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Pretrial Detention and the Decision to Impose Bail in Southern California

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ABSTRACT AND ARTICLE INFORMATION

This paper examines pretrial judicial decision making, specifically the decision to impose bail. At the bail hearing, judges must decide whether defendants should be detained, released on their own recognizance, or granted bail. In California, judges make this decision largely by relying on County Bail Schedules, which are similar to sentencing guidelines and prioritize the seriousness of the charged offense when determining bail. Being detained pretrial, either due to the denial of bail or the inability to afford the bail that was set has negative implications, including the fact that defendants who are denied bail are more likely to plead guilty, and upon conviction are more likely to be sentenced to incarceration. They also face longer sentences than defendants who are released pending trial. Despite the significant impact of the bail decision, there is limited research on the decision, including on the factors judges consider in making the bail decision and how judges make the decision. This paper presents the results of a qualitative study of bail hearings in two California counties. Relying on court observations and interviews, it finds that bail schedules are the most important factor considered by judges and that bail is usually set without regard to the ability of the defendant to pay.

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The judicial decision to detain the defendant, grant bail, or release the defendant on his or her own recognizance while awaiting trial is one of the earliest and most important decision points in the criminal justice system. In 2016, an estimated 740,700 people were confined within county and city jails (Zeng, 2018), though only 35% of these individuals were serving a sentence of incarceration following a criminal conviction. The remaining two-thirds of jail inmates were detained while awaiting trial, typically because they were unable to pay the bail that was set in their case (Reaves, 2013). Early on, usually at the defendant's first court appearance, a judge must decide whether the defendant will be detained, and if not, whether he or she will be released on his or her own recognizance (i.e., an unconditional form of pretrial release based on a promise to return to court) or released conditionally, subject to certain conditions, generally financial. This is commonly referred to as release on bail (Cohen & Reaves, 2007). The pretrial release decision has two main purposes: to ensure that the defendant appears at trial, and to protect public safety (Howe, 2015).

Pretrial detention has serious consequences, which negatively impact defendants and society. By hindering a defendant's ability to produce evidence and identify witnesses, pretrial incarceration limits the degree to which a defendant may contribute to his or her defense (Allan, Allan, Giles, Drake, & Froyland, 2005; Sacks, Sainato, & Ackerman, 2014). Defendants held in pretrial detention spend less time with their attorneys than defendants who are released within the community. Among those who enter a guilty plea, defendants held in pretrial detention plead earlier than defendants who are released pending trial (Sacks & Ackerman, 2012). In fact, pretrial detention may incentivize early pleading, as plea bargaining is the quickest way to secure release for defendants who are unable to make bail. In a recent study of pretrial detention in Harris County, Texas, Heaton, Mayson, and Stevenson (2017) found that defendants held in pretrial detention were 25% more likely to plead guilty than similarly situated defendants who were released pretrial. Further, several studies have found that individuals held in pretrial detention face higher conviction rates and receive longer sentences than defendants who are released from custody (Free, 2004; Heaton et al., 2017; Oleson, Lowenkamp, Cadigan, VanNostrand, & Wooldridge, 2014; Stevenson, 2017; Tartaro & Sedelmeier, 2009).

The detrimental effects of pretrial detention extend beyond case outcomes, as incarcerated defendants experience damaged familial bonds, diminished employment prospects, and a variety of physical and psychological ailments. Pretrial detention may compound existing financial hardships by limiting eligibility for public benefits and child support and by compromising stable housing due to loss of wages and inability to pay rent (Neal, 2012). As a consequence of their overrepresentation among individuals held in pretrial detention, these adverse consequences disproportionately impact racial and ethnic minorities, as well as the economically disadvantaged (Sacks et al., 2014). Compared to White defendants, people of color are more likely to be denied bail, have bail set higher, and be held in pretrial detention (Demuth, 2003; Demuth & Steffensmeier, 2004). In 2015, the average income of defendants between the ages of 23 and 39 who were unable to pay bail was $15,598 for males and $11,071 for females (Rabuy & Kopf, 2016). Thus, the poor and people of color are particularly vulnerable to the adverse consequences of pretrial detention.

In addition to producing hardships for individual defendants and their families, pretrial detention contributes to the costs and inefficiency of the justice system. Pretrial detention costs taxpayers $38 million per day, or $14 billion per year – an amount that could support the employment of 250,000 elementary school teachers, the provision of free or reduced lunch for 31 million children, or the provision of shelter and services for the country's 50,000 homeless veterans and homelessness prevention services for the 1.4 million veterans who are at risk of becoming homeless (Pretrial Justice Institute, 2017). The costs of pretrial detention far exceed the costs of alternatives to incarceration, including pretrial supervision. For example, in the federal system, it costs only $7.24 per day to keep a defendant under pretrial supervision, whereas, in contrast, it costs $73.03 per day to detain a defendant in jail (Administrative Office of the United States Courts, 2013). Pretrial detention further contributes to the costs and inefficiency of the justice system, as pretrial detention can raise defendants' risk of recidivism (Gupta, Hansman, & Frenchman, 2016; Heaton et al., 2017).

Overreliance on pretrial detention to ensure the appearance of defendants in court is especially evident in the state of California (Tafoya, 2015). Large urban counties in California rely more heavily on pretrial detention than comparably sized counties throughout the rest of the United States. Though the number of defendants who are denied bail in California is similar to the number of defendants who are denied bail throughout the country, only 41% of felony defendants in California's large urban counties actually obtained pretrial release between 2000 and 2009, compared to 68% in the remaining states (Tafoya, 2015). Of the 41% of felony defendants in

California's large urban counties who did obtain pretrial release, nearly all depended upon the financial assistance of a bail bondsman. California's high pretrial detention rates may be attributed to several factors, including the imposition of higher bail amounts in California and the prevalence of defendants whose criminal histories include probation, parole, prior convictions, and failure to appear (Tafoya, 2015). In 2015, the median bail amount in California was $50,000, an amount five times larger than the median bail amount for the rest of the country; not surprisingly, higher bail amounts are associated with lower pretrial release rates (Cohen & Reaves, 2007).

California's relatively high rates of pretrial detention are not associated with lower failure-to-appear rates or non-violent felony arrest rates, compared to the rest of the United States. Moreover, California's rate of multiple failures to appear is 6.6%, compared to 2.9% in the remaining states (Tafoya, 2015). This rate is particularly high among defendants who secure non-financial conditions of release. Though the purpose of pretrial detention is to ensure defendants' appearances in court and preserve the safety of the public, California's pretrial practices have not achieved these ends (Lester, 2005; Tafoya, 2013).

Despite the consequences and prevalence of pretrial detention, both in the state of California and throughout the country, the process by which judges make pretrial decisions remains largely unexplored. The disproportionate impact of pretrial detention on economically disadvantaged, low-risk defendants is well documented, yet little is known about how or whether defendants' ability to pay influences pretrial decision-making. Further, although bail schedules have been criticized by many, it is unclear what role they play in the decision to impose bail. To address this gap in the empirical record, the present study applies a predominantly qualitative methodology to the study of pretrial decision-making in two large California counties. Drawing on observations of arraignment hearings, as well as interviews with selected judges and attorneys, this study seeks to examine how judges make decisions about pretrial release and to identify the factors that influence the imposition of bail in a jurisdiction that utilizes bail schedules.

