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Pretrial Decision-Making in Brazil under Inter-American Human Rights Law

Thiago Nascimento dos Reis*

In recent decades, pretrial detention has been a key contributor to Brazil's mass incarceration. This is true, despite domestic and international norms limiting pretrial detention to exceptional circumstances and mounting evidence linking it to worse outcomes for arrestees in their criminal proceedings and post-release life prospects. As a longitudinal multivariate pretrial research in Brazil, this Article investigates the key mechanisms and factors that explain pretrial detention in relation to inter-American human rights standards. This Article conducts a quantitative case study of the first one hundred days of detention for all 2,158 non-confidential flagrant arrests in the first eight months of 2016 reviewed by the state courts of Campo Grande, the capital city of the mid-western state of Mato Grosso do Sul. The findings offer a grim picture of a non-exceptional use of pretrial detention, mostly through orders issued by bail hearing judges denying release based on public order rationales (incapacitation and anticipated punishment). Additionally, these findings show consistently high judge-specific rates of denial of release. Reasons for the high number of pretrial detention also include outright illegal denials of release, the long duration of orders denying release, and instances where denial of

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release is disproportionate to a case's ultimate outcome. Release by bail was found to be an insignificant pathway to pretrial detention. The increased severity of an arrestee's offense and adult and juvenile records revealed a strong link to a worse pretrial status. The magnitude of these effects, combined with evidence that judges tend to rely on the latter factors to assess public order grounds for denial of release, reinforces concerns over abusive detention orders. Lastly, this Article makes proposals that target the Brazilian pretrial regulation, the culture of key judicial actors, and the structure underlying pretrial decision-making.

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I. INTRODUCTION

In recent decades, Brazil’s criminal justice system has been marked by a drastic five-fold increase in its incarceration rate, specifically, from 61 inmates per 100,000 inhabitants in 1990 to 322 inmates (excluding house arrest) per 100,000 inhabitants in June 2024.¹ Among the key contributors to mass incarceration in Brazil,² pretrial detention stands out. Notably, 28% of all inmates as of June 2024 were yet to be convicted, with this figure rising to almost 50% when including convicted inmates whose appeal is pending.³ Many argue that pretrial detention can raise concerns as it stands in stark contrast with the fundamental tenet of criminal procedure—an

¹ SISDEPEN, LEVANTAMENTO NACIONAL DE INFORMAÇÕES PENITENCIÁRIAS, INFORMAÇÕES GERAIS 17, www.gov.br/depen/pt-br/servicos/sisdepen (last visited April 8, 2025).

² IBCCRIM, CADERNO DE PROPOSTAS LEGISLATIVAS: 16 MEDIDAS CONTRA O ENCARCERAMENTO EM MASSA 34-39 (2017) (identifying 16 critical areas of mass incarceration in Brazil and proposing legislative reforms to tackle it).

³ This calculation excludes individuals under house arrest. The exact updated share of inmates with an appeal pending is unclear but recent data puts that figure at 18%. CONSELHO NACIONAL DE JUSTIÇA [CNJ] [NATIONAL COUNCIL OF JUSTICE], ESTATÍSTICAS BANCO NACIONAL DE MONITORAMENTO DE PRISÕES (last visited Apr. 8, 2025), <https://portalbnmp.cnj.jus.br/#/estatisticas>.

individual should be punished only after being convicted in a proper proceeding.⁴ Moreover, in addition to inherently harming a detainee's personal integrity, particularly in overcrowded jails,⁵ evidence suggests that pretrial detention leads to worse case outcomes, such as a higher likelihood of conviction and lengthier sentences, and life-altering consequences, such as a lower likelihood of formal sector employment and a higher risk of post-release rearrest.⁶ On a broader level, the overuse of pretrial detention adds major public costs with no demonstrated benefits to public security.⁷ As a response, domestic and international law attempt to curb pretrial detention abuses by setting rules aimed at making pretrial detention an exception rather than the standard.⁸

Despite awareness of Brazil's high pretrial detention rate and its implications, academics and policymakers have generally lacked

⁴ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION], art. 5, LIV, LVII (Braz.) (establishing a person's right not to be deprived of liberty without due process and the right not to be considered guilty before a final criminal conviction). For a notable example in the U.S. Supreme Court, *see* *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

⁵ The consequences of being incarcerated in Brazil can hardly be overstated. In 2015, the Brazilian Supreme Court [STF or S.T.F.] acknowledged the "unconstitutional state of affairs" of the Brazilian penitentiary system after finding that detainees are subject to "prison overcrowding, torture, killings, sexual violence, filthy and insalubrious cells..." S.T.F., *Medida Cautelar na Arguição de Descumprimento de Preceito Fundamental* [Precautionary Measure on Claim of Noncompliance with Fundamental Precept] No. 347, Relator: Min. Marco Aurélio, 09.08.2015 (Braz.).

⁶ For instance, Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108(2) AM. ECON. REV. 201 (2018) (in the United States); Ana Maria Diaz & Luz Magdalena Salas, *Pretrial detention and conviction*, 53 EUR. J. LAW ECON. 1 (2022) (in Colombia); Thiago Nascimento dos Reis, *The Impact of Pre-trial Detention on Case Outcomes: Evidence from Brazil* (April 2025) (working paper) (analysis relying on the same dataset as this Article showing that pretrial detention increases the risk of conviction, sentencing to imprisonment and post-trial detention pending appeal in Brazil).

⁷ Inter-Am. Comm'n on H.R. [IACHR], *Informe sobre el uso de la prisión preventiva en las Américas*, ¶¶ 79-106, 124-130 (2013) [hereinafter *Informe*].

⁸ S.T.F., *Medida Cautelar no Habeas Corpus* [Precautionary Measure on Habeas Corpus] No. 225.733, Relator: Min. Nunes Marques, 21.03.2023 (Braz.) (recently on pretrial detention exceptionality); and *Tzompaxtle Tecpile et al. v. Mexico*, Preliminary objections, merits, reparations, and costs, Inter-Am. Ct. H.R. (ser. C) No. 470, ¶ 104 (Nov. 7, 2022).

detailed evidence on the phenomenon as a result of studies tending to report strictly descriptive statistics.⁹ Filling this empirical gap, this Article investigates Brazilian pretrial decision-making through a quantitative case study that includes all 2,158 non-confidential suspect-level¹⁰ flagrant arrests reviewed by the state courts of Campo Grande, the capital city of the Brazilian state with the second highest incarceration rate, during the first eight months of 2016.¹¹ Specifically, this Article measures the incidence of pretrial detention in the 100-day post-arrest period, identifies its mechanisms and the key case-specific elements associated with pretrial decisions, and discusses these findings in light of standards for pretrial detention developed by the Inter-American Human Rights System (“IAHRS”).

The findings herein reveal the systematic curtailment of an arrestee’s rights to personal liberty and presumption of innocence throughout the Brazilian pretrial detention process. Despite domestic and international law standards requiring pretrial detention to be used exceptionally, 55% of all arrestees stayed at least 10 days in detention post-arrest, and 37% went on to spend at least 100 days incarcerated.¹² The main path to pretrial detention consists of orders denying release (*prisão preventiva*), which accounted for 98% of the detention period of the detainees in this case study and were primarily grounded on public order rationales (incapacitation and anticipated punishment).¹³ Such findings clash with the IAHRS standard that pretrial detention should only be used to curb procedural risks,

⁹ Three exceptions to that are: Giovane Cerezuela Policeno et al., *Análise dos Decretos de Prisão Preventiva em Casos Envolvendo Acusações por Roubo, Tráfico de Drogas e Furto: um Estudo no Âmbito de Algumas Cidades Populosas do Sul do País*, 5(1) REVISTA JURÍDICA LUSO-BRASILEIRA 919 (2019) (Braz.); Livia Bastos Lages & Ludmila Ribeiro, *Os determinantes da prisão preventiva na Audiência de Custódia: reforço de estereótipos sociais?*, 15(3) REVISTA DIREITO GV 1 (2019) (Braz.); and Ludmila Ribeiro et al., *Decision-making in an Inquisitorial System: Lessons from Brazil* 56(1) L. & SOC’Y REV. 101 (2022). The three studies use non-randomized samples of bail hearings.

¹⁰ I use “arrestee” or “suspect” instead of “defendant” to refer to individuals in this case study because most become a defendant (*réu*) only days or weeks after the arrest, once charges are accepted, while some arrests never lead to charges.

¹¹ *Infra* note 97.

¹² *Infra* Graph 1 and Section V.

¹³ *Infra* Graph 1 and Section VI.

namely flight risk and risk of procedural obstruction.¹⁴ Additional descriptive results underlying the high pretrial detention rate, which also contravene international standards, show outright illegal orders denying release to arrestees (1.6% of all cases), the long duration of orders denying release due in part to a lack of periodic review, and the frequent instances of denial of release to arrestees ultimately acquitted or not sentenced to imprisonment.¹⁵ On a more positive note, the extremely rare long-term occurrence of pretrial detention due to an inability to post money bail (*fiança*)—with only three arrestees still detained for that reason at day 100 after their arrest—¹⁶aligns with Brazil’s obligation to ensure material equality in the money bail setting.¹⁷ However, some factors associated with money bail decisions raise concerns, as they appear unrelated to the subject arrestees’ economic capacity.

The regression results shed light on the factors associated with the arrestees’ pretrial status during the first 100 days post-arrest, as well as the outcome of the pretrial decisions examined. Overall, the increasing severity of arrest offense—both in abstract and specific terms—was strongly associated with an increase in the arrestee’s likelihood of pretrial detention. In a similar fashion, the increasing severity of adult and juvenile records was associated with worse pretrial status. The magnitude of these findings and evidence that judges tend to rely on those elements to assess whether the arrestee’s dangerousness and blameworthiness warrant denial of release reinforce concerns with undue restriction of the arrestees’ presumption of innocence. Some models identified that prior failure to appear (“FTA”) was moderately associated with a more negative pretrial status. Such a finding is consistent with IAHR standards because having a history of FTA events is potentially linked with future flight risk, which is an accepted ground for pretrial detention. This Article also offers evidence of moderate inter-judge disparities in denials of release, which do not rise to a level of arbitrariness, and instead suggest a convergence among bail judges toward high rates of denial of release in bail hearings.

¹⁴ *Infra* note 48 and accompanying text.

¹⁵ *Infra* Graph 3 and Section V.

¹⁶ *Infra* Graph 1 and Section V.

¹⁷ *Infra* notes 63-64.

After scrutinizing pretrial decision-making in the jurisdiction of study, this Article advances recommendations to improve compliance with IAHR standards. On the traditional front, it proposes reforming the Brazilian Criminal Procedure Code (“CPP”)¹⁸ to remove or significantly constrain the clause authorizing denial of release to guarantee the public order, to remove blanket prohibitions to release, and to shorten the period for review of pretrial detention. Acknowledging the limitations of purely legislative changes, this Article further recommends addressing the legal culture of judicial actors by promoting a shift toward limiting pretrial detention to instances of procedural risks as well as investing in monitoring mechanisms that involve non-carceral restrictions, establishing pretrial services, and implementing statistical pretrial risk assessment.

This Article proceeds as follows: Section II provides an overview of pretrial decision-making in Brazil along with relevant IAHR standards. Section III justifies the hypotheses used in the regression analyses. Section IV explains the methodology of the case study. Section V reports descriptive statistics and regression results. Section VI discusses the findings and offers improvement proposals, and Section VII offers a brief summary and concludes the Article.

II. PRETRIAL DECISION-MAKING IN BRAZIL AND RELEVANT INTER-AMERICAN HUMAN RIGHTS STANDARDS

The presumption of innocence principle is ubiquitous in modern legal systems. IAHR case law imposes both a high evidentiary burden on the state to secure a conviction and requires that defendants be treated as innocent before a conviction in proceedings safeguarded by due process guarantees.¹⁹ As a consequence of the latter requirement, states should not apply pretrial restrictions that arise

¹⁸ Código de Processo Penal [Criminal Procedure Code], Decreto-Lei No. 3.689, de 3 de outubro de 1941, (Braz.) (this Article adopts the acronym CPP consistently with its original usage in Portuguese).

¹⁹ *Compare Zegarra Marín v. Peru*, Preliminary objections, merits, reparations, and costs, Inter-Am. Ct. H.R. (ser. C) No. 331, ¶ 159 (Feb. 15, 2017) (finding a violation of the evidentiary dimension), *with Villarroel Merino et al. v. Ecuador*, Preliminary objections, merits, reparations, and costs, Inter-Am. Ct. H.R. (ser. C) No. 430, ¶ 108 (Aug. 24, 2021) (finding a violation of the treatment dimension).

from an anticipated judgment of guilt or that result in anticipated punishment.²⁰ Formally, Brazil's criminal procedure embraces this rationale by prohibiting that an individual begin serving a sentence before a final conviction.²¹ Until then, incarceration is deemed pre-trial detention and governed by the standards below.²²

This section describes key features of Brazil's pretrial decision-making and lays out the inter-American human rights standards and respective domestic rules relevant to the case study herein. Importantly, Brazil has ratified and incorporated domestically the American Convention on Human Rights ("ACHR"),²³ which the Supreme Court ("STF") interprets as being above federal law and below the Constitution,²⁴ and has accepted the contentious jurisdiction of the Inter-American Court of Human Rights ("IACtHR").²⁵

²⁰ *Informe, supra* note 7, ¶ 322.

²¹ CONSTITUTION, *supra* note 4. The STF has varied in recent years its position on when a sentence should start being enforced and currently considers that enforcement should happen only after exhaustion of all appeals available. S.T.F., Ações Declaratórias de Constitucionalidade [Claims of Declaration of Constitutionality] No. 43, 44 and 54, Relator: Min. Marco Aurélio, 7.11.2019 (Braz.) (6-5 judgment). An important exception applies to defendants convicted of willful crimes against life (*i.e.*, homicide, infanticide, abortion and assistance to suicide), who must start serving their sentences immediately after a first instance verdict, as a rule. S.T.F., Recurso Extraordinário [Extraordinary Appeal] No. 1.235.340; Tema de Repercussão Geral [General Repercussion Theme] No. 1.068, Relator: Min. Luís Roberto Barroso, 12.09.2024 (Braz.) (6-5 judgment). These cases account for approximately 14% of all detainees in Brazil (99% of homicide and 1% of abortion). SISDEPEN, LEVANTAMENTO NACIONAL DE INFORMAÇÕES PENITENCIÁRIAS, TIPIFICAÇÕES CRIMINAIS 4 (last visited Apr. 8, 2025), www.gov.br/depn/pt-br/servicos/sisdepen.

²² This aligns with the IAHRs definition of pretrial detention. *Informe, supra* note 7, ¶ 37. See JAMES L. CAVALLARO ET AL., DOCTRINE, PRACTICE, AND ADVOCACY IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM 464 (2019) (on how the IAHRs definition comports the differing civil and common law notions of pretrial detention's end term).

²³ Decreto [Executive Decree] No. 678, de 6 de novembro de 1992, Diário Oficial da União [D.O.U.] (Braz.).

²⁴ S.T.F., Recurso Extraordinário [Extraordinary Appeal] No. 349.703, Relator: Min. Gilmar Mendes, 03.12.2008 (Braz.) (striking down provisions of federal laws that prescribed debtors' detention as a means of enforcing civil obligations due to the specific prohibition in the ACHR).

²⁵ Decreto [Executive Decree] No. 4.463, de 8 de novembro de 2002, D.O.U. (Braz.). Brazil has also ratified the International Covenant on Civil and Political Rights, which contains personal liberty rights similar to those in the ACHR. I

Because the IACtHR is the ACHR's ultimate interpreter,²⁶ governmental authorities must exercise control over the conventionality²⁷ of their actions to ensure compliance with the ACHR as interpreted by the IACtHR.²⁸

In Brazil, most criminal cases initiate after a red-handed (*in flagrante delicto*, hereinafter "flagrant") arrest, which occurs when the person is caught in the criminal act or immediately after committing it.²⁹ At the police station, the chief officer performs preliminary investigative steps to formalize the arrest and decides whether to set money bail for arrestees accused of crimes punished by an aggregate maximum prison term of up to four years.³⁰ This study reveals that police chiefs set stationhouse bail for 31% of the arrestees. After the chief officer formalizes the arrest, the case file is referred to a court for judicial review.³¹

Aligning Brazil with its international obligations to assure arrestees the right to a prompt in-person judicial review of an arrest,³² Brazilian courts started to hold bail hearings (*audiências de*

focus on Brazil's compliance with its IAHRs obligations due to their more detailed standards on pretrial detention.

²⁶ Gomes Lund et al. v. Brazil, Preliminary objections, merits, reparations, and costs, Inter-Am. Ct. H.R. (ser. C) Monitoring Compliance with Judgment, ¶ 19 (Oct. 17, 2014). I also rely on decisions and reports of the Inter-American Commission on Human Rights ("IACHR"), the quasi-judicial IAHRs body in charge of monitoring human rights in the region that is also a legitimate interpreter of the ACHR.

²⁷ "[A]ll of the State's organs . . . are required to exercise "conventionality" control *ex officio* between domestic norms and the American Convention." Rochac Hernández et al. v. El Salvador, Merits, reparations, and costs, Inter-Am. Ct. H.R. (ser. C) No. 285, ¶ 213 (Oct. 14, 2014).

²⁸ Norín Catrimán et al. v. Chile, Merits, reparations, and costs, Inter-Am. Ct. H.R. (ser. C) No. 279, ¶ 464 (May 29, 2014) (pretrial detention case stating that conventionality control must include the IACtHR's interpretative standards).

²⁹ Código de Processo Penal [Criminal Procedure Code], Decreto-Lei No. 3.689, de 3 de outubro de 1941, art. 302 (Braz.).

³⁰ *See id.*, art. 322. Also, although domestic violence arrestees are not per se ineligible for stationhouse money bail, police chiefs in this study often denied it to those arrestees referring to non-binding prosecutorial guidance supporting such prohibition.

³¹ *See id.*, art. 306, ¶ 1.

³² Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica" art. 7.5; United Nations, International Covenant on Civil and Political Rights, art. 9.3.

custódia) in 2015.³³ Since then, arrestees must be brought to court for a hearing with mandatory legal representation within twenty-four hours of the arrest. In these hearings, the bail judge decides if the arrest was legal, if pretrial restrictions are necessary, and whether preliminary evidence of police violence requires further inquiry.³⁴ The bail hearing requirement applies to all arrestees who are not released by the police chief after posting money bail (86% of the cases in this study).³⁵ Notably, Brazilian judges perform a strictly clinical assessment of the arrestees' pretrial risks, relying on the police files, the pleadings, and arrestee questioning performed at the hearing; courts are not equipped with pretrial services for data gathering.³⁶

Once the legality of the arrest is ratified (99.3% of this study's cases), the judge must decide the conditions under which the suspect will await trial.³⁷ As a rule, pretrial restrictions beyond money bail and denial of release (pretrial probation) are substantially milder, as no serious compliance mechanism is available for them.³⁸ For that

³³ S.T.F., Ação Direta de Inconstitucionalidade [Direct Claim of Unconstitutionality] No. 5.240, Relator: Min. Luiz Fux, 20.08.2015 (Braz.) (requiring courts to hold bail hearings due to Brazil's international obligations, even without the CPP mandating it). Law 13,964/2019 amended the CPP to add the bail hearing requirement. Despite this and other recent piecemeal reforms that incorporated adversarial elements to Brazil's criminal procedure, it remains non-adversarial in its core for being characterized as a court-driven search for truth where the parties play a secondary role. It also conforms with expansive notions of non-adversarialism as, for instance, trials by professional judges are the rule and plea mechanisms are mostly restricted to minor offenses.

³⁴ CNJ, Resolução [Resolution] No. 213, de 15 de dezembro de 2015, art. 8 (Braz.).

³⁵ A bail hearing was held in 95.5% of those cases, on average 32 hours after the arrest. Considering all cases, the initial judicial review of the arrest (with or without a bail hearing) occurred on average 31 hours after the arrest.

³⁶ INSTITUTO DE DEFESA DO DIREITO DE DEFESA [IDDD], MONITORAMENTO DAS AUDIÊNCIAS DE CUSTÓDIA EM SÃO PAULO 35-43 (2016) (reporting the arrest and arrestee information available for pretrial decisions at bail hearings).

³⁷ Código de Processo Penal [Criminal Procedure Code], Decreto-Lei No. 3.689, de 3 de outubro de 1941, arts. 310, 312, 319 (Braz.).

