Judicial Bond-Setting Behavior: The Perceived Nature of the Crime May Matter More Than How Serious It Is

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Whether a criminal defendant will be released on bail or held in jail pretrial is one of the first decisions made in a criminal prosecution. This study examined whether a certain group of defendants is subject to the setting of higher bonds by virtue of the subjectively perceived nature of the offense with which the defendants are charged. We specifically tested whether, despite lower overall rearrest rates, judges are imposing higher bonds on defendants charged with a sex offense than on defendants charged with a nonsex offense of equal statutory offense level. Results showed a statistically significant difference in the bond rates between sex offenders and nonsex offenders, with the mean sex offense bond being set approximately $30,000 higher than the mean nonsex offense bond, despite controlling for level of offense, sex of the defendant, and judge setting the bond amount. Given the high costs of pretrial detention to both the defendant and the state, the utility of empirically based bond setting is discussed.

Keywords: bond, judicial decision-making, sex offenders, criminal adjudication

One of the first judicial decisions made in the adjudication of any criminal case is whether the defendant will be released on bond or held in jail while the adjudication of his or her case is pending. Bail is the grant of freedom before conviction, which "allows the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction . . . [absent bail,] the presumption of innocence, secured only after centuries of struggle, would lose its meaning" (*Stack v. Boyle*, 1951, p. 4). Conversely, confinement pending trial makes it substantially more difficult for the accused to assist counsel in preparing a defense and exposes the accused to a penal environment while depriving him of access to his social support network, means of generating income, and any treatment providers. The Eighth Amendment to the U.S. Constitution provides that "[e]xcessive bail shall not be required." Importantly, the language of the Constitution does not establish an affirmative right to bail; rather, if a defendant is to be admitted to bail, the amount of security may not be excessive. Nevertheless, the U.S. Supreme Court has ruled that bail is "basic to our system of law" (*Schilb v. Kuebel*, 1971, p. 365) and has generally assumed that the Eighth Amendment's proscription of excessive bail is applicable to the states under the Fourteenth Amendment. From the passage of the Judiciary Act of 1789, U.S. law historically favored—and the Supreme Court had recognized—the basic proposition that a person arrested for a noncapital offense was *entitled* to reasonable bail and that bail could be set no higher than an amount reasonably necessary to ensure the defendant's appearance at trial (*Stack v. Boyle*, 1951).

Historically, the bail decision was based solely on the goal of ensuring a defendant's appearance for trial (Foote, 1954; Goldkamp & Gottfredson, 1979). In the 1960s and 1970s, a debate about the proper role of bond arose among academic, policymakers, and the legal community. One camp supported the traditional use of bail solely to ensure the defendant's appearance at trial, while the other took the position that a defendant's threat to community safety should be taken into consideration in determining whether to grant pretrial release and supporting pretrial detention when such a threat was thought to exist (Goldkamp, 1985; Kennedy, 1980). By 1978, nearly half the states and the District of Columbia had laws incorporating defendant danger assessment into pretrial release decisions (Goldkamp, 1985).

This shift toward considering a defendant's dangerousness was further reflected in the Bail Reform Act of 1984, which established for the first time that federal courts can confine a defendant pending trial when the government can offer proof that the defendant is potentially dangerous to other people in the community. The Act has been found constitutional by the Supreme Court (*United States v. Salerno*, 1987). As the Act currently exists, a federal judge may deny bail to a person charged with an offense when the judge concludes there is a risk that the defendant poses a danger to "the safety of any other person and the community" and that no less restrictive condition will ameliorate the danger (18 U.S.C. § 3142(e)(1)). Today. the number of jurisdictions with laws addressing defendant danger in pretrial release decisions has risen to 45 states and the District of Columbia (Baradaran, 2011), and the trend persists in state legislatures. In mid-2012, for example, New Jersey, one of the five states where appearance at trial remains the only legally cognizable consideration in bail decision-

making, introduced a concurrent resolution proposing to amend the state's constitution to permit denial of bail when it would "protect the safety of any person or of the community" (New Jersey State Assembly, Con. Res. No. 153, 2012).

Costs of the Bond Decision

For nearly two decades, jails in the United States have housed more pretrial detainees than convicted criminals serving sentences (Burdeen, 2009), yet no official measure of the overall cost of preventive pretrial detention appears to exist. Preliminary data from the U.S. Bureau of Justice Statistics show that in fiscal year 2010, federal, state, and local governments spent around $80.2 billion on corrections (T. H. Cohen, 2013). Local governments are estimated to have spent $26.5 billion of that total, and 61% of the 748,728 inmates held in local jails at midyear 2010—about 450,000 inmates—had an unconvicted status (Minton, 2012; T. H. Cohen, 2013). Thus, assuming pretrial detention is no more or less costly than postconviction detention, local governments spent approximately $16.2 billion on pretrial detention of criminal defendants in 2010. In 2009, the National Association of Pretrial Services Agencies calculated the cost of pretrial detention to be "over $9 billion per year," based on a cost estimate of $60 per defendant per day (The National Association of Pretrial Services Agencies, 2009, p. 9), but they did not provide sufficient data to determine the basis for this figure or identify the source of the data used. The Vera Institute of Justice's recent survey of 40 states found an average annual cost per inmate in those states to be $31,286 (Henrichson & Delaney, 2012), which is $85.71 per day, or $14.1 billion annually spent on pretrial detention, assuming the cost per inmate is equivalent between state and local facilities, the latter of which house the majority of pretrial defendants.

