is not justified by the crime charged, who finds himself in that predicament. It is most desirable that this class of offender should be solicited and bailed.[51]

Bail bondsmen provide a way for the average citizen to secure enough money to

---

M. Stout, *Bounty Hunters as Evidence Gatherers: Should they be Actors Under the Fourth Amendment When Working With the Police?*, 65 U. CIN. L. REV. 665 (1997); Gregory Takacs, *Tyranny on the Streets: Connecticut's Need for the Regulation of Bounty Hunters*, 14 QUINNIPAC L. REV. 479 (1994).

48. *See* FREED & WALD, *supra* note 5, at 34-35.

49. RONALD GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 102 (1965).

50. *See supra* notes 23-29 and accompanying text (discussing the importance of bail). The presumption of innocence prohibits punishment before conviction and the opportunity to be free before conviction is extremely important. Bail can only be used as a way to secure appearance for trial and not as a means to punish. *See* Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976); State v. Midland Ins. Co., 494 P.2d 1228 (Kan. 1972). Freedom before trial helps the defendant prepare his defense. *See* Stack v. Boyle, 342 U.S. 1, 4 (1951).

51. People v. Smith, 91 N.Y.S.2d 490, 494 (1949).

be released.[52] Although a privatized bail bonds system has been criticized for keeping the poor in jail, in reality, professional bail bondsmen help more people to avoid jail, which serves the needs of the defendant, the state budget, and the bail bondsman.[53] The plight of the indigent defendant is in no way served by decreasing the power of the bail bondsman to solicit and serve defendants. Without professional bail bondsmen, the problems of the poor and inexperienced would be made worse by the fact that they would be required to produce the full amount of bail.

The willingness of a bail bondsman to post a bond for a particular defendant can even affect the amount of bail set in that defendant's case.[54]

> The bondsman plays no formal part in this process, either. In many cases of this kind, the defendant or his attorney may contact a bondsman before the bail hearing and the bondsman may supply informal advice to the judge or the prosecutor concerning his willingness to post bail for the defendant. This may help the defendant by inducing the judge to set bail at a level which the defendant can afford. It can hardly work to the defendant's disadvantage.[55]

Without this service, it is likely that many defendants would not be able to make

---

52. The court does have the authority however to refuse to allow a surety to post bond for a defendant if the court has reason to doubt the willingness or ability of the surety to produce the defendant. *See* American Druggist v. Bogart, 707 F.2d 1229, 1233 (11th Cir. 1983).

53. *See* Toberg, *supra* note 31, at 44; *see also infra* Part II.E.

54. The main factors considered by judges in determining whether bail is appropriate in a case are set by the Bail Reform Act of 1984, 18 U.S.C. § 3142(g) (1994):

> The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—
>
> (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
>
> (2) the weight of the evidence against the person;
>
> (3) the history and characteristics of the person including—
>
> (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
>
> (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law. . .

55. Forrest Dill, *Discretion, Exchange and Social Control: Bail Bondsmen in Criminal Courts*, 9 LAW & SOC'Y REV. 639, 653 (1975). Mr. Dill, however, rejects the idea that bondsmen are "purveyors of freedom" who decide which defendants will be released and which will not. That type of view exaggerates the influence that bondsmen have over the bail decision. *See id.* at 652.

bail at all.[56] The bondsman is able to evaluate a potential client's likelihood of nonappearance with an eye on his profit. He is not bound by statutes or guidelines, like the court system, and can help society by evaluating the risk of flight.

B. Social Control

Bail bondsmen play an important role in maintaining social control over bailed defendants. The bondsman and the defendant form a contract in which the bail bondsman agrees, for a fee,[57] to act as the defendant's surety.[58] In addition to paying the fee, the defendant agrees to appear in court for all scheduled appearances. The bondsman only makes a profit when he is able to collect fees from the defendant and avoid paying the amount of the bond to the court. Just as the traditional English surety, usually a family member, had a personal incentive to encourage the defendant to appear, so does the professional bail bondsman. His business depends on the appearance in court of his clients.

There is, of course, risk that the defendant will sign the contract with the bondsman, secure release and leave the jurisdiction or refuse to appear in court.[59] To protect his investment, the bondsman must be thorough not only in assessing the risk of flight before writing the bond,[60] but in keeping tabs on the defendant after the bond is written. "The profit motive is presumed to insure diligent attention to his custodial obligation."[61]

When entering the contract with the defendant, the bondsman may require that a third party, such as a friend or relative, cosign or post collateral.[62] The advantage to the bail bondsman is two-fold. First, in the event of nonappearance, the bondsman can try to recover costs from the third party. Second, the involvement of friends and family makes it easier for the bondsman to influence the actions of the defendant and keep tabs on him or her.[63] Requiring a friend or family member to accept liability helps to provide an incentive for the defendant

---

56. *See* El Franco Lee, *Leave Harris County's Poor in Jail Without Bail Bonds?*, HOUSTON CHRON., June 26, 1994, at E1 (stating that county records showed that in Harris County, Texas 77,553 defendants were released using a bail bond in one year).

57. Usually 10% of the amount of bail. *See supra* notes 31-32 and accompanying text.

58. The bondsman posts a bond for the full bail amount with the court that does not come due until a set time after the court date of the defendant's case. If the defendant appears in court as scheduled, the bondsman is released from liability on the bond and makes a profit from the fee already collected. *See* Toberg, *supra* note 31, at 142.

59. Defendants accused of more serious crimes carrying long prison sentences are more likely to jump bail when they feel that being a fugitive is more attractive than facing prison. *See* Samuel L. Myers, Jr., *The Economics of Bail Jumping*, 10 J. LEGAL STUD. 381, 382 (1981).

60. See *supra* notes 37-38 and accompanying text (discussing the factors bondsmen consider when deciding whether or not to contract with a particular defendant).

61. FREED & WALD, *supra* note 5, at 22.

62. *See* Toberg, *supra* note 31, at 142.

63. *See id.*

to meet his legal and contractual obligations.[64] The bondsman is able to achieve a greater degree of social control over the defendant. From the oldest system of bail to the present, the main idea of a surety assumes that a defendant required to account to another for his actions will be more likely to honor his obligations.

C. Bail Bondsmen Help Courts Run Smoothly

In an effort to ensure appearance, the bondsman provides a variety of useful services to his clients, which in turn help the courts to run smoothly. Services designed to take the fear and guesswork out of court appearances help ensure that bailed defendants will appear, which helps the courts avoid wasted time and expense.

> Many bondsman mail reminders of future court dates to defendants, call them the day before court, or require them to telephone the office periodically, although some consider periodic contact unnecessary. A bondsman may also notify a bond's cosigners of the defendant's next court appearance, so that they can help ensure the appearance of the accused at the proper time.[65]

Bondsmen provide the defendants they serve with important details about their court appearances such as when to arrive, which courtroom to report to, how to find that courtroom, and what kind of proceeding will occur.[66] This helps to avoid nonappearance through mistake, forgetfulness or fear of the unknown.[67]

Bondsmen can also clear up administrative mistakes made by the courts, such as a defendant scheduled to appear in two courtrooms at the same time. A bondsman is familiar with the operation of the court system and is able to catch errors and bring them to the attention of the court before problems occur.[68] The bail bondsman's knowledge of the system and ability to act as a liason between the court and the accused serves all involved.

While bondsmen are unable to give legal advice, they can give defendants important information on how to hire a lawyer[69] and can encourage a defendant to cooperate with a lawyer's advice.[70] They can also explain the meaning and importance of legal procedures, types of actions, and can encourage a defendant to carefully make legal decisions.[71] Advice concerning lawyers, legal options,

---

64. *See supra* notes 30-35 and accompanying text (discussing incentive problems caused by the lack of a personal relationship between the defendant and the professional bail bondsman).

65. Toberg, *supra* note 31, at 142.

66. *See* Dill, *supra* note 55, at 654-55.

67. *See id.* at 655.

68. *See id.* at 656; *see also* Toberg, *supra* note 31, at 143.

69. Attorneys can also help the bondsman by referring clients to a bondsman the attorney knows and has worked with before. *See* Dill, *supra* note 55, at 648.

70. *See id.* at 655.

71. Bail bondsmen may, however, have a greater interest in encouraging defendants to plead guilty because that would decrease the time that the defendant is free on bond. The chances of

and legal decisions helps a defendant to navigate his way through a sometimes unfriendly and confusing criminal justice system. By acting as liason, the bail bondsman helps the court to avoid delays caused by a defendant's errors and confusion.

In addition to providing information to defendants, bail bondsmen supply information to court officials and attorneys about the defendant. This allows the courts to run more smoothly. The bondsmen act as liaison between the court and the defendant, helping each obtain needed information about the other.[72] In exchange, the courts and the state help the bondsmen to operate more profitably through lenient local rules regarding bonding.[73]

D. Desire to Avoid Forfeiture Leads to Effective Apprehension of Bail Jumpers

Profit is the driving force behind the thorough service bondsmen provide. The ability to make a profit depends on avoiding forfeiture, which provides a deterrent to poor service. The bondsman's profit comes from the fee, equal to ten percent of the bail amount, which he collects from the defendant at the time of contracting. If a defendant fails to appear, the bondsman stands to lose up to 100 percent of the amount of bail, which means that not only does the ten percent profit disappear, but the bondsman must pay the other ninety percent out of pocket.[74]

For example, if a defendant's bail was set at $2000, the bondsman would collect a fee and possible profit of $200 to write the bond. If the defendant does not appear and the bondsman is unable to return that defendant to the court, the bondsman must give up the $200 and also produce $1800 to cover the bond.

