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MAKING BAIL IN NEW YORK CITY

By Mary T. Phillips, Ph.D.

Fifty years ago hardly anyone was released from pretrial detention in New York City without the intervention of a professional bail bondsman. This state of affairs was the motivation for the founding of CJA's parent institution, the Vera Institute of Justice, and sparked the bail reform movement of the 1960s. The movement was based upon the premise that defendants (who are presumed innocent) should not be jailed merely for lack of bail money.

Bondsmen offer defendants an alternative to posting bail in cash, but their non-refundable fees ensure that a commercial bond will be costlier in the long run. This and other considerations led the American Bar Association (ABA) to recommend the total abolition of commercial bonds as long ago as 1964, a position the ABA reiterated in the 2007 (3rd) edition of its *Standards For Criminal Justice*.

Commercial bonds still dominate pretrial release in much of the coun-

try, but by the 1980s they had almost disappeared from New York City. By that time nearly half of defendants whose cases were not disposed at arraignment were released on recognizance, and almost all who made bail did so by posting cash directly with the court.

Release on recognizance has continued to grow in importance in New York, to the point where nearly two thirds of defendants whose cases are not disposed at arraignment are now released without bail. When bail is set, however, New York City defendants are much more likely to post bail through a commercial bondsman than they were 25 years ago.

The research examined bail making by defendants in a sample of cases with an arrest in 2005, focusing on the role of commercial bonds. The report concludes with a discussion of the implications of the findings, suggesting several strategies that could lessen defendants' growing reliance on bondsmen.

"Compensated sureties should be abolished."
ABA Standards for Criminal Justice: Pretrial Release, 3rd Ed. Standard 10-1.4 (f)

This *Research Brief* is adapted from
Making Bail In New York City: Commercial Bonds and Cash Bail (2010)
by Mary T. Phillips, Ph.D., Deputy Director, Research Department

The full report is available on CJA's web site:
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Please cite as follows, adapted to your citation style:
Phillips, Mary T. 2010. "Making Bail In New York City."

Research Brief series, no. 23. New York: New York City Criminal Justice Agency, Inc.

Bail-Making Options

In setting bail, New York judges specify not only the amount, but also the form in which it may be posted. Judges often set two amounts, written as, for example: \$1,000/\$500. In this illustration, the defendant may post a bond for \$1,000, or cash in the lesser amount of \$500—the *cash alternative*. If only one amount is specified, it may be posted as either bond or cash (unless the judge specifies “cash only,” which happens occasionally).

All bonds posted for defendants in this research were commercial bonds. Other types of bonds, such as personally secured bonds, are rarely used in New York.

Fees For Making Bail By Cash vs. Bond

Cash bail—If the defendant is convicted, a 3% fee is retained by the court and the balance is refunded after sentencing. If no conviction, the entire amount is refunded unless bail was forfeited for failure to appear.

Commercial bond—Fees for bonds are regulated by the New York State Insurance Department: 10% for the first \$3,000, 8% for the next \$7,000; 6% for amounts over \$10,000. The fee is not refunded regardless of the outcome of the case. Collateral is also required; it is refunded at the end of the case unless bail was forfeited for failure to appear. Collateral is usually cash in an amount that is not regulated but must be acceptable to the judge. Property is sometimes accepted as collateral in lieu of or in addition to cash.

Dataset Used In The Research

The dataset used for this research included all prosecuted arrests in the four largest boroughs of New York City during the third quarter of 2005 (July through September). Bail making was tracked until disposition of the case or until December 31, 2005, allowing a minimum of three months following arrest for bail to be made.

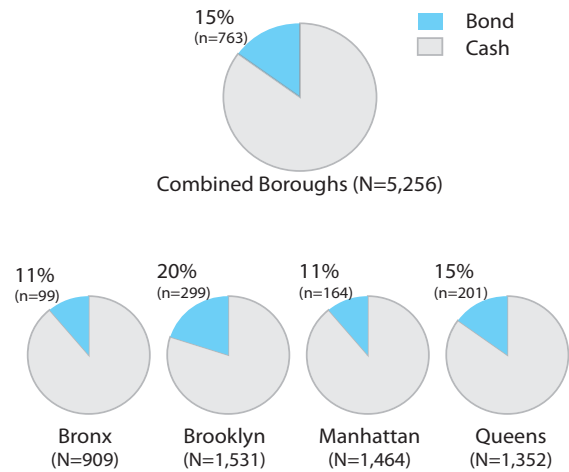
Case processing information was drawn from the CJA database. Form of bail making was collected manually from paper documents in courthouses and corrections facilities, and gaps were filled in from the database maintained by the Office of Court Administration (OCA). Supplementary bond data for cases in Brooklyn and Manhattan were collected from case files.

