Journal of Criminal Law and Criminology

Volume 74
Issue 4 *Fall*

Article 18

Fall 1983

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0091-4169/83/7404-1556
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 74, No. 4
 Printed in U.S.A.

QUESTIONING THE PRACTICE OF PRETRIAL DETENTION: SOME EMPIRICAL EVIDENCE FROM PHILADELPHIA

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I. INTRODUCTION

The role of pretrial detention in the American criminal justice system has long been questioned.[1] Within the last sixty years, pretrial detention in particular has been the source of social, legal, and research debate.[2] The bail reform movement of the 1960's was in large part a response to concerns about the institution of pretrial detention.[3] State and local investigations of jails, focusing on conditions, resources, and rights of the pretrial confined,[4] became increasingly common during the 1960's and 1970's as federal efforts to conduct censuses of jails and surveys of their inmates[5] provided new data which were descriptive of

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[1] Perhaps the earliest criticism of the practice was offered by de Beaumont and de Tocqueville during the nineteenth century. *See* G. DE BEAUMONT & A. DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 53 (reprint ed. 1964).

[2] A. BEELEY, THE BAIL SYSTEM IN CHICAGO (1966); PENNSYLVANIA COMMITTEE ON PENAL AFFAIRS, A HOUSE OF DETENTION FOR PHILADELPHIA (1938); *see* R. POUND & F. FRANKFURTER, CRIMINAL JUSTICE IN CLEVELAND (reprint ed. 1968); Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954); W. Morse & R. Beattie, *Survey of the Administration of Criminal Justice in Oregon,* 11 OR. L. REV. 100 (Supp. 1932).

[3] D. FREED & P. WALD, BAIL IN THE UNITED STATES: A REPORT TO THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE 9-21 (1964).

[4] The following sources represent a few of the many examples of these kinds of efforts. A. ASHMAN, LOCKUP: NORTH CAROLINA LOOKS AT ITS LOCAL JAILS (1969); CALIFORNIA BOARD OF CORRECTIONS, CALIFORNIA CORRECTIONAL SYSTEM STUDY: THE SYSTEM 26 (1971); H. MATTICK & R. SWEET, ILLINOIS JAILS (1969); NEW YORK STATE COMM'N OF INVESTIGATION, COUNTY JAILS AND PENITENTIARIES IN NEW YORK STATE 67 (1966); G. STRACENSKY, TEXAS JAILS—PROBLEMS AND REFORMATION 43 (3 CRIMINAL JUSTICE MONOGRAPH NO. 4, 1970).

[5] *See, e.g.*, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION (LEAA), DEP'T OF JUSTICE, CENSUS OF JAILS AND SURVEY OF JAIL INMATES, 1978 (1979) [hereinafter cited as

the overall dimensions of jail problems.

At the heart of the bail reform movement during the 1960's were issues related to pretrial detention, many of which have received thorough review elsewhere.[6] Generally, critics of bail practices and of the use of pretrial detention questioned the fairness and effectiveness of bail practices that were so discretionary and that placed the detained at such a disadvantage. Commentators noted that defendants who awaited adjudication in confinement suffered not only from the privations associated with incarceration in jail, but also experienced ruptures in family and social ties, loss of employment, and restricted access to counsel which impaired their ability to prepare an adequate defense.[7] A number of studies focused on an additional apparent handicap: defendants who were detained seemed to have their cases dismissed less often or charges dropped less often and to be convicted and sentenced to incarceration more often than their released counterparts.[8]

Although it is incorrect to suggest that the initial influence of bail reform has totally diminished, the current focus on pretrial detention reflects emphases somewhat different than those of the 1960's and early 1970's. Two recent developments, overcrowding in many of the nation's jails and proposals and enactments for extended uses of pretrial detention,[9] are premised in part on serious concerns about the function and performance of the pretrial detention institution.

LEAA, CENSUS]; LEAA, DEP'T OF JUSTICE, SURVEY OF INMATES OF LOCAL JAILS, 1972: ADVANCE REPORT (1972) [hereinafter LEAA, ADVANCE REPORT].

[6] *See generally* D. FREED & D. WALD, *supra* note 3; R. GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 127 (1965); J. GOLDKAMP, TWO CLASSES OF ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE 5-25 (1979); W. THOMAS, BAIL REFORM IN AMERICA 227 (1976); Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959 (1965) [hereinafter cited as Foote, *Crisis in Bail: I*]; Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125 (1965) [hereinafter cited as Foote, *Crisis in Bail: II*].

[7] *See* Foote, *Crisis in Bail: I*, *supra* note 6, at 960. *See generally* ATTORNEY GENERAL'S COMM. ON POVERTY & ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963) [hereinafter cited as COMM. ON POVERTY]; D. FREED & P. WALD, *supra* note 3; R. GOLDFARB, *supra* note 6; Alexander, Glass, King, Palermo, Roberts & Schury, *A Study of the Adminstration of Bail in New York City*, 106 U.PA.L. REV. 685 (1958); Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole*, 38 N.Y.U. L. REV. 67 (1963) [hereinafter cited as Ares]; Foote, *supra* note 2.

[8] *See* J. GOLDKAMP, *supra* note 6, at 185; Foote, *supra* note 2, at 1049-58; Landes, *Legality and Reality: Some Evidence on Criminal Proceedings*, 3 J. LEGAL STUD. 287, 329 (1974); Morse & Beattie, *supra* note 2, at 19; Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641 (1964); SINGLE, *The Unconstitutional Administration of Bail: Bellamy v. the Judges of New York City*, 8 CRIM. L. BULL. 459, 462 (1972).

[9] See, e.g., NATIONAL ASSOCIATION OF CRIMINAL JUSTICE PLANNERS, NATIONAL SURVEY OF COUNTY JAILS (1982), for a recent survey of population levels in county jails. For examples of recent provisions for extended use of pretrial detention, see MICH. CONST. art. I, §§ 15-16; NEB. CONST. art. I, § 9; D.C. CODE ANN. §§ 23-1321 to -1332 (1981 & Supp. 1983); WISC. STAT. §§ 969.001-969.013 (West Supp. 1983-84).

Both those seeking solutions to mounting overcrowding in urban jails and proponents of pretrial or "preventive" detention measures[10] have questioned the use of pretrial detention, though perhaps for very different reasons. Analysts of jail crowding view bail-produced detention as a major and disproportionate contributor to the overcrowding crisis. They believe that ineffective bail practices lead to unnecessary detention of defendants who are poor, not very seriously charged, and have reasonably strong community ties.[11] In contrast to this concern with detention practices' systematic overinclusion, proponents of preventive detention assume that current practices do not successfully restrain dangerous defendants, but rather permit their release, thereby threatening public safety.[12] Of course, these criticisms of the current practice of pretrial detention in the United States are not mutually exclusive: pretrial jails simultaneously may overinclude low-risk defendants and underinclude those likely to abscond or pose a public danger. It is noteworthy that discussions in both arenas—overcrowding and preventive detention—share as common ground the criticism that pretrial detention is not sufficiently selective.

II. BAIL AND DETENTION AS PREDICTION

Since pretrial detention affectuates a radical abridgment of the liberty of confined defendants and not of those released before trial, questions about the use of detention and whether pretrial detention performs its function adequately are of utmost importance.[13] The job of the bail judge, who serves as gatekeeper of pretrial detention, involves prediction

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[10] The difference between pretrial and "preventive" detention is often confused in contemporary usage. Pretrial detention generally denotes the custody of defendants before trial as a result of having unaffordably high or no bail assigned at the first appearance before a judge. "Preventive" detention usually signifies a purposeful detention of a defendant deemed likely to pose a danger to the public if released pending adjudication, either *sub rosa* through the device of setting high cash bail or directly when permitted by statute, as for example in the District of Columbia. *See* D.C. CODE ANN §§ 23-1321 to -1332. Although defendants could also be preventively detained as a result of their perceived risk of flight, this use of the term preventive detention is rarely encountered. *But see* K. Feinberg, Promoting Accountability in Making Bail Decisions (February 1982) (paper presented at Harvard University, Conference on Public Danger, Dangerous Offenders and the Criminal Justice System).

[11] In fact, this strongly resembles the perspective of early advocates of bail reform. *See, e.g.*, D. FREED & P. WALD, *supra* note 3, at 39-48; R. GOLDFARB, *supra* note 6, at 32; Ares, *supra* note 7, at 88-92; Foote, *supra* note 2, at 1057.

[12] *See, e.g.*, AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, TASK FORCE ON CRIME 11-14 (1981) [hereinafter cited as ABA]; ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, TASK FORCE ON VIOLENT CRIME; FINAL REPORT 50-53 (1981) [hereinafter cited as ATTORNEY GENERAL'S TASK FORCE]; Mitchell, *Bail Reform and the Constitutionality of Preventive Detention*, 55 VA. L. REV. 1223 (1969).

[13] For a discussion of the equal protection issues raised by the use of pretrial detention, see J. GOLDKAMP, *supra* note 6, at 11; Meyer, *Pretrial Detention*, 60 GEO. L.J. 1381 (1972).

in its most fundamental sense. The judge must assess the likelihood that defendants will abscond, commit crimes, or harass or intimidate victims and witnesses if released before trial,[14] and then devise the necessary restraints from a range of options.[15] From this perspective, we may view detained defendants as those deemed by the judges as ineligible for less restrictive pretrial options—such as ROR (release on recognizance) or conditional release—and thus as embodying the judges' (or the system's) prediction of "worst-risks."[16] Because the goals of bail involve anticipation of possible future conduct, and the resulting use of detention is predictive in nature, questions about prediction have played a major role in the debate surrounding bail and detention practices. Answers to these questions will necessarily be derived through use of a framework designed to evaluate their predictive effectiveness.

Two concerns lie at the core of prediction-related issues in bail and pretrial detention, although they may likewise apply to other crucial justice decisions.[17] Those concerns are (1) that courts make unwarranted assumptions of guilt; and (2) that courts are unable accurately to predict defendants' behavior.

A. UNWARRANTED ASSUMPTIONS OF GUILT

By definition, bail and pretrial detention decisions involve defendants who have been charged with but not convicted of any crime. A major criticism of the *sub rosa* use of detention through traditional cash bail practices (*sub rosa* because detention is produced through the indi-

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[14] It is important to note the longstanding debate over defining the legitimate purposes of bail. Many have argued that concerns about danger are not constitutionally relevant to the bail determination and that bail may be used only to assure the appearance of defendants at trial. For a summary of this argument and its treatment in case law and legislation, see J. GOLDKAMP *supra* note 6, at 18.

