
An Analysis of the Bail System

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An important legal dilemma arises shortly after an individual has been charged with committing a crime. The due process right of the accused to be considered innocent of criminal charges until proven guilty is in conflict with the fact that at least one part of the criminal justice system—the police—believe that sufficient legally obtained evidence exists to prove the accused guilty of a crime. The dilemma results from the fact that in the present criminal justice system it takes considerable time to achieve the numerous steps due process has come to involve (e.g., a fair trial), partly as a consequence of long delays made necessary by crowded court calendars. The dilemma facing the court is how the accused is to be treated during the period before the court can dispose of the case. If accused individuals are simply released, some of them might leave the area before their cases could be disposed of and some might commit additional crimes. If accused individuals are detained in jail, they are being punished for crimes they may not have committed.

FEATURES OF THE BAIL SYSTEM

The bail system is intended to provide a partial solution to the above dilemma.

Pretrial options of the court

In most jurisdictions, accused individuals are released a few days after arrest in exchange for a monetary bond—a promise to pay a stated amount of money if they fail to appear at any of the court

proceedings dealing with the case. If defendants are unable to deliver the required bond amount to the court because their financial resources are not sufficient to cover the bond or the fees (usually between 10–30% of the bond) of a professional bondsman who acts as surety for the bond, the court generally orders the defendants detained in jail until the bond amount is obtained or until the proceedings are completed. In some jurisdictions, accused individuals are released without paying a cash sum to the court if they sign a promise to pay the bond, should they fail to appear. In other jurisdictions, accused individuals are allowed to pay some fraction of the bond amount provided they sign a promise to pay the rest. The court may, of course, choose not to set any bail bond and release the defendants on their own recognizance. Finally, failure to appear is considered a criminal action in many jurisdictions, so that the prospect of additional criminal charges serves as another deterrent against not appearing at scheduled court proceedings.

Potential adverse consequences of the bail system

Although the bail system seems to provide a means for the court to avoid punishing individuals prior to their being found guilty of a crime and still insure that potential criminals are not allowed to escape appropriate legal proceedings and sanctions, a number of studies have concluded that the bail system contains many potential and actual injustices (Ares, Rankin, and Sturz, 1963; Foote, 1958; Foote, Markle, and Woolley, 1954; Freed and Wald, 1964; Friedland, 1965; Goldfarb, 1965; Rankin, 1964; Wald, 1964). Besides the obvious fact that a monetary bail system discriminates against the poor, the President's Commission on Law Enforcement and the Administration of Justice had the following to say about the bail decision:

The importance of this decision to any defendant is obvious. A released defendant is one who can live with and support his family, maintain his ties to his community, and busy himself with his own defense by searching for witnesses and evidence and by keeping close touch with his lawyer. An imprisoned defendant is subjected to the squalor, idleness, and possible criminalizing effect of jail. He may be confined for something he did not do; some jailed defendants are ultimately acquitted. He may be confined while presumed innocent only to be freed when found guilty; many jailed defendants, after they have been convicted, are placed on probation rather than imprisoned. The community also relies on the magistrate for protection when he makes his decision about releasing a defendant. If a released defendant fails to appear for trial, the law is flouted. If a released defendant commits

crimes, the community is endangered. (President's Commission, 1967, p. 131)

Consequences of judicial bail decisions may extend beyond their immediate effects on defendants. In particular, the treatment that defendants receive from other participants in the criminal justice system (e.g., judges, prosecutors, and probation officers) may depend on their pretrial status (Konečni and Ebbesen, Chapter 11, this volume; Landes, 1974; Rankin, 1964). For example, probation officers may not react as sympathetically to defendants when the presentence interview is conducted in jail, rather than in the officers' own office.

Given the obvious impact that the bail decision can have on a defendant's pretrial activities and its potential for affecting the outcome of decisions at other points in the criminal justice system, it is important that the rules that seem to govern judicial bail decisions be discovered and examined in light of the functions that the bail system is supposed to serve. Therefore, in the remainder of this chapter we will first explore the constitutional and statutory functions of the bail system. Next, we will examine empirical evidence concerning the extent to which these functions are achieved by the bail system. Then, we will present the results of research on the decision rules used by judges when setting bail. Finally, the best-fitting decision rules that emerge from this research will be examined in light of the apparent purposes of the bail system.

FUNCTIONS OF THE BAIL SYSTEM

Even though the bail system can and does produce many injustices, these inadequacies are tolerable if the functions of the bail system are reasonable and can only be accomplished in a manner consistent with the current operation of the bail system. Unfortunately, there is widespread disagreement about the exact purposes of the bail system and whether it is successful in performing these functions. Critics of the bail system often recognize the right of the court to guarantee the appearance of defendants at required court proceedings, but object to bail being set at such high levels (e.g., in major felony cases) that defendants cannot possibly afford to pay the bond (e.g., Beeley, 1927; Foote, Markle, and Woolley, 1954). Such *sub rosa* preventive detention is seen as an abuse of the court's legitimate discretionary power. On the other side are those who argue that an equally, if not more, important function of high bail bonds is to protect the community, witnesses, and jurors from harm that a potentially dangerous criminal might inflict if released.

Dicta for the former view can be found in several places. For example, in a Supreme Court case of 1951, it was stated: "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant" (*Stack v. Boyle*, at p. 4). In short, bail should serve the function of assuring the attendance of the accused at court proceedings and not as a preventive measure against predicted offenses. However, in a case before the Supreme Court in the same year (*Carlson v. Landon*), the Court suggested that there was not a constitutional right to bail and that "apprehension of hurt" could be considered in the setting of bail. The concept of apprehension of hurt refers to the danger that a defendant might commit additional crimes if released in the community and/or threaten or harm witnesses, jurors, or other individuals involved in the case.

Although there is considerable constitutional and *dicta* uncertainty regarding the exact purposes of the bail system, a functional feature common to most views is that bail should counteract the defendant's tendencies to engage in specified pretrial behaviors (e.g., nonappearance at court proceedings and/or criminal actions). The higher the apparent likelihood of these behaviors, the more the court would be expected to order actions designed to counteract such behavioral tendencies. Although current *dicta* routinely fail to specify exactly how the court is to determine the likelihood of relevant pretrial behaviors on a case-by-case basis, most state statutes and administrative guidelines seem to require that the court consider one or more case and defendant factors in making this decision.

Table 8.1 lists those case and defendant factors that in 1976 were most often cited in state statutes, along with the number of states that cited each. As can be seen, states differ in the types of factors that are to be considered in the bail-setting decision.¹ Of the factors listed, some state statutes require that as many as fifteen separate factors be taken into account, while other states do not specify any (not even in the form of administrative guidelines). Nevertheless, three broad categories of factors are mentioned most frequently: the nature and severity of the current crime, the defendant's prior record, and the defendant's community ties. By emphasizing community ties, some states seem to accept the idea that one function of bail is to counteract

¹It is of interest to note that the factors listed in Table 8.1 vary in terms of specificity. For example, the prior-arrests factor presumably refers to the number (and possibly severity) of prior arrests on the accused's FBI and/or state "rap sheet." In contrast, it is quite unclear which facts in a case are to be used in evaluating the danger-to-self factor. In a real sense, the latter expresses a vague policy rather than a specific factor that can be associated with specific features of the case. How, exactly, is danger to self to be determined? In short, some states list factors that are easily determined by examining the facts of the case, while other states list "factors" that can only be the result of an unspecified judgment process.

Table 8.1

Factors to be used in bail and pretrial release decisions that were listed in state statutes, 1976

Category	Factor	Number of states
Current crime	Nature of present charge	28
	Probability of conviction	13
	Possible penalty	2
Prior record	Prior criminal record	25
	Prior record of court appearance	15
	On pretrial release for previous charge	3
	On probation or parole when presently charged	1
	Prior arrests	1
Community ties	Financial resources of defendant	22
	Family living in area	16
	Length of residence in area	15
	Employment history	15
	General community ties	2
	Persons to aid defendant in appearing	2
Character of defendant	Character of defendant	16
	Mental condition of defendant	12
	Reputation of defendant	3
	Past conduct	1
Dangerousness	Danger to community (in general)	6
	Danger to others	4
	Dangerousness of defendant	2
	Danger to self	2
	Likelihood of violating law if released	3
Risk	Risk of nonappearance	13

Note: Many of the states not included in this summary table list factors to be used in bail setting in places other than state statutes, e.g., state constitutions and administrative guidelines. Although these states were not included in this table, their inclusion would not substantially alter the list of factors nor the number of states that endorsed the various factors.

SOURCE: Goldkamp (1977).

nonappearance and that the degree to which a defendant is tied to the local community is predictive of nonappearance. In contrast, other states seem to assume that previous and current criminal activity is predictive of nonappearance and/or that the control of pretrial criminal activity is the primary function of bail and can best be predicted by prior criminal activity.

