Pretrial Detention in the Ninth Circuit

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I. INTRODUCTION

In 1992, the Judicial Conference of the United States ("JCUS") adopted a resolution encouraging the examination of bias based on race, ethnicity, gender, age and disability in the federal judiciary.[1] The Ninth Circuit responded to the JCUS resolution with a study of gender bias, completed in 1993.[2] Subsequently, the Ninth Circuit Judicial Conference authorized a second study, establishing the Task Force on Racial, Religious, and Ethnic Fairness in 1993.[3] This study of pretrial detention in the Ninth Circuit was undertaken as part of the research commissioned by the Task Force.

A. Research Context

Pretrial detention has been the topic of numerous law review notes and

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1. See 1992 DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. 64 (reporting on the proceedings of the Judicial Conference of the United States held March 16 and September 22, 1992).

2. Pretrial detention was not included in this work. See The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force, 67 S. CAL. L. REV. 745 (1994).

3. The Task Force originated from a January, 1993 conference on "Ethnicity, Race, and Religion and the Ninth Circuit" convened by Chief Judge J. Clifford Wallace. See Report of the Conference on Ethnicity, Race, and Religion and the Ninth Circuit, January 27, 1993, (copies of the report can be obtained from the office of the Circuit Executive, P.O. Box 193846, San Francisco, California 94119-3846).

journal articles. Law review notes have concentrated on constitutional issues generated by the bail reform movement, the 1984 Bail Reform Act ("Bail Reform Act"), and the Supreme Court's 1987 decision in *United States v. Salerno,*[4] which found this act constitutional.[5] Many of the notes have questioned whether preventive detention authorized under the Act violates the excessive bail clause of the Eighth Amendment, compromises the presumption of innocence, and/or assesses a penalty on the assumption of future wrongdoing.[6] Research with a sociological or criminological focus has tended to examine the results of the pretrial process (incarceration, terms of release, etc.) as a function of innate attributes of defendants (age, race, sex, etc.), acquired characteristics (income, criminal history, etc.), and the nature of the offense. Such studies have usually been limited to individual state courts; few have examined federal pretrial practices.[7] Moreover, most of the research is dated, having been done in the 1980's (in the years leading up to and immediately following passage of the Bail Reform Act).

This research project is focused on the federal level, employing 1994

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4. 481 U.S. 739 (1987).

5. In *Salerno,* a six to three Court majority found that the 1984 Bail Reform Act was a regulatory, not a punitive, measure and that the amount of pretrial detention was not immoderate in the context of preventing danger to the community—a goal explicitly advanced by Congress. *See id.* at 740, 747.

6. The following is a sample of the large number of articles and notes which address these and related issues: John A. Washington, Note, *Preventive Detention: Dangerous Until Proven Innocent,* 38 CATH. U. L. REV. 271 (1988) (exploring competing doctrines of preventive detention and judicial authority to predict dangerous behavior); Michael W. Youtt, Note, *The Effect of* Salerno v. United States *on the Use of State Preventive Detention Legislation: A New Definition of Due Process,* 22 GA. L. REV. 805 (1988) (examining prior Supreme Court decisions regarding preventive detention and preventive detention issues not addressed in *Salerno*); Michael J. Eason, *Eighth Amendment—Pretrial Detention: What Will Become of the Innocent?,* 78 J. CRIM. L. & CRIMINOLOGY 1048 (1988) (critically discusses the opinions of the Court in *Salerno* and asks at what point pretrial detention becomes punitive); John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform,* 76 J. CRIM. L. & CRIMINOLOGY 1 (1985) (examines the public safety focus of bail reform laws of the 1980's and evaluates the implication for pretrial release in the future); Robert S. Natalini, Comment, *Preventive Detention and Presuming Dangerousness under the Bail Reform Act of 1984,* 134 U. PA. L. REV. 225 (1985) (evaluates procedures under which a person is determined to be dangerous and in addressing the Act's presumption of dangerousness concludes that it permits deprivation of liberty without due process).

7. One of the small number to have done so is a study by Stryker, Nagel, and Hagen of pretrial release decisions in ten federal courts. *See* Robin Stryker et al., *Methodological Issues in Court Research: Pretrial Release Decisions for Federal Defendants,* 11 SOC. METHODS & RES. 469, 471-79 (1983). Unfortunately, this piece was completed before the Act. A GAO study looked at the effect of the Bail Reform Act of 1984 by comparing before and after data, but the number of pretrial service offices which had been established at the time of the study was small. *See* U.S. GEN. ACCOUNTING OFFICE, *Criminal Bail: How Bail Reform is Working in Selected District Courts,* REP. CHAIRMAN, SUBCOMMITTEE ON CTS., CIV. LIBERTIES, & ADMIN. JUST., COMMITTEE ON JUDICIARY, HOUSE REPRESENTATIVES, Oct. 1987, at 2.

data from the Pretrial Database maintained by the Statistics Division of the Administrative Office of the U.S. Courts ("AOUSC"). It attempts to determine the most prominent factors in the decision to detain Pretrial Services Act ("PSA") defendants prior to trial and, specifically, to discover and assess the magnitude of any relationship that may exist between racial or ethnic identity and incarceration during the pretrial period for the calendar year 1994.[8] The linkage between detention rates and gender has also been briefly explored.

B. Objectives of Pretrial Services

The Manhattan Bail Project, initiated by the VERA Foundation in the early 1960s, served as the origin of a bail reform movement to eliminate reliance on money as the sole determinant of pretrial release. In its stead, the use of information regarding a defendant's ties to the community was to be used with the goal of increasing the percentage of defendants released. The movement's effect on the federal level was evidenced by passage of the Bail Reform Act of 1966, which provided guidelines and standards requiring consideration of the overall background of the accused—including community ties—in determining whether release was appropriate. Recognizing the need to enhance the efficacy of this piece of legislation, Congress subsequently included in the Speedy Trial Act of 1974 provisions to address the need for enhanced information requirements under the Bail Reform Act, and authorized the establishment of demonstration pretrial services offices in ten districts.[9]

The success of these offices led to the passage of the Pretrial Services Act of 1982, which authorized establishment of pretrial services offices in all judicial districts except the District of Columbia.[10] While

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8. Race and ethnicity are considered separate variables in the pretrial database. The ethnicity variable itself is only a Hispanic indicator. A defendant is either Hispanic or not Hispanic. Religious affiliation is not captured.

Another method of measuring potential bias in the pretrial process would be to examine terms of release, which vary from unrestrictive (personal recognizance), to moderately restrictive (PSA supervision), to highly restrictive (house arrest, electronic monitoring, etc.). Although this approach was considered, it was deemed less important than the decision to release or detain, and the additional complexity it introduced precluded it from becoming part of the study.

9. *See* Betsy Kushlan Wanger, Note, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 YALE L. J. 320, 326 (1987).

10. *See id.* at 329.

individual pretrial services offices vary in their policies, procedures, and philosophies, their common goals are (1) to prepare objective, concise, and thorough pretrial services reports, (2) to reduce unnecessary detention and crime committed while on bail, and (3) to provide effective supervision for individuals on pretrial release.

C. Pretrial Services Case Processing

The defendants counted as "detained" in this study have, in most instances, gone through several hearings to determine their suitability for release prior to trial. While the processing of these cases can vary according to several factors, the following summary illustrates a "typical" pretrial services case (i.e., one that originates and terminates in the same district). This case processing example will be useful in understanding the analysis that follows, although it does not address the supervision aspect of the pretrial process, which is a major component of the work of a pretrial services office.[11]

When a defendant has been arrested, or when a defendant is ordered to appear on a summons, the pretrial services office is notified and, in most districts, the case is immediately assigned to a pretrial services officer who begins an investigation by conducting the prebail interview.[12] The officer then performs a criminal record check, pursues investigative leads, and verifies information which the defendant has provided, such as address, employment, assets, and citizenship.[13] Once the investigation has been completed, the pretrial services report is prepared for the court. In the report the pretrial services officer recommends either detention or release and, if release is advocated, the conditions the court should impose on the defendant. In some instances, an oral report may be presented, with a written report drafted afterward.

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11. This synopsis is based on Section 2.1 of the "Probation and Pretrial Automated Case Tracking System (PACTS) 2000 Functional Requirements Document" produced by the Federal Corrections and Supervision Division of the AO.

A minority of cases fail to follow the pattern outlined below, as they do not originate and close within the same district. Courtesy supervision, collateral investigations, material witnesses, and pretrial diversion are still other atypical situations which involve the pretrial officer in various degrees of supervision or investigation.

12. Defendants may refuse this interview. In the Ninth Circuit, interview refusal rates are the highest in the country (20% as compared to 4% for all other circuits in 1994). This high refusal rate negatively impacts the current study in the form of missing data. This point will be discussed in greater detail later in the report.

13. Though a charge may occur simultaneously with an arrest or appearance, an indictment on which a defendant is arrested may be several months, or even years, old. Conversely, a defendant might be apprehended in the act of committing a crime, in which case the charging document may be completed after an arrest has been effected and before an initial appearance.

1. *Initial Appearance*

The first hearing, in what may be a sequence of hearings, is an initial appearance, which generally occurs within twenty-four hours of arrest. At an initial appearance, a defendant is usually provided with counsel, informed of the charge(s), and given an advice of rights. The government, usually an assistant United States attorney ("AUSA"), is then asked its position regarding pretrial release of the defendant.

The AUSA will advise whether the prosecution is seeking detention, and, if not, what pretrial release conditions are requested by the government. The AUSA may seek temporary detention for up to ten days of any person on probation, parole, or pretrial release for any other offense, or for a person who may be in the United States illegally.[14] If the AUSA is not seeking any form of detention, the judicial officer will usually make an immediate determination as to release.

The judicial officer has a number of choices with regard to bond/detention issues. The defendant can be (1) held on a continuance pending a detention hearing, (2) released under specific conditions, which may include pretrial services supervision, (3) held because release conditions cannot be met by the defendant, (4) held in temporary detention for up to ten days, or (5) detained, with no bail set (under limited conditions). If the AUSA, or the judicial officer on his/her own motion, moves for detention, the only remaining issue at the initial appearance is the setting of a date and time for the detention hearing.

2. *Detention Hearing*

According to the Bail Reform Act, the purpose of the detention hearing is to determine whether the facts of a particular case require that a defendant be held in pretrial detention pending the resolution of the charges. The detention hearing may occur immediately or may be continued—up to three days on motion of the AUSA and up to five days on motion of the defense attorney. The defendant is held in jail until a pretrial release decision is rendered at the conclusion of the detention hearing (or after further deliberation by the judicial officer).

Under certain circumstances, a presumption of detention can apply. In contrast to the "presumption of release" created under the Bail Reform Act, defendants accused of some relatively serious crimes must provide

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14. *See* 18 U.S.C. § 3142(d) (1988).

proof, through counsel, as to why release, with or without bail, would be appropriate. This rebuttable presumption in favor of detention arises when the defendant (1) has been charged with a crime of violence involving a firearm or with a drug offense which carries a penalty of ten years or more, or (2) has committed at least one specific type of offense while on pretrial release for a similar offense.

Regardless of whether a rebuttable presumption has been raised, the detention hearing focuses on the determination of relevant facts to allow the judicial officer properly to apply the provisions of the Bail Reform Act. Following this hearing, the defendant can be detained, released on specific conditions (which may include pretrial services supervision), held because release conditions have been set which the defendant is unable to meet, or detained with no bail set because bail conditions cannot be fashioned to alleviate (1) the danger the defendant poses to the community or a specific individual, or (2) the risk that the defendant may flee, or fail to appear.

3. Bail Review Hearing

If a defendant is detained, or is unable to meet bond conditions, the detention order and/or conditions of release (which the defendant has not met) may be subject to reconsideration in a bail review hearing. This type of hearing is generally held on motion of defense counsel or the assistant United States attorney, or results from the discovery of new information by pretrial services which bears on the release of the defendant. The purpose of a bail review hearing is to determine whether continued detention of the defendant is the only way to assure the defendant's presence at future proceedings and/or to assure the safety of the community.

A bail review hearing can be held at any time prior to sentencing. The detention/release choices available to the judicial officer are the same as those available following a detention hearing. Bail decisions are also subject to review in cases where a defendant has been released on bond, at adjudication of guilt (when the presiding judge makes a determination regarding continuing bond or remanding the offender to custody), and at sentencing (when the judge decides whether to remand the offender or allow voluntary surrender).

The results of the detention hearing or any bail review hearing may be appealed to the district court by either the prosecutor when release is granted or by the defense attorney if release is denied. The defendant may also appeal the conditions of release in this forum.[15] The discovery

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15. *See* 18 U.S.C. § 3145 (1988).

by the pretrial services officer of new information bearing on the case is yet a third source of appeal.

4. Environment

Throughout this process, the pretrial services office plays an active role, providing an independent source of information—including recommendations—to the magistrate judge. The Bail Reform Act, with its emphasis on release, places a high value on the quality of the data used by judges in deciding when a defendant should be detained. The pretrial services model envisions pretrial services officers as functioning as objectively and impartially as possible. As this study will show, the operating philosophies of individual pretrial services offices vary considerably across the Ninth Circuit, reflecting the local legal culture as well as social and demographic conditions in the districts.

The pretrial detention decision must also be made within the complex realities of conflicting interests and multiple criminal justice jurisdictions. The ease with which information can be obtained from defendants may differ for various reasons, including the ongoing relationship of the defense bar and the United States attorneys. Defendants may need to be treated differently because of pending charges from other jurisdictions, or defendants may refuse pretrial interviews on the advice of defense attorneys, making it necessary to rely on collateral sources for critical information. Factors such as these complicate the analysis of pretrial statistics and will be noted throughout the following report.