[15] Consideration of a range of options at bail may be alien to most judges who actually make bail decisions. Generally, if bail is not denied outright, either personal recognizance release (ROR) or cash bail are the only two options employed. Yet, in theory the options available to bail decisionmakers are much richer. The landmark legislation from the bail reform movement of the 1960's, the Federal Bail Reform Act of 1966, 18 U.S.C. §§ 3146-3152 (1976), outlines a "least restrictive" strategy for federal judges deciding bail, including release to a third party, release under supervision, restrictions on travel, residence, and associations, deposit bail, and, at the restrictive extreme, part-time custody. Except under recent preventive detention amendments, legislation, and proposals, bail in most states cannot be denied directly except in capital cases "where the proof is evident and the presumption great." See J. GOLDKAMP, *supra* note 6, at 55, for a comprehensive analysis of laws in the states governing the right to bail.

[16] This, of course, ignores the extent to which bail and pretrial detention are put to nonlegitimate uses such as punishment. *See* Landes, *supra* note 8, at 328; R. FLEMMING, PUNISHMENT BEFORE TRIAL: AN ORGANIZATIONAL PERSPECTIVE OF FELONY BAIL PROCESS (1982).

[17] For an excellent treatment of prediction issues in criminal justice system-wide, see M. GOTTFREDSON & D. GOTTFREDSON, DECISIONMAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION 7-17 (1980).

rect device of assigning unaffordable cash bail) and of preventive detention proposals is that bail judges premise the assessment of the probability of future crime or flight largely on the offense(s) with which a defendant is currently charged but of which he or she has not yet been convicted.

Judges may perceive a "pattern" of dangerous behavior, reasoning, for example, that if a defendant could have been involved in a particularly serious offense, then he or she might be quite likely to become so involved again. Judges, like many preventive detention supporters, may also discern such a pattern by combining knowledge of a current alleged offense with a record of past conviction(s) or arrest(s) for similar crimes.[18] Though perhaps logical from the point of view of the decisionmaker making the forecast of future behavior, critics argue that this approach, which is based upon *a priori* assumptions about the defendent's guilt, flies in the face of the perceived due process right to a presumption of innocence.[19]

B. INABILITY TO PREDICT ACCURATELY

Critics who argue from a legal perspective that prediction based upon assumptions of guilt related to a current charge is unconstitutional may shift to a social science argument to protest that, in any event, prediction of rare human behavior (such as pretrial flight or crime, which have generally low baseline or incidence rates) is statistically difficult and, as performed by judges making the bail decisions, is quite likely to be terrible.[20] That detention could be the result for some defendants, then, would be unconscionable. The critics can point to recent research literature in criminal justice generally,[21] and in bail specifically[22] which

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[18] *See* United States v. Edwards, 43 A.2d 1321 (D.C. App. 1981), *cert. denied*, 455 U.S. 1024 (1982); D.C. CODE ANN. §§ 23-1321 to -1332; ABA, *supra* note 12, at 11-13; ATTORNEY GENERAL'S TASK FORCE, *supra* note 12, at 50-53.

[19] *See* Ares, *supra* note 7, at 69, 88; Ervin, *Foreword* to *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 290, 298 (1971); Foote, *supra* note 2, at 1036, 1038, 1043; Foote, *Crisis in Bail: I*, *supra* note 6 at 963; Foote, *Crisis in Bail: II*, *supra* note 6, at 1130, 1135-36, 1164-65. *But see* Bell v. Wolfish, 441 U.S. 520 (1979) (presumption of innocence has no application to a determination of the rights of a pretrial detainee during confinement before trial).

[20] *See generally*, J. MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES (1981) (comprehensive review of issues relating to prediction of dangerousness).

[21] *See* M. GOTTFREDSON & D. GOTTFREDSON, *supra* note 17.

[22] *See, e.g.*, S. CLARKE, J. FREEMAN & G. KOCH, THE EFFECTIVENESS OF BAIL SYSTEMS: AN ANALYSIS OF FAILURE-TO- APPEAR IN COURT AND REARREST WHILE ON BAIL 2-4 (1976) [hereinafter cited as S. CLARKE]; J. LOCKE, R. PENN, R. RICK, BUNTEN & G. HARE, NATIONAL BUREAU OF STANDARDS, TECHNICAL NOTE 535, COMPILATION AND USE OF CRIMINAL COURT DATA IN RELATION TO PRE-TRIAL RELEASE OF DEFENDANTS: PILOT STUDY (1970) [hereinafter cited as J. LOCKE, PILOT STUDY]; J. ROTH & P. WICE, PRETRIAL RE-

supports the contention that current predictive skills are poor.

Both legal and social science critiques of the predictive abilities of bail judges focus on the margin of error that results from poor prediction. To successfully ensure the detention of defendants who would actually abscond or commit crimes if released, many defendants who would never pose such a risk will necesssarily be held. At the same time, in attempting to foster the release of as many low-risk defendants as possible, judges also mistakenly permit the release of defendants who turn out to be dangerous or who later abscond.[23]

Recent studies of prediction in pretrial decisionmaking have added fuel to the debate about the predictive efficacy of bail and detention. In general, correlates of failure for defendants on pretrial release have been found,[24] but they have not demonstrated strength in multivariate analyses. Moreover, their overall power to predict failure-to-appear (FTA) and rearrest among released defendants accurately has been weak. Moreover, factors found to be related to pretrial failure, however weakly, have not been found to be those necessarily relied upon by judges in making bail decisions; rather, factors actually employed in bail decisions may ignore or contradict those found to be noteworthy in predictive studies.[25]

The less-than-overwhelming findings concerning the power of bail predictions aside, it is important to note that virtually all of the studies may have suffered a significant limitation in the selection of their samples: they studied only defendants achieving pretrial release, thus excluding those who were detained. Although researchers have grown accustomed to studying released defendants for the same practical reasons that parole predictions are based only on those released and not on those originally eligible (i.e., a certain proportion of the high-risk cases remain confined and unavailable for study), this limitation is potentially important because a sizeable proportion of the total population of defendants may have been ignored.[26] Depending upon the proportion of defendants typically detained, which varies from jurisdiction to jurisdic-

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LEASE AND MISCONDUCT IN THE DISTRICT OF COLUMBIA (1978); Gottfredson, *An Empirical Analysis of Pretrial Release Decisions*, 2 J. CRIM. JUST. 287, 289 (1974); M. Feeley & J. McNaughton, The Pretrial Process in the Sixth Circuit: A Qualitative and Legal Analysis (1974) (mimeograph).

[23] *See* Angel, Green, Kaufman & Van Loon, *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 301, 303-32 (1971) [hereinafter cited as Angel].

[24] *See, e.g.*, S. CLARKE, *supra* note 22, at 20-32; J. LOCKE, PILOT STUDY, *supra* note 22, at 293-301; Angel, *supra* note 23, at 309-22; J. ROTH & P. WICE, *supra* note 22; Gottfredson, *supra* note 22, at 293-301; M. Feeley & J. McNaughton, *supra* note 22.

[25] *See* J. GOLDKAMP, M. GOTTFREDSON & S. MITCHELL- HERZFELD, NATIONAL INSTITUTE OF CORRECTIONS, BAIL DECISIONMAKING: A STUDY OF POLICY GUIDELINES (1981) [hereinafter cited as J. GOLDKAMP, BAIL DECISIONMAKING].

[26] *See* Gottfredson, *supra* note 22, at 300-01. For a general discussion of methodological

tion,[27] and the selectivity of detention practices, it is conceivable that these studies have produced predictive equations for failure among defendants from whom the most likely candidates for failure have already been screened out by detention.

Along with the assumptions implied in overcrowding reduction strategies and provisions for increased use of detention, the predictive studies fuel further questions about the nature of pretrial detention. If even statistical prediction is likely to be inherently marginal and it is known that statistical methods are generally superior to "clinical" methods, then subjective assessments of judges at bail may be poor and the resulting use of detention may be highly unselective. If pretrial confinement practices were found to differentiate only poorly among criminal defendants awaiting adjudication, then grave questions concerning the legitimacy of the institution of pretrial detention would have to be faced.

The study presented here makes use of several sources of detention-related data gathered in Philadelphia to investigate the effectiveness of pretrial detention. A fundamental question focuses on the extent to which pretrial detention differentiates among criminal defendants (i.e., its selectivity) and the degree to which this selectivity is appropriate and effective. The analysis involves both empirical characterizations of detainees to assess whether they conform to their presumed status as the system's (or, more correctly, the bail judges') predictions of "worst-risk" defendants and testing of these predictions through release and follow-up of detained defendants.[28] We designed the following two empirical components to address separate aspects of detention and prediction questions.

1. Pretrial Detention in Philadelphia and a "Natural" Experiment

In the first component, we addressed questions concerning the relative "selectivity" of pretrial detention empirically through two sets of data—one, a sample describing the population of defendants detained

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issues related to prediction in other areas of criminal justice decisionmaking, including parole, see M. GOTTFREDSON & D. GOTTFREDSON, *supra* note 17, at 99-143.

[27] *See* LAZAR INSTITUTE, PRETRIAL RELEASE: AN EVALUATION OF DEFENDANT OUTCOMES AND PROGRAM IMPACT 6 (1981); W. THOMAS, *supra* note 6, at 37-42.

[28] Although Philadelphia may differ from other American jurisdictions in important respects such as the existence of well-developed pretrial services resources, Philadelphia nevertheless was an excellent case study because of its similarities with other major urban jurisdictions which are struggling with diminishing resources, large case loads, and jail overcrowding. This study was funded in part by the National Institute of Corrections as part of the work of the Bail Decisionmaking Project through the Criminal Justice Research Center in Albany, New York, and in part by Temple University. Temple University provided support for the data collection relating to the *Jackson* defendants.

in Philadelphia on a single day, and the second, a sample comprised of a group of defendants selected by court order for emergency release from detention as a result of overcrowding litigation. Using these data, we examined questions about the characteristics of those typically detained in a major urban jurisdiction and drew inferences about the selectivity of detention practices. Further inferences about the predictive effectiveness of detention in Philadelphia were examined by means of the "natural" experiment brought about by the expedited release of defendants who would otherwise have remained in detention.

2. *The Utility of Predictive Classification*

The second component of the study tested the accuracy of a predictive classification recently developed through study of released Philadelphia defendants. As applied to the specially released defendants, as well as to the pretrial population overall, this device provided a singular analytic framework resulting in evidence relating to the function of pretrial detention and its selectivity, as well as to the general utility of predictive classification in bail and detention.

