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# Global Pretrial Detention Use: A Cross-National Analysis

Martin Schönteich

*The Graduate Center, City University of New York*

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GLOBAL PRETRIAL DETENTION USE: A CROSS-NATIONAL ANALYSIS

by

MARTIN SCHÖNTEICH

A dissertation submitted to the Graduate Faculty in Criminal Justice in partial fulfillment of the requirements for the degree of Doctor of Philosophy

The City University of New York

2018

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Global pretrial detention use: A cross-national analysis

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Martin Schönteich

This manuscript has been read and accepted for the Graduate Faculty in  
Criminal Justice in satisfaction of the dissertation requirements for the  
Degree of Doctor of Philosophy.

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Date

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Lucia Trimbur, Ph.D.  
Chair of Examining Committee

-----  
Date

-----  
Deborah Koetzle, Ph.D.  
Executive Officer

Supervisory Committee:

Rosemary Barberet, Ph.D.

Jeemy R. Porter, Ph.D.

THE CITY UNIVERSITY OF NEW YORK

## ABSTRACT

Global pretrial detention use: A crossnational analysis

by

Martin Schönteich

Advisor: Lucia Trimbur PhD.

To better understand global pretrial detention patterns, this study explores economic, political, and social factors associated with two measures of pretrial detention: the number of pretrial detainees as a rate of the general population, and the number of pretrial detainees as a proportion of the overall prison population. Through simple correlation analysis, stepwise regression, and moderation analyses, the study identifies factors most strongly associated with the two pretrial detention measures. The literature does not represent large-scale crossnational studies on pretrial detention. This study addresses this gap focusing exclusively on pretrial detention using a large crossnational sample of almost 200 countries.

The economic, political, and social correlates of the two pretrial detention outcome measures are not the same as many of the correlates of general incarceration. This insight provides a useful pathway for constructing new theoretical approaches to understanding crossnational pretrial detention patterns.

Factors dealing with insecurity, development, and good governance are all significantly associated with the proportion of prisoners in pretrial detention. Countries with high levels of insecurity, and lacking development and good governance, tend to have a high proportion of prisoners in pretrial detention. This finding is important for national policy makers and international development assistance providers, especially in places where development intersects with modernization and democratic transitions of which are associated with pretrial detention practices.

## ACKNOWLEDGMENTS

This dissertation is the culmination of years of learning and scholarship, and ~~and~~ desire to understand and engage with the world and its complexities. This quest for knowledge and agency is ably encapsulated by Friedrich Schiller (1759-1805), German poet, philosopher, and historian:

Knowledge, the object of knowledge and the knower ~~are~~ the three factors which motivate action; the senses, the work and the doer comprise the threefold basis of action.

Many people have contributed to my thirst for knowledge, particularly my parents. My father instilled in me a love of books, and an intellectual curiosity which set me on a lifelong path of enquiry and study. At an early age, my mother patiently guided me to ensure school projects ~~and~~ with their background research, extensive reading, and attention to detail enjoyable and empowering experiences. For the supportive and nurturing environment my parents created, and the guidance they continue to provide, I am truly grateful.

My sister and her family opened their home to me, during which time I used part of a sabbatical to begin formulating ideas and asking questions which led to the development of the theme on which this dissertation is based. Their hospitality and good cheer were very helpful to give direction and impetus to this study.

I am especially thankful to my wife, Sharon, and my ~~children~~ <sup>children</sup>, Tristen and Amelia. They graciously and stoically endured a husband and father preoccupied with tracking down journal articles on pretrial detention, puzzling over the intricacies of regression analysis, or grumpily editing yet another dissertation draft. They gave me the time and space to complete this dissertation journey, which started years ago with coursework and evening classes, culminating

in many hours hunched behind a computer over precious weekends. The opportunity costs of completing a doctoral degree program are difficult to quantify but are considerable.