Factors that predict appearance

Unfortunately, the predictive relationship between such factors and defendant pretrial behavior has received little empirical attention, and what evidence does exist is inconsistent with some of the intuitions that seem to guide state statutes. In particular, one study (Landes, 1974), based on a 1971 sample of 307 individuals who were released during their pretrial period in New York County, examined (among other things) the relationship between a large number of predictors—community ties (e.g., residence, employment, and income), current charge (nature and severity of charges), size of bond, and prior record (e.g., number of prior felony arrests, number of prior misdemeanor arrests, and prior parole and probation violation history)—and whether the defendant failed to appear. Only three factors were significantly related to appearance. These were size of bond,² whether there was an outstanding detainer for the defendant, and whether resisting arrest was included in the current charge. Factors such as nature of charge, penalty if convicted, prior record, residence, employment, and so on, were unrelated to the likelihood of nonappearance. In short, in the sample studied, community ties did not predict whether defendants would appear.

In a study of a 1973 sample from Charlotte, North Carolina, Clark, Freeman, and Koch (1976) also found that employment and income were unrelated to nonappearance. (Residence was not included as a variable since almost all defendants lived in the Charlotte area.) Besides the time that had elapsed since the bail hearing, Clark and co-workers found that the form of pretrial release and the extent of the prior arrest record were related to nonappearance, however. With regard to the latter, individuals with more extensive arrest records were less likely to appear. The effect of the form of pretrial release was slightly different from that reported by Landes. In particular, defendants whose release was secured through the aid of a bail bondsman were less likely to appear than (1) defendants who were selected and supervised during the release period by a formal pretrial release program (and who signed an unsecured appearance bond), and (2) defendants who paid their own bail bond.³ Clark and asso-

²This relationship between bond amount and appearance is complicated, however, by several factors. One of the most important is that the effect appears to be due primarily to whether any bond, regardless of amount, was set. Of those released without any bond, 33% failed to appear, whereas only 12.5% of those with some bond failed to appear. In other words, requiring that some bond amount be paid seems to be associated with a reduced nonappearance rate but, given that a bond is set, the role of size of bond is ambiguous.

³Too few defendants were released on their own recognizance for their appearance rates to be evaluated in a meaningful way.

ciates did not examine the relationship between appearance and size of bond.

The findings from these studies are not necessarily incompatible with the view that community ties (and other factors) play an important role in determining the pretrial behavior of defendants. If the community ties for those defendants who were not released were much weaker than those who were, and if the former defendants would have been much less likely to appear had they been released, then community ties would prove to be a potentially important factor in pretrial behavior. On the other hand, Landes (1974) did report that the community-ties variables were not significantly related to the likelihood that a defendant obtained pretrial release. In other words, although Landes did not study this question directly, it is unlikely that this alternative explanation is correct for Landes' data set.

In a third study, Gottfredson (1974) examined the predictive utility of the criteria suggested by the Vera Institute of Justice (1972) for releasing defendants on their own recognizance. He also compared these criteria to the predictive utility of other defendant characteristics. Briefly, the Vera method is to devise a score by giving points for various defendant characteristics that are thought to predict appearance. Four major categories of information are typically collected and scored: residence (e.g., length of time in area, property owned), family ties (e.g., relatives living in area, marital status, children in area), employment (e.g., currently employed, history of employment), and prior record (e.g., number of prior arrests, history on previous probations). The resulting scores are used to determine whether to release the defendants on their own recognizance. An unusual feature of Gottfredson's study was that it contained two samples of defendants from the Los Angeles area who were released on their own recognizance. One sample consisted of those defendants whom the project staff recommended for release on the basis of the Vera score, and the other sample consisted of defendants whom the staff did not recommend for release but who were released anyway by special arrangement with the courts. When the rates of nonappearance were compared across the two samples, it was found that they did not differ to a great extent: 15% of those recommended for release failed to appear, compared to 26% of those not recommended. Although this difference was statistically significant, many prediction errors were made by the project staff.

When the predictive ability of other factors (e.g., age, sex, prior record, severity of current charge) was examined for the entire sample of defendants, Gottfredson found that although it was possible to account for a significant portion of the variability in appearance with a multiple regression equation, when this equation was used to pre-

dict the appearance of an independent sample of defendants, it accounted for less than 4% of the variance in the new sample. Thus, prior record, severity of crime, community ties, and other defendant characteristics, even when collected by a trained staff who attempt to verify most of the information, seem unable to predict, to any reasonable degree, whether defendants will appear at appropriate court proceedings.

In summary, the results from several studies tentatively suggest that community ties may be a less important factor in predicting appearance than is generally believed. The roles that crime (its type and severity) and prior record play are even less clear. Landes (1974) reported that neither factor was significantly related to appearance. Clark, Freeman, and Koch (1976) reported that although severity of current crime was not related to appearance, extent of prior record was. Finally, Gottfredson (1974) found that both factors were related to appearance, but when the obtained prediction equation was used on a validation sample (a step neither Landes nor Clark et al. took), it failed to adequately predict appearance.⁴

Factors that predict pretrial criminal activity

The same three studies also attempted to determine which factors predict pretrial criminal activity (other than failure to appear). Landes (1974) accomplished this by comparing defendants who had pending charges against them with those who did not.⁵ On the other

⁴Of course, these different results might be due to differences in factor definitions and/or sampling procedures. For example, none of the defendants in Gottfredson's sample was released on *bail*, whereas many of those in the other studies were. The definitions of severity of crime, prior record, and so on, varied considerably across the studies. Furthermore, the samples in the Landes study and the Clark et al. study did not contain any defendants who could not afford the bond or who were detained for other reasons. Since amount of bond was related to severity of crime in Landes' New York sample, and probably in the Charlotte sample as well, it is conceivable that whatever effects severity might have had on appearance were counterbalanced by bond amount. Finally, Gottfredson's sample eliminated all defendants who had been charged with certain violent offenses (e.g., homicide, sexual assault, robbery, and assault). Despite these differences, it does appear, when these studies are taken together, that the community-ties factor does not predict appearance and that if prior record and severity of crime do predict appearance, they account for a very small portion of the variance.

⁵Because Landes did not have data on the pretrial criminal activity of the defendants, he was forced to use this procedure even though it meant that the two samples were not equated in terms of the time when they received bail. This procedure would present a biased picture of the relationship between various factors and pretrial criminal activity if the police arrest and charging policies were influenced by the defendants' prior records. (For example, the police might seek out known felons as potential suspects of particular crimes.)

hand, both Clark et al. (1976) and Gottfredson (1974) directly examined the likelihood of defendants being arrested for a new offense while released on their own recognizance or on bail. Although there were some differences, the agreement in findings between the studies was much closer than that obtained with the appearance measure. In particular, all three studies found that indicators of the severity of the current charge and of prior criminal activity were related to the likelihood of the defendant being arrested while awaiting trial for another crime. In addition, other defendant characteristics (e.g., age, sex, race, income, marital status) were consistently unrelated to pretrial arrests. However, although neither Landes nor Clark and associates reported that the community-ties factor was related to pretrial arrests, Gottfredson found a very weak, but significant relationship. Nevertheless, when Gottfredson examined, on a new sample, the predictive ability of his best-fitting multiple regression equation that included all of these factors, he again found that only a very small percentage of the variance (2%) in rearrests could be predicted.

Although there is good agreement across the available studies regarding those factors that predict the defendant's criminal activity while awaiting disposition of another charge, several points should be noted. First, in agreement with other studies (e.g., Thomas, 1974), only a small minority of those defendants who were released (around 15%) were arrested or charged with serious crimes during the pretrial period, despite the fact that Chief Justice Warren E. Burger claims that "bail crime" is one of the major failures of the current judicial system's attempts to deter crime (San Diego Evening Tribune, February 4, 1980). Second, the interpretation of the consistent results from these studies is partially hampered by the fact that individuals who failed to appear may have fled the area and therefore could not be arrested by the local authorities, even though they may have committed crimes before leaving the area. Third, in the one case in which the prediction equation was validated on a new sample, the shrinkage in the accounted-for variance was very large. Finally, although nature of the crime and extent of prior record were significantly related to the likelihood that additional crimes would be committed (even in the validation sample), these factors by no means accounted for all of the variation in the data. Therefore, the use of these factors as predictors would not necessarily decrease the total number of prediction errors below that which would occur if judges simply assumed that no defendant would be arrested for additional crimes and therefore simply released all defendants on their own recognizance or set a small bail amount (Meehl and Rosen, 1955; Nagel and Neef, 1976).

The effect of bail amount on pretrial behavior

One very important issue about which virtually nothing is known concerns the effect that the size (as well as the form) of the bail bond has on the pretrial behavior of defendants. Aside from the obvious effect that being detained (as a result of an inability to afford bail) has, the amount of bail that is needed to counteract whatever tendencies defendants might have to fail to appear and/or to commit additional crimes is not known. Furthermore, except for the suggestive evidence obtained by Clark, Freeman, and Koch (1976), the extent to which other forms of pretrial release (e.g., supervision by probation officers, promissory notes, the addition of severe criminal sanctions against nonappearance and rearrest, property in lieu of monetary bonds, and so on) might prove to be equally or even more effective methods of controlling pretrial behavior has received little attention. Unless it is shown that size of the bond has an effect on the pretrial behavior of defendants, then the only consequence of a bail bond would be to cause some defendants to be detained. This consequence can be achieved without the bail system by giving judges two options: release on own recognizance and pretrial detention.