Despite the significant dedication of public resources to pretrial detention, the bond-setting process has received limited empirical attention. In the past 60 years, relatively few published studies have investigated bond-setting behavior. This dearth of attention is surprising, given that the cost of pretrial detention to the state is so high and the benefit of pretrial release to the criminal defendant—both legally and psychologically—is so significant. Beyond its immediate personal costs to the individual defendant, pretrial detention has long been known to impact subsequent decisions in the adjudicative process (Cavadino & Gibson, 1993; Nagel, 1983), including increasing the likelihood of conviction and the imposition of harsher sentences (Davies, 1971; Foote, 1954; Wald, 1964; Williams, 2003).

The high cost of pretrial detention to both the state and the individual defendant makes rational bond setting decision-making by judges an equitable and fiscal imperative. Despite this, an analysis of 116,000 pretrial defendants charged between 1990 and 2006 in the United States revealed that judges frequently overdetain defendants who have a comparatively low likelihood of offending during the pendency of the adjudication and simultaneously underdetain those with higher likelihood of offending pretrial (Baradaran & McIntyre, 2012). Furthermore, almost half of the approximately 45,000 defendants held pending trial ($n = 22,500$) had less than 20% chance of rearrest, while an equivalent number of those released had more than 20% chance of rearrest (Baradaran & McIntyre, 2012). It would seem to follow logically from these findings that a significant proportion of defendants held

pretrial could be released without negatively impacting public safety, realizing a significant reduction in government correctional expenditures.

Research on Bond-Setting Decisions

Although bond-setting behavior has not been extensively studied, existing scholarship has focused on two areas: (1) factors predicting bond-setting outcomes and (2) detected rates of pretrial (re)offense.[1] The former tends to focus on identifying factors that statistically predict judicial bond-setting outcomes, generally dividing the factors into legal factors (e.g., seriousness of the offense charged) and extralegal factors (sex and race) (Baradaran & McIntyre, 2012; Dhami, 2005), while the latter focuses on observed rates of offending or misconduct in defendants released pretrial (T. H. Cohen, 2013)

Historically, studies of factors associated with bail decision outcomes have employed linear regression models to infer judgment process from judgments made (Dhami & Ayton, 2001). For example, Ebbesen and Konečni (1975) published the results of a pair of studies employing factor and regression analysis to examine how actual felony court judges decided the amount of bail to set, given various hypothetical situations presented in a survey, and compared the survey findings with their decisions in actual cases. They found that the weakest single predictor of bond outcome was the defendant's prior criminal record and the strongest was the prosecution's bond recommendation, which, in turn, was found to be influenced by the statutory severity of the offense charged (when homicide cases were excluded). Similarly, Goldkamp and Gottfredson (1979) developed a trifurcated and contingent three-step model to determine what factors played a role in determining pretrial release conditions (or denial of release). They used a regression analysis of bail hearing outcomes on groups of demographic (i.e., age, race, home ownership, employment, sex, and income), health (i.e., drug use, mental health, and alcohol use), legal (i.e., type of probable surety, references, and private counsel), prior criminal processing (i.e., prior arrest information, open cases, past failure to appears, probation, and past convictions), and charge-related (i.e., offense, number of charges, weapons, and prostitution) independent variables and found that the offense charged was a significant determining factor in each step of the bail decision that they analyzed.

Baradaran and McIntyre (2012) recently published an empirical study that included a thorough review of eight significant published judicial bond studies, some of which reported factors found to influence the bond decision. The studies reviewed included Foote's (1954) Philadelphia bail study, which found that the bond decision was heavily influenced by the offense charged. Baradaran and McIntyre (2012) found that observable characteristics of a defendant that predict flight risk are available to judges at the time of the bond-setting decision, but are different from the observable characteristics of defendants that are associated with pretrial (re)

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[1] The use of (re)offense calls attention to the fact that a person charged with (but not convicted of) a crime would not be "reoffending" pretrial because the person has not been convicted of anything. Similarly, rearrest is not the same thing as reconviction or recidivism. We have endeavored to reflect these important distinctions in the selection of terms used throughout this article, but, for purposes of readability, we do not highlight the distinctions further.

offending. Comparing the two (factors predicting flight vs. factors predicting reoffending), they concluded that judges were basing bond decisions on predicted violence risk, nearly to the exclusion of considering flight risk.

Nature of the Bond Decision

The bond-setting decision is a quick one. One study found that from the moment a defendant sets foot in the courtroom, the average duration of bail hearings in two London courts was 6 min, with a range of 50 s to 62 min (Dhami & Ayton, 2001). Given that range and average, hundreds of defendants can be arraigned in a matter of hours. In addition to the volume and speed of bail proceedings, judges have vast, largely unchecked discretion in determining whether to detain a defendant pending trial and in determining the amount of bail that must be posted for the defendant to secure his release (Dhami, 2005; Goldkamp & Gottfredson, 1979; Gottfredson & Gottfredson, 1988).

Given the speed and lack of objective criteria involved, it is not surprising that research has shown not only that different judges make different pretrial decisions on identical facts, but also that individual judges are free to make different decisions when considering similar cases, that is, judges show high intrarater variability (Dhami & Ayton, 2001; Dhami, 2005).

Stereotypes are also generally known to impact decision-making (Devine, 1989), and judges do not appear to be immune from this effect. For example, when considering civil legal matters, judges have been found to be no better at excluding biasing information from their decision-making than are lay decision-makers (Landsman & Rakos, 1994). Judges' decisions also appear to be influenced by the cognitive biases known to impact human decision-making generally, including reliance on the representativeness heuristic and concomitant tendency to commit the inverse fallacy (assuming that what has just happened has likely happened many times before), although judges may commit this latter type of error less often than the lay decision-maker (Guthrie, Rachlinski, & Wistrich, 2001).

