The Presumption for Detention Statute's Relationship to Release Rates Revisited: A Replication and Extension

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WITH THE PASSAGE of the Bail Reform Act of 1966, the federal government became the first entity to abolish money bail—a huge step forward in decreasing inequities based solely on a defendant's financial resources and shifting towards a risk-based system of bail. For decades, the federal government was one of the few entities focused on risk. Most states and counties relied on bail schedules and bail bondsman, resulting in a disproportionate effect on indigent defendants and people of color (Arnold, Dobbie, & Yang 2018; Assesfa, 2019; Pretrial Justice Institute, 2017). Despite the gains made by the Bail Reform Act of 1966 in addressing these disparities, the public and federal bench became concerned with the limitations of the Act, specifically its limiting detention only to those individuals found to pose a risk of flight or nonappearance and not allowing for detention based on danger.

This limitation came under increasing scrutiny in the 1980s (US DOJ, 1981). In response to shifting political winds and the request of judges to be able to detain a defendant based on risk of danger, Congress passed the Comprehensive Crime Control Act of 1984, which included the Bail Reform Act of 1984 (S. 1762, 1984). As noted in previous articles, the Bail Reform Act of 1984 had two primary changes compared to the Act of 1966. First, it added the danger prong, giving judges the ability to detain a defendant based solely on the perceived risk of danger to the community. Second, it established two statutory presumptions for detention—the Previous Violator Presumption and the Drug and Firearm Presumption (Austin, 2017).

Historically, the Previous Violator Presumption, which was carefully qualified and subject to certain legal criteria, has not applied to a statistically significant number of defendants (Austin, 2017). The same cannot be said of the Drug and Firearm Presumption, which is triggered simply by the charge and potential sentence with no additional qualifiers or legal criteria to be met (18 U.S. Code § 3142(e)(3).

The effect of the Bail Reform Act of 1984 was immediate and devastating to release rates. Just prior to its passage in 1983, the federal release rate was 76 percent (Kennedy & Carlson, 1988). By 1985, the release rate had dropped to 71 percent. In the years since, this decline has continued relentlessly to our current release rate for fiscal year 2024 of 29 percent, an almost complete reversal in rates (H-14, 2024). This year, even after excluding undocumented noncitizens, the federal release rate was 47 percent (H-14B, 2024).

Most often, the decrease in release rates is justified by suggesting that the average defendant now is a far greater risk than the average defendant was in 1985. Without the aid of an objective and validated risk assessment tool such as the Pretrial Risk Assessment (PTRA), it is difficult to quantify how much the risk profile of our defendants has changed. However, we do have statistics gathered by the Bureau of Justice Statistics (BJS) describing the defendant population in 1985 in detail. In their Special Report published in February 1988, they describe the demographics of federal defendants as follows: 91 pecent male, 74 percent white, 23 percent Black, 47 percent Hispanic, 42 percent between the ages of 21-30, 53 percent unemployed, and 82 percent classified as indigent (Kennedy & Carlson, 1988). As of March 2024, the demographics for of federal defendants were as follows: 87 percent male, 69 percent white, 24 percent Black, 49 percent Hispanic, 27 percent between the ages of 18-30, and 15 percent unemployed (data on financial condition is not currently collected) (Profile, Caseload Data, 2024). On face value, the basic demographics of our defendants have not changed significantly, although the shifts in age and

employment status could indicate a decrease in risk.

When looking at changes to charge types, we see the following, as reflected in Figure 1. Between October 1, 2000, and September 30, 2001 (the first year for which we have data), 39 percent of cases were for Drug offenses, 6 percent for Firearms or Weapons related offenses, 17 percent for Immigration charges, 17 percent for Property and Fraud related charges, 1 percent for Sex Offenses, and 4 percent for Violence (Profile, Pretrial Profiles, 2022). Between June 30, 2023, and June 30, 2024, 25 percent of cases were for Drug offenses, 13 percent for Firearms or Weapons related offenses, 35 percent for Immigration charges, 10 percent for Property and Fraud-related charges, 4 percent for Sex Offenses, and 5 percent for Violence (Profile, Pretrial Services Profiles, June 2024, 2024). Overall, this reflects a 14 percentage point decrease in Drug charges, a seven percentage point increase in Firearms or Weapons related offenses, an 18 percentage point increase in Immigration cases, a seven percentage point decrease in Property and Fraud cases, and a three percentage point increase to sex offense cases. While an argument could be made that weapons and sex cases have doubled, it should be noted that these cases still account for a small percentage of all cases charged each year, especially compared to Drug or Immigration cases. Drug cases are generally higher risk than Immigration cases on risk for danger (DSS 1288, 2024), so the significant changes to these cases, in particular, reflect that the overall risk composition, as a function of cases charged, has most likely decreased.

Additionally, we looked at the detention rates by charge type between 1985 and 2024 (Figure 2). In 1985, 33 percent of drug offenses with a potential 10-year sentence, 67 percent of Immigration cases, 14 percent of Fraud charges, and 47 percent of violent cases, were detained (Kennedy & Carlson, 1988). Between June 30, 2023 and June 30, 2024, 63 percent of defendants charged with a drug offense with a potential 10 year sentence, 90 percent of immigration cases, 20 percent of property and fraud charges, and 69 percent of defendants charged with a violent offense, were detained (Decision Support System (DSS) 1268, 2024).[1] Given the significant increase in detention rates to all major offense types, the overall increase in detention rates cannot be explained simply by a changing defendant profile, but rather a change in the perceived risk of a case.

Finally, we can compare past criminal histories of defendants charged between October 1, 2000, and September 30, 2001 (the first year for which we have comparable data). Fifty-two percent of defendants had prior felony arrests, 39 percent had prior felony convictions, of which 19 percent were for violence, and 27 percent were for drugs (Profiles, 2001). Additionally, 15 percent had prior failures to appear (Profiles, 2001). In contrast, between October 1, 2021, and September 30, 2022 (the most recent year for which we collected data), 37 percent of defendants had prior felony arrests, 29 percent had prior felony convictions of which 14 percent were for prior violence and 18 percent were for drugs (Profile, Pretrial Profiles, 2022). Twelve percent of defendants had a prior Failure to Appear (Profile, Pretrial Profiles, 2022). This reflects that risk composition as a function of prior criminal history has also decreased substantively.

If the demographics of our cases have remained comparable, but the types of cases charged and their prior criminal histories have actually decreased in risk, how can we reconcile this with an ever-decreasing release rate, especially considering our constitutional and statutory obligations?