II. METHODOLOGY

A. Research Objective

This analysis attempts to determine the extent to which the race or ethnicity of a defendant appears to increase or decrease the chances of pretrial detention, assuming all other factors are the same. A review of the pretrial detention literature, together with this writer's experience in working with federal pretrial data, suggested a set of independent variables to test in a multivariate analysis along with race and ethnicity.[16]

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16. Correlation analyses were employed to reduce the number of highly correlated,

Preliminary models incorporating a variety of variables were created and analyzed for one district in the Ninth Circuit. The results were discussed with the Ninth Circuit's ten Chief Pretrial and three Chief Probation Officers from combined offices, who then assessed the appropriateness of the various factors in their respective districts. The final set of seven independent variables, each denoting a defendant characteristic, consisted of:

1. Citizenship, a variable which indicates illegal immigrant status which is, in turn, related to presumptions of flight and lack of community ties;

2. Criminal history, a factor frequently cited in the literature and strongly correlated with detention;

3. Rebuttable presumption, an indicator which was not initially chosen, but which proved to have explanatory power in the test district;

4. Residence, a surrogate for community ties which was considered a key factor favoring release under the Bail Reform Act;

5. Severity of crime, another variable linked in the literature to detention;

6. Race/ethnic status, the variable whose influence we are attempting to ascertain; and

7. Gender, a variable added at the request of the task force.

The dependent variable is the outcome of the pretrial hearing process: detention or release.[17] For the purpose of this study, individuals are considered detained if they are not released at the initial pretrial hearing, at the detention hearing, or at any of three bail review hearings. This means that some defendants can be incarcerated a number of days before they gain their release. However, over ninety percent of those gaining release are granted their freedom within five days of the initial hearing.[18]

B. Study Population

The research covers the 9,813 defendants who had their pretrial service interview or first court appearance during the 1994 calendar year. A total of 12,327 cases were entered in 1994. The smaller number included in this research resulted from dropping approximately 120 defendants who had their cases dismissed, about 750 who were transferred, around 380 whose race/ethnicity was unknown, and about

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redundant variables from the large set of candidate independent variables.

17. Even without a judicial decision ordering detention, the study counts a defendant as detained if bail or conditions are set that the defendant is unable to meet.

18. Some of the released defendants are reincarcerated because they violate the terms of their release. These individuals are still counted as "released."

1250 whose citizenship was unknown. The figures are approximate because a number of defendants fell into more than one of the excluded categories.[19] Table 1 shows the defendant population by district, as well as the detention rate and percentage of illegal aliens.

TABLE 1

NINTH CIRCUIT PRETRIAL SERVICES ACT DEFENDANTS IN 1994

	TOTAL	DETAINED		ILLEGAL ALIENS	
	NUMBER	NUMBER	PERCENT	NUMBER	PERCENT
CIRCUIT	9, 813	4,822	49.1%	2,759	28.1%
ALASKA	219	74	33.8%	12	5.5%
ARIZONA	2,159	1,095	50.7%	1,166	54.0%
CAL, N	583	206	35.3%	60	10.3%
CAL, E	557	354	63.6%	199	35.7%
CAL, C	1,848	924	50.0%	454	24.6%
CAL, S	1,906	1,178	61.8%	485	25.4%
HAWAII	231	61	26.4%	14	6.1%
IDAHO	143	40	28.0%	13	9.1%
MONTANA	233	62	26.6%	4	1.7%
NEVADA	553	186	33.6%	33	6.0%
OREGON	611	339	55.5%	207	33.9%
WASH, E	291	148	50.9%	59	20.3%
WASH, W	479	155	32.4%	53	11.1%

The pretrial database records Hispanic status separately from race, but at the request of the Task Force, Hispanics were consolidated into a distinct racial category in the race variable. This was possible because virtually all Hispanic defendants in the Ninth Circuit are White. The

19. The overall detention rate for the Ninth Circuit when these defendants are included is higher by a few percentage points than the figure when they are excluded. This reflects the effect of dropping those whose citizenship is unknown (about half of all cases dropped from the study). Three-quarters of this population is Hispanic and is detained at a rate identical to the rate for illegal alien Hispanic defendants (76%, including transfers).

seventeen Black Hispanic defendants (out of a total of 4826 Hispanic defendants) were excluded from the study.

C. Statistical Methods

Two types of analyses were performed on the pretrial database records. The primary technique employed was logistic regression, an analogue of linear regression, but designed to examine the interrelationship among categorical variables.[20] The second technique was cross-tabulation or contingency table analysis.

1. Logistic Regression

The primary technique employed was logistic regression, an analogue of linear regression, but designed to examine the interrelationship among categorical variables. Logistic regression allows the researcher to isolate the effect of any one variable from a set of independent variables upon the cell counts (serving as the dependant variable) of a cross-tabulation. Using this technique, one can determine the degree to which race/ethnicity influences the decision to detain, holding the other independent variables constant. The type of logistic regression used in this study was a logit model, which is appropriate for analyses where one factor is clearly the dependent variable. In this paper, the dependent variable is the logarithm of the number of defendants released to the number detained, or the log odds ratio for the chance of being released to the chance of being detained.

The direction and strength of the relationship between an independent variable and the dependent variable can be determined by examining the logistic regression coefficient for the independent variable. The "direction" of the relationship is indicated by the sign of the coefficient. As an example, the sign of the coefficient for "Hispanic" indicates whether being Hispanic increases (positive sign) or decreases (negative sign) the defendant's chance of pretrial release (relative to Whites, which is the reference category in the analysis). The strength of the relationship between the independent variable and the dependent variable is indicated by the magnitude of the coefficient. The size of the coefficient is a general guide to the strength of the effect, but the relationship between coefficients is not linear. In other words, a coefficient of .40 does not signify a relationship twice as strong as a

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20. Categorical variables represent the quantity examined (like gender) as mutually exclusive categories such as "male" and "female." No value or order is assigned to the categories.

coefficient of .20.[21]

The data used in this study do not comprise a random sample, but instead constitute almost the entire population of individuals who went through the pretrial detention system in 1994. Thus, interpretation of tests of statistical significance, such as the Z-score, which can be calculated for each coefficient, is somewhat problematic and of questionable relevance.[22] However, tests of statistical significance are appropriate if the 1994 data are construed as one sample in a temporal data sequence (i.e., one year among a series of several years of data). The Z-score can then be understood as an indication of the stability of the coefficient; that is, the degree of confidence that a coefficient of similar magnitude would be seen in data gathered for other years.

A second method of evaluating logit models involves the use of measures of entropy and concentration. Both statistics are proportional reduction in error measures ("PRE"), which produce coefficients with values between zero (no association) and one (perfect association—the values of the variables increase or decrease together in a uniform manner). They are analogous to the R^2 statistic in linear regression in attempting to account for the amount of variation in the dependent variable explained by the set of independent variables included in the model, but they differ from R^2 in that they may exhibit rather modest magnitudes even when the variables are strongly related.[23] In this paper, concentration and entropy statistics are used to rank the strength of the models in an ordinal fashion within each district, and thereby identify the most powerful explanatory models for the circuit.[24]

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21. Differences in the detention rates cannot be derived without further calculations.

22. The Z-score indicates whether the coefficient is significant at the 95% confidence level. Thus, a statistic calculated for a sample should be fairly close to the true population parameter ninety-five times out of one hundred for every randomly selected sample. Coefficients with Z-scores greater than 1.96 in absolute value (either positive or negative coefficients) are considered significant at the 95% confidence level.

23. *See* Shelby J. Haberman, *Analysis of Dispersion of Multinomial Responses*, 77 J. AM. STAT. ASS'N 568, 572-75 (1982).

24. Because the data differs by district, an entropy value of .30 for model *A* in district one versus an entropy value of .15 for model *A* in district two will not be interpreted to mean that model *A* is twice a good at explaining the variation in detention rates in district one as in district two. However, if model *A* accounts for more variation in more districts than any alternative model, it will be said to be the best circuit-wide model.

Several statisticians recommended using district as an independent variable in the models and thus circumventing the problem with inter-district comparisons. This was

Cross-tabulation or contingency table analysis, the second technique used, presents results that may be more easily interpreted by non-statisticians. In its simplest form, a two-by-two table can demonstrate an association between two variables such as race (White or Black) and smoking (smokers or non-smokers). This relationship can be clearly displayed by the counts in the four cells of the table. Such a table would indicate whether the tendency to smoke is associated with race. For the present study, cross-tabulations also have the advantage of displaying differences in detention rates when the populations of some categories in some variables (such as race) are small compared to the total population.

The most often reported cross-tabular result in this paper is that of race by detention for the subset of defendants who have the following attributes: they are United States citizens, they have no prior criminal history, and they have not been charged with a rebuttable presumption offense. The residual effect of race or ethnicity is more easily seen by controlling for the above-mentioned factors which have the greatest impact on detention decisions. In other words, all defendants with these characteristics should have very low detention rates. There may be reason to suspect bias, however, if, after controlling for these characteristics, one racial group exhibits substantially higher rates of detention.[25]

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attempted but yielded disappointing results. Because rates of detention are strongly affected by the percentage of illegal aliens in a district's population, the district variable, when uncontrolled, largely expressed this relationship. If just two additional controlling variables were added, a majority of the non-saturated models failed to converge. With four independent variables almost none converged. Collapsing variable categories was not an option for variables such as race, citizenship, and rebuttable presumption. Thus, employing the districts as an independent variable would have unnecessarily restricted the use of additional independent variables without providing meaningful inter-district comparisons based upon anything other than the percentage of illegal immigrants in a district.

25. A reviewer commented that one would not expect to find racial differences in detention rates among this group of defendants because decision-makers would have relatively little discretion to incorporate legally irrelevant factors like race or ethnicity in their recommendations or judgments. She cited several studies which have demonstrated that the effect of race is confined primarily to cases of "disposition uncertainty." Letter from Professor Cassia Spohn, Department of Criminal Justice, University of Nebraska at Omaha (Aug. 1996) (on file with author).

The problem in addressing this issue is that several of the variables which have the most powerful affect on the detention decision do not have an intermediate value or an intermediate value with a sufficiently large number of defendants. One is either an illegal alien or not; one has either committed a crime for which there is a rebuttable presumption or one has not. Furthermore, defining a type of defendant whose aggregate set of criminal history and demographic characteristics would make his or her disposition indeterminate would require an amount of additional research well beyond the scope of this paper. However, a contingency table for the circuit's data on U.S. citizens who were

The different approaches used in this paper are complementary. The significance, sign, and magnitude of the coefficients produced from the logit analyses indicate whether bias may exist toward a specific racial or ethnic group. The entropy and concentration statistics distill the independent variables which have the greatest relative effects on the decision to detain. The cross-tabulations are accessible and provide opportunities to examine detention rates in situations where the minority population is relatively small.

D. *Methodological Caveats*

1. *Cross-Tabulations and Small Numbers*

Although cross-tabular analysis was used as a reliability check on the logit models in districts where a minority constituted a small fraction of the population, there are inherent limitations on the effectiveness of the cross-tabulations and the interpretation the reader may make when cell counts (the number of defendants in a multi-dimensional category) contain only a few individuals. In particular, one should exercise caution interpreting tests of significance. As stated above, this study examines the entire pretrial population for 1994. It is not a sample, except in the sense of being a year's worth of data from a temporal set. Tests of statistical significance do not supply us with the same ability to discriminate among results as they do when they are applied to a sample population. In a three-dimensional cross-tabulation, differences among the percentages of detainees across races may hinge upon just two or three individuals falling into a particular category. This difference can be considered "significant" in the sense that it is "real" and not an artifact of the sampling process. However, one can make an argument that it is not a meaningful difference in terms of describing practices within the circuit.

2. *Number of Factors Used as Controls*

The relatively small number of factors that could simultaneously be

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not charged with a rebuttable presumption offense, but who had one to four criminal history events, revealed a detention rate for Whites of 30%; Blacks 31%; Native Americans 25%; Asians 12%; and Hispanics 43 %. The high rate for Hispanics is due to factors that will be discussed later in the paper.

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used as controls provides an additional rationale for careful interpretation of these results. The pretrial decision must take into account a variety of factors that are not controlled in this study, either because of the technical limitations of the analytical tools used, or because information about those factors is not included in the pretrial database. These factors may not be evenly distributed across all racial and ethnic groups, thus limiting the generalizability of the findings.

3. Interview Rate and Missing Information

Responses to questions regarding employment, education, residence, and marital status were missing for approximately half of the defendant population because of the relatively low interview rate in the circuit.[26] The frequency of the "unknown" response limited the usefulness and explanatory power of these variables. As a result, only one variable which serves as an indicator of community affiliation.(residence status) was drawn from the database. Despite the large number of "unknowns," residential status proved to be a strong factor positively associated with the decision to release. Given the performance of this variable, it is likely that additional demographic indicators, such as employment status, could also demonstrate an association between community ties and propensity to release. Use of additional variables measuring community attachment might account for the residual detention rate differences between some racial groupings.[27]

4. Excluded Cases

As previously noted, a number of cases were excluded from the analyses because of missing information due to refusal to participate in interviews, usually on the advice of counsel, or because the cases were transfers whose resolution could not be easily determined. Half of the excluded cases were dropped because there was no value for citizenship. An examination of these cases showed them to be largely Hispanic defendants with a collective detention rate similar to that of illegal alien

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26. *See supra* note 12.
27. When one examines the defendant population and controls for those who are United States citizens, who have no criminal history, and for whom there is no rebuttable presumption offense, the circuit-wide detention rates for different racial/ethnic groups continue to demonstrate differences. The data for these groups show 11% of Whites are detained, while 15% of Blacks, 18% of Native Americans, 5% of Asians, and 27% of Hispanics are detained. If one examines only those who own or rent, then detention rate differences diminish. The detention rates are: Whites 7%; Blacks 9%; Native Americans 16%; Asians 5%; and Hispanics 16%. If severity of the offense is added as an additional controlling variable, the last statistically significant differences among racial group detention rates disappear.

Hispanic defendants. Those cases which were missing a designation for race were released, detained, and transferred in approximately the same proportions as the rest of the pretrial population. Because of methodological problems, the investigation of bias in the population of excluded cases would be best accomplished in a separate study.

5. *Circuit and District Data*

Detention practices and environments differ as much across the districts of the Ninth Circuit as detention rates.[28] Because of these striking dissimilarities, results drawn from aggregating and analyzing the data at the circuit level can mislead by possibly masking significant differences among the districts. It is, therefore, preferable to look at the data district by district. In addition, it should be kept in mind that detention decisions are not made at the circuit level; such decisions are exclusively the province of the individual districts.

6. *Severity of Crime*

Severity of the crime with which the defendant is charged is an index of maximum possible sentence length whose construction is explained in the appendix. The use of an index rather than the specific penalty associated with the title and section of the offense charged attenuates the impact of the variable on the detention decision. The severity variable also loses some explanatory power because an inordinate number of crimes with four- to ten-year sentences are white collar crimes. Because those accused of white collar crimes are released at higher rates than defendants charged with other types of crimes (even those who allegedly have committed crimes with lesser maximum sentences), the coefficients for severity in the logit models do not proceed uniformly from high to low values with increasing sentence length. For example, the coefficient for the four- to ten-year sentence category is larger than the coefficient for the one- to three-year category. Even so, pairing the severity of the alleged crime with citizenship provides one of the more successful models accounting for detention throughout the circuit.[29]

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28. In the whole circuit, approximately 49% of all defendants were detained, but detention rates at the district level varied from a low of 26% in Hawaii to a high of 64% in the Eastern District of California. *See supra* Table 1.