III. *JACKSON V. HENDRICK* AND THE "NATURAL" EXPERIMENT

The three institutions which serve as the functional equivalent of Philadelphia's urban jail system, Holmesburg, the House of Correction, and the Detention Center (hereinafter "the Philadelphia prisons"), have been the source of serious crowding-related difficulties for at least the last fifteen years. Two of the facilities were constructed near the turn of the century; the third, the Detention Center, was constructed in 1965 to help alleviate overcrowded conditions in the City's other institutions.

During the late 1960's, the Philadelphia prisons gained national notoriety as a result of an investigation of sexual violence occurring within the institutions and in sheriffs' vans.[29] Riots in the 1970's and the murder of prison administrators were followed by two class actions brought on behalf of inmates protesting conditions within the prisons. In *Bryant v. Hendrick*,[30] the Pennsylvania Supreme Court found the existence of "cruel and unusual" conditions, and, in *Jackson v. Hendrick*,[31] the Court of Common Pleas set forth procedures designed to remedy conditions within the substandard facilities. The *Jackson* suit, litigated for more

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[29] *See* Davis, *Report on Sexual Assaults in the Philadelphia Prison System and Sheriffs' Vans*, TRANSACTION 8 (1968).

[30] 444 Pa. 83, 280 A.2d 110 (1971).

[31] No. 71-2437 (Philadelphia Court of Common Pleas, Feb. 1971); *see also Jackson*, No. 71-2437 (Mar. 1981) (stipulation and agreement); *Jackson*, No. 71-2437 (Feb. 1977) (same). For a description of problems leading up to the class action, see Rudovsky, *Prison Reform in Philadelphia*, 38 SHINGLE 85 (1975).

than a decade at the time of this writing, has produced consent decrees mandating procedures for improvements in physical conditions, programs, and resources available to the individuals held in the Philadelphia prisons. A theme running throughout these actions has been crowding; one decree stipulated a population limit of 2,200 inmates, although at the time of this study the population was approaching 3,000 and still growing.[32]

Although the Philadelphia institutions hold inmates in diverse statuses as do other urban jails, one of the *Jackson* court-ordered population reduction measures was aimed at bail-held detainees because a substantial portion of the total population of the prisons are detained awaiting trial.[33] Premised on a belief that a major share of the pretrial population consisted of defendants who were not seriously charged, had good community ties, were reasonably good risks, and were held principally because they were unable to afford low amounts of bail, the *Jackson* court ordered prompt review for release of all defendants held on $1,500 bail (only $150 bail in actual ten percent terms)[34] or less, with particular priority assigned to those confined for the longest periods awaiting trial. The rationale for this emergency approach was simple and tantamount to a "longest-in and lowest-bail" approach to expedited release. This resulted in what, from the perspective of social science research, might be viewed as a "natural" experiment. The court remedy sought to reasonably delineate and to grant belated release to the safest, lowest-risk defendants in the jail, those who but for a few dollars would have been able to secure pretrial release in any event.[35]

The resulting release of defendants who were—and would have re-

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[32] By December 1981, the population had reached 3,700, or 1,500 inmates over capacity.

[33] Each of the Philadelphia prisons housed some pretrial detainees. According to an annual report from 1980, pretrial detention accounted for 88% of the population of the Detention Center, 78% of the inmates at Holmesburg and about 50% of those in the House of Detention. *See* PHILADELPHIA DEP'T OF PUBLIC WELFARE, ANNUAL REPORT OF THE PHILADELPHIA PRISONS (1980).

[34] *Jackson*, No. 71-2437 at 3. Under Philadelphia's "deposit" bail program, the bondsman has been displaced and the defendant is able to secure release by posting 10% of the actual full bail amount with the court. Upon successful completion of the required proceedings, the deposit is returned to the defendant, minus a small service charge. *See* J. GOLDKAMP, *supra* note 6, at 111-35. *See generally* W. THOMAS, *supra* note 6, at 188.

[35] It is important to point out that the soundness of the *Jackson* court's method in selecting the most appropriate detainees for expedited release rests heavily on the assumption that the relative risk of defendants is accurately indicated by the amount of bail the court assigns to them. There is a growing body of research literature that would seriously call into question such an assumption. *See* J. GOLDKAMP, *supra* note 6; J. GOLDKAMP, BAIL DECISIONMAKING, *supra* note 25; J. GOLDKAMP & M. GOTTFREDSON, JUDICIAL DECISION GUIDELINES FOR BAIL: THE PHILADELPHIA EXPERIMENT (1983); J. ROTH & P. WICE, *supra* note 22; J. Goldkamp, Bail Decisionmaking and the Role of Pretrial Detention in American Justice (Ph.D. dissertation 1977).

mained—detained provided an important opportunity to gather evidence relating to the nature of pretrial detention. Although a full "natural" experiment might have involved study and follow-up of release of the total population of pretrial detained,[36] we determined that follow-up of defendants implicitly designated by court order as the most releasable (i.e., the lowest-risk) would shed light on the highly questioned "dividing-line" between release and detention. If the court-selected, most releasable of Philadelphia detainees differed little from other released defendants, then serious questions could be raised about the apparent arbitrariness of the assignment of detention among defendants. If, for example, the "specially" released defendants resembled the "normally" released defendants, then either they never should have been confined pending adjudication in the first place, or the "normally" released defendants ought to have been confined as well. On the other hand, if they differed greatly from those "normally" released, and in follow-up it was shown that they performed considerably more poorly, one could conclude that the dividing line between release and detention before trial, creating two classes of accused, was based on a tangible and relevant distinction and that the institution of detention appeared, in Philadelphia at least, to be appropriately selective.

A. METHOD: DETENTION, RELEASE, AND FOLLOW-UP

As noted above, the data collected were (1) descriptive of the pretrial population in the Philadelphia prisons in general, and (2) related to the defendants ordered released by the *Jackson* court. Furthermore, we also used descriptive findings from an earlier study done in Philadelphia[37] for purposes of comparison.

To reflect the pretrial population generally, we drew a random sample (n = 463) of defendants detained in the prisons prior to trial on a "typical" day (November 13, 1980).[38] To study the specially released

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[36] An excellent example of a "natural" experiment is described in H. STEADMAN & J. COCOZZA, CAREERS OF THE CRIMINALLY INSANE 46-54 (1974). In the Steadman and Cocozza study, the researchers took advantage of the Supreme Court's decision in Baxstrom v. Herold, 383 U.S. 107 (1966), which mandated the release of persons held in a New York institution for the criminally insane to civil mental facilities. This court-ordered release allowed the researchers to test assumptions about persons confined as criminally insane in comparison with those civilly determined to be insane, particularly assumptions about their dangerousness. In this respect, though on a more modest scale, the current study capitalizes on a similar circumstance to examine assumptions about those held in pretrial detention in Philadelphia.

[37] J. GOLDKAMP, *supra* note 6; J. Goldkamp, *supra* note 35; *see also* J. GOLDKAMP, BAIL DECISIONMAKING, *supra* note 25.

[38] The total population of pretrial detained on that day was 1,452 defendants. This sampling approach, focusing on a single day, follows the approach adopted by LEAA in surveying inmates of jails across the United States. The cross-sectional approach permits

defendants, we collected data on all defendants (n = 462) named in the first five lists produced by the *Jackson* court for expedited release during the late summer and fall of 1979.[39] We then followed defendants released under the *Jackson* procedures for a period of ninety days to record their performance while on pretrial release.

In order to address questions relating to the nature of pretrial detention in more general terms, the sample reflecting the detained overall is examined first. The descriptive findings are outlined here because of the important background they provide.

B. DEFENDANTS DETAINED IN THE PHILADELPHIA PRISONS

On November 13, 1980, approximately 54% of all persons confined in the prisons (n = 2,695) were confined for bail-related reasons. (See Figure 1). We took a 17% random sample (n = 463) of these 1,452 detainees to produce estimates of the pretrial population overall.[40] Briefly, the Philadelphia detainees exhibited the following characteristics.

1. Demographics. Defendants detained in the Philadelphia prisons were predominantly young (58% were twenty-five years old or younger), single (73% had never married), black (80% were black, 17% white, 3% other ethnicities), male (94%), and unemployed (79%). About one-third were on public assistance at the time of their arrests.

2. Criminal charge. Figure 2 arrays the detained defendants according to the seriousness of the offenses with which they were charged. Using Pennsylvania's former six-grade felony-misdemeanor classification,[41] we found that most were charged with serious offenses: 85% were charged with felonies; 61% were charged with first degree felonies. In addition, more than half (56%) were charged with crimes against the person. Approximately 22% were charged with crimes involving injury to the victim (9% minor injury, 6% serious, 7% resulting in death).

[Figure 1 about here]

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characterization of the overall population as it might typically be faced "on a given day." *See* LEAA, ADVANCE REPORT, *supra* note 5, at 11-12. *See generally* LEAA, CENSUS, *supra* note 5.

[39] The court ruled in *Jackson*

> that by July 1, 1977, the defendants shall develop and implement an adminstrative mechanism to maintain the population in the 3 institutions at no greater than the rated level. If the population exceeds this level, persons who are held in default of $1,500 bail or less, starting with those who have been detained for the longest period of time, shall be released on their own recognizance by the Court . . . .

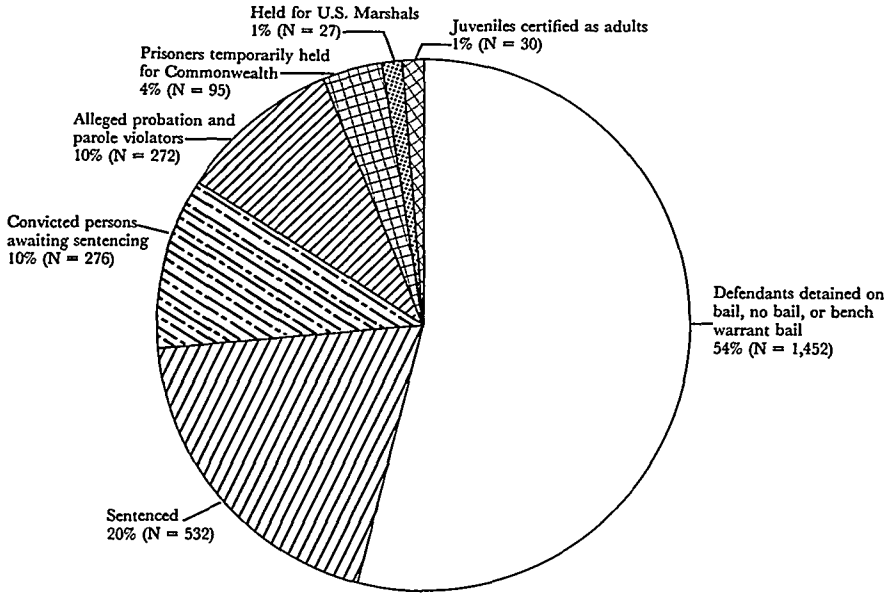
No. 71-2437 at 3 (Philadelphia Court of Common Pleas, Feb. 21, 1977). More than five lists were ultimately produced; in fact, the *Jackson* listing procedure continued until a subsequent consent decree changed the order to include defendants held on $3,000 or less. The *Jackson* reviews continue at the time of this writing.