³⁸ The non-carceral restrictions (pretrial probation) the CPP prescribes are periodic appearance in court to report activities (used in 21% of my cases in the initial cycle of judicial review), prohibition to attend certain places (3%), to contact certain persons (2%) and to leave the court's county (17%), night and weekend home retreat (7%), suspension of public function or economic activity (none),

reason, this Article examines only three core scenarios: (a) release not conditioned to money bail (release on recognizance) (22% of the subject cases 10 days after the arrest); (b) release conditioned to money bail (26%); and (c) denial of release (52%). Scenario (c) always leads to detention, and scenario (b) will lead to it only if the person fails to post money bail.³⁹

In Brazil, suspects who are denied release or who fail to post money bail remain in jail indefinitely, however, their counsel may request a review to the Court of Appeals and superior courts, as an appeal or habeas corpus, or directly to the competent judge.⁴⁰

Lastly, detained defendants have priority for trial⁴¹ and pretrial jail time must be deducted from the sentence.⁴²

The case study herein is apt to shed light on Brazil's compliance with the particular dimensions of the following IAHR standards:

A. Exceptionality

The overarching IAHR standard on pretrial detention is the principle that it must be applied exceptionally as it is the strictest restriction of a defendant's rights available.⁴³ Accordingly, the CPP restricts jail to situations where other pretrial restrictions are insufficient (Article 310, II), and the STF repeatedly affirms its

electronic monitoring (six cases) and house arrest (only once). *Id.*, art. 319. Other measures incidentally ordered were driving license suspension (prescribed by the Brazilian Traffic Code), psychological treatment and school attendance. The two last measures are not legally prescribed and thus could not have been imposed as judges do not have a "generic precautionary power" (*poder geral de cautela*) to create new criminal pretrial restrictions. S.T.F., Habeas Corpus, No. 186.490, Relator: Min. Celso de Mello, 10.10.2020 (Braz.).

³⁹ A third, less common pathway to pretrial detention in Brazil that I do not cover is temporary detention (*prisão temporária*). It allows judges to keep individuals detained during the investigation of certain serious crimes to protect the investigation or to prevent flight for five or 30 days (renewable once), depending on the crime investigated.

⁴⁰ Código de Processo Penal [Criminal Procedure Code], Decreto-Lei No. 3.689, de 3 de outubro de 1941, arts. 3-B.VI, 316, 581.VI, 647-667 (Braz.).

⁴¹ *See id.*, art. 429.

⁴² Código Penal [Criminal Code], Decreto-Lei No. 2.848, de 7 de dezembro de 1940, art. 42 (Braz.).

⁴³ *See Tzompaxtle Tecpile*, Inter-Am. Ct. H.R. (ser. C) No. 470 at 104; *see also* Daría Olinda Portocarrero Hurtado v. Ecuador, Inter-Am. Comm'n H.R. Case No. 12.931, ¶ 39 (2021).

exceptional nature.⁴⁴ Although the assessment of exceptionality is inherently case-specific, a high pretrial detention rate indicates a systematic disrespect for such a standard.⁴⁵ In the absence of a clear-cut maximum pretrial detention rate beyond which it becomes abusive, this study considers two intuitive thresholds: a very conservative 50% threshold—given that exceptionality is, at the very least, incompatible with majority—and a more reasonable and grammatically-coherent⁴⁶ 20% threshold—the preferred threshold for being consistent with a *pro homine* interpretation.⁴⁷ This study measures the prevalence of pretrial detention against those thresholds at various time points within the arrestees' first 100 days after the arrest. The assessment of Brazil's compliance with the remaining standards aims to explain the magnitude of (non-)exceptionality identified.

B. Permissible Grounds

The inter-American standard on pretrial detention that most often clashes with Brazilian criminal procedure is the one that limits pretrial detention to countering procedural risks (flight risk or risk of procedural hindrance). Using pretrial detention to counter non-procedural risks, such as the risk of rearrest or impunity, is rejected outright because it pursues goals reserved for punishment in breach of the presumption of innocence.⁴⁸ In contrast to this standard, the

⁴⁴ In March 2023 alone, STF justices stated such exceptionality in at least nine habeas corpus opinions.

⁴⁵ *Informe*, *supra* note 7, ¶ 310 (supporting the assessment of exceptionality by analyzing pretrial detention rates).

⁴⁶ *Exceptional*, CAMBRIDGE DICTIONARY, www.dictionary.cambridge.org/us/dictionary/english/exceptional (last visited Apr. 8, 2025) (“not like most others of the same type”, “unusual; not what happens regularly or is expected”).

⁴⁷ *Jorge, José and Dante Peirano Basso v. Uruguay*, Inter-Am. Comm'n H.R. Case No. 12.553, ¶¶ 75 and 84 (2009) (“[a]s any restriction affecting human rights, this [pretrial detention] shall be restrictively interpreted in virtue of the *pro homine* principle.”).

⁴⁸ *Norín Catrimán*, Inter-Am. Ct. H.R. (ser. C) No. 279, ¶¶ 311-312, 321-323, 337, 352 (ACHR violation for using pretrial detention to counter danger to society); *Vladimiro Roca Antunez et al. v. Cuba*, Inter-Am. Comm'n H.R. Case No. 12.127, ¶¶ 128-135 (2018) (violation of the American Declaration of the Rights and Duties of Man for using pretrial detention for punitive purposes); *See also* Sandra Mayson, *Dangerous Defendants*, 127 *YALE L.J.* 490, 557 (2018) (argument on the lack of basis for pretrial restrictions based on the distinction of

CPP authorizes judges to deny release due to public order risks as well as procedural risks,⁴⁹ and the STF interprets the public order clause as encompassing the incapacitation of dangerous suspects.⁵⁰ This study abides by the IAHRs position that pretrial detention should not be used to accomplish punitive goals because that is a consolidated interpretation of the IACtHR, thus applicable domestically. This Article provides evidence on compliance with this standard by estimating how key factors related to pretrial detention grounds impact decisions and by reviewing the orders' reasoning.

C. Individualization

The IAHRs prohibits provisions mandating and practices resulting in the pretrial detention of entire categories of defendants.⁵¹

dangerous and non-dangerous defendants). The notion that the state should refrain from treating a suspect as guilty until convicted often clashes with laypeople's expectation of swift justice and the media's portrayal of impunity, in particular when the suspect's guilt seems evident. Still, such caution is consistent with the criminal procedure's aversion to false positives: "Better that 10 guilty persons escape than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

⁴⁹ Código de Processo Penal [Criminal Procedure Code], Decreto-Lei No. 3.689, de 3 de outubro de 1941, art. 312 (Braz.). This rule also authorizes denial of release to protect the economic order, which overlaps with public order for being generally interpreted as prevention of economic crimes. Judges may also deny release in case of non-compliance with pretrial probation, which occurred only twice in the 100 days after the arrest in this study.

⁵⁰ The CPP rule that pretrial restrictions may be used to avoid crimes when legally prescribed (CPP, art. 282, I) provides support for such interpretation of the public order clause as encompassing denial of release for incapacitation purposes. In the first quarter of 2023, the STF issued four collegiate opinions denying habeas corpus petitions on the grounds that lower courts had properly demonstrated the defendants' dangerousness when keeping them detained pretrial. S.T.F., Agravo Regimental [Ag. Reg.] no Habeas Corpus [Internal Appeal on Habeas Corpus] No. 221.179, Relator: Min. Edson Fachin, 13.02.2023; S.T.F., Ag. Reg. no Habeas Corpus No. 221.345, Relator: Min. Nunes Marques, 02.22.2023; S.T.F., Ag. Reg. no Habeas Corpus No. 224.087, Relator: Min. Alexandre de Moraes, 02.22.2023; and S.T.F., Ag. Reg. no Habeas Corpus No. 220.054, Relator: Min. Nunes Marques, 10.01.2023 (Braz.).

⁵¹ *Manuela et al. v. El Salvador*, Preliminary objections, merits, reparations and costs, Inter-Am. Ct. H.R. (ser. C) No. 441, ¶ 104 (Nov. 2, 2021) (ACHR violation due to El Salvador's automatic pretrial detention to defendants accused of certain crimes); and *Daríá Olinda*, *supra* note 43, 55 (ACHR violation due to

Instead, it requires individualized assessments relying on a combination of factors.⁵² This study examines orders of denial of release, investigating potential reliance on the domestic blanket prohibition of release for drug trafficking suspects,⁵³ which directly contravenes this inter-American standard. As for the main factors influencing decisions, this study estimated their individual weights using regression analyses and discusses their implications on the arrestees' rights and pretrial detention exceptionality more broadly.

D. Legality

Under the ACHR, the restriction of personal liberty is strictly permissible under the conditions previously established by law.⁵⁴ While this standard permeates the others, this Article's analysis of legality focuses on the rules regarding eligibility to denial of release because they are distinctively clear-cut, and because denial of release is the main path to pretrial detention in Brazil.⁵⁵ Specifically, the CPP restricts denial of release to cases of intentional crimes punished by an aggregate maximum prison term higher than four years,

Ecuador's automatic pretrial detention based on the severity of the offense's punishment and the case's procedural stage).

⁵² *Informe, supra* note 7, ¶¶ 147-157, 326.C.10-11 and 326.C.13; Romero Feris v. Argentina, Merits, reparations and costs, Inter-Am. Ct. H.R. (ser. C) No. 391, ¶¶ 112-120 (Oct. 15, 2019) (ACHR violation due to justification of pretrial detention relying on abstract elements).

⁵³ Lei No. 11.343, de 23 de agosto de 2006, art. 44 (Braz). The STF declared this provision unconstitutional in a specific case and then assigned binding effect to such interpretation in all cases. S.T.F., Habeas Corpus No. 104.339, Relator: Min. Gilmar Mendes, 10.05.2012; S.T.F., Recurso Extraordinário [Extraordinary Appeal] No. 1.038.925; Tema de Repercussão Geral [General Repercussion Theme] No. 959, Relator: Min. Gilmar Mendes, 18.08.2017 (Braz.). This case study takes place before the latter decision and thus some judicial actors still relied on that blanket prohibition arguing that the STF position did not have generic binding force.

⁵⁴ Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica" art. 7.2; González v. Venezuela, Merits and reparations, Inter-Am. Ct. H.R. (ser. C) No. 436, ¶ 95 (Sept. 20, 2021).

⁵⁵ 98% and 2% of the pretrial detention days in this study were due, respectively, to denial of release and inability to post money bail. *Infra* Graph 1 and Section V. Accordingly, a study in 13 Brazilian cities found that 57% and 7% of the bail hearings resulted in the pretrial measures of denial of release and money bail, respectively. IDDD, O FIM DA LIBERDADE [THE END OF FREEDOM] 85, 98 (2019).

recidivism in intentional crimes, and domestic violence against a specially-protected person as an enforcement of urgent protective measures.⁵⁶ This case study measures the prevalence of denial of release to arrestees outside these categories, which pursuant to the CPP is an illegal practice that entitles them to compensation.⁵⁷

*E. Strict Proportionality*⁵⁸

Although the CPP does not expressly provide it, proportionality is a general principle that requires the harms of a restriction to be intrinsically proportionate to its benefits.⁵⁹ This study assesses compliance with the proportionality corollary that compels judges to release a suspect who is unlikely to be convicted or to receive a prison sentence because, in these cases, the person would receive worse treatment during pretrial than upon the proceeding's likely outcome.⁶⁰

F. Reasonable Duration

The IAHRs neither provides clear temporal limits for pretrial detention nor compels domestic law to do so, but it requires authorities to periodically review detentions and to revoke them once they

⁵⁶ Código de Processo Penal [Criminal Procedure Code], Decreto-Lei No. 3.689, de 3 de outubro de 1941, art. 313 (Braz.). A fourth scenario where denial of release is allowed is until the identification of a defendant whose identity is unclear is confirmed. I omit this ground from the analyses because it is meant to be short-term and only six detention orders directly mentioned it in this study, with 23 cases in total reporting forensic identification of suspects due to identity doubts.

⁵⁷ Código Civil [Civil Code], Lei No. 10.406, de 10 de janeiro de 2002, art. 954, sole paragraph, III (Braz.).

⁵⁸ The IACtHR uses a four-part proportionality test that requires pretrial detention to be appropriate, necessary and strictly proportionate in pursuing a legitimate goal. *Tzompaxtle Tecpile*, Inter-Am. Ct. H.R. (ser. C) No. 470 at 105. I use proportionality here in the latter sense.

⁵⁹ *Id.* at 105; S.T.F., Habeas Corpus No. 124.306, Relator: Min. Marco Aurélio, 09.08.2016, ¶¶ 18 and 43-48 (Braz.) (defining and applying strict proportionality to the criminalization of abortion).

⁶⁰ *Informe, supra* note 7, ¶¶ 163, 310 and 326.G.4(h); S.T.F., Habeas Corpus No. 126.704, Relator: Min. Gilmar Mendes, 03.05.2016 (Braz.) (“Violation of the proportionality principle: pretrial detention is more severe than the very punishment in case of potential conviction.”).

become unreasonable.⁶¹ At the time of this study, Brazil had no provision mandating such periodic reviews.⁶² This Article analyzes the local practice regarding the ongoing review of detentions by measuring their stability during the 100-day post-arrest period.

G. *Non-Discrimination*

In line with the IAHRs concern with material equality in the bail setting,⁶³ the CPP provides that money bail may be waived, reduced by up to two-thirds, or increased by up to 1,000 times depending on the suspect's financial capacity.⁶⁴ Further, the STF has decided that "the defendant's economic situation is the main element to be considered" in setting money bail.⁶⁵ This Article assesses compliance with this standard by investigating money bail amounts, pretrial detention due to inability to post it, and the factors associated with money bail decisions.

Finally, the ACHR contains a general protection against arbitrary detentions, which goes beyond lawfulness to include elements

⁶¹ *Informe, supra* note 7, ¶¶ 165 and 202; Carranza Alarcón v. Ecuador, Preliminary objections, merits, reparations, and costs, Inter-Am. Ct. H.R. (ser. C) No. 399, ¶ 83-90 (Feb. 3, 2020) (ACHR violation due to pretrial detention for four years without periodic review).

⁶² Lei No. 13.964, de 24 de dezembro de 2019, art. 3 (Braz.) (added to the CPP the judicial obligation to review orders of denial of release every 90 days). Generally, judges must release defendants when the reasons for detention are not present anymore or when the time spent in detention becomes unreasonable based on a case-specific analysis. *Compare* S.T.F., Recurso Ordinário em Habeas Corpus [Appeal on Habeas Corpus] No. 190.582, Relator: Min. Dias Toffoli, 05.05.2021 (granting release for unreasonable duration of pretrial detention to defendant jailed for five and a half years), *with* S.T.F., Recurso Ordinário em Habeas Corpus [Appeal on Habeas Corpus] No. 212.379, Relator: Min. Gilmar Mendes, 25.02.2022 (Braz.) (upholding denial of release to defendant in pretrial detention for more than seven years).

⁶³ Andrade Salmón v. Bolivia, Merits, reparations, and costs, Inter-Am. Ct. H.R. (ser. C) No. 330, ¶ 114 (Dec. 1, 2016).

⁶⁴ Código de Processo Penal [Criminal Procedure Code], Decreto-Lei No. 3.689, de 3 de outubro de 1941, art. 325, ¶ 1 (Braz.).

⁶⁵ S.T.F., Habeas Corpus No. 137.078, Relator: Min. Rosa Weber, 14.03.2017. *See also* S.T.F., Habeas Corpus No. 196.652, Relator: Min. Cármen Lúcia, 28.01.2021 (Braz.) (recent case identified where the STF waived money bail, in the amount of R\$ 1,000 (approximately US \$170 in the current exchange rate), due to poverty). *See infra* note 186 and accompanying text.

of propriety, justice, and predictability.⁶⁶ Acute inter-judge disparities may threaten those notions by defying the principle that requires that defendants must be treated alike when similarly situated in the eyes of the law.⁶⁷ This Article adds to this debate by measuring adjudication disparities in bail hearings.

III. HYPOTHESES ON FACTORS ASSOCIATED WITH PRETRIAL DECISION-MAKING IN BRAZIL

While this study's descriptive statistics provide important evidence on compliance with the inter-American standards above, pretrial decision-making should be individualized. Because of this, assessment of Brazil's practice against those standards ought to consider, to the extent possible, the relationship between specific factors and pretrial outcomes.

The CPP does not list the factors that judges should use to evaluate if the suspect offers the prescribed pretrial risks.⁶⁸ The statute refers to case-specific elements only to narrow the situations where denial of release is an option: (i) there must be proof that the crime occurred and sufficient evidence of the suspect's involvement⁶⁹ and (ii) the case must fall under one of the three scenarios described in the legality standard above.⁷⁰

The regression hypotheses that follow are based on the legal standards discussed, prior literature, and my fieldwork with bail

⁶⁶ *Carranza Alarcón*, Inter-Am. Ct. H.R. (ser. C) No. 399, ¶ 62.

⁶⁷ Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica" art. 24; CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION], art. 5 (Braz.) (setting forth the right to equality).

⁶⁸ As mentioned, denial of release can be ordered to counter flight risk, risk of procedural hindrance and risk to the public order. Differently, judges may only set money bail to counter procedural risks. *See* Código de Processo Penal [Criminal Procedure Code], Decreto-Lei No. 3.689, de 3 de outubro de 1941, art. 319, VIII (Braz.).

⁶⁹ *Id.*, art. 312.

⁷⁰ For a notable example of a detailed list of factors elsewhere, *see* 18 U.S.C. § 3142(g) (U.S. Federal Bail Act requiring judges to consider in pretrial decisions the nature and circumstances of the offense charged, the weight of the evidence and the person's characteristics, criminal history and community danger).

hearings in a different jurisdiction.⁷¹ The hypotheses are drafted as true/false statements for simplicity, but they all include the measurement of effect magnitude and direction.⁷² This study investigates the effects of the selected factors on decisions of denial of release and money bail and the arrestee's pretrial status, except for the hypothesis on bail judge identity, which focuses solely on decisions of denial of release due to restrictions of the random effects analysis.

H_a 1.1. Arrest offense category affects pretrial decisions and status.

H_a 1.2. Arrest offense sentencing range affects pretrial decisions and status.

H_a 2. Criminal records affect pretrial decisions and status.

The most commonly used legal ground for denial of release in Brazil is the public order clause due to its undefined nature and close relationship with non-procedural risks, such as the risk of rearrest or impunity.⁷³ This has been demonstrated by previous interviews with judicial actors and by figures showing that orders denying release very frequently rely on public order grounds.⁷⁴ Because the use of pretrial detention to counter public order risks aims to achieve punitive goals, judges tend to assess those risks using factors that are particular to the adjudication and sentencing stages, where judges assess the defendant's blameworthiness and mete out punishment.⁷⁵

⁷¹ See generally THIAGO NASCIMENTO DOS REIS, *DETAINEES ON STAGE: ACHIEVEMENTS AND CHALLENGES OF THE NEWLY-IMPLEMENTED BAIL HEARINGS IN SÃO PAULO STATE COURTS* (2017) (SPILS thesis).

⁷² See GEOFFREY R. LOFTUS, *NULL HYPOTHESIS*, *ENCYCLOPEDIA OF RESEARCH DESIGN* 939 (N. J. SALKIND ED., 2010) (simple explanation of null and alternative hypotheses).

⁷³ NASCIMENTO DOS REIS, *supra* note 71, at 34 (finding that all 96 orders denying release in the study relied on the public order ground and that the nine judges interviewed decided primarily based on concerns with such ground); see also IDDD, *O FIM DA LIBERDADE [THE END OF FREEDOM]* 108 (2019) (76% of the orders expressly relied on such ground).

⁷⁴ See *id.*

⁷⁵ Darrell Steffensmeier et al., *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 *CRIMINOLOGY* 763, 766-769 (1998) (introducing a "focal concerns" theory by

Typical adjudication and sentencing factors that judges use to assess public order risks in pretrial decisions are evidence strength, offense severity, and the suspect's criminal history.⁷⁶

With respect to procedural risks, the IACHR has provided a non-exhaustive set of acceptable factors to assess flight risk (attachment to jurisdiction, defendant behavior indicating interest to abscond, and arrest offense type and expected sentence) and risk of procedural hindrance (serious indicia that the defendant may tamper with evidence).⁷⁷ Often, however, the lack of information on most of these factors and the perceived power that offense and records related elements have to predict the suspect's procedural risks lead judges to assess these risks using the same elements they use to assess public order risks.⁷⁸ For instance, an extensive records sheet may be associated with higher chances of conviction or a longer expected sentence,⁷⁹ which in turn may be interpreted as incentives for suspects to abscond or tamper with evidence.

