FALSE EQUIVALENCE: LOCAL, STATE, AND FEDERAL DETAINEES

Seventy-three percent of people facing criminal charges—including immigration cases[1]—in federal district courts are detained and never released during the pretrial period.[2] This is a high rate of detention, especially given that no one in the federal system is ever held only because he or she cannot afford financial bond (18 U.S.C. §3142(c)(2)); a specific process must be followed before a court can order detention, and secured money bail is not an option.

Proponents of the for-profit bail bond industry often cite this high level of detention to dissuade state and local-level policymakers from adopting a model similar to that used in the federal courts. However, the comparison presumes a false equivalence. Caseloads in state and local courts are fundamentally different from those in the federal system, in both type and severity. Immigration cases, for example, comprise more than one-fourth of the federal criminal docket and have very high detention rates. State and local courts, meanwhile, deal with more misdemeanors than felonies.

To conduct a meaningful comparison of federal and state pretrial detention outcomes, researchers at the Pretrial Justice Institute reviewed the law, research, and data, and spoke with members of the Administrative Office of the U.S. Courts (AOC), the agency providing a broad range of support to federal courts. The findings, articulated in this issue brief, show that high detention rates are not an inevitable outcome of moving away from money bond; many federal jurisdictions have seen appropriately low rates of detention, and some state and local jurisdictions have also successfully

"It is anticipated that [pretrial release] will continue to be appropriate for the majority of Federal defendants."

From the legislative history of the Bail Reform Act of 1984

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moved away from money bond without an increase in detention.

These findings belie the bail bond industry's claims. Nevertheless, the federal system does provide valuable lessons: Specifically, maximizing pretrial release requires a coherent legal scheme oriented toward pretrial liberty. The experience of the federal system also demonstrates the power of court culture to embrace or reject change and the importance of bringing all court stakeholders to the table when making changes.

The fundamental findings of our inquiry are:

- While state and local court systems have much larger criminal caseloads compared to the federal system, they also have a much greater proportion of misdemeanor cases;
- Unlike state and local courts, the federal system has a significant portion of immigration cases, which have high detention rates;
- Unnecessary detention in the federal system reflects the challenges of creating a coherent legal scheme and reconciling court culture with desired outcomes; they do not indicate anything inherent in assessment-based pretrial justice itself.

UNDERSTANDING THE FEDERAL MODEL OF DETENTION AND RELEASE

The current federal model of detention and release, created under the Bail Reform Act of 1984, was designed to maximize release while also authorizing courts to preventively detain exceptional individuals who, if released pretrial, pose an unmanageable risk of flight or danger to the community. Today nearly everyone brought before the federal courts is screened with an empirically based, validated assessment instrument called the Pretrial Risk Assessment Instrument (PTRA). PTRA determines the likelihood of success on pretrial release, defined as showing up at all court dates with no new arrests during the pretrial period.

PTRA was designed to aid pretrial service officers (PSO) in identifying who can be released, with or without conditions, and those who should be considered for pretrial detention. Since 2010, when implementation of the tool began, PTRA has been found to accurately and reliably predict and differentiate pretrial outcomes among individuals based on court appearance and new arrests. A Category 1 case "represents a defendant with a minimal, if any, criminal history and a stable personal background in terms of employment, residence, education, and substance abuse history."[3] People in Categories 1 and 2 have the highest likelihood of pretrial success; in 96% of Category 1 cases and 91% of Category 2 cases, people will appear in court with no new arrests or revocations of release.[4 & 5] People in Categories 3 and 4 have somewhat lower rates of success. Those in Category 5 cases have the lowest success rate—with 65% appearing in court and having no new arrests or revocations.[6]

The Bail Reform Act holds that pretrial detention should only occur through an intentional action of the court, not because an arrested person cannot afford a financial bond. To order detention, the court must conduct a detention hearing and find through clear and convincing evidence that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. §3142(e)

The rules and processes of the federal system are also meant to provide a level of standardization across the country. However, the federal court system is highly decentralized —with 94

district courts organized among 13 circuits—and practices, decisions, and outcomes vary widely among districts and circuits.

