

# Overuse of Pretrial Detention in tension with Judicial and Prison Reforms in the Dominican Republic

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## Abstract

In 2003, the Dominican Republic began to shift towards an adversarial judicial model and has implemented one of the region's most ambitious reforms to its prison system, based on rehabilitative and human rights principles. Although these reforms have improved prison conditions and trial processes, the number of people incarcerated has nearly doubled, from 14,000 to over 26,000. This increase is due mostly to rising rates of pretrial detention, despite the availability of alternative pretrial measures. Drawing on data from prisoner surveys, interviews, and administrative data, this paper analyzes individual- and institutional-level factors that might explain variation in the decision as to whether impose pretrial detention or not. Several legal and extra-legal factors that are salient in other research on pretrial detention, such as charge and education level, are not significantly associated with pretrial detention decisions at individual level in the Dominican Republic. Qualitative findings suggest that broader system-level factors – specifically institutional capacity gaps, inaccessible cash bail, risk-averse decisions by attorneys and judges, and general penal populism – are more important. This suggests that in order for policymakers to reduce the overuse of pretrial detention, they should focus more attention on institutional and political dynamics rather than individual-level disparities.

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## Keywords

Prisons, pretrial detention, judicial reform, Dominican Republic

### **El sobre-uso de la prisión preventiva en tensión con las reformas judiciales y carcelarias en la República Dominicana**

## Resumen

Desde 2003, la República Dominicana ha tenido un modelo judicial acusatorio y ha implementado también una de las reformas penitenciarias más ambiciosas de la región, basada en la rehabilitación y los principios de derechos humanos. Aunque estas reformas han mejorado las condiciones carcelarias y los procesos judiciales, el número de personas encarceladas casi se ha duplicado, pasando de 14.000 a más de 26.000. Este aumento se debe sobre todo al crecimiento de la tasa de prisión preventiva, a pesar de la disponibilidad de otras medidas de coerción. A partir de datos obtenidos de encuestas efectuadas a personas privadas de la libertad, de entrevistas y de datos oficiales, este artículo analiza los factores institucionales e individuales que podrían explicar la variación en la decisión de imponer o no la prisión preventiva. Varios factores jurídicos y extrajurídicos, destacados en otras investigaciones sobre la prisión preventiva, como el tipo de delito del que se acusa a la persona y el nivel educativo, no están asociados de manera significativa con las decisiones sobre prisión preventiva individual en la República Dominicana. Los hallazgos cuantitativos sugieren que son más importantes los factores sistémicos más amplios, en particular, los vacíos de capacidad institucional, la imposibilidad de conseguir la fianza, las decisiones de abogados y jueces con aversión al riesgo, y el populismo penal general. Esto indicaría que los creadores de políticas públicas deberían prestar mayor atención a la dinámica institucional y política, y menos a las desigualdades individuales de la población carcelaria, si quieren reducir el uso de la prisión preventiva.

## Palabras clave

Prisión, prisión preventiva, reforma judicial, República Dominicana

## INTRODUCTION

The Dominican Republic is well-known for its New Prison Management Model, a new type of prison based on human rights principles, which are cleaner, healthier, and less violent than other prisons in the country. At the same time, the Dominican Republic shifted from an inquisitorial to an adversarial justice system, in an attempt to improve due process and decreasing pretrial detention. But, during this same fifteen-year period (since 2003-04), the number of people incarcerated in the country has almost doubled – from about 14,000 to about 26,000 in 2018. The rate of incarceration per 100,000 people has increased from 140 in 2004 to 239

in 2017, while crime rates have dropped substantially since 2005.<sup>1</sup> The largest portion of this increase (about 70%) involves people in pretrial detention. Currently, about 60% of people behind bars in the Dominican Republic have not yet faced trial or been convicted. According to Dominican law, pretrial detention is a last resort – there are various alternative measures – but in practice it is the most common measure imposed.

This level of pretrial detention undermines due process and the presumption of innocence, increases demands and costs on facilities, slows down case processing, and takes a heavy toll on those detained and their families. What is unusual about the Dominican case is that the scope of pretrial detention has drastically increased despite institutional changes with progressive goals in courts and prisons. It is a threat to the successes, sustainability, and expansion of both the adversarial judicial system and the New Prison Management Model.

This article analyzes the patterns and trends of pretrial detention in the Dominican Republic's judicial system and inside Dominican prisons. Using survey, interview, and administrative data, it considers legal, extra-legal, and socio-political factors that may contribute to the decision to impose pretrial detention instead of an alternative. This article argues that the main drivers are at institutional and social levels: judicial discretion, lack of institutional capacity and meaningful alternatives, and penal populism.

## 1. EXISTING RESEARCH

### 1.1. Pretrial Detention and Judicial Reforms in Latin America and the Caribbean

The extent, cost, features, and consequences of pretrial detention around the world have been well documented.<sup>2</sup> In many countries, protection of due process rights is minimal and people in pretrial detention face worse conditions than do sentenced prisoners. In countries with more severe problems related to insecurity, poor institutional governance, and economic development, pretrial rates and the proportion of incarcerated people who are pretrial detainees tend to be higher.<sup>3</sup> In Latin America, the rates of pretrial detention in the general population (per 100,000 inhabitants)<sup>4</sup> are higher than the world average. Some countries in the region have very high proportions of pretrial detainees, measured as the percentage of total people in prison or jail. The Dominican Republic is fifth in the region on this indicator, at about 60%, behind

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1 Lilian Bobea, "Dominican Republic: Chronicle of an Unreported Death," *InSight Crime*, September 16, 2013, <https://www.insightcrime.org/news/analysis/dominican-republic-the-chronicle-of-an-unreported-death/>; Tristan Clavel, "InSight Crime's 2017 Homicide Round-Up," *InSight Crime* (blog), January 19, 2018, <https://www.insightcrime.org/news/analysis/2017-homicide-round-up/>.

2 Martin Schönteich and Open Society Justice Initiative, *Presumption of Guilt: The Global Overuse of Pretrial Detention*, (Open Society Justice Initiative, 2014).

3 Martin Schönteich, *Global Pretrial Detention Use: A Cross-National Analysis* (Thesis, CUNY Graduate Center, 2018).

4 This refers to the rate of pretrial detention across the general population. It is a part of the overall incarceration rate per 100,000 people – incarceration rates include pretrial detainees and sentenced people serving a prison sentence.

Bolivia (83%), Paraguay (73%), Haiti (66%), and Venezuela (64%) – see Table 1. Meanwhile, it is closer to the median for the region in its overall incarceration rate per capita (pretrial plus sentenced), with 238 per 100,000 people, as the median rate is 316 per 100,000 for Central America and 233 per 100,000 for South America.<sup>5</sup>

**Table 1.** Prison Populations and Rates in Latin America and the Caribbean

Country	Incarceration Rate per 100,000 inhabitants (descending order)	Total Incarcerated Population	% of Incarcerated people in Pretrial Detention
El Salvador	618	39,807	30.5%
Virgin Islands (UK)	542	134	37%
Cuba	510	57,337	-- unknown
Bahamas	438	1,746	42.0%
Grenada	435	465	15.2%
Virgin Islands (USA)	426	577	36.4%
Panama	395	16,561	47.3%
St. Kitts & Nevis	393	220	30.5%
Cayman Islands	393	253	29.6%
St. Vincent & Grenadines	378	469	24.3%
Costa Rica	374	19,226	13.3%
Anguilla (UK)	367	55	45.5%
Belize	356	1,297	30.1%
Antigua & Barbuda	347	305	37%
Brazil	337	719,998	33.8%
Barbados	322	874	48.9%
Uruguay	321	11,078	69.7%
Puerto Rico (USA)	313	10,475	13.0%
Guyana	283	2,200	35.6%
St. Lucia	280	527	53.5%
Peru	277	90,638	39.1%
Nicaragua	276	17,196	21.4%
Trinidad y Tobago	270	3,999	59.7%
French Guiana	267	784	25.9%
Dominica	247	211	23.7%
<b>Dominican Republic</b>	<b>238</b>	<b>26,286</b>	<b>60.3%</b>

Continúa

5 Roy Walmsley, *World Prison Population List, 12th Edition* (London: Institute for Criminal Policy Research, 2018), [http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl\\_12.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf).