This article consists of four components. Part I reviews the existing literature and describes the components of pretrial decisions, the manner in which pretrial decisions are made, the structure of the California bail system, and prior research on pretrial decision-making. Part II describes the methodology of this study. It explains how using qualitative methods overcomes some of the limitations of prior research. Drawing on courtroom observations and interviews with judges and attorneys, Part III presents the study's findings. It highlights the rarity of arguments at bail hearings, judges' tendency to defer to the bail schedules, and the consequent lack of consideration given to defendants' financial resources. Part IV addresses the policy implications of these findings and calls into question the fairness of a system that fails to consider a defendant's ability to pay in setting bail.

Literature Review

Pretrial Processing

Pretrial processing consists of two components: the pretrial release decision itself and the pretrial release outcome (e.g., Demuth & Steffensmeier, 2004; Free, 2001; Sacks et al., 2014). Pretrial release decisions are determinations made directly by judges, and pretrial release outcomes are the consequences of such decisions (Demuth, 2003). Examinations of pretrial decision-making must address both elements, as failure to differentiate decisions from outcomes produces a distortion of judicial decision-making and an inaccurate depiction of disparities (Free, 2001).

Pretrial release decisions. Demuth and Steffensmeier (2004) conceptualize pretrial release decisions as consisting of three distinct elements: whether the defendant receives a release option or is denied bail, whether the defendant receives a financial or non-financial condition of pretrial release (i.e., bail type), and the specific amount of money that the defendant must pay as a condition of pretrial release (i.e., bail amount). Defendants charged with a non-homicide crime are generally eligible for some form of pretrial release (Petee, 1994). The most favorable option, release on recognizance, permits defendants to be released unconditionally, without posting a cash bond. Individuals granted release on recognizance must appear at designated court hearings, and failure to appear results in remand into custody for the duration of the pretrial period. Another non-financial condition of release is pretrial supervision, which requires defendants to be monitored by pretrial service agencies. Defendants under pretrial supervision may be required to wear an electronic monitor or submit to testing for drug and alcohol use (Cohen & Reaves, 2007). Bail, which is a conditional promise to return to court, is more common. Bail release is generally conditioned on payment of a cash bond, requiring defendants to pay a specified amount of money as a condition of pretrial release (Turner & Johnson, 2007). There are three types of bail – cash bail, property bail, and surety bonds – and the latter usually requires

defendants to seek assistance from bail bondsmen. Failure to appear in court typically results in forfeiture of the bond and may result in remand into custody. Both financial and non-financial terms of release may be revoked due to non-compliance.

Pretrial release outcomes. Pretrial release outcomes refer to whether the defendant is ultimately released pretrial or held in pretrial detention. Pretrial detention results from either denial of bail or inability to meet the conditions of release (Free, 2001). In this sense, Demuth (2003) conceptualizes pretrial release outcomes as the result of pretrial release decisions. It is crucial to distinguish pretrial release decisions from pretrial release outcomes, as the opportunity for pretrial release (e.g., receiving financial bail or release on recognizance) is necessary, but not sufficient, in securing the outcome of release.

Pretrial Decision-Making

Pretrial decision-making is broadly constrained by the Eighth Amendment to the United States Constitution. Rather than establish an absolute right to bail, the Eighth Amendment prohibits the imposition of *excessive* bail (Howe, 2015; Verilli, 1982; Woodruff, 2013). In the case of *Stack v. Boyle* (1951), the U.S. Supreme Court clarified that "[b]ail set at a figure higher than an amount reasonably calculated to fulfill [the purpose of ensuring the presence of the accused] is 'excessive' under the Eighth Amendment" (p. 5). However, although it appears that the Excessive Bail Clause has been incorporated against the states through the Fourteenth Amendment, there is little jurisprudence in this area (Wiseman, 2011). Recent constitutional attacks on bail have relied on the Equal Protection Clause of the Fourteenth Amendment. For example, in *O'Donnell v. Harris County* (2017), a class of misdemeanor defendants argued that detaining them "before trial solely because of their inability to pay violates the Equal Protection Clause, because defendants with similar histories and risks but with access to money are able to purchase pretrial release" (p. 21). This claim was upheld by the district court and later by the Fifth Circuit Court of Appeals (*O'Donnell v. Harris County*, 2018). Individual states consequently retain substantial discretion in determining the manner in which bail is calculated and imposed (Howe, 2015; Lester, 2005).

Most states have established additional constraints on pretrial decision-making through their constitutions and statutes (National Conference of State Legislatures, 2015). For example, the Florida Constitution is unique in its assertion that defendants are entitled to pretrial release "on reasonable conditions" (Florida Const. art. I, § 14). Additionally, most states have incorporated a right to bail, unless the defendant is charged with a capital offense, and most states have adopted an excessive bail clause like the federal provision. In all states, judges are responsible for the pretrial release decision; however, their discretion may be formally constrained by two decision-making tools: bail schedules and risk assessments.

Bail schedules. Many jurisdictions employ bail schedules to guide judges' pretrial decision-making. Bail schedules outline money bail amounts for specific offenses. Originally, bail schedules were intended to help people who were arrested to get out of jail without having to wait potentially days before appearing in court (Thomas, 1970). Once a bail schedule is approved, the amounts payable for each offense are made available in the jail, and the jail officer is authorized to release the arrestee upon payment. Then, in theory, when the defendant does appear in court, the judge can review all of the relevant factors and make an individualized assessment as to whether the defendant poses a risk to public safety, and if not, whether conditions, including financial conditions, are necessary to ensure his or her appearance at trial. Despite the widespread reliance on bail schedules, particularly in misdemeanor cases, there are a number of problems with their use.

Bail schedules have been criticized for replacing judicial discretion and individualized pretrial release assessments with automated decisions (Carlson, 2011). If judges consistently fail to exercise their discretion to make bail decisions based on all of the statutory factors, the bail schedules become rules rather than guidelines. Further, bail schedules do not take into account either the risk of the defendant to public safety or the likelihood that the defendant will appear in court, and instead use money as the sole criterion for release. Moreover, bail schedules do not account for the ability of the defendant to pay. Indigent and non-dangerous defendants may consequently be unnecessarily detained due to their inability to afford the bail amount prescribed by the bail schedule, whereas more dangerous defendants are able to purchase release without judicial review of their risk of flight. In addition to producing individual hardships for defendants, including loss of residence, employment, and ties to the community, the detention of low-risk defendants contributes to the costs and inefficiency of the legal system. Thus, Carlson (2011) argues that judicial discretion, rather than excessive deference to bail schedules, is necessary in order to ensure fair and efficient case processing.

Evidence-based risk assessment. In some states, pretrial release agencies also influence bail decisions through the application of evidence-based

risk assessments. Pretrial risk refers to the likelihood that a defendant will fail to appear in court if he or she is released from custody pending trial (Bureau of Justice Assistance, 2010). Evidence-based risk assessments are instruments that have been empirically demonstrated to accurately sort defendants into categories based on their likelihood of making all court appearances without being arrested on new charges. Typically, pretrial release agencies are responsible for collecting and presenting information that will guide judges in making pretrial release determinations, as well as providing monitoring and supervisory services for defendants who receive conditional release (Tafoya, 2015).

