How Accurate are Rebuttable Presumptions of Pretrial Dangerousness?

A Natural Experiment from New Mexico

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Abstract: In New Mexico and many other jurisdictions, judges may detain defendants if the prosecutor proves, through clear and convincing evidence, that releasing them would pose a danger to the public. However, some policymakers argue that certain classes of defendants should have a "rebuttable presumption" of dangerousness, shifting the burden of proof to the defense. Using data on over 15,000 felony defendants who were released pretrial in a four-year period in New Mexico, we measure how many of them would have been detained by various presumption criteria, and what fraction of these defendants in fact posed a danger in the sense that they were charged with a new crime pretrial. We consider presumptions based on the current charge, past convictions, past failures to appear, past violations of conditions of release, and combinations of these drawn from recent legislative proposals. We find that for all these criteria, at most 8% of the defendants they identify are charged pretrial with a new violent crime (felony or misdemeanor) and at most 5% are charged with a new violent felony. The false positive rate, i.e., the fraction of defendants these policies would detain who are not charged with any new crime pretrial, ranges from 71% to 90%. The broadest legislative proposals, such as detaining all defendants charged with a violent felony, do little better than the base rate among all defendants released under the current system. We also consider detention recommendations based on risk scores from the Arnold Public Safety Assessment (PSA). Among released defendants with the highest risk score and the "violence flag," 7% are charged with a new violent felony and 71% are false positives. We conclude that these criteria for rebuttable presumptions do not accurately target dangerous defendants: they cast wide nets and recommend detention for many pretrial defendants who do not pose a danger to the public.

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Introduction: Bail Reform and Rebuttable Presumptions

In this paper, we measure the accuracy of various "rebuttable presumptions" that a defendant is a danger to the public, and therefore should be detained pretrial. Specifically, we measure what fraction of the defendants to whom these presumptions apply are charged with new crimes during their pretrial period, especially violent crimes, and what fraction are "false positives" who are not charged with any new crime. Some of the criteria we consider, singly and in combination, are whether the defendant:

- is charged with a violent felony or firearm-related crime
- has prior felony convictions
- has prior failures to appear or prior violations of conditions of release
- receives a high risk score from a risk assessment algorithm

Our goal is to help policymakers and advocates better understand the benefits and costs of these presumptions, and especially whether they yield an improvement over a system of individualized hearings which places the burden of proof on the prosecution. We show that many such policies, including recent legislative proposals, are not accurate ways of identifying dangerous defendants: they are wide nets that recommend detention for many pretrial defendants who do not pose a danger to the public. We do not attempt to design an "optimal" policy: rather we measure the effect of policies similar to those used or proposed in various jurisdictions today.

Very recently, the Mayor of Chicago complained that judges release too many defendants charged with violent crimes on bond or electronic monitoring.[4] She argued that such a charge is sufficient evidence of public danger in itself: "We shouldn't be locking up nonviolent individuals just because they can't afford to pay bail. But, given the exacting standards that the state's attorney has for charging a case, which is proof beyond a reasonable doubt, when those charges are brought, these people are guilty." This is exactly the debate—between individualized hearings vs. broad criteria for detention—that we hope to inform.

We begin with some historical context. Since the 1960s and before, reformers and civil rights activists have argued that imposing financial conditions of release ("money bail") on defendants—and the resulting *sub rosa* detention of many defendants who cannot afford the amount of bail set—is unjust and unconstitutional. It is also a major source of bias in the criminal justice system against low-income defendants, and due to the correlations between race and class in our society, also contributes to bias against defendants who are people of color.[5] This has led to multiple waves of bail reform at the Federal and state level.[6]

At the same time, a number of states have laws or clauses in their constitutions that identify certain defendants as being ineligible for pretrial release under any conditions. Originally most states followed Pennsylvania in guaranteeing a right to bail except for those accused of capital offenses. However, as part of an omnibus crime act passed during the Nixon administration, judges were given the ability to deny bail for non-capital crimes in the District of Columbia on the basis of danger to the public. This model was taken up by several state legislatures, and by Federal courts in the Bail Reform Act of 1984.

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[4] Chicago Tribune, June 7, 2022.

[5] e.g. Traci Schlesinger, *Racial and ethnic disparity in pretrial criminal processing*, Justice Quarterly, 22:2, 170-192 (2005).

[6] Timothy R. Schnacke, Michael R. Jones, and Claire M. Brooker, *The History of Bail and Pretrial Release*. Pretrial Justice Institute, 2010; Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 Arizona Law Review 909 (2013)

Where they exist, these laws create "rebuttable presumptions" that certain defendants are a danger to the public and therefore have no right to bail. In essence, they predict that a defendant will commit a serious crime if they are released between arrest and trial. These presumptions place the burden of proof on the defense to argue that the defendant can be released, perhaps under strict conditions of supervision, without posing a danger to the community—rather than requiring the prosecution to prove they cannot.

Since defendants in the United States are presumed innocent until proven guilty, these laws raise profound constitutional questions.[7] However, in 1987 the Supreme Court upheld the facial constitutionality of the Bail Reform Act of 1984, as long as pretrial detention is "carefully limited." Specifically, the Court held[8] that a judge can detain a defendant pretrial if they hold a hearing[9] and find there is "clear and convincing evidence" that "no condition or combination of conditions will reasonably assure the safety of any other person and the community."

In addition to this general criterion, the 1984 Bail Reform Act created certain rebuttable presumptions of dangerousness for defendants in Federal courts. These consist of criteria involving the charge the defendant is currently accused of, whether the current charge occurred during pretrial supervision, and whether the defendant has past convictions for serious felonies.

At the state level, the analogous criteria differ widely. A defendant is presumed dangerous in Maryland[10] if they are charged with being a "drug kingpin"; in North Carolina[11] if their charge is associated with being a street gang, they have prior convictions, and are currently under supervision; in the District of Columbia[12] if they were armed with a firearm or had one readily available when arrested; and in New Jersey[13] if they are accused of murder or another crime punishable by life imprisonment. In California, state law briefly contained[14] a rebuttable presumption for defendants who are "assessed as high risk," a broad phrase that caused great concern in the age of algorithmic risk assessment.[15] While this language was enacted in 2018, it was put on hold and repealed by referendum in 2020.

While many of these rebuttable presumptions are intuitive and politically popular, there is no general agreement on what criteria should apply, or on best practices, if any, for using them. We argue that this is, in part, due to the lack of scientific data regarding their predictive accuracy: that is, the probability that these defendants will in fact commit additional crimes if released. Some argue that judges implicitly try to estimate this probability and impose pretrial detention if they believe this probability is above some threshold. But it is not clear what this threshold is or should be.[16]

To put this more sharply, for every violent crime we prevent by detaining someone, we detain a certain number of defendants who would not have posed a danger to the public if released.

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[7] e.g. Ann M. Overbeck, *Detention for the Dangerous: The Bail Reform Act of 1984,* 55 U. Cincinnati Law Review (1986) 153–199; Rebekah Durham, *Innocent Until Suspected Guilty*, 90 U. Cincinnati Law Review (2021) https://scholarship.law.uc.edu/uclr/vol90/iss2/7

[8] *United States v. Salerno,* 481 U.S. 739 (1987)

9 This hearing is not a trial and it may not focus on whether the defendant committed the crime of which they are accused, although evidence that they did can be taken as evidence of danger to the public. The defense is entitled to counsel and may cross-examine witnesses, if any. However, the standard rules of evidence typically do not apply: for instance, "reliable hearsay", such as from the arresting officer, is allowed.

