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# History, Issues and Analysis of Pretrial Release and Detention

## A Policy Analysis

**November 1994**



Minnesota's Constitution provides persons accused of criminal offenses, other than capital offenses, with the right to release on bail pending trial, and it prohibits setting bail in excess of the amount needed to assure the defendant's appearance at trial.[1] These constitutional provisions place limits on pretrial release and detention policies in Minnesota and effectively prohibit the use of preventive detention, even of assumedly dangerous persons. Increasing public concern about violent crime has lead some Minnesotans to question these constitutional provisions. This policy analysis addresses some of the critical issues related to the authorization of preventive detention and discusses the potential effects of its use in Minnesota.

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# Summary

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- The right to release on bail for criminal defendants awaiting trial was virtually unconditional in the United States until quite recently. The federal Bail Reform Act of 1966 formalized that right by establishing that 1) flight risk alone was to be considered when determining conditions of pretrial release, and 2) preventive detention through the denial of bail could be ordered only for those accused of a capital offense.

- Public awareness of the prevalence of crime, particularly among defendants on pretrial release, led the federal government and several states to rethink existing pretrial release policies throughout the 1970s and 1980s. Many began to question the almost unconditional right to bail and the omission of public safety as a purpose of setting release conditions.

- In 1970, the District of Columbia enacted the first legislation permitting the use of preventive detention. This law added the dangerousness of the defendant as a criterion to consider for conditions of pretrial release or denying release altogether.

- The precedent set by the D.C. law, coupled with increasing concern about the problem of *sub rosa* detention—i.e., detention of allegedly dangerous defendants secured by setting extremely high bail under the pretense of concern about flight risk—led Congress to enact the second Bail Reform Act in 1984. The 1984 act greatly expanded the range of detainable defendants by permitting the detention of persons accused of certain offenses who also were believed to pose a threat to public safety.

**What are the current alternatives for pretrial decisionmaking?** (Page 9)

- Federal and state judges typically choose from the same pretrial alternatives—i.e., nonfinancial release, financial release, or some form of detention—but the regulations governing the use of these alternatives differ between jurisdictions. Twenty five states, the District of Columbia, and the federal government permit judges to deny bail for certain defendants believed dangerous to the public. The remaining states—Minnesota is one—permit exceptions to the bail right in capital cases alone.

**How common is pretrial misconduct among releasees?** (Page 13)

- Misconduct among offenders released before trial varies substantially by the jurisdiction within which the offender is charged (federal versus state) and type of offense charged. Research reveals that rates of pretrial misconduct are lower among federal than state defendants, and persons accused of drug offenses exhibit the highest rates of pretrial misconduct among defendants charged in either federal or state courts. However, the

majority of all offenders who engage in pretrial misconduct, regardless of jurisdiction or offense charged, do not commit serious or violent crimes.

**Does preventive detention reduce pretrial misconduct?** (Page 16)

- Federal statistics reveal that the use of preventive detention has not reduced rates of pretrial misconduct among detainees, contrary to an intention of the Bail Reform Act of 1984.

**To what extent does *sub rosa* detention occur?** (Page 18)

- A recent study conducted by the U.S. General Accounting Office (GAO) suggests that the use of *sub rosa* detention was common under the Bail Reform Act of 1966 as evidenced by the high rates of detention due to failure to make bail. The proportion of defendants detained who were unable to post bail declined significantly shortly after Congress passed the Bail Reform Act of 1984, although the overall detention rate increased slightly and has continued to increase over the last decade.

**Does preventive detention violate U.S. constitutional guarantees?** (Page 22)

- The issue of preventive detention has generated constitutional questions. The creation of policies that govern decisions to release or detain the accused before trial requires a careful balancing of the rights secured by the Fifth Amendment—which forbids the deprivation of life, liberty, or property without due process of law—with legitimate government interests in the resolution of criminal charges and public safety.

**How accurate are predictions of dangerousness and flight risk?** (Page 25)

- The debate over preventive detention is further complicated by the uncertain prediction of misconduct by potential releasees. Empirical research shows that the best prediction models result in only a modest (about 20 percent) increase over what could be predicted by chance alone. Nevertheless, predictions based on statistical methods still appear more accurate than decisions based on subjective judgements.

**Would preventive detention be applied in a racially discriminatory manner?** (Page 27)

- Many observers contend that some racial bias currently exists in pretrial decisionmaking; however, such bias is difficult to measure. This makes it difficult to predict whether preventive detention would be employed in a more racially neutral manner than in current pretrial decisionmaking.

**How might preventive detention affect Minnesota's jails?** (Page 29)

- Most county jails in Minnesota, like those nationwide, are at or over capacity. The impact of more stringent pretrial release and detention policies on jail crowding in Minnesota is difficult to predict; federal detention statistics suggest that Minnesota might expect a 17 percent increase in the number of pretrial detainees within one year of implementing preventive detention and additional increases in subsequent years.

**What would allow preventive detention in Minnesota?** (Page 32)

- Minnesota's bail requirement is a state constitutional mandate. Thus, a constitutional amendment is required to permit state courts to order preventive detention for defendants thought too dangerous to release. Voter ratification of a proposal to repeal the state constitutional bail provision would clear the way for legislation establishing preventive detention policies.

**Would the public support greater use of preventive detention?** (Page 33)

- Public support for greater use of preventive detention appears to be increasing in Minnesota and across the nation. The American public perceives not only an increase in violent crime, but increasingly feels that too many dangerous persons who have been arrested for serious crimes are being released, through bail, while awaiting trial. ♦

# A Brief History of Pretrial Practices in the U.S. and Minnesota

**History reveals that lawmakers and the courts have long struggled with issues involving the pretrial management of defendants, a central concern being whether or not to detain defendants deemed to be of danger to the public. During the past three decades, the federal government and many states have first moved to restrict the use of preventive detention based solely on perceived dangerousness, and then reversed themselves by allowing the consideration of dangerousness as a criterion for preventive detention.**

**The practice of providing pretrial release on bail originated in Elizabethan England. The purpose was to minimize pre-conviction punishment while assuring the accused would appear at trial.**

**The practice of bail was developed in England during the thirteenth century as a practical method to accommodate the needs of the circuit judge system.** In Elizabethan England, magistrates traveled from county to county and served a particular locality for only a few months of each year.[2] Since pretrial periods could be quite lengthy, release pending trial became an established practice. However, the English realized pretrial release gave the defendant the opportunity to flee before trial. To minimize such risk, it became customary in the case of non-capital offenses to release the accused into the custody of a trusted friend or neighbor who would assure the court that the defendant would appear for trial. Nevertheless, the flight risk presented by those accused of capital offenses—i.e., crimes for which the punishment is death—was considered too great to allow release prior to trial.

The English system of pretrial release initially required the custodian to surrender to the court if the accused failed to appear before the magistrate. However, money or property pledged by the custodian or the accused gradually replaced the requisite corporal surety, as the judiciary adopted the belief that the possible forfeiture of assets would sufficiently motivate defendants to appear.

**A combination of these two methods of pretrial release—personal surety and financial surety—was adopted in the United States and employed until the mid 1800s.**[3] Changes occurring in nineteenth century America required the alteration of existing pretrial

release practices.[4] The opportunity for flight offered by the American frontier, coupled with a growing class of propertyless citizens, resulted in greater rates of pretrial detention. Unable to pay for their pretrial release, a growing number of defendants remained jailed pending trial.[5]

**The problems of spiraling bail amounts and increasing rates of pretrial detention fostered the conception of the role of the bail bondsman in the United States.** A bail bondsman is an individual who assumes financial and, to some extent, personal responsibility for the accused. The bondsman, in exchange for a nonreturnable fee paid by the accused, guarantees the court that the accused, for whom the court has set a bail amount, will appear for trial.[6] Typically, the bondsman's fee is ten percent of the amount of the bond set by the court. Should the defendant fail to appear for trial, the bondsman is required to pay the court the full amount of the bond.

