

PREDICTING VIOLENCE*

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*This is a shortened version of an article by the same title forthcoming in the *Texas Law Review* (2012).

INTRODUCTION

The last several years have seen a marked rise in state and federal pretrial detention rates. Many of those being held are detained pretrial rather than released on bail. It is unclear whether this increased detention has caused a commensurate decrease in crime rates. It is also unclear whether the United States is effectively detaining people who would otherwise commit crimes on pretrial release. Judges determine who to detain pretrial, often based on a defendant's "dangerousness," which is based on the current charge against the defendant or on prior convictions.



Judges considering the “danger” posed by a defendant in pretrial release is a relatively new phenomenon. Historically, most defendants were guaranteed release on bail before trial.¹ The major factor to determine pretrial release used to be whether a defendant posed a flight risk. However, after the Federal Bail Reform Act of 1984, judges were charged with determining which defendants were “dangerous” or posed a threat to public safety, allowing judges to hold particular defendants in jail pretrial. Across the nation judges began predicting which defendants would be likely to commit a violent crime. Much debate ensued on whether that determination was appropriate, as well as which factors should be taken into consideration. However, the debate died more than 20 years ago, and there has been little dialogue since on how pretrial detention is going for America. Today, politicians are searching for a solution to the rising costs of incarceration in tough economic times; however, pretrial detention’s impact on high incarceration rates has yet to enter the discussion.²

Our analysis of a nationally representative 15-year dataset of over 100,000 defendants shows that the United States could significantly reduce the amount of people held in jail pretrial. These data show that currently judges often detain the wrong people. We also demonstrate that up to 25 percent more defendants could be released pretrial without an increase in pretrial crime. As many counties in the United States spend more money on jails than on schools,³ changes to pretrial detention could have sweeping public policy effects, especially since the majority of people in U.S. jails are pretrial defendants.⁴ If pretrial detention can be reduced and more defendants can be safely released without increasing crime, more defendants would have access to pretrial liberty and due process, counties would save substantial amounts of money on corrections that could be put toward other important social goals, and the public would continue to feel safe at home.

History of American Pretrial Prediction

Under the common law, due process and the presumption of innocence guaranteed defendants the right to bail before trial.⁵ U.S. federal law required bail to be presumed for everyone but murder defendants (where significant proof of the alleged crime was present).⁶ Until 1944, federal law guaranteed bail for all noncapital federal offenses,

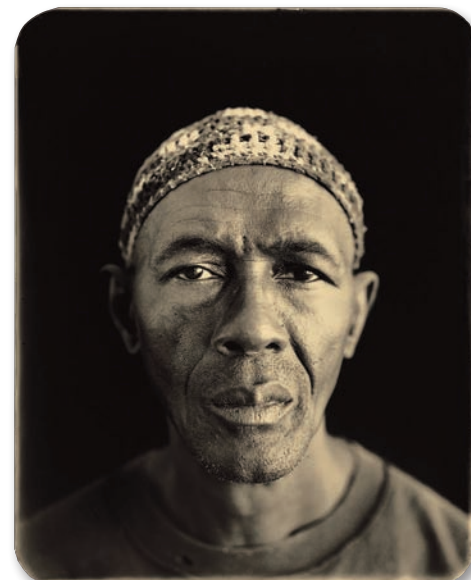
and most states followed suit.⁷ In 1944, Rule 46 of the Federal Rules of Criminal Procedure allowed courts to consider several factors in setting bail, including “the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and *the character of the defendant*.”⁸ While it did not consider whether the defendant posed a threat while released, the ability of judges to consider the “character of the defendant” provided an opening to evaluate a defendant’s dangerousness.