Even if size of the bond is related to the pretrial behavior of defendants, as Landes (1974) has argued, there is still the question of whether the effect it has depends on case and defendant characteristics. For example, is a higher bond needed for defendants with extensive prior records than for defendants with minimal records in order to produce equivalent pretrial behavior, or is the effect of the bond amount independent of such factors? Until answers to this and similar questions are obtained, it will be impossible to determine whether the bail system is serving the appearance and/or the crime-control functions that most observers argue it should serve.

FACTORS THAT JUDGES USE IN SETTING BAIL

Quite independent of the factors that predict and control the pretrial behavior of defendants is the issue concerning the factors that are causal in judicial bail-setting decisions. Judges may or may not base their bail-setting decisions on factors that actually predict the pretrial behavior of defendants. Judges might adopt a particular decision strategy because it is consistent with state or administrative guidelines or because it intuitively follows from their beliefs about the function that bail should serve regardless of the actual effectiveness of that strategy.

Factors producing predictively ineffective decision strategies

It is quite reasonable to expect that judicial decisions are made on the basis of factors that are poor predictors of pretrial behavior. The feedback that judges receive from incorrect decisions is necessarily biased given the nature of the bail system. For example, assume that judges use prior record as a factor to decide how much bail should be set. Defendants with extensive prior records would then find it more difficult to pay the higher bonds that are set for them and would consequently be more likely to be detained in jail. Being detained in jail, these defendants would be unable to demonstrate to the judges that if they had been released, they would have appeared when scheduled and would not have been rearrested. In short, unnecessary detentions will be undetected by judges. Furthermore, the use of any decision factor that eventually increases the number of defendants who are detained almost guarantees a reduction in the total number of individuals who are rearrested, even if the factor has no relationship to the pretrial behavior of defendants. Defendants who are detained in jail cannot be rearrested for additional crimes. Finally, judges in crowded urban courts do not usually receive any feedback concerning their decisions. A given defendant is not handled by the same judge for each court proceeding. The judge who sets bail may never know how the defendant behaved during the pretrial period, much less how the case was disposed of. Thus, the nature of the feedback that judges receive concerning the adequacy of their bail-setting decisions will not, in general, tend to reinforce decision factors that are accurate predictors of pretrial behavior.

Other facts that tend to militate against decision strategies that are based on predictively accurate factors are:

1. The data available to judges in most jurisdictions concerning the defendant's background and the crime are meager.
2. The reliability of what data do exist is often unknown.
3. As with many legal decisions, the decision-maker must rely on other people for the "facts."
4. As the previous section suggested, it is unclear whether the potential predictors of pretrial behavior that are available to judges (e.g., Table 8.1) can predict who will appear and/or who will commit additional crimes even if they could be measured in a perfectly reliable manner.

With regard to the latter point, it may be that the factors which account for most of the variation in pretrial behavior have little to do

with community ties, prior record, and severity of crime. Even the pioneering efforts of the Vera Institute of Justice (Ares, Rankin, and Sturz, 1963) to provide judges with more reliable information about community ties through the use of an extensive prebail interview schedule have not improved, to any substantial degree, the predictive ability of the community-ties factor (Gottfredson, 1974).

Although the efforts of the Vera Institute to show that more reliable information can be provided to judges have had a major impact on many jurisdictions, it is still the case that the information made available often depends on the self-reports of the defendant, whether and how strongly a defense attorney argues for lower bail, and the information that the police have presented to the prosecutor regarding their investigations and the nature of the criminal activity. In fact, in one study conducted in England (which has a bail system very similar to that in the United States), Bottomley (1970) found that the court often set bail and remanded accused individuals to custody knowing only the offenses with which the defendants were charged!

Case factors and bail decisions

Several studies have examined the relationship between various case and defendant characteristics (including community ties) and judicial bail decisions in an attempt to discover the decision strategies that judges do use (Ebbesen and Konečni, 1975; Foote, 1958; Foote, Markle, and Woolley, 1954; Landes, 1974; Suffert, 1966). It is quite clear from these studies that the amount of bail increases as the severity of the current crime increases and, to a lesser degree, as the extent of the prior record increases. Other factors—age, sex, community ties, and so on—seem to be only very weakly related to bail amount, if at all. In short, most studies have found that the amount of bail (and the decision to remand the defendant to custody with no bail) are related to two factors: severity of the current crime and extent of prior record.

Social influence and bail decisions

It would be premature to conclude from this evidence, as many have, that severity of crime and prior record are the *direct* causes of judicial bail decisions. It is conceivable, for example, that these two factors are related to some other, unmeasured factor or factors that are the direct causes of judicial decisions. One class of such factors, often ignored in most studies of bail setting, is *social influence*. As with

many legal decisions, in bail hearings the judge is often presented with arguments and recommendations for action from several different sources. Three different actors are potentially important: the defense attorney, the district attorney, and the probation officer. The probation officer often is responsible for collecting and verifying community-ties and prior-record information, which is then made available to the court usually in a written form. In some jurisdictions, the probation officer also recommends whether defendants should be released on their own recognizance. In the bail hearing the district attorney often proposes a particular bail amount and attempts to support this recommendation with a series of brief arguments. The defense attorney then usually makes a recommendation for a lower bond amount and attempts to support it with a different series of arguments. It is conceivable that judicial decision strategies are, at least partly, based on these recommendations. That is, rather than directly considering prior record, nature of current crime, community ties, and other factors, a judge might simply base the bail decision on the recommendations that are received from other individuals.

For example, as part of the Manhattan Bail Project conducted by the Vera Institute, Suffert (1966) examined the interaction patterns between the judge, the prosecutor, and the defense attorney at bail hearings. He found that in 49% of the hearings a judge simply proposed a bond amount that was not opposed by either attorney. That is, both attorneys quietly agreed with the judge's decision. In another 38% of the cases, one or the other attorney suggested that bail be set at a particular amount, and then the judge imposed bail without disagreement from either attorney. Rarely was the imposed amount the same as that recommended, however. The remaining cases involved some form of counterargument and counterproposal from one, the other, or both attorneys before the judge imposed bail. Analysis of the cases in which the prosecuting attorney suggested a higher bail and/or the defense attorney suggested a lower bail than either the judge's or the other attorney's initial recommendation led Suffert to conclude that the district attorney's recommendations had a greater impact on the judge than did the defense attorney's recommendations. This conclusion was based on several results:

1. The judges were more likely to raise the bail amount over a previous suggestion in response to a district attorney's request than to lower the bail amount in response to a defense attorney's recommendation.
2. Defense attorneys made fewer recommendations than prosecuting attorneys.

3. When prosecutors recommended that defendants be released on their own recognizance, the judges *always* followed this suggestion; whereas when similar recommendations were made by defense attorneys, they were followed in only about 60% of the cases.

Although aspects of Suffert's results are consistent with the view that the prosecutor's recommendation is influential in judicial bail decisions, there is another explanation for the findings: The judge's and the prosecutor's decision strategies may be more similar to each other than are the judge's and the defense attorney's strategies. That is, judges may agree with prosecutors because they base their decisions on the same case and defendant characteristics that the prosecutors use to construct their recommendations. Unfortunately, Suffert did not present his data in a manner that allows this issue to be examined. In summary, there is a reasonable degree of uncertainty concerning which factors are *direct* causes of judicial bail decisions. Severity of crime, prior record, prosecutor recommendation, defense attorney recommendation, and possibly community ties are likely candidates, but which, if any, are direct causes of the judicial decision remains to be determined. If both case and social-influence factors prove to be causal, the relative importance of these different factors in the final outcome needs to be determined as well.

A causal analysis of case and social influence

These empirical issues led us (Ebbesen and Konečni, 1975) to consider different methods that might be used to determine which factors were direct causes of judicial decisions. One method, unusual for legal research, but common in social-psychological research, was an experimental simulation of the bail-setting process. This method allowed us to examine the impact of different potential causes of judicial decisions unconfounded by other potential causes. If some of the previously studied factors are related to bail decisions only because they are associated with the actual causes of bail decisions and therefore are not themselves direct causes, then, in an experimental analysis, these factors should have no effect on bail decisions.

While experimental designs provide an unambiguous method of determining which factors are direct causes *in the simulation*, they have other difficulties. In particular, the causal process that controls judicial decisions in the simulation need not be the same as that which controls bail setting in actual court proceedings (Ebbesen and Konečni, 1980; Konečni and Ebbesen, 1979; also Chapter 2, this vol-

ume). The simulation may differ from the situations being simulated in any number of potentially important respects. If any of these differences influence the nature of the decision processes that judges use, then incorrect conclusions could be drawn from simulation research. To counteract this difficulty, it is necessary to examine the extent to which simulation results are consistent with evidence from the situations being simulated.