[40] Because of standard error, estimates may vary from true population values of ± 2% to 3%.

[41] PA. CONS. STAT. ANN. § 106 (Purdon 1983).

FIGURE 1

OVERVIEW OF POPULATION OF PHILADELPHIA PRISONS ON A GIVEN DAY[a]



[a] On November 13, 1980, the population of Philadelphia prisons totalled 2,695 persons.

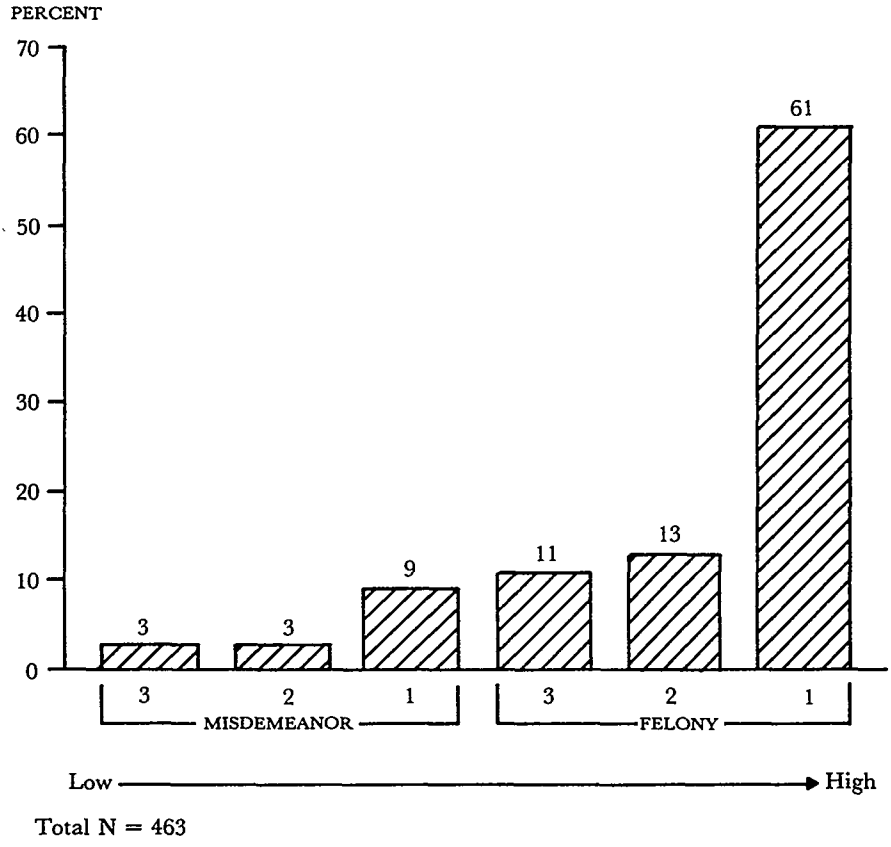
3. Prior record. Only 23% had not been arrested within the past three years. Nineteen percent had been arrested once, and 58% had been arrested two or more times. Approximately 28% had been arrested four or more times during that period. Sixty-two percent had prior arrests for crimes against the person, 51% for property crimes, 32% for drug offenses, and 47% for weapons offenses.

Only 31% had no prior convictions; 21% had one prior conviction; 48% had two or more. Thirty-nine percent had prior convictions for crimes against the person, 16% had prior drug convictions, and 25% had prior weapons convictions. Overall, 56% of those detained on a single day had prior felony convictions.

4. Other indicators of prior involvement with the criminal justice system. Twenty percent had warrants or detainers outstanding, and 40% had other charges pending at the time of their arrest on the current alleged offense. More than half of all detainees had prior willful FTAs (failures-to-appear in court): 16% had one prior willful FTA; 36% had two or more.

FIGURE 2

SERIOUSNESS OF CHARGES OF DETAINED DEFENDANTS IN PHILADELPHIA PRISONS ON NOVEMBER 13, 1980: FELONY - MISDEMEANOR GRADINGS



Total N = 463

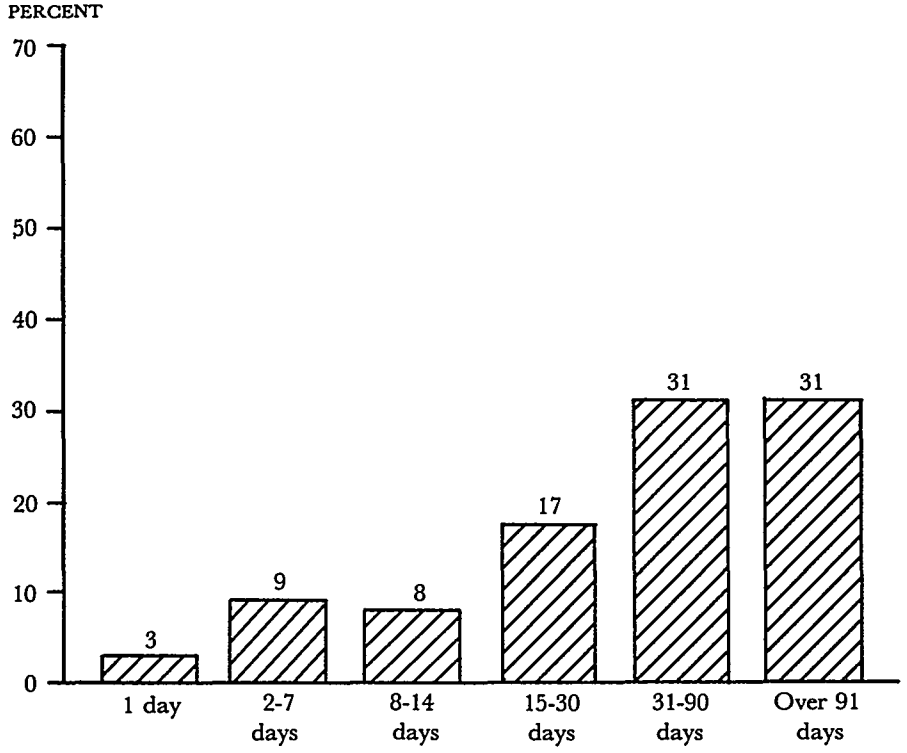
5. Length of confinement. Figure 3 depicts the length of time already spent in detention by defendants sampled on November 13, 1980. Approximately 3% had been in jail for one day or less, another 9% had been confined from 2 to 7 days, 8% were in their second week (between 8 and 14 days), 17% were in their third or fourth week of confinement. Approximately 62% of all detainees had been confined for more than one month; 31% had been confined for more than three months.

6. Bail holding defendants in detention. Figure 4 shows the amount of bail on which Philadelphia detainees were held: 6% of defendants were held on amounts between $300 and $500; 11% were held on amounts between $800 and $1,000; 5% were held on $1,500; 13% were held on amounts between $2,500 and $3,000; 7% were held on amounts between

$3,500 and $4,500; 13% were held on $5,000; 5% were held on between $5,300 and $9,500 bail; 10% were held on $10,000; 21% were held on amounts higher than $10,000. The court completely denied bail to 7% of the defendants.[42]

FIGURE 3

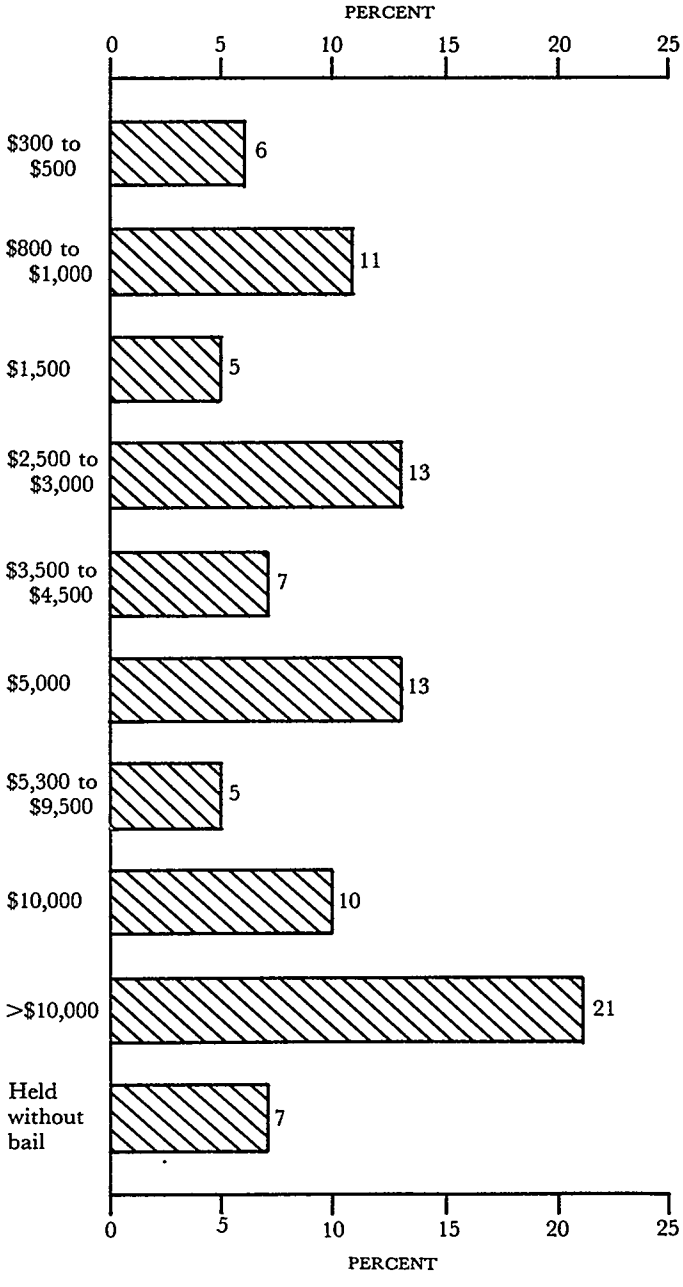
LENGTH OF PRETRIAL CONFINEMENT FOR DEFENDANTS IN PHILADELPHIA PRISONS ON NOVEMBER 13, 1980



Total N = 463

[42] These amounts reflect the full amount theoretically owed to the court should a defendant abscond and then be apprehended. In practice, because of Philadelphia's ten percent plan, defendants could gain release by paying only 10% of those amounts. *See supra* note 34.