Literature on pretrial decision-making has corroborated these observations with evidence on the role of criminal variables. One study with a sample of 1,121 bail hearings across 13 Brazilian cities found that drug trafficking and robbery arrestees and arrestees with criminal records had odds of denial of release, respectively, 3.6, 6.4, and 3.8 times greater than the respective reference groups.⁸⁰ These figures were 6.2, 5.7, and 6.0 in a study with a sample of 825 bail

which judicial actors analyze sentencing based on blameworthiness, dangerousness and practical concerns); Tina L. Freiburger et al., *The Impact of Race on the Pretrial Decision*, 35(1) AM. J. CRIM. JUSTICE 76, 77-78 (2010) (an example of extensive literature adapting the focal concerns theory to analyze pretrial decisions).

⁷⁶ For prior research in Brazil, see Ribeiro et al., *supra* note 9, at 112; see also Lages & Ribeiro, *supra* note 9, at 25.

⁷⁷ *Informe*, *supra* note 7, ¶¶ 326.C.10-11.

⁷⁸ One notable exception are domestic violence arrests as they are prone to provide indications of the suspect's risk of hindering the proceeding by threatening victims and witnesses.

⁷⁹ E.g., Kirill D. Titaev, *Pretrial Detention in Russian Criminal Courts: A Statistical Analysis*, 41 INT'L J. COMP. & APPL. CRIM. JUST. 145, 155 (2017) (showing a sizable effect of criminal records on conviction risk in Russia); see also Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME AND JUST. 303, 362 (1997) (exploring the pathways through which a person's criminal records can increase sentence length in the U.S.).

⁸⁰ Ribeiro et al., *supra* note 9, at 112.

hearings in Belo Horizonte, with the difference that the arrest offense category “robbery” was replaced by “offense using a gun.”⁸¹ The first study also found no effect in cases where the only evidence was the word of the officer responsible for the arrest.⁸² More broadly, the effects of the severity of arrest offense and criminal records in pretrial decisions are well-documented in other countries.⁸³

In view of that, this study hypothesizes that the severity of arrest offense (which is measured in this study both by offense category and sentencing range) and of criminal records is associated with pre-trial outcomes.⁸⁴

“Arrest offense category” in *H_a 1.1* captures abstract offense severity, which refers to perceptions arising either from legal provisions or the personal beliefs of judges about the severity of entire categories of offenses. Predictors *most serious arrest offense*, *maximum sentence higher than four years*, and *domestic violence* test this hypothesis.⁸⁵ “Arrest offense sentencing range” in *H_a 1.2* captures specific severity, as it incorporates all elements that modify the sentencing range for a particular case. Predictor *sentencing range midpoint* tests this hypothesis. “Criminal records” in *H_a 2* encompasses three predictors: *most serious adult criminal record*, *juvenile*

⁸¹ Lages & Ribeiro, *supra* note 9, at 25; Policeno et al., *supra* note 9, at 936 (study with 277 cases also found significant effects for arrest offense category and criminal records).

⁸² Ribeiro et al., *supra* note 9, at 112.

⁸³ For instance, Stephen Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 SOC. PROBL. 222, 232 (2004); and Xifen Lin et al., *The Predictors of Pre-Conviction Decisions in China*, 19(2) CHINA REV. 151, 164-165 (2019). Prior research has generally not considered evidence strength.

⁸⁴ See *infra* Section IV.B for an explanation on why the models do not include evidence strength as a predictor.

⁸⁵ I also considered testing *H_a 1.1* with the predictors: (i) *offense unsusceptible to money bail*, which includes, *inter alia*, torture, drug trafficking and heinous crimes; (ii) *heinous crime*, a legal qualification given to certain offenses (in my dataset, aggravated murder, felony murder in robbery, rape and exploitation of child prostitution) that leads to harsher correctional treatment including mandatory incarceration and deferred eligibility for parole; and (iii) *criminal association offense*, which includes suspects arrested for an offense that requires the involvement of multiple individuals (three for criminal association and four for criminal organization). I excluded these predictors from the final analyses for simplicity and because they introduced multicollinearity issues or were largely non-significant.

records, and incident in preceding year. Although only criminal records generating recidivism, as legally defined,⁸⁶ have predetermined statutory consequences, the STF allows judges to also consider adult and juvenile records falling short of recidivism in pretrial decisions.⁸⁷ Additionally, previous findings suggest that bail judges interpret rearrest after recent pretrial release as an indication of risk of future offending.⁸⁸

H_a 3. FTA History Affects Pretrial Decisions and Status

As opposed to the previous null hypotheses, in which the rejection does not directly authorize conclusions related to specific pretrial detention grounds, *H_a 3* tests a predictor closely linked to the assessment of flight risk, namely the *arrestee's FTA history*. *H_a 3* is premised on the extensive use of prior FTA in pretrial risk assessment tools,⁸⁹ literature showing its effects on pretrial decisions,⁹⁰ and the STF position that corroborates the use of such a factor to assess flight risk.⁹¹

While other case-specific variables are primarily used as controls, the discussion of regression results will refer to them when appropriate, for instance, by reporting findings on socioeconomic

⁸⁶ Situation where at the moment of the new crime the suspect has not finished serving a previous final adult conviction more than five years before (“purifying period”). Código Penal [Criminal Code], Decreto-Lei No. 2.848, de 7 de dezembro de 1940, arts. 63-64 (Braz.).

⁸⁷ S.T.F., Recurso Ordinário em Habeas Corpus [Appeal on Habeas Corpus] No. 222.999, Relator: Min. Luiz Fux, 06.12.2022 (Braz.) (reciting settled case law that judges may rely on “bad records, recidivism, juvenile records, ongoing investigations and proceedings” to assess public order risks).

⁸⁸ NASCIMENTO DOS REIS, *supra* note 71, at 41; MINISTÉRIO DA JUSTIÇA AND DEPEN, IMPLEMENTAÇÃO DAS AUDIÊNCIAS DE CUSTÓDIA NO BRASIL: ANÁLISE DE EXPERIÊNCIAS E RECOMENDAÇÕES DE APRIMORAMENTO 49 (2016) (Braz.).

⁸⁹ FTA history is used in the five most common pretrial risk assessment tools in the United States. MAPPING PRETRIAL INJUSTICE, COMMON PRETRIAL RISK ASSESSMENTS (last visited Apr. 8, 2025), www.pretrialrisk.com/the-basics/common-prai/.

⁹⁰ See, e.g., QUENTIN KARPILOW, RACIAL AND ETHNIC THREATS IN PRETRIAL RELEASE PROCESSING (2012), www.icpsr.umich.edu/files/ICPSR/prize/karpilow.pdf.

⁹¹ S.T.F., Habeas Corpus No. 178.548, Relator: Min. Celso de Mello, 01.07.2020 (keeping defendant in pretrial detention in part due to FTA history and reciting supporting case law). Accordingly, 4% of the orders denying release in my study relied on FTA history.

factors to assess the non-discrimination standard in money bail decisions.

H_a 4. Bail Judge Identity Affects the Likelihood of Denial of Release

Pretrial adjudication is at high risk for excessive inter-judge disparities due to the limited information available, the reduced scrutiny of decisions, the broad criteria,—⁹²as exemplified in Brazil by the public order clause for denial of release—and the short time allocated to bail hearings.⁹³ As already performed in other jurisdictions,⁹⁴ *H_a 4* aims to measure inter-bail judge disparities to assess whether judicial discretion could be making room for arbitrariness in Brazil.⁹⁵

IV. CASE STUDY: CAMPO GRANDE, MATO GROSSO DO SUL

This Article presents the first longitudinal multivariate research of pretrial decision-making in Brazil. This research was developed using the full target population of non-confidential flagrant arrests in the chosen jurisdiction at the level of arrestees, with an ample set of predictors and outcomes. This study relies on Brazil's vast

⁹² Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees* in 41 CRIMINOLOGY 873, 876-877 (2003) (providing a U.S. explanation).

⁹³ IDDD, MONITORAMENTO DAS AUDIÊNCIAS DE CUSTÓDIA EM SÃO PAULO 23 (2016) (reporting that some bail hearing last less than four minutes); Bruna Gisi et al., *The exercise of authority during interactions in custody hearings in São Paulo (Brazil): Building legitimacy through exclusion*, 25(3) PUNISHMENT & SOC'Y 707, 714 (2023) (“procedures were not only mechanic, but performed hurriedly, and [bail] hearings commonly lasted no more than 10 min.”).

⁹⁴ Will Dobbie et al., *supra* note 6, at 217 (finding a 33% spread difference between the release rates of the most and least lenient judges three days after the bail hearing in Miami-Dade and Philadelphia between 2006 and 2014); Oren Gazal-Ayal & Raanan Sulitzeanu-Keanu, *Let My People Go: Ethnic In-Group Bias in Judicial Decisions – Evidence from a Randomized Natural Experiment*, 7 J. OF EMPIRICAL LEGAL STUD. 403, 418 (2010) (finding significant inter-judge variation in pretrial release decisions but not in the length of detention in Israel).

⁹⁵ Policeno et al., *supra* note 9 (identifying significant judge effects; however, the small sample of 277 cases without details on time, jurisdiction, or selection methodology prevent the assessment of its validity).

electronic availability of proceedings to develop a unique data gathering methodology based on Python⁹⁶ coding scripts specifically written to retrieve, process, and, in part, analyze criminal case files from the judicial online database of the jurisdiction of study.

A. Jurisdiction Selection and Dataset

The jurisdiction of study is Campo Grande, capital city of the midwestern state of Mato Grosso do Sul (“MS”) and home to 898,100 inhabitants in 2022.⁹⁷ While the fact that MS currently has Brazil’s second-highest incarceration rate⁹⁸ makes the investigation of its decision-making more pressing, the primary criterion for selection was data availability. After surveying different online case processing systems maintained by each of the country’s state courts of appeals,⁹⁹ MS was selected for this study because its court’s website enabled automated case searches, had a manageable confidentiality rate, and had the case files of virtually all in-scope cases digitized and available for download by any Brazilian lawyer.¹⁰⁰

Because the MS court of appeals does not publish a full list of criminal cases initiated or active, in-scope cases were identified using a script to perform a serial search of potential case numbers in the court’s search system. Then, a script was created to go over the relevant case numbers, the digitized version of their files (the scanned police dossier and court documents in PDF) was downloaded, and webpages of the cases were scraped to obtain standardized case processing information. To transform the 80,155 pages of

⁹⁶ Python is a general-purpose programming language used for several tasks, including website and software development, data science, and machine learning. See JAKE VANDERPLAS, PYTHON DATA SCIENCE HANDBOOK: ESSENTIAL TOOLS FOR WORKING WITH DATA (O’Reilly Media, Inc. 2016) (giving an overview of Python’s data science applications).

⁹⁷ IBGE, CIDADES (last visited Apr. 8, 2025), <https://cidades.ibge.gov.br/brasil/ms/campo-grande/panorama>.

⁹⁸ SISDEPEN, *supra* note 1, at 17 (650 inmates per 100,000 inhabitants).

⁹⁹ Twenty-six state courts of appeals and the court of appeals for the federal district. This study focused on state courts because federal courts are reserved for offenses against federal interests and account for less than 0.5% of the inmates. *Id.* at 3.

¹⁰⁰ TRIBUNAL DE JUSTIÇA DE MATO GROSSO DO SUL, CONSULTA DE PROCESSOS (last visited Jan. 11, 2025), <https://esaj.tjms.jus.br> (access may be unavailable outside of Brazil).

raw text into processed data suitable for statistical analyses, I (i) recognized the text in the digitized case files, (ii) developed a text-pattern recognition script with regular expressions to identify textual structures of interest, (iii) manually coded poorly-scanned police dossiers and highly-nuanced variables such as criminal records, and (iv) performed coding validation with coding scripts and manual verification of outlying values.

The total observations are 2,158, which account for all non-confidential flagrant arrests of arrestees in Campo Grande in the first eight months of 2016.¹⁰¹ These arrests occurred in 1,742 cases, referring to 2,069 unique arrestees, and led to bail hearings for 1,774 arrestees.¹⁰² The focus on 2016 was meant to enable a potential parallel discussion about the effects of the introduction of bail hearings in 2015 in Brazil.

i. Dependent Variables

The dependent variables vary depending on the testing dataset. The first dataset includes all arrestees in the study ($N_1 = 2,158$), and the second and third are subsets of N_1 , including only those observations eligible and ineligible for denial of release, respectively ($N_2 = 1,569$ and $N_3 = 589$). The fourth set includes only arrestees in N_2 not released on stationhouse money bail who had a bail hearing ($N_4 = 1,491$). The fifth set includes only N_4 cases of bail judges who heard at least 10 cases in this study ($N_5 = 1,484$). The sixth set includes only arrestees legally eligible for stationhouse money bail ($N_6 = 803$), and N_7 encompasses only arrestees in N_3 not released on stationhouse money bail who were granted release in a bail hearing ($N_7 = 248$). N_1 , N_2 , and N_3 use as dependent variables a time-to-event

¹⁰¹ The cases' temporal distribution was balanced with 10.5 to 14.5% in each month and 13 to 16% in each week day.

¹⁰² I could not find the precise amount of flagrant arrests in the study period, but sparse data points suggest that 200 to 300 arrestees on average have a bail hearing every month in Campo Grande. See Defensoria Pública de Mato Grosso do Sul, *Defensoria Pública atuou em 79% das audiências de custódia da Capital* (Feb. 10, 2017), <https://nucon.defensoria.ms.def.br/imprensa/noticias/281-defensoria-publica-atuou-em-79-das-audiencias-de-custodia-da-capital> (reporting that 1,251 arrestees had a bail hearing in the approximate six months after this study's period). This research includes a monthly average of 222 non-confidential bail hearing arrestees, confirming that it covers a vast majority of in-scope cases. See *infra* Section IV.B (providing an estimate of confidential cases).

variable where the event is the arrestee's release. N_1 also uses binary variables indicating whether the arrestee was in detention 10 and 30 days after the arrest, and a continuous variable indicating detention days in the 100-day period after the arrest. The outcome for N_4 and N_5 is whether the judge denied release. For N_6 and N_7 , the dependent variables are whether the police chief or the judge, respectively, set money bail, and for how much.

ii. Independent Variables

The coding considered the applicable law at the time of the arrests.

A. "Most serious arrest offense" is a seven-level variable of increasing severity based on the average sentencing maximum of the non-aggravated form of the offenses in each category. The categories are 'traffic offenses' (reference level), 'gun offenses,' 'non-violent property offenses,' 'public offenses,' 'violent property offenses,' 'drug trafficking offenses,' and 'personal offenses.'¹⁰³

B. "Maximum sentence higher than four years" is a binary variable based on the total sentence prescribed to the arrest offense(s). It is the main criterion of suspect eligibility for denial of release, and it is included only in tests with the overall dataset N_1 because the subsets exclude all observations either meeting or not meeting this variable.

¹⁰³ Traffic offenses: driving without a license, driving under the influence, vehicular assault or homicide, hit and run and illegal street racing. Gun offenses: possession or sale of firearm and firearm shooting. Non-violent property offenses: essentially theft and receipt of stolen goods. Public offenses: frauds, corruption, perjury, copyright violation, environmental and economic offenses, damage to public property, contempt, use of minors in crimes, criminal association and organization. Violent property offenses: essentially robbery. Drug trafficking offenses: self-explanatory. Personal offenses: verbal assault, criminal trespass (domestic violence-related), assault, battery, kidnapping, abandonment of vulnerable person, exploitation of child prostitution, rape, torture and homicide. Given the variation in offense type within many of these categories, I also modelled this variable considering only core offenses (including their aggravated forms and additional counts of milder offenses): drunk driving (reference group), illegal possession of firearm, receipt of stolen goods, theft, robbery, drug trafficking and murder. This restriction reduced the sample to 1,640 observations (76% of the total) and affected effect sizes but did not change this research's overall findings. *See infra* note 129 (reporting results of this alternative analysis for the tests in Table 2).

C. “Domestic violence” indicates whether the police chief or reviewing judge considered that any arrest offense involved domestic or family violence against a woman, child, elder, ill person, or person with disability. Because these cases are eligible for denial of release, domestic violence is not a predictor in tests with subsets limited to cases ineligible for it (N_3 and N_7).

D. “Sentencing range midpoint” is a continuous variable in years that indicates half of the total sentencing range computed pursuant to legal count rules. It incorporates all crime-specific elements that modify the baseline sentencing range from which judges depart to sentence defendants, *e.g.*, a deduction in case of attempt.¹⁰⁴ It is not limited to 30 years, the maximum prison term in Brazil at the time of the study,¹⁰⁵ as that limit operates solely as a correctional constraint.

E. “Most serious adult criminal record” is a six-level variable of increasing severity. ‘Clean record’ (reference) means no incidents or only final acquittals. ‘Mild adult record’ includes arrestees whose worst record is a prior arrest or investigation, an ongoing case without accepted charges, or a purified conviction.¹⁰⁶ ‘Pending case’ includes arrestees whose worst record is a pending trial or a non-final acquittal. ‘Non-final conviction’ includes non-recidivating arrestees with at least one non-final conviction. ‘General recidivism’ includes arrestees with at least one non-purified final conviction who are not subject to specific recidivism. ‘Specific recidivism’ includes those arrested for an offense similar to a prior offense that led to a non-purified final conviction.

F. “Juvenile records” is a three-level variable of increasing severity based on the arrestee’s number of juvenile incidents. ‘No incident,’ is the reference level to levels ‘1 to 3 incidents,’ and ‘4 or more incidents.’ This categorization considered the theoretical difference between none, a few, and many incidents and the need for a reasonable amount of units of analysis in each category.

¹⁰⁴ Using midpoints avoids the collinearity of including both minimums and maximums and is more realistic than using either of them.

¹⁰⁵ See Lei No. 13.964, de 2019 [Law 13,964/2019] (Braz.) (increasing the maximum prison term to 40 years).

¹⁰⁶ See *supra* note 86.

G. “Incident in preceding year” indicates whether the arrestee was investigated, arrested, or charged for an arrest offense that occurred in the twelve months preceding the new arrest.

H. “Most serious prior FTA” is a three-level variable of increasing severity that indicates the most serious incident in the arrestee’s criminal history that constitutes a failure to comply with appearance-related commitments. ‘No prior FTA’ is the reference level. ‘Prior pretrial FTA’ includes arrestees whose worst FTA was a failure to comply with appearance-related pretrial restrictions, a case suspension for inability to summon the defendant or trial *in absentia*. ‘Prior post-trial FTA’ includes arrestees who, at least once in the past, failed to comply with probation or parole appearance-related conditions or evaded a prison sentence.

I. “Bail judge” identifies the 38 judges who presided over the bail hearings in the study and is restricted to subset N_5 , where the amount of observations allowed a random effects analysis.

iii. Control Variables

The lack of treatment randomization—except, to some extent, for bail judges, which are semi-randomized to arrestees due to the rotation of judges at bail hearings—¹⁰⁷recommends adding potentially confounding factors as controls to reduce omitted variable bias. Prior literature has found most of the controls used herein to be associated with pretrial decisions.¹⁰⁸

¹⁰⁷ TRIBUNAL DE JUSTIÇA DE MATO GROSSO DO SUL, CÓDIGO DE NORMAS DA CORREGEDORIA-GERAL DE JUSTIÇA DO ESTADO DE MATO GROSSO DO SUL 117 (2023) (Article 517 of the MS Court of Appeals’ Rules of Conduct establishes a weekly rotation schedule of bail judges in the jurisdiction of study).

¹⁰⁸ *Arrestee demographics*. Age at arrest in years. Sex: male (reference) and female. Marital status: ‘single’ (reference), ‘cohabiting’ and ‘married’. Origin: ‘local’ (reference), ‘out-of-city’ and ‘out-of-state’. Occupation: ‘unemployed, homemaker or student’ (reference), ‘lower-status job’ and ‘higher-status job’, meaning professional worker, civil servant or business owner. Arrestee homelessness indicates if the files contain reference of it. Level of schooling: ‘middle school incomplete or lower’ (reference), ‘completed middle school but not high school’, ‘completed high school’. *Bail hearing variables*, which are restricted to tests of observations with a bail hearing. Time from arrest to bail hearing in days (log-transformed). Counsel: public defense (reference) and private counsel (retained or court-appointed). Violence claim indicates if the arrestee claimed violence from the arrest until the bail hearing. Bail judge sex: male (reference) and female. Prosecutor against release indicates if the prosecutor requested denial of

Table 1 provides basic statistics for the full dataset and the subsets with only observations eligible or ineligible for denial of release. A cursory review indicates a high incidence of pretrial detention in Campo Grande (overall, 54.8% at day 10) and the importance of analyzing cases separately depending on their eligibility for denial of release in view of the differences between the two groups, for instance, by most serious arrest offense and criminal records.

release at the hearing. *Miscellaneous*. Amount of suspects arrested: 'single' (reference) and '2 or more suspects'. Police station (only subset N_6): 'police station 1' (reference), 'police station 2' and 'other police stations'. Stationhouse money bail in minimum wages with zero indicating that the police chief did not set it (only subset N_7). Arrest month: January (reference) to August 2016.