Forfeiture in the federal courts is covered by Federal Rule of Criminal Procedure ("Rule") 46(e)(1), which mandates bail forfeiture when a defendant breaches a condition of his release, such as failing to appear.[75] There are typically two steps to a forfeiture proceeding. First, in accordance with Rule 46(e)(1), the district court declares the forfeiture when the defendant fails to appear[76] or in some other way breaches the conditions of his bail, such as committing a crime.[77] Second, the surety becomes a debtor to the government

---

nonappearance decrease, and the bondsman is more likely to make a profit. *See id.* at 656.

72. *See* Toberg, *supra* note 31, at 143.

73. *See id.* at 144.

74. *See* Liz Dupont-Diehl, *Bail Bondsmen Fill the Gap in the Criminal Justice System*, J. INQUIRER (Manchester, Conn.), Mar. 29, 1993.

75. FED. R. CRIM. P. 46(e)(1).

76. Notice of nonappearance need not be given to the surety because the surety is presumed to know the whereabouts of the defendant. *See* United States v. Minnesota Trust Co., 59 F.3d 87, 90 (8th Cir. 1995); American Druggist Ins. Co. v. Bogart, 707 F.2d 1229, 1235 (11th Cir. 1983); United States v. Vera-Estrada, 577 F.2d 598, 600 (9th Cir. 1978); United States v. Marquez, 564 F.2d 379, 381 (10th Cir. 1977).

77. *See* United States v. Gigante, 85 F.3d 83, 85 (2d Cir. 1996); United States v. Dudley, 62

and must pay after the order of forfeiture is entered.[78] Modern individual bail bondsmen are usually backed by a surety insurance company,[79] which maintains funds sufficient to cover forfeitures,[80] but losses can still be devastating to the individual bail bondsman who must pay insurance premiums.[81]

Forfeiture is not always absolute, and can be set aside in rare circumstances. Rule 46(e)(2) provides that "[t]he court may direct that a forfeiture be set aside upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture."[82] The court has "wide discretion" in setting aside a forfeiture judgment,[83] and the surety must prove that "an injustice is done by the forfeiture."[84]

When deciding whether or not to set aside a forfeiture judgment, the court considers several factors[85] including: (1) the willfulness of the defendant's breach of his bond conditions; (2) the participation of the sureties in apprehending the defendants;[86] (3) the cost, inconvenience, and prejudice suffered by the government as a result of the defendant's breach; (4) any explanation or mitigating factors; (5) whether the sureties were professionals or friends and family of the defendant;[87] and (6) the appropriateness of the amount

---

F.3d 1275, 1277-78 (10th Cir. 1995); Unites States v. Vaccaro, 51 F.3d 189, 191-92 (9th Cir. 1995); United States v. Patricia, 948 F.2d 789, 793-94 (1st Cir. 1991); United States v. Santiago, 826 F.2d 499, 506-07 (7th Cir. 1987); United States v. Dunn, 781 F.2d 447, 449-50 (5th Cir. 1986).

78. In most jurisdictions, forfeiture occurs at a graduated rate where the surety is only required to pay a small percentage of the bail amount at first, then more and more as time goes by. *See* FREED & WALD, *supra* note 5, at 28.

79. *See id.* at 23. Most modern courts will not consider a bail bondsmen an acceptable surety unless he is backed by an insurance company. *See id.* Bail bondsmen used to be individual entrepreneurs with fairly scant resources, but that method of operation is a thing of the past. *See* Dill, *supra* note 55, at 645.

80. *See* FREED & WALD, *supra* note 5, at 23. Although they insure bail bondsmen against loss, insurance companies do not control the actions of the bondsmen any more than an auto insurance company can control the way insured motorists drive. *See* Dill, *supra* note 55, at 646.

81. Some bail bondsmen try to soften the blow of forfeiture by building up a buffer fund from which they can pay part of the forfeiture, thus relieving some obligation of the insurance carrier. This helps to keep premiums lower. *See* Dill, *supra* note 55, at 645; Interview with Joyce Carlson, Managing General Partner, State Bonding, Indianapolis, Ind. (Oct. 30, 1997).

82. FED. R. CRIM. P. 46(e)(2).

83. United States v. Amwest Surety Ins. Co., 54 F.3d 601, 602 (9th Cir. 1995); United States v. Gil, 657 F.2d 712, 715 (5th Cir. 1981); United States v. Stanley, 601 F.2d 380, 382 (9th Cir. 1979); United States v. Hesse, 576 F.2d 1110, 1114 (5th Cir. 1978).

84. *Gil*, 657 F.2d at 715; *see also* United States v. Nolan, 564 F.2d 376 (10th Cir. 1977).

85. *See* United States v. Frais-Ramirez, 670 F.2d 849, 852 (9th Cir. 1982). The factors are not a checklist and are to be weighed as the judge sees fit. *See Amwest Surety Ins. Co.*, 54 F.3d at 603.

86. *See infra* notes 89-96 and accompanying text.

87. *See* United States v. Bass, 573 F.2d 258, 260 (5th Cir. 1978).

of the bond.[88] The burden on the surety is difficult to meet, and, as a result, forfeitures are rarely set aside, especially for professional sureties like bail bondsmen who are well aware of the risk involved.

If a defendant does jump bail, the best course of action for a bail bondsman is to quickly find and return that defendant to the court. The faster the defendant can be apprehended, the less money the bondsman will lose.

Bail bondsmen have a distinct advantage over police officers in finding bail jumpers. The bondsman does nothing but deal with bail, therefore he has time to track down a fleeing defendant and has the resources with which to do it.

> This difference in retrieval authority for bondsmen and public officials, combined with the scarce resources available in many jurisdictions for serving warrants, creates an incentive for law enforcement officers to rely on bondsmen as much as possible to return defendants to court. Such reliance on bondsmen effectively transfers part of the costs of fugitive retrieval from the publicly funded criminal justice system to the privately funded bond system.[89]

Additionally, since most bondsmen keep track of the whereabouts of their clients while the clients are out on bail, the bondsman is more likely to find the defendant quickly. Most defendants who do not appear simply forgot their court dates, could not get to the courthouse because of transportation problems or illness, or misunderstood their attorneys and believed that they did not have to appear that day.[90] Most return to court with a phone call eliminating the expense of sending police to rearrest them.[91] The desire to minimize monetary loss drives the bondsman to respond quickly, and the defendant returns to court without serious loss to the sureties, expense to the state, or additional penalties for the defendant.

Even some defendants who deliberately fail to appear can be quickly found and talked back into court.[92] If a third party, such as a friend or relative, cosigned the bond, the bondsman will try to use that person to help locate the defendant and talk him or her into appearing. The third party's personal relationship comes in handy for the bondsman who can gather information about where the defendant would likely run and who would help him. Armed with this information, the bondsman begins to "skip trace" or try to trace the movements of the defendant.[93] With the resources and time to find defendants who jump bail, bail bondsmen have an impressive success rate for apprehension. Bondsmen or their agents apprehend between eighty-seven and ninety-nine

---

88. *See* United States v. Mizani, 605 F.2d 739, 740 (4th Cir. 1979).

89. Toberg, *supra* note 31, at 143.

90. *See id.* at 142.

91. *See id.*

92. *See id.*

93. Many bondsmen hire professional skip tracers and bounty hunters for this work, although some bondsmen locate bail jumpers themselves.

percent of all bail jumpers.[94] The police only apprehend approximately ten percent, usually during traffic stops.[95] A small percentage of bail jumpers are never caught.[96] The odds, however, are in favor of getting caught.[97] The result is that fewer criminals are running free, possibly committing more crimes, while police are unable to locate and catch them.

Incidents involving violence during apprehension, while highly publicized and debated, are actually infrequent according to Bob Burton who heads the National Institute of Bail Enforcement in Tucson, Arizona, an institute set up to properly train bail bondsmen and their agents.[98] In 1996, "there were fewer than [twenty] 'incidents' of false arrest, unlawful entry, or misuse of firearms."[99] Burton noted that law enforcement agencies cannot claim as good a record.[100]

A deterrent to excessive behavior is the knowledge that although bail bondsmen cannot be sued as state actors, they can be sued as private individuals.[101] When bondsmen use unreasonable means, they are subject to civil liability just as any other regular citizen would be. Although the U.S. courts have consistently upheld the right of a bondsman to exercise custodial rights, courts are willing to acknowledge when a bondsman has crossed the line.[102]

E. Decreases Costs for State

One of the most substantial advantages to enforcement of bail provisions in the private sector is cost. Taxpayers, who are already shouldering the rising cost of crime and law enforcement,[103] are not required to foot the bill for apprehension

---

94. *See* Marc Gunther, *Experts on Call: They're in the Book and They Thrive On Public Attention*, CHI. TRIB., Nov. 7, 1993, at 4; Minier, *supra* note 1, at B7; Roy Rivenburg, *Hunting for Humans*, L.A. TIMES, Aug. 8, 1993, at E7. There were approximately 23,000 apprehensions in 1996. *See* Minier, *supra* note 1, at B7.