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## TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION .....	1
Background.....	1
International standards and norms « « « « « « « « « « « « « « « «	5
Statement of the problem « « « « « « « « « « « « « « « « « «	6
Conceptual framework « « « « « « « « « « « « « « « « « «	9
Research questions and hypotheses « « « « « « « « « « « « « « « «	13
Method «	15
Significance of the study « « « « « « « « « « « « « « « « « «	17
Organization of the study « « « « « « « « « « « « « « « « « «	19
CHAPTER 2: LITERATURE REVIEW .....	21
Introduction «	21
General imprisonment literature « « « « « « « « « « « « « « « «	23
Political economy «	23
Legitimacy «	30
Crime «	31
Group or racial threat «	33
Form of government and public opinion « « « « « « « « « « « « « « « «	36
Legal system / tradition «	38
Crossnational quantitative pretrial detention literature « « « « « « « « « «	39
Political repression and democracy « « « « « « « « « « « « « « « «	39

Prison overcrowding	40
Comparative descriptive or single jurisdictional literature	42
Unemployment and labor surplus	42
Imprecise laws	43
Punitive public attitudes	44
Limited state resources	45
Inadequate legal representation and assistance	47
Police and prosecutorial influence	48
Corruption	49
Conclusion	50
CHAPTER 3: RESEARCH METHODOLOGY .....	
Introduction	52
Purpose, benefits and challenges for crossnational methodologies	52
Study themes and hypotheses	64
Economic factors	64
Political factors	68
Social factors	70
Dependent variables and dataset	76
Independent variables	79
Unemployment	82
Inequality	83
Social welfare	83

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## LIST OF TABLES

Table 1:	Variables and hypotheses	14
Table 2:	Variable metadata	81
Table 3:	Descriptive statistics for dependent variables	102
Table 4:	Descriptive statistics for economic independent variables	102
Table 5:	Descriptive statistics for political independent variables	102
Table 6:	Descriptive statistics for social independent variables	103
Table 7:	Descriptive statistics for log transformed independent variables	104
Table 8:	Recoding of legal system categories	104
Table 9:	Simple correlations between independent variables and pretrial detention	117
Table 10:	Determining the best predictive model of the rate of pretrial detention	121
Table 11:	Determining the best predictive model for proportion prisoners in pretrial detention	121
Table 12:	Moderation results for analysis 3a	130
Table 13:	Moderation results for analysis 3b	133
Table 14:	Moderation results for analysis 3c	138
Table 15:	Independent variables with statistically significant correlations with the proportion of prisoners in pretrial detention	164
Table 16:	Independent variables with moderate to strong correlations with the proportion of prisoners in pretrial detention	165





## CHAPTER 1: INTRODUCTION

### Background

The right to be presumed innocent until proven guilty is entrenched in international law, standards and norms. Yet, over a quarter of all prisoners, some three million people are in pretrial detention worldwide. During the course of an average year, an estimated 15 million persons are remanded to pretrial detention (Schönteich, 2014). In many places pretrial detention rather than imprisonment after conviction is the norm. In South Asia, Central and West Africa, and parts of Latin America the majority of prisoners are pretrial detainees (Walmsley, 2017).

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often languishing for weeks, months and even years before their trials are finalized or charges dismissed.

Many pretrial detainees are treated more harshly than convicted prisoners (UNICEF, 1998; Rodley 2000; Jones, 2003; Nowak, 2007). Pretrial detainees are regularly held in police cells, sometimes for extended periods of time, where conditions can be particularly crowded. Prison administrators regard their main mandate as the custody and rehabilitation of convicted prisoners and see pretrial detainees as a group whose imprisonment is temporary and somewhat incidental to their work. As a result, pretrial detainees are typically not provided with educational, vocational and related work opportunities. In poorer countries, health services are frequently particularly inadequate in remand facilities. There is a reluctance to provide treatment

for infectious diseases that requires a sustained period of therapy for people in pretrial detention,

