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## The Impact of Race on the Pretrial Decision

Tina L. Freiburger, Catherine D. Marcum, Mari Pierce

### ABSTRACT

This study examined the effect of race on the pretrial release decision for drug offenders. Although this decision point has not been examined as extensively as the final sentencing decision, it is a critical discretion point which impacts defendants' future sentencing outcomes. The results found that race had a significant impact on judges' decisions to release a defendant on recognizance, with black defendants less likely to receive this release status. Race was not significant, however, in the decision of bail amount or in the likelihood to post bail. These results are consistent with the focal concerns perspective which suggests that black defendants are viewed by courts as more dangerous and blameworthy and thereby, less likely to be released on their own recognizance.

On any given day in the United States, approximately 780,000 individuals are incarcerated in local jails, with a total of 13 million inmate admissions in the year 2007 (Bureau of Justice Statistics 2007). Many of these incarcerated men and women are being held pending court proceedings and without an actual conviction. Although they may eventually be found not guilty of their accused crimes, they still face the damaging effects of incarceration (e.g., disintegrated relationships and family ties, inability to obtain employment, and an increased likelihood of recidivism) (Pager 2003; Western 2002; Western et al. 2001; Western and McLanahan 2000). Despite the potentially destructive effects of pretrial incarceration, pretrial release decisions and outcomes have received less research than sentencing practices (Demuth and Steffensmeier 2004). This is especially noteworthy as researchers have suggested that racial differences have the most impact during the defendant's primary encounters with the criminal justice system (Farnworth and Horan 1980; Leiber and Johnson 2008; Leiber and Stairs 1999; Spohn et al. 1987).

Demuth (2003) points out several important reasons why more attention should be focused on pretrial release decisions. First, he argues that despite the intention of protecting the community, detention prior to trial is still a form of punishment that can negatively affect defendants (e.g., cause embarrassment, family disruption, and loss of employment). Secondly, the pretrial release decision allows for a greater deal of discretion than other decision points (Albonetti 1989), as judges often use information such as the defendant's employment status, parenting status, and community reputation when making pretrial release decisions (Petee 1994; Walker 1993). Because of this increased discretion and a lack of public scrutiny focused on this decision, the potential of racial bias impacting this decision is increased (Demuth 2003). Furthermore, racial disparity at the pretrial stage can affect later stages of the process and lead to greater levels of sentencing disparity (Feeley 1979; Hagan and Bulmiller 1983). For example, previous research suggests that pretrial release status may have an impact on a defendant's likelihood of incarceration, with those detained prior to trial having increased odds of incarceration (e.g., Bickle and Peterson 1991; Spohn and Holleran 2000). Racial disparity in the pretrial release decision, therefore, has the potential to create sentencing bias long after the initial pre-trial sentence determination.

Despite the importance of the pretrial release decision, limited prior research is available that examines racial disparity. The research that has been conducted has produced mixed results. Additionally, several factors that are considered by judges during this decision (e.g., employment and marital status) have not been included in recent research. The current study, therefore, utilizes data collected from a midsized county in Pennsylvania to address these gaps in the literature and further our understanding of racial disparity in pretrial decisions.

## **THEORETICAL PERSPECTIVE**

Developed by Steffensmeier and colleagues (Steffensmeier et al. 1993; Steffensmeier et al. 1998), the focal concerns perspective argues that judges consider the three focal concerns of blameworthiness, dangerousness, and practical constraints and consequences when making sentencing decisions (Steffensmeier et al. 1998). When considering the blameworthiness of the offender, judges consider characteristics such as the type of the offense, severity of the offense, and the defendant's prior record.

Factors such as employment status and extent of prior record are used to construct the protection of the community concern. Demuth (2003) suggests that protection of the community is a common goal of judges when making pretrial release decisions. Therefore, it is especially important that research consider the influence of the variables that construct this perception (e.g., marital status, employment, and education) when examining pretrial release. The third focal concern, practical constraints, considers such organizational issues as jail and prison space (Steffensmeier et al. 1998).