As time went on, bail reform continued to expand upon the reasoning for which defendants could be detained pretrial. The 1966 Bail Reform Act focused on a defendant’s appearance in court, permitting judges to consider a defendant’s prior record⁹ and thus opening the door for judges to consider additional factors besides flight risk.¹⁰ Under the District of Columbia Crime Bill of 1970,¹¹ judges, for the first time in U.S. history, could detain a defendant pretrial, without setting any bail, if the defendant was deemed dangerous to society.¹²

Taking a cue from the D.C. Crime Bill and a greater public fear of crime, the Federal Bail Reform Act of 1984¹³ took a leap towards preventative detention, focusing on protecting the public from danger.¹⁴ The act was soon challenged in court, but it withstood constitutional challenges of vagueness, violation of right to bail, presumption of innocence, due process, and excessive bail.¹⁵

Before the Bail Reform Act of 1984, various states had passed legislation allowing judges to consider in making bail determinations the danger that defendants posed to the community.¹⁶ Some state laws generally listed criteria to consider when making bail decisions (such as community ties, employment status, financial resources, drug addictions, etc.); however, judges were free to ignore these criteria and focus solely on the criminal charge and the prior criminal record of the defendant.¹⁷ Because dangerousness was not clearly defined, there were no “precise legal standards” that judges were required to follow, and determining dangerousness varied greatly by state.¹⁸

Often, state courts evaluate three main categories to determine dangerousness: (1) the present offense charged, (2) past conduct, and (3) judicial discretion of the accused’s circumstances and character. To objectively determine dangerousness, the present offense charged often triggers dangerousness assessments based upon the nature of the crime. Many states review the defendant’s criminal record and record of appearances to evaluate dangerousness. The most subjective factor that courts consider when determining dangerousness is the defendant’s character.



This could include (1) the accused's family situation, (2) employment, (3) finances, (4) character and reputation, (5) record of appearances or history of flight, (6) community ties,¹⁹ (7) alien status,²⁰ (8) gang involvement,²¹ (9) possession or control of weapons,²² (10) propensity for violence,²³ (11) general attitude and demeanor,²⁴ (12) history of depression,²⁵ (13) treatment of animals,²⁶ and (14) "any other factor" relevant to making a determination of dangerousness.²⁷ A defendant found to pose a danger to the public will either be detained pretrial or released subject to restrictive conditions that are the "least restrictive" conditions to ensure the defendant's appearance and protect the community.²⁸

Past Studies on Predictions of Violence

A number of studies have been performed over the last 50 years in order to examine various bail systems, pretrial detention, and prediction of pretrial crime. While informative, many are limited in scope and outdated.

Foote's Philadelphia Bail Study in 1954 found that judges based pretrial detention on the charge because it was an easy standard to apply,²⁹ despite the fact that those with lesser offenses were less likely to appear in court than defendants with more serious criminal charges.³⁰

The National Bureau of Standards Study in 1969 found that the instances of criminal defendants committing serious felonies pretrial were low, contradicting claims by advocates of preventive detention.³¹ The study concluded that there was no statistical relationship between the first arrest type of crime and the second arrest crime. It also asserted that none of the 10 characteristics used in the District of Columbia's Bill were accurate predictors.³²

A 1970 Los Angeles study concluded that defendants are rarely arrested for new crimes on pretrial release.³³ This study agreed with the NBS study, concluding that those released pretrial are not very likely to be rearrested.

A Harvard study conducted in 1970 confirmed the NBS study's findings on pretrial detention,³⁴ concluding that the initial charge is a poor indicator of recidivism.³⁵ The study determined that juvenile arrests, previous incarceration, conviction of violent or dangerous crimes within the past 10 years, and convictions of four or more misdemean-

ors were better predictors. However, problems with its sample size limit the study's informative value.³⁶

Goldkamp's Philadelphia Bail Study in the late 1970s found that detained pretrial defendants were much more likely to be incarcerated after conviction or pleading guilty than those who were released pretrial.³⁷

Studies in the 1980s indicated that most defendants appeared at trial. However, rearrest rates were quite high, between 10 and 20 percent, thus failing to convince policy makers to reduce pretrial detention.³⁸