In this, the law has been clear. The right to bail is enshrined in the Eighth Amendment in that "excessive bail shall not be required." It is further codified in the Bail Reform Act of 1984, which establishes a presumption for release: "the judicial officer shall issue an order that, pending trial, the person be […] released on personal recognizance […] unless the judicial officer determines that such release will not reasonably assure the appearance of the

FIGURE 1.
Changes to Types of Charges Brought 2001 to 2024

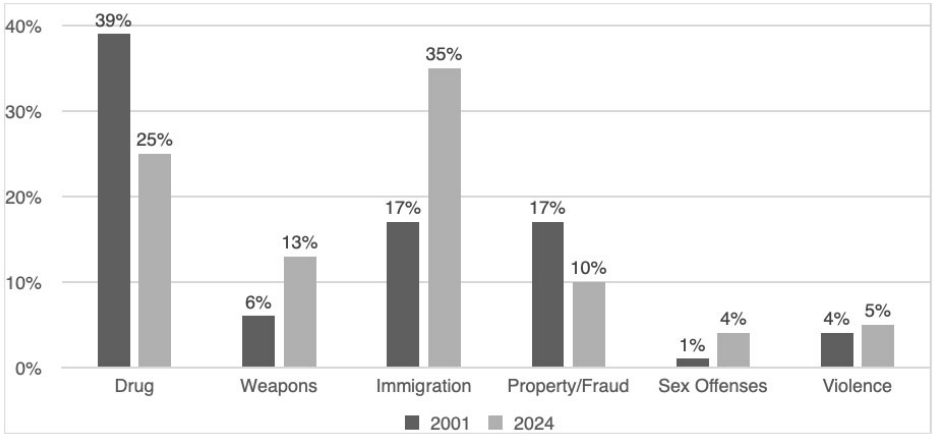
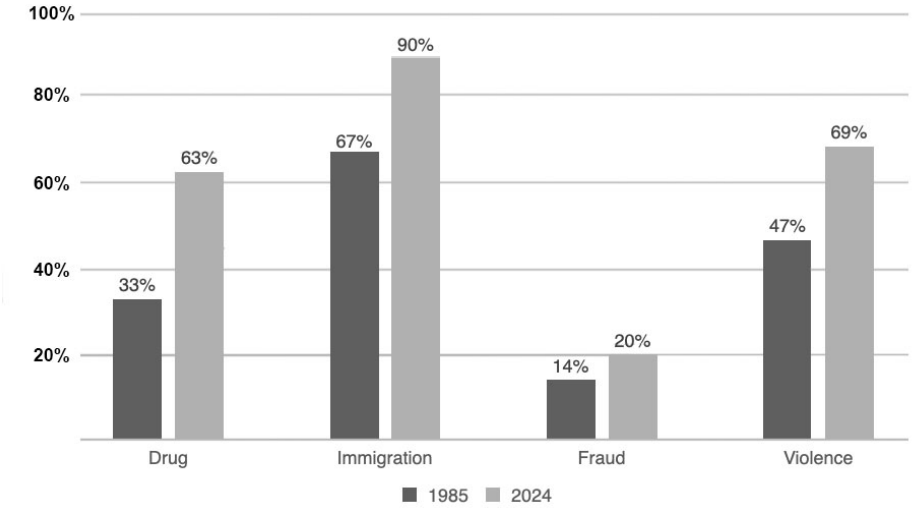


FIGURE 2.
Detention Rates by Offense Type 1985-2024



[1] Data was not available to compare rates for weapons or sex-related offenses.

person as required or will endanger the safety of any other person or the community." As noted in the fourth edition of the Bail Reform Act, "In fact, if a case does not involve any of the factors in section § 3142(f) that authorize a detention hearing, release is mandatory, subject to certain terms and conditions" (Wood, 2022). This was further reinforced by the Supreme Court in 1987, which held in *United States v. Salerno*[2] that, "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."

If the legal argument were not sufficient, there is now a wealth of data that ties pretrial detention to worse outcomes, both while on pretrial release and in the long term. Specifically, recent research has documented that pretrial incarceration, especially for extended periods of time, has been shown to negatively impact several criminal case outcomes (McCoy, 2008; Oleson et al., 2014; Oleson et al., 2016; Lowder & Foudray, 2021; Bechtel et al., 2022; St. Louis, 2023). Even short stints of pretrial detention have shown negative case results due to justice-involved defendants being separated from prosocial activities like employment and personal relationships (Holsinger et al., 2023). Studies have shown that only two or three days of pretrial detention for defendants classified as low-risk (such as during the three- to five-day continuance that may occur under § 3142(f) before a detention hearing is held) have been associated with an increased likelihood of failure to appear, and longer periods of incarceration are associated with an increased likelihood of a new arrest (Lowenkamp et al., 2013). More recent research indicates that any length of pretrial detention is not consistently associated with court appearance but is associated with a higher likelihood of rearrest (Bechtel et al., 2022). Further, research has suggested that preventative detention results in an increased likelihood of conviction (Diaz & Salas, 2022; Bechtel et al., 2022). It is theorized this increased likelihood for conviction is driven solely by detainees' desire to exit jail by the quickest means possible, sacrificing their right to prove their innocence (Heaton et al., 2017).

Finally, pretrial detention is also associated with harsher sentencing outcomes, including the increased likelihood of a defendant being sentenced to a term of imprisonment as well as receiving a longer sentence compared to similarly situated defendants who are allowed pretrial release (Oleson, 2016; Lowenkamp, 2022; St. Louis, 2023). This was exemplified in a study involving two federal districts that determined pretrial detention was, in fact, associated with increased prison sentences in the federal system (Oleson et al., 2014). Importantly, pretrial detention has also been shown to contribute to racial disparity in criminal case outcomes (Lowder & Foudray, 2021). Yet, despite the many negative associations tied to pretrial detention, research to date has shown no actual benefits of pretrial detention, not even reducing reoffending (Petrich et al., 2021), which further fails to explain the dramatic decline in pretrial release rates.

In sum, what has changed are not the demographics or risk profiles, or our statutory and constitutional mandates. What has changed is our culture, which was once a culture of release and now is a culture of detention, and this shift can be attributed almost directly to the passage of the Bail Reform Act of 1984 and the creation of the Drug and Firearm Presumption (hereafter referred to simply as the presumption).

In 2016, the first study into the effect of the presumption was conducted (Austin, 2017). This study found that presumption cases accounted for approximately 43 percent of all federal cases, that they were being detained at rates disproportionate to their risk, and that their outcomes did not justify the higher rates of detention. Following the publication of that study, the Criminal Law Committee endorsed a statutory amendment to 18 U.S.C. § 3142(e)(3) that would limit application of the presumption to drug offenses.[3] To date, the amendment has been introduced to Congress as the Smarter Pretrial Detention for Drug Charges Act of 2021 and again in 2023 under the same name; however, the amendment has not been passed (Durbin, 2021). As it is now eight years since the original study was published, the current study aims to update and expand upon the previous research.

