A

Supreme Court of Wisconsin

DIRECTOR OF STATE COURTS
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MADISON, WISCONSIN 53701-1688

Shirley S. Abrahamson
Chief Justice

16 East State Capitol
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A. John Voelker
Director of State Courts

January 9, 2004

The Honorable Garey Bies
Chair, Assembly Committee on Corrections and the Courts
Room 125 West, State Capitol
Madison, WI 53702

RE: Assembly Bill 334, Relating to Compensation of Sureties

Dear Representative Bies:

I write on behalf of the Legislative Committee of the Wisconsin Judicial Conference to express its opposition to Assembly Bill 334. This bill would return Wisconsin to a system that allowed sureties, often referred to as bail bondsmen, to be compensated. The same negative influences that led the Wisconsin Legislature to remove the element of compensation from the bail system nearly 25 years ago continue to exist in those states that have a commercial surety system. The Legislative Committee's opposition is premised on concern about those negative influences, including the following:

1. Bail bondsmen often act in a law enforcement capacity, but with a commercial purpose. The ends they pursue of helping guarantee a defendant's presence at court proceedings is desirable, but the means they use to accomplish those ends are often undesirable.

2. The court would be placed in the position of dealing with any misconduct by bail bondsmen because there does not appear to be any system of regulation. There are numerous anecdotes of bad practices used by bail bondsmen, and the court would most likely be the entity that would be required to manage the consequences of that conduct.

3. Judges currently use the bond system as an indicator of defendants' seriousness about the charges facing them. Now defendants themselves are responsible for returning to court for all proceedings. The introduction of bail bondsmen may place different motivations behind defendants' behavior and will not provide judges with information on defendants' patterns of conduct that are now useful tools.

4. There does not appear to be any significant problem in our current system of setting bond. Is there any empirical evidence that indicates Wisconsin has a lower court attendance rate than states that allow bail bondsmen?

On behalf of the Wisconsin Judicial Conference, I urge you to reject AB 334. I hope these comments will assist your committee in its deliberations. If you have questions about our position, please do not hesitate to contact me or our Legislative Liaison, Nancy Rottier. Thank you.

Respectfully submitted,

A. John Voelker
Director of State Courts

AJV:NMR
cc: Members, Assembly Committee on Corrections and the Courts

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MEMORANDUM

To: Members of the Assembly Committee on Corrections and the Courts

From: Criminal Law Section, State Bar of Wisconsin
Individual Rights & Responsibilities Section, State Bar of Wisconsin

Date: January 13, 2004

Re: Assembly Bill 334 - OPPOSE

The Criminal Law Section and the Individual Rights and Responsibilities Section of the State Bar of Wisconsin urge you to oppose AB 334, resurrecting bail bonding for profit. The bill is scheduled for an executive session before the Assembly Committee on Corrections and the Courts on Wednesday, January 14th.

Almost twenty-five years ago, the Legislature wisely decided to abolish commercial surety bail in favor of nonfinancial release options and privately-secured money bail. Assembly Bill 334 (AB 334) would reverse this decision and return the state to a time when the jail population increased, justice was overridden by profit-driving forces and public accountability was eroded.

History tells us what will happen if AB 334 becomes law – more jail overcrowding, a dire prospect for communities struggling with budget issues. When state law allowed for commercial surety bail, judges were more likely to require defendants to post bail. Defendants, whose bail was set so low as to be financially unappealing to a bail bondsman or those who were too poor to afford the services of a bail bondsman, remained behind bars awaiting trial. Meanwhile those with financial resources were set free pending trial. During these times, the decision to tie up a jail bed at taxpayer expense was essentially made by a bail bondsman with no regard for local budget constraints and no allegiance to the principle of equal treatment before the law.

By putting out the welcome mat for bonding companies, AB 334 would allow the driving forces of profitability to override notions of equal justice and fairness. In the eyes of the commercial bail bondsmen, the most important criterion for release is the person's ability to pay a bail premium. The higher the premium, the more likely the bondsman will be able to secure a defendant's release, regardless of the criminal charge. The courts, on the other hand, are concerned about failure to appear and threat to public safety in deciding suitability for pre-trial release. Changing the law to authorize commercial surety bonding in criminal cases would allow profitability to trump these considerations.

The emphasis on financial criterion for pretrial release also would erode public accountability and subvert judicial intent. When the court sets a surety, the actual release decision passes from an official accountable to the public to a largely unregulated private individual. A judge may set

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a small bail, intending the defendant to be released quickly, or a large bail to make release unlikely. But a bondsman may focus on the higher bond since he will make the most profit there. In either case, judicial intent is thwarted, resulting in unnecessary pretrial detention or the release of a high-risk defendant at the hands of a private entity.

For these reasons, the Criminal Law Section and the Individual Rights and Responsibilities Section of the State Bar of Wisconsin are urging members of the Assembly Committee on Corrections & the Courts to oppose AB 334.

If you have any questions, please feel free to contact Deb Sybell, Government Relations Coordinator for the State Bar of Wisconsin at (608) 250-6128.

Assembly Republican Majority
Bill Summary

AB 334: Bail Bondsmen
Relating to: Sureties in criminal cases.
Introduced by Representatives Suder, Owens, Stone, Bies, Grothman, Petrowski and Seratti.

Date: February 5, 2004

BACKGROUND

Under current law, a surety - a person who guarantees the appearance at trial of a criminal defendant and who must pay any fine imposed if the defendant does not appear - must either be a natural person who is a resident of the state or act as a surety through an automobile club, association, or insurance company. Current law also prohibits a surety from being compensated for acting as a surety.

SUMMARY OF AB 334 AS AMENDED BY COMMITTEE

Assembly Bill 334 authorizes an insurer that is licensed to do business in this state to act as a surety. The bill also specifies that the prohibition on compensation for a surety does not apply to an insurer that is licensed to do business in this state or to a person acting as a surety through an automobile club, association, or insurance company.

AMENDMENTS

Assembly Substitute Amendment 1 to Assembly Bill 334 allows insurance companies licensed in Wisconsin to act as a surety. Also, ASA1 stipulates that in order to be compensated for acting as a surety, the surety must be an insurer that is licensed to do business in this state or is a person acting as a surety through an automobile club, association, or insurance company. AB 334 as originally drafted simply removed the prohibition on being compensated for acting as a surety.

FISCAL EFFECT

No Fiscal Estimate was prepared for Assembly Bill 334.

PROS

1. Of methods of release pending trial, the compensated surety method outperforms all others in getting defendants to court.

2. Recidivism of those utilizing a corporate surety bond is low.

3. Passage of AB 334 will ease the burden on law enforcement as the responsibility to insure some appearances falls to the surety.

4. No government cost, and can generate additional revenue for local jurisdictions.

CONS

1. Current system allows the judges to set bonds appropriate to the defendant, thereby giving the judges the ability to effectively decide who is able to post bond.

2. Bail bondsmen should not be the ones holding "get out of jail" cards.

3. Court could be placed in position of dealing with the misconduct of bail bondsmen.

4. There are no apparent problems with the current system of setting bond.

5. The Wisconsin Legislature prohibited compensation for acting as a surety 25 years ago as a result of the corruption of judges by the surety industry.

SUPPORTERS

Rep. Scott Suder, author; American Bail Coalition; American Insurance Association.

OPPOSITION

Fred Kessler, Reserve Circuit Judge; EM McCann, Milwaukee District Attorney; ACLU.

HISTORY

Assembly Bill 334 was introduced on May 13, 2003, and referred to the Assembly Committee on Corrections and the Courts. A public hearing was held on August 13, 2003. On January 14, 2004, the Committee voted 6-4 [Reps. Pocan, Colon, Staskunas and Wasserman voting no] to recommend passage of Assembly Bill 334.