Since the 1980s, few studies regarding pretrial detention have been done. A study conducted in New York, where dangerousness cannot be a determinant factor of preventive detention, showed that few defendants were rearrested for violent crimes while on pretrial release.³⁹ The study determined that residing at a New York City address, having a residential telephone, being employed, being in school, or participating in a training program full-time were all factors that related significantly to a low risk of pretrial misconduct.⁴⁰

These studies illustrate the difficulty of accurately predicting pretrial crime. Scholars disagree as to (1) whether judges should rely on the initial charge to set bail,⁴¹ (2) what the crime rate is for defendants released pretrial,⁴² (3) whether past criminal behavior is an accurate predictor of future criminal conduct,⁴³ (4) whether a previous failure to appear has an indication on future failures to appear or an impact on predicting future crimes.⁴⁷ Also, as far as age and gender, all of those who have commented on this have noted that younger male defendants are more likely to commit pretrial crime than older female defendants.⁴⁸ Finally, many scholars have lamented that determinations of bail and predictors of pretrial crime can never be effective or accurate.⁴⁹

Pretrial Crime Dataset

Our national dataset is based on a nationally representative sample covering the 75 largest counties in the United States. The data are drawn from the Bureau of Justice's State Court Processing Statistics from 1990 to 2006 and include over 116,000 observations.⁵⁰ Each observation records what happens to a given felony defendant from the time of their arrest through their trial. The data contain information on the initial crime committed, any subsequent bail crime, the defendant's prior record, any failures to appear, and demographic characteristics such as age, gender, and race.

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Our dataset allows us to overcome two types of selectivity bias inherent to pretrial risk assessment. First, because the sample size is large and many jurisdictions use different determinations for detaining or releasing defendants, we can predict how dangerousness differs between those commonly—but not always—held and those commonly released. Second, many defendants are released based upon a number of conditions that may make them less likely to commit crime. However, knowing a defendant’s crime risk under no restrictions is not pertinent if the most common way defendants are released is with restrictions.⁵¹

Overall, there is a relatively low level of arrests pretrial. Of all of the defendants released, only 16 percent of them are rearrested for any reason, while 11 percent are rearrested for a felony and 1.9 percent are rearrested for a violent felony.

In 43 states judges consider the defendant’s present charge in determining release.⁵² Prior studies have found that judges often rely on the initial charge to set bail,⁵³ though some studies have concluded that the crime charged is unrelated to the crime the defendant is rearrested for on release.⁵⁴ Our large sample allows us to draw a much cleaner inference than found in previous studies.

While the Harvard study and others claimed that there was little information in the initial charge, this turns out to be untrue. For example, those with an initial murder charge are more than 20 times more likely to be rearrested on a violent felony charge than a defendant charged with fraud (0.3 percent v. 6.4 percent) and about six times more likely than someone arrested on a drug possession charge (1.1 percent v. 6.4 percent).

Defendants charged with violent crimes are *not* necessarily more likely to be rearrested pretrial. The defendants with the highest rearrest rates pretrial (21 percent) are those charged with drug sales and robbery. Those released who are charged with the more “dangerous crimes,” such as murder, rape, and felony assault, have much lower overall rates of pretrial rearrest at 12 percent, 9 percent, and 12 percent. However, those *originally* charged with violent crimes are much more likely to be rearrested pretrial for violent crimes, showing that the initial charge is linked with the type of crimes committed pretrial.

While there is a large range of “dangerousness” pretrial, those released pretrial are perhaps much less dangerous than most people would anticipate. For almost all crimes,⁵⁵ defendants are only about 1–2 percent likely to be arrested for a violent crime pretrial.

Thirty-three states and the District of Columbia conduct some review of the defendant’s prior convictions as a factor in pretrial release. However, prior work has disagreed as to whether past conduct⁵⁶ or previous convictions are accurate predictors of future criminal conduct.⁵⁷ This more extensive dataset analysis indicates that past crime *is* a key predictor of future crime. Though there is a correlation between prior convictions and rearrest, the data show that defendants with four or more prior convictions are not rearrested much more than defendants with no or just one prior conviction. Repeat offenders, those with four prior convictions, are still only committing pretrial violent crime in about one in 30 instances. A person with prior convictions appears to be more dangerous than a person with prior arrests, yet both categories of defendants are more likely to commit violent crimes pretrial.