Steffensmeier et al. (1998) also incorporated Albonetti's (1991) theoretical idea that judges must often rely on stereotypical ideas to make decisions. Reliance on stereotypes causes extralegal factors such as gender, race and age to further influence decisions. The focal concerns perspective is commonly used to explain various decision points in the court system, including the pretrial release decision (Demuth 2003). The results of this study, therefore, are interpreted using this perspective.

## **PRIOR RESEARCH**

While the final sentencing decision has been extensively examined in research, the pretrial sentencing decision has not been subjected to the same level of inquiry. Of the few studies initiated, several have found racial disparity practices during pretrial release stages (Demuth 2003; Demuth and Steffensmeier 2004; Nagel 1983; Patterson and Lynch 1991; Schlesinger 2005). For example, Schlesinger's (2005) study of felony defendants in large urban counties between the years of 1990 and 2000 found that racial disparity was most likely during decisions to deny bail and for defendants charged with violent crimes. Ethnic disparity was most likely to be present during non-financial release decisions (release on recognizance), especially for defendants charged with drug offenses.

Patterson and Lynch (1991) performed a study of formalized bail procedures in Florida. They found that nonwhite defendants were significantly less likely to receive bail below schedule guidelines while controlling for legal and extralegal factors. Judges failed to give black defendants the same "benefit of the doubt" given to white defendants. The researchers suggested this was a result of stereotypes insinuating nonwhite persons as less dependable and more likely to choose criminal behavior (Patterson and Lynch 1991).

More recently, Demuth (2003) analyzed Hispanic, black, and white differences in pretrial release with felony defendant data from large urban courts during the years of 1990 to 1996. Hispanic defendants, followed closely by black defendants, were least likely to be awarded pretrial release when compared to white defendants. Hispanic defendants also were found less likely to be released under non-financial terms than white or black defendants. Black and Hispanic defendants were both more likely to be held on bail than white defendants.

Demuth and Steffensmeier (2004) used the same data to further examine raceethnicity effects on pretrial release decisions and outcomes. In regards to the effects of race, black defendants were more likely to be detained than white defendants and had an increased likelihood of detention based solely on the inability to pay bail. The data utilized in these studies, however, was limited because it did not contain

information on the defendant's ties to the community (e.g., employment status and education) which are considered relevant to the pretrial release decision (Petee 1994; Walker 1993).

Other research examining the relationship between race and pretrial release are mixed. In an analysis of federal courts, Albonetti et al. (1989) found that race did not significantly affect pretrial release outcomes; however, white defendants received greater leniency for education and income. Conversely, Katz and Spohn (1995) examined offenders charged with violent crimes in Detroit between 1976 and 1978 and found that race did not have an effect on the amount of bail. Race did, however, affect the likelihood of pretrial release. In summary, while it appears race had a significant effect on various components of the process, it was not shown to affect all aspects of pretrial release decision.

The purpose of this study is to examine whether a racial disparity exists in the pretrial decision. This study utilizes three measures of the pretrial release decision in an effort to offer a more comprehensive understanding of this decision point. Additionally, variables that have commonly been left out of prior pretrial research (e.g., employment, education, marital status), despite their believed influence on the pretrial release decision, are included in the analysis.

## **METHODS**

### **Sample**

The data were collected from two sources. First, presentence investigation (PSI) reports written in 2000, 2001, 2002, and 2003 for all individuals charged with a drug offense in a midsized county in Pennsylvania (N=312) were used. Additional data were collected from the offenders' official court dockets. The Pennsylvania Unified Judicial System (<http://ujportal.pacourts.us>) contains court dockets for each offender in the county. These dockets were utilized to obtain information on the defendant's pretrial release status and bail amounts.

### **Dependent and Independent Variables**

Coding for the independent and dependent variables is provided in Table 1. Prior research has shown that offense severity and prior record are essential in studies on judicial decisions (Gottfredson and Gottfredson 1988). For offense severity, two variables were included as controls. The first represents the offense grade (misdemeanor=0, felony=1) of the most serious offense for which the defendant was actually convicted. The second offense severity variable included was number of charges (entered as continuous variable). Prior record was controlled by calculating the defendant's number of prior felony convictions and their number of misdemeanor convictions and entered as two continuous variables.