95. *See* Minier, *supra* note 1, at B7.

96. *See id.*

97. The private bail bonds system has a 0.8% fugitive rate, while a public bail bonds system that relies on police officers for enforcement has an 8% fugitive rate. *See* Charles Oliver, *Nat'l Issue*, INVESTOR'S BUS. DAILY, May 12, 1994, at 1.

98. *See* Minier, *supra* note 1, at B7.

99. *Id.*

100. *See id.*

101. *See id.*

102.

> [W]henever a bondsman takes undue advantage of his justly granted and needed authority in violation of his duty to the granting court and such undue advantage results in injury or damage to his principal or another party, that bondsman should and will be rendered liable for any damage caused as a result of an act which would render liable any other person who was not vested with such authority.

McCaleb v. Peerless Ins. Co., 250 F. Supp 512, 515 (D. Neb. 1965).

103. *See supra* notes 42-45 and accompanying text.

of bail jumpers.[104] This allows state resources to be used for other purposes such as education, crime prevention, and state debt reduction. To protect his profit, the bondsman will be vigorous in tracking down defendants and returning them to justice at little or no cost to the state.

The close eye that bondsmen are able to keep on defendants can help judges make the decision to allow bail instead of sending a defendant to jail.

> Additionally, bondsmen diffuse responsibility for the release of defendants. By setting bail, a judge shares the responsibility for a defendant's release with both the bondsman and individuals who become parties to the bond, such as the defendant's relatives or friends, who may cosign the bond or provide collateral for it. This furnishes the judge with a "buffer" against any adverse publicity that may arise, if a defendant commits a heinous crime prior to trial.[105]

Every defendant who does not go to jail saves the taxpayers approximately $1600 per month.[106] Because the average time in jail between arrest and trial is eight months, the savings are substantial.[107]

The cost to apprehend bail jumpers is effectively shifted from the taxpayers to the private sector almost completely. Thus, police manpower and state resources can be devoted to other uses. Decreasing the power of bail bondsmen would shift the cost back, requiring taxpayers to shoulder the responsibility. With the considerable costs of crime and law enforcement that already burden taxpayers,[108] a system that allows the private sector to defray some of the cost is prudent.

III. Professional Bail Bondsmen Need Special Authority

Sureties traditionally have had special rights arising from custody of the accused. Critics of the professional bail bonds system argue that the old idea of custody is outdated and inapplicable to modern sureties who have no personal relationship to the principal (the defendant).[109] Some advocate prohibition of professional bail bondsmen or a limiting of their authority.[110] The relationship between the bail bondsman and the defendant is, at its root, simply contractual in nature, yet the bondsman can remedy the contract's breach with the unusual remedy of self-help.[111]

---

104. *See* Minier, *supra* note 1, at B7.

105. Toberg, *supra* note 31, at 143.

106. *See* Branham, *supra* note 43, at 403 (stating that it costs approximately $19,118 to confine one prisoner for one year).

107. *See id.*

108. *See supra* notes 42-45 and accompanying text.

109. *See* Freed & Wald, *supra* note 5.

110. *See id.*

111. Early American courts recognized the relationship as contractual, yet still giving rise to special rights for the bondsman. *See* Reese v. United States, 76 U.S. 13, 22 (1869) (stating that

A. The Special Contractual Relationship Between Bondsman and Defendant

Professional bail bondsmen enter two contracts with defendants. The first is a bilateral contract in which the bondsman agrees to post a bond to meet the defendant's monetary bail obligation, and the defendant agrees to pay a fee and appear in court at the time specified by the judge.[112] The defendant also agrees that the bondsman has custodial rights over him with the ability to surrender that defendant at any time or to pursue and apprehend the defendant in the case of nonappearance.[113] The second contract entered by the parties is the bond itself, which is a contract between the defendant, the government and the bail bondsman.[114] Though traditional contract law governs analysis of the contract,[115] the remedies for breach are unique.

Most contracts are remedied through either expectation or reliance damages.[116] The plaintiff sues the defendant for breach of contract in civil court hoping to collect money damages for either expected gains or out-of-pocket expenses spent in reliance on the contract's performance.[117] This remedy, however, is ill-suited to the contract between the bondsman and the defendant; while it may work to recover money already lost in forfeiture, it cannot serve to return the defendant to the court before forfeiture occurs.[118]

The plaintiff in a breach of contract action also has recovery options in the

---

when a court accepts the bail from the surety, the government is impliedly agreeing not to interfere with the surety's right to protect his bond); Fitzpatrick v. Williams, 46 F.2d 40 (5th Cir. 1931) (holding that a bondsman need not resort to legal process to detain or arrest a defendant, but instead has the power through the contract); *In re* Von Der Ahe, 85 F. 959 (C.C.W.D. Pa. 1898); Nicolls v. Ingersoll, 7 Johns. 145, 154 (N.Y. 1810); Worthen v. Prescott, 11 A. 690, 693 (Vt. 1887).

112. *See* Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 551 (9th Cir. 1974). Early and current American courts recognize the contract between bondsman and defendant as giving the bondsman the right to apprehend that defendant.

113. This first contract will hereinafter be referred to as "the contract." It is really a "super contract" because its terms and remedies are unique to the bondsman.

114. A bail bond is "[a] three-party contract which involves [the] state, the accused and the surety and under which [the] surety guarantees that [the] accused will appear at subsequent proceedings." BLACKS LAW DICTIONARY 140 (6th ed. 1990). *See also* United States v. Vaccaro, 719 F. Supp. 1510, 1517 (D. Nev. 1989). This second contract will hereinafter be referred to as "the bond."

115. *See* United States v. Figuerola, 58 F.3d 502, 503 (9th Cir. 1995); United States v. Toro, 981 F.2d 1045, 1047 (9th Cir. 1992).

116. *See* JOHN EDWARD MURRAY JR., MURRAY ON CONTRACTS § 119 (3d ed. 1990) [hereinafter MURRAY ON CONTRACTS].

117. *See id.*

118. It is highly possible that a defendant could be judgment proof or have left the jurisdiction. The nature of the contract is such that if the defendant does not perform and cannot be returned in time to avoid serious forfeiture, he is likely not to be found for a civil case. Additionally, the cost of litigation might far exceed the recovery in cases of minimal bail, discouraging suits.

form of equitable remedies such as specific performance.[119] This remedy is also wholly inadequate because the bondsman has no way to enforce the remedy without the right to apprehend the defendant.

Traditional remedies for breach of contract also do not produce the same social benefits as allowing exercise of custodial powers through self-help. Requiring the bondsman to wait until a breach has occurred and take only civil legal action removes the profit motive to return defendants who flee. The result would be that fewer bail jumpers would be apprehended, and unapprehended jumpers would be free to commit additional crimes.

The possibility of self-help can provide an important deterrent to jumping bail. Defendants with the knowledge that the bail bondsman has the power and ability to apprehend him forcibly will likely think twice before fleeing.

> [P]ersonal bondmen in our country are a very aggressive group and relentlessly pursue the defendant who skips bail on which they have surety and bring them back in very many instances. . . . This hard attitude on the part of some of these sureties has put the fear of God into a lot of defendants who know what to expect in the event they skip bail.[120]

Self-help also allows the bail bondsman to mitigate his damages by returning the defendant before the entire bond has been forfeited. As a surety on the bond, the bondsman need not wait until the principal (the defendant) has breached the contract with the obligee (the court) and the obligee has instituted civil action against the surety. Litigation time and expense can be saved. This profit motive ensures immediate and vigorous action.

The old custodial rights of the surety survive in modern society. Perhaps it is as much because of the infeasibility of civil remedies and the social benefit of privatized bail enforcement as the fact that there is historical precedent. There appears to be no judicial movement toward reducing the power of bail bondsmen.[121]

The special and controversial powers that bondsmen have begin with the ability to enter into a "super contract" with the defendant and extend to the ability to enforce that contract. The defendant typically agrees that the bondsman can apprehend him using any means reasonably necessary.[122] Those means often

---

119. *See* MURRAY ON CONTRACTS, *supra* note 116, at § 117.

120. FREED & WALD, *supra* note 5, at 30-31.

121. *See* Landry v. A-Able Bonding, Inc., 75 F.3d 200, 204-05 (5th Cir. 1996) (holding that an arrest warrant does not make the bondsman a state actor); United States v. Rose, 731 F.2d 1337, 1345 (8th Cir. 1984) (stating that arrest by a bail bondsman is enforcement of a private contract right, and therefore is outside the jurisdiction of the state.); Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 550 (9th Cir. 1974) (holding that private conduct like that of a bondsman does not give rise to a cause of action under 42 U.S.C. § 1983); *but see* Smith v. Rosenbaum, 333 F. Supp. 35, 38 (E.D. Pa. 1971) (holding that a bondsman was a state actor in this fact situation because he had obtained a "bail piece" from the courts).