Z K R V H F X V W R G \ L V V H H Q D V W H P S R U D U \ H Y H Q L I <sup>3</sup> W H P S R U

The generally poor conditions under which pretrial detainees are confined often serve an instrumental purpose. Police and prosecutors exploit the period of pretrial detention as an

opportunity to cajole detained defendants to cooperate with the criminal investigation (Human Rights Watch, 2017). Pretrial detainees are particularly vulnerable to physical and psychological abuse during the first few days of detention as interrogators seek to extract confessions from defendants (Novak, 2009). Such abuses, and the generally inhumane conditions in pretrial detention induce defendants to plead guilty with the expectation of being transferred to a prison for convicted prisoners where conditions are generally better. Even in jurisdictions where physical abuse and torture are relatively rare, pretrial detainees face heightened risks of conviction compared to analogous defendants awaiting trial at liberty (Davies, 1971; Williams, 2003; Stevenson, 2017). Pretrial detention often serves as a de facto form of punishment (Vagg & Dünkel, 1994; Redpath, 2015), especially in countries where conviction rates are low because of underresourced or dysfunctional criminal justice systems. This may be the case in the 50 or so countries where the majority of prisoners are pretrial detainees. The result is not solely too many people in pretrial detention, but also injustice and corrosion of the rule of law.

Perhaps paradoxically, the widespread use of pretrial detention undermines public security. Globally, prisons are filled beyond their official capacity by some 1.5 million prisoners. 7KH ZRUOG¶V SULVRQ FURZGLQJ SUREOHP ZRXOG LQ SULQ pretrial detainees. Lower crowding, and more focused efforts at the rehabilitation of convicted prisoners should reduce recidivism. Moreover, in jurisdictions where pretrial detainees are not confined separately from convicts, such mixing heightens the risk of abuse and can have a criminogenic effect. There is also evidence to suggest that pretrial detention, especially of longer duration, is positively associated with the likelihood that pretrial detainees will subsequently (re)offend (Lowenkamp, VanNostrand, and Holsinger, 2013a).

Pretrial detention often unnecessarily burdens criminal justice systems and strains public finances. Many detainees are not convicted of the charges that led to their arrest and detention (Human Rights Watch, 2017); many others receive custodial sentence because of the minimal risk they pose to public security even after their guilt has been proven (Karth, 2008; Human Rights Watch, 2010; Peillard, Ahumada Chahuán, 2011; UNODC, 2011). A significant chunk of state resources devoted to the confinement of pretrial detainees is \$14 billion in the U.S. (Henrichson, Rinaldi & Delaney, 2015; Ortiz D Q G D U R X Q G ¼ E L O O L European governments (Aebi, Tiago & Burkhardt, 2016) annually. This money which could have been spent on combating or preventing crime more effectively, such as hiring more police officers or increased funding for social welfare programs.

In 2015 the United Nations General Assembly adopted the 2030 Agenda for Sustainable Development which seeks to, among other things, reduce the proportion of prisoners in pretrial detention (United Nations, 2015). The inclusion of pretrial detention in the global development agenda is an important political recognition of the issue in the development context, and underscores the link between pretrial detention and economic development. Pretrial detainees often lose their jobs, are forced to abandon their education, and are evicted from their homes. Their families suffer from lost income and forfeited education opportunities, producing a multi-generational effect in which the children of detainees experience reduced educational attainment and lower lifetime income (OSJI, 2011; Baradaran Baughman, 2017; Muntzing & Redpath, 2018). In fragile communities the impact of pretrial detention is lost earnings, broken homes, and the incarceration of adult caregivers aggravate some of the underlying causes of crime.

Pretrial detention and corruption can be mutually reinforcing phenomena. A criminal justice system that overuses pretrial detention is susceptible to corruption, and an environment

marked by corruption will likely lead to the excessive use of pretrial detention. Corruption is disproportionately prevalent during the pretrial phase of the criminal justice process because it receives less scrutiny and is subject to more discretion than subsequent stages of the justice process, and often involves lower paid and mostly junior actors in the system (OSJI, 2010). The corrupt and arbitrary abuse of power disproportionately punishes the poor, destroys the justice system, and undermines the rule of law.