29. Although crimes for which there is a rebuttable presumption are, by definition, serious, the relatively small percentage of defendants in this category attenuates the

7. Strength of Evidence

Another factor which much of the literature cites as affecting detention decisions at the local level is strength of evidence against the defendant.[30] At the federal level, the Bail Reform Act specifically directs the judicial officer to take into account the available information concerning the weight of evidence against the person.[31] The pretrial database does not record this information, thus precluding examination of its effect in Ninth Circuit detention decisions and its degree of variation from district to district.

III. RESULTS

A. Major Findings

First, the effect of race/ethnicity on the pretrial detention decision is slight. In the main effects model using seven-independent variables for the entire circuit, the coefficients for Blacks and Hispanics were negative (indicating a greater likelihood of being detained) and significant at the ninety-five percent confidence level, but the magnitudes of the coefficients were small. At the district level, most Z-scores were not significant. As measured by the entropy and concentration statistics, race/ethnicity had very little explanatory power in all the logit models which were run. Similarly, two-dimensional cross-tabulations revealed an association between Black status and higher rates of detention, but when additional factors were introduced into multi-dimensional cross-tabulations as controls, the differences usually disappeared. These findings indicate that while a greater percentage of African Americans are detained as compared to Whites, the disparity is attributable to factors such as higher rates of alleged commission of rebuttable presumption offenses.[32] At the circuit level,

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correlation (.339) between severity and rebuttable presumption. In other words, there are a significant number of defendants charged with serious crimes for which there is not a rebuttable presumption.

30. *See* Ilene H. Nagel, *The Legal/Extra-Legal Controversy: Judicial Decisions in Pretrial Release,* 17 L. & SOC'Y REV. 481, 484 (1983); Charles E. Frazier et al., *Pretrial Release and Bail Decisions: The Effects of Legal, Community, and Personal Variables,* 18 CRIMINOLOGY 162, 177-78 (1980).

31. *See* 18 U.S.C. § 3142(g) (1988).

32. Throughout the circuit, 81.8% of those accused of a violent crime for which there is a rebuttable presumption are detained, and 81.4% of those accused of drug crime with a maximum sentence in excess of 10 years are detained. Rebuttable presumption drug crimes outnumber rebuttable presumption crimes involving violence by a 3 to 1 ratio. Slightly more than 3% of White defendants are charged with violent rebuttable presumption offenses compared to 7.6% of the Black defendants. Seven percent of

using similar elements as controls reduced, but did not eliminate, the difference between Hispanic and White detention rates. This residual relationship is largely explained by unique administrative and population characteristics in the Southern District of California. Asians (26%) and Native Americans (27%) experienced the lowest rates of detention in the Ninth Circuit.

Second, citizenship is the variable with the most effect upon the detention decision.[33] Compared to those with U.S. citizenship, both legal and illegal aliens are more likely to be detained. There is a presumption that defendants who have illegal alien status have a greater likelihood of fleeing and such an assumption results in decisions to detain a high percentage of this group.

Third, citizenship is associated with race in the Ninth Circuit, as the vast majority (96%) of illegal aliens entering the pretrial system are Hispanic. This fact artificially inflates the importance of race in explaining the circuit's detention rates. The detention rate is sixty-five percent for all Hispanics versus thirty-two percent for all Whites, but this difference significantly declines if one controls for citizenship, becoming forty-one percent for Hispanics with U.S. citizenship versus thirty-one percent for Whites with United States citizenship.

Fourth, local detention decisions appear to be functions of (1) defendant population characteristics such as citizenship and residency, (2) the mix of crimes which the court encounters, and (3) the administrative policies of the court and pretrial office. No single logistic regression model offers a "best fit" for all districts.

Fifth, in various multivariate regression models that use demographic factors like race and ethnicity, and criminal indicators such as severity of crime and prior arrest record, the most critical variables in detention decisions are citizenship, criminal history, alleged commission of a crime for which there is a rebuttable presumption, severity of the alleged offense, and residential status. These same variables are composed of categories with the largest coefficients. This finding conforms to the views of pretrial service officers. Illegal immigrant status, alleged

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White defendants are accused of drug offenses for which there is a rebuttable presumption as compared to 15% of Black defendants. While in the entire defendant population 45% of Blacks are detained as compared to 32% of Whites, this difference is halved if one controls for rebuttable presumption. Twenty-seven percent of Whites with no rebuttable presumption offense are detained compared to 34% of Blacks who have not been accused of a rebuttable presumption offense.

33. *See infra* Table 8.

commission of a serious crime, and prior criminal conduct all increase the likelihood that the defendant will be detained.[34] Stronger community ties, as measured by residential status, increase the chances of release.

Sixth, because of the skewed distribution (most defendants are male), gender had very modest explanatory power in the series of logit regressions. In cross-tabulations, however, its effect was stronger. In every district, men were considerably more likely to be detained than were women, even when factors such as severity of offense and criminal history were taken into account. Women in all racial categories were detained less frequently than were their male counterparts. Female detention rates did not exhibit as much disparity across racial groupings as did male detention rates.

B. *Logit Regression Coefficients*

The main effects model with seven independent variables was run first at the circuit level and then at the district level.[35] The circuit level model converged at five iterations. The districts' models converged in less than ten iterations in six districts, but in the other seven districts the model either failed to converge or only converged after seventeen to nineteen iterations. The large number of iterations generated error messages and produced coefficients which were suspect as to any meaningful interpretation. As a result of this difficulty, any models that required more than ten iterations will be noted, but the coefficients will not be discussed.

Reducing the number of independent variables did not produce a successful logit model in any of these seven districts until race was the only remaining independent variable. Since this simple model did not control for any other factor in these seven districts, the model was run a second time for a subset of the population consisting only of U.S. citizens. This introduced a type of control, but did so at the expense of neglecting potentially different detention rates among the racial groupings of legal and illegal aliens.

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34. This has been well-documented in the literature. *See* Ronald A. Farrell and Victoria Lynn Swigert, *Prior Offense Record as a Self-Fulfilling Prophecy*, 12 L. & SOC'Y REV. 437 (1978); Tim S. Bynum, *Release on Recognizance: Substantive or Superficial Reform?*, 20 CRIMINOLOGY 67 (1982); Frazier et al., *supra* note 30, at 171.
35. A main effects model measures the individual affect of each independent variable upon the dependent variable. No terms representing the interaction of two variables (i.e., criminal history and rebuttable presumption) are included in the model. A second type of model, a saturated model, contains all possible main-effects and interaction terms. Earlier tests in one district with selected interactive terms did not yield results which were superior to main effects models. Time constraints prevented testing of a variety of main effects plus interactive term models for each district.

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1. Circuit

The coefficients and measures of statistical significance for the independent variables included in the basic model run for the entire circuit are presented in Table 2.

TABLE 2

COEFFICIENTS AND Z-SCORES FOR MAIN EFFECTS MODEL

VARIABLE	PARAMETER	COEFFICIENT	STD ERROR	Z-SCORE
GRAND MEAN		-.282	.039	-7.208*
CITIZENSHIP	Illegal Alien	-.358	.024	-14.645*
	Legal Alien	-.056	.023	-2.388*
CRIMINAL HISTORY	5 or More	-.416	.021	-19.269*
	1 to 4	.056	.020	2.730*
REBUT. PRESUMP.	Yes	-.433	.020	-21.307*
RACE	Hispanic	-.185	.030	-5.996*
	Black	-.099	.036	-2.680*
	Native American	.033	.061	.547
	Asian	.202	.052	3.867*
CRIME SEVERITY	More than 11 Years	-.336	.024	-13.672*
	One to Ten Years	.046	.024	1.912
RESIDENCE	Unknown, No Fixed Add.	-.254	.013	-18.184*
SEX	Male	-.162	.019	-8.296*

* Statistically significant.

The Z-scores for Hispanic, Black, and Asian coefficients are significant at the 95% level, and the coefficients for Hispanics and Blacks are negative, indicating a greater propensity for detention than for release. However, the sizes of the coefficients are relatively modest, indicating the effect of race on the detention decision is small. The logistic

regression coefficients can be useful in calculating the estimated probability of detention of the defendants in each racial/ethnic category. The following example uses the coefficients to show what the difference in detention rates is (grand mean -.282) for a male (-.162) legal alien (-056) who rents (.254), has a criminal history listing nine events (-.416), and is accused of a crime with a one- to ten-year sentence (.046) that is not a rebuttable presumption offense (.433). The first computation assumes the defendant is White (-.048): the second set of equations assumes that he is Black (-.099).

- ln (Released/Detained) = 2 X (-.282 -.056 -.162 +.254 -.416 +.046 -.048 +.433)
- ln (Released/Detained) = 2 X (-.231)
- ln (Released/Detained) = -.462

Taking the antilog of each side:

- Released/Detained = .630
- Percent Detained (White) = 61%

Using the same equation but substituting -.099 (the coefficient for Blacks) for -.048 (the coefficient for Whites) we get:

- Released/Detained = .569
- Percent Detained (Black) = 64%

Both the magnitude of the coefficients for race/ethnicity and the respective Z-scores are considerably smaller than the coefficients and Z-scores for the lead category of all the other variables except sex. Rebuttable presumption (yes), criminal history (five or more), and residence (unknown/no fixed address) have Z-scores around twenty. Their effect on the decision to detain or release is considerably stronger than the race/ethnicity variable.[36]

2. *District*[37]

Table 3 shows the Z-Scores for the Hispanic and Black coefficients in each district. The results are displayed in columns two and three for the base model discussed above. Columns four and five provide the results

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36. It bears repeating that the calculations of circuit-wide statistics have little practical meaning because they are based on aggregated figures. The circuit, as an entity, does not make detention decisions: the districts do. Therefore, individual district calculations are a far more accurate reflection of detention practices and procedures than are the circuit figures.

37. The District of Guam and the District of the Northern Marianas Islands were not included in the analysis because the populations of these districts are radically different than the other districts in the Ninth Circuit (see the Task Force's demographic report for more details). Moreover, the number of defendants processed by the Pretrial Services Offices in these districts is exceedingly small.

of a simplified model with race as the only independent variable. Columns six and seven provide the results of a simplified model with only defendants who were United States citizens.

TABLE 3
Z-SCORES FOR BLACK AND HISPANIC COEFFICIENTS
AT THE DISTRICT LEVEL

	MAIN EFFECTS MODEL WITH SEVEN INDEPENDENT VARIABLES		MODEL WITH RACE AS ONLY INDEPENDENT VARIABLE		RACE ONLY INDEPENDENT VARIABLE: U.S. CITIZENS	
	BLACKS	HISPANICS	BLACKS	HISPANICS	BLACKS	HISPANICS
CIRCUIT	-2.680*	-5.996*	-4.567*	-25.107*	-8.611*	-6.360*
ALASKA	Failed to Converge		-0.380	-4.901*	-0.667	-2.681*
ARIZONA	-0.056	0.715	0.991	-3.938*	0.121	-0.552
CAL, N	Iterations =19 Coefficients Suspect		-0.875	-2.310*	-1.573	-0.014
CAL, E	-1.487	-1.611	-1.429	-4.940*	-2.124	-0.285
CAL, C	1.174	-0.533	-0.010	-3.242*	-1.704	-0.898
CAL, S	Iterations =19 Coefficients Suspect		-1.150	-3.692*	-1.678	-1.871
HAWAII	Failed to Converge		-1.682	-1.170	-1.911	-0.791
IDAHO	Failed to Converge		0.889	-3.406*	0.380	0.825
MONTANA	Iterations =19 Coefficients Suspect		0.121	-1.248	0.057	-0.414
NEVADA	0.974	-1.657	-2.415*	-2.799*	-2.988	-0.395
OREGON	0.245	-0.154	0.521	-7.103*	-0.732	-0.112
WASH, E	Iterations =17 Coefficients Suspect		-0.191	-3.054*	-1.117	0.308
WASH, W	-0.813	-0.844	-0.472	-5.987*	-1.947	-0.743

* Statistically significant.

For the six districts (Arizona, Central California, Eastern California, Nevada, Oregon, and Western Washington) where the complete main effects model ran successfully, the fact that the defendant was either

Black or Hispanic was not statistically significant in determining the outcome of the detention decision.

To assess the effect of race in the seven districts (Alaska, Northern California, Southern California, Hawaii, Idaho, Montana, and Eastern Washington) where the multivariate model had convergence problems, independent variables were successively dropped until the model converged in less than ten iterations.[38] In other words, the model was able to produce statistically reliable results. This occurred only after race was the sole independent variable. When this model was run, the difference between Blacks and Whites was statistically significant in only one district (Nevada). In all districts, with the exception of Hawaii and Montana, the difference between Hispanic detention rates and the Ninth Circuit's average detention rate was statistically significant. However, when the model was run for only those who were U.S. citizens, the fact that the defendant was Hispanic was statistically significant in only one district (Alaska).

C. Explained Variation

Entropy and concentration statistics produced by one-, two-, and three-variable saturated models, with the original complement of variable categories, reinforced the findings produced by the coefficients of the main effects model discussed above.[39] They also afford a useful district-by-district comparison of the relative importance of key variables. In general, the addition of a second or third independent variable increased the amount of explained variation in the dependent variable, with the exceptions noted in Chart 1. Occasionally, a more parsimonious model accounted for virtually the same amount of variation.

Among models employing only two independent variables, the model having the greatest explanatory power in the most districts used citizenship and criminal history (a composite variable), while two alternate models (citizenship/rebuttable presumption and citizenship/residence) proved superior in a few districts.[40] The best models using three independent variables always included citizenship,

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38. The estimates of the cell counts in a logistic regression are calculated by means of an iterative algorithm. Each time an estimate is obtained, it is called an iteration. The largest amount by which successive estimates differ is called the convergence criterion. For this research, the convergence criterion was set to .001. If the number of iterations reached 20, and the difference between the last two estimates was greater than .001, the computation was said to have failed to converge. *See* MARIJA J. NORUSIS, SPSS ADVANCED STATISTICS 6.1, at 152 (1994).

