

The Justice System Journal

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RECENT RESEARCH ON CRIMINAL COURTS

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AN OVERVIEWGeorge F. Cole and
Cheryl V. Martorana

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OVERCROWDINGAlbert C. Price
Charles Weber and Ellis Perlman

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The Justice System Journal publishes articles and notes that discuss research, experience, and ideas concerning the operation of courts and related agencies. Manuscripts are evaluated by members of the Board of Editors and others, with both practitioners and scholars participating in the review process. The Journal is especially interested in manuscripts that have explicit policy implications and that foster increased understanding of problems faced by those with responsibilities for court administration, broadly defined.

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The Justice System Journal is printed by West Publishing Company as a public service to scholars, practitioners, and others interested in judicial administration.

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EDITOR'S INTRODUCTION

Diversity has been a hallmark of *The Justice System Journal*. Regular issues have included articles ranging from judicial recruitment to caseload management techniques to the representativeness of American juries. Special issues have been devoted to analyzing both issues pertinent to all courts such as budgeting and planning and issues relevant to particular types of courts. Although this variety has been beneficial in casting light on the many specific problems confronting judges, legal practitioners, and court administrators, a key role of the *Journal* is to help put the individual policy research issues into a coherent perspective. In this regard, the traditional distinction between criminal and civil courts still provides a useful basis for organizing what we know and do not know about the administration of justice. Differences in structure and process between criminal and civil courts lead to different questions although common methods of analysis are used in addressing the respective research agendas. For this reason, the current issue of the *Journal* is devoted to criminal court research and the next issue will be devoted to civil court research.

George Cole and Cheryl Martorana have organized this issue around the activities of state trial courts of general and limited jurisdiction, which handle the major portion of criminal cases in America. They begin the issue with a review of where the field of criminal court research has gone over the past two decades. Their essay is followed by articles that analyze activities at different stages of the adjudicatory process. Although three of the articles examine perennial issues in the field—plea bargaining, trials, and sentencing—the remaining two essays consider activities that have not received extensive systematic treatment—bail bondsmen and the relationship between sentencing and jail population. Thus, this issue of the *Journal* contributes to our knowledge by pointing to the cumulative advances in traditional issue areas and information uncovered by exploratory efforts in other areas.

Roger A. Hanson
Editor-in-Chief

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BAIL BONDSMEN AND CRIMINAL COURTS*

MARY A. TOBORG**

Despite frequent criticisms of their activities, bail bondsmen continue to play an important role in the pretrial processing of defendants in most jurisdictions. Bondsmen facilitate the operations of criminal courts, which in turn insure the continued profitability of bondsmen's activities. The durability of bondsmen is analyzed in this article within the context of their symbiotic relationship with criminal courts. An analysis of the factors affecting bondsmen's decisions demonstrates the importance of courts' actions for bondsmen's profitability and suggests that certain "reform" measures may have unanticipated adverse consequences.

Background

The role of bail bondsmen in contemporary criminal justice poses a seeming anomaly. On one hand, their activities have been criticized for decades as both corrupt and corrupting (see, for example, American Bar Association, 1980; Freed and Wald, 1964; Goldfarb, 1965; Murphy, 1971; Thomas, 1976). A variety of "bail reforms," designed to reduce the bondsman's importance in the pretrial process, have been adopted around the country in recent years. Nevertheless, they continue to operate in most jurisdictions, including those that have introduced extensive reform measures, such as establishment of pretrial release programs and introduction of 10% deposit systems. How can the durability of bail bondsmen be explained? One answer lies in an understanding of the bondsman's relationship to criminal courts.

Shortly after arrest, a defendant is usually brought before a judge who sets the conditions of release. These conditions may consist of a simple promise by the defendant to appear for subsequent court dates ("own recognizance" release), supervision prior to trial by a pretrial release program or other agency, third party custody, or a requirement that bond be posted with the court. When bond is mandated, the defendant may be permitted to post a percentage of the amount (usually 10%) with the court and receive a refund of most of that "deposit" if no court appearances are missed.¹ If deposit bond is not a possibility, the defendant (or someone acting on behalf of the defendant) will usually contact a bondsman, who

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**President, Toborg Associates, Inc.

1. Failure to appear makes the person who posted the deposit liable for the full face value of the bond.

must then decide whether to write the bond.