**Several studies in the 1950s and 1960s revealed that the bail system in this nation was inherently biased against the poor. Indigent defendants are less likely to make bail and, thus, are more likely to be detained pending trial, to lose their jobs, to have difficulty preparing for their defense, and to be convicted.**

Although criticized in the early twentieth century, the use of bail bondsmen and financial release persisted in the United States until the mid 1960s. At this time, concern over class and racial inequity, allegations of corruption among bail bondsmen, and questions pertaining to the constitutionality of pretrial detention inspired the examination of pretrial practices.[7]

**However, the principal issue around which the bail reform movement began was the primacy of financial resources in securing pretrial release.** Under the bail system, the ability of the accused to make bail or the fee required by a bondsman was the sole determinant of whether or not the accused obtained release before trial. Consequently, indigent defendants were more likely to be detained before trial than wealthier defendants regardless of the offense charged.

Several studies[8] conducted in the late 1950s and early 1960s revealed that the bail system was inherently biased against the poor and suggested that the problem of bias in pretrial decisionmaking had a "rippling effect."[9] The empirical research showed that defendants who were detained before trial were more likely to lose their jobs and have greater difficulty

preparing an adequate defense than were released defendants.[10] Research also revealed that, compared to defendants charged with similar crimes but able to secure pretrial release, defendants detained before trial were "more likely to plead guilty, to be found guilty after trial, to be sentenced to prison, and to be denied probation."[11]

**The Vera Foundation's Manhattan Bail Project further discredited the use of financial surety and recommended an alternative to bail—*release on recognizance*—for any defendant deemed to be a low flight risk.**

**The event that contributed most to the rise of the 1960s bail reform movement was the creation of the Vera Foundation and Institute.** The Vera Foundation was established in 1961 for the purpose of funding and promoting the reform of pretrial release.[12] To this end, the foundation directed the Manhattan Bail Project, the results of which further discredited financial surety and provided empirical support for the use of nonfinancial release conditions.

The results of the Manhattan Bail Project revealed that defendants who posed little risk of flight could be identified utilizing objective criteria such as the accused's ties to the community, length of residence in the community, living arrangement, length of employment, number of prior convictions, and type of offense committed.[13] Defendants who were deemed low flight risks were considered suitable for nonfinancial release—now commonly referred to as *release on personal recognizance* (ROR)—and were released on simply their promise to appear for any subsequent court dates.

**The federal Bail Reform Act of 1966: 1) created a presumption favoring the use of *release on recognizance* for defendants in federal court; 2) limited the criterion for setting conditions for pretrial release to flight-risk alone; and 3) restricted pretrial detention through denial of bail to those accused of capital offenses. Most states subsequently enacted similar provisions.**

Knowledge of the Vera Foundation's findings spread quickly, and the consequence was rapid change during the 1960s and 1970s in pretrial release practices at both the federal and state levels. Pretrial release and detention policy in federal courts was altered considerably when Congress passed the Bail Reform Act of 1966. The 1966 act was notable for creating a presumption in favor of the use of ROR for those accused of federal offenses. In addition, the act formalized two practices governing pretrial decisionmaking:

1) flight risk alone was to be considered when determining conditions of pretrial release; and,

2) preventive detention through the denial of bail could be ordered only for those accused of a capital offense.[14]

**Public sentiment soon shifted, however, and by 1970 Washington D.C. enacted the first legislation permitting pretrial detention through denial of bail for defendants accused of certain serious crimes. It also added dangerousness as a criterion for setting conditions of release or for denying bail entirely.**

**The Bail Reform Act of 1966 also served as a model for reform among the states.**[15] In Minnesota, the Rules of Criminal Procedure which govern state pretrial release practices are taken primarily from the Bail Reform Act of 1966.[16] In addition, 31 states, including Minnesota, currently require the use of ROR release for specified offenses.[17]

**Nevertheless, the prevailing philosophy which gave rise to the Bail Reform Act of 1966 soon shifted dramatically as a result of growing public concern over rising crime rates, particularly crimes committed by defendants on pretrial release.**[18] In 1970, the District of Columbia enacted the first legislation permitting the use of preventive detention for defendants accused of certain serious offenses. The D.C. law added the dangerousness of the defendant as a criterion to be used when setting conditions of pretrial release or denying release altogether.[19]

**The federal Bail Reform Act of 1984 reversed the earlier presumption in favor of pretrial release, and greatly expanded the range of defendants who could be detained, including those believed to be dangerous.**

The precedent set by the D.C. law and growing concern about the problem of *sub rosa* detention led Congress to reconsider the policies of the 1966 Bail Reform Act within just a few years of its enactment.[20] *Sub rosa* detention is the detention of allegedly dangerous defendants secured through the setting of extremely high bail under the pretense of concern about flight risk.

**The Bail Reform Act of 1984 re-embraced preventive detention.** The issue of pretrial release was debated by Congress throughout the 1970s, but federal legislative action did not occur until 1984. In this year, Congress passed the second Bail Reform Act. The Bail Reform Act of 1984 marked a considerable departure from the 1966 act, assuming "a connection between crime and pretrial release that was not present in the 1966 act."[21] The 1984 act limited for certain defendants the earlier presumption in favor of pretrial release; more specifically, the act greatly expanded the range of defendants who could be detained by including persons believed to be dangerous.[22]

**Since 1984, 17 states have joined the federal government in permitting pretrial detention through the denial of bail for defendants accused of certain non-capital offenses**

**The Bail Reform Act of 1984, like its 1966 predecessor, prompted modification of state pretrial practices.** In the past decade, seventeen states have joined the federal government in enacting legislation or establishing rules which permit the denial of bail for defendants accused of certain non-capital offenses.[23] However, several authors suggest that the use of preventive detention remains infrequent in states with such policies.[24] ♦

# What Are the Current Alternatives for Pretrial Decisionmaking?

**Both federal and state judges typically have available to them the same pretrial alternatives — i.e., nonfinancial release, financial release, or some form of detention. However, the regulations governing the use of these alternatives differ among jurisdictions. Seventeen states and the federal government permit judges to deny release for those accused of certain non-capital offenses. The majority of the remaining states, including Minnesota, prohibit the denial of pretrial release on bail in all instances except cases in which the offender is accused of a capital offense.**

**Federal:** Federal pretrial release decisions currently are governed by the provisions of the Bail Reform Act of 1984. Under the 1984 act, defendants not detained must be released under the least restrictive alternative necessary to assure appearance and protect public safety. These federal provisions do not govern pretrial release decisions in state courts, but are presented here as examples of policy alternatives.

The 1984 act provides four alternatives from which federal judicial officers must choose when making pretrial release decisions: 1) **nonfinancial release**, 2) **financial release**, 3) **temporary detention**, and 4) **detention after a hearing.**[25] These four alternatives are briefly described below.

**Nonfinancial Release**: Nonfinancial release alternatives include **release on personal recognizance, conditional release, release on unsecured bond,** and **citation release.**

- **Release on recognizance (ROR)** permits the pretrial release without bail bond of defendants deemed not dangerous or of low flight risk. Defendants may be prosecuted for any failure to appear for subsequent court dates.

- **Conditional release** requires defendants to follow specified conditions of release deemed necessary to guarantee the defendant's appearance at trial or the safety of the community, in lieu of posting bail. Typically, defendants on conditional release are monitored by a pretrial release program and are required to

report to the program regularly, undergo drug monitoring, and/or submit to drug treatment. Restrictions also may be placed on the defendant's movements and associations.

- Defendants released under an **unsecured bond** likewise do not post bail but risk forfeiting a prescribed monetary amount upon failure to appear.

- Under a **citation release**, the arrestee is released before his first court appearance by a law enforcement officer's written order.

