

Justice Denied: The Harmful and Lasting Effects of Pretrial Detention

THE ANSWER



By Dan Barto

Forward

Every so-often, an advocacy group comes out with a criminal justice report decrying the injustice of our pretrial criminal justice system. As a bondsman and admitted criminal justice nerd, I'm likely one of the few people who actually read these reports. What I've found is they are typically full of propaganda and deceptions, dressed up in academic and scholarly clothes, to advocate a position which cannot be backed up with logic, reason, and facts.

I've answered a couple these reports and have documented their fraudulence. These pro-bail reform reports are usually well-footnoted, albeit deceptively so. My previous rebuttals to these types of articles are: [Pretrial Services: A Subversion of Justice](#) and [Selling Off Our Freedom - The Answer](#).

That being stated, I came across a brief titled "Justice Denied: The Harmful and Lasting Effects of Pretrial Detention" by the Vera Institute of Justice. It attempts to make a case against pretrial detention. After reading it and verifying its' sources, I am convinced that these reports are produced knowing that few will actually read them and no one in the media (i.e. P.R. Lockhart / Vox.com) will give an honest critical analysis. Rather, these reports achieve the desired media buzz to further an agenda which can only be obtained using tactics of deception and propaganda.

The "Justice Denied: The Harmful and Lasting Effects of Pretrial Detention" brief falls in this category. The premises it puts forth are glaringly false, not only by the shallow arguments, but because they are often contradicted in this same report. To say the authors, Leon Digard and Elizabeth Swavolate, misquoted their sources would be an understatement.

A case in point of both contradiction and deception is the use of the very first sentence misquoting the first endnote. The report's summary begins, "Approximately two-thirds of the more than 740,000 people held in locally run jails across the United States have not been convicted of a crime—they are presumed innocent and simply waiting for their day in court."¹ The cited source for this is a statistic from the Bureau of Justice which states the total inmates in local jails was 740,700, but did not delineate how many of those were pretrial. In fact, their endnote for this quote directly contradicts their claim by correctly stating, "Zhen Zeng, ... estimates the total jail population for June 30, 2016, as 740,700"².

In addition, the next paragraph doubles down on the two-thirds claim, "... the pretrial population comprised ... now accounts for approximately two-thirds of people in jail nationwide"³. This is footnoted to another Vera Institute report, "Out of Sight: The Growth of Jails in Rural America"⁴. However, it is not footnoted in the "Out of Sight" report. The two-thirds claim is simply made up by the Vera Institute. It appears the Vera Institute puts out reports with made-up claims, then uses them as footnotes for future reports.

The entirety of the Vera's "Justice Denied" brief is a continuous flow of untruths and mendacious non sequiturs. This brief is an answer to that. This brief will answer what I deem the most egregious assertion in each section. To correct every false assertion and statement would be too voluminous to be practical.

The growth of pretrial detention

This section targets financially secured bonds, or private sector bail bonds, as the main driver for a substantial growth of pretrial detention. The biggest whopper in this section is in the statement, “there is little evidence to support the efficacy of monetary bail in achieving the intended goals of reducing harm to the community and increasing court appearances”⁵

Aside from the fact that the two citations of this were simply claims which were not backed up, there is ample evidence which refutes the claim.

For example, a 2007 Bureau of Justice Statistics report which focused on the pretrial release of felony defendants found that the failure-to-appear rates were significantly lower for defendants released on secured bonds as compared to other forms of pretrial release.

“By type of release, the percent of the defendants who were fugitives after 1 year ranged from 10% for unsecured bond releases to 3% of those released on surety bond.”⁶

In addition, that same report showed that felony defendants released on unsecured bonds or their own recognizance had initial failure to appear rates almost double that of felony defendants released on surety bonds.⁷

There are many jurisdictions who adopted parts of the bail-reform movement, only to drop it because of an increase of defendants not showing up to court. After implementing a risk-based pretrial system in Potter County, Texas,

“An assessment was done to see what the return rate to court was for people on a pretrial program vs. being monitored by a bail bond company. Pretrial releases had less than a 30 percent return rate compared to 75 percent when monitored by a bail bond company.”⁸

What the authors, Digard and Swavola, are doing here is making claims where no evidence exists and ignoring actual evidence which directly refutes their contention.

