

Despite the idea that all are equal under the law, women are often treated more leniently in pretrial decisions.

*The 14th Amendment guarantees that Americans are all equal under the law, but in reality this is often not the case. In new research which covers nearly 78,000 felony defendants, **Gillian M. Pinchevsky** and **Benjamin Steiner** examined the whether or not criminal defendants received different treatment based on their sex or other characteristics during their pretrial period. They find that compared to men, female defendants were treated more leniently during the pretrial process. In addition, women arrested for more serious offenses were treated more harshly than other women.*



Research related to uncovering disparities in how courts process defendants has primarily focused on racial/ethnic **disparities** that result from judicial **sentencing decisions**. Few studies have focused on potential sex-based disparities that result from decisions made during earlier stages of the court process, such as **pretrial**. Although sentencing decisions have significant consequences for criminal defendants (e.g., imprisonment), decisions made during pretrial can impact defendants' liberty and can have **negative implications** for their job, family life, and community. Researchers have also **found** that defendants detained before trial receive harsher treatment during subsequent stages of the court process, such as sentencing.



Pretrial decisions are subject to less oversight than other stages of the court process, which raises the possibility that disparate treatment of defendant groups may result from these decisions. As noted, the majority of the research pertaining to disparities resulting from court processing has focused on potential racial/ethnic disparities. In our study, we examined possible sex-based disparities resulting from pretrial decisions and outcomes, and whether defendants receive differential treatment based on the combination of their sex and other individual (e.g., age) or case characteristics (e.g., offense type). We also assessed whether the county-context in which defendants were processed affected the relationship between their sex and pretrial decisions and outcomes. We found that sex does have an influence; compared to men, women are treated more leniently during the pretrial process. The type of offense also appears to matter; women who were arrested for more "male" crimes were treated more harshly – sometimes even more harshly than men who had committed the same crime.

Pretrial Decision-Making and Outcomes

Judicial decisions made during pretrial evoke the fundamental conflict between judicial interests in controlling crime and providing due process equally under the law, as judges must weigh defendants' risk of reoffending and likelihood of appearing for subsequent proceedings, alongside their desire to impose minimal restrictions and/or penalties on defendants who are legally innocent. Pretrial decisions are often made with little or incomplete information and subjected to less oversight than decisions made during later stages of the criminal court process, but there are also similarities between pretrial and later stages of the court process; such that, we informed our study by considering the extensive theoretical and empirical literature on judicial-decision making during criminal sentencing.

For our study, we drew from the uncertainty avoidance, causal attribution, and focal concerns perspectives, which recognize that judges have an interest in controlling crime, but make sanctioning decisions in the face of **uncertainty** driven by limited information concerning defendants' prospects for reform. In order to reduce the uncertainty involved in these decisions, judges develop perceptual shorthand based on stereotypes associated with individual and case characteristics. The focal concerns perspective further theorizes that three domains of reference guide judges'

responses: 1) a defendant's blameworthiness, 2) a defendant's risk to the community, and 3) the practical consequences of imposing the relevant punishment for a defendant and/or the justice system.

Blameworthiness refers to defendants' **culpability** for the offense and the degree of harm caused to the victim. Judicial concerns related to defendants' risk to the community evoke predictions about defendants' about future dangerousness that are based on attributions linked to case and offender characteristics. Practical consequences associated with the justice system and individuals affect judicial decisions because judges are **sensitive** to the necessity of maintaining working relationships in an interdependent justice system, and because judges are **cognizant** of the social costs of incarcerating particular defendants (e.g., those with dependent children). Based on the focal concerns perspective, then, women should receive leniency during pre-trial because they generally commit less serious crimes and/or have shorter criminal histories than men, are **underrepresented** in offender populations, are less likely to act alone when committing crimes and frequently commit crimes with men, and because of the perceived social costs—particularly the costs to the family—of **incarcerating female defendants**. There is evidence to suggest that women are sentenced less harshly than men, but it is less clear whether women receive similar leniency during pretrial.

Researchers have also found that not all women are treated equally. That is, some groups of women receive harsher treatment compared to other women; some of these women receive more punitive treatment than men. For instance, women who are arrested for traditionally "male crimes" (e.g., robbery) or have more extensive criminal histories may be considered more blameworthy or a greater risk to the community, and punished accordingly. In some cases, they may be treated similarly to or even more harshly than men, perhaps in an attempt to reinforce women's traditional place in society. Additional research suggests that defendant characteristics (e.g., age, race) condition judicial treatment of female defendants. Women that possess characteristics that are atypical among the female offender population (e.g., older), for example, may receive leniency if judges perceive that women with these characteristics are less able to cope with incarceration.