Age is also a strong predictor of future arrests. The older the defendant, the less likely the defendant will be rearrested. Teenagers are four times more likely to be rearrested than a defendant over the age of 50. Along with age, both prior record and initial charge make substantial differences in the probability of rearrest. On the other hand, prior failures to appear are not significant predictors of future violent behavior.

Judges detain defendants pretrial not only on the basis of dangerousness but also on flight risk. Flight risk varies somewhat with age, but the difference is not as pronounced as it was for violence risk. A prior failure to appear more than doubles the chance of flight. This is significant because historically courts looked primarily at flight risk to determine whether to release an individual on bail. Initial offense is also a strong predictor, but in a very different pattern compared to violent crime. For violent crime, an initial violent crime charge indicated the highest chances of rearrest for violence; but for flight risk, those most likely to flee are those accused of drug crimes.

In general, the factors that a judge can easily observe about a defendant that make him more likely to flee are almost completely uncorrelated (and thus unrelated) to the factors that

make a defendant likely to be rearrested for a violent crime. This is not to say that the two events are entirely uncorrelated but rather that the things *one can predict* about future crime are uncorrelated with the things *one can predict* about flight risk.

In states that consider both flight risk and dangerousness, which constitute the majority of states, dangerousness seems to be a much larger consideration for judges. A one-unit log increase in flight risk increases the chances of being held by about 2 percent, while a similar increase in predicted violence leads to a 10 percent increase in likelihood of detention. Thus, potential for violence is considered almost five times more heavily than flight risk in most states.

In the states that do not consider dangerousness or that ban preventative detention, flight risk becomes dramatically more important. A one-unit log change in flight risk produces an increase of 9.9 percent in the chances of being held, while a similar increase in predicted violence increases the chances of being held by 8 percent. Thus, while these states may not be following the law perfectly, flight risk is a bigger consideration than expected danger.

Since the 1980s both federal and state detention rates have increased. Over the last two decades local jails have housed more pretrial detainees than actual convicts.⁵⁸ Based upon the dataset and current pretrial detention practices, judges are often releasing and detaining the wrong groups of people. The data suggest that about half of those detained are less likely to commit a violent crime pretrial than many of the people released. The percentage of pretrial defendants released could be increased from its current 62 percent to 85 percent while maintaining a crime rate of 14.7 percent, which is lower than the current rate of 16 percent. Thus, our predicted model can provide guidance for judges to make more efficient decisions and increase the number of people released pretrial without causing increased danger to the public.

Beyond just reducing the prison population, more accurately predicting rearrest rates would have a great impact on defendants. Often defendants who are detained pretrial suffer prejudice, being more likely to be convicted or plead guilty.⁵⁹ Beyond the likelihood of guilt, defendants detained pretrial often encounter difficulty in financial and employment pursuits,⁶⁰ in obtaining private counsel,⁶¹ and in sentencing.⁶² In addition, increased detention increases costs for counties, which are dealing with tight budgets.

We do not ignore that there are large costs to victims and society when more crimes are committed. The costs of murder, rape, burglary, robbery, and other felony offenses are tremendous financially and in other intangible ways.⁶³ The aims of detaining defendants pretrial have evolved in order to protect society from repeating events that brought the defendants to court in the first instance.



Conclusion

In our society today we expect the government to provide for our safety by preventing crime and violence and often criticize the criminal justice system and its inefficiencies. Others tackling the pretrial crime and prediction problem have advocated speedy trials,⁶⁴ an increase in pretrial supervision programs,⁶⁵ bail forfeiture,⁶⁶ more visibility of judicial detention decisions,⁶⁷ and setting bail amounts in a more logical way.⁶⁸ While our model is not the end-all to solving the problem, accurately predicting pretrial violent crime contributes in several important ways.