TABLE 1 - Descriptive Statistics of Dataset with All 2,158 Non-Confidential Cases with a Flagrant Arrest between Jan-Aug/2016 in Campo Grande, Brazil - Proportion, or Mean and (Standard Deviation) if Continuous Variable -

	N1	N2	N3
Number of observations	2158	1569	589
Pretrial detention at day 10	54.8	72.1	8.7
Jail days in first 100 days	45.0 (45.6)	60.3 (43.9)	4.2 (13.4)
1. Traffic offense	14.7	5.0	40.4
2. Gun offense	8.7	5.0	18.7
3. Non-violent property offense	27.0	23.1	37.4
4. Public offense	6.2	7.3	3.1
5. Violent property offense	14.6	20.1	-
6. Drug offense	22.4	30.8	-
7. Personal offense	6.4	8.7	0.5
8. Max. sentence >4 years	62.8	86.4	-
9. Domestic violence	5.3	7.3	-
10. Midpoint prescribed sentence (y)	7.2 (6.1)	9.1 (6.2)	2.2 (0.5)
11. Clean adult record	35.8	31.6	46.9
12. Mild record	18.7	15.0	28.5
13. Pending case	16.9	15.8	19.7
14. Non-definitive conviction	5.1	5.2	4.9
15. General recidivism	8.9	12.3	-
16. Specific recidivism	14.6	20.1	-
17. No juvenile incident	69.9	65.8	80.8
18. 1-3 juvenile incidents	21.7	24.8	13.4
19. 4+ juvenile incidents	8.4	9.4	5.8
20. Incident in preceding year	23.1	24.3	19.9
21. No prior FTA	70.9	65.0	86.6
22. Prior pretrial FTA	13.3	13.8	11.9
23. Prior posttrial FTA	15.8	21.2	1.5
24. Female	8.9	9.7	6.6
25. Age in years	29.2 (10.3)	28.3 (9.6)	31.6 (11.6)
26. Single	61.8	61.7	62.1
27. Cohabiting	24.7	26.7	19.4
28. Married	13.5	11.6	18.5
29. Local	90.7	88.5	96.6
30. Out-of-city	4.3	5.3	1.7
31. Out-of-state	5.0	6.2	1.7
32. Unemployed	29.0	29.9	26.7
33. Lower-status job	66.2	66.9	64.2
34. Higher-status job	4.8	3.2	9.2
35. Middle school incomplete or less	53.5	57.1	43.8
36. Completed middle school	25.9	26.0	25.6
37. Completed high school	20.6	16.9	30.6
38. Homeless	3.7	3.8	3.2
39. Single suspect	66.6	59.4	85.7
40. 2 or more suspects	33.4	40.6	14.3

N1 = All observations.

N2 = Observations eligible to denial of release.

N3 = Observations ineligible to denial of release.

B. Race and Other Study Limitations

The main limitation of this research is the risk of omitted variable bias, which occurs when analyses yield unreliable estimates due to a failure to include important predictors.¹⁰⁹ While additional

¹⁰⁹ LEE EPSTEIN & ANDREW D. MARTIN, AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH 209 (2014). Accordingly, the adjusted r-squared (R2) of 0.57 in Model (4) of Table 2 indicates that the predictors in the full model are unable

arrestee socioeconomic data, such as net worth, could improve the estimates in view of poverty's well-studied relationship with crime and criminal justice,¹¹⁰ the inclusion of age, marital status, occupation, level of schooling, and homelessness should function as proxies for that. Also, this study's design was unable to code the strength of evidence for being a highly nuanced and offense-specific factor. Arrestee race is an omitted variable that merits more discussion.

Race is a potentially powerful predictor in view of the over-representation of racial minorities in the Brazilian correctional system,¹¹¹ their under-representation in the legal ranks,¹¹² and research on the mechanisms of discrimination in the administration of justice.¹¹³ However, in this study, arrestee race was available in the police identification sheet of only 442 arrestees (20.5%), as a three-level categorization: white (31% of the cases), brown (*pardo*) (64%), or black (6%).¹¹⁴ The fraction of cases with arrestee race was small enough that neither imputation of missing values nor listwise deletion of incomplete observations was possible. Moreover, the set of cases with arrestee race is biased because that information was usually listed in the release warrant of arrestees who posted money bail at the police station. For what they are worth, regression

to explain 43% of the variability in the outcome analyzed. See Jeremy Miles, R-Squared, Adjusted R-Squared, *ENCYCLOPEDIA OF STAT. IN BEHAV. SCI.* (2005).

¹¹⁰ Patrick Sharkey et al., *Poverty and Crime*, in *THE OXFORD HANDBOOK OF THE SOCIAL SCIENCE OF POVERTY* 623 (David Brady & Linda Burton eds., 2016) (overview of research on poverty's association with crime); LÖIC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009) (linking broader trends of social welfare curtailment and enlargement of the criminal system in the United States).

¹¹¹ *Compare* SISDEPEN, LEVANTAMENTO NACIONAL DE INFORMAÇÕES PENITENCIÁRIAS, MULHERES E GRUPOS ESPECÍFICOS 5, www.gov.br/depen/pt-br/servicos/sisdepen (last visited April 8, 2025) (68% of Brazilian inmates are black or brown), with IBGE, *supra* note 97 (estimating that 56% of the Brazilian population was black or brown as of 2018).

¹¹² CNJ, PESQUISA SOBRE NEGROS E NEGRAS NO PODER JUDICIÁRIO 58 (2021) (only 13% of the Brazilian judges were black or brown as of 2021). Based on online searches, only around 9% of the judges and prosecutors and 17% of the public defenders acting in this study's bail hearings are black or brown.

¹¹³ Sergio Adorno, *Racial Discrimination and Criminal Justice in São Paulo*, in *RACE IN CONTEMPORARY BRAZIL: FROM INDIFFERENCE TO INEQUALITY* 123 (Rebecca Reichmann ed., 1999) (seminal research on the subject in Brazil).

¹¹⁴ IBGE, *supra* note 97 (in 2015, browns and blacks were, respectively, 48% and 5% of the MS state's population).

analyses limited to observations with arrestee race found no significant coefficients for it.¹¹⁵ Given all this, as a measure to mitigate the absence of race, all models include socioeconomic controls that generally correlate with it.¹¹⁶

Despite this shortcoming, the information on arrestee race in some case files and the lack of this information from most case files provide meaningful insights. First, such a finding exemplifies the challenge of researching racial disparities in the Brazilian criminal system and the importance of ensuring data gathering on race.¹¹⁷ Second, it raises the question about the adequacy of the process used to determine arrestee race because it is common practice in Brazil to have police officers decide and record it, regardless of the arrestee's self-identification.¹¹⁸ Third, even if arrestee race was generally available in the case files, the three-level categorization could present the challenge that racial disparities in Brazil are better captured by analyzing race along a spectrum of skin colors in view of the country's intense race-mixing.¹¹⁹

An additional important limitation of this research is the exclusion of flagrant arrest files of confidential proceedings. While the exact amount of confidential proceedings is unknown, I estimate the confidentiality rate to be around 17% by comparing the number of

¹¹⁵ Results on file with author.

¹¹⁶ IBGE, SÍNTESE DE INDICADORES SOCIAIS: UMA ANÁLISE DAS CONDIÇÕES DE VIDA DA POPULAÇÃO BRASILEIRA 26, 35 (2021) (whites without high school degree and unemployed were, respectively, 28% and 11% in Brazil in 2020 while those figures for blacks and browns were 42% and 16%); IBGE, CENSO DEMOGRAFICO 2010: NUPCIALIDADE, FECUNDIDADE E MIGRACAO: RESULTADOS DA AMOSTRA 119-124 (2012) (single and married whites were, respectively, 49% and 39% in Brazil in 2010 while those figures for blacks and browns were 61% and 31%).

¹¹⁷ IACHR, *Measures to Reduce Pretrial Detention*, 231.K.8, at 159 (2017); Mutuma Ruteere (Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance), *Combating racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action*, ¶ VI.88, U.N. Doc. A/70/335 (Aug. 20, 2015).

¹¹⁸ See IDDD, MONITORAMENTO DAS AUDIÊNCIAS DE CUSTÓDIA EM SÃO PAULO 29 (2016); *see also* IDDD, O FIM DA LIBERDADE [THE END OF FREEDOM] 85, 63 n.46 (2019). Jointly reporting that race determination pattern in thirteen Brazilian cities.

¹¹⁹ EDWARD TELLES, PIGMENTOCRACIES: ETHNICITY, RACE, AND COLOR IN LATIN AMERICA 226 (2014).

cases in the sample with the number of flagrant arrest proceedings within the case identification number range of this study's window that were mentioned in the official gazette during 2016 (includes both confidential and non-confidential cases). Importantly, this review of the official gazette revealed that confidential cases tend to differ from non-confidential ones as those generally concern domestic violence and sexual offenses, which appear in this study's dataset only 5% and 0.4% of the instances, respectively. Such disparity provides reassurance that this study's findings are not largely affected by the exclusion of confidential arrests.

Lastly, caution should be taken with respect to this study's external validity as it is a case study of the eight-month caseload of a single city in a country of continental proportions. For instance, Campo Grande's proximity to drug trafficking corridors in South America may skew the proportion of these cases and alter pretrial decision-making patterns. Further, being the capital city of the Brazilian state with the second-highest incarceration rate may reduce the findings' applicability to jurisdictions with fewer inmates per capita. Despite this, some structural factors support the generalization of the findings herein to Brazil's state-level pretrial decision-making as a whole. Criminal and procedural law are matters exclusively regulated at the federal level, meaning that the same actions are prescribed as crimes and the same pretrial rules apply in all states by virtue of federal codes.¹²⁰ Moreover, federal rules govern key aspects of legal careers, eliminating potential interstate variations related, for instance, to the selection of judges, prosecutors, and public defenders.¹²¹

C. Statistical Analysis

The analyses use: (i) linear regression to model the continuous dependent variable in column (4) of Table 2; (ii) Poisson instead of binomial logistic regression for models with binary dependent

¹²⁰ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION], art. 22, I (Braz.) (empowering Congress with the exclusive responsibility to pass federal laws on criminal and procedural matters, meaning that states cannot adopt their own criminal or criminal procedure codes).

¹²¹ *Id.* arts. 92-135 (extensive regulation of judicial professions in the text of the Constitution itself, including the provision of federal authority to enact national laws on judicial professions).

variables in order to obtain risk ratios, which are easier to interpret than odds ratios; (iii) Hurdle regression to model money bail setting in Table 4, which includes a binary dependent variable (whether to set money bail) and a count dependent variable (amount of money bail in minimum wages); (iv) cox regression for the survival models with time-to-event dependent variables; and (v) mixed effects logistic regression for the random effects model in column (1) of Table 3.

I adopt sequential decision-making, which assumes that judges first decide whether to deny release, and then whether to release the arrestee on recognizance or money bail, along with its amount.¹²² Police officers are also assumed to decide jointly whether to set money bail and its amount.¹²³ The regression analyses compute robust standard errors with clustering by case, arrestee, and arrestee mother. Missing values of marital status (2.5%) and level of schooling (22%) were imputed using single logistic regression. When required, levels of variables were collapsed along sensible lines or dropped in case of prohibitively sparse data to ensure model convergence and avoid overfitting.

¹²² This study also used multinomial logistic regression with a three-level dependent variable (release on recognizance, release on money bail and denial of release) but omitted the results due to the preference for focusing on the core decisions for each set of cases.

¹²³ The risk of selection bias by virtue of sample restriction due to earlier procedural decisions is inapplicable to Table 2 and survival models in Tables 3 and 4 because their outcome is the overall pretrial status of all arrestees without regard for specific decisions. Selection bias is also not a concern in Table 4's Models (1) and (2) as their outcome variable is the police chief stationhouse money bail decision, which is the very first decision on pretrial restrictions for those arrestees. Such risk is negligible in Models (1) and (2) of Table 3 as their outcome is denial of release, which is a decision made in almost all cases eligible for denial of release (98% of them are not released on stationhouse money bail). Readers should be aware that the threat of selection bias exists in analyses of bail hearing money bail decisions for arrestees ineligible for denial of release (Models (3) and (4) of Table 4) due to the exclusion of 46% of those arrestees who were released on stationhouse money bail. I was unable to assess the significance of an inverse Mills ratio correction term due to the lack of a plausible exclusion restriction. See Shawn Bushway et al., *Is the Magic Still There? The Use of the Heckman Two-Step Correction for Selection Bias in Criminology*, 23 J. QUANT CRIMINOL 151-178 (2007) (explaining the pitfalls of using such strategy to correct selection bias absent an exclusion restriction).

All effects reported are fixed effects, except for the bail hearing judge, which is modeled as a random effects group variable because it is hypothesized that bail judges decide somewhat idiosyncratically, creating within-judge correlation. Also, the bail judges represented in the dataset are a sample of a greater bail judge population, and, practically, this study is more interested in composite inter-judge variation than in the individual fixed effect of each judge. Significance tests of random effects were based on goodness-of-fit comparisons between reduced and full models.

V. FINDINGS

This section reports the case study's findings on the use of pretrial detention during the 100-day post-arrest period, which includes descriptive results from a set of time series of the arrestees' pretrial status followed by regression results testing hypotheses $H_a 1.1$ to $H_a 4$.

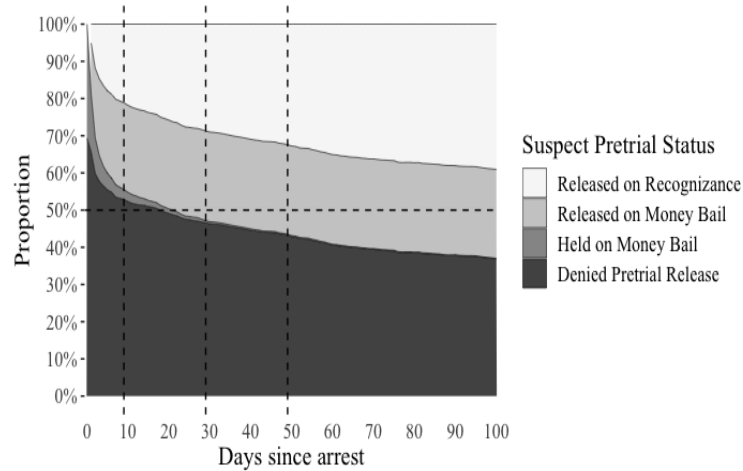
A. Descriptive Findings of the First 100 Days Post-Arrest

Graphs 1 to 3 present stacked time series plots of the evolution of the arrestees' pretrial status in the 100 days since the arrest considering four main scenarios, by increasing severity (each represented with a shade of gray): released on recognizance, released on money bail, held on money bail and denied pretrial release.¹²⁴ Pretrial detention includes arrestees held on money bail and denied release. Graph 1 includes all 2,158 arrestees, Graph 2 only the 1,569 arrestees eligible for denial of release, and Graph 3 only the 589 arrestees ineligible for it. Graphs 4 and 5 present time series plots of the pretrial detention rate by broad category of offense and recidivism status. The starting point is the police chief's decision whether to set money bail, and each time point refers to the arrestee's status at the end of that day. The graphs consider the arrestees' factual status and were accordingly labeled as released only when the release warrant was carried out. The status of arrestees whose case

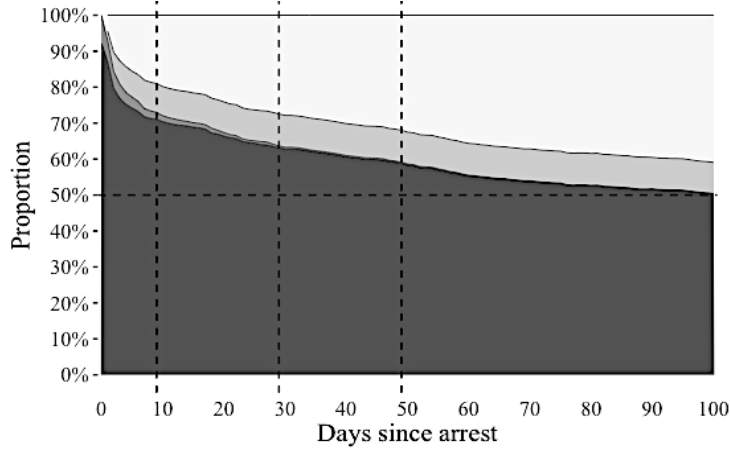
¹²⁴ Technically, arrestees not released on stationhouse money bail remain in flagrant arrest (*prisão em flagrante*) until a judge ratifies it and decides on pretrial restrictions. I omitted this nuance from the charts for simplicity given that the initial judicial review occurred on average 28 hours after the arrest for arrestees not released at the police station.

information was confidential during part of the period remained unchanged during the confidential period (less than 5% had a confidential arrestee pretrial status at day 100). The units of analysis subject to censoring due to case dismissal were considered released after that (3% at day 100). There were seven instances of revocation of release in the 100 days observed, and two of those arrestees were released again weeks later.

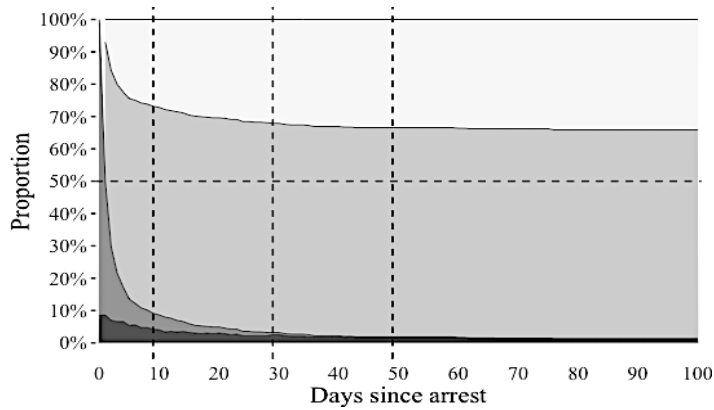
GRAPH 1 – PRETRIAL STATUS IN THE 100 DAYS AFTER THE ARREST OF ALL NON-CONFIDENTIAL CASES WITH A FLAGRANT ARREST BETWEEN JAN-AUG OF 2016 IN CAMPO GRANDE, BRAZIL



GRAPH 2 – PRETRIAL STATUS OF ARRESTEES ELIGIBLE FOR DENIAL OF RELEASE



GRAPH 3 – PRETRIAL STATUS OF ARRESTEES INELIGIBLE FOR DENIAL OF RELEASE



Graph 1 presents the overall pretrial detention rate in Campo Grande and reveals that 55% of the arrestees spent at least 10 days in jail after a flagrant arrest, 47% spent at least 30 days in jail, and over 37% remained incarcerated 100 days later. In the aggregate, arrestees spent 45% of the total 215,800 arrestee days in pretrial detention. These rates increase to 72%, 63%, 50%, and 60% in Graph 2, respectively, when only cases eligible for denial of release are

considered. As for arrestees ineligible for denial of release, Graph 3 reveals that 9% and 3% of them remained detained 10 and 30 days after the arrest, respectively.

The analysis of the pretrial detention curve in Graph 1 also shows that the first 10 days are critical, as the arrestees' pretrial status remained largely stable thereafter. Accordingly, 85% of those released within the first 30 days and 72% of those released within the first 100 days were released up to the tenth day after the flagrant arrest. In line with the lack of a legal requirement for pretrial detention review at the time of the study, the shape of the detention curves in Graphs 1 and 2 suggests an absence of temporal thresholds at which judges perform such a review. Their shape instead corroborates the practice apparent from the case files that, as a rule, the review of pretrial detention orders happens not *ex officio*, but for external reasons, such as a counsel request.

Between failure to post money bail and denial of release, the latter accounts for the vast majority of pretrial detentions in the long term. Three reasons explain that. First, in the initial cycle of review of the arrests, money bail (stationhouse or judicial) was set to only 28% of the arrestees, while judges denied release to 57% of them. Second, judges often waive non-posted stationhouse money bail in their initial review of the arrest, which occurred in 37% of such instances. Lastly, judges eventually release arrestees who are unable to post judicial money bail (all but three instances) up to day 100. Indeed, 98% of the 97,000 jail days in the study (*i.e.*, 45% of the total 215,800 arrestee days) were due to denial of release. Graph 1 shows that 89% of all arrestees detained had release denied at day 3, a number that increased to 95.5% at day 10. Even for arrestees ineligible for denial of release, Graph 3 shows that the share of those detained who were denied release increases from 31% at day 3 to a vast majority at day 30.