**Financial Release**: The Bail Reform Act of 1984 prohibits a federal magistrate from imposing any financial condition which, by itself, results in the pretrial detention of the accused. Financial release alternatives include the use of **deposit bonds, surety bonds,** and **collateral bonds.**

- Defendants eligible for release on **deposit bond** must post with the court a portion of the bail bond, typically ten percent of the full bond amount. The defendant is responsible for the remainder of the bond upon failure to appear.

- Release on a **surety bond** requires that the defendant post the full bail amount with the court.

- Defendants unable to post the amount of the surety bond may post collateral instead, thus securing release on a **collateral bond.**

**Temporary Detention:** A defendant may be held up to ten days without a hearing if a judge determines that the defendant may flee or pose a danger to the community and

a) committed the present offense while on probation or parole,

b) is not a citizen of the United States, or

c) is on pretrial release for a previous offense for which he or she has not yet been tried.[26]

**The federal Bail Reform Act of 1984 prohibits setting bail excessively high, such that it results in the pretrial detention of a defendant.**

**However, the act stipulates that a defendant may be detained before trial through the denial of bail if no condition of release will likely ensure both his appearance at trial and the safety of the community.**

**The 1984 act requires that if a defendant is denied bail and, thus, detained pretrial, certain procedural safeguards must be applied to determine whether the detention is necessary.**

**Detention after a Hearing:** The Bail Reform Act of 1984 stipulates that a defendant may be detained before trial if it can be demonstrated that no condition or combination of conditions of release will reasonably assure the defendant's appearance, the safety of the community, or both. However, a detention hearing first must be held to determine if detention is warranted.

The 1984 act also establishes procedural safeguards and a list of general factors which the court must consider before ordering the detention of the defendant. These safeguards provide the defendant the right to counsel at the detention hearing, the right to testify and present information, and the right to cross-examine any witnesses who appear at the hearing.[27]

To detain the defendant, the prosecutor must prove to the court by "clear and convincing evidence" that the defendant indeed is a danger risk or "through a preponderance of the evidence," is a flight risk.[28] However, offenders accused of committing specific drug-related or violent crimes[29] face a rebuttable presumption that no conditions of release will reasonably assure the appearance of the defendant, the safety of the community, or both. The rebuttable presumption shifts only the burden of producing evidence from the prosecutor to the defendant; the prosecutor retains the burden of persuading the court of the flight or danger risk posed by the defendant.

**About half the states still have a constitutional, statutory, or regulatory requirement specifying a defendant's right to bail in all but capital offenses.**

Conditions of release, as well as the initial decision to detain, are determined by the judge who is directed to consider several factors relating to the crime of which the defendant is accused and various attributes of the defendant. Factors include the nature and circumstances of the offense charged and the weight of the evidence against the defendant. In addition, the judge considers the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record of appearance at court proceedings.[30]

**States:** State judicial officers, like their federal counterparts, typically choose from the four alternatives described above when making pretrial release decisions. However, state policies stipulating the purpose of bail and the offenses eligible for pretrial release or detention vary considerably from one another and from federal policies.

**The Minnesota Constitution provides a right to bail, except in capital cases. The Minnesota Rules of Criminal Procedure establish that appearance at trial is the sole purpose of setting conditions of release; however, it provides that community safety may be considered in determining flight risk. Thus, the role of public safety in pretrial decisionmaking is rather ambiguous in Minnesota.**

Nearly all of the states specify the assurance of appearance at trial as a purpose of establishing bail conditions, and over half of the states and the District of Columbia also cite the protection of the public as a legitimate purpose of bail. Twenty-five states and the District of Columbia provide exceptions to the right to bail for defendants accused of certain non-capital offenses. Twelve of these states permit the denial of bail for persons accused of non-capital offenses on the grounds that the defendant poses a danger to public safety if released before trial. Eight of the remaining states and the District of Columbia impose explicit requirements of proof, and four states impose no additional constraints at all.[31] All other states have a constitutional, statutory, or regulatory requirement specifying a defendant's right to bail in all but capital cases.[32]

**Minnesota:** In Minnesota, the state constitution requires setting bail for those accused of non-capital offenses, and the Rules of Criminal Procedure establish that assurance of appearance at subsequent hearings is the sole purpose of imposing conditions of release. The perceived threat that the accused poses to community safety is not assigned such a purpose. However, the Rules of Criminal Procedure cite community safety as one of the criteria which judicial officers must consider when determining flight risk and establishing conditions of release. The other factors considered at this stage of pretrial decisionmaking are those established by the Bail Reform Act of 1966, which include the nature and circumstances of the offense charged; the weight of the evidence against the accused; and the accused's family ties, employment, financial resources, character and mental condition, length of residence in the community, record of convictions, and record of appearance at court proceedings or flight to avoid prosecution.

The fact that community safety is assessed during pretrial decisionmaking but only as an indicator of flight risk leaves the role of community safety in pretrial decisionmaking somewhat ambiguous. Perhaps as an indicator of flight risk, community safety could be considered a proxy for the severity of the offense committed; generally, severity of offense coincides with severity of punishment if convicted. However, this is mere speculation. The relationship between flight risk and community safety is not specified in the Rules of Criminal Procedure. ♦

# How Common Is Pretrial Misconduct among Releasees?

**Misconduct among offenders released before trial varies substantially by the jurisdiction within which the offender is charged (federal versus state) and by type of offense charged. Research reveals that rates of pretrial misconduct are lower among federal than state defendants, and persons accused of drug offenses exhibit the highest rates of pretrial misconduct among defendants charged in either federal or state courts. However, the majority of all offenders who engage in pretrial misconduct, regardless of jurisdiction or offense charged, do not commit serious or violent crimes.**

**Federal:** Pretrial misconduct includes both: 1) criminal acts (e.g., failure to appear in court or rearrest while on pretrial release), and 2) acts which are not criminal but violate some condition of the defendants' bail release (e.g., violation of curfew or failure to abstain from drugs or alcohol).

Table 1, using data from the National Pretrial Reporting Program (NPRP), shows that the likelihood of federal defendants on pretrial release engaging in pretrial misconduct varies with the offense charged. Among felony defendants, those charged with a drug or violent offense were more likely to commit an offense while on

**Table 1**

**Behavior of Federal Felony Defendants Released Prior to Trial: 1990**

| Type of Offense | No Violation | Violations while on Release | | | | | Number Released |
|---|---|---|---|---|---|---|---|
| | | Total | Failure to Appear | New Offense Charged: | | Technical Violation | |
| | | | | Felony | Misdemeanor | | |
| All Offenses | 87.7% | 12.3% | 2.5% | 1.8% | 1.1% | 7.9% | 22,977 |
| Violent Offenses | 82.7% | 17.3% | 1.8% | 2.4% | 3.5% | 10.8% | 878 |
| Property Offenses | 90.5% | 9.5% | 1.7% | 1.5% | 1.0% | 6.2% | 7,782 |
| Drug Offenses | 82.2% | 17.8% | 3.6% | 2.3% | 1.3% | 11.9% | 8,533 |
| Public Order | 93.0% | 7.0% | 1.9% | 1.1% | 0.7% | 3.9% | 5,784 |

Source: U.S. Department of Justice, *Compendium of Federal Justice Statistics, 1990*

**Relatively few federal defendants commit any violations while on pretrial release.**

pretrial release than those charged with either a property or public order offense. However, the vast majority of federal defendants released pending trial do not commit any violations; furthermore, and irrespective of the offense charged, the majority of the federal offenders who did engage in pretrial misconduct committed a minor crime or technical violation.

**States:** Data from NPRP also reveal that pretrial misconduct is relatively common among offenders charged in state courts.[33] NPRP collects data on felony defendants charged in the 75 largest counties in the United States to assess criminal justice processing at the state level. NPRP's research reveals that of state defendants charged in 1990, 18 percent were arrested for a new offense while on pretrial release and 24 percent violated their conditions of release by failing to appear in court (Table 2).