[10] Maryland Criminal Procedure Code Ann. § 5-202 (2020)

[11] 2015 North Carolina General Statutes §15A-533, Right to pretrial release in capital and noncapital cases

[12] Code of the District of Columbia §23–1322, Detention prior to trial

[13] Rule Governing the Courts of the State of New Jersey. Rule 3:4A, pretrial detention

[14] California Penal Code §1320.20, 2019 version

[15] John Logan Koepke and David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform.* 93 Washington Law Review (2018),https://ssrn.com/abstract=3041622

[16] Sandra G. Mayson, *Dangerous Defendants*. 127 Yale Law Journal (2018) 490–567.

Detention has many collateral consequences. It causes defendants to lose jobs, housing, families, and relationships; makes it harder for them to mount a strong defense; pressures them to accept plea bargains even if they are innocent, or are guilty of a lesser charge; and makes them more likely to commit crime in the future[17]. Even a few days of detention can have significant effects on housing, employment, and health. As the American Bar Association states, "Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support."[18]

Errors and Accuracy

Legislators considering proposals for rebuttable presumptions need to face, not just constitutional questions, but questions of accuracy. They need to consider, as quantitatively and objectively as possible, both types of error inherent in any pretrial detention policy: "false positives" who are detained unnecessarily, and "false negatives" who are released and commit a serious crime during the pretrial period.[19] Both of these types of error have severe costs and consequences to society and to individuals.

But there is a fundamental asymmetry in society's awareness of these two types of error. The defendants whose lives are disrupted due to pretrial detention are largely invisible, and are rarely reported on. In contrast, when someone is arrested and released and then convicted of a terrible crime, the press reports their name, the name of their victim, and the nature of their act. This raises understandable questions about why they were not behind bars given their arrest, and produces a sense that pretrial supervision isn't working: that law enforcement is being forced to "catch and release" dangerous criminals, creating a "revolving door" of crime.[20] The salience of these high-profile cases creates political pressure to broaden the conditions for pretrial detention, and—especially during periods where crime is increasing—makes it easy to portray policymakers who oppose rebuttable presumptions as "soft on crime." In a number of states and cities, this has cast doubt on the overall project of bail reform.[21]

This makes it all the more important to assess the accuracy of rebuttable presumptions—the fraction of the people they detain who would commit a serious crime if released, and the fraction who would not. If the stated goals of a pretrial detention policy are to prevent serious crime while preserving constitutional liberties, then it is important to know to what extent it succeeds in meeting these goals. If a policy has a high false positive rate, and thus detains a large number of people for

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[17] Léon Digard and Elizabeth Swavola, Vera Institute of Justice, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention.* https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf

[18] ABA Standards for Criminal Justice: Pretrial Release, 3d Ed. (2007). https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.pdf

[19] We use these terms rather than opaque phrases like "Type I errors" and "Type II errors" partly because the reader may be familiar with them due to the current pandemic. If danger to the public is a disease, we think of a given rebuttable presumption as a diagnostic test, and pretrial detention as a treatment which may or may not be worth the harm it causes. In fact the phrase "false positive" in this context goes back to the debate around the Bail Reform Act of 1984: see e.g. Scott D. Himsell, Preventive Detention: *A Constitutional But Ineffective Means of Fighting Pretrial Crime*, 77 J. Crim. L. & Criminology 439 (1986).

[20] "In Wake of Violent Weeks, Mayor's Metro Crime Initiative Develops Strategies for Shutting Revolving Door," https://www.cabq.gov/mayor/news/in-wake-of-violent-weeks-mayor2019s-metro-crime-initiative-develops-strategies-for-shutting-revolving-door; Greater Albuquerque Chamber of Commerce, "Unmonitored defendants are a serious safety problem in BernCo," Opinion in the Albuquerque Journal, Oct. 3rd 2021. https://www.abqjournal.com/2434481/unmonitored-defendants-are-a-serious-safety-problem-in-bernco.html

[21] US News "New Mexico Poised to Reconsider Bail Reform Amid Crime Wave", https://www.usnews.com/news/best-states/new-mexico/articles/2021-08-31/new-mexico-poised-to-reconsider-bail-reform-amid-crime-wave One recent instance of movement in the opposite direction is Virginia, who repealed rebuttable presumptions along party lines in 2021 (Senate Bill 1266). See Daily Press February 6, 2021, "Virginia lawmakers scrap 'presumption' that those charged with certain crimes don't get bail."

each serious crime it prevents, we should question whether it succeeds in balancing individual liberty with society's interest in preventing crime.[22]

But how can we measure the accuracy of pretrial detention? Just as a bank only knows if a borrower would return a loan if it is approved, and a university only knows how a student would perform if they are accepted, we don't know how a defendant will behave unless they are released.

One approach is to measure jail populations and rearrest rates before and after a pretrial detention policy is established, repealed, or modified.[23] However, crime rates and law enforcement are in constant flux for many reasons, due to changes in policy, procedures, demographics, social and economic conditions, the availability of weapons, and so on. This makes it difficult to assign credit or blame for decreases or increases in jail populations or crime to any one factor. Studies of this type for the effectiveness of risk assessment algorithms have produced mixed results.[24]

Instead of a before-and-after study, we would ideally like to measure the accuracy of a given policy by looking at outcomes in two parallel worlds: one where the policy is in place, and one where it is not. These "natural experiments" are not always available to us.[25]

Here we carry out a natural experiment using a database of over 15,000 felony defendants who were released pretrial in Bernalillo County, New Mexico (where Albuquerque is located) over the course of four years. As discussed below, New Mexico's current system allows pretrial detention for any felony, but places the burden on the prosecutor to prove by clear and convincing evidence that the defendant is dangerous. Rebuttable presumptions would lower this threshold, and would detain additional defendants except when judges ruled in favor of the defense that the presumption has been overcome. By looking at outcomes for defendants released under the current system, we can measure the accuracy of a variety of rebuttable presumptions—both those rejected by the New Mexico legislature in the 2022 legislative session, and those already in force or under discussion in other states and cities. This data lets us revisit the 50-year-old debate over rebuttable presumptions and pretrial detention.

Laws as Algorithms

There is an important connection between our study and the growing debate on algorithmic risk assessment. This data on felony defendants is available to us because the New Mexico Administrative Office of the Courts undertook a local revalidation study[26] of the Arnold Public Safety Assessment (PSA), a risk assessment tool used in many jurisdictions around the country. Indeed, one of the policies we assess is the use of this tool to recommend detention, as many

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[22] Even if pretrial detention is constitutional in principle, sufficient inaccuracy can call the constitutionality of a policy into question. Laws must have a rational connection with their intended effect, especially when they impose restrictions on a class of people. Arthur R. Angel, Eric D. Green, Henry R. Kaufman, and Eric E. Van Loon, *Preventive Detention: An Empirical Analysis*, 6 Harvard Civil Rights-Civil Liberties Law Review (1971) 300–396, and Forward by Sam J. Ervin Jr., *Preventive Detention—A Step Backward for Criminal Justice.*

[23] For an early attempt to do this for the 1984 Bail Reform Act, see Kingsnorth et al., *Preventive Detention: The Impact of the 1984 Bail Reform Act in the Eastern Federal District of California.* Criminal Justice Policy Review 2(2) 149–172 (1987).

