

Articles

Predicting Violence

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The last several years have seen a marked rise in state and federal pretrial detention rates. There has been very little scholarly analysis of whether increased detention is reducing crime, and the discussion that has taken place has largely relied on small-scale local studies with conflicting results. This Article asks whether the United States is making substantially mistaken judgments about who is likely to commit crimes while on pretrial release and whether we are detaining the right people. Relying on the largest dataset of pretrial defendants in the United States, this Article determines what factors, if any, are relevant to predicting “dangerousness” pretrial and what percentage of defendants can be released safely before trial. Prior work in this area disagrees as to whether the current charge or past convictions are relevant predictors of future crimes, whether flight risk is linked to pretrial violence, and whether judges can accurately predict which defendants are dangerous. This Article—for the first time—relies on empirical methods and a nationally representative fifteen-year dataset of over 100,000 defendants to determine what factors are reliable predictors of who will commit pretrial crime. This analysis suggests two important conclusions: First, judges often detain the wrong people. Judges often overhold older defendants, defendants with clean records, and defendants charged with fraud and public-order offenses. Second, using our model, judges would be able to release 25% more defendants while decreasing both violent crime and total pretrial crime rates.

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I. Introduction

Historically, defendants were guaranteed release on bail before trial.¹ Until the 1970s and 1980s, people were primarily legally held in jail before trial if they posed a flight risk. The 1984 Federal Bail Reform Act and state legislation during this period altered the landscape, allowing defendants to be held if they were deemed dangerous or posed a threat to public safety.² Congress and state legislatures charged judges³ with the task of predicting who could be safely released and who should be held in jail before trial.⁴ It became appropriate nationally to hold people in jail before trial if they were most likely guilty or if they were believed to threaten public safety. During this time period, many legal scholars, criminologists, and economists discussed the issues surrounding preventive detention and the reliability of judicial prediction⁵: Can and should judges predict which defendants are most likely to commit crimes pretrial? If so, what factors can reliably

1. There were some exceptions for capital defendants. *See, e.g.*, Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (requiring bail to be admitted in all criminal cases “except where the punishment may be death,” in which case admission would be only at the judge’s or court’s discretion). However, overall, the Court made clear that due to the presumption of innocence and due process, bail was presumed and liberty should not be deprived without an adequate hearing. *See Ex parte Milburn*, 34 U.S. (9 Pet.) 704, 710 (1835) (stating that bail is “not designed as a satisfaction for the offence, when it is forfeited and paid, but as a means of compelling the party to submit to the trial and punishment, which the law ordains for his offence”); *see also Rochin v. California*, 342 U.S. 165, 169–71 (1952) (making clear that an adjudication was required to satisfy the demands of due process); *Coffin v. United States*, 156 U.S. 432, 463 (1895) (holding that even a trial by an impartial but confused jury was not sufficient to deprive a defendant of liberty); *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 371–72 (1873) (holding that although bail bondsmen do have considerable authority over the accused, due process requires that the bail be forgiven if an act of God or act of the law precludes the accused from appearing before the court); *United States v. St. Clair*, 42 F.2d 26, 28 (8th Cir. 1930) (“Bail is to procure release of a prisoner by securing his future attendance”); 2 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 286–91 (1736) (delineating the many criteria that must be met before the accused may justly be found guilty and subject to punishment).

2. Bail Reform Act of 1984, Pub. L. No. 98-473, sec. 203, § 3142(d)(2), 98 Stat. 1976, 1978 (codified as amended at 18 U.S.C. § 3142(d)(2) (2006)).

3. Throughout this Article, we refer to the individuals releasing defendants as *judges* or *judicial officers*. However, in many jurisdictions throughout the United States, bail decisions are handled by magistrates, judicial officers, or others. *E.g.*, 18 U.S.C. §§ 3041, 3141, 3156(a)(1) (2006) (authorizing judicial officers to release the accused).

4. *See Shima Baradaran, Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 747–49 (2011) (observing that the 1984 Act empowered federal judges to consider a defendant’s dangerousness when deciding whether to grant pretrial release and that many state legislatures soon granted state judges similar authority).

5. For a poignant critique of using statistical methods for criminal law decisions, particularly racial profiling and policing, *see* BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 5–6 (2007). Harcourt criticizes the trend toward actuarial prediction and argues that “criminal law enforcement and correctional institutions should be blind to predictions of criminality based on group characteristics.” *Id.* Other scholars have commented more broadly on other issues surrounding bail, like the Excessive Bail Clause. *See, e.g.*, Caleb Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125, 1126 (1965) (arguing that equal protection issues arise from the history of the right to bail, which was originally intended to systematically disadvantage the lower class).

indicate which defendants will commit violent crimes? Should judges consider the prior record of the defendant, or the current charge, in deciding who to release? However, broad public debate on the topic died in the 1980s, and since then there has been little dialogue on how pretrial detention is going for America.⁶ While politicians are starting to talk about the rising costs of incarceration in tough economic times, the solutions proposed have not focused on the substantial impact of pretrial detention on high incarceration rates.⁷

This Article uses empirical methods to analyze the largest dataset of pretrial defendants in the United States to determine what factors, if any, are relevant to predicting “dangerousness” pretrial and what percentage of defendants can be released safely before trial. Previous commentators in this area disagree as to whether the current charge or past convictions are relevant as predictors of future crimes, whether flight risk is linked to pretrial violence, and whether judges are accurately able to predict which defendants are dangerous.⁸ Most previous work also relies on small-scale local studies. Our analysis, in contrast, relies on the most current national data for over 117,000 defendants,⁹ between 1990 and 2006, from a large, representative sample of urban counties in the United States. This analysis is both timely and necessary, as there has been no comprehensive nationwide analysis of

6. While an additional question is what impact race, gender, and age have in predicting pretrial crime, in this Article we do not comment on the merits of judges using race and gender in their determination of whether to release individuals on bail. Others have commented extensively on this issue and on other important issues of race in the criminal justice system. See, e.g., DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 5 (1999) (arguing that “our criminal justice system affirmatively depends on inequality” (emphasis omitted)); Donald G. Gifford, *Equal Protection and the Prosecutor’s Charging Decision: Enforcing an Ideal*, 49 GEO. WASH. L. REV. 659, 660–62 (1981) (noting that the Supreme Court has interpreted the Due Process and Equal Protection Clauses to “mandate a comprehensive reform of the criminal justice system,” though it has not discussed the impact of race on the prosecutor’s discretion). For an interesting analysis of how racial stereotypes play into jury and police perceptions of dangerousness, see CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 138–99 (2003).

7. E.g., Newt Gingrich & Pat Nolan, *Saving Money, Saving Lives*, WASH. POST, Jan. 7, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html> (blaming the escalating prison population on recidivism and drug-related convictions but failing to mention the effects of pretrial detention).

8. See J.W. Looney, *Neuroscience’s New Techniques for Evaluating Future Dangerousness: Are We Returning to Lombroso’s Biological Criminality?*, 32 U. ARK. LITTLE ROCK L. REV. 301, 314 (2010) (considering the implications of using neuroscience techniques in pretrial predictions); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1432 (2001) (describing the preventative-detention trend which allows punishment of defendants to prevent future crimes). Compare BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *SPECIAL REPORT: PRETRIAL RELEASE AND MISCONDUCT* 4 (1985) [hereinafter *RELEASE AND MISCONDUCT*] (identifying various factors exhibiting a positive correlation with pretrial misconduct), with Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1034–35 (1954) (arguing that the nature of the offense charged is the only factor that can be generally applied to dangerousness).

9. About 80,000 of these defendants were released, and the remainder were detained during this time period.

pretrial violence since the 1970s and 1980s.¹⁰ Though scholars have written about predicting violence after trial,¹¹ and about violent recidivism in general,¹² there has been no commentary accounting for all of the new state laws and federal amendments since the 1980s that have made considerations of dangerousness almost universal. Additionally, in the last several years, national pretrial detention rates have increased significantly¹³ without any scholarly comment and without a determination of whether increased detention is reducing crime.

The results of this analysis can have sweeping public-policy impacts, as many counties in the United States spend more on jails than schools¹⁴ and

10. The Bureau of Justice releases biyearly reports with some analysis of the data, but none of these reports provides an analysis of the data from such a broad range of years. *E.g.*, THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006 (2010) [hereinafter 2006 FELONY DEFENDANTS], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf>; TRACEY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004 (2008) [hereinafter 2004 FELONY DEFENDANTS], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf>. The analysis is also not comprehensive, nor does it rely on any of the modeling techniques we rely on here to examine prediction.

11. *See, e.g.*, HARCOURT, *supra* note 5, at 22–34 (outlining three critiques of prediction, including in the context of sentencing); CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS 10–12 (2007) (discussing dangerousness and punishment in terms of experts' predictions of antisocial behavior by offenders); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1 *passim* (2003) (arguing that the state police power justifies detention based on dangerousness by focusing on sexual predator laws and detention based on propensity to commit sexually deviant acts); Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 122 (2005) (discussing the increasing use of dangerousness to confine individuals and arguing that criminal law should unabashedly embrace the use of dangerousness determinations and strive for prevention of crime).

12. Andreas Mokros et al., *Assessment of Risk for Violent Recidivism Through Multivariate Bayesian Classification*, 16 PSYCHOL. PUB. POL'Y & L. 418, 418 (2010) (noting that Bayesian statistics have already been used to assess violent recidivism and extending Bayesian analysis of violent recidivism to the multivariate case).

13. *See, e.g.*, Timothy P. Cadigan, *Pretrial Services in the Federal System: Impact of the Pretrial Services Act of 1982*, 71 FED. PROBATION 10, 11 (2007) (reporting that pretrial detention rates rose from approximately 40% in 1992 to more than 60% in 2006).

14. *See* 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, 465 (2010) (noting that Oregon, Michigan, Connecticut, Vermont, and Delaware spend more on corrections than on higher education). *Compare* HEATHER C. WEST ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf> (reporting and discussing annual prison statistics), with NAT'L EDUC. ASS'N, RANKINGS AND ESTIMATES: RANKINGS OF THE STATES 2010 AND ESTIMATES OF SCHOOL STATISTICS 2011, at 55 tbl.H-11 (2010), available at http://www.nea.org/assets/docs/HE/NEA_Rankings_and_Estimates010711.pdf (listing state-by-state expenditures per enrolled student). States trying to reduce prison populations are placed in a political predicament due to a change in public view evidenced by forty years of increasing prison capacity and size. *See* TODD R. CLEAR ET AL., AMERICAN CORRECTIONS IN BRIEF 350 (2012) (lamenting the nearly forty-year period of U.S. prison population growth); Elizabeth Napier Dewar, Comment, *The Inadequacy of Fiscal Constraints as a Substitute for Proportionality Review*, 114 YALE L.J. 1177, 1183 (2005)

because the majority of the people in U.S. jails are pretrial defendants, not convicts.¹⁵ And, the total number of people in U.S. jails has tripled from 1985 to 2006.¹⁶ If it can be shown that pretrial detention can be decreased and more defendants can be safely released without a commensurate increase in crime, more defendants will have access to pretrial liberty and due process, counties can save substantial amounts of money on corrections that can be put toward other important social goals, and the public can continue to feel safe at home.

This Article unfolds in four parts. Part II of this Article discusses the history of changes in federal and state law that allow judges to make predictions of future violence and pretrial dangerousness. This part traces the shift from using flight risk as a determinant to considering other factors such as community safety and dangerousness of the defendant for release decisions. Part III of this Article reviews previous empirical studies that look at pretrial violence, crime, and the reliability of various factors in determining which defendants will commit crimes pretrial. It reviews studies conducted historically and examines the effect of the initial charge, past conduct, and age on pretrial crime and court appearance rates. Part IV analyzes our national dataset with several predictive models and concludes that we are largely holding the wrong defendants pretrial. It also concludes that up to 25% more defendants can be released pretrial while maintaining the same level of pretrial crime if we release a larger number of older defendants, defendants with clean records, and defendants charged with fraud and public-order

(suggesting that legislation that would reduce criminal penalties, including imprisonment, is unpopular with constituents and, thus, imposes a “high political cost”).

15. See WILLIAM J. SABOL & TODD D. MINTON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2007, at 5 (2008) [hereinafter INMATES AT MIDYEAR 2007] (reporting that in 2007, 62% of the people in local jails were pretrial defendants); ALLEN J. BECK & JENNIFER C. KARBERG, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2000, at 7 (2001) [hereinafter INMATES AT MIDYEAR 2000] (reporting that “an estimated 56% of the Nation’s adult jail inmates in 2000 were awaiting court action on their current charge”). Over the last two decades, local jails have housed more pretrial detainees than actual convicts. In 1990, the percentage of pretrial detainees was about 50%, but since then, the percentage has climbed. CHERISE FANNO BURDEEN, JAIL POPULATION MANAGEMENT: ELECTED COUNTY OFFICIALS’ GUIDE TO PRETRIAL SERVICES 4 (2009). In 2000, the percentage hovered around 56%, and in 2007, the pretrial detainee population increased to 62% of the jail population. INMATES AT MIDYEAR 2000, *supra*, at 7; INMATES AT MIDYEAR 2007, *supra*, at 7. Based on the authors’ calculation from the *Annual Survey of Jails*, the number of pretrial detainees has increased from 49% of the jail population in 1985 to about 56% of the jail population in 2006. Bureau of Justice Statistics, U.S. Dep’t of Justice, *Annual Survey of Jails: Jurisdiction-Level and Jail-Level Data, 1985*, NAT’L ARCHIVE OF CRIMINAL JUSTICE DATA (Oct. 12, 1987), <http://dx.doi.org/10.3886/ICPSR08687.v1> [hereinafter *1985 Annual Survey of Jails*] (computer file); Bureau of Justice Statistics, U.S. Dep’t of Justice, *Annual Survey of Jails: Jurisdictional Level Data, 2006*, NAT’L ARCHIVE OF CRIMINAL JUSTICE DATA (July 27, 2007), <http://dx.doi.org/10.3886/ICPSR20368.v1> [hereinafter *2006 Annual Survey of Jails*] (computer file).

16. Compare *1985 Annual Survey of Jails*, *supra* note 15 (reporting that the total number of inmates was 209,412), with *2006 Annual Survey of Jails*, *supra* note 15 (reporting that the total number of inmates had ballooned to 602,416).

offenses. Part V sketches out the conclusions of our study and provides a roadmap for future research.

II. History of American Pretrial Prediction

A. Federal Changes in Detention Laws

Under the common law, due process rights combined with the pretrial presumption of innocence to guarantee defendants the right to bail before trial.¹⁷ U.S. federal law largely followed English law by requiring bail to be presumed for all but murder defendants, so long as there was significant proof that the accused committed the alleged crime.¹⁸ The Judiciary Act of 1789 guaranteed bail for all noncapital federal offenses, and most states took a similar approach.¹⁹ In 1944, the adoption of Federal Rule of Criminal Procedure 46 required courts to take into account several factors in setting a bail amount to ensure the defendant's appearance at trial, 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.*"²⁰ Opening the door for judges to consider the "character of the defendant" marked a step toward evaluation of a defendant's dangerousness. Like the Judiciary Act, Federal Rule 46 only allowed consideration of the character of the defendant as it impacted whether the defendant would appear at trial. It did not consider whether the defendant would pose a threat while released. But the culmination of these small steps came with the 1984 Bail Reform Act, which allowed judges to consider whether defendants were dangerous in determining whether to detain them pretrial.

1. *1966 Bail Reform Act.*—The Bail Reform Act of 1966²¹ evolved as a result of a collaboration between Congress and private citizens concerned about excessive pretrial detention of defendants.²² Congress held various

17. See Baradaran, *supra* note 4, at 739 (noting that early U.S. cases assert the importance of the right to bail, sometimes connecting it to due process rights).

18. *Id.* at 728–29.

19. See *id.* at 730 ("In the early nineteenth century, U.S. state and federal courts unanimously agreed that the Constitution entitled the accused to pretrial release except when the crime charged was a capital offense."). However, during this time, many felonies were capital offenses. See, e.g., Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 (designating treason, murder, piracy, counterfeiting, and robbery on the high seas as capital crimes).

20. *Stack v. Boyle*, 342 U.S. 1, 5 n.3 (1951) (emphasis added) (quoting FED. R. CRIM. P. 46(c) (1951) (repealed 1956)).

21. Pub. L. No. 89-465, 80 Stat. 214 (codified at 18 U.S.C. § 1341 (2006)).

22. See, e.g., *Proposals to Modify Federal Bail Procedures: Hearing on S. 1357, S. 646, S. 647, and S. 648 Before the Subcomm. on Constitutional Rights and the Subcomm. on Improvements to Judicial Machinery of the S. Comm. on the Judiciary*, 89th Cong. 27 (1965) (statement of Ramsey Clark, Deputy Att'y Gen. of the United States) (explaining the progress of the Department of Justice in studying the procedures by which U.S. attorneys regularly report to the Attorney General on all detained defendants in order to minimize unnecessary detention); *Bills to Improve Federal Bail*

hearings,²³ ultimately resulting in the 1966 Bail Reform Act, which was based on the philosophy that bail laws' sole purpose is to ensure the court appearance of defendants.²⁴ The 1966 Act included language allowing judges to consider defendants' prior records in determining whether they would be a flight risk.²⁵ As an unintended consequence, the Bail Reform Act of 1966 opened the door for judges to consider additional factors besides flight risk in determining whether to release defendants pretrial.²⁶

2. *District of Columbia Crime Bill.*—In a decidedly controversial crime bill, Congress passed a law in 1970 allowing preventive detention in the District of Columbia.²⁷ This bill—for the first time in U.S. history—allowed judges to detain a defendant pretrial without setting any bail if the defendant was deemed dangerous to society.²⁸ Certainly, judges had set bail at prohibitively high amounts in the past, preventing defendants from obtaining release, but by all measures this was a bill that commentators feared would greatly increase detention.²⁹ The District of Columbia Court of Appeals

Procedures: Hearing on S. 2838, S. 2839, and S. 2840 Before the Subcomm. on Constitutional Rights and the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary, 88th Cong. 148 (1964) (statement of David J. McCarthy, Jr., Director, District of Columbia Bail Project) (identifying a goal of the proposed legislation as crafting a method to halt the frequent refusal of bondsmen to write bonds for invalid reasons); see also Sam J. Ervin, Jr., Foreword: Preventive Detention—A Step Backward for Criminal Justice, 6 HARV. C.R.-C.L. L. REV. 291, 292 (1971) (lauding the collaboration of the legal profession, the Executive Branch, private citizens, and Congress to craft a well-regarded—if only partial—solution to the problem of pretrial release of defendants accused of a crime).

23. Ervin, *supra* note 22, at 292. *Compare Preventive Detention: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, 91st Cong. 210 (1970) (statement of Daniel J. Freed, Professor of Law, Yale Law School) (bemoaning the tendency of preventative detention hearings to determine guilt without the protections of trial and consequently, to result in short-term imprisonment based on inadmissible evidence), with D.C. CODE §§ 23-1321 to -1322 (2001) (calling for pretrial releases of most defendants unless the judicial officer, after conducting a pretrial hearing, cannot be reasonably assured that the defendant will appear as required and poses no danger to the safety of others).*

24. S. REP. NO. 98-147, at 8 (1983). The Supreme Court had held in *Stack v. Boyle* that the only legitimate reason for restricting pretrial freedom is if the defendant is not likely to appear in court. *Stack*, 342 U.S. at 5–6.

25. Bail Reform Act of 1966, Pub. L. No. 89-465, sec. 3, § 3146(b), 80 Stat. 214, 214 (codified at 18 U.S.C. § 3146(b) (2006)).

26. *See Baradaran, supra* note 4, at 741–42 (tracing the courts' movement from solely determining flight risk to also analyzing guilt through consideration of additional factors such as the prevention of crime).

27. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473.

28. *Id.* sec. 210, § 23-1321, 84 Stat. at 642–43; Ervin, *supra* note 22, at 292.

29. *See, e.g.,* Ervin, *supra* note 22, at 293 (stating that while the Bail Reform Act is considered by some to have been a milestone in criminal justice reform, the District of Columbia crime bill and preventive detention are viewed by many as having regressed society back to a time when fear and politics controlled criminal justice); Keith Eric Hansen, *When Worlds Collide: The Constitutional Politics of United States v. Salerno*, 14 AM. J. CRIM. L. 155, 165 (1988) (discussing the fear of preventative detention expressed by Congressman Sam Ervin, Abner Mikva, Lawrence Tribe, and others testifying before Congress and quoting Ervin, who testified that preventative detention was a

decided in *United States v. Edwards*³⁰ to uphold the Act's authorization of detention based on dangerousness, reasoning that preventive detention is not punishment but is, rather, a form of regulation.³¹

3. *The Federal Bail Reform Act of 1984.*—Taking a cue from the D.C. crime bill and a greater public fear of crime, the federal Bail Reform Act of 1984³² took a leap towards preventive detention.³³ Whereas earlier bail reforms in the 1960s were concerned with failure to appear in court and with improving defendants' right to bail, the 1980s reforms focused on protecting the public from danger.³⁴

With no definition, or even a vague definition, of *danger*, scholars have criticized the “danger laws” as too overbroad, stating that just about any defendant could be considered dangerous.³⁵ In 1984, many of the laws allowing danger as a factor in bail decisions did not explicitly define *danger*.³⁶ Out of those states with laws that did define *danger*, scholars claimed that half of the definitions were vague.³⁷

The 1984 Bail Reform Act has been challenged in court but has been upheld³⁸ and even amended to further decrease pretrial release for defendants.³⁹ Right away, there were a number of constitutional challenges to the 1984 Act—claims of vagueness, violation of the right to bail, the presumption of innocence, due process, and freedom from excessive bail that courts rejected individually.⁴⁰ One such challenge where the Supreme Court

“radical departure” from American law and argued that “if our country is going to remain a free society it has got to take certain risks and one of those risks is that persons who are released prior to their trial may commit another crime”).

30. 430 A.2d 1321 (D.C. 1981).

31. *Id.* at 1332–33.

32. Pub. L. No. 98-473, tit. II, ch. I, 98 Stat. 1976, 1976–87 (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C. § 636, FED. R. CRIM. P., and FED. R. APP. P. 9(c)).

33. John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 1, 4–6 (1985).

34. *Id.* at 2.

35. E.g., Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. CRIM. L. & CRIMINOLOGY 415, 422–24 (1996); Goldkamp, *supra* note 33, at 27; Jack F. Williams, *Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325, 336–38, 343–44 (1994).

36. Goldkamp, *supra* note 33, at 1, 17, 29–30 (asserting that though there is a great margin of error associated with predicting future danger, prediction will continue to be practiced because it has been traditionally practiced and because it became institutionalized in the legislation of the 1980s).

37. *Id.* at 18. References to danger in bail laws appear in provisions excluding defendants from the right to bail, in provisions discussing conditions of release, and in provisions discussing specific factors to be considered in fixing bail or conditions of release. *Id.* at 19.

38. *Id.* at 45–46.

39. Compare 18 U.S.C. § 3142(f) (2000), with 18 U.S.C. § 3142(f) (2006) (adding numerous offenses to the list of those for which a court must consider whether pretrial release will ensure both that the defendant will appear in court and the safety of the community).

40. See *United States v. Jessup*, 757 F.2d 378, 384–87 (1st Cir. 1985) (holding that the Act's imposition of a rebuttable presumption that a defendant charged with a serious drug offense will flee before trial did not deprive defendants of liberty without due process of law); *United States v.*

legitimized pretrial detention was *Schall v. Martin*.⁴¹ The Court upheld detention of a juvenile based on anticipated future crime, stressing that “crime prevention is ‘a weighty social objective.’”⁴² The Court conceded that prediction of future criminal conduct is not readily codified, but felt that “from a legal point of view there is nothing inherently unattainable” about it and that it is “an experienced prediction based on a host of variables.”⁴³ With this and the decision in *United States v. Salerno*⁴⁴ upholding the 1984 Act, federal judges were able to detain defendants if they were deemed a flight risk or dangerous.⁴⁵

B. State Changes in Danger Laws

Before the 1984 Bail Reform Act, various states had passed legislation allowing judges to consider the danger posed by defendants to the community in making their bail determinations.⁴⁶ Some state laws listed general 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 only on the criminal charge and prior criminal record of the defendant.⁴⁷ By 1978, twenty-three states and the District of Columbia had passed legislation pointing to danger as a factor in bail decisions;⁴⁸ by 1984, this had grown to thirty-four states and the District of Columbia.⁴⁹ During this time, one legal scholar cautioned that in determining dangerousness, there should be “precise legal standards,” methods of prediction “subjected to careful and continuous validation,” and

Hazzard, 598 F. Supp. 1442, 1448–49 (N.D. Ill. 1984) (holding that the Eighth Amendment did not grant defendants a right to bail and also holding that the Act’s capacity to deny defendants bail did not constitute an unconstitutional imposition of excessive bail); *United States v. Payden*, 598 F. Supp. 1388, 1395–97 (S.D.N.Y. 1984) (rejecting a vagueness challenge to the Act on the grounds that the Act specified certain factors to be considered in ordering detention and also holding that there was no conflict between the Act and the presumption of innocence).

41. 467 U.S. 253 (1984).

42. *Id.* at 264 (quoting *Brown v. Texas*, 443 U.S. 47, 52 (1979)); *id.* at 278–79.

43. *Id.* at 278–79 (quoting *Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 16 (1979)).

44. 481 U.S. 739 (1987).

45. *See id.* at 747 (holding that preventing danger to the community is a legitimate regulatory goal).

46. *E.g.*, FLA. STAT. ANN. § 907.041(1) (West 1985); *see also* Goldkamp, *supra* note 33, at 1, 5 (noting that state legislatures scrutinized their bail practices in response to heightened public fear of crime in the 1980s, and observing that a shift in emphasis toward protecting the public from dangerous defendants started appearing in state legislation prior to the federal 1984 Act).