Release on recognizance and money bail each account for a similar 24% share of all pretrial status in Graph 1 at day 15. As time passes, judges move to revoke orders denying release and to waive money bail, leading to an increase in releases on recognizance, which reached 39% of all pretrial status or 62% of the releases at day 100. Conversely, money bail releases plateau 10 days after the

arrest at 24%.¹²⁵ Police chiefs and bail judges set average money bail amounts of R\$1,900 (approximately US\$320 in the current exchange rate), with a maximum of R\$17,600 (approximately US\$3,000). Taken together, these data reveal that money bail has a relatively reduced role as a pretrial restriction both in incidence and amounts, and that arrestees who post it do so early on.

Ideally, because Graph 3 includes only arrestees ineligible for denial of release, it should not show any observations with such restriction in the period after the judicial review of arrests. However, the bottom of the picture concerningly reveals 35 instances where arrestees were illegally denied release, 1.6% of the total observations. Additionally, prosecutors pleaded against pretrial release in the bail hearings of 101 arrestees ineligible for denial of release (5% of the sample).¹²⁶

The pretrial detention rates by broad category of offense and recidivism status in Graphs 4 and 5 offer descriptive indicia that this study's main independent variables correlate with how arrestees await trial. While only 19% of the arrestees accused of public offenses were incarcerated at day 10, 44.5%, 78%, and 92% of those accused, respectively, of non-violent property, violent, and drug offenses, were in detention. At day 100, those rates had dropped to 8%, 20%, 60%, and 75%.¹²⁷ As for recidivism status, 47% of non-recidivating arrestees and 80% of those recidivating were in jail at

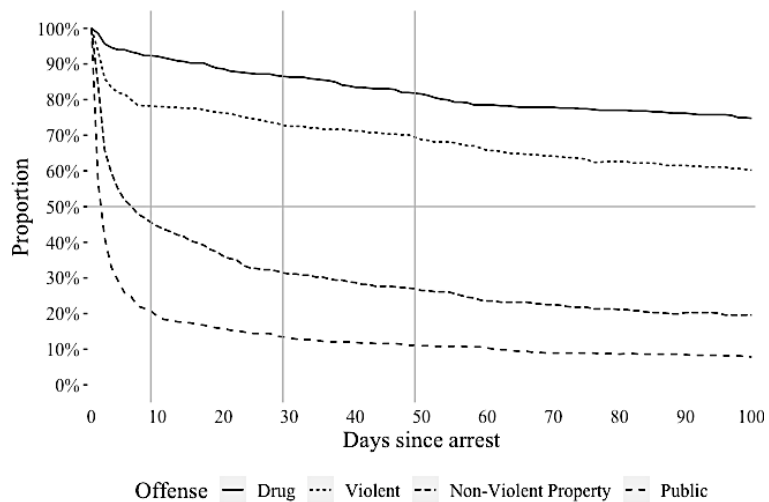
¹²⁵ The comparison between Graphs 2 and 3 shows that arrestees eligible for denial of pretrial release are released on money bail much less often than ineligible arrestees: 9% versus 64.5% of all pretrial status at day 100. Reasons for that are the authorization for police chiefs to set money bail to most arrestees in Graph 3 and to a few in Graph 2, and the money bail ban to arrestees accused of drug trafficking and heinous offenses, who are all in Graph 2. *See supra* note 85.

¹²⁶ Graph 2 also reveals a potential illegality in its upper left corner by showing that police chiefs set money bail for some arrestees eligible for denial of release, a category whose most arrestees (86%) are ineligible for stationhouse money bail for having been arrested for offenses punished by a maximum prison term higher than four years. In specific, police chiefs set money bail to 29 arrestees accused of offenses over the four-years threshold. Further analysis indicated that 23 of those cases could be justified by reasonable count calculations that placed the maximum prison term for the arrest offenses under the four-years threshold, reducing the amount of illegal stationhouse money bail decisions to six.

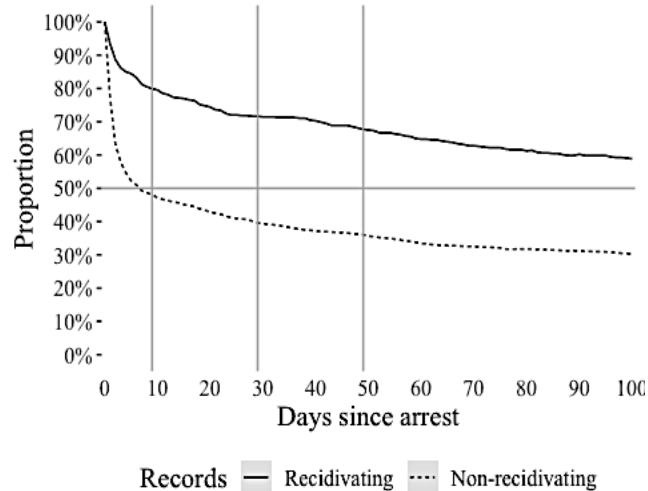
¹²⁷ Focusing on domestic violence cases, arrestees in this category were detained less often than non-domestic violence ones: 52% versus 73% at day 10 and 17% versus 53% at day 100, respectively.

day 10, rates that dropped to 30% and 59% at day 100. The next section delves into these relationships by adding an extensive set of controls and testing more detailed predictor and outcome variables. It also examines bail judges' impact on pretrial decisions.

GRAPH 4 – PRETRIAL STATUS BY BROAD CATEGORY OF OFFENSE



GRAPH 5 – PRETRIAL STATUS BY
RECIDIVISM STATUS



To enable the proportionality discussion, this study compared the arrestees’ pretrial status during the first 100 days post-arrest with the first instance judgment outcome (excluding cases still pending at the time of this Article). It was found that 71% of those who stayed detained at least until day 10 were not sentenced to prison in a closed regime (“imprisonment”),¹²⁸ 24% were not convicted, and 47% were sentenced to a milder punishment. Those figures were, respectively, 41%, 13%, and 28% for arrestees in pretrial detention at day 100. Comparatively, 97% of the arrestees released on day 10 were not sentenced to imprisonment. Lastly, arrestees not sentenced to imprisonment stayed on average 40 days in pretrial detention

¹²⁸ The sentencing judge sets one of three initial prison regimes: closed, semi-open (work during the day and prison at night) or open (minimum supervision in government shelter or house arrest). In case of inexistence of or lack of capacity in institutions for the prison regime of the sentence, the STF compels its replacement by a milder regime. S.T.F., Súmula Vinculante 56 [Binding Summary] (June 29, 2016) (Braz.), <https://portal.stf.jus.br/jurisprudencia/sumariosumulas.asp?base=26&sumula=3352>. I consider only prison in a closed regime to be equivalent to an imprisonment punishment for comparison purposes with pretrial incarceration because only such a regime matches the level of restriction of pretrial detention. See *infra* note 143.

during the first 100 days post-arrest, with one such arrestee spending 850 days in jail prior to trial.

B. Arrest Offense, Criminal Records and Judge Effects in the Pretrial Stage

i. Overall Pretrial Status

Table 2 presents the effects of arrest offenses and criminal records on the pretrial status of all 2,158 arrestees. The models vary based on how they incorporate time. The survival analysis in Model (1) measures the effects of predictors on the time-to-release after a flagrant arrest. The next paragraphs focus on describing Model (1)'s findings for being a longitudinal model that accounts for censoring. Model (4) offers more reader-friendly coefficients by measuring the outcome as a continuous variable of days spent in jail during the 100-day post-arrest period. Unlike Models (1) and (4), which consider time in a dynamic fashion, Models (2) and (3) consider time statically, as their outcome is a binary variable indicating whether the arrestee was in pretrial detention at days 10 and 30, respectively. The measurement at day 10 arises from the descriptive finding above that the release rate decreases considerably after that. The measurement at day 30 serves as a long-term pretrial status, which remained the same at 100 days for approximately 90% of the arrestees, and avoids the greater effects of omitted variable bias that a later measurement would imply.

TABLE 2 - Factors Associated with the Overall Pretrial Status (Detained or Released) of Suspects in Criminal Cases with a Flagrant Arrest between Jan-Aug/2016 in Campo Grande, Brazil

	Time-to-Release (1)	Jail at Day 10 (2)	Jail at Day 30 (3)	100 Post-Arrest Days (4)
1. Gun offense	0.86 (0.68, 1.09)	5.55*** (2.87, 10.71)	7.86*** (2.80, 22.07)	2.62 (-1.36, 6.60)
2. Non-violent property offense	0.56*** (0.46, 0.67)	8.19*** (4.37, 15.34)	13.19*** (4.88, 35.62)	7.92*** (4.44, 11.39)
3. Public offense	0.53*** (0.41, 0.68)	7.99*** (4.14, 15.43)	15.15*** (5.48, 41.94)	11.96** (4.32, 19.59)
4. Violent property offense	0.17*** (0.13, 0.24)	10.62*** (5.63, 20.05)	22.00*** (8.11, 59.67)	40.47*** (33.24, 47.70)
5. Drug offense	0.18*** (0.13, 0.25)	11.18*** (5.93, 21.05)	24.01*** (8.88, 64.93)	41.12*** (34.76, 47.48)
6. Personal offense	0.39*** (0.27, 0.56)	10.40*** (5.41, 19.99)	22.83*** (8.31, 62.72)	29.01*** (18.42, 39.60)
7. Max. sentence > 4 years	0.48*** (0.41, 0.55)	2.09*** (1.77, 2.47)	2.44*** (1.97, 3.02)	17.66*** (13.82, 21.51)
8. Domestic violence		1.31* (1.02, 1.68)	1.32 (0.99, 1.77)	-2.33 (-13.97, 9.30)
9. Midpoint sentence in years	0.92*** (0.90, 0.95)	1.01*** (1.01, 1.02)	1.01** (1.00, 1.02)	1.14*** (0.74, 1.55)
10. Mild adult record	0.89 (0.76, 1.05)	1.03 (0.92, 1.15)	1.07 (0.94, 1.22)	1.57 (-2.03, 5.17)
11. Pending case	0.64*** (0.52, 0.78)	1.17*** (1.06, 1.30)	1.29*** (1.14, 1.46)	9.27*** (4.61, 13.92)
12. Non-final conviction	0.42*** (0.31, 0.57)	1.36*** (1.20, 1.54)	1.52*** (1.31, 1.76)	18.62*** (12.39, 24.85)
13. General recidivism	0.48*** (0.37, 0.63)	1.40*** (1.24, 1.58)	1.48*** (1.28, 1.71)	15.52*** (9.57, 21.47)
14. Specific recidivism	0.29*** (0.21, 0.38)	1.56*** (1.40, 1.75)	1.67*** (1.47, 1.90)	25.49*** (19.57, 31.40)
15. 1-3 juvenile incidents	0.83* (0.71, 0.98)	1.07 (1.00, 1.15)	1.06 (0.97, 1.15)	3.32 (-0.48, 7.11)
16. 4+ juvenile incidents	0.55*** (0.43, 0.70)	1.16** (1.06, 1.28)	1.20** (1.07, 1.36)	11.76*** (5.92, 17.60)
17. Incident in preceding year	0.81* (0.69, 0.95)	1.12** (1.04, 1.20)	1.09* (1.00, 1.18)	3.80* (0.39, 7.22)
18. Prior pretrial FTA	0.81* (0.67, 0.99)	1.06 (0.96, 1.18)	0.98 (0.87, 1.11)	-0.46 (-5.05, 4.13)
19. Prior posttrial FTA	0.62*** (0.48, 0.80)	1.09 (1.00, 1.19)	1.18*** (1.07, 1.31)	9.98*** (4.71, 15.26)
20. Female	1.46*** (1.20, 1.78)	0.89* (0.80, 0.99)	0.87* (0.76, 1.00)	-5.27* (-10.04, -0.51)
21. Age in years	1.01 (1.00, 1.01)	0.99* (0.99, 1.00)	0.99 (0.99, 1.00)	-0.16 (-0.32, 0.01)
22. Cohabiting	1.10 (0.96, 1.26)	0.99 (0.92, 1.06)	0.98 (0.90, 1.07)	-1.80 (-5.14, 1.54)
23. Married	1.26* (1.05, 1.50)	0.85** (0.75, 0.96)	0.76*** (0.66, 0.87)	-5.12** (-8.86, -1.37)
24. Out-of-city	0.72 (0.51, 1.02)	1.08 (0.96, 1.21)	1.08 (0.93, 1.25)	5.29 (-2.31, 12.89)
25. Out-of-state	0.31*** (0.24, 0.41)	1.54*** (1.39, 1.71)	1.53*** (1.34, 1.73)	22.64*** (16.83, 28.45)
26. Lower-status job	0.93 (0.81, 1.06)	1.02 (0.95, 1.09)	1.06 (0.97, 1.15)	1.08 (-2.24, 4.40)
27. Higher-status job	1.12 (0.80, 1.57)	0.99 (0.77, 1.28)	0.86 (0.63, 1.18)	-1.19 (-7.09, 4.71)
28. Completed middle school	1.08 (0.94, 1.23)	0.97 (0.90, 1.04)	0.94 (0.86, 1.02)	-2.24 (-5.47, 0.98)
29. Completed high school	1.18* (1.00, 1.39)	0.95 (0.87, 1.05)	0.94 (0.83, 1.05)	-1.38 (-4.91, 2.15)
30. Homeless	0.90 (0.71, 1.14)	1.10 (0.95, 1.28)	1.04 (0.86, 1.26)	1.24 (-5.51, 8.00)
31. 2 or more suspects	0.97 (0.84, 1.11)	0.99 (0.93, 1.07)	0.97 (0.89, 1.06)	-1.94 (-5.75, 1.87)
Constant		0.03*** (0.02, 0.05)	0.01*** (0.004, 0.03)	-0.54 (-8.29, 7.20)
Observations	2,158	2,158	2,158	2,158
Adjusted R ²				0.57
Wald Test	1,400.93*** (df = 30)			
LR Test	1,970.63*** (df = 30)			

Note: *p<0.05; **p<0.01; ***p<0.001

The preferred specification is the survival analysis in (1). Parentheses show coefficients' 95% confidence intervals.

(1) reports coefficients in hazard ratios, (2) and (3) in risk ratios and (4) in jail days.

(1) uses cox regression, (2) and (3) use generalized linear modelling, and (4) uses linear regression.

For ease of interpretation, (2) and (3) use the Poisson instead of the binomial distribution to obtain risk ratios.

(1) omits domestic violence due to stratification for violation of the proportional hazards assumption.

Coefficients for control variable arrest month are omitted due to space constraints.

The first six predictors report the effects of the arrest offense category on the release hazard rate—the instantaneous likelihood of being released from jail—and the risk and days of pretrial detention. The seventh and eighth predictors report the effects of being arrested for an offense punished by a maximum prison term higher than four

years and for an offense involving domestic violence. The results for all these variables provide strong evidence in support of $H_a 1.1$.

Model (1) reveals that the release hazard rate is lower for arrestees in all non-reference categories of arrest offense variables except for gun offenses. When compared to traffic offense arrestees, the release hazard rate decreased by 44%, 47%, 83%, 82%, and 61% for suspects arrested for non-violent property, public, violent property, drug, and personal offenses, respectively. Arrestees over the four-year prescribed sentence threshold had a 52% lower release hazard rate, and domestic violence arrestees were 31% and 32% more likely to be in jail at days 10 and 30, respectively, with the day 30 result being on the margin of significance (p-value = 0.06).

The preferred specification in Model (1) supports $H_a 1.2$, as it found that a one-year increase in the sentencing range midpoint is strongly associated with an 8% decrease in the release hazard rate when compared to arrestees with one year less in the sentencing range midpoint. Model (4) also found that such a one-year increase in prescribed sentencing led to an additional 27 hours in pretrial detention.

The results in predictors 10 to 17 strongly reject the no-effects null hypothesis $H_0 2$ when it comes to adult criminal records (except for mild records) and the higher category of juvenile incidents, and provide some evidence supporting $H_a 2$ with respect to the intermediate category of juvenile incidents and incidents in the preceding year. Accordingly, arrestees whose most serious adult records were, respectively, pending case(s), non-final conviction(s), general recidivism, and specific recidivism, had release hazards rates that were 36%, 58%, 52%, and 71% lower than arrestees without records. Also, suspects arrested in the preceding year had a 19% lower release hazard rate. As for juvenile records, arrestees with few incidents and those with many incidents had, respectively, 17% (p-value of 0.03) and 45% lower release hazard rates when compared with arrestees with no incidents.

The results for arrestees with prior posttrial FTA in row 19 strongly support $H_a 3$ as it was associated with a 38% lower release hazard rate and 10 additional days in jail when compared with arrestees with no FTA history. As for the arrestees with prior pretrial FTA, the modestly significant 19% decrease in the hazard rate (p-

value of 0.04) provided some support to $H_a 3$, although other results for such variable were non-significant.¹²⁹

Besides the main predictors, four demographic variables yielded significant results. Being out-of-state, female, married, and having a high school degree translated to a 69% decrease and 46%, 26%, and 18% increases in the release hazard rate compared to arrestees who are local, male and single, and who did not complete middle school, respectively.

ii. Pretrial Decision-Making in Cases Eligible for Denial of Pretrial Release

While Table 2 offers persuasive evidence of the effects of arrest offense and criminal records severity on the pretrial status of arrestees, two reasons justify additional analyses. First, the different detention curves in Graphs 1 through 3 and the different pretrial regulation of cases depending on their generic severity recommend analyzing them in separate models.¹³⁰ Second, Table 2 misses the complexity of pretrial decision-making by only considering the overall status of arrestees. This section and the next overcome these limitations, at the cost of statistical power due to dataset restrictions, by

¹²⁹ An analysis equivalent to Table 2 restricting the sample to core offenses found similar results (the core offenses are defined in note *supra* 103). In specific, the survival model found that being arrested for a non-reference offense (except gun offense) was associated with decreases in the release hazard rate between 33% and 81% compared to drunk driving arrestees, while arrest for an offense over the four-years prison threshold and a one-year increase in sentencing range led to decreases of 59% and 8.5%, respectively. As for adult criminal records, non-reference categories (except mild records) decreased the release hazard rate between 32% and 68% compared to clean record arrestees. Also, having a few juvenile incidents, many juvenile incidents, incident in the preceding year, prior pretrial FTA and prior posttrial FTA were associated with decreases of, respectively, 15% (p-value of 0.075), 37%, 22%, 26% and 40% in the release hazard rate compared to the respective reference groups. The model omitted the domestic violence variable because those offenses were mostly excluded due to the sample restriction to core offenses. Results are on file with the author.

¹³⁰ Previous Brazilian studies have failed to account for this difference and mixed in their analyses cases that are legally ineligible for denial of release with those that are eligible for it, potentially biasing the results. *See, e.g.*, Cerezuela Policeno et al., *supra* note 9; Bastos Lages & Ribeiro, *supra* note 9; Ribeiro et al., *supra* note 9.

analyzing more serious cases separately from less serious ones and by focusing on specific, core pretrial decision points for each.

Table 3 analyzes cases eligible for denial of release under at least one scenario of CPP's Article 313: intentional offense punished by a maximum prison term higher than four years (86% of the instances), recidivism in intentional crimes (32%), and domestic violence against a specially protected person (7%). Table 3 does not report findings on money bail setting because most of its cases are ineligible for stationhouse money bail (*i.e.*, cases under the first category above),¹³¹ and judicial money bail was set for only 9% of its arrestees. Instead, Table 3 examines the factors influencing the highly consequential decision of denial of release, in particular the one taken in the bail hearing, which is the key mechanism for reviewing arrests that happened in 95% of the instances.¹³²

Model (1) reports bail judge random effects, meaning that cases decided by the same bail judges are allowed to have specific intercepts, and Model (2) reports only fixed effects, allowing it to incorporate more detailed predictors. Model (2) includes all arrestees eligible for denial of release for whom a bail hearing was held (N_4), and Model (1) eliminates cases heard by three judges who had less than 10 cases (N_5). Model (3) is a time-to-release regression similar to column (1) in Table 2 and includes all arrestees eligible for denial of release (N_2). The description of results focuses on Models (1) and (2).

Analyzing preliminarily the prosecutor's role in bail hearing decisions, Models (1) and (2) show a very strong relationship between prosecutorial pleading against release and the decision of denial of release.¹³³ While such a strong association confirms previous

¹³¹ Accordingly, 98% of the arrestees eligible for denial of release are not released on money bail at the police station.