FIGURE 4
AMOUNTS OF BAIL HOLDING PHILADELPHIA DETAINEES ON NOVEMBER 13, 1980



Total N = 463

Of course, the composition of the jail population in Philadelphia fluctuates from day to day and month to month. Nevertheless, it seems reasonable to view these findings as generally indicative of the pretrial population on a given day.

In themselves, these descriptive findings are insufficient to draw definitive conclusions; nevertheless, the general picture of the pretrial detained that emerges does not on its face confirm assumptions that detention is unselective or that many non-seriously charged, first-time, low-risk defendants are held. Interestingly, a sizeable portion of the population was confined on relatively low bail; an estimated 22% were held on $1,500 bail—only $150 in 10% terms—or less (this portion of the population became the target of the *Jackson* release measures). On the whole, and without the benefit of comparison with released defendants, the characteristics of the population of pretrial detainees suggest a notable degree of selectivity in the institution of pretrial detention.

C. DETAINED DEFENDANTS DESIGNATED FOR RELEASE UNDER *JACKSON*

In the summer of 1979, the *Jackson* court ordered that detainees held on $1,500 or less be reviewed immediately for expedited release. As a result, periodic lists of detained defendants were produced. This study included all defendants named on the first five lists, although the listing process continued beyond that number. It was reasoned that study of a "slice" of the overall pretrial population of the prisons implicitly viewed as the most releasable of detained defendants by the *Jackson* court would allow inferences to be drawn about the selectivity of pretrial detention, the "dividing line" between release and detention, and the predictive effectiveness of detention in one jurisdiction. Following is a summary of the attributes of the *Jackson* defendants designated for expedited release from pretrial detention.

1. *Demographics*. The *Jackson* defendants exhibited the demographic attributes shared by the pretrial population as a whole reported above.

2. *Current charge*. Remarkably, 62% were being held on felony charges, and 29% were held for first degree felony charges. More specifically, 2% were held for serious crimes against the person,[43] 9% were held for robbery, 21% were held for burglary, and 21% were held for aggravated asssult. Overall, 32% of those designated for expedited release under *Jackson* were charged with crimes against the person.

[43] This category of offenses includes murder, rape, manslaughter, aggravated assault, involuntary deviate sexual intercourse, and kidnapping. *See* PA. CONS. STAT. ANN. §§ 2301, 2501-2504, 2702, 2901, 3101 (Purdon 1983).

3. *Prior record*. Among the *Jackson*-designated most releasable defendants, only 26% had no record of prior arrest within the last three years; 24% had one, and 50% had more than one arrest. Fifty percent had prior arrests against the person; 32% had recent prior arrests for weapons offenses.

More than half (57%) had prior convictions; 39% had two or more prior convictions. Twenty-six percent had convictions for crimes against the person, 11% had drug convictions, and 43% had convictions for felonies.

4. *Pending charges*. If one test of the likelihood that a defendant might commit a crime while on pretrial release is whether the current arrest occurred while on release pending disposition of previous charges, then the fact that about one-third of *Jackson* designees had pending charges is striking: 11% had more than one case pending.

5. *Prior willful FTAs*. Equally striking is the finding that 45% of *Jackson* defendants had prior willful FTAs; 25% had recorded two or more prior willful FTAs. Most astonishing, 20% of the defendants designated for release under *Jackson* were in jail after having failed, either through FTA or rearrest, on pretrial release.

Inferences about the selectivity of pretrial detention can best be made by contrasting detained defendants with Philadelphia defendants generally and then comparing the profiles of each of these with the *Jackson* special releases. Table 1 compares several of the salient characteristics of Philadelphia detainees and *Jackson* defendants with characteristics of the overall Philadelphia defendant population obtained in a study conducted in 1975.[44] Some limitations in the data should be acknowledged, such as possible sampling errors in the sample of Philadelphia detainees (estimated at no more than ± two to three percentage points) and the fact that the figures from the 1975 study are also subject to very slight error[45] around the estimates given. In addition, the three sets of data were not drawn at the same time and thus may be subject to qualitative fluctuations associated with the passage of time. These qualifications aside, a contrast of the three studies generate very valuable findings.

Using the 1975 sample of all Philadelphia defendants entering the system[46] prior to selection for detention or release as a baseline, we

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[44] *See* J. GOLDKAMP, *supra* note 6, at 126.

[45] For a description of the methodology employed in the 1975-1977 study of Philadelphia defendants, see *id*. at 111-35.

[46] "All" defendants were defined as including only those continuing forward into the criminal process after first appearance. Thus, certain cases, such as immediate dismissals and fugitive warrants, were not included in the sample. *See id*.

TABLE 1

COMPARISON OF ATTRIBUTES OF *JACKSON* DEFENDANTS, ALL DETAINED DEFENDANTS AND ALL PHILADELPHIA DEFENDANTS ENTERING THE JUDICIAL PROCESS[a]

Study	Felony charges		Prior felony convictions		Prior FTAs		Pending charges	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Jackson defendants								
1979-1980 (n=463)	(286)	62.0	(199)	43.0	(208)	45.0	(148)	32.0
Ratio (Jackson/all)		2.8		1.7		3.2		4.0
Philadelphia detainees								
Nov. 13, 1980 (n=462)	(394)	85.0	(259)	56.0	(241)	52.0	(185)	40.0
Ratio (Detainees/all)		3.9		2.2		3.7		5.0
All Philadelphia defendants								
1975-1977 (n=8,311)	(1,828)	22.0	(2,078)	25.0	(1,164)	14.0	(635)	8.0

[a] Percentages of *Jackson* defendants and defendants detained in the Philadelphia prisons on a single day are contrasted with those describing all Philadelphia defendants from an earlier study. That study examined all defendants in an estimated cohort of 8,311 entering the system at first appearance in the fall of 1975 through conclusion of all cases by 1977. *See* J. GOLDKAMP, *supra* note 6; J. Goldkamp, *supra* note 35.

learned the following about the characteristics of detainees in general, and the *Jackson* defendants, in particular (see Table 1).

1. *Current charge*. Roughly 22% of all Philadelphia defendants entering the system were charged with felonies. Nearly four times that proportion of detainees and nearly three times the *Jackson* defendants were so charged.

2. *Prior felony convictions*. Approximately 25% of the total number of defendants who entered the system in Philadelphia had records of prior felony convictions. More than two times as many detainees and almost twice that proportion of *Jackson* defendants showed such prior records.

3. *Prior FTAs*. Roughly 14% of the total number of defendants had prior willful FTAs. Almost four times that proportion of Philadelphia detainees in Philadelphia prisons had prior willful FTAs, and more than three times that proportion of *Jackson* defendants had previously absconded.

4. *Pending charges*. Approximately 8% of Philadelphia defendants entering the process in late 1975 on a current charge had been on pretrial release for a former, pending charge; thus, they had "failed" on release as a result of the current offense. Five times that proportion of all detainees and four times that proportion of *Jackson* defendants similarly had pending charges at the time of their current offenses.

The comparison in Table 1 removes all doubt about whether pretrial detention is used selectively; indeed, there is evidence that a substantial screening of defendants occurs. Moreover, these findings create inferences about the dividing line between release and detention. If the *Jackson* order applied to the most releasable of detainees in the Philadelphia prisons during the period studied, the implications are clear: the *Jackson* defendants also possessed the attributes of central concern (criminal charge, prior record, prior FTA and pending charges) at several times greater than the averages for Philadelphia defendants generally, although at a rate slightly less than detainees overall. Even if the *Jackson* group represented the least-releasable segment of the pretrial population, one could infer that pretrial detention functions selectively in choosing between defendants who are released and those who are detained, given the greatest differences between the *Jackson* detainees and defendants overall.

D. RELEASE AND FOLLOW-UP OF THE *JACKSON* DEFENDANTS

The first five lists compiled under the *Jackson* $1,500 bail rule designated 462 defendants for expedited release from pretrial confinement, but by the time the lists were fully processed only 313 or 68% of those

named were actually released. Detainees not released had either progressed through the judicial process to disposition or were held for other reasons, such as detainers or probation violations that were not evident when the lists were produced. Defendants released subsequent to their inclusion on the *Jackson* lists were followed for a period of ninety days. Of the *Jackson* defendants achieving release, 42% recorded willful FTAs from court at least once. Twenty-eight percent were arrested for crimes occurring during their period of pretrial release. Of these, approximately 24% were for serious crimes against the person (murder, rape, robbery, aggravated assault), 23% were for serious property crimes, 5% for weapons crimes.

By using the previous study of all Philadelphia defendants as a baseline, we were able to confirm the perception that these rates of failure are high.[47] Approximately 76% of the cohort of an estimated 8,311 defendants were released within one day of their bail decisions. Approximately 12% of all released Philadelphia defendants in that representative cohort recorded willful FTAs and 17% were rearrested for crimes during a follow-up period of 120 days.[48] Thus, defendants released through the *Jackson* court-ordered selection of the "most releasable" of detainees absconded at 3.5 times and were rearrested at roughly 2.3 times the Philadelphia average.

The implications of these results for the use of detention in a general sense are straightforward: not only is detention in Philadelphia selective, but the dividing line between released defendants and the "most releasable" detained defendants appears to have predictive merit. The assumption that a sizeable proportion of detained defendants, as exemplified in this study by the *Jackson* defendants, poses no more serious risk of flight or crime than that posed by released defendants generally is not supported. If we view detainees generally, and the *Jackson* detainees in particular, as the system's prediction of poor risks, the *Jackson* findings reveal predictive merit.

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[47] *See* J. GOLDKAMP, BAIL DECISIONMAKING, *supra* note 25, at Appendix H; J. GOLDKAMP, *supra* note 6.