Pretrial detention leads to worse outcomes for those held

This section is their report contends that pretrial detention leads to worse outcomes for defendants as compared to defendants on pretrial release. However, a simple analysis will show that it’s full of non sequiturs and inconsistencies and their conclusions are nonsensical.

Pretrial detention and failure to appear for future court events

Digard and Swavola cited a 2013 study by the Arnold Foundation to make the case that prolonged pretrial detention causes more FTAs. To summarize, the study concluded that, when taking into account very precise factors and conditions like low risk and number of days detained, defendants who are detained longer are less likely to show up to court.⁹ It should be noted that citing a study from an advocacy group which advocates for what is being argued for is hardly an unbiased source. A study by the Arnold Foundation cannot be considered unbiased or impartial by any stretch.

However, the last paragraph of the section refutes this contention stating “Other studies have failed to replicate these results.”¹⁰ followed by citing a study which found that longer pretrial detention reduces FTAs.

Give Digard and Swavola credit for presenting both sides on this one. There are studies which show that longer pretrial detention leads to more FTAs and studies that show longer pretrial detention lead to fewer FTAs. So, it appears it’s either inconclusive or it has no affect.

Boxout (page 3) – The price of freedom: Monetary bail and pretrial detention

The gray box on page 3 of their report gives a succinct description of what happens when someone is arrested how bail may be determined. It then concludes by providing a biased one-liner of how bail denies release because it's all about money. The source they cited for this quote is from another subjective, like-minded, anti-bail report. In short, it simply dropped a sound-bite over-generalizing an extensive and complex topic.

Pretrial detention and conviction

This section of their report attempts to correlate conviction rates with pretrial detention. Several studies were cited which showed the longer the defendant spends in pretrial detention, the more likely the defendant will be convicted.

From these studies, Digard and Swavola stated the “researchers hypothesize that at least part of the effect of pretrial detention on conviction is due to a greater likelihood that those who are detained will plead guilty”¹¹. The operative phrase this statement is “at least part”. If pretrial detention is “at least part” of the reason, how big of a part is that? Is it a small, insignificant part or a considerable part? What are the other parts of the effect and why not address them?

These questions are addressed below, but there's an element of sophism in their argument which deserves pointing out. Correlation does not mean causation. The authors seemed of have either disregarded this truism or noticeably avoided it as it permeates their argument.

For example, they claimed that “that people who were unable to pay bail within seven days of their bail hearings were 25 percent more likely to be convicted than similarly situated people who paid bail and were released”¹². Could it be that the reason defendants who paid their bail and were released were more likely to pay for their own attorney and get better defense for their case?

This leads to elephant-in-the-room part of this issue, which is the defense counsel. It's the defendant's attorney's job to provide the best legal counsel, so it follows that the type of defense counsel should be regarded as a significant contributing factor of conviction rates. However, it wasn't mentioned.

A 2000 Bureau of Justice Statistic report titled “Defense Counsel in Criminal Cases” addressed the outcomes of federal and local criminal cases based on the type of defense counsel. The data was from, in part, U.S. district court statistics for persons accused of Federal crimes (fiscal year 1998) and pretrial records for felony defendants in the Nation's 75 largest counties (1992-96).¹³

The BJS report addressed both their premise (the longer the defendant spends in pretrial detention), and conclusion (more likely the defendant will be convicted).

Regarding the time spent in pretrial detention, the report found “About half of defendants using a public defender or assigned counsel, compared with over three-quarters employing a private attorney, were released from jail prior to trial.”¹⁴

Regarding the conviction rates, interestingly, the BJS report found “Defendants with publicly financed or private attorneys had the same conviction rates.”¹⁵

If the researchers' hypothesis were correct, then since defendants with public attorneys were significantly less likely to be released prior to trial than those with private attorney, it should follow that they should also have a higher conviction rate than defendants with private attorneys. However, this wasn't the case; defendants had about the same conviction rates regardless whether a public or private counsel was used.