122. The defendant is arguably in a significantly weaker contract position, facing jail or the

include home invasion,[123] crossing state lines,[124] force,[125] and deception.[126] The rights of the bondsman agreed to by the defendant in the contract are unparalleled. Debt collectors, who also stand to lose substantial profits if debtors do not pay, are far more restricted in their tactics than bondsmen.[127] Despite the contract signed by the debtor, a debt collector who attempts to physically restrain a debtor or enters a debtor's home without permission is subject to criminal liability as well as civil.[128]

The reason for this disparity in contract interpretation can only logically be explained by the different social contributions made by debt collectors and bail bondsmen. Debt collectors protect their own financial interests or the financial interests of the entity who hired them. While it is important to the economy that debts be paid, the social value of debt collection does not extend beyond that benefit. The social value of bail bondsmen, however, extends far beyond the financial interests of the individual bondsman. Profit drives the bondsman to protect his investment,[129] but the result is far beyond personal gain. The court system is able to operate effectively, the right to bail is protected, and fleeing criminals, of possible danger to society, are apprehended.[130]

B. State Actor Status

The means used by bail bondsmen also exceed, to some extent, the means

---

terms of the contract, but the contract has never been found to be unconscionable. *But see* McCaleb v. Peerless Ins. Co., 250 F. Supp. 512, 515 (D. Neb. 1965) (holding that a bondsman had power to apprehend the defendant based on the contract, but could not exceed the power contracted for). In *McCaleb*, the bondsman apprehended the defendant, but did not immediately surrender him to the court, instead driving him around the country and telling him to appear, then to leave town when they returned home. *Id.*

123. *See* Nicolls v. Ingersoll, 7 Johns. 145, 156 (N.Y. 1810).

124. *See* Taylor v. Taintor, 83 U.S. 366, 371 (1872); Fitzpatrick v. Williams, 46 F.2d 40, 41 (5th Cir. 1931); *Nicolls*, 7 Johns. at 154.

125. *See* State v. Lingerfelt, 14 S.E. 75, 77 (N.C. 1891) (holding that the force used can even be deadly).

126. Bondsmen have been known to impersonate relatives, long-lost friends, and priests to obtain information and find defendants. *See* Teresa Walker, *Thrill of the Chase Snares Posse of Bounty Hunters*, SAN BERNIDINO COUNTY SUN, Sept. 27, 1992, at B3.

127. The Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (1994), limits the ways in which debt collectors can contact debtors, prohibits harassment and unfair collection practices.

128. *See, e.g.*, Fassitt v. United T.V. Rental, 297 So. 2d 283, 287 (La. Ct. App. 1974) (holding that debt collector could not legally break into debtor's home despite contract authorizing it); Kimble v. Universal T.V. Rental, 417 N.E.2d 597, 603 (Franklin County Mun. Ct. 1980) (stating that repossessing television by removing window pane and entering house not permissible).

129. Courts have long acknowledged the fact that profit motive leads to effective apprehension. *See, e.g.*, Pugh v. Rainwater, 557 F.2d 1189, 1200 (5th Cir. 1977).

130. *See supra* Part II.

available to police officers.[131] Since a police officer on duty is working for the government and not for himself, he is clearly a state actor.[132] State actors are bound by statutory and constitutional limits that do not bind private actors.[133] For example, a police officer cannot cross state lines to apprehend a fugitive. He must instead use the formal extradition process in cooperation with another jurisdiction.[134] Bondsmen are not required to use the extradition process.[135] They may cross state lines and apprehend the defendant in any jurisdiction. This makes bondsmen both more efficient and more effective at apprehension.

Police officers cannot act to deprive suspects of their constitutionally protected rights. Rights such as those protected by the Fourth Amendment[136] are

---

131. While the contractual right of the bail bondsman does allow him to apprehend the defendant, it is limited by the bondsman's duty to the court to surrender the defendant immediately. Any other action does not fall within the contractual right and is not permitted. *See* McCaleb v. Peerless Ins. Co., 250 F. Supp 512, 515 (D. Neb. 1965).

132. State actors are subject to additional liability and their actions can put the state for which they work at risk of liability. *See* 42 U.S.C. § 1983 (Supp. II 1996). *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), established the two part test for liability under 42 U.S.C. § 1983. First,

> the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id. at 937.

133. While the law does not consider bail bondsmen to be state actors, they have been described as enjoying a "hybrid status somewhere between a free enterprise and a public utility." FREED & WALD, *supra* note 5, at 23. *See also* Dill, *supra* note 55, at 644 (describing bail bondsmen as governmental "subcontractors" who operate outside the government but directly affect the goings on in criminal courts).

134. *See* California v. Superior Court, 482 U.S. 400, 407 (1987) (finding that a state must use formal extradition proceedings); Comment, *Bail Bondsmen and the Fugitive Accused—The Need for Formal Removal Procedures*, 73 YALE L.J. 1098 (1964) (discussing the requirement that states use the formal process of extradition). Federal law also requires the use of the extradition process under 18 U.S.C. § 3182 (1994).

135. Bail bondsmen are not required to use extradition. *See* Lopez v. McCotter, 875 F.2d 273, 277 (10th Cir. 1989) (stating that bail bondsmen have the right to cross state line to apprehend defendants, and they are not required to use the extradition process); Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 554-45 (9th Cir. 1974) (stating that a bondsman's authority has nothing to do with extradition).

136. The Fourth Amendment protects citizens from police searches and seizures unless probable cause is previously established sufficient to justify a search warrant. It states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

designed to limit the power of the state and its agents to interfere with the property of U.S. citizens.[137] Evidence gathered in violation of the Fourth Amendment is generally not admissible against the person whose rights were violated in its collection.[138]

Bondsmen, not being state actors, are not bound by the constraints of the Fourth Amendment.[139] Evidence discovered by a bail bondsman's apprehension of a defendant is admissible even though no search warrant was ever issued.[140] Additionally, bail bondsmen are not required to give *Miranda* warnings in accordance with the Fifth Amendment.[141]

Different rules and liabilities apply to police officers and bail bondsmen because they serve different functions.[142] It is true that both, as part of their professions, apprehend those who have jumped bail, however, the similarity largely ends there. The rules binding police officers are subject to political will and a desire for a small and unintrusive government.

> [T]he changes in police practices which have been mandated by appellate decisions over the last two decades are so sweeping, and the lack of any alternative enforcement mechanism so patent, as to presuppose a substantially new function for local level judicial officials. Many of these decisions, indeed, seem aimed precisely at extending the political doctrine of separation of powers, and the companion doctrine of judicial supremacy, to the administration of local criminal justice. The core assumption in nearly all of them has been that criminal courts must counter-balance the activities of police agencies in order to prevent mistreatment of citizens accused of crime.[143]

Bail bondsmen, however, are not as readily subject to politics. Allowing their power to remain based on contract principles helps to insulate them from the whims of popular political thought. They are able to serve the criminal justice system, yet they operate outside of the sphere of government. Their effectiveness

---

U.S. CONST. amend. IV.

137. *See* Katz v. United States, 389 U.S. 347, 357 (1967) (stating that searches conducted without warrants are per se unreasonable).

138. *See* Murray v. United States, 487 U.S. 533, 536 (1988).

139. However, if a bail bondsmen enlists the help of police officers in apprehending a defendant, the bondsman is then bound by the same constitutional restraints as the police officer. *See* Bailey v. Kenney, 791 F. Supp 1511, 1524 (D. Kan. 1992). Bail bondsmen may also not combat police when apprehending a defendant. *See Lopez*, 875 F.2d at 278.

140. *See* Drimmer, *supra* note 47, at 770.

141. The state is required to warn a suspect of his rights under the Fifth Amendment, and confessions or incriminating statements made without the warnings are inadmissible against the suspect. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

142. Bail bondsmen are not required to give *Miranda* warnings. *See* United States v. Rose, 731 F.2d 1337, 1345 (8th Cir. 1984); State v. Zeko, 407 A.2d 1022, 1024 (Conn. 1979); State v. Perry, 274 S.E.2d 261, 262 (N.C. Ct. App. 1981).

143. Dill, *supra* note 55, at 671.

and cost efficiency[144] serve to justify their power partly because the alternatives are undesirable. Without professional bail bondsmen, the alternatives would be to either devote more police manpower and resources to bail enforcement or to let most bail jumpers escape.[145] The damage to the system could be severe, resulting in fewer defendants being released on bail[146] and fewer bail jumpers being brought to justice.

Certainly it is not desirable to allow bail bondsmen to operate completely without restraint. Most states regulate bail bondsmen or require that they be licensed.[147] Evaluation of fitness to act as a surety and any undesirable activity can be evaluated when licenses are renewed. Additionally, the threat of civil liability helps to control activity.[148] There is little to gain by excessive restriction. Moving the rights and liabilities closer to or equal to that of police officers would result in decreased efficiency and increased cost. The broad powers, based on contract rights and historical precedent, enable the delicately balanced system to continue to operate. The disadvantages of declaring that bail bondsmen are state actors far outweigh the advantages. While it might ensure that homes were never entered without warrants and people were never apprehended across state lines without the formal extradition process, the cost would be the entire bail bonds system itself. Restraint of the bondsman's power jeopardizes the bondsman's profit, potentially leading to fewer bondsmen and consequently, fewer opportunities for defendants to make bail.