[48] *See* J. GOLDKAMP, BAIL DECISIONMAKING, *supra* note 25, at Appendix H. Note that the follow-up period—120 days—for the baseline sample is longer than that which was employed for the *Jackson* follow-up. Some observers of bail contend that failure rate is a function of the length of time at risk (on pretrial release). *See, e.g.*, S. CLARKE, *supra* note 22, at 18. Thus, it would be hypothesized that, other factors being comparable, a sample employing a longer follow-up period would show a somewhat higher rate of failure. Therefore, the findings from this comparison become more striking when the longer follow-up period for the baseline sample is acknowledged.

IV. VIEWING DETENTION FROM THE PERSPECTIVE OF A PREDICTION INSTRUMENT

The finding that pretrial detention may effectively select for confinement defendants who are significantly higher risks than those released underscores the problem raised in studies of prediction in pretrial release. As noted above, these studies have attempted to predict failure-to-appear and rearrest among various samples of released defendants. Their results, though potentially very valuable to the improvement of bail decisionmaking, generally have been weak. The exclusion of detained defendants was viewed as a serious limitation[49] to the extent that those defendants might differ from released defendants. That is, if detained defendants were generally more dangerous or more likely to fail to appear, the weakness of these predictive analyses could be traced in part to the fact that they were derived from the study of failure among populations of defendants generally unlikely to fail.

As a final component to the current study, we attempted to assess the validity of release-based predictive approaches by applying a predictive classification instrument recently developed in a study of released defendants[50] to the *Jackson* defendants who, but for the court-ordered special release procedures, would have remained in detention. We reasoned that application of the prediction instrument to the *Jackson* defendants would test the validity of a bail prediction instrument, which was based on a limited sample of defendants, only those achieving release, and would thereby shed light on the likely utility of such instruments for bail decisionmaking. Moreover, we determined that application of the prediction instrument here would allow further inferences to be drawn concerning the attributes of the *Jackson* "most releasable" detainees. Would the use of such a predictive classification confirm or rebut inferences about the dividing line between released and detained defendants? Would the prediction instrument accurately predict the relative rates of failure among *Jackson* releases?

As part of the work of the Bail Decisionmaking Project in Philadelphia,[51] we conducted a number of empirical analyses of failure-to-appear and rearrest among Philadelphia defendants.[52] A final prediction

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[49] *See* J. GOLDKAMP, *supra* note 6, at 77-108; Gottfredson, *supra* note 22, at 300.

[50] *See generally* J. GOLDKAMP, BAIL DECISIONMAKING, *supra* note 25.

[51] The Bail Decisionmaking Project was funded initially by a grant from the National Institute of Corrections (NIC) to the Criminal Justice Research Center to study the feasibility of a guidelines approach to bail in Philadelphia. In a subsequent experimental implementation stage, NIC was joined by the National Institute of Justice. *See* J. GOLDKAMP & M. GOTTFREDSON, *supra* note 35. J. GOLDKAMP, BAIL DECISONMAKING, *supra* note 25.

[52] *See* J. GOLDKAMP, BAIL DECISIONMAKING, *supra* note 25, at 81-84, Appendices G & H.

instrument, which sought to predict pretrial failure generally,[53] was validated on an independent sample representative of Philadelphia defendants who were processed into the judicial system and who subsequently

TABLE 2

PARAMETERS AND CORRESPONDING POINTS[a] FOR FINAL MODIFIED LOGIT MODEL FITTED TO FAILURE ON RELEASE FOR CONSTRUCTION SAMPLE DATA[b]

Variable	Parameter	Points
Intercept	−0.54	− 4
Over 44		
Yes	−0.76	− 5
Phone		
Yes	−0.36	− 2
Prior FTAs		
1	0.25	2
2 or more	0.50	3
Pending charges		
1 or more	0.64	4
Arrests within the last three years		
1	0.17	1
2	0.34	2
3 or more	0.51	3
Serious personal/sex offense		
Yes	−2.03	−14
Miscellaneous offense		
Yes	−0.89	− 6
Property offense		
Yes	−0.48	− 3
Over 44 is yes and prior FTAs is		
1	0.69	5
2 or more	1.38	9
Serious personal/sex offense is yes and arrests is		
1	0.23	2
2	0.46	3
3 or more	0.69	5

[a] Points were derived by dividing by .15.

[b] Source: J. GOLDKAMP, BAIL DECISIONMAKING, *supra* note 25.

[53] Failure among released defendants refers to either FTA or rearrest.

TABLE 3

OBSERVED PERCENT FAILURE FOR DEFENDANTS IN THE CONSTRUCTION AND VALIDATION SAMPLES, BY FIVE RISK GROUPS DERIVED FROM MODIFIED FINAL LOGIT MODEL FITTED TO FAILURE ON RELEASE[a]

		Construction sample			*Validation sample*		
		Released defendants		Observed	Released defendants		Observed
Risk group	Failure score	Number	Percent	percent failure	Number	Percent	percent failure
Total, all released defendants	———	4,020	100	24	6,785	100	26
I	-13 or less	471	12	9	1,062	16	12
II	-12 to -10	1,242	31	15	2,401	35	18
III	- 9	698	17	20	1,069	16	23
IV	- 8 to - 4	1,106	28	32	1,733	26	38
V	- 3 or more	503	12	46	520	8	54

Construction sample
MCR = .34
P.R.E. = .00
X^2 = 292.68 with 4 df; P<.001

Validation sample
MCR = .34
P.R.E. = .02
X^2 = 558.46 with 4 df; p<.001

[a] Source: J. GOLDKAMP, BAIL DECISIONMAKING, *supra* note 25.

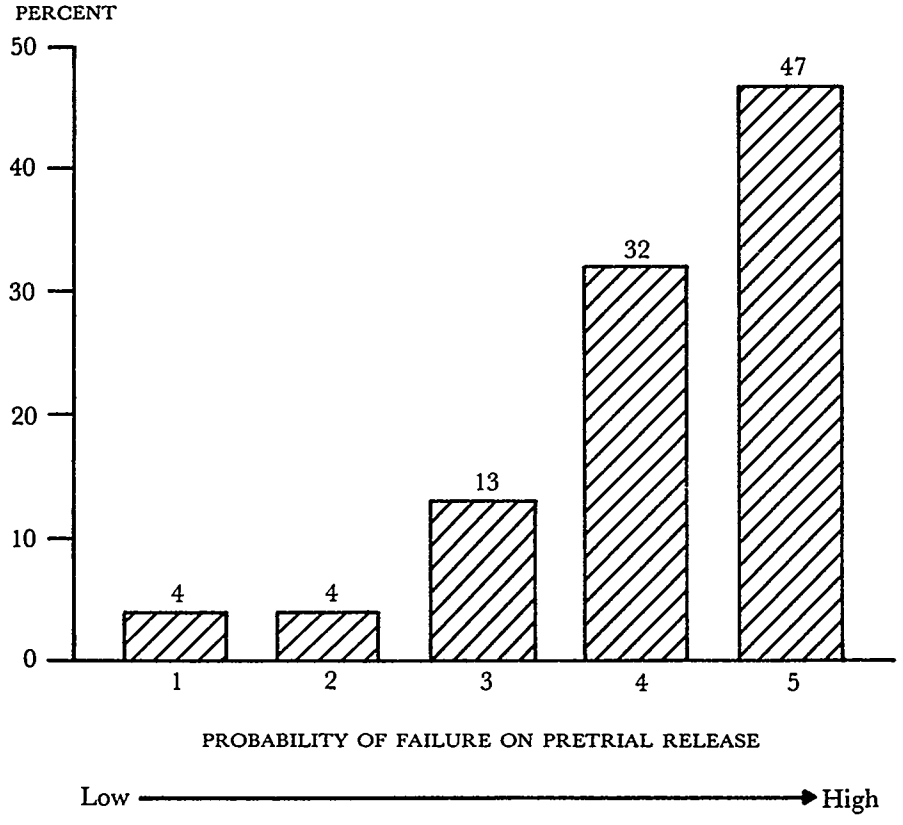
secured release.[54] The final instrument included the following factors (see Table 2): type of charged offense, recent arrests pending charges, prior willful FTAs, age, telephone, and combination of charge and arrests, age, and FTAs.[55]

1. Classification of the Jackson Defendants According to Risk

The predictive scheme described above produces five classes of de-

FIGURE 5

RISK CLASSIFICATION OF *JACKSON* DEFENDANTS DESIGNATED FOR SPECIAL RELEASE



Total N = 457
Missing cases = 69

[54] For a discussion of the validation procedures, see J. GOLDKAMP, BAIL DECISIONMAKING, *supra* note 25, at Appendix H.

[55] As noted above, *see supra* text accompanying note 54, this predictive classification was validated on an independent sample of Philadelphia defendants. *See also* J. Goldkamp, *supra* note 35, at 355-65.

fendants based on the relative likelihood of pretrial failure. As depicted in Table 3, in the validation sample on which the final version of the instrument was based, defendants classified in Group 1 failed on release (through FTA or rearrest) 12% of the time; those in Group 2 failed 18% of the time; Group 3 defendants failed 23% of the time; 38% in Group 4 failed; and in Group 5 defendants failed 54% of the time. These rates of failure reflect the probability that other defendants classified as falling within a given group would fail to appear in court and/or be rearrested for a new crime during pretrial release.

Figure 5 arrays defendants designated for special release by the *Jackson* $1,500 bail rule according to their classification of risk. Had this tool been available before the *Jackson* court release procedures began, the court would not have been reassured: 47% of the *Jackson*-named defendants would have been in the highest risk category (Group 5); another 32% percent would have been ranked as second highest risk (in Group 4).[56] Thus, together, 79% would have shown the highest probabilities of failure during a period of pretrial release. On the other hand, 8% would have been classified as lowest risk, 4% falling into Group 1 and 4% into Group 2. Figure 6 shows roughly the same classification results for *Jackson* defendants actually set free.[57] Using this classification approach, the court would have predicted a rate of failure among the soon-to-be-released *Jackson* defendants of approximately 42%.

These findings further undermine the view that the dividing line between release and detention is arbitrary: the *Jackson* court's designation of the most releasable defendants actually included a discouragingly high proportion of high-risk detainees. In fact, contrasted with the expected distribution among Philadelphia defendants (see Table 3), the *Jackson* defendants were disproportionately high risk.

