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Costs of Pretrial Detention

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COSTS OF PRETRIAL DETENTION

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Spending on U.S. incarceration has increased dramatically over the last several decades. Much of this cost is on incarcerating pretrial detainees—inmates not convicted of a crime—which constitute the majority of individuals in our nation's jails. Current statutory schemes give judges almost complete discretion to order pretrial detention based on unexplained or unidentified factors. With this discretion, judges tend to make inconsistent decisions in every jurisdiction, some releasing almost all defendants—including the most dangerous—and others detaining most defendants—even those who are safe to release. There are constitutional and moral reasons to evaluate our current detention scheme, but even the fiscal impact of pretrial detention alone calls for an empirical analysis. Although legal scholarship has applied cost-benefit analysis to other areas of criminal law, this Article is the first attempt at conducting such analysis in the pretrial arena. This Article compares the risk posed by each defendant and the cost of any crimes they may potentially commit while released with the costs incurred by detaining these defendants. The results show that relying on the cost-benefit model provided here, judges could bring significant savings—approximately $78 Billion, increased safety, and potentially more equitable pretrial detention decisions.

INTRODUCTION

Over the past few decades, the amount of money expended on the administration of the criminal justice system has skyrocketed.[1] In particular,

· Professor of Law, University of Utah College of Law. The author appreciates work on this article by James Parry Sanders, Alexandra Mareshcal, and Alexander Williams. I am also thankful to Frank McIntyre for the underlying econometric work relied on in this article.

[1] William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 783–84 (2006) (stating that "[s]pending on the adjudication process has risen a great deal" in the "past generation").

spending on prisons has increased dramatically.[2] According to one study, spending on corrections from 1971 to 2002 rose 455%, adjusted for inflation.[3] Institutions of higher learning and prisons compete for limited state funds, and prisons often win.[4] In California, for instance, 10% of the state general fund went to higher education and 3% went to prisons thirty years ago, today 11% goes to prisons and 7.5% to higher education;[5] per-inmate spending in the state is $48,214, compared with per-student spending of $7,463.[6] And overall, this nation spends an estimated $80 billion per year on incarceration.

However, not all of the incarceration costs are for prisoners. Rather, much of it goes toward housing pretrial detainees—individuals held without bail based on some perceived level of dangerousness or flight risk—who now make up the majority of detainees nationwide.[7] Historically, many inmates enjoyed the constitutional right to release before trial.[8] But as the law has evolved in this area, judges have been charged with deciding which defendants can be safely released and which should be held in jail before trial.[9] The current balancing process that judges use to make pretrial release and detention decisions is full of individual biases and ad-hoc heuristics that

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[2] Shima Baradaran & Frank McIntyre, *Predicting Violence*. 90 TEX. L. REV. 497, 551 (2012).

[3] Stuntz*, supra* note 1, at 784 n. 12 ("From 1972 to 2001, spending on corrections rose 455% in constant dollars.").

[4] David Browdin, *How High Prison Costs Slash Education and Hurt the Economy*, U.S. NEWS & WORLD REPORT, May 24, 2012, http://www.usnews.com/opinion/blogs/economic-intelligence/2012/05/24/how-high-prison-costs-slash-education-and-hurt-the-economy ("With state revenues under pressure and prison budgets off-limits, funds for higher education have been slashed.").

[5] *Id*. ("Thirty years ago, 10 percent of the general fund went to higher education and only 3 percent went to prisons. Today, almost 11 percent goes to prisons and only 7.5 percent goes to higher education.").

[6] Brian Resnick, *Chart: One Year of Prison Costs More Than One Year at Princeton*, THE ATLANTIC, Nov. 1, 2011, http://www.theatlantic.com/national/archive/2011/11/chart-one-year-of-prison-costs-more-than-one-year-at-princeton/247629 (comparing spending on prisons vs. spending on higher education in New Jersey).

[7] Shima Baradaran & Frank McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 551 (2012) ("In 1990, the percentage of pretrial detainees was about 50%, but in 2007, the pretrial detainee population increased to 62% of the jail population.").

[8] Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L. J. 723, 768–69 (2011).

[9] Baradaran, *supra* note 7, at 499 (discussing the types of selectivity bias inherent in the pretrial risk assessment performed by judges).

make these decisions unpredictable.[10] This is evidenced by the inconsistency in pretrial release rates across counties in the United States—some judges release less than 5% of defendants, whereas others release more than 90% of defendants charged with exactly the same types of crimes in similar neighborhoods.[11] The amount spent on pretrial detention—and the inconsistent decisionmaking processes from which those costs stem—require consideration.

In this Article, I explore the potential value of a cost-based method of pretrial detention decisionmaking. In its simplest form, cost-benefit analysis is a means of converting the losses and gains of two different courses of action into quantifiable dollar terms and aggregating to determine total gains and losses to society.[12] It is an examination of the factors that weigh in favor of or against choosing between the two courses of action—with the end goal of deciding which course, as a matter of policy, will garner the greatest net benefit.[13] Relying on my own research and on data aggregated from prior studies, I first quantify the total costs and benefits—both financial and social—of pretrial detention of those accused of various crimes, and then compare those to the costs and benefits of pretrial release. Next, with the understanding that it is likely unrealistic to achieve the optimum pretrial detention policy (detaining only those individuals for whom detention produces a net benefit to society), I use this same data to identify characteristics of felony criminal defendants that most accurately predict whether a judge should detain or release a particular defendant pretrial. I ultimately find that with violent crime, economic savings are greatest when a relatively low number of defendants—those statistically most likely to pose a danger to society—are detained pretrial. I further find that adopting such an approach could yield a savings of $78 billion as compared to the current approach of leaving it up to the subjective evaluation of judges. At a minimum, I suggest that federal and state courts should consider a cost-benefit approach to pretrial detention

[10] *Id.* at 525–26 ("Congress and state legislatures charged judges with the task of predicting who could be safely released and who should be held in jail before trial.").

