

# Bail Decisionmaking

## *Research Summary*

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# Research Summary: Bail Decisionmaking

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## INTRODUCTION

Bail decisionmaking is a critical component of the pretrial phase of case processing.

Research shows that outcomes of these decisions are influenced by legal factors such as severity of the offense and prior record, and extralegal characteristics such as income and social disadvantage of the defendant as well as his or her race, ethnicity, and gender. Pretrial detention is being used increasingly, and those who are detained have harsher outcomes than those who are not.

Bail is a form of security—usually a sum of money—exchanged for the release of an arrested person as a guarantee of that person’s appearance for trial. In some cases a defendant may be allowed to post bail immediately after being booked. For more serious crimes, a bail hearing will be held, where a judge will determine if the accused is eligible for bail and at what cost.

Bail decisions are made to release defendants under the least restrictive conditions available, while minimizing pretrial failures (Clark, 2008). This requires weighing the rights of the defendant against the safety of the community (Bail Reform Act of 1984). Ideally, these decisions are based on input from a variety of stakeholders from the community and the criminal justice system. Such input ensures that decisions are consistent with the state of our knowledge about the risks posed by the defendant and the potential effect of his or her release on the community.

The decision to grant bail or detain a defendant has significant and lasting ramifications for the accused. Several factors need to be considered:

- ▶ Many people consider pretrial detention to be punishment before conviction.

- ▶ Bail decisions are based on incomplete information and involve great prosecutorial and judicial discretion.
- ▶ The decisionmaking process for bail is less restrictive than other legal criteria used when making sentencing decisions.
- ▶ Bail decisions that involve significant financial investment may lead to racial and ethnic disparities (Demuth, 2003).

## BACKGROUND

Recent data on pretrial detention rates suggest that the number of defendants detained while awaiting trial has steadily increased. In 2006, most (60 percent) of federal district court defendants were detained before trial, and 62 percent of suspects in state and local cases were held in jail before trial (Harrison and Beck, 2006). Trend data suggest that these rates have been steadily increasing since the 1990s (VanNostrand and Keebler, 2007).

One major factor driving the rise in pretrial detentions is an increase in punitive policies such as the War on Drugs and the Three Strikes laws. These initiatives have increased the number of individuals who have been arrested. This in turn results in an increase in the percentage of defendants with prior criminal histories, which is associated with an increased probability of detainment before trial or plea (Clark and Henry, 1996).

Moreover, evidence suggests that there is significant regional variation in pretrial detention rates in state and federal jurisdictions (Clark and Henry, 1996; Phillips, 2010). This is because of variations in bail decisionmaking requirements across states, as well as judicial discretion in individual cases.

In New York, for example, state law requires that the court “consider the kind and degree of control or restriction that is necessary to

secure his court attendance when required” (CPL 510.30,2. [a]). State law also enumerates factors that should be considered by the court when setting bail. These include the defendant’s character, reputation, habits, and mental condition; employment and financial resources; family ties and length of residence in the community; criminal record; adjudication as a juvenile; previous record of failure to appear for required court attendance; strength of the evidence presented; severity of the sentence if convicted; and other factors indicating the probability of conviction (Phillips, 2004).

Despite this extensive list of factors to consider when setting bail and releasing offenders on their own recognizance, judges exercise great discretion in selecting what factors to consider, how to consider them, and which conclusions to draw from them (Phillips, 2004). In the New York statute, public safety is not listed as a factor that the judge should consider, but it actually has an impact on bail decisionmaking. Even when there are statutes and laws to guide the bail decision process, judges have leeway in selecting and weighing which factors are the most important in each case.

The impact of pretrial bail decisions has been shown to affect post-conviction sentencing decisions and can even influence the outcome of a case. Research has shown that offenders who are detained during pretrial proceedings are more likely to be convicted, are less likely to have their charges reduced, and are likely to have longer sentences than those who were released before trial (Phillips, 2008). Pretrial detention also increases the likelihood that a defendant will plead guilty (Clark and Kurtz, 1983; Phillips, 2008; Rankin, 1964). The bail decision process can therefore have adverse effects on defendants who are not granted bail and those who have not been released before trial throughout all stages of the criminal justice process.

## LEGAL CHARACTERISTICS

Most state courts have their own pretrial release strategies geared to ensuring the return of the offender, maintaining public safety, and protecting individual liberty. An important aspect of bail decisionmaking regards those legal characteristics of the offense that negatively influence pretrial release goals.

Most research in legal characteristics finds that severity of the offense and prior record are the strongest predictors of pretrial release decisions (Bock and Frazier, 1977; Goldkamp, 1979; Goldkamp and Gottfredson, 1985; Gottfredson and Gottfredson, 1990; Walker, 1993). Moreover, blameworthiness (or factors indicating the likelihood of conviction) and the need to protect the community also influence whether the suspect will be released, and if so, how much bail is set (Gottfredson and Gottfredson, 1990).