Also included in the analysis were variables for gender (female=0 or male=1), race (white=0 or black=1) and age (continuous), and type of attorney (public defender=0 or private=1). Other variables that relate to the defendants' risks of flight and stability in the community also were considered to influence judges' pretrial release decisions.

Therefore, dummy variables for employment status (employed part or full-time or not employed), marital status (single or married),<sup>1</sup> and education level (high school education/GED or no high school/GED education) were included in the analysis.

**Table 1** Descriptive statistics for all variables (N=312)

Continuous Independent Variables	Mean	SD	N
Age	32	10.16	312
Prior felony convictions	3.4	3.4	312
Prior misdemeanor convictions	4.1	4.6	312
Number of charges	4.9	3.67	312
Nominal/Ordinal Independent Variables	%		n
Offense severity			
Misdemeanor (0)		13%	39
Felony (1)		87%	273
Race			
White (0)		39%	120
Black (1)		62%	192
Gender			
Female (0)		19%	60
Male (1)		81%	252
Marital Status			
Not married (0)		86%	268
Married (1)		14%	44
Education			
No high school (0)		29%	91
High school (1)		71%	221
Employment			
Unemployed (0)		80%	249
Employed (1)		20%	63
Attorney Type			
Public Defender (0)		49%	154
Private (1)		51%	158
Dependent Variables			
Pretrial release			
Not detained (0)		47%	147
Detained (1)		53%	165
Judge's pretrial release decision			
ROR release (1)		27%	83
Not granted ROR (0)		73%	229
Bail amount (N=220 <sup>a</sup> )		10171 (mean)	15676.65 (standard deviation)

<sup>a</sup>9 cases were excluded due to missing data

Three dependent variables were examined. Goldkamp (1979) developed a model of the pretrial release decision which argued that pretrial release is actually a series of three separate decisions. The first is the decision to release on recognizance. Second, is the decision to grant or deny bail. Last is the decision of the bail amount. Based upon Goldkamp's model, the first dependent variable in the current study examined whether the defendant was granted release on recognizance (ROR=1). The decision to grant ROR is the most desirable pretrial outcome, as defendants enter into the community without having to post money (bail) which they would forfeit if they failed to return to court. Instead, ROR defendants are released solely on the "promise" that they will appear at their court dates.

Although Goldkamp (1979) suggests a second decision of whether to post bail or to detain, none of the defendants in this sample were denied bail and ordered to be detained. Instead, all the defendants detained prior to trial had failed to post their bail. This is not surprising given that all the offenders examined were drug offenders, as a sentence of detention is more commonly used for dangerous violent offenders. While none of the defendants were sentenced to detention, many were detained regardless. Demuth (2003) argues failure to post bail is not an actual decision; however, it has the same result as if the judge would have actually sentenced the defendant to be detained. Therefore, the second model included only those who received bail with those posting bail coded as 0 and those not posting bail coded as 1 (offenders who received ROR were excluded).

The last dependent variable is based upon Goldkamp's (1979) third decision point. It examines the impact of the independent variables on judges' decisions of bail amount. This analysis is limited to only those 229 defendants who were released on bail and does not include those who received a ROR. Due to missing data, 9 of the cases had to be removed from the analysis resulting in a final sample of 220.

To assess the impact of the independent variables on judges' decisions to sentence defendants to release on recognizance, logistic regression was used. Logistic regression also was used to examine the defendant's actual release status (detained or not detained). For the decision of bail amount, Ordinary Least Squares (OLS) regression was used. Because the data was right skewed, the natural log of bail amount was used in the analysis.

## **RESULTS**

The descriptive statistics are shown in Table 1. As shown in the table, the majority of offenders committed a grade three felony. This is due to the fact that the most common offenses were for drug trafficking and drug manufacturing, which are both grade three felonies. The mean number of prior felony convictions was 3.4 and the mean number of charges was 4.9. Over half of the sample was black, with a mean age of 32. The majority was male, single, had a high school education, and was not employed full-time. About half of the sample had a private attorney and the remaining had a public defender. Examination of the dependent variable indicates that a little less than half of the defendants were released prior to sentencing while the remaining defendants were detained. Less than one third were granted release on recognizance (ROR) and the mean bail amount for those receiving bail was 10,171 dollars.