[11] *Id.* at 540, fig. 5 (showing the percentage of jurisdictions–counties in a given year–that have the given release rate for pretrial detainees).

[12] *See* MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 2, 12–18 (2006) (discussing the cost-benefit analysis concept in detail).

[13] *See* David L. Weimer & Aidan R. Vining, *Assessing the Costs and Benefits of Social Policies*, *in* INVESTING IN THE DISADVANTAGED 2 (David L. Weimer & Aidan R. Vining, ed., 2009) (stating that cost-benefit analysis "provides a framework for comprehensively taking account of a full range of social benefits and costs" and is a tool for suggesting new policy as well as changes to existing policy).

decisionmaking as they seek out ways to increase efficiency in the criminal justice system and reduce budget expenditures overall.

This Article proceeds as follows. Part I lays out the costs inherent in the decision to either detain or release a defendant pretrial. Part II presents the empirical model used to determine the net costs and benefits of both pretrial detention and release and then determines the factors most predictive of cost savings to society. Part III offers critiques and limitations of the methodology. And the final section explains that if judges considered the risk of pretrial violent crime, they could release more people pretrial with a substantial savings in costs nationwide. It concludes that a cost-benefit analysis of pretrial detention reveals that if judges nationally followed the model described here, they could save approximately $78 Billion and release individuals who pose less of a risk to society.

I. COSTS OF PRETRIAL DETENTION AND RELEASE

An important consideration in pretrial detention or release is the costs and benefits—economic and social—that result in these decisions. When a judge chooses to detain an individual, that individual bears direct costs and inconvenience associated with detention.[14] The detainee's family, employer, government, and the detention center bear costs as well (societal costs).[15] Conversely, when a judge chooses to release a defendant prior to trial, she subjects the public to costs with that release—primarily in the form of defendants who may commit further crimes.[16] In this Part, I enumerate the various costs that warrant consideration in the cost-benefit analysis. This explanatory section is not intended to be inclusive. Rather, the costs noted are intended to be indicative of the types of costs that appear in the cost-benefit analysis that follows in Section II.

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[14] Thomas Bak, *Pretrial Release Behavior of Defendants Whom the U.S. Attorney Wished to Detain*, 30 AM. J. CRIM. L. 45, 65 (2002) (discussing the types of losses a pretrial detainee will incur while incarcerated).

[15] *See* JAMES J. STEPHAN, U.S. DEPT. OF JUSTICE, STATE PRISON EXPENDITURES, 2001, at 1–9 (2004) (detailing state expenditures on prison inmates); *see* NATIONAL HEALTHY MARRIAGE RESOURCE CENTER, INCARCERATION AND FAMILY RELATIONSHIPS: A FACT SHEET (2010) (discussing the negative consequences of incarceration on family relationships).

[16] *See* TED R. MILLER, MARK A. COHEN, AND BRIAN WIERSEMA, U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK 9–17 (1996) (discussing the tangible and intangible losses incurred by victims of crime).

A. Costs of Pretrial Detention

1. Costs to Detainees

Pretrial detention imposes direct economic costs on detainees. A detainee's inability to work causes the loss of income and, potentially, the loss of employment and property.[17] If pretrial detainees lose employment, they often simultaneously encounter reduced wages if and when they find new employment, as serving time reduces hourly wages for men by approximately 11%, annual employment by nine weeks, and annual earnings by 40%.[18] Furthermore, when property (either apartments or rented homes) is lost, as occurs in 23% of cases,[19] extra funds are expended on a subsequent housing search. In addition, one-third of detainees report having their property stolen upon detention and thereafter,[20] which amounts to about $370 per incident of larceny.[21]

In addition to direct economic costs, detention imposes significant yet difficult-to-quantify costs on individuals including those associated with the loss of liberty, dignity, damaged reputation and standing in the community,[22] and disruptions to family life and other relationships.[23]

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[17] Bak, *supra* note 14, at 65 ("The price to the defendant of pretrial incarceration is clearly his or her loss of freedom, loss of income from work which can no longer be performed.").

[18] PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 11, 2010, http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf ("When age, education, school enrollment, region of residence and urban residence are statistically accounted for, past incarceration reduced subsequent wages by 11 percent, cut annual employment by nine weeks and reduced yearly earnings by 40 percent.").

[19] Mark Pogrebin, Mary Dodge, & Paul Katsampes, *The Collateral Costs of Short-Term Jail Incarceration: The Long-Term Social and Economic Disruptions*, 5 CORRECTIONS MANAGEMENT QUARTERLY 64-65 (2001).

[20] *See* Ian O'Donnell, *Prisons and Penal Purpose: Measuring 'Performance' in English Jails*, 8 Crim. L. F. 111, 118 (1997) (book review) (stating that one in three inmates had been threatened or had property stolen).

[21] TED R. MILLER, MARK A. COHEN, AND BRIAN WIERSEMA, U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK 9, tbl.2 (1996) (indicating the dollar costs associated with various incidents that occur in prisons).

[22] Pogrebin, et al., *supra* note 19.

[23] *See* NATIONAL HEALTHY MARRIAGE RESOURCE CENTER, INCARCERATION AND FAMILY RELATIONSHIPS: A FACT SHEET (2010) (presenting research on the factors that strain family relationships when one partner is incarcerated).