Boxout (page 4) – Challenges in researching the impact of pretrial detention

In this boxout, the authors' point out the challenges of analyzing the data to understand the impacts of pretrial detention, since there are many variables for researchers to consider in order to attempt to draw any conclusions based on data.

For example, the random assignment of judges is one with some judges being more lenient than others. In addition, some researchers have suggested it's more likely defendants will be released when their cases which are heard toward the end of the week. [It's kind of like the truism that it's better to buy a car which was built in the middle of the week rather than on a Friday or Monday.]

Reading between the lines of this section, it's comes across an admission that there are too many variables to come to any conclusions on this topic based on evidence, logic, and reason. So, they're just going to make conclusions anyhow.

There is also a nugget in this boxout which deserves highlighting. While describing how regression analysis looks for correlations between detention and outcomes, they temper it by stating, "Correlation does not, however, necessarily mean causation"¹⁶. Unfortunately, nearly the entirety of their report seems to pretend that correlation does mean causation.

Pretrial detention and sentencing

Much the same as the [Pretrial detention and conviction](#) section, this section of their report correlates sentencing with pretrial detention. And just the same as before, the "correlation does not mean causation" axiom is conspicuously avoided while never attempting to consider any real cause, like their legal counsel.

For example, it's pointed out "the impact of pretrial detention on sentencing severity is greatest for people who are classified as low risk, held on the smallest amounts of bail, or charged with misdemeanors rather than felonies"¹⁷. With that, it's stated "the larger effect of pretrial detention on sentencing for people with these lower level cases may, at least in part, be because they are more likely to be sentenced to the time already served in jail pretrial than people facing more serious charges"¹⁸.

Throughout all of this, the contention made is pretrial detention is the cause of it without offering any evidence that it actually is.

Contrary to this, the Bureau of Justice Statistics report presented data correlating sentencing with the defendant's type of legal representation. For more serious charges, "On average State inmates who used appointed counsel expected to serve over 7 years on sentences of 13 years, while those who hired their attorneys expected to remain in prison 8 years on sentences of 15 years"¹⁹.

While the BJS report did not provide data for misdemeanor offenses, the correlation was made between types of attorneys (public versus private) and sentencing. As previously stated, it is the attorney's job to provide the best council for the defendant.

Pretrial detention and future justice system involvement

The entire section of the report contends the more time a defendant spends in pretrial detention, the more likely the defendant will be involved in future criminal activity.

Nowhere in this section does it give any evidence that pretrial detention leads to recidivism. The researchers to the studies they site found a correlation between pretrial detention and recidivism, then hypothesize why pretrial detention causes an increased risk to recidivism. No other contributing factors to recidivism are considered.

Once again, correlation does not mean causation. While it states that the researchers controlled for demographics and “other pertinent factors” for their studies, there are still questions about the rationale adopted for their conclusions. For example, in the second paragraph, the researchers “found that people held for the entire pretrial period were 1.3 times more likely to be arrested on new charges following disposition of the original case than people who were released at some point pending trial.”²⁰

So, the researchers compared defendants who were detained for the *entire pretrial period* to defendants who were released “*at some point*”. It’s obvious there will be a disparity for this. Someone who sits in jail cannot be out working, going on with their life as someone who can. Almost certainly after being incarcerated for three to five weeks, a defendant will be unemployed when he or she is released and their options a very limited.

The question is why were the defendants detained. If all of the “other pertinent factors” were controlled, that implies the researchers compared defendants with similar charges, backgrounds, and histories. If that is true, then it doesn’t make sense that some of those defendants remained in jail the entire time while others were released.

It begs more questions than it answers. Why were the defendants detained the entire pretrial period? Was it they didn’t receive a bond or they did receive a bond and were unable to get it posted? If they didn’t receive a bond, why? Did their attorney attempt a bond hearing? If they had a bond and couldn’t get it posted, why was that?