An experimental simulation Eighteen municipal and superior-court judges who had recently been or were currently involved in bail hearings in San Diego County participated in the simulation. The judges were given "case records" designed to simulate the type of information typically available in bail hearings. To reinforce this idea, the judges were told that the cases had been selected from San Diego County Court records. Each case described the defendant as an unmarried, male Caucasian between the ages of 21 and 25 (the ages were varied within this range to enhance the appearance that these case records were derived from actual past cases). The criminal charge against the defendants was held constant across all cases: robbery. Although the details of the criminal activities leading to this charge were varied from case to case (e.g., two TV sets from an appliance store, cash and liquor from a liquor store, gems from a jewelry store, cash from a restaurant), the value of the stolen property did not exceed \$950 nor go below \$850. A plea of "not guilty" was always entered.

The levels of four different factors were systematically varied: the district attorney's bail recommendation (in dollars), the defense attorney's bail recommendation (in dollars), the extent of the defendant's prior record, and the strength of the defendant's community ties.⁶ The levels of these factors were chosen to be representative of the range of values that usually occurred in robbery cases. Three levels of district attorney recommendation (around \$1,500, \$2,400, and \$6,000) and three levels of defense attorney recommendation (release on own recognizance, \$500, and \$1,000) were used. The two levels of prior record were: no previous arrests versus several previous felony convictions along with the fact that the defendant was on probation for one of the prior convictions at the time of the hearing. The two levels of community ties were: the defendant had lived in San Diego for 4 to 6 years, was currently employed, and had a family that lived in the San Diego area versus the defendant had lived in the area for only 1 to 2 months, was unemployed, and had a family that

⁶Because the judges were unwilling to spend a great deal of time on this study, we reduced the number of cases they had to judge by holding severity of crime constant.

lived in Northern California. To conform to typical courtroom procedure, prior-record information was presented with the district attorney's recommendation, while community-ties information was presented along with the defense attorney's recommendation.

Each judge read eight case histories and was told to set bail as if they were real cases. A $3 \times 3 \times 2 \times 2$ analysis of variance of the amount of bail set as a function of the above conditions showed that three of the four factors had significant effects on the judges' bail decisions: community ties, $F(1,198) = 22.38, p < .0001$; district attorney recommendation, $F(2,108) = 7.05, p < .01$; prior record, $F(1,108) = 5.91, p < .05$. Community ties accounted for the most variation, district attorney recommendation the next most, and prior record the next most. The effect of the defense attorney recommendation was not significant: $F < 1$. There were no interactions among the factors: $F_{\max}(2,108) = 2.22, p > .05$. The effect of any one factor did not depend on the level of other factors. The mean amounts of bail that were set (collapsed over the one nonsignificant factor: defense recommendation) are shown in Table 8.2. As can be seen, the judges seemed to conform to the American Bar Association (1968) and Vera Institute recommendations that high bail be set when the community ties of the defendant are weak. In addition, higher bail bonds were set for defendants with prior felony records than for those with no previous records. Finally, consistent with Suffert's (1966) findings, the bond amount increased as the amount of the prosecutor's recommendation increased.

Several conclusions follow from these results. The failure of the defense attorney recommendation to have a significant impact on bond amount suggests that the defense recommendation is not a

Table 8.2

Mean bail set (in dollars) by judges as function of prior record, community ties, and prosecuting attorney recommendation

Prior record	Community ties	Prosecuting attorney recommendation		
		1,600	2,250	6,250
No	Strong	1,208	1,375	1,600
	Weak	1,958	2,437	3,142
Yes	Strong	2,121	1,462	2,492
	Weak	2,175	2,750	4,437

SOURCE: Adapted from E. B. Ebbesen and V. J. Konečni, Decision making and information integration in the courts: The setting of bail. *Journal of Personality and Social Psychology*, 1975, 32, 805-821. Copyright © 1975 by the American Psychological Association. Reprinted by permission.

direct cause of the judge's bail decision. The significant effects of prior record and of the prosecutor's recommendation suggest that none of the previous findings relating prior record and prosecuting attorney recommendations to the amount of bail is artificial. Apparently, prior record and the district attorney recommendation are both *direct* causes of bail decisions. On the other hand, it is curious that the one factor that accounted for most of the variation in the amount of bail was the strength of the defendant's community ties. As we noted earlier, previous research has not found this factor to be strongly related to judicial bail decisions.

Several explanations for the latter anomaly are possible. One that comes readily to mind is that the bail-setting procedures may have been different in California (at the time of the study) than in the jurisdictions where the previous data were collected. For example, several studies prior to ours were based on samples from New York. Although neither New York nor California includes community ties in state statutes, California differs from New York in that its statutes require that the risk of nonappearance be considered. It is conceivable that the judges in our sample were accomplishing this by attending to the community-ties factor. Another explanation for the difference in results is that the simulation methodology did not tap the decision process that judges normally use when setting bail (Ebbesen and Konečni, 1980; Konečni and Ebbesen, 1979).

An analysis of actual bail decisions In order to examine the utility of these two alternative explanations, we obtained naturalistic data from five of the eighteen judges who participated in the simulation by unobtrusively observing them set bail in actual bail hearings. Trained observers attended a total of 177 bail hearings. Using specially prepared data sheets, the observers recorded the following for each case:

1. The sex, approximate age, and race of the accused.
2. The type of crime charged against the accused.
3. Whether a defense attorney was present.
4. The defendant's plea (guilty or not guilty).
5. The defense attorney's dollar recommendation.
6. The prosecuting attorney's dollar recommendation.
7. The accused's prior record (when it was mentioned by one of the participants).
8. Whether the accused was employed.

9. Whether and how long the accused had lived in the San Diego area.
10. Whether the accused had relatives living in the area.
11. The amount of bail that was set.

Of the cases observed, 35% were not used in the analyses described below because one or more of the major classes of information were missing. Since 96% of the defendants were males between the ages of 18 and 30 who pleaded not guilty, sex, age, and plea were ignored in the final analyses.

The reliability of these data was assessed by comparing the records of two independent observers who simultaneously coded 23 cases. Comparison of the records indicated that the two observers agreed with each other on all major categories of data for all of the cases, indicating near-perfect reliability.

The analyses of the data that are of most relevance to the present concern were conducted using five predictors of the judges' decisions. One was the severity of the current criminal charge. Seven levels were created by categorizing the charges into the following classes:

1. Victimless crimes (possession of drugs, AWOL).
2. Nonviolent crimes with nonspecific victims (forgery, sexual perversion).
3. Nonviolent minor crimes with specific victims (burglary, petty theft, theft).
4. Nonviolent major crimes with specific victims (sale of drugs, robbery).
5. Crimes with the potential of violence or death (armed robbery, possession of a deadly weapon).
6. Violent crimes not resulting in death (kidnapping, rape, and assault).
7. Homicide.

The ordering of these categories from least to most severe matches that derived from our own (Ebbesen and Konečni, 1976) and previous judgmental work (Coombs, 1967).

Another factor was prior record. Four levels were created: (1) No prior arrests. (2) A minor record consisting of traffic violations. (3) A moderate prior record consisting of no more than one nonviolent

felony conviction. (4) A severe record consisting of more than one felony conviction or one violent felony conviction. Those defendants with severe prior records were also typically on parole at the time of the hearing.

The third factor was community ties. Three levels were defined: (1) A defendant with weak ties had not lived in the San Diego area for more than 1 month. (2) One with moderate ties had lived in the area for more than 1 year but was unemployed at the time of arrest. (3) A defendant with strong community ties had lived in the area for more than 1 year, had been steadily employed, and had relatives living in the area.

The remaining two factors, defense and prosecutor recommendations, were coded in terms of dollar amounts: (1) The defense attorney recommendation ranged from \$0 (release on own recognizance) to \$25,000 in one homicide case. (2) The prosecuting attorney recommendation ranged from \$0 to a recommendation that the bail request be denied (also in one homicide case).

The judges' final bail decisions were also coded in dollars. They were obtained when the judge announced the final bail amount so that the court stenographer could record it.

The results of an initial analysis of the relationships between the judge's bail recommendation (treating release on own recognizance as \$0) and each of the aforementioned factors are presented in Table 8.3.⁷ It shows these relationships in terms of separate regression equations for each factor. Prior record was the only factor that was not at least marginally related to the amount of bail. For the remaining factors, bail increased as the severity of the crime and the two attorney

Table 8.3

Regression equations relating severity of crime, prior record, community ties, defense attorney recommendation, and prosecuting attorney recommendation to amount of bail set

Source	Constant	Beta	r
Severity of crime ^a	- 1744	1319.0	.47 ^b
Prior record ^a	1575	296.7	.07
Community ties ^a	3678	- 878.3	-.16 ^b
Defense attorney recommendation	664	2.6	.84 ^b
Prosecuting attorney recommendation	- 464	.9	.96 ^b

^a Scaled arbitrarily: 1-6, 1-4, and 1-3, respectively.

^b $p \leq .05$.

⁷Four homicide cases were eliminated from the analyses since no bail was set for three of them and an unusually high bail was set for the fourth one.

recommendations increased and as the strength of the community ties decreased.

