BAIL AND MASS INCARCERATION

Samuel R. Wiseman[*]

It is widely known that the United States has the highest incarceration rate in the developed world, and the causes and ramifications of mass incarceration are the subject of intense study. It is also increasingly widely recognized that the high rates of pretrial detention, often linked to the use of money bail, are unjust, expensive, and often counterproductive. But, so far, the links between money bail, pretrial detention, and mass incarceration have been largely unexplored. Our criminal justice system relies primarily on plea bargains to secure convictions at a relatively low cost. And, as shown by recent empirical work, the bail system, which results in high pretrial detention rates for indigent defendants, plays a significant role in incentivizing quick pleas, and leads to more convictions and longer sentences. Releasing more defendants pretrial would generate more pretrial motions, lengthier plea negotiations, and more trials, and would thus raise the cost—in the form of prosecutors, public defenders, and judges—of convictions and imprisonment. In other words, if we release significantly more defendants pretrial, we will have to either spend more on criminal justice or convict fewer people and punish them less severely. In addition to inducing quick, inexpensive guilty pleas from defendants unable to post bond, money bail also plays a more subtle role in sustaining high incarceration rates. Money bail, by its very nature, discriminates based on wealth, and thus provides a built-in sorting mechanism—politically weak low-income defendants are pushed into the quick-plea process, while wealthier defendants are able to obtain

[*] McConnaughhay and Rissman Professor, Florida State University College of Law. J.D. Yale Law School, B.A. Yale University.

release and the increased access to more robust process that it affords. If politically better-represented wealthy and middle-class defendants were detained, and thus subjected to at least some of the same pressures to plead guilty as indigent defendants, there would, in all likelihood, be more demand for reform.

This Article explores the role of bail in mass incarceration, concluding that opponents of mass incarceration should pay increased attention to the pretrial process as a locus of reform. Relatedly, it analyzes the likely impact of the bail–plea bargain link on future bail reform—which, of course, serves important interests beyond reducing the prison population, such as fairness and the avoidance of wrongful convictions.

TABLE OF CONTENTS

I. INTRODUCTION

The movement for reforming the U.S. bail process—a system in which thousands of non-dangerous, low-income defendants are jailed pretrial simply because they cannot afford bail[1]—is gaining momentum. A recent federal appellate panel held that Houston's money bail system violates due process and equal protection rights,[2] and similar legal arguments have succeeded in local and federal courts around the country—most recently in California.[3] These decisions build upon a growing number of legislative bail reforms.[4]

These changes are important for the defendants who are able to avoid jail as a result of them and the changes will likely have an impact far beyond the pretrial process. Bail reform could be a useful tool in the largely unsolved crisis of U.S. mass incarceration.[5] Recognizing the effect that bail reform could have on mass

---

[1] *See* THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 214994, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1 (2007), http://bjs.gov/content/pub/pdf/prfdsc.pdf (showing that five out of six defendants who are jailed pretrial are in jail because they could not afford the bail amount set).

[2] *See* ODonnell v. Harris Cty., 892 F.3d 160–163 (5th Cir. 2018).

[3] *See* Bob Egelko, *Court ruling could change state's approach to bail*, S.F. CHRON. (Jan. 25, 2018), https://www.sfchronicle.com/bayarea/article/Court-ruling-could-change-state-s-approach-to-12526554.php (describing a state appeals court ruling invalidating detention of a defendant who stole a $5 bottle of cologne and could not afford the $350,000 bail set in his case).

[4] In 2017, New Jersey implemented an ordinance and constitutional amendment that substantially expanded pretrial release. *See* N.J. CONST art. I, para. 11, *amended by* N.J. Pretrial Detention Amend., Public Question No. 1 (2014) (amending the state constitution, which previously required courts to grant bail and limited other pretrial options); N.J. STAT. ANN. § 2A: 162-15 (West 2018) ("Monetary bail may be set for an eligible defendant only when it is determined that no other conditions of release will reasonably assure the eligible defendant's appearance in court when required."). In 2018, Atlanta joined the ranks of large metropolitan areas that have instituted similar reforms. ATLANTA, GA., ORDINANCE 18-O-1045 (Feb. 6, 2018) (eliminating cash bond requirements for pretrial release); Rhonda Cook, *Atlanta mayor signs new ordinance changing cash bail system in a nod to the needy*, ATL. J.-CONST. (Feb. 5, 2018), http://www.myajc.com/news/local/atlanta-council-oks-changes-cash-bail-system-nod-the-needy/SW50dABJAtWgBwpB4vtgBN/; *see also* Press Release, Laura and John Arnold Found., *More than 20 cities and states adopt risk assessment tool to help judges which defendants to detain prior to trial* (June 26, 2015) http://www.arnoldfoundation.org/more-than-20-cities-and-states-adopt-risk-assessment-tool-to-help-judges-decide-which-defendants-to-detain-prior-to-trial/ (describing cities and states that apply sophisticated predictive models to assess defendant's likely dangerousness and flight risk, which increases the number of defendants released pretrial).

[5] *See infra* Part II (discussing the empirical literature that shows the link between the bail system and mass incarceration).

incarceration also has important political and economic implications for future reform efforts and the scholarly literature in these areas.

The U.S. has the highest incarceration rate in the developed world, and the causes and ramifications of mass incarceration are the subject of intense study.[6] It is also increasingly recognized that the high rates of pretrial detention in many jurisdictions, often linked to the use of money bail, are unjust, expensive, and often counterproductive.[7] But, so far, the links between money bail, pretrial detention, and mass incarceration have been largely unexplored.[8] The bail system plays an important role in keeping the wheels turning in the larger criminal justice bureaucracy, which, as Rachel Barkow notes, was built up when violent crime rates were

---

[6] *See, e.g.,* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION – AND HOW TO ACHIEVE REAL REFORM 6 (2017) (noting that high incarceration rates are driven by an "increased rate at which people get sent to prison in the first place" due in large part to "prosecutorial toughness" in charging decisions); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6-8 (2010) (discussing the War on Drugs, its racial dimensions, and its impact on mass incarceration); CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS xii (2000) (noting that the criminal justice buildup occurred first "in response to racial upheaval and political rebellion," then as a means of managing economic "inequality and surplus populations").

[7] *See, e.g.*, Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713 (2017) (describing the serious consequences of pretrial detention, including, for example, loss of employment and child custody); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1416–37 (2017) (providing comprehensive documentation of similar consequences to defendants and to society); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1320–21, 1363 (2012) (describing how pretrial detention causes nonviolent offenders to become dangerous, among other problems); Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 368–69 (1990) (describing a variety of negative effects of pretrial detention); Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1353–58 (describing impacts on defendants, their families, and society).

[8] Discussions of bail reform and incarceration have tended to focus on the direct reduction of the number of inmates in jails and prisons that results from shrinking pretrial detention rates. *See, e.g.*, Alexander Shalom, *Bail Reform as a Mass Incarceration Reduction Technique*, 66 RUTGERS L. REV. 921, 927 (2014) (discussing how reducing the New Jersey pretrial detainee population by 20% would "represent a nearly 6% reduction in the total incarcerated population in the state"). Many discussions also focus on the link between pretrial detention and conviction, but they do not tend to directly discuss the contributions of pretrial detention to mass incarceration and the potential for bail reform to reduce the mass incarceration problem. For discussion of the pretrial detention-conviction link, *see infra* Part II; SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK 87 (noting that "pretrial detention may be the crucial factor leading to a conviction or the direct cause of prison sentences").

high.[9] This system remains stubbornly in place, causing the U.S. to incarcerate more offenders, including many charged with drug and similar non-violent offenses, despite the significant social and financial costs of the system.[10]

Most convictions obtained in the U.S. are misdemeanor convictions,[11] which result in fees and often incarceration.[12] Moreover, a prior misdemeanor conviction followed by additional convictions can lead to a felony conviction and longer sentence.[13]

The vast majority of misdemeanor and felony convictions are obtained through plea bargains.[14] An under-appreciated driver of this chain of events is the U.S. approach to bail, which generates high pretrial detention rates and plays a significant role in incentivizing quick pleas.[15] The effect of bail on plea bargains and

---

[9] Rachel Barkow, *The Criminal Regulatory State*, *in* THE NEW CRIMINAL JUSTICE THINKING 33, 33–36 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

[10] *Id*. at 35–36.

[11] *See* Alexandra Natapoff, *Misdemeanors,* 85 S. CAL. L. REV. 1313, 1314–15, 1320–21 (2012) (observing that the individuals serving time in prison for felony convictions are "only the tip of the iceberg" and that "[m]ost U.S. convictions are misdemeanors").

[12] *See id.* at 1326 (citing Bridget McCormack, *Economic Incarceration*, 25 WINDSOR Y.B. OF ACCESS TO JUST. 223, 226–27 (2007)) (describing a study of misdemeanor cases in Michigan that demonstrated how administrative fees charged to defendants led to increased incarceration).

[13] *See id.* at 1324 (telling a story of a Kenneth Nichols, whose uncounseled misdemeanor conviction increased the sentence on a later conviction by two years).

[14] *See* Missouri v. Frye, 566 U.S. 134, 143 (2012) (compiling Department of Justice statistics and observing that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas"); *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2470–71 (2004) (describing the ease of plea bargaining as compared to obtaining a conviction through trial); LINDSEY DEVERS, BUREAU OF JUSTICE, ASSISTANCE PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY, BJA Report (Jan. 2011) (estimating the percentage of convictions obtained through plea to be 90%–95%); MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS (2007) (concluding that 95% of felony convictions are the result of a plea); THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967) (estimating that as many as 95% of misdemeanor convictions were obtained through plea bargaining).

[15] *See* Heaton et al., *supra* note 7, at 785–86 (describing evidence that suggests that misdemeanor defendants "pleaded guilty simply to go home, not because of the strength of the case against them"); *see also* Bibas, *supra* note 14, at 2493 (observing that "pretrial detention places a high premium on quick plea bargains in small cases, even if the defendant would probably win acquittal at an eventual trial"). For a discussion of potential links between plea bargaining and mass incarceration, see Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 191, 200–201 (2015). For a discussion of how an improved heuristic for determining pretrial release or detention could

incarceration is not surprising, although its magnitude may be. Defendants who are detained pretrial are highly motivated to agree to a plea.[16] Each day in jail is a missed day of work and time with family, and each day increases the likelihood of losing employment and housing.[17] Pretrial detention also lowers the likelihood of winning at trial.[18] Further, many defendants detained pretrial are charged with relatively low-level crimes with short sentences, and when pretrial detention counts toward their sentence, these defendants serve only a few days post-conviction.[19] Thus, a plea often results in a quicker release than contesting the case, whatever the ultimate outcome.

Released defendants do not face the same pressures as detained defendants, and they are in a better position to resist unfavorable plea offers, file motions to suppress, seek dismissal, and, in rare cases, proceed to trial.[20] Releasing more defendants pretrial, then, would lead to more pretrial motions, lengthier plea negotiations, and more trials and would thus raise the cost—in the form of prosecutors, public defenders, and judges—of convictions and imprisonment.[21] Pretrial detention, which substantially limits the number of released defendants in the system as a whole, thus allows

---

allow defendants to make more informed decisions about entering a plea or not, and could change prosecutors' charging decisions, see Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 5-7 (2017).

[16] *See* Wiseman, *supra* note 7, at 1356 (observing that defendants are incentivized to take a quick plea deal regardless of innocence due to high defense burdens).

[17] *Id.* at 1356–1357; BARADARAN BAUGHMAN, *supra* note 8, at 87-89; Baradaran Baughman, *supra* note 15, at 5-7.

[18] *See, e.g.,* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 205 (1979) (providing empirical evidence that pretrial detention lowers the likelihood of winning a case, even when controlling for potentially confounding variables such as the seriousness of the crime with which the defendant was charged); COHEN & REAVES, *supra* note 1, at 7 (showing that in state courts, 60% of defendants who were released pretrial were convicted, whereas 78% of defendants detained pretrial were convicted, although showing a higher conviction rate for released misdemeanor defendants than for detained defendants (14% and 9%, respectively)).

[19] *See* Bibas, *supra* note 14, at 2492 ("[P]retrial detention can approach or even exceed the punishment that a court would impose after trial.").

[20] *Cf.* Caleb Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125, 1147 (1965) (describing several factors that limit the "quality of representation" for jailed defendants, including, for example, lower-quality representation (since the attorney must visit an often-distant jail) and "a reduction in the frequency of pretrial consultation").

[21] *See infra* notes 80–85 and accompanying text.

prosecutors to charge more people with crimes.[22] And an increase in the percentage of arrestees charged by prosecutors is, according to a leading scholar, the "primary driver" of mass incarceration.[23] Accordingly, if we release significantly more defendants pretrial as a result of meaningful bail reform, we will have to either spend more on prosecutors and judges[24] or convict fewer people and punish them less severely, which creates a complex scenario for reform.