DIFFERENCES IN SCOPE AND FOCUS OF FEDERAL AND STATE & LOCAL SYSTEMS

Federal courts have a fundamentally different caseload, in both size and case type, from state and local courts. The vast majority of criminal cases in the United States are handled in state and local courts. In 2013, state courts reported 19.3 million incoming criminal cases[7] compared to 80,051 cases[8] in the federal system. Most of the state and local caseloads are made up of misdemeanors; felony charges usually make up less than 20% of their caseloads.[9] These proportions suggest that state and local jurisdictions have a vested legal and resource interest in maximizing pretrial release and ensuring that pretrial detention is restricted to those individuals who cannot be reasonably managed in the community.

By comparison, felonies account for 86% of the federal courts' criminal caseload,[10] although only a small percentage include crimes of violence. Immigration cases and drug-related cases take up a far larger portion of the federal criminal caseload, together accounting for approximately 60% of the criminal caseload. (See Figure 2) Both of these categories involve distinctions that may help account for the different rates of detention between the federal justice system and state and local systems.

Immigration

Immigration cases are handled largely in the federal courts and made up 27% of the federal criminal caseload in 2016.[11] The most common charge in immigration cases is illegal re-entry.[12] Immigration cases have high detention rates; one study of pretrial detention in the federal system found that from 1995 to 2010, detention rates for immigration cases ranged from 86-98%.[13] Without immigration cases, the federal pretrial detention rate is 14 points lower.

Drug Offenses

For 2016, drug offenses made up 32% of the federal criminal caseload, usually involving the manufacture, sale, or transportation of a drug ("trafficking"). Fewer than 10% of those drug cases involved a conviction for the simple possession of a drug, which is the most common type of drug offense handled in state and local courts.[14 & 15] Because most drug cases in the federal system carry a reverse presumption of detention[16]—discussed in more detail below—