If bond decisions are being made in an unsystematic, stereotype-influenced way, it is possible that defendants charged with a socially reviled offense are at increased risk of having a disproportionately high bond set, irrespective of the likelihood of offending during adjudication or of failing to appear for trial. As Richard Posner (1973) has noted, this type of error in legal decision-making can distort substantive justice.

The Bond Decision in Sex Offender Cases

Sex offenses are unique not only because of the special impact of the offense on those directly affected by the offender's conduct, but also because the offenses generate high levels of public fear despite relatively low detected incidence rates of sexual violence (M. Cohen & Jeglic, 2007). Despite research evidence to the contrary (Hanson & Bussiere, 1998; Hanson & Morton-Bourgon, 2004), survey evidence has suggested that as much as 75% of the general public believes that sex offenders (rapists and child molesters) are a specific type of specialized and chronic offender (Levenson, Brannon, Fortney, & Baker, 2007). Judges are not immune to such public perceptions. For example, a qualitative study based on interviews with 12 judges from California and Texas recently found that magistrates not only share negative public sentiment toward sex offenders, but also that some are explicitly aware that their negative personal views of sex offenders often result in their imposing punishment on sex offenders beyond what is called for by the law (Nhan, Polzer, & Ferguson, 2012). It has also been reported that judges hold beliefs and perceptions about the etiology, impulsivity, role of fantasy, and homogeneity of sex offenders that are not shared by experts (Bumby & Maddox, 1999). Bumby and Maddox (1999) also found magistrates report that adjudicating sex offense (SO) cases is more professionally and personally difficult than adjudicating other criminal cases.

Setting higher bonds for defendants charged with a sex offense, as a category, would be completely rational if sex offenders presented a higher risk of reoffending while awaiting trial than other defendants charged with offenses of equal statutory offense level. There is, however, no empirical evidence demonstrating that sex offenders, as a group, recidivate at higher rates or are more likely to offend during pretrial release than nonsex offenders. The Department of Justice has reported that sex offenders are less likely (43%) than nonsex offenders (68%) to commit any type of offense (not necessarily a sex offense) after their release from prison (Langan, Schmitt, & Durose, 2003), and the absolute rate of sex offender reoffending after release is comparatively quite low. Langan et al.'s (2003) large study ($N = 9,691$) found that, within the first 3 years after release, only 5.3% of sex offenders were rearrested for a sex crime, while Hanson and Morton-Bourgon's (2004) meta-analysis examining sex offender outcomes across 73 studies found a sexual offense recidivism rate of 13.7%, over a 5- to 6-year follow-up period.

Generally low rates of detected recidivism are also found for rearrest during pretrial release for all defendants. Most studies have found that the rate of rearrest for defendants released pretrial is low, particularly rearrest for any felony (Baradaran & McIntyre, 2012; Siddiqi, 2009). Baradaran and McIntyre (2012) found that, of the 70,000 defendants released pretrial in their study, the probability that any one would be rearrested for any offense (including misdemeanors) was 16%, and that those charged with more serious crimes such as murder, rape, and felony assault had much lower overall rates of pretrial rearrest. Similarly, the Bureau of Justice Statistics has reported overall rearrest rates to be from 13−21% for any offense and from 10−13% for rearrest on a felony for state court felony defendants in the 75 largest counties who were released pretrial between 1990 and 2004 (T. H. Cohen & Reaves, 2007). The same report found comparatively low rates of rearrest for sex offenders. Just 9% of defendants for whom the most serious charge at the time of arrest was rape were rearrested while awaiting trial on the initial charge. This was the second lowest rate of pretrial rearrest for any group reported, behind fraud at 8%. The rate for those charged with murder was 12%; robbery, 21%; assault, 12%; drug trafficking, 21%; weapons charge, 13%; and driving related, 14% (T. H. Cohen & Reaves, 2007)

Purpose

Predicting a defendant's future behavior is the central issue being decided when a judge is setting bail. The judicial officer is deciding at what bond amount the chance of a defendant appearing for trial is maximized while the chance of the defendant offending

pretrial is minimized. The nature of the task makes it particularly well suited to the use of evidence-based analysis.

The purpose of this study was to determine whether bond for criminal defendants charged with an offense about which judges have been shown to hold negative views is set categorically higher than for offenders charged with other categories of offenses of equal statutory offense level. We hypothesized that bond would be set higher for criminal defendants charged with an SO than for those charged with nonsex offenses (NSOs) of equal statutory offense level. A corollary hypothesis was that those charged with an SO would be more likely to be denied bond (i.e., remanded to custody pending trial) than those charged with NSOs of equal statutory offense level.

Method

Data were collected from the case files of a court of original limited jurisdiction situated in a large Midwestern county. The jurisdiction has a population of about 1.2 million people. The population is 70% White, 22% African American, and 5% Hispanic, and the median household income is approximately $50,000. Almost all criminal defendants charged in the county are arraigned in the court from which the data were collected. After arraignment, cases involving most felonies are set over to the trial court of original general jurisdiction and most misdemeanors are set over for further proceedings in the arraigning court. The study was reviewed and approved by the university's institutional review board before any data were collected.

At the researcher's request, the clerk of the court provided electronic records of all misdemeanor and felony cases filed in the jurisdiction in the year 2011. Based on the data provided, the number of cases filed in 2011 was 28,793, and each case contained one or more separate charges (range, 1–18). The clerk produced an individual record for each charge filed, resulting in a total of 40,032 records. Several categories of records were excluded from the data from the outset because they were not relevant to the current inquiry: charges filed on a warrant that had not been executed at the time of the data collection or that were otherwise undisposed of; civil capias cases (warrants issued under a criminal case number for the production of a witness or party in a civil matter); cases filed based on arrest warrants from foreign jurisdictions (extradition holders); cases of direct contempt; fugitive cases (i.e., initiated by bounty hunter); and cases with blatantly erroneous data (e.g., cases where a defendant's date of birth was in the future or the record was duplicated; in the latter case, both records were excluded, because no technical explanation for the duplication could be identified). A total of 1,254 records fell into these categories.