In addition to inducing quick, inexpensive guilty pleas from defendants unable to post bond, money bail also plays a more subtle role in sustaining our high incarceration rate. If more politically better-represented wealthy and middle-class defendants were detained,[25] and thus subjected to some of the same pressures to plead guilty as indigent defendants, there would, in all likelihood, be more demand for reform. Money bail, by its very nature, discriminates based on wealth, and thus provides a built-in sorting mechanism—politically weak, low-income defendants are pushed into the quick-plea process, while wealthier defendants are able to obtain release and practical access to the more robust process that it affords.[26] Bail, as a sorting mechanism, is a key yet under-recognized facet of a system that Alexandra Natapoff describes as a

---

[22] This is true in economic models and in reality. The models predict that jailed defendants have a higher probability of conviction if they proceed to trial because they have limited access to attorneys and other resources to prove their innocence. A higher likelihood of conviction at trial weakens these defendants' position in the bargaining process. *See* William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & Econ. 61, 62-63 (1971) (expounding economic models to calculate different factors' effects on the demand for trial and settlements, as well as the probability of conviction); *see also infra* Part II and accompanying text (discussing recent empirical studies documenting a connection between pretrial detention and pleas).

[23] PFAFF, *supra* note 6, at 6 (2017) ("The primary driver of incarceration is increased prosecutorial toughness when it comes to charging people, not longer sentences.").

[24] *See infra* Part II.C.

[25] COHEN & REAVES, *supra* note 1, at 1 (showing that of the defendants who are detained pretrial, "5 in 6" were detained because they could not afford bail); *see also* Wiseman, *supra* note 7, at 1346 n.2 (providing other statistics showing that many defendants detained pretrial are low-income defendants).

[26] *See infra* notes 53 and 118 and accompanying text (noting how many felony defendants cannot afford a bail of $1,000 and the discrepancy in conviction rate between defendants jailed pretrial and those released on bail); *cf.* Issa Kohler-Hausmann, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should be Friends*, *in* THE NEW CRIMINAL JUSTICE THINKING 246, 265 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (observing from a case study of misdemeanor arrests and convictions in New York City that the lack of criminal process given to the defendants was largely "a story about frontline actors using the various tools of the criminal process as a means to sort, engage, and regulated defendants over time").

penal pyramid, where, for the elite at the top, the criminal "process is sensitive to evidence, transparent, accountable, and hypervisible,"[27] but for the bottom of the pyramid, these types of protective rules have little relevance because outcomes "are driven by institutional practices and inegalitarian social relations."[28]

The inherent discrimination of money bail is exacerbated by many jurisdictions' reliance on fixed bail schedules, which set a specific bond amount for different charges and are often blind, in practice, to defendants' ability to pay.[29] Additionally, both state and federal statutes direct judges in the pretrial process to consider factors that implicitly benefit wealthy defendants.[30] Even portions of the statutes ostensibly designed to protect low-income defendants from pretrial detention primarily benefit the wealthy, who can hire attorneys to make complex procedural arguments against pretrial detention.[31] Because wealthier defendants more frequently avoid pretrial detention and the quick pleas it helps induce, they are able to engage in a more robust defense of the charges against them.[32]

---

[27] Alexandra Natapoff, *The Penal Pyramid*, *in* THE NEW CRIMINAL JUSTICE THINKING 71, 72 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

[28] *Id*.

[29] *See* PRETRIAL JUSTICE INST., PRETRIAL JUSTICE IN AMERICA: A SURVEY OF COUNTY PRETRIAL RELEASE POLICIES, PRACTICES, AND OUTCOMES 8 (2009), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=d4c7feb2-55be-ccd0-f06a-02802f18eeee&forceDialog=0 (showing that 51% of jurisdictions surveyed used bail schedules "both before and at initial appearance")

[30] The federal Bail Reform Act directs judges making the bail decision to consider, among other factors, "employment" and "financial resources." 18 U.S.C. § 3142(g)(3) (2012). States such as Arizona, Florida, and South Carolina use the same language. ARIZ. REV. STAT. ANN. § 13-3967 (West 2018); FLA. STAT. ANN. § 903.046 (West 2018); S.C. CODE ANN. § 71-15-30 (West 2018).

[31] The Bail Reform Act directs judges to release rather than detain defendants pretrial if an alternative to detention would "reasonably assure" the defendant's presence at trial. 18 U.S.C. § 3142(b)-(c) (2012). For examples of wealthy defendants' attorneys persuading judges to release defendants under expensive self-funded home monitoring regimes, see United States v. Karni, 298 F.Supp.2d 129, 130-31, 133 (D.D.C. 2004) (ordering that defendant, charged with acquiring nuclear materials, be released based on $100,000 cash payment, $75,000 bond, and home monitoring) and United States v. Dreier, 596 F.Supp.2d 831, 832–833 (S.D.N.Y. 2009) (ordering that defendant, charged with fraud amounting to $400 million, be release through a commitment to home monitoring by "armed security guards" and other conditions).

[32] Only wealthy defendants can afford the bail amounts often set by judges. *See, e.g.*, COHEN & REAVES, *supra* note 118, at 1 (showing that only 1 in 10 defendants can afford bail set at $100,000 and above and 7 in 10 defendants can afford bail set at $5,000 or lower, but the mean and median bail amounts between 1990 and 2004 were $9,000 and $35,800, respectively); Stuart Rabner, Opinion, *Chief justice: Bail reform puts N.J. at the forefront of*

The system thus works much better for wealthier defendants than for the politically weak lower-income class, ensuring that those without the political wherewithal to effectively lobby for change almost exclusively bear the costs of cheap convictions.[33]

The connections between bail, pretrial detention, and incarceration rates have important implications for the future of reform efforts. Most immediately, they suggest that opponents of mass incarceration should look to the pretrial bail process as a potential locus of reform. More speculatively, they suggest that, if indeed pretrial detention plays a role in maintaining the U.S.'s current high rate of incarceration, bail reform advocates may face additional sources of opposition and difficult choices pursuing change. If bail reform—which, of course, serves important interests beyond reducing the prison population, such as fairness[34] and the avoidance of wrongful convictions[35]—forces jurisdictions to choose between reducing the number of prosecutions or increasing spending, reform might come at the price of diverting the savings associated with lower rates of pretrial detention to fund more prosecutions.[36] Finally, jurisdictions with recently-implemented reforms like New Jersey, Atlanta, and Houston will be important test cases in the coming years to see how these dynamics play out.[37]

---

fairness, STAR-LEDGER (Jan. 9, 2017), https://www.nj.com/opinion/index.ssf/2017/01/nj_chief_justice_bail_reform_puts_nj_at_the_forefr.html (claiming that, in New Jersey in 2012, "1 in 8 inmates were in jail because . . . they didn't have enough money to post even a modest amount of bail").

[33] *See* Rabner, *supra* note 32 (explaining that poor defendants may lose jobs while in jail and cost taxpayers at least $100 per day).

[34] *See* Heaton et al. *supra* note 7, at 770–71 (describing due process concerns); Appleman, *supra* note 7, at 1310 (describing "complex and unfair fee structures" in the bail process); *see also* Thompson v. Moss Point, No. 1:15cv182LG–RHW, 2015 WL 10322003 at *1 (S.D. Miss. Nov. 6, 2015) (finding that Moss Point, Mississippi's use of secured bail schedules violated the Equal Protection Clause and concluding that "[i]f the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond"); Cooper v. City of Dothan, 1:15–CV–425–WKW [WO], 2015 WL 10013003 at *1 (M.D. Ala. June 18, 2015) (granting a temporary restraining order to release a pretrial defendant jailed solely because he could not afford bond and concluding that Dothan, Alabama's bail system likely violated the Due Process and Equal Protection clauses).

[35] *See infra* note 69 (discussing how the pretrial process may lead to wrongful convictions).

[36] *See infra* notes 189-92 and accompanying text (discussing the cost savings associated with bail reform).

[37] *See supra* note 4 (noting legislative reforms throughout the country); CRIMINAL JUSTICE REFORM INFORMATION CTR., N.J. COURTS, https://www.judiciary.state.nj.us/courts/criminal/reform.html (last visited Dec. 10, 2018) ("On Jan. 1, 2017, the state shifted

Part II of this Article explores the procedural role of money bail and pretrial detention in maintaining high incarceration rates, arguing, based on recent empirical work, that they allow the system to operate at its current cost and capacity by inducing quick, relatively inexpensive guilty pleas. Part III turns to the political economy of bail and mass incarceration, arguing that by allowing wealthier, more politically influential defendants to buy their way out of the quick-plea track, money bail allows the wealthy and middle-class to enjoy the benefits of the status quo (cheap convictions) while concentrating its costs on the poor. Moreover, many judges and prosecutors—who are influential stakeholders in reform debates[38]—are functionally reliant upon pretrial detention to maintain the high docket clearance and conviction rates that have become the norm, and upon which they have built careers.[39]

These dynamics make achieving reform through the political process difficult. Building from this political economic story, Part IV explores some of the implications of the interplay between bail and mass incarceration for the future of reform efforts.

II. BAIL, PRETRIAL DETENTION, AND MASS INCARCERATION: LOWERING THE COST OF (LENGTHY) CONVICTIONS

Since the 1960s, there has been strong empirical evidence that the U.S. bail system generates high pretrial detention rates, largely due to defendants' inability to pay, and that pretrial detention is correlated to both an increased likelihood of conviction and lengthier average sentences.[40] Economists and legal scholars

---

from a system that relies principally on setting monetary bail as a condition of release to a risk-based system that is more objective, and thus fairer to defendants because it is unrelated to their ability to pay monetary bail."); *see also* News Release, Mayor's Office of Commc'n, Mayor Keisha Lance Bottoms Signs Cash Bond Ordinance into Law (Feb. 6, 2018), http://www.atlantaga.gov?Home?Components/News/news/11448/1338?backlist=%2F (noting the promulgation of an ordinance that "eliminates cash bonds").

[38] *See* Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1548 (2010) (noting prosecutors' political clout); *see also* Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1087 (1991) (noting judges' "institutional position and personal access to . . . legislators").

[39] *See infra* notes 156, 173 and accompanying text (discussing the pressure judges and prosecutors face to process cases quickly).

[40] *See* Will Dobbie et al., *The Effects of Pre-trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 201, 225

suggest a causal relationship and attribute the link to a variety of factors—many of which likely combine to influence conviction rates.[41] Detained defendants may plead guilty in exchange for a time-served sentence,[42] and they have more limited access to attorneys and more difficulty identifying witnesses.[43] In addition, the longer they spend in jail and away from work, the less likely it is that they will have the resources necessary to retain an attorney who has a lighter caseload than a free public defender.[44] Indeed,

---

(2018), https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20161503 (conducting an empirical analysis that shows that "released defendants have significantly better case outcomes than detained defendants," although the significance of the results varies substantially when one controls for previous crimes committed); *see also* Yang, *supra* note 7, at 1421–22 (noting that the research shows "a negative correlation between pre-trial detention and criminal case outcomes"); Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641, 642 tbl. 1 (1964) (showing a correlation between pretrial detention and conviction, controlling for certain factors such as prior criminal record); Foote, *supra* note 20, at 1148–51 (providing a survey of the empirical studies); Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees,* 26 CARDOZO L. REV. 1947, 1972–73 (2005) (providing a similar, more recent survey of the empirical results); *id.* at 1981 ("Empirical studies have repeatedly borne out the common sense insight that those mounting a defense behind prison walls suffer disadvantages that significantly increase their probability of being convicted or having to cop a guilty plea."); William M. Landes, *Legality and Reality: Some Evidence on Criminal Procedure*, 3 J. LEGAL STUD. 287, 333–35 (1974) (describing how pretrial detention correlates with longer sentences).

[41] *See, e.g.*, Landes, *supra* note 22, at 72–73 (observing that defendants detained pretrial have a lower likelihood of success at trial and thus less of a bargaining position in the plea process, and that they are therefore more likely to agree to a plea).

[42] *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1136 (2008) ("If the defendant can get a plea to a misdemeanor and time served, then the process constitutes the whole punishment. Any plea that frees this defendant may be more than advisable—it may be salvation."); *see also* Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 444 (1971) ("If the prosecutor believes that the defendant has already been incarcerated for a sufficient period of time and is willing to recommend a 'time-in' sentence, the defendant will invariably agree to plead guilty to obtain immediate freedom.").

[43] For example, pretrial detainees are sometimes only allowed to call their attorneys and not personal acquaintances, a practice that could prevent them from contacting key potential witnesses. *See, e.g.*, Steele v. Cicchi, 855 F.3d 494, 499–500 (3d Cir. 2017) (describing a jail's "Inmate Guidelines" manual that restricted detainees' calls to "legal calls" for inmates who were in "disciplinary lockup," and requiring general population inmates to make paid or collect calls). Further, pretrial detainees' calls to their attorneys often do not go through. *See, e.g.*, *id* (noting that the detainee "made three attempts to contact his attorney" and only reached him on the third try).