[24] J.L. Viljoen, M.R. Jonnson, D.M. Cochrane, L.M. Vargen, and G.M. Vincent, *Impact of risk assessment instruments on rates of pretrial detention, postconviction placements, and release: A systematic review and meta-analysis,* Law and Human Behavior, 43(5), 397–420 (2019); Megan Stevenson, *Assessing Risk Assessment in Action,* 103 Minnesota Law Review 303 (2018).

[25] One natural experiment occurred during the litigation leading to *Schall v. Martin.* In 1981, a federal judge enjoined the preventive detention of juvenile offenders in New York State, creating a writ of habeus corpus that applied for three years until the Supreme Court found in 1984 that the New York law does not violate the Fourteenth Amendment. This led to the release of 74 juvenile defendants. Although this is a very small sample, it offered an opportunity to measure the accuracy of judicial decisions. Jeffrey Fagan and Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment,* J. Criminal Law and Criminology Vol. 86 415–448 (1996).

[26] Elise Ferguson, Helen De La Cerda, Paul Guerin, and Cristopher Moore, *Bernalillo County Public Safety Assessment Validation Study.* Institute for Social Research, University of New Mexico (2021). https://isr.unm.edu/reports/2021/bernalillo-county-public-safety-assessment-validation-study.pdf

jurisdictions such as New Jersey[27] and San Francisco[28] do. This use of the PSA, while not recommended by the PSA's designers,[29] is effectively an algorithmically-driven rebuttable presumption. Thus, it can be examined for accuracy using the same techniques that we apply to legislatively-driven policies.

It is our hope that the growing demand for transparency and accountability in algorithms will renew and strengthen the same demands for all aspects of decision-making in criminal justice, both human and automated. Many laws are algorithms by another name: a policy of the form "if [condition] then detain" might as well be a line of computer code. These lines of code, whether created by programmers, machine learning algorithms, or legislatures, must be subject to scrutiny and quantitative study, so that all stakeholders can make a clear-eyed assessment of their benefits to the public and their costs to liberty.[30]

The New Mexico Setting

New Mexico has a unique history of bail reform.[31] In 2014, the New Mexico Supreme Court considered a case where a defendant accused of murder was detained for two years and four months because he could not afford a $250,000 bail bond even though uncontroverted evidence was presented that he would not pose a danger to the public if he were released under a strict set of conditions, including monitoring by a GPS device, living with his father, making regular contact with the pretrial services program, and maintaining employment at a local restaurant. The Court found that this detention violated the defendant's right to bail in the New Mexico Constitution, as well as New Mexico's rules of criminal procedure that a defendant be released "on the least restrictive conditions necessary to reasonably assure both the defendant's appearance in court and the safety of the community."[32]

This case began a process that led to an amendment to the state constitution, approved by New Mexico voters in 2016. This amendment ostensibly prevents defendants from being detained simply because they cannot afford bail, but it also allows judges to detain any felony defendant if the

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[27] New Jersey Pretrial Release Recommendation Decision Making Framework (DMF), https://www.njcourts.gov/courts/assets/criminal/decmakframwork.pdf

[28] Alissa Skog and Johanna Lacoe, *Validation of the PSA in San Francisco.* California Policy Lab https://www.capolicylab.org/wp-content/uploads/2021/08/Validation-of-the-PSA-in-San-Francisco.pdf

[29] Currently, Arnold Ventures and their project Advancing Pretrial Policy and Research state that the PSA "doesn't make recommendations about whether to release or detain a person pretrial" and should only be used to recommend conditions of release, see https://advancingpretrial.org/psa/factors/release-conditions-matrix/ . However, it was initially presented as a tool for both purposes (e.g. https://www.arnoldventures.org/newsroom/laura-and-john-arnold-foundation-launches-psa-to-improve-risk-based-decision-making/) and many jurisdictions still interpret the highest risk scores as a recommendation to detain.

[30] For more on the analogies between law and code, see Lawrence Lessig, *Code 2.0*, http://codev2.cc/download+remix/ . In *Race After Technology: Abolitionist Tools for the New Jim Code* (Wiley, 2019) Ruha Benjamin argues that algorithms reproduce historical structures of racism and discrimination. Some other recent contributions, including Kleinberg et al. *Algorithms as discrimination detectors,* Proceedings of the National Academy of Science 117 (48) 30096-30100 (2020) and Bell et al., *The Recon Approach: A New Direction for Machine Learning in Criminal Law,* Berkeley Technology Law Journal vol. 37 (2021) take a more optimistic view: namely that if algorithms are sufficiently transparent, they can be used to detect discrimination in human decisions, and thus create fairer systems overall. This is a vital debate. Our claim here is that both algorithms and human policies should be held accountable to their stated goals, and independently assessed to see if they meet these goals.

[31] Ella J. Siegrist, Jenna L. Dole, Kristine Denman, Ashleigh Maus, Joel Robinson, Callie Dorsey, and Graham White, *Implementing Bail Reform in New Mexico.* Institute for Social Research, University of New Mexico (2020). http://isr.unm.edu/reports/2020/implementing-bail-reform-in-new-mexico.pdf

[32] State v. Brown, 2014-NMSC-038, 338 P.3d 1276

prosecutor proves that they are a danger to the public. The new language in Article II, Section 13 of the New Mexico constitution reads:[33]

> Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.
>
> A person who is not detainable on the grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond.

Like a number of other states, New Mexico's movement away from money bail was coupled with an increased interest in risk assessment tools, also known as instruments or algorithms, in the hope that they would make release decisions more consistent and evidence-based. Since June 2017, the Bernalillo County Metropolitan Court and the Second Judicial District Court have used the Arnold Public Safety Assessment (PSA) for felony defendants. Since then, the state has started pilot projects in several other jurisdictions.

When a jurisdiction adopts the PSA, local stakeholders construct a "release conditions matrix" that translates risk scores into recommendations to the judge for conditions of release. These conditions might include additional notifications of upcoming hearings, required check-ins with pretrial supervision officers, drug testing, or tracking with a GPS device. In Bernalillo County, the recommendation in the highest score category is for the judge to hold a hearing to see if the constitutional conditions for detention are met as per the 2016 amendment, and if not, to release the defendant with maximum conditions (see Figure 1 below). Thus, in the current system, the burden of proof is on the prosecutor to bring a motion and show that detention is necessary, even for defendants with high risk scores and/or serious charges.[34]

In recent years, judges in Bernalillo County have agreed with roughly half the motions to detain brought by prosecutors. However, due partly to high-profile cases where serious crimes were committed by pretrial defendants and partly to an overall concern about rising crime rates, a wide range of New Mexico policymakers from both parties—including the local District Attorney, the Mayor of Albuquerque, state legislators, and the Governor of New Mexico—have called for more defendants to be detained pretrial. In the 2021 and 2022 legislative sessions, bills were introduced that would have created rebuttable presumptions of dangerousness based on the current charge, past felony convictions, or past violations of conditions of release. These bills failed due to a combination of constitutional, financial, and evidence-based concerns, but they are likely to reappear in some form.

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[33] The 2016 amendment also repealed a 1980 "three strikes"-like amendment which allowed detention for felony defendants with two or more prior felony convictions, or those accused of a felony involving a deadly weapon who have one or more prior felony convictions.