Method

The current study was designed to replicate and extend the 2016 study of the impact of presumption on release conducted by this article's lead author. Statistical software was used to identify non-presumptive, presumptive, and wobbler cases to all new cases activated (received) between fiscal years 2016 and 2022, excluding undocumented noncitizens. Wobbler cases were defined as cases that might be subject to the presumption or not, depending on the specifics of their case. For instance, a violent act that does not involve the use of a firearm does not trigger the presumption, whereas a violent act that uses a firearm does. As those specific details are unknown based solely on the statute charged, they were designated as wobblers. Undocumented noncitizens were also excluded, as they are so often subject to immigration detainers that including them could obfuscate the effect of the presumption, specifically compared to the effect of an immigration detainer. After these exclusions, the initial data set consisted of 345,844 defendants, of which 57,176 were PTRA[4] Category 1; 65,655 were Category 2; 95,120 were Category 3; 82,015 were Category 4; and 45,878 were Category 5.

Once the data set had been defined, the data were analyzed across a variety of metrics including release recommendations, release rates, and outcomes. The PTRA was used as a standard risk measurement in comparing the risk of presumption, wobblers, and non-presumption cases. Additionally, the original study was expanded via the use of logistic regression models and racial bias analysis.

Results

Initially, we sought to determine what percentage of cases were subject to the presumption and how this number has changed since 2016. At that time, 44 percent of all cases qualified for the presumption. As can be seen in Figure 3, that number has remained fairly constant, and in fiscal year 2022, approximately 43 percent of all federal cases qualified for the presumption, before considering wobblers. Additionally, the distribution of cases by risk category, charge type, and presumption status was analyzed. As can be seen in Table 1, most drug cases are subject to the presumption,

[2] 481 U.S. 739, 755 (emphasis added). Additional case law on the presumption for release can be found in *United States v. Berrios-Berrios*, 791 F.2d 246, 250 (2d Cir. 1986), *United States v. Holloway*, 781 F.2d 124, 125 (8th Cir. 1986), and *United States v. Orta*, 760 F.2d 887, 890 (8th Cir. 1985).

[3] See: JCUS-SEP 2017, pp. 10-11.

[4] The Pretrial Risk Assessment, or PTRA, is an actuarial risk assessment for use with pretrial defendants. The PTRA was developed in 2009 (see Lowenkamp & Whetzel, 2009), and has been validated three times since its development (see Cadigan, Johnson, & Lowenkamp, 2012; Cohen, Lowenkamp, & Hicks, 2018; and Hoffer-Valdez & Lowenkamp, 2024). The PTRA score is converted into a category score that ranges from 1 to 5. Failure rates for any adverse event (revocation, FTA, or arrest for a new criminal offense) are 5%, 11%, 20%, 29%, and 36% for each category from 1 to 5, respectively (Cohen et al., 2018).

FIGURE 3.
Distribution of Cases by Presumption Status by Fiscal Year

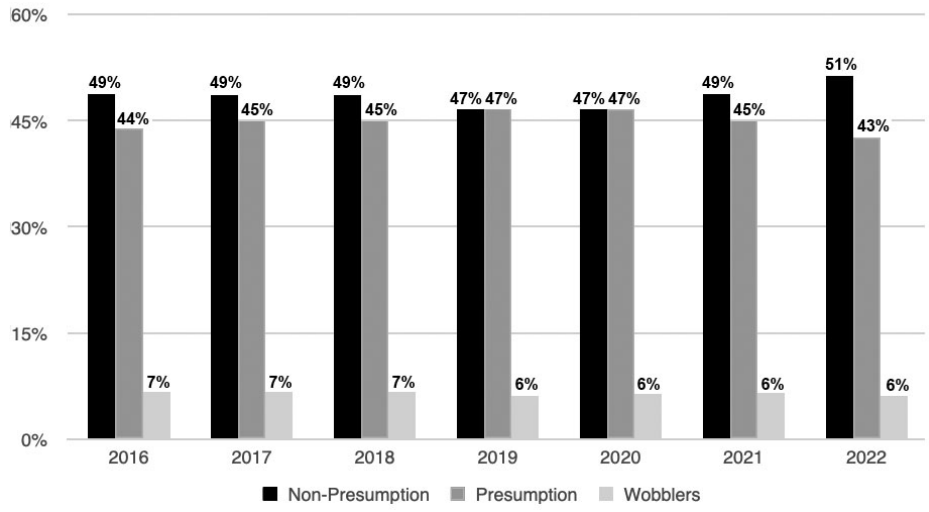


TABLE 1.
Distribution of cases activated FY2016-2022 by Offense Type, Risk Category, and Presumption Status

PTRA Category	N	Non-Presumptive	Presumptive	Wobblers
Drug Offense				
One	6,073	16.24	83.76	0.00
Two	24,340	7.94	92.06	0.00
Three	45,134	3.10	96.90	0.00
Four	37,277	1.73	98.27	0.00
Five	19,979	1.16	98.84	0.00
Property Offense				
One	30,567	99.26	0.21	0.54
Two	14,428	96.78	0.47	2.75
Three	9,446	91.81	0.62	7.57
Four	4,959	85.12	0.75	14.14
Five	1,524	76.25	0.52	23.23
Weapons Offense				
One	1,437	82.39	17.19	0.42
Two	5,622	77.46	22.22	0.32
Three	15,315	79.22	20.65	0.12
Four	23,184	83.48	16.44	0.09
Five	18,966	86.24	13.68	0.07
Sex Offense				
One	6,603	7.83	90.11	2.06
Two	6,567	14.57	83.58	1.84
Three	4,177	31.05	66.39	2.56
Four	1,870	45.67	52.19	2.14
Five	460	49.13	48.26	2.61

regardless of their risk category. Notably, as was seen in 2016, weapons offenses are by and large not subject to the presumption.

As a final descriptive analysis, we looked at the distribution of presumption cases by PTRA risk category (Figure 4). Of note, there are similar numbers of presumption, non-presumption, and wobbler cases across PTRA categories 2-5, with fewer presumption cases in Category 1. At face value, this would seem to reflect that presumption cases are marginally higher risk than non-presumption cases but also that there are significant numbers of presumption cases across all five risk categories.

With these descriptive statistics, the analysis proceeded to the main question: are presumption cases detained at higher rates than non-presumption cases in the low and moderate-risk categories?

This was determined by comparing the release rates for the three categories of cases (presumption, wobbler, and non-presumption) across the five PTRA categories (Figure 5 and Table 2). The results mirror what was found in the initial study; namely, the effect of the presumption is disproportionately large precisely on the lowest risk defendants, with Category 1 presumption cases being released 22 percentage points less than Category 1 non-presumption cases. By Category 2, the discrepancy is still 16 percentage points, but it narrows to 6 percentage points by Category 3, with no significant difference in release rates for Category 4 and 5 defendants. The initial study found a discrepancy of 26 percentage points between Category 1 defendants, 17 percentage points for Category 2 defendants, and 7 percentage points for Category 3 defendants. The disparity in release rates for Category 1 presumption defendants was 4 percent smaller during this analysis, though there appeared to be no significant difference in the discrepancies for Category 2 or 3 defendants compared to the original study. It is possible the difference for Category 1 defendants can be attributed to the fact that the release rates for non-presumption Category 1 defendants have decreased since 2016, when they were released 94 percent of the time compared to 86 percent in 2022. Since the change in release rates to Category 1 presumption cases has only changed by 4 percent (64 percent to 68 percent, respectively), it is logical to conclude the discrepancy has been reduced as a function of the decreased release rates for non-presumption cases rather than any lessening of the effect of the presumption

itself.