Detainees are often victims of humiliation, rape,[24] and other violent acts while incarcerated, and also suffer added anxiety, stress, and a lower quality of life as a result.[25] All told, the value of lost freedom to pretrial detainees may be as high as $6,770 for the least dangerous defendants.[26]

2. Costs to Society

Society's highest direct cost associated with pretrial detention is the cost of imprisonment, including facilities maintenance, prison staff and administration officials, meals, rehabilitation and education programs, etc. One study has estimated that the annual cost to detain one inmate is $22,650,[27] although individual states, most notably California, spend more than twice as much on imprisonment.[28] Other monetary costs to society include a reduction in GDP from wages that the defendant would have otherwise earned[29] as well as lost tax revenue.[30] Society also bears the

[24] *See* ALLEN J. BECK, PAIGE M. HARRISON, MARCUS BERZOFSKY, RACHEL CASPAR, & CHRISTOPHER KREBS, U.S. DEPARTMENT OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008-09, at 7-8 (2010) http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf (reporting sexual victimization in prisons from inmate surveys in 2008 to 2009).

[25] Pogrebin, et al., *supra* note19, at 69; *see* Katherine Nesbitt, *Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis*, 17 B. U. PUB. INT. L. J. 39, 39-98 (2007) (examining the intrusion of preventative detention in the United States on personal liberties); Miller, *supra* note 20 (researchers have estimated the monetary cost of each rape to be $87,000).

[26] David S. Abrams & Chris Rohlfs, *Optimal Bail and the Value of Freedom: Evidence from the Philadelphia Bail Experiment*, 49 ECON. INQUIRY 750, 751 (2011) (To calculate the value to defendants of lost freedom, Abrams & Rohlfs applied the concept of revealed preference to defendants' bail-posting decisions; that is, when a defendant posts bail at a certain amount, the researchers implicitly assume that the benefits of freedom exceed the cost of posting that amount, and assign a value accordingly. The same researchers also estimate that the typical defendant is willing to pay $1,000 for ninety days of freedom.).

[27] STEPHAN, *supra* note 15, at 2.

[28] Resnick, *supra* note 6.

[29] Douglas L. Colbert, Ray Paternoster, & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Cause for the Right to Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1763 (2002) ("During pretrial incarceration, detainee's loss of freedom results in many losing jobs and homes. Taxpayers are left to pay the rising costs of detention, while absorbing the social and financial impact of newly dislocated family members."); *See generally* Albert W. Alschuler, *Preventative Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 517 (1986) ("The jobs of detained defendants frequently disappear, and friendships and family relationships are disrupted.").

expenses incurred to administer court proceedings and the cost of providing counsel for indigent defendants.[31]

There are also indirect costs to society associated with pretrial detention. For example, because pretrial detention often deprives the detainees' children of financial and emotional support,[32] these children are much more likely to develop anti-social behaviors and engage in future criminal activity themselves.[33] They are likewise significantly more likely to drop out of school, at a long-term cost of at least $260,000 per child.[34] And given that these children are more likely to receive public assistance, cost shifting is further enhanced.[35]

Pretrial detention also carries more indefinite, less-easily quantifiable costs. Although it may be difficult to monetize the impact of costs like unexplained pretrial detention decisions on the presumption of innocence,[36] it would appear that these costs nonetheless belong in the analysis.

B. Costs of Pretrial Release

As compared to pretrial detention, pretrial release generates relatively minimal direct costs. For example, in the federal system, pretrial release programs cost $3,100 to $4,600 per defendant, depending upon the degree

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[30] On average, incarceration results in $4960 and $1205 in lost federal and state tax revenue, respectively. Loren A.N. Buddress, *Federal Probation and Pretrial Services—A Cost-Effective and Successful Community Corrections System*, 61 FED. PROB. 5, 10 (1997).

[31] William A. Brockett, Jr., *Presumed Guilty: The Pre-Trial Detainee*, 1 YALE REV. L. & SOC. ACTION 10, 18 (1970) (explaining that the appointment of Public Defenders for pre-trial detainees is "another financial burden . . . placed on the state").

[32] Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1974 (2005) ("Children may suffer from both the absence of a detained parent, and from neglect from other family members who may be forced to spread their attention more widely or work to make ends meet.").

[33] Pogrebin, et al., *supra* note 19, at 66; *see also* John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST.: REV. OF RES. 121, 121–29 (1999) (discussing the various challenges and issues that the children of detained parents face); JEREMY TRAVIS, ET AL., FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY 2 (2005) (arguing that "parental separation due to imprisonment can have profound consequences for children").

[34] JASON AMOS, ALL. FOR EXCELLENT EDUC., DROPOUTS, DIPLOMAS, AND DOLLARS: U.S. HIGH SCHOOLS AND THE NATION'S ECONOMY 2 (2008), http://all4ed.org/wp-content/uploads/2008/08/Econ2008.pdf.

[35] Pogrebin et al., *supra* note 19, at 66; Manns, *supra* note 32, at 1974.

[36] Manns, *supra* note 32, at 1971–72 (stating that detainees face many different types of cost, some of which are incalculable).

of flight risk and comparative dangerousness of the defendant.[37] These estimates account for the costs of supervision, alternative residential arrangements or treatment programs, and the cost of recovering defendants who have fled the jurisdiction. The amount of budget funds apportioned to these programs can be unusually small, yet highly effective; one municipality with a population of 50,000 has a fully functioning pretrial release program supported by an annual operating budget of $19,880.[38] Thus, pretrial release in the majority of cases would clearly result in substantially enhanced direct-cost savings to state and federal budgets.