[34] Like most states, New Mexico's constitution excludes from the right to bail those accused of "capital offenses when the proof is evident or the presumption great." However, the death penalty was repealed in New Mexico in 2009 so there are currently no capital offenses in New Mexico law. In 2018 the State Supreme Court ruled that this exclusion does not apply to formerly capital crimes such as first degree murder, referring instead to judges' ability to find a danger to the public under the 2016 amendment. State v. Ameer, No. S-1-SC-36395 slip op. (N.M. S. Ct. April 23, 2018)

Data

Our study is based on the 15,134 felony defendants arrested in the 48-month period from July 1st, 2017 through June 30th, 2021, who were assessed with the Arnold PSA, whose cases were closed by the end of this period, and who were released pretrial for all or part of the intervening period—either because the prosecutor did not bring a motion to detain them, or because the judge ruled against such a motion. For each defendant, our data includes the following:

- the original charge filed by the District Attorney
- past felony convictions, past failures to appear, and past violations of conditions of release
- the scores and recommendations produced by the PSA[35]
- whether the prosecutor brought a motion to detain
- new charges filed from crimes committed during pretrial supervision, if any
- failure to appear at court hearings during pretrial supervision, if any.

All charges are classified by type (property, drug, DWI, public order/other, and violent) and severity (petty misdemeanor, misdemeanor, and 1st through 4th degree felonies). Note that all the original charges are felonies, since Bernalillo County only uses the PSA for felony defendants. In the tables below we classify rearrests by violent vs. nonviolent and felonies vs. misdemeanors for simplicity. We exclude most traffic charges, all parking statutes, and city ordinances.

It is worth noting that very few of these defendants were charged with new high-level felonies. A total of 15 defendants in our dataset, or one out of every thousand, were charged with a new first-degree felony. A total of 141 were charged with a new second-degree felony, 70 of which were violent—about one-half of one percent.

We consider criteria for detention based on the original charge, including violent felonies, Serious Violent Offenses (see Tables 1 and 2), and firearm- and weapons-related charges; prior convictions for felonies and violent crimes, and prior violations of conditions of release, including failure to appear; and scores and recommendations derived from the PSA. We also consider various combinations of these similar to proposals recently considered in the New Mexico legislature.

For each criterion or combination of criteria, we measure how many additional defendants in our sample would have been detained. We then ask what fraction of these defendants would have been arrested pretrial for crimes of various types and severity (including violent vs. nonviolent and felonies vs. misdemeanors) and what fraction would not have been rearrested at all. This lets us measure the false positive rate of a given detention policy, as well as the number of people who would have to be detained to prevent a single violent rearrest.

Before we proceed we consider three caveats to our data and how it is coded.

Charges vs. crime. We equate crime with arrests that lead to filed charges. In particular, "new criminal activity" (NCA) means that a charge was filed by the District Attorney for a crime committed during the pretrial period. While this is the only measure we have, it makes errors in both directions: not all crime is reported and not all reported crime leads to arrest and prosecution, and not all arrests or charges correspond to actual crimes.

Based on the National Crime Victimization Survey, the estimated fraction of crimes reported to police is 52% for aggravated assault, 47% for robbery, and 34% for rape and sexual assault.[36]

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[35] Advancing Pretrial Policy and Research, "About the Public Safety Assessment." https://advancingpretrial.org/psa/factors/

[36] Pew Research Center (2020) "What the data says (and doesn't say) about crime in the United States." https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s/

Some writers have speculated that these rates are higher for crimes committed by defendants who are under pretrial supervision,[37] but we know of no studies to that effect.

In the other direction, we know of very few studies that measure pretrial crime in terms of convictions rather than charges. A study of the PSA in Los Angeles found that less than one-third of pretrial rearrests led to new convictions, although they caution that this may be an underestimate due to reporting delays and cases still pending at the end of the study period.[38]

Thus, with misgivings, and the usual sheepish reply that "it's the data we have," we use filed charges as a signal of crime in both directions: we give a detention policy credit for having prevented a crime if a detainee would have had new charges filed against them during their pretrial period, and we call a detainee a false positive if they would not have been. We hope to revisit this in the future with other forms of data. But even though charges are both noisy and biased as signals of crime, we believe they yield compelling results in this context.

Definitions of Serious Violent Offense. Several legislative proposals have focused on defendants charged with a Serious Violent Offense (SVO). New Mexico law defines these as in Table 1. However, there is an additional set of charges, shown in Table 2, which a court can find to be SVOs as well. Thus, in several places below we consider both a narrow definition based just on Table 1, and a broad one that includes both tables. In practice, judicial discretion would fall somewhere in between these two.

Firearm-related crimes. The involvement of firearms in a crime can be defined in many ways, ranging from discharging a firearm, to brandishing one, to having one "readily available." Since our data only gives us the filed charge, we do not always know which cases involved a firearm: for instance, aggravated assault with a deadly weapon includes cases both with and without the use of a firearm. In addition, the only appearance of brandishing a firearm in the current New Mexico code is an enhancement for other felonies.[39]

As a proxy for firearm use, we focus on charges listed in Table 3 that clearly indicate the use of a firearm or a deadly weapon. In Table 4 we give a longer list of charges that indicate the use of a deadly weapon which may or may not be a firearm. We hope to improve this in the future by looking at crime reports and sentencing hearings. We claim, however, that broadening the definition to include possession of a firearm, the presence of a firearm in easy reach (say, in the glove compartment when the defendant's car is searched), and so on, is likely to lead to higher false positive rates. Wider nets tend to be less accurate.

How Much Crime is Committed by Pretrial Defendants?

Since the stated purpose of rebuttable presumptions is to prevent crime, we start by considering their potential benefits to the public in terms of reducing crime rates. Of all felonies, what fraction is committed by pretrial defendants? To what extent do these defendants drive a "revolving door" of crime?

To answer this, we compare the number of felony cases filed against released defendants (the numerator) with the total number of felony cases filed during the study period (the denominator). As discussed above, not all felony crimes lead to arrest and prosecution. But we assume this affects the numerator and denominator equally, i.e., that the probability a felony leads to filed charges is the same for crimes committed by pretrial defendants as for felonies overall. If it is higher for the

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[37] Angel et al., *supra* note 17.

[38] County of Los Angeles, Pretrial Risk Assessment Tool Validation, July 2021. http://file.lacounty.gov/SDSInter/probation/1109503_LosAngeles-UPDATEDCountyvalidation-FINAL7-1-21.pdf

[39] N.M. Stat. § 31-18-16

former, since most pretrial defendants are under some form of supervision, then our method would overestimate the fraction of crime committed by these defendants.

In order to compare apples with apples, in the denominator we only count felonies for which the defendant was in custody for their release decision, for which the PSA was assessed, and which were closed by the end of the 48-month period. Since this is just a subset of felonies which were committed during this time, we are probably underestimating the total number of felony cases, and therefore overestimating the fraction that are committed by pretrial defendants.

Tables 5 and 6 show that, by this measure, a small fraction of felonies are committed by pretrial defendants. Defendants who are accused of violent felonies commit about 2% of all felonies, about 3% of violent felonies, and about 2% of first-degree felonies. As a result, detaining all defendants accused of a violent felony would only decrease felony crime by a few percent. Even detaining *all* felony defendants, which to our knowledge no one has proposed, would prevent about 8% of all felonies, about 5% of violent felonies, and about 6% of first-degree felonies. Thus, going beyond the current system and detaining additional defendants based on rebuttable presumptions would decrease the rate of serious crime only slightly.