When all five factors were considered together in a multiple regression analysis, the resulting equation was able to account for slightly over 94% of the variance in the bail amount. When all possible two-way linear interactions (Ebbesen and Konečni, 1975) between pairs of factors were included in the model, the new model accounted for a significant amount of additional variance, $F(10,86) = 5.12$, $p < .0001$, and explained about 97% of the total variation in bail. To determine the contribution that each of the factors made to this excellent fit, the *additional* sum of squares that each factor added to the remaining factors was examined. The results of this analysis are presented in Table 8.4. We found that only the two attorney recommendations and the severity of the crime each added significantly to the amount of “main-effect” variation in the amount of bail that could be explained by the remaining four factors. Thus, the previously noted relationship between bail and community ties could be explained by the fact that the strength of a defendant’s community ties was correlated with the remaining three factors. In fact, when the community-ties and prior-record factors were removed, the remaining three factors accounted for virtually the same amount of variation in bail as all five factors taken together: residual $F < 1$. The effects that these three significant factors had on the amount of bail that was set are shown in the following best-fitting linear equation:

$$\begin{aligned} \text{Bail (in dollars)} = & -91.49 + .82 (\text{prosecutor}) \\ & + .52 (\text{defense}) - 122.13 (\text{crime}) \end{aligned}$$

When a similar analysis was performed to determine which interactions were contributing to the overall two-way interaction variance, we found that two interactions were sufficient to explain all of the “interaction-effect” variance. One was between severity of crime and the defense attorney recommendation, and another was between the two recommendations. The first of these interactions was examined by dividing the data into minor crimes (categories 1–3) and major crimes (categories 4–6) and then examining the relationship between the judges’ decisions and the defense attorneys’ recommendations. Table 8.5 presents the zero-order correlations between the judicial decision and the defense recommendation (and for comparison purposes correlations between the judge and the prosecutor and between the judge and the crime) for minor crimes and for major crimes. As can be seen, the relationship between the defense attorney and the judge was higher ($p < .05$) when the defendant was charged with a more severe crime. In contrast, the correlations between the judge and the prosecutor and between the judge and the severity of

Table 8.4
Multiple regression analyses of judge's actual bail decision

Source	df	F
All main and two-way interaction effects	15	155.77 ^a
Main effects only	5	319.90 ^a
Two-way interactions only (residual)	10	5.12 ^a
Main effects (additional)		
Severity of crime (A)	1	4.26 ^b
Prior record (B)	1	1.61
Community ties (C)	1	<1.0
Defense attorney recommendation (D)	1	23.63 ^a
Prosecuting attorney recommendation (E)	1	523.81 ^a
Two-way linear interaction effects (additional)		
A × B	1	1.45
A × C	1	2.78
A × D	1	10.59 ^a
A × E	1	<1.0
B × C	1	<1.0
B × D	1	<1.0
B × E	1	2.19
C × D	1	<1.0
C × E	1	<1.0
D × E	1	15.08 ^a
Mean square error	86	.83 ^c

Note: These analyses were based on data from 102 cases. Four homicide cases were eliminated because of extreme values. Severity of crime, prior record, and community ties were scaled as in Table 8.3.

^ap < .01.

^bp < .05.

^cMean square error; should be multiplied by 10⁵ to obtain the true value.

SOURCE: Adapted from E. B. Ebbesen and V. J. Konečni, Decision making and information integration in the courts: The setting of bail. *Journal of Personality and Social Psychology*, 1975, 32, 805-821. Copyright © 1975 by the American Psychological Association. Reprinted by permission.

Table 8.5
Correlations between judge's bail decision and defense attorney recommendation, prosecuting attorney recommendation, and severity of crime for minor and major crimes

Judge with:	Severity of crime	
	Minor (n = 52)	Major (n = 50)
Defense attorney recommendation	.43	.84
Prosecuting attorney recommendation	.88	.97
Severity of crime (within category)	.58	.63

the crime remained fairly stable across the two data sets. In short, the judge seemed to have been more responsive to the defense attorney recommendation when the crime was more severe.

The linear interaction between the defense attorney and the prosecutor suggests that the judges' recommendations were higher than might be expected from either the defense attorney recommendation or the prosecutor recommendation considered alone when *both* attorneys recommended that higher bail bonds be set. That is, the impact of either attorney's recommendation was enhanced by the presence of a similarly high recommendation from the other attorney.

These results paint quite a different picture of the bail decision from that obtained in the simulation study. Recall that the major causal factor in the simulation was the same factor used by the Vera Institute and recommended by the American Bar Association: the strength of the defendant's community ties. In the present, real-world data, however, community ties did not seem to play a meaningful role in the judges' bail decisions. Before rejecting the simulation results as unrepresentative of causal processes in actual bail decisions, however, we explored several *methodological* explanations for the different results. These were: (1) The ranges of the factors were much larger in the naturalistic data than in the simulation data. (2) The scale values used in the multiple regressions may have been quite different from the subjective scale values that the judges used in deciding on bail. (3) Some unmeasured factor or factors not included in the multiple regression analyses may have produced the pattern of results. Although the last of these alternative explanations is virtually impossible to reject, it is hard to imagine what such a factor or factors might be in the present setting. Even if such factors were found, the resulting picture of the bail-setting process would still be different from that obtained in the simulation experiment and therefore would not provide a satisfying account of the differences between the two studies.

To provide some evidence relevant to the first two explanations for the differences in results, 63 cases were selected from the real-world sample so that their range of values on the four factors that were varied in the simulation did not exceed those values used in the simulation and so that the levels of these factors matched, as closely as possible, the levels used in the simulation. Three levels of prosecuting attorney and of defense attorney recommendations, two levels of prior record, and two of community ties were coded, using Overall and Spiegel's (1969) dummy-variable coding procedure. Then a dummy-variable multiple regression (a technique that can be identical to least-squares analysis of variance and therefore does not scale the levels of the factors; e.g., Applebaum and Cramer, 1974; Cohen, 1968) was used to analyze these data. We reasoned that if the results

of this analysis were the same as those from the simulation, then one or more of the previous methodological explanations were probably correct. As it turned out, these analyses did not substantially alter the conclusions from the naturalistic data. The district attorney recommendation was the most important predictor of bail, $F(2,43) = 17.91$, $p < .01$, just as in the entire naturalistic sample, and neither prior record nor community ties was significantly related to the bail amount ($p > .05$). The defense attorney recommendation was only marginally related to the bail amount ($p < .10$) in this restricted sample, however. These results implied that the differences between the simulation study and the naturalistic study were not due to simple artifactual problems in our methods of analysis. Apparently, the judges in the simulation were using a decision strategy that was not identical to the one they used when setting bail in actual cases.

In fact, a number of important differences in results emerged. Within the range of values studied, the simulation data implied that judges combined, in a noninteractive fashion, three sources of information in deciding on the amount of bail to set: community ties, prior record, and the prosecuting attorney recommendation. In contrast, the full range of naturalistic data implied that community ties and prior record were not relevant factors and that the prosecuting attorney recommendation was far more influential than the other factors. These and other differences suggested that the causal process controlling judicial decisions in the simulation was not the same as that in real bail hearings. (See Chapter 2, this volume, for an expanded discussion of this issue.) Therefore, we were not able to use the simulation results as we had originally intended, namely, to clarify the causal relationships among the studied factors and judicial decisions. Nevertheless, we used some features of the naturalistic data to assess the plausibility of several alternative causal models.

Any one of several different causal models might describe the influence that the five factors (crime, prior record, community ties, defense recommendation, and prosecutor recommendation) have on judges' bail decisions:

1. In an *independent-judgment model*, all of the factors are assumed to act as *direct* (though correlated) causes of judicial bail decisions. Given the results that we have already described, neither community ties nor prior record is likely to be a direct cause of the bail decision. Nevertheless, severity of the crime and the two attorney recommendations could all act as direct causes of judicial decisions.
2. In contrast to the independent-judgment model, we can assume that the factors are related to each other in a causal chain. One

reasonable chain assumes that the direct causes of the judges' decisions are the recommendations of the two attorneys and that the remaining factors (including prior record) have only *indirect* causal effects on bail. In this complete *social-influence model*, severity of crime, prior record, and community ties have no direct effects on the judges' decisions. Thus, some subset of these case factors or all of them have only indirect effects on judicial decisions.

3. In the *case-factors model*, all three actors are assumed to reach independent decisions. Thus, the decisions of one actor are assumed to have no effect on the decisions of any other actor. Instead, the three case factors (or some subset of them) are assumed to have direct causal effects on the decisions of all three actors. One could explain the agreement between the attorney recommendations and the judges' decisions that we described previously by assuming that all of the actors used similar decision strategies. Focusing on the judges, this causal model assumes that they make their decisions on the basis of the case factors only.
4. A *prosecutor-only model*, suggested in part by Suffert's (1966) study, assumes that the only direct cause of the judges' decisions is the prosecutor's recommendation. Case factors are assumed to influence both of the attorney recommendations, but only the prosecutor is assumed to have a direct causal effect on the judges. A slightly modified version of this model assumes that the defense attorney is also directly influenced by the prosecutor's recommendation rather than by the case factors.
5. A *defense-only model* reverses the role of the prosecutor and the defense attorney in the previous model.⁶

The prosecutor-only and defense-only models make similar types of predictions. If one or the other attorney recommendation is the only direct cause of judicial bail decisions, then the relationships between the remaining variables and the judges' decisions should disappear when the appropriate recommendation is held constant. Stated differently, the other factors should not explain a significant amount of *additional* variance in bail over that already explained by

⁶It is also possible that the judge has a causal influence on attorney recommendations. This seems especially reasonable in light of the fact that discussion among the attorneys and the judge sometimes occurs. Unfortunately, an adequate test of the fit of this and other mutual causality (or nonhierarchical) models was not possible in the current case.

the relevant attorney recommendation. We examined this prediction for both attorney recommendations using the error term from the “main-effects” model (described earlier). Although both the prosecutor and the defense attorney recommendations each accounted for large portions of the variance in bail (see Table 8.3), the additional variance accounted for by the remaining four factors (one attorney recommendation and the three case factors) was highly significant in each case: prosecutor-only residual $F(4,96) = 5.03, p < .0001$; defense-only residual $F(4,96) = 100.13, p < .0001$. These results are inconsistent with both the prosecutor-only and the defense-only models.

