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Pretrial Release: Issues, Strategies and Improvement

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PRETRIAL RELEASE: A CRITIQUE OF THE STUDY

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INTRODUCTION

The concept of pretrial release is extremely important to both the justice system and the individual—to the former, because of a lack of adequate jail space in this country, and the latter, for the sake of his freedom. However, Mr. Clarke, in his zeal to be as complete as possible, tried to cover too broad a research spectrum and ended up with what seems to be a lack of focus. Such things as the profit motive of bail bondsmen and the right to pretrial release might have been better covered in separate papers. If this study had been limited to reviewing the effectiveness of the various strategies for improving pretrial release and the effectiveness of the reform measures already tried, it would still be of great value for practitioners.

It appears that buried not too deeply in the article are several built-in assumptions and/or biases. They are (1) that pretrial release needs improvement and expansion, (2) that release decisions are too conservative and biased, and (3) that most arrestees could be released without bail and would appear in court as directed. Much of the research cited is contradictory and is difficult to use in justifying policy decisions about releases. For example, the author discusses predictability of a defendant's release and the failure of researchers to find characteristics that distinguish defendants who fail to appear and defendants who commit new crimes after release. A very clear statement of the purpose of the article and the method the author intended to use to make his point, followed by conclusions and recommendations, would have made this article much more useful for practitioners. As presently formatted, more is needed to pull the research together to give the practitioner some guidelines on what seems to work and what does not.

CONCEPTS AND ISSUES IN PRETRIAL RELEASE

It is questionable whether pretrial release and bail are synonymous. Perhaps pretrial release and bail should be defined separately. Also, *release on recognizance* (ROR) should also include *own recognizance*, or OR, as it is known in some jurisdictions. The descriptions of the excessive bail clause of the U.S. Constitution, the history of economic discrimination, and the discussion of efforts to liberalize pretrial release, while having some historical import, are not particularly relevant for the practitioner who is looking for a practical application of workable concepts.

equity of bail decisions. We have found that the guidelines require periodic reassessment as conditions or judicial personnel change in our jurisdiction. We can report a positive experience with the use of guidelines, however. They have provided us with a benchmark and a means of analyzing our effectiveness.

Finally, we would like to argue against the view that failure to appear should be vigorously prosecuted. We have found that most failures to appear are due to personal inadequacies on the part of the defendant. In our opinion, fear of prosecution would not help to alleviate those personal factors. Finally, effective prosecution in these cases would be difficult and would only waste resources that could be used more effectively in other ways.

In contrast, the discussion of *de facto* and *de jure* preventive detention, authorized by the Federal Bail Reform Act of 1984 and upheld by the U.S. Supreme Court in 1987, is important for practitioners, because these concepts may represent significant inroads to presumed civil rights.

Clarke's list of legal developments since 1960 gives the reader a sense of what has occurred with this concept during the past 27 years. The author's two "theories" concerning pretrial release—that bond deters nonappearance and that community ties measure risk of nonappearance—do not appear to be in and of themselves theories of pretrial release. An assumption might have been added stating that a defendant with local community ties is less likely to flee in the face of criminal prosecution. Also, it would be useful to further define why community ties are considered an important issue in this matter. It is interesting to note that the "common sense" belief is still open to question and requires further testing.

OPPORTUNITIES FOR PRETRIAL RELEASE

The discussion of the issues surrounding release—including how the decision is made, what release conditions are imposed, predictability of criminal behavior, and the relationship between pretrial detention and case outcome—contains a great deal of information which can be boiled down to the following statements:

- The rates of release are generally increasing, but they vary from city to city.
- Pretrial decisions are made by a judge soon after arrest, usually based on the severity of the charge; they are usually not changed as the case progresses.
- The particular conditions of release are influenced by the individual judge making the decision and are affected by the defendant's charge, prior record, community ties, age, and race.
- A secured bond, i.e., one that has money or property guaranteeing the return of the individual, is an effective obstacle to pretrial release for some arrestees.
- A multivariate analysis of pretrial release opportunity found that charge severity and prior record have the most negative influence on release.

The author makes a very important point about the predictability of whether a defendant will be released that is almost in the form of a recommendation. He states that "program planners concerned with improving opportunities for pretrial release or reducing disparity in pretrial release usually must allocate their limited resources to facilitate the release of defendants who would not normally be released before trial." The point is also made that "few defendants remain unreleased for more than a day or two, and thus such defendants constitute a very small target group for a bail reform program." For example, in one study, 70 percent of the defendants were released within 24 hours of arrest; thus, the target population for anyone seeking to reform the system is relatively small and contains people for whom other alternatives may have already been exhausted.

In several of the studies noted, it was found that the longer the person remained in pretrial detention, the more severe was the eventual sentence received. Opposing issues were put forth as potentially explaining this phenomenon, i.e., the inability of a person to contribute to his or her own defense while incarcerated and the probability that the severity of the offense and not the mere fact that the person was detained resulted in the sentence. However, the evidence on both sides of these arguments was found to be inconclusive.