Sentencing researchers have uncovered between-county variation in sentencing outcomes, and these scholars have described county courts as communities comprised of interdependent participants and stakeholders who hold common beliefs regarding "going rates" or patterned responses that are applied to defendants with similar case characteristics. The focal concerns perspective also posits that judicial decision-making may be shaped by broader sociopolitical environment in which courts are situated, and these external pressures could affect pretrial decisions and outcomes.

Drawing from the focal concerns perspective and related research pertaining to criminal sentencing, we used data from the State Court Processing Statistics (SCPS) for the years 1994-2006 to examine whether judicial decision making during pretrial differs for male and female defendants processed within and across urban counties. The target population for the study included all of the defendants processed in the nation's 75 largest counties. After accounting for missing data, our final sample included 77,688 felony defendants processed in 62 counties.

The outcome measures included judges' decisions whether defendants were denied bail, released on their own recognizance (ROR), conditionally released, the bail amount imposed, and whether defendants were held on bail. Our models included a number of individual-level variables, including legal factors (e.g., offense type) and extralegal factors (e.g., age), as well as county-level variables (i.e., female violent crime rate, household disadvantage, conservatism, and jail crowding) that reflect the sociopolitical environments of these courts.

Our analysis revealed that female defendants were treated more leniently throughout the pretrial process. Compared to men, women were less likely to be denied bail, more likely to be granted ROR, and were given lower bail amounts. Although defendant's sex did not directly affect the likelihood of being held on bail, it may be indirectly related to being held on bail through the influence of lower bail amounts imposed on female defendants by judges.



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We also found that not all women were treated the same during the pretrial process. Specifically, female defendants arrested for more serious offenses and those with lengthier prior records were treated more harshly than other women, suggesting that judges may have viewed these women as more blameworthy and/or more of a risk to the community. The effects of some legal factors were stronger among women versus men (e.g., robbery arrest, drug trafficking arrest, criminal history), which suggests judges do not afford women who commit particular offenses or those who have longer criminal histories the same leniency they do other women; these women are treated more similarly to men. On the other hand, we found that groups of female defendants defined by extralegal factors, such as age and race, were treated similarly. Taken together, our analyses indicate that women are treated more leniently than men throughout the pretrial process, but the degree of leniency judges afford to women is affected by case characteristics.

Our analysis of potential county-level effects on pretrial decision-making uncovered variation between counties in pretrial decisions and outcomes and in the relationship between defendants' sex and most of the outcomes we examined. However, very few of the county-level measures included in our analysis shaped these decisions in a consistent fashion.

In sum, although less research has been conducted on the pretrial process, our findings support the use of frameworks typically applied to judicial decision-making related to criminal sentencing (e.g., focal concerns). Specifically, our finding that women received more lenient treatment throughout the pretrial process and our finding that not all women are treated equally – particularly as it relates to females arrested for offenses typically committed by men – is supportive of the focal concerns perspective. We also found some support for lesser-utilized perspectives (e.g., evil woman hypothesis) in the finding that the commission of offenses outside the proscribed gender norms for women may have a stronger impact on decision-making involving female defendants than male defendants. Although the county-level predictors in our study were not consistently predictive of pretrial decisions and outcomes, these decisions did vary across counties, which is similar to the variation in sentencing outcomes found in other studies.

Our findings help address a gap in the literature by exploring a highly understudied, but important, stage of the criminal court process. The results highlight the need for continued research on pretrial and other understudied

stages of the criminal court process, as decisions made during this stage illustrate the delicate balance between preserving the defendant's liberty with goals of reducing the risk to the community, and decisions made in pretrial [may impact](#) later court processing. The results also suggest the need to explore sex-disparities – particularly the impact of the combination of sex and other factors – at various stages of the court process, including continued research in the pretrial stage. Understanding the factors that impact decision making and outcomes at pretrial can provide insight into decisions made at later stages of the court process as well as underscore the importance of identifying sources of disparities in courtroom decisions.

*This article is based on the paper, '[Sex-Based Disparities in Pretrial Release Decisions and Outcomes](#)' in *Crime & Delinquency*.*

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