CONTACT: Andrew Nowlan, Office of Rep. Garey Bies

Burri, Lance

From: Morgan, Deirdre A. DOC
Sent: Wednesday, August 06, 2003 12:25 PM
To: Burri, Lance
Cc: Margolies, Robert S. DOC
Subject: FW: Info on first time offenders - PS

Lance,

Attached are numbers using the definition of first time offenders to include no prior felony record.. Meaning, this is the very first time they have been convicted of a felony crime and they were sentenced to prison. They could have been arrested and convicted of a misdemeanor and actually been placed on probation for the offense(s). I hope this is helpful and not confusing. Feel free to give me a call. Dede

Deirdre A. Morgan, Executive Assistant
Wisconsin Department of Corrections
608-240-5055
608-240-3305 Fax

-----Original Message-----
From: Simonson, Dennis L. DOC
Sent: Wednesday, August 06, 2003 9:55 AM
To: Morgan, Deirdre A. DOC
Subject: RE: Info on first time offenders - PS

Dede - here is a second analysis, looking only at offenders who have been admitted to prison for the first time and who have no prior felony convictions.

FirstTimeOffenders.doc

-----Original Message-----
From: Morgan, Deirdre A. DOC
Sent: Tuesday, August 05, 2003 10:55 AM
To: Simonson, Dennis L. DOC
Subject: RE: Info on first time offenders - PS

Please run the numbers both ways. I can give them both to the reporter and they can sort it out. Thanks, D

Deirdre A. Morgan, Executive Assistant
Wisconsin Department of Corrections
608-240-5055
608-240-3305 Fax

-----Original Message-----
From: Simonson, Dennis L. DOC
Sent: Monday, August 04, 2003 5:23 PM
To: Morgan, Deirdre A. DOC
Subject: RE: Info on first time offenders - PS

Dede - something important to point out about these answers - in the absence of clarification, I took the question to be about "first time incarcerations" rather than "first time offenders" as it was actually worded - because I thought the interest would be in the effects related to persons who are having their first episode of incarceration.

On reflection, and with the benefit of Jo Winston's assistance - maybe the question really is about "first time offenders" which would exclude from these numbers persons that are coming to prison for the first time after some prior sentence to probation. I could run the numbers this second way, it would take another hour or so.

Please let me know. Sorry for any confusion.

****

Here you go.

<< File: FirstTimeAdmissions.doc >>

-----Original Message-----
From: Burri, Lance
Sent: Wednesday, July 30, 2003 5:14 PM
To: Morgan, Deirdre A. DOC
Subject: Info on first time offenders

Hi DeeDee.

Don't know if I spelled that right. Frank has asked me to compile some information about first time offenders in our prison system. Basic questions: how many first time offenders are serving in our prisons? What's the rate of incarceration per month? How many are incarcerated for non-violent crimes?

He may have some follow up questions later on, so the more detail we can give him right away the better. Can we break them down by crime or category of crime? What's the average length of sentence for a first-time non-violent offender?

I'd appreciate any information you can give me.

Lance Burri
Office of Rep. Frank Lasee
888-534-0002 or 608-266-9870
lance.burri@legis.state.wi.us

August 12, 2003

Via Telecopier and Mail
(608) 282-3601

Representative Garey Bies
Committee on Corrections and the Courts
Wisconsin State Assembly
P.O. Box 8952
Madison, WI 53708

Re: 2003 Assembly Bill 334

Dear Representative Bies:

The Surety Association of America ("SAA") is a national trade association of companies licensed to write fidelity and surety insurance in the United States. SAA's 538 members are sureties on the vast majority of bonds written in the United States and in Wisconsin.

SAA collects statistics on premiums and losses on surety bonds and files the statistics with the insurance departments of all fifty states. SAA is licensed by the Wisconsin Department of Insurance as a Rate Service Organization. SAA also represents the interests of its member companies before the United States Congress, the legislatures of the various states, and the executive branches of the federal and state governments.

In federal courts and the vast majority of states, criminal defendants can obtain pretrial release by posting a bond with a regulated insurance company as the surety. Such commercial bail bonds, for which the insurer receives a fee, serve several public purposes. A possibly innocent defendant can remain free pending trial, but the bail bond surety has a financial stake in assuring that the defendant appears for trial. The taxpayers do not bear the cost of incarcerating the defendant, and law enforcement authorities receive assistance in locating the defendant if he does not appear.

We do not suggest that commercial bail should be the exclusive means of pretrial release, but it should be one alternative available to the courts to use in appropriate cases. Under current Wisconsin law, however, insurance companies are barred from writing bail bonds. Wis. Stat. §969.12(2) forbids anyone but a natural person from acting as surety on a bail bond, and forbids compensation of the surety. The only exception is one for automobile club bonds for minor traffic offenses pursuant to Wis. Stat. §345.61.

SAA supports the concept behind Assembly Bill 334 to permit compensated sureties as an alternative to the present system. That is, everything permitted today would still be permitted, but in addition the court could choose to require a commercial bail bond if it thought that was the most appropriate means of releasing the defendant while assuring his or her appearance for trial.

We believe that A.B. 334 would accomplish its purpose more effectively if it were amended to change §969.12(2) to read as follows:

> A surety under this chapter shall be either a natural person, an insurer licensed to do business in this state, or a surety under s. 345.61. Only an insurer licensed to do business in this state may be compensated for acting as such surety.

A companion change in paragraph (1) of §969.12 would limit the requirement that the surety be a resident of Wisconsin to natural persons. The current text of Wis. Stat. §969.12 with our proposed changes redlined is enclosed.

The reason for our suggested changes from the current text of A.B. 334 is to assure that natural persons writing commercial bail for a fee would have to meet the same capital and reserve requirements as a corporate surety. If a friend or relative gratuitously guarantees the defendant's appearance, he or she would not be expected to become licensed or meet the same financial standards as a commercial surety. Under current law, no one can charge a fee, so our proposal does not change anything for natural persons, but it would allow properly licensed entities to offer commercial bail bonds for a fee.

It is important that there be oversight and regulation of commercial bail sureties, and the Department of Insurance can provide it just as it regulates other lines of insurance. Only entities meeting the Department's requirements would be licensed. No court would be required to utilize commercial bail bonds, but they would be an alternative available to Wisconsin judges just as they are available in almost all other states.

We appreciate your consideration of this matter and would be glad to provide any information we have.

Sincerely yours,

Edward G. Gallagher
General Counsel

969.12. Sureties

(1) Every natural person acting as a surety under this chapter, except a surety under s. 345.61, shall be a resident of the state.

(2) A surety under this chapter shall be either a natural person, an insurer licensed to do business in this state, or ~~except~~ a surety under s. 345.61. ~~No~~Only an insurer licensed to do business in this state ~~surety under this chapter~~ may be compensated for acting as such surety.

(3) A court may require a surety to justify by sworn affidavit that the surety is worth the amount specified in the bond exclusive of property exempt from execution. The surety shall provide such evidence of financial responsibility as the judge requires. The court may at any time examine the sufficiency of the bail in such manner as it deems proper, and in all cases the state may challenge the sufficiency of the surety.

SCOTT SUDER

State Representative • 69th Assembly District

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Rep.Suder@legis.state.wi.us
www.legis.state.wi.us/assembly/asm69/news

August 15, 2003

Representative Gary Bies
125 West, State Capitol
PO Box 8952
Madison, WI 53708

Dear Representative Bies:

I want to thank you for all your willingness to hold a hearing on Assembly Bill 334.

Your office should already have received a copy of an amendment that we have worked on with input from the Surety Association of America and the American Insurance Association. Please do not hesitate to contact my office should you have any questions regarding this amendment. It would be perfectly fine with me should you wish to introduce it as a committee amendment. Otherwise I would be happy to introduce the amendment as well.

Once again, thank you for your willingness to schedule a hearing on AB 334. I certainly appreciated your assistance during the hearing process.

Sincerely,

Scott Suder
State Representative
Wisconsin's 69th Assembly District

Representative Frank Lasee Request for Information
8/6/2003

First Time Felony Conviction Offenders Admitted to WI Prison System

The underlying source for the following analysis was the DOC Monthly Report File (MRF) created on 3/31/2003. See notes at the end of this document for definitions and qualifications.