The data relevant to each record were delivered in two separate data files with information relating to each charge distributed across the files. For example, the offense level of a given charge appeared in one file, while the section of the criminal code allegedly violated appeared in the other. The clerk reported that this was a result of only predetermined queries being available for searching the court's database. Two unique identifiers appeared in both data files produced by the clerk: the case number and the charge number. As a result, a computer script was used to combine the information from the two data files, resulting in a unique record for each charge filed. On comparing the unique identifiers in the two files produced by the clerk, 2,211 records (5.7%) could not be matched across the two files and they were excluded from further analysis because, given the overall size of the dataset, they were deemed to represent a sufficiently small percentage of the records that their exclusion would not impact the overall analysis. A random number table was used to select 100 "combined" records that were compared with data on the clerk's website to ensure that the records had been combined properly; no errors were detected.

For each of the 36,567 remaining records (dataset) of individual charges, the following data were available from the clerk: case number; charge count; state criminal code section number and narrative description (e.g., assault, solicitation); the level of the offense (e.g., first-degree felony, second-degree felony); the defendant's date of birth, sex, race, height, weight, eye color, hair color, and home zip code; the agency filing the charge; the disposition of the case and the date of the disposition; and, in the case of felonies, the judge presiding at the arraignment. The clerk was unable to provide data on the amount of bond set at the defendant's initial appearance, because none of the predefined queries available to the clerk included this information. Bond information was, however, available on the clerk's public website and so the bond amount and bond type (including recognizance bonds), if any, for each charge was collected from the public website. Not all cases had a bond set by a judge, for example, cases where the defendant pled guilty to the charge at the initial appearance or those where the defendant was issued a summons to appear at arraignment, rather than being taken into custody by the charging law enforcement officer.

The dataset included a total of 1,285 cases, consisting of 1,416 charges, or counts, defined by law as SOs. Table 1 details the SOs charged by level and count. In all of the SO cases used in the analysis, the lead count was an SO and the bond set on the case was a case bond, meaning that bond was set for the case as a whole, rather than for each count within a case. Of the lead SO charges, 868 were related to prostitution; 56 were related to sex offender registration and/or addressed update violations; and eight were related to illegally operating a sexually oriented business. These cases were eliminated from the analysis because prostitution, registration, and sexually oriented business violations, while defined by law in the jurisdiction as sex crimes, were thought to be fundamentally different types of violations than the sex offender construct under investigation, that is, those charged with offenses matching the public perception of specialized, chronic offending patterns (Levenson, Brannon, Fortney, & Baker, 2007). Of the remaining lead charges, 116 charges had no bond information (i.e., the defendant was summoned rather than arrested; defendant pled guilty at arraignment; or data were missing), no judge information, or both. Those cases were eliminated from further analysis. The remaining 235 SO cases were included in the primary analysis.

Each of the 235 SO cases was matched with an NSO case in which the lead count was of equal statutory offense level, that is, the level of offense from minor misdemeanor to first-degree felony established for the offenses by law. Table 2 identifies the offenses used as matches for the target offenses, along with the percentage of the match sample represented by each particular type of offense. In each of the matched pairs, three variables were held constant: level of offense, judge setting the bond ($n = 18$), and sex of the defendant. An effort was also made to match cases that were heard by the judge on the same day, and, where that was not possible,

Table 1
Frequencies of Sex Offenses Charged by Count and Level for the Entire Sample

Description	Level*	Count							Total
		1	2	3	4	5	6	7	
Attempted sexual offense	F4−F2	18	1	0	0	0	0	0	19
Compelling prostitution	F3	2	0	0	0	0	0	0	2
Disseminating matter harmful to juveniles by sale	F4	1	0	0	0	0	0	0	1
Disseminating matter harmful to juveniles	F4	1	1	0	0	0	0	0	2
Failure to register as a sex offender	F2	1	0	0	0	0	0	0	1
Failure to reverify sex offender address	F4−F1	35	1	0	0	0	0	0	36
Failure to change sex offender address	F4−2	20	1	0	0	0	0	0	21
Felony importuning	F5−F4	1	1	1	0	0	0	0	3
Gross sexual imposition	F3	0	1	0	0	0	0	0	1
Gross sexual imposition by force	F4−F3	9	3	2	0	0	0	0	14
Gross sexual imposition, victim under 13	F3	8	5	3	2	1	1	1	21
Gross sexual imposition, victim disabled	F4	1	0	0	0	0	0	0	1
Illegal operation of a sex business	M1	8	2	0	0	0	0	0	10
Importuning	F5−F4	2	23	3	0	0	0	0	28
Loitering for prostitution	F3	0	2	1	0	0	0	0	3
Loitering for solicitation, HIV+	F3	1	0	0	0	0	0	0	1
Loitering for solicitation	M4−M3	171	7	2	0	0	0	0	180
Pandering obscenity with nude minor	F2	2	0	0	0	0	0	0	2
Pandering obscenity, minor	F4	1	0	0	0	0	0	0	1
Pandering obscenity, minor in sexual act	F4, F2	41	5	1	0	0	0	0	47
Promoting prostitution	F4	4	0	0	0	0	0	0	4
Public indecency	M4−M1	145	15	5	1	0	0	0	166
Rape	F1	38	4	0	0	0	0	0	42
Rape, victim under 13	F1	25	8	2	1	1	0	0	37
Sexual battery	F3	8	1	1	1	0	0	0	11
Sexual imposition	M3, M1	13	1	0	0	0	0	0	14
Soliciting	M3, M1	689	3	0	0	0	0	0	692
Soliciting, HIV+	F3	1	0	0	0	0	0	0	1
Unlawful sexual contact with minor	M1, F4−F3	32	8	5	2	1	0	0	48
Voyeurism	M3−M2	7	0	0	0	0	0	0	7
Total	NA	1285	93	26	7	3	1	1	1416