CONCLUSION

There is no simple answer to the debate that surrounds the professional bail bonds system. With the individual rights of criminal defendants on one side and the needs of a struggling criminal justice system on the other, it is clear that the controversy will not soon be resolved. On both sides is a desire to continue the system of bail in one form or another. Thus far, few acceptable alternatives to professional bail bondsmen can be found.

Some of the concerns about the professional bail bondsman are created by a media-drowned society, which fails to see the important functions that professional sureties serve in the community. Concerns that the idea of bail is contravened when the defendant's personal wealth is not at stake are answered by the thorough service bail bondsmen provide.

---

144. *See supra* Part II.

145. The police have only about a 10% apprehension rate. *See* Minier, *supra* note 1, at B7.

146. *See* Comment, *supra* note 134, at 1105.

147. *See, e.g.*, ALA. CODE § 15-13-160 (1995); CAL. INS. CODE § 1802 (West 1993); CONN. GEN. STAT. ANN. § 29-145 (West 1990); FLA. STAT. ANN. § 648.34 (West 1996); IND. CODE § 27-10-3 (1998); KY. REV. STAT. ANN. § 304.34-030 (Michie 1988); MISS. CODE ANN. § 83-39-3 (1991); MO. ANN. STAT. § 374.710 (West 1991); NEV. REV. STAT. ANN. § 697.090 (Michie 1993); OKLA. STAT. ANN. tit. 59, § 1303 (West 1989); TEX. REV. CIV. STAT. ANN. art. 2372p-3 (West 1988 & Supp. 1996).

148. *See supra* notes 101-02 and accompanying text.

The ability to be free on bail is considered an important right worthy of protection. Freedom before trial helps a defendant prepare a defense, and bail bondsmen help more people take advantage of that right.

The old idea of bail has survived centuries, though it has changed in ways that the medieval English sheriffs who conceived of it could never have imagined. Despite the nearly constant rights of the surety, the face of the surety has changed as the nature of society has changed. No longer are people nontransitory and acquainted with everyone in the community. Now sureties are professionals, driven not only by the fear of losing personal wealth, but by the desire to turn a profit for their services. Striving for personal profit, the professional bail bondsman brings important benefits to the society in which he works. Changing the effective system of the status quo would be a mistake.

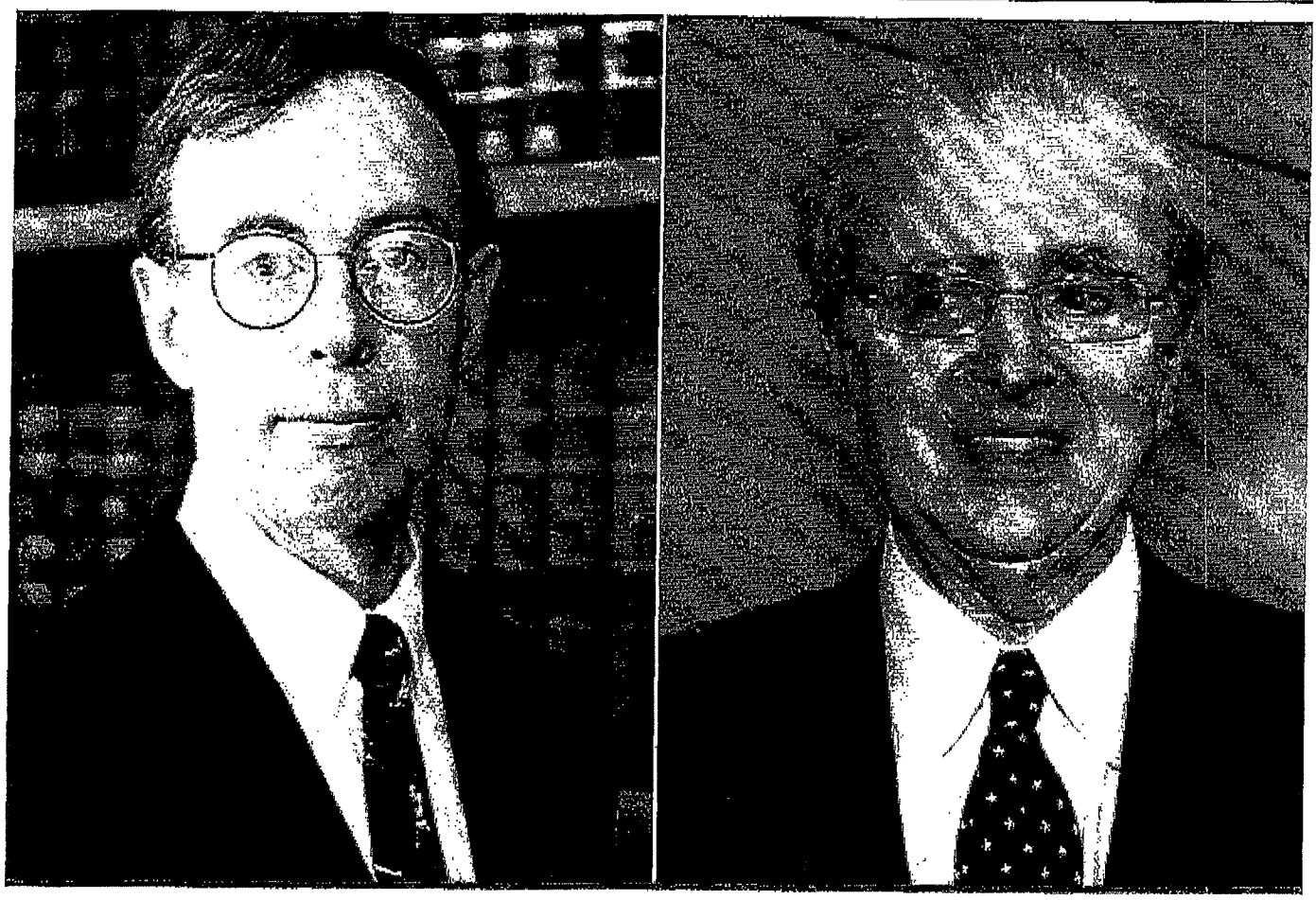
EXHIBIT 10

METRO

EXCLUSIVE

Judge says bail reform plan is an 'insult' to the judiciary

By Rebecca Rosenberg
October 13, 2015 | 2:25am



Edward McLaughlin (left) and Jonathan Lippman
Photo: Rick Kopstein ; Spencer A. Burnett

In a stunning rebuke of Chief Judge Jonathan Lippman's recent "overhaul" of the state bail system, no-nonsense Manhattan Supreme Court Justice Edward McLaughlin has labeled the plan an "insult" to the judiciary.

"Lippman's . . . reform of the 'broken' bail system insults judges, overlooks that bail review is available presently, fails to provide a complete record of bail/release decisions, and intrudes on the judiciary's independence," McLaughlin wrote in an Oct. 6 letter emailed to more than 100

New York judges.

"The accusation is that daily, countless judges in five boroughs, without consulting each other, knowingly made incorrect bail decisions," he wrote. "Their actual bail decisions were correct.

"That they produce an unwelcome result does not mean the decision was wrong or that the system is broken."

Lippman — chief of the Court of Appeals, the state's highest court — on Oct. 1 announced new bail initiatives to address what he called a "two-tier system of justice," one for the rich and another for the poor. Under the new plan, a judge in each borough will be designated to review bail amounts in misdemeanor cases.

The "automatic judicial review" will be triggered when a defendant is unable to make bail, he said.

Nearly 50,000 city defendants are jailed each year because they cannot make bail, Lippman said.

But McLaughlin, 67, who is known for setting high bails and meting out stiff sentences, counters that a "huge number" of defendants who do make bail or are released without it don't return to court. Nearly 51,000 warrants were issued for no-show defendants so far this year, he said.

"This mass thumbing of noses at the legal system following sincere judicial bail decisions seemingly is neither noticed nor noted in the chief judge's announcement," he wrote.

McLaughlin also accuses Lippman of undermining judicial independence "by implying that he could suggest a goal and that judges, like lemmings, would dutifully comply rather than make individualized, case-specific decisions."

Lippman's spokesman, David Bookstaver, declined to comment. McLaughlin did not return a call seeking comment.

FILED UNDER **BAIL BONDS** , **CRIME** , **JUSTICE** , **NEW YORK**

Supreme Court
of the
State of New York

HON. EDWARD J. MCLAUGHLIN
SUPREME COURT JUSTICE

Personal & Unofficial

JUSTICE'S CHAMBERS
100 CENTRE STREET
NEW YORK, NEW YORK 10013
(646) 386-3972

October 6, 2015

Dear Editor:

Chief Judge Lippman's announced reform of the "broken"bail system insults judges, overlooks that bail review is available presently, fails to provide a complete record of bail/release decisions, and intrudes on the judiciary's independence. As reported, the gist of the press conference was a broad criticism of discretionary decisions made by scores of sincere judges in individual cases. Using the word "broken" and mockingly recalling Alice in Wonderland might raise press interest but it also surely further lowers judicial morale. The accusation is that daily countless judges in five boroughs, without consulting each other, knowingly made incorrect bail decisions. Merit judicial selection, as some call it, in place for decades, accounts for the vast majority of judges sitting in Criminal Court arraignments (selected judges of the Civil Court are the exception). Judges appointed by every mayor from Koch to de Blasio are accused of presiding over a "broken" bail system. This accusation is false. Their actual bail decisions were correct. That they produce an unwelcome result does not mean the decision was wrong or that the system is broken. When diverse sincere people make determinations over time, independently of each other, the results should be accepted as fair. Judging is not – and should not be – results oriented.

