

# Pretrial Detention Choices and Federal Sentencing

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**HOW JUDGES DECIDE** cases has long been an issue of both academic and practical interest (e.g., Fitzmaurice & Pease, 1986; Hogarth, 1971; Myers & Talarico, 1987; Posner, 2008; Spohn, 2009a; Tonry, 1996; Ulmer, 1997). It is also a matter that has become increasingly important during the last 35 years, as many jurisdictions have dramatically increased their imprisonment rates (Austin & Irwin, 2012; Lynch, 2007), incurring burdensome economic and social costs (e.g., Clear, 2007; Frost & Clear, 2012; Western, 2006). The United States has the highest reported per capita rate of incarceration in the world (Walmsley, 2011), incarcerating its citizens at a rate 5 to 10 times that of other Western industrialized nations (Berman, 2009). Indeed, in 2009, the Pew Center on the States reported that 1 in 31 adult U.S. citizens was either incarcerated or under community supervision. Understanding how judges decide their cases may allow us to understand the drivers of mass incarceration and to thereby reduce the U.S. reliance upon prisons as a mechanism for social control.

A very substantial body of the research on how judges decide suggests that legal factors (e.g., severity of the offense and the offender's criminal history) are chiefly determinative in deciding whether an offender will be incarcerated and for how long (Gottfredson & Gottfredson, 1988; Klein et al., 1990; Kramer & Steffensmeier, 1993; Neubauer, 2002; Reitler et al., 2013; Spohn & Halleran, 2000). Nevertheless, other, so-called extralegal, factors also appear to influence sentencing

outcomes, including race (e.g., Mitchell, 2005; Steffensmeier & Demuth, 2000; Western, 2006), gender (e.g., Daly & Bordt, 1995; Doerner, 2012; Freiburger, 2011), and age (e.g., Doerner & Demuth, 2010; Steffensmeier & Motivans, 2000). These extralegal factors become even more influential when they act in combination than when they operate in isolation (Doerner & Demuth, 2010; Leiber & Fox, 2005; Steffensmeier et al., 1998; Wooldredge, 2012), such as harsher sentences for young, black males.

However, one factor that has received relatively little scholarly attention is the possible influence of pretrial detention on sentencing. Many researchers include pretrial detention in their analyses of sentencing, but it is usually included as a control variable and used in analyses of other legal or extralegal factors (Williams, 2003). Research focusing specifically upon the effects of release and detention on sentencing decisions is rare: Only a handful of such studies exist (see, e.g., Free, 2004; Philips, 2007, 2008, 2012; Reitler et al., 2013; Sacks & Ackerman, 2012; Tartaro & Sedelmaier, 2009; Williams, 2003).

More study is needed of the role of pretrial detention for shaping sentences in the U.S. federal courts and of related issues (e.g., Hagan et al., 1980; Reitler et al., 2013; Spohn, 2009b; Stith & Cabranes, 1998). The federal courts process an immense criminal docket. In 2011, a total of 91,938 defendants of the approximately 110,000 criminal defendants who moved through federal district courts were convicted and sentenced (Hogan, 2011, tbls.

D-1, D-5). Approximately 14 percent of those sentenced received non-custodial sentences (~2.5 percent were fined and ~11.3 percent were placed on probation), but approximately 86 percent were sentenced to federal prison, with an average sentence of 52.9 months (Hogan, 2011, tbl. D-5).

This article describes the effects of pretrial release and detention on sentencing decisions in the U.S. federal courts. It begins with a description of extant research on the sentencing consequences of pretrial detention, drawn mostly from city and state courts. The article then briefly outlines the establishment of the federal pretrial services system, describes the statute that governs detention decisions, and notes current trends in federal detention data. It also describes some current research on the sentencing consequences of pretrial detention and the revocation of pretrial services supervision. Finally, it discusses the implications of these findings for decision makers within the federal criminal justice system, noting that the choice to detain or release a defendant before trial can have reverberating consequences downstream.