By posting a bond, a bondsman guarantees that the defendant will appear for trial or, if not, that the bondsman will pay to the court the full face value of the bond. Consequently, a bond-writing decision is based on both immediate financial considerations and the expected ease or difficulty of locating the defendant, if a court appearance is missed. In return for writing a bond, the defendant pays the bondsman a fee, typically a percentage of the amount. Depending on the jurisdiction, these fees (commonly about 10%) are set either by the state or by the bondsman.

In the course of their business activities, bondsmen facilitate court operations in a variety of ways. First, they help maintain social control over defendants during the pretrial period (Dill, 1975). This process begins when the bond is written. At that time, bondsmen typically stress to defendants the importance of appearing for court and the penalties for failing to do so and also often require third party indemnitors to cosign or post collateral.² Although the bondsman's concern in involving third parties is pecuniary, the result is the participation of defendants' relatives and friends in helping assure court appearances. This is advantageous to the court as well as to bondsmen.

Bondsmen also help maintain social control over defendants awaiting trial through followup activities. Many bondsmen 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 routine contact unnecessary. A bondsman may also notify a bond's cosigners of the defendant's next court date, so they can help ensure the appearance of the accused at the proper time.

If a defendant does not appear for court, the bondsman will usually try to locate the individual. Many defendants are easily found and return to court of their own volition. Typically, these defendants forgot their court dates, were told by their attorneys that they did not have to appear that day, could not get to court because of illness or transportation problems, or deliberately failed to appear but are readily persuaded to return to court. Such defendants, who probably constitute the majority of the failure-to-appear cases, often require only a telephone call to return them to court.

Other defendants are more difficult to locate and may require an extensive search, which may be done by the bondsman or through hired "skip-tracers" or "bounty hunters." The arrest powers of bondsmen or their agents sometimes exceed those of criminal justice officials. For example, a

2. All bondsmen do not, of course, provide the various services discussed in this article.

bondsman can usually retrieve a fugitive who has crossed state lines much more easily than a law enforcement officer can. The officer must follow formal extradition procedures that do not apply to the bondsman, whose apprehension of the defendant is viewed as a private right that stems from the bond contract (Murphy, 1971: 457-59).

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.

Thus, bondsmen perform several functions related to the monitoring and, if necessary, the apprehension of defendants during the pretrial period. They also help correct the inevitable mistakes made by any court that handles a large volume of cases. For example, a defendant may report for court on the specified date and find his or her name missing from the court calendar. The defendant may contact the bondsman, who is usually easy to locate (and, indeed, may be in the court building on other business at that time), about the problem. In such cases the bondsman will usually try to find out what happened, see when the case is in fact scheduled, and notify the defendant. When these problems are handled by bondsmen, this reduces the burdens placed on the court.

Besides services directly related to defendant processing and control, bondsmen engage in other activities beneficial to the court. Bondsmen possess considerable information gained by constant movement throughout the courthouse. Bondsmen help the court avoid lengthy delays in case processing by providing this information, such as the present location of a specific attorney, to court officials who need it (Feeley, 1979: 102-03).

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 released defendant commits a heinous crime prior to trial (Suffet, 1966: 328-31).³

3. The judge is also buffered from any subsequent criticism due to the defendant's inability to secure release. Although diffusion of responsibility has certain advantages for judges, it has been criticized by those who want greater judicial accountability for release decisions. See, for example, National Association of Pretrial Services Agencies, 1978.

The fact that bondsmen provide such a buffer may help explain why many defendants charged with serious crimes are released on bond, rather than through other mechanisms. Although the use of bond has been attacked as causing the detention of defendants who cannot afford the bonding fee, it is possible that bondsmen facilitate the release of defendants whom judges are reluctant to release directly. To the extent that this occurs, bondsmen are alleviating jail overcrowding, rather than contributing to it.