Studies have repeatedly identified pending felony charges, prior felony convictions, prior violent felony convictions, prior failures to appear, employment status, residence status, primary charge category, and primary charge type as statistically significant predictors of high pretrial risk (Mamalian, 2011; VanNostrand & Keebler, 2009). However, despite the consistency of these results, fewer than 10% of all state and federal jurisdictions in the United States currently utilize evidence-based risk assessments to inform pretrial decision-making (Milgram et al., 2015). The underutilization of these instruments is attributed to the fact that few jurisdictions have the resources needed to interview each defendant prior to arraignment. Evidence-based risk assessments have traditionally required pretrial service agencies to conduct qualitative interviews and evaluations in order to thoroughly assess defendants' flight risk and threat to the community (Tafoya, 2013). However, less expensive, actuarial pretrial risk assessments offer a viable alternative to interview-based assessments (Bechtel, Holsinger, Lowenkamp, & Warren, 2016; Milgram et al., 2015).

Actuarial pretrial risk assessments assign numerical values to risk factors and appraise risk based on the defendant's total point values (Bureau of Justice Assistance, 2010). Empirical studies indicate that these instruments provide more accurate assessments than qualitative or clinical instruments, as the subjective nature of interview-based tools can impede consistent application across multiple jurisdictions (Bechtel et al., 2016; Bureau of Justice Assistance, 2010; Milgram et al., 2015; VanNostrand & Keebler, 2009). One of the more successful quantitative risk assessment instruments is the Arnold Foundation's Public Safety Assessment (Milgram et al., 2015; Schuppe, 2017). The PSA is unique in that its algorithm operates without information derived from interviews (e.g., defendant's address or employment status). The PSA incorporates the aforementioned evidence-based risk factors and has been shown to accurately predict the risk of additional crime, additional violence, and court appearance (Milgram et al., 2015). Over two dozen jurisdictions have adopted the PSA, though it is most widely used in New Jersey (Schuppe, 2017). By reducing the uncertainty surrounding pretrial decision-making, the PSA and other evidence-based risk assessments allow judges to make pretrial decisions based on more objective information.

However, despite the predictive ability of these instruments, actuarial risk assessment is not a magic bullet. Although risk assessment tools are designed to reduce the uncertainty surrounding pretrial decision-making, diminish the influence of biases, and produce less disparate outcomes, some critics argue that they may perpetuate or even exacerbate existing disparities (Harcourt, 2007). Further, judges may not always follow the recommendation of pretrial services agencies. For example, in Harris County, Texas, hearing officers denied a personal bond in 56.3% of cases in which Pretrial Services recommended release on unsecured personal bond with conditions of supervision (*O'Donnell v. Harris County*, 2017, p. 67).

Pretrial Release in California

In California, the state constitution, penal code, and rules of court address eligibility for pretrial release and the factors that may guide pretrial decision-making. Each county must develop a countywide bail schedule, though pretrial decision-making may also be guided by evidence-based risk assessments. Both the bail amounts prescribed by bail schedules and the availability of risk assessment tools depend on the county in which the case is processed.

Eligibility. Section 12 of Article I of the California Constitution states that a defendant is eligible for release on bail unless he or she is charged with a capital crime, a felony offense involving violence against another person, felony sexual assault, or a felony offense in a case in which the court has clear and convincing evidence that the defendant threatened another person with great bodily harm and that there is a "substantial likelihood that the person would carry out the threat if released." This section also states that the court may not require excessive bail for eligible defendants and authorizes judges to exercise discretion in granting release on recognizance.

Relevant factors. In setting the bail amount, Section 12 of Article I of the California Constitution instructs the court to consider the seriousness of the offense(s), the previous criminal record of the defendant, and the probability that the defendant will appear at the trial or hearing if released. Additionally, Section 28 requires the court to

consider the safety of the public, the victim, and the victim's family (Judicial Council of California, 2013). Rule 4.105 of the California Rules of Court states that the court must consider the "totality of the circumstances," including whether the bail amount would "impose an undue hardship on the defendant."

The California Penal Code provides a more thorough description of the factors that may be considered in granting release on recognizance or setting bail. According to Section 1270, public safety should be the court's primary concern. This section indicates that judges may grant release on recognizance for any defendant charged with a non-capital offense, and defendants charged with misdemeanors are entitled to release on recognizance unless the court finds that release on recognizance will compromise public safety. Section 1275 of the California Penal Code further specifies that in setting, reducing, or denying bail, judges or magistrates must consider the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability that the defendant will appear at trial or at a hearing if released. In cases involving defendants charged with serious or violent felonies, the court must make a finding of unusual circumstances in order to reduce bail below the presumptive amount established by bail schedule.

Section 1270.1 of the California Penal Code lists offenses for which judges must have a hearing in order to assign bail that is higher or lower than the scheduled amount. These offenses include serious felonies, dissuading a witness, and violation of a protective order if the defendant has engaged in violence against, has threatened to kill or harm, or has gone to the residence or workplace of the protected party. At the hearing, subsection c instructs the court to consider evidence of the defendant's past court appearances, the maximum potential sentence that may be imposed upon conviction, and the danger that may be posed to others if the defendant is released. In determining whether to release the defendant on his or her own recognizance, the judge must consider the potential danger to others, including threats that have been made by the defendant and any prior acts of violence. The court must also consider any evidence offered by the defendant regarding his or her ability to post bond and his or her ties to the community. For offenses in Section 1270.1 only, judges must justify any deviations from the bail schedule on the record.

Bail schedules. The California Rules of Court and the California Penal Code explain the purpose of the bail schedules as well as the manner in which these schedules are adopted and employed. Rule 4.102 of the California Rules of Court notes that the Judicial Council of California has developed a policy of utilizing uniform bail and penalty schedules in order to "achieve a standard of uniformity" in handling certain offenses. Section 1269b of the California Penal Code instructs the superior court judges in each county to prepare and adopt a countywide bail schedule for all bailable felony offenses as well as all misdemeanor and infraction offenses, with the exception of infractions contained in the Vehicle Code. This schedule is to be reviewed on an annual basis.

Although other provisions of the Penal Code identify a number of factors that should influence pretrial decisions, bail schedules focus on the seriousness of the offense charged. Subsection e of section 1269b instructs judges who adopt the uniform countywide bail schedule to consider the seriousness of the offense when determining the appropriate bail amount. In considering the seriousness of the offense charged, this subsection further instructs judges to increase the bail amount for each aggravating or enhancing factor charged in the complaint. Subsection f specifies that the countywide bail schedule must include a list of the offenses and the applicable amount of bail for each offense. The schedule must also include a clause addressing the determination of bail for offenses not included in the schedule. Some counties, including Orange County, identify the circumstances in which, pursuant to Penal Code section 1270.5 and Article 1, Section 12(a) of the California Constitution, defendants are not entitled to release on bail. Other counties, including Los Angeles County, do not note these circumstances within their bail schedules. With the exception of cases involving offenses addressed in Section 1270.1 of the California Penal Code, judges may exercise discretion in adhering to or deviating from the bail amount contained in the bail schedule without providing justification on the record.

If a suspect is booked and taken into custody, bail is first set at the county jail in accordance with the bail schedule. At the defendant's first court appearance, judges may exercise discretion in raising or lowering the bail amount following an assessment of the characteristics of the case (Tafoya, 2015). The extent to which judges in California default to presumptive bail amounts remains unclear. Though the Bureau of Justice Statistics' State Court Processing Statistics (SCPS) project has documented bail amounts and offense types throughout the state, the manner in which the offenses were aggregated precludes an accurate analysis of the frequency with which judges in California defer to or deviate from their jurisdiction's bail schedule (Tafoya, 2013).