However, the decision to release a defendant pretrial gives rise to other costs, which, though indirect, are nonetheless borne by society. Foremost among these are the costs that come from releasing defendants who reoffend during the interim period between release and resolution of their cases. That is, there are costs of crimes that would not have been committed but for the pretrial release of dangerous defendants.[39] When defendants that are granted pretrial release go on to commit crimes, there is a concomitant increase in law enforcement costs, court costs, and the costs borne by victims.[40] Crime also imposes further costs on society, such as reduced housing prices,[41] and reduction in local business activity.[42] Table 1 below provides a comprehensive estimate of the unit cost to society for individual crimes.

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[37] Marie VanNostrand & Geena Keebler, *Pretrial Risk Assessment in the Federal Court*, 73 FED. PROB. 2, 6 (2009).

[38] Melinda Tanner et al., *Evaluating Pretrial Services Programs in North Carolina*, 72 FED. PROB. 18, 19–20 (2008).

[39] Manns, *supra* note 32, at 1968; *see also* Bak, *supra* note 1417, at 64–65 (discussing the various costs associated with the release of prisoners).

[40] Manns, *supra* note 32 at 1968; *see also* Andrew W. Bogue & Thomas G. Fritz, *The Six-Man Jury*, 17 S.D. L. REV. 285, 288–90 (1972) (discussing the cost of jury trials in South Dakota); Julie Berry Cullen & Steven D. Levitt, *Crime, Urban Flight, and the Consequences for Cities*, 81 REV. ECON. & STAT. 159, 159–60, 168–69 (1999) (analyzing the cost of crime and its effect on cities); Benjamin Landis, *Jury Trials and the Delay of Justice*, 56 A.B.A. J. 950, 950–51 (1970) (discussing costs associated with jury trials); *see generally* THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, STATE COURT PROCESSING STATISTICS, 1990-2004: PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS (2007) (discussing the effects and costs of pretrial release for felony defendants).

[41] Ralph B. Taylor, *The Impact of Crime on Communities*, 539 ANNALS AM. ACAD. POL. & SOC. SCI. 28, 37 (1995) (stating that an increase in violent crime lowered home values in various areas).

[42] *See, e.g.*, Robert T. Greenbaum & George E. Tita, *The Impact of Violence Surges on Neighbourhood Business Activity*, 41 URB. STUD. 2495 (2004); Wesley Skogan, *Fear of Crime and Neighborhood Change*, 8 CRIME & JUST. 203, 204, 222 (1986).

Table 1. Total Per-Offense Cost for Different Crimes in 2014 dollars[43]

Type of offense	Tangible cost ($)	Intangible cost ($)	Total cost ($)
Murder	1,420,857	9,333,475	10,754,332
Rape/sexual assault	45,608	220,724	266,332
Aggravated assault	21,528	105,057	126,585
Robbery	23,630	24,959	48,589
Arson	18,164	5,675	23,839
Motor vehicle theft	11,646	290	11,936
Stolen property	8,816	N/A	8,816
Household burglary	6,820	355	7,175
Embezzlement	6,059	N/A	6,059
Forgery and counterfeiting	5,821	N/A	5,821
Fraud	5,563	N/A	5,563
Vandalism	5,373	N/A	5,373
Larceny/theft	3,895	11	3,906

II. A COST-BENEFIT ANALYSIS OF PRETRIAL DETENTION DECISIONS IN FELONY ARREST CASES

Cost-benefit analysis allows a consideration of whether decisions are efficient and how well empirical data is being followed. By drawing on various estimates presented in previous sections of this Article, and by relying on data from my previous work estimating the probabilities

[43] *See* Kathryn E. McCollister et al., *The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation*, 108 DRUG & ALCOHOL DEPENDENCE 98, 104 tbls.3 & 4 (2010). The dollar values have been adjusted for inflation to reflect the value of 2014 dollars.

The study identifies four main categories of costs resulting from crime: (1) victim costs, covering direct economic losses, such as health care costs, lost earnings, and property losses; (2) criminal justice system costs, including government expenditures on police protection, legal services, and corrections; (3) crime career costs, which estimate the opportunity costs incurred by the choice to forego legal activities; and (4) intangible costs, which estimates the indirect societal costs suffered by victims, such as pain and suffering, stress, and a lower quality life. *Id.*

associated with criminal behavior during pretrial release,[44] I demonstrate below that 28% fewer defendants could have been detained pretrial over the past decade without statistical risk to the public. Furthermore, this reduction in detentions would have saved defendants and society an estimated $78 billion.

The first subsection estimates the economic benefits to society of pretrial detention, while the second estimates the economic costs. Subsection C compares the results of the two preceding subsections and makes assessments as to the types of individuals for which, empirically, it would be more cost effective to either release or detain pretrial.

A. Estimating the Costs Avoided Through Pretrial Detention

The benefits of pretrial detention include avoiding (1) the costs associated with prosecuted crimes committed during the interim period between release and trial, (2) failures to appear, (3) felonies for which no arrest is made, and (4) the cost of monitoring a released individual. I rely on estimates by other scholars for each of these costs. Table 2 below lists estimates for the potentially avoidable costs associated with each type of crime and the sources from which I derived each estimate.

To estimate the rate of re-arrest prior to trial, I used Bureau of Justice Statistics (BJS) data from 134,767 randomly selected felony arrest cases between 1990 and 2006. The BJS regularly collects information on felony arrestees in the nation's seventy-five largest counties, reporting information on each defendant's demographic characteristics, the type of offense, status in the criminal justice system at the time of arrest, criminal history, bail and pretrial release, court appearance record, and rearrests while on pretrial release.[45]

[44] *See generally* Baradaran & McIntyre, *supra* note 7, at 557–58 (analyzing and discussing the most common predictive factors of pretrial violence, as well as the effect they have on prisoner detention and release).