Conceptual Framework for Analysis

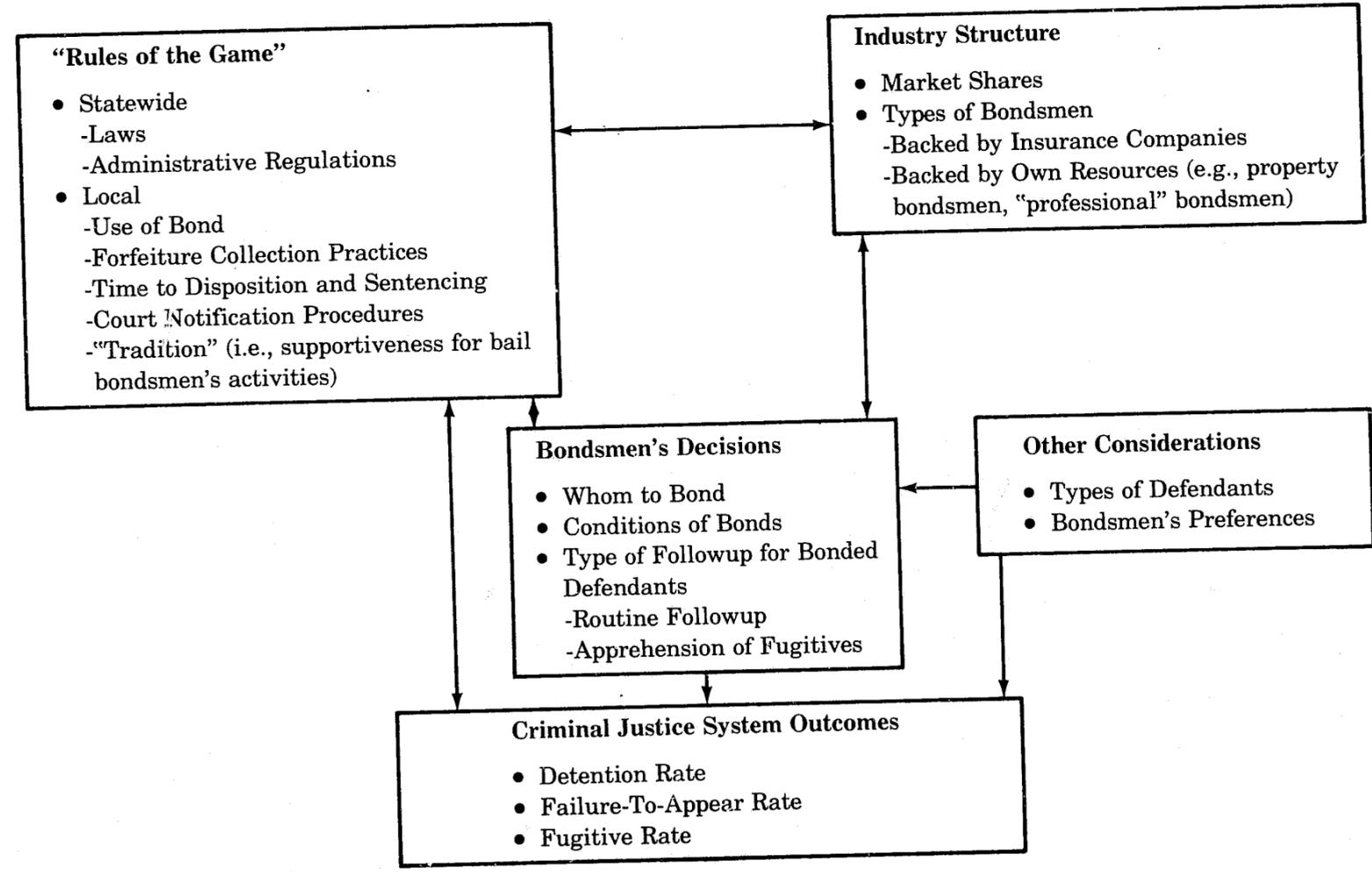
In return for bondsmen's services, the criminal justice system helps them operate profitably. The ways in which the reciprocity occurs can perhaps best be understood by considering the various factors that affect bondsmen's decision-making and the relative impact of court actions on those decisions. Such analysis also provides insight about the ways that bondsmen's decisions affect important outcomes of the criminal justice process (e.g., detention and failure-to-appear rates), as illustrated in Figure 1.

A major influence on bondsmen is the "rules of the game," which reflect the external environment they face. This includes statewide laws and administrative regulations governing bonding, as well as local practices, such as the overall use of bond (which determines the size of the market for their services), forfeitures collection practices (which affect their profit margins), time required for cases to reach disposition (which is also the time that their funds are at risk), court notification procedures (which may affect defendants' appearance rates) and "tradition" in the jurisdiction regarding use of bondsmen (although some communities view them as vital components of the criminal justice system, other areas see them as relatively minor actors in the process).