The logistic regression estimates for judges' decisions to release a defendant on recognizance are presented in Table 2. As shown in the table, the number of prior felonies ( $b=-.097$ ,  $p<.05$ ) had a significant effect on whether a defendant received release on recognizance (ROR). With each increase in the number of felonies, the odds of a defendant receiving ROR decreased.

The table also shows that several extra legal variables significantly influenced the ROR decision. The coefficient for race ( $b=-1.529$ ,  $p<.001$ ) shows that black defendants were less likely than white defendants to be granted ROR by the judge. In fact, black defendants were approximately 80% less likely than white defendants to receive ROR. Those who were employed ( $b=1.015$ ,  $p<.01$ ) had significantly increased odds of receiving ROR, with those having full time employment being 1.7 times more likely to be granted ROR. The coefficient for attorney type ( $b=-.637$ ,  $p<.05$ ) indicates that those with a private attorney were significantly less likely to receive an ROR than those with a public defender.

**Table 2** Logistic regression for the decision to release on recognizance (N=312)

Variable	b	SE	Wald	Exp(B)
Offense severity	-.526	.417	1.586	.591
Number of charges	-.080	.052	2.392	.923
Prior felony charges	.097	.044	4.779*	1.102
Prior misdemeanor charges	-.054	.041	1.707	.948
Gender (male=1)	-.297	.369	.649	.743
Race (black=1)	-1.529	.314	23.700***	.217
Age	.004	.015	.086	1.004
Education	.494	.335	2.178	1.639
Employment	1.015	.354	8.243**	2.761
Marital status	-.442	.448	.973	.643
Attorney type (private=1)	-.637	.317	4.035*	.529
Constant	.446	.776	.330	1.561
-2 Log-likelihood	296.400			
Model Chi-Square	58.514***			
Cox & Snell R <sup>2</sup>	.173			
Nagelkerke R <sup>2</sup>	.253			

\* $p<.05$  \*\* $p<.01$  \*\*\* $p<.001$

The second model, shown in Table 3, presents the results of the actual detention status for defendant who received bail. As shown in the table, the only significant variable was for prior felony convictions. In the decision of bail amount, shown in Table 4, offense severity was a significant predictor of bail amount. As offense grade moved from a misdemeanor to a felony, the natural log of bail amount increased ( $b=1.124$ ,  $p<.01$ ). The coefficient for gender ( $b=.826$ ,  $p<.01$ ) shows that males received significantly higher natural log of bail amounts than females. Also

significantly related to the natural log of bail amount were marital status ( $b = -.917$ ,  $p < .001$ ) and attorney type ( $b = -.511$ ,  $p < .01$ ), with married defendants and defendants represented by a public defendant having a decreased natural log of bail amount. It also should be noted that while race was significant in the two previous models, it is not significant in the bail amount model.

**Table 3** Logistic regression results for detention status, ROR offenders not included (N=229)

Variable	b	SE	Wald	Exp(B)
Offense severity	.373	.547	.466	1.452
Number of charges	.026	.040	.442	1.027
Prior felony charges	.120	.059	4.162*	.887
Prior misdemeanor charges	.063	.044	2.039	1.065
Gender	.764	.424	3.248	2.146
Race	-.594	.381	2.422	.552
Age	.021	.017	1.465	1.021
Education	-.443	.349	1.615	.642
Employment	.250	.445	.318	1.285
Marital status	-.725	.422	2.947	.484
Attorney type	-.604	.334	3.264	.547
Constant	.342	.929	.136	1.408
-2 Log-likelihood	253.576			
Model Chi-Square	16.452			
Cox & Snell R <sup>2</sup>	.070			
Nagelkerke R <sup>2</sup>	.100			