The manifold harms associated with (over)use of pretrial detention are often interrelated and cumulative in their impact. For example, pretrial detention aggravates prison overcrowding, which has negative public health consequences and a criminogenic effect on detainees. Both undermine socioeconomic development through higher incidences of illness and crime. Thwarted development and poverty, in turn, foster crime which engenders insecurity and increases public demands for draconian pretrial detention practices.

Its widespread use and pernicious consequences should not suggest that pretrial detention is inherently excessive or unwarranted. Applied fairly and sparingly, pretrial detention can play an important role in a balanced criminal justice system. To do so a rational and effective pretrial justice system needs to balance two potentially competing rights. Namely, the right of defendants to personal liberty and to be presumed innocent until convicted, and the right of the general public to live in safety and see defendants stand trial if the evidence so indicates, convicted and punished. To achieve this balance in compliance with internationally accepted norms and standards can be a challenge, especially for criminal justice systems burdened by high levels of crime, dysfunction, corruption, and a lack of resources.

## International standards and norms

Underlying the legal consideration of the applicability of pretrial detention are the right to liberty and the presumption of innocence. The presumption of innocence is universally recognized as a key principle in the administration of criminal justice (Stumer, 2010). This implies that the treatment of defendants throughout the criminal process should, in principle, be consistent with their innocence. Nevertheless, according to international laws reflected in numerous treaty provisions and authoritative jurisprudential interpretations thereof, circumscribed preconditions are met.

The International Covenant on Civil and Political Rights (ICCPR) provides that arrestees be brought promptly before a judicial officer and are entitled to trial within a reasonable time (Article 9(3)). The ICCPR also states that persons awaiting trial shall be detained in conformity with the law and shall be treated humanely and with respect for their inherent dignity (Article 10). The United Nations Standard Minimum Rules for Non-Custodial Measures, enumerate the following guidelines in respect of pretrial detention (UN Standard Minimum Rules, 1990, Rule 6): pretrial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offense and for the protection of society and the victim; alternatives to pretrial detention shall be employed at as early a stage as possible; pretrial detention shall last no longer than necessary and shall be administered humanely and with respect for the inherent dignity of human beings; and the offender shall have the right to appeal.

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<sup>1</sup> Article 11(1), Universal Declaration of Human Rights (adopted 1948); Article 14(2), International Covenant on Civil and Political Rights (adopted 1966, entered into force 1976); Article 6(2), Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 1950, entered into force 1953); Article 7(American Charter on Human Rights, adopted 1961, entered into force 1978); Article 8(2), American Convention on Human Rights (adopted 1969, entered into force 1978); Article 6(2), European Convention on Human Rights (adopted 1950, entered into force 1953).

to a judicial or other competent independent authority in cases where pretrial detention is employed.

In 1990, the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders established the principle that pretrial detention should only be used on reasonable grounds to believe that the persons concerned have been involved in the commission of the alleged offences and there is a danger of their absconding or committing further serious offences, or a danger that the course of justice will be seriously interfered with if they are let free. The Human Rights Committee, an expert body responsible for interpreting the ICCPR, has emphasized that domestic courts must interrogate whether less restrictive measures than pretrial detention can secure the attendance of defendants at trial. Moreover, a state cannot assume that a defendant will abscond, tamper with evidence, or obstruct the investigation of the case. Any risks associated with the pretrial release of a defendant must be investigated by the state (Ballard, 2011).

### Statement of the problem

The purpose of this study is to better understand how economic, political, and social variables are associated with two national level pretrial detention measures. While evidence of such relationships exists for incarceration generally, this is lacking in respect of pretrial detention. This is a curious gap in the research literature given that pretrial detention is a major driver of imprisonment. Over a quarter of all prisoners in the world are pretrial detainees. In many countries, pretrial detention is the norm with detainees outnumbering sentenced prisoners. Moreover, pretrial detention is a particularly draconian aspect of the criminal justice process. Not convicted of a crime, and legally presumed to be innocent, pretrial detainees lose their freedom, and as stated earlier, can also lose their family, health, job and community ties.