In general, in jurisdictions having rules of the game that are more favorable to bondsmen (as reflected in rules and regulations that are not unduly restrictive, extensive use of bond, lenient forfeiture collection practices, short case processing times, good court notification procedures and local traditions supportive of bondsmen's operations), they should be able to operate their businesses more profitably. Consequently, they should be willing to incur a higher level of risk in their bail decisions. This should result in their writing bonds for defendants who pose higher release risks and extending terms, such as collateral and cosigner requirements or credit availability, that are more favorable to defendants.

The expected outcomes for the criminal justice system are reduced de-

Figure 1.
Factors That Affect Bondsmen's Decisions, As Related to Criminal Justice Outcomes



TOBORG

tention for defendants who have bonds set (because bondsmen will be able to write bonds for higher risk defendants, who might otherwise be detained), increased failure-to-appear rates (because of the release of higher risk defendants), and increased fugitive rates (because of the combined effect of higher failure-to-appear rates and reduced incentives for bondsmen to track skips, due to lenient forfeiture collection practices).

Conversely, in jurisdictions with less favorable rules of the game, bondsmen should have a more difficult time making a profit and, consequently, would be expected to take fewer risks. Thus, bail decisions should be more conservative (riskier defendants would not make bond), and so would bond terms (collateral and cosigner requirements would be more stringent, and credit would be more difficult to obtain). As a result, there should be greater detention of defendants who have bonds set but lower failure-to-appear and fugitive rates.

The effect of forfeiture collection practices deserves special mention, because of the common assumption that "tough" forfeiture collection practices (such as consistently requiring full payment or requiring payment after only a short time) are desirable and "lenient" procedures are scandalous (see, for example, Freed and Wald, 1964; Thomas, 1976; Wice, 1974). Although stringent policies regarding forfeiture will increase a bondsman's incentive to locate a defendant who has failed to appear, such policies will reduce the incentive to write bond for a risky defendant. Thus, increased detention may be an unanticipated consequence of tough forfeiture collection policies.

A second major factor affecting bondsmen's behavior is industry structure, particularly market shares, which reflect the extent of competition among local bondsmen. In general, a more competitive situation should result in more bonds written and more favorable terms offered defendants. Consequently, there should be less detention (as bondsmen rush to write bonds before their competitors do) but higher failure-to-appear rates (because riskier defendants will make bond).

The nature of the market may mitigate the influence that the rules of the game alone would have on bondsmen's behavior. For example, although "tough" forfeiture collection policies might discourage bonding of higher risk defendants, this tendency could be offset by the pressures in a very competitive market to write as many bonds as possible.

In addition to mitigating the effects of the rules of the game, industry structure may itself be affected by these rules of the game. For example, state laws and administrative regulations may restrict competition by making it difficult for new bondsmen to enter local markets. Also, regu-

lations, such as financial requirements, may effectively limit bondsmen to being those backed by insurance companies. Similarly, industry structure may affect the rules of the game. If markets become too concentrated and regulatory agencies are dissatisfied with the resulting bonding behavior, policies may be changed to foster increased competition.

Other considerations besides industry structure and the rules of the game affect behavior. These include the characteristics of defendants and bondsmen's preferences. For defendants who pose higher risks, one expects fewer bonds to be written and terms to be more stringent, unless forfeiture collection practices are so lax that the increased risk posed by the defendants does not reflect any increased risk of financial loss for the bondsmen. Additionally, bondsmen's individual preferences vary considerably, although the effect of those preferences on overall practices should be less in more competitive markets.

There are, of course, many interrelationships among the factors shown in Figure 1. For example, a jurisdiction's use of bond, a component of the rules of the game that affect bondsmen's behavior, will depend in part on the extent of jail overcrowding, with overcrowded jails likely to result in lower bonds and more lenient release practices. However, jail overcrowding partly reflects bondsmen's decisions regarding good risks, and those decisions are in turn affected by the rules of the game.