This analysis was then repeated with the release recommendation rates by pretrial services officers, as can be seen in Figure 6 and Table 3. There again we see a now familiar pattern, with non-presumption cases being recommended for release at 94 percent compared to 67 percent for presumption cases, a difference of 27 percent. For category 2 defendants, the difference in release rates was 15 percent. This gap narrowed to a 3 percent discrepancy for Category 3 defendants and no significant difference in release recommendation rates for Category 4 and 5 defendants.

It is worth noting that the difference in officer recommendations for release between Category 1 presumption and non-presumption cases (27 percent) was even greater than the difference in actual release rates for Category 1 presumption and non-presumption cases (22 percent). This would seem to indicate that pretrial services recommendations are applying more weight to the presumption than does the actual court, despite national policy and the Office of General Counsel (OGC) prohibition on their considering the presumption at all.[5] Again, these results are not significantly different from the initial analysis, which also found the greatest discrepancy in release recommendations and rates on Category 1 defendants, with the effect plateauing by Category 3.

This study also expanded on the initial study by looking into the question of racial bias with the application of the presumption: specifically, whether Black defendants subject to the presumption were detained at higher rates than White defendants subject to the presumption. In terms of bivariate analyses, Black defendants were more likely than White defendants to be recommended for release and to be released at the low end of the PTRA scale and when presumption was applicable or possibly applicable. Some of the differences were large and favored Black defendants, some were smaller and favored White defendants, and in some instances there was no difference in rates of recommendation for release or actual release. Given that there are many factors other than risk and presumption that might impact officer recommendations for release and actual release decisions, several multivariate models were estimated. We constructed and estimated a logistic regression model predicting officer recommendation for release. This model controlled for PTRA risk category, age, sex (male), race (Black),[6] presumption status, district, and an interaction term between presumption status and Black. All models used robust standard errors clustered by district. The results of the regression model were then translated into changes in marginal probabilities associated with the interaction between race and presumption status. As is indicated in Figure 7, there are differences in the likelihood of an officer recommending release for Black compared to White defendants in non-presumptive cases, and those differences are statistically significant but relatively small. Further, there are no differences in the likelihood of recommending release for Black compared to White defendants when presumption is applicable or possible (i.e., wobbler status).[7] Multivariate

[5] Under national policy and OGC decisions, there are a total of four factors pretrial services officers should not consider in their recommendations: the presence of the presumption, the weight of the evidence, the potential maximum penalties, and the specific circumstances of the offense.

[6] For the multivariate models, we restricted race to White and Black defendants only. This was done as, historically, disparity in the criminal justice system has typically focused on differences between these two groups. Further, limiting race to two groups makes the estimation and interpretation of interactions terms much more straightforward. Future research will focus on looking at the issue of disparity across other races and ethnicities.

[7] Of note, we also ran a multivariate logistic regression model with Offense Type as a control variable. The addition of this variable does cause some concern, given the correlation offense type

FIGURE 4.
Distribution of Presumption Status by Risk Category

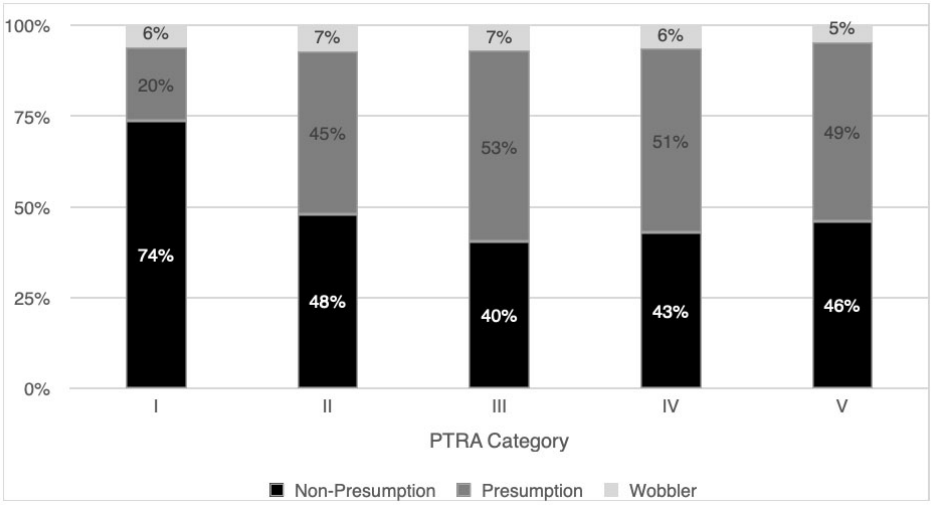
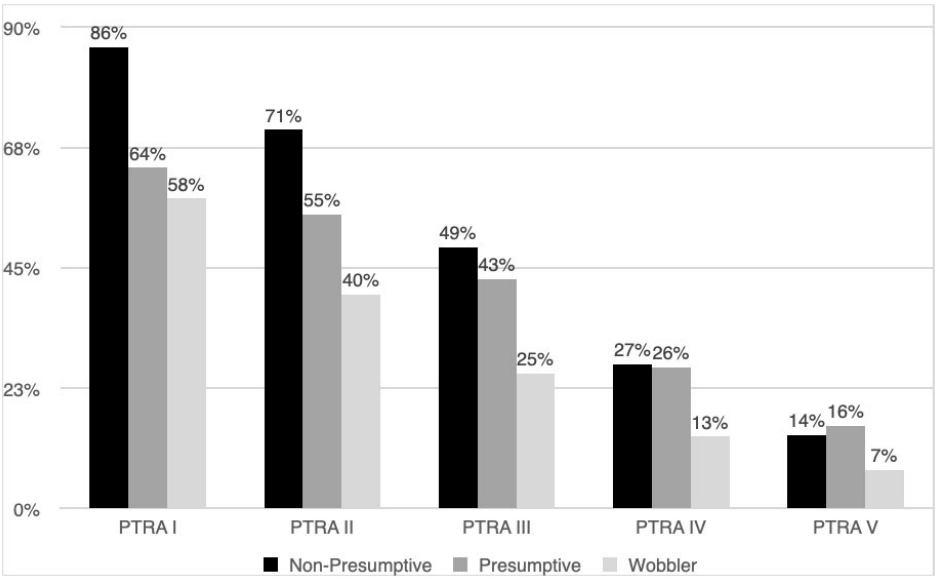


FIGURE 5.
Percent of Defendants Released by Presumption Status and Risk Category



logistic regression models run by risk category has with presumption status. This model, with the addition of Offense Type, generates differences in probabilities of officer recommendation for release associated with the interaction between Black and presumption status that are not statistically significant.

indicate no significant differences for the interaction between Black and presumption status.