## Research on the Effects of Pretrial Detention

While there is not a great deal of research focusing particularly on the effects of pretrial release and detention on sentencing decisions, research on this topic is not altogether new. Fifty years ago, researchers with the Vera Foundation examined 3,000 cases of adult New York felony defendants and found

that defendants who were detained before trial were more likely to be convicted and incarcerated (Ares et al., 1963). Following up, they noted that other factors (e.g., prior record, bail amount, type of counsel, family integration, and employment stability) did not explain away the relationships between detention and conviction and incarceration, and concluded that “a causal relationship exists between detention and unfavorable disposition” (Rankin, 1964: 655). More recently, the New York City Criminal Justice Agency examined more than 50,000 cases from the New York metropolitan region and confirmed that pretrial detention is significantly and positively related to conviction, incarceration, and sentence length (Philips, 2012). The positive correlations between pretrial detention and increased conviction rates, increased likelihood of incarceration, and increased length of sentence exist for both felony cases (Philips, 2008) and non-felony cases (Philips, 2007). The New York City Criminal Justice Agency research seems to confirm the wry assessment of the subject by Sacks and Ackerman: “[P]retrial decisions determine mostly everything” (2012: 14).

Of course, the relationship between pretrial detention and unfavorable sentencing dispositions extends beyond New York. After analyzing 412 cases from Leon County, Florida, Williams concluded that “pretrial detention was a strong, significant predictor of both incarceration and length of sentence” (2003:313). Indeed, pretrial detention was the strongest predictor of incarceration in the model, even after controlling for legal (e.g., offense seriousness and criminal history) and extralegal variables (e.g., race, gender, and age). Similarly, Leiber and Fox (2005) reported a significant association between pretrial detention and sentencing dispositions. After controlling for a dozen other variables in a study of 1,800 Canadian cases, Kellough and Wortly (2002) reported that pretrial detention was the strongest predictor of guilty pleas. Other researchers have identified significant links between detention and increased rates of conviction (Cohen & Reaves, 2007; Hart & Reaves, 1999), detention and the increased probability of a prison sentence (Harrington & Spohn, 2007), and detention and increased sentence length (Tartaro & Sedelmaier, 2009; Willison, 1984), as well. While Goldkamp (1980) found little relationship between pretrial detention and conviction in his study of 8,000 cases from Philadelphia, he *did* find a strong relationship between detention and the likelihood of incarceration. Sacks and

Ackerman (2012), on the other hand, did not find evidence that pretrial detention affected the decision to incarcerate in their study of 975 New Jersey cases, but they *did* report an association between detention and increased sentence length.

There is a consensus within this body of research that pretrial detention is associated with negative effects on sentencing, but the precise causal mechanisms of these relationships remain unknown. Williams suggests that the explanation might be found in the released defendant's ability to demonstrate good behavior, writing, “[A] defendant who is out on bail has the ability to demonstrate to the sentencing judge that he or she is not a danger to the community” (2003: 314). Although the relationships between detention and unfavorable sentencing outcomes persist even when controlling for the nature of the offense, criminal history, and risk, Williams (2003) also notes that defendants are often detained before trial based on the same facts that drive sentencing decisions: serious and harmful crimes, lengthy criminal histories, and perceived risk of further offending. Defendants who are detained before trial are often indigent, and can neither afford privately-retained counsel nor post bail (Holmes et al., 1987). Many have prior convictions, lack employment and education, and suffer from deficits such as illiteracy, mental illness, physical disability, and drug and/or alcohol addiction (Petersilia, 2003; VanNostrand & Keebler 2009). Poor, marginalized, and vulnerable (Wacquant, 2009), such “rabble” (Irwin, 1985) may prove ill-equipped to contribute meaningfully to their own defense (Foote, 1954; Reitler et al., 2013), a problem exacerbated by the fact that attorneys spend less time with defendants who are detained before trial than with defendants who are released (Allan et al., 2005). The studies mentioned above, however, have not been conducted within the federal courts, with federal defendants and with federal judges. The federal criminal justice system is complex (Oleson, 2011). Sentencing decisions are made under obligations imposed by statute (i.e., 18 U.S.C. § 3551 et seq. and 28 U.S.C. §§ 991 to 998), now-advisory sentencing guidelines (e.g., *United States v. Booker*, 2005), and by controlling federal case law (e.g., *Gall v. United States*, 2007; *Kimbrough v. United States*, 2007; *Rita v. United States*, 2007). Given that kind of complexity, we wanted to examine the effects of pretrial detention on sentencing decisions in the U.S. federal courts.