Note. NA = not applicable.
* Offense level as defined by state law: F1 = felony of the first degree, which is a higher level offense than a F2, etc. M1 = misdemeanor of the first degree, is a higher level offense than a M2, etc. Ranges result from an offense being chargeable at differing degrees based on status of the victim and/or past criminal history of the defendant.

matched pairs were heard as temporally close to one another as possible. Age was also matched as closely as possible (SO $M = 36$ years, $SD = 12.16$; NSO $M = 31.56$ years, $SD = 10.96$). When maximizing the age match frustrated the temporal match and vice versa, tolerances of about 10 years and about 30 days were used as a rule of thumb. When possible, defendants across the matches were of the same race, though the records contained only the designations "white," "black," and "other" for racial identification. Because of a limitation in the data provided by the clerk, a reliable date for the bond decision was available for felonies, but not misdemeanors. An estimated date, based on the date of the case filing and date of final disposition was thus used for misdemeanors. Table 3 summarizes the descriptive statistics of the primary sample.

In addition to the above-described method for matching cases used in the primary analysis, we undertook an additional distance matching approach using the same data in an attempt to explore the robustness of the findings. Holding the judge setting the bond and level of offense constant, we calculated a Mahalanobis distance for each record based on the defendant's age, sex, race, and the date of arraignment. We then matched each SO (the target) with the two closest NSOs based on the calculated distance. The number of

nonprostitution SOs in the study with no missing data (i.e., those for which a Mahalanobis distance could be calculated) was 261. Thus a total of 783 cases were included in this secondary analysis. Interestingly, this approach did not appear to substantially alter the mean age of the groups, but it did produce a much closer standard deviation between the groups (SO $M = 36$ years, $SD = 11.8$; NSO $M = 32.6$ years, $SD = 11.6$).

Analysis Plan

Because the main hypothesis being tested was that there is a difference between the bond set for sex offenders and nonsex offenders charged with the same level offense, an analysis of variance (ANOVA) was undertaken to examine whether there was a statistically significant difference in the mean bond set for sex offenders versus nonsex offenders charged with an offense of equal statutory offense level. A number of assumptions underlying the data analysis were assessed prior to analysis. The data were examined to ensure that the observations were randomly sampled and independent, that the data were normally distributed, and that there was homogeneity of variance. Normal distribution was assessed by checking for statistically significant skewness and the

Table 2

Nonsex Offenses Matched With Sex Offenses in the Primary Analysis by Statutory Offense Level

Offense level*	Sex offenses	n	NSO-match offenses	n	Percent of NSO cases
M4	Public indecency	32	Criminal trespass	10	31.3
			Disorderly conduct	3	9.4
			Domestic violence	2	6.3
			Open container	1	3.1
			Possession of drug paraphernalia	16	50.0
M3	Public indecency	6	Criminal mischief	7	53.8
	Sexual imposition	7	Criminal weapons discharge	3	23.1
	Voyeurism	2	Drug abuse	4	30.8
			Unlawful restraint	1	7.7
M1	Public indecency	3	Simple assault	2	33.3
	Sexual conduct with a minor	2	Petty theft	3	50.0
	Sexual imposition	1	Improper use of 911	1	16.7
F5	Importuning	1	Breaking and entering	1	33.3
	Voyeurism	2	Felony drug possession	2	66.7
F4	Attempted F3 sex offense	18	Arson	1	1.3
	Disseminating matter harmful to a minor	2	Assault on a peace officer	2	2.6
	Gross sexual imposition with force	8	Burglary	1	1.3
	Gross sexual imposition	1	Carrying a concealed weapon	20	26.3
	Importuning	1	Criminal handling of firearm	6	7.9
	Pandering obscenity to a minor	30	Deception with drugs	1	1.3
	Sexual conduct with a minor	16	Drug trafficking	2	2.6
			Drug possession	14	18.4
			Assault	2	2.6
			Felony DUI	1	1.3
			Theft	4	5.3
			Forgery	1	1.3
			Grand theft	1	1.3
			Receiving stolen property	19	25.0
			Vandalism	1	1.3
F3	Attempted F2 sex offense	1	Abduction	2	6.7
	Gross sexual imposition with force	1	Attempted F2	1	3.3
	Gross sexual imposition: under 13	8	Escape from custody	1	3.3
	Importuning	1	Drug possession	6	20.0
	Sexual battery	8	Felony DUI	1	3.3
	Unlawful sexual conduct with minor	11	Theft	1	3.3
			Fleeing and eluding lawful authority	1	3.3
			Illegal possession of a weapon	8	26.7
			Illegal transport of property into jail	1	3.3
			Robbery	3	10.0
			Tampering with evidence	5	16.7
F2	Attempted F1 sex offense	1	Burglary	8	57.1
	Pandering obscenity to a minor	12	Assault	3	21.4
	Unlawful sexual conduct with minor	1	Drug possession	3	21.4
F1	Rape: victim under 13	24	Aggravated arson	2	3.4
	Rape	35	Aggravated burglary	10	16.9
			Aggravated robbery	28	47.5
			Drug trafficking	3	5.1
			Assault	1	1.7
			Conspiracy	1	1.7
			Drug possession	12	20.3
			Kidnapping	2	3.4

Note. DUI = driving under the influence; NSO = nonsex offense.