We also ran a set of logistic regression models with the same control variables listed above predicting actual release. The results of all those models indicated that the coefficients for the interaction term between Black and presumption status are not statistically significant. While it might be the case that race (Black) interacts with presumption status to produce different effects for those with a charge that is not presumptive, the effects are rather small (absolute difference of 4 percent and a Cohen's h value of 0.09, a value categorized as a smaller than small effect size). The smaller than small effect size should further be tempered by the fact that when controlling for offense type, the effect of the interaction between race and presumption status is reduced to null effects. All other effects for the interaction term between Black and presumption status predicting officer recommendations for release were null. This is also true across the models separated by risk category. Race does not interact with presumption status in any of the models when predicting actual release decisions.

Another question to be updated in this research is whether the higher rates of detention for presumption cases could be justified based on their outcomes. As was suggested in 2016, if low-risk presumption defendants have significantly higher failure rates than low-risk non-presumption cases, then the discrepancy in release rates could be justified. For the purposes of this study, pretrial failure was defined as sustaining a new arrest on pretrial release (of any kind); sustaining a new arrest for a violent offense, specifically; sustaining a failure to appear; or engaging in technical violations that ultimately result in revocation of bond[8] under 18 U.S.C. § 3143.

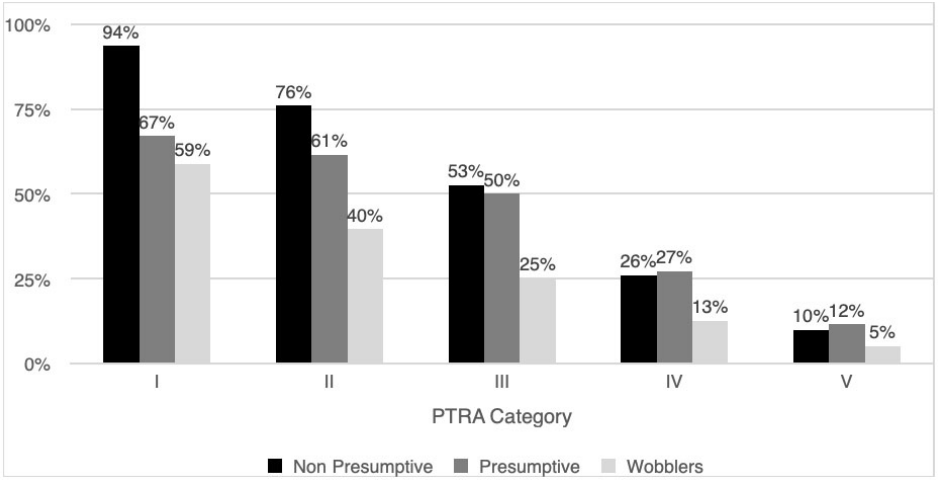
As can be seen in Table 4, the results of this analysis are also similar to those found in 2016, with low-risk presumption cases being no more or less likely to have a new arrest for any kind of offense, an arrest for a violent offense, or a failure to appear. For Categories 3 and 4, presumption cases were *less* likely to have a rearrest of any kind or for a violent offense than non-presumption cases, and for Category 5 defendants, there was no statistically significant difference in rearrest rates. As far as revocations based on technical violations, presumption cases in all five categories

TABLE 2.
Percentage of Cases Released by Risk Category and Presumption Status

Presumption Status	N	N Released	% Released
PTRA I			
Non-Presumptive	33,043	28518	86.3%
Presumptive	8,677	5532	**63.8%**
Wobbler	2,538	1471	**58.0%**
PTRA II			
Non-Presumptive	25,836	18305	70.9%
Presumptive	22,113	12159	**55.0%**
Wobbler	3,626	1452	**40.0%**
PTRA III			
Non-Presumptive	31,860	15584	48.9%
Presumptive	39,441	16930	**42.9%**
Wobbler	5,257	1330	**25.3%**
PTRA IV			
Non-Presumptive	29,525	7962	27.0%
Presumptive	33,364	8802	**26.4%**
Wobbler	4,132	555	**13.4%**
PTRA V			
Non-Presumptive	17,655	2436	13.8%
Presumptive	18,041	2802	**15.5%**
Wobbler	1,640	119	**7.3%**

Bolded values significantly differ from the percentages for the "Non-Presumption" group at $p < .001$.

FIGURE 6.
Percent of Cases Recommended for Release by Risk Category and Presumption Status



[8] Although revocations for technical violations were included as "failures," it is worth noting that the likelihood of suffering a technical violation should not be considered in the initial release or detention decision. 18 U.S.C. § 3142 refers only to the failure to appear and/or the safety of the community, and compliance with conditions does not enter the equation until there is probable cause to believe the conditions were violated under 18 U.S.C. §3143.

were much more likely than non-presumption cases to have a revocation for technical violations, though the difference was widest for Category 1 defendants at 14 percent for presumption cases compared to 2 percent for their non-presumption counterparts.

As previously stated, these results are similar to what was found in the original study, which theorized the presumption was overriding the risk principle and low-risk defendants were being treated as high-risk solely on the basis of the presumption. In testing this theory, we compared the average number of conditions applied to low-risk cases, as well as the nature of those conditions. The results (Table 5) reflect that Category 1 non-presumption defendants received an average of 6.5 special conditions of release. In contrast, Category 1 presumption defendants averaged 11.7 special conditions of release, an average of five additional conditions of release. For Category 2 defendants, the discrepancy was 2.5 additional special conditions of release for presumption cases, and by Category 3 the discrepancy was only one special condition of release.

Additionally, research has categorized conditions of release as those that are restrictive in nature or directed at restricting defendant's freedoms (e.g., weapons restrictions and travel restrictions) and those that are monitoring in nature or intended to monitor the behaviors of defendants (e.g., electronic monitoring and substance abuse testing) (Cohen & Hicks, 2023). When looking at the additional special conditions of release based on categorization (Table 6), it was found that 95 percent of presumption Category 1 defendants will receive a condition that is restrictive in nature, compared to 73 percent of non-presumption cases (22 percent differential). Additionally, Category 1 presumption cases received a condition that was monitoring in nature 85 percent of the time, compared to 51 percent for non-presumption cases.

Finally, logistic regression models predicting release recommendations, release rates, and outcomes (FTA, a new arrest for any criminal offense, a new arrest for a violent offense) were estimated. The goal in estimating these models was to understand the effect of presumption status on the different outcomes net the effects of other relevant factors. The six regression models include controls for race, sex, age, total PTRA score, Hispanic ethnicity, citizenship, district, and presumption status.[9]

[9] Again, we also ran alternate models controlling for offense type. We present the models without offense type, as the models without offense type do not generate the same concerns over multicollinearity and the trend in results does not differ when considering the two sets of models (i.e., those that controlled for offense type and those that did not).