[44] *See* Margaret A. Costello, *Fulfilling the Unfulfilled Promise of* Gideon*: Litigation as a Viable Strategic Tool*, 99 IOWA L. REV. 1951, 1964–65 (2014) (noting that prior to litigation that spurred legislative reform, "indigent pretrial detainees in Massachusetts had no attorneys because the low rate of compensation created a shortage of lawyers in the assigned-counsel program"); *see also* Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 337 (2011) (observing that "[s]tates' pretrial jails are filled with detainees who

pretrial detainees even typically lack a right to access legal research materials.[45] But a causal link between pretrial detention and higher conviction rates has, until recently, been more difficult to show empirically.

Recent empirical literature strongly indicates that pretrial detention causes higher plea rates, and higher plea rates in turn cause both higher conviction rates and longer sentences. It confirms that, controlling for differences in defendant characteristics and other factors that would influence the likelihood of conviction, there is a statistically significant link between pretrial detention and the likelihood of pleading guilty as well as the number of convictions and resulting sentence length.[46] Thus, pretrial detention generates higher conviction rates largely by securing large numbers of guilty pleas.[47] As one empirical study concludes, "We believe our estimates [connecting pretrial detention to conviction rates] are primarily driven by defendant plea behavior."[48] This Part explores this literature, first describing earlier work that identified likely connections between bail, plea rates, and convictions and then analyzing the more recent empirical support for these theories. This literature review provides a platform for the functional and political economic analyses in Parts III and IV.

A. MONEY BAIL LEADS TO THE DETENTION OF INDIGENT DEFENDANTS

The role of money bail in driving guilty pleas, convictions, and longer sentences involves a number of links, and the pieces to this puzzle have been incrementally documented through nearly a century of research. The first link is the connection between bail

---

have no lawyer to advocate for their pretrial freedom and who often wait in jail for days, weeks, and sometimes even months following arrest before obtaining in-court representation").

[45] Jeremiah F. Donovan, Note, *The Jailed Pro Se Defendant and the Right to Prepare a Defense*, 86 YALE L.J. 292, 295, nn.14, 15 (1976) (describing numerous cases denying detainees' requests for materials); Lewis v. Casey, 518 U.S. 343, 351 (1996) (concluding that in the context of access to materials generally, there is no "abstract, freestanding right to a law library or legal assistance"). *But see* Smith v. Harvey Cty. Jail, 889 F.Supp. 426, 429 (D. Kan. 1995) (noting that although jail inmates could not access the law library, a plaintiff's "requests for copies of legal materials were granted").

[46] *See infra* Part II.B.

[47] *Id*.

[48] Arpit Gupta, Christopher Hansman, & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 488 (2016).

practices and the likelihood of a defendant being detained prior to trial rather than released on bond or other conditions. In 1927, Arthur Beeley documented how poor defendants in the Chicago bail system—dominated by money bail and bail bondsmen—were often jailed pretrial because they could not afford bail bonds set by the courts.[49]

Two prominent studies in the 1950s further highlighted this connection. A report on the New York bail system showed that few judges used the available option of setting alternative, lower amounts of cash bail, which allowed a defendant to, for example, put down a $100 cash deposit rather than obtaining a $1,000 bond from a bail bondsman.[50] Even in the 1% of cases in which judges allowed this alternative bail, 33% of defendants were still unable to afford the cash amount.[51] For the many defendants who remained in the traditional money bail system of paying larger amounts of cash bail or relying on a bondsman, the study noted that "it would seem that only the wealthy defendant is able to avail himself of the opportunity to post cash bail."[52] Researchers who studied Philadelphia's bail system similarly observed that state courts "almost never" allowed defendants to be released on their own recognizance (an assurance of an appearance at trial) in lieu of bail and that "no information was elicited during bail-setting as to the defendant's financial condition."[53] This resulted in bail amounts that were "too low to deter the rich, but high enough to prohibit the poor."[54]

---

[49] *See generally* ARTHUR L. BEELEY, THE BAIL SYSTEM IN CHICAGO (2d ed. 1966).

[50] John W. Roberts et al., *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693, 719 (1958).

[51] *Id.* at 720; *see also id.* at 708 (concluding that "the need to furnish security seems to be the major stumbling block" and noting the inability of "average low-income city dweller[s]" to afford bail).

[52] *Id.* at 719.

[53] Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1036 (1954).

[54] *Id.* (quoting REGINALD HEBER SMITH, JUSTICE AND THE POOR 23 (1919) (internal quotation marks omitted)).

Similar observations recurred through the 1960s[55] and '70s[56] and in more recent literature.[57] A 1965 study concluded that "for a majority of defendants accused of anything more serious than petty crimes, the bail system operates effectively to deny rather than to facilitate liberty pending trial" due to the common practice of imprisoning defendants pretrial "solely as a result of their poverty."[58] The study attributed this largely to courts' general refusal to consider defendants' ability to pay in making the bail decision and their tendency to rely on fixed bail schedules that set bail amounts solely on the crime charged—in amounts largely unaffordable to low-income defendants.[59] An analysis of the Philadelphia bail system also noted that judges' heavy reliance on the seriousness of the charge or on a bail schedule in making pretrial release decisions tended to cause release to depend on defendants' "differential ability to afford bail."[60]

Beyond the link between income and pretrial detention, there is another strong, long-recognized connection between pretrial detention, conviction, and longer sentences.[61] Until recently, much

---

[55] *See* Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 PA. U. L. REV. 959, 995–96 (1965) (listing several studies that found the majority of defendants could not make their required bail payments); *see also* President Lyndon B. Johnson, Remarks at the Signing of the Bail Reform Act of 1966, THE AM. PRESIDENCY PROJECT, (June 22, 1966), http://www.presidency.ucsb.edu/ws/index.php?pid=27666&st=&st1= (noting poor defendants stay in jail pretrial only because they are poor, not because they are guilty or more likely to flee).

[56] *See*, MALCOLM M. FEELEY, *supra* note 18, at 199–241 (1979) (examining various factors that lead to high costs at the pretrial stage of criminal cases); *see also* JOHN. S. GOLDKAMP, TWO CLASSES OF ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE 21-22 (1979) (describing how bail disparately impacts indigent defendants); RONALD GOLDFARB, JAILS: THE ULTIMATE GHETTO 29–86 (1975) (arguing that the vast majority of persons in jail are there because they cannot afford to buy their way out); Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 420 n.10 (2016) (describing literature focusing on bail's effect on indigent defendants).

[57] *See, e.g.*, Eric Holder, Att'y Gen., U.S. Dep't of Justice, Address at the National Symposium on Pretrial Justice (June 1, 2011) https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice (noting that many defendants are jailed pretrial due solely to their income).

[58] Foote, *Constitutional Crisis*, *supra* note 55, at 960.

[59] *Id*. at 994–996.

[60] GOLDKAMP, *supra* note 56, at 158.

[61] *See* Note, *supra* note 53, at 1051 (concluding that "defendants who came to court from jail received much less favorable treatment as to both the proportions of those convicted and those receiving prison sentences" and that, controlling for the offense charged, "[o]ver two and one-half times as many jail defendants got prison terms as is the case for defendants who were out on bail"); *see also* Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial*

of the literature focused on how pretrial detention led to conviction and longer sentences[62] due to its impacts on accessibility to counsel and general trial preparation,[63] although the literature also noted higher plea rates by detained defendants.[64] More recent empirical studies have specifically documented the connection between bail, pleas, and convictions, as discussed in the following section.

B. PRETRIAL DETENTION INCREASES CONVICTION RATES AND SENTENCE LENGTH

A group of studies published in the past five years shows a compelling empirical connection between bail and convictions and bail and guilty pleas, specifically.[65] A 2018 paper authored by economists and law professors, which investigates felony and misdemeanor convictions in Philadelphia County and Miami-Dade Counties, found that as compared to the mean detained defendant, defendants released pretrial experience more than a 25 percent change decrease both in the likelihood of guilty conviction and in the probability of pleading guilty.[66] The authors note that a variety of factors could contribute to the connection between pretrial detention and conviction, including, for example, the fact that defendants detained before trial appear before the judge and jury in

---

Detention on Case Outcomes: Evidence from New York City Arraignments, 60 J.L. & ECON. 529, 531, 554 (2016) (noting a "strong causal relationship between pretrial detention and case outcomes" and documenting how these findings date back to the 1960s).

[62] *See* Roberts et al., *supra* note 50, at 727–28 (showing higher percentages of conviction and longer sentences for defendants detained before trial as opposed to those released on bail); *see also* Foote, *supra* note 55, at 960 (noting the "extraordinary correlation between pretrial status (jail or bail) and the severity of the sentence after conviction").

[63] *See* Roberts et al., *supra* note 50, at 725–26 (discussing decreased access to attorneys and the outside world generally, the "constant presence of a uniformed officer in the counsel room," and the reluctance of acquaintances of the defendant to share information with the attorney, a "total stranger," when the defendant is not present).

[64] *Id*. at 725 (noting a defendant's "despair in some cases resulting in a loss of faith in the judicial system and the entry of a plea of guilty"); Rankin, *supra* note 40 (noting that a guilty plea was related to detention).

[65] For a helpful summary of the link between pretrial detention and conviction and the empirical studies that have established this—including older studies—see SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK 83-84.

[66] Dobbie et al., *supra* note 40, at 203 ("[P]retrial release decreases the probability of being found guilty by 14.0 percentage points, a 24.2 percent change from the mean for detained defendants . . . largely driven by a reduction in the probability of pleading guilty, which decreases by 10.8 percentage points, a 24.5 percent change.").

"jail uniforms and shackles."[67] But given the similar empirical link between pretrial release and lower plea rates, the authors conclude that their results are consistent with "pretrial release strengthening defendants' bargaining positions during plea negotiations."[68]

A 2016 study of misdemeanor cases in Harris County, Texas, reaches similar results, finding that "[c]ompared to similarly situated releasees, detained defendants are 25% more likely to be convicted"[69] and that "detention increases the likelihood of pleading guilty by 25% for no reason relevant to guilt."[70] This study also investigates the impact of pretrial detention on sentencing, finding that detainees also are "43% more likely to be sentenced to jail."[71]

Another 2016 study that focused specifically on whether money bail drove guilty pleas examined data from misdemeanor and felony defendants in Philadelphia and Pittsburgh, concluding that "the presence of money bail increases the likelihood that a defendant is found guilty by about 12 percent"[72] and that although it is difficult to tease out the extent to which pleas caused this, the authors believe that their "estimates are primarily driven by plea behavior."[73]

Still more research has repeated these findings, with one study of misdemeanor and felony defendants concluding that the "increase in conviction rates [associated with pretrial detention] is driven by detainees accepting plea deals more frequently."[74] Another found "a 13% increase in the probability of conviction and 18% increase in the likelihood of pleading guilty."[75]

All of these studies controlled for factors not associated with bail that could affect the likelihood of conviction and release, including, for example, race, age, gender, prior offenses, and number of

---

[67] *Id*. at 234.
[68] *Id*. at 236.
[69] Heaton et al., *supra* note 7, at 717.
[70] *Id*. at 771.
[71] *Id*. at 717.
[72] Gupta et al., *supra* note 48, at 487.
[73] *Id*. at 488.
[74] Leslie & Pope, *supra* note 61, at 530.
[75] Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, J.L. ECON. & ORG. (forthcoming 2018) (manuscript at 17).

charged offenses.[76] Thus, while the literature has long documented the link between bail practices and pretrial detention as well as between bail and the likelihood of conviction, more recent empirical studies consistently show a strong connection between pretrial detention and guilty pleas, specifically, as a factor driving the higher conviction rates for pretrial detainees.

As has now been empirically demonstrated, money bail systems lead to increased pretrial detention of poor defendants, which in turn generates higher rates of conviction and longer sentences.[77] This is discriminatory and unfair,[78] and may increase the risk of wrongful convictions.[79] Beyond those (significant) objections, money bail and pretrial detention may contribute to high incarceration rates by bringing down the cost of convictions and longer sentences.

C. BAIL, PLEAS, AND INCARCERATION: MAKING CONVICTIONS CHEAPER

Defendants who quickly plead guilty are relatively cheap to convict.[80] They do not take up much of the time of prosecutors,

---

[76] *See* id. at 13 (controlling for age, prior felonies, prior convictions, prior arrests, number of charges, and severity of charges); Dobbie et al., *supra* note 40, at 218–29 (controlling for race, gender, prior offenses, charged offenses, and crime type and severity); Gupta et al., *supra* note 48, at 480 (controlling for age, prior cases, number of offenses, race, gender, and whether the offense was committed out of state); Leslie & Pope, *supra* note 53, at 541 (controlling for age, criminal history, and number of counts).

[77] *See supra* notes 60–66.

[78] *See supra* note 30 and *infra* note 179 and accompanying text (describing the due process concerns that arise from the traditional bail processes).