Analysis

1. First Time Felony Conviction Offenders

The number of offenders currently serving their first episode of incarceration for a first felony conviction in WI Prisons as of 3/31/2003 = 8,276 offenders

2. Rate of Incarceration

Average admissions of first time offenders per month

Calendar 2000 = 210
Calendar 2001 = 204
Calendar 2002 = 219
Calendar 2003 (January through March) = 202

Adm Yr	Adm Mo	Count
2000	Jan	229
2000	Feb	213
2000	Mar	231
2000	Apr	207
2000	May	230
2000	Jun	200
2000	Jul	212
2000	Aug	186
2000	Sep	200
2000	Oct	185
2000	Nov	218
2000	Dec	206
2001	Jan	203
2001	Feb	204
2001	Mar	234
2001	Apr	170
2001	May	187
2001	Jun	204
2001	Jul	212
2001	Aug	194
2001	Sep	188
2001	Oct	213
2001	Nov	221
2001	Dec	212
2002	Jan	229
2002	Feb	235
2002	Mar	254

2002	Apr	213
2002	May	215
2002	Jun	231
2002	Jul	246
2002	Aug	183
2002	Sep	201
2002	Oct	216
2002	Nov	216
2002	Dec	185
2003	Jan	182
2003	Feb	213
2003	Mar	211

3. Violent Crimes

Average count of first time admissions for first felony violent crime convictions per month. Percentage numbers are based on only those incarceration episodes where the offense conviction is available in the source data - see note 4 at the end of this document.

Calendar 2000 = 80 (38%)
Calendar 2001 = 74 (36%)
Calendar 2002 = 81 (37%)
Calendar 2003 (January through March) = 74 (39%)

Adm Yr	Adm Mo	Count	Percent
2000	Jan	86	37.6%
2000	Feb	72	34.0%
2000	Mar	101	43.9%
2000	Apr	76	36.9%
2000	May	76	33.2%
2000	Jun	91	45.7%
2000	Jul	80	37.7%
2000	Aug	67	36.2%
2000	Sep	81	40.5%
2000	Oct	59	31.9%
2000	Nov	92	42.2%
2000	Dec	83	40.3%
2001	Jan	79	38.9%
2001	Feb	77	37.7%
2001	Mar	88	37.6%
2001	Apr	67	39.4%
2001	May	60	32.1%
2001	Jun	78	38.4%
2001	Jul	85	40.1%
2001	Aug	70	36.1%
2001	Sep	66	35.3%
2001	Oct	67	31.6%
2001	Nov	66	29.9%
2001	Dec	81	38.2%
2002	Jan	80	35.1%
2002	Feb	92	39.3%
2002	Mar	99	39.1%
2002	Apr	81	38.2%

2002	May	76	35.8%
2002	Jun	97	42.2%
2002	Jul	95	38.9%
2002	Aug	59	32.4%
2002	Sep	69	34.5%
2002	Oct	81	38.2%
2002	Nov	79	36.9%
2002	Dec	69	37.5%
2003	Jan	69	40.4%
2003	Feb	72	35.5%
2003	Mar	80	40.0%

4. Offense Category

First Time Felony Convcition Admissions by Offense Category

Offense Category	2000	2001	2002	Jan-Mar 2003
ARSON	21	14	9	5
ASSAULT/BATTERY	186	186	176	48
DRUG POSSESSION	163	178	219	60
DRUG TRAFFICKING	536	534	594	134
ESCAPE	96	90	86	13
FRAUD	113	110	132	18
HOMICIDE WITH INTENT	61	47	59	7
HOMICIDE WITHOUT INTENT	49	46	65	20
KIDNAPPING	17	25	9	4
NEGLECT OF CHILD	31	22	45	9
OTHER NON-VIOLENT	48	63	39	13
OTHER VIOLENT	182	181	172	31
ROBBERY	198	187	229	34
SEX ASSAULT ADULT	81	54	69	25
SEX ASSAULT CHILD	246	226	260	64
SEX CRIME OTHER	7	9	10	2
THEFT NON-VEHICLE	324	324	288	59
THEFT VEHICLE	107	106	104	19
WEAPON	45	37	40	9

5. Average Length of Sentence

Average Length of Sentence for First Time Felony Conviction Admissions for Non-violent Crimes

Adm Yr	Avg Sentence Months
2000	60
2001	82
2002	72
Jan-Mar 2003	69

Notes:

1. This analysis examines the first episode of incarceration for all offenders. Episode is defined by a single admission date through release date.

2. All admission types are included.

3. Offense type and category is based on the governing offense conviction. Offense convictions in addition to the governing offense are not considered.

4. Offense conviction information is not available in the source data for all offenders. Specifically the information is not available when there is no conviction, and is not available for recent episodes when the conviction information has not yet been received or entered into the database.

5. Determination of offense category and offense violence is based on the coding system in use within the WI DOC Prisoner Information Guide (PING) database application for risk analysis and decision support.

FACT SHEET SUPPORTING THE COMPENSATED SURETY SYSTEM

FACT 1:

Compensated sureties, due to their superior performance in getting persons back to court, are more in keeping with the very purpose of bail than any other approach.

> Bail should be " . . . reasonably calculated to ensure that one accused will stand trial and submit to sentence if found guilty."
>
> *Stack v. Boyle, 342 U.S. 1, 4-6 (1951).*

FACT 2:

Of methods of release pending trial, the compensated surety method outperforms all others in getting defendants to court.

United State Department of Justice, Bureau of Justice Statistics, NCJ-148818

FACT 3:

Compensated sureties bonded out over two million cases in 1998. Their loss ratio on this book of business was less than two per cent (2%).

National Association of Bail Insurance Companies

FACT 4:

All that is regularly accomplished by compensated sureties is performed at zero cost to government, and, in fact, substantial revenue is generated in local jurisdictions via this system.

FACT 5:

The compensated surety system outperforms all others in promoting community safety; fewer persons are re-arrested while out on a surety bond than those out through any other method of release.

Honorable Wilma Lewis, U.S. Attorney for the District of Columbia, at a recent hearing before the D.C. Government Council on the need to promote the use of commercial bail in the District, on the question of how much attention should be paid to the "monetary" issue said, "*This should not be first about rich or poor – it should be first about public safety.*"

Compensated surety releasees have an almost 50% lower re-arrest rate while on pretrial release than persons released via any other method.

Bureau of Justice Statistics Bulletin, NCJ-148818.

FACT 6:

Utilizing private sector bonding is recognized by experts in the field as desirable.

"Favor competitive, commercial bail bonding."

From a study headed by Mr. Morgan Reynolds U.S. Congressional Joint Committee on Economics.

"Private bail has done an excellent job of ensuring that defendants get to court . . . and they do it at no cost to the taxpayer. It's a system that has a long history of success."

William P. Barr, Attorney General under President George Bush.

FACT 7:

Local, state and national leaders recognize the contribution of commercial bonding to the criminal justice system.

- "Harris County Commissioners Court recognizes that the Harris County community victims of crime are entitled to a pretrial supervision program which protects not only the rights of the accused individual, but the rights and safety of the community as well; and

Now Therefore Be It Resolved that Harris County Commissioners Court hereby recognizes, supports the National Association of Bail Insurance Companies for their contribution on the success of this project.

It is hereby ordered that this Resolution be spread upon the minutes of Commissioners Court this 8th Day of December, 1998."

Resolution passed in Houston, Texas on December 8, 1998.

- The American Legislative Exchange Council , having over one half of all State legislators in its membership has published, "The publicly funded pretrial release system has failed the American people."

- "Bail Bondsmen serve an important supplemental role in state law enforcement efforts."

Honorable Charles T. Canady, Chairman, U.S. Congress Subcommittee on the Constitution, March 12, 1998.

- "I write to thank you for the assistance you have provided to me and my office in relation to S. 1637. The benefit of your expertise cannot be overstated and was most generously shared . . ."

Letter dated September 2, 1998 from U.S. Senator Robert G. Torricelli, Senate Judiciary Committee, to the National Association of Bail Insurance Companies.

FACT 8:

The low failure to appear rate for the compensated surety approach creates enormous "bottom line" financial savings for local government.

"Every failure to appear imposes quite substantial public costs . . ., the weighted average cost for each failure to appear is $1,273.81."

Executive Summary, Report Card On Crime, May 1997 ALEC Criminal Justice Task Force study.