We then generate the marginal probabilities for each of the presumption status groups for the six outcomes of interest. The marginal probabilities are contained in Table 7. The models where significant differences between presumption status groups were observed are indicated with an asterisk. The data in Table 7 indicate that when all other factors in the logistic regression models are held constant, presumption and possible presumption cases are less likely to be recommended for release and are less likely to be released. The presumption and possible presumption (wobbler) cases are more likely to be revoked than non-presumption cases. In terms of pretrial outcomes related to the defendant's behavior, presumption and possible presumption cases are not significantly more likely to FTA or be arrested for any criminal offense. Presumption cases are less likely to be arrested for a violent offense, while wobblers are slightly more likely to be arrested for a violent offense when compared to non-presumption cases (1 percent, 3 percent, and 2 percent respectively).

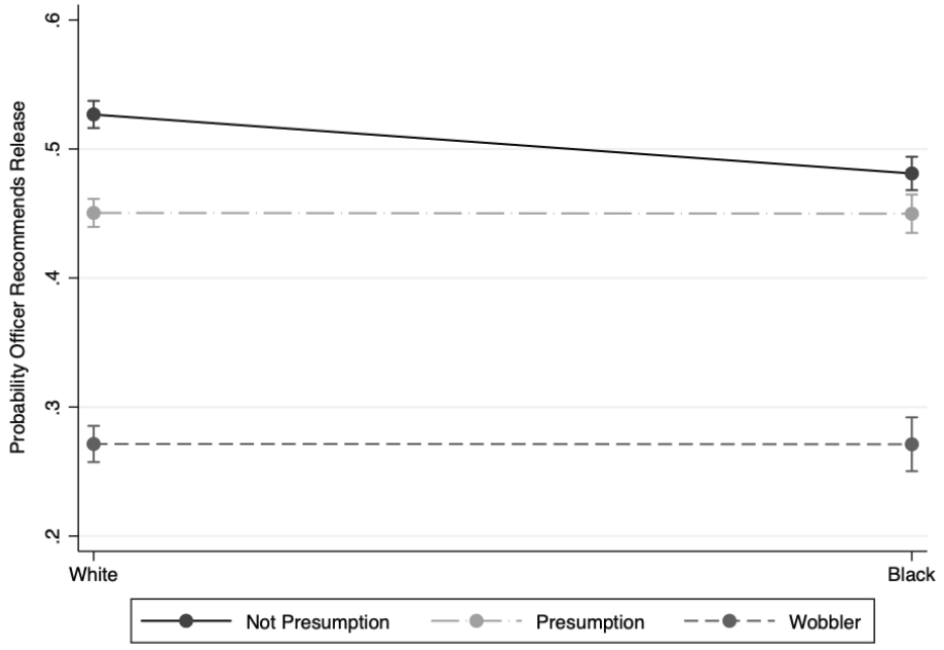
Discussion

Despite the 2017 endorsement of the Criminal Law Committee to modify 18 U.S.C. § 3142(e)(3), an amendment has not passed Congress. In the intervening eight years, it appears the presumption has continued to have an inordinate effect on low-risk defendants, which cannot be explained by their outcomes. In fact, the outcomes for presumption cases reflect that we continue to ignore the risk principle

TABLE 3.
Percent of Cases Recommended for Release by Risk Category & Presumption Status

		Percent Recommended for Release			
PTRA Category	N	Non-Presumptive	Presumptive	Wobblers	Total
I	49,417	94%	67%	59%	86%
II	57,722	76%	61%	40%	67%
III	87,608	53%	50%	25%	49%
IV	77,593	26%	27%	13%	26%
V	44,138	10%	12%	5%	10%

FIGURE 7.
Predictive Margins for Officer Release Recommendation of Interaction Between Black and Presumption Status with 95% Cis



and, in so doing, are making our communities less safe by increasing failure rates for defendants charged with presumption cases. Furthermore, by detaining thousands of low-risk presumption cases (approximately 8,000 since 2016), we increase short- and long-term recidivism while simultaneously placing an even greater burden on taxpayers.

As was seen in 2016, the cost of detaining low- and moderate-risk defendants charged with presumption offenses is significant. When looking at the cost of detaining PTRA 1-2 defendants, excluding those charged with sex or immigration offenses, the cost to taxpayers has been at least $186 million (Table 7). This estimate is net, meaning after excluding the estimated cost of pretrial supervision for these defendants. When we include PTRA 3 defendants, the estimated net cost is at least $651 million (Table 8).

Despite these burdens, an oft-heard argument from stakeholders is that cost savings is not a factor that judges can consider under 18 § 3142(g), otherwise known as the (g) factors. While this is true, it ignores several factors that judicial officers can consider. First, the (g) factors do include the "history and characteristics of the person." This analysis requires the judicial officer to weigh the potential risk of nonappearance and/or danger to the community posed by the specific individual before the court. Research has shown that actuarial risk assessment tools such as the PTRA can lead to better decision-making compared to unaided decision-making, even among those trained specifically in criminal justice (Kleinberg et al., 2017; Cohen et al., 2022; Angelova, Dobbie, & Yang, 2022; Montoya, Skeem, & Lowenkamp, 2024). On that basis, the use of the PTRA by all stakeholders, including judicial officers, should be encouraged. If judicial officers were given access to the PTRA, and were convinced of its utility as a tool, they would be better able to assess a defendant's risk with or without the presumption.

Additionally, there is nothing in the statute to indicate that all (g) factors should be given equal weight or consideration. In fact, while case law on the subject is limited, the Ninth Circuit held in *United States v. Honeyman* that the "least weight should be given to the weight of the evidence against the accused." Judicial officers may put different emphasis on each of the (g) factors in their risk determination. Given this authority and the evidence outlined in the 2016 and now the current study, we suggest that the application of the presumption by judicial officers be strictly limited to what it is provided for by the law. Specifically, under 18 U.S.C. § 3142, a presumption for release is *always* present, even in presumption for detention cases, with the government always retaining the burden of proving that there is no condition or combination of conditions that may be imposed to reasonably assure the defendant's appearance at future court appearances and the safety of the community. The only change in a presumption case is that the defense must present "some" evidence to rebut the presumption. "Even if a presumption is not rebutted, that is not sufficient for an order of detention. The government still has the burden of persuasion, and the court must still consider the factors in section 3142(g) to determine whether the government proved that detention is warranted" (Wood, 2022).