**However, among offenders charged in state courts who are on pretrial release, both rearrest and failure to appear in court are fairly common.**

**Table 2**

**Rates of Pretrial Misconduct Among State Felony Defendants: 1990**

| Type of Offense | Type of Pretrial Misconduct | |
|---|---|---|
| | Rearrest | Failure to Appear |
| All | 18% | 24% |
| Property | 21% | 28% |
| Drug | 20% | 26% |
| Violent | 16% | 19% |
| Public Order | 9% | 13% |

Source: U.S. Department of Justice, *Pretrial Release of Felony Defendants, 1990*

The NPRP data also reveal that pretrial misconduct among state offenders varies by offense charged. As shown in Table 2, rearrest and failure to appear rates were highest among property offenders and drug offenders and lowest among those accused of public-order offenses.

**A recent Hennepin County study reveals rearrest and failure to appear rates of 20 percent and 21 percent for state defendants on pretrial release — these rates are similar to the national averages for state courts.**

**Minnesota:** A recent study conducted by the Hennepin County Bureau of Community Corrections[34] revealed that rearrest and failure to appear rates among persons accused of a criminal offense in Hennepin County were similar to the state court averages reported by NPRP.

The Hennepin County sample consisted of all defendants accused of a gross misdemeanor or felony offense whose first appearance occurred between September 14, 1989 and February 28, 1990. The sampling procedure yielded a total sample of 1,058 offenders; statistical analyses to determine rearrest and failure to appear rates were performed on a subsample of 778 offenders, since 280 or approximately 26 percent of the total sample were detained from first appearance through case disposition.

Of the 778 released offenders, 20 percent were rearrested for a new offense between first appearance and case disposition. The majority of the offenses for which defendants were rearrested were minor offenses. Fully 81 percent of the 266 new offenses committed were petty misdemeanor or misdemeanor offenses; felony offenses accounted for 11 percent of all rearrests among released offenders.

The Hennepin County study also measured the failure to appear rate between the defendant's first appearance and case disposition. The study found that 21 percent of the 778 released offenders failed to appear at some time before case disposition. ◆

# Does Preventive Detention Reduce Pretrial Misconduct?

**Federal statistics suggest that the use of preventive detention has not reduced rates of pretrial misconduct among detainees.**

**The limited available evidence suggests that implementation of pretrial detention at the federal level has not had the intended effect of reducing pretrial misconduct.**

Pretrial misconduct rates among federal offenders have increased in the last decade, primarily due to an increase in technical violations. As shown in Table 3, the overall rate of pretrial misconduct among released defendants increased from 4.6 percent in 1983 to 12.3 percent in 1990. As stated above, much of this increase is attributable to an increase in the rate of technical violations recorded during this time. "Technical violation" refers to breaking a condition of release—such as failing to abstain from alcohol, if so ordered—rather than to another law violation or failing to appear for trial. Table 3 reveals that the technical violation rate among released offenders increased from 1.2 percent to 7.9 percent between 1983 and 1990. However, this considerable increase in technical violations is not necessarily an indicator of more frequent misconduct while on pretrial release; instead, at least part of the increase might be a reflection of increased monitoring of defendants by pretrial release agencies and a greater number of technical rules.

**Table 3**

**Rates of Pretrial Misconduct Among Federal Felony Defendants**

| Year | Pretrial Misconduct while on Release | | | |
|---|---|---|---|---|
| | Total | New Offense | Failure to Appear | Technical Violation |
| 1983 | 4.6% | 1.8% | 1.5% | 1.2% |
| 1985 | 6.5% | 2.0% | 1.8% | 2.6% |
| 1990 | 12.3% | 2.9% | 2.5% | 7.9% |

Sources: U.S. Department of Justice, *Compendium of Federal Justice Statistics, 1990*; U.S. Department of Justice, *Pretrial Release and Detention: The Bail Reform Act of 1984.*

The data presented in Table 3 also show that rates of rearrest and failure to appear have increased slightly since 1983; this suggests the Bail Reform Act of 1984 may not have had the intended effect on rates of pretrial misconduct. Between 1983 and 1990, the rearrest rate among federal pretrial detainees increased from 1.8 percent to 2.9 percent, and the failure to appear rate increased from 1.5 percent to 2.5 percent. Although small, the changes in these rates are not in the expected direction. Whether these types of misconduct would have increased further in the absence of pretrial detention is unknown. Anecdotal evidence suggests that criminal defendants are becoming increasingly hardened, on average, and that fact might be the cause of the increase in pretrial misconduct; however that assertion is difficult to assess. Thus, from the limited available evidence, it does not appear that the implementation of preventive detention at the federal level has reduced the incidence of misconduct among pretrial detainees. ◆

# To What Extent Does *Sub Rosa* Detention Occur?

**Previous research suggests that the use of *sub rosa* detention was fairly common in the federal court system during the time period covered by the 1966 Bail Reform Act, as evidenced by the high pre-1984 rates of detention due to failure to make bail.[35] The Bail Reform Act of 1984, which added consideration of public safety as a legitimate basis for pretrial detention, has significantly reduced the proportion of federal defendants being detained for being unable to post bail, even though the overall percentage of defendants being detained pending trial has increased significantly following the act.**

**Studies attempting to determine the prevalence of *sub rosa* detention among state defendants are inconclusive.**

***Sub rosa* detention is the generally illicit practice of effectuating pretrial detention for defendants assumed to be dangerous through the setting of extremely high bail. It is widely recognized that the impetus for this practice is the prohibition in some jurisdictions of pretrial detention based solely on perceived dangerousness.**

**Federal:** In 1987, the U.S. General Accounting Office (GAO) conducted a study which compared pretrial detention rates recorded a few months before and a few months after the 1984 Bail Reform Act.[36] The GAO study compared two random samples of felony cases charged in four federal district courts to determine the effect of the 1984 act on pretrial detention rates.[37] The first sample included 1,406 defendants whose cases commenced between January and June 1984 under the Bail Reform Act of 1966. The second sample included 1,544 defendants whose cases commenced between January and June 1986 under the 1984 act.[38]

Interview data obtained from 12 federal magistrates surveyed as a part of the 1987 GAO study revealed that prior to the 1984 act all had used financial bail to detain allegedly dangerous, non-capital offenders.[39] The magistrates stated that bail for defendants who were thought to pose a flight risk was set at an amount that would assure the appearance of the defendant. In contrast, in an attempt to prevent their release before trial, bail for defendants thought to be dangerous often was set at a level the magistrate felt the defendant could not pay.

The data presented in Table 4 support the statements of the magistrates noted above. The GAO study found that the percentage of defendants detained before trial increased from 26 percent in the first sample to 31 percent in the second sample. However, all of those detained in the first sample were detained for failure to pay the financial bail set by the court, whereas only half

of the detainees in the second sample were detained for this reason. The remainder of the detainees in the second sample were detained after being deemed a flight and/or danger risk.

**Table 4**

**Comparison of Pretrial Outcomes of Felony Defendants Charged in Federal Court under the Bail Reform Acts of 1966 and 1984**

| Pretrial Outcome | Analysis of Felony Defendants In Federal Court | |
|---|---|---|
| | 1966 Act | 1984 Act |
| **Released:** Nonfinancial Condition (ROR) | 30% | 35% |
| **Released:** Paid Bail | 32% | 23% |
| **Detained:** Flight and/or Danger Risk | 0% | 15% |
| **Detained:** Did Not Pay Bail | 26% | 16% |
| **Fugitives** | 7% | 6% |
| **Other** | 5% | 5% |

Source: U.S. General Accounting Office, *Criminal Bail.*

Note: Data on offenders for whom the pretrial release decision was governed by the 1966 act were collected between January and June 1984 (N=2,066); data on offenders charged for whom the pretrial release decision was governed by the 1984 act were collected between January and June 1986 (N=2,200).