Country	Incarceration Rate per 100,000 inhabitants (descending order)	Total Incarcerated Population	% of Incarcerated people in Pretrial Detention
Curacao (Holland)	236	377	41%
Colombia	227	119,896	32.1%
Chile	226	41,594	31.8%
Ecuador	222	37,497	34.9%
Honduras	216	18,950	53.1%
Martinique (France)	211	813	27.3%
Guadalupe (France)	211	946	26.9%
Paraguay	199	13,607	77.9%
Argentina	186	72,693	47.7%
Suriname	183	1,000	50%
Venezuela	178	54,738	63.0%
Aruba (Netherlands)	165	170	16.6%
Mexico	163	203,364	39.2%
Bolivia	156	17,946	69.9%
Sint Maarten (Netherlands)	153	62	18.1%
Guatemala	140	24,303	52.0%
Jamaica	138	3,866	23.1%
Haiti	80	8,882	66.8%

**Source:** Data from 2018 or most recent numbers, compiled by the *Institute for Criminal Policy Research*, [prisonstudies.org](http://prisonstudies.org)

The shifts from the inquisitorial to the adversarial judicial system that unfolded across the region in the 1990s and 2000s shaped the pretrial detention dynamics in significant ways. While in the inquisitorial system, using pretrial detention as a form of pressure on a defendant was standard practice, in the adversarial system the role of the prosecutor and defense counsel, and the independence of the judge are more important.<sup>6</sup> Legal scholars warned at the time that the key benefit of the adversarial system – reducing prolonged pretrial detention – would require investments in institutional capacity, local adaptations, meaningful alternatives, and judicial independence.<sup>7</sup> Indeed, pretrial detention rates did drop overall in the aftermath of the judicial reforms<sup>8</sup> – but larger structural changes fell short. Without meaningful implementation

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6 Mauricio Duce, Claudio Fuentes, and Cristiano Riego, “La Reforma Procesal Penal En América Latina y Su Impacto En El Uso de La Prisión Preventiva,” in *Prisión Preventiva y Reforma Procesal Penal En América Latina: Evaluación y Perspectivas*, editado por Cristián Riego & Mauricio Duce. (Chile: Centro de Estudios de Justicia de las Americas (CEJA), 2009), 13–72, [http://biblioteca.cejamericas.org/bitstream/handle/2015/2578/prision preventiva\\_riego\\_duce.pdf?sequence=1&isAllowed=y](http://biblioteca.cejamericas.org/bitstream/handle/2015/2578/prision preventiva_riego_duce.pdf?sequence=1&isAllowed=y).

7 Jonathan L. Hafetz, “Pretrial Detention, Human Rights, and Judicial Reform in Latin America,” *Fordham International Law Journal*, nº 26(6) (2002): 26.

8 Duce, Fuentes, and Riego, “La Reforma Procesal Penal En América Latina”

of alternative (non-detention) pretrial measures, a “counter reform” could emerge. Some analysts argue that elements of the inquisitorial system have persisted, and that a new set of reforms is required as a “second stage.”<sup>9</sup>

## 1.2. Legal Factors in Pretrial Detention

In Latin America, most countries base their laws on the Model Criminal Code for Ibero-America, issued in 1988,<sup>10</sup> which sets out very limited grounds for imposing pretrial detention: risk of failure to appear at court, risk of interference in the case, and risk to public safety. More generally, the principles of exceptionalism (rare), legality, necessity, proportionality, and reasonableness should govern any decision to impose pretrial detention. The Inter-American Human Rights Commission (IAHRC) has issued numerous rulings on prolonged and/or unjustified pretrial detention, as it is not meant to be punitive in its application.<sup>11</sup> However, several countries have defined certain crimes (charges) as requiring mandatory pretrial detention (*prisión preventiva oficiosa*), purportedly for public safety reasons. In Mexico, for example, for several types of homicide, drug trafficking, and kidnapping, the judge has no choice but to impose pretrial detention.<sup>12</sup> The Ibero-American Code and other regional frameworks define various non-detention alternative measures, but these are typically under-resourced and not-widely used.

In the Dominican Republic, Law 76-02, the criminal code written in 2002 and implemented in 2004, regulates pretrial detention and alternative measures.<sup>13</sup> In contrast to other countries, there is no mandatory pretrial detention for specified charges, and there is the option of cash bail (“economic guarantee”). Article 222-234 establishes the right to liberty and security, with pretrial detention as a last resort, to be used only to ensure public safety and/or appearance at trial. It sets out numerous alternative measures: house arrest, electronic monitoring, periodic appearance, supervision, prohibition on travel, bail (cash), custody in a mental health institution, and release on recognizance. In practice, electronic monitoring has only been available in the Dominican Republic since 2016.<sup>14</sup>

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9 Juan Enrique Vargas Viancos, “La nueva generación de reformas procesales penales en Latinoamérica,” *URVIO - Revista Latinoamericana de Estudios en Seguridad*, nº 3 (2008): 33–47. <http://hdl.handle.net/10469/1453>

10 Comisión Interamericana de Derechos Humanos, *Medidas para reducir la prisión preventiva*, OEA/Ser.L/V/II.163 (Organización de Estados Americanos (OEA), 2017).

11 Carolina Villadiego Burbano, *Estrategias para Racionalizar el Uso de la Prisión Preventiva en América Latina: Mecanismos para Evaluar la Necesidad de Cautela* (Chile: Centro de Estudios de Justicia de las Américas (CEJA), 2010).

12 Fiscalía General de la República. “La medida cautelar de la prisión preventiva: oficiosa y justificada”, *Fiscalía General de la República (blog)*, 28 de septiembre del 2017, <https://www.gob.mx/fgr/es/articulos/la-medida-cautelar-de-la-prision-preventiva-oficiosa-y-justificada?idiom=es>. It is worth noting that the Mexican Constitution did not include a guaranteed right to the presumption of innocence until 2008.

13 Specifically, Articles 15, 16, 222, 226-232, 234, 238-242.

14 Harold Modesto, “La prisión preventiva en las Américas y el informe de la CIDH: una mirada a la situación de la República Dominicana,” *Observatorio Judicial Dominicano (OJD)*, <http://www.ojd.org.do/index.php/171-sistema-judicial-dominicano/actualidad-judicial/593-la-prision-preventiva-en-las-americas-y-el-informe-de-la-cidh-una-mirada-a-la-situacion-de-la-republica-dominicana>.

### 1.3. Extra-Legal Factors in Pretrial Detention

Apart from the constraints of the criteria and alternatives set out in the legal frameworks, pretrial measures are largely a discretionary decision, in which judges' and lawyers' biases and assumptions about the defendant, internal institutional incentives, courtroom culture, and other extra-legal factors matter.<sup>15</sup> In the US system, racial disparities emerge early in the process, as black and Latino defendants are more likely to receive a pretrial detention decision compared to white defendants.<sup>16</sup> Being detained at this early stage of the process can generate "cumulative disadvantage" – harsher decisions at later stages of sentencing.<sup>17</sup> Stereotypes about "dangerousness" can influence judicial decisions (through implicit bias), leading to harsher decisions particularly for young men of color.<sup>18</sup> Others demonstrate that people with access to private legal representation are significantly less likely to receive pretrial detention.<sup>19</sup>

In Latin America, research on pretrial detention patterns has focused mostly on system-level factors<sup>20</sup> – the transition to adversarial judicial systems and socio-economic inequality – and less so on individual cases.<sup>21</sup> Generally speaking, scholars find that people who are more socio-economically marginalized and who have limited access to government services and