First, this expansive dataset and study show that pretrial crime is actually quite unlikely. Looking specifically at some of the most dangerous felony defendants, the data show that only 1.9 percent are rearrested for violent felony crime. To look at it another way, about 80 percent of released pretrial defendants have less than a 3 percent chance of being arrested pretrial for a violent crime. Overall, the average rearrest rates are only about 1–2 percent for a violent pretrial crime.

Second, while most defendants released pretrial do not commit violent felonies, there are several factors that judges should consider in order to more accurately predict the likelihood of pretrial crime. The present offense, prior convictions, and prior failure to appear are all important predictors of pretrial rearrest. Regarding the present offense charged, those charged with robbery, burglary, and motor vehicle theft are more likely than the average defendant to be rearrested for any crime on release. While defendants charged with drug offenses were thought to be dangerous, they are among the least likely to be rearrested for a violent crime. The data also show that prior convictions are directly correlated with future likelihood to commit crime. Although pretrial crime is generally exaggerated, defendants with prior convictions are more likely to commit pretrial crime—about one in 30 instances. As for failing to appear in a prior court proceeding, it is a good predictor for being a flight risk but not a good predictor of pretrial violent crime. However, past failure to appear is an indicator for being rearrested for a nonviolent crime.

Third, based upon these factors, judges often weigh the dangerousness of a defendant

much more heavily than flight risk. However, if the state is not permitted to consider dangerousness, flight risk is a bigger consideration.

Finally, while recognizing the overall increase in detention rates, this study shows that if the goal is to prevent crime, judges are releasing and detaining the wrong groups. About half of those detained have less chance of being rearrested pretrial than many of the people released. We would be able to release 25 percent more defendants while decreasing pretrial crime levels if we released defendants using our evidence-based model. This model demonstrates that judges may safely release some older defendants, people with clean prior records, and people who commit fraud and public order violations without increasing danger to the public.

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NOTES

- 1 *Ex parte* Milburn, 34 U.S. 704, 710 (1835); Coffin v. United States, 156 U.S. 432, 452 (1895); Taylor v. Tainter, 83 U.S. 366, 371–72 (1872); United States v. St. Clair, 42 F.2d 26, 28 (8th Cir. 1930).
- 2 Newt Gingrich & Pat Nolan, *Prison Reform: A Smart Way for States to Save Money and Lives*, WASH. POST, Jan. 7, 2011, Opinions.
- 3 Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification As a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465 (2010).
- 4 See BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 7 (2000); BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 5 (2007). See NAT'L ASS'N. OF COUNTIES, JAIL POPULATION MANAGEMENT: ELECTED COUNTY OFFICIALS' GUIDE TO PRETRIAL SERVICES 4 (2009). In 1995, the percentage rose to 56 percent. See BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 7 (1995). See BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 7; BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 5. According to the Annual Survey of Jails, the number of pretrial detainees has increased from 49 percent of the jail population in 1985 to about 56 percent of the jail population in 2006.
- 5 See Shima Baradaran, *Restoring the Presumption of Innocence*, forthcoming in *Ohio State Law Journal*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1757624.