39. At the district level, models with four independent variables failed to converge.

40. *See infra* Table 9.

but the other two variables could be almost any pairing of criminal history, residence, rebuttable presumption, or severity of crime: the best model varied from district to district.[41] Thus, across the circuit, a set of models gives a more complete picture of pretrial detention practices than a single grand model. This finding supports what was learned through telephone interviews of chief pretrial services and chief probation officers in the Ninth Circuit.[42]

IV. RESULTS BY DISTRICT

A. District of Alaska

Alaska has one of the lowest percentages of illegal aliens of any district in the Ninth Circuit (6% of the defendant population in 1994).[43] As a result, citizenship is not as strongly related to detention in Alaska as it is in other districts. With the small amount of illegal immigration, the detention rate in Alaska (34%) is among the lowest in the circuit, even though the large distances in the state discourage repeated trips between home and court for hearings, and encourage the use of temporary detention based on cost and convenience to the defendant.[44]

Offenses for which there is a rebuttable presumption (usually drugs) represent the single most important independent variable affecting the decision to release. Combined with citizenship, the pair constitutes the best two independent variable model, which is equivalent in explanatory power to the best three independent variable model. The reason for the preeminence of the rebuttable presumption variable is the high percentage of out-of-state drug dealers.[45] These defendants have no ties to the community, making it much more difficult for them to rebut the presumption that they will not flee or will not commit another crime, and enhancing the pro-detention effect of a rebuttable presumption offense.[46]

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41. *See infra* Table 9.
42. Small districts have a combined probation/pretrial services staff with one Chief Probation Officer. Larger districts have a separate pretrial staff headed by a Chief Pretrial Services Officer.
43. There were only 12 illegal alien defendants in Alaska in 1994. All were Hispanic and all were detained.
44. Telephone Interview with Norman E. Mugleston, Chief Probation Officer for the District of Alaska (Oct. 4, 1995).
45. *Id.*
46. Magistrate judges in Alaska discourage pretrial service officers from making

Because many of these defendants (charged with an offense for which there is a rebuttable presumption) are Hispanic, Alaska is the only district where the coefficient for Hispanics was significant at the ninety-five percent level when race was the only independent variable and the population was restricted to U.S. citizens.[47] The coefficient for Blacks was not significant, and the main effects model with seven independent variables failed to converge.

Whites comprise a majority of defendants in Alaska (55%), with Blacks (24%) comprising the next largest group. Alaskan Natives/Native Americans comprise only six percent of the defendant population and have the lowest detention rate (7%) of any racial group. Contingency table analysis examining the detention and release of defendants with U.S. citizenship, no criminal history, and no rebuttable presumption offense showed little difference among the racial groupings. No Alaskan Natives/Native Americans, Asians, or Hispanics in this group were detained, and only eight of eighty-five Whites (9%) and three of twenty-four Blacks (13%) did not gain pretrial release. Five of the six Hispanic legal aliens were detained, but four of the five had criminal histories or had committed rebuttable presumption offenses.

B. District of Arizona

Along with the Southern District of California, Arizona is one of two districts in the Ninth Circuit most affected by illegal immigration. More than three-quarters (76%) of defendants in Arizona are Hispanic—the highest percentage in the circuit. Whites represent only fifteen percent of defendants, while Native Americans represent six percent. Seventy percent of the Hispanic defendant population is of illegal alien status, giving Arizona almost half (44%) of the illegal aliens in the entire circuit.

Though illegal alien status almost automatically results in detention in most other districts, Arizona apparently represents an exception. Cross-tabulations show that Arizona releases thirty-six percent of illegal aliens. Citizenship, while still the most significant variable in the logit models, does not account for much variation in Arizona, and the coefficient for illegal alien status in a model with only one independent variable is among the smallest for any district in the circuit (indicating a diminished effect of this variable in Arizona). However, these numbers arise from the nature of immigration violations in Arizona and the technique this district employed for coding these offenses. Arizona's actual detention

recommendations in rebuttable presumption cases. *Id.*
    47.   *See supra* Table 3.

rate for illegal Hispanic aliens approximates that of the circuit as a whole.[48]

Because of the high percentage of illegal aliens in the defendant population, the decision to detain or release is partially detached from the factors which are prominent in other districts. The typical illegal alien in the Arizona pretrial system has no criminal history, has not committed a rebuttable presumption offense, and has no community ties. Thus, these and other independent variables in the logit models for this district account for less variation in the dependent variable and the Z-scores are diminished. Neither the coefficient for Blacks nor the coefficient for Hispanics was significant in the main effects model with seven independent variables.

Though citizenship would be more prominent absent the coding anomaly described above, it is still the single most important independent variable and, when citizenship is paired with residence or severity of crime, these variables provide the best model with two independent variables. The best model with three independent variables employs citizenship, severity of crime, and criminal history.

For United States citizens with no criminal history and no rebuttable presumption offense, the detention rates for Whites, Blacks, and Hispanics were virtually identical at eight to nine percent. The only two Asian defendants were released. Twenty-five of eighty-nine (28%) Native Americans in this group were detained, but this statistic appears to be the result of the unusual pattern of offenses on reservations, not biased treatment. Many of the alleged crimes of violence on reservations were committed without a firearm. For a rebuttable

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48. In the rest of the circuit, 14% of Hispanic illegal aliens gain their freedom before trial. The artificially high release rate for Arizona derives from illegal aliens who were previously deported and are subsequently caught reentering the United States. They are charged with "illegal entry after deportation," a felony. At the initial hearing, the U.S. attorney will usually allow them to plead guilty to the misdemeanor of illegal entry if this is the first illegal reentry. Illegal aliens pleading to this misdemeanor are sentenced to time served (the several days they are held pending the initial hearing). They are then released immediately after the hearing and the case is coded as a release, even though they have pled guilty to a misdemeanor and have served time. If these defendants are not counted, the release rate for illegal Hispanic aliens in Arizona approximates that of the other districts in the Ninth Circuit. It should also be noted that the practice described above is more characteristic of the Tucson and Yuma offices, which process a large majority of the illegal aliens, and it is less typical of the processing in Phoenix, which is distant from the border. Telephone Interview with Richard D. Baillargeon, Deputy Chief Pretrial Services Officer for the District of Arizona (Feb. 6, 1996).

presumption to be invoked in a violent crime, a firearm must be used. Also, the Flagstaff court, where most of these defendants first appeared, had no assigned assistant United States attorney, the official who would ordinarily make a motion for detention based upon a rebuttable presumption. For these reasons, the use of rebuttable presumption as a control for Native American defendants in Arizona was ineffective.[49]

A majority (54%) of Hispanic legal aliens were detained and even forty-two percent of Hispanic legal aliens with no criminal history or rebuttable presumption offenses failed to gain their freedom prior to trial. However, the majority of these legal aliens did not reside in the United States, but lived in Mexico. They possessed border crosser cards which enable the holder to stay in the United States for not more than seventy-two hours and restrict the possessor to areas within twenty-five miles of the border. Thus, a difference in detention rates, which appears to be the result of disparate treatment of Hispanic legal aliens, actually reflects the detention of Mexican and, sometimes, Central and South American nationals.

C. Northern District of California

The Pretrial Services Office for the Northern District of California places great weight on achieving the release of as many defendants as possible.[50] This policy and the relatively low percentage of illegal aliens (10%) combine to give the district one of the lowest detention rates in the circuit (35%).

The racial composition of the defendant population in the Northern District of California shows a plurality of Whites (38%) with a higher percentage of Blacks than the circuit as a whole (30% versus 12%). Only twenty percent of defendants are Hispanics. Blacks and Hispanics are detained in higher percentages than are Whites or Asians (there was only one Native American defendant), but there was no appreciable difference among the groups when citizenship, criminal history, and rebuttable presumption were controlled for.[51] The number of legal alien

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49. Upon my inquiry, the Deputy Chief Pretrial Services Officer examined the set of Native American defendants processed in the Flagstaff office and found that none were recorded as rebuttable presumption offenses despite the prevalence of crimes of violence, including a number of homicides and rapes. Telephone Interview with Richard D. Baillargeon, Deputy Chief Pretrial Services Officer for the District of Arizona (Feb. 8, 1996).

50. Telephone Interview with Primitivo Rodriquez, Jr., Chief Pretrial Services Officer, Northern District of California (October 3, 1995). Mr. Rodriquez indicated that even those accused of bank robbery, a crime of violence and, thus, an offense for which there is a rebuttable presumption for detention, are often released. Id.

51. The statistical impact of illegals is reduced by a district court policy which prevents the pretrial services office from entering undocumented aliens into the pretrial

defendants in the district is fairly small (seventy-nine) and the differences in detention rates for legal aliens among the various racial categories were small.

Criminal history proved to be the strongest single independent variable and, together with citizenship, provided the most powerful two independent variable model. Reflecting the propensity of the pretrial services office for release,[52] the effect of the rebuttable presumption variable in the logit runs was quite modest, both independently and in conjunction with other variables. Four of the six models with three independent variables are equivalent, but none account for much more of the variation in the dependent variable than does the citizenship/criminal history model with two independent variables.

The main effects model with seven independent variables required nineteen iterations. In the model with race as the only independent variable, the coefficient for Blacks was not significant at the ninety-five percent level. The coefficient for Hispanics was not significant when only U.S. citizens were considered.

D. *Eastern District of California*

The Eastern District of California represents a contrast to the Northern District of California in that its overall detention rate of sixty-four percent is the highest in the Ninth Circuit. This figure is partially accounted for by the relatively large illegal Hispanic defendant population, but also reflects the district's policy of not preparing reports and not reporting data on summons cases unless referred by the court.[53] Since virtually all of these defendants would be released if they were recorded, this practice raises the detention rate of the district. It also affects other statistics such as the percentage of defendants charged with rebuttable presumption drug offenses.

The Eastern District has the highest percentage of defendants charged with rebuttable presumption drug offenses (26% compared to a circuit average of 11%). If the summons cases were recorded, it is likely that

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system if their only crime is illegal entry. *Id.*

    52. The Northern District of California had the highest rate of release in the circuit for defendants charged with rebuttable presumption drug offenses (45%). The rate was 19% for the entire circuit.

    53. Telephone Interview with Glenn R. Thomas, Chief Services Pretrial Officer for the Eastern District of California (Aug. 2, 1995). Many of these offenses are white collar crimes involving fraud or embezzlement. *Id.*

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this figure would fall by a third to seventeen or eighteen percent which, while still among the highest, is comparable to other districts.[54]

Another result of the summons policy is that the three racial groups, which are present in significant numbers in the Eastern District's defendant population, are all detained at rates exceeding the circuit average.[55] The difference between White and Black detention rates disappears when citizenship and rebuttable presumption are controlled for; thirty-six percent of White U.S. citizens indicted for a non-rebuttable presumption offense were detained compared to thirty-five percent of Blacks. In the case of Hispanics with U.S. citizenship and no rebuttable presumption offense, only twenty-six percent were detained. When citizenship, criminal history, and rebuttable presumption are controlled for, the detention rate for Whites and Blacks is equal (21%), and exceeds that for Asians (10%) and Hispanics (6%). Legal aliens of Hispanic extraction were detained at a rate exceeding that of other legal aliens, but twenty-four of the twenty-seven defendants detained had been charged with crimes for which there was a rebuttable presumption.

Among the single independent variable logit models, citizenship accounted for the most variation, with residence second. Rebuttable presumption was the weakest single independent variable model tested but, in combination with citizenship, created the two independent variable model with the most explanatory power. Citizenship, criminal history, and rebuttable presumption together constituted the strongest three independent variable model. Neither the coefficient for Blacks nor the coefficient for Hispanics was statistically significant in the main effects model with seven independent variables.

E.   Central District of California

Rebuttable presumption offenses are the most important indicators of detention in the Central District of California, a finding which takes on particular importance given that this district has thiry-eight percent of the violent rebuttable presumption offenses and twenty-nine percent of

54.   In 1994, 176 criminal defendants out of 964 in the district were charged with fraud and embezzlement.   Most were probably summons cases.   An additional 82 criminal defendants were charged with traffic offenses and would not have entered the pretrial system.   These three offense categories account for most of the approximately 300 defendant difference between criminal defendant filings and PSA cases activated.

55.   There were 180 White defendants in the Eastern District, 41% of whom were detained as compared to 32% for the circuit.   Blacks in the district have a detention rate of 65% versus 45% for the circuit, and Hispanics have a rate of 81% as opposed to 65% in the circuit.   (Arizona's detention coding lowers the circuit figure for Hispanics somewhat.)   There were only three Native American defendants, two of whom were detained (67%), and there were 24 Asian defendants, 17% of whom were detained.

the drug-related rebuttable presumption offenses in the circuit.[56] The reason for the high rate of rebuttable presumption offenses lies in the quantity of drugs that comes through the district. The U.S. Attorney's Office has such a great number of drug-related matters that it only initiates prosecution for those cases where the quantity of drugs is especially large and, therefore, likely to exceed the amount established for a sentence of ten or more years.

Eighty-nine percent of defendants charged with rebuttable presumption offenses are detained, a rate exceeding that for any other district.[57] Logit models also reflect this relationship as the one independent variable model with rebuttable presumption accounted for the most variation within that class of models, and multiple-independent-variable models with rebuttable presumption were stronger than alternative models. Neither the coefficient for Blacks nor the coefficient for Hispanics was statistically significant in the main effects model with seven independent variables.

Citizenship turned out to be a relatively weak predictor of detention largely because illegal alien status does not automatically lead to detention in the Central District. This district has the third highest release rate of illegal aliens (30%) in the circuit; the second highest, if one disregards the statistical coding conventions used in Arizona to record illegals charged with border violations. The relatively high release rate derives, in part, from the release-oriented philosophy of the district.[58] In the Central District, long-term illegals who have stable community ties get released. The use of a signature bond, usually signed by a relative, is the usual mechanism for releasing illegal aliens.[59] A more important reason for the high release rate is the one hundred to two hundred illegal alien material witnesses processed into the pretrial system. Virtually all gain their freedom, but court appearance is assured by an effort on the part of the pretrial services office, working with the Immigration and Naturalization Service ("INS"), to supply these

56. The Central District of California has 19% of the circuit's PSA defendants.
57. Pretrial Service Officers and their supervisors in the district often recommend release for defendants charged with rebuttable presumption offenses, but magistrate judges usually side with the prosecution's recommendation for detention. Telephone Interview with Marvin L. Shuck, Acting Chief Pretrial Services Officer, Central District of California (February 27, 1996).
58. Telephone Interview with John W. Luymes, former Chief Pretrial Services Officer, Central District of California (October 6, 1995).
59. Telephone Interview with Marvin L. Shuck, *supra* note 57.

individuals with work permits.[60] The overall detention rate for the Central District of California is fifty percent, average by the circuit standard of forty-nine percent, but relatively low given the district's large number of illegal aliens. There are few Native American defendants. Blacks and Hispanics are detained at rates close to the circuit averages for their respective groups, but exceed the detention rate for Whites. Asians are detained at a higher rate than they are circuit-wide (36% versus 26%). Cross-tabulations of race versus detention for U.S. citizens with no criminal history and no rebuttable presumption offense result in a reduction in, but not an elimination of, racial disparities in detention rates (Whites 11%, Blacks 15%, Asians 4%, and Hispanics 19%).[61] Detention of Hispanic legal aliens stands at sixty-one percent, close to the circuit figure of fifty-nine percent and the highest among the five racial categories. The difference is partially accounted for by higher rates of rebuttable presumption charges against legal Hispanics. The possession of border crosser cards does not play a role for these defendants.