* Offense level as defined by state law: F1 = felony of the first degree, which is a higher level offense than a F2, etc. M1 = misdemeanor of the first degree, is a higher level offense than a M2, etc. Ranges result from an offense being chargeable at differing degrees based on status of the victim and/or past criminal history of the defendant.

standard deviation of the dependent variable across groups was assessed using Levene's test to check homogeneity of variance. In addition to the main hypothesis, a logistic regression analysis was used to examine whether status as a sex offender was statistically significantly related to being denied bond and whether status as a nonsex offender was statistically significantly related to a defendant being released on recognizance.

Results

The mean bond amount set for sex offenders in the overall sample (treating released on own recognizance [ROR] cases as $0 bond and excluding no bond cases) was $77,129 ($SD$ = $160,982; range, $0–$1,000,000); for matched nonsex offenders, the mean bond set was $46,526 ($SD$ = $111,219; range,

Table 3
Descriptive Statistics

Variable ($N = 470$)	Sex offense	Nonsex offense	Total	Percent or overall
Cases	235	235	470	100.00
Felony	182	182	364	77.45
Misdemeanor	53	53	106	22.55
Felony, remanded[a]	4	1	5	1.37
Misdemeanor remanded[a]	2	1	3	2.83
Felony, ROR[a]	8	6	14	3.85
Misdemeanor ROR[a]	9	9	18	16.98
White defendant[b]	127	84	211	44.89
Black defendant[b]	92	135	227	48.30
Other race[b]	15	16	31	6.60
Male defendant	229	229	458	97.45
Female defendant	6	6	12	2.55
Mean age (*SD*), years	36 (12.16)	31.56 (10.96)	NA	33.77 (11.77)
Mean bond (*SD*)	$77,129 ($160,982)	$46,329 ($111,0219)	NA	$61,595.49 ($138,771.53)

Note. NA = not applicable; ROR = released on own recognizance (though a recognizance bond may be set).
[a] Remanded means bond denied.   [b] Does not total due to missing data.

$0–$1,000,000) (see Table 3). The bond amounts in the sample were not normally distributed, with a *z* score of skewness of +36. Transforming the data by using a log10-base transformation successfully corrected the skewness for those cases that had bond set above $0, that is, for nonrecognizance and non-remand cases. In an attempt to include those $0 cases in the analysis, the distribution of bond amounts was observed, the cases were grouped by bond amount, and a scaled score (1–9) was assigned to each case corresponding to its matched-range bond amount. Although Levene's test of equality revealed that there was no homogeneity of variance in the transformed log10 data, the test was statistically significant for the Likert-type scaled bond amounts, violating an assumption underlying the analysis. Because all assumptions for the analyses were only met with respect to the transformed bond amount excluding the $0 cases, the analysis continued excluding any pair of matched cases in which either the target or the match bond amount was $0 (ROR without a recognizance bond amount set[2]) or in which bond was denied (remand). Thirty-two cases were ROR with no bond (17 SO, 15 NSO), and eight cases had bond denied (6 SO, 2 NSO). In total, 35 pairs were excluded (because the bond set for the target or match, or both, was $0 or remand), leaving a total of 400. The mean bond amount set for sex offenders when excluding the ROR/remand cases was $82,717 (*SD* = $156,896; range, $254–$1,000,000); for nonsex offenders, the mean bond set was $49,192 (*SD* = $113,962; range, $254–$1,000,000) (see Table 4).

The $33,525 difference between the mean bond amounts set for sex offenders and nonsex offenders in the primary analysis was statistically significant ($p = .001$), with a small effect size ($\eta_p^2 = .030$) (see Table 4). When examining the misdemeanor cases (SO $n = 41$, NSO $n = 43$) and felony cases (SO $n = 171$, NSO $n = 175$) separately, the difference between SO and NSO bond remained statistically significant for both, with a medium-to-large effect size ($\eta_p^2 = .134$, $p = .002$) found for misdemeanors and between small and medium ($\eta_p^2 = .044$, $p = .000$) for felonies (J. Cohen, 1988).

Similar results were found with the distance-matched cases. As with the primary matches, only nonzero bond cases were included

in the analysis, and there was a statistically significant ($p = .005$) $18,000 difference between the mean bond set for SOs ($73, 240) and for NSOs ($55,159) in the sample. As seen in Table 4, the overall effect size was small, while, consistent with the primary analysis, the largest effect size was seen in the misdemeanor cases.

To further explore the association between the category of SO and the bond outcome, logistic regression analyses, testing whether sex offender status (predictor) was related to a dependent variable of either denial of bond or being released on recognizance, were undertaken. The hypothesis was that SO charges would correlate positively with denial of bond and negatively with release on recognizance. However, no statistically significant association was found among the variables.

Finally, the "level of offense" variable was statistically significantly skewed and could not be corrected by transformation. An ANOVA using this skewed data indicated that there was a statistically significant effect between bond and level of offense and sex offender status, respectively; however, the interaction between level of offense and sex offender status was not statistically significant. Level of offense was not skewed within just the felonies in the sample, and a follow-up ANOVA using both level of offense and sex offender status as predictors of bond amount was undertaken. As would be expected given the previous literature, results indicated that level of offense was an extremely strong predictor of bond ($\eta_p^2 = .521$, $p = .000$), and the interaction between SO and level of offense was statistically significant in the felonies.