¹³² The bail hearing review was the first judicial review of the arrest in 94% of the cases eligible for denial of release with a bail hearing and the merits judges reversed the bail hearing decision only 5% of the time.

¹³³ Indeed, the coefficients in row 43 are so high that they suggest quasi-complete separation in the data, meaning that a prosecutorial pleading on whether to deny release matched the bail judge decision very often (92%). By virtue of that, the magnitude of the effects for prosecutorial pleading in columns (1) and (2) should not be interpreted literally, although their direction, high significance and overall intensity as well as the models' other coefficients remain reliable. *See* Ribeiro et al., *supra* note 9, at 111-12 (finding identity between prosecutorial

findings on the concordance between prosecutors and judges, it is unclear how much of it is due to causation or correlation. On the one hand, judges may strongly side with prosecutors at bail hearings because their pleadings are persuasive or simply for deference to the prosecution (*causation*). Supporting such an explanation, many judges consider that they can only deny release if the prosecutor or the police chief requested it in view of the proceeding's adversarial nature.¹³⁴ On the other hand, the large coefficients may be minimizing the real effects of other predictors on bail decisions by inaccurately portraying a legal culture alignment of judges and prosecutors as a causal effect (*correlation*). Under this formulation, judges side with prosecutors not because of their pleadings, but because they already would by virtue of sharing views on the use of pretrial detention and relying on the same factors that prosecutors use in their pleadings.¹³⁵ For completeness, the models reported include prosecutorial pleading as a control, but readers should nevertheless be aware that the effect sizes of the main predictors generally increase once such control is omitted.

The most serious arrest offense categories in Model (2) consistently support $H_a 1.1$ in bail hearing decisions of denial of release. Specifically, arrestees eligible for denial of release not in the reference group were 61% to 77% more likely to be denied release. In the opposite direction of the finding in Table 2, domestic violence was associated with an 18% lower chance of denial of release. Notably, the mixed model did not identify an effect for being arrested in a domestic violence context or for a violent or drug offense compared to the reference groups. However, the latter predictor was

pleading and judge decision in 83% of the cases and also identifying a very high coefficient for prosecutorial pleading against release).

¹³⁴ NASCIMENTO DOS REIS, *supra* note 71, at 29. Corroborating that adversarial view, Law 13,964/2019 removed from the CPP provisions allowing the judge to deny release *ex officio*. S.T.F., Habeas Corpus No. 225.225, Relator: Min. André Mendonça, 08.03.2023 (Braz.) (applying the new statutory provision and revoking a judicial order that denied release *ex officio*).

¹³⁵ For instance, an interesting study including the observation of 1,473 bail hearings in New York City in 1964 found that, when making the first suggestion of pretrial decision in the hearing, judges and prosecutors had similar shares of suggestion by pretrial decision (remand, money bail or release on recognizance). Frederic Suffet, *Bail Setting: A Study of Courtroom Interaction* 12(4) CRIME & DELINQ. 318, 326 (1966).

associated with 157% greater odds of denial of release when prosecutorial pleading against release was excluded.

A one-year increase in the sentencing range midpoint was strongly associated with a 22% increase in the odds of denial of release in the mixed model and with a 0.6% increase in the risk of denial of release in the fixed effects-only model. These results extend to the subset of cases eligible for denial of release the general finding in Table 2 that a higher sentencing range is associated with harsher pretrial status, in support of $H_a 1.2$.

The results for criminal records provide strong evidence of the influence of adult records in bail hearing decisions in support of $H_a 2$. Accordingly, arrestees with non-recidivism records and recidivating arrestees had odds of denial of release, respectively, 1.3 and 4.6 times higher than arrestees without any adult records in the mixed model. Except for arrestees with mild records or pending cases, the fixed effects-only model yielded increases between 8% and 14% in the likelihood of denial of release for non-reference levels of adult criminal records. Beyond that, arrestees in the higher category of juvenile records had a 6% increase in the risk of release denial, and those with an incident in the preceding year had a 34% lower release hazard rate.

As for FTA history, column (3) extends to cases eligible for denial of release, the general finding in Table 2 that arrestees with posttrial FTA history have a lower release hazard rate (39% in Table 3) than those without any FTA history. FTA history did not affect bail hearing decisions.

Beyond the main hypotheses on the factors influencing pretrial decision-making, arrestees from outside of Campo Grande and those who claimed violence during the arrest had odds of denial of release 1.9 and 1.4 times greater than reference group arrestees, respectively. The fixed effects-only model also found effects with varying significance related to arrestee origin, occupation, and violence claim.

TABLE 3 - Factors Associated with Pretrial Detention Decision-Making in Cases Eligible to Denial of Pretrial Release with a Flagrant Arrest between Jan-Aug/2016 in Campo Grande, Brazil

	Bail Hearing (BH) Denial of Release		Time-to-Release
	(1)	(2)	(3)
<i>1. Violent+drug v. public+non-violent property</i>	1.60 (0.84, 3.04)		
2. Gun offense		1.77** (1.20, 2.63)	
3. Non-violent property offense		1.61* (1.10, 2.37)	0.77* (0.64, 0.94)
4. Public offense		1.62* (1.09, 2.40)	
5. Violent property offense		1.74** (1.19, 2.54)	
6. Drug offense		1.77** (1.21, 2.58)	0.34*** (0.26, 0.46)
7. Personal offense		1.67** (1.13, 2.45)	
<i>8. Violent (including personal) offense</i>			0.40*** (0.31, 0.51)
9. Domestic violence	0.76 (0.23, 2.49)	0.82** (0.70, 0.95)	1.17 (0.84, 1.63)
10. Midpoint sentence in years	1.22*** (1.12, 1.32)	1.01*** (1.00, 1.01)	0.89*** (0.87, 0.92)
<i>11. Non-recidivism adult record</i>	2.28** (1.23, 4.22)		
<i>12. Recidivism</i>	5.59*** (2.52, 12.40)		
13. Mild adult record		1.02 (0.95, 1.09)	
14. Pending case		1.06 (1.00, 1.13)	
15. Non-definitive conviction		1.14*** (1.06, 1.23)	
16. General recidivism		1.08* (1.02, 1.16)	
17. Specific recidivism		1.13*** (1.06, 1.21)	
<i>18. 1+ juvenile incidents</i>	1.53 (0.91, 2.57)		
19. 1-3 juvenile incidents		1.03 (0.99, 1.08)	0.82* (0.68, 1.00)
20. 4+ juvenile incidents		1.06* (1.01, 1.12)	0.55*** (0.40, 0.75)
21. Incident in preceding year	1.10 (0.63, 1.90)	1.01 (0.97, 1.06)	0.66*** (0.55, 0.79)
<i>22. Any prior FTA</i>	0.91 (0.51, 1.66)		0.61*** (0.50, 0.75)
23. Prior pretrial FTA		0.99 (0.93, 1.05)	
24. Prior posttrial FTA		1.00 (0.94, 1.05)	
25. Female	0.87 (0.38, 1.99)	0.99 (0.93, 1.05)	1.51** (1.18, 1.93)
26. Age in years	0.99 (0.96, 1.01)	1.00 (1.00, 1.00)	1.01* (1.00, 1.02)
<i>27. Cohabiting/married</i>	0.71 (0.44, 1.14)		1.17* (1.00, 1.37)
28. Cohabiting		0.98 (0.94, 1.02)	
29. Married		0.93 (0.86, 1.01)	
30. Out-of-city	2.91* (1.21, 7.01)	0.99 (0.94, 1.06)	0.42*** (0.32, 0.56)
31. Out-of-state		1.11*** (1.06, 1.17)	
<i>32. Employed</i>	1.28 (0.75, 2.19)		
33. Lower-status job		1.01 (0.97, 1.06)	
34. Higher-status job		1.08* (1.00, 1.17)	
35. Completed middle school	1.22 (0.78, 1.92)	1.02 (0.98, 1.06)	1.15 (0.96, 1.38)
36. Completed high school		1.03 (0.97, 1.09)	1.22 (1.00, 1.49)
37. Homeless	2.69 (0.73, 9.91)	1.05 (0.99, 1.12)	
38. 2 or more suspects	1.38 (0.81, 2.33)	1.02 (0.98, 1.06)	1.01 (0.85, 1.20)
39. Arrest to bail hearing in log-days	1.09 (0.81, 1.46)	1.01 (0.99, 1.03)	
40. Female bail judge	0.89 (0.43, 1.85)	0.98 (0.94, 1.02)	
41. Private counsel	0.82 (0.47, 1.46)	0.97 (0.93, 1.02)	
42. Violence claim	2.43* (1.21, 4.85)	1.05** (1.01, 1.09)	
43. Prosecutor against release	369.15*** (139.06, 979.96)	25.98*** (11.54, 58.47)	
Constant	0.001*** (0.0002, 0.01)	0.02*** (0.01, 0.04)	
Number of bail judges	35		
Judge harshness (one SD effect)	2		
Observations	1,484	1,491	1,569
R ²			0.35
Wald Test			499.41*** (df = 16)
LR Test			676.92*** (df = 16)

Note:

*p<0.05; **p<0.01; ***p<0.001

Indented and italicized variables collapse levels of categorical predictors to assure model convergence.

Parentheses show the coefficients' 95% confidence intervals. SD means standard deviation.

(1) reports odds ratios, (2) reports risk ratios and (3) reports hazard ratios.

(1) uses generalized linear mixed model with random intercepts.

(2) uses Poisson regression and (3) uses cox regression.

(3) omits adult records/occupation/homelessness due to stratification for lack of proportional hazards.

Coefficients for control variable arrest month are omitted due to space constraints.

The mixed effects model found that judge variation in the frequency of denial of pretrial release in bail hearings was statistically

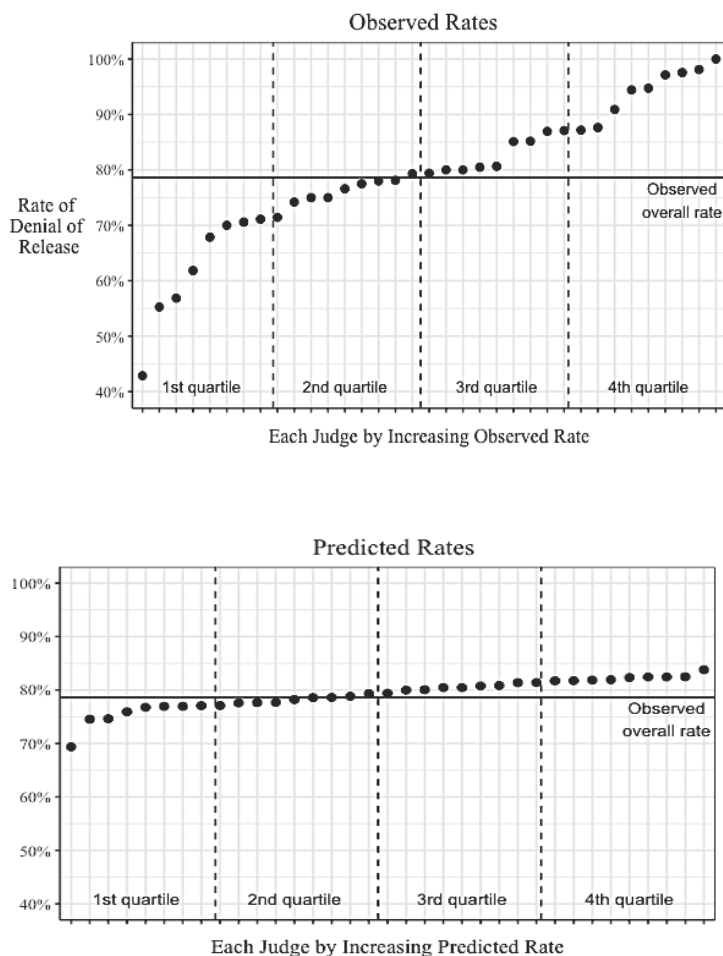
significant (p-value < 0.01).¹³⁶ In particular, a judge who was one standard deviation harsher than another judge had twice the odds of a denial of release than the other judge. The second figure in Graph 6 offers visual confirmation of this finding by showing predicted probabilities of denial of release,¹³⁷ with the horizontal line showing the observed overall rate (79%). Being assigned to the harshest instead of the least harsh judge increased an arrestee's likelihood of denial of release by 14 percentage points, or by 21% (second graph). Similar comparison between the average predicted rate of judges in the harshest and the least harsh quartiles yielded a 7% point difference, or a 9% increase. Perhaps more importantly, Graph 6 reveals that all judges were predicted to deny release to the majority of arrestees, with the least harsh and the second least harsh judges doing so in a striking 69% and 75% of the cases, respectively.¹³⁸ The first figure shows the judges' raw observed rates of denial of release and was included to highlight the importance of considering differences among bail judge caseloads, which the second figure captures. An unsophisticated analysis of observed rates would inadvertently suggest greater variation in rates (the observed spread between harshest and least harsh judges was 57 percentage points, which is four times the spread considering predicted probabilities).

¹³⁶ The significance of judge effects was tested by performing a simple analysis of variance (ANOVA) comparing the goodness-of-fit of Model (1) (full model) with a model without judge random effects (reduced model).

¹³⁷ The average predicted probability for each judge was calculated by predicting the likelihood of denial of release of each observation using Model (1)'s coefficients assuming they had all been assigned to that judge, and averaging those predictions. Clemma J. Muller & Richard F. MacLehose, *Estimating predicted probabilities from logistic regression: different methods correspond to different target populations*, 43(3) INT. J. EPIDEMIOL. 962 (2014) (suggesting this approach over prediction at the modes or the means when making inference to the overall population).

¹³⁸ Preliminary investigation of further disparities adding random slopes for the predictors of interest found significant inter-judge variation by arrest offense category and sentencing range midpoint. The effect on the odds of denial of release of a one standard deviation increase in judge harshness was almost five-fold for the arrest offense category (violent and drug versus public and non-violent property offenses) and 18% for one additional year in sentencing range midpoint.

GRAPH 6 – OBSERVED V. PREDICTED PROBABILITY OF DENIAL OF RELEASE BY BAIL HEARING JUDGE IN CASES WITH A FLAGRANT ARREST BETWEEN JAN-AUG OF 2016 IN CAMPO GRANDE, BRAZIL



iii. Pretrial Decision-Making in Less Serious Cases

The last regressions examine money bail decisions by police chiefs and bail judges as well as the overall pretrial status of arrestees in less serious cases. Models (1) and (2) investigate stationhouse decision-making and so include only arrestees eligible for stationhouse release, *i.e.*, those arrested for offenses punished by a maximum prison term of up to four years (N_6). Models (3) and (4)

investigate the bail judge's decision on whether to condition the arrestee's release to money bail and its amount, and thus include only arrestees ineligible for denial of release who were granted release at the bail hearing (N_7).¹³⁹ Importantly, the interpretation of predictor effects on the chance of having money bail set depends on the decision-maker: a greater likelihood of stationhouse money bail is beneficial to arrestees as it offers them the chance to post it and be released, but a greater likelihood of judicial money bail is harmful to them, in my design, as it presents an obstacle to their release. Greater money bail amounts are harmful to arrestees in both cases. Table 4 also presents a time-to-release Model in (5) with overall pretrial status as the dependent variable, including only cases ineligible for denial of release (N_3). The description of results focuses on Models (1) to (4).

The first three predictors of Table 4 provide support to $H_a 1.1$ in less serious cases, depending on the offense category. Police chiefs were 33% less likely to set money bail to suspects arrested for public, gun, or personal offenses when compared to traffic offense arrestees. Police chiefs were also 92% less likely to set money bail in domestic violence cases, a large effect caused by a recurrent notion that these cases are not susceptible to stationhouse release.¹⁴⁰ Stationhouse money bail amounts were 23% higher for suspects arrested for property offenses compared to the reference group. As for judicial money bail setting, bail judges were 56% less likely to require property offense arrestees to post it than traffic offense arrestees. When judges conditioned the arrestees' release to money bail, the amounts set for those arrested for public, gun, or personal offenses were 69% higher than for traffic offense arrestees.

Although results for a one-year increase in sentencing range midpoint were null in all money bail models, the survival model found it to correlate with a 23% decrease in the release hazard rate for arrestees ineligible for denial of release, in line with the findings in Tables 2 and 3.

¹³⁹ Due to this subset's restriction to arrestees legally ineligible for denial of release, Table 4 does not include a model where the outcome is denial of release such as Table 3's Models (1) and (2). *See supra* Section V.A (for the share of decisions illegally denying release to those arrestees); *see also infra* Section VI.A.ii (explaining the likely cause of the subject illegal decisions).

¹⁴⁰ *See supra* note 30.

Predictors five to eleven test hypothesis $H_a 2$ in the subset of less serious crimes. The significant findings on adult criminal records were that police chiefs were 59% less likely to set money bail to specific recidivism arrestees, and that bail judges required arrestees with pending cases to post 47% lower money bail amounts compared to the amounts for those without adult records. With modest significance, arrestees with a few juvenile incidents and those with many juvenile incidents were set 23% and 33% higher stationhouse money bail compared to arrestees without juvenile incidents, respectively. Finally, police chiefs were 30% less likely to allow arrestees with an incident in the preceding year to post money bail. In contrast, bail judges were 38% less likely to condition their release to posting it.

FTA history was found to be associated with bail setting in less serious cases only in the case of arrestees with posttrial FTA, as police chiefs were 45% less likely to allow them to post stationhouse money bail when compared to arrestees without FTA history.

With high significance, Table 4 also reveals that police chiefs were 64% more likely to allow married arrestees to post stationhouse money bail and 39% less likely to do so in multi-suspect cases. Moreover, police chiefs in the second busiest police station set money bail more often and in smaller amounts than central station officers. At bail hearings of cases ineligible for denial of release, a one-year increase in age was associated with a 3.2% decrease in the chance of money bail being required. Also, bail judges set money bail amounts that were 95% higher in multi-suspect cases. Finally, each additional minimum wage that the police chief set as stationhouse money bail earlier in the case was associated with an 11% increase in judicial money bail amount.