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15 Mia Ortiz, "The Impact of Extralegal Characteristics on Recognizance Release among Misdemeanants," *Journal of Ethnicity in Criminal Justice*, nº 14(2) (2016): 77–99. <https://doi.org/10.1080/15377938.2015.1077760>. See also: Meghan Sacks, Vincenzo A. Sainato, and Alissa R. Ackerman, "Sentenced to Pretrial Detention: A Study of Bail Decisions and Outcomes," *American Journal of Criminal Justice*, nº 40(3) (2015): 661–81. <https://doi.org/10.1007/s12103-014-9268-0> See also: John Wooldredge, James Frank, and Natalie Goulette, "Ecological Contributors to Disparities in Bond Amounts and Pretrial Detention," *Crime & Delinquency*, nº 63(13) (2017): 1682–1711. <https://doi.org/10.1177%2F0011128716659636>

16 Cassia C. Spohn, "Racial Disparities in Prosecution, Sentencing, and Punishment," in *The Oxford Handbook of Ethnicity, Crime, and Immigration*, edited by Sandra Bucerius & Michael Tonry (Oxford University Press, 2014). See also John Wooldredge, "Distinguishing Race Effects on Pre-Trial Release and Sentencing Decisions," *Justice Quarterly*, nº 29(1), (2012). <https://doi.org/10.1080/07418825.2011.559480>

17 Besiki L. Kutatladze et al., "Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing," *Criminology*, nº 52(3) (2014): 514–51, <https://doi.org/10.1111/1745-9125.12047>. Emily Leslie and Nolan G. Pope, "The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments," *The Journal of Law and Economics*, nº 60(3), (2017): 529–57, <https://doi.org/10.1086/695285>. Meghan Sacks and Alissa R. Ackerman, "Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?," *Criminal Justice Policy Review*, nº 25(1), (2012). <https://doi.org/10.1177%2F0887403412461501>

18 Traci Schlesinger, "Racial and Ethnic Disparity in Pretrial Criminal Processing," *Justice Quarterly*, nº 22(2), (2005): 170–92, <https://doi.org/10.1080/07418820500088929>

19 Rod V. Hissong and Gerald Wheeler, "The Role of Private Legal Representation and the Implicit Effect of Defendants' Demographic Characteristics in Setting Bail and Obtaining Pretrial Release," *Criminal Justice Policy Review*, nº 30(5) (2019): 708–30, <https://doi.org/10.1177/0887403417714560>.

20 Villadiego Burbano, *Estrategias para Racionalizar el Uso de la Prisión Preventiva en América Latina*; Vargas Viancos, "La nueva generación de reformas procesales penales en Latinoamérica".

21 CIDH, *Medidas para reducir la prisión preventiva*. For empirical research on pretrial court hearings in Colombia and Mexico, see forthcoming research from Andrés F. Rengifo & Lina Marmolejo. "Acción y representación: indicadores de desempeño de la defensa en una muestra de audiencias de control de garantías en Colombia", *Latin American Law Review*, nº 4, (2020), 1-24, <https://doi.org/10.29263/lar04.2020.01>; and Gustavo Fondevila & Miguel Quintana-Navarrete. "Determinantes de la sentencia: Detención en flagrancia y prisión preventiva en México", *Latin American Law Review*, nº 4, (2020), 49 – 72, <https://doi.org/10.29263/lar04.2020.03>

protections also face higher rates of pretrial detention, regardless of the severity of the crime.<sup>22</sup> Notably, differences by race/ethnicity are rarely documented in studies of Latin American courts. This is likely because most Latin American societies do not use racial categories in the clear-cut way that the US does, and because court data and most social science studies do not track individuals by race/ethnicity.

#### **1.4. Penal Populism as a Driver of Pretrial Detention**

A prominent socio-political factor influencing pretrial detention is “penal populism” – public opinion and political pressure that favors harsh punishment in the judicial system, even if due process or other rights are compromised in the process.<sup>23</sup> When a population does not trust that the justice system will provide fair consequences, this cynicism can morph into a demand for harsher punishment in whatever form is accessible, even in otherwise progressive regimes or on behalf of victims.<sup>24</sup> According to some analysts, people can turn to penal populism out of frustration with economic crises and fear of crime – despite the reality that populist calls for hardline government responses can end up harming marginalized communities.<sup>25</sup> Media coverage plays a key role here: public outcry when a judge declines to impose or extend pretrial detention can increase the use of pretrial detention, regardless of the actual risk in the case.<sup>26</sup>

### **2. THIS STUDY**

This paper draws on data from a larger mixed-methods project that explores prisoners’ perceptions and conditions, in both old and new Dominican prisons. The quantitative part used

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22 Schönteich and Open Society Justice Initiative, *Presumption of Guilt*. See also Duce, Fuentes, and Riego, “La Reforma Procesal Penal En América Latina y Su Impacto En El Uso de La Prisión Preventiva.”

23 Markus-Michael Müller, “The Rise of the Penal State in Latin America,” *Contemporary Justice Review*, nº 15(1), (2012): 57–76, <https://doi.org/10.1080/10282580.2011.590282>. For research on penal populism in the UK and US, see: David A. Green, *When Children Kill Children: Penal Populism and Political Culture* (Oxford: Oxford University Press, 2012); Michael Tonry, “Determinants of Penal Policies,” *Crime and Justice* nº 36(1), (2007): 1–48; Tim Newburn and Trevor Jones, “Symbolic Politics and Penal Populism: The Long Shadow of Willie Horton,” *Crime, Media, Culture: An International Journal*, nº 1(1), (2005): 72–87, <https://doi.org/10.1177%2F1741659005050272>.

24 Máximo Sozzo and Maialén Somaglia, “Prisión preventiva y reforma de la justicia penal. Una exploración sociológica sobre el caso de la Provincia de Santa Fe, Argentina,” *Derecho y Ciencias Sociales*, nº17, (2017): 7–43, <https://doi.org/10.24215/18522971e008>; Máximo Sozzo, *Los retos de la izquierda en las políticas públicas de seguridad ciudadana*. (Caracas: Universidad Nacional Experimental de la Seguridad (Unes), 2012), 15. On victims, see: Duce, Fuentes, and Riego, “La Reforma Procesal Penal En América Latina y Su Impacto En El Uso de La Prisión Preventiva.”

25 Nicole Curato, “Politics of Anxiety, Politics of Hope: Penal Populism and Duterte’s Rise to Power,” *Journal of Current Southeast Asian Affairs*, nº 35(3), (2016): 91–109, <https://doi.org/10.1177/186810341603500305>.

26 Sozzo and Somaglia, “Prisión preventiva y reforma de la justicia penal”; Ezequiel Kostenwein, “Prisión preventiva: entre los medios de comunicación y las autoridades políticas,” *Revista Direito e Práxis*, nº 6(11), (2015), <https://doi.org/10.12957/dep.2015.14437>

a survey of prisoners, adapted from other prisoner surveys in the UK<sup>27</sup> and in Latin America.<sup>28</sup> The qualitative part uses interviews and participant observation. The sample for the survey is 1240 prisoners, from 17 facilities of varying sizes (from both types of Dominican prisons, with about 56% in the old model). Participants were chosen as randomly as possible from those who were available and willing on the days of data collection in the general population areas. People in maximum security, solitary confinement, or women's facilities were excluded. Of the 1153 survey respondents who confirmed their legal status, 44.4% were in pretrial detention – a proportion slightly less than the proportion in the overall prison population (about 60%). This study also included semi-structured interviews, with about 35 current and former prisoners and with about 90 other key actors, including prison staff, government and elected officials, attorneys and judges, academics, journalists, and human rights advocates.

### 3. PRETRIAL DETENTION IN THE DOMINICAN REPUBLIC

#### 3.1. Brief Review of Judicial and Prison System Reforms

The Dominican Republic modernized its prison system through Law 224 (1984), which established rehabilitation as the goal of the prison system, but prisons remained dilapidated, overcrowded, and under police control.<sup>29</sup> The judicial system shifted to the adversarial system in 2004, including a new criminal code and the principles of due process, presumption of innocence, and right to counsel.<sup>30</sup> The National Public Defender's Office was established in 2009. One former prisoner described how pretrial detention was handled prior to the judicial reform and after:

"Before, to be seen in court, a youth could spend two weeks in the police station, before getting to the courthouse. Two months could pass before they apply the coercive (pretrial) measure. But they also used to send you to La Victoria [the largest prison] without any coercive measure in place. That's to say, they arrested you today, you stayed in the police station for ten days, two weeks in the police headquarters, three or

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27 Alison Liebling, *Prisons and Their Moral Performance: A Study of Values, Quality, and Prison Life* (Oxford: Oxford University Press, 2004).