FACT 9:

The notion of supplanting compensated sureties with 10% deposit bail as a method of financially secured release is flawed, as it promotes a program that has a poor performance record:

a. In 1973, Oregon passed a 10% deposit bail Bill. A later comprehensive study showed that over 40% of those so released failed to appear.

b. Cook County, Illinois is trying the 10% cash deposit approach. The Illinois Criminal Justice Information Authority reports that the failure to appear rate is 21% for women and 30% for men.

c. California is probably the most telling example of deciding against 10% cash deposit bail. A large deposit bail pilot project was run there. In addition to finding that deposit bail did not alleviate jail overcrowding, California concluded that (1) commercial bonds were more successful in assuring reappearance of defendants, and (2) taxpayers carried a significantly higher financial burden with deposit bail.

d. New Jersey had a 10% program for years. In 1995 their legislature, with N.J.A. 526/212, dismantled the program because of its horrendous failure.

e. Compensated surety has a 30% better court appearance rate than does 10% deposit bail.

Bureau of Justice Statistics Bulletin, NCJ-148818.

FACT 10:

The Compensated surety industry continues to invent resources and energy toward the betterment of the criminal justice system.

Example: The National Association of Bail Insurance Companies proposed model legislation in all states to either abolish or control the practice of "bounty hunters." Twenty-six states, so far, have adopted some form of this measure.

Example: Industry leaders are regular participants in criminal justice education programs nationwide. "Thank you for your time and effort . . . in the attorney certification program . . . appreciate your helping make the program a success."

District Courts, Harris County, Texas – September, 1999

"In an effort to ensure appearance, the bondsman provides a variety of useful services to his clients, which in turn helps the courts to run smoothly."

Indiana Law Review, Vol. 32:1413, August, 1999.

FACT 11:

The motives of some of those who oppose compensated surety are at best suspect:

Criminal defense attorneys see the premium paid for the surety's services as monies that could otherwise be collected as attorney fees.

Pretrial services agencies employees view compensated surety representatives as "business competitors", vying for the same inmate/"customer". The fact that the private sector generally outperforms public funded bail programs in terms of getting persons to court does not help, of course.

FACT 12:

Those who argue that the use of compensated surety is violative of the presumption of innocence err.

The United States Supreme Court described the presumption as, "a doctrine that allocates the burden of proof in criminal trials" and denied that it has any "application to the rights of a pretrial detainee during confinement before his trial has even begun."

Bell v. Wolfish, 441 U.S. 520, 533 (1979).

FACT 13:

Promoting that method of release pending trial which (1) best enhances court appearances and (2) best discourages recidivism is fully in keeping with ABA goals.

Goal I. To promote improvements in the American System of Justice.

Goal IV. To increase public understanding of and respect for the law, the legal process, and the role of the legal profession. (*underlining ours*).

Goal VIII. To advance the rule of law in the world.

FACT 14:

Any ABA Standard, or language, which would discourage utilization of such an effective system is contra the stated goals of the ABA.

RECENT EXAMPLES OF ABUSES ASSOCIATED WITH BAIL BONDING FOR PROFT

In 2001, the F.B.I. obtained court approval to wiretap the telephones of Jefferson Parish, Louisiana bail bondsman Louis Marcotte, whose companies write 95 percent of the bail bonds in that parish. In addition, the F.B.I. also wiretapped the telephones of two local judges and secretly installed video cameras in their chambers. As a result of information obtained so far from this investigation, a former judge and a former sheriff's deputy have pled guilty in U.S. District Court to illegally helping Marcotte's bail bonding business. Judge Ronald Bodenheimer, who stepped down from the bench after his indictment last year, admitted in court to accepting gifts such as trips, meals, campaign contributions, and home repairs from Marcotte in exchange for lowering bonds. (*The Times Picayune*, 4/01/03.) Former Sheriff's Department Lt. Guy Crosby pled to illegally passing on restricted information from the jail computer system to Marcotte's office. Crosby, who has told prosecutors that Marcotte paid him $1,000 a week while he worked at the jail to run names of individuals through the National Crime Information Center database, has also agreed to cooperate with the investigation in exchange for a lighter sentence. (*The Times Picayune*, 3/14/03.) Marcotte's attorney has been advised by the U.S. Attorneys Office that it will seek Marcotte's indictment on federal racketeering charges.

In Riverside County, California, 13 employees of a bail bonding company have been charged in connection with a scheme to make illegal payments for bail bond referrals. According to the district attorney's office, the bondsmen are charged with paying commissions to inmates in the county jail to refer other inmates to the services of the bonding company. Seven of the 13 have pled guilty and face sentences of 16 months to four years in prison. The remaining bondsmen will go to trial. (*The San Diego Union-Tribune*, 2/23/03.)

A Maryland bounty hunter has pled guilty to a number of charges, including false imprisonment and robbery, after he and another bounty hunter burst into a Baltimore County apartment last year and held five residents at gun point for several hours, ransacking the apartment and stealing money from the premises. None of the residents of the apartment were wanted for failure to appear in court. The bounty hunter was sentenced to six months time served. The second bounty hunter is scheduled to go to trial in May. (*The Baltimore Sun*, 3/18/03.)

Two Richmond, Virginia bounty hunters have been charged in connection with the shooting death of a 32-year-old father of six as he celebrated Christmas Eve with his family. According to the man's family, two armed men forced their way into their apartment around 10:40 p.m. on December 24, 2002, grabbed Roberto Martinez and pulled him outside. The family said that the men never identified themselves as bounty hunters. Thinking that Martinez was being robbed, the family called the police. When police arrived they found that Martinez had been shot. He died two hours later. In questioning the bounty hunters after the shooting, police determined that they had gone to the wrong address, and that Martinez was not wanted for anything. One of the bounty

hunters was charged with murder and both were charged with breaking and entering and abduction. (*Richmond Times-Dispatch*, 12/27/02.)

A Denver, Colorado bail bond agent has been charged with theft from an at-risk adult after allegedly fooling a 92-year-old developmentally disabled woman into signing over the deed to her house, and then trying to have her evicted. According to authorities, the elderly woman paid the bond agent, Phyllis Brandt, a $1,000 fee to arrange the bond for her grandson, who had been arrested on a drug charge. A short time later, Brandt went to the elderly woman and told her that police and prosecutors were going to seize her home. She told the woman that if she signed over the deed of the house to her the authorities could not seize it. Brandt promised to then return possession of the house to the woman when her grandson's case was concluded. Instead, Brandt went to court to try to evict the woman and her 71-year-old daughter, who is also developmentally disabled. (*The Denver Post*, 1/01/03.)

A Dade County, Florida bail bondsman was arrested and charged with 287 counts of forgery and other offenses after allegedly filing fraudulent court orders intended to free his bail bonding company of about $150,000 in unpaid forfeitures. According to the Dade County State's Attorney, the bondsman forged the signatures of judges on at least 95 court orders. (Office of the State Attorney, 11th Judicial Circuit of Florida, 7/10/02.)

Two New Haven, Connecticut bail bondsmen have been arrested on racketeering, conspiracy, forgery, and larceny charges for allegedly posting fraudulent bail bonds in the state. According to prosecutors, the bondsmen accepted bond money from defendants totaling over $6,000,000 and then filed forged documents stating that a Texas insurance company had insured the bonds, when in fact it had not. Many of the defendants released on these bonds have failed to appear and are now fugitives. (State of Connecticut, Division of Criminal Justice, 7/2/02.)

A former DeKalb County, Georgia sheriff was convicted for ordering the assassination of the man who ousted him in his re-election bid in an effort to forestall an investigation into corruption at the jail under the former sheriff's administration. At his trial, the jury heard testimony from a female bail bonding agent that she engaged in sexual relations with the sheriff and paid him kickbacks in exchange for permission to write bails in the jail. (*Atlanta Journal-Constitution*, 7/10/02 and 7/11/02.)

A Maryland state senator who was experiencing personal financial difficulties was reprimanded by the senate after accepting a $10,000 loan arranged by a bail bondsman, failing to report or pay back the loan, and then sponsoring bills favorable to the bail bonding industry. (*Baltimore Sun*, 2/27/02.)