## Pretrial Services in the United States Federal Courts

The pretrial services system of the U.S. federal courts can be traced to the pioneering initiative of John Augustus (Panzarella, 2002) and the early Anglo-American reliance upon personal sureties, community custodians who assumed responsibility for ensuring the defendant's appearance at trial (Wanger, 1987). During the mid-nineteenth century, the system evolved from one that relied upon sureties to one dominated by commercial bail bondsmen (Freed & Wald, 1964). Under this system, in order to safeguard communities, “many judicial officers set financial conditions of release that exceeded the defendant's ability to pay, effectively ordering *sub rosa* pretrial detention” (Wanger, 1987, p. 324). To ameliorate such burdens, Congress passed the 1966 Bail Reform Act, establishing a presumption of release upon personal recognizance or execution of an unsecured security bond. Later, the Speedy Trial Act of 1974 created 10 demonstration pretrial services offices (Partridge, 1980), but the watershed moment for pretrial services supervision is customarily associated with passage of the Pretrial Services Act of 1982 (Byrne & Stowell, 2007; Cadigan, 2007). The 1982 Act established four principal goals: ensuring pretrial services investigations and reports for all defendants, reducing unnecessary detention, reducing crime and absconding while on bail, and reducing reliance on surety bonds (Cadigan, 2007). Today, the federal pretrial services system has offices in 93 of the 94 judicial districts (i.e., under 18 U.S.C. §3152 (a), the District of Columbia operates under a different system), but the federal criminal justice system of 2013 bears little resemblance to that of 1982, and the pretrial services system of today is very different from that of 30 years ago. Today, there are more federal crimes (Baker, 2008), more federal defendants (Hogan, 2011), more federal prisoners (La Vigne & Samuels, 2012), and more non-citizens (Lopez & Light, 2009; Scalia, 1996). In recent years, the federal pretrial services system has developed and implemented a program of risk assessment (Cadigan & Lowenkamp, 2011a; Lowenkamp & Whetzel, 2009) and it is increasingly evidence-based (Cadigan, 2009).

In the federal criminal justice system, decisions about pretrial detention and release are governed by the Constitution (the Eighth Amendment specifies that “excessive bail shall not be required”), by legal precedent (e.g., in *United States v. Salerno* [1987], the Supreme

Court held that detention under the Bail Reform Act does not constitute unconstitutional punishment), and by federal statute. Specifically, United States Code 18 U.S.C. § 3142(b) directs the presiding judicial officer to release the defendant upon personal recognizance or upon execution of an unsecured surety bond “unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.” If a personal recognizance or surety bond is insufficient to ensure appearance and safety, § 3142(c) (1)(B) directs the judicial officer to order the least restrictive further condition (or conditions) that will reasonably assure appearance and community safety, such as maintaining ongoing employment or education, avoiding all contact with the victim, or abiding by a curfew. Only if no condition or conditions will reasonably assure appearance and safety, is pretrial detention authorized under § 3142(e). Detention, however, is not as difficult to impose as it might initially seem. A number of offenses (e.g., some drug crimes, possession of a firearm in connection with crimes of drugs and violence, terrorism offenses, human trafficking, and many offenses involving child pornography or minor victims) carry a statutory presumption of detention (18 U.S.C. § 3142(e)(3)); the attorney for the government may seek detention for a variety of other offenses under § 3142(f); and either the government attorney or the judicial officer can move for detention when flight risk or obstruction of justice are serious concerns. In making determinations about pretrial release, § 3142(g) directs judicial officers to consider specific factors, including: (1) the nature and circumstances of the offense, (2) the weight of the evidence, (3) the history and characteristics of the person (e.g., “the person’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings”), and (4) the nature and seriousness of danger to any person or the community posed by the defendant’s release. Although 18 U.S.C. § 3142 indicates that federal defendants should not normally be detained before trial, rates of pretrial detention have actually increased over time (Byrne & Stowell, 2007; Cadigan, 2007; VanNostrand & Keebler, 2007) and now stand at 66.2 percent (Hogan 2011, tbl. H-14). After

excluding non-citizen immigration cases, the rate is still 53.4 percent (Hogan 2011, tbl. H-14A). This means that today, pretrial detention for federal defendants—U.S. citizens who enjoy the presumption of innocence under the law (Pennington, 2003)—is not the exception but the rule.

