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From issue: **Natural Resource Extraction in Latin America** (Winter 2013)

■ AQ FEATURE

Prisons: In Jail, But Not Sentenced

BY [Richard M. Aborn](#) and [Ashley D. Cannon](#)

Millions of people languish in miserable conditions in prisons across the Americas, awaiting trial. (Video interview available.)

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Each year, millions of people across the world find themselves in jail without being convicted of anything—often for months at a time—as they await trial. Alarming, although the rights to liberty, security and equal justice under the law are cornerstones of justice systems throughout the Americas, pretrial detention is being employed at rates two to five times greater than the international average, and its use continues to grow unabated.

The impact of this unfair, harmful and inhumane practice spreads beyond the detainee to families, communities and government itself.

Pretrial detention serves an important purpose in the judicial process, but in practice its excessive and arbitrary use traps innocent people in a legal limbo, stretching the capacity of already-overcrowded prisons and undermining respect for the criminal justice system.

Differing legal definitions complicate efforts to measure and compare pretrial detention practices across national jurisdictions. The conditions under which detainees are held also vary widely, ranging from police station holding cells to prisons. Moreover, the lack of government transparency makes it hard to get reliable data. Nevertheless, there are multiple ways to estimate the extent of the use of pretrial detention, including the total number of pretrial detainees; the proportion of the total prison population who have not been convicted; and the number of pretrial detainees as a proportion of the general population.

On any given day, in the majority of countries in the Western Hemisphere, the total pretrial detention population averages below 20,000 people. The countries with the highest estimated pretrial detention populations on an average day are, not surprisingly, those with the largest general populations. The United States heads the list with 487,000, followed by Brazil (190,000), Mexico (98,000), Peru, Colombia and Argentina (31,000–34,000), and Venezuela (29,000).¹

As a result of these high pretrial detention rates, 10 to 40 percent of the entire incarcerated population is behind bars without a conviction in most countries in the Americas. The highest proportion of pretrial detainees among the total prison population is in Bolivia (83.6 percent), followed by Paraguay (71.2 percent), Haiti (67.7 percent), Venezuela (66.2 percent), Dominican Republic (64.7 percent), Uruguay (64.6 percent), Panama (60.8 percent), Peru (58.6 percent), Guatemala (54.4 percent), Argentina (52.6 percent), and Honduras (50.1 percent).²

Another way to measure where pretrial detention is highest is to estimate the rate of pretrial detention as a proportion of the general population. This provides a standardized comparison across countries of varying sizes, and is not altered by changes in the sentenced prison population. Here, several countries far outpace the global average of 40 pretrial detainees per 100,000 in the general population. Panama (223) heads the list, followed by Uruguay (180), the U.S. (157), the Dominican Republic (136), El Salvador (113), and Peru (111).³

In most jurisdictions in the Americas, authorities are required by law to bring an arrested individual before a judicial officer within 24 to 72 hours of arrest. If the accused is not released on personal recognizance or cannot afford bail, the individual may spend months in detention while his or her case is pending.



Illustration by Luba Lukova



Devastatingly, in some countries (including Bolivia, Argentina, Panama, and Paraguay), human rights organizations and government reports have found that detainees can spend long periods in detention awaiting even having charges filed against them. In Bolivia, which has the world's second highest proportion of pretrial detainees among the total prison population, an estimated 75 percent of detainees were held in excess of the 18-to-36-month limits established by law for pretrial

detention.⁴ In Argentina, where the law permits investigative detention for up to two years, detainees can wait three to six years before being tried.⁵ The causes of these violations range from judicial corruption and limited and overburdened public defenders to inadequate case tracking, according to the U.S. Department of State.⁶

In Panama, which has the world's highest pretrial detention rate in the world, prolonged detention without a hearing is common. Detainees may wait over a year for a hearing due to inefficiencies in the legal system and the use of a written inquisitorial system.⁷ In Paraguay, where the law permits detention without trial until the accused completes the minimum sentence for the alleged crime, pretrial detention may range from six months to five years.⁸

Many people who have spent time in detention may eventually be acquitted or released without a trial. Others may be convicted of low-level crimes that do not carry a prison sentence or receive sentences for terms of imprisonment less than the period they spent in detention.