[79] *See, e.g.*, Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1124 (2005) (arguing that "one of the causes of wrongful convictions is the pretrial criminal process, which, even when it is working properly, can distort the gathering and presentation of exculpatory evidence" and providing supporting evidence).

[80] *See* Steven Mongrain & Joanne Roberts, *Plea bargaining with budgetary constraints*, 29 INT'L REV. L. & ECON. 8, 8 (2009) ("[P]lea bargaining saves money, or . . . more precisely . . . it saves time, by reducing the time spent in court by both prosecutors and judges."); *see also* Carissa B. Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CAL. L. REV. 47, 94 (2011) (noting that plea bargaining "minimizes the number of charges a prosecutor must prove"); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 537 (2001) ("Legislators can help prosecutors pursue guilty pleas, then, both by creating new crimes and by creating overlapping crimes that allow for charge-stacking. To the extent those things help prosecutors charge and convict people at lower cost, that is to legislators' advantage. Reducing the cost of policing and prosecution means getting more law enforcement for the dollar, something that legislators should find politically rewarding.")

judges, or, for indigent defendants, appointed counsel, and they allow prosecutors to charge more people and obtain more convictions, thus sending more defendants to prison.[81] When one recognizes the criminal justice system as a mass administrative bureaucracy, as Rachel Barkow has, the importance of achieving results at the lowest possible costs becomes more apparent; efficiency is at a "premium" in this system.[82] And the system relies centrally on plea bargains to operate efficiently and produce large numbers of convictions,[83] thus enabling mass incarceration. As Chief Justice Burger observed in 1970, "It is elementary, historically and statistically, that systems of courts—the number of judges, prosecutors, and courtrooms—have been based on the premise that approximately 90 per cent of all defendants will plead guilty, leaving only 10 per cent, more or less, to be tried."[84]

Without bail-driven pleas, the modern system—one that locks up astoundingly large numbers of people on the basis of an even higher plea rate—would collapse absent a significant infusion of resources. Indeed, Professor John Pfaff believes increasing charging rates—the percentage of arrestees who are ultimately charged with a crime—are a direct and primary cause of the U.S. mass incarceration problem.[85] He points to factors such as prosecutorial

---

[81] *See supra* note 80; *infra* notes 83-84.

[82] Barkow, *supra* note 9, at 36.

[83] *See, e.g.* Chief Justice Warren Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 931 (1970) ("A reduction from 90 per cent to 80 per cent in guilty pleas requires the assignment of twice the judicial manpower and facilities—judges, court reporters, bailiffs, clerks, jurors and courtrooms. A reduction to 70 per cent trebles this demand."); *id.* (pointing to Washington, DC, where, after plea rates "dropped to 65 per cent," three or four judges could no longer handle "all serious criminal cases," and noting that "[b]y 1968, twelve judges out of fifteen in active service were assigned to the criminal calendar and could barely keep up"); *see also* Barkow, *supra* note 9, at 39 (noting that "[i]n many offices, an emphasis is placed on processing as many cases as possible because of crushing caseloads," thus leading to a 95% plea bargain rate). *But see* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 221-222 (1983) (arguing that the criminal justice system could still operate efficiently without pleas); *see also* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 948 (1983) (arguing that "the annual cost of providing three-day jury trials to *every* felony defendant who reaches the trial stage probably would not exceed $843 million," that this "would represent a 3.2% increase in civil and criminal justice expenditures in the United States over the level in 1979," and that plea bargaining is not essential for an economically efficient criminal justice system).

[84] Burger, *supra* note 83, at 931.

[85] PFAFF, *supra* note 6, at 6.

discretion, growing numbers of prosecutorial offices and staff, political incentives, and budgets that are not tied to prison costs as central drivers of these rates.[86] Although not nodding to pretrial detention specifically,[87] Pfaff also describes how an opposition weakened by underfunded indigent defense and threats of tougher sentencing has tilted the odds in favor of prosecutors, allowing them to charge more people.[88]

From the perspective of easing the prosecutorial path to conviction and imprisonment, the role of pretrial detention in directly incentivizing plea bargains has, perhaps, not received due attention. As economists explain, defendants accept a plea if it "entails a lower cost than going to trial,"[89] and pretrial detention makes trial look far more costly to the average defendant. The many defendants charged with misdemeanors with relatively short potential sentences will often already have served most of the time they would spend in prison if they receive time-served credit; they therefore choose to plead guilty and obtain a quick release.[90] These defendants, with little access to witnesses, attorneys, or research materials, face bleak prospects for winning their cases if they proceed to trial.[91] And when detained defendants do manage to obtain representation, counsel might typically be more inclined to work with the prosecutor toward a plea because counsel is aware of likely future interactions with this same prosecutor and wishes to maintain a "good relationship" in light of this knowledge.[92]

In contrast with defendants who are detained pretrial and incentivized to plead out, defendants who seek, for example, to have evidence suppressed, engage in extended bargaining, and/or proceed to trial consume more of prosecutors' and judges' limited

---

[86] *Id.* at 134–45.

[87] *See* PFAFF, *supra* note 6, at 136 (noting that prosecutors can be "more aggressive against defendants with longer criminal histories" including being "more insistent on higher bail amounts").

[88] *See id.* at 135–37 (discussing prosecutors use of tough sentencing laws as "bargaining chips" instead of tools of punishment and discussing overworked, underpaid public defenders' offices).

[89] Thomas Miceli, *The Economics of Criminal Procedure* 6 (Univ. of Conn., Dep't of Econ. Working Paper Series, Working Paper No. 2007-24, 2007), http://web2.uconn.edu/economics/working/2007-24.pdf.

[90] *See supra* note 42 and accompanying text.

[91] Miceli, supra note 89, at 6.

[92] White, *supra* note 42, at 444.

resources.[93] Economists predict that increasing pretrial release through bail reform would reduce "the fraction of defendants convicted" because defendants would have a higher chance of success at trial and thus a stronger position in the plea bargaining process, which, in turn, would increase "demand for trials" and cause "court delay."[94] In simpler terms, if the average cost of convictions rose because more defendants exercised these more expensive procedural rights, jurisdictions would either have to increase their spending on criminal justice—hire more judges, prosecutors, and public defenders—or convict fewer people. Indeed, Chief Justice Burger suggested that a mere 10% decline in plea rates could double the number of judicial resources needed.[95] As argued in this Part, bail and pretrial detention play a role in maintaining the status quo of high conviction, supervision, and incarceration rates by helping to induce the quick, cheap pleas that keep overall costs down.

D. SUPPLY AND DEMAND

Meaningful bail reform would decrease pretrial detention rates, as early numbers from New Jersey's recent reforms suggest.[96] And as highlighted by the empirical work outlined above, higher release rates lead to fewer pleas.[97] Released defendants are more likely, and better able, to pursue a vigorous defense.[98] If more defendants were released, public defenders are able to engage in more investigation and bargaining and file more pretrial motions, which prosecutors would have to respond to and judges would have to rule on. With caseloads already high, more prosecutors, public defenders, and

---

[93] *See id*. ("Unlike the defendant in prison, the bailed defendant can only profit by postponement of his case.").

[94] Landes, *supra* note 22, at 72-73.

[95] *See* Burger, *supra* note 83, at 931.

[96] *See* CRIMINAL JUSTICE REFORM INFO. CTR., N.J. COURTS, CRIMINAL JUSTICE REFORM STATISTICS: JAN. 01, 2017 - DEC. 31, 2017 Chart C, https:www.judiciary.state.nj.us/courts/assets/criminal/cjrreport.pdf (showing a 35.7% decrease in the number of non-sentenced pretrial detainees in New Jersey from December 31, 2015 to December 31, 2017).

[97] *See supra* notes 66–75 and accompanying text.

[98] *Id.* These defendants are also more likely to be able to retain their job, if they had one, and thus have more money available to hire an attorney. They are also able to visit an attorney more frequently at the attorney's office as opposed to relying on the attorney to visit a potentially distant jail. *See* Foote, *supra* note 20, at 1147 (discussing these and other comparative disadvantages for detained defendants).

judges would thus be necessary if the system were to produce the same number of convictions that it did before bail reform.

Rough, back-of-the-envelope numbers provide a hint at the types of costs involved when more judges, prosecutors, and other key members of the criminal justice system must be hired or, in the case of jurors, recruited. Total judicial and legal direct expenditures in criminal cases in fiscal year 2012—the latest year for which detailed, compiled data are available—were approximately $15 billion at the federal level, $21 billion at the state level, and $22 billion at the local level.[99] These numbers include court, prosecution, and public defense expenses such as salaries, supply purchases, and capital expenditures on facilities and other equipment.[100] They exclude corrections and police protection expenses as well as any duplicative intergovernmental spending that could potentially be counted twice, such as when the federal government funds certain state or local criminal justice costs.[101]

With more trial and pre-plea procedures, all types of expenses—from the cost of building and supplying courtrooms and public defender and prosecutor offices to paying personnel wages—would likely increase due to currently long waits for trials and the need for more courthouses and staff.

For comparison, federal spending on one of the agencies that received the least federal funding—the Environmental Protection Agency—was approximately $7 billion in fiscal year 2015.[102]

The empirical data discussed in Part I shows that pretrial detention increases the likelihood of a defendant's pleading guilty by somewhere between 18 and 25%.[103] If half of the defendants currently detained were released, guilty pleas might decline by somewhere between 9 and approximately 12%. Due to fixed capital

---

[99] TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS, 2012 - PRELIMINARY tbl.1 (2015), http:www.bjs.gov/index.cfm?ty=pbdetail&iid=5239 (follow "Comma-delimited format (CSV)" hyperlink; then select "jeeus1201.csv" filename).

[100] *Id.* at DEFINITIONS OF TERMS AND CONCEPTS.

[101] *Id.*

[102] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, HISTORICAL TABLES: BUDGET OF THE UNITED STATES. GOVERNMENT, FISCAL YEAR 2017, tbl.4.1 (2016) (listing the 2015 outlay for the Environmental Protection Agency as $7,007,000,000).

[103] *See supra* notes 57, 61, 66 and accompanying text (discussing several studies linking pretrial detention and guilty pleas).

expenditures, economies of scale, and other factors,[104] sending this many more defendants to trial or more complex plea bargaining negotiations would not cause criminal justice costs to rise by this same percentage.[105] Nonetheless, the additional resources required to maintain current prosecution and conviction rates would be significant.

Bail and pretrial detention thus play an important role in making current conviction rates possible at existing funding levels. But in addition to playing a key functional part in enabling the status quo of high rates of plea-induced convictions and associated incarceration and supervision, bail makes this problematic system politically feasible, as explored in Part III.

III. THE POLITICAL ECONOMY OF BAIL AND ITS ROLE IN MAINTAINING THE STATUS QUO

Lobbying by the bail bond industry has long been recognized as a source of opposition to pretrial justice reform.[106] And, indeed, public choice analysis suggests that such a concentrated financial interest would be difficult for criminal defendants, a diffuse and politically unpopular class, to overcome.[107] But the widespread use

---

[104] *See* CHRISTIAN HENRICHSON & SARAH GALGANO, VERA INST. OF JUSTICE, A GUIDE TO CALCULATING JUSTICE-SYSTEM MARGINAL COSTS 4–5 (2013), http://www.bja.gov/publications/vera_calculating-justice-system-marginal-costs.pdf (defining marginal cost as "the amount the total cost changes when a unit of output . . . changes" and noting that marginal costs for "administrations, utilities, and other expenses" in prisons do not change much with slight decrease in prison populations, whereas "expenses such as food, clothing, and medical care" do change noticeably).

[105] *See id.* at 13 (showing actual average per-inmate costs of prisons in Washington State as $31,446, with long-run marginal costs of $13,921 and short-run marginal costs of $4,495, and per-inmate costs of jail as $28,900, with long-run marginal costs of $21,469 and short-run marginal costs of $3,457).

[106] *See* Wiseman, *supra* note 7, at 1381–82 (observing that "[f]or nearly a hundred years, the existence of a powerful commercial bondsmen lobby—and a lack of interest in the plight of poor defendants—has hampered reform efforts").

[107] Specifically, a public choice account suggests that a relatively small group of wealthy, concentrated, and organized interests that individually have more to gain or lose from a decision will have more influence in the political process than a diffuse, less-organized group of individuals who collectively have more to gain or lose from the decision but lack the resources to overcome the transaction costs of organizing. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 2 (1965) ("[U]nless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, *rational self-interested individuals will not act to achieve their common or group interest*.").

of money bail and pretrial detention create additional barriers not just to changes to the pretrial process but to criminal justice reform as a whole. First, the use of money bail neatly separates criminals into two categories: in one category are those with assets who can obtain release and are thus better able to exercise their rights and mount a vigorous defense, and in the second are those without assets who cannot afford release and often receive cursory process as a result.[108] This separation of the moneyed from the poor likely plays a significant role in maintaining the status quo because the better-represented moneyed classes would almost certainly demand reform of a system that routinely treated them or their families the way that it treats the indigent. Second, because money bail and pretrial detention help produce quick, cheap convictions, and because prosecutors' and judges' careers and reputations often depend, at least to some extent, on the number of convictions they obtain or the number of cases they process,[109] these powerful stakeholders have an incentive to leave the system as it is.