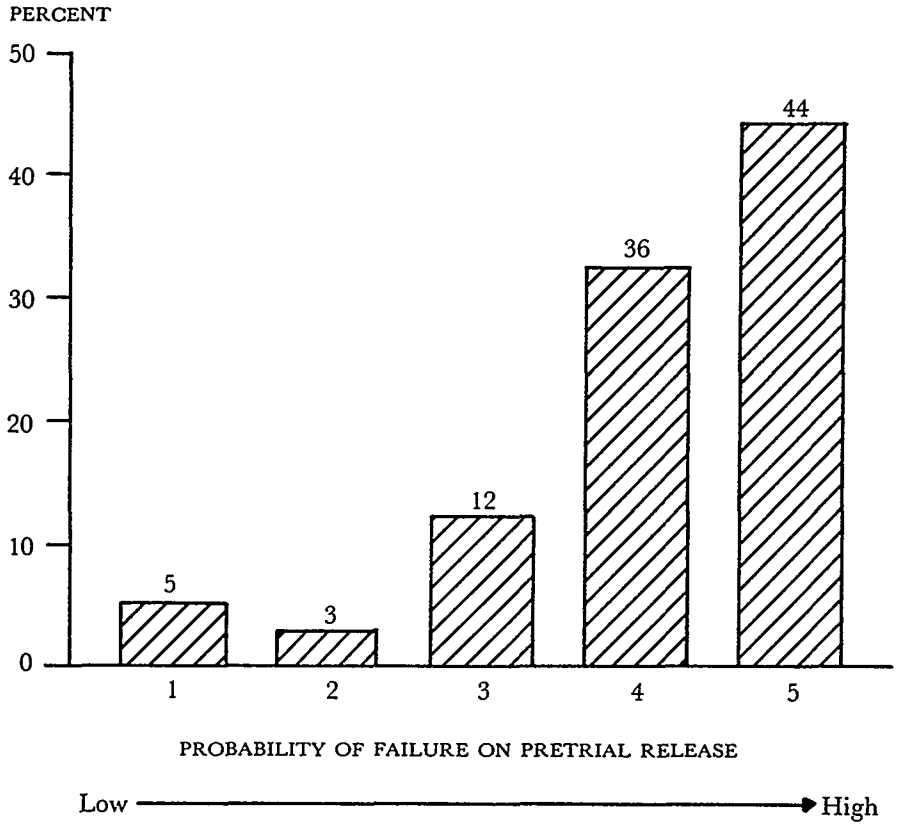
The strength of this predictive classification approach is supported by findings from the follow-up study of *Jackson* defendants. Figure 7 first contrasts the rates of failure, either through FTA or rearrest, for *Jackson* defendants with the rates for the representative sample of Philadelphia defendants. The darkened horizontal bar shows that 53% of the *Jackson* defendants either absconded or were rearrested within ninety

[56] The missing numbers indicated in the figures for *Jackson* defendants resulted from the lack of relevant information in certain cases—the partial result of a retrospective data collection procedure.

[57] As noted above, some of the defendants designated for expedited release under the *Jackson* procedures were not released, either as a result of other factors that were at first not apparent or because their cases reached disposition through dismissal, adjudication, or sentencing shortly after the lists were produced. *See supra* text accompanying notes 47-49.

FIGURE 6

RISK CLASSIFICATION OF *JACKSON* DEFENDANTS ACHIEVING RELEASE



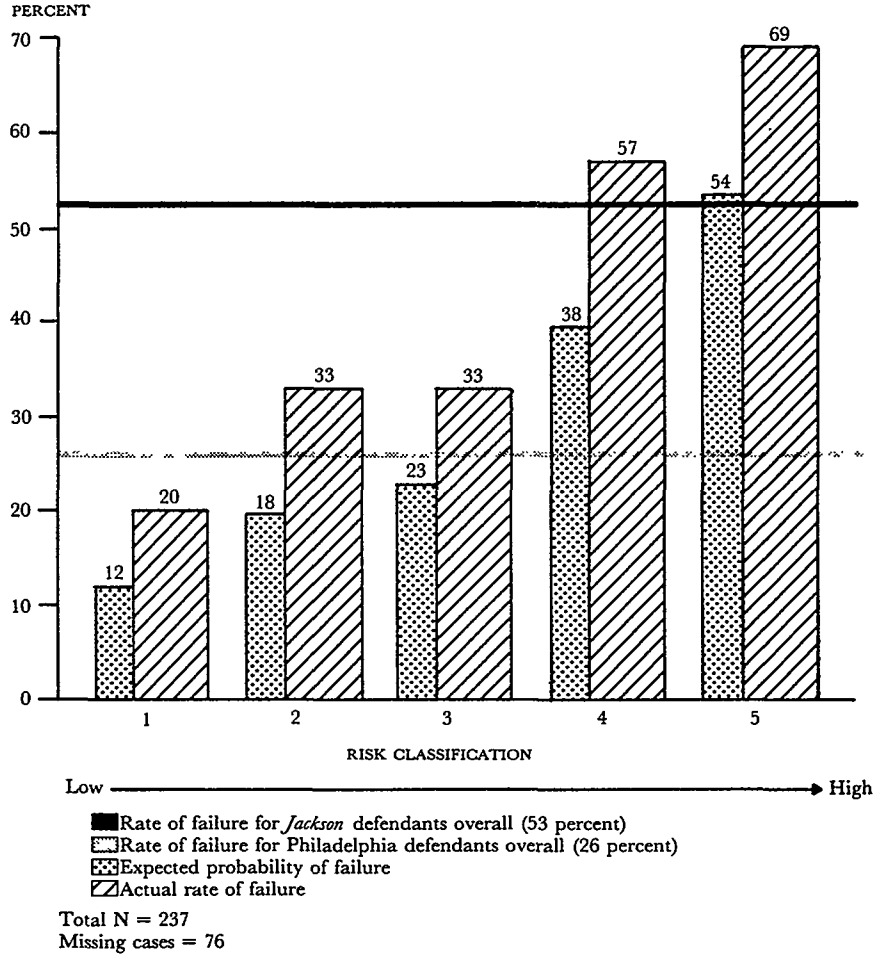
Total N = 313
Missing cases = 40

days compared to 26% of a representative sample of Philadelphia defendants overall.[58] In addition, however, this Figure documents support for the predictive classification: the instrument ranked defendants well according to their relative probabilities of failure. With the exception that *Jackson* defendants in Groups 2 and 3 failed at similar rates, Group

[58] It should be recalled again that the baseline sample employed a 120-day follow-up. *See supra* note 46.

FIGURE 7

FAILURE RATES[a] OF *JACKSON* DEFENDANTS ACHIEVING RELEASE DURING 90 DAY FOLLOWUP[b]



[a] Failure is recorded for either a failure to appear in court or arrest for new crime during pretrial release.

[b] These data reflect defendants named on the first five lists for *Jackson* hearings beginning in August 1979. Defendants achieving release were not necessarily released as a result of *Jackson*.

1 defendants failed less than those in higher groups and defendants classified into Groups 4 and 5 failed at the highest rates. Thus, the prediction instrument developed through analysis of released defendants ranked detained defendants according to the relative probability of failure on pretrial release reasonably well.

Remarkably, Figure 7 further shows that the prediction scheme underpredicts rates of failure. Based on the validation sample,[59] defendants classified within Group 1 could be expected to fail on release about 12% of the time; *Jackson* defendants failed 20% of the time. The classification also underpredicted failure for Group 3 defendants by 10%. Although the prediction scheme based on the performance of released defendants would have projected a 38% failure rate among Group 4 Jackson defendants, 57% failed. Although a 54% failure rate was projected for Group 5 *Jackson* defendants, 69% actually failed during pretrial release.

Thus, use of the prediction instrument would have predicted that the *Jackson* court's releasees could be expected to fail in approximately 42% of the cases—a striking contrast to an expected rate of failure among all Philadelphia defendants of about 25%. In fact, however, their performance was notably worse: 53% failed on pretrial release, 11% more than predicted.

2. *Classification of All Detainees According to Risk*

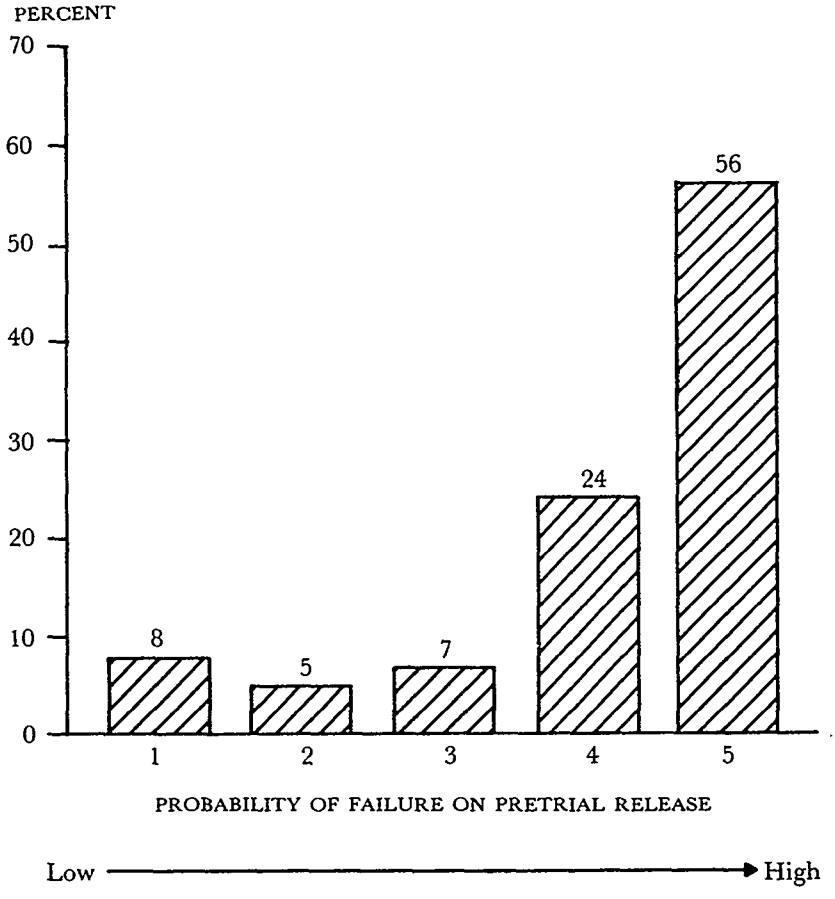
An important implication of the application of the classification instrument to *Jackson* defendants is that predictive studies in bail have been weak in part because they have had to develop predictors using samples that under-represented likely absconders and pretrial "recidivists." If the application of the previously developed predictive classification instrument to the *Jackson* detainees validates to a certain extent the strength and utility of that instrument, then it commends its use to the further evaluation of pretrial detention as well.