Figure 1

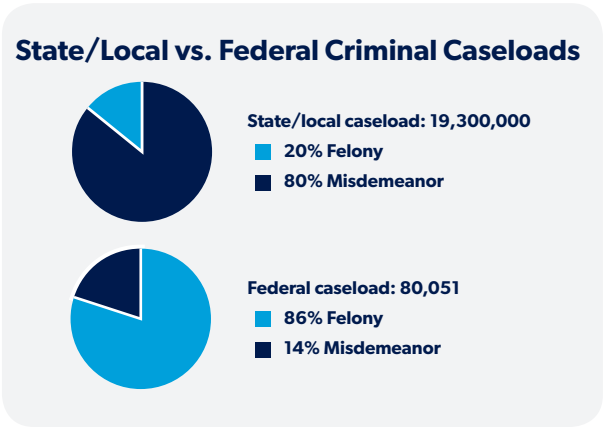


Figure 2

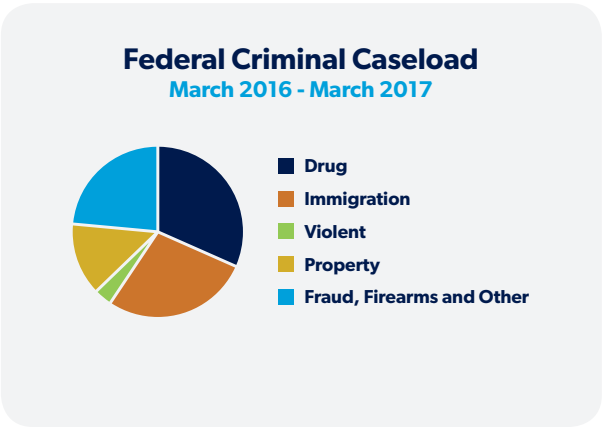
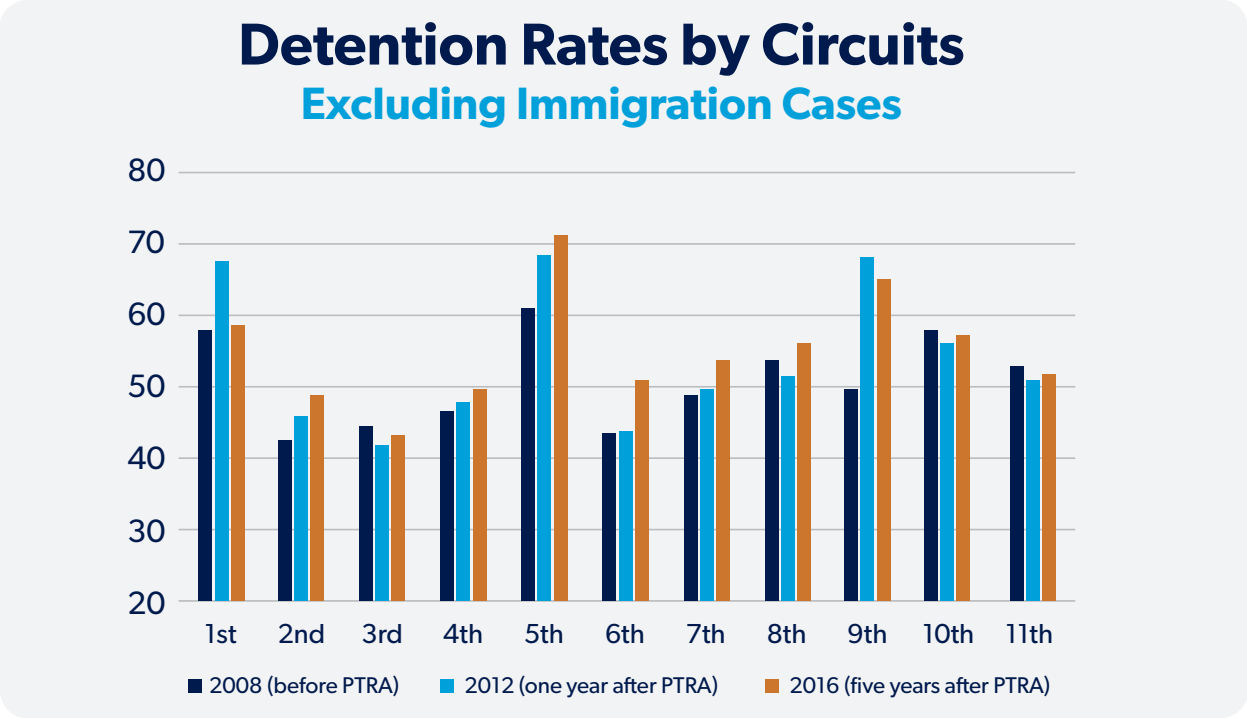


Figure 3



62% of individuals charged with federal drug offenses are detained before trial.[17]

CHALLENGES TO PRETRIAL RELEASE

Without immigration cases, the federal pretrial detention rate is 59%, rather than 73%.[18] However, trends in pretrial detention indicate that maximizing pretrial release in the federal system is still a challenge, and state and local systems should take notice of the causes. Courtroom culture, as expressed through the decisions of judges, prosecutors, and pretrial service officers, can undermine the best-intended changes if not addressed, and "reverse presumption" provisions in the law require persons with certain charges to rebut a presumption of detention.[19 & 20]

Court Culture

Changing courtroom culture and customs is a difficult task. As demonstrated in Figure 4, above, the introduction of PTRA has not significantly changed release rates by circuit. Implementation of PTRA began in 2010, and by August 2011 all districts in their respective federal circuits had implemented the instrument. In 2012 and 2016 (one year and five years after implementation, respectively) detention rates appear unaffected, or any significant changes have moved toward higher rates of detention.