28 Marcelo Bergman, Hernán Flom, and Carlos Vilalta, *Encuestas Penitenciarias En América Latina Herramientas Conceptuales y Metodológicas Para Su Diseño, Ejecución y Evaluación* (Centro de Estudios Latinoamericanos sobre Inseguridad y Violencia, 2014); Guillermo E. Sanhueza, "Diseño e implementación de la Primera Encuesta de Percepción de Calidad de Vida Penitenciaria en Chile: propuestas y desafíos para el sistema penitenciario," *Economía y Política*, nº 2(1) (2015): 5–32, <https://doi.org/10.15691/07194714.2015.001>.

29 Yunior Andrés Castillo, "Origen, Historia y Formación Del Sistema Penitenciario de La República Dominicana" (Tesis, Santiago de los Caballeros, 2014) See also S. Saldaña Saldaña, "Análisis de la implementación del nuevo modelo penitenciario período 2002-2010" (Masters Thesis, Legal Studies, Universidad Autónoma de Santo Domingo, 2016).

30 Olga Espinoza, "Sistema Penitenciario En Republica Dominicana: Revision Normativa e Institucional." Unpublished report (Santiago de Chile: Universidad de Chile, 2016).

four in court, then in La Victoria and only later would the papers show up, with your charge against you a month or two later. Now, you can only be in the station for 48 hours and you have to go to hearing; in the prosecutor's office they have to transfer you within two hours to court, and you have to see a judge within 48 hours. ... So in a way, it's quicker now. They no longer abuse the pretrial detention time; before they used it to see if you would give money, if you would go out to find what was stolen, if you would recuperate it if they gave you a beating. Now there is less physical abuse. But the three months of pretrial detention are still very harsh, because here there are no jails just for pretrial detention"<sup>31</sup>

In the early 2000s, with support from international cooperation and from the *Procuraduría*, the Dominican government set up the New Model for Prison Management, based on UN standards and human rights principles. The key components of the New Model are new, spacious facilities without overcrowding, a new corps of corrections officers (*agentes de vigilancia y tratamiento penitenciario*, known as VTPs), expanded programs, and semi-release options. Since 2003, the Dominican government has built or renovated 22 *Centros de Corrección y Rehabilitación* (CCR). This new model exists in parallel with the remaining 19 "traditional" prisons, including one very large prison (La Victoria) that holds about 9,000 people.

A feature of this half-implemented prison reform is that, to date, there is only minimal separation of pretrial and sentenced prisoners inside prisons. With the exception of one CCR that holds only sentenced prisoners, in most CCRs and traditional prisons, between 50-70% of inmates are in pretrial detention. There are no differences in housing areas, conditions, program access, or other daily conditions for pretrial versus sentenced people, except for more frequent interactions with legal counsel for people undergoing trial.

### **3.2. Growth in the Incarcerated Population, 2002 - 2018**

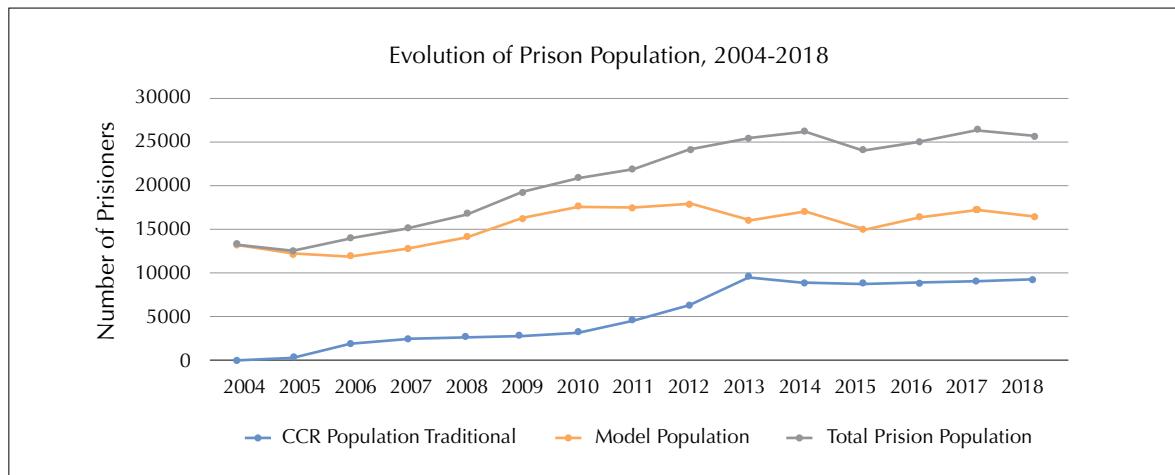
The incarcerated population has nearly doubled, from 14,000 to over 26,000 people, since 2004, when the judicial and prison reforms began in earnest. This is illustrated in the graph (top line) in Figure 1 (Notably, the prison population numbers do not include holding cells in police stations or courthouses, which in 2018, held an estimated 2,000 people, according to a justice ministry official).<sup>32</sup> During this period, the New Model's facilities (CCRs) have taken on a growing proportion of the prison population (blue line), now about 35%. Since CCRs do not permit overcrowding as a matter of policy, the growth in the prison population over the years has led to even higher overcrowding rates in old model prisons, with some surpassing 500% capacity.

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31 Interview with staff member of an NGO working with formerly incarcerated people (NGO6), interviewed by J. Peirce, September 2017.

32 Interview with government official in the Attorney General's Office (GMP3), interviewed by J. Peirce, August 2018.

**Figure 1.** Evolution of the Prison Population, 2004-2018



**Source:** Data from the *Dirección General de Prisiones*

Pretrial detention is the principal cause for this growth, but three additional factors also contribute: more punitive laws on certain crimes, more punitive sentencing decisions,<sup>33</sup> and reduced use of early release, parole, and probation. Out of about 9,000 people in the New Model system, at the end of 2018, 639 (about 7%) were in some type of *medio libre* (partial release), but only 54 of these (8.4%) are under house arrest and three (0.5%) are under electronic monitoring.<sup>34</sup> Similarly, approvals for parole – for which people are eligible after two thirds of a sentence – are unpredictable. One judge estimated that only about a third of parole applications are approved.<sup>35</sup>

### 3.3. Growth in Pretrial Detention

Pretrial detention in the Dominican Republic has increased in both rate and raw numbers. In 2000, the vast majority of people held in prisons were in pretrial detention: about 82% of the total, with a rate of 141 people per 100,000 residents in the general public.<sup>36</sup> The judicial reform in 2004 generated a sharp drop in pretrial cases, as many were vacated during the conversion. A few years later, the rate had surpassed 2004 levels, although the proportion of

33 In 2013, 20% of respondents were serving a 20-year sentence, 18% serving five years, 16% serving ten years, and 12% were serving thirty years, with only 8% serving less than five years. *Dirección General de Prisiones (DGP), Informe: Censo Penitenciario En Recintos Tradicionales 2013.* (Santo Domingo: Procuraduría General de la República, 2013)