In the U.S., which has the largest pretrial detention population in the world, 20 percent of detainees

eventually had their case dismissed or were acquitted.⁹ After the long wait for a trial in Argentina, 30 percent of detainees were acquitted.¹⁰ In Mexico, 14 percent of detainees were acquitted; of those who were convicted, 85 percent received sentences of less than five years, meaning that their detention exceeded the sentence.¹¹

The experience of detention can bring lasting damage to the detainee. The loss of liberty and security, and being cut off from friends and family can result in lasting psychological impact.¹²

Further, exposure to violence among detainees, threats of violence from other inmates and even guards and direct violence ranging from acts of humiliation to physical violence or sexual assault also often traumatize individuals.¹³ Inmates in Bolivia have reportedly been forced to pay other inmates a “life insurance” fee to stop beatings and torture.¹⁴ The U.S. has estimated that at least 13 percent of inmates have been sexually assaulted.¹⁵

The Impact beyond the Cell

Pretrial detention affects all members of society—detainees, their families and the larger community—resulting in a broad range of personal, social and financial costs. Ironically, pretrial detention has an undesirable impact on factors that have been found to correlate with future criminal offenses—future employment and socializing with criminals.¹⁶

Detention can cause lost wages or loss of employment, which carries severe collateral consequences for the individual, his or her family, and society at large. The loss of income and the ability to support family members or pay for housing may drive some individuals to criminal activity.

It also creates a vicious circle: many of those caught in pretrial detention are already poor and unable to afford bail, which further hampers their ability to obtain legal counsel that can help them negotiate the pitfalls of the judicial system.¹⁷ For example, in Bolivia, an estimated 70 percent of detainees could not afford legal counsel.¹⁸ The amount of income lost by pretrial detainees has been estimated at 1.3 billion pesos (approximately \$100 million) in Mexico (2006);¹⁹ and almost 40 million pesos (over \$10 million) in Argentina (2009).²⁰

Research also indicates that pretrial detention increases the likelihood that a person will be convicted, and increases the probability that a person will be sentenced to prison.²¹

The effects of pretrial detention on justice appear the same even after controlling for factors such as the seriousness of the charges, prior convictions and evidence against the defendant.²² The explanations for this include the inability of a defendant to present himself in a favorable manner, a lack of legal advice, system inefficiencies, and allegations of bias or corruption.²³ Moreover, detainees do not have the opportunity of advocating to the court that they should remain in the community, for example, by getting or keeping a job, maintaining or reestablishing family ties, participating in treatment programs, and developing a record of complying with the conditions of release.²⁴

A Way Out

There are measures that governments and legal practitioners can take to reduce this heavy burden on society—to make detention fairer, less harmful and more humane. Reducing the numbers of those in pretrial detention and the time they spend in jail waiting for trial doesn't necessarily require the revision of existing laws. It can be accomplished through adjustments to existing procedures and institutions—and it invariably means rethinking the current approach to crime and punishment in many countries.

A critical first step is to ensure access to legal assistance for all defendants, including immediately informing detainees of their rights. Several jurisdictions (such as England and Wales, Ukraine, Nigeria, and Malawi) now assign lawyers, paralegals or law students to police stations and/or to detention facilities to advise detainees of the charges, the potential consequences, and how to acquire legal representation. Other jurisdictions provide free access to a lawyer through a legal aid authority so the defendant has representation before the court. Legal counselors must also have access to the detainee so that the accused can assist in their own defense.

Here are seven additional ways to begin to address the challenge of excessive pretrial detention.

1. Collect sufficient data to understand the full picture before pursuing change

The consequences of pretrial detention are easy to generalize across jurisdictions; however, the causes are not. Justice systems comprise many agencies influencing various decision points. Reformers should start by gathering data from each decision point of the system, capturing information about who is in the system and why. Collecting detailed information about each offender, such as education level, employment status and marital status, in addition to relevant case information, can help inform where resources should be allocated and which offenders can be safely supervised in the community.