A. AVOIDING POLITICAL POOLING

Routine pretrial detention and the summary convictions it helps produce would probably be infeasible if members of politically powerful groups were regularly subjected to this system. If they were, those with money and the political wherewithal that comes with it would likely lobby for and obtain reform.[110] But the U.S. bail system, which sorts individuals based on their incomes, is, perversely, a perfect mechanism for separating the politically powerful from the politically weak.[111] Thus, the criminal justice system avoids pooling these two groups and instead gives a robust

---

[108] *See infra* Part III.A (analyzing state and federal statutes that guide bail determination and concluding that the bail system sorts defendants by wealth).

[109] *See infra* notes 178 and 193 and accompanying text (noting political pressure on prosecutors and judges to meet numerical thresholds).

[110] *See, e.g.*, Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 602–03 (2004) (observing that when politically powerful individuals like legislators face potential criminal sanctions reform sometimes results).

[111] *See* Cohen & Reaves, *supra* note 1 and accompanying text (noting the high rate of pretrial detainees who are in jail because they cannot afford bail, as opposed to being denied bail, and the high right of defendants who cannot afford modest bail amounts); *see also infra* note 117 and accompanying text (noting that many defendants cannot afford even low bail amounts).

series of procedural protections to those who can afford bail access[112] (which, as discussed above, would be quite costly if extended to the entire population). This separation, then, helps entrench the status quo.

Low-income, minority defendants have relatively little clout in the political process.[113] A public choice theory of governance attributes this phenomenon to the fact that this population of criminal defendants involves large numbers of relatively disorganized voters—many of whom cannot vote due to prior convictions[114]—who lack the funds and other resources needed to overcome organizational barriers and meaningfully influence the political process.[115] In contrast, middle and higher income defendants are far more likely to have the resources, time, sophistication, and connections that make political influence more feasible. These defendants, due largely to their class as well as "speech, dress, knowledge of their rights, and access to counsel," are better able to take advantage of "protective rules" within the system and thus avoid many of its harshest consequences.[116]

If this latter, more influential class of defendants were subjected to the high pretrial detention, plea, and conviction rates experienced by lower income defendants,[117] they would likely lobby for legislative fixes and pressure elected judges and prosecutors to

---

[112] *See infra* notes 129–48 and accompanying text (discussing the protections given to individuals with the financial resources to afford bail).

[113] *See* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1090 (explaining that young black men, the most common targets of police investigations, represent a small part of the nation's electorate).

[114] *See* The Sentencing Project, *Fact Sheet: Felony Disenfranchisement* 1 (2011), https://www.sentencingproject.org/wp-content/uploads/2015/12/Felony-Disenfranchisement-Laws-in-the-US.pdf (estimating that, as of 2010, 5.85 million Americans had "currently or permanently lost their voting rights as a result of a felony conviction").

[115] *See, e.g.*, Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1137 (2007) (describing how "criminal defendants have little, if any, political clout" due to the fact that they are not repeat players in the political system and the small number of organized groups that represent these defendants are "generally politically weak"); Cristina M. Rodriguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787, 1825 (2010) (noting criminal defendants' weak political position because "they are an unsympathetic and unorganized constituency"); William J. Stuntz, *supra* note 80 (describing how criminal defendants are now a "political bogey").

[116] Natapoff, *supra* note 28, at 83.

[117] *See* COHEN & REAVES, *supra* note 1, at 7 (noting "[c]onviction rates were higher for detained defendants, with 78% convicted").

change their practices to lower these rates. Moreover, in the absence of a sorting mechanism, some of the benefits of this lobbying would potentially benefit the less politically powerful class of defendants.[118] But bail acts as a class-dividing scalpel, severing the link between higher and lower income defendants. Higher income defendants can easily afford the bail amounts set.[119] They also use the statutes designed to protect lower income defendants in the bail process to their own benefit, arguing that even if they face high-level charges, release accompanied by high bail amounts and expensive pretrial monitoring will ensure their appearance and protect the public while they await trial.[120] Thus, bail further exacerbates the divisions between the elite and lower class defendants in Alexandra Natapoff's "penal pyramid."[121] It is one of the many tools used at the very bottom of the pyramid, where "[s]uspects and defendants are handled in the aggregate based on discretionary police and prosecutorial decision-making."[122] In other words, bail is one of the many "mechanisms for institutionalizing disadvantage and conferring privilege"[123] within the system; indeed, one could reasonably argue that it is one of the most powerful mechanisms available for this type of sorting.

Most criminal defendants encounter the criminal justice system at the local and state level,[124] and the majority of courts within these

---

[118] It is not clear empirically how much beneficial spillover can occur, of course. *See, e.g.*, Lerner, *supra* note 110, at 602-03 (arguing that "spillover in procedural protections" occurs). *But see* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 796, 799-800 (2006) (noting that "procedural limits on white-collar investigations" maybe "an easier political sell," but rejecting the proposition that legislators only protect the interests of wealthy defendants).

[119] *See* COHEN & REAVES, *supra* note 1, at 1 (showing that only one out of six defendants detained pretrial was denied bail; the remaining five out of six were detained because they could not afford bail); *id.* at 3 (showing a median bail amount of $9,000 and a mean of $35,800).

[120] *See infra* notes 150–156 and accompanying text.

[121] *See* Natapoff, *supra* note 28, at 72 ("The penal system can be thought of as a pyramid in which law itself functions very differently at the elite top than it does at the sprawling bottom.").

[122] *Id.*

[123] Sharon Dolovich & Alexandra Natapoff, *Introduction: Mapping the New Criminal Justice Thinking*, *in* THE NEW CRIMINAL JUSTICE THINKING 15 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

[124] *See* CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 4 (2000), http://bjs. gov/content/pub/pdf/dccc.pdf (noting that "[a]pproximately 95% of criminal defendants are charged in State courts").

jurisdictions use money bail schedules to determine defendants' fate before trial.[125] These schedules, which are established by judges or legislatures,[126] are mandated in some jurisdictions and encouraged in others, and many judges use them.[127] The schedules typically assign a specific dollar amount or range for the bail that defendants must post, and the amount is based solely on the types of crimes charged.[128] For example, the California statute addressing bail schedules directs judges to "consider the seriousness of the offense charged" and does not include any other factors.[129] Bail schedules do not take into account defendants' ability to pay.[130] And although many bail amounts on the schedule would appear to be low and affordable, many defendants cannot afford these seemingly low amounts—for example, a $2,000 bond that must be posted within thirty days.[131] Indeed, 44% of felony defendants held on bail are detained pretrial because they cannot afford bail set at amounts less than $1,000.[132] Compounding this problem is the fact that many seemingly affordable bail amounts are increasing, with average bail

---

[125] *See* PRETRIAL JUSTICE INST., *supra* note 26 ("Between 1990 and 2004, the percent of cases where courts were requiring felony defendants to post a money bail . . . rose 54 percent to 69 percent.").

[126] Lindsey Carlson, Bail Schedules: A Violation of Judicial Discretion? 26-SPG Crim. Just. 12, 13 (2011) (noting that the schedules are sometimes "promulgated through state law"); *see also, e.g.*, Cal. Penal Code §1269b (c) (directing each superior judge in each California county to "prepare, adopt, and annually revise a uniform countywide schedule of bail for all bailable felony offenses" and misdemeanors).

[127] *See* Carlson, *supra* note 126, at 13 (noting that the schedules are "mandatory or merely advisory"); PRETRIAL JUSTICE INST., *supra* note 29, at 7 (noting that of 112 counties responding to a 2009 survey, 64% reported that judges use bail schedules).

[128] *See* PRETRIAL JUSTICE INST., *supra* note 29, at 7 (noting bail schedules' "exclude consideration of factors other than the charge"); Carlson, *supra* note 126, at 13 (noting that bail schedule amounts are "based upon the offense charged"). *Cf.* Brief for American Bar Association as Amicus Curiae in Support of Appellees and Affirmance at 15, Walker v. Calhoun (11th Cir., case no. 10521), https://www.americanbar.org/content/dam/aba/images/abanews/walker_v_calhoun_amicus.pdf (opposing the use of bail schedules because, *inter alia*, "the nature or name of the charge against the defendant may have little to do with the need for particular conditions on release").

[129] Cal. Penal Code §1269b (e).

[130] *Id.*

[131] *See* Anamaria Lusardi et al., *Financially Fragile Households: Evidence and Implications*, BROOKINGS PAPERS ON ECON. ACTIVITY 83–84 (2011) (showing that 25 percent of Americans cannot afford this amount).

[132] Leslie & Pope, *supra* note 61, at 530 (citing Mary T. Phillips, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., A DECADE OF BAIL RESEARCH IN NEW YORK CITY 149 (2012)).

amounts doubling in the past two decades.[133] Further, despite state statutes that often direct judges to take into account other factors,[134] as discussed below, these discretionary factors tend to benefit the wealthy, who hire sophisticated attorneys to make complex procedural arguments against detention.

Thus, wealthy defendants avoid what they would likely view as a highly unjust system in which they were rapidly pushed through the courts, jailed while awaiting trial, and pressured to agree to a quick plea deal, making this class of defendants relatively content with the status quo. In contrast, vast numbers of low-income, politically weak defendants are subjected to this system and lack the resources to change it.[135] Additionally, the few pretrial protections that have been achieved through political reform tend to offer little benefit to this class because they lack sophisticated attorneys or other resources to take advantage of these provisions.[136] The statutes intended to protect low-income defendants—which, in practice, further benefit wealthy defendants without providing much protection for the poor—expand the divide between the two classes of defendants in the pretrial and plea process and further prevent potentially beneficial pooling.

For federal defendants, the Bail Reform Act (BRA) directs a judge at a detention hearing to consider a variety of conditions in

---

[133] *Compare* PHENY Z. SMITH, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1990, 9 tbl.11 (1993) (reporting that, in 1990, the mean bail was $7,400 for released defendants and $21,700 for pretrial detainees) *with* BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 19 tbl.16 (2013) (noting that the mean bail for all defendants in 2009 was $55,400).

[134] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3967 (West 2018); FL. STATS. ANN. § 903.046 (West 2018); S.C. CODE ANN. § 17-15-30 (West 2018) (all requiring consideration of factors nearly identical to those required under the federal Bail Reform Act including, for example, family ties and "character and mental condition").

[135] *See* Shima Baradaran, *The State of Pretrial Detention*, *in* THE STATE OF CRIMINAL JUSTICE 2011 187, 190 (Myrna S. Raeder ed., 2011) (showing that total pretrial detainees were approximately 500,000); *State Policy Implementation Project*, A.B.A. CRIM. JUST. SEC. 2, http:// www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_handouts.authcheckda-pdf (last visited on Dec. 10, 2018) (observing that two-thirds of these defendants are non-dangerous defendants who are also low flight risk but cannot afford bail).

[136] *See* Wiseman, *supra* note 56, at 452–53 (describing reforms that rely more on actuarial risk assessment to predict likely pretrial flight or dangerousness in setting bail or requiring pretrial detention); COHEN & REAVES, *supra* note 18, at 4 (showing four states (Oregon, Illinois, Kentucky, and Wisconsin) that prohibit the use of commercial bail and explaining that the "District of Columbia, Maine, and Nebraska have little commercial bail activity").

determining whether to release or detain a defendant.[137] Some of these considerations appear to affect wealthy and low-income defendants evenly, such as the type of charges and weight of the evidence against the person.[138] While the act states that "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person," [139] detention of low-income federal defendants is common.[140] Specifically, the act directs judges to release defendants on personal recognizance (a promise that they will appear) or an unsecured appearance bond (one that does not require money) on the condition that the person not commit any crimes " during the period of release."[141] Judges may only impose additional conditions, including a money bond, if they determine that these non-monetary conditions would not "reasonably assure" appearance at trial or community safety.[142] And if judges do impose monetary conditions, the BRA prohibits them from setting "a financial condition that results in the pretrial detention of the person."[143]

Despite the apparently clear bar on detention for inability to pay, courts have interpreted the BRA to allow detention when defendants, due to their income or other circumstances preventing them from paying, cannot post the bond set by the court.[144] The courts justify this result because, as the First Circuit describes the circumstances, the defendant is detained "not because he cannot raise the money, but because without the money, the risk of flight is too great."[145] Moreover, defendants with relatively low incomes who are unable to meet bail are often unsuccessful in persuading a court that there are any conditions that would reasonably assure

---

137 *See generally* 18 U.S.C. § 3142 (2012).

138 18 U.S.C. § 3142(g) (2012).

139 18 U.S.C. § 3142(c)(2) (2012).