Released defendants also commit some misdemeanors, including violent misdemeanors, as we show below. However, since our data only concerns felony defendants, we do not know the total number of misdemeanor cases filed during the study period. Lacking that denominator, we cannot calculate the fraction of misdemeanors committed by pretrial defendants. But we see no reason why this fraction would be very different than it is for felonies.

Felony type	Number of closed felony cases during study period	Felony cases filed against pretrial defendants accused of any felony	Felony cases filed against pretrial defendants accused of a violent felony
Violent	8366	456 (5.4%)	228 (2.7%)
Drug	6972	567 (8.1%)	104 (1.5%)
Property	5503	630 (11.4%)	100 (1.8%)
DWI	235	5 (2.1%)	2 (0.9%)
Public order/other	669	49 (7.3%)	10 (1.5%)
Total	21745	1707 (7.8%)	444 (2.0%)

Table 5. The fraction of felonies committed by felony defendants who are released under the current hearing-based system. For instance, there were a total of 8366 violent felony cases filed and closed during the study period. 456 cases were filed against felony defendants, and of those 228 were filed against defendants accused of a violent felony. Thus, detaining all defendants accused of a violent felony would prevent about 3% of violent felonies, and about 2% of felonies overall. Detaining all felony defendants would prevent about 5% of violent felonies and 8% of felonies overall.

Felony degree	Number of closed felony cases during study period	Felony cases filed against pretrial defendants accused of any felony	Felony cases filed against pretrial defendants accused of a violent felony
1st degree	262	15 (5.7%)	5 (1.9%)
2nd degree	1869	141 (7.5%)	34 (1.8%)
3rd degree	4751	276 (5.8%)	94 (2.0%)
4th degree	14863	1275 (8.6%)	311 (2.1%)
Total	21745	1707 (7.8%)	444 (2.0%)

Table 6. The same data as in Table 5, but classified by severity rather than type. Detaining all defendants accused of a violent felony would decrease first-degree felonies by about 2%. Detaining all felony defendants would decrease first-degree felonies by about 6%.

Results: Criteria based on Charges and Priors

Since rebuttable presumptions would prevent at most a small fraction of serious crimes, their benefits to society are modest. The rest of this paper focuses on their costs—including the number of people they detain unnecessarily—and whether they are accurate enough to justify these costs.

We consider policies that recommend detention for various classes of defendants. Within each such class, what fraction of defendants in fact pose a danger to the public if released, measured by new charges filed against them during the pretrial period? And what fraction are false positives who would receive no new charges if released?

Since New Mexico's current system already allows the prosecutor to present evidence that a defendant is dangerous to the public, and allows the judge to detain if they find this evidence to be clear and convincing, the reader should feel free to assume that at least some defendants with strong evidence of dangerousness are already being detained. Our question is whether it is accurate to go beyond this hearing-based system and recommend detention for broad classes of defendants even though the judge does *not* find the prosecutor's evidence to be clear and convincing—or, equivalently, to direct the judge to treat these criteria in and of themselves as sufficient evidence of public danger.

We consider criteria based on the type or severity of crime of which the defendant was originally accused (Table 7); their criminal record, including prior convictions or prior violations of conditions of release (Table 8); and their risk score according to the Arnold Public Safety Assessment (Table 9). For comparison, in the top row of each table we show the base rates for all felony defendants released under the current system. We find that 82% of all released defendants do not receive any new charge during the pretrial period; these would become false positives if detained. We find that 18% of all released defendants receive some new charge pretrial. This includes 5% who are charged with a new violent crime, which in turn includes 3% who are charged with a new violent felony.[40]

In Table 7 we see that defendants whose original charge is a violent felony actually have a slightly lower rate of rearrest overall. When they are rearrested, it is somewhat more likely that the new charge will be violent rather than nonviolent. Nevertheless, for all of these charge-based criteria, the rate of new charges for violent crime is at most 7%, including 5% who are charged with violent felonies. The false positive rates of these criteria range from 77% to 90%.

In Table 8 we see similar results for criteria based on past convictions or violations of conditions of release, including past failures to appear. Among defendants with three or more prior convictions for violent crimes (felonies or misdemeanors) 8% are charged with a new violent crime, including 5% who are charged with a violent felony. Most of these criteria again have a false positive rate of at least 77%. For defendants with two or more failures to appear in the past two years the false positive rate is 71%, but just 7% of them are charged with new violent crimes including just 4% with violent felonies.

[40] There are a handful of cases where a defendant is simultaneously charged with a nonviolent felony and a violent misdemeanor. We count these as "violent felonies" even though the highest charge is nonviolent. This has no signficant effect on our results.

Criterion (original charge)	No new charge	New charge: nonviolent misdemeanor	New charge: nonviolent felony	New charge: violent misdemeanor	New charge: violent felony	Total
All released felony defendants	12388 (82%)	744 (5%)	1252 (8%)	295 (2%)	455 (3%)	15134
1st degree felony	121 (89%)	4 (3%)	5 (4%)	2 (1%)	4 (3%)	136
1st or 2nd degree felony	1046 (83%)	64 (5%)	105 (8%)	13 (1%)	27 (2%)	1255
Violent felony	5137 (86%)	232 (4%)	217 (4%)	172 (3%)	228 (4%)	5986
Violent 1st degree felony	108 (90%)	4 (3%)	2 (2%)	2 (2%)	4 (3%)	120
Violent 1st or 2nd degree felony	426 (83%)	30 (6%)	32 (6%)	5 (1%)	21 (4%)	514
Narrow SVO (Table 1)	1835 (86%)	80 (4%)	70 (3%)	61 (3%)	81 (4%)	2127
Broad SVO (Table 1 or 2)	4351 (85%)	203 (4%)	189 (4%)	147 (3%)	202 (4%)	5092
Firearm-related charge (Table 3)	315 (77%)	18 (4%)	50 (12%)	9 (2%)	16 (4%)	408
Deadly weapon-related charge (Table 3 or 4)	2248 (83%)	122 (4%)	148 (5%)	72 (3%)	124 (5%)	2714

Table 7. Criteria based on the original charge of which the defendant is accused, including high-level or violent felonies, Serious Violent Offenses (SVOs) as defined in New Mexico law (see Tables 1 and 2), and charges that indicate the use of a firearm or deadly weapon (see Tables 3 and 4). These rates are for pretrial defendants released under New Mexico's current hearing-based system. For instance, detaining all 136 people charged with a first degree felony would have prevented 6 charges for violent crimes, 4 of which were felonies, while also detaining 121 defendants who would not have received any new charge if released.

Criterion (prior convictions and violations)	No new charge	New charge: nonviolent misdemeanor	New charge: nonviolent felony	New charge: violent misdemeanor	New charge: violent felony	Total
All released felony defendants	12388 (82%)	744 (5%)	1252 (8%)	295 (2%)	455 (3%)	15134
Prior felony conviction	4401 (77%)	340 (6%)	608 (11%)	128 (2%)	210 (4%)	5687
Prior violent conviction	3518 (78%)	251 (6%)	426 (9%)	115 (3%)	187 (4%)	4497
3 or more prior violent convictions	745 (77%)	67 (7%)	80 (8%)	32 (3%)	46 (5%)	970
Prior violations of COR	8273 (79%)	611 (6%)	1039 (10%)	223 (2%)	370 (4%)	10516
FTA in the past two years	3802 (74%)	388 (8%)	620 (12%)	128 (2%)	207 (4%)	5145
2 or more FTAs in the past two years	1932 (71%)	251 (9%)	346 (13%)	72 (3%)	113 (4%)	2714

Table 8. Criteria based on prior convictions and prior violations of conditions of release (COR) including recent Failures to Appear (FTA). These rates are for pretrial defendants released under New Mexico's current hearing-based system. Note that "prior violent convictions" includes both violent felonies and violent misdemeanors.