This brings us to another goal of this article—to clarify the correct application of the presumption. The 2016 article incorrectly stated that the "presumption for release was reversed" and that the defendants charged with these offenses are "presumed to be detained unless they can demonstrate by clear and convincing evidence that they do not pose a risk of nonappearance or danger to the community." This conclusion is incorrect in that the defendant never has to prove that release is warranted—the presumption for release remains, and the burden of proving that detention is warranted remains on the government. While the correct application of the law lies with judicial officers, pretrial services officers who routinely identify presumption cases, and inadvertently consider the presumption, should be cognizant that the burden of proof does not change and therefore officers should never assume that a presumption indicates the defendant should be detained.

TABLE 4.
Outcomes by Risk Category and Presumption Status

Presumption Status	N Released	% Released	Any Rearrest	Violent Rearrest	FTA	Revocation
PTRA I						
Non-Presumptive	28518	86.3%	2.7%	0.4%	0.8%	2%
Presumptive	5532	**63.8%**	**3.4%**	**0.4%**	0.9%	**14%**
Wobbler	1471	**58.0%**	**4.0%**	**1.3%**	1.0%	**10%**
PTRA II						
Non-Presumptive	18305	70.9%	6.3%	1.1%	2.1%	6%
Presumptive	12159	**55.0%**	5.5%	0.9%	2.5%	**14%**
Wobbler	1452	**40.0%**	6.4%	1.6%	2.8%	**16%**
PTRA III						
Non-Presumptive	15584	48.9%	11.2%	2.0%	3.9%	14%
Presumptive	16930	**42.9%**	**8.9%**	**1.7%**	4.4%	**19%**
Wobbler	1330	**25.3%**	**8.6%**	**3.4%**	4.4%	**29%**
PTRA IV						
Non-Presumptive	7962	27.0%	16.4%	3.4%	5.3%	24%
Presumptive	8802	**26.4%**	**13.0%**	**2.2%**	5.5%	**27%**
Wobbler	555	**13.4%**	**14.1%**	**5.6%**	4.9%	**29%**
PTRA V						
Non-Presumptive	2436	13.8%	18.7%	4.1%	6.1%	29%
Presumptive	2802	**15.5%**	16.3%	3.1%	5.4%	**35%**
Wobbler	119	**7.3%**	15.1%	3.4%	4.2%	**39%**

Bolded values significantly differ from the percentages for the "Non-Presumption" group at $p < .001$.

Policy Recommendations

Until Congress passes an amendment to 18 U.S.C. § 3142(e)(3), judicial officers will continue to apply the presumption to all qualified cases, as required by the law. Given this fact, the lack of evidence to support the detention rates on presumption cases, the need to address disparity in our justice system by increasing release rates for all defendants,

and the overall increase to detention rates, we make the following policy recommendations.

First, judicial officers should consider the presumption carefully and be cautious not to give it too much weight, given it is relatively easy to rebut, and even if not rebutted is only one factor, not the deciding factor. Detention is not mandatory and should never be automatic. Judges must always consider all factors outlined in the statute in deciding to release or detain a defendant. With this study, we now have 14 years of data to support the conclusion that the presumption for detention is not an evidence-based factor that should be given significant weight in the release decision. Furthermore, pretrial services officers should not be considering the presumption at all. Instead, all pretrial services officers should receive updated training on the research surrounding the presumption as well as the OGC decision explaining why officers should not consider the presumption in release decisions. Additionally, districts can and should be analyzing their data on a quarterly or bi-annual basis to determine if they are over-recommending detention on low-risk presumption cases.

Second, as noted above, we recommend that judicial officers and pretrial services officers both make the PTRA central to their release analysis. While not intended to be dispositive, the PTRA can and should be used to guide officer recommendations, including recommendations for conditions of release. Recent research into disparity has shown that if recommendations were based solely on the PTRA, release rates could increase by over 30 percent, while negative outcomes would only increase by 1 percent (Skeem, Montoya, & Lowenkamp, 2022). This same research has recommended that increasing release rates for all defendants is the best and most efficient way of decreasing racial disparities in our system, so increasing our reliance on the PTRA would also serve to reduce racial bias.

Previous efforts to increase use of the PTRA have met with minimal success. The PTRA was deployed to all pretrial services offices in 2010, yet correct implementation and buy-in has been gradual at best. Furthermore, stakeholders were not involved in the initial development or implementation of the tool, so buy-in with stakeholders has been equally gradual. To date, approximately 14 districts include the PTRA in their bail reports, and national policy does not reflect an official position on whether or not it should be included in the report. Among the 14 districts that include the PTRA, there is no standard format for doing so, with some sending just the score, while others send full results with predicated failure rates for each of the violation categories. Due to this lack of consistency, it has been difficult to determine the effect of including the PTRA in the report.

Both judicial officers and pretrial services officers have expressed concerns that the PTRA will curtail their professional judgement or that it cannot be considered as it is not a (g) factor. Both of these contentions are inaccurate. The PTRA was never developed or meant to replace professional judgment. Rather, it is meant to augment and serve as a consistent check on professional judgment, ensuring equal treatment of defendants across jurisdictions and demographics. As to whether it is a (g) factor or not, clearly the tool itself is not listed as a factor for the judicial officer to consider. Nonetheless, every question in the PTRA is, directly or indirectly, a (g) factor so in essence the PTRA is simply consolidating most of the (g) factors and providing a statistically valid score for those combinations of factors (Cohen & Lowenkamp, 2018).

Last, given the significant shift towards detention since 1984, efforts to increase release rates should be made thoughtfully, with particular consideration to training and outcomes. A culture of release should be established with leadership in each district, with the aim of prioritizing and supporting increased release recommendations. In recent years, several districts across the country, in both separate and consolidated districts, have significantly increased their release recommendations without seeing an accompanying increase to their failure rates (DSS 1288, 2024). The

TABLE 5.
Conditions by Risk Category and Presumption Status

PTRA Categories	N	Percent with 1 or more Conditions	Mean # Special Conditions
All Released Defendants			
Non-Presumption	88,935	86%	8.50
Presumption	60,193	**97%**	**11.46**
Wobbler	6,247	**95%**	**11.06**
PTRA I			
Non-Presumption	35,442	78%	6.46
Presumption	7,197	**95%**	**11.68**
Wobbler	1,909	**92%**	**9.85**
PTRA II			
Non-Presumption	21,808	86%	8.53
Presumption	15,962	**96%**	**11.14**
Wobbler	1,837	**95%**	**11.16**
PTRA III			
Non-Presumption	18,814	**94%**	**10.48**
Presumption	21,755	**97%**	**11.42**
Wobbler	1,644	**96%**	**11.75**
PTRA IV			
Non-Presumption	9,668	97%	11.29
Presumption	11,518	**98%**	**11.76**
Wobbler	704	**98%**	**12.27**
PTRA V			
Non-Presumption	3,024	98%	11.25
Presumption	3,695	98%	**11.80**
Wobbler	146	97%	12.12

Bolded values significantly differ from the percentages and mean for the "Non-Presumption" group at $p < .001$.

commonality in these districts is courageous leadership by the chief, who has been willing to engage stakeholders and staff in culture change initiatives. Furthermore, the fact that outcomes have not worsened should be highlighted and advertised to other districts struggling with release rates, to counter the belief that increasing release will lead to higher rates of failure (DSS 1294, 2024). Additionally, pretrial services officers and stakeholders should receive annual training on the Bail Reform Act of 1984 and our statutory obligations under the Act. Officers should track their release recommendation rates, and significant decreases should be analyzed and addressed.