47. Goldkamp, *supra* note 33, at 9–10.

48. *Id.* at 15. The states were Alabama, Alaska, Arkansas, Colorado, Delaware, Kentucky, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont, Virginia, and Washington. *Id.* at 15 n.56 (citing JOHN GOLDKAMP, TWO CLASSES OF ACCUSED (1979)).

49. *Id.* at 15. Arizona, California, Florida, Georgia, Hawaii, Illinois, Indiana, Massachusetts, Nevada, South Dakota, and Wisconsin were the additional states. *Id.* at 15 n.57.

defendants provided with “certain minimal procedural safeguards.”⁵⁰ While most state laws enacted during this period provided defendants with some procedural safeguards such as a hearing before detention, the laws did not establish precise legal standards for judges to use in predicting dangerousness, and those determinations were not carefully monitored.⁵¹

To date, forty-eight states and the District of Columbia have enacted laws permitting courts to either detain or conditionally release defendants determined to be dangerous.⁵² All danger laws include some method for determining dangerousness, but the laws vary by state. These state laws are depicted in Table 1.

1. Determining Dangerousness.—In determining whether the accused is too dangerous to release prior to conviction, state courts consider three main categories: (1) the circumstances surrounding the present offense charged, (2) the defendant’s past conduct, and (3) judicial discretion regarding the defendant’s circumstances and character.⁵³ Many states use the first two categories in an attempt to objectively determine which defendants pose a risk to public safety. For example, states often create a statutory rebuttable presumption for defendants charged with specific crimes.⁵⁴ Similarly, some

50. Andrew von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFF. L. REV. 717, 725 (1972).

51. See Fagan & Guggenheim, *supra* note 35, at 417–18 (explaining that the new state statutes were often insufficiently precise in defining detention eligibility).

52. For the laws of forty-six of the jurisdictions, see *infra* notes 53–55. For the remaining two, see IDAHO CODE ANN. § 19-2904 (Supp. 2011) and N.D. R. CRIM. P. 46.

53. ALA. R. CRIM. P. 7.2(a); CAL. CONST. art. I, § 12; CAL. PENAL CODE §§ 1270.5, 1275(a) (West 2011); COLO. REV. STAT. ANN. § 16-4-105(1)(h) (West Supp. 2010); CONN. GEN. STAT. ANN. § 54-64a(b)(1), (2) (West 1958); DEL. CODE ANN. tit. 11, § 2105(b) (2007); IND. CODE ANN. § 35-33-8-4(b) (West 2004); IOWA CODE ANN. § 811.2(2) (West 2003); KAN. STAT. ANN. § 22-2802(8) (Supp. 2010); ME. REV. STAT. ANN. tit. 15, § 1026(4) (West Supp. 2010); MASS. GEN. LAWS ANN. ch. 276, § 58 (West Supp. 2011); MINN. R. CRIM. P. 6.02(2); MO. REV. STAT. ANN. § 544.457 (West 2002); NEB. REV. STAT. § 29-901.01 (2008); N.H. REV. STAT. ANN. § 597:2(III-a) (Supp. 2010); N.M. CONST. art. II, § 13; N.M. R. CRIM. P. FOR DIST. CTS. 5-401(c); N.C. GEN. STAT. § 15A-534(c) (Supp. 2010); OHIO CONST. art. I, § 9; OHIO REV. CODE ANN. § 2937.222(C) (West 2006); S.C. CODE ANN. § 17-15-30 (Supp. 2010); S.D. CODIFIED LAWS § 23A-43-4 (2004); TEX. CODE CRIM. PROC. ANN. art. 17.15(3) (West 2009); UTAH CODE ANN. § 77-20-1 (LexisNexis 2008); VT. STAT. ANN. tit. 13, § 7554(b) (Supp. 2010); WASH. R. CRIM. P. 3.2(b).

54. ALASKA STAT. § 12.30.011(d)(2) (2010); ARIZ. REV. STAT. ANN. § 13-3961(A), (G) (West 1956); DEL. CONST. art. I, § 12; DEL. CODE ANN. tit. 11, § 2103(a), (b) (2007); FLA. STAT. ANN. §§ 907.041(4)(a), (c)(5) (West Supp. 2011); GA. CODE ANN. § 17-6-1 (Supp. 2011); HAW. REV. STAT. ANN. §§ 804-3(a), (c) (LexisNexis 2007); ILL. CONST. art. I, § 9; 725 ILL. COMP. STAT. 5/110-4-5(a) (West Supp. 2011); IND. CONST. art. I, § 17; IND. CODE ANN. §§ 35-33-8-2 (West 2004), 35-33-8-3.5(c) (West Supp. 2011); KY. R. CRIM. P. 4.02; LA. CODE CRIM. PROC. ANN. art. 330 (2003); MD. CODE ANN., CRIM. PROC. § 5-202(a)–(f) (LexisNexis Supp. 2010); MICH. CONST. art. I, § 15; MICH. COMP. LAWS ANN. § 765.5 (West 2000); MISS. CONST. art. III, § 29(3); MONT. CODE ANN. § 46-9-106(2) (2011); NEV. CONST. art. I, § 7; OHIO CONST. art. I, § 9; OKLA. STAT. tit. 22, § 1101(D) (Supp. 2010); OR. CONST. art. I, § 43; OR. REV. STAT. ANN. § 135.240 (West 2009); PA. CONST. art. I, § 14; 42 PA. CONS. STAT. ANN. § 5701 (West Supp. 2011); R.I. CONST. art. I, § 9; S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 8; TENN. CONST. art. I, § 15; TEX. CONST. art. I, §§ 11, 11a; UTAH CODE ANN. § 77-20-1(1) (LexisNexis 2008); VT. STAT. ANN.

statutes create a rebuttable presumption of detention if a defendant has previously been convicted of certain enumerated violent crimes.⁵⁵ The third category, in contrast to the first two objective inquiries, allows a much more subjective judicial assessment, permitting judges to consider the totality of the defendant's character and present circumstances.⁵⁶

a. Present Offense Charged.—Courts analyze the nature of the alleged crime to predict the dangerousness of the defendant. In the 1980s, many judges relied predominantly on the criminal charge in determining whether to detain an individual.⁵⁷ Of the forty-six jurisdictions that allow pretrial detention of dangerous defendants, only two jurisdictions do not include some aspect of the present offense charged as a factor in determining whether the defendant is dangerous.⁵⁸ The remaining forty-four jurisdictions

tit. 13, § 7553 (2009), tit. 13, § 7553a (Supp. 2010); VA. CODE ANN. § 19.2-120 (B)–(E) (Supp. 2010); WASH. R. CRIM. P. 3.2(a), (e); WIS. CONST. art. I, § 8(3).

55. ALASKA STAT. § 12.30.011(d)(2)(b) (2010); HAW. REV. STAT. ANN. § 804-3(c)(1) (2007); MD. CODE ANN., CRIM. PROC. § 5-202(f)(1) (LexisNexis Supp. 2010); MICH. CONST. art. I, § 15(a); *see also* GA. CODE ANN. § 17-6-1(e)(4) (Supp. 2011) (creating the presumption if the current charge and a previous conviction were of the type enumerated in the statute).

Other states allow the court to consider a defendant's criminal history when making bail determinations. ALA. R. CRIM. P. 7.2(a)(3); ARK. R. CRIM. P. 8.5(b)(vii); CAL. CONST. art. I, § 12; COLO. REV. STAT. ANN. § 16-4-105(1)(i) (West Supp. 2010); CONN. GEN. STAT. ANN. § 54-64a(b)(2)(B) (West 1958); DEL. CODE ANN. tit. 11, § 2105(b) (2007); D.C. CODE § 23-1322(e)(3)(A) (2001); FLA. STAT. ANN. § 907.041(3)(b)(2) (West Supp. 2011); 725 ILL. COMP. STAT. ANN. 5/110-6.1(d)(2)(A) (West 2006); IND. CODE ANN. § 35-33-8-4(b)(5) (West 2004); IOWA CODE ANN. § 811.2(2) (West 2003); KAN. STAT. ANN. § 22-2802(8) (Supp. 2010); LA. CODE CRIM. PROC. ANN. art. 334(8) (2003); ME. REV. STAT. ANN. tit. 15, § 1026(4)(C)(7) (Supp. 2010); MASS. GEN. LAWS ANN. ch. 276, § 58 (West Supp. 2011); MINN. R. CRIM. P. 6.02(2)(h); MO. REV. STAT. ANN. § 544.455(2) (West 2002); NEB. REV. STAT. § 29-901.01 (2008); NEV. REV. STAT. § 178.4853(5) (2009); N.M. R. CRIM. P. FOR DIST. CTS. 5-401(C)(3)(h); N.C. GEN. STAT. § 15A-534(c) (Supp. 2010); OHIO REV. CODE ANN. § 2937.222(C)(3)(a) (West 2006); R.I. GEN. LAWS § 12-13-1.3(c)(7) (2002); S.C. CODE ANN. § 17-15-30(b)(1) (Supp. 2010); S.D. CODIFIED LAWS § 23A-43-4 (2004); TENN. CODE ANN. § 40-11-115(b)(5) (2006); VT. STAT. ANN. tit. 13, § 7554(b) (Supp. 2010); VA. CODE ANN. § 19.2-120(D)(2) (Supp. 2011); WASH. R. CRIM. P. 3.2(b); W. VA. CODE ANN. § 62-1C-3 (LexisNexis 2010); WIS. STAT. ANN. § 969.01(4) (West Supp. 2010); WYO. R. CRIM. P. 46.1(d)(3).

56. ALA. R. CRIM. P. 7.2(a)(1)–(13); ALASKA STAT. § 12.30.011(c) (2010); COLO. REV. STAT. ANN. § 16-4-105(c)–(j) (West Supp. 2010); CONN. GEN. STAT. ANN. § 54-64a(b)(2) (West 1958); DEL. CODE ANN. tit. 11, § 2105(b) (2007); D.C. CODE § 23-1322(e)(3) (2001); FLA. R. CRIM. P. 3.131(b)(3); 725 ILL. COMP. STAT. ANN. 5/110-6.1(d)(2) (West 2006); IND. CODE ANN. § 35-33-8-4(b) (West 2004); IOWA CODE ANN. § 811.2(2) (West 2008); KAN. STAT. ANN. § 22-2802(8) (2007); ME. REV. STAT. ANN. tit. 15, § 1026(4)(C) (West Supp. 2010); MASS. GEN. LAWS ANN. ch. 276, § 58 (West Supp. 2011); MINN. R. CRIM. P. 6.02(2)(c)–(m); NEB. REV. STAT. § 29-901.01 (2008); NEV. REV. STAT. § 178.4853 (2009); N.M. R. CRIM. P. FOR DIST. CTS. 5-401(C)(3); N.C. GEN. STAT. § 15A-534(c) (Supp. 2010); OHIO REV. CODE ANN. § 2937.222(C)(3) (West 2006); R.I. GEN. LAWS § 12-13-1.3(c)(3)–(10) (2002); S.C. CODE ANN. § 17-15-30 (Supp. 2010); S.D. CODIFIED LAWS § 23A-43-4 (2004); TENN. CODE ANN. § 40-11-115(b) (2006); VT. STAT. ANN. tit. 13, § 7554(b) (Supp. 2010); VA. CODE ANN. § 19.2-120(D)(2) (Supp. 2011); WASH. R. CRIM. P. 3.2(b); WYO. R. CRIM. P. 46.1(d).

57. *See, e.g.*, ARIZ. CONST. art. II, § 22(3); MICH. CONST. art. I, § 15; WIS. CONST. art. I, § 8; MINN. STAT. § 629.72 (1983); N.Y. CRIM. PROC. LAW §§ 530.12, 530.13 (1984).

58. IDAHO CODE ANN. § 19-2904 (Supp. 2011); N.D. R. CRIM. P. 46.

use the present offense charged to restrict the scope of pretrial detention authority⁵⁹ and require or permit judicial officers to consider the present offense in the exercise of judicial discretion.⁶⁰

Some states constrain judicial discretion in dangerousness assessments by creating a presumption of detention or release based on the nature of the crime.⁶¹ Where there is a presumption based on the charges, judges are able to avoid making subjective determinations.

b. Defendants' Past Conduct.—In addition to considering the present offense charged, thirty-seven states consider some aspect of the defendant's prior conduct.⁶² Specifically, thirty-four states and the District of

59. ARIZ. REV. STAT. ANN. § 13-3961 (2010); CAL. CONST. art. I, § 12; CAL. PENAL CODE § 1270.5 (West 2011); CONN. GEN. STAT. ANN. § 54-64a(b)(1) (West 1958); DEL. CONST. art. I, § 12; DEL. CODE ANN. tit. 11, § 2103(a) (2007); FLA. STAT. ANN. § 907.041(4) (West Supp. 2011); GA. CODE ANN. § 17-6-1(a)–(b) (2008); HAW. REV. STAT. §§ 804-3(a)–(c), 840-8 (LexisNexis 2007); ILL. CONST. art. I, § 9; 725 ILL. COMP. STAT. ANN. 5/110-4 (West Supp. 2011); IND. CONST. art. I, § 17; IND. CODE ANN. §§ 35-33-8-2, 35-33-8-3.5 (West 2004 & Supp. 2011); LA. CONST. art. I, § 18; MD. CODE ANN., CRIM. PROC. § 5-202(a)–(f) (Supp. 2010); MASS. GEN. LAWS ANN. ch. 276, § 58 (West Supp. 2011); MICH. CONST. art. I, § 15; MICH. COMP. LAWS ANN. § 765.5 (West 2000); MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 29(3); MONT. CODE ANN. § 46-9-106(2) (2011); NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 7; NEV. REV. STAT. § 178.484 (2009); N.M. CONST. art. II, § 13; OHIO CONST. art. I, § 9; OHIO REV. CODE ANN. § 2937.222(A) (West 2006); OKLA. CONST. art. II, § 8; OKLA. STAT. ANN. tit. 22, § 1101(A) (West Supp. 2011); OR. CONST. art. I, § 43; OR. REV. STAT. § 135.240 (2009); PA. CONST. art. I, § 14; 42 PA. CONS. STAT. ANN. § 5701 (West Supp. 2011); R.I. CONST. art. I, § 9; S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 8; TENN. CONST. art. I, § 15; TEX. CONST. art. I, § 11; UTAH CODE ANN. § 77-20-1 (LexisNexis 2008); VT. STAT. ANN. tit. 13, §§ 7553, 7553a (2009); VA. CODE ANN. § 19.2-120(B)–(E); WASH. R. CRIM. P. 3.2(a); WIS. CONST. art. I, § 8 (3).

60. ALA. R. CRIM. P. 7.2(a)(6); ALASKA STAT. § 12.30.011(c)(1) (2010); CAL. PENAL CODE § 1275(a) (West 2011); COLO. REV. STAT. ANN. § 16-4-105(1)(h) (West Supp. 2011); CONN. GEN. STAT. ANN. § 54-64a(b)(2) (West 1958); DEL. CODE ANN. tit. 11, § 2105(b) (2007); D.C. CODE § 23-1322(e)(1) (Supp. 2011); FLA. STAT. ANN. § 907.041(c)(5) (West Supp. 2011); GA. CODE ANN. § 17-6-1(e) (Supp. 2011); 725 ILL. COMP. STAT. ANN. 5/110-5(a) (West Supp. 2011); IND. CODE ANN. § 35-33-8-4(b)(7) (West 2004); IOWA CODE ANN. § 811.2(2) (West 2003); KAN. STAT. ANN. § 22-2802(8) (2007); LA. CODE CRIM. PROC. ANN. art. 334(1) (2003); ME. REV. STAT. ANN. tit. 15, § 1026(4)(A) (Supp. 2010); MASS. GEN. LAWS ANN. ch. 276, § 58 (West Supp. 2011); MICH. COMP. LAWS ANN. § 765.6(1)(a) (West Supp. 2011); MINN. R. CRIM. P. 6.02(2)(a); MO. ANN. STAT. § 544.455(2) (West 2002); MONT. CODE ANN. § 46-9-301(5) (2011); NEB. REV. STAT. § 29-901.01 (2008); NEV. REV. STAT. § 178.4853(7) (2009); N.H. REV. STAT. ANN. § 597:2(III-a) (Supp. 2010); N.M. R. CRIM. P. FOR DIST. CTS. 5-401(C)(1); N.C. GEN. STAT. § 15A-534(c) (Supp. 2010); OHIO REV. CODE ANN. § 2937.222(C)(1) (West 2006); S.C. CODE ANN. § 17-15-30(B)(2) (Supp. 2010); S.D. CODIFIED LAWS § 23A-43-4 (2004); TENN. CODE ANN. § 40-11-115(b)(7) (2006); TEX. CODE CRIM. PROC. ANN. art. 17.15(3) (West 2005); UTAH CODE ANN. § 77-20-1 (LexisNexis 2008); VT. STAT. ANN. tit. 13, § 7554(b) (Supp. 2010); VA. CODE ANN. § 19.2-120(D)(1) (Supp. 2011); WASH. R. CRIM. P. 3.2(b); WYO. R. CRIM. P. 46.1(d)(1).

61. *See, e.g.*, HAW. REV. STAT. ANN. § 804-3(c) (LexisNexis 2007); MD. CODE ANN., CRIM. PROC. § 5-202(a)–(d) (LexisNexis Supp. 2011); N.C. GEN. STAT. § 15A-533(d)–(e) (2009); OKLA. STAT. ANN. tit. 22, § 1101(d) (West Supp. 2011); R.I. GEN. LAWS § 12-13-5.1 (2002); VA. CODE ANN. § 19.2-120(B)–(E) (Supp. 2010). Georgia has a rebuttable presumption based on the nature of the crime, but the presumption only applies when the defendant has a previous conviction for certain enumerated crimes. GA. CODE ANN. § 17-6-1(e) (Supp. 2011).

62. *See supra* note 55.

Columbia allow some degree of review of the defendant's prior convictions in determining dangerousness.⁶³ Some statutes allow full review of the accused's criminal record,⁶⁴ while others allow only the portions of the record that relate to a dangerousness determination⁶⁵ or only certain types of crimes.⁶⁶ Twenty-five jurisdictions either require or allow judges to consider the defendant's record of appearances, or past conduct while on bond or supervised release.⁶⁷

63. ALA. R. CRIM. P. 7.2(a)(3); ALASKA STAT. § 12.30.011(c)(6) (2010); CAL. CONST. art. I, § 12; CONN. GEN. STAT. ANN. § 54-64a (b)(2)(B) (West 1958); DEL. CODE ANN. tit. 11, § 2105(b) (2007); D.C. CODE § 23-1322(e)(3) (2001); FLA. STAT. ANN. § 907.041(3)(b)(2) (West Supp. 2011); GA. CODE ANN. § 17-6-1(e) (Supp. 2011); HAW. REV. STAT. ANN. § 804-3(c)(1) (LexisNexis 2007); 725 ILL. COMP. STAT. ANN. 5/110-6.1(d)(2)(A) (West 2006); IND. CODE ANN. § 35-33-8-4 (b)(5) (West 2004); IOWA CODE ANN. § 811.2(2) (West 2003); KAN. STAT. ANN. § 22-2802(8) (2007); LA. CODE CRIM. PROC. ANN. art. 334(3) (2003); MD. CODE ANN., CRIM. PROC. § 5-202(f)(1) (LexisNexis Supp. 2010); NEV. REV. STAT. § 178.4853(5) (2009); N.M. R. CRIM. P. FOR DIST. CTS. 5-401(C)(3)(h); N.C. GEN. STAT. § 15A-534(c) (Supp. 2010); OHIO REV. CODE ANN. § 2937.222(C)(3)(a) (West 2006); R.I. GEN. LAWS § 12-13-1.3(c)(7) (2002); S.C. CODE ANN. § 17-15-30(B)(1) (Supp. 2010); TENN. CODE ANN. § 40-11-115(b)(5) (2006); VT. STAT. ANN. tit. 13, § 7554(b) (Supp. 2010); VA. CODE ANN. § 19.2-120(D)(2) (Supp. 2011); WASH. R. CRIM. P. 3.2(b); WIS. STAT. ANN. § 969.01(4) (West Supp. 2010); WYO. R. CRIM. P. 46.1(d).

In some states that allow this review, the statutes do not specify that the judge should consider a defendant's prior convictions specifically in light of how dangerous they are. COLO. REV. STAT. ANN. § 16-4-105(1)(i) (West Supp. 2010); ME. REV. STAT. ANN. tit. 15, § 1026(4)(C)(7) (Supp. 2010); MASS. GEN. LAWS ANN. ch. 276, § 58 (West Supp. 2011); MICH. CONST. art. I, § 15(a); MINN. R. CRIM. P. 6.02(2)(h); MO. ANN. STAT. § 544.455(2) (West 2002); NEB. REV. STAT. § 29-901.01 (2008); S.D. CODIFIED LAWS § 23A-43-4 (2004).

64. *See, e.g.*, IOWA CODE ANN. § 811.2(2) (West 2003) (stating that the court may consider the defendant's record, including failure to pay fines or failure to appear at court proceedings); *see also* LA. CODE CRIM. PROC. ANN. art. 334(8) (2003) (allowing a court to consider "[w]hether the defendant is currently out on bond on a previous felony arrest" in addition to the defendant's criminal record).

65. *See, e.g.*, 725 ILL. COMP. STAT. ANN. 5/110-6.1(d)(2)(A) (West 2006) (requiring that, to be considered, the defendant's criminal history be relevant to "violent, abusive, or assaultive behavior"); *see also* IND. CODE ANN. § 35-33-8-4(b)(5) (West 2004) (specifying that the defendant's criminal record must be indicative of "instability and a disdain for the court's authority").

66. *See, e.g.*, GA. CODE ANN. § 17-6-1(e) (Supp. 2011) (creating a rebuttable presumption against bail release when the defendant is charged with a serious violent felony and has been previously convicted of a serious violent felony); *see also* MD. CODE ANN., CRIM. PROC. § 5-202(f)(1) (LexisNexis Supp. 2010) (forbidding the defendant's release on bail if the defendant was previously convicted of one of the crimes enumerated in § 5-202(f)(1) and is currently charged with one of the enumerated crimes).

67. ALA. R. CRIM. P. 7.2(a)(3); ALASKA STAT. § 12.30.011(c)(7) (2010); ARK. R. CRIM. P. 8.5(b)(vii); COLO. REV. STAT. ANN. § 16-4-105(1)(i) (West 2006); CONN. GEN. STAT. ANN. § 54-64a(a)(2)(C) (West 1958); DEL. CODE ANN. tit. 11, § 2105(b) (2007); D.C. CODE § 23-1322(e)(3)(A) (Supp. 2011); FLA. STAT. ANN. § 903.046(2)(d) (West Supp. 2011); 725 ILL. COMP. STAT. ANN. § 5/110-5(a) (West Supp. 2011); IND. CODE § 35-33-8-4(b) (West 2004); KAN. STAT. ANN. § 22-2802(8) (Supp. 2010); ME. REV. STAT. ANN. tit. 15, § 1026(4)(c)(8), (11) (Supp. 2010); MD. CODE ANN., CRIM. PROC. § 5-202(d)(1) (LexisNexis Supp. 2011); MASS. GEN. LAWS ANN. ch. 276, § 58 (West Supp. 2011); MO. ANN. STAT. § 544.455(2) (West 2002); NEB. REV. STAT. § 29-901.01 (2008); NEV. REV. STAT. § 178.4853(5) (2009); N.Y. CRIM. PROC. LAW § 51.30(2)(a) (McKinney 2009); OHIO REV. CODE ANN. § 2937.222(C)(3)(b) (West 2006); S.C. CODE ANN. § 17-15-30(A)(7) (Supp. 2010); TENN. CODE ANN. § 40-11-118(b)(5) (Supp. 2010); VT. STAT. ANN.

A substantial minority of states allow for an even deeper look into a defendant's background by allowing judges to factor the defendant's "past conduct" into their determination.⁶⁸ A few states explicitly mention the defendant's history of violence generally as important to evaluating prior conduct.⁶⁹

c. Defendants' Character and Present Circumstances.—The third major factor for determining dangerousness is much broader and allows for judicial discretion in analyzing the circumstances and character of the defendant. Twenty-six states and the District of Columbia urge the court to consider a specific series of factors substantially similar to the factors set forth in the Federal Bail Reform Act, which include the accused's (1) family situation, (2) employment, (3) finances, (4) character and reputation, (5) record of appearances or history of flight, and (6) community ties.⁷⁰ However, state danger laws include a variety of additional relevant factors not included in the Bail Reform Act, such as alien status,⁷¹ gang involvement,⁷² possession or control of weapons,⁷³ propensity for violence,⁷⁴ general attitude and demeanor,⁷⁵ history of depression,⁷⁶ and treatment of animals.⁷⁷ Many state danger laws begin the list of factors with an

tit. 13, § 7554(b) (Supp. 2011); VA. CODE ANN. § 19.2-120(D)(2) (Supp. 2011); WASH. REV. CODE ANN. § 10.21.050(3)(a)–(b) (West Supp. 2011); WYO. R. CRIM. P. 46.1(d).

68. *See, e.g.*, D.C. CODE § 23-1322(e)(3) (2001) (allowing inquiry into a defendant's "past conduct" including criminal history and court record); ME. REV. STAT. ANN. tit. 15, § 1026(4)(C) (Supp. 2010) (prescribing consideration of the defendant's "history and characteristics"); N.M. R. OF CRIM. PROC. FOR DIST. CTS. 5-401(C)(3) (allowing inquiry into "history and characteristics"); OHIO REV. CODE ANN. § 2937.22(C)(3) (West 2006) (focusing on "history and characteristics"); VA. CODE ANN. § 19.2-120(D)(2) (Supp. 2011) (focusing on "history and characteristics").