## EXTRALEGAL CHARACTERISTICS

Extralegal characteristics include income and social disadvantage, race and ethnicity, sex and gender, and age. To date, research suggests that some extralegal characteristics are associated with the likelihood of not being released before trial, in addition to influencing the amount of bail set for bond. In particular, income and social disadvantage, race and ethnicity, and gender affect how likely it is that a defendant will be held in detention before trial.

### Income and Social Disadvantage

Concerns about crime control and community safety, including perceptions that crime is an underclass problem, have reinforced particular labels about crime and criminality. In fact, Bridges and colleagues (1987) found the defendant’s financial status mediates the relationship between defendant demographics and bail decisions. In other words, the true source of bias in bail decisions might be financial rather than demographic (Bridges et al., 1987).

Although income and social disadvantage have correlated with pretrial release, many of the characteristics overlap with those stereotypes associated with race and ethnicity. Minority populations share many of the same social problems, such as poverty, unemployment, greater numbers of single heads of household, lower levels of education, and increased opportunity to commit crime (Demuth, 2003).

### **Race and Ethnicity**

Multiple studies have assessed whether race and ethnicity affect decisions to grant bail and to release defendants before trial. The most robust investigation analyzed 25 studies from 1975 to 2002 to investigate the relationship between race and bail and its effect on pretrial release decisions. The major finding from these analyses is that racial disparities are significant and have been stable over time (Free, 2002).

It also has been found that bail decisionmakers are less likely to give black suspects the same “benefit of the doubt” they give white suspects (Patterson and Lynch, 1991). Black defendants are less likely to be released from pretrial detention than are white defendants. Conversely, in some cases, race is not associated with the amount of bail posed (Katz and Spoon, 1995). Ethnicity appears to be a factor in both pretrial release decisions and bail outcomes. Specifically, Hispanics are more likely to be detained than are both white and black suspects. These effects are more pronounced in drug cases (Demuth, 2003).

### **Sex and Gender**

The suspect’s gender also has been found to be a source of bias in bail decisions because of issues regarding societal roles and family care (Free, 2002). Being female is often seen as a significant factor in bail decisions because women are perceived as integral to family functioning and are considered primary caregivers. Women are expected to have the primary responsibility for family care and duties, so they are sometimes

treated differently from men in this regard. Despite this, more research is necessary to determine whether gender effects are true across jurisdictions and states. Little research has been conducted in this area.

### **SUMMARY FINDINGS**

- ▶ Pretrial detention rates have increased in both federal and state cases.
- ▶ Judges have great discretion in selecting and weighing which factors are the most important in a particular bail decision.
- ▶ The bail decision process has adverse effects for defendants who are not granted bail and/or whose bail is set too high for them to pay.
- ▶ Research has shown that the decision to grant bail or detain suspects affects all stages of the criminal justice process.
- ▶ Most research in the area of legal characteristics finds that severity of an offense and prior criminal record are the strongest predictors of pretrial release decisions.
- ▶ Income and social disadvantage have been correlated with pretrial release.
- ▶ Both race and ethnicity affect the decision to grant bail and influence whether the suspect will be released before trial.
- ▶ Some evidence suggests that these factors are also influenced by gender.

### **POLICY IMPLICATIONS AND FUTURE RESEARCH**

The current state of pretrial detention has led to increased calls to incorporate evidence-based practices into the bail decision process. To date, research on this process has been limited. The first step toward instituting evidence-based practices is to develop consistent goals across states to standardize policies and practices. Without consistency, disparities will still exist across state jurisdictions. Moreover, without consistency, the system and its components cannot be

assessed. The National Institute of Corrections has outlined six conditions for evidence-based practices when making bail decisions (VanNostrand, 2007):

- ▶ Bail recommendations should be based on an explicit, objective, and consistent policy for identifying appropriate release conditions.
- ▶ Conditions of bail should be the least restrictive, reasonably calculated, to assure a defendant's court appearance and the community's safety.
- ▶ Financial terms of bail should only be recommended when no other term will reasonably assure a defendant's court appearance.
- ▶ Conditions of bail should be restricted to those related to the risk of failure to appear or danger to the community posed by the defendant.
- ▶ Defendants should be contacted frequently enough to monitor the conditions of their release.

- ▶ Defendants should be reminded of their court date(s).

The first step toward incorporating evidence-based practices in the bail decision process has been to cite factors to take into account when making a bail decision. The federal court system, states, and professional organizations have begun to outline factors relevant to determining the risks for pretrial failure. These standards typically include public and personal safety, community ties, previous failure to appear in court, criminal history, and nature of the charge. By outlining these factors, practitioners are able to determine objective risks defendants pose. This ultimately could eliminate judicial discretion in the bail decision process. These practices have led to the development of pretrial risk-assessment instruments for use by pretrial services officers. By validating these assessments, more research can be done on their effectiveness at predicting risk and informing bail decisions, ultimately reducing disparate treatment among defendants.

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