Analyses were restricted to 14,795 continued cases with bail set at arraignment. Some analyses included an additional 222 cases for which bail was not set at arraignment, but the defendant made bail post-arraignment.

Prevalence Of Bonds In Bail Making

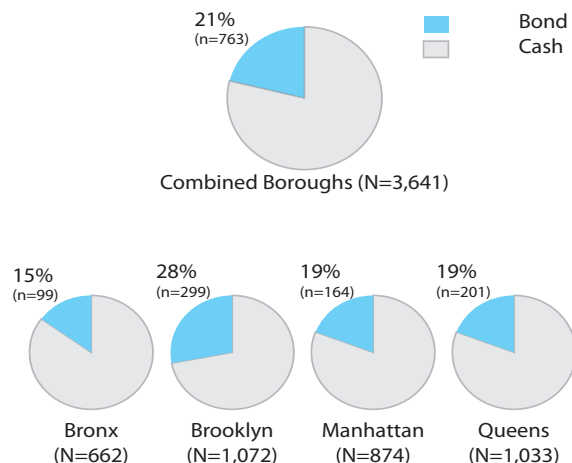
In the four boroughs combined, a bond was posted in 763 cases, or 15% of the 5,256 cases with bail made by December 31, 2005 (Figure 1). Bonds were most common in Brooklyn (20% of all bail made) and least common in Manhattan and the Bronx (both 11%).

Figure 1
Proportion of Bonds Among Cases With Bail Made



Because of the low profits to be made on bonds under \$1,000, bondsmen in this study were unwilling to write bonds for such small amounts. When cases with bail set under \$1,000 were excluded, bonds accounted for a much larger proportion of bail making: 21% city-wide, and from 15% in the Bronx to 28% in Brooklyn (Figure 2). There was no difference between Manhattan and Queens once the cases with bail below \$1,000 were excluded (19% bonds in both boroughs).

Figure 2
Proportion of Bonds Among Cases With Bail Made Restricted to cases with bail set at \$1,000 or more



Factors Associated With Posting A Bond Rather Than Cash

Multivariate analyses identified the following factors as statistically significant predictors of the form of bail:

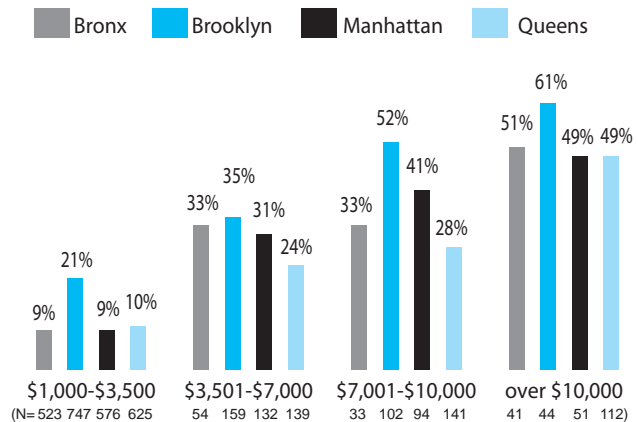
Bail amount set at arraignment

“Bail amount” here refers to the lowest amount the defendant could post to gain release (the cash alternative, if one was set; see “Bail-Making Options,” p. 2).

Bail amount was the strongest predictor of whether bail would be posted by cash or bond, among cases with a defendant who made bail. In each borough, higher bail amounts were associated with greater likelihood of posting bail by bond rather than cash (Figure 3). For bail amounts over \$10,000, the proportion of bonds ranged from 49% (Manhattan and Queens) to 61% (Brooklyn) of cases with bail made.

The numbers at the bottom of each column show that in each borough there were far more cases with bail set at \$1,000-\$3,500 than at higher amounts, among cases with a defendant who made bail. Although this bail range had the lowest *proportion* of bonds, it contained the greatest *number* of bonds (not shown).