The § 3142(g) factors appear straightforward, but these seemingly straightforward decisions can have profound downstream consequences for federal defendants. Indeed, just as “a causal relationship exist[ed] between detention and unfavorable disposition” (Rankin, 1964: 655) in the New York courts, federal detention appears to exercise analogous negative effects on sentencing decisions. Using 2007 data obtained from the United States Sentencing Commission, Reitler and her colleagues (2013) examined the drivers of federal presentence detention and found that detention after conviction (but before sentencing) was most related to legal factors (e.g., length of criminal history, commission of a violent or otherwise serious offense, or commission of a crime while under criminal justice supervision) but that extralegal factors (e.g., race, ethnicity, and age) also influenced the decision to detain. More recently, looking specifically at the effects of pretrial detention and revocation of pretrial services supervision on sentencing, we conducted two different analyses. In the first, we analyzed 1,798 cases drawn from two federal districts (New Jersey and Pennsylvania Eastern) and, after controlling for a number of variables (including \$5K1.1 substantial assistance departures), found that being detained before trial—and, to a lesser degree, being revoked from pretrial services supervision—were associated with increased sentence length, while defendants who were released before trial and successfully completed their terms of pretrial services supervision appeared to receive shorter sentences (Oleson et al., 2013a). The effects of detention and revocation appeared to be dramatic: After controlling for other variables, a detained defendant who served 60 months in prison would serve only 36 months if released before trial; a defendant who completed pretrial services supervision and served 60 months in prison would serve 82 months in prison if supervision was revoked. In our second analysis (Oleson et al., 2013b), we followed all U.S. federal court defendants sentenced in fiscal year 2011 with a case-closure code of “execution of sentence” ( $n = 94,229$ ) from indictment through to sentencing and found that being released before trial had a negative

(i.e., decreasing) effect on the likelihood of a prison sentence and on sentence length, while having pretrial services supervision revoked had a positive (increasing) effect on the likelihood of a prison sentence and on the length of sentence. In fact, the likelihood of going to prison was roughly double if a defendant had supervision revoked. Our finding that federal defendants who are detained before trial are more likely to go to federal prison and to serve longer sentences there, and our finding that revocation of pretrial services supervision has a similar, but less powerful, effect on sentencing break new ground in understanding the sentencing effects of pretrial detention in federal court. Our findings also have implications for the federal pretrial services system and for other decision makers throughout the federal criminal justice system.

## Discussion

For a variety of reasons, a great deal of criminological research fails to lead to policy changes (Austin, 2003; Schmitt, 2013). Nevertheless, we believe that our findings should be of interest to actors throughout the federal criminal justice system: criminal defendants, prosecutors, federal defenders and panel attorneys, and judges, as well as probation and pretrial services officers, Bureau of Prisons staff, and other policy makers throughout government. This is nothing new. Twenty years ago, Judge Vincent Broderick warned:

Pretrial detention can create—and in many circumstances has created—crises of mammoth proportions, creating problems for every element of the criminal justice system: those charged with crime; defense counsel; pretrial services and probation officers; judges; prosecutors; marshals; and the Bureau of Prisons (1993, p. 5).

Matters of federal pretrial detention and release should interest all of these people because the effects of detention are like ripples that radiate outward from a central point where a stone has been thrown into a pool; in time, they will affect the whole of the federal criminal justice system, even those who are not immediately involved in detention decisions. Of course, most immediately, pretrial detention affects the detained defendant. Detention before trial is an obvious impediment to autonomy and freedom, but it also may impede the ability to contribute toward one’s defense (Williams, 2003). Furthermore, some research (e.g., Ares et al., 1963; Philips, 2012) indicates that pretrial

detention exerts an independent effect on the likelihood of conviction and—as found in our current research (Oleson et al., 2013a, 2013b)—the likelihood of imprisonment and increased sentence length. There may be consequences to pretrial detention that take effect even further downstream: Federal defendants who are detained before trial are twice as likely as released defendants to fail on post-conviction supervised release (Cadigan & Lowenkamp, 2011b).