The Burlington County, New Jersey prosecutor's office filed charges against a local bail bondsman alleging that the bondsman demanded sex in return for writing bonds for female defendants and then forcing them into a prostitution ring to pay off the bondsman's fees. (*Burlington County News*, 12/06/00.)

Owners of a Colorado bail bonding business were arrested on 17 offenses. Among the allegations were that the owners knowingly accepted money from a bank robbery as payment for bonding out the accused bank robber, and then spent $25,000 of the stolen cash that had been offered as collateral. (*Daily Sentinel*, 6/18/00.)

An Albuquerque, New Mexico bail bondsman was charged with bribery after allegedly offering money to two correctional officers and a pretrial services officer to change a no-bond detention order placed on a defendant by the court, and allow the bondsman to bail the defendant out. The defendant was being held in connection to a drive-by shooting. (*Albuquerque Tribune*, 1/10/00.)

In Davidson County, Tennessee two bail bondsmen were arrested and charged with money laundering for their part in an alleged scheme to have false death certificates issued for two defendants bailed out by the bonding company who failed to appear in court. Both defendants fled to Mexico after they were bonded out, where the fake death certificates were issued after the bondsmen allegedly made payments to an intermediary. (*Pecos Enterprise*, 3/26/99.)

A Bexar County, Texas bail bondsman was sentenced to 15 years in prison after admitting in federal court to fraudulently operating several bail bonding companies, failing to pay taxes on the company's earnings, and then hiring a hit man to silence a business partner who was cooperating with a federal tax investigation. By pleading guilty to these charges, the bondsman avoided a trial for murder, resulting from the fact that the hit man that he hired, who also worked for him as a bounty hunter, was killed in a shoot-out with the intended victim during the attempted hit. The intended victim of the hit was the bondsman's brother-in-law. (*San Antonio Express-News*, 9/16/98.)

A former Starr County, Texas sheriff was sentenced to two years in federal prison for accepting kickbacks from a local bail bondsman to refer inmates to the bondsman's company. (*Abiline Reporter-News*, 5/27/98.)

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Bondsman or Bail Agent

Bail is the means by which the US criminal justice system permits the release of a defendant from custody while ensuring his appearance at all required court proceedings. Bail (from the French *bailler*, to deliver) is the legacy of Anglo-Saxon jurisprudence wherein defendants were delivered to their sureties who gave security for their appearance. Current practice allows a number of kinds of bail, the most common of which are:

1- Deposit bail, usually 10% of the face amount of the bond, deposited with the court, returnable to the defendant upon making required appearances.
2- Own recognizance release, wherein the defendant is released on his promise to appear, but liable for the full amount of the bail should he default in appearing.
3- Financially secured release through a commercial surety, called a bondsman or bail agent. (The commercial bond approach is by far the most effective. See U.S. Bureau of Justice Statistics, *Pretrial Release of Felony Defendants*, NCJ-148818, p. 10. This study demonstrates the superior performance of commercial bonding, as compared with all other pretrial release methods in getting defendants to court.)

This article focuses on the latter method of bail and the role of the bail agent. Bail bonds initially were put up by persons who pledged their own property as security for the bond. They became known as "property bondsmen". This genre still exists in a limited fashion in a few southern states, but it is becoming a thing of the past because most states prefer the uniformity of regulation and collection certainties where corporate sureties are employed. Hence, we will concern ourselves with the bail agent who is a professional retail bond writer and who generally operates as an independent contractor utilizing a surety company's credentials in posting his client's appearance bond.

When a person is arrested on probable cause of having committed a criminal offense, he is incarcerated and booked into a detention facility. His bail is determined by a preset bail schedule or by a magistrate prior to arraignment. A bail agent is contacted and arranges to post the defendant's bail whereupon the defendant is released. The bail agent charges the defendant a premium (usually 10% of the bond) for assuming the risk of the defendant's not appearing. If the defendant fails to appear, the court declares the bond forfeited and the bail agent, usually after getting an opportunity to recover the absconded defendant, has to pay the forfeiture, which constitutes the full amount of the bond. (In addition, most jurisdictions permit revocation which allows the agent to return the

defendant to custody before the court date in order for the agent to avoid liability. This may require the agent to return the premium to the defendant.)

Bail is a straightforward procedure, but can be complicated by a number of factors. Bail is both a criminal and civil matter. The bond is an integral part of a criminal case. But attempts to collect breaches of the bond's conditions are strictly civil in nature. Furthermore, significant statutory variation, involving bail forfeiture, exoneration, remission, and fugitive recovery, vary from state to state, within political subdivisions of states, and between federal and state criminal justice systems. In addition, there are a myriad of differences in local court rules, practices, forms, and procedures. Many states regulate commercial bail through their departments of insurance. A bail insurance company must qualify for admission in each state under the same standards as any other insurance company. Some states even require a company to maintain funds on deposit with the insurance department as a hedge against forfeitures. Other states leave administration of bail to local sheriffs, courts, judges, or bail bond boards.

Most states regard bail as a form of insurance. Hence, bail agents are licensed and regulated like any other insurance producer, subject to certain basic qualifications and prelicensing and continuing education requirements. Most states also require bail agents to be appointed by an admitted bail insurance company. In addition, some states require that the bail agent be certified by a bail insurance company with a "qualified power of attorney" the purpose of which is to confer limited authority on the agent to execute bonds (usually for a specified amount).

The relationship between the bail agent and the surety, that is, the bail insurance company, is of a contractual nature wherein the surety allows the agent to use, for a fee, the surety's financial standing and credit as security on bonds. In addition, the contract also specifies that the agent is an independent contractor whose customers and risks are his own. The bonds he writes are his own and not those of the surety. Furthermore, the bail agent is bound to hold the surety harmless for any loss, costs, or damages on bonds written.

If the defendant fails to appear, thus violating the bail bond's primary condition, the bond is declared forfeited. The specific procedure whereby the bond is forfeited and judgment entered against the bail agent varies widely from jurisdiction to jurisdiction. Many jurisdictions allow the agent time to apprehend and surrender the defendant before the forfeiture judgment has to be paid. Courts can also set aside forfeiture judgments if there is good cause why the defendant did not appear.

A bail agent is exonerated from liability on a bail bond when it has been revoked or its conditions have been met. In most cases this takes place when the defendant makes all required court appearance, is convicted, acquitted, pleads guilty or *nolo*, or the charges are dropped.

Bail agents perform an extraordinarily valuable public service to law enforcement and accused persons alike. The Bail Clause of the Eighth Amendment to the Constitution

embodies the long-standing Anglo-American tradition of favoring pretrial release of accused persons. This frees up crowded jail space and permits defendants to participate more fully in their own defense. Bail agents, backed by the financial resources of surety insurance companies, make possible the pretrial release of in excess of two million defendants annually, at no expense to the tax payer, by providing assurances to the state that the persons charged with crimes will appear as scheduled to answer charges.

Dennis Alan Bartlett

William Blackstone, *Commentaries on the Laws of England*, Vol III, p.290

Jerry W. Watson and L. Jay Labe, "Bail Bonds", (2001) *The Law of Miscellaneous and Commercial Surety Bonds*, Chicago, IL: American Bar Association. pp. 127-142.

http://www.americanbailcoalition.com

Public versus Private Law Enforcement: Evidence from Bail Jumping

Eric Helland* and Alexander Tabarrok**

Abstract

After being arrested and booked, most felony defendants are released to await trial. On the day of the trial, a substantial percentage fail to appear. If the failure to appear is not quickly explained, warrants are issued and two quite different systems of pursuit and rearrest are put into action. 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 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 failure to appear rates and rearrest rates of felony defendants who fall under the respective systems.

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Introduction

Approximately one quarter of all released felony defendants fail to appear at trial. Some of these failure to appears (FTAs) are due to sickness or forgetfulness and are quickly corrected, but many represent planned abscondances. After one year, some thirty 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 a fugitive for at least one year.[1]

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 (BJS 1996). 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 and fugitive rates reduce expected punishments.[2]

The dominant forms of release are by surety bond, i.e. release on bail that is lent to the accused by a bond dealer, and non-financial release. Just over one-quarter of all

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[1] All the figures are from the State Court Processing Statistics (SCPS) program of the Bureau of Justice Statistics and can be found in the reports of various years on *Felony Defendants in Large Urban Counties*. We describe the data at greater length below. The SCPS program creates a sample representative of one 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 implies 660,000 filings in a year and 1,320,000 filings in the nation. The absolute figures were calculated using this total and the release, FTA, and fugitive (defined as FTA for one year or more) rates from the random sample.