**States:** As part of the National Pretrial Reporting Program (NPRP), a stratified sample of felony cases filed in state courts was drawn in May 1990.[40] Data on 13,597 felony cases were collected from 39 county jurisdictions, and analysis was completed using a weighted total of 56,618 cases. The results indicate that 65 percent of defendants who had felony charges filed against them in a state court were released prior to the disposition of their case. Of the 35 percent who did not secure some form of pretrial release, only one out of six

was held without bail. The remaining detainees, who represent 28 percent of all felony defendants, were assigned bail but failed to post the required bail amount.

The NPRP study also identified several factors that affect the probability of pretrial release. The seriousness of offense committed was somewhat associated with the probability of pretrial release and detention. Overall detention rates were highest for those accused of a violent offense (37 percent) and lowest for those accused of a public order offense (31 percent). The NPRP study also found when a bail amount was set, the probability of release decreased as the amount of bail was increased. Only 28 percent of defendants who had bail set at an amount of $20,000 or more eventually obtained release before case disposition, while nearly 70 percent of those who had bail set at an amount under $2,500 obtained release.

**Considerable controversy exists over how much *sub rosa* detention occurs in state court systems that disallow preventive detention. The common wisdom, backed by significant research, is that it is relatively common and widespread in such court systems. However, some noted criminologists disagree.**

The findings of the NPRP study suggest that the prohibition in some states of the use of preventive detention for potentially dangerous defendants has resulted in the continuing practice of *sub rosa* detention. However, one significant problem with that conclusion stems from the relationship between the alleged dangerousness of the defendant and the risk of flight. Criminal justice officials and the public alike typically view violent offenses against persons and other offenses that threaten the public welfare (i.e., drug offenses) as more serious than offenses against property. Accordingly, the severity of punishment if convicted often increases with the severity of the offense. However, severity of punishment is one factor employed by judicial officers when determining risk of flight. In this manner, judgements of dangerousness and flight risk often are associated, a phenomenon which may bias estimates of the occurrence of *sub rosa* detention.

In a recent analysis of court data, Jackson further questions the contention that *sub rosa* detention is common among the states.[41] Jackson examines characteristics of defendants booked into jail and finds that most detainees "are charged with misdemeanor offenses and do not have extensive criminal histories."[42] The data reveal that detained defendants are often of low socioeconomic standing, unemployed, poorly educated, have minimal financial resources, and

are drunk at the time of admission. Most of the offenders who are detained obtain release within a few hours or a few days; many have their original charges dropped. Of those convicted, relatively few are sentenced to jail and even fewer are sentenced to prison.

Jackson's findings present a markedly different picture of the typical pretrial detainee than that presented by the NPRP study. Jackson's study suggests that the typical pretrial detainee is not the victim of a judge who, believing the defendant is dangerous but lacking the authority to deny bail, sets bail excessively high to prevent the defendant from obtaining release. Rather, his study suggests that most detainees are accused of committing a minor offense but are held for a short time to "sober up" or while amassing enough resources to meet even a low bail amount.

In support of the NPRP findings, Jackson reports that those who remain for a longer period of time typically are accused of a more serious offense or have a more serious criminal history. Nevertheless, Jackson concludes that the primary effect of greater use of preventive detention at the state level would be jail overcrowding without a significant decrease in pretrial crime or danger to the public.[43]

It would appear from these conflicting findings that the prevalence of *sub rosa* detention among the states, some of which still disallow preventive detention, is unclear. ♦

# Does Preventive Detention Violate U.S. Constitutional Guarantees?

**"The creation of policies which govern decisions to release or detain the accused before trial requires a careful balancing of the rights secured by the Fifth Amendment — which forbids the deprivation of life, liberty, or property without due process of law — with legitimate government interests in both the resolution of criminal charges and public safety."[44] While acknowledging this need for balance, the U.S. Supreme Court nevertheless ruled in *United States v. Salerno* that the detention of allegedly dangerous defendants prior to trial does not violate the accused's constitutional rights. Still, the issue receives debate.**

**The argument against preventive detention.**

Those opposed to preventive detention contend that the only legitimate reason to order the detention of the accused before trial is to assure the administration and integrity of the trial process. **The logic of the argument against the use of preventive detention is as follows:**

**The argument against preventive detention rests on the assumption that it violates a defendant's constitutional right to due process.**

*Preventive detention violates a defendant's constitutional right to due process. The Fifth and Fourteenth Amendments explicitly state that the government may not deprive any person of life, liberty, or property without due process of law. This statement implies that those arrested are presumed innocent; thus, it forbids the imposition of punishment until guilt is established through the trial process. However, a purpose of preventive detention — i.e., incapacitation — also is one of the primary goals of punishment.[45] Thus, preventive detention is unconstitutional on the grounds that it punishes the accused before he or she is found factually guilty.*

*United States Supreme Court rulings upholding the constitutionality of preventive detention are based on improper precedent. The decision in United States v. Salerno[46] erroneously relied on the precedent set in Schall v. Martin.[47] The Schall case involved the detention of a juvenile before adjudication to prevent crime. However, historic limitations placed on the rights of*

*juveniles and the state's special interest in the welfare of children make the liberty interests of juveniles qualitatively different than those of adults.*[48] *Therefore, a statute allowing the detention of juveniles may be less constitutionally rigorous than a statute permitting the detention of adults. Moreover, while the Court conceded in Salerno that preventive detention would be unconstitutional if imposed as punishment, the Court erred by avoiding the crucial task of determining the circumstances that make detention punishment.*[49]

**The argument supporting preventive detention.**

Supporters argue that the right to due process does not forbid the use of preventive detention; rather, prohibiting the use of preventive detention often results in the violation of other constitutional rights. **The argument in favor of preventive detention is as follows:**

**The argument in favor of preventive detention rests on the Supreme Court conclusion in Salerno: 1) that the state has a legitimate interest in protecting the public from potential crimes by pretrial detainees, and 2) that preventive detention serves a regulatory and not punitive purpose.**

*The detention of apparently dangerous defendants prior to a complete trial does not violate the accused's constitutional rights. Admittedly, the Fifth and Fourteenth Amendments state that the government may not deprive any person of liberty without due process of law. However, to require that legal process be followed is not at all the same as to specify that only a full criminal trial can justify detaining those accused of crimes.*[50] *This position is supported by the Supreme Court's decision in Salerno. In this decision, the Court concluded that 1) the state has a legitimate interest in protecting the public from potential crimes committed by pretrial detainees, and 2) preventive detention serves a regulatory and not punitive purpose.*[51]

*Prohibiting preventive detention often results in the violation of the accused's Eighth Amendment rights, since judges who do not have the explicit ability to detain dangerous persons often set excessively high bail to assure the detention of the accused. This practical alternative to*

*preventive detention — i.e., sub rosa detention — constitutes a violation of the Eighth Amendment's protection against excessive bail.*

*The United States has a long legal tradition of permitting the denial of bail where there is compelling evidence of a serious crime.*[52] *In colonial America, only persons accused of capital offenses could be denied bail. However, a great many more acts were considered capital offenses during that time period than now. Most serious felonies remained capital offenses until well into the nineteenth century, which suggests that the government believed that the nature and severity of many offenses warranted the imposition of the death penalty. A secondary effect of classifying numerous crimes as capital offenses was to permit the preventive detention of persons accused of these offenses.*[53] *Thus, the use of preventive detention for persons accused of serious offenses is not a recent development.* ◆

# How Accurate Are Predictions of Dangerousness and Flight Risk?

**The debate over preventive detention is further complicated by the quite limited present ability to predict the behavior of offenders. Predictions based on statistical methods appear more accurate than decisions based on subjective judgements;[54] however, the question of whether these predictions are reliable enough to justify more detention remains unanswered.**

**The Vera Foundation's Manhattan Bail Project attempted to develop an objective instrument for predicting success or failure on pretrial release. However, the best prediction models provide only about 20 percent improvement over what could be predicted by chance alone.**

Pretrial detention decisions necessarily are based on prediction devices that suffer from low reliability. Judges in most jurisdictions are directed to consider the seriousness of the present charge, seriousness of prior charges, prior record, and an array of factors measuring the defendant's community ties when deciding whether to set or withhold bail. Previous empirical research has found that these factors are among the most salient predictors of pretrial misconduct, although the factors that best predict failure to appear are not necessarily the same factors that best predict rearrest. Prior studies suggest that the most salient predictors of rearrest while on pretrial release are measures of the defendant's prior criminal history and present charge, while the most salient predictors of appearance include prior record of appearance, length of residence in the community, and present charge.[55] Nevertheless, the best prediction models result in only a 20 percent improvement over what could be predicted by chance alone.[56]

The accuracy of predictions of pretrial criminality is complicated by the fact that the measure used (rearrest) is an imperfect gauge of criminal behavior. This measure fails to capture the numerous criminal acts that never come to the attention of law enforcement officials and, thus, do not result in rearrest.