69. *See* CONN. GEN. STAT. ANN. § 54-64a(b)(2)(J) (West 1958) (allowing consideration of the defendant's "history of violence"); 725 ILL. COMP. STAT. ANN. 5/110-5.1(b)(1) (West Supp. 2011) (weighing evidence of violent behavior); VT. STAT. ANN. tit. 13, § 7554(b) (Supp. 2010) (considering recent history of violence).

70. *See* statutes cited *supra* note 56.

71. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3961(A)(5) (2010) (refusing to allow bail if the person committed a serious felony and there is probable cause to believe the person is in the United States illegally).

72. ARIZ. REV. STAT. ANN. § 13-3961(G) (2010); GA. CODE ANN. § 17-6-1(f)(4) (Supp. 2011); 725 ILL. COMP. STAT. ANN. 5/110-5(a) (West Supp. 2011); VA. CODE ANN. § 19.2-120(D)(2) (Supp. 2011).

73. 725 ILL. COMP. STAT. ANN. 5/110-6.1(d)(6) (West 2006); N.H. REV. STAT. ANN. § 597:2(III-a)(d) (Supp. 2010); WASH. R. CRIM. P. 3.2(b); *see also* ALA. R. CRIM. P. 7.2(a)(7) (instructing a judge to consider the type of weapon used in the crime).

74. 725 ILL. COMP. STAT. ANN. 5/110-6.1(d)(8) (West 2006); KAN. STAT. ANN. § 22-2802(8) (2007).

75. *See* *Querubin v. Commonwealth*, 795 N.E.2d 534, 542 (Mass. 2003) (quoting *Commonwealth v. Hodge* (No. 1), 406 N.E.2d 1010 (Mass. 1980)) (including "general attitude and demeanor" in the list of factors a judge should consider when setting bail).

76. N.H. REV. STAT. ANN. § 597:2(III-a)(b) (Supp. 2010).

77. *Id.* § 597:2(III-a)(g).

“including but not limited to” clause, or permit judicial officers to consider “any other factor” relevant to making a determination of dangerousness.⁷⁸

Seven state danger laws do not include any list of factors for courts to consider in exercising judicial discretion.⁷⁹ However, in some states, where the legislature has included no specific factors for consideration, state courts have judicially created factors to consider in determining dangerousness.⁸⁰ California law now mandates that public safety is the first consideration in determining bail,⁸¹ while traditional factors such as the nature of the charge and the defendant’s prior criminal record are secondary considerations.⁸² California also requires pretrial detention for serious felonies involving violence or sexual predation.⁸³ Only one state allows absolute discretion to judges regardless of the present offense charged or prior criminal convictions.⁸⁴

After finding that a defendant poses a danger to an individual or the community, forty-five states and the District of Columbia permit either (1) pretrial detention or (2) release subject to restrictive conditions, depending on the seriousness of the danger posed.⁸⁵ Many of the statutes

78. *E.g.*, FLA. STAT. ANN. § 907.041(3)(b)(3) (West Supp. 2011); IND. CODE ANN. § 35-33-8-4(b)(9) (West 2004); ME. REV. STAT. ANN. tit. 15, § 1026(4)(C)(9-A) (Supp. 2010); MO. ANN. STAT. § 544.676 (West 2002); NEV. REV. STAT. § 178.4853(10) (2009); N.H. REV. STAT. ANN. § 597:2(III) (Supp. 2010); N.M. R. CRIM. P. FOR DIST. CTS. 5-401(C)(5); OHIO R. CRIM. P. 46(C); R.I. GEN. LAWS § 12-13-1.3(c) (2002); TENN. CODE ANN. § 40-11-118(b)(9) (Supp. 2010); WASH. SUP. CT. CRIM. R. 3.2(e).

79. IDAHO CODE ANN. § 19-2904 (Supp. 2011); KY. REV. STAT. ANN. § 431.520 (LexisNexis 2010); KY. R. CRIM. P. 4.10; MONT. CODE ANN. § 46-9-106 (2011); N.D. R. CRIM. P. 46(a)(3)(G); TEX. CODE CRIM. PROC. ANN. art. 17.15 (West 2005); UTAH CODE ANN. § 77-20-1(2) (LexisNexis 2008).

80. For example, the Idaho Supreme Court held,

The statute makes this decision an occasion for the exercise of the sound legal discretion of the district court. These cases, however, are not entirely consistent with respect to the standard which this Court should apply to determine whether bail was improperly denied. The district court should consider (1) whether the defendant is prosecuting his appeal in good faith, (2) the personal situation of the defendant, (3) the nature and circumstances of the offense, (4) the defendant’s past record, (5) the possibility that the defendant will commit additional offenses, and (6) the possibility that the defendant will attempt to escape.

State v. Jimenez, 456 P.2d 784, 789 (Idaho 1969) (footnote omitted).

81. CAL. PENAL CODE §§ 1270(a), 1275(a) (West 2011).

82. *Id.* § 1275(a).

83. *See* CAL. CONST. art. I, § 12(b)–(c) (declaring that a person “shall be released on bail,” except for felony offenses involving acts of violence, sexual assault, or threats of great bodily harm where the court finds that there is a substantial likelihood that the person would harm another if released); *Ex parte* Page, 255 P. 887, 888 (Cal. Dist. Ct. App. 1927) (explaining that an individual charged with a capital offense may be denied bail if the evidence “induces the belief that he may have committed the offense”). *See generally In re* Christie, 112 Cal. Rptr. 2d 495, 497–98 (Cal. Ct. App. 2001) (describing various factors and procedures used by California courts when setting bail).

84. N.D. R. CRIM. P. 46.

85. Sometimes, a judge will take dangerousness into account and release a defendant on certain conditions for release. For example, the accused may have to participate in alcohol treatment (if alcohol abuse is possibly the underlying cause of dangerousness) or will have to stay away from a

prohibit detention if conditional release would prevent flight and protect the public from danger.⁸⁶ Similarly, many statutes require that the court impose the “least onerous” or “least restrictive” condition that will ensure the defendant’s appearance and protect any person or the community.⁸⁷

While states have different considerations and definitions of dangerousness, the majority of states currently allow judges to detain the accused pretrial based on predictions of dangerousness. The next part discusses past studies that have looked at which factors accurately predict pretrial violence.

III. Past Studies on Predictions of Violence

A number of studies have been performed over the last fifty years in order to examine various bail systems, pretrial detention programs, and predictions of pretrial crime. This part reviews the major studies and their conclusions. Most of these studies have a small sample, are locally limited, and, for the most part, are outdated and less predictive than our analysis in Part IV.

A. Foote’s Philadelphia Bail Study (1954)

The Philadelphia Bail Study, conducted by Caleb Foote in 1954,⁸⁸ documented inequities in bail and detention practices, and it served as a catalyst for many bail reforms in both Philadelphia and the rest of the country.⁸⁹ Foote examined bail-hearing records for 501 Philadelphia defendants and found evidence that judges relied heavily on defendants’ criminal charges when determining bail.⁹⁰ This reliance on the charge criterion provided judges with a fast and easy standard to apply to a large volume of cases.⁹¹ The data indicated the opposite of what was expected: those charged with less serious offenses were less likely to appear in court.⁹²

certain person or people. Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 11–12 (2008). GPS bracelets and home detention are other examples of conditional release. Cf. *In re McSherry*, 5 Cal. Rptr. 3d 497, 499–502 (Cal. Ct. App. 2003) (describing various bail restrictions and release conditions based on safety concerns).

86. E.g., MONT. CODE ANN. § 46-9-108(2) (2011).

87. See, e.g., MASS. GEN. LAWS ANN. ch. 276 § 58 (West Supp. 2011); MONT. CODE ANN. § 46-9-108 (2011) (both allowing a court to impose restrictions on a defendant’s activity on release).

88. Foote, *supra* note 8, at 1031.

89. According to Foote, the following troublesome issues were apparent in the bail and detention practices of the 1950s: the unstructured exercise of discretion in bail matters, the procedural impediments to the fair administration of bail, the presumption of guilt and pretrial punishment, the inequitable treatment of defendants at bail, and questions about the effectiveness of bail practices. *Id.* at 1069–72.

90. *Id.* at 1048 & n.68.

91. *Id.* at 1034–35.

92. See *id.* at 1062 (stating that bail forfeitures for serious crimes were rare and noting that when gambling, liquor, and traffic offenses were removed from the calculus, the forfeiture rate

If the justification for bail was to guarantee appearance in court, defendants charged with more serious crimes should be receiving bail more often. Bail decisions provided judges with too much discretion, permitting bail to be denied for any reason.⁹³ Foote's conclusion that too much emphasis was placed on the crime charged was noted, and judges in Philadelphia were encouraged to consider other factors in deciding bail.⁹⁴ This study also warned that, due to the uncertainty of human behavior, bail determination may never be effective.⁹⁵

B. The National Bureau of Standards Study (1969)

The National Bureau of Standards conducted a study in August 1969 in response to the proposed District of Columbia crime bill introducing preventive detention. The study focused on 712 defendants in a four-week sample of cases in the District of Columbia in 1968.⁹⁶ The Bureau's study concluded that only 11% of defendants were arrested for a new crime while released pretrial, a figure that included misdemeanors.⁹⁷ If only counting serious felonies, the pretrial crime rate was actually only 5%.⁹⁸ The study's first conclusion contradicted the claims of advocates of preventive detention by showing that there is a low crime rate among defendants released pretrial.⁹⁹

The Bureau also concluded that there was no statistical relationship between the first-arrest type of crime and the second-arrest crime. Those

dropped to 1.35%). Foote also found evidence indicating that judges used cash bail as a means to detain defendants they personally considered guilty and as a means to punish certain defendants. *Id.* at 1038–39.

93. *Id.* at 1038–43. The evidence Foote found of excessive reliance on the charge criterion and manipulative bail proceedings came approximately twenty-five years after the National Commission of Law Observance and Enforcement (known as the Wickersham Commission), which was a government commission on crime that admonished judges and magistrates to pay closer attention to defendants' history, character, standing, personality, and record when setting bail, thus individualizing bail determination. NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION (1931).

94. See John S. Goldkamp, *Philadelphia Revisited: An Examination of Bail and Detention Two Decades After Foote*, 26 CRIME & DELINQ. 179, 187–88 (1980) (examining Foote's study and its effects on Philadelphia bail practices and noting that Philadelphia judges are now instructed to consider up to sixteen factors in their bail decisions).

95. Foote, *supra* note 8, at 1036. The defendants' charges were interpreted differently by different judges, which resulted in unequal treatment of similar defendants. Goldkamp, *supra* note 94, at 184.

96. J.W. LOCKE ET AL., NAT'L BUREAU OF STANDARDS, COMPILATION AND USE OF CRIMINAL COURT DATA IN RELATION TO PRE-TRIAL RELEASE OF DEFENDANTS: PILOT STUDY 1 (1970) [hereinafter NBS STUDY] (describing a study of 712 defendants with comparisons for "re-arrest rates for defendants initially charged with particular classes of crime").

97. *Id.* at 2 & n.1, 131.

98. See *id.* at 2 ("[O]nly 5 percent of those initially charged with a violent offense were re-arrested for another violent offense, and only 5 percent of those initially arrested for a dangerous offense were re-arrested for a dangerous offense.").

99. See *id.* at 188 (finding only 11% recidivism).

first arrested for committing felonies were almost as likely to be charged with misdemeanors as felonies the second time.¹⁰⁰

The Bureau also evaluated the District of Columbia bill's predictive mechanism and its accuracy. The bill attempted to predict which individuals were more likely to commit another crime and should therefore be detained, basing its findings on ten characteristics.¹⁰¹ These ten characteristics were (1) the nature and circumstances of the offense charged, (2) the weight of the evidence against the defendant, (3) the defendant's family ties, (4) the defendant's employment, (5) the defendant's financial resources, (6) the defendant's character and mental conditions, (7) the defendant's past conduct, (8) the length of the defendant's residence in the community, (9) the defendant's record of convictions, and (10) any record of the defendant's appearances at court proceedings, flight to avoid prosecution, or failure to appear at court proceedings.¹⁰² The Bureau's study asserted that none of the ten characteristics were actually accurate predictors, because criminal law is a "chancy process."¹⁰³

C. *Los Angeles Study (1970)*

In a 1970 Los Angeles study,¹⁰⁴ an experimental-release group of 328 defendants were released even though they were deemed high risks for failure to appear for trial.¹⁰⁵ The study compared the experimental group with a group of 201 defendants who were deemed low risks and eligible for release.¹⁰⁶ Approximately 74.1% of the low-risk defendants were never rearrested while awaiting trial, while 53% of the high-risk group avoided rearrest.¹⁰⁷ The crimes for which both groups were arrested were mostly property crimes.¹⁰⁸ The study concludes that it is rare for defendants on pretrial release to be arrested for new crimes—especially those who are

100. *See id.* at 135 (illustrating that of the 217 first arrested for felonies, 9 were rearrested for a felony while 8 were rearrested for misdemeanors). The Bureau's third conclusion was that most bail recidivism does not occur within the immediate postarrest time period; thus, preventive detention does not work because most crimes were not committed in the first sixty or ninety days after arrest, which is the time limit set on pretrial detention in the District of Columbia. *See* D.C. CODE ANN. § 23-1322(d)(2)(A) (2001).

101. Ervin, *supra* note 22, at 295.

102. 115 CONG. REC. 19,261 (1969).

103. Ervin, *supra* note 22, at 295.

104. Michael R. Gottfredson, *An Empirical Analysis of Pre-trial Release Decisions*, 2 J. CRIM. JUST. 287 (1974) (part of the Los Angeles Superior Court Own Recognizance Project).

105. *Id.* at 289.

106. *Id.* at 289–90.

107. *Id.* at 294 tbl.IV. These numbers included as failures those who unintentionally missed their trial date and voluntarily returned to the court without the use of a warrant; if these voluntary returns were instead counted as successes, then only 15% of the low-risk group failed to appear and only 27% of the high-risk group failed to appear. *See id.* at 293 (reporting that 85% of the low-risk group and 73% of the high-risk group were successes if voluntary returners are included).

108. *Id.* at 294 tbl.IV.

evaluated as low risks.¹⁰⁹ The Los Angeles study agreed with the National Bureau of Standards study that defendants released pretrial are not very likely to be rearrested.

D. Harvard Study (1970–1971)

A Harvard study conducted in 1970 confirmed the Bureau's findings on the incidence of bail crime, the relationship between the first and second crimes, and the time frame of bail recidivism.¹¹⁰

In this study, 657 defendants were examined; 230 were charged with violent crimes but were not eligible for preventive detention.¹¹¹ Of the remainder, 427 would have been subject to preventive detention.¹¹² Of the 657 defendants in the sample, the study found that 12.3% were rearrested, 6.2% were rearrested for violent crimes, and 4.1% were rearrested and convicted for violent crimes.¹¹³ The sample size was small, however, and the margin for error was large for the types of assertions made.

The study examined the ten characteristics that the District of Columbia used to determine which defendants should be held without bail: (1) the nature and circumstances of the offense charged, (2) the weight of the evidence against the defendant, (3) the defendant's family ties, (4) the defendant's employment, (5) the defendant's financial resources, (6) the defendant's character and mental conditions, (7) the defendant's past conduct, (8) the length of the defendant's residence in the community, (9) the defendant's record of convictions, and (10) any record of the defendant's appearances at court proceedings, flight to avoid prosecution, or failure to appear at court proceedings.¹¹⁴ As to the first factor, the Harvard study concluded that the initial charge was actually "little better than a random indicator of recidivism."¹¹⁵ Similarly, the circumstances of the initial offense did not identify recidivism risks with substantial accuracy.¹¹⁶ The Harvard study also found that the defendant's family ties, economic situation, and occupational status were equally poor predictors of recidivism.¹¹⁷ Past conduct as well as character and mental condition, evaluated by variables such as education level and arrests for drunkenness, were of little help

109. *Id.* at 300. It is also rare for pretrial defendants to fail to appear for trial. *Id.*

110. Ervin, *supra* note 22, at 296.

111. Arthur R. Angel et al., *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 300, 306 (1971).

112. *Id.* This study took place in Boston, and this sample of 427 defendants represents the defendants that would have been subject to preventive detention if the defendants were subject to the District of Columbia bill. *Id.*

113. *Id.* at 308 tbl.A.

114. *Id.* at 309–10.

115. *Id.* at 311.

116. *Id.*

117. *Id.* at 312.

because many of the defendants shared the same characteristics.¹¹⁸ Mental illness and drug use correlated with recidivism fairly substantially, but only a small number of recidivists displayed these traits.¹¹⁹

The Harvard study concluded that factors that were better at predicting recidivism included juvenile arrests, previous incarceration, conviction of violent or dangerous crimes within the past ten years, and convictions of four or more misdemeanors.¹²⁰ In several cases, defendants with these characteristics had recidivism rates almost twice the rate of the overall sample.¹²¹ In addition, those who had failed to appear at previous court proceedings more than twice had a higher recidivism rate than those who had not failed to appear.¹²² What could be gleaned is that criminal acts committed while on bail could be traced with certainty to 10% of the population eligible for preventive detention.¹²³

While the Harvard study was groundbreaking during its time and is still the most widely cited study on this topic, it failed to differentiate between indicators that are poor predictors simply because the sample size under con-

118. *Id.* High school graduates were better risks, but 75% of defendants had not graduated from high school, making any conclusions difficult to ascertain. *Id.* In addition, most had never served in the armed forces. *Id.*

119. *Id.* Many of these factors could not be accurately predicted due to small sample size. *Id.* at 313 n.72.

120. *Id.* at 313.

121. *Id.*

122. *Id.* (21.3% as compared to 4.6%). The researchers gave each defendant a dangerousness score and then tried to find a point where the most recidivists would be caught and the least nonrecidivists detained. *Id.* at 314. At that numerical point, eighteen defendants were recidivists and fifty-two were not. *Id.* at 315. At no point could the researchers find a formula that would detain more recidivists than nonrecidivists. *Id.* at 314. Missing from this study are the unreported, undetected, and unsolved bail crimes. Because of these uncertainties, some have used arrests, not convictions, in recidivism studies. *Id.* at 317. However, using the number of arrests in calculations is an uncertain figure that calls into question the accuracy of the results. *Id.* at 321. For this reason, the study presented in this Article uses convictions, not arrests.

123. *Id.* Six other studies confirm these findings. *Id.* A 1962 study reported sixteen rearrests (.7%) out of 2,192 defendants released pending trial. *Id.* at 321 n.126 (citing NAT'L CONFERENCE ON BAIL & CRIMINAL JUSTICE, PROCEEDINGS AND INTERIM REPORT 172 (1965)). A 1966 study found that 207 (7.5%) of 2,776 defendants released on felony charges for a two-and-one-half-year period were charged with a bail crime, and 124 (4.5%) were charged with a crime of actual or potential violence. *Id.* (citing REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA (1966)). Another study, this one after the Bail Reform Act of 1966, found that about 9% of bailed defendants (59 out of 671) were indicted for crimes committed within six months after pretrial release, as compared with 15% of defendants released on bail pending appeal (14 of 93). *Id.* (citing JUDICIAL COUNCIL OF THE D.C. CIRCUIT, REPORT OF THE JUDICIAL COUNCIL COMMITTEE TO STUDY THE OPERATION OF THE BAIL REFORM ACT IN THE DISTRICT OF COLUMBIA 45 (1968)). In the most comprehensive study on pretrial crime, 200 (9.2%) of 2,166 defendants released on recognizance were rearrested pretrial, and of those charged with serious or violent crimes, 16 (2.9%) of 552 were rearrested for another violent or serious crime. *Id.* (citing RICHARD MOLLEUR, BAIL REFORM IN THE NATION'S CAPITAL: FINAL REPORT OF THE D.C. BAIL PROJECT 31, 44 (1966)). In the Vera Institute's Manhattan Bail Project, only 20 (less than 1%) of 3,200 defendants released on their own recognizance were rearrested. *Id.* at 322 n.127 (citing *Federal Bail Procedures: Hearings on S. 2838, S. 2839 and S. 2840 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 88th Cong. 117 (1964)).

sideration was too small and predictors that would be uninformative even in large samples. Dividing 657 defendants over a dozen initial crime categories made it extremely difficult to say anything informative about the relationship between initial crime and future criminal activity.¹²⁴

E. Goldkamp's Philadelphia Bail Study (1977–1980)

Goldkamp conducted a study in the late 1970s that examined changes in the Philadelphia bail system that had occurred since the 1950s.¹²⁵ By 1980, many aspects of the bail system had changed in Philadelphia.¹²⁶ Before bail was set, defendants were first interviewed about their community ties, employment, income, health problems, and prior record,¹²⁷ and this information was provided to judges.¹²⁸ While the Pennsylvania Rules of Court dictated that judges weigh sixteen factors when determining bail,¹²⁹ the nature of the criminal charge still appeared to carry the most weight in deciding bail.¹³⁰ The Goldkamp study also indicated that those who were detained pretrial were much more likely to be incarcerated than those who were released pretrial when both groups pleaded, or were found, guilty.¹³¹

F. 1980s Studies

In the early 1980s, some studies showed that pretrial crime rates were low and defendants attended their court dates. These studies tried to counter the public tide that was turning against pretrial release and toward preventive detention. Pryor and Smith's review in 1982 concluded that more than 85% of defendants appeared for their court dates.¹³² Rearrest rates were reported

124. For instance, like our analysis below, the Harvard study makes assertions about the dangerousness of those held, claiming that they are more dangerous than those released. *Id.* at 332 (calculating that the 102 defendants held are substantially more dangerous than the typical defendant (with about a fourth of them expected to commit a new crime) but also concluding that if they had been released, the total rate of bail conviction would have increased by a little more than 2%). It is difficult, though, with such a small number of defendants to make such assertions with any degree of accuracy.

125. Goldkamp, *supra* note 94, at 179.

126. *Id.* at 186. There was no longer a division of responsibility between the lower and higher courts; instead, Philadelphia had an entire division of its court system devoted to pretrial services. *Id.* Lower court judges were exclusively lawyer-judges. *Id.* Nonhomicide defendants waited a maximum of twelve hours for bail to be set. *Id.*

127. *Id.*

128. *Id.* This information was provided to judges by the Pretrial Services Division. *Id.* at 188.

129. *Id.* at 188. Factors included employment, community ties, financial resources, etc. *Id.*

130. *Id.* Goldkamp based this assertion on interviews with bail judges in Philadelphia, observations of first appearances, and empirical analysis of bail decisions. *Id.* at 188 & n.27.

131. *Id.* at 190–91.

132. DONALD E. PRYOR & WALTER F. SMITH, PRETRIAL ISSUES: SIGNIFICANT RESEARCH FINDINGS CONCERNING PRETRIAL RELEASE I (1982); *see also* JEFFREY A. ROTH & PAUL B. WICE, PRETRIAL RELEASE AND MISCONDUCT IN THE DISTRICT OF COLUMBIA 42–43 (1980) (finding 11% nonappearance rates for felony and misdemeanor cases); WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA 87–105 (1976) (noting that the percentage of defendants on pretrial release who failed to appear increased between 1962 and 1971 and analyzing problems with computing such failure-to-

to be quite high though, hovering between 10% and 20%, with 5% to 10% of those arrests resulting in convictions.¹³³ These studies ultimately did not convince policy makers: federal and state laws increased detention.¹³⁴

In 1985, against the tide of academic commentary at the time, the Bureau of Justice Statistics examined data and concluded that the following factors could be used to determine whether a person was likely to commit a new crime while on release: amount of time before trial, prior criminal record, drug use, economic and social stability, age, sex, and race.¹³⁵ According to the Bureau of Justice Statistics, those with prior criminal records were more likely to commit new crimes or fail to appear at trial.¹³⁶

G. *Urban Institute Data (1999–2001)*

Though most of the public debate on pretrial detention died in the 1980s, there have been a few more recent studies that have examined pretrial detention issues, though none on a national scale. In a largely inconclusive study, the Urban Institute (UI) examined pretrial risk assessment in the District of Columbia. The study was conducted in 2001 using data on defendants processed by the D.C. Pretrial Services Agency between January 1, 1999, and June 30, 1999.¹³⁷ The instrument used by UI contained

appear data); PAUL B. WICE, *FREEDOM FOR SALE: A NATIONAL STUDY OF PRETRIAL RELEASE* 65–73 (1974) (describing failure to appear in terms of a forfeiture rate, noting that high forfeiture rates could be the result of several problems, arguing that forfeiture rates can be easily manipulated and can be interpreted to advance a particular group's agenda and proposing some solutions for high forfeiture rates).

133. See NBS STUDY, *supra* note 96, at 2 (reporting that “11 percent of those released charged with misdemeanors or felonies were subsequently rearrested on a second charge during the release period”); see also Angel et al., *supra* note 111, at 308–09 (reporting that 14.5% of the sample defendants were rearrested during the pretrial period and 64% of those arrested (9.6% of the sample) were convicted). Some jurisdictions had rearrest rates as low as 3% to 8%. Gerald R. Wheeler & Carol L. Wheeler, *Two Faces of Bail Reform: An Analysis of the Impact of Pretrial Status on Disposition, Pretrial Flight and Crime in Houston*, 1 *POL’Y STUD. REV.* 168, 170, 173–78 (1981) (finding that a higher number of convicted, detained defendants were sentenced to prison than those released on bail but that pretrial crime rates for released defendants were low at about 7%).