Discussion

This study examined whether judges impose higher bond amounts for defendants charged with an SO than for defendants charged with an NSO of equal statutory offense level. Overall, we found a significant difference in the amount of bond set between groups—with the mean SO bond set $33,000 higher than the mean NSO bond, controlling for level of offense, sex of the defendant,

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[2] In cases in which the defendant was released on recognizance, but the court set a recognizance bond, the case was treated as having a bond set for purposes of the analysis.

Table 4
Results of Analyses

Analysis	SO bond		NSO bond		SO − NSO		
	M	SD	M	SD	M	p	η_p^2
Primary (n = 400)	$82,717	$156,896	$49,192	$113,962	$33,525	.001	0.030
Felony	$99,600	$167,995	$59,859	$123,368	$39,741	.000	0.044
Misdemeanor	$3,123	$6,580	$597	$532	$2,527	.002	0.134
Distance matched (n = 698)	$73,240	$158,996	$55,159	$139,232	$18,081	.005	0.012
Felony	$84,199	$168,556	$64,173	$148,444	$20,026	.005	0.013
Misdemeanor	$4,063	$8,351	$802	$948	$3,262	.008	0.070

Note. NSO = nonsex offense; SO = sex offense.

and judge setting the bond amount (see Table 4). We also found that when misdemeanors and felonies were analyzed separately, a significant difference in the bond amount between sex offenders and nonsex offenders remained. These findings provide support for the original hypothesis that bond would be set higher for sex offenders than for nonsex offenders charged with an offense of equal statutory offense level. However, the data did not reveal any differences in the likelihood that a sex offender would be remanded without bond or that a sex offender would be less likely to be released on recognizance, as we had hypothesized.

As decades of previous research has demonstrated, we found that the level of offense charged correlated highly with the judicial bond decision outcome (Baradaran & McIntyre, 2012; Dhami & Ayton, 2001; Ebbesen & Konečni, 1975; Foote, 1954; Goldkamp & Gottfredson, 1979). Beyond that, this study is the first to examine whether judges set higher bonds for a certain group of offenders—sex offenders— when holding other factors (e.g., offense level) constant, despite evidence that has shown their lower rate of reoffending in general and, specifically, while awaiting trial. Even the small overall effect size estimate found using this sample is ecologically significant given that sex offenders are, on average, less likely than nonsex offenders to reoffend. If there was no difference in the bond amount set for sex offenders and nonsex offenders charged with the same level offense, that would still represent bond being set at a level disproportionately higher than would be necessary to ameliorate the danger posed to the community pending trial, given their rates of detected reoffending. This, in turn, represents significant corrections costs being incurred without any increase in public safety. The finding that bond is being set higher in SO cases represents compounded disparity in that, as a class, sex offenders are more likely to be held in preventive detention than other classes of defendants. As previously noted, pretrial detention increases public cost, the likelihood of conviction, and is associated with the imposition of harsher sentences (Davies, 1971; Foote, 1954; Wald, 1964; Williams, 2003).

Perhaps the most striking finding in this study is the size of the observed effect in misdemeanor cases. The most frequent misdemeanor SO represented in the sample, by far, is public indecency (see Table 1), the essential elements of which could be established by the act of public urination or a lewd, mock-sexual gesture. The current findings suggest that defendants charged with a minor SO are more likely to be detained pretrial than other misdemeanants who have committed more serious offenses such as domestic violence, assault, and stalking. One possible explanation for the larger effect size found among misdemeanor cases is that the judges conducting the arraignments handle only misdemeanors on their trial dockets, which include

thousands of cases covering everything from traffic tickets to domestic violence. Even a minor SO may be perceived as a serious criminal offense when compared with a traffic violation, which might plausibly explain why judges in this sample set bonds for misdemeanant sex offenders disproportionately higher than other misdemeanors of equal statutory offense level. But domestic violence, a misdemeanor, is also a serious offense compared with a traffic offense, so the relative seriousness of the charge does not fully explain the observed difference, unless sex offenders are perceived as posing a greater danger than those who are charged with committing intimate partner violence.

Our analysis did not allow us to draw conclusions with respect to our hypothesis that sex offenders would be more likely to be denied bond and less likely to be released on their own recognizance than nonsex offenders charged with an offense of equal statutory offense level. If there is no between-groups difference in the judicial decision to resort to either of these extremes, it may be because the facts underlying the decision are, themselves, extreme. That is, the factual allegations necessary to convince a judge that remand is necessary may not vary across classes of offenders. Similarly, it may be that some factual allegations are so *de minimus* that judges view recognizance as appropriate, regardless of the category of offense charged. It is also theoretically possible that paired outliers in decision-makers' preference for release or remand between the SO and NSO groups would be sufficient to obscure any difference. It should be noted that the latter suggestion— pairs of idiographic judges cancelling each other out, statistically— would result in the type of *un*systematic bias being introduced into the process of adjudication that Posner (1973) showed would not be expected to subvert substantive justice, as a whole.

Our results with respect to the interaction between level of offense and sex offender status in the overall sample were not statistically reliable because the assumptions necessary for the analysis could not be met. We did find an indication of a statistically significant interaction between the "level of offense" and "sex offense" categories on the bond outcome in the felonies. The lack of a trend in the overall sample, however, is particularly intriguing and points to the possibility that judges are basing their bond decisions on the category of SOs without any consideration of the seriousness of the offense. The need for more research to determine whether this is, in fact, occurring would seem to be most pressing.