None of this was considered. There was no why. The ‘why’ was assumed to be only because of pretrial detention. Also, regarding issue of a defendant can’t post a bond because he or she’s family can’t come up with the money. Although this is anecdotal, very often the defendant has burned his or her bridges and can’t get anyone to sign. The point is there are many reasons which weren’t considered.

This leads to the other issue, which is the sources cited as their evidence. This section begins by citing a study by the Arnold Foundation. The Arnold Foundation is hardly an unbiased source on this issue. The Arnold Foundation has been a consistent advocate of pretrial release, as well as many other criminal justice reforms (some of which I agree with).

Had the researcher disclosed anything other than the negative aspects of pretrial detention, would the study have been published? Unfortunately, advocacy groups priority is advocating for a cause, as well as received more money. Getting to the truth of an issue is too-often discounted and ignored.

Pretrial detention perpetuates inequities in the criminal justice system

This section attempts to make the case that the minorities and women are more likely to be held in pretrial detention throughout the resolution of their cases.

There are real problems with the author's arguments in this section. First of all, as with the other sections, it's admitted that the research between pretrial detention with regards to race is mixed.²¹ Hence, a solid conclusion cannot be reached based on data or evidence. Once again, the sources the authors used were cherry-picked.

Also, the authors' arguments lack reason, are somewhat incoherent, and contradictory. Particularly on the paragraph on how monetary bail impacts women. They admitted that (1) women are released on recognizances at higher rates, (2) release is denied to women less often, and (3) bail amounts are set lower for women. However, women are less likely to afford bail when bail is set.²²

Then it states, "It is often women, however, who absorb the financial costs, including bail, attorney fees, and court fines and fees, when family members are incarcerated, which, in many cases, deepens their financial insecurity"²³ That begs the question, "If women are less likely to afford bail when bail is set, then how do they often absorb the financial costs associated with an arrest?"

The answer lies in what the authors didn't explore, which is the reason women are less likely to afford bail whenever it's set. Women commit far less crimes than men. But for female inmates who end up being jailed, "Most female offenders are poor, undereducated, and unskilled, with sporadic employment histories. A survey of female jail inmates in the United States found that nearly two-thirds were unemployed when arrested, while fewer than one-third of male inmates were unemployed."²⁴

The conclusion the authors make is that bail increases their financial insecurity, therefore, the solution is to eliminate monetary bail. Note that the authors target bail to be eliminated to ease the financial burden to women. Attorney's fees, which are often exorbitant, don't increase women's financial insecurity. Court fees and fines, which are rarely questioned, don't increase women's financial insecurity. It is only the bail premium that burdens women. In reality, the bail premium is usually much less than attorney's fees or court costs and fines.

This type of reasoning shows the true agenda of many groups, which includes the Vera Institute of Justice, involved in America's criminal justice system. While they claim to be sticking up for the poor and downtrodden, they are exploiting them for their own means, often doing more harm to the people they claim to be helping.

Better approaches to pretrial justice

This section attempts to give alternatives to pretrial detention. However, their alternative are weak and arguments are weaker.

For instance, their first statement is an example of an overreach: “The mounting evidence linking pretrial detention to harmful consequences for people who are held in jail demands that jurisdictions adopt new approaches.”²⁵

It’s understood that being incarcerated is not a good thing for anyone, but it doesn’t demand jurisdictions adopt new approaches. The “mounting evidence” isn’t there. As previously pointed out, their sources (i.e. mounting evidence) are specious at best. The pro-reform groups will demand it regardless of the evidence, but until an honest discussion of pretrial detention in its’ full context as compared to the alternatives takes place, these cries for reform should be dismissed.

Regardless, this section lists four changes to our criminal justice system which could “yield big results”. They are meaningful bail hearings, pretrial supervision, court date reminders, and unsecured bonds.