In line with returning to our statutory roots, pretrial services should start increasing release recommendations with the "low-hanging fruit," meaning the cases most likely to succeed if released. Once a district has addressed these cases, they can begin to take more chances on higher risk cases. Specifically, there are two categories of cases that have traditionally experienced high rates of detention despite their low-risk status: PTRA 1-3 presumption cases and immigration cases. This study has confirmed that low-risk presumption cases exist and, if released, those defendants would do well in a majority of cases. Therefore, we suggest that a district seeking to increase their release rates gradually can begin by targeting these cases while following the risk principle and being mindful not to over-condition these defendants with excessive conditions of release.

Additionally, judicial officers, federal defenders, and assistant United States attorneys should renew their focus on the correct application of 18 U.S.C. § 3142(f)(1). While a detention hearing may be requested under (f)(1) for a variety of serious offenses, most illegal immigration cases simply do not fall within (f)(1) and are mandatory release cases unless a judge makes a finding under (f)(2) or orders temporary detention under 3142(d)(1)(B). Despite this, in fiscal year 2024, only 8 percent of those charged with immigration offenses were released, many of whom were low-risk defendants. A significant problem with the release of undocumented noncitizens is the amount of resources it would require for a district, especially those on the Southern border, to process these cases appropriately. While this is a legitimate logistical concern, the same logic applies to the financial cost of detaining presumption cases—the law does not allow for the detention of defendants simply because the logistics are challenging. Ultimately, the resource concern needs to be addressed by Congress, but in the meantime, pretrial services officers are encouraged to follow the law and make recommendations for release in these mandatory release cases.

Even with the significant changes created by adding the danger prong into the release decision, the greater shift caused by the Bail Reform Act of 1984 was a shift away from release and from the correct application of the law. This has resulted in a system where release has become the carefully limited exception, instead of detention. While the challenges are many, they can and have been overcome in many districts by engaging in the above recommendations. We hope that Congress will soon address the Criminal Law Committee's recommendation and amend 18 U.S.C. § 3142(e)(3). In the interim, actions can be taken to minimize the effect of the presumption, avoid incorrect application of the statute, decrease racial disparity, and safely increase release rates for all defendants.

TABLE 6.
Types of Pretrial Conditions by Risk Category And Presumption Status

		Percent with Condition				
Presumption Status	N Released	Restriction	Monitoring	Treatment	Education Employment	Other Party Guarantee
PTRA I						
Non-Presumptive	28518	73.1%	50.7%	26.4%	33.3%	8.9%
Presumptive	5532	94.7%	84.8%	56.6%	51.3%	18.9%
Wobbler	1471	91.1%	77.6%	48.1%	38.7%	16.6%
PTRA II						
Non-Presumptive	18305	80.8%	69.9%	45.4%	48.3%	14.6%
Presumptive	12159	95.1%	85.8%	62.9%	58.6%	21.6%
Wobbler	1452	93.7%	86.6%	68.0%	50.1%	25.3%
PTRA III						
Non-Presumptive	15584	90.6%	85.2%	65.0%	62.7%	21.8%
Presumptive	16930	96.6%	89.9%	73.8%	65.1%	22.4%
Wobbler	1330	93.6%	90.6%	72.7%	52.0%	32.6%
PTRA IV						
Non-Presumptive	7962	94.5%	92.8%	77.7%	63.5%	25.5%
Presumptive	8802	97.1%	95.1%	82.0%	62.8%	23.2%
Wobbler	555	96.4%	95.0%	83.2%	52.1%	30.3%
PTRA V						
Non-Presumptive	2436	94.7%	95.2%	78.7%	58.2%	26.1%
Presumptive	2802	96.3%	96.0%	83.0%	56.2%	25.3%
Wobbler	119	95.0%	90.8%	84.9%	37.0%	26.9%

TABLE 7.
Marginal Probabilities from Logistic Regression Models Predicting Six Outcomes

	Release Recommendation*	Release*	FTA	Arrest Any	Arrest Violence*	Revoked*
Non-Presumption	0.51	0.49	0.03	0.08	0.02	0.10
Presumption	0.46	0.43	0.02	0.07	0.01	0.14
Wobblers	0.29	0.28	0.03	0.08	0.03	0.16

TABLE 8.
Cost of Pretrial Detention versus Pretrial Supervision for PTRA Categories I & II (Excluding Cases for Sex Offense and Immigration)

Year	Detained PTRA I & II Presumption Cases	Average Days Detained	Daily Cost Detention	Average Days Supervision	Daily Cost of Supervision	Total Cost Detention	Total Cost Supervision	Difference
2016	1,326	296	$87	399	$11	$34,147,152	$5,819,814	$28,327,338
2017	1,379	293	$87	393	$11	$35,152,089	$5,961,417	$29,190,672
2018	1,464	322	$89	426	$11	$41,955,312	$7,746,024	$34,209,288
2019	1,499	306	$90	481	$11	$41,282,460	$7,453,028	$33,829,432
2020	1,145	343	$92	452	$11	$36,131,620	$3,917,045	$32,214,575
2021	1,003	259	$98	311	$12	$25,458,146	$1,203,600	$24,254,546
2022	392	121	$101	100	$12	$4,790,632	$470,400	$4,320,232
Total	8,208					$218,917,411	$32,571,328	$186,346,083

TABLE 9.
Cost of Pretrial Detention versus Pretrial Supervision for PTRA Categories I, II, & III (Excluding Cases for Sex Offense and Immigration)

Year	Detained PTRA I, II, & III Presumption Cases	Average Days Detained	Daily Cost Detention	Average Days Supervision	Daily Cost of Supervision	Total Cost Detention	Total Cost Supervision	Difference
2016	4,837	280	$87	382	$11	$117,829,320	$20,325,074	$97,504,246
2017	4,929	284	$87	387	$11	$121,785,732	$20,982,753	$100,802,979
2018	5,231	303	$89	413	$11	$141,064,377	$27,447,057	$113,617,320
2019	5,376	308	$90	477	$11	$149,022,720	$26,729,472	$122,293,248
2020	3,945	349	$92	452	$11	$126,666,060	$13,886,400	$112,779,660
2021	3,537	270	$98	320	$12	$93,589,020	$4,626,396	$88,962,624
2022	1,162	146	$101	109	$12	$17,134,852	$1,519,896	$15,614,956
Total	29,017					$767,092,081	$115,517,048	$651,575,033

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