Findings from Four Jurisdictions

The overall utility of the conceptual approach illustrated in Figure 1 was assessed for four jurisdictions: Fairfax, Virginia; Indianapolis, Indiana; Memphis, Tennessee; and Orlando, Florida. In each site data were collected from courts' and bondsmen's records for a sample of defendants charged with selected felony offenses (robbery, burglary, aggravated assault, larceny, fraud or the distribution of drugs). Altogether, information was acquired on about 1200 defendants arrested in 1979. In addition, bondsmen and criminal justice officials were interviewed about the local bonding market and activities of bail bondsmen.

The statewide regulatory environment was most favorable to bondsmen in Virginia, where regulations were not very detailed, bondsmen of different types were encouraged to operate, and credit for the fee was allowed to be extended. The second most favorable regulatory environment was found in Tennessee, where various types of bondsmen were encouraged to function and credit was permitted. The regulations were more detailed than in Virginia, however, and imposed more limitations on bondsmen's activities.

The least favorable regulatory environments existed in Florida and Indiana. Both states had detailed regulations, which were enforced more actively than in Virginia or Tennessee. Additionally, bondsmen who were not backed by insurance companies were rare in Florida and were not permitted in Indiana, which also prohibited credit bonding.

Local "rules of the game" also varied across sites. When the overall use of bail was considered, Indianapolis and Orlando had the practices most favorable to bondsmen, as shown by the setting of surety bond for about 95% of the cases studied. In Fairfax and Memphis surety bond was set for 67% of the defendants studied. Amounts were considerably higher in Indianapolis and somewhat lower in Orlando than in the other sites, as shown in Table 1. In Indianapolis 14% of the bonds were below \$2,500, as compared with 53% in Fairfax, 70% in Memphis and 77% in Orlando. Additionally, 35% of the Indianapolis bonds were at least \$10,000, as compared with about 5% of the bonds elsewhere. Thus, Indianapolis had both high use of bond and high amounts, while Memphis had low use and relatively low amounts. Orlando and Fairfax showed mixed patterns of use. Orlando had extensive setting of bond and low amounts, while Fairfax had low use and moderate amounts.

No reliable data were available on differences in forfeiture collection

Table 1.
Comparison of Bond Amounts in Four Cities
(Percentages Are Cumulative)

Bond Amount	Fairfax, Virginia	Indianapolis, Indiana	Memphis, Tennessee	Orlando, Florida
\$ 0 - \$ 999	5%	1%	13%	3%
\$ 1,000 - \$ 1,499	44	7	55	77
\$ 1,500 - \$ 2,499	53	14	70	77
\$ 2,500 - \$ 3,499	80	35	85	91
\$ 3,500 - \$ 5,499	90	58	95	97
\$ 5,500 - \$ 9,999	93	65	95	99
\$10,000 - \$14,999	100	72	100	99
\$15,000 or more	100	100	100	100

practices across sites. There were very few cases in the defendant sample for which collection was a possibility. This is because only 12% of the released defendants failed to appear, and the vast majority of those defendants subsequently returned to court. Indeed, only about 1% of the released defendants were successful fugitives, never coming back to court.

The sites reflect varied statutory and administrative provisions regarding the collection of forfeitures. Fairfax and Orlando required payment most quickly (1 month) but allowed the longest time period (12 months) for returning the defendant to court. In Indianapolis and Memphis payment was due after approximately 6 months, which was also the time allowed for fugitive retrieval.

The median time for a studied case to reach disposition was shortest in Fairfax (3 months) and longest in Indianapolis (6 months), with Memphis' and Orlando's elapsed times falling between these extremes. There was little difference in court notification procedures for the four sites, although bondsmen in Memphis reported some problems caused by the fact that they were not routinely notified of defendants' scheduled court dates after their first court appearances.

Concerning industry structure,⁴ Fairfax had a much higher degree of market concentration than the other sites. In Fairfax the three largest bonding agencies wrote 85% of the bonds; comparable percentages elsewhere were 57%, Indianapolis; 50%, Memphis; and 56%, Orlando. In terms of types of bondsmen, Indianapolis and Orlando were both exclusively "insurance bondsmen" sites, while Fairfax and Memphis had substantial participation from property or "professional" bondsmen.