- 6 *Id.*
- 7 Act of Apr. 30, 1790, ch. 9, 1 Stat. 112.
- 8 *Stack v. Boyle*, 342 U.S. 1, 5 n.3 (1951) (quoting FED. R. CRIM. P. 46(c) (1951)).
- 9 18 U.S.C. § 3146 (a).
- 10 *Id.*
- 11 District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91–358, 84 Stat. 473 (July 29, 1970).
- 12 See Baradaran, *supra* note 5.
- 13 Federal Bail Reform Act of 1984, Pub. L. 98–473, tit. II, ch. 1, 98 Stat. 1976 (1984) (formerly S. 1762).
- 14 John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 1 (1985).
- 15 See *United States v. Jessup*, 757 F.2d 378, 384–85 (1st Cir. 1985); *United States v. Hazzard*, 598 F. Supp. 1442, 1451 (N.D. Ill. 1984); *United States v. Payden*, 598 F. Supp. 1388, 1395–96 (S.D.N.Y. 1984). See also Schall v. Martin, 467 U.S. 253 (1984).
- 16 See FLA. STAT. ANN. § 907.041(1) (1985). Goldkamp, *supra* note 14, at 1, 5.
- 17 Goldkamp, *supra* note 14, at 9–10.
- 18 Andrew Von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFF. L. REV. 717, 725 (1972).
- 19 Alabama, ALAB. R. CRIM. PROC. 7.2(a)(1)–(13); Alaska, ALASKA STAT. § 12.30.020(c) (2009); Colorado, COLO. REV. STAT. § 16-4-105(C)–(J) (2010); Connecticut, CONN. GEN. STAT. ANN. § 54-64a (b)(2); Delaware, DEL. CODE ANN. tit. 11, § 2105(b); District of Columbia, D.C. CODE § 23-1322(e)(3) (2010); Florida, FLA. R. CRIM. PROC. 3.131(b)(3); Illinois, 725 ILL. COMP. STAT. § 110-6.1(d)(2); Indiana, IND. CODE § 35-33-8-4 (B)(1)–(8) (2010); Iowa, IOWA CODE § 811.2(2) (2010); Kansas, KAN. STAT. ANN. § 22-2802(8) (2009); Maine, ME. REV. STAT. ANN. tit. 15, § 1026(4)(C) (1)–(11) (2009); Massachusetts, MASS. GEN. LAWS ch. 276, § 58 (2010); Minnesota, MINN. R. CRIM. PROC. 6.02(2)(c)–(m); Nebraska, NEB. REV. STAT. ANN. § 29-901.01 (2009); Nevada, NEV. REV. STAT. § 178.4853(1)–(10) (2009); New Mexico, N.M. RULES CRIM. PROC. FOR DIST. CTS. Rule 5-401(C)(3); North Carolina, N.C. GEN. STAT. ANN. § 15A-534(c) (2009); Ohio, OHIO REV. CODE ANN. § 2937.222(C)(3); Rhode Island, R.I. GEN. LAWS § 12-13-1.3(c)(3)–(10) (2009); South Carolina, S.C. CODE ANN. § 17-15-30 (2009); South Dakota, S.D. CODIFIED LAWS § 23A-43-4 (2009); Tennessee, TENN. CODE ANN. § 40-11-115(B) (2010); Vermont, VT. STAT. ANN. tit. 13, § 7554 (a)–(b) (2010); Virginia, VA. CODE ANN. § 19.2-120 (2010)(D)(2); Washington, WA. ST. SUPER. CT. CR CRR 3.2(c), (e). Some state statutes refer to these factors by saying the court “may consider” while others say “shall consider” or “must consider.”

20 See e.g., Arizona, ARIZ. REV. STAT. ANN. § 13-3961(A)(5) (A)(V)-(VI).

21 Arizona, ARIZ. REV. STAT. ANN. § 13-3961(G); Georgia, GA. CODE ANN. § 17-6-1(f)(4) (2009); Illinois, 725 ILL. COMP. STAT. § 110-5(a) (2010); Virginia, VA. CODE ANN. § 19.2-120 (D)(2) (2010).

22 Alabama, ALAB. R. CRIM. PROC. 7.2(a)(7); Illinois, 725 ILL. COMP. STAT. § 110-5(a) (2010); New Hampshire, N.H. REV. STAT. ANN. § 597:2(III-A); Washington, WA. ST. SUPER CT. CR CRR 3.2(d)(3).