140 THOMAS H. COHEN, PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 1995-2010 1 (2013), https://www.bjs.gov/content/pub/pdf/pdmfdc9510.pdf (noting that in 2010, 76% of federal defendants were detained pretrial and that although much of this percentage consists of immigration defendants, the percentage of other types of defendants is also high—for example 84% of drug defendants).

141 18 U.S.C. § 3142(b) (2012).

142 18 U.S.C. § 3142(c) (2012).

143 18 U.S.C. § 3142(c)(2) (2012).

144 Wiseman, *supra* note 7, at 1396 n.234.

145 *Id.* (quoting United States v. Jessup, 757 F.2d 378, 389 (1st Cir. 1985), *abrogated by* United States v. O'Brien, 895 F.2d 810, 810 (1st Cir. 1990)).

the safety of the community or their appearance at trial. For example, a New York federal district judge considered the defendant's $50,000 personal recognizance bond (requiring $1,500 in money down) to be "modest."[146] He proceeded to determine the defendant's two bond co-signers were not "financially responsible" and could not guarantee a payment of $50,000, concluding that the bail package was insufficient to reasonably assure appearance at trial.[147] Thus, detention resulted directly from the defendant's financial inability to meet the bail amount set in the case. Indeed, the judge found that he was not required to "engage in a hypothetical or metaphysical meditation upon whether some combination of conditions might be imagined which would assure a defendant's appearance."[148] This is an implied concession that relatively low-income defendants will have a much more difficult time proving reasonable assurances in light of their inability to afford expensive home confinement, monitoring, or similar conditions in addition to their difficulty meeting the basic money bail requirements.

The "reasonable assurances" portion of the BRA has largely failed to benefit low-income defendants—those whom this language, in concert with the prohibition on the imposition of financial conditions that lead to pretrial detention, was designed to protect. In contrast, wealthy defendants, relying on sophisticated procedural arguments made by skilled attorneys, have used the language quite effectively.[149] For example, one criminal defendant accused of acquiring and exporting products "capable of triggering nuclear weapons" to Pakistan persuaded a federal judge that his posting of $100,000 in cash, detention at home under an electronic monitoring program paid for by the defendant, and provision of a $75,000 third-party bond would "reasonably assure" his appearance at trial under the BRA.[150]

---

[146] United States v. Lair, No. 06CR 1068, 2007 WL 325776, at *5 (S.D.N.Y. Feb. 2, 2007).

[147] *Id.* at *5.

[148] *Id.* at *4.

[149] *See* Jonathan Zweig, Note, *Extraordinary Conditions of Release Under the Bail Reform Act*, 47 HARV. J. ON LEGIS. 555, 563–566, 559 (2010) (describing how Bernie Madoff and Marc Dreier were able to benefit from the Bail Reform Act and criticizing the bail system for privileging the wealthy).

[150] United States v. Karni, 298 F. Supp. 2d 129, 130–31, 133 (D.D.C. 2004).

Another defendant, Marc Dreier, who fraudulently acquired more than $400 million, also managed to convince a federal court to release him under conditions that included home detention with electronic monitoring and private "armed security guards," among other conditions. [151] The guards reportedly cost $70,000 monthly.[152] The court directly recognized that Dreier's wealth had provided him with a distinct advantage in the pretrial process as compared to a poor defendant.[153] But it concluded based on Dreier's attorney's persuasive arguments that release was justified, finding:

> It cannot be gainsaid that many kinds of bail conditions favor the rich, and, conversely, that there are many defendants who are too poor to afford even the most modest of bail bonds or financial conditions of release. This is a serious flaw in our system. But it is not a reason to deny a constitutional right to someone who, for whatever reason, can provide *reasonable assurances against flight*.[154]

In 2016, a defendant with more than $600,000 in home equity assets, who posted a $500,000 secured bond and agreed to home detention and monitoring, similarly succeeded in arguing that these were reasonable assurances of community safety under the BRA despite having been charged with numerous violent crimes, including, for example, murder and kidnapping.[155] This was also despite a rebuttable presumption that no conditions would reasonably assure community safety due to a previous grand jury indictment of the defendant.[156]

Additional BRA language further tips the scales in favor of wealthy defendants—particularly the factor involving "the history

---

[151] U.S. v. Dreier, 596 F. Supp. 2d 831, 832–33 (S. D.N.Y. 2009).

[152] Elaine Silvestrini, *Reggae Star's Pretrial Release at Own Expense Raises Questions*, TAMPA BAY TIMES (Mar. 22, 2013), http://www.tbo.com/arts_music/reggae-stars-pretrial-release-at-own-expense-raises-questions-27820.

[153] *Dreier*, 596 F. Supp. 2d at 833.

[154] *Id.* (emphasis added); *see also* Zweig, *supra* note 149, at 556 (discussing the *Dreier* case).

[155] United States v. Enix, 209 F.Supp.3d 557, 564, 574-76 (W.D.N.Y. 2016).

[156] *Id*. at 562.

and characteristics of the person."[157] This prong includes "[t]he person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings."[158]

It is now widely documented that low-income individuals, and particularly individuals from certain racial groups, are disproportionately targeted for arrest and charged with crimes.[159] Thus, individuals from these groups are more likely to have criminal histories.[160] Further, indigent defendants without housing or employment stability will have more difficulty showing community ties, a lengthy residence within one community, or a solid job history or current employment situation.[161]

Many state statutes that guide judges' bail determinations direct judges to apply similar criteria. For example, Washington, D.C. uses identical language to the BRA in directing judicial officers to consider whether there are conditions of release that will protect the safety of the community and assure appearance at trial.[162]

South Carolina and Vermont list identical factors to the BRA to be considered in release determinations but require consideration

---

[157] 18 U.S.C. § 3142(g)(3) (2012).

[158] 18 U.S.C. § 3142(g)(3)(A).

[159] *See* CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, 62–64 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (finding that African Americans experience a statistically disparate impact in nearly every aspect of the law enforcement system in Ferguson, Missouri); *see also* William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 20 n.51 (1996) (noting "[t]he fact that the large majority of criminal defendants qualify for appointed counsel suggests how disproportionately poor defendants are" and that, in some parts of the country, at least 80-85% of defendants qualify for free counsel) (citing Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 379 n.102 (1993) and Jeffrey R. Rutherford, Comment, *Dziubak v. Mott and the Need to Better Balance the Interests of the Indigent Accused and Public Defenders*, 78 MINN. L. REV. 987, 987 n.48 (1994)).

[160] *See*, Stuntz, *supra* note 159, at 20 ("Criminal suspects and defendants are much more likely than the general population to be poor and black.").

[161] *See, e.g.*, Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 FORDHAM URB. L.J. 121, 155–56 (2009) (discussing how these factors, which grant judges broad discretion, allow judges to make arbitrary and discriminatory bail decisions).

[162] D.C. CODE ANN. § 23-1322 (West 2018).

of "character and mental condition" rather than physical and mental condition.[163] Arizona requires judges to consider the "accused's family ties, employment, financial resources, character and mental condition" in "determining the method of release or the amount of bail."[164] Florida has a similar list but also, like the BRA, includes "length of residence in the community."[165]

Some states go even further than the BRA in requiring judges to consider factors that might weigh against low-income defendants in the bail determination. For example, Rhode Island has a rebuttable presumption that any defendant charged with drug-related offenses—offenses for which a disproportionate percentage of the defendants are low-income defendants[166]—poses "a danger to the safety of the community," [167] thus making it more likely that the defendant will be detained pretrial.

Although these and other statutes might appear to somewhat limit judges' discretion in the pretrial release determination, the statutes also give judges wide latitude to balance the factors and make personal judgments in deciding whether to release a defendant.[168] Psychological biases in favor of wealthy defendants deemed more responsible and trustworthy therefore also affect the judicial decision. A factor as simple as the quality of the defendant's clothing sometimes influences a judge's decision to release or detain.[169] Indeed, studies indicate that defendants charged with the same crime, appearing before the same judge, and exhibiting

---

[163] S.C. CODE ANN § 17-15-30(A)(4) (West 2018); VT. STAT ANN. tit. 13, §7554(6)(2) (West 2018).

[164] ARIZ. REV. STAT. ANN. § 13-3967(B)(7) (West 2018).

[165] FLA. STAT. ANN. § 903.046(c) (West 2018).

[166] *See, e.g.,* Deena Greenberg, Note, *Closing Pandora's Box: Limiting the Use of 404(B) to Introduce Prior Convictions in Drug Prosecutions*, 50 HARV. C.R.-C.L. L. REV. 519, 523 (2015) (noting that "drug enforcement disproportionately focuses on low-income communities").

[167] 12 R.I. GEN. LAWS ANN. 1956, § 12-13-5.1 (West 2018).

[168] *See* Baradaran Baughman, *Costs*, *supra* note 15, at 3 ("The current balancing process that judges use to make pretrial release and detention decisions is laden with individual biases and ad hoc heuristics that make these decisions unpredictable."); *id*. (noting that individuals who are charged with identical crimes who live in similar neighborhoods experience dramatically varied pretrial release outcomes).

[169] *See* Mitchell P. Pines, *An Answer to the Problem of Bail: A Proposal in Need of Empirical Confirmation*, 9 COLUM. J.L. & SOC. PROBS. 394, 408 (1973) ("An unusual appearance, from the type of jacket to the length of hair, may elicit different bail decisions for the same crime."); *see also* Wiseman, *Fixing Bail*, *supra* note 56, at 441 (describing highly subjective bail decisions).

similar characteristics with respect to dangerousness and flight risk nonetheless receive meaningfully different treatment. For example, in one case study of a courthouse's bail practices, out of three defendants facing marijuana-related charges, who appeared before the same judge on the same day and had similar backgrounds, two were assigned bail amounts of $500, and a third had to pay $2,000.[170]

The combination of statutes that provide procedurally offensive strategies for wealthy defendants and the common use of money bail, which explicitly benefits wealthier defendants, creates a distinctly two-track system. Wealthy defendants largely avoid the worst aspects of a system characterized by high pretrial detention, plea, and conviction rates, thereby maintaining and entrenching a status quo that is increasingly recognized as unjust[171] and economically inefficient.[172]

B. CLEARING DOCKETS

As argued above, cash bail and pretrial detention contribute to high incarceration rates by helping produce cheap convictions.[173] Because prosecutors and judges face professional pressure to process a high volume of cases, these groups—both key stakeholders in criminal justice reform[174]—have an incentive to resist efforts to make obtaining convictions a lengthier and more difficult process by reducing pretrial detention.

Prosecutors are overburdened with cases—facing "extreme docket pressure"[175]—yet they work under stringent performance

---

[170] *See* Pines, *supra* note 169, at 408; *see also* Wiseman, *Fixing Bail, supra* note 56, at 447, n. 186 (noting this problem).

[171] *See supra* note 30 (outlining due process concerns related to the current bail system).

[172] *See* Eric Holder, Att'y Gen., U.S. DEP'T OF JUSTICE, Address at the National Symposium on Pretrial Justice (June 1, 2011) https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice (noting that many defendants are jailed pretrial due solely to their income); *see also* CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 6 (2012), https://storage.googleapis.com/vera-web-assets/downloads/Publications/price-of-prisons-what-incarceration-costs-taxpayers/legacy_downloads/price-of-prisons-updated-version-021914.pdf (noting the extremely high costs of state prisons to taxpayers).

[173] *See supra* Part II.

[174] *See supra* note 38 (noting the political influence of prosecutors and judges).

[175] Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 601 (2005); *see also* Barkow,

expectations and tend to be ambitious politically.[176] District attorneys' electorates demand convictions,[177] or at least that is the presumption of many prosecutors with electoral concerns in mind.[178]

The political factors that contribute to high incarceration rates—including, as argued above, the bail system's sorting of defendants by wealth[179]—have entrenched a prosecutorial reward and incentive structure that tends to encourage high conviction rates, and indeed, prosecutors tend to receive promotions and better pay when they achieve higher conviction rates.[180] And individual prosecutors' personal incentives have been well-documented.[181] Even for the many prosecutors who operate under the best intentions, obtaining large numbers of convictions through quick plea bargains is far easier than slogging through slow trials or complex pretrial negotiations that result in fewer convictions.[182]

Judges' incentives, too, seem strongly skewed toward practices

---

supra note 9, at 39 ("In many offices, an emphasis is placed on processing as many cases as possible because of crushing caseloads.").

[176] *See* Bibas, *supra* note 13, at 2472 (noting that prosecutors "are a politically ambitious bunch" and "have incentives to take to trial only extremely strong cases and to bargain away weak ones").

[177] *See, e.g.*, Stuntz, *supra* note 80, at 537–38 (observing that "local prosecutors must satisfy local public demands" and that "anything that converts contested trials into guilty pleas" benefits prosecutors).