THE RISKS INVOLVED IN PRETRIAL RELEASE

The discussion of the risks of pretrial release hits at the very heart of the pretrial release issue. That is, Who can safely be released? The author reports that between 85 and 90 percent of individuals currently released return to court as promised and, in the long run, only 2 percent of those who initially fail to appear remain fugitives. Of this entire group, 35 percent commit new crimes. This is particularly significant information for practitioners who have community safety and public relations concerns about release.

HOW PREDICTABLE ARE FAILURE TO APPEAR AND NEW CRIMES WHILE RELEASED?

Information on predicting failure to appear and the occurrence of crimes while on release is of major interest from a practitioner's point of view and should be highlighted. This is one of the main concerns of individuals developing or sustaining pretrial release programs. Unfortunately, the research has shown that there are no statistically reliable predictors that distinguish defendants who do appear for court hearings as scheduled from those who fail to appear or commit new crimes. The data presented here show that assessments of risk and trial release recommendations made using factors such as community ties are slightly more accurate than those based on more subjective measures, but the difference is not statistically significant. It was also found that the longer a released defendant waits for final disposition of a case, the more likely he is to commit a new crime. The relationship between court processing time and failure to appear or new criminal behavior is an important factor in justifying allocating resources to reduce court delay. An important finding here is that neither community-ties factors, nor charge, nor prior record predict risk of either new criminal behavior or failure to appear very well.

A major point of interest to practitioners is that researchers have been unable to find characteristics that distinguish those who fail to appear and who commit criminal behavior from other defendants. It is particularly disturbing that the percentage of defendants correctly classified as high or low risk by program investigators is virtually the same as the percentage classified by mere chance. Since predictability is the very underpinning of the release decision, this area is a potentially fruitful one for further research.

EFFECTIVENESS OF PRETRIAL RELEASE AND STRATEGIES FOR IMPROVING IT

The discussion of the effectiveness of pretrial release and strategies for improving it is of interest to practitioners because of its potential practical application. Clearly, the effectiveness of pretrial release is important to operators of release programs, judges, and the community at large, because it affects community safety, judicial reputations, and program continuance. Any strategy that purports to insure these factors would be welcomed.

Clarke presents some good advice on assessing one's own system and determining the local failure (or success) rate. He makes some suggestions for measuring risk versus the costs of expansion and suggestions for improving existing agencies rather than beginning from square one and making changes incrementally. He then recommends program evaluation.

Following up the earlier discussion of the increase in the failure rate with increasing court disposition time, controls such as tighter supervision or high bond amounts commensurate with increased court processing time are evaluated. However, no material is presented to indicate that these strategies have been tried or, if so, that an evaluation of the outcome has been performed.

While the author cited no direct experiments on better communication with released defendants, at least one study noted that failure to appear was related to inadequate advisement of the defendant of his obligation to appear in court. The need to continually reinforce appearance responsibility, while logical, is a tenuous conclusion. From a practical point of view, those familiar with court processing know that defendants often use the excuse that "I didn't know I was to appear" or "nobody told me." Whether these are truthful statements, the results of anxiety at being present in court, or simply excuses for willfully disregarding the court's order remains to be researched.

The effectiveness of specialized ROR agencies is examined, and it appears from the evidence that, where release on one's own recognizance is already well grounded in a particular court, the interjection of a specialized agency does not improve overall release rates. The agency appears to simply supplant what the judiciary is already doing. The point is made that ROR agencies in some parts of the country have demonstrated the use of release so effectively that they may have worked themselves out of a job. Once the judiciary accepts the concept and begins using it, whether an investigating agency is present or not makes no difference in the overall release rates. It appears to be more important to get the judiciary to accept the concept than it is to develop specialized agencies for prerelease screening.

The question of whether postrelease supervision is effective in controlling either failure to appear or criminal behavior is an important issue. The author examines research comparing the outcomes of groups who were supervised and unsupervised, and the results of a "focused supervision" program. Generally speaking, there is no significant difference in the appearance rate of the supervised and unsupervised groups, except in the case of high-risk defendants,

defined as those with two or more prior arrests. Using postrelease supervision for low-risk defendants is appropriately concluded to be an expensive use of resources that could be better channeled elsewhere.

In a somewhat more intensive program called "focused supervision," a special agency makes the prerelease evaluation, a judge makes the final release decision, and there are specific supervision criteria which, in some cases, include particular social services. The program evaluation notes that this process allowed defendants who would ordinarily spend long periods of time in jail to be safely released without exceeding usual levels of risk. This finding is of particular consequence to jurisdictions currently attempting to deal with jail overcrowding problems. A point raised by the author concerning monetary bail bond and its ramifications seems to fly in the face of the "common sense" viewpoint that the fear of forfeiture of the bond effectively deters defendants from failing to appear in court. There is reportedly no clear-cut proof that this is the case, and further, the author indicates that no comparative research has been done to determine the validity of this viewpoint. Additionally, since the courts reportedly rarely seize the bond, the presumed threat of forfeiture is not real.