134. See *supra* notes 4–6 and accompanying text.

135. *RELEASE AND MISCONDUCT*, *supra* note 8, at 4. The longer an individual is on bail release before his or her trial, the higher the likelihood that he or she will commit a new crime. *Id.*

136. *Id.* at 4 (finding also that those with prior drug use and poor economic and social stability were likely to commit new crimes or fail to appear at trial). About 35% of defendants with a serious record (three felony convictions, one case pending, and one failure to appear) either failed to appear in court or were arrested for a new crime while released on bail, compared to only 20% of those with less serious records (one felony conviction, no pending cases, and no failure to appear) and only 8% of those with no previous criminal record. *Id.* About 98% of the “stable group” (employed, college degree, six years at same residence, and retained counsel) avoided misconduct—new arrest or failure to appear—while only 80% of the “unstable group” (unemployed three years, no high school degree, no fixed residence, and appointed counsel) was able to do so. *Id.*

137. LAURA WINTERFIELD, MARK COGGESHALL & ADELE HARRELL, *URBAN INST., DEVELOPMENT OF AN EMPIRICALLY-BASED RISK ASSESSMENT INSTRUMENT I* (2003). Defendants had appeared in either the D.C. Superior Court or in the U.S. District Court for the District of Columbia (only 3%). *Id.* at 5.

twenty-two factors¹³⁸ related to criminal history and the current charge.¹³⁹ After assigning numbers and then categories to each defendant,¹⁴⁰ UI examined how the instrument had performed in predicting which defendants were failure-to-appear (FTA) risks and which were safety risks.¹⁴¹ The correlation found was not perfect, and UI concluded that most of the variation across people lies in factors not captured by the data.¹⁴²

H. New York City Pretrial Misconduct Data (2001)

In another local study, the New York City Criminal Justice Agency (CJA) conducted a study on New York defendants in order to analyze pretrial risk prediction.¹⁴³ New York law prohibits considering dangerousness as a factor in determining bail, and thus bail decisions are based exclusively on risk of flight.¹⁴⁴ CJA compiled data on pretrial rearrests¹⁴⁵ showing that 17% of defendants were rearrested while on pretrial release,¹⁴⁶ and only 3% of defendants were rearrested for violent crimes.¹⁴⁷

The analysis used independent variables that could be categorized into community-ties items,¹⁴⁸ criminal-history indicators,¹⁴⁹ top charge at initial

138. *Id.* at 4. Three of the items, which were meant to help predict failure to appear, were age, citizenship, and whether the defendant lived with a family member. *Id.*

139. *Id.* (“Nearly all selected items relate to drug testing, criminal history, and current charges.”).

140. “Low” consisted of good candidates for release on personal recognizance, “condition monitoring” would recommend release on personal recognizance with certain conditions, “moderate” would recommend release under more restrictive conditions, “high” would recommend release only under the most restrictive conditions (e.g., halfway house, intense supervision program), and “severe” would recommend detention. *Id.* at 7.

141. *Id.* at 4–5. The instrument produced a correlation (also known as Spearman R) of .21 between the categories and appearance risk and .16 between the categories and safety risk. *Id.* at 4. A strong relationship correlation is usually considered .33 or higher. *Id.* at 5. UI determined that this instrument would be fairly useful in decision making. *Id.* at 5.

142. *See id.* at 4–5 (stating that “much variance in risk is not explained” by the instrument and the factors it employed). UI suggested that this variance might have been explained by nearly half of the sample being categorized as a moderate risk. *Id.* at 5.

143. 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 (2009). Defendants in the analysis were all initially arrested between January 1, 2001, and March 31, 2001. *Id.* at 3.

144. *Id.* at 1.

145. *Id.* at 1–2.

146. *Id.* at 7. Rearrests included both misdemeanors and felonies. *Id.*

147. *Id.* at 13. Violent offenses included murder, non-negligent murder, negligent murder, forcible rape, robbery, aggravated assault, simple assault, and kidnapping. *Id.* at 55. From the at-risk sample, 15% of defendants failed to appear in court. *Id.* at 13.

148. *Id.* at 13. Community-ties items included data concerning whether the defendants had a working telephone (residential or cellular), length of time at their current address, if they had a New York City-area address, if they expected someone at their arraignment, and whether they were employed, in school, or in a training program full-time when they were arrested. *Id.*

149. *Id.* The criminal-history variables included information on a defendant’s prior arrests, convictions, failures to appear, and pending cases. *Id.*

arrest,¹⁵⁰ demographic attributes,¹⁵¹ and case-processing characteristics.¹⁵² The study found 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 low risk of pretrial misconduct.¹⁵³

In terms of criminal history, those defendants with prior arrests or previous failures to appear in court were at a higher risk of failing to appear or being rearrested for violent offenses.¹⁵⁴ The correlation between the initial crime charged and the risk of pretrial misconduct was statistically significant, and those initially arrested for felony-level violent offenses and property offenses were actually less likely to fail to appear in court or to be rearrested for a violent crime.¹⁵⁵ In terms of demographics, younger defendants were also higher risks.¹⁵⁶

CJA concluded that while New York did not then permit consideration of dangerousness and public safety when making pretrial-release decisions, CJA's analysis and recommendation system could help predict the likelihood of pretrial misconduct.¹⁵⁷ Indeed, CJA posited that focusing exclusively on flight-risk prediction could still reduce pretrial crime.¹⁵⁸

I. Analysis of Earlier Studies

Previous studies revealed several important points about prediction of pretrial crime. First, judges often relied on the initial charge to set bail.¹⁵⁹ Though some scholars criticized the reliance on the initial charge, stating that it was irrelevant to what crimes the defendant would later commit,¹⁶⁰ others demonstrated that those charged with more serious crimes were actually more likely to appear in court.¹⁶¹ Second, several researchers pointed out

150. *Id.* at 13–14. Both the type and severity of the offense were considered. Offense type was based on Uniform Crime Reports' categories: violent, property, drug, public order, and other offenses. *Id.*

151. *Id.* These variables included the defendant's sex, ethnicity, and age. *Id.*

152. *Id.* at 14 (“The case-processing variables included . . . borough of initial arrest, borough of first pretrial re-arrest, time from arraignment to disposition on the initial arrest (case-processing time), type of first release, and court of disposition.”).

153. *Id.* at 23.

154. *Id.* Defendants with open cases were also at a higher risk of new arrests or failing to appear in court. *Id.*

155. *Id.* at 26. Those initially arrested for misdemeanors or other lesser offenses were more likely to fail to appear or be rearrested for a violent crime. *Id.*

156. *Id.*

157. *See id.* at 51–52 (noting that the CJA's recommendation system was implemented citywide in June 2003).

158. *Id.* at 52.

159. Foote, *supra* note 8, at 1035; Goldkamp, *supra* note 94, at 183.

160. Angel et al., *supra* note 111, at 311.

161. *See, e.g.,* SIDDIQI, *supra* note 143, at 49 (reporting that only 3% of their 2001 at-risk sample was rearrested pretrial for a violent offense); Foote, *supra* note 8, at 1036 (reporting that “most bail jumping was for minor crimes and that there was none for the most serious offenses”).

that there was a low crime rate by defendants released pretrial.¹⁶² A New York study stated that there were even lower rearrests for violent crime,¹⁶³ though some rearrest rates reported in the 1980s ranged from 10% to 20%, depending on the jurisdiction.¹⁶⁴ Third, some studies claimed that past conduct¹⁶⁵ or previous convictions were not accurate predictors of future criminal conduct.¹⁶⁶ But other researchers found that a prior criminal record was relevant to future misconduct.¹⁶⁷ Fourth, some said previous failure to appear did not predict future failure to appear or future crimes that would be committed.¹⁶⁸ Fifth, all of those who commented on age and gender noted that younger, male defendants were more likely to commit pretrial crime than

162. See NBS STUDY, *supra* note 96, at 2 (reporting in 1970 that 11% of those released charged with misdemeanors or felonies were rearrested presentence); see also Gottfredson, *supra* note 104, at 293 (finding 74.1% of low-risk and 53% of high-risk defendants were not rearrested pretrial); *supra* subpart III(F) (detailing the studies from the early 1980s).

163. See SIDDIQI, *supra* note 143, at 49 (finding that 3% of their 2001 at-risk sample was rearrested pretrial for a violent offense).

164. PRYOR & SMITH, *supra* note 132, at 2.

165. Angel et al., *supra* note 111, at 312 (suggesting that the usefulness of past conduct as a factor was limited because many recidivist and nonrecidivist defendants shared the same characteristics).

166. See WILLIAM RHODES ET AL., PREDICTING PRETRIAL MISCONDUCT WITH DRUG TESTS OF ARRESTEES: EVIDENCE FROM SIX SITES 4 (1996), available at <https://www.ncjrs.gov/pdffiles/pretrmis.pdf> (finding that prior failures to appear did not lead to future likelihood to commit crimes while on release for individuals charged with serious crimes); MARY A. TOBORG, PRETRIAL RELEASE: A NATIONAL EVALUATION OF PRACTICES AND OUTCOMES 5, 18 (1981) (studying 3,500 defendants in a multivariate study to demonstrate that it was not possible to identify defendant characteristics that could predict failure to appear accurately); PAUL B. WICE, FREEDOM FOR SALE: A NATIONAL STUDY OF PRETRIAL RELEASE 73 (1974) (casting doubt on the importance of prior convictions in the pretrial-release determination by pointing out that the seriousness of the defendant's criminal charge had "very little predictive value" in court appearance and noting that survey respondents who favored prior record in determining release had bail-forfeiture rates higher than the national average, indicating overemphasis on prior convictions in a national regression analysis); John S. Goldkamp et al., *Pretrial Drug Testing and Defendant Risk*, 81 J. CRIM. L. & CRIMINOLOGY 585, 605, 622–23 (1990) (noting that the Dade County multivariate analysis revealed no significant relationship between prior arrests or convictions and failure to appear in court); Gottfredson, *supra* note 104, at 289, 295 (finding through a comparison between 201 Los Angeles defendants in 1969–1970 eligible for pretrial release and 328 defendants rejected by the pretrial-release program that there was little explanatory power between failure-to-appear rates and prior-conviction rates, even though one group of defendants had more prior convictions); Peggy M. Tobolowsky & James F. Quinn, *Drug-Related Behavior as a Predictor of Defendant Pretrial Misconduct*, 25 TEX. TECH L. REV. 1019, 1028 (1994) (noting that "there is no research consensus regarding the relationship, if any, between a defendant's criminal record . . . and the likelihood of his court nonappearance" and that research specifically found that prior criminal record was not correlated to a "defendant's failure to appear in court").

167. RELEASE AND MISCONDUCT, *supra* note 8, at 4.

168. THOMAS H. COHEN & BRIAN A. REAVES, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 10 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/prfdsc.pdf> (finding no relationship between prior failures to appear and future failures to appear). For additional support, see sources cited *supra* note 166.

older, female defendants.¹⁶⁹ Finally, many scholars said that determinations of bail and predictors of pretrial crime could never be effective or accurate.¹⁷⁰

Predicting pretrial violence is a difficult endeavor. During debates of the Federal Bail Reform Act, some opponents of the bill criticized the use of predictors of dangerousness in determining bail. One opponent asserted that predictions are imprecise and that states permitting detention based on these factors have not experienced any reduction of pretrial crime rate.¹⁷¹ One House report quoted experts stating that predicting pretrial crime was nearly impossible.¹⁷² Other experts pointed out the irony in the fact that many who were detained pretrial were often released rather than convicted, suggesting that predictions are frequently inaccurate.¹⁷³ A look at previous studies shows that predicting crime pretrial requires a large sample size and must account for selectivity bias.

Only three studies prior to 1987 focused on *violent* pretrial criminality.¹⁷⁴ These three studies produced similar results despite varying in jurisdiction and year: high-risk defendants were younger, unemployed, used drugs, and had longer criminal records.¹⁷⁵ Beyond that, the limited data and sample sizes made it difficult to make more fine-grained predictions¹⁷⁶—a problem we do not have given our extensive data. Our approach, discussed in the next part, leverages our large sample size to move beyond simple summary statistics to a model that determines which factors are most important in predicting violence while, at the same time, controlling for all other observed characteristics.

169. See RELEASE AND MISCONDUCT, *supra* note 8, at 4 (finding a higher probability of misconduct among males and younger defendants); SIDDIQI, *supra* note 143, at 26 (finding that the likelihood of failing to appear or of being rearrested for a violent offense decreased with age).

170. See NBS STUDY *supra* note 96, at 3 (describing how accurate prediction models are impossible due to many crimes not being reported and suspects not being apprehended and that, therefore, these additional crimes cannot be included in data used to create statistical models); Foote, *supra* note 8, at 1036 (describing how attempts to individualize bail determination have to deal with uncertainty inherent in predicting human behavior).

171. H.R. REP. NO. 99-1121, at 11–12 (1984).

172. *Id.*

173. John S. Goldkamp, *The Effects of Detention on Judicial Decisions: A Closer Look*, 5 JUST. SYS. J. 234, 238 tbl.1 (1979–1980) (reporting that only 55% of the defendants detained throughout the pretrial period were convicted and that the conviction rate for those detained for more than twenty-four hours, but not through trial, was 39%).

174. See Mary A. Toborg & John P. Bellasai, *Attempts to Predict Pretrial Violence: Research Findings and Legislative Responses*, in THE PREDICTION OF CRIMINAL VIOLENCE 101, 103 (Fernand N. Dutille & Cleon H. Foust eds., 1987) (describing three studies of serious pretrial criminality conducted before 1987).

175. *Id.* at 103–04.

176. See *id.* at 104 (concluding that the low degree of accuracy of pretrial-risk-prediction studies is due to the low rate of pretrial misconduct).

IV. Analysis of Pretrial Crime Dataset

This part analyzes our national dataset of felony state defendants in large U.S. counties to address the most controversial points of prior work, including whether judges can reliably predict pretrial crime using any factors. This analysis explores the role of the present offense charged, prior convictions and arrests, failure-to-appear rates, age, and sex in predicting pretrial crime.

We note at the outset that while empirical analysis is highly relevant and evidence-based prediction is an improvement over the system we currently have, there is no substitute for an individual determination of guilt before a deprivation of liberty.¹⁷⁷ And indeed, an ideal pretrial-release system that respects constitutional protections would leave all fact finding until trial and not allow judges to make any of these predictions pretrial.¹⁷⁸ But given the reality of federal and state judges considering dangerousness, the initial charge, and previous convictions in release determinations, judges should at least prepare to make these decisions in an evidence-based manner.

A. Introduction to Dataset and Explanation of Variables

Most of the prior work discussed above dealt with small, geographically confined samples over a couple of years.¹⁷⁹ Our analysis, in contrast, is based on a nationally representative sample covering the seventy-five largest counties in the United States. We use the Bureau of Justice's State Court Processing Statistics from 1990 to 2006.¹⁸⁰ This dataset is particularly appropriate because it is explicitly designed as a nationally representative sample of large urban counties.¹⁸¹ As the survey abstract notes, "These 75 counties account for more than a third of the United States population and approxi-

177. See *Ricks v. District of Columbia*, 414 F.2d 1097, 1110 (D.C. Cir. 1968) ("Statistical likelihood that a particular societal segment will engage in criminality is not permissible as an all-out substitute for proof of individual guilt."); see also Baradaran, *supra* note 4, at 727 (maintaining that individuals should retain their liberty until proven guilty at trial).

178. See Baradaran, *supra* note 4, at 776 (arguing that a pretrial-release system that eliminated the current practice of allowing judges to predict defendants' guilt before trial would be more faithful to the Due Process Clause).

179. An exception to this is the reports set out by the Bureau of Justice Statistics itself, though they do not provide the same depth of analysis over such a long period of time and come to some different conclusions. See 2004 FELONY DEFENDANTS, *supra* note 10, at 4 (analyzing a sample of 15,761 felony cases that arose in May 2004 in 40 of the 75 most populated counties in the nation); COHEN & REAVES, *supra* note 168, at 11 (analyzing samples of 15,000 felony cases biennially from 40 of the 75 most populated counties in the nation from 1990 to 2004).

180. The survey was originally known as the National Pretrial Reporting Program and tracks defendants arrested on felony charges. STATE COURT PROCESSING STATISTICS, BUREAU OF JUSTICE STAT., <http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=282>.

181. Data is taken from May of each year with sampling done in the large jurisdictions. The survey provides weights that allow one to reconstruct a sample representative of the seventy-five counties. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT PROCESSING STATISTICS, 1990–2006: FELONY DEFENDANTS IN LARGE URBAN COUNTIES 5 (2010), available at http://www.icpsr.umich.edu/cgi-bin/file?comp=none&study=2038&ds=1&file_id=1062658.

mately half of all reported crimes.”¹⁸² Every two years, the ten largest U.S. counties are automatically surveyed, as are thirty other counties drawn from the next sixty-five largest counties.¹⁸³ The dataset also spans almost two decades (1990–2006), abating concerns that results are due to peculiarities of a given year.

The data include over 116,000 observations spanning the sixteen-year period, as shown in Table 2.¹⁸⁴ Each observation records what happened to a given felony defendant from the time of his arrest through his trial. Over this period, judges released a little over 70,000 defendants, with an average release period of 122 days. We rely on data on both defendants’ rearrest outcomes and their characteristics.¹⁸⁵ The data contain initial-felony-charge categories including violent crimes, property crimes, drug crimes, and public order offenses. We also record the percentage of those arrested that are held in each year. This extensive and representative dataset gives us a fair amount of precision.

Our data are a rich source of information on the initial crime committed, any subsequent bail crime, and the prior record of the defendant, including any failures to appear in court.¹⁸⁶ The data also contain basic information on the demographic characteristics of the defendants, such as age, gender, and race. As judges are not allowed to use race or gender in considering whom to release, we do not use this demographic information, as we wish to focus on a model relevant to legal practice. Additionally, we use the counts of felony arrests to form average county crime rates by type of crime, which we will discuss below as an important control in our study of rearrest while on bail.

B. *Selectivity Bias*

As a preliminary matter, two types of selectivity bias are inherent in pretrial risk assessment. First, there is no way to directly observe the risk posed by detained defendants. It is difficult to predict what would happen if we were to start releasing those who were previously detained, because the statistical model is based on the released, who may be different in unobservable ways than those who are detained. In an early attempt to deal with this,

182. *Id.*

183. *Id.* at 5–6.

184. The original data contain just over 130,000 observations. About 10% of these are missing some piece of information we wish to use and are therefore removed, leaving us with 116,000. Common missing information is whether the defendants were released pretrial or their prior arrest record.

185. Those defendants who were held waited in jail an average of 73 days (a median of 41 days). Those who were released had a median of 100 days. In addition, for those who were released and rearrested, median time from release to rearrest was 63 days, with the average being 90 days. For those who were rearrested, the median time to trial was 153 days with a mean of 164 days.

186. Tables 4 and 5, *infra*, give summary statistics for the covariates we use in the probit model.

Goldkamp used emergency releases of low-danger inmates and found that, unsurprisingly, those who were held were indeed more dangerous than those who were released.¹⁸⁷

Though, admittedly, selectivity bias is a serious issue, we can address this problem using modern empirical methods and access to data from many jurisdictions. With the large number of observations provided by national-level data, we are able to model and predict the risk of detained defendants. As we show in subpart IV(F), counties across the United States have wildly varying policies on detention, which means defendants with similar characteristics are released in some jurisdictions but often held in others. We exploit this variation across counties to look at how the probability of rearrest rises for those released as we release a larger, and potentially more dangerous, fraction of defendants. From this we can predict how dangerousness differs between those defendants commonly, but not always, held and those commonly released.

Second, when courts release defendants with conditions, the defendants may experience lower levels of risk than what they would have naturally experienced.¹⁸⁸ The worry here is that we will not be recovering the latent probability that a person would commit crime, because their release may have been under a set of conditions that may make them less likely to commit crime. While it would certainly be useful to know the latent crime risk of a defendant, the more relevant policy question is the defendant's crime risk if he is released under a standard set of restrictions by the court, as this is the crime risk that will likely occur under a policy shift toward increased releases. Knowing a defendant's crime risk under no restrictions is not pertinent if the most common way defendants are released is with restrictions.¹⁸⁹

C. Overall Pretrial Crime Rates & Initial Charge

In this subpart, we explore overall pretrial crime rates and how individual defendant characteristics, like the initial charge, predict rearrest while on release.

187. John S. Goldkamp, *Questioning the Practice of Pretrial Detention: Some Empirical Evidence from Philadelphia*, 74 J. CRIM. L. & CRIMINOLOGY 1556, 1586 (1983).

188. Toborg & Bellasai, *supra* note 174, at 105.

189. See ANTHONY M.J. YEZER ET AL., CLASSIFICATION SYSTEMS FOR THE ACCUSED: AN EMPIRICAL ANALYSIS OF WASHINGTON, D.C. 79–80 (1986) (discussing the inadequacy of analytical models that predict system-wide crime risk by considering only the crime risks posed by persons who are released with no restrictions). Of course, we would also be interested in knowing how such restrictions affect the probability of committing a crime. But we leave that for future work because it is potentially very difficult to disentangle the causal effect of restrictions from the selection effect that those who are more dangerous may be placed under more serious restrictions on pretrial release. See *id.* (recognizing that restrictions on release affect the probability of committing a crime and that those given more restrictive releases have a higher probability of misconduct).

While some prior work has commented that pretrial crime is actually low, other reports have stated that rearrests were between 20% to 30% in some jurisdictions.¹⁹⁰ Using our dataset, we can confirm some previous studies that concluded that, overall, even among felony defendants, there is a relatively low level of rearrest pretrial.¹⁹¹ Table 3 presents statistics on release and rearrest based on the initial charge the defendant faced. Of all of the defendants released, 16% are rearrested for any reason,¹⁹² 11% are rearrested for a felony, and only 1.9% are rearrested for a violent felony. Overall, the rates of pretrial crime, and especially violent pretrial crime, were perhaps lower than one might expect, especially given general recidivism rates, particularly among felony defendants.¹⁹³

We then turn to examine how the initial charge predicts a defendant's rearrest rate. Overall, the data show that those charged with violent crimes are *not* necessarily more likely to be rearrested pretrial.¹⁹⁴ However, those charged with violent crimes, if arrested, are more likely to be rearrested for violent crimes on release.¹⁹⁵

In forty-four jurisdictions, judges may consider the defendant's present charge in determining release.¹⁹⁶ Prior studies have also found that judges often rely on the initial charge to set bail,¹⁹⁷ though some studies have concluded that the crime charged is unrelated to the crime the defendant is rearrested for on release.¹⁹⁸ Our large sample allows us to draw a much cleaner inference than found in previous studies because we have over 70,000 released defendants. Thus, we can subdivide our data by initial crime and still confidently predict the probability of rearrest. For example, among all those released between 1990 and 2006, the probability that any person is rearrested while awaiting trial was 16%.¹⁹⁹ This probability, though, varied

190. See *supra* notes 163–64 and accompanying text.

191. See *infra* Table 3. Obviously there is not one national detention regime in the United States because many jurisdictions have their own detention practices. While the national data is interesting broadly, to suggest any specific changes, this analysis must be replicated on a county level.

192. These break down as 6% misdemeanors (a slight number being failures to appear), 2% drug-possession felonies, and 9% non-drug-possession felonies.

193. The normative questions around how many defendants should be released are not addressed in this Article, but will be in a forthcoming article. For other scholars addressing the same topics, see generally Roger H. Peters & Mary R. Murrin, *Effectiveness of Treatment-Based Drug Courts in Reducing Criminal Recidivism*, 27 CRIM. JUST. & BEHAV. 72 (2000) and George E. Dix, *Clinical Evaluation of the "Dangerousness" of "Normal" Criminal Defendants*, 66 VA. L. REV. 523 (1980).

194. See *infra* Table 3.

195. See *infra* Table 3.

196. See, e.g., IDAHO R. CRIM. P. 46; N.D. R. CRIM. P. 46; see also *supra* subsection II(B)(1)(a).

197. See *supra* Part III.

198. See *supra* note 115 and accompanying text.

199. See *infra* Table 3. Some of these rearrests were due to a failure to appear in court. If the original charges were felonies, the rearrests would show up in the data as Public Order "Other"

wildly across individuals based on observable characteristics. In fact, one can readily calculate the rearrest probability based on the original offense.²⁰⁰ Here, we provide a simple description of these characteristics' relation to pretrial crime. Below, we bring all these factors into a probit model that lets us predict a given person's overall probability of committing a crime.

While the Harvard study and others previously claimed that there was little information in the initial charge, this turns out only to be true when one lacks the data to discriminate effectively between groups. Table 3 provides rearrest probabilities for those released, conditional on the initial charge. For example, those with an initial murder charge were more than twenty times more likely to be rearrested on a violent felony charge than defendants charged with fraud (6.4% vs. 0.3%) and about six times more likely than defendants arrested on drug possession charges (6.4% vs. 1.1%).

We can use Table 3 to give an overview of pretrial crime broadly.²⁰¹ It shows that those charged with violent crimes are *not* necessarily more likely to be rearrested pretrial. The highest pretrial rearrest rates were for defendants charged with drug sales or robbery (21%),²⁰² followed by motor vehicle theft (20%), and burglary (19%). Those released who were charged with the "more dangerous crimes," such as murder, rape, and felony assault, had much lower overall rates of pretrial rearrest at 12%, 9%, and 12% respectively.

Because many of the federal and state bail reforms focused on decreasing violence and cutting down on violent bail crime, the last column of Table 3 breaks out rearrests for violent crime. It makes clear that while no group was composed mostly of people who will be rearrested, there was still huge variation in how "dangerous" different groups were on average. For example, those *originally* charged with violent crimes, particularly murder, were much more likely to be rearrested pretrial for violent crimes. Murder defendants led this group with a 6.4% violent-crime rearrest rate. This is a relatively high percentage, affirming much of what has historically existed as a presumption against release of murder defendants. In addition, other defendants charged initially with violent crimes were much more likely to be rearrested for violent crimes. Robbery defendants had a 5.8% chance of

felonies. Some rearrests would also show up as misdemeanors. We have gone through our data and looked at the exact name of the rearrest charge, and we estimate that only 14% of these Public Order "Other" rearrests, and less than 1% of misdemeanor rearrests, were for failure to appear in court. As very few (3%) of the rearrests were charged with Public Order "Other" violations, removing these failure to appear or fugitive crimes would only slightly decrease the overall rearrest rate.