F. Southern District of California

The Southern District of California is perhaps the most exceptional district in a circuit notable for its diversity. For the past several years, it has led the country in the number of criminal drug offenses filed and the number of illegal immigration cases. These criminal filings have had a significant effect upon the pretrial caseload and its administration.

Seventy-three percent of the defendants in the Southern District are Hispanic, second in the circuit to Arizona.[62] Whites represent twenty-one percent of the defendant population, while Blacks constitute four

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60. Work permits and signature bonds apparently work well, as the district's failure-to-appear rate is below the circuit average. *Id.*

61. Investigation by the new Chief Pretrial Services Officer into a listing of legal Hispanic aliens with no criminal history and no rebuttable presumption offense has found that half were included in this grouping through coding errors (i.e., they were actually charged with a rebuttable presumption offense) while sound reasons existed for the detention of others (i.e., legal aliens who were living outside the U.S.). Telephone Interview with Thomas W. Nuelle, Chief Pretrial Services Officer, Central District of California (May 13, 1996).

62. The Southern District of California actually has considerably more captures of illegal border crossers, but when the only charge against them is illegal entry, they are sent back to Mexico at the completion of their initial hearing and are never entered into the pretrial system. These cases, approximately four to six thousand annually, are handled on a fast-track prosecution policy. Under this policy, a two-count complaint is filed charging a felony and a misdemeanor. If a plea of guilty is entered to the misdemeanor within a specific time frame, the felony charges are dismissed. Telephone Interview with Glen Vaughan, Chief Pretrial Services Officer, Southern District of California (February 20, 1996).

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percent. The percentage of illegals (25%) is relatively low and is due, in part, to the pretrial office policy of not recording defendants with minor immigration offenses.[63]   Additionally, the low percentage reflects the high percentage (29%) of aliens who have legal status. With no controls applied, the detention rate for Whites and Blacks is fairly similar (45% and 49%, respectively), while that of Asians is lower (23%) and that of Hispanics is the highest (68%). The overall detention rate for the district was sixty-two percent, the second highest in the circuit.[64]   When the population of defendants with no criminal history, no rebuttable presumption offense, and with U.S. citizenship is compared, the gap between Whites (30%) and Hispanics (42%) is halved. The difference between Whites and Blacks (39%) widens, but the number of Black defendants in this category is so small (twenty-eight) that a shift of three individuals from detained to released would produce similar rates of detention.

Virtually all of the legal aliens in the Southern District (97%) are Hispanic and they are detained at a sixty percent rate, below the rate for Hispanic illegal aliens in the district, but above the rate at which legals of all races are detained throughout the circuit (53%). Arrests of Mexican nationals with border crosser cards partially accounts for the higher rate.[65] A second factor is the seriousness of the crimes with which legal alien defendants are charged. Almost fifty percent of the legal alien defendants are accused of crimes for which the sentence is eleven or more years. In comparison, only sixteen percent of illegal aliens are charged with crimes this severe.

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63. *Id.*
64. The high detention rate derives largely from the drug and immigration problems associated with districts on the Mexican border, but is amplified in the Southern District by the low interview rate of defendants. Public defenders counsel their clients to refuse interviews on the supposition that information attained at the interview may detrimentally affect the sentence received if their client is found guilty. Since much of the information that a pretrial officer collects at an interview can positively affect the decision of the court to grant release (i.e., having a steady job or owning a home), lack of this data harms prospects for release.   When a defendant refuses to be interviewed, pretrial service officers attempt to acquire information from other sources such as friends, relatives, or employers, but the data is rarely as complete as it is when gathered from an interview.
   The Southern District of California is the most affected by this problem, but other districts (the Eastern District of California, Oregon, and the Western District of Washington) confront it to a lesser degree. The Ninth Circuit has the highest interview refusal rate in the country.
65. *See supra* Part IV.B.

In a departure from the circumstances seen in much of the rest of the circuit, the number of rebuttable presumption cases is exceedingly low. Out of 1906 defendants entered into the pretrial system, only fifty-six (3%) were recorded as having allegedly committed rebuttable presumption crimes. Logit models also reflect the irrelevance of rebuttable presumption in affecting the detention decision. The reason for this anomalous result lies in the heavy use of money bail as a means of detention. Bail is set, and the defendant detained, at the initial hearing. For most defendants, there is no detention hearing at which the question of rebuttable presumption may be argued.[66]

With rebuttable presumption so diminished as an explanatory variable in the detention decision for this district, residence achieved parity with citizenship as the one independent variable logit models which accounted for the most variation. Together, they formed the best two independent variable model and, with criminal history, the best three independent variable model. The main effects model with seven independent variables required nineteen iterations to converge. In the model with race as the only independent variable, the coefficient for Blacks was not significant at the ninety-five percent level. The coefficient for Hispanics was not significant when only U.S. citizens were considered.

G. District of Hawaii

Hawaii's detention rate of twenty-six percent is the lowest in the Ninth Circuit, and, as one might anticipate, illegal aliens comprise only six percent of its defendant population. The racial makeup of the PSA defendants in Hawaii differs from the other districts in the circuit. Individuals of Asian or Pacific Islander descent comprise fifty-seven percent of the island's defendant population, compared with only five percent of the circuit's defendant population. In 1994, there were no Native American defendants and only fourteen African American defendants (6%). Almost half the defendants in the Ninth Circuit are Hispanic, but only twelve percent in Hawaii are. The detention rate for Blacks (50%) and Hispanics (46%) is double that for Whites (19%) and Asian/Pacific Islanders (23%). However, when only U.S. citizens with

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66. The prosecution and court accede to this sidestepping of the 1984 Bail Reform Act largely from considerations related to management of the nation's heaviest caseload. Defense attorneys accept it because they feel that the arrangements for incarceration of their clients are more favorable under money bail than the detention and bail hearing alternative. The Southern District pretrial office has attempted to draw attention to the provisions of the Act, thus far without much success. Telephone Interview with Glen Vaughan, Chief Pretrial Services Officer, Southern District of California (March 7, 1996).

no criminal history and no rebuttable presumption offense are considered, the detention rates are virtually identical. Only one out of twenty-seven Whites in this group was detained, only one out of sixty-six Asian/Pacific Islanders, and no Blacks (none out of five) or Hispanics (none out of seven). Twenty-seven of the thirty-one legal aliens in the defendant population are Asian/Pacific Islander and twelve of the twenty-seven were detained. This forty-four percent detention rate was below the circuit detention rate for legal aliens (53%).[67]

Logit models which incorporate a rebuttable presumption variable fare the best in explaining detention in Hawaii. Among the one independent variable models, rebuttable presumption accounted for the most variation. Citizenship and rebuttable presumption were the best of the two independent variable models and, when combined with criminal history, performed better than any other three independent variable model as calculated by measures of entropy and concentration.[68]

The main effects model with seven independent variables failed to converge. In the model with race as the only independent variable, neither the coefficient for Blacks nor the coefficient for Hispanics was significant at the ninety-five percent confidence level.

H. District of Idaho

The District of Idaho has the fewest PSA defendants in the Ninth Circuit. It has both a low detention rate (28%) and a small percentage (9%) of illegal aliens.[69] In 1994, fifty-eight percent of the PSA defendants were White, which is higher than any other district in the circuit. Hispanics constituted twenty-four percent of the defendant population, while Native Americans constituted thirteen percent. Eighteen percent of White defendants were detained, while sixty-two

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67. Six of the 14 illegal aliens were released, a very high rate compared with other districts. This disparity probably results from the small number of illegals and Hawaii's island geography.

68. This result is in keeping with the observations of the Chief Pretrial Services Officer who stated that in the past, defendants with rebuttable presumption offenses were almost always detained. In an effort to lower the overall detention rate, rebuttable presumption defendants are now released more frequently (25% release rate versus 19% for the circuit). Telephone Interview with John Moccia, Chief Pretrial Services Officer, District of Hawaii (Sept. 28, 1995).

69. Even if an illegal immigrant is released by the judiciary, there is a strong probability that he or she will be detained by the INS. The use of immigration detainers by the INS may possibly encourage release by the court. Telephone Interview with Craig R. Fenwick, Chief Probation Officer, District of Idaho (Sept. 15, 1995).

percent of Hispanic defendants and twenty-two percent of Native American defendants were detained. All five Black and all three Asian defendants were released. Differences in detention rates are eliminated when immigrant status and criminal background are taken into account. Only two defendants, both White, were detained from the defendant population with U.S. citizenship, no criminal history, and no rebuttable presumption offense.

There were fourteen legal aliens entered into the pretrial system in Idaho, twelve of whom were Hispanic. Eight of the Hispanic legal aliens were detained: all had either a criminal history and/or were charged with a rebuttable presumption offense. Among the single independent variable logit models, citizenship accounted for the most variation, and rebuttable presumption accounted for the next most. Together, the two made up the best model with two independent variables. The top model with three independent variables had citizenship, rebuttable presumption, and criminal history.

The main effects model with seven independent variables failed to converge. In the model with race as the only independent variable, the coefficient for Blacks was not significant at the nine-five percent confidence level. The coefficient for Hispanics was not significant when the population was restricted to U.S. citizens.

I.   District of Montana

Citizenship is the dominant variable influencing detention in a majority of the Ninth Circuit's districts and is a contributing factor in all others but one—the District of Montana. Montana, one of the smaller districts with only 233 individuals entered into the pretrial system, had only four illegal alien defendants in 1994, which was only two percent of all its defendants (and the lowest percentage in the circuit). The number of legal aliens (five) was also minuscule. With such a small population of legal and illegal aliens, the citizenship variable was not effective in accounting for much variation in the released-to-detained ratio.

The logit models demonstrate this result. Among the one independent variable models, citizenship accounts for virtually no variation in the dependant variable. Race, rebuttable presumption, and residence are similarly lacking in effect. Prior criminal history was the only variable which accounted for much variation.[70]   Increasing the number of

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70.   The Chief Probation Officer indicated that criminal history and community ties are important factors in assessing whether a defendant should be released. Telephone Interview with Theodore McElkenney, Chief Probation Officer, District of Montana (Sept. 19, 1995).

independent variables had little impact on the amount of explained variation. A variety of two and three independent variable models accounted for slightly more than twenty-percent of the total variation, approximately what the criminal history variable did by itself. The main effects model with seven independent variables required nineteen iterations to converge. In the model with race as the only independent variable, neither the coefficient for Blacks nor the coefficient for Hispanics was significant at the ninety-five percent level.

Montana has the largest percentage (32%) of Native American defendants compared with other Ninth Circuit districts, and only Arizona has a greater absolute number.[71] Whites (56%) are the largest racial group, while Hispanics comprise eleven percent of defendants. In 1994, there was only one African American defendant and but one Asian defendant. The overall detention rate of twenty-seven percent is among the lowest in the circuit. Twenty-six percent of Whites were detained, while twenty-three percent of Native Americans and forty-four percent of Hispanics were detained. When citizenship, criminal history, and rebuttable presumption are controlled for, the detention rate for Whites was eight percent, while eleven percent of Native Americans and thirty-three percent of Hispanics were detained. The last figure is based on only twelve defendants, four of whom were detained.

J. District of Nevada

The overall detention rate in Nevada is thirty-four percent, one of the lower rates in the Ninth Circuit. Illegal aliens comprise only six percent of the defendant population, putting Nevada in the bottom third of Ninth Circuit districts on this measure. A majority of the defendant population is White (54%), but the population contains a substantial proportion of Blacks (23%). The Hispanic component is well below the figure for the circuit (15% versus 49%), while Asians (thirty-five defendants or 6%) and Native Americans (ten defendants or 2%) are relatively few. Whites are detained at a thirty-percent rate, a rate almost identical to the thirty-two percent circuit detention rate of Whites. The other racial groups are detained at rates lower than their respective circuit averages, but the differences between the groups seen elsewhere are also evident in Nevada. Hispanics (45%) and Blacks (41%) have the highest detention

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71. This figure for Native Americans would be even higher if misdemeanors, which are tried in tribal courts, were entered into the pretrial system. *Id.*

rates and Native Americans (20%) and Asians (11%) the lowest. When citizenship, criminal history, and rebuttable presumption offenses are controlled for, the differences between the racial detention rates disappear. Nine percent of Whites with U.S. citizenship, no criminal history, and no rebuttable presumption were detained. Twelve percent (four out of thirty-four) of Blacks in this category, as well as one out of six Native Americans, were not released. The twelve Asians and twelve Hispanics were all released.

Hispanics are slightly less than half of the legal alien population in Nevada. Approximately one-third are detained, far below the fifty-nine percent rate characteristic of the circuit, but above the rates for White, Black, and Asian legal aliens in Nevada. When criminal history and rebuttable presumption offenses are controlled for, the difference between the Hispanic legal aliens and the other legal aliens disappears.

The low percentage of illegal aliens in Nevada reduces the importance of the citizenship variable in the logit models. Among the one independent variable models, rebuttable presumption accounted for the most variation, with residence the next best predictor. The two independent variable models with the best performance were citizenship plus criminal history and rebuttable presumption plus residence. Inclusion of a third independent variable added little explanatory power and resulted in four different models which were essentially equivalent. Neither the coefficient for Blacks nor the coefficient for Hispanics was significant in the main effects model with seven independent variables.

K. District of Oregon

The detention rate for defendants in the District of Oregon is fifty-six percent, the third highest in the circuit. Illegal aliens constitute thirty-four percent of the defendant population, also the third highest in the circuit. Oregon had a moderate number (611) of PSA defendants, ninety-one percent of whom were either White (50%) or Hispanic (41%). Blacks constituted seven percent of the defendant population, while the remaining two percent was evenly divided between Native Americans and Asians. The detention rates for Whites (33%) and Blacks (42%) reflect circuit averages, while the Hispanic detention rate of eighty-seven percent is well above the circuit average of sixty-five percent and is exceeded only by Alaska.

Controlling for U.S. citizenship, rebuttable presumption offenses, and criminal history does little to explain comparative detention rates in Oregon. The Native American and Asian defendant populations were very small to begin with, and controlling for these factors reduces the Black defendant population to three (one of whom was detained) and the

Hispanic defendant population to four (one of whom was detained). The 117 Whites with U.S. citizenship, no criminal history, and no rebuttable presumption offense were detained at a three percent rate, below the eleven percent circuit rate for Whites with these traits.