Figure 3
Percent Posting A Bond By Bail Amount At Arraignment
(Cases with bail set at arraignment \$1,000 or higher and a defendant who made bail)
(N = 3,753)



Cash alternatives

Judges did not normally set a cash alternative. Citywide, a cash alternative was set in 23% of bail cases, with slight borough variations (Figure 4). A cash alternative was set most often in Brooklyn (25%) and least often in Queens (20%).

The cash alternative, when one was set, was often equal to half the bond amount: in 49% of cases with a cash alternative, the discount was exactly 50% (Figure 5). However, a smaller discount was given in 21% of cases — and a larger discount in 30% of cases — among those with a cash alternative. [Note that the size of the discount is the inverse of the cash alternative: a *larger* discount results in a *smaller* cash alternative.]

The offer of a cash alternative increased the likelihood that bail would be made (not shown), but it had an even greater impact on the form of bail. The larger the discount, the smaller the proportion of bonds. Bonds accounted for 17% of bail making in cases with no cash alternative, 14% in cases with a small discount, and 7% in cases with a medium (50%) discount (Figure 6). Among cases with a large cash discount (more than 50% off the bond amount), only 4% of bail making was in the form of a bond.

Figure 4
Cash Alternative By Borough
(Cases with bail set at arraignment)

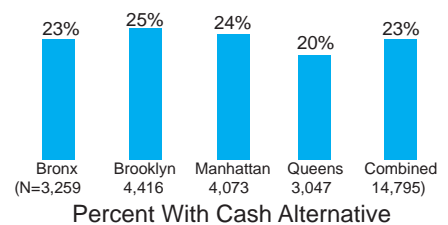
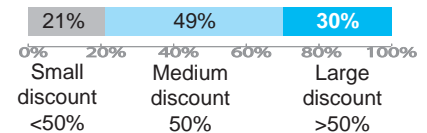


Figure 5
Size of Cash Discount
(Cases with cash discount at arraignment)
(N=3,434)



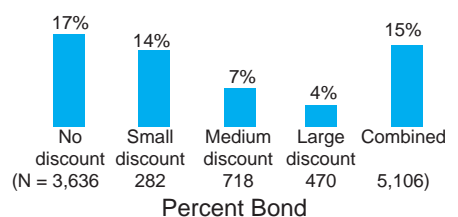
Other factors affecting form of bail

The multivariate statistical analysis identified a few other factors that also significantly affected the form of bail making. These factors *increased* the likelihood that bail would be posted by bond rather than cash:

- Prosecution in Brooklyn
- Class B (or to a lesser extent, Class E) felony arraignment charge
- Robbery or weapon charge
- Black (or to a lesser extent, Hispanic) defendant
- Defendant under 30 years of age

In addition, expecting a family member or friend at arraignment or having a prior bench warrant were factors that *decreased* the likelihood of a bond.

Figure 6
Bond By Size of Cash Discount
(Cases with bail set at arraignment and a defendant who made bail)



Supplementary Information About Bonds (Brooklyn and Manhattan)

Detailed supplementary information about bonds posted by defendants in the sample was collected from court case files in Manhattan (n=128) and Brooklyn (n=279). Items collected manually from case files included the face amount of the bond, fee amounts, types and amounts of collateral required, and bondsmen’s check-in requirements. Although some borough and agent differences are striking, these are small numbers upon which to base conclusions. Comparable bond data will be collected from the Bronx and Queens in a future phase of the study, to enlarge the sample size.

Bond Amounts

The median bond amount was \$5,000 in both boroughs (Figure 7). However, in Manhattan relatively more bonds were written for \$30,000 or more (6%, compared to 3% in Brooklyn) and relatively fewer for \$1,000 (3% vs. 13%). Accordingly, the mean bond amount in Manhattan (\$12,266) was higher than in Brooklyn (\$7,984).