200. Table 3 gives, for each initial charge, the incidence of release along with the incidence of rearrest among those released.

201. Violent crimes refer to the first five categories in Table 3: murder, rape, robbery, assault, and other violent crimes. Property crimes include burglary, larceny/theft, motor-vehicle theft, forgery, fraud, and other property crimes. Drug crimes are sales and possession/other, and public order crimes are the last three felonies in Table 3: weapons, driving-related felonies, and other public order crimes.

202. Robbery is classified as a violent crime, but it is also a property crime.

rearrest for violent crime, with rape defendants at 3.2%, and assault defendants at 2.9%. These rearrest rates were higher than those in other categories, except for motor-vehicle theft, which turns out to be more closely connected to violent crime than other property crimes.

While there is a large range of dangerousness pretrial, those released pretrial are perhaps much less dangerous than most people would anticipate.²⁰³ For almost all crimes, except for three categories,²⁰⁴ defendants were only about 1%–3% likely to be arrested for a violent crime pretrial. These data also show that the initial charge is linked with the crime the defendant is arrested for after release. Thus, those charged with violent crimes are more likely to be rearrested for violent crimes than those charged with nonviolent crimes.

Because we are most interested in predicting and preventing violent crimes, we focus on describing and then modeling *violent* crime rearrests for the various categories of crime. In subparts IV(F) and IV(I) we use the same modeling techniques to add information about all crimes and flight risk. Below, we will discuss evidence of how well judges integrate this information in their decisions about whom they release.

D. Past Conduct as a Predictor of Future Crime

Thirty-four states and the District of Columbia conduct some review of the defendant's prior convictions as a factor in pretrial release.²⁰⁵ However, scholars have disagreed about whether past conduct or previous convictions are accurate predictors of future criminal conduct.²⁰⁶

Our analysis finds that a key predictor of future crime is past crime. The data show that the number of previous convictions is directly correlated with future likelihood to commit crime. However, our data demonstrate, surprisingly, that rearrest rates are not much higher for those who have four

203. While some may argue that the public should be disappointed with any pretrial crime, our society has always been willing to risk some pretrial crime in favor of protecting the presumption of innocence and due process rights. See 4 WILLIAM BLACKSTONE, COMMENTARIES *358 (describing the maxim that society would rather acquit the guilty than imprison the innocent).

204. These categories are murder, rape, and robbery.

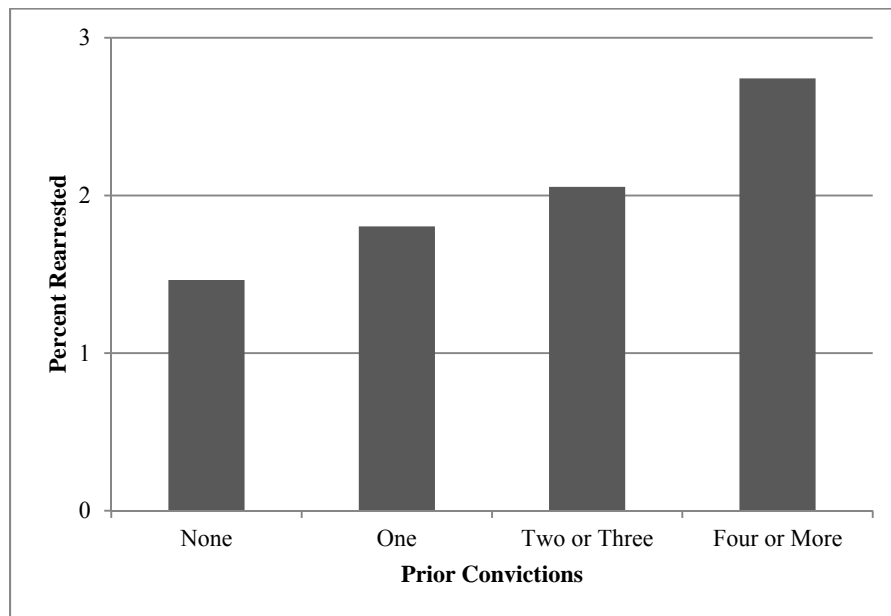
205. See, e.g., ALA. R. CRIM. P. 7.2(a)(3); ALASKA STAT. § 12.30.011(c)(6) (2010); CAL. CONST. art. 1, § 12. For a full listing, see *supra* note 63.

206. See NBS STUDY, *supra* note 96, at 40–41 (concluding that an accurate predictive instrument must rely not only on past criminal behaviors but also on other factors such as situational adjustment); Angel et al., *supra* note 111, at 313 (finding past conduct and convictions to have some predictive value about future criminal conduct); see also COHEN & REAVES, *supra* note 168, at 10 (“Compared to those without prior arrests (29%), defendants with an arrest record were predicted to be charged with misconduct more often, especially if they had previously failed to appear in court (47%). This pattern was observed for both failure to appear and re-arrest. Defendants with prior felony convictions (39%) had a higher predicted misconduct rate than other defendants (33%). This pattern also existed for re-arrest, but not failure to appear.”).

or more prior convictions than for those who have no convictions or just one prior conviction.²⁰⁷

An analysis of prior convictions shows that even those with many prior convictions are still unlikely to be rearrested for a new violent crime while on release. Figure 1 divides all those released into four groups based on their number of prior convictions. We then calculate the fraction of each group that was rearrested for a violent crime. About 1.5% of those with no prior record were rearrested, a number that rose only slightly for defendants with one conviction. On the other end of the spectrum, about 2.5% of those with four or more prior convictions were rearrested. Thus, the rearrest rate was not quite twice as high for those with many convictions as for those with none. A single past conviction, though, hardly appears to predict any increased dangerousness. Repeat offenders—those who have four prior convictions—were only arrested for pretrial violent crime in about 1 in 30 instances.²⁰⁸

Figure 1. Percent of Defendants Rearrested for Violent Crimes, by Prior Convictions

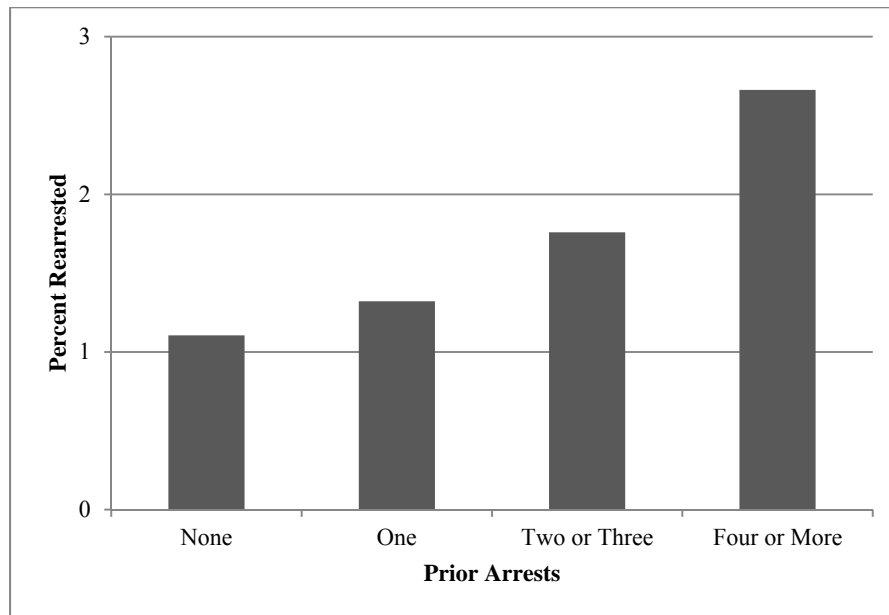


207. See *infra* Figure 1. *Contra* Larry Laudan & Ronald J. Allen, *Deadly Dilemmas II: Bail and Crime*, 85 CHI.-KENT L. REV. 23, 34 (2010) (arguing that “serial offenders (persons with more than one felony conviction within the last three years) are much more prone to commit violent crimes during their time on bail than are those without a recent criminal record”).

208. See *infra* Figure 1. However, rearrest rates by no measure fully account for all of the crime committed.

Another measure of past criminality is the number of prior arrests, which we examine in Figure 2. We see the exact same pattern here that we saw in past convictions: the more prior arrests a defendant had, the more likely it is that the defendant was rearrested for a violent crime. Nonetheless, a person with a given number of *convictions* does appear to be systematically more dangerous than a person with only that many *arrests*. Looking at the data, about 1.8% of defendants with one prior conviction were rearrested for violent crimes, whereas only 1.2% of those with prior arrests were rearrested for a violent crime on release. Again, rearrests for violent crime were fairly unlikely, though our dataset is large enough that even with such a rare occurrence, there are enough defendants that the margin of error is very small.²⁰⁹

Figure 2. Percent of Defendants Rearrested for Violent Crimes, by Prior Arrests



E. Probit Estimation of Rearrest Probabilities

The above estimates give us some insight into how the initial charge or prior record predicts future rearrests, but to form a good prediction we need

209. This might lead one to believe that judges should be warier of considering past arrests than of considering past convictions in examining the prior conduct of defendants. We show in subpart IV(G) that while arrests predict a lower crime rate than convictions, in a model that considers many factors simultaneously, prior arrests are actually a more robust independent indicator of pretrial rearrest than are prior convictions.

to bring to bear as much information as possible, accounting for all of it simultaneously. To that end, in this subpart we specify and estimate a probit model with a wide range of potential indicators of future rearrest.

1. Probit Model Specification.—We use a standard probit model and specify the probability of being rearrested to be a function of the type of felony in the original arrest, the defendant's age, the year of the offense, and various characteristics about the person's prior record.²¹⁰ We also allow rearrest rates to vary depending on the overall crime level in the county. For each person i living in county c in year t , suppose that the value V_{itc} equals one for those who were rearrested for a violent crime at any time while on bail and zero for all those who were not.²¹¹ We wish to predict this V_{itc} for any given person.

A probit models the latent or unobserved index, y_{itc} , that is positive for those that are rearrested and negative for all others. Thus, it is a continuous theoretical version of the observed behavior V_{itc} . If we had this y_{itc} index, our job would be done. Instead, all we observe about it is whether it is positive or negative for a given person. Since y_{itc} is unobserved, we model it as

$$y_{itc} = \alpha_t + X_{itc}\beta + Z_{tc}\gamma + \varepsilon_{itc}$$

where X_{itc} is a list of person i 's observed characteristics (initial felony charge, past convictions and arrests, criminal status or prior incarcerations or failures to appear, and age) and β is a vector we wish to estimate that determines how much weight to give a particular X_{itc} characteristic in determining y_{itc} . α_t is a set of year-indicator variables that track secular changes over time and are common across all counties and defendants. Z_{tc} is a vector of the natural log of county population and the county felony crime rates per thousand people in the survey month, with γ , the associated coefficient vector. The crime rates are divided out into the four major felony categories: violent, property, drug, and public order. In unreported results,

210. The drawback to this approach is that we are assuming enough commonality across people that we can use information from one group to help us form predictions about another. For example, as people age, their crime rate tends to change, and we are assuming that the change in crime rates with age is related across initial charges and prior records. This assumption and its implications can be explored in later work, but as we discuss in note 207, *supra*, the assumption is perhaps not as important as may be initially assumed. One area of particular concern would be if we were using the model to estimate the crime rates for mixtures of characteristics that never occur in the data. Since we are most interested in predicting crime for the most common groups—because these are the ones that appear before judges—our model does not face this problem.

211. Our estimates are all for the bail period as a whole—typically three to four months—rather than a crime rate per month. Later, when we compare crime rates with general population, we discuss how to compare the monthly population crime rates with the estimates we give here.

we also considered a county fixed-effects model, but the results were identical.²¹²

Of course, because there are many factors about people and their circumstances on which we do not have data, we also have an unobserved error term, ε_{itc} , which is part of the index y_{itc} . Because of this unobserved error term, no matter how good or bad the set of characteristics a person has, we can never be positive about who will or will not commit a crime. Thus, a probit model is built around matching probabilities by picking the parameters that are the most likely given the rearrests we see. Taken jointly across all n observations, this means maximizing the log of the following probability:

$$\prod_{i=1}^n P(y_{itc} > 0)^{V_{itc}} P(y_{itc} \leq 0)^{1-V_{itc}}$$

Once we estimate the model precisely, we *can* make very good predictions about the *average* rearrest rates for a group of people with a given set of characteristics. All of our measures predict future effects rather than an attempt to prove causal effects.²¹³ This focus on prediction rather than causation has a large effect on how to think about the coefficients. For example, it does not matter for the purposes of this analysis that those charged with more serious crimes may be released under more restrictive bail conditions. We do not need to account for these restrictions because we observe the *outcome* of these restrictions with empirical rearrest rates, which is adequate for this analysis. Our goal is to determine what the rearrest rate actually will be, not what it hypothetically would be under laboratory-controlled circumstances. Similarly, if prosecutors have a great deal of latitude in what initial charge to bring, it might seem that the initial charge becomes somewhat arbitrary. While this may be true, it does not affect our ability to estimate how that somewhat arbitrary choice of initial charge is related to later crime. If, in fact, there is no useful predictive information in

212. A fixed-effects specification allows each state to have its own unobserved effect on crime rates. As one can see in Appendix A, county characteristics do matter, they just do not change the other estimated coefficients and therefore do not affect the results we present here. Nevertheless, a county looking to use a more data-driven approach to bail might be well advised to estimate a model like the one presented here but for that county alone, so as to get the highest quality predictions for its particular situation.

213. Thus, we are not saying that the sole act of charging a person with robbery as opposed to rape changes that person in a way that affects his likelihood of future rearrest. Rather, we are saying that people charged with robbery systematically have different unobserved characteristics than those charged with rape. Although we never see these characteristics, we do see the person's initial charge, which is correlated with those characteristics. This makes our job statistically much easier, as many of the sharpest pitfalls in empirical work come from trying to determine causal effects rather than making simple predictions.

the initial charge, our model will not spuriously claim that there is. Rather, the estimates will assign no weight to initial charge as a predictor.²¹⁴

Table 4 gives summary statistics for the X_{itc} variables of initial offense and prior criminal record for the 116,000 felony defendants in our sample and then again for the subset of 72,000 released defendants. For example, we see that the most common initial crimes were the two categories of drug crimes (each about 17%–18% of all defendants) followed by assault, theft, and burglary. Twenty-eight percent of defendants had no prior arrests, but about half had a substantial record of four or more prior arrests. Convictions follow a similar, if lower, pattern. Forty-five percent had previously been incarcerated. Over half had multiple charges against them, 30% had failed to appear in the past, and 33% of them had an active criminal status at the time they were arrested. Eleven percent of defendants had previously been convicted of a violent felony.

Table 5 gives the age distribution and the county characteristics, Z_{itc} . About 14% were teenagers and only 4.5% were over the age of fifty. Each month, the average county had 0.18 violent felony arrests per thousand people with slightly more than that in property and drug arrests. Public order felonies were noticeably less common at 0.06 per thousand people.

Appendix A, Column 1, reports on our standard version of this model, estimated on those who were released. Each number gives the average change in probability based on a person having that characteristic, holding fixed all his other characteristics.²¹⁵ For example, the first row of Appendix A tells us how much more likely murder defendants were to be rearrested for a violent crime than a person brought in on a drug charge other than sales—typically possession—because the drug charge is the model baseline. This number is 4.74%. To calculate it, let the variable tracking murder be $X_{itc}^{murder}=1$ if the defendant was facing a murder charge. Then the number reported in the first row of Appendix A is calculated as

$$\sum_{i=1}^n P(y_{itc} > 0 | X_{itc}^{murder} = 1, X_{itc}, Z_{itc}) - P(y_{itc} > 0 | X_{itc}^{murder} = 0, X_{itc}, Z_{itc})$$

214. If prosecutors gamed the initial charge to get a desired bail outcome, this would also not matter for our prediction unless judges started using a new model for determining bail. Thus, for example, if judges adopted a model akin to the one we present here, prosecutors might respond to the change with a different mix of initial charges, which might upset the predictions. Judges could then re-estimate their model under this new mix. One, then, can imagine an iterative process as prosecutors adapt and judges respond, likely ending fairly quickly in new stable equilibrium behavior by judges and prosecutors.

215. For the probit and all other calculations, we use the survey weights to correct for the fact that some districts were over or underrepresented. In practice, the unweighted results are largely the same.

Likewise, each of the other numbers in the table tells us how the given characteristic changes the probability of a person being rearrested for a violent crime.

2. *Average Rearrest Rates for a Given Group.*—Table 6 simulates rearrest rates for teenagers and those over age fifty based on their initial crimes and their criminal records for a variety of possible scenarios. For example, 4.1% of teenagers brought in on a robbery charge with no prior record who are released would be rearrested for a violent felony. If we look at teenagers with a hefty prior record (e.g., a felon with four or more arrests, an active criminal justice status, and a prior violent felony conviction) that probability of rearrest almost quadruples to 15%.²¹⁶ Below each number we list, in brackets, the standard error of the prediction.²¹⁷ While most of these values are estimated quite precisely, a few are still fairly imprecise.

Table 6 illustrates that age is a strong predictor of future rearrests. Those over the age of fifty were always substantially less likely to be rearrested, typically on the order of one-third to one-fourth as likely as the teenager. This pattern also shows up at the intermediate ages—the younger the person, the higher the chance of rearrest.²¹⁸ We also see that both prior record and initial charge make substantial differences in the probability of rearrest. A defendant on a theft charge with no prior record has a 1.4% chance of rearrest, whereas even one prior arrest increases the odds by one-third, to 1.8%.

Through this analysis, we also determine which are the least and most dangerous groups of suspected felons.²¹⁹ The most dangerous group consists of teenagers brought in on a murder charge with four or more prior arrests, a currently active criminal justice status, and a prior violent felony conviction. This group has about a one-in-five chance of being rearrested for another violent crime if released. The least dangerous group, with a probability of

216. We fix all the characteristics listed in the table, but we let all unlisted regressors take on the values they have in the original data, so in that sense, we recover an average across those characteristics. As one can see from Appendix A, Table 6 deals with almost all the statistically significant individual characteristics.

217. We cluster these standard errors at the county level, which produces about seventy clusters. This makes our results robust to correlations within a county across individuals or over time. The clustered standard errors are about one-third larger than the unadjusted (and unreported) standard errors that assume independence. We also explored clustering at the state level, which we recognize is preferable, but we only have twenty-six states, making the asymptotic argument substantially weaker. We found the state-clustered standard errors to be approximately the same as the county ones.

218. See *infra* Appendix A, Column 1, which illustrates age coefficients.

219. We look at these groups with the obvious caveat that we might find slight differences if we included more covariate interactions and that our measure of dangerousness is being rearrested for a violent crime, as we discuss in the text.

rearrest of about one in a thousand, consists of those over the age of fifty with no prior record brought in on a fraud charge.²²⁰

Prior work has discussed whether criminal history or current charges are better predictors of future criminal behavior.²²¹ In Table 6, for a given age, this amounts to comparing the movement from left to right (as criminal history gets worse) with movement up and down (where current charge varies). Focusing on teenagers, it appears that both aspects matter a great deal. Prior criminal history can easily triple the probability that a person would be rearrested, even controlling for the initial charge. On the other hand, those brought in on violent charges were two to three times more dangerous than those brought in on drug crimes. Thus, for predicting future violent crime among a sample of felony defendants, both past history and current charge have substantial, independent predictive power.

As a side note, analyzing Appendix A, which contains the full results of the probit model, reveals a couple of interesting facts. A person's number of previous arrests is a large predictor of future rearrest; however, whether or not that prior arrest turned into a conviction is largely irrelevant as an additional predictor.²²² This may be due to a lack of pursuit of certain crimes during plea bargaining, bail cooperation, or prosecutorial discretion, though it is not clear from the data. A second fact is that prior failures to appear are not statistically significant predictors of future violent behavior, an issue we will return to later when discussing flight risk.

Given the probit results, we can assign a rearrest probability to every released person in our sample.²²³ This is extremely helpful in determining if

220. Our data include sixty teenagers brought in on murder charges with at least four prior arrests. Thirty-six of them had an active criminal justice status and four had previously been convicted of a violent felony. Murder, fortunately, is a fairly rare charge. Among the least dangerous group, our data records 112 people over the age of fifty with no prior record brought in on fraud charges.

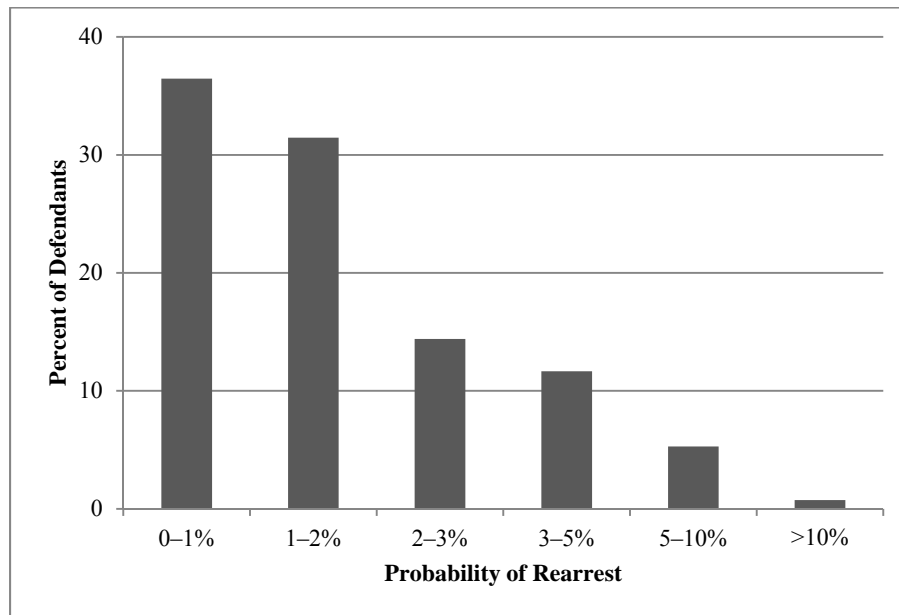
221. *See supra* Part III.

222. We have not explored the underlying cause for this, although it may be an interesting avenue for future research.

223. This is based on the probit framework where we have assumed that characteristics can be modeled commonly across ages and prior records. A natural extension would be to relax this assumption further by allowing "interaction effects" so that the effect of being a felon, for example, is allowed to be different depending on one's age. We do not do that here for several reasons. First, the number of coefficients to be reported grows very quickly as one includes interactions, thus it becomes more trying for the reader to follow the discussion or interpret the table we present in the Appendix. Second, by its nature, a probit includes some allowances for interaction effects, because it is modeling a probability that is assumed to be normally distributed. As one moves closer to the threshold for rearrest, all the effects become more important for determining the probability. Conversely, for a person with only one indicator suggesting a future rearrest, that one indicator does not increase the probability very much because rearrest is still very unlikely. Third, in the absence of interaction effects, the estimated coefficients will still be a particular average of these unmodeled interactions with more weight given to the more common groups in the data. Thus, the more common the category, the better the fit. The implication of this is that the places where we are most seriously in danger of being off are the least important places, because there are relatively few defendants with that mix of characteristics. Fourth, we originally explored a number of possible interactions, and they rarely offered substantial improvement in overall model fit, though this does

we are over- or under-detaining defendants pretrial. Figure 3 shows the fraction of our sample that has each rearrest probability. For example, a little over one-third of the released defendants have less than a 1% chance of being rearrested, and another third has a 1%–2% chance of being rearrested. Additionally, about 80% of pretrial defendants have less than a 3% chance of being rearrested. Because currently only about 40%–60% of federal and state defendants are released,²²⁴ we explore whether more defendants can be safely released pretrial, given how unlikely they are to be rearrested pretrial. On the other hand, it is worth noting that 5% of defendants have more than a 5% chance of being rearrested on a violent felony charge, with a few having higher than a 10% chance.

Figure 3. Percent of Released Defendants, by Given Probability of Rearrest



Note: Each bar indicates the percentage of the released suspects that have the given probability of being rearrested for a violent felony, based on their prior record and age.

F. Likelihood of Pretrial Crime for Defendants Held

Until this point, we have strictly relied on information for those who were, in fact, released. But we also need to know how likely those that are

not rule out the possibility that such interactions could be very important for at least some characteristics. All of that said, a natural and useful extension of this Article would be to explore which interaction effects are the most pertinent.

224. See *infra* notes 253–67 and accompanying text.

held are to commit crimes. Otherwise, we cannot know how crime rates will be affected if we release more defendants. We proceed as follows. First, we show that those who are held pretrial systematically have observable characteristics associated with higher crime rates. Second, we compare counties with high release rates and low release rates to determine if those held are also more dangerous in ways not accounted for by their observable characteristics. Lastly, we use information from counties that hold relatively few people to estimate the dangerousness of the held population.

A simple, though possibly inaccurate, way to deal with those who are held is to use the probit model we previously estimated and assume that those who are held fit the same statistical model as those who are released. This would be true if, for example, judges held or released people solely on the basis of the characteristics we observe. It would not be true if judges systematically brought to bear information about the defendants that we do not have in our dataset. For example, consider two people with the exact same prior record brought in on an aggravated-assault charge. One of the defendants spends his entire pretrial hearing attacking those around him and yelling. The other is quiet and penitent. To the extent that these facts affect the probability that the person will be rearrested, they represent changes in the value of ε_{itc} , the unobserved component in our regression model. A judge may decide to hold the yeller and let the penitent go, but our statistical model would treat them both the same.