[45] *Data Collection: State Court Processing Statistics (SCPS)*, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/index.cfm?ty=dcdetail&iid=282#Publications_and_ products (last visited Jan. 17, 2016). This data is also known as State Court Processing Statistics (SCPS).

Table 2. Economic Benefits of Detention[46]

Description	Benefits per incident in $	
	Low Estimate ($)	High Estimate ($)
Violent crimes avoided		
Murder	4,602,326[47]	18,780,120[48]
Rape	136,191[49]	488,243[50]
Assault	14,715[51]	158,250[52]
Robbery	12,523[53]	364,898[54]
Other	75,453[55]	426,571[56]
Property crimes avoided		
Motor vehicle theft	5,949[57]	19,299[58]
Forgery	5,731[59]	10,439[60]

[46] Note that the dollar values of each estimate from each respective source have been adjusted for inflation to reflect the value of 2014 dollars.

[47] MILLER ET AL., *supra* note 16, at 9 tbl.2.

[48] Matt DeLisi et al., *Murder by Numbers: Monetary Costs Imposed by a Sample of Homicide Offenders*, 21 J. FORENSIC PSYCHIATRY & PSYCHOL. 501, 506 (2010). AW

[49] MILLER ET AL., *supra* note 16, at 9 tbl.2.

[50] DeLisi et al., *supra* note 48, at 506.

[51] MILLER ET AL., *supra* note 16, at 9 tbl.2.

[52] DeLisi et al., *supra* note 48, at 506.

[53] MILLER ET AL., *supra* note 16, at 9 tbl.2.

[54] DeLisi et al., *supra* note 48, at 506.

[55] MILLER ET AL., *supra* note 16, at 9 tbl.2.

[56] DeLisi et al., *supra* note 48, at 506.

[57] MILLER ET AL., *supra* note 16, at 9 tbl.2.

[58] Jeffrey A. Butts & John K. Roman, *Juvenile Crime Interventions*, *in* INVESTING IN THE DISADVANTAGED: ASSESSING THE BENEFITS AND COSTS OF SOCIAL POLICIES 103 (David L. Weimer & Aidan R. Vining eds., 2009).

[59] McCollister, et al., *supra* note 43, at 104 tbls.3 & 4.

[60] Butts & Roman, supra note 58.

Fraud	3,950[61]	5,478[62]
Burglary	2,192[63]	44,875[64]
Larceny	580[65]	3,839[66]
Other	3,950[67]	10,439[68]
Drug crimes avoided		
Sales	730[69]	730[70]
Possession/Other	34[71]	34[72]
Public order crimes avoided		
Driving-related	18,661[73]	33,858[74]
Weapons	3,094[75]	3,094[76]
Other	6,554[77]	6,554[78]
Avoidance of failure to	409[79]	518[80]

[61] Mark A. Cohen & Alex R. Piquero, *New Evidence on the Monetary Value of Saving a High Risk Youth*, 25 J. QUANTITATIVE CRIMINOLOGY 25, 33 tbl.5 (2009).
[62] McCollister, et al., *supra* note 43, at 104 tbls.3 & 4.
[63] MILLER ET AL., *supra* note 16, at 9 tbl.2.
[64] DeLisi et al., *supra* note 48, at 506.
[65] MILLER ET AL., *supra* note 16, at 9 tbl.2.
[66] McCollister, et al., *supra* note 43, at 104 tbls.3 & 4.
[67] DeLisi et al., *supra* note 48, at 506.
[68] *Id.*
[69] EXEC. OFFICE OF THE PRESIDENT OF THE U.S. & OFFICE OF NAT'L DRUG CONTROL POLICY, THE ECONOMIC COSTS OF DRUG ABUSE IN THE UNITED STATES, 1992-2002 (2004).
[70] *Id.*
[71] Andrew S. Rajkumar & Michael T. French, *Drug Abuse, Crime Costs, and the Economic Benefits of Treatment*, 13 J. QUANTITATIVE CRIMINOLOGY 291, 308 tbl.III (1997).
[72] *Id.*
[73] MILLER ET AL., *supra* note 16, at 9 tbl.2.
[74] Cohen & Piquero, *supra* note 61, at 33 tbl.5.
[75] JOHN ROMAN & AARON CHALFIN, URBAN INST., DOES IT PAY TO INVEST IN REENTRY PROGRAMS FOR JAIL INMATES? 16 tbl.10 (2006), http://www.urban.org/sites/default/files/roman_chalfin.pdf.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] Abrams & Rohlfs, *supra* note 26, at 767.
[80] *Id.*

appear		
Avoidance of felony for which no arrest is made	40,338[81]	40,338[82]
Avoidance of daily cost of monitoring released individual	9[83]	9[84]

Estimating the economic benefit of pretrial detention involves two steps. First, I model the probability that a defendant commits a particular felony during pretrial release as a function of the category of original arrest (violent crime, property crime, drug crime, or public order crime), defendant age, year of arrest, and prior criminal record. Second, I multiply the probability of re-arrest by the benefits listed in Table 2. This procedure assigns each defendant from the BJS data a monetary value that reflects the expected economic benefit of pretrial detention. Below, I briefly summarize and present the results for each step.