The varied rules of the game and industry structure among the four sites were, as expected, associated with variation in the terms offered defendants. Overall, approximately 40% of the bonds (for which data were available) were written with no cosigners, and an additional 40% had only one cosigner. Bondsmen in both Memphis and Orlando made greater use of multiple cosigners than Fairfax bondsmen: 29% in Memphis and 22% of those in Orlando had two or more cosigners, as compared with 13% in Fairfax.

Collateral was most common in Orlando, where it was obtained for 55% of the bonds and was least common in Fairfax. There was some use of credit except in Indianapolis, where credit bonding was illegal. Credit was extended more frequently in Memphis than in Fairfax or Orlando and aver-

4. Industry structure was derived from the defendant sample. Because that sample consisted only of defendants charged with selected felony offenses, the resulting data do not reflect the total market for bail bonds.

aged about 10% for the three sites.

Thus, in terms of bond conditions for the three sites where a reasonable amount of information was available, Fairfax was the site most favorable to defendants, with bondsmen there requiring fewer cosigners and less collateral than elsewhere. Orlando had the most stringent conditions, with more requirements for multiple cosigners and for collateral. Memphis fell between these extremes, and insufficient data were available to rate Indianapolis.

The criminal justice system outcomes (e.g., detention and failure to appear) also varied among the four sites. Detention rates for defendants with bonds set were highest in Indianapolis and Orlando (44% and 46%, respectively) and lowest in Fairfax (29%) and Memphis (33%). The length of detention was higher in Indianapolis than in other sites. The failure-to-appear rates were highest in Indianapolis at 18% and ranged from 9% to 12% in the other sites.

These findings, summarized in Table 2, can be compared with the predicted relationships among rules of the game, industry structure, bondsmen's behavior and criminal justice system outcomes. First, given favorable regulations, the conceptual framework predicts that there will be better bond terms for defendants, less detention of defendants who have bonds set as their release conditions, and higher failure-to-appear rates. The expected relationship of regulations to bond terms and detention was found in all sites. However, the expected result was not achieved for failure-to-appear rates, where the highest rate occurred in the site (Indianapolis) with the least favorable regulations.

In jurisdictions with greater use of bond, one expects to find better bond terms, less detention of defendants who have bonds set, and higher failure-to-appear rates. No direct correspondence with bond terms or detention was found, although there was some relationship with failure to appear.

More favorable forfeiture collection practices should be associated with better bond terms, lower detention of defendants who have bonds set, and higher failure-to-appear rates. The expected relationship for bond terms was found in Fairfax and for detention, in Indianapolis as well. Only Memphis showed the expected result for failure to appear.

Faster case processing should be directly related to better bond terms, lower detention for defendants who have bonds set, and higher failure-to-appear rates. The expected relationships with bond terms and detention, although not with failure to appear, were found across sites.

Finally, more competitive markets should be associated with more fa-

Table 2.
Four-City Comparison of Factors Affecting
Bail Bonding Decisions,
As Related to Criminal Justice Outcomes

Item	Fairfax, Virginia	Indianapolis, Indiana	Memphis, Tennessee	Orlando, Florida
Statewide 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

avorable bond terms, less detention for defendants who have bonds set, and higher failure-to-appear rates. The bond terms and detention relationships roughly met expectations in Indianapolis, Memphis, and Orlando. Fairfax, however, diverged sharply from the expected relationships. It was the site with the least competition but nevertheless had the best bond terms and least detention of defendants with bonds set.

The absence of the expected relationship between the extent of bond-setting by the courts and the extent to which defendants with bonds set secured release before trial deserves special mention. The expectation had

been that greater use of bonds by the courts would, by increasing the bondsmen's total potential market, permit bondsmen to incur greater risks in their release decisions. As a result, the detention rates of defendants for whom bond was set were expected to be relatively low. However, the data showed that the two sites with the greatest use of bond (Indianapolis and Orlando) had the highest detention rates for defendants with bonds set, while the two sites with the least use of bond (Fairfax and Memphis) had the lowest detention rates for those defendants.⁵

When this finding is considered further, it illustrates important interrelationships among key factors affecting bondsmen's behavior. In Fairfax the low use of bond was offset by fast case processing and a favorable regulatory environment, so that relatively little detention of defendants with bonds set resulted. Indeed, fast case processing and favorable regulations in Fairfax also overcame the expected adverse effects of high market concentration in that site.