The problem, though, is that if judges systematically use information that we as statisticians do not have to improve their predictions, then those who are released will systematically be safer than those who are held. Thus, our previous statistical model, which was based entirely on the behavior of the released, will be a poor estimator for the held. We would expect that it would systematically underestimate the rearrest rates of held defendants.

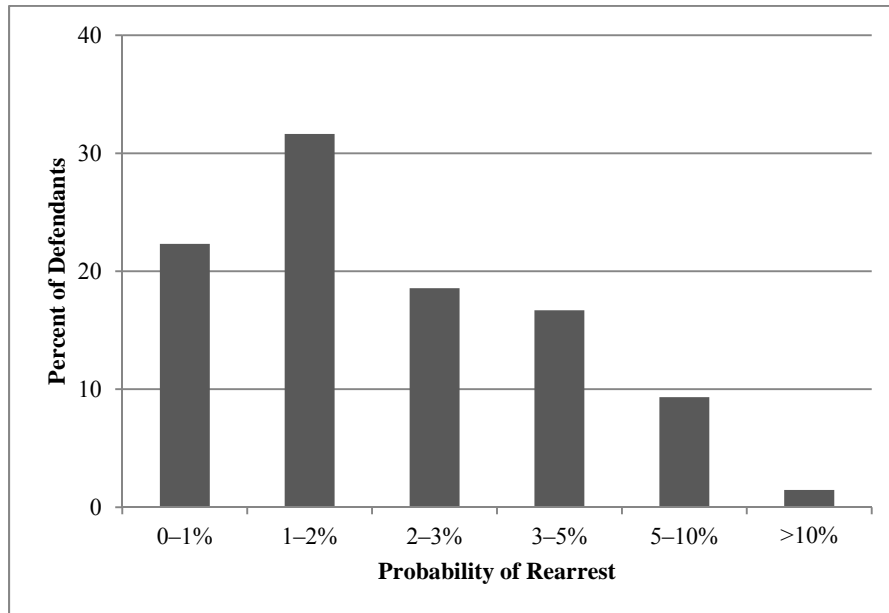
1. *Effectiveness of Judges in Determining Dangerousness.*—The first thing we need to know is whether those whom judges keep behind bars are more dangerous than those let go, at least in terms of their observable characteristics for which we have data, such as their prior records. We can use the characteristics of those held to generate their chance of committing a violent crime if (1) they had been released and (2) they were otherwise similar to those who were released. As we noted before, this probability was 1.9% for the overall set of released prisoners.²²⁵

Those who are held, though, appear systematically to have observable characteristics that are associated with higher violent-crime rearrest rates. Based on their observed characteristics, we would predict that 2.8% of them would be rearrested—about a 50% higher rate than for the released. Figure 4 is the counterpart to Figure 3, but for those who were held rather than

225. See *supra* subpart IV(C).

released. Whereas about a third of those released had less than a 1% chance of committing a crime, the age, prior record, and initial charge of those held were associated with higher rearrest rates. A little over 20% of those held had less than a 1% chance of being rearrested. In fact, the entire distribution has shifted rightward, with about 10% of those held projected to have at least a 5% chance of being rearrested.

Figure 4. Percentage of Held Defendants, by Given Probability of Rearrest



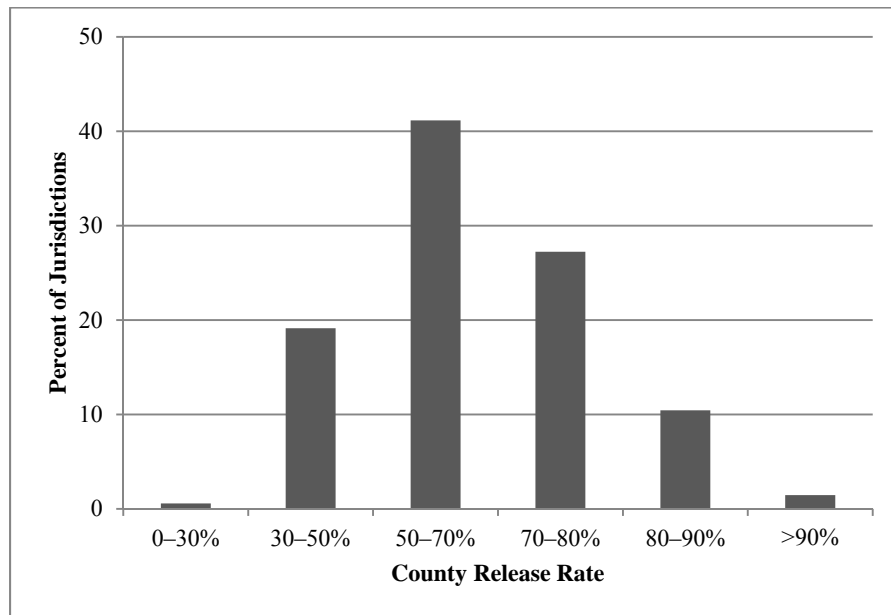
Thus, we have strong evidence that those who are held are more dangerous. By itself, this is not a problem for our statistical model. The concern is that, in addition to being more dangerous due to factors we can see and account for, those held might also be more dangerous for reasons not captured in their observed characteristics. This would be the case, as we discussed above, if judges systematically saw things that we missed in our regression model and used that information to put the more dangerous defendants behind bars. Then our model, and any other study based on those typically released, would underestimate the dangerousness of the held, even controlling for their observed characteristics.

One way to see if this might be happening is to compare across counties and years and see if, in places where systematically more convicts are released, those convicts are more dangerous than we would expect based on our probit model, while in places that hold more people, those that are released are safer than we would expect. For example, a county that releases everyone will not just be releasing people like those we see released in our

national data but also their more dangerous counterparts that would normally be kept behind bars. In that case, our expected rearrest rate would be too low, because it fails to account for the unobservable factors that make the people being released extra dangerous.

Figure 5 plots the release rates of each county–year combination in our data. As one can see, counties operate very differently from one another. A few release only 30% or fewer of those arrested, while about 40% of counties release 50%–70% of those arrested. Some counties release almost all of those arrested. Thus, there is a huge difference in county release rates, which should let us see if our predictions are just as valid in high-release counties as in low-release counties.

Figure 5. Distribution of Percent of Suspects Released Across Counties and Years



Note: Each bar gives the percentages of jurisdictions (counties in a given year) that have the given release rate for suspects.

According to our model of judge behavior, if we plot the actual rearrest numbers next to the rearrests predicted by our simple model of those released, we will find that the earlier probit model underestimates rearrests in places that release many suspects and overestimates rearrests in places that release few of them. Figure 6 plots out both our simple model’s prediction and the observed rearrest rates for county–year combinations based on their

release rates.²²⁶ Thus, in counties that release 30%–50% of defendants, we observe about 1.3% of those released being rearrested, which is approximately the same as our model’s prediction. Notice that as the county releases more people, both the predicted and the observed rearrest rates climb; thus, the people who are being released are more dangerous as release rates rise, in ways our model can readily identify.

Figure 6. Predicted and Observed Rearrests for a Violent Crime, by County Release Rate

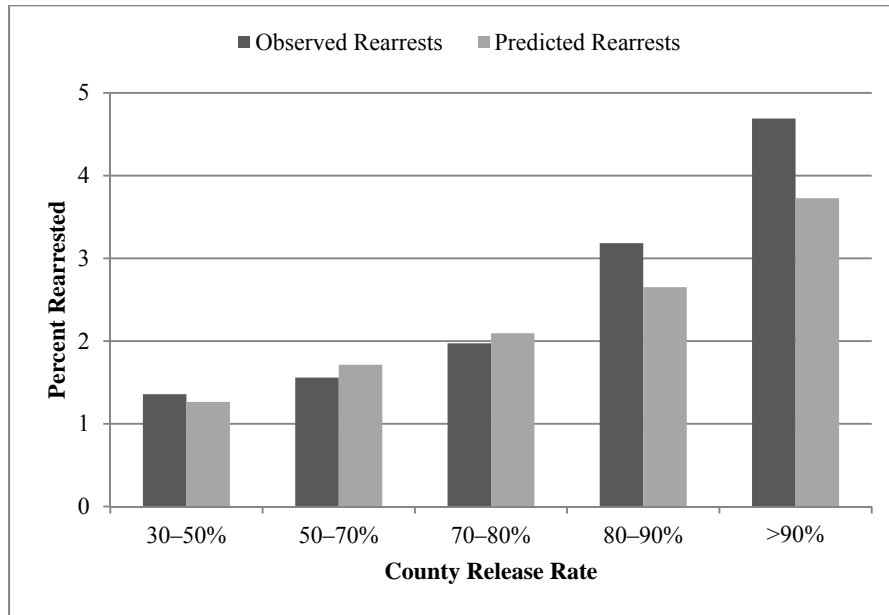


Figure 6 shows some mild evidence for our hypothesis. The simple model fits crime rates very well for counties that release less than 80% of inmates. As a county releases more than 80% of those arrested, the model begins to slightly underpredict how dangerous these inmates are. The model expects that about 2.5% would commit a crime, but in reality, over 3% did. The problem continues in counties releasing more than 90% of suspects; 4.7% of them were rearrested, but the model’s prediction is 4%. This suggests that, overall, judges are performing only slightly better than our model; in other words, there are not many additional, statistically unobserved factors on which judges are relying in detaining the most dangerous defendants. However, the figure above does show that there may be at least some suspects that judges can systematically predict are more likely to commit a new crime, even though our probit model is unable to identify these people. In

226. We also considered predictions that included race and gender information, but the resulting predicted rearrest rates were the same as those reported here.

most jurisdictions, these people are detained, but in those jurisdictions that release almost all suspects, these higher crime suspects are released and may drive up the rearrest rate.

Note that as we move through jurisdictions, our simple model predicts an ever-increasing crime rate. This might be because those counties were releasing more people with worse records, but in exploring this, we found that the largest effect was that counties with higher predicted overall crime rates, on average, did let more people go. This may have been due to completely unrelated facts, or it may have been that the jails were already full, but once we account for this overall county crime rate, we can explain most of the rise in the rearrest rate, suggesting that the rise is not due to the selection effect we are concerned about.

2. *Evaluating the Underestimation of Dangerousness Using County Release Rates.*—The results above suggest that our basic probit model may slightly underestimate how dangerous the unreleased are in some counties. The ideal way to deal with this problem is to estimate the probit model on a set of counties that released all inmates. Of course, no such county is available, and our sample of counties with release rates over 90% is so small that estimating the probit model on them alone provides little useful information.²²⁷ Thus, we consider two alternative approaches. Our first approach is to estimate the model on all the data but add in another set of county-year variables to control for each county's release rate. Using this augmented model, we can simulate what crime rates would be like if all counties released 95% of suspects. Our second approach is to use a more extensive estimation procedure that jointly estimates the release and rearrest outcomes. If we assume that the unobserved parts of both outcomes follow a bivariate normal distribution, we can estimate this joint model and use it to simulate how dangerous all defendants are, whether or not they are held.²²⁸

Table 7 reports estimates from these two alternative estimation methods. We report the average probability of rearrest for a twenty- to twenty-five-year-old brought in on one of the four major crime categories and with either a slight or extensive criminal record (using the same definitions as our prior table). For simplicity, we do not report on each possible initial offense, but rather on the weighted average of the larger felony groupings: violent,

227. The study includes 827 released defendants from counties with over a 90% release rate and for whom we have complete data on their characteristics. While this is still twice the size of some of the early studies on pretrial crime, it is still low for subdividing people into many mutually exclusive groups, such as initial offense. Only 4.7% of these people committed a violent crime, which gives us about forty violent crimes spread over about two dozen characteristics. The resulting estimation, available from the authors, is sufficiently imprecise to be useless as a comparison to the baseline.

228. For a discussion of simultaneous equation models with binary dependent variables, see G.S. MADDALA, LIMITED-DEPENDENT AND QUALITATIVE VARIABLES IN ECONOMETRICS (Angus Deaton et al. eds., 1983).

property, drug, and public order. Also, we report on all defendants, rather than just those released.

The first two columns report our baseline estimation. Accordingly, a person with only one prior arrest brought in on a property crime has a 1.3% chance of being rearrested if released. The standard error of 0.2 shows that this number is fairly precisely estimated. The middle columns come from estimating the augmented model that includes as regressors indicator variables for the county's release rate, then simulating crime rates if all counties had a 95% release rate.²²⁹ Thus, we are getting an estimate that should be closer to the latent dangerousness of the population. Though the rearrest rates rise in all cases, the increase is sometimes quite small. For violent offenders with one prior arrest, the rate goes from 3.1% to 4.6%. Drug offenders' rates rise relatively more from 1.1% to 1.7%, but the standard error of 0.4 on the 1.7% rate makes us hesitant to make much of this difference.

The final two columns estimate a joint model of both the release decision and the rearrest outcome.²³⁰ This model gives similar numbers to those in the middle columns though often with slightly lower probabilities. Our findings in both models suggest that while counties with higher release rates do have much higher rearrest rates per person released, this increase is largely due to observable differences in the compositions of the counties. In other words, these differences can mostly be explained by our data. The remaining differences may result for one of two reasons. Judges may be releasing defendants that they can tell are more dangerous than our model predicts, which would suggest that judges see more than our model does. Alternatively, the counties may simply be slightly more dangerous for some other reason not fully accounted for in our model. We cannot determine conclusively which of these two reasons accounts for the remaining differences. Both models rely on the assumption that after we control for defendant characteristics, time trends, and overall county crime levels, counties that hold many people can be used as a control group for those that release many people. This assumption, while not ludicrous, is not bulletproof because there may be other unobservable differences between counties that are correlated with the decision to hold defendants. As such, the results in Table 7 and Figure 6 are suggestive rather than definitive on the matter.

Given that we cannot formally reject the simple model, for the work that follows, we stick with our baseline probit, recognizing that this may

229. The indicator variables are 0/1 binary variables, one for each of the bins in Figure 6.

230. Both equations use the same regressors, but we exclude the county-release-rate indicator variables from the rearrest model as excluded regressors to help with identification. In estimating that model, we cannot reject that the two decisions are independent once one controls for the observed characteristics. Thus, we cannot formally reject that the baseline probit estimates are correct.

somewhat underestimate the rearrest rates for counties holding fewer than 10% to 20% of defendants. When we discuss a revised detention regime and estimate how many people could safely be released, we also give numbers from the alternate selection model as a point of comparison.

G. Predicting Rearrest for Pretrial Felons as Compared to the General Population

Our data allow us to predict rearrest rates for those brought in on a felony charge.²³¹ Federal and state case law and statutory law assumes that felons are more dangerous than the general population. Most states consider prior convictions as a factor in detaining a defendant. As a point of comparison, we take our data on felony rearrests and look at the probability that a person in the general population is brought in originally on a violent felony charge. We also compare our sample with a demographic much more likely to be arrested—male teenagers.²³²

Our data tell us the monthly number of arrests on violent felony charges and the age of those arrested. We use data from the year 2000 and divide by the county's 2000 census population data for the relevant group: either the entire population over the age of fifteen or just male teens over the age of fifteen. Dividing the number arrested by the population, we have the probability of arrest for a violent felony. In the general population, the probability that someone over the age of fifteen is arrested on a violent-felony charge is 0.02%, which translates into about 1 in every 5,000 people.²³³ Among teenage boys, the probability is 0.06%, so a little over 1 in every 2,000 teenage boys is arrested in a given month on a violent-felony charge.

231. We note here that out-of-sample predictions are not going to be a concern for us because an out-of-sample prediction would mean that none of the over 80,000 defendants released had this particular combination of characteristics. That would mean in turn that while our prediction for that combination of attributes might be poor, we would never, or almost never, actually need that prediction, because almost no one has those characteristics. Thus, we acknowledge that our predictions may be worse for characteristic combinations that have a less than 1 in 80,000 chance of occurring.

232. We note here, as was pointed out in helpful comments from J.J. Prescott, that it is possible that the chances of being arrested for a drug crime are lower than for murder, so overall rearrest rates may not be adequate measures of all crime, even if they are better measures of violent crime. For instance, an individual may make one hundred drug sales and get caught for only one, but if an individual has one violent fight at a bar, the arrest rate may be close to 100%. Of course, this highlights the value of focusing on rearrest for violent crime, both because these crimes are more likely to be reported and because violent crime is typically considered much more harmful. See generally Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10 (1995) (attributing the growth in youth-committed homicides to the recruitment of juveniles into the illicit-drug market).

233. We use the year 2000 iteration of our survey, which, when we use the survey weights, gives us an estimate of the number of people arrested in one month (May) on felony charges in forty counties. We then divide by the total population of those age fifteen and over in these same forty counties in the 2000 census. We perform the same calculations for our comparison with teenage boys, but in that case, the denominator is the population of boys age fifteen to nineteen.

In order to compare these monthly arrests rates with pretrial rearrest rates, we multiply the 0.06% probability of arresting these teens in *one* month by the three to four months over which a felony defendant is typically out on bail. This gives us an arrest probability of about 0.2% for teenage boys over a period of time equivalent to a typical pretrial release.²³⁴ It makes little sense to hold anyone in our sample who has a lower chance of violence than 0.2% while on release. Referring back to Table 6, those over the age of fifty arrested on fraud charges with no prior record—about 0.2% of defendants overall—are actually safer than the general population of teenage boys. Given that we certainly are not going to incarcerate all teenage boys because they might be dangerous, it probably does not make sense to hold this safer group for fear of dangerous behavior.

In fact, 1.5% of our sample had a predicted rearrest rate for violent crimes less than 0.2% over the duration of their pretrial release. Twelve percent of those low-risk people²³⁵ were, in fact, detained by the courts pretrial, demonstrating that a number of people detained are no more “dangerous” statistically than some members of the general population. We could almost certainly identify socioeconomic groups in the general population with even higher monthly rates of arrest than teenage boys. For example, arrest rates among inner-city populations are likely to be much higher than the 0.2% used here for teenage boys. Once again, because we are not going to incarcerate these groups wholesale, it probably does not make sense to incarcerate some of the equivalently safe felony defendants.

On the other hand, a teenager with a substantial prior record brought in on a robbery charge has a 15.0% chance of being rearrested over the next several months. This higher chance of rearrest may justify pretrial detention. Thus, there are identifiable groups of people arrested whose probability of committing a new violent crime is far higher than any member of the general population. However, there are also groups of pretrial defendants who have the same risk of being arrested for a crime as some members of the general population, and thus, it is difficult to justify holding them on safety grounds.

H. Judicial Reliance on Flight Risk or Dangerousness

We now turn to the question of judicial behavior—why judges hold the people they do. In addition to the relatively new consideration of dangerousness, the traditional criterion judges consider is flight risk. We would like to know which of these two risks weighs more heavily with judges or, in other words, which risk better models judicial behavior. For

234. If some of the arrests in the following month were of the same person, then this back-of-the-envelope calculation will exaggerate the three-to-four-month arrest-rate probability of the median person in the general population.

235. This 12% of 1.5% refers to about 230 people in our sample that could be safely released. However, given that we only have a sample from a subset of counties over one month, this represents a far larger number of people in the United States over the course of a year.

each person, we already have a probability that he will be rearrested for a violent crime, \widehat{V}_{itc} , some values of which are given in Table 6. We can estimate a model of flight risk by re-estimating our probit model, but rather than modeling \widehat{V}_{itc} , we model the variable “multiple failures to appear,” which we will denote F_{itc} . F_{itc} equals one for those with multiple failures to appear after their pretrial release (about 3.5% of cases) and zero otherwise. The second model in Appendix A gives those probit results.²³⁶

Just as we provided simulated results for the violent-crime risk in Table 6, Table 8 looks at flight risk. Once again, we look at risks by initial offense, age, and prior record, although this time we consider those with no prior record versus those with a prior failure to appear. Flight risk varies some with age, but the difference between teenagers and those over fifty is not as pronounced as it was for violent-crime risk. For example, a teenager with no prior record brought in on a burglary charge has a 2.6% chance of flight, compared to 1.7% for the equivalent person over fifty. If we take that same teenager and add a prior failure to appear, his flight risk jumps from 2.6% to 6%. Thus, prior record is very important for determining flight risk; a prior failure to appear more than doubles the chance of flight. This is significant because, historically, courts looked at flight risk in order to determine whether to release an individual on bail.²³⁷ Judges granted bail unless the defendant was not likely to appear in court.²³⁸ However, in the 1970s and 1980s, judges relied more on predictions of dangerousness to determine whether to release an individual on bail, and defendants were detained if they were thought to be likely to commit a violent crime on release.²³⁹ As discussed above, failure-to-appear rates are not predictors of future arrests for violent crime.

Lastly, initial offense is also a strong predictor but in a very different pattern compared to violent crime. For violent-crime risk, an initial violent-crime charge predicted the highest chances of a rearrest for violence. But for flight risk, the highest risk does not come from those accused of violence but rather from those accused of drug crimes. Of teenagers with no prior record brought in on a possession charge, 5% fled, compared to only 1.1% of equivalent teenagers brought in on robbery charges. The least likely to flee were those over the age of fifty with no prior record brought in on violence-related offenses, with probabilities between 0.4% and 1%, although we should note

236. The baseline offense in Appendix A is drug use, but while drug users have a comparatively low chance of being rearrested for a violent crime, they have a much larger chance of being a flight risk. Thus, in these estimates, all the other crimes have a negative sign, because they exhibit less flight risk than the baseline category of drug users.

237. *See, e.g.,* *Stack v. Boyle*, 342 U.S. 1, 5 n.3 (1951) (quoting FED. R. CRIM. P. 46(c) (1951) (repealed 1956)).

238. *See id.* at 5 (holding that courts may only restrict the release of noncapital defendants to ensure appearance at trial, which generally may be accomplished by setting a reasonable bail).

239. Goldkamp, *supra* note 33, at 1–2, 5 (noting that the bail reforms of the 1970s and 1980s authorized the expanded use of preventive detention, ostensibly to promote public safety).

that we lacked enough data on those charged with murder to estimate an effect for that group. The most likely to flee were teenagers with a prior failure to appear brought in on possession charges—one in ten are predicted to not appear for multiple court dates.

This new model lets us form a flight prediction, \widehat{F}_{itc} , for any person in our model. So if drug users are more likely to flee but less likely to commit a crime, one wonders just how correlated the two dangers are in general. The answer is that the two prediction indices, \widehat{V}_{itc} and \widehat{F}_{itc} , are almost completely uncorrelated ($\rho = 0.029$).²⁴⁰ Thus, the things that a judge can easily observe about a defendant that make him more likely to flee are unrelated to the things that make him likely to be rearrested for a violent crime. This is not to say that the two events are uncorrelated. Rather, it indicates that the things *one can predict* about future violent-crime risk are uncorrelated with the things *one can predict* about flight risk. Given that, which one best explains why a person is held?

Table 9 gives results of a probit model where the dependent variable to be explained is “being held” and the explanatory variables are \widehat{V}_{itc} and \widehat{F}_{itc} . Thus, in Column 1 we see that, on average, increasing the probability of a person fleeing—from 1% to 2%, for example—increases the probability that he will be held by 0.9%—approximately a one-for-one movement. Increasing his dangerousness by a similar amount has a much more dramatic effect, raising his chance of being held by 3.3%. Since both events—flight and violence—are about equally likely and both predictions have similar variances, it appears that judges are basing their decisions far more on predicted violence than on predicted flight.

Column 2 provides a natural log probability specification that better captures the functional form of how judges hold defendants based on risk.²⁴¹ In this case, the interpretation is slightly more difficult as a one unit increase in the log would be like moving from a 1% to 2.7% chance of flight or from a 2% to 5.4% chance. The results in Column 2 once again point to violence as a much larger predictor, approximately fivefold, than flight risk. Increasing the flight risk from 1% to 2.7% increases the chance of being held by only about 2%. But a similar increase in predicted violence would lead to a 10% increase in the probability of being held.

As we noted before, county hold rates vary dramatically and are correlated with underlying violence patterns. We can control for this county-level correlation by adding a control variable for the average hold rate in each person’s county. Then we are comparing how individuals of differing danger are treated *within* a county, rather than across counties.²⁴² We report

240. In unreported results, we find the same result here and for our results below even if we allow the predictions to depend on race, ethnicity, or gender.

241. Column 2 redoes the analysis in logs to capture a nonlinear relationship.

242. County hold rates would confound our regression results if, for example, counties that had high release rates also had high violence rates. In that case, our results would be a mix of a county-

on this model in Column 3.²⁴³ As expected, a person's probability of being held goes up approximately one for one with the overall county hold rate.²⁴⁴ Controlling for the confounding county effect makes both flight risk and violence more important in predicting whether a person will be held: the coefficients on both predictions are now larger. Increasing flight risk from 1% to 2.7% now predicts a 2.3% increase in the probability of being held, while a similar increase in the probability of rearrest for a violent crime predicts a 13.4% increase in the probability of being held. Table 3 shows that only about 39% of people are typically held. So, an increase in flight risk would move this up slightly to a 41.3% chance of being held, while an increase in violence risk would give the person a 52.4% chance of being held. Once again, violence risk trumps flight risk for judges.

I. States that Do Not Consider Dangerousness or Ban Preventive Detention

Two states do not allow preventive detention or consideration of dangerousness.²⁴⁵ Both states, New York and New Jersey, appear in our dataset. One question that prior work has not considered is whether prohibiting consideration of preventive detention and dangerousness has any effect on the detention and rearrest rates. Table 10 compiles some information about these two states compared to the others in our dataset. The percentage of defendants released in New York and New Jersey, at 76%, is

wide correlation and the relationship we want to capture—how individuals with different characteristics are detained when brought before a *given* judge. By controlling for the county's hold rate, we control for this county-wide pattern and can focus on how an individual's risk affects his chance of being held, controlling for county differences.