The findings should be of pragmatic interest to federal prosecutors, defense counsel, and judges. Pretrial detention has created a number of logistical challenges for the federal judiciary, the U.S. Marshals Service, and the Federal Detention Trustee. Transferring pretrial defendants from detention facilities to their courthouse appearances requires a sophisticated system of management. This system is expensive. According to Fiscal Year 2012 data provided by the Administrative Office of the United States Courts, the U.S. Marshals Service, and the Office of Federal Detention Trustee, the daily cost of detaining a pretrial defendant in a federal facility ranged from a low of \$35.41 (in the Middle District of Alabama) to a high of \$163.35 (in the Eastern District of New York), with an adjusted average daily cost of detention while awaiting trial of \$72.67. In contrast, using current work measurement formulas, salary amounts for probation and pretrial services officers, law enforcement account obligations, and miscellaneous operating expenses, the daily cost of releasing the defendant under the supervision of a federal probation officer (as in the 71 districts where pretrial services functions are provided by the “combined” federal probation office) was \$9.17, and releasing the defendant under the supervision of a federal pretrial services officer (as in the 22 districts where pretrial services functions are provided by a separate pretrial services office) was \$7.24, for an average of \$8.21. Prosecutors, defense counsel, and judges should be interested in these findings, because every day of pretrial release saves the federal government \$64.82.

High rates of pretrial detention produce additional costs. High rates of detention mean that many defendants are held far from the courts in which they appear. In 1993, some 10% of the pretrial and presentence defendants appearing in the Southern and Eastern Districts of New York were detained outside the district, including several who were housed as far away as Tennessee and Texas (Broderick, 1993). Today, 15% of federal

detainees are housed more than 90 miles from the courts in which they appear (Office of Federal Detention Trustee, 2013), creating second-order costs for U.S. marshals who must manage strained resources and defense counsel who must meet with far-flung clients, and scheduling hardships for judges who must juggle busy courtroom calendars (Broderick, 1993). In 2013, the U.S. Marshals forecast a cost of \$1.6 billion for pretrial detention, much of which is paid to local jails on a per-day-per-inmate basis (U.S. Department of Justice, 2013). Reducing pretrial detention and revocation rates would help to alleviate some of this strain on the detention program of the U.S. Marshals Service.

Of course, judges and counselors should be interested in the findings for more philosophical reasons, as well. The promise of “equal justice under law” is emblazoned upon the west pediment of the United States Supreme Court building (Hennings, 1957), and it is an elegant ideal. But case processing statistics tell another story. After controlling for a range of legal (e.g., criminal history, nature of offense) and extralegal (e.g., race, ethnicity, and age) variables, it appears that federal defendants who are detained or who have their pretrial services supervision revoked are more likely to go to prison and to serve a longer sentence there. *Detention itself*, not a measured legal factor, increases this likelihood. Detention begets detention. Judges and counselors also may be familiar with the fundamental sentencing principle of restraint—the understanding that imprisonment is a severe deprivation and should be invoked with a grave sense of restraint (Ashworth, 2005; Roberts & Von Hirsch, 1999). Yet for defendants who are detained before trial, restraint is compromised: by virtue of detention, they are more likely to go to prison and to serve a longer sentence there; they also are twice as likely to fail on post-conviction supervised release and to be returned to prison (Cadigan & Lowenkamp, 2011b). While this is not the racial disparity that fuels so much of the fire in sentencing policy (e.g., Albonetti, 2011; Engen, 2011; Scott, 2011; Spohn, 2011; Ulmer et al., 2011; U.S. Sentencing Commission, 2010), systematic sentencing disparity of this kind should be of great interest to sentencing judges, the United States Sentencing Commission, the Judicial Conference of the United States, and other policymakers.

Given the sentencing effects of revocation of pretrial services supervision, our findings should interest pretrial services officers.