[2] 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 (Howe and Hallissy 1999).

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 (called deposit bond) in which the defendant posts a small fraction of the bail amount with the court.

Wide variation in rates of failure to appear at trial occurs across the different release types. In particular, in the raw data those released on their own recognizance or on cash or deposit bond have FTA rates that are 25 to 50 percent higher than those released on surety bond. The lower rate of FTA for those on surety bond has created a controversy between the commercial surety industry and those in favor of less restrictive pretrial release programs (e.g. Kennedy and Henry 1996, Reynolds 2002). Much heat but little light has been shed on the key question of how comparable are the defendants released under the various release types.

The effectiveness of the pretrial release system in the US represents and interesting policy experiment of the kind often examined by labor economists. The problem can be characterized as a one of treatment evaluation (see Heckman 1978 and Heckman and Robb 1985). The difficulty with these problems is that treatment assignment is rarely determined randomly. Release assignment, for example, is based on a judge's assesment 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 (Rubin 1974, 1977, Rosenbaum and Rubin 1983, 1984 Dehejia and Wahba 1999, Heckman, Ichimura and Todd 1999). We examine three measures of the effectiveness of pretrial

release treatments. The first is whether the defendant misses his first court appearance. The second is whether the defendant is a fugitive at one year and finally whether the defendant was rearrested before his case was adjudicated. In addition we estimate a hazard function for the probability that a defendant who FTAs returns (or is returned) to the court. We begin with a brief history of pretrial release and further explanation of the different release forms and their incentive effects.

History of Pretrial Release

Bail began in medieval England as a progressive measure to help accused defendants get out of jail while they waited, sometimes for many months, for a roving judge to show up to conduct a trial. If the local sheriff knew the defendant he might release him on the defendant's promise to return for trial, sometimes backed up by some sort of bond – but more often the sheriff would release the accused to the custody of a surety, usually a family member or friend. In the common law understanding, custody over the accused was never *relinquished* but instead was *transferred,* which explains the origin of the extraordinary rights that sureties have to pursue and capture escaped defendants. Initially, if the accused failed to appear, the surety literally took their place and was judged accordingly. Over time, the penalty became less severe until the system of money forfeiture became common.[3] The English system was adopted by the United States in most particulars with the exception that personal surety was slowly replaced by a commercial system. By the end of the 19th century commercial sureties were the norm.

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

[3] Freed and Wald (1964) describe the history of bail at greater length and provide references.

attack since the 1960s.[4] As noted above, 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.[5] As a result significant efforts were made, beginning in the 1960s, to develop alternatives to money bail.

In the early 1960s, the Vera Institute's Manhattan Bail Project gathered information on a defendant's community ties and residential and employment stability and summarized this information in a point score. Defendants' with high point scores were recommended for release on their own recognizance (ROR). Felony defendants who were recommended for release by the Manhattan Bail Project had failure to appear rates that were no higher than those released on money bail. Largely on the basis of these results, in 1966 President Lyndon Johnson signed into law the first reform of the federal bail system since 1789. The Federal Bail Reform Act of 1966 created a presumption in favor of releasing defendants on their own recognizance.

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[4] Floyd Feeney (1976, xi), 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." The American Bar Association (1985, 114-115) refers to the commercial bond business as "tawdry" and discusses "the central evil of the compensated surety system." When Oregon considered reintroducing commerical surety bail, Judge William Snouffer (1989) testified "Bail bondsmen are a cancer on the body of criminal justice..."

[5] 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 due to non-linearities and fixed costs in the bail process. Assume that money bail is set so as to create equal failure to appear (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 amounts necessary to ensure equal FTA rates are not linear in wealth then such rates can generate unequal rates of release across income classes. It's possible, for example, that a bail amount of $500 is too low to ensure attendance at trial or too low to make the offering of commercial bail profitable but too high to be affordable to someone of low income.

Although the Bail Reform Act of 1966 applied only to the federal courts these reforms have been widely emulated by the states (where the reform process began).[6] Every state now has some pretrial services program 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% 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 (National Association of Pretrial Service Agencies, NAPSA 1998). Some counties will also release defendants on unsecured bonds (although the defendant is liable for the bail amount if he fails to appear he need not post anything to be released.) In what follows, we classify unsecured bonds as release on own recognizance.

The Manhattan Bail Project showed that the failure to appear rates of *carefully selected* felony defendants released on their own recognizance were no higher than those released on money bail. But the Manhattan Bail Project released relatively few defendants and so could easily "cream-skim" the defendants who were most likely to appear at trial. As pretrial release programs greatly expanded across the states in the late 1960s and early 1970s selection became more difficult and was made even more difficult as prisons became overcrowded. Using data from the 1960s and 1970s from some 15 cities, Thomas (1976) suggested that as the percent of defendants released on their own recognizance increased so did the failure to appear rate, this view is also held by many police chiefs as well as other observers of the bail process (Romano 1991).

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[6] In the Pretrial Services Act of 1982 pretrial service agencies were established in all 94 Federal district courts.

There have been several studies of the bail system by economists. For example Landes (1973, 1974), Clarke et al (1976) and Myers (1981) examine the role of the bail amount in the decision to FTA, generally finding that higher bail reduces FTA rates. These earlier studies did not focus on the central question of this paper that is the different incentive effects of the various release types. In a fascinating paper, Ayres and Waldfogel (1994) demonstrate 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 *compared to white defendants with the same probability of flight.* Recognizing this, bond dealers are induced by competition to charge minorities relatively lower bail bond rates.[7] Bond dealers will also set different rates depending on a defendant's community ties, job history and other factors that influence the probability of appearance.

Incentive Effects of Different Release Types

The US pretrial release system is designed to ensure the defendants appearance 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 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.

[7] If bail amounts are systematically higher for minority defendants than for white defendants with the same probability of flight then charging a uniform percentage of the bond, say 10 percent, will result in higher profits earned on the

> No refund is or was made by the professional surety to a defendant for his routine compliance with the conditions of his bond. *Schilb v. Kuebel,* (404 U.S. at 373-374).

Similarly, Drimmer (1996, 742), says "hiring a commercial bondsman removes the incentive for the defendant to appear at trial." Goldkamp and Gottfredson (1985, 19) suggest that "use of the bondsman defeated the rationale that defendants released on cash bail would have an incentive to return" and in their influential set of performance standards for pretrial release the National Association of Pretrial Service Agencies (1998) says under commercial bail "the defendant has no financial incentive to return to court."[8]

In light of the persistent criticism that surety bail encourages FTA it is perhaps surprising that the data consistently indicate that defendants released on surety bonds have lower FTA rates than defendants under other methods of pretrial release. One reason for this is that like lenders in general bail bondsmen have numerous ways of creating appropriate incentives for borrowers. Most obviously a defendant who skips out on bail will owe the bond dealer the entire amount of the bond. Defendants may be judgment proof, however so bond dealers often ask defendants for collateral and family cosignors to the bond. 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 dealer often remind defendants of their court dates and, perhaps more importantly,

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minority defendants. Higher profits will attract more entrants thus driving rates for minorities down until rates become proportional to flight probabilities for all types of individuals.

[8] See also Thomas (1976, 13) who because of this issue calls the surety system "irrational."

remind the defendant's mother of the son's court date when the mother is a cosignor on the bond (Toborg 1983).[9]

If a defendant does fail to appear 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 rearrest any defendants who flee. Bond dealers typically hire bail enforcement agents, more colloquially known as bounty hunters (because they typically work on commission) to pursue and return defendants to custody. The bond dealers and their agents have significant 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 necessity of entering into an extradition process (Drimmer 1996). In Taylor vs. Taintor (16. Wall. U.S. 366, 1873) which remains good law the Supreme Court noted (371-372):

> When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge, and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state; may arrest him on the Sabbath; and if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest, by the sheriff, of an escaping prisoner.