[178] *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?,* 44 VAND. L. REV. 45, 58 n.63 (1991) ("For subordinato [sic] prosecutors in larger offices, promotion and internal evaluation depends largely on the ability to produce convictions."); *see also* Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE L. & POL'Y REV. 1, 43 (2007) (noting the importance of "win-loss statistics" to prosecutors).

[179] *See supra* Part II.C.

[180] *See* Daniel S. Medwed, *The Zeal Deal Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 135 n.40 (2004) (citing several articles suggesting that upward mobility as a prosecutor is dependent on high conviction rates).

[181] *See id.* at 153–54 (noting that "[m]any prosecutors have political ambitions extending beyond the district attorney's office"); *see also* Guido Calabresi, The Current, Subtle—and Not So Subtle—Rejection of an Independent Judiciary, Address at the Owen J. Roberts Memorial Lecture (Jan. 31, 2002), *in* 4 U. PA. J. CONST. L. 637, 639 (2002) (describing political pressures faced by prosecutors).

[182] *See* Alkon, *supra* note 15, at 200–01 (noting that prosecutors "can expect cases to be easily resolved in the plea bargaining process" and that "[s]imply asking for prosecutors to exercise more discretion to return to earlier filing rates, and file fewer cases, is unlikely to have the necessary far-reaching impact"); *see also* Rachel Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 728 (2005) (noting other tools that prosecutors use in order to make their task—obtaining convictions—easier and observing that "[p]rosecutors have an incentive to lobby for harsher sentences because longer sentences make it easier for them to obtain convictions through plea bargaining").

that reduce docket pressure. The desire to process cases as quickly and efficiently as possible, combined with tunnel vision and entrenchment of familiar bureaucratic rules,[183] generates strong resistance to reform. In one extreme example, after a federal district court enjoined the use of the money bail system previously followed in Harris County, Texas, it appears that many state judges purposefully induced higher failure-to-appear rates by, for example, providing misinformation about court dates, scheduling appearance requirements the day after defendants' late-night release from jail, and releasing defendants who were the highest risk for non-appearance without supervision.[184] Their goal, it appears, was to make alternatives to money bail—those required by the injunction—seem unworkable.[185] One of the few Harris County judges who resisted this goal described the other judges' attempts as efforts to "sabotage the federal injunction and to manipulate the bond-forfeiture statistics to make it look like people released on unsecured bond pursuant to the federal order are failing to appear in droves."[186]

A decision denying bail and requiring pretrial detention tends to induce quick plea bargains, thus making the work of prosecutors and judges easier. Indeed, in *Brady v. United States,* which affirmed the legality of plea bargaining, the Supreme Court emphasized the resource-based advantages of plea bargaining, noting that "with the avoidance of trial, scarce judicial and prosecutorial resources are conserved."[187] The literature has documented a correlation between

---

[183] *See* Barkow, *supra* note 9, at 33 (noting that the criminal justice system has expanded because of the bureaucracies created in response to the violence of the 1960s and 1970s).

[184] Appellees' Opposition to Motion of Appellants Fourteen Judges of Harris County Criminal Courts at Law for Stay of the Preliminary Injunction and Entry of a Modified Conjunction Reflecting this Court's Ruling at 13–14, ODonnell v. Harris Cty., 892 F.3d 147 (5th Cir. 2018) (No. 17-20333) [hereinafter Appellees' Opposition to Motion] (describing the "policies and practices" judges allegedly used "to deliberately increase the likelihood that an arrestee released on unsecured bond" would not appear).

[185] *See id.* at 15 (describing the abovementioned practices as "an attempt to 'deliberately undermine' the federal order and evidence of a '[c]lear[] … hope … that the reformed bail process fails'" (quoting Gabrielle Banks & Mihir Zaveri, *Dozens of jail inmates miss out on pretrial help as county struggles with bail order*, HOUS. CHRON. (July 12, 2017), https://www.chron.com/news/houston-texas/article/Dozens-of-jail-inmates-miss-out-on-pretrial-help-11281893.php)).

[186] Appellees' Opposition to Motion, *supra* note 184, at Exhibit 1, p. 1.

[187] 397 U.S. 742, 752 (1970).

greater constraints on court time and plea bargaining rates,[188] and that "because of severe budgetary pressure on prosecutors," plea bargains are "viewed as an essential tool for managing large case loads."[189] These dynamics can create a race to the bottom because prosecutors who seek unaffordable bonds less often feel pressure to keep up with their peers' conviction metrics.

Some competing incentives might help to push back against this temptation, such as the personal recognition and acclaim that accompanies high-profile, drawn-out trials.[190] But these incentives are likely somewhat weak as compared to those pushing toward large numbers of convictions obtained through plea bargains. Pretrial detention and quick pleas present a convenient pathway to these results.[191] Prosecutors, important stakeholders in reform debates, thus have an incentive to oppose any reforms that would reduce the ease of plea bargains, including policies that would reduce pretrial detention rates.[192]

Judges, too, face intense docket pressures and have too few resources to clear dockets in a timely fashion. And, like prosecutors, they are penalized for failing to meet numerical thresholds. As Nancy King and Ronald Wright note, "court administrators can now hold individual trial judges accountable for each tiny variation in docket speed and related administrative cost."[193] Plea bargains provide an easy way around these challenges, allowing for rapid

---

[188] *See supra* notes 83–84 and accompanying text.

[189] Mongrain & Roberts, *supra* note 80, at 8; *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 865, 893-96 (2000) (arguing that prosecutorial incentives—and particularly their "crushing workloads"—were and are the strongest cause of the rise of plea bargains); Landes, *supra* note 22, at 64 ("Scarce resources provide an incentive for the prosecutor to avoid a trial and negotiate a pre-trial settlement with the defendant.").

[190] *See, e.g.*, Bibas, *supra* note 14, at 2472 (noting that prosecutors might "push strong or high-profile cases to trial to gain reputation and marketable experience").

[191] *See* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 32 (2012) ("Plea bargains guarantee certainty of conviction and punishment.").

[192] There are, of course, exceptions to the norm. Some prosecutors have led bail reform efforts in their jurisdiction. *See, e.g.*, INST. FOR INNOVATION IN PROSECUTION, PROSECUTORS & BAIL: USING DISCRETION TO BUILD A MORE EQUITABLE AND EFFECTIVE SYSTEM (2017), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c019f5c3-2f4e-b516-dddd-c24f05e95642&forceDialog=0 (describing instructions from the Cook County, Illinois State's Attorney to assistant attorneys indicating that they should "affirmatively support release on recognizance" in certain types of cases).

[193] Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 327 (2016)

case disposition and easing judges' workloads.[194] Indeed, state trial judges are routinely pushed to not only induce pleas but to induce *earlier* pleas, reducing "the number of conferences and hearings for each case [and] freeing up the time of attorneys, judges, court staff, and sheriff's personnel."[195] Thus, there may be a race to the bottom here, too, as judges insistent on providing defendants with more meaningful process risk clearing fewer cases than their peers, thus dimming their future prospects. They also help to preserve an appearance of criminal justice system integrity, "erasing the possibility of either factual or legal error" associated with judgments.[196]

The strong incentives pushing the most powerful players in the criminal justice system away from linked bail and plea bargain reform make changes to this system more difficult, particularly given existing, direct opposition to bail reform from well-organized stakeholders such as the bail bondsman lobby.[197]

IV. AN INTEGRATED APPROACH: IMPLICATIONS FOR REFORM EFFORTS

The link between bail, pretrial detention, plea bargaining, conviction rates, and sentence length might serve as both a benefit and impediment to efforts to reform the incarceration system as a whole as well as bail, specifically. On the positive side, it serves as yet another justification for bail reform, and it provides a key tool in the arsenal of policies attempting to reduce the size of the U.S. prison population. Yet it also might subject bail reform efforts to increased scrutiny from those who support maintenance of current charge and incarceration rates. Just as bail reform might be a subtle but meaningful way of reducing U.S. incarceration numbers—thus suggesting that incarceration reform efforts should recognize the

---

[194] *See* Fisher, *supra* note 169, at 867 (noting that soon after the rise of the use of plea bargains, "[j]udges apparently discovered that they had more power to spur pleas in criminal cases than to coerce settlements in civil cases" and that as they faced higher civil case burdens, they used plea bargains to resolve "more and more criminal cases by guilty plea").

[195] King & Wright, *supra* note 193, at 357.

[196] Fisher, *supra* note 169, at 867.

[197] *See* Wiseman, *supra* note 97, at 1381–82 (noting that the bondsman lobby "has hampered reform efforts"); FEELEY, *supra* note 18, at 214–15 (describing bail bondsmen as contributing to pretrial difficulties for defendants).

importance of bail—bail reformers must also be aware of the broader implications of reform, including the potential need to better fund other parts of the criminal justice system in order to achieve a conviction rate acceptable to both stakeholders and the public.

A. PRETRIAL REFORM AS AN INSTRUMENT OF SYSTEMIC CHANGE

Bail reformers have recently celebrated a number of striking successes, as evidenced by recent court decisions impacting California and Houston as well as significant changes to bail policies in populous areas like New Jersey and Atlanta.[198] Reform proponents have made constitutional arguments on due process and equal protection grounds, pointing to the gross injustice of a system explicitly focused on income yet designed to be blind to defendants' ability to pay.[199] Indeed, equal protection arguments raised by reform attorneys have now been successful in several U.S. district court cases.[200] If ultimately adopted by higher courts, these rulings could dramatically reshape the pretrial landscape.

The most direct contribution of the bail–mass incarceration link is thus to further support what appears to be a quickening reform pace. Beyond constitutional arguments, the bail-mass incarceration link simply provides more fuel for the fire. In the event that higher courts do not consistently follow the equal protection and due process doctrine currently building in the bail reform context, it supports a strong political case for reform. Somewhat less directly, focusing on the bail-mass incarceration link could provide a more promising path in the long effort to reduce the burgeoning U.S. prison population.

---

[198] *See supra* notes 2–4 and accompanying text.

[199] *See, e.g.*, Heaton et al., *supra* note 7, at 770–71 (noting potential empirical support for the argument that money bail violates equal protection and due process); *see also* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 766–75 (2011) (arguing for pretrial due process rights); Miller & Guggenheim, *supra* note 7, at 357–58, (arguing that pretrial detention violates due process in some circumstances); Jeff Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 WIS. L. REV. 441, 465–70 (1978) (arguing for due process protections pretrial).

[200] The group Equal Justice Under Law, raising equal protection arguments, among others, has "filed 12 challenges against money bail in 9 states," leading to the abolition of money bail in seven communities. *See* Equal Justice Under Law, *Ending American Money Bail*, http://equaljusticeunderlaw.org/money-bail-1/ (last visited Dec. 10, 2018); see also *supra* note 34 for a description of some of these cases.

Despite a drop in crime in recent decades, the U.S. incarceration rate remains stubbornly high.[201] The incentives driving a relatively high demand for convictions in the United States have been widely discussed in the literature.[202] Surveys consistently indicate that the public preference for relatively aggressive policing and prosecution of criminal defendants does not waver much: the public believes that there are high crime rates even when they have declined,[203] in part due to disproportionate media coverage of violent crime.[204]

Moreover, the groups most directly impacted by high incarceration rates also tend to have relatively little political clout.[205] Thus, local and state judges and prosecutors, the majority of whom are elected, tend to promise tough-on-crime results, as do

---

[201] *See* John F. Pfaff,, *Review: Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 Mich. L Rev 1097, 1098–1102 (2013) (describing many accounts of decreasing crime rates and increasing incarceration but criticizing them as missing key points, such as the fact that certain types of crime rates of increased).

[202] *See, e.g.*, KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 79–88 (1997) (describing politicians' explanation that they are implementing tough-on-crime policies in response to public demand); *see also* Paul H. Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1979 n.133 (2010) (arguing that politicians, not the public, often drive tough-on-crime policies); Tom R. Tyler & Robert J. Boeckmann, *Three Strikes and You Are Out, but Why? The Psychology of Public Support for Punishing Rule Breakers*, 31 LAW & SOC'Y REV. 237, 239–40 (1997) (exploring various explanations for the public's tendency toward punitiveness). *But see* Stuntz, *supra* note 118, at 801 (noting that "Americans seem to value both privacy and process more than they once did" and arguing that constitutional criminal procedural protections that give too few rights to defendants but displace certain legislative action have thwarted needed change). Stuntz has, however, also focused on how public demand for crime control and politicians' response to it have resulted in criminal injustice. *See* Stuntz, *supra* note 80, at 509.

[203] *See* Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 418 (2006) ("Public opinion polls in the United States throughout the 1990s and into the current decade demonstrated high levels of anxiety about crime, a persistent unawareness of the drop in crime rates, and strong support for more punitive measures."); *id*. (noting that "national polling indicates that a majority of the public is not aware that crime has decreased dramatically"); Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 8, 58 (2000) (reviewing numerous surveys and observing that they confirm that "the public is punitive toward crime" but that "[i]t is not clear that most citizens are highly committed to one fixed view toward the sanctioning of lawbreakers").