Risk assessments in California. The use of evidence-based risk assessments varies dramatically

throughout the state of California (Tafoya, 2015). Though the number of counties relying on pretrial services agencies has grown since the state undertook realignment, which shifted much of the state's prison population to county jails, counties differ in terms of degree of compliance with national standards. Most counties provide information based on objective risk assessments, but some have not developed a supervision component. Counties also differ in terms of the courts' willingness to embrace the objectives and goals of pretrial release agencies (Tafoya, 2015). Neither of the counties that are the focus of this study appear to have strong pretrial release agencies.

Marin County oversees one of the state's stronger pretrial service programs. There, an independent agency utilizes an evidence-based risk assessment tool to provide pretrial services to the county's probation department (Tafoya, 2013). The agency's staff assesses defendants according to three dimensions consistent with national standards: employment and residential stability, drug use, and criminal history. The agency also assesses whether defendants pose a danger to themselves or others and provides recommendations to the probation department. The probation department then submits approved Pretrial Release Reports to the courts.

The Role of Extralegal Factors in Pretrial Decision-Making

A substantial body of literature indicates that extralegal factors, including the sex and race of the defendant, influence pretrial decision-making. Several studies have found that, compared to their male counterparts, female defendants receive bail decisions that are more conducive to the outcome of release (Demuth & Steffensmeier, 2004; Katz & Spohn, 1995; Nagel, 1983). Additionally, White defendants, especially White females, are more likely to be granted some form of pretrial release (Demuth & Steffensmeier, 2004), and White defendants ultimately secure pretrial release more often than any other racial or ethnic group (Demuth & Steffensmeier, 2004; Sacks et al., 2014).

Although the potential impact of socioeconomic status also factors prominently in discussions of extralegal influences, few scholars have empirically tested the notion that lower socioeconomic standing unduly influences pretrial decisions. In their study of pretrial detention in Harris County, Texas, Heaton and colleagues (2017) utilized defendant zip codes to assess the impact of wealth on the likelihood of pretrial detention. They found that approximately 30% of defendants from wealthy zip codes were detained compared with 60-70% of defendants from poorer zip codes. This disparity persisted when they controlled for criminal history and offense seriousness.

Limitations of Prior Research

The existing literature is limited by reliance on retrospective, quantitative analyses (Allan et al., 2005). Such analyses utilize data (e.g., court files and public records) from completed cases instead of documenting the pretrial process itself. This approach is problematic, as researchers cannot correct for errors and omissions found within the data sets. These data sets also fail to capture the interactions between judges, prosecutors, and counsel for the defense. Additionally, quantitative, retrospective analyses do not indicate whether the release type or bail amount was contested or whether the defendant paid bail with cash or a bond. The omission of these elements limits the explanatory power of existing studies.

Recognizing the methodological limitations of prior research, Allan and colleagues (2005) undertook the first observational study of pretrial decision-making in Australia. They concluded that legal factors influenced bail decisions, whereas extralegal factors did not. Though these results contradict the prevailing conclusions of American studies and procedural, legal, cultural, and geographical differences limit the generalizability of the study's results to other jurisdictions, their observational methodology is instructive. By observing court hearings, they were able to document arguments made by attorneys as well as justifications or comments offered by magistrates. This information had not been recorded in quantitative studies in Australia, nor has it been included in quantitative studies within the United States. Without qualitative research, it is impossible to determine what factors, if any, are discussed during pretrial hearings and whether the bail decision is often or infrequently contested. Thus, qualitative, observational studies of pretrial decision-making in the United States are needed to produce additional insights and develop a more nuanced understanding of pretrial decision-making.

Method

Employing an observational, primarily qualitative approach, this study explores questions left unanswered by previous research on pretrial decision-making. Though the existing literature identifies disparities at the pretrial stage of adjudication, the process by which judges render pretrial release decisions remains unclear. Further, the existing literature largely ignores the impact of defendants' ability to pay. The present study seeks to

explain what occurs during pretrial hearings, as well as how, or whether, the reasonableness of the bail amount enters into discussions between the judges and attorneys who attend these hearings. More specifically, this study seeks to answer the following questions:

1) How do judges make the pretrial release decision?
2) To what extent do attorneys contest the release decision and the amount of bail during the hearings?
3) During contested bail hearings, what factors are referenced by attorneys and judges?
4) What factors influence the imposition of bail? In particular, what role is played by the ability of the defendant to pay?

The authors conducted observations and interviews at courthouses in two California counties: Los Angeles and Orange. The largest court in California, the Los Angeles County Superior Court (LACSC) is comprised of over 500 judicial officers at 38 courthouses in 12 districts (LACSC, 2015). In 2014, 2,183,626 cases were filed, including 55,666 felonies. Orange County is a neighboring county with similar demography. Both counties serve diverse populations of more than 3,000,000 people (County of Los Angeles, 2016; County of Orange, 2017). Although Los Angeles County is more populous, Orange County is more densely populated. The third largest court in the state, the Orange County Superior Court (OCSC) is comprised of 144 judicial officers at five justice centers and a separate courthouse at the Santa Ana Jail. In 2014, 511,134 cases were filed, 18,314 of which were felonies (Judicial Council of California, 2015). Observations were limited to felony cases within these counties, as very few bail hearings were held for misdemeanor cases. Misdemeanor cases are commonly resolved through plea bargaining at arraignment, which eliminates the need for a bail hearing. Thus, higher rates of plea bargaining rendered misdemeanor cases unsuitable for inclusion in this study.

The data include observations from 15 different court locations. We conducted observations at one courthouse in each of the 12 Los Angeles districts as well as the Santa Ana Jail and the four Orange County justice centers in which felony cases are heard. We excluded courthouses from the dataset if felony arraignment hearings were not held on the observation dates. We identified the specific courtrooms in which felony arraignment hearings would be heard through the OCSC's public website, by calling the clerk's office at each Los Angeles courthouse, and by speaking with clerks or courtroom bailiffs in person.

The final dataset includes 234 cases, 41.9% of which were observed in Orange County and 58.1% of which were observed in Los Angeles County. The majority of the cases were observed at one of 3 locations: the Santa Ana Jail (35.9%), the Governor George Deukmejian Courthouse in Long Beach (21.4%), and the Clara Shortridge Foltz Justice Center in Los Angeles (29.5%). The courtroom at the Santa Ana Jail is specifically designated for arraignment hearings, and the majority of arraignments in Orange County are assigned to this calendar. More arraignment hearings are scheduled at the Clara Shortridge Foltz Justice Center and the Governor George Deukmejian Courthouse than at the remaining observation sites in Los Angeles County. Though we conducted observations at each of the 15 court locations on at least one occasion, we conducted observations more frequently at the courthouses that handle a greater number of felony arraignments.