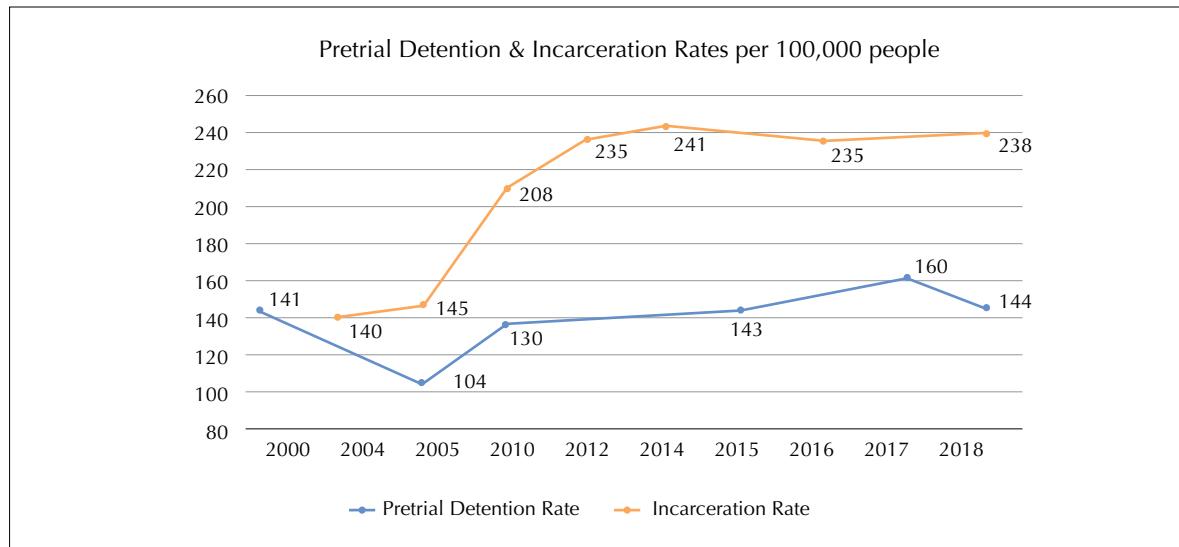
34 Internal statistics for 2018, provided by the New Model for Prison Management, February 2019.

35 Government Official, Judge (GJ5), interviewed by J. Peirce, February 2019.

36 Roy Walmsley, *World Pre-Trial/Remand Imprisonment List* (3rd Edition), (Institute for Criminal Policy Research, 2017), <http://www.prisonstudies.org/resources/world-pre-trialremand-imprisonment-list-3rd-edition>.

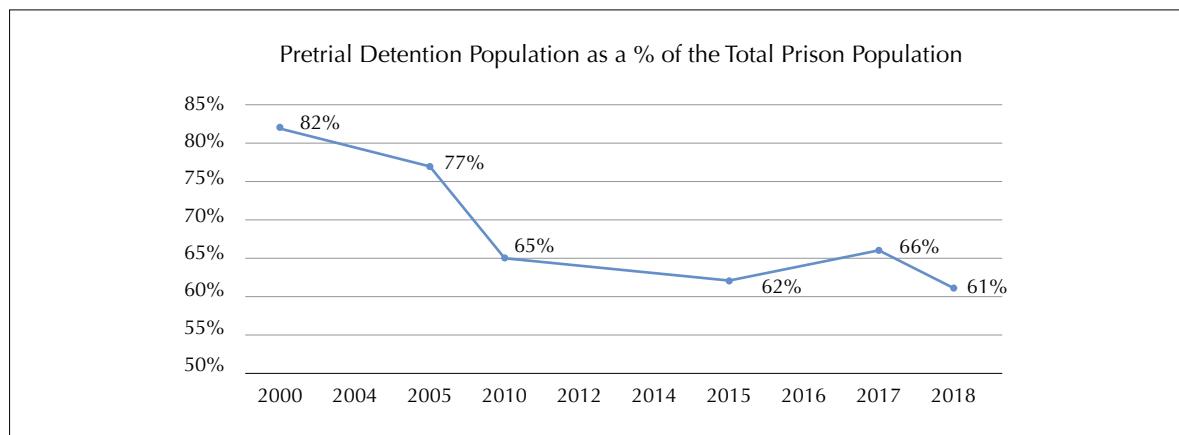
incarcerated people in pretrial detention has not returned to pre-2004 levels. In 2017, the proportion was about 66% overall, and it started to drop again in 2018, to 160 people per 100,000 residents and 61% of incarcerated people. See Figure 2 for details.

**Figure 2.** Pretrial Detention and Incarceration Rates, 2000-2018



**Source:** Data from Institute for Criminal Policy Research (ICPR), University of London

**Figure 3.** Pretrial Detention as a % of the Total Prison Population, 2000-2018



**Source:** Data from Institute for Criminal Policy Research (ICPR), University of London

### 3.4. Frequency of Pretrial Coercive Measures

The *Ministerio Público* does not release data on the number or percentage of cases for which each pretrial coercive measure (e.g., pretrial detention, bail, house arrest) was imposed in a

given year. The Annual Report of the National Office of the Public Defender in 2017,<sup>37</sup> which covers cases only in the first half of the year, shows that judges impose pretrial detention more often than any other measure – see Table 2. In another 7.58% of cases, people are offered cash bail but are unable to pay, and thus remain in detention. Thus, in practice, pretrial detention is applied in about half the cases.

**Table 2.** Use of Pretrial Coercive Measures

Type of Pretrial Coercive Measure	Number of Cases (Jan-Sept 2017)	Percentage of Cases
<b>ADULTS</b>		
Pretrial detention	5,226	42.42%
Periodic appearance at court	2,842	23.07%
Liberty through economic guarantee (cash bail)	2,572	20.87%
Economic guarantee – unable to pay (cash bail)	934	7.58%
Liberty without coercion (release on recognizance)	650	5.28%
Institutional supervision	61	0.5%
House arrest	21	0.17%
Restrictions on external travel	7	0.06%
Restrictions on internal travel	8	0.06%
<b>Total</b>	<b>12,321</b>	<b>100%</b>

**Source:** Data from the 2017 Annual Report of the National Office of the Public Defender

Notably, these numbers do not include people who take a plea deal – called an *acuerdo* colloquially in the Dominican Republic – as they are counted as “convicted” in the judicial and prison statistics. In my interviews with current and former prisoners, however, taking an *acuerdo* is a relatively common practice – reducing the apparent numbers of pretrial detentions. One young man in a focus group made the following comment:

**Respondent:** Another complaint is the so-called *acuerdos*. As much as the youth might want otherwise, when you are in the court before the judge and the lawyer says “I got you a plea”...

**Jennifer:** That gives you time off?

**Respondent:** Right, you get out, but the result is you have to go sign [at court, periodic appearances] for five years... but you are already making yourself guilty. ... This happens throughout the system ... you get arrested and there is already the *acuerdo*

<sup>37</sup> Oficina Nacional de Defensa Pública, *Informe Anual* 2017. República Dominicana. <https://www.defensa-publica.gob.do/transparencia/informe-anual/>

that will be. You won't even want to see the judge, because that means three months of pretrial detention and that's three months in prison. No one wants to stay in prison. So, to avoid three months or a year of pretrial detention in prison, better to do the *acuerdo*. ...

**Jennifer:** What about bail, is that an option or does it not get used much?

**Respondent:** Bail is for when you are economically solvent, and the majority of us youth here, much as we try, have no place to go to look for the money to pay a bail.

**Jennifer:** Do they ever offer a bail amount scaled to your income level?

**Respondent:** (laughing) No, no, never.<sup>38</sup>

## 4. SURVEY FINDINGS: INDIVIDUAL FACTORS INFLUENCING PRETRIAL DETENTION

### 4.1. Descriptive Findings

My survey sample includes only people who are currently incarcerated, and thus does not include the approximately half of adults in pretrial stages who are released under other measures. It includes people who are currently in pretrial detention and people who are serving a sentence.

Before looking at a multivariate analysis, the following section briefly presents some relevant simple descriptives and bivariate findings about pretrial detention.

*Measure Requested by Lawyer:* When asked about their experiences in pretrial stages (n=1039), 40.2% of respondents said their lawyer requested bail, while 21.4% said their lawyer requested pretrial detention – a surprising request coming from the defense attorney! – and 11.7% said they did not know what their lawyer requested. Only 15.5% said their lawyer requested release. Regarding the coercive measure that the judge ultimately imposed, the vast majority said they received pretrial detention: 87.1% of the total group (n=1064), with only a slightly higher proportion (90.9%) among those currently in pretrial detention versus those convicted and serving a sentence, 85.4% of whom went through pretrial detention. A striking difference involves bail: only 3.3% of the total respondents received a bail option. Of those whose lawyers requested bail in the first place, 5.8% of respondents received bail, and 90% received pretrial detention instead. Among those who are currently in pretrial detention, 3.5% said they were given bail, suggesting that they were unable to pay the amount and therefore are currently behind bars.