Results: Algorithmic Criteria for Detention

Table 9 shows criteria based on Arnold PSA scores. As discussed above, while jurisdictions that use risk assessments to detain don't typically call them rebuttable presumptions (except, briefly, California) they have much the same effect. Thus, algorithmic criteria deserve the same scrutiny as those written by legislators.

The PSA produces two scores on a 6-point scale, one for New Criminal Activity (NCA) and one for Failure to Appear (FTA). It also produces a "violence flag" which is either present or absent. All of these are derived from the defendant's criminal record; the only demographic variable the PSA uses is age. We consider the criterion that the NCA score is 6, and also the "Detain if Constitutional Conditions are Met" category from the local conditions of release matrix, where either the NCA or FTA score is 6 or if both scores are 5 (see Figure 1). We consider each of these criteria alone and in combination with the violence flag. When we include the flag, 11-12% of these defendants are charged with a new violent crime, including 7% who are charged with a violent felony. Their false positive rates are 71-72%.

		New Criminal Activity Scale					
		NCA 1	NCA 2	NCA 3	NCA 4	NCA 5	NCA 6
Failure to Appear Scale	FTA 1	(A) ROR	(B) ROR				
	FTA 2	(C) ROR	(D) ROR	(E) ROR-PML 1	(F) ROR-PML 3	(G) ROR-PML 4	
	FTA 3		(H) ROR-PML 1	(I) ROR-PML 2	(J) ROR-PML 3	(K) ROR-PML 4	(L) Detain or Max Conditions
	FTA 4		(M) ROR-PML 1	(N) ROR-PML 2	(O) ROR-PML 3	(P) ROR-PML 4	(Q) Detain or Max Conditions
	FTA 5		(R) ROR-PML 2	(S) ROR-PML 2	(T) ROR-PML 3	(U) Detain or Max Conditions	(V) Detain or Max Conditions
	FTA 6				(W) Detain or Max Conditions	(X) Detain or Max Conditions	(Y) Detain or Max Conditions

Figure 1. The release conditions matrix used in Bernalillo County and the Second Judicial District to interpret the results of the Arnold Public Safety Assessment (PSA).

Criterion (PSA scores and violence flag)	No new charge	New charge: nonviolent misdemeanor	New charge: nonviolent felony	New charge: violent misdemeanor	New charge: violent felony	Total
All released felony defendants	12388 (82%)	744 (5%)	1252 (8%)	295 (2%)	455 (3%)	15134
Detain/Max PSA	1691 (71%)	202 (8%)	308 (13%)	75 (3%)	111 (5%)	2387
Detain/Max PSA + violence flag	514 (72%)	49 (7%)	63 (9%)	37 (5%)	47 (7%)	710
NCA score of 6	837 (71%)	102 (9%)	147 (12%)	37 (3%)	56 (5%)	1179
NCA score of 6 + violence flag	323 (71%)	36 (8%)	43 (9%)	21 (5%)	30 (7%)	453

Table 9. Algorithmically-driven criteria based on the Arnold Public Safety Assessment (PSA) including the highest NCA score, the violence flag, and the "Detain if Constitutional Conditions are Met" category from the release conditions matrix used in Bernalillo County and the Second Judicial District (Figure 1). These rates are for pretrial defendants released under New Mexico's current hearing-based system. Note the designers of the PSA do not recommend its use for detention.

Criterion (Legislation)	No new charge	New charge: nonviolent misdemeanor	New charge: nonviolent felony	New charge: violent misdemeanor	New charge: violent felony	Total
All released felony defendants	12388 (82%)	744 (5%)	1252 (8%)	295 (2%)	455 (3%)	15134
HB80: (1st deg felony or narrow SVO) and (prior felony or COR)	934 (82%)	57 (5%)	55 (5%)	41 (4%)	55 (5%)	1142
HB80: (1st deg felony or broad SVO) and (prior felony or COR)	2373 (81%)	145 (5%)	155 (5%)	101 (3%)	152 (5%)	2926
HB5: Narrow SVO or firearm charge	2038 (85%)	93 (4%)	114 (5%)	66 (3%)	92 (4%)	2403
HB27: Broad SVO, firearm charge, or past FTA or COR	7603 (80%)	538 (6%)	776 (8%)	234 (2%)	350 (4%)	9501
HB27: Narrow SVO, firearm charge, or past FTA or COR	5681 (77%)	469 (6%)	725 (10%)	184 (3%)	288 (4%)	7347

Table 10. Criteria based on recent legislative proposals from the New Mexico legislature. House Bill 80, introduced in the 2021 session, would have created a rebuttable presumption of dangerousness for pretrial defendants charged with a first-degree felony or Serious Violent Offense (SVO) who also have a prior felony conviction or prior violation of conditions of release (COR). House Bill 5, introduced in the 2022 session, would have created a presumption if a defendant committed a Serious Violent Offense (SVO) from Table 1, or if they discharged or brandished a firearm. House Bill 27 would have created a presumption for defendants who are charged with an SVO, or have past failures to appear (FTA) in felony cases, or violations of conditions of release (COR).

The Accuracy of Recent Legislative Proposals

Table 10 shows results for various combinations of criteria based on recent bills proposed in the New Mexico legislature. House Bill 80, introduced in the 2021 session, would have created a rebuttable presumption of dangerousness for defendants who are 1) charged with a first degree felony or Serious Violent Offense (SVO) and who also 2) have a prior felony conviction or prior violations of conditions of release. As before, we consider both the narrow and the broad definition of SVO. In both cases, the fraction of defendants who would be charged with a new violent felony is 5%. An additional 3-4% would be charged with a violent misdemeanor, and an additional 10-12% would be charged with a nonviolent crime. The false positive rate in both cases is 81-82%. Thus, four out of five defendants targeted by this law would not be charged with any new crime pretrial.

Even broader proposals were introduced in the 2022 session. House Bill 5 lacks HB80's requirement of a past felony conviction. Among other things, it regards being charged with a Serious Violent Offense, or using or brandishing a firearm, as *prima facie* proof of dangerousness. House Bill 27 appears to go even farther by changing the "and" of HB80 to an "or". That is, it would create a rebuttable presumption for defendants who are charged with a Serious Violent Offense or used or brandished a firearm, *or* who have prior failures to appear on felony cases, or "a pattern of failure to follow conditions of release."

We approximate the results of these broader proposals as well as possible given our data. As before, we consider both the broad and narrow definitions of SVO. We interpret even a single violation of COR as "a pattern of failure," with the caveat that a judge may or may not agree depending on the circumstances or severity of these violations. While our data does not tell us which past failures to appear (FTA) are for felony cases, any FTA is also a violation of COR.

These proposals would significantly increase jail populations, detaining a significant fraction of defendants released under the current system. But a glance at Table 10 shows that, despite the differences between these proposals, none of them are particularly accurate. For HB5 and HB27, the rate of new charges among the defendants they would detain is essentially the same as the base rate among all released defendants: the rate of violent felony charges is 4% (the base rate is 3%), the rate of violent misdemeanor charges is 2-3% (the base rate is 3%) and the false positive rate is 77-85% (the base rate is 82%). In other words, these legislative proposals are roughly equivalent to detaining a random sample of defendants who are currently released.