In Memphis the low use of bond was offset by a reasonably favorable regulatory environment and a highly competitive industrial structure, which again resulted in relatively low detention of defendants with bonds set. On the other hand, high use of bond in Indianapolis was offset by the least favorable regulatory environment and the slowest case processing of the four sites, so that there was considerable detention of defendants for whom bond had been set as a condition of release.

These findings suggest that the nature of the regulatory environment and the length of case processing are particularly important factors affecting bondsmen's operations. Indeed, the influence of these factors seems stronger than that of market structure or of the overall use of bond in a jurisdiction, at least for the four cities studied.

The lack of certain relationships commonly thought to exist between failure-to-appear and other variables merits comment. Although high bonds are sometimes thought necessary to assure appearance, the sites with low bonds had lower failure-to-appear rates. Moreover, the city with the highest bonds (Indianapolis) had the highest failure-to-appear rate. Similarly, while low detention rates might be expected to produce high failure-to-appear rates, because of the release of many high-risk defendants, the sites with low detention rates had low failure-to-appear rates. Nor did jurisdictions with favorable regulatory environments or lenient

5. Note that this discussion considers detention rates only for defendants with bonds set, not for all defendants. Overall detention rates will, of course, depend on the extent to which defendants are released without bond as well as the extent to which defendants with bonds set secure release.

forfeitures collection practices have high failure-to-appear rates.

One expected relationship regarding failure-to-appear was confirmed, however: shorter case processing time was associated with lower rates. Low rates were found in the sites where cases were settled within short or only moderately long time periods, while the highest rate occurred in the jurisdiction with by far the longest time required for case disposition.

In general, the conceptual framework for analysis provided reasonably good explanations for the differences in bondsmen's decisions and the effects of those decisions on detention rates. The conceptual framework was not particularly helpful, however, in explaining differences in failure-to-appear rates. This lack of explanatory power may merely reflect the fact that many defendants who fail to appear are not trying to evade justice but rather have forgotten their court dates, become ill, gone to the wrong place, etc. Such "non-willful" failures to appear may occur at random among defendants and so confound efforts to provide systematic explanations of failure-to-appear rates. A better test of the conceptual framework's usefulness for understanding court appearance outcomes would be based on fugitive rates, rather than failure-to-appear rates. However, as discussed earlier, the defendant sample for the sites studied had too few fugitives to undertake such an analysis.

Policy Implications

The analysis of factors affecting bondsmen's decisions suggests that several current trends may, by adversely affecting the profitability of bail bonding, result in increased detention of defendants for whom bonds are set. First, many jurisdictions are pursuing "tougher" release policies, particularly for defendants who are deemed "dangerous" or who have lengthy prior records. One manifestation of such policies may be the setting of higher bonds. For example, Tennessee law mandates that bail be double the amount at least "customarily set" for defendants who are rearrested while awaiting trial (Tenn. Code § 40-11-148). Although higher bonds mean higher bond premiums and thus could be beneficial to bondsmen, higher bonds also mean greater losses when bond forfeitures must be paid for defendants who do not appear for court.

This higher potential loss becomes especially important when a second trend is considered: the widely reported tendency for courts now to require payment of bond forfeitures to a greater extent than formerly. More stringent policies regarding the collection of forfeitures will increase bondsmen's operating costs and should make them less willing to write bonds for riskier defendants. Consequently, unless there are offsetting

forces in the jurisdiction (such as a highly competitive bond market or a pretrial release program that actively seeks to increase release rates), detention is likely to rise.

The analysis of factors affecting bondsmen's decisions also helps explain the relatively high detention rates in many jurisdictions for defendants with low bonds. Such an outcome is especially likely to occur in "reform" jurisdictions, which have reduced their reliance on bail bondsmen by increasing the use of own recognizance and other release alternatives. In such jurisdictions bondsmen perceive that defendants with low bonds were viewed by judges as posing greater-than-average release risks; otherwise, such defendants would presumably have been released on their own recognizance or through similar mechanisms not involving surety bonds. Because these somewhat risky bonds provide only small fees (because of their low amounts), bondsmen are reluctant to write them. This situation can be compared with the pre-reform era, when bonds were set for most defendants. Under those conditions most persons with low bonds were good release risks, and bondsmen could make a healthy profit from the accumulation of small fees on many safe bonds, which more than compensated for the occasional forfeitures.