As the first step in determining the costs imposed if a released detainee commits a crime, I model the probability of a defendant *i* committing a particular felony *f* in year *t* in county *c* as follows:

$$f_{itc} = \alpha_t + X_{itc}\beta + Z_{tc}\gamma + \epsilon_{itc}$$

where X_{itc} are a defendant's observed characteristics, Z_{tc} are county characteristics, and ϵ_{itc} is an unobserved error term. Using standard probit regressions, I then estimate the model for each of the sixteen felonies reported in Table 2.[85] This assigns each defendant an unobserved index value that reflects the likelihood of arrest during pretrial release. Defendants actually arrested for a particular felony are assigned a positive value, while those not rearrested receive a negative value. I convert these values into probabilities by maximizing the log of:

[81] Abrams & Rohlfs, *supra* note 26, at 768.

[82] *Id.*

[83] Buddress, *supra* note 30, at 5. This figure is found by dividing the yearly supervision cost per year ($2,344) by 365, and adjusting for inflation to reflect the value of 2014 dollars. *Id.*

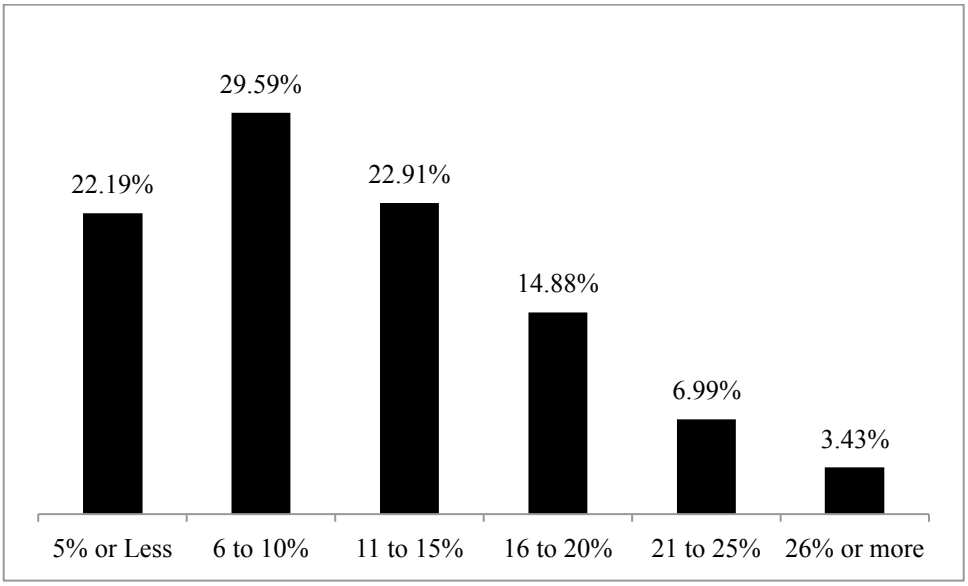
[84] *Id.*

[85] Results from the sixteen probit regression models and descriptive statistics for predictor variables are presented in appendix A.

$$\prod_{i=1}^{n} P(f_{itc} > 0)^{f_{itc}} P(f_{itc} \leq 0)^{1-f_{itc}}$$

Figure 1 below displays the results of these calculations. These calculations are striking in the sense that they contravene the average individual's estimations about the frequency of re-offense post-release. While an individual arrested for a felony and then released may well be more likely than a non-arrested individual to commit a crime, the probability of re-arrest for a new felony during pretrial release is actually relatively low. On average, a defendant on pretrial release has only an 11.36% chance of being rearrested for a felony. Only 3.43% of all defendants are more than 26% likely to be rearrested while on release, while nearly 90% of all defendants are less than 20% likely to be rearrested post-release.

Figure 1. Probability of Re-arrest if Released



The calculations presented in conjunction with Figure 1 above reveal a point crucial to my analysis: speaking in general terms, the relative cost of releasing some defendants is actually greater than the cost of detaining those defendants; the converse is also true for other subsets of defendants.

The next step, then, is to derive a formula that will determine the economic benefit of pretrial detention for each individual defendant. I

accomplish this by multiplying the probability of re-arrest by the economic savings associated with avoiding the felonies reported in Table 2. The total benefit b for preventing person i living in year t and county c from committing felony f is:

$$\sum b_{itc} = \sum P_{itc}\, f\$$$

where $f\$$ represents the economic savings in 2014 dollars of avoiding felony f.

Of course, felonies-avoided is only one category of cost savings that this analysis must account for. Using the same two procedures described above, I also calculate the economic savings associated with avoiding a defendant's failure to appear in court and avoiding felonies for which no arrest is made. The total economic benefits, represented as S, through detaining a particular defendant is given by

$$S_{itc} = \sum_{i=1}^{n} b_{itc} + \sum_{i=1}^{n} l_{itc} + 9d_{itc}$$

where l represents the benefit of avoiding failures to appear and felonies for which there is no arrest, and d represents the number of days between arrest and adjudication. This formula will later prove useful in estimating the costs potentially avoided through cost-benefit analysis.

Overall, this Part demonstrates that the relative cost of releasing some defendants is actually greater than the cost of detaining them, but that releasing some defendants allows substantial savings. And by using information on which defendants are safe to release, judges can make more informed decisions pretrial.