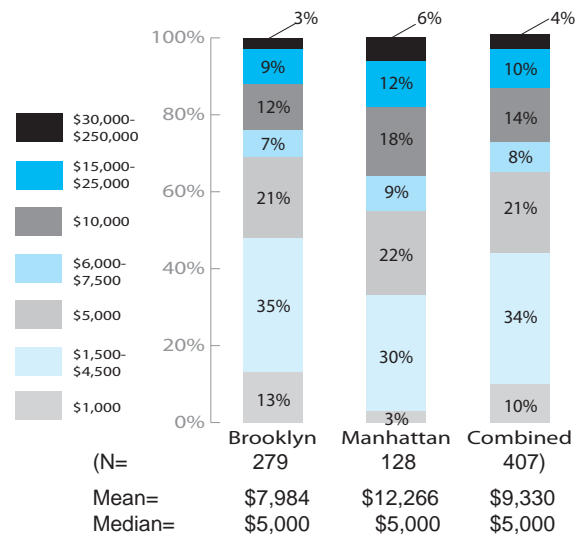
Nonrefundable Fees

Bond fees in New York are regulated by the New York State Insurance Department and are scaled to the amount of the bond (see p. 2, “Fees For Making Bail”). Fee information was missing from the court documents for 13 cases, leaving 394 cases for which bond fees were analyzed.

One would expect the higher average bond amount in Manhattan to translate into higher fees in that borough, assuming that bondsmen routinely charge the maximum permitted under the law. Sure enough, the average bond fee for Manhattan cases was \$815, compared to \$630 in Brooklyn (not shown).

While fees in Manhattan were almost uniformly set at the legal limit, in Brooklyn the fee was higher in 22 cases, or 8% of the total; and lower in 12 cases (4%) (Figure 8). By contrast, there were only 3 departures

Figure 7
Face Amount Of Bond By Borough
(Cases with supplementary bond data)



from the legal fee in Manhattan (1 higher, 2 lower).

All of the above- and below-limit fees could be attributed to only 7 bond agents, out of 22 in the sample (coded “A” through “V”). The fees charged by these 7 agents, relative to the legal limit, are illustrated in Figure 9. Four agents — C, H, K, and O — were responsible for all the above-legal fees, and most of the low fees as well. Agent C overcharged most frequently, with a fee that exceeded the legal limit in 44% of his 23 bonds.

Overcharges were generally small, often reflecting a 10% charge on the full bond in amounts over \$3,000 (amounts over \$3,000 should have been charged at 8% up to \$10,000). In the most common example, defendants were charged \$500 for a \$5,000 bond, when the fee should have been no more than \$460.

Figure 8
Bond Fee Relative to Legal Limit, By Borough
(Cases with supplementary bond data, excluding missing fees)

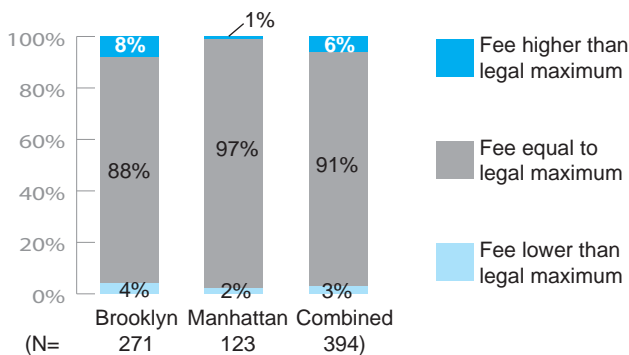
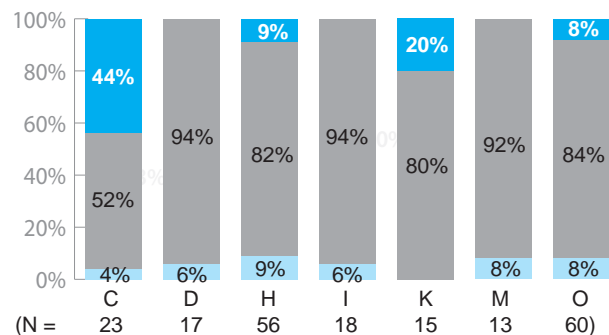


Figure 9
Bond Fee Relative to Legal Limit, By Bond Agent
(7 agents with fees above or below legal maximum)



Supplementary Information About Bonds (Brooklyn and Manhattan)

Types And Amounts Of Collateral

Collateral, usually in the form of a cash deposit, was required for every bond in the sample with supplementary data. Cash collateral alone was provided for 91% of the bonds, and a combination of cash and property was provided for an additional 3% of bonds (Figure 10). For the remaining bonds, some form of property—usually real estate—was the only collateral. Manhattan defendants were slightly more likely than Brooklyn defendants to put up both cash and property as collateral (6% and 2%, respectively).