A defendant's failure to post bail does not mean that bail was set too high. Such reasoning is neither persuasive nor logical. It certainly does not justify the administrative branch of the judiciary interfering with the independence of its adjudicative branch. Furthermore, if it were such an egregious and unfair system over which judges have presided during the last decade, why this press briefing only now?

The bail system, indeed, may be broken but not for the reasons the Chief Judge espoused.

Citywide statistics show the huge number of unjailed defendants who do not come to court on their own. Aside from the judges sitting in criminal court and the attorneys who regularly practice there, few people know how many defendants at liberty do not come to court voluntarily. For example, in New York City's Criminal Courts to date in 2015, in the five boroughs, just short of 51,000 warrants were issued for such defendants. Nearly 34,000 of the warrants issued were for defendants who either had been released by judges who set no bail or

had posted bail. Warrants issued in 2013 and 2014 practically were identical. Judges, from their experiences in arraignment and calendar parts, are aware of the plethora of past non-appearances as they begin each new arraignment assignment. They decide the day's cases individually, using only appropriate criteria. Yet, no one suggests that the rampant non-appearance at, or following, arraignment in Criminal Court justifies factoring that data into bail decisions.

Imagine the outrage if the press conference had been devoted to decrying the vast amount of people who did not come to court. What would the reaction be were an administrator to state, "too many defendants do not come to court" or release conditions are "too low?" How would the press and public greet urging judges to consider carefully the embarrassing number of persons who have failed to return to court as an appropriate consideration in future bail decisions? Judges are sanctioned in the rare instance when they attempt to influence another judge's handling of a case. How should judges perceive the subject matter of the press conference in their future bail decisions?

Furthermore, however well-intentioned the Chief Judge as administrator was, the public's understanding of their criminal justice system was not aided by his conveying the misleading and insulting impression that his opinion could influence discretionary decisions of judges. The word "retraining" is particularly insulting. It is reminiscent of recent bureaucratic action where error could reasonably be assumed. "Retraining" to make discretionary decisions implies that the judges who made the tens of thousands of bail decisions, to which there are objections, were unaware of available statutory options or chose an illegal course. Perhaps most significantly, his remarks severely undermined judicial independence by implying that he could suggest a goal and that judges, like lemmings, would dutifully comply rather than make individualized, case-specific decisions as we are ethically obligated.

Noteworthy is the failure to provide contextual data about bail decisions made by the judges now faulted for setting the "too high" bail. The judges being criticized for detaining defendants are the same judges who release defendants. Discretion is designed to produce varying results. An independent judiciary, unfettered by interference, usually from without, is the guardian of our country's democracy.

Unexecuted bench warrants and absent defendants, covering every level of offense, vastly exceed the number of defendants incarcerated pre-trial. This mass thumbing of noses at the legal system followed sincere judicial bail decisions seemingly is neither noticed nor noted in the Chief Judge's announcement. Yet, defendants who fill courtrooms during calendar calls, having been released without bail or who have posted the required bail, evidence correct discretionary decisions.

Defendants released statutorily (CPL 170.70 and 180.80) could have provided a measure of empirical data missing in the "bail-is-too-high" assumption. The announcement did not

mention any study of this data source. Defendants who fail to return following statutory release provide some evidence that the bail set was appropriate. Defendants who appear, having been statutorily released, demonstrate that bail was unnecessary. Discretionary decisions are case-by-case, individual assessments, not preordained ones driven by an administrative goal or policy.

The Legislature enacted laws related to bail and trusts judges to follow them. Now, as administrator, Chief Judge Lippman feels that bail decisions are being incorrectly made, not because of legal error, but rather because he, and others, are dissatisfied with the number of people who cannot post the amount set by judges. Those judges, screened and appointed due to their fairness and commitment to the law, should be presumed to perform their duties accordingly. Dissatisfaction with discretionary decisions does not allow administrative interference. Legal ways exist to challenge any condition of bail. Since being enacted in 1971, the Criminal Procedure Law has provided for both setting and reviewing bail decisions. Review can occur both in the Supreme Court and the Appellate Division, depending on the jurisdictional and crime level factor of bail set in Criminal and Supreme Court. The review is initiated by the supposedly aggrieved party and counsel. An accused, unable to meet the bail conditions set by a judge, is not without legal remedy.

Announcing that bail generally is too high is tantamount to asserting that judges in thousands of bail decisions have ignored the law purposefully for unstated reasons, perhaps to curry favor, avoid criticism, or assure continued incarceration. "Purposefully" is apt because the bail statute lists factors to be evaluated, in the individual judge's discretion. Under existing law, to obtain a reduction of existing bail conditions, a reviewing court must determine that an abuse of discretion occurred in the original decision or that circumstances have changed from those known to the original judge. It would be insufficient, and illegal, for a reviewing judge to adjust bail conditions merely as a different exercise of discretion or from a perception that bails generally are "too high."

The reform plan establishes one judge per county to review bail decisions when a person had been incarcerated for a specified period without posting bail. The underfunded, understaffed court system often cannot provide requested trials and hearings for jailed and unjailed persons alike. For a designated judge to conduct a meaningful review of bail, the judge needs to become familiar with each case, including current data regarding the supposed proof and information about the statutory criteria as originally presented to the bail setting judge. The newly designated judge would hear from both sides about the situation, likely needing some investigation of a defense contention about viability or altered circumstances of the case. Would such a continual review process allow the designated judge to conduct any trials for defendants, especially incarcerated ones, or would the process reduce, by nearly five citywide, the judges available for trials?

Whether the court system reports the results of this process was not addressed at the news

conference. Did some persons, released by this process, not return to court as directed or allegedly commit a new crime? How often did a reviewing judge lower bail? How often did the reviewing judge maintain the existing conditions? Will the original judge's decision be seen as correct when circumstances thereafter justify a change in bail condition? Is it presumed that the original judge would not adjust bail upon hearing the new facts or that the defense attorney or the prosecutor would not alert the court to a change circumstance?

Speaking only for myself, I am offended by the tenor of Chief Judge Lippman's remarks and dismayed at the incomplete record on which he rests his case.

Very truly yours,

Edward J. McLaughlin

EJM/fjl

EXHIBIT 11

News

OCTOBER 15, 2015 | BLOG POST

Improving risk-based decision making

The Laura and John Arnold Foundation (LJAF) recently launched the Public Safety Assessment (PSA) in dozens of jurisdictions across the country, including three entire states. To build the PSA, researchers identified nine core factors that predict the likelihood that a pretrial defendant will commit a new crime, will commit a new a violent crime, or will fail to reappear in court if released before trial. The preliminary results have been very promising: in Kentucky, the PSA has assisted judges in reducing both pretrial crime rates and jail populations, and in Charlotte, North Carolina, the jail population has declined 20 percent since the city began working towards implementation of the tool in the spring of 2014. The PSA, which does not use any factors related to race or gender, has shown that we can use evidence-based data to make our streets safer while at the same time detaining fewer people in jail.

The next challenge is to understand how judges can best use the PSA and other pretrial risk assessment tools to make better decisions about who should be released and who should be detained. New research funded by the Department of Justice and LJAF strongly suggests that using a pre-determined decision making framework (also known as a "structured decision making" tool) with a risk assessment tool reduces crime, enhances jail release rates, improves consistency, and makes the system fairer and more cost-effective overall.

The research, reported here, is based on a controlled experiment in Virginia that examined the impact of a predetermined decision making framework on decisions to release a defendant pretrial and on decisions about what kind of pretrial supervision is warranted in individual cases. Virginia uses its own pretrial risk assessment tool, the Virginia Pretrial Risk Assessment Instrument (VPRAI). Prior to the study, however, there was no structured guidance on how to use it. Pretrial officers made pretrial release and supervision recommendations to judges based on their subjective assessment of the situation.

In the study, approximately half (14) of Virginia's 29 jurisdictions were given a decision making framework, called a "Praxis," that made release and supervision recommendations based on a defendant's VPRAI risk assessment and charge category. Court officers in these jurisdictions were given training on the decision making framework and ongoing technical assistance.

The results are powerful and clear: in the jurisdictions that were trained on the decision making framework, pretrial officers followed the recommendation 80% of the time and were 2.3 times more likely to recommend release at first appearance compared to non-framework jurisdictions (where officers based recommendations on their subjective judgment).

The use of the decision making framework also had an impact on how the pretrial officers' recommendations were viewed by judges. In jurisdictions that used the framework, judges released defendants at first appearance nearly twice as often and were 8.8 times more likely to release a defendant at first appearance when release was recommended by the pretrial officer.