Thus, contra Justice Douglas et al., the commercial bail system provides significant incentives to appear at trial. Whether a defendant's incentive to appear under a surety bond is larger or smaller than under an alternative system is an empirical

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[9] Bail jumping is itself a crime which may result in additional penalties.

question to which we address below. That the incentive to appear *might* be higher when defendants face the prospect of being pursued by a bounty hunter is heightened by the typical failure of the public police to pursue and recapture defendants who fail to appear.

Public police bureaus 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 failure to appear has overwhelmed many police departments so that today many counties are faced with a massive stock of unserved arrest warrants. Balitimore alone had 54,000 unserved arrest warrants as of 1999 (Clines 2001). In recent years Cincinnati has had over 100 thousand outstanding arrest warrants stemming from failures to appear in court. One Cincinnati defendant had 33 pending arrest warrants against him (Lecky 1997). 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 (Lee and Howe 2000).[10]

Although national figures are not available it is clear that the problem of outstanding arrest warrants is widespread. Texas, for example, is relatively clean with only 132,000 outstanding felony and serious misdemeanor warrants but Florida has 323,000 and Massachusetts, as of 1997, had around 275,000 (Howe and Hallissy 1999). 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 *two and a half million* unserved arrest warrants (California Board of Corrections 1998, Howe,

Hallissy 1999). Many of these arrest-warrants are for minor offenses but tens of thousands are for people wanted for violent crimes including more than 2,600 outstanding homicide warrants (Howe and Hallissy 1999). Howe and Hallissy (1999) 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.
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> 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.

The failure of the public police to expand with increases in the number of outstanding arrest warrants - San Francisco county alone has 28,000 outstanding arrest warrants and only 2 full-time warrants officers (Howe and Hallissy 1999) – illustrates a possible advantage of the commercial bail system; the commercial bail system is self-financing and grows automatically as demand increases. That is, as the demand for bail increases so does the funds that pay for the bond dealers and the bail enforcement agents.[11]

As noted above, bond dealers have considerable incentives to make sure their clients show up in court. Bond dealers report that just to break even 95 percent of their clients must show up in court (Drimmer 1996, Reynolds 2002). Similarly, bail

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[10] See Prendergast (1999) for description of a similar program in Kenton County, Kentucky.

[11] In 1996 (Oct. 28, 96) U.S. News and World Report called bounty hunting one of the "best jobs for the future" because of the increase in demand due to overcrowded jails and more liberal release policies.

enforcement agents have considerable incentives to be productive because they do not get paid unless they recapture their fugitive.

The Matching Model with Multiple Treatments

In most treatment evaluations the individual either chooses participation in a treatment program or not. The role of the analysis is to evaluate the causal impact of the program (see Rubin 1974). Ideally 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 $Y_T - Y_{NT}$. An obvious problem is that we cannot observe an individual in two states of the world making a direct computation of $Y_T - Y_{NT}$ impossible. An intuitive method to identify the effect of treatment when other factors differ is to match each treated individual with an 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 any assumptions about functional form. When the research question is about a mean treatment effect, as it is here, matching method 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 appropriate match falls dramatically.

In an important paper, Rosenbaum and Rubin (1983) go a long way to surmounting this problem. Rosenbaum and Rubin show that if matching on X is valid then so is matching on the probability of selection into a treatment conditional on X. The multi-dimensional problem of matching on X is thus transformed into a single dimension problem of matching on $Pr(T=1 \mid X)$ where $T=1$ denotes treatment.[12] $Pr(T=1 \mid X)$ is often called the propensity score.

The matching technique extends naturally to applications with multiple treatments through the use of a multi-valued propensity score with matching on conditional probabilities (Lechner1999, Imbrens 1999). Assume that there are M mutually exclusive treatments and let the outcome in each state be denoted Y_1, Y_2, etc. As before, we observe only a specific outcome but are interested in the counterfactual; what would have the outcome been had this person been assigned to a different treatment. Rather than a single comparison we now are interested in a series of pair-wise comparisons between treatments m and l. The treatment effect on the treated is written:

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

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,

$$Y^1 \ldots Y^M \perp T \mid X = x \forall x \tag{2}$$

[12] 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 (1998) and Imbrens (1999). More applied work includes Heckman, Ichimura and Todd (1997), Dehejia and Wahba (1998) and Lechner (2000). Our multi-treatment application is closest to that of Lechner (1999a).

If this assumption is valid we can use the conditional propensity score to identify the treatment effect (see Lechner 1999),

$$\theta^{m,l} = E(Y^M \mid T = m) - \underset{p^{m|ml}}{E}\left[E(Y^l \mid p^{m|ml}(X), T = l) \mid T = m\right], \tag{3}$$

In practice we usually do not create the conditional propensity score, $p^{m|ml}(X)$, directly but indirectly from the marginal probabilities $p^l(x)$ and $p^m(x)$ estimated from a discrete choice model. In this case:

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

The matching estimator in our case is created by an ordered probit model for reasons that will be discussed below. An outline of the basic procedure is given in Table 1

It's important to emphasize that the propensity scores are not of direct interest but are the metric by which members of the treated group are matched to members of the "untreated" group (really, differently treated in our context). After matching, the treated and untreated group can be analyzed *as if* treatment had been assigned randomly (conditional on the variables in the ordered probit). 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 (Dehejia and Wahba 1998). 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 was 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 (Augurzky and Schmidt 2000). 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 want to include in the model for estimating propensity scores variables that we think may affect the treatment outcome even if we have no reason for thinking that they casually effect treatment selection.

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 (SCPS), 1990, 1992, 1994, 1996 (ICPSR 2038). We supplement with an earlier version of the same collection, the National Pretrial Reporting Program (NPRP), 1988-1989 (ICPSR 9508). The data is a random sample of one month of felony filings from approximately 40 jurisdictions where the sample was designed to represent the 75 most populous U.S. counties. The data contains detailed information on arrest charges, the criminal background of the defendant (e.g. number of prior arrests), sex and age of the defendant[13], release type (surety, cash bond, own recognizance etc.), rearrest charges for those rearrested, whether the defendant failed to appear and if so whether the defendant was still at large after one year, and the defendant's sentence among other categories.

In addition to the main release types there are minor variations on a theme. 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. Since the marginal incentives are weak we include unsecured bonds in the own recognizance

category. Own recognizance may thus be thought of as simply the least constraining release category.[14] 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% of all releases) we drop them from the analysis.[15] We thus focus on the most common release types own recognizance, deposit bond, cash bond and surety bond. Some data below are also presented on emergency release as these are of special interest although not directly related to the focus of this paper.

The initial data analysis suggests that FTA rates are lower under surety bond release than under most other types of release. In Table 2, the mean FTA rates for release categories 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. The mean FTA rate for those released under surety bond is 17 percent. Compared to surety bonds, the mean FTA rate is 6 percentage points higher under cash bonds, 5 percentage points higher under deposit bonds and 9 percentage points higher under own recognizance that has a mean FTA rate of 26 percent (each of these differences is statistically significant at the greater than 1% level.) Put slightly differently, the mean FTA rate under cash or deposit bond is approximately 30-35 percent higher than under surety bond and the mean FTA rate under own recognizance is more than 50 percent higher than under surety bond.

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[13] The SCPS is more complete and better organized than the NPRP data. The former, for example, includes information on the race of the defendant that the latter does not.

[14] The inclusion or exclusion of unsecured bonds in own recognizance does not materially affect our results.

[15] Another reason to drop property bonds is that it's difficult to compare the bail for these releases for 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 no 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.

Felony defendants released solely because of a court order limiting a jail's population are classified as emergency releases. 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 44 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 under every other category.[16]

Note, however, that emergency release is not a treatment category – the treatment in this case is own recognizance – instead emergency release denotes a group that was selected for no release but who were actually released. Since our focus is on treatment effects we do not further analyze emergency release.

Although the preliminary data analysis is suggestive, it is clear that the release category (treatment) that felony defendants receive is not chosen randomly and thus it is possible that treatment effects are being confused in the difference in means analysis with effects due to differing defendant characteristics.[17]

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[16] 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 or inmates could be shipped out-of-state or the court-order could be (temporarily) ignored. The costs of selection clearly rise substantially,however, when jail space is tightly constrained.