Although the effects of revocation of pretrial services supervision on incarceration and increased sentence length were only half as dramatic as the effects of pretrial detention, revocation also appears to exercise a significant relationship on sentencing decisions. Yet while the pretrial services officer's decision to revoke supervision may dramatically influence the ultimate sentencing outcome, there is great variation in revocation rates across districts that does not necessarily reflect differences in average risk levels as measured by the pretrial risk assessment (PTRA) tool used by officers in making pretrial release or detention recommendations (Oleson, 2013). There are also wider implications for the nature of pretrial services supervision. If pretrial services officers are to enhance supervision to reduce revocations, they may need to make use of evidence-based practices (Cadigan, 2009), ensuring that defendants who have greater criminogenic risks and needs receive high treatment dosages while those with relatively low risks and needs are not overprogrammed (Lowenkamp et al., 2006). This can be achieved, given that the highest-risk pretrial defendants can successfully complete pretrial release (i.e., appearing for court, not violating conditions, and incurring no new charges) (Lowenkamp & Whetzel, 2009). Defendants who score in the PTRA's category five have an 80 percent chance of successfully completing pretrial release (Lowenkamp & Whetzel, 2009).

The findings should interest Bureau of Prisons personnel, as well. To the extent that detention drives increased imprisonment rates and increased sentence length, the high pretrial detention rates of recent years may forecast increasing BOP populations. Federal defendants detained before trial are twice as likely as released defendants to fail on post-conviction supervised release (Cadigan & Lowenkamp, 2011b) and this group represents a substantial population. Between 8 percent and 15 percent of prisoners entering BOP custody each year are offenders who have had their supervised release revoked (Rowland, 2013). Increased numbers of defendants going to federal prisons, for longer periods of time, will exacerbate crowding in federal prisons (Government Accountability Office, 2012; Mallik-Kane et al., 2012; Rowland, 2013). The population of the federal Bureau of Prisons has increased tenfold since 1980—from 21,000 to 218,000 (La Vigne & Samuels, 2012), and this population is expected to grow by another 11,000 during the next two

years (Government Accountability Office, 2012). Of course, reciprocally, decreases in detention and revocation rates would signal future decreases in BOP populations (all other things being equal). Probation officers should be concerned about the findings for the same reasons. As prisoners emerge from BOP custody, they will serve terms of supervised release under 18 U.S.C. § 3583. These supervisees will present serious challenges for probation officers: As noted above, federal defendants who are detained before trial are more likely to fail on supervised release (Cadigan & Lowenkamp, 2011b).

Other policy makers should be concerned, as well. The principle of equal justice under law has both ideological (Griswold, 1976; Hennings, 1957) and—if the theory of procedural justice has merit—practical value (Sunshine & Tyler, 2003; Tyler, 2003), but the fiscal bottom line also matters. It currently costs between \$21,006 (minimum security) and \$33,930 (high security) per year to incarcerate a federal prisoner (La Vigne & Samuels, 2012), yielding an annual budget for the Bureau of Prisons of \$6.6 billion (Department of Justice, 2013). In contrast, it costs only \$3,433 per year to supervise a probationer in the community (La Vigne & Samuels, 2012). The financial burdens of mass incarceration are paralleled by very real social costs, affecting individuals, families, and communities (Clear, 2007; Frost & Clear, 2012; Western, 2006). Federal policy makers may seek to alleviate these fiscal and human costs by establishing programs that reduce rates of federal detention and revocation, thereby mitigating the downstream consequences on prisons and the federal criminal justice system.

## Conclusion

Fifty years of research suggests that “a causal relationship exists between detention and unfavorable [sentencing] disposition” (Rankin, 1964: 655). This relationship appears to hold true in the federal pretrial services system as well (Oleson et al., 2013a, 2013b), and while the effects of revocation are not as pernicious as those of detention, the revocation of pretrial services supervision also appears to lead to an increased likelihood of prison and a longer sentence (Oleson et al., 2013b). In making detention decisions under 18 U.S.C. § 3142, federal judges and pretrial services officers should be aware of the linkages between pretrial detention, release, conviction, incarceration, sentence length, and success or failure on supervised

release. Fortunately, researchers already know something about the factors that appear to lead to failure on federal pretrial services supervision (Bechtel et al., 2011). We hope that the establishment and dissemination of a federal pretrial risk assessment instrument (Cadigan & Lowenkamp, 2011a; Lowenkamp & Whetzel, 2009) will permit pretrial services officers and judges to make more informed release decisions.

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