Legal aliens were few in number. Two of the ten non-Hispanic legal aliens were detained; fourteen of the twenty-seven legal Hispanic aliens were detained. Among those with no criminal history or rebuttable presumption offense, all of the six non-Hispanic legal aliens were released, while three of the twelve Hispanic legal aliens were detained.[72]

Residence is more strongly associated with detention in Oregon than it is in any other district in the Ninth Circuit. Among the various one independent variable logit models, residence accounts for the most variation in the dependent variable. In the two and three independent variable models, residence is a component of the best models, though these models hardly improve upon the residence-only model as measured by entropy and concentration statistics. Neither the coefficient for Blacks nor the coefficient for Hispanics was significant in the main effects model with seven independent variables.

A look at the cross-tabulation of detention versus residence status confirms the logit model. Ninety-three percent of defendants who own or are buying their homes are released. Eighty-five percent who rent are released. The comparable figures across the Ninth Circuit are seventy-five percent (own/buy) and sixty-five percent (rent). At the other end of the spectrum, ninety-five percent of defendants with an unknown address are detained. The percentage for the circuit as a whole is seventy percent. In Oregon, knowing the residence status of a defendant is a strong indicator of the probability of release.[73]

Fifty-eight percent of White defendants own or rent, and thirty-seven percent of Black defendants are in this category. Only fifteen percent of Hispanic defendants own or rent, and Hispanics make up three-quarters

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72. Examination of the individual records of these three individuals revealed sound reasons why they were detained. In one case, the pretrial services office was ready to recommend release, but the defendant's attorney did not return the office's phone calls. A second defendant supplied false information for residence, place of employment, and address of a relative. The third case involved a Columbian national with legal immigrant status, but who was living in Columbia. She was charged with possession of 100 kilos of cocaine. Telephone Interview with Hence Williams, Jr., Chief Pretrial Services Officer, District of Oregon (May 7, 1996).

73. Eighty percent of Oregon's 611 defendants fall into the three categories of own, rent, or unknown residence.

of those with an unknown residence status. While virtually all Whites and Blacks who own or rent are released, thirty-seven percent of Hispanics in this class are detained.

The high detention rate in Oregon may be explained by the relatively large number of illegal aliens and a defendant population whose aggregate criminal history contains proportionately more felony offenses than any other district in the circuit. There remains a differentially greater detention rate for Hispanics, despite the set of controlling variables that are employed.[74]

L. Eastern District of Washington

The Eastern District of Washington is affected by illegal immigration from Mexico to a greater extent than one would suppose, given its distance from the southern border. The reason lies in the amount of farming dependent upon migrant labor in that part of Washington state. In contrast, illegal immigration from Canada is minimal.[75]

The Hispanic portion of the defendant population is twenty-nine percent, the sixth highest share among the thirteen non-territorial districts in the Ninth Circuit. Whites make up fifty-five percent of all PSA defendants, while Blacks and Native Americans comprise ten percent and six percent, respectively. There was only one Asian defendant in the district in 1994. The overall detention rate for the Eastern District of Washington was fifty-one percent, close to the circuit average, but composed of markedly different racial detention rates. Thirty-two percent of White defendants were detained, the same percentage as for the circuit, but Blacks (62%), Native Americans (35%), and Hispanics (84%) were detained at rates exceeding the circuit average for their groups. When the set of defendants with U.S. citizenship, no criminal history, and no rebuttable presumption offense were examined, differences largely disappeared.[76] In the Eastern District

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74. An aggressive enforcement policy by the Oregon office of the INS results in searches of state and local correctional facilities for persons believed to be illegal aliens. Upon conclusion of their sentences (usually for drug offenses), those discovered are charged with the federal crime of illegal re-entry. They then serve a two-year sentence if found guilty, followed by deportation to Mexico. Using numbers provided by the INS, the Oregon Pretrial Office estimates that slightly more than half of the 199 illegal aliens detained in 1994 arrived through this process. When taken together with a high interview refusal rate, this practice may account for the elevated Hispanic detention rate and contribute to the link between residence status and release. Telephone and Personal Interviews with Hence Williams, Jr., Chief Pretrial Services Officer, District of Oregon (Oct. 5, 1995 and April 17, 1996).

75. Telephone Interview with Peter L. Grunte, Chief Probation Officer, Eastern District of Washington (Sept. 25, 1995).

76. It should be noted that because of the small size of the district (219

of Washington, fourteen of the fifteen legal aliens were Hispanic, and eleven of these fourteen were detained. Even six of the eight legal aliens with no criminal history and no rebuttable presumption offense were detained. However, all six were accused of committing crimes which had maximum sentences exceeding eleven years.

Among the one independent variable logit models, criminal history accounted for the most variation. The addition of citizenship to criminal history increased the amount of explained variation and resulted in the best two independent variable model. None of the models with three independent variables offered much improvement.[77] The percentage of rebuttable presumption cases was lower in the Eastern District than it was throughout the circuit, thus diminishing the importance of the rebuttable presumption variable in the logit computations. The main effects model with seven independent variables required seventeen iterations to converge. In the model with race as the only independent variable, the coefficient for Blacks was not significant at the ninety-five percent level. The coefficient for Hispanics was not significant when only U.S. citizens were considered.

M. *Western District of Washington*

The Western District of Washington has both a low rate of detention (32%) and a small percentage of illegal immigrants entered into the pretrial system (11%). Its 479 defendants make it a mid-sized district. The racial composition of the defendant population is similar to that of other northern districts in the Ninth Circuit. Whites comprise a majority (57%) of the pretrial defendant population. Hispanics are fifteen percent of the PSA defendants and they have a reduced presence compared to the circuit as a whole. Blacks (15%), Native Americans (4%), and Asians (10%) round out the defendant population. Whites (22%), Blacks (38%), and Native Americans (20%) were detained at rates below the circuit average for their respective racial groupings, while Asians (30%) and Hispanics (71%) were detained at rates above the circuit average.

Community ties appear to play a larger role in the decision to detain or

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defendants), the number of minority defendants in this category is very small; 18 of 22 (82%) were released, compared to 75 of 83 Whites (90%). *Id.*

77. The Chief Probation Officer stated that many of the illegal aliens entered into the pretrial system now have a criminal record. In the past, they had just been guilty of immigration offenses. *Id.*

release than elsewhere in the Ninth Circuit, with the exception of Oregon. Without controlling for rebuttable presumption offenses or criminal history, racial disparities in detention rates disappeared for U.S. citizens who own or rent. The detention rates for Whites (7%), Blacks (11%), Native Americans (11%), Asians (8%), and Hispanics (9%) were nearly equal.

Among the logit models with one independent variable, residence is the factor that explains the most variation. Together with citizenship it competes with the citizenship/criminal history pair for the top two independent variable model. Citizenship, rebuttable presumption, and criminal history narrowly edge out citizenship, residence, and criminal history for the best three independent variable model. Both of the three independent variable models improve upon the best two independent variable model. Neither the coefficient for Blacks nor the coefficient for Hispanics was significant in the main effects model with seven independent variables.

The standard controls used in this paper—citizenship, criminal history, and rebuttable presumption—did not eliminate differences in detention rates in the Western District (although it should be noted that we are dealing with small numbers). Only three percent of Whites with U.S. citizenship, no criminal history, and no rebuttable presumption offense were detained. Seventeen percent of Blacks (five out of twenty-nine) in this category were detained. None of the eight Native Americans, one out of fourteen Asians (7%), and two out of eleven Hispanics (18%) were detained.

The legal alien population is mostly from Canada.[78] Only one-quarter of the legal aliens are Hispanic, but this group is detained at double the rate of White and Asian legal aliens because of prior criminal activity and alleged commission of rebuttable presumption offenses.

V. DISCUSSION

A. *Race, Ethnicity, and Pretrial Detention*

Examination of the logit regression coefficients for the main effects model and the model with race/ethnicity as the single independent variable indicates that citizenship, criminal history, and a rebuttable presumption offense have the most significant impact on the decision to detain. Race/ethnicity has the least impact among the seven independent

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78. Telephone Interview with Carol M. Miyashiro, Chief Pretrial Services Officer, Western District of Washington (Sept. 21, 1995).

variables studied. At the circuit level, when the coefficient for Black status is transformed,[79] it adds slightly less than three percentage points to a defendant's chance of being detained as compared to a White defendant. The difference between Hispanic defendants and White defendants is approximately seven percentage points, while Asian and Native American defendants have lower rates of detention than Whites.

At the district level, where the full main effects model operated successfully, none of the coefficients for the race/ethnicity categories was found to be statistically significant at the ninety-five percent level. A simpler model, with race as the sole independent variable and limited to U.S. citizens, ran successfully in all districts and confirmed that race was not significant in the decision to detain.[80] Are the circuit and district level results contradictory? Not necessarily. When the characteristics of the districts vary greatly from one another, as they do here, it is possible for the coefficients from the aggregate circuit analysis to be statistically significant while the individual district's coefficients are not statistically significant. In addition, the standard error, which is used to compute Z-scores, decreases as the sample or population size increases. This results in larger Z-scores and a greater possibility of statistical significance. Many of the districts have only a small number of cases, which means there would have to be larger differences in the detention rates for the various racial/ethnic groups for the differences to be statistically significant.

The results of the various cross-tabulations and logistic regression analyses consistently reveal that race/ethnicity is not a strong predictor of the decision to detain or release. As noted earlier, at the circuit level both Blacks and Hispanics are more likely than Whites to be detained. These differences, especially those between Blacks and Whites, substantially diminish when citizenship, offense seriousness, and rebuttable presumption are taken into consideration. Although Hispanics continue to be detained at a higher rate than Whites even when these three factors are taken into account, the differences can be

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79. The coefficient is exponentiated. In other words, its antilog is used in the analysis.

80. In two of the three cases where the race coefficient was significant (for Blacks in the Eastern District of California and the District of Nevada) in the simpler model, the full main effects model did not show racial category to be significant. The third case (Hispanics in Alaska) resulted from the large number of out-of-state Hispanics charged with drug offenses. If residence were used as a control, the coefficient would not be significant.

attributed to idiosyncratic policies and procedures in one or two districts.

The fact that Native Americans continue to be detained at a higher rate than Whites reflects the fact that, in the District of Arizona, a large number of the Native Americans charged with a violent offense did not use a firearm during the commission of the offense. The alleged offenses, including homicide, were serious enough to require detention, but because use of a firearm is necessary for a rebuttable presumption to be invoked, these cases appeared in the subset used for analysis (U.S. citizen, no criminal history, and no rebuttable presumption). Substituting severity of the offense for rebuttable presumption in the cross-tabular analysis eliminated this difference.

The higher rate of detention for Hispanics at the circuit level is the result of pretrial procedures, a data coding problem, and the characteristics of the defendant population (especially illegal aliens) in the Southern District of California. The use of bail as the primary means of detention in the Southern District of California dramatically reduces the effect of a rebuttable presumption on detention and negates the utility of this variable as a control variable. In addition, the inexperience of new pretrial service officers in San Diego in 1994 resulted in a failure to record data documenting the release of approximately two dozen Hispanic defendants who were initially detained.[81] Lastly, the use of U.S. citizenship as a control in this district is seriously compromised because approximately one-fourth to one-third of the Hispanic defendants in this district who are U.S. citizens either live in Mexico or have their spouses or children living there. These defendants are usually detained because of the presumption of flight.[82]

Without these two anomalies, the circuit-wide detention rates for Whites, Blacks, Native Americans, and Hispanics (controlling for citizenship, crime severity, and rebuttable presumption) would all be between ten and fifteen percent, with Asians detained at a rate of five percent.[83] In those districts where some differentials remain, the number

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81. These Hispanic defendants were counted as detained in the file used for the study. The Southern District of California's Pretrial Services Office performed a lengthy cross-check of computer listings with the original paper files and discovered the discrepancy.

82. Telephone Interview with Glen Vaughan, Chief Pretrial Services Officer, Southern District of California (Sept. 27, 1996). The persistence of a higher Hispanic detention rate in the Southern District, apart from the question of rebuttable presumption, is seen in the last line of Table 5 where in the control group of U.S. citizens with no criminal history, and charged with an offense whose maximum sentence is less than 11 years, Hispanics are detained at a considerably higher rate than the other racial groupings. This difference reflects the "community ties" to Mexico.

83. Dropping the cases from Arizona reduces the detention rate for Native Americans with no criminal history and no rebuttable presumption offense to 10%. All Native Americans are U.S. citizens.

of minority defendants is so small that a shift of a few individuals from detained status to released status would result in equivalent rates.

In interpreting these results, one should understand that the failure to disprove the null hypothesis (i.e., at the 95% confidence level, there are no statistically significant differences among the detention rates for the various racial groups) is not the equivalent of proving the system operates in a racially neutral manner. It is more accurate simply to conclude that the differences among detention rates for various racial and ethnic groups were not statistically significant.

B. *Pretrial Services Office Diversity*

What emerges as the most striking finding of this study is the diversity of environments—characterized by the shifting importance from district to district—of several different factors related to pretrial detention. This study is consistent with work done by others, which has found the implementation of federal authority at the district level tends to be heterogeneous rather then uniform.[84]

Among the assortment of conditions, the size of the illegal immigrant population in the district is the leading variable in explaining the overall detention rate. Because of the risk of flight and the frequent inability of pretrial service officers to acquire information about community ties (which positively influence a decision to release), illegal aliens are almost always detained. Thus, there is a strong correlation between the number of illegal alien defendants in a district and the overall detention rate. For the circuit and for many districts, the relatively large entropy and concentration values in the model with citizenship as the sole independent variable and the large negative coefficients for "illegal" in the logit models with the citizenship variable confirm this relationship.

A second factor which plays a large role in the detention decision is the nature of the alleged crime. As shown in Table 7, the mix of crimes varies considerably across the circuit. In Nevada, twenty-nine percent of criminal defendants are charged with fraud, while in seven districts less than ten percent of defendants are accused of this offense. The Southern District of California encounters a defendant population in which over half have been charged with drug offenses, while a majority of Ninth Circuit courts have about one-quarter of their defendants in this

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84. Stryker et al., *supra* note 7, at 496. For the differences among federal prosecutorial districts, see DAVID BURNHAM, ABOVE THE LAW 88-94 (1996).

category. Border districts such as Arizona and Southern California tend to have more immigration cases.