[204] *See* Beale, *supra* note 203, at 422 (describing extensive media focus on crime and its likely impact on public opinion); Cullen et al., *supra* note 203, at 58 (observing that "opinions about crime fluctuate and are likely to become more harsh if citizens are told disturbing stories about offenders and the nation's crime problem by the media or bully-pulpit politicians.").

[205] *See supra* note 115 and accompanying text.

policymakers.[206] And as Rachel Barkow has documented, the sprawling criminal justice bureaucracy that built up during the high-crime era "created agencies and actors who have a vested stake in any efforts to contract the system."[207] Indeed, these actors have developed a sort of "tunnel vision"—one rooted in the efficient processing of as many cases as possible, and in which the "tradeoffs and downsides" of the system are ignored.[208]

In the face of these dynamics, significant reductions in the incarceration rate have been difficult to achieve.[209] Although pretrial reform is far from a magic bullet, the data suggest it could have important downstream effects.[210] As this Article documents, detention paves the way for quicker prosecutions and allows prosecutors to charge more defendants, and it appears to be an important yet under-appreciated contributor to mass incarceration.[211] Modifying or eliminating the money bail system is, relatively speaking, a small change compared to more radical reform proposals aimed more broadly at mass incarceration.

Moreover, two additional features of reduced pretrial detention rates suggest it could be a promising locus of reform for groups working to reduce incarceration rates. First, it can lead to immediate financial savings on pretrial detention.[212] Per-inmate costs for the pretrial population range from approximately $50 to $123, with annual jail costs ranging from $84 million to more than $800 million.[213] Indeed, those supporting New Jersey's reforms have

---

[206] *See, e.g.*, Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L REV. 317, 327–32 (2010) (describing judges' campaign promises to be tough on crime); Medwed, *supra* note 180, at 153 ("[P]articularly in recent years, the generalized campaign theme adopted by a candidate running for the office of chief prosecutor is from the tough-on-crime category.").

[207] Barkow, *supra* note 9, at 33.

[208] *Id*. at 36.

[209] *See, e.g.*, Oregon Criminal Justice Comm'n, *Report to the Legislature: Incarceration, Costs and Crime*, 19 FED. SENT'G REP. 267, 267 (2007) (describing how between 1980 and 2005, the U.S. "incarceration rate more than tripled going from 1.34 to 4.52 persons incarcerated per 1,000").

[210] *See* Laura and John Arnold Found., *supra* note 4 (showing that pretrial reform in pilot jurisdictions has helped reduce jail populations and pretrial crime rates).

[211] *See* PFAFF, *supra* note 6, at 133–34 ("To date, however, no state- or federal-level proposal aimed at cutting prison populations has sought to explicitly regulate [prosecutorial] power.").

[212] *See* Wiseman, *supra* note 7, at 1357 (observing that pretrial detention rates impose high costs on the public given the expenses of operating detention facilities).

[213] *Id.* at 1358.

focused largely on the fact that they immediately reduced the size of the state's incarcerated population, of which pretrial detainees make up a large part, and associated costs.[214] And in Harris County, Texas, bail reform created nearly $4.5 million in avoided costs in one year.[215] Second, bail reform mostly benefits low-level offenders and the innocent.[216] It lowers innocent defendants' likelihood of pleading guilty if they have been released rather than detained pretrial. And if reform causes judges to consider empirically-tested characteristics that more accurately predict dangerousness and flight risk, it favors the release of non-dangerous defendants. Thus, reform tends to affect the populations who have historically suffered most distinctly from the U.S. incarceration policy.[217]

B. BLUNTING STAKEHOLDER OPPOSITION

Despite the support that the bail-mass incarceration link provides for reform efforts, bail reformers should also recognize that some impediments to their arguments—which have been largely focused on inequality, as well as the practical budgetary consequences of high pretrial detention rates[218]—might arise from the knowledge that bail reform would tend to reduce conviction and incarceration rates.[219] Thus, efforts to modify the bail system might find more traction if they were accompanied by proposals to maintain somewhat high conviction rates by shifting savings from reduced pretrial detention toward other parts of the criminal justice system. Of course, this would have the perverse effect of eliminating

---

[214] *See supra* note 8; *see also* GLENN A. GRANT, N.J. COURTS, JAN. 1-DEC. 31 2017 REPORT TO THE GOVERNOR AND THE LEGISLATURE 20 (2018), https://www.judiciary.state.nj.us/courts/assets/criminal/2017cjrannual.pdf (showing record lows in total jail and pretrial populations in the January 2015-January 2018 time period).

[215] ARTHUR W. PEPIN, CONFERENCE OF STATE COURT ADM'RS, 2012-2013 POLICY PAPER: EVIDENCE-BASED PRETRIAL RELEASE 8 (2013), https://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20-Final.ashx.

[216] *See* Laura and John Arnold Found., *supra* note 4 (noting that many of the individuals held in jail before trial are low-level offenders that pose little risk to public safety).

[217] *See, e.g.*, Alexander, *supra* note 6, at 6–7 (documenting the impacts of mass incarceration on low-income African-American defendants).

[218] *See supra* notes 7–8.

[219] For a discussion of the links between bail and high plea rates, and between pleas and easier convictions, *see supra* notes 15-20.

the benefits of bail reform in terms of its reduction of mass incarceration. But perhaps some compromise could be struck, in which the public accepted somewhat lower incarceration rates if adequately high savings from bail reform and maintenance of public safety could be demonstrated. To the extent that the benefits of bail reform—particularly the budgetary ones—outweigh the effects of reducing incarceration, which are viewed negatively by many politicians and stakeholders,[220] bail reform could be an effective means of chipping away at incarceration rates. Some of the substantial cost savings of bail reform noted in Part III.A could be used to co-opt opposition from prosecutors and judges.

Bail has been historically resistant to reform,[221] however, and there is likely to be a continued need for effective advocacy regardless of the outcomes in court.[222] To that end, understanding the role pretrial detention plays in letting prosecutors and judges do their jobs on a day-to-day basis might help advocates find ways of mitigating resistance. For example, bail reform advocates who might otherwise oppose a budget increase for the district attorney's office could support it as a part of a reform significantly reducing pretrial detention—recognizing both that prosecutors' workload would likely increase and that some of the money could come from reduced spending on pretrial detention. Similarly, judges' opposition might be muted by support for more criminal courts and judicial staff, along with a shift in focus away from measuring and maximizing "productivity" and towards providing meaningful process in criminal cases—or at least towards lower productivity targets.

Further, reducing the incarceration rate would of course generate substantial savings. Corrections expenses make up a large portion of the criminal justice budget—as much as 57% at the state level, by some estimates.[223] One 2012 study of 40 states found total correctional costs of $39 billion when expenses such as corrections

---

[220] *See supra* note 38 and 180–195 and accompanying text.

[221] *See* Heaton et al., *supra* note 7, at 716–17 (noting that, despite the issues associated with current bail policy, it has persisted throughout the nation and is unlikely to shift absent evidence that it does more harm than good).

[222] *See* Wiseman, *supra* note 56, at 422–23 (describing judges' continued practice of setting bail that leads to pretrial detention despite a growing legislative movement to the contrary).

[223] KYCKELHAHN, *supra* note 99, at tbl. 1 (providing FY 2012 data).

department retiree healthcare and health care for inmates were included,[224] with an average per-inmate cost of $31,286 annually.[225]

Federal prisons, which have grown even more than state detention systems in recent decades, cost approximately $6.7 billion in 2013.[226] Thus, by not spending more on the trial process, jurisdictions end up spending more on imprisonment. Rebalancing spending would result in fewer, but higher quality, convictions.

The dynamics of pretrial reform could also help minimize the concerns of those wishing to be, or appear, "tough on crime." Although bail reform broadly benefits low-income defendants,[227] the defendants most likely to be released pretrial under reformed bail systems will, in many cases, be those for whom there is less evidence of dangerousness and who have been charged with relatively low-level crimes.[228] And if prosecutors have to give up certain plea bargains as a result of lower pretrial detention rates, they are likely to jettison the least serious cases and the cases with the weakest evidence. Thus, the defendants who otherwise would have been convicted under a plea, or who have more bargaining power in the plea bargaining process because they have not been detained

---

[224] HENRICHSON & DELANEY, *supra* note 172, at 60.

[225] *Id*. at 9.

[226] Pew Charitable Trusts, *Federal Prison System Shows Dramatic Long-Term Growth* 1 (2015) http://www.pewtrusts.org/~/media/assets/2015/02/pew_federal_prison_growth.pdf.

[227] Bail reform efforts like those described in New Jersey and Atlanta substantially curtail the use of money bail, which, as documented here and in prior work, is most detrimental to low-income defendants who tend to be unable to afford the bail amounts set. *See supra* notes 125-133. Furthermore, there is a compelling case that bail—and particularly its tendency to induce pleas, even by those who are innocent—specifically harms innocent defendants. *See supra* note 79 and accompanying text.

[228] One of the most broadly-implemented reforms uses empirically-tested models to better predict flight and dangerousness and thus enables the release of more defendants but only those shown to be least likely to commit crimes or flee pretrial. *See* Laura and John Arnold Found., *supra* note 4 (noting that twenty-one jurisdictions have adopted the Public Safety Assessment, which has been shown to "increase public safety while reducing jail populations."). The recently-implemented reforms in Atlanta and New Jersey similarly focus on reducing the use of pretrial detention for non-dangerous defendants with low flight risk. *See* GRANT, *supra* note 214, at 2, 13, (noting that under the New Jersey reforms prosecutors may "move for the pretrial detention of defendants whom the prosecutor believes are too dangerous for release" and showing that over 8,000 of the more than 42,000 complaint-warrant defendants for whom release decisions were made in 2017 were detained pretrial); ATLANTA, GA., ORDINANCE 18-O-1045, *supra* note 4, at 1 (finding that "for future arrestees charged solely with non-violent offenses, the City of Atlanta wishes to allow release from the Atlanta City Detention Center after booking, on a recognizance or signature [non-monetary] bond").

pretrial, will not generally be the most notorious, dangerous criminals who typically receive the brunt of public attention and who generate "tough on crime" demands.

V. CONCLUSION

The United States is in the midst of a mass incarceration crisis which has endured for years. More than two million Americans are in prison—a higher percentage than in any other country.[229] Approximately 3% of all black males in the United States are incarcerated.[230] And as a vast literature has noted, this system is extraordinarily expensive in addition to being racially discriminatory, overcrowded, dangerous, drug-ridden, and inadequately attentive to serious major health (including mental health) and sexual assault problems, among a host of other problems.[231]

Pretrial incarceration, too, has reached a point of crisis.[232] It would be surprising if the two phenomena were entirely unrelated. On a fundamental level, both reflect our internationally-anomalous zeal for locking up our fellow citizens, the bases for which remain a subject of vigorous debate. More immediately, though, pretrial detention of indigent defendants and high overall incarceration rates are interconnected in underappreciated ways. As argued above, pretrial detention of the poor lowers the cost of convictions by inducing quick guilty pleas while ensuring that wealthier, better represented groups retain access to higher quality process and better outcomes, reducing the political appetite for both pretrial bail reform and reductions in the incarcerated population more broadly.[233] This effect is exacerbated by the role pretrial detention

---

[229] Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531, 1552 (2016).

[230] Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1142 (2014).

[231] *See* Delgado & Stefancic, *supra* note 229, at 1552–53 (summarizing the literature); *id.* at 1537-39 (describing how mass incarceration affects Latinos and Native Americans in addition to African-Americans); *supra* note 6 (noting the expansion of the criminal justice system in response to the racial upheaval of the 1960s).

[232] A system in which nearly two-thirds of defendants in jail are there because they cannot afford bail is, by many measures, a system in crisis. *See State Policy Implementation Project, supra* note 135, at 2.

[233] *See supra* Parts I & III.A.

plays in producing the high conviction and docket-clearance rates to which the public has become accustomed and on which the careers of prosecutors and judges, both key stakeholder groups, may hinge.[234]

All of this suggests that pretrial bail reform and curtailing the use of cash bail could play a non-trivial role in lowering overall incarceration rates, and that recognizing and addressing the concerns of stakeholders invested in the status quo could help reduce opposition to this reform. More broadly, absorbing the full cost of providing a meaningful adversarial process to all defendants, regardless of wealth, might push jurisdictions towards methods beyond arrest and prosecution for addressing crime and the underlying social problems that contribute to it. Indeed, if spending on prosecutions increases, the relative cost of programs such as mental health and drug addiction treatment, education and vocational training, and housing assistance decreases.

None of this is to suggest, however, that even radical pretrial bail reform would drastically reduce incarceration rates. It very likely would not; the pathologies underlying our enormous demand for imprisonment can probably not be countered by improved process alone. Nonetheless, any reduction in incarceration rates would be, in some sense, a bonus. Reducing detention rates is well worth doing for its own sake.

---

[234] *See supra* notes 180-65, 173–74 and accompanying text.