Once data are pieced together to provide a complete picture of the justice system, reformers can identify problem areas and focus on solutions. For example, data collection and analysis enabled reform of New York City's juvenile detention policies and practices. By collecting data ranging from prior criminal history to school attendance and parental involvement in the court process, researchers from the Vera Institute of Justice and

New York City government officials identified the factors that correlated with failure to appear in court and re-arrest.

They were able to develop and implement a pretrial risk assessment instrument to inform judicial detention decisions, and a continuum of community-based alternative detention options appropriate for each risk level.²⁵ Such pretrial risk assessments models are now operating in a number of county and state court systems across the U.S. Moreover, many U.S. jurisdictions use the data to help shape legislative changes or programmatic investments designed to promote fairness in the criminal justice system.

2. Use the pretrial period as an opportunity to meaningfully intervene in the lives of offenders

The period between arrest and sentencing provides a unique opportunity to identify and address the underlying needs that brought the offender into the justice system. Too often, jails and prisons across the Americas have become warehouses for individuals who are undereducated, unemployed, addicted to controlled substances, and/or have medical or mental health needs. Seizing the opportunity to identify these needs and connecting individuals to social services early in the case process provides the opportunity for a swift intervention.

And by speeding up the process by which the accused is brought to trial, such a system also provides a

strong incentive for individuals to comply. This swift intervention is particularly valuable when working with youth, who often lack the mental capacity to understand long-term consequences. By implementing an intervention shortly after the criminal activity, the chances are improved that a young person will connect the response with his or her behavior.

3. Start planning for release early

Nearly all offenders who are incarcerated eventually return to the community. Offenders may have underlying needs that drove them to commit a crime. To help keep them from re-offending, transition planning should be provided to detainees and their families to ensure they are connected to services and support systems available in the community—a process that can take days or weeks (or longer). Planning for this transition should start when an individual begins his or her detention; it should not wait until the end of the detention period or after release.

4. Improve conditions of confinement

Overcrowding exacerbates the risks inherent in correctional facilities and jeopardizes the safety of both inmates and correctional officers. If necessary, after analyzing data, detention facilities should be expanded or remodeled to mitigate overcrowding and improve conditions. This will require governments and public officials to dedicate more resources and attention to address what—in many countries—are horrific prison conditions.

In planning for expansion, officials should also consider additional space to provide services that address the needs of the detainee population (such as medical care, educational programs and/or job training). Emerging research indicates that inmates who maintain contact with supportive family members while incarcerated fare better when released.²⁶ To support this contact, space for inmates to meet with their families, as well as legal counsel, should also be a part of construction plans.

5. Collaborate

The justice system involves many different agencies and has contact with individuals with a broad range of needs. Reformers should engage government officials, practitioners, researchers, policymakers, and NGOs from within the system and from associated fields such as public health, anticorruption and socioeconomic development to develop strategies and build consensus. These partnerships can not only help to achieve legislative reforms, but can also support the development and implementation of institutional programming and services, transition planning, and coordination of community-based referrals.

6. Experiment

Given the novelty and multifaceted nature of this issue, reformers need to be willing to try different options through small-scale pilot projects, and to explore examples from other jurisdictions. Knowledge of their efforts and results can help reformers overcome challenges that at the beginning may seem insurmountable, and potentially inspire new strategies. Whether reformers choose to replicate existing programs or develop a new concept, testing pilot programs can save money and enable communities to measure the impact before investing in a large-scale change.

7. Reinvest savings

Detention (either pretrial or following conviction) is expensive. For example, in Mexico the annual direct

cost in 2006 of pretrial detention was estimated at 5.8 billion pesos (\$454 million);²⁷ in Argentina it totaled 294 million pesos (\$75 million) in 2009.²⁸ The consequences of detention result in added costs to society, compounding the already great expense. Every tax dollar spent on incarceration can mean less money spent on services correlated with reducing crime (such as social services, health, housing, and education).

Reducing the use of pretrial detention could allow funds to be redirected to crime prevention and other areas proven to enhance public safety.