Researchers have proposed that the failure to involve judges in the creation of the federal pretrial assessment tool hampered its adoption[21]—along with the fact that federal judges are not required to consider pretrial assessment scores. The federal law lays out a specific process that must be followed before a court can order detention, and nowhere in that process is an assessment tool mentioned. Without a more clearly delineated role for PTRA, the inconsistency between the

intention of the Bail Reform Act of 1984 and the work of judges has resulted in inconsistent implementation.

The recommendations of pretrial services officers (PSOs) and U.S. attorneys also suggest a failure to reconcile the goals of the PTRA with court culture. PSOs recommend detention 70% of the time,[22] contradicting the objective of reducing unnecessary detention. Even though PSOs are not supposed to consider the presence of the presumption of detention for certain charges or the weight of the evidence, significant differences between PSO recommendations for presumption and non-presumption cases exist.[23] (See Table 1, below) U.S. attorneys recommend detention even more frequently, in nearly three-quarters of cases.[24]

A study by the Office of the Inspector General on pretrial diversion programs in the federal systems provides some insight into the challenges of changing a decentralized court culture.[25] In spite of a previous Department of Justice policy to increase consideration of pretrial diversion, few such programs were initiated, whether by the courts or U.S. attorneys. Of the 94 judicial districts, 78 had no diversion-based court program. Over a three-year period (FY2012-2014), out of over a quarter-million federal criminal cases, only 1,520 people had successfully completed a pretrial diversion program created by U.S. attorneys.[26] The report also relayed qualitative observations from members of the court, suggesting that U.S. attorneys are often resistant to changes that result in less incarceration, and conversely, that a progressive U.S. attorney is necessary for change.[27]

Recognizing the need to reduce unnecessary detention, in 2015 the AOC initiated the Detention Reduction Outreach Program (DROP), which brings together all stakeholders at the district court level, including the U.S. attorney's office, the federal defenders office, the U.S. Marshals Service, and the Probation and Pretrial Services Office to discuss how to safely reduce detention rates and better incorporate the pretrial assessment score in the release decision.[28] For many jurisdictions, it was the first time all key players collaboratively discussed the issue of pretrial detention. Official results have not yet been reported, but initial numbers are promising.

Reverse Presumption

In certain cases in the federal court, the presumption of pretrial liberty is reversed, and the defense must rebut the presumption that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community."[29] These "reverse presumption" cases include drug and firearm cases with a penalty of at least ten years. If rebutted, the presumption remains a factor for the court to consider. However, the burden remains on the government to show by clear and convincing evidence that a person charged is a danger to the community.[30]

Table 1: Rates of Recommendation of Release by Pretrial Service Officers

	Non-Presumption Cases	Presumption Cases
Category 1	94%	68%
Category 2	80%	63%
Category 2	57%	50%

Federal presumption cases often work at cross-purposes with PTRA, with many people who have a high likelihood of pretrial success being detained based on the presumption. In Category 1 cases, pretrial service officers

recommend release 93% of the time in non-presumption cases but only 68% of the time in presumption cases; in Category 2 cases, 78% of non-presumption cases, compared to 64% of presumption cases.[31]

Moreover, the study found that with the exception of Category 1, all other presumption cases in the other categories had lower rates on new charges during the pretrial period than non-presumption cases, suggesting that "presumption does a poor job of assessing risk, especially compared to the results produced by actuarial risk assessment instruments such as the PTRA."[32]

EXAMPLES OF SUCCESSFUL MOVES TOWARD PRETRIAL ASSESSMENTS

Jurisdictions across the country have shown that employing validated pretrial assessments and lowering detention rates are compatible goals. Moving away from secured money bail removes the barrier to pretrial liberty.