Figure 8 extends the analysis to the sample of the total population of defendants detained in the Philadelphia prisons on a single day. When all detainees are classified using this risk assessment instrument, the view that pretrial detention may be quite appropriately selective in predictive terms is further underscored: more than half (56%) of all detainees on a single day possessed attributes falling into Group 5, the highest risk category. Another one-quarter (24%) fell into Group 4.

[59] The prediction equation was first developed on a sample that did not reflect Philadelphia defendants overall, but was designed to permit examination of judicial disparity in bail decisions. It was, however, validated on an independent representative sample from the earlier Goldkamp study. *See* J. GOLDKAMP, BAIL DECISIONMAKING, *supra* note 25, at Appendix H.

FIGURE 8

RISK CLASSIFICATION OF DEFENDANTS DETAINED IN PHILADELPHIA PRISONS ON NOVEMBER 13, 1980



Total N = 463
Missing cases = 59

Thus, on any given day, approximately 80% of all detainees could be classified as high or very high risk.

These findings should not be allowed to overshadow the following: 8% of those confined in pretrial detention were lowest-risk; in other words, 8% were very unlikely ever to abscond or be rearrested for crime during pretrial release. An additional 5% were in Group 2, nearly as low-risk as detainees classified in Group 1.

These last findings have important implications, for, if risk alone is

considered, an estimated 13% of the pretrial population or 7% of the entire population of the prisons could be considered immediate prospects for unconditional release. On November 13, 1980, that would have amounted to between 175 and 200 detainees, approximately 40% of the margin of overcrowding.

IV. EVALUATING THE PRACTICE OF PRETRIAL DETENTION: FUTURE DIRECTIONS

Underlying debates about the impact of pretrial detention in jail overcrowding and proposals for increased use of "preventive" detention are assumptions about the current uses of detention and its effectiveness in selectively confining the worst risks among defendants. Implicit in both controversies are criticisms that pretrial detention in the United States today is not doing its job.

In attempting to "solve" the overcrowding problem, commentators often assume that chaotic bail practices produce detention populations which needlessly include a substantial number of defendants. This view echoes the cries of early bail reformers that jails were filled with poor defendants who were not charged with serious offenses, had little or no prior criminal history, and had reasonable ties to the community as well.[60]

Just as overcrowding crises in many American jurisdictions have brought jails once again to the forefront of public scrutiny, proposals for extending the use of pretrial detention—as a counterpoint to movements to reduce jail populations—are being received with increasing favor by the public and justice officials alike. Generally, the various proposals focus on defendants with serious criminal charges and prior records of convictions for serious or violent crimes.[61] Regardless of whether these kinds of criteria have been statistically related to risk of flight or crime before trial,[62] proponents assume that they are appropriate standards to govern the use of pretrial detention and, judging from the impetus behind these proposals, they assume that pretrial detention does not operate effectively in current practice, or at least not along the lines envisaged in the legislation. In fact, they argue that, all too often, dangerous defendants are released to commit further crimes or to harass victims and witnesses—again, regardless of what empirical studies on

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60 *See, e.g.*, Ares, *Bail and the Indigent Accused*, 8 CRIME & DELINQ. 12, 15, (1962); Ares, *supra* note 7, at 89; COMM. ON POVERTY, *supra* note 7, at 58, 69, 75, 77; Note, *Pre-Trial Detention in the New York City Jails*, 7 COLUM. J. L. & SOC. PROBS. 350 (1971).

61 *Compare* MICH. CONST. art I., §§ 15-16 *and* NEB. CONST. art. I, § 9 *with* D.C. CODE ANN. §§ 23-1321 to -1332 (1981 & Supp. 1983).

62 For a comprehensive treatment of this question, see Angel, *supra* note 23, at 323-32.

the matter have shown.[63]

The conclusions drawn from Philadelphia data call in to question the emerging "conventional wisdoms" relating to the causes of overcrowding and the inability of pretrial detention to restrain defendants. Although these data do not indicate that no nonseriously charged or low-risk defendants are inappropriately held or that no dangerous defendants somehow gain their freedom to prey upon the public before trial, they do strongly suggest the following points.

First, pretrial detention—at least in the Philadelphia case study—appears to operate selectively and does not incarcerate defendants randomly. The descriptive findings from the study of the overall detention population and from the "natural experiment" demonstrate that detained defendants differ notably from the "average" Philadelphia defendant entering the criminal process: they are charged with more serious crimes, they have lengthy records of prior arrests and conviction, and they exhibit lengthy histories of flight from court and arrest for crimes committed during previous periods of pretrial release.

Second, if pretrial detention can best be understood as the system's prediction of "worst-risk" defendants, i.e., those most likely to flee the jurisdiction or to commit new crimes if granted pretrial release, then detention may be performing better as a predictor than critics have suspected—again, at least in the city of Philadelphia. Follow-up of the *Jackson*-released defendants, who were viewed as the "most releasable" of detainees, and the application of the predictive classification instrument to them and to the detention population overall suggests that detainees will perform worse as a group than "normally" released Philadelphia defendants.

At the same time, it is important to emphasize firmly the limitations of these conclusions. That pretrial detention operates to some measurable extent as it is expected to do is reasssuring mainly to the extent that the purely arbitrary "chaos" model of criminal processing can be rejected. To conclude that pretrial detention is at a minimum selective and not chaotic—at least in Philadelphia—begs the question of how selectively detention should be allocated among defendants. Should the standard for evaluating pretrial detention be that a substantial majority or virtually all of those held must be classified as "very high risk?"

Any standard for evaluation of the selectivity of the pretrial deten-

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63 In fact, relatively low rates of failure on pretrial release are reported in jurisdictions around the country. Especially rare are rearrests of released defendants for serious crimes against the person. *See* M. Gottfredson, *supra* note 22, at 297-301; LAZAR INSTITUTE, *supra* note 27, at 20; W. THOMAS, *supra* note 6, at 234-44; Angel, *supra* note 23, at 323-24. *See generally* J. LOCKE, PILOT STUDY, *supra* note 22.

tion population not only must focus on questions of its composition (e.g., to establish an accepted minimum level of high risk detainees) but, more fundamentally, must establish the criteria to be invoked in classifying individuals as "low" or "high" risk. Arguably, the criteria should relate demonstrably to the outcomes of concern in the bail decision, such as risk of flight or pretrial crime, and, furthermore, be based on an actuarial classification scheme, such as the one developed in the Philadelphia study. An alternative approach, based on factors merely assumed or believed to be logically related to the minimization of FTAs and rearrests by defendants awaiting trial, has been taken in various preventive detention legislative schemes—e.g., the new laws in California, Nebraska or Michigan.[64]

It is one thing to argue, as this Article does, that a large share of the detention population appears to be "very high risk" and therefore appears not randomly confined as observers of bail practices might have believed. It is quite another—and a major jump in logic—to conclude that detention should be meted out on the basis of falling into the most undesirable categories of a classification scheme measuring "very high risk" or based on other factors, such as criminal charges or prior record, established in current laws. Setting aside the controversial nature of such assumptions,[65] however, even if one accepts that being defined as "very high risk" or very "dangerous" somehow overcomes the presumption that defendants should be granted pretrial release,[66] the fact that a sizeable minority of the Philadelphia detention population did not fall into such categories should be cause for alarm. If the former group (high risk defendants) represents an appropriate use of detention, then

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[64] *Compare* CAL. CONST. art. I, § 12 *with* MICH. CONST. art. I, §§ 15-16 *and* NEB. CONST. art. I, § 9.

[65] If the preventive detention of persons who are only charged and not convicted, and who therefore must be presumed innocent, has been viewed as controversial (because the theory relies not only on predictions of future behavior but also on assumptions of past behavior which have not been demonstrated), then clearly rationales legitimizing pretrial detention based on risk classification would be doubly controversial. The reason is simple: classification of defendants into a "high risk" category based on their possession of certain attributes is likely to produce a noticeable margin of the error in individual cases. Although most members of high risk group may eventually fail to appear in court, for example, many individuals in that category, of course, would appear. Classification handles individual defendants as members of groups or categories; they are tried under the criminal laws, however, as distinct individuals. *See generally* Angel, *supra* note 23, at 342-47.

[66] In Stack v. Boyle, the Supreme Court alluded in dicta to "the traditional right [of the accused] to freedom before conviction." 342 U.S. 1, 4-5 (1951). This right later emerged as a presumption favoring the release of defendants under nonfinancial conditions and under least restrictive alternatives in subsequent state and federal legislation. *See* Bail Reform Act of 1966, 18 U.S.C. § 3146 (1976). For a discussion of state bail laws, see generally J. GOLDKAMP, *supra* note 6, at 55-75.

the latter group (the lower risk minority) surely points to inappropriate pretrial detention.

A major positive finding of this study lies in the potential value of a statistically or actuarially derived evaluation of the pretrial population based on risk. Although imperfect, the prediction instrument applied to the *Jackson* defendants who were specially released received secondary validation. The finding that the instrument ranked detainees well according to risk, but underpredicted their actual rates of failure, suggests that earlier predictive studies have suffered importantly from the exclusion of high risk defendants. Hopefully, future predictive efforts will focus productively on methods that can take into account the characteristics of detained defendants, thereby enhancing the strength of the predictions.

It is unfortunately true that, when applied as a yardstick to the pretrial population as a whole as well as to the *Jackson* designees, the predictive classification demonstrated that detainees are disproportionately high risk. Yet, in a more positive vein, the classification scheme also identified groups of lower risk defendants who arguably represent inappropriate uses of detention: thirteen percent of detainees on a given day were assessed as very low risk. Although such a predictive approach must be used with caution—for as it was to a surprising extent accurate, it was also notably inaccurate in individual cases—there is now some promise that population reduction proponents, for example, guided by assessment of risk could devise release alternatives. While certain defendants should unquestionably be released on their own recognizance, others might be released more appropriately under various forms of supervision, such as in third party custody or to particular programs based on the knowledge such a tool provides.[67] In fact, had this approach been taken in *Jackson*, the follow-up results might have been dramatically different.

Finally, as the issue of selectivity in pretrial detention sharpens in response to concerns both about jail overcrowding and about community protection, it is critical to keep in mind the potentially adverse side-effects of any "selectivity enhancing" measures, namely that defendants will be confined erroneously because of their membership in a group possessing particular attributes. The cost of these errors must be faced squarely before implementing policy measures that seem to respond effectively to hitherto intransigent pretrial issues.

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[67] This recommendation, of course, is hardly original; it borrows directly from the approach of release under least restrictive conditions outlined in the Federal Bail Reform Act of 1966. *See* 18 U.S.C. § 3146.