*Length of Time in Pretrial Detention:* The mean length of time that survey respondents – for those who are now sentenced (n=533) – spent in pretrial detention is 1.17 years, with no significant differences between people currently in new model or old model prisons. The median length of time is one year – far longer than the three months prescribed by law. The longest amount of time reported was 7 years, and 11.5% of people reported being in pretrial detention

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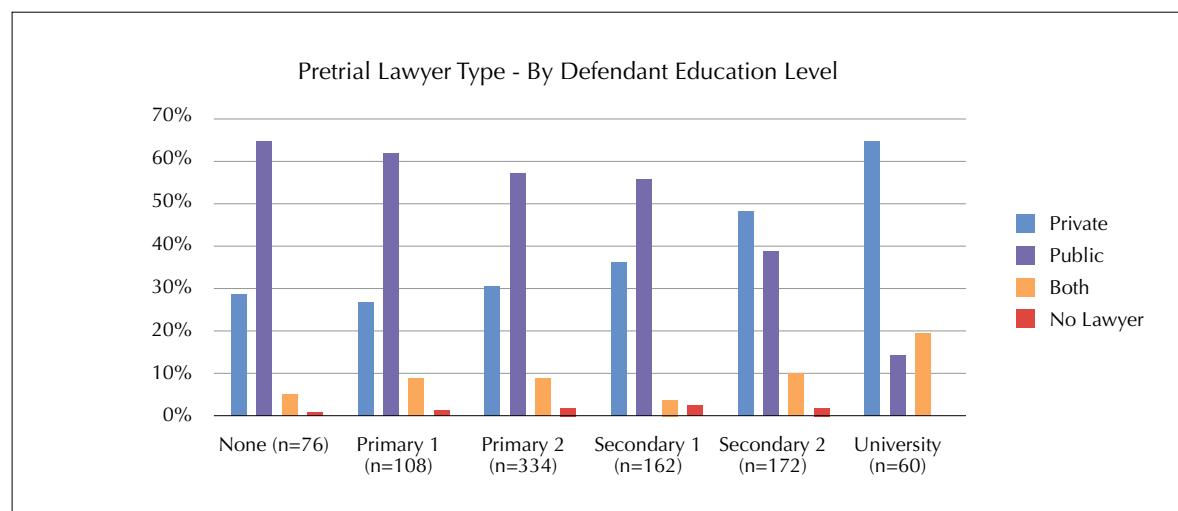
38 Comments from focus group with formerly incarcerated men (FI-FG2), facilitated by J. Peirce, September 2017.

for two years or more, while 22% reported being in pretrial detention for six months or less. People on homicide and attempted homicide charges have longer pretrial periods (1.37 and 1.36 years, respectively).

**Facility Size:** Both pretrial status and pretrial detention periods also vary significantly by facility size. The largest facilities have a disproportionate amount of pretrial detainees (57%), whereas smaller facilities hold a disproportionate amount of convicted people (68% for facilities between 100-500 people and 75% for facilities under 100 people). This is largely because, where new model facilities are available, judges tend to sentence people to them, for rehabilitative reasons (Interviews with judges, 2017-2018). Meanwhile, the single largest facility (La Victoria) holds many pretrial detainees from the capital region. Further, in my sample, the four facilities that have over 1,000 people (one of which has 9,000 people) have longer average pretrial detention periods, ranging from 1.56 to 1.15 years. Small facilities (less than 500 people) have the widest range, from 1.45 years to 0.66 years, whereas medium-size facilities cluster in the middle range of pretrial detention length. This does not reflect charge severity, as charge type is fairly evenly distributed. It may reflect more case backlog and poor coordination in the main metropolitan areas of the country, where larger facilities are located.

**Legal Representation:** Another potentially influential factor on whether or not a person is detained during pretrial is the defendant's type of defense lawyer. Conventional wisdom assumes that if a person has enough money, he or she will use a private lawyer. This appears to be the case in general terms, as in my sample, people with lower education levels (a proxy for socio-economic level) disproportionately used a public lawyer, presumably due to inability to pay a private lawyer – see Figure 4. However, among both the larger sample (currently in pretrial detention and convicted) and among the narrower sample (convicted people only), there are no significant associations between the type of lawyer and whether or not the defendant was held in pretrial detention. (Notably, the length of time spent in pretrial detention was significantly longer for people who answered that they had had both a public lawyer and a private one. This may be due to the delays and complications involved in switching legal representation.)

**Figure 4.** Pretrial Lawyer Type, by Defendant Education Level



**Source:** Data from author's survey (n=912)

## 4.2. Multivariate Analysis

This section combines some of these potential explanatory factors into a multivariate analysis, focusing on the main outcome: a decision of pretrial detention or not. To do so, a logistic regression is used, including people in the study sample who are sentenced (n=623), referring to their pretrial experiences. (The analysis excludes people currently in pretrial detention as it cannot capture those with similar legal charges who are not in detention.)

The independent variables considered in the analysis are as follows: a) type of prison (old model or new model – in lieu of facility size, as explained above), b) age of the defendant, c) type of pretrial lawyer (private, public, both, none), d) type of charge (see list in table), and e) education level (primary, secondary, post-secondary).

As noted above, Dominican social categories on race are far more fluid and subjective than in the US. While I did ask about race in the survey, I do not consider the responses to be consistent enough to be used as a predictor variable, given that respondents asked me many questions about what the categories (e.g. mestizo, Afro-descendant, white) meant and hesitated to self-identify.<sup>39</sup> Unfortunately, the data in this study did not inquire about the official reasons in the law that justify pretrial detention (i.e., whether a person is a flight risk or a public safety threat. The sample for analysis, after adding in the independent variables, is 474 individuals.

**Table 3.** Multivariate Logistic Regression: Pretrial Detention Decisions

Multivariate Logistic Regression: No Pretrial Detention (0) or Pretrial Detention (1)						
		Odds Ratio	SE	Z	p value	Conf Interval (95%)
<b>Type of Prison</b>	Old (ref)	1				
	New	1.33	0.33	1.12	0.26	0.81 2.17
<b>Age</b>	Age	1.01	0.01	0.53	0.59	0.99 1.03
<b>Type of Lawyer in Pretrial</b>	Private (ref)					
	Public	0.84	0.23	-0.62	0.53	0.49 1.45
	Both	1.25	0.55	0.51	0.61	0.53 2.97
	No lawyer	0.65	0.75	-0.37	0.71	0.07 6.31
<b>Charge</b>	homicide (ref)	1				
	att homicide	0.68	0.32	-0.82	0.41	0.27 1.72
	Drugs	0.70	0.23	-1.10	0.27	0.37 1.32
	Robbery	1.35	0.72	0.57	0.57	0.47 3.86
	Assault	0.83	0.40	-0.39	0.70	0.33 2.11
	sexual violence	0.73	0.29	-0.80	0.42	0.33 1.58
	domestic violence	1.65	1.28	0.64	0.52	0.36 7.60
	other	1.00	(empty)			
<b>School Level</b>	Primary (ref)	1				
	Secondary	1.66	0.46	1.82	0.07	0.96 2.88
	Post-Secondary	1.41	0.82	0.59	0.56	0.45 4.40
<b>N</b>		474				
<b>Pseudo R2</b>		0.02		*p<0.05		

**Source:** Data from author's survey (n=474)

39 When I add this variable into the model, it suggests that Afro-descended people are somewhat less likely to be held in pretrial detention, compared to the reference category (mestizo). However, as noted in the text, due to the problems with data collection on this variable, in this analysis the category is excluded.