Yakima County, Washington

As a Smart Pretrial Demonstration Initiative site funded by the Bureau of Justice Assistance, Yakima County implemented data-driven and evidence-based changes to its pretrial systems to reduce unnecessary detention. As a result of these changes, which included the implementation of pretrial assessment for all newly booked people, a reduction in the use of secured money bail, and a dedicated first appearance docket, pretrial detention rates decreased from 47% to 27% and racial disparities were reduced significantly.[33] All of this was accomplished without changes to public safety or court appearance rates.

The Smart Pretrial process emphasizes open and meaningful communication. The three year process brought together key stakeholders to work together. The final report to the Bureau of Justice Assistance noted, "For system change to be successful, all affected parties must be informed about the reason for the change, what will be changing, and their role in the process. They also must have the opportunity to engage in dialogue and provide feedback, and know that they are being heard."[34]

New Jersey

In 2014, under the urging of then-Governor Chris Christie, and with support from the state's chief justice and legislature, voters approved an amendment to New Jersey's constitution to permit the preventive detention of dangerous persons or people with an unmanageable likelihood of failing to appear in court. The amendment was part of an array of changes that included limiting the use of money bail as only a last resort when other release conditions are shown to be insufficient to assure court appearance and public safety.

The amendment took effect on January 1, 2017. A year later, there has been a 20% drop in the pretrial jail population statewide. At the same time, early outcomes seem to indicate that public safety has not been compromised. Both violent and overall crime rates dropped statewide in the first nine months of 2017, compared to the same period in 2016.[35]

District of Columbia

The Pretrial Services Agency for the District of Columbia conducts a risk assessment for every arrested person who will be charged in court, determines detention eligibility,

and recommends release conditions. There is a strong culture of pretrial release, as captured in its first guiding principle: "The presumption of innocence of the pretrial defendant should lead to the least restrictive release consistent with community safety and return to court, and preventive detention only as a last resort, based on a judicial determination of the risk of non-appearance in court and/or danger to any person or to the community."[36] More than 94% of arrested individuals are released pretrial without a financial bond.[37] Among those released pretrial, 98% remain arrest-free of any violent crimes during that period.[38]

CONCLUSION

Most efforts to cite federal pretrial systems as a warning to state and local systems seeking reform present a false equivalence. The state and local courts have larger caseloads and a far greater proportion of misdemeanors to felonies compared to federal courts. However, the challenges in the federal system are illuminating. Reverse presumptions in the federal system and a failure to require judges to consider pretrial assessment scores have made it difficult to realize the clear intent of maximizing release under the Bail Reform Act. Most states would face similar challenges were they to eliminate money bail without also resolving these issues. In fact, many states have rebuttable presumption provisions that extend far beyond what is in the federal law, and most states do not requires judges to consider the results of a risk assessment.

Moreover, the evidence suggests it is not enough to have the right tools; the stakeholders, especially the leaders, in the system have to buy in to the validity of that tool and the worthiness of the goal. Changing the culture of any organization requires leadership and a mutually agreed upon set of values and goals.

RESOURCES

These and many more resources are available on the University of Pretrial (UP), PJI's online learning and community platform for pretrial professionals. Membership is free, and many programs and technical assistance opportunities are available.

The PJI Approach to Improving Pretrial Justice (2016) – Describes PJI's combination of educational and technical support to help key players better understand how their systems currently operate and how desired improvements can be made.

Pretrial Services Program Implementation Starter Kit (2010) - A guide for jurisdictions that do not currently have a pretrial services program but are planning on implementing one. It contains information and resources, or where to find it, that is required when starting a pretrial services program, including state and national standards, core functions, research findings, steps to implementation, and examples of programs

Demystifying Risk Assessment: Key Principles and Controversies, Center for Court Innovation (2017) – An easy-to-read overview of the latest social science on pretrial assessment, intended for practitioners and policymakers who have questions about whether and how to incorporate pretrial assessment into their daily practice.

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