How Accurate are Motions to Detain?

In jurisdictions which already allow judges to consider evidence of public danger, calls for rebuttable presumptions are essentially calls to reduce judicial discretion. What would happen if the decision to detain were up to the prosecutor rather than the judge? How would this change the accuracy, and false positive rate, of the current system?

Our data tells us in which cases the prosecutor brought a motion to detain. When judges deny or dismiss these motions and release these defendants, we can measure how much of a danger they pose to the public. Perhaps prosecutors and judges are both good at identifying dangerous defendants when they agree. But when they disagree, how accurate are the prosecutors?

Our results are shown in Table 11 and are consistent with earlier studies in New Mexico.[41] The rate at which these defendants receive new charges is slightly above the base rate: 4% vs. 3% for violent felonies, and 3% vs. 2% for violent misdemeanors. Their false positive rate is 78%. As with the broadest legislative proposals examined above, detaining these defendants is not much more accurate than detaining a random sample of all defendants released by the current system.

Since these numbers depend both on judicial and prosecutorial discretion, and specifically on how prosecutors allocate their resources to bring motions to detain, we do not claim that they will necessarily generalize to other jurisdictions. We report them here in the hope that other jurisdictions will undertake similar studies.

Criterion (Legislation)	No new charge	New charge: nonviolent misdemeanor	New charge: nonviolent felony	New charge: violent misdemeanor	New charge: violent felony	Total
All released felony defendants	12388 (82%)	744 (5%)	1252 (8%)	295 (2%)	455 (3%)	15134
Defendants for whom a PTD motion was brought but denied	1097 (78%)	75 (5%)	139 (10%)	39 (3%)	61 (4%)	1411

Table 11. The dangerousness of defendants where prosecutors brought a motion for pre-trial detention (PTD) but where the judge denied or dismissed this motion and released the defendant. The rate of new charges among these defendants is not much higher than the base rate, similar to the broad legislative proposals analyzed above.

[41] Elise Ferguson, Helen De La Cerda, and Paul Guerin, *Failure to Appear and New Criminal Activity: Outcome Measures for Preventive Detention and Public Safety Assessments,* Institute for Social Research, University of New Mexico, January 2020; and Kristine Denman, Ella Siegrist, Joel Robinson, Ashleigh Maus, and Jenna Dole, *Bail Reform: Motions for Pretrial Detention and their Outcomes,* New Mexico Statistical Analysis Center, August 2021.

Discussion

We have shown that a wide variety of criteria for rebuttable presumptions have poor accuracy and a high false positive rate. Despite the presumed intentions of policymakers, these proposals do not accurately target the small fraction of defendants who will be charged with new serious crimes if released pretrial. Instead, they cast a wide net, recommending detention for a large number of defendants who would not receive any new charges during the pretrial period.

We agree there are some defendants for whom the evidence of danger is so clear that pretrial detention is warranted. But as we have emphasized, New Mexico's current system already allows the prosecutor to present this evidence to a judge. Going beyond this individualized system and using legislation or actuarial tools to target defendants for pretrial detention only makes sense if there are broad classes of defendants who are in fact dangerous. Our results show that, even using the type and severity of the current charge, past convictions, past violations of conditions of release, and past failures to appear, it is difficult or impossible to identify such a class.

Number Needed to Treat. In the medical literature, the number of people we need to give a treatment in order to prevent one bad outcome is called the "number needed to treat" or NNT. This is an easily interpreted measure of the cost of pretrial detention to individual liberties (and to the taxpayer) as compared with its benefits to crime prevention. For a typical legislative proposal from Table 10, we would need to detain about 5 people to prevent a single new charge, 11 or 12 to prevent a single violent charge, and at least 20 to prevent a single violent felony charge.[42]

Cost ratios. Of course, a high false positive rate or NNT does not necessarily make a policy unacceptable. This depends on the ratio between the costs of false negatives and false positives. If policymakers believe that false negatives are ten times worse than false positives—namely, that it is ten times worse to release someone who then commits a serious crime than it is to incarcerate someone who would not have committed a crime—then a policy "breaks even" even if it detains 10 false positives for every crime it prevents.[43]

But the less accurate a policy is, the higher this ratio needs to be to justify it—and if this ratio is high enough, it justifies detaining everyone. For instance, consider House Bill 27 from the last row of Table 10. Focusing on violent felonies and misdemeanors and equating them for simplicity, it would be justified if false negatives are about 12 times worse than false positives. If we raise this ratio to about 16, then it becomes justified to detain all felony defendants, which would presumably violate the Constitution.

Whether this utilitarian approach is appropriate in criminal justice is up for debate. Lawrence Tribe[44] wrote "the very enterprise of formulating a tolerable ratio of false convictions to false acquittals puts an explicit price on an innocent man's liberty and defeats the concept of a human person as an entity with claims that cannot be extinguished, however great the payoff to society." If this approach is taken, stakeholders should agree on these cost ratios in advance, and not construct them after the fact to justify a policy. And we tend to agree with those who say that the human cost of unnecessary detention has been historically underestimated.

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[42] These numbers are calculated by dividing 100% by 20% (the total rate of new charges), 8-9% (the total rate of new violent charges including both felonies and misdemeanors) and 4-5% (the rate of new violent felony charges).

[43] Note that this is the inverse of Blackstone's ratio: his maxim that it "is better that ten guilty persons escape than that one innocent suffer" suggests that false positives are more than ten times worse than false negatives. A New Mexico opinion, State v. Chambers, 86 N.M. 383 (N.M. Ct. App. 1974) set this ratio at 99, in which case the tolerable false positive rate would be 1%. For a delightful review of different values of this ratio, see Alexander Volokh, *n Guilty Men*, 146 U. Pennsylvania Law Review (1997) 173–216.

[44] Laurence H. Tribe, *An Ounce of Prevention: Preventive Justice in the World of John Mitchell*, 56 Virginia Law Review (1970) 371–407.

Uses and misuses of the PSA. It is interesting that, of all the criteria we examined, the most accurate is one based on the Arnold Public Safety Assessment, presumably because the PSA was designed to maximize the relationship between NCA scores and rearrest. But even among released defendants with an NCA score of 6 and the violence flag—those identified by the PSA as among the most dangerous—only 7% are charged with a new violent felony, and the false positive rate is 71%. Thus, we agree with its designers, and other scholars that have studied this issue,[45] that the PSA should not be used to recommend detention or to create a rebuttable presumption as in California's short-lived policy on defendants who are "assessed as high risk." While actuarial tools may be useful in recommending conditions of release or positive interventions, neither they nor the intuitions of legislators should be used to detain.

Predictable crimes. There may be types of serial crime that are easier to predict. A machine learning approach to predicting rearrest for domestic abuse[46] achieved an accuracy of 21%, i.e., 21% of the defendants it identified were rearrested during the pretrial period, and a false positive rate of 77%. We have not examined algorithms or legislation specific to domestic abuse.

Bias and fairness. We have focused on the low accuracy of rebuttable presumptions over the entire population, but it is also important to consider bias and disparities between demographic groups. Since pretrial detention has negative consequences for both case outcomes and social outcomes, it can perpetuate and amplify racial and ethnic inequalities.