B. Estimating the Costs of Pretrial Detention

The converse of the benefits of pretrial release are the costs imposed when judges decide to continue to detain a pretrial detainee. There are a number of direct and indirect economic costs inherent in continuing to detain a defendant pretrial. These include loss of freedom, income, and housing, childcare costs, stolen/lost property, strain on intimate relationships, potential violent or sexual assault, prison operation, loss of federal and local tax revenue, and welfare benefits paid to a detainee's family. I again rely on external sources to estimate each of these costs, which are presented in Table 3 below. Each source's estimate has been

converted into a per-day detainment cost. Additionally, some sources reported only a single, general-level economic figure, while others provided estimates for specific years or geographic areas. When possible, I adjusted the cost estimates for each individual defendant's geographic location and year of arrest. The last column of Table 3 shows these calculations, where *y*, represents a year-specific adjustment, and *a*, is an area-specific adjustment. The total cost of detainment (*E*) for a given person *i* in year *t* living in county *c* is

$$E_{itc} = \sum_{i=1}^{n} e_i y_i a_i d_i$$

where *d* is the number of days between arrest and adjudication.

Table 3. Economic Costs of Detention[86]

Description	Key figure(s)	Expense ($)	Calculation for person i
	Individual Costs		
Loss of freedom	Typical defendant willing to pay $1,036 for 90 days of freedom[87]	~$11 per day ($1,036/90)	$e_i = \left(\frac{\$1{,}036}{90}\right) d_i$
Loss of income	Mean U.S. county per capita income is approximately $31,028[88]	~$85 per day ($31,028/ 365)	$e_i = \left(\frac{\$31{,}028}{365}\right) y_i a_i d_i$
Loss of housing	23% of misdemeanants forfeit $1,565 in lost and new deposits[89]	~$2,748 if detained 60+ days	$e_i = \$1{,}565 m_i$

[86] The dollar values have been adjusted for inflation to reflect the value of 2014 dollars. The variable *m* takes on a value of 1 if a defendant has been detained for greater than 60 days and zero otherwise.

[87] Abrams & Rohlfs, *supra* note 26, at 750–51.

[88] *State & County Quickfacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/00000.html (last updated Dec. 2, 2015, 11:15 AM).

[89] Pogrebin, et al., *supra* note 19.

Childcare costs	Families earning under $56,670 spend $1,938 per year in childcare costs for children five and under; [90] a majority of inmates have minor children[91]	~$5 per day ($1,938/ 365)	$e_i = \left(\frac{\$1{,}938}{365}\right) d_i$
Stolen or lost property	Approximately one out of three inmates have property stolen; [92] larceny costs $580 per incident[93]	~$193 per incident (if detained 60+ days) ($580/3)	$e_i = \left(\frac{\$580}{3}\right) m_i$
Strain on intimate relationships	Marriage is worth $103,670 per year; [94] 17% of federal inmates are married[95]	~$84 per day (($103,670)(. 26))/365	$e_i = \left(\frac{\$103{,}670(.26)}{365}\right) d_i$
Possibility of violent or sexual assault	4.43.2% of prison and 3.1% of jail inmates report one or more incidents of sexual victimization; [96]	~$11 per day (($136,191 (.032))/365	$e_i = \left(\frac{\$136{,}191(.032)}{365}\right) d_i$

[90] MARK LINO, U.S. DEP'T OF AGRIC., EXPENDITURES ON CHILDREN BY FAMILIES, 2010 26 tbl.1 (2011).

[91] LAUREN E. GLAZE & LAURA N. MARUSCHAK, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2008).

[92] ROY D. KING & KATHLEEN MCDERMOTT, THE STATE OF OUR PRISONS 119 (1995).

[93] MILLER ET AL., *supra* note 16, at 9 tbl.2.

[94] David G. Blanchflower & Andrew J. Oswald, *Well-being Over Time in Britain and the USA*, 88 J. PUB. ECON. 1359, 1381 (2004).

[95] GLAZE & MARUSCHAK, *supra* note 91, at 21 app. tbl.16. (Since 201,600 out of 1,226,200 state inmates are married and 33,600 out of 129,300 federal inmates are married, thus, the total married is 235,200 out of 1,355,500 for a percentage of 17.35%).

[96] BECK ET AL., supra note 24, at 5 (An estimated 4.4% of prison inmates and 3.1% of jail inmates reported experiencing one or more incidents of sexual victimization by another inmate or facility staff in the past 12 months or since admission to the facility, if less than 12 months.)

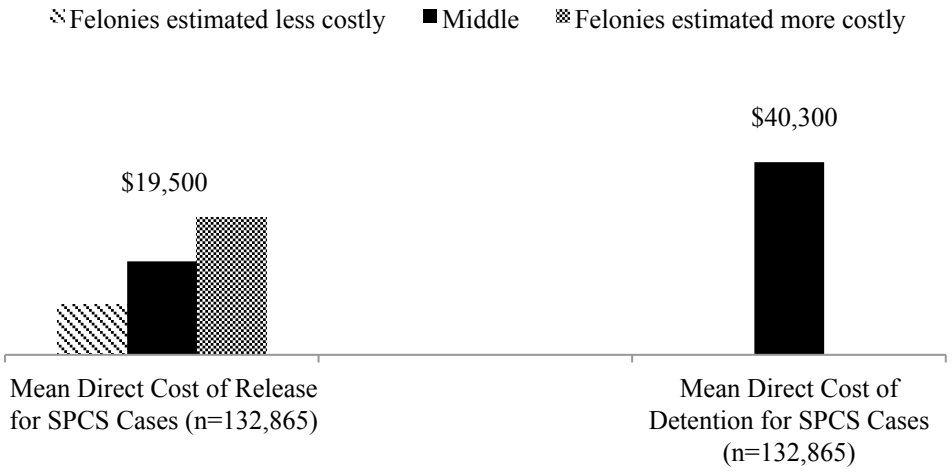
	rape costs $136,191 per incident[97]		
	Public Costs		
Prison operation costs	Mean U.S. state cost of inmate detainment is $31,406[98]	~$83 per day ($31,406/ 365)	$e_i = \left(\frac{\$31{,}406}{365}\right) a_i d_i$
Loss of federal tax	Annual federal tax revenue reduced by $5,142 per incarceration[99]	~$19 per day ($5,142/365)	$e_i = \left(\frac{\$5{,}142}{365}\right) d_i$
Loss of state tax	Annual state tax revenue reduced by $1,249 per incarceration[100]	~$3 per day ($1,249/365)	$e_i = \left(\frac{\$1{,}249}{365}\right) d_i$
Welfare for detainee's family	Typical family of incarcerated person receives $8,293 per year in welfare benefits[101]	~$30 per day ($8,293/365)	$e_i = \left(\frac{\$8{,}293}{365}\right) d_i$