A second problem with devices designed to predict pretrial misconduct is using factors that might introduce racial bias into the pretrial decisionmaking process. The Hennepin County Bureau of Community Corrections[57] recently reviewed the scale employed in that county for determining conditions of pretrial release. The bureau found three factors routinely considered in bail evaluations — time in area, voluntary surrender, and treatment for chemical abuse — which were not

**In an attempt to create a more racially-neutral prediction instrument, the Hennepin County Court developed and adopted the *modified Vera scale*.**

significant in predicting pretrial criminality but were correlated with race.

Consequently, Hennepin County adopted a new pretrial evaluation point scale.[58] The previous scale was referred to as a *modified Vera scale* and included many of the evaluation criteria identified by the initial research conducted by the Vera Foundation. The new scale is considered a model of a racially neutral, pretrial evaluation tool.[59]

The alternative to prediction models is the subjective judgement of judges and other criminal justice authorities. For the most part, researchers conclude that human judgements are inferior to statistically developed prediction devices.[60] Numerous studies have found that human decisionmakers do not always use information consistently, may inappropriately weight items of information, and may be overly influenced by spuriously correlated factors.[61] ♦

# Would Preventive Detention be Applied in a Racially Discriminatory Manner?

**Many observers contend that some racial bias currently exists in pretrial decisionmaking; however, such bias is difficult to measure. This makes it difficult to predict whether preventive detention would be employed in a more racially neutral manner than in current pretrial decisionmaking.**

**Opponents of preventive detention policies assert that racial bias in pretrial decisionmaking would be exacerbated if preventive detention were allowed in Minnesota courts.**

Some opponents of preventive detention contend that racial bias evident in current pretrial decisionmaking practices would be exacerbated if preventive detention was permitted. A recently conducted study of racial bias in Minnesota's judicial system reports that a majority of public defender attorneys and judges under the age of 50 believe that minority defendants currently are more likely to remain in custody before trial than non-minority defendants.[62] The same study also reported evidence suggesting that minority defendants are less likely to be released with no bail required and are less likely to make bail when set than are non-minority defendants.[63] Without concurrent change in other pretrial decisionmaking practices, opponents conclude that preventive detention would perpetuate the disproportionately high detention rates of minorities while virtually eliminating the possibility for release.

Opponents also argue that adopting legislation permitting preventive detention will encourage prosecutors to call for detention hearings and result in an increase in detention rates generally. They contend that public support for preventive detention will compel prosecutors to utilize their power and discretion to order detention hearings whenever allowable. Opponents support this claim with federal statistics collected before and after the Bail Reform Act of 1984. As reported earlier, the detention rate among federal defendants was 26 percent before and 31 percent after preventive detention was authorized in 1984.[64] By 1990, the detention rate had risen to 38 percent.[65] Admittedly, federal legislation places few restrictions on prosecutorial discretion. At the federal level, prosecutors may ask for a detention hearing for defendants accused of any offense, while many state laws limit eligibility for preventive detention to

defendants accused of certain violent or drug-related offenses.

**Those favoring the use of preventive detention in Minnesota courts claim that the intended procedural safeguards would actually reduce racial bias in pretrial decisionmaking.**

Nevertheless, opponents argue that efforts to narrow the range of offenses eligible for preventive detention will not eliminate the potential for racial discrimination. Those opposed to preventive detention contend that the degree of discretion inherent in the charging process enables prosecutors to exert substantial influence in decisions to detain offenders. Prosecutors exercise discretion when deciding whether to file charges against an arrested person as well as the type of charges to file. Charging decisions are based primarily on the abundance and strength of the evidence against the accused but also may be affected by other factors — many of which are difficult to detect — including public sentiment, the formal and informal policies or practices of a prosecuting attorney's office, or even prejudice. Limiting eligibility for preventive detention to those accused of specific offenses will not eliminate the effect of prosecutorial discretion on pretrial detention rates since prosecutors will retain primary authority over charging decisions.

Those who favor preventive detention counter the preceding arguments by asserting that racial bias instead would be reduced if such detention were permitted. Any legislation permitting the use of preventive detention would include provisions stipulating the process according to which prosecutorial motions for detention could be made. Guidelines also would establish the defendant's right to challenge detention motions and detention decisions.

For example, federal legislation establishes that prosecutorial requests for detention must be followed by a detention hearing to determine if detention is warranted. At this hearing, the defendant is guaranteed the right to counsel, the right to testify, and the right to cross-examine any witnesses provided by the prosecutor. Furthermore, the burden of producing evidence and persuading the court of flight or danger risk is borne by the prosecutor unless the defendant is accused of specific drug-related or violent crimes.[66] Proponents contend that these and other procedural safeguards would reduce the potential for racial bias in pretrial decisionmaking. ♦

# How Might Preventive Detention Affect Minnesota's Jails?

**Most county jails in Minnesota, like those nationwide, are at or over capacity.[67] The impact of more stringent pretrial release and detention policies on jail crowding in Minnesota is difficult to predict, although federal detention statistics suggest that Minnesota might expect a 17 percent increase in the number of pretrial detainees within one year of implementing preventive detention and additional increases in subsequent years.[68]**

In 1991, 41 states were under federal court orders to reduce overcrowding in prisons and jails; to date, Minnesota has never received such an order.[69] Nationally, Minnesota ranks 49th among the states in rates of incarceration and 48th in adult corrections costs per citizen despite ranking 37th in rates of violent crime.[70] Innovative corrections policies have been credited as the primary reason Minnesota has avoided the problems and costs associated with corrections crowding which have plagued many other states since the 1970s and 1980s.

Other reports on incarceration practices in Minnesota suggest a less appealing picture than those presented above. Between 1983 and 1989, Minnesota's correctional population increased by 104 percent; the comparable figure for the nation as a whole was 93 percent.[71] Much of this growth occurred in the state's jails, which house both sentenced offenders and pretrial detainees.[72] In 1990, Minnesota's state prisons were operating at 102 percent of capacity, and local jails were operating at 92 percent of capacity.[73] Ideally, jail populations should range between 60 and 80 percent of capacity to allow segregation of offenders and to accommodate fluctuations in demand.