Both pretrial supervision and unsecured bonds should be dismissed outright. There is plenty of data from unbiased sources which show that defendants released with private bail have much lower failure-to-appear rates than all forms of public bail. Just to name a couple:

- A 2007 study from the Bureau of Justice Statistics report titled *Pretrial Release of Felony Defendants in State Courts* found that FTA rates for public forms of pretrial release (i.e. personal recognizance, etc.) were almost double that of private bail.²⁶
- In an in-depth study comparing public and private pretrial FTA outcomes titled *THE FUGITIVE: EVIDENCE ON PUBLIC VERSUS PRIVATE LAW ENFORCEMENT FROM BAIL JUMPING* found that “In light of the persistent criticism that surety bail encourages failure to appear, it is perhaps surprising that the data consistently indicate that defendants released via surety bond have lower FTA rates than defendants released under other methods.”²⁷.

The other recommendations of meaningful bail hearings and court date reminders are superfluous and inconsequential proposals, especially given the significance with changes which they’re advocating.

Conclusion

Their conclusion is just a plea to stop monetary bail while implying there should be no pretrial detention. There are many ways our system can be improved, but this Vera Institute of Justice report misses the mark in a few different ways.

First, as previously stated, they lack the data, or facts. The sources they site are questionable at best. I've pointed out just a couple of the egregious instances, such as quoting the source out of context or even stating the opposite of their source, and use completely biased sources whose claims are not backed up.

Secondly, their arguments lack any amount of critical thinking or reason. They have constructed a soundbite argument "bail is unfair to the poor", which will only work with those unwilling or unable to honestly consider the ramifications of their proposals.

Before listing some of the considerations, it's important to have a grounded understanding of basic precepts of the **pretrial aspect of criminal justice.

The first is that a governing jurisdiction, be it local, state, or federal, has a responsibility to ensure criminal cases are adjudicated with an objective to seek justice for all parties involved. In order to achieve this, the defendant must be present at trial. Therefore, the governing jurisdiction has a responsibility to ensure the defendant is present.

Another precept to understand are the three considerations which determine if a defendant is to be released. They are:

- Is the defendant a danger to society?
- Is the defendant a danger to him- or herself?
- How likely is it the defendant will show up to court?

The oldest and most successful method for ensuring a defendant shows up for court is the private bail bond system. The reason is simple: real people, which includes family and loved ones of the defendant, have a personal and financial responsibility to ensure the defendant goes to court when secured with private bail. As detailed in the [previous section](#), the data and research shows that private bail outperforms all forms of public bail.

Now consider the alternatives for the defendant. The first obvious alternative would be to just release the defendant on a personal recognizance bond or equivalent. The defendant would just be released with few, if any, strings attached. The problem with this is (1) there is no assurance the defendant will come back to court, (2) there a possibility the defendant is a danger to him or herself or a danger to the community, and (3) for defendants who actually committed a crime, the victims of the crime are disregarded.

Another alternative would to be hold the defendant in jail until the court date. This is an obviously bad way to go, both for the defendant and the jail. A defendant should have the opportunity to be released to continue with life while awaiting trial. The jail would soon become overpopulated.

That leaves public forms of pretrial release as alternatives. There are currently two types: pretrial services and risk assessment tools.

The problem with pretrial services is it removes the principle of "Innocent Until Proven Guilty" for our criminal justice system. The defendant is essentially placed on probation before being tried. Defendants have to report to their pretrial services agent, similar to a probation officer. Depending on the case, they may have to attend classes which they have to pay for, similar to being on probation. They may have to test for alcohol or drug usage, similar to being on probation. Should the defendant miss an appointment or test dirty, that is another charge and a warrant is issued and the defendant is re-arrested. For the poor, and especially those with addiction problems, pretrial services entraps defendants in the justice system.

Finally, risk assessment tools are used to predict whether or not a defendant will show up to court. There are many problems with these tools. What happens is the defendant is interviewed and given a score. The higher the score, the less likely the defendant will be released. This score is based on the interview, criminal history, etc. A valid criticism of it is the poor and minorities typically get higher scores.