By making pretrial detention fairer, less harmful and more humane, we can better serve justice, protect basic human rights and build safer communities. But swift action is needed so another generation of our youth is not lost to the ill effects of extended and often unnecessary time behind bars. A fundamental rethinking of how our justice systems approach unconvicted detainees will save lives and money in the long term.

[View Endnotes](#)

Click on the table below for an expanded view.

TABLE 1

Data Indicators by Country (GENERAL POPULATION OVER 1 MILLION)

COUNTRY	GENERAL POPULATION (IN MILLIONS) ¹	TOTAL PRISON POPULATION (INCLUDING PRETRIAL DETAINEES) ²	PRETRIAL DETAINEES (PERCENT OF TOTAL PRISON POPULATION) ³	ESTIMATED PRETRIAL DETAINEE POPULATION ⁴	ESTIMATED PRETRIAL DETENTION RATE (PER 100,000 GENERAL POPULATION) ⁵	PRISON OCCUPANCY LEVEL ⁶ (PERCENT) ⁷
NORTH AMERICA						
Canada	33.4 (2008)	39,099 (2009)	37.0% (2009)	14,467	43	96.4% (2009)
United States	310.6 (2010)	2,266,832 (2010)	21.5% (2010)	487,369	157	106.0% (2010) ⁸
Mexico	115.5 (2010)	237,580 (2012)	41.3% (2012)	98,121	85	126.3% (2012)
CENTRAL AMERICA						
Costa Rica	4.8 (2012)	14,842 (2012)	21.7% (2012)	3,221	68	117.0% (2012)
El Salvador	6.3 (2010)	26,639 (2012)	26.7% (2012)	7,113	113	253.5% (2009)
Guatemala	14.7 (2011)	12,835 (2011)	54.4% (2010)	6,982	47	184.0% (2011)
Honduras	7.8 (2011)	12,336 (2011)	50.1% (2010)	6,180	80	143.0% (2011)
Nicaragua	5.9 (2011)	7,200 (2011) ⁹	21.2% (2008)	1,526	26	128.0% (2010)
Panama	3.6 (2011)	13,069 (2011)	60.8% (2010)	7,946	223	178.0% (2011)
CARIBBEAN						
Dominican Republic	10.0 (2011)	20,969 (2011)	64.7% (2010)	13,567	136	183.8% (2010)
Haiti	9.76 (2011)	7,009 (2011)	67.7% (2010)	4,745	49	335.7% (2009)
Jamaica	2.7 (2009)	4,500 (2011)	11.4% (2009)	513	19	110.9% (2007)
Puerto Rico (U.S.)	4.0 (2008)	12,130 (2008)	15.7% (2006)	1,904	48	87.9% (2007)
Trinidad and Tobago	1.4 (2012)	3,500 (2012)	29.4% (2012)	1,029	76	84.0% (2010)
SOUTH AMERICA						
Argentina	40.9 (2010)	59,227 (2010)	52.6% (2010)	31,153	76	101.0% (2010)
Bolivia	10.3 (2011)	11,516 (2011)	83.6% (2011)	9,627	94	185.1% (2010)
Brazil	198.1 (2011)	514,582 (2011)	36.9% (2011)	189,881	96	167.9% (2011)
Chile	17.4 (2012)	50,485 (2012)	22.1% (2012)	11,157	64	138.3% (2011)
Colombia	47.7 (2012)	111,979 (2012)	29.6% (2012)	33,146	70	148.0% (2012)
Ecuador	13.8 (2010)	11,800 (2010)	46.0% (2009)	5,428	39	139.2% (2010)
Paraguay	6.4 (2009)	6,300 (2011)	71.2% (2009)	4,486	71	118.9% (2011)
Peru	30.1 (2012)	57,221 (2012)	58.6% (2012)	33,532	111	199.7% (2012)
Uruguay	3.4 (2012)	9,450 (2012)	64.6% (2012)	6,105	180	119.9% (2012)
Venezuela	29.2 (2010)	43,461 (2010)	66.2% (2010)	28,771	99	117.4% (2005)

For notes on the table above, see: www.americasquarterly.org/prisons-in-jail-but-not-sentenced-table[View Table Endnotes](#)Watch an [AQ Q&A](#) with Richard Aborn below.

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