A recent study by the Minnesota Legislative Auditor concludes that the increase in Minnesota's jail populations in the last few decades is due to both legislative changes at the state level and to the practices of criminal justice officials (i.e., judges, prosecutors, and law enforcement agencies) at the local level.[74] Mandatory minimum sentences, many of which affect local jails because the mandated sentence is less than one year, have been enacted for several drug and

alcohol-related offenses. Jail populations also have been affected by recent increases in the number of arrests and convictions per reported crime. Reflecting these trends, the percentage of jail inmates who have actually been sentenced to serve jail time, as opposed to simply awaiting trial, has nearly doubled in Minnesota between 1975 and 1989, rising from 13 to 25 percent. During this same time, the proportion of total jail days accounted for by sentenced offenders increased from 54 percent to 63 percent.[75]

**If pretrial detention were permitted in Minnesota courts, jail populations and overcrowding would likely increase.**

These findings reveal little about the possible impact of new legislation allowing preventive detention in Minnesota; but they suggest that corrections crowding, particularly in local jails, is becoming problematic. Consequently, recommendations of the Corrections Crowding Task Force and others include continued efforts to implement pretrial diversion, screening, and conditional release or supervision programs to ease jail crowding and decrease the financial costs associated with pretrial detention and processing.[76]

The best estimate of the effect of preventive detention legislation on detention rates can be derived from the U.S. General Accounting Office (GAO) study of the impact of the Bail Reform Act of 1984.[77] The GAO study found that federal pretrial detention rates increased by approximately 17 percent (from 26 to 31 percent of all defendants) within one year of the passage of the act. However, the GAO study notes that not all of the defendants in the second sample who were eligible for preventive detention under the 1984 act actually were detained. The government sought to detain only 39 percent of the offenders whom the researchers could determine were eligible for preventive detention under the rebuttable presumption criteria, and it actually succeeded in detaining somewhat less than two-thirds of that group.[78]

The proportion of federal defendants detained until case disposition has continued to increase. In 1990, 56 percent of the 48,585 felony defendants charged in federal court were detained *at some time* after their initial court appearance. Two-thirds of these defendants were held without bail, and a third were held because they failed to meet the financial conditions set by the court. Some form of release eventually was granted to approximately one third of those detained at some time

before trial, reducing the total percentage of defendants detained until trial to 38 percent.[79]

It is not possible to determine the extent to which preventive detention legislation, as opposed to other concurrent legislative or social change, has contributed to the recent increase in federal pretrial detainees. Nevertheless, state jail data suggest that any increase in the number of pretrial detainees would add to existing space, security, and funding problems already affecting Minnesota's jails. ♦

# What Would Allow Preventive Detention in Minnesota?

**Minnesota could establish preventive pretrial detention by 1) enactment of legislation posing the constitutional question to repeal the current constitutional mandate for bail, 2) ratification of the question by a majority of the voters in the next statewide general election, and 3) enactment of legislation authorizing preventive detention.**

**To permit Minnesota's courts to order pretrial detention through the denial of bail, the state's Constitution must be amended and enabling legislation passed.**

Minnesota's bail requirement is a state constitutional mandate. Thus, it would appear that a constitutional amendment is required to permit state courts to deny bail — i.e., to order preventive pretrial detention — for defendants considered too dangerous to release.[80] Voters must approve the constitutional question repealing the mandatory bail provision to clear the way for legislation establishing preventive detention policies. Alternatively, such policies could be included in the initial legislation proposing the constitutional question.

In the late 1970s, Wisconsin undertook a similar initiative to amend a state constitutional bail provision. The amendment was ratified by the electorate in the spring of 1981 after the Wisconsin Legislature enacted legislation in 1980 posing the constitutional question. The amendment establishes that an accused person is eligible for release pending trial provided reasonable assurance of the following conditions: 1) the appearance of the accused for trial, 2) the protection of the community from serious bodily harm, and 3) the prevention of the intimidation of witnesses. The authorization to order preventive detention in Wisconsin extends only to cases involving persons accused of first degree murder or first degree sexual assault, as well as any repeat offender who is accused of a felony involving serious bodily harm or the threat of serious bodily harm. ♦

# Would the Public Support Greater Use of Preventive Detention?

**Public support for greater use of pretrial detention appears to be increasing. The public perceives not only an increase in violent crime, but also increasingly feels that too many dangerous persons who have been arrested for serious crimes are being released through bail while awaiting trial. However, crime statistics suggest that the incidence of at least some types of crime has declined or remained stable over the last decade across the nation and in Minnesota.[81]**

The results of the 1993 Minnesota Crime Survey reveal that many of the state's citizens expect to be a victim of crime; not surprisingly, many also believe the crime problem will become worse in the next few years.[82] According to the survey, 43 percent of residents expect to have their property damaged or stolen within one year of the survey, 25 percent expect their home or car to be broken into, and 21 percent expect to be hit, attacked, or threatened. The survey also revealed that one in two Minnesotans expect violent crime to become worse in the next few years.

However, crime statistics strongly suggest that fear of crime exceeds the actual experience of crime. Crime rates derived from official crime statistics and victim surveys suggest that, in contrast with the public's perception, the actual occurrence of crime has remained relatively stable over the last decade. Nationally, the number of violent victimizations reported by citizens in the National Crime Victimization Survey remained fairly constant over the last decade while the number of household crimes decreased by 22 percent.[83] Total victimizations declined by 19 percent over the same period of time.[84] In Minnesota, crime rates recorded for five of the eight index offenses[85] were lower or approximately the same in 1992 as those recorded in the early 1980s.[86]

It is difficult to explain why the public's fear and expectation of crime seems to exceed their actual experience of crime. One explanation offered repeatedly in the last year is the extent to which incidents involving crime and violence are covered by the media. Several recent cases in which offenders have committed particularly heinous crimes — especially

those committed while the defendant was on bail or parole — have received extensive coverage by the media. These sensational cases, if followed through trial, provide considerable kindling for the media over an extended period of time. However, these exceptionally violent cases represent only a fraction of all crimes committed in the state each year. In this manner, the media presents the public with an exaggerated view of the nature and prevalence of crime.

Whether such media attention is the primary basis for this public sentiment or just one of many stimulants is difficult to determine. But irrespective of the actual crime trends, this growing public concern about crime, particularly violent crime, is being manifested in a spiraling public clamoring for harsher treatment of criminals, including more-stringent pretrial detention policies. ♦

# Notes

1. *Constitution of the State of Minnesota*, Article 1, Sections 5 and 7.

2. Malcolm M. Feeley, *Court Reform on Trial* (New York: Basic Books, 1983); Wayne H. Thomas, *Bail Reform in America* (Berkeley: University of California Press, 1976); Robert A. Kaye, "Oregon's Ten Percent Deposit Bail System-Rethinking the Professional Surety's Roles," *Oregon Law Review* 66 (1987):661-684.

3. Ibid.

4. Feeley, *Court Reform on Trial.*

5. Ibid.

6. Ibid; Kaye, "Oregon's Ten Percent Deposit Bail System."

7. Feeley, *Court Reform on Trial*; U.S. Department of Justice, *Out on Bail*; Kaye, "Oregon's Ten Percent Deposit Bail System."

8. See, for example: Charles E. Ares, et al., "The Manhattan Bail Project: An Interim Report on the Use of Pre-trial Parole," *New York University Law Review* 38 (1963):67-95; Caleb Foote, James P. Markle and Edward A. Woolley, "Comparing Evidence in Court: Administration of Bail in Philadelphia," *University of Pennsylvania Law Review* 102 (1954) 1051-1079.

9. Ronald L. Goldfarb, "Bail," *The Guide to American Law, Everyone's Legal Encyclopedia*, ed. Harold W. Chase (St. Paul: West Publishing Company), vol. 2:7-8.

10. Ibid.

11. Kaye, "Oregon's Ten Percent Deposit Bail System," p. 7.

12. Goldfarb, "Bail."

13. Kaye, "Oregon's Ten Percent Deposit Bail System."

14. Michael E. O'Neill, "A Two-Pronged Standard of Appellate Review for Pretrial Bail Determinations," *Yale Law Journal* 99 (1990):885-904; Patrick G. Jackson, "Competing Ideologies of Jail Confinement," *American Jails*, ed. Joel A. Thompson and G. Larry Mays (Chicago: Nelson-Hall, 1991); Kaye, "Oregon's Ten Percent Deposit Bail System;" Wayne R. LaFave, "The Right to Bail", *Encyclopedia of Crime and Justice*, ed. S. Kadish (New York: Free Press, 1983):99-107.