The type of collateral required was heavily dependent on the face amount of the bond, as shown by Figure 11. No bond under \$5,000 had property collateral, whereas nearly half of bonds over \$10,000 did, either along with cash (18%) or alone (25%). For bonds in the middle range—\$5,000 to \$10,000—cash-only collateral was the norm but there were exceptions: for 5% of bonds the collateral was non-cash only, and for 2% both types were deposited.

Since a larger proportion of Manhattan bonds were for amounts over \$10,000 (Figure 7, previous page), this explains the slightly higher reliance on non-cash collateral in Manhattan, compared to Brooklyn (Figure 10).

Unlike fees, the amount of cash collateral is not regulated by law (and is wholly refunded unless the defendant fails to appear). The amount of cash required as collateral varied widely, from 2% to (inexplicably) 100% of the value of the bond. However, some generalizations can be made. About 37% of the bond amount—more in Manhattan (40%) and less in Brooklyn (34%)—was the median percentage when the collateral did not involve any property (Figure 12). Bondsmen adjusted the cash collateral downwards when it was combined with property: the corresponding medians when combined with property were 12% (citywide), 14% (Brooklyn) and 10% (Manhattan).

Check-In Requirements

About a third of the bonds with supplementary data had a requirement that the defendant must check in with the bondsman once a week, in some cases in person and in other cases by phone (Figure 13). Bonds in Manhattan cases were much more likely to have a weekly check-in requirement than bonds in Brooklyn cases (56% and 22% respectively).

Figure 10
Type Of Collateral By Borough
(Cases with supplementary bond data)

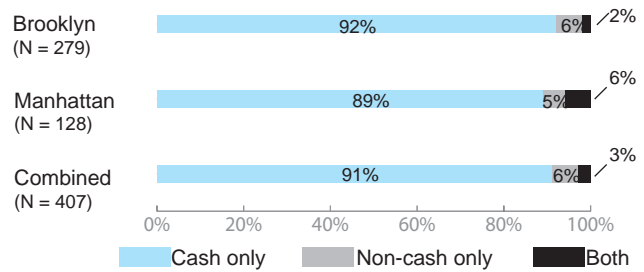


Figure 11
Type Of Collateral By Bond Amount
(Cases with supplementary bond data)

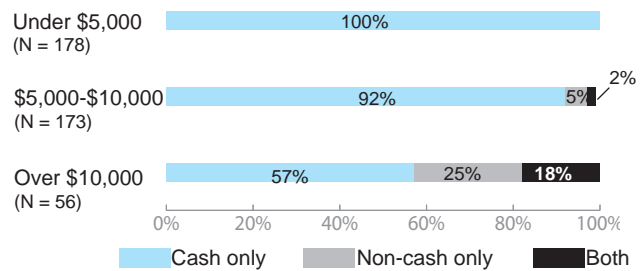


Figure 12
Amount Of Cash Collateral
As Median Percent Of Bond Amount
By Type Of Collateral And Borough
(Supplementary bond cases with cash collateral)

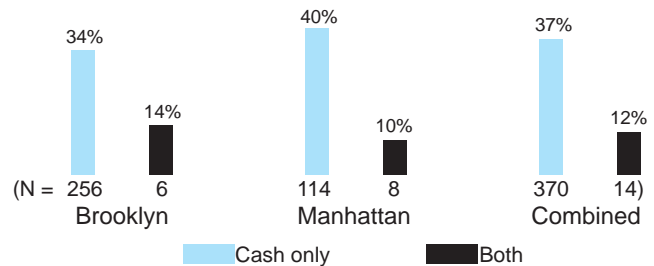
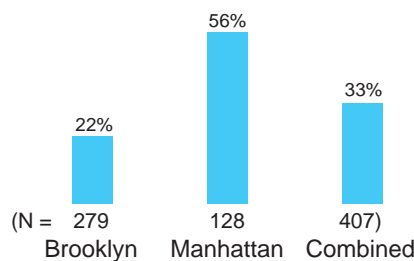


Figure 13
Weekly Check-In Requirement
(Cases with supplementary bond data)



The borough differences in check-in requirements had nothing to do with differences in bond amounts, but rather reflected variations in practices of individual bond agents. Five agents required the defendant to check in on virtually every bond they wrote. On the other hand, over half of the 22 agents did not indicate any check-in requirement for any bond (not shown).