To provide context, and to explain the patterns noted during the court observations, we conducted interviews with judges and attorneys who routinely attend arraignment hearings. This study relied on a purposive sample, as we selected judges and attorneys for observations and interviews due to their unique positions within the criminal justice system. We selected judges based on assignment to the felony judicial calendars in Los Angeles County and Orange County. The felony and misdemeanor calendars are the only calendars to which arraignment hearings are assigned. The judges presiding over these calendars consequently possess specialized knowledge of arraignment proceedings and bail-setting requirements. For the purpose of this study, the specialized knowledge of judges assigned to felony and misdemeanor calendars rendered purposive sampling more appropriate than random sampling. It is important to note that this did result in a limited pool of potential interview subjects: In most courthouses, there is typically just one judge assigned to the arraignment calendar at any one time. We requested interviews with the 5 judges who routinely oversee a large number of felony arraignment cases. Three judges agreed to be interviewed and two declined our request.

Attorneys representing the defendants in cases assigned to judges on the felony calendars, as well as the prosecutors assigned to such cases, were also subjects of this study. These individuals possess specialized knowledge of criminal law and procedure, as they are the only attorneys who routinely attend arraignment hearings. As a result of their routine presence at arraignments, these attorneys possess a unique understanding of the process by which pretrial decisions are made and the questions

that may be posed during arraignment. The defendants in these felony cases were not considered subjects of study, as defendants do not actively engage in the arraignment process.

We approached attorneys as they exited the courtroom so as not to disrupt the court's proceedings. Four attorneys agreed to be interviewed; two others provided contact information and expressed interest in participating, but they did not schedule an interview.

Procedure

Observations. Though arraignment hearings are more commonly associated with the entry of the defendant's plea, pleas of not guilty are accompanied by a pretrial release decision. This decision may then be followed by a bail hearing in which the conditions of release are contested. We collected data for all cases in which the defendant entered a plea of not guilty. Two researchers conducted observations and collected data from 234 cases between December 15, 2016 and July 6, 2016. To ensure uniform collection of data, we conducted the first set of observations together. We conducted all subsequent observations independently.

On each observation date, we reviewed the courts' online case calendars and recorded the identification number and the name of the defendant in each felony case for which an arraignment hearing was scheduled. We added additional cases to our list in court, as the online calendars were usually not up to date. We documented all courtroom observations by hand, as use of electronic devices by observers is prohibited. As each case was called, we documented the date, the case identification number, the location, the name of the judicial officer, the sex of the defendant, attorney type (i.e., private or public), a description of the charges, comments from the attorneys or the judge regarding bail, whether bail was granted, what type of bail was granted, and the bail amount. With the exception of sex, we omitted demographic variables, including race, socioeconomic status, and immigration status, due to lack of access to court records. Unlike the sex of the defendant, which we documented according to the pronouns used by the judge and attorneys in addressing the defendant, the race of each defendant was indicated only by visual cues. We determined that it would be inappropriate to make assumptions as to the defendants' race, especially since, in some cases, we were unable to see the defendant. Upon conclusion of the observational component of the study, we used the case identification numbers to extract additional information from the courts' public case access systems. This information included the defendant's release status, whether a preliminary hearing had been held, and whether the defendant had been sentenced. Where possible, we then coded the data in Excel and exported to SPSS for limited quantitative analyses. Both researchers agreed upon the coding scheme, and we discussed any ambiguous cases before assigning a code. We transcribed notes from the courtroom observations and then coded and analyzed the notes thematically. The objective nature of the courtroom data lent itself to consistent documentation, though we also compared and discussed observations at biweekly meetings to maintain inter-rater reliability.

Interviews. We obtained Institutional Review Board approval prior to beginning the interview component of this study. In accordance with the approved protocol, we approached judges and attorneys at the courthouses and presented them with a letter describing the purpose of the study, the voluntary nature of participation, and our contact information. We scheduled the interviews at participants' convenience. Judges and attorneys who wished to participate received and signed an informed consent form before we conducted their interview. According to the participant's preference, we audiotaped each interview or documented the interview by hand. The interviews ranged from 20 to 40 minutes and incorporated questions regarding bail procedures, pretrial decision-making, and attitudes toward the bail schedule. We conducted a total of seven interviews. Participants included three judges, one public defender, two prosecutors, and one alternate defender. In the interest of maintaining confidentiality, the judges are identified only as Judge A, B, and C throughout this paper. We transcribed all audiotaped recordings and stored the recordings and transcriptions in a secure location along with the informed consent forms and written notes. Both researchers reviewed each transcription. We then coded and analyzed the interviews.

Results

Pretrial Release Decision and Outcomes

Judges granted some form of pretrial release in the vast majority of cases. Almost 9% of defendants were released on their own recognizance [OR] while bail was set in 87% of cases observed. In cases where bail was set, the amounts varied significantly (as do the bail schedule amounts) and ranged from $10,000 to $2,065,000.

Table 1: Pretrial Release Decision (*N*=233)

	All Courts	LA County Courts	Orange County Courts
Detained	10 (4.3%)	10 (7.4%)	0 (0.0%)
Bail	203 (87.1%)	108 (80.0%)	95 (96.9%)
OR	20 (8.6%)	17 (12.6%)	3 (3.1%)

We did not find any differences based on sex, though 83.7% of the observed cases involved male defendants, while only 16.3% involved female defendants. However, we did identify differences based on geographic location. A chi-square test examining the relationship between the pretrial release decision and the county proved significant, $\chi^2 = 15.139$, $p<.01(2, N = 233)$: Defendants in Los Angeles County were more likely to be released on recognizance or be denied pretrial release, whereas defendants in Orange County were more likely to receive monetary conditions of release. Similarly, the relationship between the pretrial release decision and the courthouse location also proved significant, $\chi^2 = 37.829$, $p<.01(6, N = 233)$: Defendants at the Governor George Deukmejian Courthouse in Long Beach were least likely to be released on recognizance and most likely to be denied pretrial release. Despite some variation by location, judges granted some form of pretrial release for the vast majority of defendants at each courthouse.

As Table 1 shows, pretrial release was denied outright in just 4.3% of cases. Surprisingly, most (9 of 10) of these cases involved probation or parole violations, in which the policy is to deny bail until additional information is available. In the final case, the defendant was detained pending extradition to Missouri. Although California law allows judges to detain defendants pending trial based on public safety/dangerousness concerns, no such cases were observed in this study.

Although pretrial release was granted in most cases, case records indicate that most defendants remained in custody pending trial. Case observations ended on July 6, 2016, and on July 29, 2016, we documented the release status of all defendants whose arraignments had been observed. As Table 2 shows, 78% of defendants either remained in custody or had been held in custody until their case was resolved.[1] This finding is consistent with state and national patterns of pretrial release (Tafoya, 2015. However, it is not clear that judges are aware of these high numbers. One judge interviewed guessed that approximately three-quarters of defendants "on a regular daily basis are out of custody" and that about 25% of felony defendants are released OR. (Judge C, July 6, 2016) Another judge agreed with this estimate that about one quarter of defendants are released OR but was slightly more accurate in his assessment that between one third and one half of all defendants are out of custody.