Different crimes embody different levels of severity. These crimes may or may not involve a rebuttable presumption with regard to detention, and they may have been committed by perpetrators with significantly different criminal histories.[85] These factors, in turn, influence the decision to release or detain. The logit analyses confirm their importance. Combined with citizenship, these three factors produced the most successful models[86] and have the three largest coefficients among the variable categories. When criminal history was matched with citizenship, it provided the best model with two independent variables for the circuit. When these two variables were combined with rebuttable presumption, they produced the best three independent variable model.

The results of the logit runs also illuminate the differences among the districts. For example, in Alaska many defendants are charged with rebuttable presumption offenses. Since a very high percentage of those so accused (84%) are detained, the rebuttable presumption variable is quite powerful in this district (an entropy value of .25 and concentration of .32 for a single independent variable model). In contrast with Alaska, the rebuttable presumption variable adds negligible explanatory power to logit models for the Southern District of California because of the administrative practices in that district. The entropy and concentration values stand at .004 and .005, respectively.

In addition to procedural differences, the districts of the Ninth Circuit also diverge in how they interpret their roles. Some have a law enforcement orientation that could potentially result in higher detention rates. Others see themselves as extensions of the court with the duty to maximize the number of defendants released. Several Chief PSOs with a strong pro-release perspective pointed with pride to achievements in this area. Despite these differences in outlook, detention rates, whether aggregate or specific, tend to reflect the defendant environment and administrative practices of the office.

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85. In the Ninth Circuit, 28% of those accused of bank robbery had no criminal history. Twenty-two percent had 12 or more felony arrests, felonies involving violence, or felonies involving drugs. This contrasts with those indicted for bank embezzlement, where 82% of the defendants had no criminal history, and only 1% had 12 or more felony criminal events. Even among alleged drug offenders there were differences. Seventy-three percent of those accused of selling or distributing marijuana had no criminal history; 49% of those arrested for selling or distributing narcotics were in this category.

86. *See infra* Table 8.

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C. Gender and Pretrial Detention

Only 14% of the circuit's PSA defendants were women and their overall detention rate was less than half that of the men (24% versus 53%). The difference persists even when controlling for factors such as criminal history. In the aggregate circuit data, women who had between eight and eleven previous felony events were less likely to be detained than were men who had no felony criminal record.[87] The striking difference in detention rates appears to result from several factors.

In many cases, the woman is the wife or girlfriend of a male who heads or participates in a criminal enterprise. Upon arrest and indictment, the woman is charged with the same offense as the man. The pretrial office and the judicial official take into account the different roles in determining whether or not detention is appropriate.[88] A second cause of the higher release rate for females may be their role as mothers. If the woman has children, she is usually the primary care giver and this factor predisposes the court toward release.[89] A third element involves the nature of the alleged offense. Defendants of both sexes accused of white collar crimes get released at higher rates than defendants charged with other types of crimes, and women are indicted for proportionately more white collar crimes than are men. Lastly, traditional attitudes about gender that impede women in other circumstances may, in this instance, benefit them.[90]

VI. CONCLUSION

This paper has discussed the diverse influences affecting pretrial detention in the Ninth Circuit. Among the varied environments of the thirteen districts, citizenship and criminal history, broadly interpreted, play important roles. Less obvious is the existence of racial or ethnic

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87. The figures are 39% detention for women with 8 to 11 felony events and 41% detention for men with no felony events. There are only 18 women in this category, however. Felony events are arrests, convictions, or felonies compounded by drugs or violence for which the defendant is given an additional point.

88. Telephone Interview with Olivia Meza, Chief Pretrial Services Officer, District of Arizona (Sept. 18, 1995); Telephone Interview with Hence Williams, Jr., *supra* note 74; Telephone Interview with James R. Marsh, Chief Pretrial Services Officer, District of Nevada (Sept. 19, 1995).

89. *Id.*

90. Telephone Interview with Olivia Meza, *supra* note 88.

discrimination in the decision to release or detain defendants.[91] Logistic regression analysis of the aggregate circuit data showed that while race/ethnicity was statistically significant, it has only a slight impact on the detention decision.

At the district level, the operational level of the federal pretrial system, racial/ethnic bias was not evident. Residual differences in the detention rates between Hispanics and Whites in the main regression model likely reflect the strong ties to Mexico of an appreciable number of Hispanic defendants with U.S. citizenship and, to a lesser extent, a data coding problem in the Southern District of California. In Arizona and Southern California, the high detention rate of legal Hispanic immigrants is, in fact, largely a high detention rate of Mexican nationals holding border crossing cards. The individual's actual residence being in a foreign country, the individual's lack of community ties to the United States and the inability of the United States to extradite these individuals once they have returned to their country of origin are factors which favor detention.

Contingency table analysis occasionally revealed some differences between the detention rates of Blacks or Hispanics and other races, but the significance of such findings is questionable given the low cell counts and the statistical difficulty of controlling for more than a few factors. The potential for coding idiosyncracies to affect adversely such fine-grained analysis also calls into question any conclusions one might draw.

The study may best be viewed as having delimited the range of effect of any bias that may exist in Ninth Circuit pretrial detention practices. In the "worst case," using circuit level data, and ignoring both data problems in the Southern District of California and any possible impact from variables which could not be entered into the model (such as strength of evidence or ties to Mexico), Black status adds very slightly to the likelihood of being detained, while being Hispanic adds somewhat more of a likelihood. Asian and Native American status reduces the probability of detention. For African Americans and Hispanics, any bias appears to be confined to a relatively small number of cases of "dispositional uncertainty," where the competing arguments for

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91. This is not to say that supposedly neutral factors do not have a disparate racial impact on the pretrial process. For instance, it has been argued by many that there is a systemic racial bias in the conduct of the "war on drugs." *See, e.g.,* David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality,* 1994 U. CHI. LEGAL F. 237, 237-39. Bias of this type can be seen most clearly in pretrial detention with rebuttable presumption offenses, which result in detention for better than four out of five defendants. Because rebuttable presumption offenses are most often drug offenses and drug defendants are disproportionately Black, application of this provision of the 1984 Bail Reform Act has a greater impact on the Black defendant population.

detention and release are evenly balanced.[92]

At the district level, the coefficients of the logit runs did not indicate the presence of racial bias. This finding, together with the absence from the logit model of some factors which affect the detention decision (and which could account for the differential in circuit detention rates), supports the notion that there is no bias in the pretrial process. Said another way, the magnitude of any bias that may exist is too small to be unambiguously confirmed through statistical techniques, which cannot reliably incorporate the multitude of considerations expressed in the recommendations of pretrial service officers and the decisions of court officials.

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92. Letter from Spohn, *supra* note 25.

APPENDIX

I. MODELS

In the first tests of pretrial detention logit models, attempts to employ more than three independent variables caused the computation to fail to converge within the default range of twenty iterations. This meant that the coefficients and tests of significance that were produced by the calculations could not be meaningfully interpreted. The reason for this problem was the high number of empty or low count cells produced by interactions of the independent variables.

One solution to this problem was to reduce the number of categories in the independent variables. For example, the residence variable which had six categories (own, rent, lived with others, no fixed address, unknown, and other) was recoded into only two categories: one comprising those who own, rent, or live at a fixed address with others, and a second category containing the remainder of residence response categories.[93] This analytical approach conforms with the larger body of criminal justice research and provides perhaps the best of several perspectives from which to evaluate the question of possible bias in the pretrial detention process.

Four of the seven independent variables had their categories reduced so that only race contained more than three categories. In addition, the categories were reordered so that the element producing the greatest propensity for detention was listed first. The SPSS Loglinear procedure which was used to produce these statistics does not report statistics for the last listed category of the independent variable(s). Its coefficient can be calculated by adding the coefficients for all of the other categories and then subtracting that sum from zero. Unfortunately, the Z-score for this category cannot be computed. For the race variable, it was determined that "White" would be the last category listed. The decision to have White be the last category for the race variable permits calculation and display of the coefficients for the four minority groups with their respective Z-scores.

As stated above, the dependent variable in the logit model was the

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93. The penalty for implementing this approach is a loss of information which decreases the R^2 statistic (in this study, the entropy and concentration statistics) for each model. What this means is that the variations in data on the individuals are not detailed. For example, one cannot statistically analyze the differences among those who own their home compared to those who rent, or who are living at a fixed address. In evaluating the one, two, and three independent variable logit models (explained below), the original full range and order of categories for each variable was kept.

ratio of released to detained defendants. All seven independent variables were entered into the equation, which took the form of a main effects model. A main effects model assumes no interactive effects between any subset of independent variables.[94]

A second solution to the convergence problem was to limit the equations to a maximum of three independent variables. This approach was used to discover which sets of independent variables had the most explanatory power at the circuit and district levels. Over fifty different logit models were run for each district and for the aggregate circuit data. The models tested contained one to three independent variables and were run in both saturated and unsaturated main effects modes. In districts with small defendant populations (such as Alaska), virtually all main effects models with three independent variables and some models with two independent variables either failed to converge within the number of iterations specified (twenty) or produced anomalous results with warning messages indicating that parameter estimates could be incorrect due to cell counts of zero or a mixture of large and small counts. To avoid the computational difficulties associated with small populations, all the model results reported here were for saturated models. Comparison of results from districts where both main effects and saturated models ran successfully revealed relatively small differences between the two as measured by Shannon's entropy measure and Gini's concentration measure.

As one would expect, the more independent variables in the model, the greater the amount of explained variation in the dependent variable. Models with more than three independent variables usually failed to converge. Chart 1 and Tables 8 and 9 display the percent variation accounted for by various one, two, and three independent variable models in the circuit and in each district. Chart 1 shows the additional amount of variation explained when a second and a third independent variable are added to the citizenship model. Usually, less additional variation is explained with each additional independent variable. For some districts, a more parsimonious two independent variable model is as good as a three independent variable model. For one district,

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94. Subsequent tests using a saturated model, which includes all interactive effects, were unsuccessful because of insufficient computer memory. Time did not permit the selection and testing of models which contained a subset of all interactive terms. In the preliminary research performed on one district, the vast majority of interactive terms were found to have coefficients which were not significant.

Montana, the one independent variable model (criminal history) explains as much variation as two and three independent variable models.

The use of entropy and concentration statistics is somewhat controversial, and they have the liability of minimizing the effect of an independent variable if the distribution is skewed among the variable categories. For example, if a population is fifty percent White, forty-five percent Hispanic, and five percent Black, and the White and Hispanic detention rates were both fifty percent, the detention rate for Blacks could be ninety percent without causing the concentration or entropy statistics to attribute much marginal explanatory power to the addition of the race variable to the model. Despite this deficiency, they are used in this paper because they concisely summarize the relative explanatory power of the hundreds of models tested, thus providing a general measure of whether race and ethnicity matters in the pretrial detention/release decision. As explained below, contingency table analysis was used in conjunction with the logit models to examine situations where the concentration and entropy statistics might understate detention rates for a small minority population.

Table 4 presents entropy and concentration values (measures of association) for various saturated logit models for the aggregated circuit data. The dependent variable is always detention, a dichotomous variable with value 1 for released and value 2 for detained.

TABLE 4
ENTROPY AND CONCENTRATION VALUES FOR
AGGREGATED CIRCUIT DATA

INDEPENDENT VARIABLES	ENTROPY	CONCENTRATION
Citizenship, rebuttable presumption, criminal history	.242	.299
Citizenship, criminal history and Severity	.240	.297
Citizenship, criminal history and residence	.235	.292
Citizenship, rebuttable presumption and residence	.229	.285
Citizenship, criminal history and race	.200	.254
Citizenship and criminal history	.187	.239
Citizenship, rebuttable presumption and race	.175	.223
Citizenship and residence	.166	.214
Citizenship and rebuttable presumption	.162	.208
Citizenship and severity	.159	.203
Citizenship and sex	.119	.155
Citizenship and race	.114	.151
Citizenship	.098	.132
Residence	.092	.124
Criminal history	.080	.105
Race	.077	.104
Rebuttable presumption	.054	.070
Severity	.045	.061
Sex	.030	.040

For circuit data, citizenship accounts for most variation among the one independent variable models. Together with criminal history, citizenship accounts for the most variation among the two independent variable models and, when grouped with criminal history and rebuttable presumption, it accounts for the most variation among the three independent variable models.

The severity of the crime allegedly committed by the defendant is one of the most important factors in the decision to release or detain. Unfortunately, the pretrial file maintained by the Statistics Division of the AOUSC no longer contains entries for Title and Section of the U.S. Code. In the past, Title and Section could be linked to a three-character severity code, which lists thirteen levels of a maximum possible sentence (from no prison time to the death penalty).

The criminal database, which is maintained by the Statistics Division, does include data on Title and Section, and the individuals in the criminal file are mostly the same people who are in the pretrial file. Both the pretrial file and the criminal file contain an identical four-digit offense code.

To construct a severity of crime index which could be used with an extract from the pretrial file, criminal defendant filings in the United States in calendar year 1994 were selected. The output contained the severity code, the four-digit offense code, and the number of defendants who had committed a particular offense with a specific severity (as defined by sentence length). For each four-digit offense, a weighted average was then built, which reflected both the dispersion of the various severity levels for each offense and the number of defendants in each severity level. If the distributions for most offenses were multimodal, this procedure would have yielded an inaccurate index. However, approximately half the offenses were represented by a single severity level and 80% of the remainder by a severity level distribution with a clear, dominant mode. The weighted average was then checked with the original distributions to make sure that it was an appropriate indicator of central tendency.

Next, the thirteen severity levels were consolidated to five, as follows:
1. no sentence or misdemeanor
2. 1 to 3 years
3. 4 to 10 years
4. 11 to 20 years
5. 21 or more years, including life and the death penalty

The last step was to perform a match in SPSS of four-digit offense codes with the newly created index file and the existing pretrial extract file. Each of the records in the Ninth Circuit file then had an indicator of severity of crime.

This index is not as powerful as a severity indicator attached directly to the record: it is an average. A particular defendant may have been charged with a larceny offense for which he could receive a maximum of three years in jail. The index may reflect an average five year sentence

for larceny. In this case, the defendant would be assigned a severity code of three, when his true severity code was two. Thus, the detention decision would not be accurately compared with the severity of offense. Despite the lack of precision inherent in the use of an index, the severity index variable does modestly correlate with likelihood of being detained, proving its utility. However, severity of crime would be a more robust variable, and add more explanatory power to several logit models, if it were not a weighted average.

III. CRIMINAL HISTORY

The criminal history variable is a composite of four felony criminal fields in the pretrial database: prior felony arrest, prior felony conviction, prior violent felony, and prior drug-related felony. The number of felony events from each field were summed, producing a grand total. After examining the distribution, a new variable was created with six aggregated categories, as shown below:

1. No previous felony history
2. 1 or 2 felony events
3. 3 or 4 felony events
4. 5 to 7 felony events
5. 8 to 11 felony events
6. 12 or more felony events

Fifty-five percent of defendants had no previous felony history, while the remaining groupings represented 7% to 12% of the population. Only 2% of the population had three or more felony arrests with no felony convictions. The composite criminal history variable correlated more strongly with detention than did any of the component variables. Although the database also contains similar misdemeanor fields, they did not correlate with detention as well as the felony variables and were not used.