\* $p < .05$  \*\* $p < .01$  \*\*\* $p < .001$



**Table 4** OLS results for bail amount (N=220)

Variable	b	SE	Beta	t
Offense severity	1.124	.348	.214	3.228**
Number of charges	.026	.025	.068	1.075
Prior felony charges	.035	.037	.069	.940
Prior misdemeanor charges	-.032	.024	-.096	-1.303
Gender	.826	.271	.200	3.043**
Race	-.071	.229	-.021	-.310
Age	-.014	.010	-.095	-1.376
Education	-.321	.211	-.096	-1.520
Employment	.286	.285	.066	1.006
Marital status	-.917	.281	-.210	-3.260*
Attorney type	-.511	.209	-.165	-2.446*
Constant	7.574	.600		12.628***
F	4.342***			
R-square	.187			

\*p<.05 \*\*p<.01 \*\*\*p<.001

## DISCUSSION

The purpose of this study was to determine whether a racial disparity was present in the pretrial decision. The results showed that a racial difference was found in judges' decisions to grant ROR and in the actual release status of the defendants. In fact, race had a strong influence on both these decisions. This may be partially due to the study's focus on drug offenders. Demuth (2003) found that racial disparities were strongest among these offenders (also see Mitchell 2005). Therefore, it might be possible that such a strong effect would not be found with other types of offenders.

The findings that black defendants are less likely to be granted ROR and more likely to remain detained prior to trial is consistent with the focal concerns perspective. This is likely due to judges' perceptions of black defendants as being more dangerous, blameworthy, and better able to serve time incarcerated. The strong racial impact found among this sample of drug offenders also is consistent, as black drug offenders are believed to initiate especially strong stereotypical images among judges (see, Chilton and Galvin 1985).

While females were not significantly more likely to be granted ROR, they did receive significantly lower bail amounts than males. Drawing on the focal concerns perspective, it is likely that females are considered less dangerous and less of a flight risk. Therefore, judges feel more comfortable assigning females lower bail amounts. Employment status also was found to be a significant predictor of whether a judge granted a ROR. Being employed fulltime is an important indication of a defendant's stability and ties in the community. Therefore, it is reasonable that judges will use this

as a measure of defendants' flight risks. It is important, however, that future research further examine the relationship of race and employment status to determine whether being unemployed equally disadvantages all offenders. Examination of the literature on final sentencing decisions suggest that black males are actually punished more for being unemployed as they more closely fit the stereotypical image of a dangerous criminal who is better able to serve time incarcerated (Nobling et al. 1998). While employment status is a legitimate consideration in pretrial release decisions, it should equally impact pretrial decisions for all defendants.

The results of attorney type appear to be contrary to what would be expected. Commonly, it is believed that those who retain private attorneys fair better in the court system. However, some prior research contradicts this assertion (e.g., Guevara et al. 2004; Jordan and Myers 2007). The ability of public defenders to secure more desirable pretrial release status (ROR and lower bail amounts) is likely due to courtroom workgroups in operation. Guevara et al. (2004) suggested that public defenders might have better informal relationships with prosecutors and judges, while private attorneys may be viewed more as outsiders. Furthermore, to be eligible for a public defender, defendants must prove they are indigent. It is unlikely, therefore, that offenders who are unable to pay for their defenses would be able to afford even a relatively small bail amount.

Also consistent with the focal concerns perspective, several legal variables were found to influence pretrial release. Number of prior felony convictions, and serious offenses were found to be significant in various decision points. Focal concerns suggest that those who commit more serious offenses and have a more extensive criminal record are more likely to be treated harshly by the judge because they are viewed as more dangerous and blameworthy.

It is important that future research examine various dependent measures when assessing pretrial release decisions. As discussed previously, judges' decisions to grant bail over detention is relatively meaningless if the defendant is not actually able to post bail. While the dollar amount of the bail ordered can offer some insight into these variations, it is still insufficient in fully capturing the varying treatment of offenders as the same dollar amount has different meanings for defendants of different economic backgrounds. This measure is further complicated by defendants' abilities to secure bail bonds and the varying degrees of financial assistance provided by family and friends. The current study confirms, therefore, the importance of examining defendants' actual release statuses in addition to the judges' rulings.

## **NOTES**

1 Additional controls for having children and paying child support also were included. Because they were not significant and did not add any explanatory power to the models, they were not included in the final analysis.

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