TABLE 4 Factors Associated with Pretrial Detention Decision-Making in Less Serious Cases with a Flagrant Arrest between Jan-Aug/2016 in Campo Grande, Brazil

	SH Bail Setting	SH Bail Amount	BH Bail Setting	BH Bail Amount	Time-to-Release
	(1)	(2)	(3)	(4)	(5)
1. Public, gun or personal offense	0.67* (0.45, 0.98)	1.27 (1.00, 1.62)	0.84 (0.44, 1.58)	1.69* (1.05, 2.71)	1.09 (0.81, 1.46)
2. Property offense	0.99 (0.70, 1.41)	1.23* (1.02, 1.48)	0.44** (0.27, 0.74)	0.95 (0.61, 1.47)	0.60*** (0.47, 0.76)
3. Domestic violence	0.08*** (0.04, 0.15)	0.75 (0.50, 1.12)			
4. Midpoint sentence in years	0.83 (0.64, 1.07)	1.05 (0.88, 1.25)	1.57 (0.96, 2.57)	0.82 (0.59, 1.13)	0.77* (0.61, 0.98)
5. Mild adult record	0.78 (0.57, 1.07)	1.14 (0.95, 1.36)	1.53 (0.91, 2.58)	0.71 (0.47, 1.05)	1.01 (0.80, 1.27)
6. Pending case (incl. non-final conv.)	0.74 (0.52, 1.05)	1.17 (0.96, 1.42)	1.75 (0.92, 3.34)	0.53** (0.34, 0.83)	0.68** (0.51, 0.90)
7. General recidivism	0.69 (0.42, 1.12)	1.12 (0.86, 1.46)			
8. Specific recidivism	0.41** (0.24, 0.71)	1.27 (0.92, 1.75)			
9. 1-3 juvenile incidents	1.29 (0.96, 1.74)	1.23* (1.02, 1.49)	0.98 (0.55, 1.75)	1.05 (0.65, 1.70)	0.80 (0.62, 1.04)
10. 4+ juvenile incidents	0.78 (0.51, 1.18)	1.33* (1.04, 1.69)	1.29 (0.67, 2.46)	1.02 (0.62, 1.68)	0.52*** (0.37, 0.74)
11. Incident in preceding year	0.70* (0.53, 0.92)	0.92 (0.77, 1.10)	0.62* (0.39, 1.00)	1.17 (0.77, 1.80)	0.78* (0.61, 1.00)
12. Prior pretrial FTA	0.86 (0.62, 1.20)	0.89 (0.71, 1.12)			
13. Prior posttrial FTA	0.55* (0.35, 0.87)	0.94 (0.72, 1.23)			
14. Any prior FTA			0.60 (0.33, 1.11)	1.47 (0.86, 2.52)	0.78 (0.60, 1.01)
15. Female	1.09 (0.68, 1.74)	1.03 (0.75, 1.41)	1.05 (0.38, 2.87)	0.84 (0.51, 1.39)	1.19 (0.81, 1.76)
16. Age in years	1.01 (0.99, 1.02)	1.00 (0.99, 1.01)	0.97** (0.95, 0.99)	1.02 (1.00, 1.04)	1.01 (0.99, 1.02)
17. Cohabiting	1.26 (0.96, 1.65)	0.94 (0.81, 1.11)	1.46 (0.93, 2.31)	1.24 (0.90, 1.70)	
18. Married	1.64** (1.18, 2.28)	1.04 (0.87, 1.26)	1.69 (0.88, 3.24)	1.04 (0.68, 1.57)	
19. Cohabiting or Married					1.09 (0.91, 1.32)
20. Out-of-city	0.57* (0.33, 1.00)	1.39* (1.04, 1.85)			
21. Lower-status job	0.91 (0.71, 1.17)	0.91 (0.78, 1.07)			
22. Higher-status job	0.84 (0.51, 1.40)	0.98 (0.75, 1.29)			
23. Employed			1.74* (1.07, 2.84)	0.93 (0.61, 1.42)	0.95 (0.77, 1.18)
24. Completed middle school	1.14 (0.89, 1.47)	1.02 (0.87, 1.20)			
25. Completed high school	1.16 (0.84, 1.59)	1.02 (0.87, 1.19)			
26. Completed middle school or above			1.01 (0.68, 1.50)	1.51* (1.06, 2.16)	1.14 (0.95, 1.36)
27. Homeless	0.71 (0.42, 1.19)	0.66* (0.47, 0.95)			0.80 (0.54, 1.20)
28. 2 or more suspects	0.61*** (0.45, 0.82)	1.04 (0.86, 1.26)	1.15 (0.68, 1.94)	1.95*** (1.40, 2.72)	0.78* (0.61, 0.99)
29. Police station no. 2	1.42* (1.07, 1.88)	0.80** (0.69, 0.92)			
30. Other police stations	0.78 (0.56, 1.07)	0.80* (0.66, 0.98)			
31. Arrest to bail hearing in log-days			0.78 (0.59, 1.03)	0.93 (0.77, 1.11)	
32. Female bail judge			1.10 (0.72, 1.67)	0.84 (0.56, 1.25)	
33. Stationhouse bail (0 means not set)			1.08* (1.02, 1.15)	1.11*** (1.07, 1.14)	
Constant	4.11*** (1.98, 8.52)	3.62*** (2.37, 5.53)	1.51 (0.35, 6.57)	1.81 (0.57, 5.71)	
Observations	803	803	248	248	589
R ²					0.23
Wald Test					158.16*** (df = 16)
LR Test					152.12*** (df = 16)

Note:

*p<0.05; **p<0.01; ***p<0.001

SH stands for stationhouse (police chief is the decision-maker) and BH for bail hearing (bail judge is the decision-maker). Indented and italicized variables collapse levels of categorical predictors to assure model convergence.

(1) to (4) report risk ratios and (5) reports hazard ratio. Parentheses show the coefficients' 95% confidence intervals.

(1) to (4) use hurdle Poisson-negative binomial regression, and (5) uses cox regression.

(2) and (4) use the negative binomial distribution in the count part as dispersion tests indicated overdispersion.

Model (5) omits suspect origin due to stratification for violation of proportional hazards.

Coefficients for control variable arrest month are omitted due to space constraints.

VI. BRAZILIAN PRACTICE WITH PRETRIAL DETENTION IN LIGHT OF INTER-AMERICAN HUMAN RIGHTS LAW

A. Key Reasons of the Non-Exceptionality of Pretrial Detention

The starting point of this discussion is the finding that aggregate pretrial detention rates in Brazil are inconsistent with the principle

of *exceptionality*, which stems from the right to presumption of innocence as interpreted by IAHR bodies and the STF.¹⁴¹ Graphs 1 and 2 attest to non-compliance with the exceptionality principle in the jurisdiction of study under the two proposed maximum thresholds of pretrial detention (50% or 20%).¹⁴² Graph 1, which includes all arrestees, shows that 37% of them were still detained by day 100, well above the preferred 20% threshold. Importantly, even the very conservative 50% threshold does not support pretrial detention's exceptionality in Graph 1 because judges kept a majority of the arrestees detained in the initial judicial review of the arrests, as demonstrated by the 54.8% detention rate (52.3% denied release and 2.5% pending money bail) at day 10, which was a moment when all but six arrests had already been reviewed by a judge. When only arrestees eligible for denial of release are considered (Graph 2), pretrial detention was so common that a majority of the arrestees were still detained by the end of the 100-day period covered. Indeed, Graph 6 shows that bail hearing judges denied release to striking 79% of those arrestees, with the least harsh judge having a 69% predicted probability of denial of release. Pretrial detention exceptionality was only a reality for arrestees ineligible for denial of release as less than 10% of them were detained at day 10, which is a positive sign of proportionality, as those suspects are unlikely to be imprisoned if convicted.¹⁴³

Beyond aggregate detention rates, the case study's descriptive statistics reveal a series of practices running afoul of IAHR standards on pretrial detention that help explain the magnitude of non-

¹⁴¹ *Supra* notes 43 and 44.

¹⁴² *See supra* Graphs 1, 2, 3. For completeness, I discuss aggregate pretrial detention rates of the overall dataset, as well as of the subsets by eligibility to release denial. Note, however, that assessing pretrial detention exceptionality using Graph 1 seems more consistent with the IAHR generic enunciation of such principle for all criminal cases.

¹⁴³ Suspects ineligible for denial of release must be non-recidivating and accused of crimes punished by a maximum prison term of up to four years. Código de Processo Penal [Criminal Procedure Code], Decreto-Lei No. 3.689, de 3 de outubro de 1941, art. 313 (Braz.). As such, the standard punishment for them in case of conviction are sanctions that are milder than pretrial detention: open and semi-open prison regimes, probation-like punishments and suspension of punishment (*sursis*). *See supra* note 128. *See also* Código Penal [Criminal Code], Decreto-Lei No. 2.848, de 7 de dezembro de 1940, arts. 33, 44, 77 (Braz.).

exceptionality identified. A preliminary finding informing this standard-specific analysis is that denial of release contributes vastly more to pretrial incarceration than does pending money bail (which are the two primary pathways to pretrial detention in Brazil), in specific 99.6% of all arrestees detained at day 100 or 98% of the jail days in the period (Graph 1). Surprisingly, denial of release is the prevailing long-term detention mechanism even for arrestees ineligible for denial of release under the law: 79% of arrestees detained 30 days after the arrest had their release denied (Graph 3). For that reason, the next paragraphs focus on denial of release practices.

i. Permissible Grounds

First, the high prevalence of denial of release is largely justified by judges' reliance on its legal authorization to "guarantee the public order."¹⁴⁴ Accordingly, in line with previous research,¹⁴⁵ 88% of the orders denying release in this study relied on the public order clause,¹⁴⁶ and 44% relied on procedural risks (flight risk and/or risk of procedural hindrance). As the IACtHR deems punitive rationales impermissible grounds for pretrial detention, a case in the IAHRs against Brazil would potentially result in international liability as domestic courts generally deny release to accomplish punitive goals (69% of the orders denying release in this study) such as to incapacitate defendants expressly determined to be dangerous or inclined to commit crimes (32%).¹⁴⁷ Because the STF supports this

¹⁴⁴ Código de Processo Penal [Criminal Procedure Code], Decreto-Lei No. 3.689, de 3 de outubro de 1941, art. 312 (Braz.).

¹⁴⁵ See NASCIMENTO DOS REIS, *supra* note 71.

¹⁴⁶ This figure increases to 93% when I add orders relying on punitive goals, *infra* note 147, but not expressly mentioning public order. Note that pretrial orders are often short, based on generic arguments and highly standardized by judges and thus are likely to not always reflect their full reasoning. Future research could shed light on the extent to which Brazilian judges discharge their duty to reason pretrial detention decisions, as required by domestic and inter-American human rights law. Código de Processo Penal [Criminal Procedure Code], Decreto-Lei No. 3.689, de 3 de outubro de 1941, art. 315 (Braz.); *Tzompaxtle Tecpile*, Inter-Am. Ct. H.R. (ser. C) No. 470 ¶ 113.

¹⁴⁷ Punitive goals mentioned included to restrain dangerous suspects, ensure public or social safety, stability and peace, avoid crimes by the arrestee, promote exemplarity, protect the credibility of justice and institutions, answer societal expectations of justice (including due to media coverage) and prevent a perception of impunity.

incapacitation rationale,¹⁴⁸ exhaustion of domestic appeals¹⁴⁹ would likely not cure the inconsistency of many of these lower court decisions with settled IACtHR case law.¹⁵⁰

ii. Legality

Outright illegal denials of release in cases where arrestees are ineligible for it also contribute to the significant share of arrestees kept in jail. Specifically, 1.6% of the arrestees were denied release by sixteen bail judges, despite not fulfilling any of the alternate requirements of Article 313 of the CPP.¹⁵¹ The main justification given by judges in those cases was the existence of criminal records of the arrestees, even though they did not reach the legal requirement of recidivism. Even more worrisome, two of those arrestees had no records whatsoever. These denials of release are unquestionable breaches of the right to personal liberty that could give rise to reparations. Concerning prosecutors, they breached their duty to uphold the law by pleading against the release in the bail hearing of arrestees ineligible for denial of release in 5% of all cases.

¹⁴⁸ *Supra* note 50.

¹⁴⁹ The ACHR requires petitioners to ensure “that the remedies under domestic law have been pursued and exhausted.” Organization of American States, American Convention on Human Rights “Pact of San Jose, Costa Rica” art. 46, ¶1(a); *See also* CAVALLARO ET AL., *supra* note 22, at 129-39 (providing the purpose, scope and exceptions to this rule).

¹⁵⁰ So far, the IACtHR has discussed Brazil’s pretrial detention practices only in provisional measures related to overcrowded prisons by demanding information on actions to reduce pretrial detention and briefly in a contentious matter to highlight the insufficient state measures to enforce a pretrial detention warrant against an alleged human rights perpetrator who ultimately evaded justice. *See* Four Brazilian Incarceration Facilities, Provisional Measures, Order of the President of the Court, “Considering,” ¶ 5.12 (Apr. 20, 2021); *see also* Sales Pimenta v. Brasil, Preliminary objections, merits, reparations, and costs, Inter-Am. Ct. H.R. (ser. C) No. 454, ¶ 100 (June 22, 2022). I found no on-point IACHR merits report, friendly settlement or precautionary measure related to pretrial detention in Brazil.

¹⁵¹ The judge in one such case justified that denial of release in cases legally ineligible for the measure was possible because “the judge may, exceptionally, soften, in a particular case, the application of Article 313’s conditions of admissibility, making them compatible with Article 282 [proportionality requirement] to find the most adequate and necessary measure for that specific case.” *See* Bail Hearing Decision in Observation 96 (Feb. 2, 2016).

iii. Strict Proportionality

824 (38%) and 476 (22%) of this study's arrestees spent at least 10 and 100 days in pretrial detention, respectively, and did not receive an imprisonment sentence. These individuals received harsher treatment at the pretrial stage than upon case disposition, which, in hindsight, made their pretrial detention disproportionate to their case outcome. While that comparison is insufficient to affirm that pretrial detention was illegal in those cases,¹⁵² the considerable number of such cases reinforces concerns over abusive detention practices. In particular, these figures suggest that judges may be denying release to arrestees unlikely to be convicted due to weak evidence, potentially even falling short of the evidentiary legal requirement for denial of release,¹⁵³ and to those unlikely to be imprisoned in the event of a conviction, due to case-specific circumstances that lower sentence length.¹⁵⁴

iv. Reasonable Duration

Despite being limited to the first 100 days after the arrest, Graphs 1 to 3 also reveal a concern that detained suspects may be spending more time in pretrial detention than their pretrial risks warrant. That concern stems from the stability of the arrestee's pretrial status after the initial judicial review of the arrests, given that only 14% of the arrestees detained 10 days after the arrest were able to be released by the 30th day, a figure that increased to only 33% by day 100. Various reasons seem to explain the lasting duration of decisions denying release. First, judges tend to be deferential to earlier

¹⁵² In March 2023, the STF maintained on procedural grounds two decisions denying compensation to defendants who awaited trial detained but were ultimately acquitted, which aligns with the STF's substantive interpretation of the issue. *See* S.T.F., Recurso Extraordinário [Extraordinary Appeal] No. 1.423.101, 03.03.2023 (Braz.); S.T.F., Recurso Extraordinário [Extraordinary Appeal] No. 1.425.620, 13.03.2023 (Braz.).

¹⁵³ Proof that the crime occurred and sufficient evidence of the suspect's involvement. Código de Processo Penal [Criminal Procedure Code], Decreto-Lei No. 3.689, de 3 de outubro de 1941, art. 312 (Braz.).

¹⁵⁴ *See supra* note 143 (the standard punishment for non-recidivating defendants sentenced to up to four years in prison are sanctions alternative to full imprisonment). Note that part of the mismatch identified between pretrial status and case outcome is caused simply by the effects of subsequent evidence-taking and the higher evidentiary standard required for a conviction *vis-à-vis* pretrial detention.

decisions based on the rationale that no evidence has been adduced to justify modifying them, which contrasts with the IAHRs understanding that as time passes, the justification of pretrial risks must be increasingly convincing to keep the detention.¹⁵⁵ Second, at the time of this study, Brazil did not have a IAHRs-backed rule of periodic review of pretrial detention,¹⁵⁶ and there was no spontaneous practice to that effect, as demonstrated by the shape of the detention curves and the lack of periodic review orders in case files. Third, and perhaps most importantly, judges' punitive rationale to deny release favors longer detention periods, because if suspects are to be kept incarcerated due to a risk of offending (attested by their arrest for offenses punished with years-long prison terms), then a few months in jail are insufficient to justify changing their status.

v. Necessity¹⁵⁷

A further reason explaining the high rates of denial of release is the dearth of reliable non-carceral pretrial restrictions (pretrial probation). Putting aside the instances of electronic monitoring,¹⁵⁸ restrictions beyond jail have virtually no compliance mechanism and thus release coupled with any restrictions effectively amounts to unconditional release (38.9% of the cases at some point during the 100-

¹⁵⁵ *Informe, supra* note 7, ¶ 202.

¹⁵⁶ *Supra* note 62 and accompanying text.

¹⁵⁷ This standard is also embedded in the exceptionality principle as it compels judges to resort to jail as a last resort when milder measures cannot address the suspect's pretrial risks. *Tzompaxtle Tecpile*, Inter-Am. Ct. H.R. (ser. C) No. 470 at 110; Código de Processo Penal [Criminal Procedure Code], Decreto-Lei No. 3.689, de 3 de outubro de 1941, arts. 282, 310, II (Braz.). I opted not to list necessity as a stand-alone standard in Section II because my case study generally does not shed light on it. Still, in order to explain the high rates of denial of release identified, this paragraph refers to a generic finding that hinders compliance with such standard.

¹⁵⁸ Electronic monitoring was used in only 15 cases during the first 100 days. Note that courts have increased the use of pretrial electronic monitoring in Brazil in recent years, including in the jurisdiction of study. TJMS, *Mais de 2,6 mil pessoas passaram por custódia na Capital em 2021* (Dec. 17, 2021), <https://www.tjms.jus.br/noticia/61261> (access may be unavailable outside of Brazil) (reporting that 9% of the arrestees in bail hearings in Campo Grande in 2021 (around 240 people) received electronic monitoring/house arrest).

day period).¹⁵⁹ If there were a roster of functional measures of increasing severity, judges might deem pretrial detention unnecessary to curb the pretrial risks identified and release part of the suspects currently being held in jail. Relevantly, though, the strong reliance on punitive methods in denials of release suggests that these orders often occur not because of a lack of reliable, less restrictive measures, but because incarceration is the ideal means for the goals sought. As a consequence, strengthening the oversight of non-carceral measures without the comprehensive reform perspective proposed below could lead to their use in cases that are currently treated more leniently, rather than reducing pretrial detention rates.¹⁶⁰

vi. Non-Discrimination

The minor role of money bail as a pathway to detention—only six cases at day 50 and three cases at day 100 (0.4% of detentions)—is in stark contrast to the United States, where 90% of felony suspects in pretrial detention were in jail due to failure to post it as of 2009.¹⁶¹ That, however, does not mean that Brazil is more attuned to the requirement that pretrial detention should be exceptional. Instead, it suggests that outright denial of release is the method Brazilian judges tend to use to keep suspects detained rather than purposefully setting money bail amounts that are disproportionate to the suspects' economic capacity (*sub rosa* detention, a disguised denial

¹⁵⁹ *Supra* note 38 (see for a breakdown of this study's dataset by restriction applied in the initial judicial review of the arrest).

¹⁶⁰ This would be a pretrial instance of “net widening” and “mesh thinning”, metaphors used to explain the phenomenon by which criminal reforms to foster incarceration alternatives end up increasing the level of intervention or the amount of individuals under supervision. Stanley Cohen, *The Punitive City: Notes on the Dispersal of Social Control*, 3 CONTEMPORARY CRISES 339, 346-350 (1979). See a potential example of this phenomenon in pretrial electronic monitoring in Sainju et al., *Electronic Monitoring for Pretrial Release: Assessing the Impact*, 82 FED. PROBATION 3, 8-9 (2018) (finding that electronic monitoring reduced FTA rates in Santa Clara, California, but cautioning that it led to more revocations of release due to technical violations when compared to defendants without monitoring).

¹⁶¹ Brian A. Reaves, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables 17* (2013) (data on the 75 largest counties). Although measured at different moments (0.4% at day 100 versus 90% at case disposition), the comparison is warranted as both are long-term pretrial status measurements and a potential comparison of measurements at the same time would not considerably narrow such a gap.

of release),¹⁶² which is a common U.S. phenomenon.¹⁶³ While deserving a separate investigation regarding its causes, the Brazilian reliance on denial of release *vis-à-vis sub rosa* detention is likely related to CPP provisions linking money bail amount to economic capacity, to settled domestic case law that an individual should not be kept in jail due to poverty,¹⁶⁴ and to the socioeconomic vulnerability of many, if not most, defendants.¹⁶⁵ All in all, the extremely rare instances of long-term pretrial detention due to the inability to post money bail align with the IAHRs standard on material equality.

B. Case-Specific Factors Driving Pretrial Decision-Making

The regression results provided persuasive evidence that arrest offense severity, in both abstract and specific terms, is strongly associated with an arrestee's overall pretrial status and bail hearing decisions on denial of release. Illustrative of that, the release hazard

¹⁶² Interestingly, money bail amounts in both my dataset and the U.S. in 2009 were similar when scaled to federal minimum wage. The median money bail amount set in my dataset was R\$1,500, almost two minimum monthly wages in Brazil in 2016, and the median money bail in the U.S. for detained defendants who failed to post it was US\$25,000 in 2009, approximately 20 federal minimum monthly wages based on a 40-hour work week (the Brazilian legal standard) and the US\$ 7.25 per hour rate of 2009. Despite this roughly 12-fold difference, U.S. defendants generally can retain a private bail company—which is unheard of in Brazil, despite not being illegal—to post the full amount on behalf of them in exchange of a nonrefundable portion of it, typically 10%. That would reduce the median U.S. amount to US\$2,500, not far from the almost two minimum monthly wages found in my research. *See id.* at 18 (approximately 50% of all U.S. felony defendants released on bail in 2009 used private bail bonds). The similarity of the amounts suggests that the difference between the two countries lies more in how often and in which cases judges use money bail than in its amount.

¹⁶³ Legislative and litigation efforts have been underway in the United States in recent years aiming to move the criminal system away from money bail for various reasons, including its disproportionate effect on defendants based on economic capacity. *See* Samantha A. Zottola et al., *Bail Reform in the United States: The What, Why, and How of Third Wave Efforts*, in *HANDBOOK OF ISSUES IN CRIMINAL JUSTICE REFORM IN THE UNITED STATES* 143, 153-158 (Elizabeth Jeglic & Cynthia Calkins eds., 2021) (includes an overview of the legislative and litigation efforts).

¹⁶⁴ *Supra* note 65 and *infra* note 186.