The pretrial database also contains information on prior criminal activity while on probation or pretrial release, as well as data showing whether the defendant had absconded, escaped from custody, or failed to appear for court dates. An individual's chance for release is dramatically reduced if he or she has done any of the above, but because only a relatively small percentage of defendants have committed these transgressions (5.4% have absconded, 2.5% have escaped, and 16.4% have failed to appear), the variables do not have much impact in estimating the chance of being detained.

CHART 1

Effect of Adding Variables

Legend:
- ■ Citizenship
- ☐ Citizenship & Crimhist
- ■ Citizen, Crimhist, & Presume
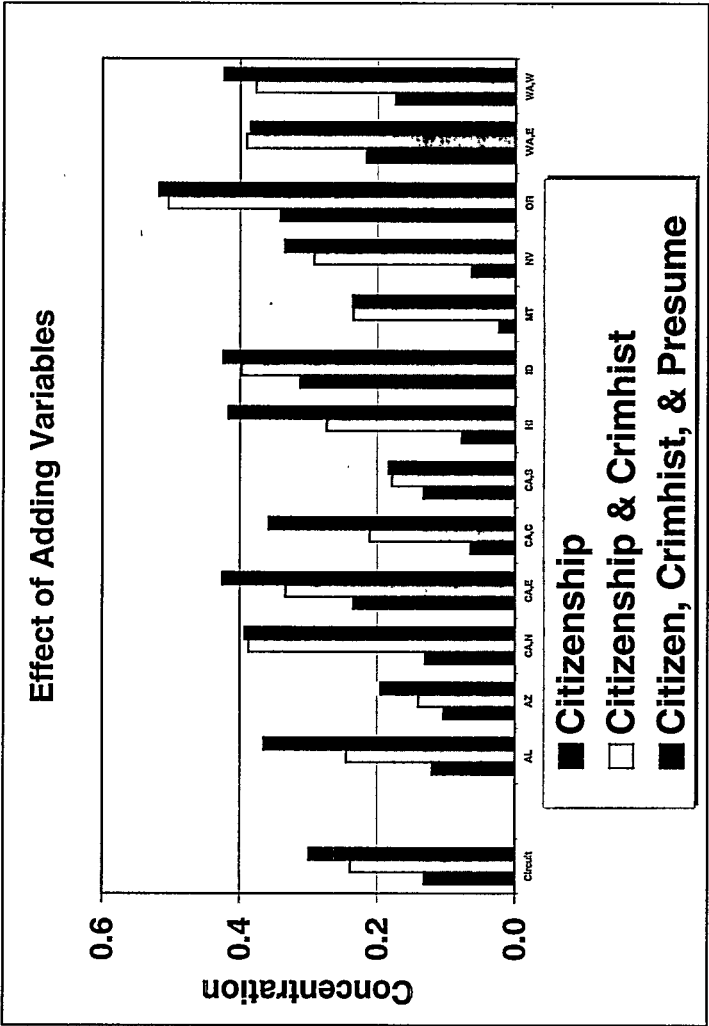
Note: Addition of third valuable to WA,E results in a reduction of concentration because of computational delta.

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TABLE 5
1994 NINTH CIRCUIT PSA DEFENDANT POPULATION

	WHITE		BLACK		NATIVE AMERICAN		ASIAN		HISPANIC	
	No.	%	No.	%	No.	%	No.	%	No.	%
Circuit	3077	31.4%	1131	11.5%	300	3.1%	496	5.1%	4809	49.0%
Alaska	120	54.8%	52	23.7%	14	6.4%	7	3.2%	26	11.9%
Arizona	332	15.4%	52	2.4%	127	5.9%	3	0.1%	1645	76.2%
Cal, N	223	38.3%	176	30.2%	1	0.2%	68	11.7%	115	19.7%
Cal, E	180	32.3%	62	11.1%	3	0.5%	24	4.3%	288	51.7%
Cal, C	525	28.4%	419	22.7%	5	0.3%	140	7.6%	759	41.1%
Cal, S	392	20.6%	83	4.4%	2	0.1%	30	1.6%	1399	73.4%
Hawaii	58	25.1%	14	6.1%	0	0.0%	131	56.7%	28	12.1%
Idaho	83	58.0%	5	3.5%	18	12.6%	3	2.1%	34	23.8%
Montana	131	56.2%	1	0.4%	75	32.2%	1	0.4%	25	10.7%
Nevada	297	53.7%	126	22.8%	10	1.8%	35	6.3%	85	15.4%
Oregon	306	50.1%	41	6.7%	8	1.3%	6	1.0%	250	40.9%
Wash, E	159	54.6%	29	10.0%	17	5.8%	1	0.3%	85	29.2%
Wash, W	271	56.6%	71	14.8%	20	4.2%	47	9.8%	70	14.6%

TABLE 6
1994 NINTH CIRCUIT DETENTION RATES

	WHITE		BLACK		NATIVE AMERICAN		ASIAN		HISPANIC	
	No.	%	No.	%	No.	%	No.	%	No.	%
	DETAINED		DETAINED		DETAINED		DETAINED		DETAINED	
ALL DEFENDANTS	977	31.8%	509	45.0%	82	27.3%	131	26.4%	3123	64.9%
DEFENDANTS WITH U.S. CITIZENSHIP, NO CRIMINAL HISTORY, AND NO RE-UTTABLE PRESUMPTION OFFENSE	152	10.8%	52	14.9%	35	18.3%	10	5.2%	134	27.3%
DEFENDANTS WITH U.S. CITIZENSHIP, NO CRIMINAL HISTORY, AND LESS SERIOUS OFFENSES*	66	7.2%	27	10.9%	10	9.6%	8	5.8%	46	21.1%

*   Offenses where the maximum sentence is less than 11 years.

Note: The higher detention rates for Hispanics in the two control groups is partly a function of a data coding problem in the Southern District of California. This problem is exaggerated for the control group with no rebuttable presumption offenses as the judicial procedures followed in CA,S rarely permit a detention hearing where a motion for rebuttable presumption can be made. Thus, controlling for this factor in CA,S has little effect. Lastly, Hispanic defendants in districts which border Mexico often either live in Mexico or have a wife and children living there. These ties increase the chance of flight and are a rationale for detention.

TABLE 7

1994 NINTH CIRCUIT DEFENDANTS COMMENCED
FOR SELECTED OFFENSE CATEGORIES

	TOTAL	LARCENY		EMBEZZLE-MENT		FRAUD		WEAPONS		DRUGS		TRAFFIC		IMMIGRATION	
	No.	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
CIRCUIT	12988	602	4.6%	332	2.6%	1548	11.9%	512	3.9%	3617	27.8%	2941	22.6%	1255	9.7%
ALASKA	266	28	10.5%	2	0.8%	18	6.8%	13	4.9%	74	27.8%	69	25.9%	3	1.1%
ARIZONA	1418	44	3.1%	45	3.2%	230	16.2%	70	4.9%	582	41.0%	7	0.5%	181	12.8%
CAL, N	783	60	7.7%	83	10.6%	174	22.2%	43	5.5%	188	24.0%	35	4.5%	24	3.1%
CAL, E	964	70	7.3%	37	3.8%	139	14.4%	37	3.8%	249	25.8%	82	8.5%	161	16.7%
CAL, C	1595	123	7.7%	49	3.1%	386	24.2%	82	5.1%	391	24.5%	15	0.9%	130	8.2%
CAL, S	2167	49	2.3%	31	1.4%	145	6.7%	23	1.1%	1186	54.7%	3	0.1%	460	21.2%
HAWAII	2202	39	1.8%	13	0.6%	47	2.1%	7	0.3%	87	4.0%	1912	86.8%	15	0.7%
IDAHO	169	4	2.4%	1	0.6%	12	7.1%	8	4.7%	47	27.8%	5	3.0%	6	3.6%
MONTANA	339	37	10.9%	6	1.8%	33	9.7%	38	11.2%	83	24.5%	32	9.4%	12	3.5%
NEVADA	582	14	2.4%	8	1.4%	166	28.5%	48	8.2%	166	28.5%	6	1.0%	7	1.2%
OREGON	641	26	4.1%	18	2.8%	64	10.0%	46	7.2%	203	31.7%	0	0.0%	133	20.7%
WASH, E	395	6	1.5%	7	1.8%	20	5.1%	66	16.7%	139	35.2%	1	0.3%	96	24.3%
WASH, W	1467	102	7.0%	32	2.2%	114	7.8%	31	2.1%	222	15.1%	774	52.8%	27	1.8%

TABLE 8

LOGIT MODELS WITH ONE INDEPENDENT VARIABLE

	CITIZENSHIP		CRIMINAL HISTORY		RACE		REBUTTABLE PRESUMPTION		RESIDENCE		SEVERITY		SEX	
	Entropy	Concentration	Entropy	Concentration	Entropy	Concentration	Entropy	Concentration	Entropy	Concentration	Entropy	Concentration	Entropy	Concentration
CIRCUIT	0.0985	0.1316	0.0797	0.1054	0.0766	0.1038	0.0541	0.0704	0.0921	0.1239	0.0453	0.0613	0.0304	0.0404
ALASKA	0.0961	0.1201	0.1110	0.1455	0.1494	0.1910	0.2490	0.3232	0.0565	0.0740	0.2617	0.2887	0.0297	0.0350
ARIZONA	0.0768	0.1037	0.0111	0.0153	0.0481	0.0649	0.0371	0.0491	0.0248	0.0340	0.0281	0.0383	0.1459	0.0203
CAL, N	0.0989	0.1304	0.2196	0.2793	0.0382	0.0498	0.0590	0.0785	0.0647	0.0810	0.0646	0.0828	0.0169	0.0202
CAL, E	0.2125	0.2349	0.1553	0.1898	0.1382	0.1780	0.0517	0.0623	0.1672	0.2072	0.0950	0.1268	0.0382	0.0520
CAL, C	0.0476	0.0646	0.0828	0.1073	0.0397	0.0544	0.1493	0.1871	0.0906	0.1179	0.0566	0.0764	0.0324	0.0432
CAL, S	0.1117	0.1330	0.0656	0.0765	0.0388	0.0524	0.0042	0.0050	0.1017	0.1328	0.0330	0.0433	0.0318	0.0436
HAWAII	0.0611	0.0777	0.1500	0.1846	0.0502	0.0637	0.2038	0.2600	0.0532	0.0622	0.1372	0.1357	0.0231	0.0237
IDAHO	0.2526	0.3127	0.2025	0.2536	0.1308	0.1661	0.2335	0.2915	0.0793	0.0990	0.1545	0.1727	0.0473	0.0488
MONTANA	0.0176	0.0237	0.1865	0.2280	0.0152	0.0192	0.0158	0.0214	0.0243	0.0287	0.0601	0.0653	0.0147	0.0156
NEVADA	0.0478	0.0637	0.1772	0.2171	0.0258	0.0310	0.0950	0.1265	0.1438	0.1818	0.0617	0.0801	0.0302	0.0339
OREGON	0.2961	0.3416	0.1996	0.2575	0.2184	0.2760	0.0342	0.0432	0.4852	0.5732	0.1164	0.1538	0.0729	0.0927
WASH, E	0.1806	0.2166	0.2098	0.2702	0.1675	0.2170	0.0251	0.0310	0.0798	0.1049	0.1353	0.1710	0.0996	0.1210
WASH, W	0.1330	0.1744	0.1948	0.2510	0.0993	0.1315	0.1090	0.1459	0.2511	0.3069	0.0334	0.0430	0.0245	0.0280

TABLE 9
LOGIT MODELS WITH TWO INDEPENDENT VARIABLES

	CITIZENSHIP AND RACE		CITIZENSHIP AND PRESUMPTION		CITIZENSHIP AND CRIMINAL HISTORY		CITIZENSHIP AND RESIDENCE		CITIZENSHIP AND SEVERITY		CITIZENSHIP AND SEX	
	Entropy	Concentration	Entropy	Concentration	Entropy	Concentration	Entropy	Concentration	Entropy	Concentration	Entropy	Concentration
CIRCUIT	0.1136	0.1508	0.1625	0.2084	0.1869	0.2390	0.1662	0.2144	0.1586	0.2029	0.1186	0.1551
ALASKA	0.1481	0.1847	0.3022	0.3845	0.1946	0.2450	0.1561	0.1980	0.3290	0.3535	0.1328	0.1611
ARIZONA	0.0788	0.1062	0.1361	0.1671	0.1073	0.1404	0.1493	0.1868	0.1482	0.1829	0.0867	0.1154
CAL, N	0.1213	0.1562	0.1453	0.1904	0.3225	0.3870	0.1482	0.1830	0.1904	0.2374	0.1131	0.1449
CAL, E	0.2493	0.2785	0.3249	0.3829	0.2873	0.3336	0.2774	0.3076	0.2988	0.3424	0.2325	0.2592
CAL, C	0.0664	0.0890	0.2091	0.2611	0.1668	0.2112	0.1565	0.1996	0.1776	0.2244	0.0731	0.0964
CAL, S	0.1178	0.1410	0.1196	0.1429	0.1573	0.1791	0.1733	0.2125	0.1346	0.1585	0.1437	0.1673
HAWAII	0.1118	0.1391	0.2729	0.3273	0.2309	0.2740	0.1127	0.1357	0.1946	0.2138	0.0784	0.0986
IDAHO	0.2508	0.3057	0.3834	0.4469	0.3424	0.3983	0.2754	0.3323	0.2921	0.3438	0.2764	0.3421
MONTANA	0.0439	0.0579	0.0363	0.0486	0.1944	0.2354	0.0425	0.0530	0.1029	0.1155	0.0310	0.0378
NEVADA	0.0900	0.1066	0.1464	0.1919	0.2450	0.2926	0.1771	0.2247	0.1177	0.1483	0.0948	0.1157
OREGON	0.2963	0.3433	0.3455	0.4074	0.4422	0.5042	0.5183	0.5966	0.3708	0.4255	0.3282	0.3727
WASH, E	0.2159	0.2600	0.2064	0.2523	0.3212	0.3906	0.1958	0.2393	0.2249	0.2598	0.2402	0.2794
WASH, W	0.1628	0.2059	0.2240	0.2873	0.3155	0.3771	0.3216	0.3683	0.1776	0.2247	0.1505	0.1907