243. An alternate approach would be to use county-fixed effects, which we estimate in results available from the authors. The county-fixed-effect version gives results largely identical to those reported here, although the coefficients are slightly higher.

244. One might expect that this effect should be exactly one for one. This is true in a simple regression framework with no other regressors.

245. See N.J. STAT. ANN. § 2A:162-13 (West Supp. 2011) (providing that in determining whether to grant bail to someone charged with a crime with bail restrictions, the court "may inquire into any matter appropriate to its determination, including, but not limited to, the following:" the character of the person posting cash bail; the relationship of the person posting cash bail to the defendant; the source of any money posted as cash bail and whether the money was gained by criminal conduct; the character of any person who has indemnified an obligor on the bond; the character of any obligor; the source of any money deposited by any obligor as security and whether such money was gained by criminal conduct; and the source of any money delivered by any obligor as indemnification on the bond and whether such money was gained by criminal conduct); N.Y. CRIM. PROC. LAW § 510.30 (McKinney 2009) (providing that when a court must use its discretion to grant or deny an order of recognizance or bail, the determination shall be made on the basis of the following factors: the principal's character, reputation, habits, and mental condition; his employment and financial resources; his family ties and the length of his residence, if any, in the community; his criminal record, if any; his record of previous adjudication as a juvenile delinquent; his previous record, if any, in responding to court appearances when required; the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; and the sentence which may be, or has been, imposed upon conviction).

noticeably higher than the average of 59% in other places.²⁴⁶ The predicted rearrest rate for those released is noticeably higher in these two places, suggesting an overall higher level of violent crime. In other states the probability is about 1.7%, but it is 2.8% in New York and New Jersey. When we look at actual rearrests, we find that New York and New Jersey are above their predicted rates and other states are below their own predicted rates. This is not too surprising given our county evidence in subpart IV(F) that crime rates relative to predictions rise with the release rate. But the gap is not too extreme—most of the differences between the two places can be readily explained by our model.

Given our available data, we can actually see to what extent New York and New Jersey judges appear to be following their laws. Columns 4 and 5 of Table 9 divide the sample into New York and New Jersey, where danger may not be considered, and the other states in our sample, where it may. Focusing first on the no-dangerousness states of New York and New Jersey, it turns out that the legal regime has a strong effect on our coefficients. Flight risk becomes dramatically more important for determining whom to hold, with a coefficient of 9.9% for a unit log change. And while these states actually do appear to use predicted violence as a consideration, the coefficient on violence drops to 8%—making it less important than flight risk. For example, a defendant in New Jersey with heightened flight risk (e.g., moving from a 1% to a 2.7% chance of multiple failures to appear) would increase his chance of being held by about 10%. Given that the average chance of being held in New Jersey or New York is only 24%²⁴⁷ an increase to a 34% chance of being held is substantial. And, in fact, it is a bigger response than one sees in these states from increased violence risk, where a comparable increase in risk only increases the chance of being held by 8%. Thus, although judges in these states may not be following the law perfectly, flight risk is a bigger consideration than expected danger.

Other states claim to consider both flight risk and dangerousness in determining whom to release pretrial. However, while the coefficient on flight risk was about 10% in New York and New Jersey—suggesting that in these places flight risk plays a big role in incarceration—in all other places it is at best only a marginal consideration with a coefficient of 1.1%. Outside of New York and New Jersey, increasing one's flight risk hardly changes the likelihood of being detained at all. Instead, these other states place tremendous weight on predicted violence. A person with a higher-than-average risk of violence would see a 14% rise in the probability of being held. Most state judges consider dangerousness at a much higher rate than flight risk, though

246. Our data on New Jersey and New York contain 15,300 defendants with about 11,700 of them released. *See infra* Table 10. For all the remaining counties in our sample, we have release data on about 102,000 defendants with about 60,000 released. *Id.*

247. *See infra* Table 10.

most states claim to consider both factors in release decisions and some even state that flight risk is the primary consideration.²⁴⁸

J. Misdemeanor and Other Rates on Release

Our current model only considers violent crime, but obviously there are many more defendants who are rearrested on less serious charges. If we make the dependent variable “any rearrest,” including for misdemeanors, we can re-estimate our model and see what predicts any rearrest. Model 3 of Appendix A reports on the underlying probit model, while Table 11 gives simulated results. Here we see quite a shift upward in the probabilities and a shift in who are the most likely to commit crimes. For example, even teenagers with no prior record have a 10%–15% chance of being rearrested once they have been brought in on a felony charge. And for those with an extensive record, the probability of rearrest for any reason reaches close to 40%. While those arrested for murder are specifically at risk for committing another violent crime, they are actually less likely to be rearrested than those who are arrested for robbery or, for that matter, any of the property or drug crimes listed in Table 11.²⁴⁹

Once again, we see both from Table 11 and the underlying results in Appendix A that overall rearrest probabilities drop with age. Prior arrests, incarceration or failures to appear, or a current criminal status all contribute to substantial increases in the likelihood of more crime.²⁵⁰

K. Potential Impacts of the Model on Pretrial Detention Rates

A few natural follow-up questions after considering this data include: what optimal national detention rates would be; what national detention rates have historically been; and, of course, why this matters for defendants.²⁵¹ As to the first point, depending on how willing we are to abide the risk of crime, we may determine the optimal number of people to hold. While a closer look at the costs and benefits to the state, society, defendants, and victims is in order to really determine accurate thresholds for detention,²⁵² we can still consider this question preliminarily. The following three sections look at state and federal pretrial detention rates historically and then examine current detention rates and how they could potentially be reduced without increasing

248. See *supra* notes 58–60, 237–39, 245 and accompanying text.

249. Murderers' rearrest rates for violent crimes are higher. See *infra* Table 6. They are lower here for measures of all rearrests.

250. The effect of county crime rates on rearrest rates, on the other hand, is estimated very imprecisely, such that no strong claims can be made.

251. We do not advocate using a national model to create local release rates. In fact, in section IV(K)(2), *infra*, we advocate using a predictive model with local county rates to best dictate appropriate release rates for each county.

252. A follow-up article will more closely analyze the costs of pretrial release for defendants and society.

the overall level of pretrial crime. The final section comments briefly on the impacts of detention on defendants and society.

1. Pretrial Detention Rates Historically.—Overall, both federal and state detention rates have increased since the 1980s. Additionally, over the last two decades, local jails have housed more pretrial detainees than actual convicts.²⁵³ In 1990, the percentage of pretrial detainees was about 50%,²⁵⁴ but in 2007, the pretrial detainee population increased to 62% of the jail population.²⁵⁵ State detention trends can be gleaned from a number of small studies on state pretrial detention. Wayne Thomas analyzed release rates in twenty cities in 1962 and 1971 and found that, during that time frame, pretrial release rates had increased from 48% to 67% for felony defendants.²⁵⁶ Lee Silverstein also completed a study in 1962 that found that 44% of defendants were released pretrial.²⁵⁷ Mary Toborg completed a study using data from 1976 to 1978 that analyzed pretrial release in eight cities. The overall pretrial release rate was 85%, and she suggested that her findings demonstrated a continuation of a trend toward higher pretrial release rates.²⁵⁸ In 1969, Paul Wice surveyed seventy-two cities and found that 65% of detainees were released pretrial using cash bonds.²⁵⁹ State pretrial release rates were fairly constant at 64% to 62% through the 1990s and into the first part of the 2000s.²⁶⁰ In 2004, there was a distinct drop in release rates where

253. This is based on the authors' calculation from the *Annual Survey of Jails* for the years 1985–1987, 1989–1992, 1995–1997, 2000–2004, and 2006, produced by the Bureau of Justice Statistics. To obtain the underlying databases, see INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, <http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/7/studies?archive=ICPSR&sortBy=7>.

254. Compare BURDEEN, *supra* note 15, at 4 (reporting the pretrial detainee population to be about 200,000 in county jails in 1990), with U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 1995, at 7 (1995) (reporting the total local jail population to be 403,019 in 1990). In 2000, the percentage rose to 56%. INMATES AT MIDYEAR 2000, *supra* note 15, at 7.

255. INMATES AT MIDYEAR 2007, *supra* note 15, at 7.

256. WAYNE H. THOMAS, JR. ET AL., PRETRIAL RELEASE PROGRAMS 29 (1977). Thomas also reported an increase from 60% to 72% in release rates for misdemeanor defendants. *Id.*

257. See 1 LEE SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT 8 (1965) (finding that 56% of defendants were not released on bail before trial).

258. TOBORG, *supra* note 166, at 5–6.

259. WICE, *supra* note 132, at 8–9.

260. Since the 1990s, pretrial-release records have been kept more consistently, and the numbers reveal a steady decline in pretrial release of defendants, both on a state and federal level. In the state detention system in 1992, 63% of defendants were released pretrial across the seventy-five largest counties in the United States. BRIAN A. REAVES & PHENY Z. SMITH, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1992, at 17 (1995). The release rate remained steady at an average of 63% from 1992 to 2003, but in 2004, pretrial-release percentages began to decline again, and in 2006, they dropped to 58%. See BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1994, at 16 (1998) (reporting a pretrial release rate of 62%); TIMOTHY C. HART & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS,

about 5% more defendants were being held pretrial than in 2002, and this drop largely carried over into 2006.²⁶¹

In the years before the federal Bail Reform Act of 1984, the government failed to keep consistent records on federal pretrial release. But, in 1982, a study of ten federal districts found high pretrial release rates: 90% in 1978, 89% in 1979, and 87% in 1980.²⁶² However, subsequent to the passage of the 1984 federal Bail Reform Act, pretrial release dropped. A 1987 General Accounting Office (GAO) report concluded that pretrial incarceration increased with the new law.²⁶³ For instance, in 1984, 74% of defendants were released pretrial, and in 1986 after the passage of the Act, the percentage dropped to 69%.²⁶⁴ However, under the new law, the number of defendants detained because of inability to meet bail dropped by almost 50%.²⁶⁵ In the federal detention system in 1994, 61% of defendants were released pretrial, which was a decrease from 1986 when 69% of defendants were released pretrial.²⁶⁶ The federal numbers continued to decline over the next decade until they reached a 40% release rate in 2004.²⁶⁷

FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1996, at 16 (1999) (reporting a pretrial release rate of 63%); BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1998, at 16 (2001) (reporting a pretrial release rate of 64%); GERARD RAINVILLE & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2000, at 16 (2003) (reporting a pretrial release rate of 62%); THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002, at 16 (2006) (reporting a pretrial release rate of 62%); 2004 FELONY DEFENDANTS, *supra* note 10, at 2 (reporting a pretrial release rate of 57%); 2006 FELONY DEFENDANTS, *supra* note 10, at 6 (reporting a pretrial release rate of 58%).

261. Pretrial release rates in 2004 were 56% and in 2006 they were 58%. *See infra* Table 2.

262. U.S. GEN. ACCOUNTING OFFICE, GGD-82-51, STATISTICAL RESULTS OF BAIL PRACTICES IN SELECTED FEDERAL DISTRICT COURTS 7 (1982).

263. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-88-6, CRIMINAL BAIL: HOW BAIL REFORM IS WORKING IN SELECTED DISTRICT COURTS 18 (1987) ("Our analysis of criminal cases in the four districts showed that overall, a greater percentage of defendants remained incarcerated during their pretrial period under the new law than under the old law." (footnote omitted)).

264. *See id.* (observing a pretrial incarceration rate of 26% under the old law and a rate of 31% under the new law, which corresponded to 74% and 69% pretrial release rates, respectively).

265. *See id.* at 17 (observing that, under the old law, all defendants in a sample size were detained because they did not meet bail, while under the new law, only 51% of defendants in a sample were detained for that reason).

266. *See id.* at 18; OFFICE OF THE FED. DET. TR., U.S. DEP'T OF JUSTICE, DETENTION NEEDS ASSESSMENT AND BASELINE REPORT: A COMPENDIUM OF FEDERAL DETENTION STATISTICS 3-4 (2006) [hereinafter FEDERAL DETENTION STATISTICS], available at http://www.justice.gov/ofdt/compendium_final.pdf (showing the changing pretrial detention rates of federal defendants).

267. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 47 tbl.3.2 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs04.pdf> (illustrating the types of pretrial release for cases terminated in 2004 and showing an overall release rate of 40% for the year); FEDERAL DETENTION STATISTICS, *supra* note 266, at 4 tbl.3 (listing the release rates for 1995 (60%), 1996 (57%), 1997 (54%), 1998 (53%), 1999 (49%), 2000 (48%), and 2001 (48%)); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2002, at 37 (2004) (listing the overall release rate at 45% for 2002); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, at 41 (2005) (listing the overall release rate at 41% for 2003).

2. *Current Pretrial Detention Practices.*—In our dataset, we know detention rates and predicted crime rates for 116,000 defendants from 1990 to 2006. Of those, approximately 45,000 were held and 72,000 were released. If we wanted to release everyone with less than a 20% chance of being rearrested, that would be approximately 73,500 people—very comparable to the current rate. However, as it stands, almost exactly half of those *held*—22,500—in reality have a lower than 20% chance of rearrest, while an equivalent number of those *released* have higher than a 20% chance of committing a crime. Thus, if we are releasing people based on a threshold of 20%, then we are often releasing the wrong groups of people. In other words, about half of those detained have a lower chance of being rearrested pretrial than many of the people released.²⁶⁸

To prove this point in a different way, we can change the threshold of people we are willing to release pretrial. Currently, we release about 72,000 defendants, and this rate generally matches the number of people we could release if we were to release everyone with a less than 20% chance of being rearrested for any crime pretrial. We can also choose to release all of those who are less than 30% likely to commit a crime pretrial to see what the impact would be. With this 30% threshold, we would release 99,882 defendants, which is 85% of defendants—a much larger proportion than our current percentage. In that world, 14.7% of those released would be predicted to commit a crime. This is lower than where we end up now with a 16% rate,²⁶⁹ mostly because we are assuming a somewhat different methodology for predicting crime—one where we rely on our predicted crime model and nothing else. This consideration raises our efficiency such that we can release more defendants and still decrease the pretrial crime rate. This is not even accounting for any prohibited factors such as race or gender, though it does consider the age of the defendant. Thus, our predicted model can provide guidance for judges to make more efficient decisions and increase the number of people released pretrial while not causing increased danger to the public.²⁷⁰

If we were particularly interested in violent crimes, rather than just total crime rates, we could establish a double threshold. Suppose that we only release those who have both a less than 30% chance of being rearrested for any crime *and* less than a 3% chance of rearrest for a violent crime. Under this double threshold, we would release 84,000 defendants, or 72% of all defendants. Even with this increase in releases, because we are better targeting which defendants to release, pretrial violent-crime rates would

268. If we wanted to release everyone with less than a 10% chance of being rearrested for a crime pretrial, we would release 34,000 defendants in our sample, leading us to detain around three-fourths of all defendants. In contrast, if we were willing to release all of those with a 30% or less chance of committing a crime, we would release 102,202 defendants.

269. See *infra* Table 3.

270. It is important to note that we are not arguing that efficiency in prediction should be favored at the expense of the civil rights of defendants.

decrease from 1.9% to 1.24%, which is a significant improvement. The overall crime rate would be 13.8% under this model, as opposed to 17% currently.

Compared to this statistical-threshold model, it appears that judges often overhold older defendants, people with clean prior records, and people who commit fraud and public-order violations.²⁷¹ The probability of being overheld steadily rises as a defendant's prior conviction and arrest record gets better, whereas prior failures to appear in court and prior incarceration make being overheld less likely.²⁷²

As we discussed in subpart IV(F), our baseline probit model may not adequately track the riskiness of those released by underestimating the extent to which those held are more dangerous in unobservable ways. Though we could not formally reject our baseline model of violent crime, there was at least some evidence that this "selection on unobservables" was occurring. If we restrict ourselves to just looking at violent crime, we can use the augmented two-equation probit model, reported in Columns 5 and 6 of Table 7, which jointly accounts for release and rearrest, to re-estimate how many people should be released. For simplicity, we considered a single threshold of less than a 3% chance of committing a violent crime.²⁷³ In that case, we would release 79,000 people, and the violent-crime rate would be 1.35%. Once again, even under these alternate assumptions, we could potentially release more people and have lower crime rates.

Rather than judges relying on these national conclusions, we recommend that local counties estimate a jurisdiction-specific model based on the probit illustrated here. This will provide them with a prediction model best attuned to local circumstances. Once judges have in hand these baseline risks based on past record, initial charge, and age, they can supplement them as needed if there are extenuating circumstances *beyond* the data we have already accounted for. We also recommend a county-specific estimation

271. Those charged with violent crimes are less likely to be overheld. Those charged with property and drug crimes form a second tier.

272. In order to determine which groups were overheld relative to their chances of committing a crime, we ran a regression on all those held using the same regressors as in Appendix A. The dependent variable was 1 for those who were held but had less than a 30% chance of rearrest for any crime and less than a 3% chance of rearrest for a violent crime. What do these individuals who were held but would be released under this new threshold look like? Fifty-seven percent have four or more prior arrests, about half are over the age of thirty, about half have a prior felony conviction, one-third have a prior failure to appear and 88% are male. This model does not say who exactly is being overheld but instead identifies factors that make it more likely that judges would overhold someone. Thus, it is similar to the model predicting crime rates, but in reverse.

273. Methodologically, we simulated an error term for the release equation that represents judges' idiosyncratic release decisions. We know from the joint probit model how correlated this decision is with future rearrest, and so we used it to form a simulated probability that each defendant would be rearrested. Thus, we were simulating a world where the judge started from an empirical model like the one presented here and then added a certain amount of private information based on individual circumstances not captured in our data. We then simulated rearrest rates as if the judge had released all those with rearrest probabilities below 3%.

because, as one can see in the Appendix, differences across counties can lead to substantial differences in rearrest probabilities.

3. *Impacts of Detention on Defendants and Society.*—As to the third point, there are several documented effects on defendants who are detained pretrial and on society when pretrial defendants commit crimes. These assertions rely on studies whose merits we do not test here.²⁷⁴ The largest impact may be that incarcerating a defendant pretrial prejudices the defendant's case in favor of guilt. Several studies show that incarcerated defendants are more likely than those released pretrial to be found, or to plead, guilty and serve prison time.²⁷⁵ Detention leads to the loss of employment and other negative financial conditions²⁷⁶ and to less likelihood of obtaining private counsel, which can harm the defendant's chances of acquittal²⁷⁷ or favorable sentencing.²⁷⁸ In addition, living conditions in jail are often poor and have been shown to have a negative influence on a defendant's trial demeanor.²⁷⁹ In addition, increased detention increases costs to counties, which currently struggle with hard decisions regarding budget cuts.

On the other side, there is the obvious consideration that there is a large cost to victims and society when there are more crimes committed. The costs of murder, rape, burglary, robbery, and other felony offenses are tremendous

274. A fuller discussion of the normative claims surrounding the impacts on defendants and society of applying this model will be included in a forthcoming article.

275. See Foote, *supra* note 8, at 1053 tbl.2 (observing that 22% of defendants on bail and 59% of detained defendants received prison sentences); Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641, 643 n.6 (1964) (finding that detained defendants are more likely to receive prison sentences than bailed persons); Patricia Wald, *Foreword: Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U. L. REV. 631, 639 (1964) (finding that “defendants released any time before sentencing received more favorable treatment than those who stayed in jail the entire time”). In the study presented in this Article, 74% of those detained were found guilty and 69% served prison sentences, while 53% of those released were found guilty and 26% served prison time.

276. See Angel et al., *supra* note 111, at 354 (explaining that 40% of defendants were steadily employed, but almost 90% had savings of less than \$300, which meant that detention often forced dependents onto welfare).

277. Defendants with appointed counsel were found guilty 65% of the time as compared to 49% for those with private attorneys, and 17% of defendants with appointed counsel were found not guilty as compared to 35% of those with private counsel. See *id.*, at 347–49 (stating that detained defendants are less able to afford the costs of witnesses and private investigators, are more ready for police lineups, and go to court with the baggage of having been detained pretrial).

278. *Id.* at 350–51.

279. William A. Brockett, Jr., *Presumed Guilty: The Pre-trial Detainee*, YALE REV. L. & SOC. ACTION, Spring 1971, at 10, 17–18 (“Time in jail may alter the defendant’s appearance for the worse. One inmate, when first seen, appeared to be a young, clean-cut, and cheerful country boy. Two weeks later, the same inmate, who had spent his past few days in administrative segregation as an escape risk, had acquired an unmistakable pallor—‘jailhouse grey’—had sunken eyes, trembling hands, a few days stubble on his jaw, and had become completely withdrawn, sinking his chin onto his chest and answering questions in monosyllables only. . . . The appearance of the defendant is not likely to go unnoticed by a jury.”).

both financially and in other intangible ways.²⁸⁰ Indeed, recent scholars have argued that pretrial release costs society more than detaining innocent people, because it allows the release of a greater number of suspected felons on the street for several more months.²⁸¹ While we leave the determination of whether (and at what level) the costs of crime outweigh the benefits of releasing more individuals for another day, we conclude here that release rates can be increased in most U.S. counties without a commensurate increase in crime rates.

V. Conclusion

We have high expectations that our government will keep us safe from crime and violence.²⁸² We are much less patient with government when those who cause us harm are already part of the criminal justice system.²⁸³ Others tackling the pretrial crime and prediction problem have advocated speedy trials,²⁸⁴ an increase in pretrial supervision programs,²⁸⁵ bail

280. See *Crime in the United States by Volume and Rate per 100,000 Inhabitants, 1990–2009*, FED. BUREAU OF INVESTIGATION (Sept. 2010), http://www2.fbi.gov/ucr/cius2009/data/table_01.html (citing the number and rates of these types of crimes); see also Mark A. Cohen, *The Monetary Value of Saving a High-Risk Youth*, 14 J. QUANTITATIVE CRIMINOLOGY 5, 17 (1998) (finding that a typical criminal career causes between \$1.3 million and \$1.5 million in external costs after discounting to present value); Mark A. Cohen et al., *Willingness-to-Pay for Crime Control Programs* 27 (Nov. 2001) (unpublished manuscript), available at <http://ssrn.com/abstract=293153> (finding victim costs due to armed robbery and burglary to be about five to ten times higher than previous estimates).

281. Larry Laudan & Ronald J. Allen, *Deadly Dilemmas II: Bail and Crime*, 85 CHI.-KENT L. REV. 23, 27 (2010) (pointing out that an individual has a 0.25% chance of being wrongfully convicted of a serious crime sometime in his life but an 83% chance of being the victim of a serious crime).

282. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533 (2001) (analyzing the demand for symbolic legislative action and the influence of public pressure on the formulation and enforcement of criminal law).

283. See, e.g., Thomas Bak, *Pretrial Release Behavior of Defendants Whom the U.S. Attorney Wished to Detain*, 30 AM. J. CRIM. L. 45, 48 (2002) (“While support for bail reform came from all quarters . . . the rationale as seen by conservatives originated in the perceived need to protect the public from criminal behavior by defendants who had been released on bail.”); *id.* at 48 n.8 (“The impetus for pretrial incarceration did not come from criminal justice professionals but from politicians responding to public sentiment.”); Thomas Henry, *Reflections on the 25th Anniversary of the Pretrial Services Act*, FED. PROBATION, Sept. 2007, at 4 (“The vast majority of citizens, although recognizing the right to bail (especially if they are the arrestees), resent the fact that those arrested for crime are free on the streets and back in their neighborhoods. Safety is the concern, voiced most frequently by law enforcement frustrated that ‘criminals’ (not defendants) are back on the street before they finish their paperwork.”).

284. Foote, *supra* note 8, at 1077–78. While working to make trials speedier, Foote also recommended that failure to appear in court be a criminal offense, cash bail be phased out in favor of nonfinancial conditions like personal recognizance, and bail amounts be reduced in order to reduce economic bias in the bail system. *Id.* at 1073–74; see also Ervin, *supra* note 22, at 299 (advocating speedy trials and noting that most defendants do not commit crimes within the first sixty days of bail release). For examples of recent speedy trial innovations, see Stephen Hunt, *Early Resolution Program Aims to Unclog Courts*, SALT LAKE TRIB. (Jan. 19, 2011), <http://www.sltrib.com/sltrib/home/51080841-76/cases-program-ecr-county.html.csp> and Emiley Morgan, *Early Resolution Plan in Works To Move Criminal Justice System Along*, DESERET NEWS (Dec. 22,

forfeiture,²⁸⁶ more visibility of judicial detention decisions,²⁸⁷ and setting bail amounts in a more logical way.²⁸⁸ Some of these proposals deserve serious consideration. While our model is not the panacea to solving the problem of predicting pretrial violence, it contributes in several important ways.

First, prior work has disagreed on how likely reported pretrial arrest actually is, and our study shows that it is actually quite unlikely. This is especially the case considering that this data looks exclusively at felony defendants in urban counties, arguably the most dangerous recidivists in the system. Of all of the defendants released, only 16% are rearrested for any reason, 11% are rearrested for a felony, and only 1.9% are rearrested for a violent felony. To look at it another way, about 80% of released pretrial defendants have less than a 3% chance of being rearrested pretrial for a violent crime. And for almost all crimes, the average rearrest rates are only about 1%–2% for a pretrial violent crime.²⁸⁹

Second, scholars have said that there are no accurate predictors of pretrial crime.²⁹⁰ We disagree with that, showing that the present offense, prior convictions, and prior failures to appear are all important predictors of pretrial rearrest. As to the present offense, while scholars have commented

2010), <http://www.deseretnews.com/mobile/article/705363391/Early-resolution-plan-in-works-to-move-criminal-justice-system-along.html>. For an editorial in support of the program, see *Early Case Resolution*, KSL (June 11, 2010), <http://www.ksl.com/index.php?nid=238&sid=11121088>.