Table 2: Pretrial Release Outcomes (*N*=186)

	All Courts	LA County Courts	Orange County Courts
In Custody	145 (78.0%)	98 (79.7%)	47 (74.6%)
Out of Custody	41 (22.0%)	25 (20.3%)	16 (25.4%)

Most Bail "Hearings" are Short and Uncontested

In California, as in most states, the pretrial release decision is made at arraignment, which is a required hearing at which defendants are informed of the charges against them and at which they enter a plea. The vast majority of defendants were in custody for these hearings, and all were represented by an attorney, typically a public defender assigned to the courtroom; just 14 defendants were represented by a private attorney. These hearings are usually very short. In the Long Beach courthouse for example, the judge would call the case by name and number and then ask if the defendant waived further arraignment, full reading of charges, and advisement of rights, and plead not guilty. In no case did we observe a defendant refuse to waive these rights. On one occasion in the downtown LA courthouse, we observed a judge ask for the attention of all the public defenders and alternate public defenders, and then he asked them all, as a group, to waive formal reading of the charges, enter a plea of not guilty, set a

preliminary hearing (based on the statutory time), and submit on the county-wide bail schedule. At the Santa Ana jail courtroom, the judge typically called the case and stated the charges before asking the defendant how he or she plead.

Judges varied in their approach to setting bail. At the Santa Ana jail, the judge typically set bail directly after the defendant entered his or her plea. The judge did not explicitly invite attorneys to present arguments regarding bail; however, when attorneys did make a request regarding bail, they typically did so after the defendant entered a plea and before the judge set bail. One judge in downtown LA simply stated that bail was set at particular amount while another judge at the same courthouse would state: "Bail?" or "Do you wish to be heard on bail?" The swiftness of these hearings was recognized by one of the judges we interviewed, who stated,

> Well, you know, somebody will come through and you know, it's Costco justice. They're doing things really fast. But somebody comes through with a felony, he's he's not really gonna have too much time to consider bail in depth. So more often than not bail gets set at the bail schedule. (Judge C, July 6, 2016)

Regardless of the approach taken by the judge, arguments by attorneys over the amount of bail set were rare. Although the bail schedule is generally the starting point in a particular case, the bail hearing affords the opportunity to challenge the conditions of release and present the judge with additional information that might yield a more individualized assessment. Despite this, and despite the range of factors that judges can consider in imposing bail under California law, attorneys contested bail in just one-third of cases (82 of 234) and explicitly reserved arguments for subsequent hearings in only eight cases. As discussed in more detail below, defense attorneys usually asked for the defendant to be released on his or her own recognizance or for a lower bail amount, while not surprisingly, prosecutors tended to ask for presumptive bail (bail set according to the schedule) or a higher bail amount. In the cases where arguments were made, ensuing discussions were generally brief, and judges usually denied requests for lower bail or OR without comment.

Factors Considered by Judges in the Pretrial Release Decision

Bail schedules. The county bail schedules appeared to be the main factor determining pretrial release decision making. Indeed, in declining to be interviewed for this study, one judge noted: "I don't have much to do with bail. I just follow the schedule." As explained earlier, these schedules assign bail amounts based on the seriousness of the charged offense with increases for prior "strikes." All of the judges interviewed expressed support for the schedules, although one did note that the focus on the charged offense "places an awful lot of discretion in the hands of the police because they can book somebody on a charge that they know will never stick, and that will result in bail being set really high" (Judge C, July 6, 2016).

In the absence of an argument made by an attorney, judges tended to set bail according to the schedule, or above it. Indeed, defense attorneys recognize this. One defense attorney, an alternate public defender, noted that 9 times out of 10, appointed counsel does not fight the schedule because they know that "in 99 out of 100 cases the court will follow the schedule" (July 11, 2016). One judge emphasized the importance of attorneys knowing the practices of a judge so that they can rely on those practices, noting, "So my reputation is 'he follows the bail schedule unless there is some reason to deviate'" (Judge A, June 29, 2016).

The importance of the bail schedule to judges was clear in *People v. Farley*[2] in which a defendant, charged with possession of a controlled substance for sale, showed up for his arraignment out of custody having posted bail of $30,000. He asked for a continuance of the arraignment so that he could hire a private attorney, but the hearing focused on the fact that bail had been incorrectly set at the jail and should have been set at $100,000. The judge could not find any record of the defendant having posted bail, despite the fact that the online case record showed that bail had been posted, and that it would have been strange for him to have been released from jail without posting bail. Although the defendant explained that he had posted bail, and even though he had shown up to his scheduled hearing, the judge ordered him taken into custody and set the bail at $100,000 per the schedule. The defendant spent two days in jail before posting the higher amount.

However, judges do not always blindly follow the schedule. In *People v. Edmund*, the prosecutor argued that the bail schedule required the judge to increase the defendant's bail. At the first arraignment, the defendant was believed to have one prior strike, but he actually had two. The judge explained that there is no presumptive bail amount that magistrates must impose; the bail schedule is for law enforcement, and the judge may set or change the bail amount at their own discretion. The defense attorney argued that felony possession of a firearm is not a strike since the firearm was not used in the commission of the offense and that therefore

$100,000 was sufficient. The judge agreed, and denied the prosecutor's request to increase the defendant's bail.

Prior failures to appear. In interviews, judges noted that although not a factor taken into account in the bail schedule, prior failures to appear was an important factor to be considered in determining whether to grant OR. Given the facts of *People v. Hubbert* this appeared warranted. In that case, a defendant showed up for her hearing after having failed to show the previous week. She had originally posted $25,000 bail but the judge noted that bail should have been set at $135,000. Although she argued that she lived locally and had a job, the judge emphasized that she had not been reliable in the past, with three failures to appear. He set bail at the higher amount and ordered her taken into custody until the new bond was posted. The defendant eventually posted this new bond, but just one month later, failed to show up for a hearing and forfeited her bond.

Seriousness of the charged offense. According to the alternate public defender interviewed, the two main questions that relate directly to bail are whether the client is a flight risk and whether they are a threat to the safety of the public. In some cases, when judges denied OR, they noted the seriousness of the offense, which of course is typically reflected in the bail schedule. When interviewed, Judge C focused on the sometimes conflicting reasons for setting bail:

> So Article 1 Section 12 of the constitution says that in setting bail we're supposed to look at the likelihood of the defendant appearing and the risk that they pose to the public. And those two things can be vastly different. You can have somebody who you're very confident is gonna show up, but who is very very dangerous. And you're very worried they're gonna reoffend. So you're gonna go upwards. There's just a myriad of factors.

This conflict is evident in the cases described below, where arguments about likelihood to appear based on ties to the community were rejected because of the seriousness of the offense.

Ties to the community. In requesting OR, defense attorneys often made arguments connecting the defendant's likelihood to appear to his or her ties to the community. In interviews judges indicated that connections were important. For example, Judge A stated, "if I have family members here and it's a non-violent offense, I'm much more like to release them OR" (June 29, 2016). Similarly, Judge C emphasized the importance of stability: "The things that I am gonna be concerned about are prior record, job, kids, how deeply into the soil of the community does this person's roots go? That relates to the probability of appearing" (July 6, 2016). Judge B noted that sometimes a young person would come in with a parent, and he would get the impression that this was a good family and that he would be more likely to grant OR in such a case (July 1, 2016).

However, in the cases we observed, arguments based on ties to the community were not always successful. For example, in *People v. Jameson*, the defendant requested OR, arguing that he had no prior record or failures to appear, that he had lived in LA for 16 years, with two children and a wife, and was fighting foreclosures. The prosecutor objected to this, noting that there was no evidence of employment and that he had ties to New York and overseas. The defendant offered to surrender his passport, but the request for OR was denied based on the serious nature of the charges and the need to protect the community. The defendant did post bail four days after the hearing and, at the time of writing, had attended all scheduled hearings since then. Similarly, in *People v. Ludwig*, the defendant, who had a family member in the courtroom during arraignment, asked for OR, arguing that it was her first offense, that she was employed and that she had lived in the area for four years. The judge rejected her argument and noted that it must have been "something big" for it to have been charged as felony.