Judicial discretion is one potential source of bias in pretrial detention. Release decisions are often made quickly with limited information, a setting in which implicit bias can play a strong role. If judges apply stereotypes and overestimate the risk of defendants in a certain group, they will unnecessarily detain more of those defendants.[47] Moreover, if they release only very low-risk defendants from a group, presumptions may have a higher false positive rate in that group.

Another potential source of bias is prosecutorial discretion. If prosecutors give more severe charges to some defendants than others even when the facts of the crime are similar, such as applying felony vs. misdemeanor charges or labeling a crime as firearm-related due to more aggressive searches, then more defendants in that group will meet the criteria for presumptions of dangerousness. If the actual risk of these defendants is similar, this would again increase the false positive rate in that group.

We hope to examine demographic differences in accuracy and false positive rates in future work, but our preliminary explorations suggest that in our dataset they are broadly similar across groups except for a lower rate of new charges among women.

Evaluation vs. design. Finally, we have focused on evaluating existing policies and proposals for rebuttable presumptions in order to inform the current debate over bail reform and pretrial detention. We have not attempted to *design* a rebuttable presumption policy. It is possible, and indeed likely, that by combining PSA scores, current charges, and other factors, one could develop a policy which is somewhat more accurate than any of the ones we have considered here. However, we would be very surprised if the false positive rate of any such policy was significantly less than 70%.

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[45] Timothy R. Schnacke, *"Model" Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention.* Center for Legal and Evidence-Based Practices, http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf

[46] Richard A. Berk, Susan B. Sorenson, and Geoffrey Barnes, *Forecasting Domestic Violence: A Machine Learning Approach to Help Inform Arraignment Decisions.* Journal of Empirical Legal Studies, Volume 13, Issue 1, 94–115, March 2016.

[47] e.g. Matthew Mizel, *A Plea for Justice: Racial Bias in Pretrial Decision Making.* Ph.D. thesis, UCLA (2018).

Conclusion

The National Association of Pretrial Services Agencies[48] states that "All defendants should have a statutory presumption of release on personal recognizance with the requirement that the defendant attend all court proceedings and not commit any criminal offense while released." The burden is on the government to overcome this presumption of release, not on the defense to overcome a presumption of dangerousness: "Pretrial detention should be authorized but limited only to when the court finds by clear and convincing evidence that a detention-eligible defendant poses an unmanageable risk of committing a dangerous or violent crime during the pretrial period or willfully failing to appear at scheduled court appearances."

Rebuttable presumptions relax this standard. They reduce judicial discretion by requiring judges to regard large classes of defendants as dangerous by default, rather than demanding that prosecutors prove this individually. Their proponents argue that they prevent a large amount of crime with a minimal impact on civil liberties. We have shown that this is not the case, both because a small fraction of crime is committed by pretrial defendants, and because presumptions detain many defendants for each crime they prevent.

Our results should not be taken as an endorsement of the current system. Since we do not know how detainees would behave if they were released, the decisions of judges to detain are largely unfalsifiable.[49] We do not know what fraction of people currently detained are actually dangerous.

What we have done is compare New Mexico's current system with one where presumptions are added to it, detaining additional defendants who are currently released. By measuring how dangerous these defendants are, we have shown that presumptions would not add accuracy to the system. That does not mean that the system could not be reformed in other ways.

The justice system makes many tragic mistakes: crimes that should have been prevented, and defendants that should not have been detained. Judges, algorithms, and legislators all try to prevent these mistakes by identifying dangerous defendants and releasing the rest. But crime is hard to predict, and basing pretrial detention on inaccurate predictions is neither effective nor just. Unless and until some much more accurate method of prediction appears, we should continue to demand that prosecutors prove, case by case, that detention is justified.

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[48] National Association of Pretrial Services Agencies, *Standards on Pretrial Release: Revised 2020*, downloadable at napsa.org.

[49] John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*. Journal of Criminal Law and Criminology Vol. 76 Number 1 pp. 1–74 (1985).

[50] E. Ferguson, H. De La Cerda, A. O'Connell, and P. Guerin (2021). *The Public Safety Assessment, Preventive Detention, and Rebuttable Presumptions in Bernalillo County*. Institute for Social Research, Center for Applied Research and Analysis, University of New Mexico. https://isr.unm.edu/reports/2021/the-public-safety-assessment-preventive-detention-and-rebuttable-presumptions-in-bernalillo-county.pdf.

Appendix: Tables of charges in New Mexico law used in this study

(a) second degree murder
(b) voluntary manslaughter
(c) third degree aggravated battery
(d) third degree aggravated battery against a household member
(e) first degree kidnapping
(f) first and second degree criminal sexual penetration
(g) second and third degree criminal sexual contact of a minor
(h) first and second degree robbery
(i) second degree aggravated arson
(j) shooting at a dwelling or occupied building
(k) shooting at or from a motor vehicle
(l) aggravated battery upon a peace officer
(m) assault with intent to commit a violent felony upon a peace officer
(n) aggravated assault upon a peace officer

Table 1. Serious Violent Offenses according to New Mexico Statute §33-2-34 (2018). These constitute the "narrow" definition of SVO.

1) involuntary manslaughter
2) fourth degree aggravated assault
3) third degree assault with intent to commit a violent felony
4) fourth degree aggravated assault against a household member
5) third degree assault against a household member with intent to commit a violent felony
6) third and fourth degree aggravated stalking
7) second degree kidnapping
8) second degree abandonment of a child
9) first, second and third degree abuse of a child
10) third degree dangerous use of explosives
11) third and fourth degree criminal sexual penetration
12) fourth degree criminal sexual contact of a minor
13) third degree robbery
14) third degree homicide by vehicle or great bodily harm by vehicle
15) battery upon a peace officer

Table 2. Additional offenses that the court can find to be a Serious Violent Offense according to New Mexico Statute §33-2-34 (2018) subparagraph L(4)(o). The "broad" definition of SVO includes these charges as well as the charges in Table 1.

Unlawful Carrying of a Firearm in Licensed Liquor Establishment
Receipt, Transportation, or Possession of a Firearm, Deadly Weapon, or Destructive Device or Destructive Device by a Prisoner or Felon
Negligent Use of a Deadly Weapon (Discharge)
Shooting at or from a Vehicle
Shooting at Dwelling or Occupied Building
Unlawful Possession or Discharge of Weapons or Firearms

Table 3. Firearm-related charges in New Mexico law.

Aggravated Assault (Deadly Weapon)
Aggravated Battery - Felony (Great Bodily Harm or Deadly Weapon)
Aggravated Burglary (Armed after Entering)
Aggravated Stalking (Possession of a Deadly Weapon)
Armed Robbery With Deadly Weapon
Criminal Sexual Contact / Minor (Deadly Weapon)
Criminal Sexual Contact in the Fourth Degree (Deadly Weapon)
Criminal Sexual Penetration in the Second Degree (Armed with a Deadly Weapon)
Negligent Use of a Deadly Weapon (Intoxication, Near Dwelling or Building, Unsafe Handling)
Negligent Use of Explosives
Unlawful Carrying of a Deadly Weapon
Unlawful Carrying of a Deadly Weapon on School Premises
Unlawful Carrying of a Handgun by a Person Under Age 19
Unlawful Negligent Use of Weapons
Unlawfully Carrying Deadly Weapons

Table 4. Additional deadly weapon-related charges in New Mexico law. This list is somewhat simplified: there are specific statutes for assault or battery on household members, health care workers, and peace officers. There are also additional statutes for attempting, conspiring, or soliciting to commit many of the these felonies.