Although neither attorney recommendation can be considered the sole direct cause of judicial bail decisions, it is possible that both attorney recommendations when taken together are sufficient to explain the relationships between the case factors and judicial decisions. Using the same additional-variance logic outlined previously, we found that the two attorney recommendations were capable of accounting for virtually all of the “main-effect” variance in bail: residual $F(3,96) = 1.19, p = .32$. Thus, the present results are not inconsistent with the complete social-influence model.

To test whether the complete social-influence model or the case-factors model provided a better account of the results, we examined the additional variance that the two attorney recommendations added to the variance that the three case factors could explain by themselves. We reasoned that if the case-factors model was correct, the addition of the two attorney recommendations should not significantly increase the variance that we could account for, since according to the case-factors model the only reason the three actors’ decisions correlate with each other is that they all respond to the same case factors in a similar manner. From a different perspective, this analysis tested whether the multiple correlation between the judge and the two attorneys was due to all three decisions having a common set of causes—the three case factors. As it turned out, the two attorney recommendations considerably improved our ability to account for variation in the judges’ bail decisions, $F(2,96) = 603.06, p < .001$, suggesting that the complete social-influence model is to be preferred over the case-factors model.

It is conceivable that one or two of the remaining case factors rather than all three of them act directly on the judge in addition to their having effects on the two attorney recommendations. If this were so, we would expect the addition to the attorney recommendations of one or two of the case factors to significantly increase the variance in judicial bail decisions. Only one of the three case factors came close, severity of crime: $F(1,96) = 2.37, p = .13$.

Taken together, these results suggest that the complete social-influence model provides the most parsimonious account of the real-world judicial decision data.⁹ The model that assumes that the judge is independently influenced by the various case factors and by the two attorney recommendations was not supported by the results of the previous analyses. On the other hand, the previous results do not exclude the possibility that one or more of the case factors have indirect effects on the judges' decisions. It is conceivable, for example, that the judges respond to the attorney recommendations because they know that the attorneys are basing their recommendations on precisely those case factors that the judges would have taken into account had the attorneys been absent from the proceedings.

We examined which of the three case factors had significant effects on the prosecuting attorney and on the defense attorney in separate regression analyses. When the relationships between each case factor and one of the recommendations were examined, we found that severity of crime and community ties were both significantly related to the prosecutor's recommendation ($r = .52$ and $-.167$, respectively), but only severity of crime was significantly related to the defense attorney's recommendations ($r = .44$). The multiple main and interaction effects of these variables on the two recommendations are shown in Table 8.6. Each main and interaction "effect" represents the significance of the additional variance that each factor (or interaction) added to the remaining factors (or interactions).

As can be seen, for the prosecutor's recommendation, severity of crime is capable of accounting for the previously noted main effect of the community-ties factor. Given that the crime is known, the addition of community ties does not improve our ability to predict the prosecutor's recommendations: $F(1,99) = 1.11$. On the other hand, severity of crime and community ties did seem to interact significantly. Our analysis of the mean bail that the prosecuting attorney recommended for each level of crime within the various levels of the community-ties factor provided a picture of this interaction. Table 8.7 shows these results collapsed across several levels of crime category to increase the number of cases in each cell. The form of this

⁹Other explanations for the pattern of results are possible. Some would assume differential reliability of our measures. Others would point to the greater variance in the recommendations than in the case factors. Still others might attack our assumptions about error (e.g., that the errors in measurement of the different factors were uncorrelated with each other and/or with any of the measured factors) or about the lack of "third-factor causes." Finally, others might point to the lack of power in our statistical tests because of the extreme multicollinearity in our small sample. Nevertheless, the present findings still suggest that bail is not set in the real world in a manner consistent with the simple independent-judgment model that emerged from the simulation study.

Table 8.6

Results of multiple regression analyses of severity of crime, prior record, and community ties on recommendations of the prosecuting attorney and defense attorney

Source	df	F values	
		Prosecuting attorney	Defense attorney
Regression (all main and two-way interaction effects)	6	8.42 ^a	4.26 ^a
Regression (main effects only)	3	12.89 ^a	7.93 ^a
Additional (two-way interactions only)	3	9.35 ^a	2.02
Main effects (additional)			
Severity of crime (A)	1	36.99 ^a	14.26 ^a
Prior record (B)	1	< 1	< 1
Community ties (C)	1	1.31	< 1
Two-way linear interaction effects (additional)			
A × B	1	1.26	< 1
A × C	1	9.05 ^a	1.92
B × C	1	< 1	< 1
Mean square error	99	.15 ^b	.02 ^b

^ap < .01.

^bMean square error.

SOURCE: Adapted from E. B. Ebbesen and V. J. Konečni, Decision making and information integration in the courts: The setting of bail. *Journal of Personality and Social Psychology*, 1975, 32, 805–821. Copyright © 1975 by the American Psychological Association. Reprinted by permission.

Table 8.7

Mean bail recommended (in dollars) by prosecuting attorney as function of severity of crime and community ties

Severity of crime	Community ties		
	Weak	Moderate	Strong
Low ^a	1,000 (n = 13)	1,111 (n = 9)	738 (n = 19)
High ^b	1,999 (n = 9)	3,283 (n = 23)	5,404 (n = 29)

^aConsisted of the two lowest levels described in the text.

^bConsisted of the remaining levels, with the exclusion of the homicide cases.

SOURCE: Adapted from E. B. Ebbesen and V. J. Konečni, Decision making and information integration in the courts: The setting of bail. *Journal of Personality and Social Psychology*, 1975, 32, 805–821. Copyright © 1975 by the American Psychological Association. Reprinted by permission.

interaction was quite unexpected. For less severe crimes the prosecutors tended to recommend less bail as the strength of the defendants' community ties increased—exactly as recommended by the American Bar Association. On the other hand, for more severe crimes, the prosecutors acted in opposition to the ABA guidelines and actually recommended higher bail bonds as the strength of the defendants' community ties increased! Thus, being tied to the area was actually detrimental to defendants charged with more severe crimes.

Interestingly enough, even though one might expect the defense attorneys to be most responsive to the community-ties factor, severity of crime seems to control their recommendations as well as that of the prosecutors. In fact, as Table 8.6 shows, severity of crime is the only factor one needs to know in order to account for the defense attorney recommendations.

The causal processes that are most consistent with the results of these analyses can now be summarized. The judges seemed to be directly influenced by the prosecutor and the defense attorney recommendations. The causal path from the prosecutor to the judge (standardized beta = .83) was considerably higher, however, than that from the defense attorney to the judge (standardized beta = .17). With the possible exception of severity of crime, none of the case factors studied appeared to have direct causal effects on the judges' decisions. Severity of crime seemed to play some role by moderating the causal relationship between the defense attorney and the judge, however. In particular, the causal influence of the defense attorney seemed greatest when the defendant was charged with a more severe crime. Finally, the impact that either attorney recommendation had on the judge increased as the recommendation of the other attorney increased.¹⁰ It was almost as if the judges expected an own-recognition recommendation from the defense attorney, and when the defense attorney recommended that some bail be set, the judges assumed that some bail amount was necessary (otherwise, the defense would have recommended own recognition). In our sample, judges never set less bail than was recommended by the defense attorney.

Although severity of crime, prior record, and community ties did not seem to have direct causal effects on the judge, severity of crime and community ties did seem to have indirect effects by controlling

¹⁰It is possible to formalize the decision rule that the judges appear to have followed. In particular, as we discuss later, a weighted averaging model in which the weight given to the defense attorney recommendation is assumed to increase with the amount of the recommendation provides a satisfactory account of the pattern of results.

the recommendations of the two attorneys. Severity of crime interacted with community ties to determine the prosecutor recommendations. On the other hand, the defense attorney responded solely to severity of crime. Neither attorney seemed to respond to prior record, as we coded it, however.¹¹

In sum, except for the weak role of prior record, our results were quite consistent with previous studies. Both case and social-influence factors were important in judicial bail decisions. Thus, bail seems to be set in San Diego in a manner quite similar to the way it is set in other large urban areas. Severity of crime seems to be the primary cause, although apparently it has its effects on the judge indirectly by influencing both the prosecutor and the defense attorney recommendations, which in turn directly determine the judge's decision.