The findings of this study are limited in several ways. First, the study design depends on the assumption that crimes with the same statutory offense level are of a similar quality, severity, and level of dangerousness. In the legal context, it is accepted that the legislature

makes a judgment about the nature and severity of harm caused by a given offense when it assigns an offense level (or levels) to a particular criminal statute at the time the law is adopted. Indeed, the offense level dictates the range of fine and maximum period of incarceration that may be imposed by a judge for a conviction that violates a statute. This assumption, therefore, is an environmentally valid way to quantify the nature of the offenses and allows them to be held constant for purposes of analysis, but this study does not exclude the possibility that SOs may not be the same as NSOs of equal statutory offense level in an objective sense. Nor does this study explore the possibility that judges in our sample rationally weighed the consequences of SOs and determined them to be the most harmful when weighed against all other offenses within their respective offense level, thus warranting high rates of pretrial detention.

The decision to exclude prostitution offenses from the sample is a further limitation. These offenses were excluded based on a subjective assessment that prostitution, despite being categorized by state law as a SO, differs qualitatively from other types of SOs. Excluding one type of high recidivism offense from the target group (i.e., prostitution), but not a similar high recidivism offense from a comparison group (e.g., drug offenses), may have affected the results. In this case, however, the inclusion of high recidivism drug offenses and exclusion of high recidivism SOs would seem to actually disadvantage our hypothesis given that an attempt to deter recidivism might tend to raise bond amounts. Another limitation of the study is that the data were collected from only one jurisdiction and the number of SOs relative to the total number of cases was small. Although this may impact the generalizability of the findings, the cases in this dataset do represent all the cases from a fairly representative American jurisdiction for an entire year. A first step in future research would be to reproduce this study with a nationally representative sample. Finally, we were unable to perfectly match all SO cases to NSO cases across age, sex, race, and timing of bond setting. This could have introduced confounds into the analysis, although it is unclear whether this should be expected to impact the overall findings of the study inasmuch as offense charged has consistently been shown to be the best predictor of the bond amount imposed by a judge, to the exclusion of race and other demographic variables (Baradaran & McIntyre, 2012).

With modern technology, tracking the pretrial whereabouts of defendants through various electronic monitoring devices is a feasible alternative to pretrial detention. Arguably, then, modern bond decisions could justifiably be solely concerned with minimizing risk to public safety. If this is the relevant issue, identifying what changes can be made to the bond-setting procedure to reduce the effects of unsystematic judicial decision-making is paramount. To answer this question, one must not fail to appreciate the systemic incentives for both prosecutors and judges in the bond-setting process. In many jurisdictions in the United States, both prosecutors and judges are elected officials. Because they answer to the public, prosecutors and judges have a strong incentives to avoid releasing defendants pretrial, given that the cost of a defendant offending pretrial might be a newspaper headline about the defendant being "let off easy" on a low bond. Conversely, holding a defendant pretrial, even if the risk of the defendant offending pretrial is quite low, is a very low risk strategy for judges and prosecutors.

One obvious point of intervention would seem to be alerting judges to the research findings and developing strategies to help judges make better decisions that are backed by solid science. Indeed, the need for sex offender−specific educational interventions with judges has been recognized since at least 1996 (Center for Effective Public Policy, 1996). Bumby and Maddox's (1999) study was, in fact, an explicit response to the Center for Public Policy's (1996) report to the Office of Justice Programs and was designed to identify areas in which judicial knowledge of sex offenders could be enhanced. Inspection of the literature does not reveal, however, any judicial educational interventions resulting from this prior research. Particularly if the current findings are reproduced using a nationally representative sample, research into how to introduce evidence-based judicial decision-making in bond decisions is warranted, given the costs of unneeded pretrial detention to both the state and the individual defendant. Evidence-based bond decision-making has the potential not only to encourage bond setting based on the risk posed by a given defendant, but also to alter the systemic incentives inherent in the process for prosecutors and judges by providing data-based justification for bond decisions.

Such an evidence-based solution is not without precedent. In 2003, the Urban Institute developed a 22-item assessment instrument that yielded two subscale scores, Safety Risk and Flight Risk (Winterfield, Coggeshall, & Harrell, 2003). A number of states also encourage or require pretrial service agencies to estimate risk and to provide that information to courts. For example, Virginia requires the development and use of a pretrial risk assessment instrument. A large majority of pretrial service agencies routinely assess pretrial risk and provide that information to judicial decision-makers (Clark, 2009). The extent to which these tools are research-based and validated, however, varies, as do subpopulation risk assessment tools for those charged with, for example, SOs or domestic violence (Clark, 2009). Unfortunately, existing tools tend to be quite lengthy and do not directly target the decision-making of the actual decision-maker. Although the development of a compact, research-based, validated assessment instrument that can be used by the judicial decision-maker on the bench may be a tall order, given the costs involved, it presents as a worthwhile area for further study.

For 60 years (Foote, 1954), empirical research has consistently shown that the offense charged, not risk of flight or risk of reoffense, is the strongest predictor of the bond set for a criminal defendant. The current study results are consistent with these findings, but further demonstrate that certain classes of defendants may be impacted disparately by virtue of the class of offense with which they are charged. Recidivism data have indicated that, as a class, sex offenders are less likely to reoffend than other defendants, and they less likely to be rearrested pretrial than nonsex offenders; thus, even assuming every defendant charged with an SO is guilty, they are more likely to be confined pretrial at state expense than other defendants without any benefit in terms of public safety resulting from that expenditure. Although this study analyzed sex offenders, other stigmatized groups may be at risk for similar disparate bond outcomes. The development of an empirically based risk assessment measure and its subsequent adoption by judicial officers setting bond would not only improve substantive justice, but it would also potentially save millions of dollars currently devoted to unnecessarily detaining defendants pretrial.

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