Comparative Costs

The chart at right compares costs for posting a bond versus cash, for bail set at \$1,000 (Example 1) or \$15,000 (Example 2). The costs for cash bail are charged uniformly by the courts; the costs for bonds are estimated using the results of this research.

Example 1 (\$1,000): With a cash alternative that offers a 50% discount, the amount of cash required up front would be \$500 for posting cash, and about the same for a bond: 10% fee plus about 40% cash collateral (probably less in Brooklyn). A convicted defendant would save \$85 (\$100 if no conviction) by posting cash. With a smaller discount or no cash alternative, the defendant would still ultimately save money by posting cash, but would need more money up front.

Example 2 (\$15,000): Fees for bond amounts over \$3,000 are lower than 10%, so the cash discount set by the judge would have to be greater than 50% in order to reduce the

What will it cost?		
	Cash Up Front*	Not Refunded
Example 1: \$1,000 Bail		
COMMERCIAL BOND		
(a) Brooklyn	\$440	\$100
(b) Manhattan	\$500	\$100
CASH BAIL		
(a) no cash alternative	\$1,000	\$30**
(b) \$1,000/\$500 (50% discount)	\$500	\$15**
<i>At 50% discount, savings for posting cash = \$85 (if convicted) or \$100 (no conviction).</i>		
Example 2: \$15,000 Bail		
COMMERCIAL BOND		
(a) Brooklyn	\$6,260	\$1,160
(b) Manhattan	\$7,160	\$1,160
CASH BAIL		
(a) no cash alternative	\$15,000	\$450**
(b) \$15,000/\$7,500 (50% discount)	\$7,500	\$150**
<i>At 50% discount, savings for posting cash = \$1,010 (if convicted) or \$1,160 (no conviction).</i>		

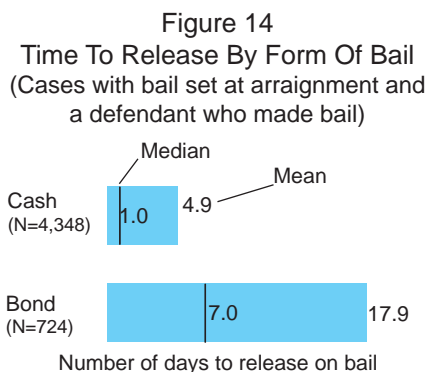
*Cash up front for commercial bonds was estimated by adding the maximum legal fee (a percentage of the bond) to the estimated amount of cash collateral. Cash collateral varied considerably by agent; an estimate was calculated by using the median percentage of the face amount of the bond that was deposited as cash collateral for bonds in Brooklyn and Manhattan separately.

**Only if convicted; otherwise entire amount refunded.

amount of cash needed up front to a level no higher than the amount needed for a bond, including cash collateral. Even with a 50% discount, \$7,500 would be needed for cash bail in this example, compared to roughly \$7,160 for a bond in Manhattan (or roughly \$6,260 in Brooklyn). However, the end-of-case saving would be over \$1,000 for posting cash.

Time to Release

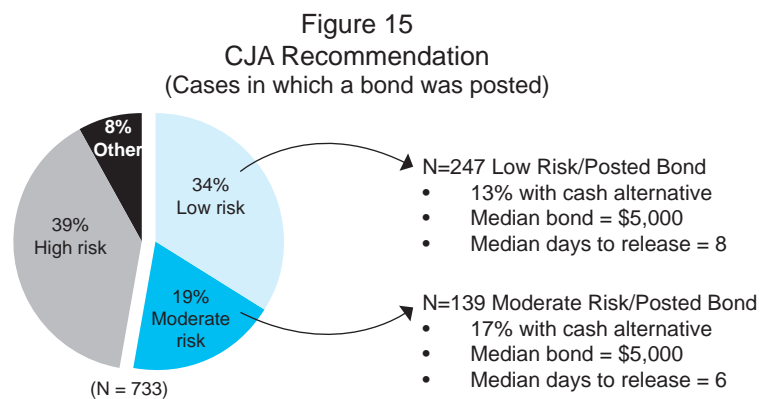
It took longer to post a bond than to post cash. The mean time from arraignment to release for cash bail was 4.9 days (median 1 day), compared to 17.9 days (median 7 days) for bonds (Figure 14). Many cash bails, but few bonds, were posted the same day as arraignment (not shown).