CONCLUSIONS

The dependence of causal relations on methodology

The fact that the causal model which best described the simulation results was different from that which described the real-world results can be looked at from several different perspectives. It might be argued, for example, that our simulation was not very good and that had we designed a better (more realistic?) simulation, it would have yielded results that were more comparable to the naturalistic data. Although this argument may prove correct, it is important to note that when we designed the simulation, we felt that it was quite realistic and that it would yield results similar to those obtained from the actual bail hearings. The point is that results from experiments that seem to have mundane realism or face validity may not generalize. Had we not collected the real-world data, we would never have known that the results from the simulation were caused by a process other than that which seems to govern real-world decisions.

From a somewhat different perspective, one could attempt to minimize the differences in results from the two procedures and search

¹¹In a more recent sample in which prior-record information was obtained from court records rather than from the hearings, prior record was weakly related to bail amount. Apparently, the prior-record information discussed in the hearing is not a perfectly reliable indicator of the prior-record information that is available to the judge (e.g., in a file that is in front of the judge) when the bail decision is made. In short, the information about particular case factors that emerges in public court proceedings may be different from the information in the court files that are available to the judge but not made public. This raises the possibility that our results from the real-world study represent the public part of the bail-setting process only.

for commonalities. This is the approach we took in our initial discussion of this work (Ebbesen and Konečni, 1975). In particular, we argued that the same general decision model, namely, a weighted averaging model in which the weight (or relative importance) of the defense attorney recommendation was monotonically related to the size of that recommendation, could explain aspects of results from both studies. Although it was clear that the weights that best fit the factors and the scale values that best fit the levels within the factors had to be different across the studies, we still felt that the fact that some type of weighted averaging model could account for both sets of results was worth emphasizing. After all, it could have been the case that, say, a multiplying model explained the data from one study, but a configural model worked best for the other study. If a similar decision process did underlie both data sets, it suggested that something useful would be found by conducting the kinds of simulation studies that are so common in social psychology.

Since our original report, however, we have changed our position on this issue. It is clear that had we behaved like most social psychologists and conducted only the simulation (relying on our belief in its mundane realism), we would not have concluded that a weighted averaging model was the likely decision process. This model was suggested to us by the pattern of results in the real-world data. After the fact, a weighted averaging model is general enough to account for a wide range of findings, including those that we obtained from the simulation. In short, the fact that one model can be found to explain the results from both studies should not be taken as evidence that simulation research will lead to the same general conclusions as do its real-world counterparts. On the other hand, the fact that a weighted averaging model can explain the behavior of judges in the real world is a finding worth emphasizing, especially if it is realized that the model only describes part of the entire causal process that determines how bail is set.

The multimethod approach to social research emphasized by Campbell and his associates (Campbell and Stanley, 1966; Webb et al., 1966) assumes that all methods have biases, that through the use of different methods the different biases will (hopefully) cancel each other out, and that what remains is as good an approximation of the truth as we can get. This argument applies equally well to the measurement of unobservable states such as attitudes, values, and feelings and to the assessment of causal processes. Applying this approach to the results from the two studies that we have reported here (and to our research on other decision-makers in the legal system; see Chapter 11, this volume) is difficult, however. We have already noted that a weighted averaging model can describe both data

sets. On the other hand, the only factor common to both models is the prosecutor recommendation. It would seem silly to conclude both that judges set bail by taking a weighted average of several different sources of information and that only one source of information causes the judges' decision! We prefer, in part for reasons that we have outlined elsewhere (Konečni and Ebbesen, 1979; and Chapter 2, this volume), to assume that our real-world data, even with its own peculiar biases, provides a far more accurate and useful view of the bail-setting process than do the data from the simulation or even than the view that emerges from the common features of both studies. Underlying this assumption is our belief that our simulation and most others are likely to have more biases and sources of error than carefully done observations of the real world. But in addition, we worry that the types of conclusions that may "fall out" of attempts to combine results from different methods will be so general as to be of little practical use.

Even if one wishes to conclude from our work that a basic decision process, a weighted averaging integration rule, underlies judicial bail decisions (say, by adding the defense attorney recommendation to the model), this conclusion has no applied significance until the weights of the factors and the scaling of levels within the factors are specified. Until they are specified, prediction of judicial behavior is not possible. As should be obvious from the previously described results, quite different estimates for weights and scale values are obtained from the simulation than from the real-world study. These different estimates imply quite different models of bail setting. For example, from the simulation we concluded that judges respond primarily to the strength of the defendant's community ties, that prior record and prosecutor recommendation both have significant weights but are of low magnitude compared to the weight given to community-ties information, and that the defense attorney recommendation is unimportant. In contrast, from the real-world study we concluded that the prosecutor recommendation was the most important factor, that the effect of community ties was indirect (had no direct effect on the judges) and interacted with severity of crime, that the defense attorney recommendation was *not* ignored by the judge, and that severity of crime rather than community ties was the primary factor controlling the recommendations by the two attorneys. Thus, the simulation results are largely consistent with the Vera Institute and American Bar Association guidelines and suggest that judges believe the primary function of bail is to insure the appearance of defendants at pretrial court hearings. In contrast, the real-world results are inconsistent (and in the case of severe crimes directly opposite to) Vera Institute and ABA guidelines and suggest that judges believe the pri-

mary function of bail is either to protect the community and court personnel from predicted criminal activities and/or to punish the defendant for current criminal activities.¹² In short, even though one might argue that the “same” basic process underlies judicial bail-setting decisions no matter how measured, the details of the picture of bail setting that one obtains from the two studies are quite different and lead to very different conclusions about the policy that seems to guide judicial bail decisions.

An evaluation of the bail system

An evaluation of the utility of judicial bail-setting and pretrial-release strategies can be made in light of the particular functions that the bail system should serve.¹³ If it is agreed that the function of bail is to increase the likelihood of appearance, then deciding how much bail to set on the basis of factors that do not predict the likelihood of appearance—even though these factors might predict the likelihood of rearrest—would not seem to be a useful strategy. On the other hand, the identical decision strategy could be quite useful if the principal function of bail were to reduce the likelihood of criminal activity during the pretrial interval.¹⁴

If decision strategies can only be evaluated in the context of particular functions of bail, then it is important to ask how the function of bail should be determined. Unfortunately, there is no clear method. As already noted, Supreme Court decisions provide conflicting views. Even the judges who set bail daily do not generally agree on what the function of bail should be. For example, as part of our project, we interviewed judges and asked them their views on this topic.

¹²Another conclusion consistent with the real-world data is that judges believe that the primary function of bail is to insure appearance but also incorrectly believe that the best predictor of appearance is severity of the crime rather than strength of community ties.

¹³To the extent that the bail decision is seen as an attempt to control predicted behaviors of defendants, the pretrial decision has much in common with the civil commitment of persons believed to be mentally ill. In both cases, the function of the decision is to prevent (or cause) certain predicted behaviors. In fact, in some states dangerousness to self and others—common criteria in civil commitment cases—are proposed as factors relevant in the bail decision (see Table 8.1).

¹⁴If bail is designed to control predicted criminal behavior, one wonders to whom these predictions ought to apply. If accurate predictions of criminal behavior are possible and if aspects of the current crime play little role in these predictions, then one might apply the same prediction model to anyone, whether currently charged with a crime or not. In short, if one function of bail is to control predicted criminal behavior, it is important to ask what criteria should be used to decide whether a given individual belongs in the sample of people that the court considers for bail or detention.

Although the majority of the judges stressed appearance as the primary function, others suggested that the control of pretrial criminal activity was either a primary or a secondary function of the bail system. Even if there had been greater agreement among the judges' verbal reports, we would not know what to make of the agreed-upon function. As we have emphasized (see Chapters 1 and 2, this volume), the reports that judges (and others) give about their decision-making may not reflect the causal processes that seem to best describe their actual decisions. Whether these reports are designed to reflect the way judges believe the decisions ought to be made or merely reflect the fact that judges are reporting noncausal aspects of their decision-making is not known. In fact, it is quite reasonable to suppose that judicial decisions might be guided by considerations that are rarely verbalized, even informally. Some judges may use a decision strategy that coincides with what they believe the public or other members of the legal system view as a reasonable strategy, even though that strategy may not satisfy the function these other groups believe it does. For example, the public may believe that the severity of a crime is a good indicator of the likelihood that the accused will commit additional crimes and therefore expect that high bail bonds will be set in such cases. Thus, even though there is little evidence linking the severity of the current charge with the likelihood of rearrest, a judge's decisions might be considered useful because they coincide with public demands. Appeasing public outcries for protection against *potentially* dangerous individuals may be an important function of bail decisions, even though such decisions might be considered contrary to due process rights.