In the multivariate logistic regression (see table above), none of the independent variables significantly increase the likelihood of a decision to impose pretrial detention.<sup>40</sup> The only variable that approaches significance is school level, with secondary school completers more likely than primary school completers to be in pretrial detention ( $p=0.07$ ). Interestingly, the charge type does not appear to be significantly related to pretrial detention decisions. A possible (albeit speculative) explanation might be that there is some kind of socio-economic middle ground, perhaps between less-educated people perceived as relatively harmless and the more highly educated who have access to influencing the process through illicit payments or social capital.

There are important limitations to this analysis at individual level. Most notably, this study's sample cannot compare people in pretrial stages who are in detention to those who were released under various conditions. Further, the reality is that the courts impose pretrial detention on the vast majority of cases. The main explanation for high rates of pretrial detention, therefore, does not necessarily emerge from studying variation at individual-case level. In other words, it appears that many of the extra-legal factors that influence pretrial decisions in the US and other settings – most prominently perceptions of “dangerousness” and “culpability” of a defendant based on stereotypes related to race and other individual traits – are not the primary explanation for pretrial detention rates in the Dominican system. As such, the following section turns to qualitative findings about the broader system-level dynamics that seem to generate incentives for judges to select pretrial detention, despite the existence of alternative options in the criminal code.

## 5. SYSTEM-LEVEL FACTORS INFLUENCING PRETRIAL DETENTION

### 5.1. Institutional Capacity Gaps and Delays

The most common reason provided in reports, interviews, and press coverage to explain pretrial detention is about problems or delays with the basic mechanics of case processing – due to resource constraints and lack of capacity (respondents called this “congestion”). One official first identified a data system problem: the judge’s order to release someone from pretrial detention is not immediately transmitted to a prison facility; rather there is an additional administrative document, produced by the prosecutor, that is required. The respondent elaborated on some obstacles as follows:

We [have] these coexisting “transit jails” that are often not very transitory, in the court houses and some police stations, which are a real problem. ... because it is impossible to make sure that people were taken from these court hearings directly to their prison facility. This affected [the situation]. Another issue is that the periods of time established in the law for the hearings and the [coercive] measures are not fulfilled. ...

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40 The same analysis with a multinomial outcome variable (pretrial detention compared to several alternative measures, such as house arrest, bail, and release on recognizance) produces similar results: no significant associations.

This debilitates the reform, that there is no enforcement of respecting the norms [of time limits] and the rights of these people...

Delays are also due to an unacceptable situation, which is when a judge decides [to release from pretrial detention], the prosecutor says that he has to go check whether the defendant has other pending charges. But they have been investigating this person for two and a half years on average, in the best scenario and you can't tell me that the day the judge decides to free them, that's when they [prosecutors] go to check for other cases. This should be considered misconduct by the prosecutor. This is a problem.<sup>41</sup>

In my survey, I asked about *re-envíos*, or the number of times a person was remanded to pretrial detention to await another hearing or stage in the case. Typically, each *re-envío* results in three more months of pretrial detention, although this varies by the nature of the case. The median number of *re-envíos* is 4, with the mean being 6. In conversations, numerous prisoners told me that these delays were due to the absence of a key actor – such as a prosecutor or a witness – or to missing documentation or other basic elements, rather than substantive complications in the investigation. As one prisoner told me, if the lawyers don't all show up with the right documentation to the hearing, "they give you three months [pretrial detention], and I'm going on eight months now."<sup>42</sup> The director of a major NGO said that when delays in the prescribed periods are not justified, the defendant should be released on *habeas corpus* grounds, but that this rarely happens.

Advocates for defendants highlight problems with logistics and basic resources. The director of the Prisons Commission at the Public Defenders' Office identified insufficient vehicles, drivers, and gasoline as a principal reason that defendants miss court hearings – "even when the system claims to want to resolve this situation."<sup>43</sup> Another advocate pointed out the excessive caseload of public defenders:

"For example, most public defenders have up to 500 cases at a time, so in jurisdictions where you need 30, 40, 50 attorneys you only have 10 or 15, and so even if they are the best, they resign, because the work conditions are nearly unsustainable ... carrying 500 criminal case files is almost humanly impossible"<sup>44</sup>

The Attorney-General's Office has implemented some tracking and oversight mechanisms to reduce these types of case backlogs and delays.<sup>45</sup> One of these initiatives is to identify Haitian citizens (who make up 10% of the prison population) and to connect them with services provided by their Embassy to advance their cases, which are often stuck due to problems with

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41 Interview with former government official and current NGO staff (NGO10), interviewed by J. Peirce, December 2017.

42 Prisoner, in a focus group by J. Peirce, August 2018.

43 Written correspondence with staff member of Commission (GPD3), by J. Peirce, November 2017.

44 Interview with advocate, Interviewed by J. Peirce, June 2017.

45 Espinoza, "Sistema Penitenciario En Republica Dominicana: Revisión Normativa e Institucional. [Dominican Prison System: Review of Laws and Institutions]."

language translation and lack of identification documents.<sup>46</sup> The slight downtick in pretrial detention rates for 2018 compared to 2017 may be a positive first sign of impact.

In interviews, judges and prosecutors said they do not trust their own law enforcement institutions to produce an accused person on the day of hearing. For this reason, some prosecutors told me they try to find ways to keep people in the temporary holding cells in the courthouse, because they have a better chance of finding the right person for the right hearing if he is “on site.” Another judicial system official told me,

“It isn’t enough if you give me six alternative coercive measures to pretrial detention and I do not have the institutional capacity to locate and bring a person to the court effectively ... The prosecutor knows this and tries to cover the risk, he says better to deny [release] than to risk losing the entire case.”<sup>47</sup>

The weakness of community supervision services, which in practice consists in the local court office keeping an updated address and phone number and logs of monthly or weekly sign-in visits, means that prosecutors cannot rely on these colleagues to ensure that the person shows up at court on the right day. There are no data on court appearance rates, much less an analysis of whether non-custodial pretrial options alter such rates. In this context, the only alternative pretrial measure that prosecutors and judges trust is electronic monitoring – “technology can’t fail you like humans can” said one – but this is not widely available.

## 5.2. Judicial Discretion

Judges must assess the legal considerations – risk of flight and public safety threat – based on their own discretion. Generally, they base this decision on the charge type and a loose assessment of whether a person is a “hardened criminal” (as one lawyer put it). Several prosecutors said they try to push judges to send people with more severe charges to new model CCR facilities, in order to ensure greater state control over these prisoners, and to allow people in pretrial detention to have certain “liberties” – alluding to access to cellphones and unregulated visits – in the old model prisons. These comments suggest that justice system actors make a series of assumptions about a person’s criminal propensity and about the risks he may face inside prison, as part of their decisions. But, importantly, they assess these questions similarly be it for pretrial detention decisions or for sentencing decisions, which reinforces research suggesting that they see pretrial detention as a first phase of a sentence, rather than a period requiring different conditions for people with a presumption of innocence.

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46 Interview with Embassy representative (INT1), Interviewed by J. Peirce, January 2018, and Interview with Government Official, judge (GJ4), Interviewed by J. Peirce, February 2019.

47 NGO staff member (NGO10), Interviewed by J. Peirce, December 2017.

### 5.3. Inaccessibility of Cash Bail

Although the cash bail system has come under significant criticism in the US for holding people due to inability to pay rather than their actual risk of not appearing in court,<sup>48</sup> the bail option is only in moderate use in the Dominican Republic. According to the Public Defenders Office report, about 30% of defendants were offered bail in 2017, but only two out of three of those defendants were able to pay this bail. Of course, some people accused in high-profile cases pay very high bail amounts and can afford to do so – for example, notorious white-collar crime cases pay 5-15 million pesos [US \$100,000 - \$300,000].<sup>49</sup> But, of course, the vast majority of defendants do not have this level of economic resources, not even through a family member or guarantor. As the director of one major human rights NGO put it,

"Most people in prison are from poor social sectors, so you have 1500 to 2000 people who cannot pay 400 or 700 pesos [US \$8-14], and you have the prosecutors sending people to prison for 500 pesos [US \$10], meanwhile the Dominican state has to provide them basic food, three meals a day, and lodging there, plus security. That means the state is investing and spending more, and I tell the people from the Attorney General's Office and judges, what are you doing sending someone to prison on 2000 pesos [US \$40] bail?"<sup>50</sup>

This NGO director said that the majority of these 1500-2000 prisoners, incarcerated because they can't pay bail often spend longer in pretrial detention than their ultimate prison sentence, if they are convicted, as they are typically facing minor charges.