Ability to pay was not considered by judges. Notably absent from bail hearings was any discussion of the defendant's financial resources or ability to pay. Defense attorneys referenced their client's inability to pay in only two of the 82 cases in which an argument was made, and those arguments were both rejected. In *People v. Larson*, the public defender stated that the defendant, who was charged with a DUI, did not have the means to post bail. He then requested that the defendant be released on recognizance, but the judge rejected this request and set bail at $100,000. Lopez did ultimately post bond. In *People v. Banks,* the public defender offered an argument that encompassed multiple factors, including ability to pay. She stated that her client had a medical condition and wanted to seek treatment "on the outside," stressing that the defendant's spouse was supportive and had attended all his appearances. She also noted the issue of inability to make high bail. The public defender then asked for a reduction from the prescribed bail amount, noting that the strike on the defendant's record was old. Without the strike, presumptive bail would be set at $20,000; she asked that bail instead be set at $10,000. The judge then asked if the defendant was on probation or parole, to which the prosecutor replied that the defendant was currently on parole after spending 15 years in prison and asked for presumptive bail. The

judge declined the request for a bail reduction without comment, and the defendant remained in custody and was still in custody at the time data collection ended.

The Inequity of the Current Bail System is Widely Acknowledged and Accepted

The inequities of the current bail system are frequently discussed by its critics, and interviews with judges and attorneys for this study revealed both acknowledgement and acceptance of these inequities. As the public defender noted, the tendency to impose financial conditions of release in accordance with the bail schedule incentivizes plea bargaining irrespective of guilt. For both indigent and working class defendants who cannot afford the presumptive bail amount, pleading guilty becomes the less costly and more expedient option. In this sense, she asserted that the bail system is "totally stacked to make people plead guilty" (June 29, 2016). The alternate defender echoed this sentiment, describing the proportion of his clients who could reasonably be expected to post bail as "de-minimis" (July 11, 2016).

Prosecutors expressed satisfaction with the overall system while at the same time acknowledging its injustices. Although Prosecutor A stated that he generally believed the bail amount to be appropriate, he recognized that if "you are indigent in any way, then you could never make bail" (July 6, 2016). Similarly, Prosecutor B noted that "the criminal justice system does not favor the indigent population as a whole" (July 13, 2016). However, of all the problems in the criminal justice system, the matter of bail for indigent defendants did not stand out to him as a "red flag."

Judges also recognized these concerns, with one admitting that bail is "unfair to those in the lower socio-economic strata" (Judge B, July 1, 2016). However, he stated that he cannot just release people on recognizance because they are poor, because too many do not show up. Despite recognizing the inequity inherent in the existing bail system, judges also expressed the belief that the system is as good as it can be without compromising public safety. For instance, Judge B noted that "this is not a process where everyone is treated the same. The solution is not to put everybody in or to let everybody out. It's not a perfect system, but I'm not aware of a better way to do it" (July 1, 2016). His response is emblematic of the attitudes expressed by the judges.

Additionally, despite the empirical evidence supporting the use of actuarial risk-assessment tools, judges universally rejected the notion that such tools could improve the existing system. When considering the use of risk-assessment tools, Judge C expressed the concern

> that there are so many variables that have to go into the decision-making process regarding the setting of bail that there is no way you can sanitize it to the extent that there is no human involved. And if you do, it's gonna – it's just not gonna work. Public safety, I think, is gonna be compromised. (July 6, 2016)

Judge A, agreed, noting,

> those theories [are] not a substitute, in my opinion, for doing the job. In other words, a person who's a plumber for 30 years knows what to look at, versus a guy that's gone to a high-age technology plumbing school that says, "Oh by the way we're doing this." Well I've done that 150 times, you've done it once. That's not how to do it. So I have concerns about that. (June 29, 2016)

Judge C also noted,

> I am aware of the fact that there is this trend to try to objectify, almost computerize, different factors in arriving at the bail decisions. I'm not a fan at all because I don't think there's any objectified, standardized process that can ever substitute for the judgment of somebody who has done this for their whole life. (Judge C, July 6, 2016)

Ironically, these judges appear to be defending a system that they are not practicing. Though they recognize the inequity of the bail system, the judges seemed to believe that discretion and extensive experience allow the existing system to function as effectively and fairly as possible—despite the fact most judges exercise their discretion in a way that turns the bail schedule into a rule from which they rarely deviate.

Limitations and Future Research

The limitations of this study stem from impediments to generalizability and access. The sample of cases was necessarily small (N = 234 cases), as only two researchers conducted observations at multiple locations within a relatively short period of time. The size of the sample limited the generalizability of our findings and precluded a power analysis of the quantitative data. Though the Public Policy Institute of California found that Orange County and Los Angeles County are

representative of California in terms of economic and demographic characteristics, these counties may not be demographically, geographically, or legislatively representative of other states (Tafoya, 2013).

Access to court records and subjects of study was also limited. In California, although only limited case information is available to the public online, the public can review full paper case files in the relevant courthouse. However, before a member of the public or a researcher can review the file, the court clerk will remove all sensitive information, which includes probation department reports that might contain information relevant to the pretrial release decision. After an initial review of a number of case files, we determined that review of the incomplete case files available would not add useful information to the study. Access issues also stemmed from the relatively small proportion of judges and attorneys who were eligible for observation or interview participation. Few judges are assigned to felony arraignment hearings; thus, the pool of potential interview subjects was severely limited, and not all were willing to participate. Although more attorneys routinely handle arraignments, few attorneys had time to participate, or even be asked to participate, in interviews between hearings.

Additional research is needed to further explore the factors influencing the imposition of bail. If possible, researchers should coordinate with court personnel in order to obtain more detailed case records and control for demographic variables, such as age, race, and socioeconomic status. Given the overrepresentation of minorities among defendants held in pretrial detention across the country, controlling for race is particularly important (Bureau of Justice Statistics, 2016). Additionally, future studies should include larger samples from more counties in order to improve the generalizability of their findings. Longitudinal, mixed method studies would provide a more comprehensive account of the pretrial decision-making process. These studies should incorporate qualitative observations and interviews as well as quantitative analyses of relevant variables. These studies should also focus on both judges and attorneys, as the attitudes and practices of each group shape the decision-making process.

Discussion

This study sought to answer four primary questions. Our findings indicate the following:

1) Judges generally make the pretrial release decision by considering the bail schedule.
2) At bail hearings, attorneys infrequently contest the release decision and the amount of bail.
3) During contested bail hearings, attorneys and judges reference factors related to flight risk (e.g., employment and other ties to the community) and threat to the community (e.g., the severity of the offense).
4) The ability of the defendant to pay does not appear to influence the imposition of bail.

More specifically, this study reveals several troubling patterns. State laws allow California judges to consider a wide variety of factors in determining whether to impose bail, and if so, what amount to set; for example, Rule 4.105 of the California Rules of Court instructs the court to consider the "totality of the circumstances," including whether the bail amount would "impose an undue hardship on the defendant."