Critically, the study also showed that using risk assessment tools with a structured decision making framework yielded better results than using the risk assessment alone. Defendants were 20 percent less likely to experience any pretrial failure, such as re-arrest, and 30 percent less likely to fail to appear or to experience a new arrest pending trial in the jurisdictions that used the framework to make pretrial recommendations.

Adopting evidence-based approaches to criminal justice is partially about creating better data and partially about learning to use that data. With this new study, we are closer to reaching both goals.

This post was published by the Laura and John Arnold Foundation's Criminal Justice team.

News

JUNE 26, 2015 | PRESS RELEASE

More than 20 cities and states adopt risk assessment tool to help judges decide which defendants to detain prior to trial

NEW YORK, NY—The Laura and John Arnold Foundation (LJAF) today announced a widespread rollout of one of the most significant criminal justice reform initiatives currently underway in the United States. Twenty-one jurisdictions—from major cities to entire states—will adopt the Public Safety Assessment (PSA), a risk assessment tool that helps judges make accurate, efficient, and evidence-based decisions about which defendants should be detained prior to trial and which can be safely released. Early indications have shown that the tool helps judges increase public safety while reducing jail populations. Once the rollout is complete, the PSA will have been implemented in 29 jurisdictions, including three entire states—Arizona, Kentucky, and New Jersey—as well as three of the largest cities in the country—Charlotte, Chicago, and Phoenix.

Chief Judge Timothy Evans of the Circuit Court of Cook County, Illinois, which includes the city of Chicago, expressed excitement about the launch of the PSA in his jurisdiction. "We welcome the Public Safety Assessment as an important step in our continuing revitalization of our pretrial assessment process," he said. "For the first time, our pretrial services staff will offer judges an entirely objective risk assessment score to consider when making release/detention decisions."

Every day in America, judges must assess the likelihood that a newly arrested defendant, if released before trial, will commit a new crime or fail to appear in court. Research suggests that this may be the single most important decision made in the criminal justice system, because it can impact every other outcome that follows: whether or not a defendant is sentenced to jail or prison, how long he is incarcerated, and most importantly, how likely he is to commit violence or other crimes in the future. Yet, only about 10 percent of courts use risk assessments during this phase, which means that the majority of pretrial release decisions are made in a subjective manner. The result, although unintended, is that many of the individuals who are held in jail before trial pose little risk to public safety, while many violent, high-risk defendants are released into the community.

The PSA addresses this issue by providing judges with reliable, predictive information about the risk that a defendant released before trial will engage in violence, commit a new crime, or fail to return to court. The tool was developed using the largest, most diverse set of pretrial records ever assembled—1.5 million cases from approximately 300 jurisdictions across the United States. The assessment is based solely on factors related to criminal history, current charge, and current age. The tool is easy and cost-effective to administer. It has proven to be both race- and gender-neutral. Judges who use the PSA still retain all of their decision-making authority, they simply benefit from the input of an evidence-based tool. LJAF plans to make the PSA available, free of cost, to every interested city, county, and state within the next few years.

The PSA has shown positive results in pilot jurisdictions. In Kentucky, the PSA has assisted judges in reducing both jail populations and pretrial crime rates. In Mecklenburg County, North Carolina, the jail population has dropped nearly 20 percent since they began working toward implementation of the tool in the spring of 2014.

"For a judge, the Public Safety Assessment provides an unbiased method of ensuring that individuals before the court are afforded all of their constitutional rights, while also ensuring the safety of the community," Chief Regional District Judge Karen Thomas of Kentucky explained. "It hasn't taken away my discretion; rather, it has given me another tool in my judicial tool box that provides objective, consistent criteria."

Since the PSA provides an objective measure of risk for each defendant, it allows jurisdictions to target and prioritize limited resources more efficiently, and to quickly identify defendants who are appropriate candidates for early case resolution or diversion. The PSA also helps jurisdictions decide whether or not to detain a defendant within 24 hours of arrest, thus ensuring that taxpayers do not incur the cost of detaining defendants who pose little risk to public safety.

The sites adopting the PSA include 11 counties in Arizona; Volusia County, Florida; Cook County (Chicago) and two other counties in Illinois; the State of New Jersey; Lucas County (Toledo), Ohio; Allegheny County (Pittsburgh), Pennsylvania; Yakima County, Washington; Milwaukee County, Wisconsin; and one more soon-to-be-announced site. The PSA is already being used statewide in Kentucky; in four counties and one city in Arizona; in Santa Cruz County, California; and in Mecklenburg County (Charlotte), North Carolina.

"The Public Safety Assessment will help us get the results on the ground that we all want to see, enabling judges to increase public safety while reducing jail populations," said LJAF Vice President of Criminal Justice Anne Milgram. "We believe the widespread adoption of the tool will have a significant impact on public safety, government spending, and fundamental fairness."

More information about the PSA is available on LJAF's website.

Jurisdictions interested in the PSA can request more information here.

About the Laura and John Arnold Foundation

LJAF is a private foundation that is working to address our nation's most pressing and persistent challenges using evidence-based, multi-disciplinary approaches. Its investments are currently focused on criminal justice, education, evidence-based policy and innovation, public accountability, and research integrity. LJAF has offices in Houston, New York City, and Washington, D.C.

ALL NEWS, PRESS RELEASES, AND BLOG POSTS

ljaf RESEARCH SUMMARY

DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT

Every day in America, judges have to answer a critical question again and again: What are the chances that a recently arrested defendant, if released before trial, will commit a new crime, a new violent crime, or fail to appear for court?

This may be the single most important decision made in the criminal justice system because it impacts everything that follows: whether or not a defendant is sentenced to jail or prison, how long he is incarcerated, and most importantly, how likely he is to commit violence or other crimes in the future. Yet most of these decisions are made in a subjective manner, without the benefit of data-driven, objective assessments of the risks individual defendants pose to public safety.

Today, in many jurisdictions, judges do their best to apply their experience and instinct to the information they have about a defendant to make a subjective determination of whether he will commit a new crime or fail to return to court if he is released. In other jurisdictions, judges may follow court guidelines that require that all defendants arrested for a specific crime receive the same conditions of release (such as supervision, bail, or drug testing), regardless of risk. But neither method of deciding whether a defendant should be detained or released – a subjective evaluation, or an offense-specific one-size-fits-all approach – provides a reliable measure of the risk that a defendant poses. And yet this decision – whether to release or detain a defendant – is far too important to be left to chance.

Each year, 12 million people are booked into local jails across the country, the vast majority for nonviolent crimes. More than 60% of inmates in our jails today are awaiting trial, and we spend more than $9 billion annually to incarcerate them. The goal of most criminal justice decisionmakers is to detain defendants who pose a risk to public safety – particularly those who appear likely to commit crimes of violence – and to release those who do not.

Yet data collected by the Laura and John Arnold Foundation (LJAF) during the past two years shows that although this may be our goal, it is far from being a reality. Indeed, our research has shown that defendants who are high-risk and/or violent are often released. In two large jurisdictions that LJAF examined in detail, nearly half of the highest-risk defendants were released pending trial. And, at the

other end of the spectrum, our data shows that low-risk, non-violent defendants are frequently detained. Moreover, soon-to-be-released LJAF research on low-risk defendants shows that when they are detained pretrial, they are more likely to commit new crimes in both the near and long term, more likely to miss their day in court, more likely to be sentenced to jail and prison, and more likely to receive longer sentences. In other words, failing to appropriately determine the level of risk that a defendant poses impacts future crime and violence, and carries enormous costs – both human and financial.

In other words, failing to appropriately determine the level of risk that a defendant poses impacts future crime and violence, and carries enormous costs – both human and financial.

AN OPPORTUNITY FOR TRANSFORMATIONAL CHANGE

Two years ago, LJAF decided to use data, analytics, and technology to promote transformational change in criminal justice. With the goal of making the system safer, fairer, and less costly, we set out to improve how decisions are made during the earliest part of the criminal justice process, from the time a defendant is arrested until the case is resolved. (Criminal justice professionals refer to this as the "pretrial" period.)

From the beginning, we believed that an easy-to-use, data-driven risk assessment could greatly assist judges in determining whether to release or detain defendants who appear before them. And that this could be transformative. In particular, we believed that switching from a system based solely on instinct and experience to one in which judges have access to scientific, objective risk assessment tools could further our central goals of increasing public safety, reducing crime, and making the most effective, fair, and efficient use of public resources. We understood that judges already consider many of the most critical factors related to a defendant's risk of committing a new crime or failing to return to court; however, we also knew that it is extremely difficult for judges to know how to accurately and objectively weigh these factors, or to know which factors, when combined with one another, increase the risk of failure exponentially. We were also able to see the impact that risk assessments have had in the limited number of U.S. jurisdictions in which they are presently used: although less than 10% of jurisdictions use data-driven pretrial risk assessments, these jurisdictions have been able to spend less on pretrial incarceration, while at the same time enhancing public safety.

We initially looked for an existing pretrial risk assessment that could be used by any judge throughout the country. This sort of universal risk assessment has been used effectively for probation and parole. However, we quickly found that there was nothing equivalent for the pretrial release/detention decision.