Snapshot:

Released On Bond With A Positive CJA Recommendation

In more than half of the bond cases, the defendant had been assigned a positive CJA recommendation: the assigned category, which assesses risk of failure to appear, was either low risk (34%) or moderate risk (19%; Figure 15). Very few low- or moderate-risk defendants who posted a bond had been offered a cash alternative (13% and 17%, respectively). The median bond amount was \$5,000 for both groups, and median number of days to release was 8 for the low-risk cases and 6 for the moderate-risk cases.



Discussion

Commercial bonds are much costlier in the end for defendants than posting cash bail, yet the poor are driven to pay high bond fees because the amount of cash needed up front is often considerably less than would be required to post cash directly with the court. This not only discriminates against the poor, but also removes some aspects of the release decision from the hands of the court. Commercial bondsmen decide which clients to accept, how much and what type of collateral to require, and what sort of supervision (if any) to impose. Moreover, their decisions are based on the defendant's ability to pay rather than on any empirical assessment of risk.

The commercial priorities of bondsmen also lead to the ironic result that some defendants might be able to gain release with bail set at \$1,000 yet be unable to do so if bail were lower—say, \$750. Since the bondsmen in

our research were unwilling to write a bond for \$750, the defendant would need the entire amount in cash, while a \$1,000 bond would be obtainable for \$500 or less.

The inability to post cash bail is also costly in terms of time spent in pretrial detention. Among defendants in the sample who made bail, the ones who posted cash directly with the court were released many days earlier than those who posted a bond.

These inequities are among the reasons for the American Bar Association's longstanding opposition to commercial bonds. Although four states (Illinois, Kentucky, Oregon, and Wisconsin) have abolished them altogether, New York has not done so. However, our research suggests several measures—outlined below—that could be taken by the courts to reduce reliance on bondsmen in cases where judges are not willing to consider ROR (or supervised release, where available).

Policy Implications

- **Expand the use of cash alternatives.** The offer of a cash alternative significantly increases the likelihood that the defendant will make bail, and that the bail will be posted in cash, not through a bondsman. The use of cash alternatives has dropped in recent decades, to fewer than one in four cases with bail. This allows ample room for expansion.

- **Focus on good flight risks.** Expansion of the use of cash alternatives could focus on defendants whose risk of failure to appear is low, which describes more than half of the cases in which the defendant posted a bond. Of this group, fewer than one in five were offered a cash alternative.

- **Make cash alternatives no larger than 50% of the bond.** To be most effective in reducing reliance on bondsmen, the size of the cash discount should be large enough to eliminate the bondsman's advantage. For bail up to \$3,000, this would generally require that the cash alternative be no larger than half the bond amount. To achieve the same effect for higher bail, the discounts would need to be greater (i.e., the cash alternatives would need to be smaller) because the bond fee is calculated at a lower rate.

- **Tailor cash alternatives to bondsmen's collateral requirements.** For cash alternatives to be equally effective in reducing bonds throughout the City, they would need to be tailored to variations in levels of cash collateral. The arraignment judge may

not know in advance what the cash collateral will be, but our research shows that collateral was generally lower in Brooklyn than in Manhattan. This suggests that the cash alternatives would also need to be lower in Brooklyn in order to be equally effective.

- **Provide the option of a personally secured bond.** For a small subset of the defendant population with little cash available for bail but with home ownership, cash alternatives did not provide what a bondsman could—the option of putting up property in place of cash collateral. Judges' increased acceptance of bonds secured by property and posted directly with the court could enable a few hundred defendants annually to avoid bondsmen's fees.

- **Monitor bail affidavits more closely.** Increased judicial oversight could reduce the number of defendants who—whether through ignorance or for some other reason—paid a bondsman when they could have posted cash bail for the same amount or less (for example, one defendant put up cash collateral equal to 100% of the bond amount). In addition, increased scrutiny of bail affidavits filed with the court, especially in Brooklyn, could reduce overcharging by bondsmen. Judges could also insist on more stringent documentation of weekly check-in requirements; currently, there is no way to know whether the frequent absence of this item on bail affidavits reflects widespread lack of supervision or clerical omissions.



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Making Bail In New York City**

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