15. Jackson, "Competing Ideologies of Jail Confinement."

16. *Minnesota Statutes 1992, Rules of Criminal Procedure,* Comment re. Rule 6.02.

17. Data obtained from the National Conference of State Legislatures, 1993.

18. U.S. Department of Justice, *Out on Bail.*

19. Ibid.

20. Kaye, "Oregon's Ten Percent Deposit Bail System."

21. Ibid, p.668.

22. U.S. General Accounting Office, General Government Division, *Criminal Bail: How Bail Reform is Working in Selected District Courts* (Washington, D.C.: Government Printing Office, 1987).

23. Information from the National Conference of State Legislatures suggests that public safety is a stated purpose of bail conditions in limited conditions for the following states: Connecticut, (felonies only), Vermont (if conditions to assure appearance are insufficient to protect the public); West Virginia (in cases of crimes between household or family member), and Wisconsin (under non-monetary conditions only).

24. Samuel Walker, *Sense and Nonsense About Crime and Drugs* (Belmont: Wadsworth Publishing Company, 1994); Jackson, "Competing Ideologies of Jail Confinement."

25. U.S. General Accounting Office, *Criminal Bail.*

26. Ibid.

27. David N. Adair, "Looking at the Law," *Federal Probation* 57 (1993):74-79.

28. U.S. General Accounting Office, *Criminal Bail.*

29. The rebuttable presumption clause applies to persons accused of committing (1) a capital offense, (2) a crime of violence, (3) an offense for which the maximum penalty is life imprisonment, (4) a drug offense punishable by 10 or more years, or (5) any felony after twice committing any of the four types of offenses listed above.

30. U.S. Department of Justice, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics 1990.* (Washington, D.C.: Government Printing Office, 1993).

31. Data obtained from the National Conference of State Legislatures, 1993.

32. Ibid.

33. U.S. Department of Justice, *Pretrial Release of Felony Defendants, 1990* (Washington, D.C.: Government Printing Office, 1992).

34. Hennepin County Bureau of Community Corrections, Planning and Evaluation Unit, *Pretrial Release Study* (Minneapolis, 1992).

35. U.S. General Accounting Office, *Criminal Bail.*

36. Ibid.

37. The four district courts were located in northern Indiana, Arizona, southern Florida, and eastern New York.

38. The adjusted universe for the first sample included 2,066 cases; the number of cases in the adjusted universe for the second sample was 2,200. The number of defendants detained in each sample—537 and 678—are projections based on these adjusted figures.

39. Two of the 14 magistrates had not set bail under both the 1966 and 1984 Acts and were not asked this question.

40. U.S. Department of Justice, *Pretrial Release of Felony Defendants, 1990.*

41. Jackson, "Competing Ideologies of Jail Confinement."

42. Ibid, p. 27.

43. Ibid.

44. Vincent L. Broderick, "Pretrial Detention in the Criminal Justice Process," *Federal Probation* 57 (1993):4-8.

45. Miller and Guggenheim, "Pretrial Detention and Punishment."

46. *United States v. Salerno,* 481 U.S 739 (1987).

47. *Schall v. Martin,* 467 U.S. 253 (1984).

48. Miller and Guggenheim, "Pretrial Detention and Punishment."

49. Ibid.

50. Robert F. Nagel, "The Myth of the General Right to Bail." *The Public Interest* (1990):84-97.

51. Jackson, "Competing Ideologies of Jail Confinement."

52. Nagel, "The Myth of the General Right to Bail."

53. Ibid.

54. Stephen D. Gottfredson, "Prediction: An Overview of Selected Methodological Issues," ed. Donald M. Gottfredson and Michael Tonry, *Prediction and Classification: Criminal Justice Decision Making* (Chicago: University of Chicago Press, 1987):21-52.

55. Ibid; Hennepin County Bureau of Community Corrections, *Pretrial Release Study.*

56. Joan Petersilia and Susan Turner, "Guideline-based Justice: Prediction and Racial Minorities," ed. Donald M. Gottfredson and Michael Tonry, *Prediction and Classification: Criminal Justice Decision Making* (Chicago: University of Chicago Press, 1987): 151-182.

57. Hennepin County Bureau of Community Corrections, *Pretrial Release Study.*

58. The factors considered in the pretrial services point scale adopted by Hennepin County in 1992 include the present offense, current Minnesota residence, living situation, employment/income, age at booking, history of failure to appear, and prior criminal record.

59. Minnesota Supreme Court Task Force, *Minnesota Supreme Court Task Force on Racial Bias in the Judicial System.*

60. Gottfredson, "Prediction: An Overview of Selected Methodological Issues;" Charles P. Ewing, "Preventive Detention and Execution: The Constitutionality of Punishing Future Crimes," *Law and Human Behavior* 15 (1991):139-163.

61. Gottfredson, "Prediction: An Overview of Selected Methodological Issues."

62. Minnesota Supreme Court, *Minnesota Supreme Court Task Force on Racial Bias in the Judicial System, Final Report* (St. Paul, 1993).

63. Ibid.

64. U.S. General Accounting Office, *Criminal Bail.*

65. U.S. Department of Justice, *Compendium of Federal Justice Statistics, 1990.*

66. Adair, "Looking at the Law."

67. County Corrections Administrators of Metropolitan Area, *Report to the Minnesota Legislature: Metropolitan Corrections Crowding* (St. Paul, 1992).

68. U.S. General Accounting Office, *Criminal Bail.*

69. Minnesota Department of Corrections, *1991-1992 Biennial Report*, (St. Paul, 1992).

70. Ibid.

71. Minnesota Office of the Legislative Auditor, Program Evaluation Division, *Sentencing and Correctional Policies*, (St. Paul, 1991).

72. Ibid.

73. Ibid.

74. Ibid.

75. Ibid.

76. Corrections Crowding Task Force, *Report to the Minnesota Legislature: Corrections Crowding in Minnesota*, (St. Paul, 1993); County Corrections Administrators of the Metropolitan Area, *Metropolitan Corrections Crowding.*

77. U. S. General Accounting Office, *Criminal Bail.*

78. These figures are projections based on the adjusted universe. A determination of eligibility for detention under the rebuttable presumption was made for 1,923 cases; 1,112 met the rebuttable presumption criteria. Detention was sought for 406 of these defendants and obtained for 249.

79. U.S. Department of Justice, *Compendium of Federal Justice Statistics, 1990.*

80. Some state courts have ruled that, notwithstanding the defendant's constitutional right to cash bail, courts have the inherent power to deny or revoke bail in exceptional cases when necessary to protect the orderly processes of the criminal justice system. Such "exceptional cases" include situations in which there is a serious risk that the defendant will flee, will obstruct or attempt to obstruct justice, or will threaten, injure, or intimidate a prospective witness or juror. According to this analysis, preventive detention is authorized in these exceptional cases without first having to amend the state constitution. However, most states with constitutional cash bail provisions that established preventive detention systems in recent years did amend their state constitutions first.

81. United States Department of Justice, Bureau of Justice Statistics, *Criminal Victimization in the United States, 1992* (Washington, D.C.: Government Printing Office, 1993); Minnesota Department of Public Safety, Office of Information Systems Management, *Bureau of Criminal Apprehension: Crime Information Reports* (St. Paul, MN: 1980-1993).

82. Minnesota Planning, *Troubling Perceptions: 1993 Minnesota Crime Survey* (St. Paul, MN: 1993).

83. U.S. Department of Justice, *Criminal Victimization in the United States, 1992.*

84. Ibid.

85. The eight offenses which comprise the crime index are murder, forcible rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft, and arson.

86. Minnesota Department of Public Safety, *Bureau of Criminal Apprehension: Crime Information Reports* (1980-1993).