Moreover, there appeared to be no risk assessment instrument that could be scaled to provide data-driven risk analysis to courts across America. In large part, this is because existing pretrial risk assessments are often costly and resource-intensive to administer, since they rely on data that can only be gathered through defendant interviews. These interviews are time-consuming and expensive to conduct and cannot be completed when a defendant refuses to cooperate or provides information that cannot be verified. (For these and other reasons, 40% of all defendants in one jurisdiction we studied were not evaluated for risk.) Further, most existing pretrial risk assessments were developed using data from a single jurisdiction, and other states and counties did not believe they could adopt a tool that was based on case records from

somewhere else. In addition, existing tools also present a single risk level for each defendant, combining – and assigning equal weight to – the risk that a defendant will fail to appear and the risk that he will reoffend. And none of the existing tools determine risk of new violent criminal activity, which is perhaps judges' greatest concern.

Our challenge was to figure out how to provide objective, scientific, data-driven risk assessments to the more than 90% of jurisdictions that did not use them. No existing model did what we wanted it to do: separately analyze risk of new crime, new violent crime, and failure to appear; be useable by every judge in the country; be applicable to every defendant; and be highly predictive of the most important risks. In short, what we needed was an instrument that would be accurate, inexpensive to administer, easy to use, and scalable nationally. So we decided to try to create a new, second-generation risk assessment that could be adopted by judges and jurisdictions anywhere in America.

When judges can easily, cheaply, and reliably quantify defendant risk, they will be much better able to identify the high-risk defendants who must be detained and the low-risk defendants who can safely be released.

DEVELOPING THE RISK ASSESSMENT

The first step was a study to assess the feasibility of eliminating the costly and time-consuming defendant interviews from the risk assessment process. LJAF's research team – led by two of the country's top criminal justice researchers, Dr. Marie VanNostrand and Dr. Christopher Lowenkamp – began its work in Kentucky, which was already using an interview-based risk assessment, and has long been a national leader in the pretrial field. An initial study focused on the core question of whether eliminating the interview would decrease the predictive power of the tool. To test this, the research team looked at the existing Kentucky risk assessment, which consisted of 12 total factors: nine that were drawn from the defendant's criminal history and three that were elicited during the interview process. The team created a new tool, relying solely on criminal history factors from the state's original instrument. We then used this non-interview tool to evaluate more than 190,000 Kentucky defendants who had already gone through the existing interview-based assessment. The study compared the risk prediction of the new tool – the one without an interview – to the existing interview-dependent tool, and found that the non-interview risk assessment was just as predictive as the existing one.

That finding led us to the next step: to gather the most comprehensive dataset of pretrial cases ever assembled in the United States with the goal of developing a universal risk assessment. Researchers started with 1.5 million cases drawn from more than 300 U.S. jurisdictions. From the initial dataset, the research team was able to study 746,525 cases, since these defendants had been released at some point in the pretrial process. The researchers had two primary objectives. First, to determine the best predictors across jurisdictions of new criminal activity, failure to appear, and, for the first time, new violent criminal activity. Second, to develop a risk-assessment tool based on these predictors. Although we believed that the interview could likely be eliminated, we considered both interview and non-interview factors in an effort to build the most predictive risk assessment possible.

The study identified and tested hundreds of risk factors, which fell into broad categories, including prior arrests and convictions, prior failures to appear, drug and alcohol use, mental health, family situation, employment, residence, and more. The researchers identified nine factors that

were the most predictive – across jurisdictions – for new crime, new violence, and failure to appear. These factors were drawn from the existing case (e.g., whether or not the current offense is violent) and from the defendant's prior criminal history. The researchers looked at numerous interview-based factors, including employment, drug use, and residence, and found that, when the nine administrative data factors were present, none of the interview-based factors improved the predictive analytics of the risk assessment. In other words, for all three categories – new criminal activity, new violent crime, or failure to appear – the addition of interview-dependent variables did not improve the risk assessment's performance.

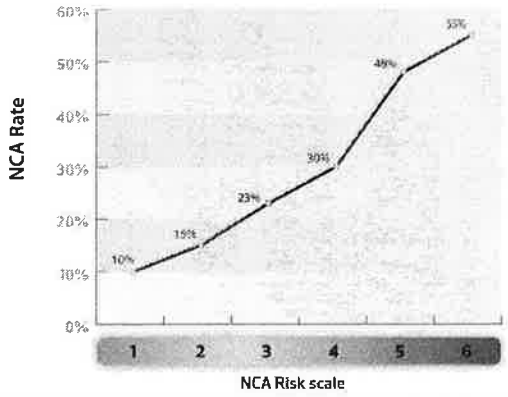
The resulting product is the Public Safety Assessment-Court (PSA-Court), a tool that reliably predicts the risk a given defendant will reoffend, commit violent acts, or fail to come back to court with just nine readily available data points. What this means is that there are no time-consuming interviews, no extra staff, and very minimal expense. And it can be applied to every defendant in every case.

PROMISING RESULTS

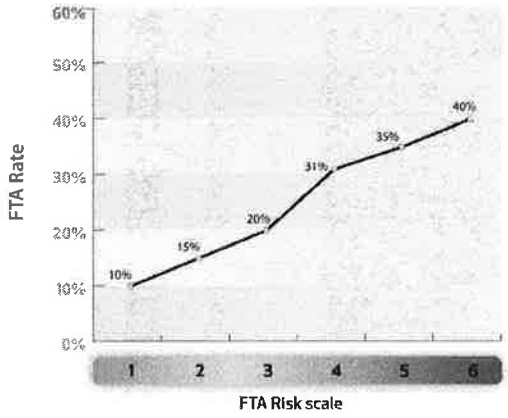
The PSA-Court's three six-point scales – one each for new crime, new violence, and failure to appear – do a remarkable job distinguishing among defendants of different risk levels. As the charts demonstrate, the likelihood of a negative pretrial outcome increases with each successive point on the scale. Each scale begins with the lowest level of risk, identified by the number one, and increases point-by-point until reaching the highest level of risk, identified by the number six.

PSA-Court Failure Rates by Risk Level

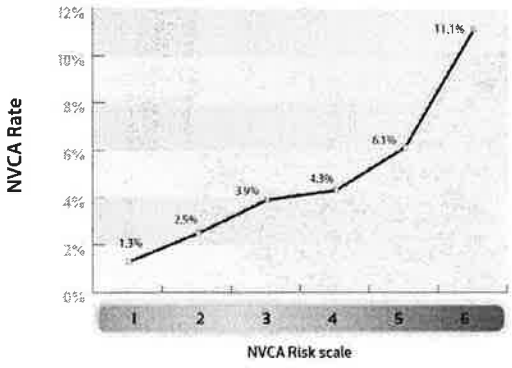
New Criminal Activity



Failure to Appear



New Violent Criminal Activity



The promise of the PSA-Court was further validated using historical data from one state and one major city. Moreover, researchers found that defendants in each category failed at similar rates, regardless of their race or gender. The results confirmed that the assessment does not over-classify non-whites' risk levels, which has been a concern in some other areas of risk assessment.

Our goal is that every judge in America will use a data-driven, objective risk assessment within the next five years. We believe that this one change can make our communities safer and stronger, our corrections budgets smaller, and our system fairer.

All of Kentucky's 120 counties began using the instrument in July of 2013. Preliminary analysis shows that the PSA-Court is, thus far, successfully predicting criminal reoffending and failing to return to court.

LJAF plans to roll out the PSA-Court in additional pilot sites soon and then to make the tool widely available. We will also continue to collect more data, as this will allow us to rigorously evaluate whether we can improve upon the existing universal risk assessment. LJAF also plans to create data-driven risk assessments for police and prosecutors; and to evaluate or create tools that will specifically predict the likelihood of repeat domestic violence and driving under the influence.

LOOKING AHEAD

Under the current system, we make decisions based on gut and intuition instead of using rigorous, scientific, data-driven risk assessments. This has led to a public safety crisis nationally, where too many high-risk defendants go free, and too many low-risk defendants remain locked up for long periods. These systemic failures put the public in danger and place unnecessary strain on budgets, jails, law enforcement, families, and communities. The PSA-Court, and instruments like it, can help recalibrate the equation. When judges can easily, cheaply, and reliably quantify defendant risk, they will be much better able to identify the high-risk defendants who must be detained and the low-risk defendants who can safely be released. They will also be able to better identify what conditions can be imposed on defendants to minimize risk.

It is critically important to note that tools such as this are not meant to replace the independent discretion of judges; rather, they are meant to be one part of the equation. We expect that judges who use these instruments will look at the facts of a case, and at the risk a defendant poses, and will then make the best decision possible using their judgment and experience.

Our goal is that every judge in America will use a data-driven, objective risk assessment within the next five years. We believe that this one change can make our communities safer and stronger, our corrections budgets smaller, and our system fairer. The Laura and John Arnold Foundation is dedicated to bringing transformational change to criminal justice through advanced data analysis and technology. Getting the PSA-Court in the hands of judges across America is one of our first major steps in that effort.

About Laura and John Arnold Foundation

Laura and John Arnold Foundation is a private foundation that currently focuses its strategic investments on criminal justice, education, public accountability, and research integrity. LJAF has offices in Houston and New York City.