23 Illinois, 725 ILL. COMP. STAT. § 110-6.1(d)(8) (2010); Kansas, KAN. STAT. ANN. § 22-2802(8) (2009).

24 See *Querubin v. Commonwealth*, 440 Mass. 108, 116 (2003).

25 New Hampshire, N.H. REV. STAT. ANN. § 597:2.

26 *Id.*

27 Florida, FLA. STAT. § 907.041(3)(B)(3) (2010); Indiana, IND. CODE § 35-33-8-4 (B)(9) (2010); Maine, ME. REV. STAT. ANN. tit. 15, § 1026 (2009)(4)(C)(9-a); Missouri, MO. ANN. STAT. § 544.457(2); Nevada, NEV. REV. STAT. § 178.4853(10) (2009); New Hampshire, N.H. REV. STAT. ANN. § 597:2(III-A); New Mexico, N.M. RULES OF CRIM. PROC. FOR DIST. CTS. Rule 5-401(C)(5); Ohio, OHIO CRIM. PROC. Rule 46(C); Rhode Island, R.I. GEN. LAWS § 12-13-1.3(c) (2009); Tennessee, TENN. CODE ANN. § 40-11-115(B)(8) (2010); Washington, WA. ST. SUPER CT. CR CRR 3.2(c).

28 Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954).

29 *Id.* at 1043, 1048.

30 *Id.* at 1046.

31 See J. Locke et al., *Compilation and Use of Criminal Court Data in Relation to Pre-Trial Release of Defendants: Pilot Study*, National Bureau of Standards Technical Note 535, 1, 2, 117-171 (1970) [hereinafter NBS Study].

32 Sam J. Ervin, Jr., *Foreword: Preventive Detention—A Step Backward for Criminal Justice*, 6 HARV. C.R.-C.L. L. REV. 291, 295 (1970-1971).

33 Michael R. Gottfredson, *An Empirical Analysis of Pre-Trial Release Decisions*, 2 J. CRIM. JUST. 287, 300 (1974).

34 Ervin, *supra* note 32, at 296.

35 Arthur R. Angel et al., *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 311 (1970-1971).

36 *Id.*

37 John S. Goldkamp, *Philadelphia Revisited: An Examination of Bail and Detention Two Decades After Foote*, 26 CRIME & DELINQ. 179, 190 (1980).

38 DONALD E. PRYOR & WALTER F. SMITH, PRETRIAL ISSUES: SIGNIFICANT RESEARCH FINDINGS CONCERNING PRETRIAL RELEASE (1982) in 31 CRIMINAL LAW AND PROCEDURE PAMPHLETS.

39 Qudsia Siddiqi, *Predicting the Likelihood of Pretrial Failure to Appear and/or Re-Arrest for a Violent Offense Among New York City Defendants: An Analysis of the 2001 Dataset* 1, 7 (2009).

40 *Id.* at 23.

41 Angel et al., *supra* note 35, at 309-10.

42 See Foote, *supra* note 28, and Qudsia Siddiqi, *supra* note 39.

43 In 1969, NBS pointed out it was 5 percent; see NBS Study *supra* note 31, at 1; see also Gottfredson, *supra* note 33 and accompanying text.

44 DONALD E. PRYOR & WALTER F. SMITH, PRETRIAL ISSUES: SIGNIFICANT RESEARCH FINDINGS CONCERNING PRETRIAL RELEASE (1982) in 31 CRIMINAL LAW AND PROCEDURE PAMPHLETS.

45 Angel et al., *supra* note 35, at 309-10. NBS Study, *supra* note 31, at 1; however, the Harvard study did point out that previous convictions do help predict recidivism. See Angel et al., *supra* note 35.

46 BUREAU OF JUSTICE, DEPARTMENT OF JUSTICE, SPECIAL REPORT, PRE-TRIAL RELEASE AND MISCONDUCT 1 (1985).

47 See NBS Study *supra* note 31, at 1, although the 1970 Harvard study stated that previous FTAS do impact future FTAS. See Angel et al., *supra* note 35, but see Siddiqi, *supra* note 39, at 26.

48 See BUREAU OF JUSTICE, *supra* note 46; see Siddiqi, *supra* note 39, at 26.

49 See NBS Study *supra* note 31, at 1; see Foote, *supra* note 28.

50 See State Court Processing Statistics from 1990-2006, available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&cid=282>.