Thus, in a reform jurisdiction, the defendants for whom bond continues to be set may be worse off than before the reforms. This is because bondsmen will find it harder to make a profit after the reform and, consequently, can be expected to take fewer risks. As a result, defendants for whom bond is set may have more difficulty making bond than previously. Hence, although the reforms benefit many defendants, they may harm others (Fleming, 1982: 130-33).

As this analysis suggests, unanticipated problems may arise in jurisdictions that try to combine bail reform measures with the continued operation of a surety bond system. Some jurisdictions have avoided those problems by eliminating surety bonding altogether. This has occurred in Kentucky and Wisconsin, where bail bonding for profit is now illegal, and also in such states as Illinois and Oregon, where the availability of 10% deposit bond as a release option has effectively ended surety bonding.

The problem could also be addressed, however, by assuring the continued profitability of bail bonding. For example, the permissible bonding fees for small bonds could be increased in jurisdictions where defendants with such bonds are now detained at unnecessarily high rates. Alternatively, bondsmen's costs for writing such bonds could be reduced, through lenient forfeiture collection policies by the court for those bonds.

It is important to understand that strengthening the surety bonding

system could have desirable effects. Although some persons have urged that bonding be abolished (National Association of Pretrial Services Agencies, 1978), bond provides a way for defendants with sufficient resources to secure release relatively quickly and easily, particularly in jurisdictions with bond schedules.⁶ Indeed, defendants with the resources to post bond may prefer to do so than to wait for a bail hearing to be held. True equity considerations do not so much require the elimination of money bond as the assurance that defendants will not be unnecessarily detained for any reason, whether due to financial inability to post bond, lack of community ties or another cause.

Unfortunately, "bail reform" has been accompanied in some jurisdictions by a tendency to focus on the release process, rather than its outcomes. Such jurisdictions consider themselves to have "good" release systems if they have established pretrial release programs, introduced deposit bond and other release alternatives, and reduced the importance of bondsmen—without regard to the concomitant effects on detention or failure-to-appear rates.

Such a focus on process measures may mask undesirable outcomes resulting from that process, such as unnecessary detention caused by the impact of a pretrial release program that uses very restrictive eligibility and release recommendation criteria (Pryor, 1982: 7). A "reform" jurisdiction with such a program may have detention and failure-to-appear rates exceeding those of a comparable jurisdiction that relies extensively on bail bondsmen. While the reverse may also be the case, it is far from an inevitable outcome of bail reform today.

Concluding Remarks

Despite the widespread introduction of alternative release mechanisms, most jurisdictions continue to use bail bondsmen in their pretrial release systems. The relationship between bondsmen and criminal courts in such jurisdictions has often been a symbiotic one, in which the actions of the courts have enhanced the profitability of bondsmen's operations, which in turn have facilitated the actions of the courts.

Among the major factors affecting the profitability of bail bonding are the courts' bond-setting practices and forfeiture collection policies as well as the time required to process cases. In return for courts' actions to assure their profitability, bondsmen have written bond for defendants who might

6. Bond schedules have been criticized, because they are usually based on charge alone and thus do not reflect "individualized" release decisions.

otherwise have been detained, helped the criminal justice system maintain social control over released defendants prior to trial and assisted the court in locating defendants who failed to appear and returning them for trial. Additionally, bondsmen have provided judges with a buffer against public criticism arising after unpopular release decisions.

There is a potential danger that courts may try to redefine their relationship with bondsmen in ways that will make it more difficult for bondsmen to perform such functions as bonding defendants and tracking fugitives. For example, promulgating regulations that have costly compliance requirements or implementing tougher forfeiture collection practices could, by increasing bondsmen's costs of operations, reduce their willingness to write bonds for riskier defendants. Such policy changes may be ill-advised, particularly in jurisdictions with overcrowded jails.

If reliance is to be placed on bondsmen to keep detention at manageable levels and to provide other services for the criminal justice system, then they must be enabled to operate profitably while writing bonds for higher risk defendants. This does not imply that such reliance on bondsmen is necessarily desirable. It does imply, however, that if a jurisdiction has adopted a pretrial release system in which bondsmen are expected to play a major role, then the jurisdiction should facilitate and not hinder their performance of that role.

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