285. Studies have shown that high-risk defendants could safely be released into the public by imposing harsher conditions on them instead of the lighter conditions imposed on low-risk defendants. Toborg & Bellasai, *supra* note 174, at 106. For instance, programs that would force defendants who test positive for drugs to be sent back to jail have been shown to be helpful. See PAUL BERNARD WICE, BAIL AND ITS REFORM: A NATIONAL SURVEY 66 (1973) (supporting pretrial supervision programs rather than detention pretrial and noting that a 1972 Department of Justice survey of cities revealed that 72% of cities with pretrial rearrest rates below the national average used pretrial supervision). Wice further noted that these supervision programs have a stronger influence on rearrest rates than release criteria such as community ties and the present charge. *Id.* at 66–67.

286. Bail forfeiture is when a defendant is released on bail and is informed that if he gets arrested for another crime while free on bail, he waives his right to bail for the subsequent crime. Angel et al., *supra* note 111, at 365–68 (noting that bail forfeiture should be accompanied by strong procedural protections, an expedited trial, and a detention hearing).

287. Goldkamp, *supra* note 33, at 55–56 (suggesting the development of methods for judges to review bail policies, organize discretionary and improvisational release and detention practices, and monitor their consequences so that judges will be more able to make informed decisions based on rational policy).

288. Karnow, *supra* note 85, at 21 (noting that if the likelihood of getting caught is low, then the defendant will commit the offense, and if bail is high enough that the defendant does not want to risk losing it, but is able to achieve it, he is adequately deterred from being rearrested or committing additional crimes). Note, though, that defendants often do not lose money bail for committing additional crimes but only for failing to appear for court dates.

289. This is true except for three categories: murder, rape, and robbery.

290. See NBS STUDY, *supra* note 96, at 40–41 (contending that current data is inadequate to develop and validate a high quality prediction device for pretrial crime); Foote, *supra* note 8, at 1071–72 (arguing that it is “impossible” to determine how much weight should be given to the possibility that “the type of defendants who are now jailed are so much more unreliable as a group that their pre-trial freedom would substantially increase the incidence of non-appearance”).

that it provides little information, we show that those charged with robbery, burglary, and motor-vehicle theft are more likely to be rearrested for any crime on release than the average defendant. We also show that though defendants with drug felonies are presumed to be dangerous, they are among the *least* likely to be rearrested for a violent crime. In fact, people charged with drug felonies are about as likely to be rearrested as those brought in on driving-related offenses.²⁹¹ As to prior convictions, while many states consider this factor and prior work has disagreed as to its importance as a predictor of pretrial misconduct, we find that the number of previous convictions is directly correlated with future likelihood to be arrested.²⁹² Again showing that the instance of pretrial crime is exaggerated, we show that even repeat offenders²⁹³ only get arrested for a pretrial crime in about one in thirty instances. With failure-to-appear rates, we show that previous failures to appear are a significant predictor of future multiple failures to appear, though past failure to appear is not a good predictor of violent crime. Past failure to appear also predicts being rearrested for a nonviolent crime.

Third, our analysis also considers an issue of first impression in this area: which of two risks weighs more heavily with judges—dangerousness or flight risk? In states where judges should consider both factors, we find that judges consider dangerousness at a much higher rate than flight risk, almost to the exclusion of flight risk. In states not permitted to consider dangerousness, flight risk is a bigger consideration, though judges still consider dangerousness at a smaller level.²⁹⁴

Finally, recognizing that overall detention rates have increased in both federal and state systems, our study examines whether we can release more defendants safely. In the most significant finding in our study, our analysis shows that if the goal is to prevent crime, judges are often releasing and detaining the wrong groups. In other words, about half of those detained have a lower chance of being rearrested pretrial than many of the people released. Indeed, we would be able to release 25% more defendants while decreasing pretrial crime levels if we released defendants using our evidence-based model. This model would not allow judges to consider prohibited factors such as gender and race, but it demonstrates that judges could 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.

291. In addition, we conclude that, in general, those charged with violent crimes are the most likely to be charged with violent crimes while released on bail.

292. However, our data surprisingly finds that rearrest is not much higher for those who have four or more prior convictions than those who have no convictions or just one prior conviction.

293. By repeat offenders, we refer to defendants with four or more convictions.

294. On this point, our study focused on New York and New Jersey and did not analyze data in other states that prohibit considerations of dangerousness.

Table 1. Determining Dangerousness: General Statutory Discretions

Possible Discretionary Considerations	Level of Discretion	Number of States
Present offense charged	<i>Objective</i>	44
Restrict scope of pretrial detention authority		35
Require/permit consideration of present offense		31
Presumption of detention/release based on nature of crime		7
Past conduct	<i>Objective</i>	33 (+D.C.)
Full review of criminal record		17
Limited review related to determination of dangerousness		2
Limited review of certain types of crimes		2
Past appearances, conduct during bond/supervised release		25
Review past conduct, especially history of drugs or violence		10
Character and present circumstances	<i>Subjective</i>	25 (+D.C.)
Bail Reform Act factors:		
• Family situation		
• Employment		
• Finance		
• Character and reputation		
• Record of appearances/history of flight		
• Community ties		
Factors not included in Bail Reform Act:		
• Alien status		3
• Gang involvement		4
• Possession or control of weapons		4
• Propensity for violence		2
• General attitude and demeanor		1
• History of depression		1
• Treatment of animals		11
Consider “any other factor” relevant or “including but not limited to”		16
No list of factors		7

Table 2. Observations and Percentage of Defendants Released by Year

Year	Defendants (Observations)	Percentage Released (Weighted)
1990	12,257	64%
1992	10,518	63%
1994	12,922	63%
1996	13,192	64%
1998	13,432	63%
2000	12,738	61%
2002	13,414	61%
2004	12,596	56%
2006	15,828	58%

Table 3. Releases and Rearrests by Offense

Original Offense	Percentage of All Defendants	Percentage Released	Percentage of Those Released Who Are Rearrested		
			For Any Crime	For a Felony	For a Violent Felony
All Defendants	100%	61%	16%	11%	1.9%
Violent Crimes					
Murder	0.9%	19%	12%	9%	6.4%
Rape	1.5%	53%	9%	6%	3.2%
Robbery	6.6%	42%	21%	13%	5.8%
Assault	12.0%	63%	12%	7%	2.9%
Other	3.7%	62%	11%	5%	2.5%
Property Crimes					
Burglary	8.7%	49%	19%	13%	1.9%
Larceny/Theft	9.4%	67%	16%	10%	1.4%
Motor Vehicle	3.1%	48%	20%	16%	2.4%
Forgery	2.7%	70%	15%	9%	1.3%
Fraud	2.8%	80%	9%	6%	0.3%
Other	4.4%	71%	18%	12%	2.3%
Drug					
Sales	17.2%	63%	21%	14%	1.6%
Possession/Other	18.3%	66%	17%	11%	1.1%
Public Order					
Weapons	3.0%	64%	12%	8%	2.1%
Driving Related	2.7%	73%	13%	9%	1.0%
Other	3.0%	61%	13%	8%	1.1%

Table 4. Summary Statistics for Initial Offense and Past Criminal Record Variables

	All Defendants	Released Sample
Violent Crimes		
Murder	0.9%	0.3%
Rape	1.5%	1.3%
Robbery	6.6%	4.6%
Assault	12.0%	12.3%
Other	3.7%	3.7%
Property Crimes		
Burglary	8.7%	6.9%
Larceny/Theft	9.4%	10.3%
Motor Vehicle	3.1%	2.4%
Forgery	2.7%	3.1%
Fraud	2.8%	3.6%
Other	4.4%	5.1%
Drug		
Sales	17.2%	17.5%
Other	18.3%	19.6%
Public Order		
Weapons	3.0%	3.2%
Driving Related	2.7%	3.2%
Other	3.0%	3.0%
Prior Arrests		
None	27.7%	35.4%
One	8.9%	10.0%
Two or Three	13.6%	14.0%
Four or More	49.8%	40.5%
Prior Convictions		
None	41.8%	52.1%
One	13.4%	13.7%
Two or Three	16.4%	14.5%
Four or More	28.4%	19.8%
Prior Incarceration	44.9%	33.1%
Multiple Charges	55.9%	55.3%
Prior Failure to Appear	29.7%	24.3%
Criminal Status	32.5%	23.4%
Felon	40.4%	29.7%
Prior Violent Felony Conviction	10.9%	7.7%

Note: Each cell gives the fraction of the sample that has the given characteristic. Thus, 2.8% of all defendants in the sample were arrested on fraud charges. For the full and released samples, $n = 116,887$ and $71,943$ respectively. Data are all weighted to be representative of large urban counties.

Table 5. Summary Statistics for Demographic and County Variables

	All Defendants	Released Sample
Age		
Under 20	13.9%	15.6%
20–24	21.8%	22.3%
25–29	17.8%	17.6%
30–39	28.2%	26.8%
40–49	13.8%	13.0%
50 and above	4.5%	4.8%
County Crime Rate per Thousand People		
Violent	0.18	0.19
Property	0.21	0.22
Drug	0.25	0.26
Public Order	0.06	0.06
County Population (log)	14.37	14.24

Table 6. Rearrest Probabilities Based on Observable Characteristics

Initial Felony Charge	Teenager			Over 50		
	No Prior Record	One Prior Arrest	Extensive Record	No Prior Record	One Prior Arrest	Extensive Record
Violent Crimes						
Murder	5.9% [2.4]	7.2% [2.8]	19.4% [6.2]	1.7% [0.9]	2.2% [1.1]	8.0% [3.4]
Rape	3.4% [0.7]	4.2% [0.9]	13.0% [2.3]	0.9% [0.3]	1.2% [0.4]	4.7% [1.4]
Robbery	4.1% [0.4]	5.1% [0.7]	15.0% [1.6]	1.1% [0.3]	1.5% [0.4]	5.7% [1.3]
Assault	2.7% [0.3]	3.4% [0.4]	11.0% [1.1]	0.7% [0.2]	0.9% [0.2]	3.8% [0.8]
Property Crimes						
Burglary	1.5% [0.2]	2.0% [0.3]	7.2% [0.9]	0.3% [0.1]	0.5% [0.2]	2.3% [0.6]
Larceny/Theft	1.4% [0.2]	1.8% [0.3]	6.6% [0.8]	0.3% [0.1]	0.4% [0.1]	2.0% [0.5]
Motor Vehicle	2.0% [0.4]	2.6% [0.6]	8.8% [1.2]	0.5% [0.2]	0.6% [0.2]	2.9% [0.8]
Forgery	1.4% [0.3]	1.8% [0.5]	6.6% [1.3]	0.3% [0.1]	0.4% [0.1]	2.0% [0.6]
Fraud	0.4% [0.2]	0.6% [0.2]	2.8% [0.9]	0.1% [0.0]	0.1% [0.1]	0.7% [0.3]
Drug Crimes						
Sales	1.2% [0.2]	1.6% [0.3]	6.0% [0.8]	0.3% [0.1]	0.4% [0.1]	1.8% [0.4]
Possession/Other	1.2% [0.2]	1.6% [0.3]	6.0% [0.6]	0.3% [0.1]	0.4% [0.1]	1.8% [0.5]
Public Order						
Weapons	1.8% [0.3]	2.3% [0.4]	8.2% [1.2]	0.4% [0.1]	0.6% [0.2]	2.6% [0.7]
Driving Related	1.1% [0.3]	1.4% [0.4]	5.5% [1.3]	0.2% [0.1]	0.3% [0.1]	1.6% [0.6]

Note: “Extensive Record” is a person previously convicted of a violent felony with at least four prior arrests and active criminal justice status. All other characteristics of the individual are left as they are in the data. Standard errors are clustered at the county level and are in brackets. For the underlying probit estimation used to form the estimates, see Appendix A. For the sample, $n = 71,943$. Estimates are weighted to be representative.

Table 7. Probability of Rearrest for a 20–25 Year Old Under Different Modeling Assumptions

Initial Felony Charge	Baseline		Predict 95% County Release Rate		Maximum Likelihood Joint Selection Model	
	One Prior Arrest	Extensive Record	One Prior Arrest	Extensive Record	One Prior Arrest	Extensive Record
Violent Crimes	3.1%	10.2%	4.6%	13.6%	4.1%	13.5%
	[0.4]	[1.1]	[0.8]	[1.9]	[0.9]	[2.9]
Property Crimes	1.3%	5.2%	2.0%	7.3%	1.7%	6.9%
	[0.2]	[0.5]	[0.4]	[1.2]	[0.4]	[1.6]
Drug Crimes	1.1%	4.4%	1.7%	6.3%	1.4%	5.9%
	[0.2]	[0.4]	[0.4]	[1.1]	[0.3]	[1.4]
Public Order	1.2%	4.8%	1.9%	6.8%	1.5%	6.3%
	[0.2]	[0.6]	[0.4]	[1.3]	[0.4]	[1.5]

Note: “Extensive Record” is a person previously convicted of a violent felony with at least four prior arrests and active criminal justice status. All other characteristics of the individual are left as they are in the data. Standard errors are clustered at the county level and are in brackets. All probabilities are estimated latent probabilities for the whole population of defendants, rather than just those released. Baseline estimates are those in Appendix A, model (1). The next estimates add county hold rate as an explanatory variable to the estimation, then simulate rearrest rates if all counties released 95% of defendants. The last estimates jointly model being held and being rearrested to estimate the latent risk of a person being rearrested if he or she were released. Estimates are weighted to be representative.

Table 8. Predicting Multiple Failures to Appear

Initial Felony Charge	Teenager		30–35		Over 50	
	No Prior Record	Prior Failure to Appear	No Prior Record	Prior Failure to Appear	No Prior Record	Prior Failure to Appear
Violent Crimes						
Murder	insufficient data					
Rape	0.7% [0.3]	1.9% [0.7]	0.7% [0.3]	1.8% [0.6]	0.4% [0.2]	1.2% [0.5]
Robbery	1.1% [0.2]	2.9% [0.7]	1.1% [0.2]	2.8% [0.6]	0.7% [0.2]	1.9% [0.5]
Assault	1.6% [0.3]	3.8% [0.7]	1.5% [0.2]	3.7% [0.6]	1.0% [0.2]	2.5% [0.5]
Property Crimes						
Burglary	2.6% [0.3]	6.0% [1.1]	2.6% [0.3]	5.9% [0.9]	1.7% [0.4]	4.1% [0.9]
Larceny/Theft	3.0% [0.5]	6.7% [1.4]	3.0% [0.4]	6.6% [1.3]	2.0% [0.4]	4.7% [1.1]
Motor Vehicle	3.6% [0.8]	7.8% [1.8]	3.5% [0.7]	7.7% [1.6]	2.4% [0.6]	5.5% [1.4]
Forgery	3.4% [0.6]	7.3% [1.5]	3.3% [0.5]	7.2% [1.4]	2.2% [0.5]	5.1% [1.2]
Fraud	2.4% [0.3]	5.5% [1.0]	2.4% [0.3]	5.4% [0.9]	1.5% [0.3]	3.8% [0.9]
Drug						
Sales	2.9% [0.5]	6.5% [1.4]	2.8% [0.4]	6.4% [1.2]	1.9% [0.4]	4.5% [1.1]
Possession/Other	5.1% [0.8]	10.4% [2.0]	5.0% [0.7]	10.3% [1.7]	3.5% [0.8]	7.5% [1.7]
Public Order						
Weapons	2.0% [0.4]	4.6% [1.1]	1.9% [0.4]	4.5% [1.0]	1.2% [0.4]	3.1% [1.0]
Driving Related	1.5% [0.4]	3.7% [1.0]	0.5% [0.3]	3.6% [0.9]	0.9% [0.2]	2.4% [0.7]

Note: We simulate the probability of multiple failures to appear for a given person while varying their age, original offense, and whether or not they have previously failed to appear. All other characteristics of the individual are left as they are in the data. Standard errors are clustered at the county level and are in brackets. For the underlying probit estimation used to form the estimates, see Appendix A. $n = 71,763$. Estimates are weighted to be representative.

Table 9. Predicting Holds Based on Predicted Flight Risk and Violence

	(1)	(2)	(3)	(4)	(5)
	Linear Covariates	Log Covariates	Add County Hold Rate	New York and New Jersey	Other States
Predicted Flight	0.9%*** [0.06]				
Predicted Violence	3.3%*** [0.08]				
Log (Predicted Flight)		1.9%*** [0.21]	2.3%*** [0.19]	9.9%*** [0.47]	1.1%*** [0.20]
Log (Predicted Violence)		9.8%*** [0.16]	13.4%*** [0.15]	8.0%*** [0.41]	14.4%*** [0.16]
County-Year Hold Percentage			1.1%*** [0.01]	1.0%*** [0.04]	1.1%*** [0.01]
Observations	115,889	115,889	115,889	15,289	100,600

Note: Coefficients and county-clustered standard errors are multiplied by 100 to be in percentage terms. Each value gives the average over the sample of the change in probability of being held from a change in the covariate. Thus a 1 log-point movement (a 170% increase) in (2) predicts a 1.9 percentage point rise in the probability of being held. Predicted Flight Risk and Violence are formed from the model (1) and (2) estimates in Appendix A. Estimates are weighted to be representative. The county-fixed-effects version of column (3), available from the authors, gives similar results.

Table 10. No Detention vs. Detention States

	New York and New Jersey	Other States
Percent Released	76%	59%
Predicted Rearrest Percentage, Based on Observable Characteristics	2.79%	1.71%
Observed Rearrest Percentage	2.95%	1.57%

Note: Estimates are weighted to be representative. The New York and New Jersey sample has 15,289 observations. The "Other States" sample has 100,600 observations. In the first row, the New York and New Jersey sample has 15,430 observations and the "Other States" sample has 101,457 observations. For the following two rows, the sample sizes are 11,738 and 60,205 and respectively.

Table 11. Predicting All Rearrests

Initial Felony Charge	Teenager			Over 50		
	No Prior Record	One Prior Arrest	Extensive Record	No Prior Record	One Prior Arrest	Extensive Record
Violent Crimes						
Murder	9.1% [3.0]	12.8% [3.8]	28.8% [6.5]	2.5% [1.1]	4.0% [1.6]	11.9% [3.9]
Rape	8.0% [0.9]	11.4% [1.2]	26.5% [2.6]	2.2% [0.3]	3.4% [0.5]	10.6% [1.4]
Robbery	13.8% [1.1]	18.7% [1.5]	37.7% [2.4]	4.4% [0.6]	6.6% [0.8]	17.5% [1.8]
Assault	9.6% [0.7]	13.4% [1.1]	29.8% [2.0]	2.7% [0.4]	4.2% [0.6]	12.5% [1.4]
Property Crimes						
Burglary	13.4% [1.0]	18.1% [1.4]	36.9% [2.2]	4.2% [0.5]	6.3% [0.8]	17.0% [1.7]
Larceny/Theft	12.8% [1.0]	17.5% [1.3]	35.9% [2.3]	4.0% [0.4]	6.0% [0.6]	16.4% [1.5]
Motor Vehicle	14.5% [1.6]	19.5% [2.0]	38.8% [2.6]	4.7% [0.8]	6.9% [1.1]	18.3% [2.1]
Forgery	12.5% [1.2]	17.0% [1.6]	35.3% [2.7]	3.8% [0.5]	5.8% [0.8]	16.0% [1.8]
Fraud	9.4% [1.4]	13.2% [1.8]	29.5% [3.3]	2.6% [0.6]	4.1% [0.8]	12.3% [2.1]
Drug Crimes						
Sales	14.7% [1.1]	19.8% [1.4]	39.2% [2.2]	4.8% [0.5]	7.1% [0.7]	18.6% [1.5]
Possession/Other	13.9% [1.2]	18.8% [1.5]	37.8% [2.3]	4.4% [0.6]	6.6% [0.8]	17.6% [1.8]
Public Order						
Weapons	9.4% [1.0]	13.2% [1.5]	29.4% [2.3]	2.6% [0.5]	4.1% [0.7]	12.3% [1.6]
Driving Related	10.2% [1.0]	14.3% [1.2]	31.1% [2.6]	2.9% [0.5]	4.6% [0.7]	13.3% [1.8]

$n = 71,943$

Note: “Extensive Record” is defined as a person previously convicted of a violent felony with at least four prior arrests and active criminal justice status. All other characteristics of the individual are left as they are in the data. Standard errors are clustered at the county level and are in brackets. For the underlying probit estimation used to form the estimates, see Appendix A. $n = 71,943$. Estimates are weighted to be representative.

Appendix A. Determinants of Being Rearrested or Having Multiple Failures to Appear

	(1) Violent Felonies		(2) Multiple Failures to Appear		(3) All Crimes	
	Coefficient	S.E.	Coefficient	S.E.	Coefficient	S.E.
Initial Felony Charge						
Violent Crimes						
Murder	4.74%*	[2.43]	N/A		-5.35%	[3.38]
Rape	2.23%***	[0.77]	-5.10%***	[0.82]	-6.59%***	[1.43]
Robbery	2.97%***	[0.46]	-4.55%***	[0.77]	-0.06%	[1.17]
Assault	1.53%***	[0.26]	-4.05%***	[0.74]	-4.83%***	[0.93]
Other	1.60%***	[0.51]	-4.55%***	[0.74]	-4.75%***	[1.17]
Property Crimes						
Burglary	0.35%*	[0.21]	-2.77%***	[0.69]	-0.60%	[0.81]
Larceny/Theft	0.18%	[0.19]	-2.33%***	[0.69]	-1.17%	[1.06]
Motor Vehicle	0.82%**	[0.36]	-1.68%**	[0.81]	0.60%	[1.41]
Forgery	0.16%	[0.32]	-1.95%**	[0.90]	-1.52%	[1.35]
Fraud	-0.82%***	[0.23]	-3.05%***	[0.80]	-5.02%***	[1.95]
Other	0.78%**	[0.31]	-2.14%***	[0.67]	0.02%	[1.15]
Drug						
Sales	0.01%	[0.17]	-2.48%***	[0.67]	0.89%	[0.91]
Other			baseline			
Public Order						
Weapons	0.62%**	[0.30]	-3.57%***	[0.66]	-5.06%***	[1.20]
Driving Related	-0.13%	[0.31]	-4.11%***	[0.78]	-4.07%***	[1.09]
Other	-0.07%	[0.28]	-3.19%***	[0.79]	-4.18%***	[1.25]
Prior Arrests						
One	0.33%**	[0.17]	-0.07%	[0.31]	3.70%***	[0.53]
Two or Three	0.82%***	[0.20]	0.36%	[0.29]	7.21%***	[0.64]
Four or More	1.61%***	[0.19]	0.89%**	[0.43]	12.30%***	[1.15]
Prior Convictions						
One	-0.31%	[0.19]	-0.90%***	[0.30]	-2.88%***	[0.71]
Two or Three	-0.45%**	[0.21]	-1.45%***	[0.44]	-2.60%***	[0.99]
Four or More	-0.04%	[0.23]	-1.26%***	[0.47]	1.00%	[1.35]

Appendix A (continued)

	(1) Violent Felonies		(2) Multiple Failures to Appear		(3) All Crimes	
	Coefficient	S.E.	Coefficient	S.E.	Coefficient	S.E.
Prior Incarceration	0.21%	[0.20]	0.98%**	[0.38]	2.27%***	[0.84]
Multiple Charges	0.13%	[0.13]	0.63%**	[0.27]	1.54%**	[0.62]
Prior Failure to Appear	0.30%**	[0.13]	2.85%***	[0.52]	4.04%***	[0.79]
Criminal Status	0.50%***	[0.12]	0.57%***	[0.19]	4.40%***	[0.58]
Felon	-0.21%	[0.19]	-0.77%***	[0.27]	0.10%	[0.61]
Prior Violent Felony Conv.	0.95%***	[0.15]	0.46%	[0.39]	1.27%**	[0.59]
Age						
Under 20			baseline			
20–24	-0.82%***	[0.18]	-0.45%	[0.31]	-5.68%***	[0.63]
25–29	-1.63%***	[0.19]	-0.31%	[0.37]	-8.67%***	[0.92]
30–39	-1.78%***	[0.20]	-0.06%	[0.32]	-9.76%***	[0.88]
40–49	-2.20%***	[0.19]	-0.45%	[0.34]	-11.85%***	[0.90]
50 or more	-2.37%***	[0.28]	-1.23%**	[0.49]	-14.01%***	[1.03]
Year						
1990			baseline			
1992	-0.06%	[0.43]	1.18%*	[0.60]	-2.59%	[2.11]
1994	0.14%	[0.37]	0.05%	[0.47]	-1.76%	[2.08]
1996	-0.12%	[0.34]	-0.03%	[0.52]	-0.48%	[2.08]
1998	0.00%	[0.37]	0.29%	[0.53]	-1.04%	[1.85]
2000	0.09%	[0.31]	-0.69%	[0.55]	0.20%	[2.23]
2002	0.00%	[0.41]	1.16%*	[0.69]	2.22%	[2.62]
2004	0.09%	[0.43]	0.63%	[0.67]	4.85%	[3.41]
2006	0.08%	[0.45]	-0.01%	[0.55]	0.92%	[2.47]
County Crime Rate/1000 People						
Violent	3.82%***	[0.81]	0.41%	[3.15]	13.03%*	[7.57]
Property	-2.49%**	[1.10]	1.67%	[3.24]	-9.16%	[8.60]
Drug	-0.50%	[0.84]	0.59%	[3.02]	5.78%	[3.95]
Public Order	-0.21%	[1.84]	-8.15%	[8.05]	-8.57%	[14.66]
County Population (log)	-0.30%*	[0.15]	-0.44%	[0.48]	-2.47%***	[0.77]

$n = 71,943$

Note: Coefficients give the average percentage change in probability for a person having the given characteristic, compared to having the baseline. Standard errors are clustered at the county level and are in brackets. Estimates are weighted to be representative.