51 ANTHONY YEZER ET AL., CLASSIFICATION SYSTEMS FOR THE ACCUSED (1986).

52 See, e.g., Idaho, IDAHO CODE ANN. § 19-2904 (2009); North Dakota, N.D. R. CRIM. P. Rule 46.

53 See *supra* Part II.

54 *Id.*

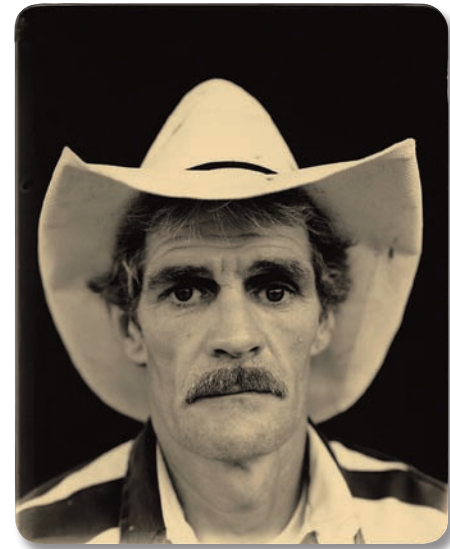
55 The three exceptions are murder, rape, and robbery.

56 Angel et al., *supra* note 35.

57 See NBS Study, *supra* note 31, although the Harvard study did point out that previous convictions do help predict recidivism. Compare BUREAU OF JUSTICE, DEPARTMENT OF JUSTICE, SPECIAL REPORT, PRE-TRIAL RELEASE AND MISCONDUCT 1, 4 (1985).

58 U.S. Dept. of Justice, Bureau of Justice Statistics, *Annual Survey of Jails: Jurisdiction-Level Data*, 1985-1987, 1989-1992, 1995-1997, 2000-2004, 2006, available by year at <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies?sortBy=7&q=annual+survey+of+jails>.

59 In this study, 74 percent of those detained were found guilty and 69 percent served prison sentences, while 53 percent of those released were found guilty and 26 percent served prison time. See Foote, *supra* note 28, at 1051-53; Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641, 643 (1964) (Detained defendants are more likely to receive prison sentences than bailed per-



sons regardless of how high or low bail is set.); Patricia Wald, *Foreword, Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U. L. REV. 640 (1964).

60 See Angel et al., *supra* note 35, at 354.

61 *Id.* at 347-49.

62 *Id.* at 350-51.

63 See *Crime in the United States by Volume and Rate per 100,000 Inhabitants*, 1990-2009, Table 1, available at http://www2.fbi.gov/ucr/cius2009/data/table_01.html. See also Mark A. Cohen, *The Monetary Value of Saving a High-Risk Youth*, 14 J. QUANTITATIVE CRIMINOLOGY 1 (1998); Mark A. Cohen et al., *Willingness-to-Pay for Crime Control Programs*, (working paper), available at <http://ssrn.com/abstract=293153>.

64 Foote, *supra* note 28, at 1073. See also Ervin, *supra* note 32, at 291 (advocating speedy trials and noting that most defendants do not commit crimes within the first 60 days of bail release).

65 Mary Toborg & John Bellasai, *Attempts to Predict Pretrial Violence: Research Findings and Legislative Responses*, in THE PREDICTION OF CRIMINAL VIOLENCE, 104, 106 (FERNAND N. DUTILE & CLEON H. FOUST EDS., 1987). See also PAUL B. WICE, BAIL AND ITS REFORM: A NATIONAL SURVEY 66 (1973).

66 Angel et al., *supra* note 35, at 365-68.

67 Goldkamp, *supra* note 14, at 55-56.

68 Curtis E. A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 11, 21 (2008).

ART

Page 18: Still-life photograph by Bradley Slade. Portraits of inmates (cover, contents page, and pages 19-20, 23, 25) by Deborah Luster (Jack Shainman Gallery, NYC), from *One Big Self: Prisoners of Louisiana* (Twin Palms Publishers, 2003). Background image from iStockphoto.