For example, a defendant who has lived at the same address for more than a year will be looked upon more favorably than one who hasn't. Low-income people typically move often. They then get a higher score for that reason alone, even if their address changes are within the community.

The pro-reform advocates who demagogue this issue are doing no favors to the people they claim to be rescuing. Should monetary bail be done away with, the negative effects will be felt in our communities in various ways. The poor and minorities will be further exploited and burdened with yet another hurdle to face from our system. The courts, jails, and law enforcement will be required to expand their duties, thus creating higher taxes for the citizens. The citizens will be forced to pay more for a much inferior service.

Removing pretrial detention and private bail is a really bad idea. It is being pushed by charlatans who benefit, both politically and financially, by exploiting the poor and minorities. Such ideas should be dismissed and the those advancing these policies should be called out to prove their ideas with facts, logic, and reason.

EndNotes

- ¹ Digard and Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention* (Vera Institute of Justice , 2019), p 1, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/Justice-Denied-Evidence-Brief.pdf>. Summary states 740,700 inmate have not yet been convicted , but end note states 740,700 inmates incarcerated
- ² Ibid, p. 15
- ³ Ibid, p. 2
- ⁴ Jacob Kang-Brown and Ram Subramanian, *Out of Sight: The Growth of Jails in Rural America* (New York: Vera Institute of Justice, 2017), 9-10, <https://perma.cc/J9DW-4WK5>.
- ⁵ Digard and Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention* (Vera Institute of Justice , 2019), p 2, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/Justice-Denied-Evidence-Brief.pdf>.
- ⁶ U.S. Department of Justice, Office of Justice Programs. November 2007, NCJ 214994. Accessed January 4, 2018. <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf>, p 8.
- ⁷ Ibid, Table 7, p 9.
- ⁸ Judy Maples. "Bail Bond Systems Works Well for Potter County." *Amarillo Globe-News*, April 9, 2016. Web. 25Oct.2017, <https://www.amarillo.com/article/20160409/OPINION/304099824>, Accessed August 28, 2019
- ⁹ Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (Houston, TX: Laura and John Arnold Foundation, 2013), <https://perma.cc/498S-LM6P>, p10.
- ¹⁰ Digard and Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention* (Vera Institute of Justice , 2019), p 3, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/Justice-Denied-Evidence-Brief.pdf>.
- ¹¹ Ibid, p 4.
- ¹² Ibid, p 4.
- ¹³ Defense Counsel in Criminal Cases." U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. November 2000, NCJ 179023. p 2, Caroline Wolf Harlow, Accessed September 9, 2019. <https://www.bjs.gov/content/pub/pdf/dccc.pdf>
- ¹⁴ Ibid, p 5.
- ¹⁵ Ibid, p 1.
- ¹⁶ Digard and Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention* (Vera Institute of Justice , 2019), p 4, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/Justice-Denied-Evidence-Brief.pdf>.
- ¹⁷ Ibid, p 5.
- ¹⁸ Ibid, p 6.
- ¹⁹ Defense Counsel in Criminal Cases." U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. November 2000, NCJ 179023. p 9, Caroline Wolf Harlow, Accessed September 9, 2019. <https://www.bjs.gov/content/pub/pdf/dccc.pdf>
- ²⁰ Digard and Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention* (Vera Institute of Justice , 2019), p 5, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/Justice-Denied-Evidence-Brief.pdf>
- ²¹ Ibid, p 7.
- ²² Ibid, p 7.
- ²³ Ibid, p. 7
- ²⁴ Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Women in the Criminal Justice System* (Carolina Academic Press, 2003), p 5, <https://www.stephaniecovington.com/assets/files/4.pdf>, Web. 19-Nov-2019
- ²⁵ Digard and Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention* (Vera Institute of Justice , 2019), p 8, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/Justice-Denied-Evidence-Brief.pdf>
- ²⁶ U.S. Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts, 1990-2004*, November 2007, NCJ 214994, Table 7, p. 9. <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf>
- ²⁷ Helland and Rabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, *Journal of Law and Economics*, the University of Chicago(2004), pg 96. Web. 17-Nov-2019