In my interviews with current and former prisoners, when I raised the question of bail, most of them responded that they would not even bother to request this, since they have minimal or zero ability to pay. Their calculation of options is between pretrial detention awaiting trial and taking a plea deal, which typically entails a combination of prison time and probation time served in the community. Many people responded to my questions about bail with a version of "Why are you asking me that?" or "That is only for wealthy people." When I asked defense lawyers about this, they said that some people do not even realize that a bail amount was set on their case, as the possibility of paying it is entirely abstract.

Of course, any expansion of cash bail in the Dominican system would be vulnerable to similar problems as those faced by the US system, particularly if judges do not have the tools for determining ability to pay or do not face oversight for setting bail at appropriate levels.

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48 Léon Digard and Elizabeth Swavola, "Justice Denied: The Harmful and Lasting Effects of Pretrial Detention," *Vera Evidence Brief* (New York: Vera Institute of Justice, 2019), <https://storage.googleapis.com/vera-web-assets/downloads/Justice-Denied-Evidence-Brief.pdf>.

49 This was the bail amount set for some defendants in the major Odebrecht corruption scandal, in 2017, after a brief period of pretrial detention. The defendants paid this bail and are currently awaiting trial. <https://www.diariolibre.com/actualidad/justicia/acusados-de-sobornos-en-el-caso-odebrecht-saldrian-hoy-de-la-carcel-de-najayo-KK7590693>

50 Interview with NGO representative (NGO3), interviewed by J. Peirce, June 2017.

One advocate suggested that a defendant could promise community service (labor) in lieu of paying bail. Another suggested contracting pretrial supervision out to community-based organizations (similar to pretrial services in the US).

#### **5.4. Penal Populism**

Public pressure on judicial actors to make punitive decisions against defendants was the most common theme in my interviews on pretrial detention. Such attitudes are also commonly held by judges and lawyers themselves. In written correspondence, a lawyer advocating for prisoner rights said that the prevalent attitude among prosecutors is, "Lock him up and investigate later [tráñquelenlo, y después se averigua]."<sup>51</sup> Three interviewees used the term "the criminal law of the enemy" [*derecho penal del enemigo*], describing this idea as the state's obligation to treat any accused person as a serious threat or enemy (like a *narco* or murderer, said one) and to exert control over this person at all costs. One professor said that the Dominican justice system is still affected by the legacy of authoritarian dictatorship.<sup>52</sup>

One prosecutor told me, with a regretful look on his face, "I know the system does not work, so I seek *acuerdos*. The public perception is that if the person is in prison, the issue is resolved."<sup>53</sup> A public defender characterized the attitude as the opposite of the presumption of innocence, "If you are being investigated, they treat you as a delinquent ... It is not called "to suffer a sentence" (*sufrir una pena*) for nothing."<sup>54</sup> A prison system leader said that the generalized attitude towards pretrial detention is that it is an "anticipated punishment or sentence."<sup>55</sup> because people believe that the "real" punishment is unlikely to occur due to the system's weakness and corruption.

Media pressure is an additional exacerbating factor. The interviewees in my study talked almost exclusively about media pressure on prosecutors and judges in specific cases, not in general punitive terms. More concretely, they noted that the media put a negative spin on a judge granting anything other than pretrial detention, a harsh sentence, or deny parole. Indeed, the Attorney-General's Office publishes that it has "won" or "secured" or "achieved" pretrial detention in a particular case on its website and social media nearly every day – implying that this is a positive achievement by the government, rather than a neutral, risk-based assessment by an independent judge.

A justice ministry official said, "Now with social media anything a person or prosecutor or judge says comes out in the media ... Because when the judge understands that there are crimes that can be managed with other measures that aren't pretrial detention, but still society demands that it be prison."<sup>56</sup> A judge who had direct experience with media backlash said,

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51 Interview with academic (ACAD1), interviewed by J. Peirce, September 2017.

52 Interview with government official, prosecutor (GMPFis1), interviewed by J. Peirce, Oct 2017.

53 Interview with public defender (GPD4), interviewed by J. Peirce, October 2017.

54 Interview with government official, prison system (GPHQ-T5), interviewed by J. Peirce, January 2018.

55 Interview with government official, judge (GJ4), interviewed by J. Peirce, December 2017.

“Penal populism is the religion of the 21<sup>st</sup> century. We judges free fewer people … The press talks and we are careful not to fall under public scrutiny … They want us to imprison everyone.”<sup>56</sup>

This punitiveness sometimes extends to white-collar or political crimes or upper-class people who are accused – as demonstrated by the widespread public marches against corruption (*la Marcha Verde*) in 2017 and 2018. But on the whole, penal populism emphasizes the problem of street crime and violent crime. “The other kind of criminality goes untouched,” said one Dominican academic analyst, and this leads to the “prisonization” of the popular classes.<sup>57</sup> Human rights advocates and civil society representatives in my interviews uniformly upheld more education and public knowledge about the principles of the criminal code and due process protections as urgently needed. “There is no clear public policy from the Attorney General’s Office about its constitutional role, and another issue is the implementation of the rights of people in the Constitution. It’s not clear that prisoners have dignity, that they are people, and that the state through its legal coercive capacity can imprison them. And that despite having a public defender, the system is not efficient.”<sup>58</sup>

## CONCLUSION

This paper has outlined the extent and features of pretrial detention in the Dominican Republic, including its growth over a period of seemingly-progressive reform in the prison system under the New Prison Management Model. So, even though a third of the prison population now enjoys the benefits of the New Model’s facilities, twice as many people are now in the old model facilities. This in and of itself severely constrains the system’s ability to provide adequate amenities and services to more incarcerated people, and it requires a stretching of budgets to cover more individuals. The most significant contributor to this increase is the steady rise in pretrial detention since 2005 – despite the adversarial judicial system reform’s purported goal to reduce pretrial detention.

As revealed by the data from official and NGO sources, as well as my survey findings, judges opt for pretrial detention as the most common pretrial measure, rather than the least common, with the average stay extending over triple the prescribed three-month limit. However, contrary to research from the US and other Global North countries, the choice of whether to send someone to detention or not does not appear to be explained by legal factors such as charge or by individual extra-legal factors like type of lawyer or education level. (One of the most salient factors in US research, race, is a fuzzier category in the Dominican context in a social sense, and self-reported race categories are not as clear-cut.)

Instead, the explanation might be rooted in broader system-level issues. Although this study does not permit a quantitative analysis of these factors, qualitative data reveal some pathways for further research. Based on analysis of interviews with incarcerated people and system actors, the primary reasons that judges impose pretrial detention in most cases include: institutional

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56 Interview with government official, judge (GJ7), interviewed by J. Peirce, November 2017.

57 Interview with academic (ACAD1), interviewed by J. Peirce, September 2017.

58 Interview with NGO representative (NGO9), interviewed by J Peirce, October 2017.

capacity gaps, inaccessibility of cash bail, and the non-feasibility of other alternative measures, judicial assumptions, and penal populism.

The purpose of this article is not to analyze the larger impacts of the over-use of pretrial detention. Looking ahead, however, further research on the link between excessive pretrial detention and the overall functioning and legitimacy of the judicial system is important. Anecdotally, people in this study spoke bitterly about their experiences with police and with attorneys and judges who were dismissive of the defendants' real-life circumstances. They also complained about the conditions of courthouse holding cells and about having to deal with overworked public defenders. Thus, excessive pretrial detention might also affect broader support for the rehabilitation-oriented reforms that the New Model is promoting.

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