However, the data indicate that such individualized assessments, though permissible, are rare. Judges routinely deferred to the presumptive bail amounts listed in the bail schedules. Deference to the bail schedule may stem from the need to expeditiously process large caseloads despite limited resources; as the alternate defender pointed out, deviation from the schedule requires "tremendous energy" and risk. Given the time pressures and limited resources faced by judges, interacting flexibly and responsively with each defendant may not be feasible. Indeed, while no other research studies examine the relationship between bail schedules and decision to impose bail, in *O'Donnell v. Harris County, Texas* (2017), the court found credible expert testimony that Hearing Officers there "adhered to the prescheduled bail amount stated on the charging documents in 88.9 percent of all misdemeanor cases" (p. 68).

However, while deferring to the bail schedule might make things simpler for court actors, setting bail based almost entirely on the offense with which a defendant is charged has significant consequences for defendants. This study found a disconnect between pretrial release decisions (i.e., whether pretrial release was granted) and pretrial release outcomes (i.e., whether the defendant was released or held in pretrial detention). Although judges granted some condition of release for most defendants, monetary conditions of release (i.e., bail) were the most common. Given how few defendants had posted bail at the completion of the study, it appears that many defendants could not pay the bail amount that was set. As a result, a large number of defendants, whom judges had not deemed a flight risk or substantial danger to the community, were detained pretrial without being

convicted of a crime. As explained earlier, this detention predicts adverse consequences at later stages of case processing: Defendants who cannot afford to post bail are disadvantaged from the pretrial stage of adjudication onward.

Further, this reliance on bail schedules by judges came without many arguments over bail amounts, in part because attorneys know judges will defer to the bail schedule. As one alternate defender explained in an interview,

> Nine times out of 10, appointed counsel is not fighting the schedule. They know that in 99 out of 100 cases the court will follow the schedule. It is easier for the court to follow the schedule and the attorneys know they will not win that battle. He will fight for the cases that are 'squeaky wheels.' A client may indicate that he needs to get out sooner to go to work, and the first thing they'll talk about is damage control to make sure there isn't a major problem that makes a request for OR unreasonable. On a given day, if he has 5 clients, there will probably be no discussion with 4 of them. One of them might say they need to get out and need a lower bail amount. He will look at the client's background for holds and strikes to make sure a bail pitch won't make things worse.

Prosecutor A, too, acknowledged that attorneys infrequently make arguments because they know how to "choose [their] battles." In addition, a judge who declined to be interviewed insisted that he "[didn't] have much to do with" determining the bail amount. The reluctance of both judges and attorneys to challenge the presumptive bail amounts suggests that they regard bail schedules as rules rather than guidelines.

Finally, even when bail was contested, attorneys rarely provided information pertaining to the defendant's ability to pay, and judges did not solicit this information. When judges requested additional information before making a bail decision, this information typically pertained to flight risk and the safety of the community in the context of whether OR was appropriate. Judges did not seem to ignore or disregard evidence of the defendants' ability to pay; this factor was simply not a part of discussions at most arraignment hearings.

The findings of this study have broad implications both in California and nationwide. They support statistics (Tafoya, 2015) showing that although very few felony defendants in California are *denied* bail, high numbers of those granted bail remain in pretrial detention, apparently because they are unable to pay the amount of bail set by the judge. Further, the study adds to the small, but growing, body of literature showing the extent to which judges and hearing officers defer to bail schedules (*O'Donnell v. Harris County*, *Texas*, 2017). This study clearly demonstrates that while bail schedules may have been developed with the goal of reducing disparity in pretrial decision-making, because judges usually defer to the schedule without considering defendants' ability to pay, bail schedules are increasing disparity between indigent defendants and those who can afford to pay. A recent news report in *The Guardian* highlighted this disparity, comparing a defendant who has been detained while he awaits trial on welfare fraud charges because he cannot pay this bail, which was set at $75,000, and a defendant accused of murder for hire, who is awaiting trial while under house arrest after satisfying the $35 million bail set in her case (Levin, 2017). Further, as we argue in a companion essay, because bail schedules in California appear to be used presumptively in a way that denies defendants any individualized pretrial release determination, they are likely unconstitutional (Scott-Hayward & Ottone, 2018).

It is important to note that the inequality seen in this study has not gone unnoticed. During the state of California's annual State of the Judiciary address on March 9, 2016, Chief Justice Tani Cantil-Sakauye called for reform of the existing bail system, noting that "we need more pretrial release programs to balance safety against the need to post bail. We must not penalize the poor for being poor" (Judicial Branch of California, 2016). In December of 2016, Assemblyman Rob Bonta and Sen. Bob Hertzberg introduced AB-42, a bill "to safely reduce the number of people detained pretrial, while addressing racial and economic disparities in the pretrial system, to ensure that people are not held in pretrial detention simply because of their inability to afford money bail" (AB-42, 2016). Although this bill did not pass, a companion bill passed the Senate and is currently in committee in the Assembly. At the county level, the Los Angeles County Board of Supervisors recently commissioned a study to comprehensively review the county's bail system (KPCC, 2017).

Reform efforts, many aimed at eliminating the use of cash bail, are also underway in numerous other jurisdictions (*O'Donnell v. Harris County, Texas*, 2017; Wiltz, 2017). For example, as a result of a 2014 voter-supported amendment to the state Constitution, New Jersey virtually eliminated cash bail under a new system that went into effect in 2017. Similarly, the Supreme Court of Maryland recently changed its rules to prevent defendants who are neither a flight risk nor a danger to public safety from remaining in jail simply because they are poor. In

other jurisdictions, alternatives to preventative pretrial detention have come from the community through the use of community bail funds (Pretrial Justice Institute, 2016). These funds allow community groups to post bail on behalf of strangers who may otherwise remain in pretrial detention (Simonson, 2017).

Conclusion

The present study sheds light on both the process by which pretrial decisions are made and the consequences of these decisions. Though judges granted some form of pretrial release for all but 10 defendants in the observed cases, over 70% of defendants were ultimately held in pretrial detention. The data indicate that pretrial detention results, primarily, from an apparent inability to comply with the conditions of release, that is, an ability to pay bail. Although judges have the discretion to deviate from their county's bail schedule when determining the financial conditions of release, deference to the bail schedule is the norm. Though eligibility for pretrial release and heavy reliance on financial conditions of release could give way to argument and substantive discussion of the bail amount, this is rarely this case. Moreover, when attorneys challenge the bail amount, the defendant's ability to pay rarely enters into the conversation. The result of these patterns is that discretionary bail schedules become the law in practice, though most defendants cannot afford the prescribed amount. Given the adverse impact of pretrial detention on subsequent stages of case processing, these findings call into question the fairness of the existing bail system. Judges' infrequent exercise of discretion and the ambivalence of both judges and attorneys to the financial resources of the defendant are particularly problematic for the indigent, who are overrepresented among individuals held in pretrial detention. The inequality inherent in the existing bail structure must be addressed as the state of California moves forward in pursuing bail reform.

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Endnotes

[1] For ongoing cases, we considered defendants to be held in custody if the case access system designated his or her release status as "in custody" (Orange County) or bond was not posted (LA County). For cases that already reached a disposition, we considered defendants to have been held in custody if the judge set bail at the arraignment hearing and the defendant did not post bond prior to the disposition.

[2] All case names have been changed in order to protect the identities of the defendants. Although the hearings are public, we do not wish to exacerbate the problem of what Jacobs (2015) has termed "the eternal criminal record."