¹⁶⁵ Demographic information in Table 1 corroborates that by showing that only 5% and 20% of the arrestees had a higher-status job and completed high school, respectively, with almost a third being unemployed.

rate for violent property and drug offense arrestees was 83% to 82% lower than for traffic offense arrestees, and a one-year increase in sentencing range was associated with an 8% decrease in such rate. From a different angle, the predicted probabilities of pretrial detention at day 100 for each arrest offense category, in the order categorized, were 4% (traffic), 20%, 24%, 26%, 53%, 51%, and 39% (personal). These probabilities were, respectively, 30%, 32%, and 38% for cases with sentencing range midpoints equivalent to the first, second, and third quartile cutoff values (*i.e.*, 2.5, 5, and 10.2 years).¹⁶⁶ In bail hearings of cases eligible for denial of release, the chance of denial of release was 61% to 77% higher for arrestees in non-reference arrest offense categories, and a one-year increase in sentencing range midpoint was associated with a 0.6% increase in the risk of denial of release. Two main reasons explain the link between arrest offense severity and denials of release, both of which clash with inter-American human rights standards.

First, despite STF constitutional rulings against provisions prohibiting release for entire categories of offenses,¹⁶⁷ prosecutors and judges occasionally rely on them. Review of case files revealed that with respect to the drug trafficking provision in 25 instances (1.2% of the dataset). Beyond express reliance on bans to pretrial release, judges may have deep-seated beliefs that suspects of certain categories of crimes are never, or almost never, to be released pretrial.¹⁶⁸ IAHR bodies have already found in multiple instances that generic bans on release, by virtue of law or practice, violate the ACHR as they prevent individualization of the need for pretrial detention,¹⁶⁹

¹⁶⁶ See *supra* note 137 (specifically, the calculation method of these probabilities).

¹⁶⁷ *Supra* note 53 (decision on blanket prohibition of pretrial release in drug trafficking cases); S.T.F., Ação Direta de Inconstitucionalidade [Direct Claim of Unconstitutionality] No. 3.112, Relator: Min. Ricardo Lewandowski, 02.05.2007 (Braz.) (gun offenses); S.T.F., Súmula 697 [Summary] (Mar. 24, 2003) (Braz.) (heinous crimes). Currently, the only Brazilian provision directly clashing with the IAHR prohibition of blanket bans on pretrial release that has not been declared unconstitutional is the rule added by Law 13,964/2019 after the time of this study's observations, see *infra* item (4) in Subsection VI.C.

¹⁶⁸ NASCIMENTO DOS REIS, *supra* note 71, at 39 (interview with two São Paulo judges who affirmed they always denied release to drug trafficking suspects whose flagrant arrest was deemed legal).

¹⁶⁹ See *supra* note 51 (see recent cases); *Informe*, *supra* note 7, ¶¶ 148-152.

and they would likely reach a similar conclusion in a case against Brazil.

Second, even if whole groups of suspects are not mandatorily kept in pretrial detention based on arrest offense severity, judges still give strong, and often decisive, consideration to it in decisions of denial of release. That is generally done by using arrest offense severity to justify the person's dangerousness and blameworthiness, which in turn calls for the denial of release under the public order clause. Less commonly, judges may refer to arrest offense severity to justify pretrial incarceration on procedural risk grounds, for instance, by highlighting a suspect's incentive to flee or otherwise hinder the proceeding due to the heavy punishment in case of a guilty verdict. Accordingly, 78% of this study's written decisions in cases eligible for denial of release mentioned arrest offense severity to justify the pretrial status ordered, 90% and 40% of the time referring (even if superficially) to public order and procedural risks, respectively. While IAHR bodies have only expressly ruled out reliance on elements of the arrest offense to justify non-procedural risks (the majority of cases in this study), and the IACHR has expressly stated that such a factor can be part of the analysis of flight risk,¹⁷⁰ the very large effects of the arrest offense category identified herein are problematic, even if limited to justifying procedural risks. That is because attributing such a powerful, decisive effect to the nature of the offense for which a person was arrested means restricting someone's liberty to the full extent permitted under the law on account of an alleged conduct of which the person is still legally presumed innocent.¹⁷¹

¹⁷⁰ *Informe, supra* note 7, 326.C.10(c) ("The following . . . may be considered when deciding the question of flight risk: . . . the type of crime the accused is charged with and the severity of the foreseen sentence"). The European Court of Human Rights has taken a similar position in the assessment of flight risk, *e.g.*, *Polonskiy et al., v. Russia* 30033/05, ¶ 147 (Sept. 14, 2009).

¹⁷¹ Regarding the domestic violence category, Table 3 is preferable to assess its effect because it is limited to cases eligible for denial of release and all domestic violence cases are potentially eligible for it by legal design. Accordingly, Table 3 reveals that bail hearing judges treat domestic violence arrestees 18% less harshly than non-domestic violence ones, which seems to be due to two main mechanisms. First, judges may treat domestic violence arrestees more leniently by virtue of application of strict proportionality given that three-fourths of them in this study were arrested for offenses punished by a maximum term of up to four

As to criminal records, the research found evidence that increasing severity of adult and juvenile records is associated with a greater likelihood of pretrial detention in general. For example, arrestees incurring specific recidivism and those with four or more juvenile incidents had release hazard rates 71% and 45% lower than reference group arrestees, respectively, and the predicted probabilities of pretrial detention at day 100 by increasing severity of adult criminal records, as categorized, were 29% (clean records), 31%, 39%, 44%, 42%, and 50% (specific recidivism). Also, arrestees eligible for denial of release who had more serious adult records fared worse in bail hearings, as demonstrated by the almost five-fold increase in the odds of denial of release of recidivating arrestees compared to those without records. Contrary to IAHRs standards, judges primarily rely on criminal records to assess the need for denial of release to pursue some punitive rationale under the public order clause,¹⁷² as that happened in 63% of the written decisions in cases eligible for denial of release that discussed the arrestee's criminal records. In addition, my findings indicate that, along with recidivism-level records, non-recidivism records are also associated with harsher pretrial outcomes.¹⁷³ This once again indicates a restriction of the arrestees' presumption of innocence because proceedings without a final judgment or even a judicial consideration of probable cause are means used to restrict personal liberty to the fullest extent allowed by law.¹⁷⁴ Importantly, at least recidivism-level categories tended to be associated with harsher outcomes compared to non-recidivism categories.

years, rendering pretrial detention disproportionate to likely case outcomes, *see supra* notes 60, 154 and accompanying text. Second, judges may consider that those arrestees present milder pretrial risks, which would seemingly be at odds with obligations to combat violence against women by suggesting greater concern with pursuing the goals of denial of release in general than in domestic violence cases.

¹⁷² *Supra* note 146.

¹⁷³ Indeed, the models also found evidence of an independent effect of incident in the preceding year—which tends to be non-recidivism records—on certain pretrial outcomes. Most notably, such a variable was associated with a 19% lower release hazard rate in the full dataset, supporting the notion that judges interpret a person's quick rearrest as a sign of contempt and thus tend to treat those arrestees more harshly.

¹⁷⁴ *Informe, supra* note 7, ¶ 157.

Table 4 reveals that the severity of arrest offenses and criminal records often affects money bail decisions, although much less consistently than in decisions of denial of release. The analysis of arrest offense effects offers mixed conclusions in view of IAHRs standards. On the one hand, the significant coefficients in Table 4's first two rows raise the presumption of innocence concerns outlined earlier, as they suggest that police chiefs and judges rely on the arrest offense category when setting money bail.¹⁷⁵ On the other hand, those effects are potentially explained by reasons related to the arrestee's economic capacity, consistent with the non-discrimination standard. For instance, the 56% lower risk of judicial money bail to property offense arrestees when compared to traffic offense arrestees could be the result of the contrast between poor theft arrestees in the property category versus automobile owners in the traffic category. In that vein, the 34% lower amounts of stationhouse money bail to homeless arrestees reinforce the notion that authorities consider the arrestees' economic capacity when setting money bail. Unlike arrest offense, socioeconomic reasons seem unable to justify differential money bail treatment for individuals based on criminal records.

In contrast to other predictors, FTA history is directly related to the assessment of a suspect's flight risk, whose containment is an accepted pretrial detention ground within the IAHRs for being a procedural risk. Despite not being significant in all models, arrestee FTA history was consistently associated with greater chances of pretrial detention as exemplified by the 19% and 38% decreases in the release hazard rate for arrestees with pretrial and posttrial FTA history in Table 2, and the 45% lower chances of stationhouse money bail for arrestees with any FTA history in Table 4. Comparison of the magnitude of these effects with those of the most serious arrest offense categories also suggests that evasion history is part of the decisional mix and is not an inevitable jail indicator, which would run afoul the inter-American standard against blanket pretrial detention practices.

¹⁷⁵ See *supra* note 30 (for the likely cause of the significant coefficient for domestic violence in row three of Table 4).

The discussion of inter-judge disparities involves a tension between respect for judicial independence,¹⁷⁶ which implies tolerance for some degree of inter-judge disparities, and the right to equal protection of the law,¹⁷⁷ which is threatened by the arbitrariness of excessive disparities. Here, Graph 6 found a 7% point difference between the average predicted probabilities of denial of release of judges in the harshest and the least harsh quartiles. While not negligible, such a difference is not high enough to enable a claim of abusive exercise of judicial discretion.¹⁷⁸ On the contrary, the most striking and concerning finding in Graph 6 is the convergence among bail judges toward high rates of denial of release, which explains the finding above on the non-exceptionality of pretrial detention, and reinforces the concerns about the violation of the arrestee's presumption of innocence by revealing a dominantly punitive approach to pretrial detention across bail judges.¹⁷⁹

Despite not being this Article's focus, the more lenient pretrial treatment of female, older (in fewer models), and local arrestees identified corroborates prior criminology research.¹⁸⁰ Along with

¹⁷⁶ Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica" art. 8.1; CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION], art. 2 (Braz.).

¹⁷⁷ See Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica" art. 24; CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION], art. 5 (Braz.).

¹⁷⁸ Table 4 also revealed some police station effects on money bail setting. Despite the lack of a threshold beyond which the police chiefs' discretion becomes unwarranted, this study considers the effect sizes to be moderate (42% increase in chance of money bail setting and 20% decrease in amounts) and not problematic per se. They do suggest, however, that police chiefs differ to a considerable extent in their money bail practices.

¹⁷⁹ Potential future research in inter-bail judge disparities in Brazil could include geographic (*e.g.*, inter-county or—state comparisons), temporal (*e.g.*, before and after reforms) and demographic (*e.g.*, by judge gender) comparisons and delve into disparities by case and defendant traits. See *supra* note 138; see also David Arnold et al., *Racial Bias in Bail Decisions*, 133 Q.J. ECON. 1885 (2018) (includes an example of U.S. research into pretrial disparities).

¹⁸⁰ Ribeiro et al., *supra* note 9, at 112, 114 (finding protective effects for being female in Brazil); see also Lages & Ribeiro, *supra* note 9, at 25 (finding protective effects for being female and older in Brazil). For examples in other countries, see Lin et al. *supra* note 83, at 167 (Chinese study finding protective effects for having local registered domicile and being older); see also John Wooldredge et al., *Ecological Contributors to Disparities in Bond Amounts and Pretrial Detention*,

married arrestees' more positive pretrial outcomes, these findings suggest that judges consider that male, young, out-of-state, and single arrestees pose greater procedural risks for having weaker community ties and/or greater non-procedural risks for being perceived as more dangerous and blameworthy.¹⁸¹ Lastly, Table 3 revealed that individuals who alleged police violence were more likely to be denied release, raising the concern that judges may be retaliating against them by keeping them detained. If true, this would be shocking and legally problematic, but not entirely inconsistent with qualitative evidence suggesting that judges sometimes confront arrestees who allege police violence with skepticism or aggressive questioning.¹⁸²

C. Recent Developments and Potential Ways Forward

Since 2016, two very impactful events have shaped Brazil's law and politics, including its criminal procedure. First, the Brazilian Congress passed a significant criminal procedure reform in late 2019, referred to as the "Anticrime Package" (Law 13,964/2019). For this study's purposes, the reform changed the CPP to introduce (1) the bail hearing requirement, (2) the investigations judge (*juiz das garantias*)—who is in charge of the bail hearing and must be separate from the merits judge—,¹⁸³ (3) a rule of periodic review of denials of release every 90 days, (4) a ban of pretrial release to individuals recidivating, part of an armed criminal organization or possessing weapons of restricted use, and (5) a prohibition of denial of release to anticipate the punishment or as an immediate effect of the

63(13) CRIME DELINQ. 1682-1711 (2017) (U.S. study finding protective effects for being female).

¹⁸¹ Confirming the role of arrestee socio-economic profile in pretrial decisions, 15.5% of the orders denying release in the study expressly mentioned some information of that nature (such as the lack of proof of fixed address or lawful employment) when discussing the need of pretrial detention.

¹⁸² MINISTÉRIO DA JUSTIÇA AND DEPENDÊNCIA PENAL, *AUDIÊNCIAS DE CUSTÓDIA E PREVENÇÃO À TORTURA: ANÁLISE DAS PRÁTICAS INSTITUCIONAIS E RECOMENDAÇÕES DE APRIMORAMENTO* 39-41, 46-47 (2016).

¹⁸³ After an in-chambers STF opinion suspended the efficacy of this specific reform in January 2020, the STF ruled for its constitutionality in August 2023 and gave courts up to 24 months to establish the investigations judge. S.T.F., *Ações Diretas de Inconstitucionalidade [Direct Claims of Unconstitutionality]* No. 6.298, 6.299, 6.300 and 6.305, Relator: Min. Luiz Fux, 24.08.2023 (Braz.).

proceeding itself.¹⁸⁴ Then, in 2020, the COVID-19 pandemic set in and pushed Brazilian courts to take temporary measures to address social distancing and prisons' high risk of contagion. The key pandemic measures that related to pretrial decision-making were the occasional cessation of bail hearings, their shift to videoconference, and judicial guidelines and decisions that promoted non-carceral pretrial restrictions by:¹⁸⁵ (a) waiving money bail to all defendants unable to post it,¹⁸⁶ (b) limiting new denials of release to cases of *maximum* exceptionality,¹⁸⁷ and (c) reassessing existing orders of denial of release with priority to vulnerable inmates, those in overcrowded prisons, detained for more than 90 days or accused of non-violent crimes. (b) and (c) were inapplicable to those convicted of money laundering, corruption, heinous, domestic violence, or organized crimes.¹⁸⁸

In light of these important developments, the diagnosis of mechanisms and factors affecting pretrial decision-making in Brazil points to a mix of areas where improvements could move the

¹⁸⁴ Respectively, Articles 310, 3-A to 3-F, 316, sole paragraph, 310.2 and 313.2. Also, see references to specific Anticrime Package changes, *supra* notes 33, 62, 105 and 134. With the notable exception of item (4), these changes better aligned the Brazilian pretrial detention regulation with IAHR standards.

¹⁸⁵ CNJ, Recomendação [Recommendation] No. 62, arts. 4, 5-A, 8 and 8-A (Mar. 17, 2020), as modified and extended by Recomendações No. 68 (Jun. 17, 2020) and No. 78 (Sept. 15, 2020). Despite an impetus to stop bail hearings during the pandemic, the STF affirmed that they remained mandatory and suspended, during the pandemic, the efficacy of a legal provision that prohibited holding them through videoconference (Law 13,964/2019, Article 3-B.1). S.T.F., Medida Cautelar na Ação Direta de Inconstitucionalidade [Precautionary Measure on Direct Claim of Unconstitutionality] No. 6.841, Relator: Min. Nunes Marques, 28.06.2021 (Braz.) (the reporting justice granted partial interim relief on June 28, 2021, but the judgment was taken to the plenary and was suspended after a review request by one of the justices; the relief granted remains in effect).

¹⁸⁶ S.T.J., Habeas Corpus 568.693, Relator: Min. Sebastião Reis Junior 14.10.2020 (Braz.). This decision by the Brazilian court of cassation corroborates the finding that money bail is a minor pathway to pretrial detention in Brazil due to judicial willingness to waive it when defendants cannot post it, in line with the non-discrimination standard.

¹⁸⁷ Future research may potentially assess if such a higher standard led to less new orders of denial of release during the pandemic.

¹⁸⁸ This carve-out, the reassessment priority based on alleged offense type and the new ban of pretrial release to certain categories of individuals reinforce my finding that offense and records severity is a strong factor in pretrial decisions.

country closer to pretrial detention exceptionality and compliance with IAHR standards.¹⁸⁹ On the traditional front of legal reform, my findings recommend: (i) removing or significantly constraining the scope of the clause authorizing denial of release to guarantee the public order; (ii) removing the newly-introduced blanket prohibitions to denial of release (item (4) in this subsection); and (iii) shortening the periodic review requirement for denials of release (item (5)) to 30 or 45 days. While (ii) may be achieved with an unconstitutionality claim before the STF due to its precedents against blanket prohibitions to pretrial release,¹⁹⁰ (i) and (iii) are likely to require congressional action for targeting, respectively, the key CPP provision supporting pretrial detention and a policy-driven rule. Strictly statutory reforms would have limited effect, however, absent a concomitant change in the culture of judicial actors toward a paradigm focused on curbing procedural risks rather than anticipating punitive goals, and on using pretrial probation instead of jail. Importantly, in a context where the least harsh and the second least harsh bail hearing judges are predicted to deny release to 69% and 75% of the arrestees eligible for the measure (Graph 6), an initiative to tackle judges' pretrial detention-driven culture will require the active engagement of the judiciary leadership, as it was the case for the introduction of bail hearings.

Beyond incremental changes to laws and attempts to influence the legal culture of key judicial actors, investment in structural measures could be key to unlocking sustainable improvement in pretrial decision-making in Brazil. First, judges could be more inclined to release suspects subject to non-carceral pretrial restrictions if reliable monitoring mechanisms were generally available. Second, the proposed shift to focus on procedural risks and non-carceral restrictions would demand the establishment of pretrial services capable of gathering more accurate data related to those risks.¹⁹¹ Lastly,

¹⁸⁹ This Article's proposals focus on specific rules and measures that would not require a broader reform. See Thiago Nascimento dos Reis, *Prisão Provisória: Recentes Reformas e Próximos Passos à Luz do Sistema Interamericano de Direitos Humanos*, 330 BOLETIM IBCCRIM (2020) (where I first proposed part of these changes); see also IACHR, *supra* note 117, at ¶ 231.A.7, G, H.

¹⁹⁰ See *supra* note 167.

¹⁹¹ IACHR, *supra* note 117, ¶ 53-54; 231.E (on the role of functioning non-carceral measures and pretrial services).

the proper implementation of statistical pretrial risk assessment could bring pretrial detention rates to an exceptionality standard without sacrificing procedural integrity or public safety concerns.¹⁹²

VII. CONCLUSION

The pervasive resort to pretrial detention in Brazil does not come as news for local practitioners and observers of Latin American criminal justice systems. It is a phenomenon that regional human rights bodies have increasingly monitored and attempted to address by developing a series of adjudication standards. As the first longitudinal multivariate research into criminal pretrial decision-making in Brazil, this Article performed a rare quantitative case study of state compliance with international human rights law¹⁹³ by analyzing the practice of the state courts of Campo Grande, Mato Grosso do Sul, with the pretrial adjudication of 2,158 flagrant arrests from 2016 in light of inter-American human rights standards on pretrial detention. The case study revealed, in synthesis, a non-exceptional use of pretrial detention, with over half of all arrestees spending at least 10 days in jail, mostly by virtue of outright denials of release relying on punitive purposes that remain in force for considerable periods and often end up being disproportionate to the case outcome. Compounding this grim picture, reliable non-carceral restrictions were generally unavailable, and judges occasionally denied release to arrestees legally ineligible for the measure. Further, regression analyses showed that the severity of arrest offense and criminal history is strongly and often decisively associated with the likelihood of pretrial detention, and that judge-specific rates of denial of release are consistently high. Taken together, these findings revealed a systematic contempt for the right to presumption of innocence given

¹⁹² Zhiyuan Lin et al., *The Limits of Human Predictions of Recidivism*, 6(7) SCI. ADVANCES (2020) (finding that algorithms can outperform human predictions of recidivism in ecologically valid settings); Thiago Nascimento dos Reis, *Statistical Pretrial Risk Assessment in the Tropics: A Case Study in Brazil* (Apr. 2025) (working paper) (using this study's dataset to find that algorithms could simultaneously reduce both FTA and pretrial detention rates).

¹⁹³ Statistical studies on international human rights law have tended to focus on identifying the effects of treaty ratification on domestic human rights conditions. See, e.g., Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

that individuals are subject to the harshest of the state's restriction of rights by virtue of factors closely tied to punitive rationales, despite not having been found guilty yet. On a more positive note, pre-trial detention for inability to post money bail was extremely rare in the long term, and the amounts were relatively low, suggesting greater compliance with the standard of material equality in money bail settings.