As we have emphasized, attempting to discover what the judges regard as the function of bail by conducting simulation experiments is likely to yield results that are not much better than those obtained from simple interviews with the judges. One wonders, in fact, whether the multiattribute-utility approach used so frequently by decision analysts (e.g., Edwards, Guttentag, and Snapper, 1975) to help decision-makers choose among complex alternatives can provide any better picture of the values and goals of decision-makers than can experimental simulations. In such applied research, the decision-maker is often asked which goals or attributes of the alternatives are important and what the relevant weights of these goals are. When we have done similar things (although admittedly not in as formal a manner as is typical of decision analysts), we have found that the goals elicited and weights obtained depend, at least to some extent, on the method used to obtain them (Ebbesen and Konečni, 1976; Konečni and Ebbesen, 1979). In short, attempts to characterize the function of bail by asking relevant "experts" what the function

should be may yield as method-specific an answer as we argue is obtained from experimental simulations. Goals and values may be as labile as causal processes (Fischhoff, Slovic, and Lichtenstein, 1980).

Reaching agreement concerning the function that the bail system should serve is not the only issue making evaluation of the bail system difficult, however. It is conceivable that procedures other than the setting of bail bonds can better achieve that function. For example, Clark, Freeman, and Koch (1976) suggest that shortening the delay between arrest and disposition will tend to have a much larger impact on appearance and rearrest than imposing bail (unless the latter leads to detention). It is also possible that some forms of posting bail are more effective than others. For example, Landes (1974) reported that the amount of bail was related to appearance, but only when the defendant had to deposit the entire amount of bond with the court. In those cases in which a written promise to pay, along with a small fraction of the total bond, was given to the court, the size of the bond was unrelated to the likelihood that the defendant would appear. In the Clark et al. (1976) study, bonds paid by bail bondsmen did not seem to be as effective in controlling appearance as bonds paid by the defendants themselves. In short, when one focuses on the effectiveness of different procedures for controlling the pretrial behavior of the defendant, one must conclude that at present the utility of bail is unknown.

Prediction errors also play an important role in an evaluation of the bail system. Not only should the total number of prediction errors be examined, but a system for weighting different types of errors needs to be established. Is it worse to detain defendants who would not have been rearrested and would have appeared had they been released on their own recognizance, or is it worse to release defendants who commit additional crimes and/or do not appear? Since it is likely that the selection of high-risk defendants will never be perfectly accurate, it is essential to have a decision system that not only minimizes errors (e.g., Nagel and Neef, 1976), but also defines acceptable trade-offs between different types of errors. Trade-off functions that weight errors not only according to type but also according to defendant characteristics might even be developed. For example, incorrectly detaining a mother of a 1-month-old child might be considered worse than incorrectly detaining an unemployed male with no living relatives. Finally, bail decisions may well have multiple consequences, some of which have little to do with the pretrial behavior of the defendant. There is evidence, for example, that being detained increases the likelihood that a defendant will be convicted of a crime (Rankin, 1964; Single, 1972) and if convicted will receive

a prison sentence (Friedland, 1965; Chapter 11, this volume). Such consequences should be included in the evaluation of a particular strategy. Until these and similar issues are resolved, evaluation of the usefulness of the bail system will be difficult if not impossible, except along dimensions that everyone would agree should characterize discretionary decisions, such as equal treatment for equal cases (see Chapter 13, this volume).

Given the research that has been done thus far, the amount of variation in both nonappearances and rearrests that is accounted for by aspects of the current crime, prior record, and community ties seems minimal, at best. Therefore, any judicial bail-setting strategy based only on these factors is bound to result in many decision errors. Too much bail will be set in some cases, and too little in others. Thus, the important role that severity of crime seems to play in determining the amount of bail set is in no way consistent with the predictive utility of this factor. It is of interest, therefore, to ask why severity of crime plays the role it does when its predictive validity is so poor. Judges may be unaware of the lack of predictive validity of this factor, they may realize the problem but not know how to improve the situation, or they may not see their decisions as prediction errors because they believe bail serves a different function from those specified here, for example, a partial punishment for the current charge.

Adequate knowledge of the kinds of prediction errors that different decision strategies are likely to produce is not yet available because identification of errors depends on having agreement about the function that bail should serve and knowing what role particular case factors should play in that function. Much future research should be directed at discovering factors that predict and control the pretrial behavior of defendants on the assumption that most agree that a primary function of bail is to control pretrial behavior. As the work by Gottfredson (1974) shows, an essential aspect of such research is that it include validation-sample assessments of the predictive ability of different models.

The determination of the extent to which judges are employing a useful decision strategy (given agreement about the function of the decision node), also needs to be accomplished carefully. As our work on bail suggests, simulation procedures must be evaluated with much more care than is typically done. As another example, Ebbesen and Konečni (1981) described results concerning individual differences among judges in their sentencing decisions. They found that the same causal model (see Chapter 11, this volume) seemed to apply to each judge, even though many simulated judicial-sentencing studies (e.g., O'Donnell, Churgin, and Curtis, 1977) have suggested that judges

differ widely in their sentencing decision strategies. Judges' motivations may be quite different in simulation studies than in the courtroom.

In our bail research, one explanation for the pattern of results in the simulation is that the judges were attempting to present themselves as behaving consistently with Vera Institute guidelines. An alternative explanation is that the judges may believe that they make bail decisions largely on the basis of community ties. Then, when asked to make simulated decisions, the judges may respond to each case by asking themselves how they would respond had this been a real case. If judges spend some proportion of their time in each real case thinking about the community ties of the defendant without these thoughts having any causal effect on the final decision, then the judges might determine what they would have done by remembering what they think about in real cases. In short, the simulations may have tapped the judges' phenomenology about their own decision processes. There is no need to assume, however, that this phenomenology accurately describes the causal process guiding their decisions in the real world.

Social influence in the bail system

Although additional research is clearly required, the fact that judges seem to be strongly influenced by the recommendations of the prosecutor and the defense attorney is of considerable interest. The bail hearing has an adversary tone, much like a trial. The prosecutor and the defense attorney often disagree about the way to treat a defendant during the pretrial period. These disagreements arise from legitimate differences in the goals of the two attorneys. Defense attorneys are probably attempting to protect their clients and to obtain the best possible treatment for them. Prosecutors, on the other hand, are probably trying to insure that the defendant will be sanctioned appropriately for the current charge as well as trying to prevent the defendant from committing additional crimes. If, as our results suggest, judges are more influenced by prosecuting attorney recommendations than by defense attorney recommendations, then the court is siding with the prosecutor's motivations rather than acting as an independent fact finder or as an unbiased arbitrator.

On the other hand, the court is generally ill-equipped to serve either of the latter two functions. Fact finding is an essential part of arbitration, yet the time given to bail hearings (they rarely last more than a few minutes), the lack of knowledge concerning which facts might be relevant, and the method by which the facts are obtained

(from the reports of the two adversaries) virtually prevent the court from being a successful fact-finding arbitrator. The court is virtually forced to rely on the recommendations of the two attorneys, although both are clearly biased.

Although the court must gather its information from others, it is not necessary that it be more influenced by one as opposed to another class of individuals. It is unclear why prosecutors have more influence on the bail decision than do defense attorneys. One possible explanation is that the prosecutor's recommendations are more likely to agree with what the public expects; i.e., potentially dangerous criminals should be treated harshly (even if such treatment violates due process). Along similar lines, the judge may consider that setting bail too high is less worrisome than setting it too low. The latter can result in community harm, the former hurts only the defendant.

Alternatively, in line with our previous comments about the detection of errors, unnecessarily high bail recommendations by the prosecutor are not likely to be discovered by the judge or anyone else, because in such cases defendants often are unable to obtain the bond amount and are detained in jail. On the other hand, unnecessarily low bail recommendations by the defense attorney can be detected if the defendant does not appear when scheduled or is arrested for additional crimes after being released. In short, prosecuting attorney recommendations may be seen as more accurate, and therefore more reasonable, than defense attorney recommendations, even though the relative accuracy of the two recommendations is more or less equal.

Another factor that could bias the judge in favor of the prosecutor is that the variability of defense recommendations is necessarily less than the variability of prosecutor recommendations. The range of defense recommendations is limited at the upper end by the prosecutor's recommendation and at the lower end by release on one's own recognizance. The defense cannot have a differential effect when low prosecutor recommendations are given. The only reasonable response available to the defense if the prosecutor recommends, say, \$1,000 bail, is release on one's own recognizance. However, the defense cannot recommend negative bail when the prosecutor only recommends, say, \$500. Release on one's own recognizance is still the best that the defense can do. Thus, the prosecutor's recommendation will tend to control variation in the judge's decision when the recommendation is low enough that the defense attorney's only response is release on one's own recognizance.

The fact that prosecutors seem to have more influence on the amount of bail set than do defense attorneys is not a sufficient explanation for the role that severity of the crime seems to play in bail setting. It will be recalled that the defense attorney recommendation

was also best predicted by severity of the crime. Community ties simply did not predict defense recommendations.

These results are of special interest because defense attorneys typically supported their recommendations not by focusing on aspects of the current crime and/or prior record, but rather by emphasizing positive features of the defendant's community ties. In short, even though defense attorneys seemed to speak mostly about community ties, they apparently based their own recommendations on severity of the crime. One wonders whether defense attorneys are aware of this discrepancy in their behavior. Could it be that the arguments they present are for the defendant's ears, rather than the court's?

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