The question of the effectiveness of a professional bondsman with significant legal powers to capture a fleeing defendant and return him to court is discussed from a deterrence-theory point of view. Proponents and opponents of bondsmen view the situation quite differently. Viewpoints range from the opinion that the bondsman nullifies the deterrent effect of the bail bond by acting as an intermediary between the defendant who has few resources and the court, to the opposing view that the bondsman's inherent powers of arrest have a significant deterrent effect on defendants, who believe they will be apprehended eventually, no matter where they flee. The evidence presented does not appear conclusive in either direction. Several useful suggestions have been made for improving the deterrent effect of the bond itself. One that holds some promise but has apparently not been evaluated is a progressive forfeiture that allows the court to keep more of the bond, the longer it takes the nonappearing defendant to be returned to court. The second concept is that of utilizing the deposit bond, which allows the defendant to pay the fee to the court rather than to a bondsman; the incentive to appear on schedule is the deposit. The advantages for the defendant would be that a lower overall amount would need to be deposited with the court and that the deposit would be returned upon fulfilling the promise to appear. From the court's point of view, there is value in holding some of the defendant's money, which obviously makes forfeiture easy and could compensate the court for the expenses of nonappearance. A study reported by the author indicated that this fractional deposit system virtually eliminated the bail bondsmen in a metropolitan area where it was implemented, but the final result was a dramatic increase in the bond amounts imposed by the judiciary, which eventually reduced the proportion of all defendants released on bond.

Finally, an experiment with pretrial release guidelines is reported, in which some judges used preset guidelines and some did not. The principal finding was that those using the guidelines were more consistent in their bail decisions, but the

overall results were essentially the same. Both groups had approximately the same rates of detention, release, failure to appear, and rearrest. Of note is the fact that the guidelines had a significant possible effect on the equity of bail decisions, although the net total number of releases remained the same.

The report concludes with a recommendation for improving the deterrence of failure to appear by a more vigorous prosecution of individuals who abscond. The author reports that there is little, if any, follow-up on failure to appear, since the importance of the original charge takes precedence in the final sentencing, and any additional penalty is often allowed to run concurrently with the principal sentence. In essence, the message to defendants is that there is no real penalty for failure to appear, even though it is a criminal offense in most jurisdictions. In the long run, however, the notation of failure to appear on an individual's arrest record will most certainly be given strong consideration by a judge or a pretrial release agency, should the individual be brought up again on a subsequent charge.

Stevens H. Clarke

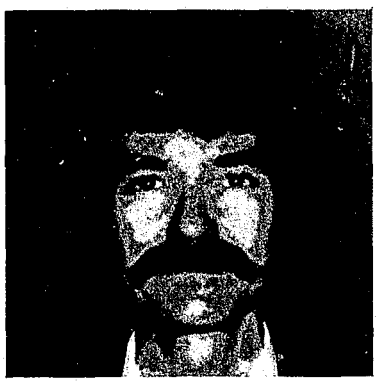
Stevens Clarke received his law degree from Columbia University in 1966. He is now a Professor of Public Law and Government at the Institute of Government, University of North Carolina at Chapel Hill. He has published research concerning the incapacitation effects of commitment of juvenile delinquents, the effectiveness of rehabilitation programs, plea bargaining, sentencing and sentencing reform efforts, pretrial release, prisons, and probation. Dr. Clarke's interests include research on offender classification and risk-assessment techniques and evaluation of programs of alternative dispute resolution in the civil justice area. He is now engaged in several studies of jail population control and pretrial release in North Carolina, working as a consultant to county administrators and court officials.

Michael Schumacher

Michael Schumacher received his Ph.D. in Human Behavior in 1978, from U.S. International University, San Diego, and is currently the Chief Probation Officer of Orange County, California. He has served as a State Commissioner on the California Commission for Revision of Juvenile Court Law in 1983, and is currently a Governor's appointee to the California Council on Criminal Justice and the State Task Force on Gang Violence. He was elected President of the California Probation, Parole and Correctional Association in 1985 and Vice-President of the Chief Probation Officers of California in 1988. Dr. Schumacher has published in the areas of juvenile delinquency in Japan and the United States, the role of probation officers, and case classification and case management for adult and juvenile offenders. He is currently a part-time instructor at the University of Southern California and at California State University, Long Beach.

Bowne J. Sayner

Bowne Sayner, a graduate of the University of Minnesota, is the Assistant Executive Director of the Wisconsin Correctional Service (WCS). He received his Masters in Social Work from the University of Wisconsin-Milwaukee in 1970 and has worked for WCS since 1971. Mr. Sayner has been active in developing a wide variety of pretrial services and community-based mental health treatment programs. He has established and managed a community support program for chronically mentally ill offenders, as well as a central intake unit featuring bail evaluation, court intervention, and supervised pretrial release. He is a member of the Task Force on Human Services and the Law and is currently an active participant in the Milwaukee County Jail Planning effort.



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