[17] The 1992 BJS report, *Felony Defendants in Large Urban Counties* broke down FTA rates into release categories in a similar manner to that done here but no further statistical analysis was done. This report created a good deal of controversy as proponents of commercial bail seized on the findings to promote their industry. Opponents responded that the results were invalid because other factors were not controlled for (Kennedy and Henry 1996). Due to the controversy, later BJS reports have not published FTA rates by release category although the raw data is still collected.

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 that they believe are compatible with ensuring appearance at trial.[18] 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 of the cash is typically low. 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. Emergency releases are also included in the final category because had it not been for the emergency these individuals would not have been held. Thus stringency of release, measured by z^* is a function of all of the independent variables in the sample, x,

$$z^* = \beta' x + \gamma_t + \lambda_k + \varepsilon,$$

where γ_t are year specific intercepts for 1990, 1992, 1994, and 1996 and λ_k are county fixed effects. The observed values of stringency are discrete and take on the value of 1

[18] The Federal Bail Reform Act of 1966 required that defendants be released on the least restrictive conditions that will ensure their appearance at trial and almost all states have adopted similar laws since that time.

for those released on own recognicance, 2 for those on deposit bond, 3 for those on cash bond, 4 for those on surety bond and 5 if the defendant was not released. That is,

$$\begin{aligned} z &= 1 \text{ if } z^* \le 0 \\ &= 2 \text{ if } \mu_1 < z^* \le \mu_2 \\ &\vdots \\ &= 5 \text{ if } \mu_4 \le z^* \end{aligned}$$

where $\mu's$ are the unknown cut points. Probabilities for each release type can then be constructed (see, for example, Greene 1993). From the ordered probit we generate conditional propensity scores for each possible pairwise comparison.

Variables in the ordered probit include individual specific variables denoting whether the crime the defendant has been accused of is a murder, rape, robbery, assault, other violent crime, burglary, theft, other property offense, drug trafficking, other drug related, or driving related (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 respectfully if the defendant had some active criminal justice status at the time of the arrest (e.g. was on parole or probation), had prior felony arrests, or had a prior failure to appear at trial. The defendant's sex and age are also included.[19] Note that these variables are exactly the sorts of variables that judges use to make treatment selection decisions. Other, non-individual variables include the police clearance rate, 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. Finally, fixed effects for each county and year are included (county 29 and 1988 are

[19] Unfortunately, the defendant's race was not collected for all years in our data.

absorbed in the constant to prevent multicollinearity). The results of the ordered probit are in Table 3.

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 no observations can be matched within the caliper distance the observations(s) is dropped. We use matching with replacement so the order of matching is irrelevant and every untreated observation is compared against every treated observation.[20]

The match quality is good as we can match large proportions of the sample despite using a relatively small caliper of 0.0001. The effect of matching is illustrated in Table 4 which compares the mean absolute standardized bias (MASB) and variance of standardized bias of the set of variables used in the ordered probit (Table 3) before and after matching. That is, we use the MASB and variance of the standardized biases as measures of the differences in the set of variables across release types before and after matching.[21] The MASB is typically similar before and after matching but the variances are typically considerably lower after matching. The exception is in the surety versus own and own versus surety samples where the MASB is lower but the variance is higher.

Estimated Treatment Effects: Failure to Appear

In Table 5 the row variable denotes the treated variable and the column the untreated variable. For reference, the main diagonal includes the mean FTA rate in that

[20] Dehejia and Wahba (1998) find that matching with replacement is considerably superior to matching with non-replacement.

[21] Of course, there are a variety of methods for comparing multidimensional distributions. None of them, however, is definitely superior to the others. The mean and variance of the standardized biases are two of the simpler methods.

category from the full sample.[22] Reading across the surety row, for example, we see the estimated difference in FTA rates caused by the surety treatment relative to the column treatment – i.e. the estimate of the effect of treatment on the treated. The matching estimator suggests that similar individuals are 7.1 percentage points or just over 25% less likely to fail to appear than those released on their own recognizance. Similar individuals are also 3 percentage points or 15% less likely to fail to appear than those released on deposit bond. The estimated treatment effect for those on surety bonds versus cash is small and not statistically significant.

Unlike Table 2, both the top and bottom halves of Table 5 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 say the own recognizance treatment on those who were released on surety bond is not necessarily the exact opposite as the effect of own recognizance relative to surety bond on those who were released on own recognizance. As it happens, however, our estimates of these effects are similar and the small differences that exist across the relevant diagonals does not appear to be systematic. The estimate of the effect of own recognizance relative to surety on those who were released on their own recognizance, for example, is +6.8% nearly identical in size but opposite in sign to the –7.1 surety effect relative to own recognizance of those who were released on surety bond. The similarities across diagonals suggests that either (or both) treatment selection or treatment effect does not interact strongly with defendant characteristics.

[22] 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.

We estimate that the surety bond treatment causes FTA rates to be 7 percentage points or 25 percent lower than under own recognizance and 3 percentage points or 15 percent lower than release on deposit bond. We do not find any statistically significant differences between the surety bond and cash bond treatments. We also do not find statistically significant differences between the cash and deposit treatments although in both directions the evidence is consistent with a lower FTA rate for the cash bond treatment.

Estimating the surety v. cash bond treatment effect is especially important because what most separates surety and cash bond is the surety, i.e. the incentive effects of bond dealers and bounty hunters. Thus, the surety-cash difference is most revealing for understanding the role of public versus private law enforcement. We therefore explore this treatment estimation in greater detail. Unlike the other treatments, the cash versus surety treatment involves *self*-selection. In particular, it's likely that defendants self-select into cash bond when their bail amounts are low. Bail is determined by the same sorts of factors that enter into treatment selection (e.g. seriousness of crime, prior arrests etc.), and thus our matching will match on bail to some extent. It's still likely, however, that cash bond is chosen when bail is unexpectedly low, ie. low relative to what would be expected given the controlled for factors. Indeed, in the matched surety bond sample the mean bail is $8435 but in the cash bond sample it is only $3703. To the extent that bail is important this could be masking a superior surety bond treatment effect. Thus, to ensure that our effects are not being caused by bail per se, however, we match on propensity score and bail using the Mahalanobis distance.[23,24]

[23] The Mahalonobis distance is a Euclidian (squared) distance that is weighted by the inverse covariance matrix for the matching variables. For details see Sianesi (2001).

Table 6 compares cash versus surety bond treatments when matching on both propensity score and bail and also includes similar matching results for the other bail-relevant treatments. Although matching on bail produces a surety and cash bond sample with very similar mean bail amounts, $3907 and $3782 respectively, we still do not find any statistically significant difference between the cash and surety bond treatments. The results on the other treatment effects are also very similar to those found earlier. In particular, surety results in lower FTAs than deposit bond. Since the results do not change much when we match on both bail and propensity score it is evident that relative to its effects on FTA, bail is already being accounted for by the propensity score.[25]

Estimated Treatment Effects: The Fugitive

Not every failure to appear is the result of an attempt to escape justice. In many cases, a defendant fails to appear because he forgets his trial date, gets sick, or is already in jail. A telephone call usually resolves these issues and the defendant is back on trial within a couple of weeks. Bond dealers will monitor their sureties and remind them of court dates but various court agencies also perform these sorts of services in many counties so we would not expect large differences in say under two-week FTA rates.

The potential for bail enforcement agents to reduce FTA rates binds mostly on those defendants who have purposively skipped town. We hypothesize, therefore, that treatment effects between surety and larger for say over two-week FTA rates.

Further below we look at over-two week rates in a restricted sample. For the entire sample, however, we are limited to two measures of FTA, any FTA and FTAs that

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[24] Matching on more than one variable is much more computationally intensive than matching on one variable. On a reasonable fast Pentium computer each matching process took several hours.

[25] Note that our result does not imply that bail has no effect on FTA. It implies only that matching on propensity score is strong enough to control for this issue. When we run regressions with bail as independent variable, for example, we find, that higher bail reduces FTA but the bail effect has been discussed before and is not the focus of this study.