Figure 2 below incorporates these calculations to display the average estimated direct cost resulting from a decision to detain or release a defendant before trial. In conjunction with Figure 1 above, these calculations show, perhaps unsurprisingly, that the economic costs of pretrial detention typically exceed the costs imposed by pretrial release. Specifically, the average cost of detention exceeds the cost of release by approximately $20,000; detaining a defendant, on average, results in

[97] MILLER ET AL., *supra* note 16, at 9 tbl.2.
[98] STEPHAN, *supra* note 15, at 1.
[99] Buddress, *supra* note 30, at 10.
[100] *Id.*
[101] *Id.*

$40,300 in direct costs, while the mean cost of releasing a defendant pretrial is just $19,500.

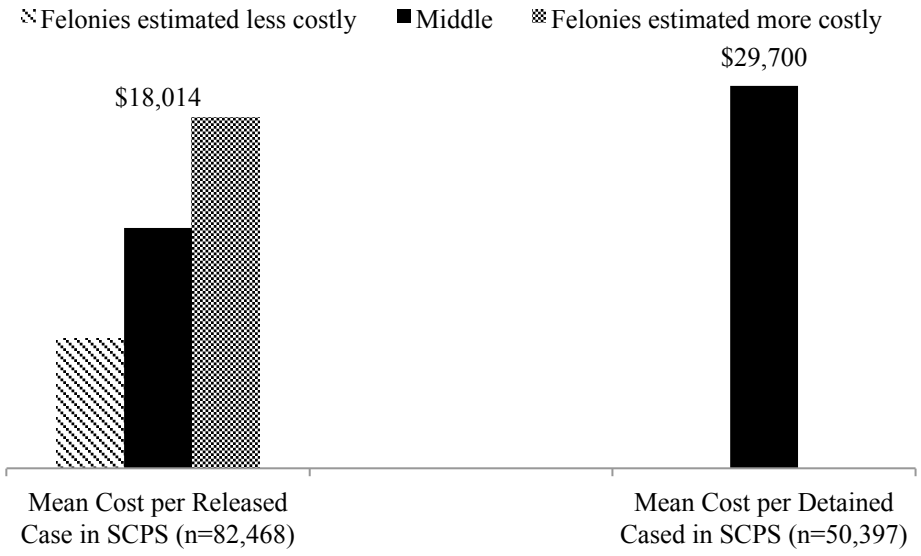
Figure 2. Mean Cost of Release and Detention



Of course, these calculations are merely the result in the average case—and theoretical results, at that. Figure 3, below, puts theory into practice by displaying the estimated direct cost of pretrial release and detention in actual judicial pretrial detention and release decisions. Out of 132,865 defendants, 62% were released, while the remaining 38% were detained.[102] Importantly, the reported data presented in Figure 3 mirror the data presented in Figure 2 above; pretrial release resulted in an average direct cost of $18,014 compared to an average cost of $29,700 for pretrial detention.

[102] COHEN & REAVES, *supra* note 40, at 1–2.

Figure 3. Direct Cost Differentials Between Released and Detained SCPS Cases



C. Net Economic Benefit of Pretrial Release

The cost calculations set forth above mean that pretrial release is, accounting for all costs and benefits, often less expensive than pretrial detention, and suggest that judges would do best to release defendants pretrial more often than detain. To complete the analysis, however, one must also account for the benefits of avoiding costs associated with pretrial detention. If the cost of releasing a defendant, including the cost of any crimes committed during release, exceeds the cost of detention, releasing the defendant fails to produce a net economic benefit. Similarly, if the cost of detention exceeds the cost of release, detaining the defendant pretrial fails to produce a net economic benefit. Table 4 below presents a hypothetical representations of the four possible net benefit scenarios of pretrial detention decisions: detain with negative net benefit; detain with positive net benefit; release with negative net benefit; and release with positive net benefit.

Table 4. Net Benefit Scenarios

Scenario	Detained or Released?	Cost of Detention ($)	Cost of Release ($)	Net Benefit Formula ($)	Net Benefit ($)
A	Detained	25,000	20,000	20,000 - 25,000	- 5,000
B	Detained	25,000	30,000	30,000 - 25,000	+ 5,000
C	Released	25,000	30,000	25,000 - 30,000	- 5,000
D	Released	25,000	20,000	25,000 - 20,000	+ 5,000

Using the cost and benefit calculations from the previous two subsections, it is possible to measure the expected net benefit associated with the decision to release or detain each defendant in the BJS data. To calculate the net benefit of release, I subtract the expected benefit of release from the expected cost of detainment. The decision to release a defendant produces a net economic benefit if the costs imposed on society of releasing the defendant do not exceed the expected cost of detainment. The net benefit formula for release is therefore

$$N_{itc} = E_{itc} - S_{itc}$$

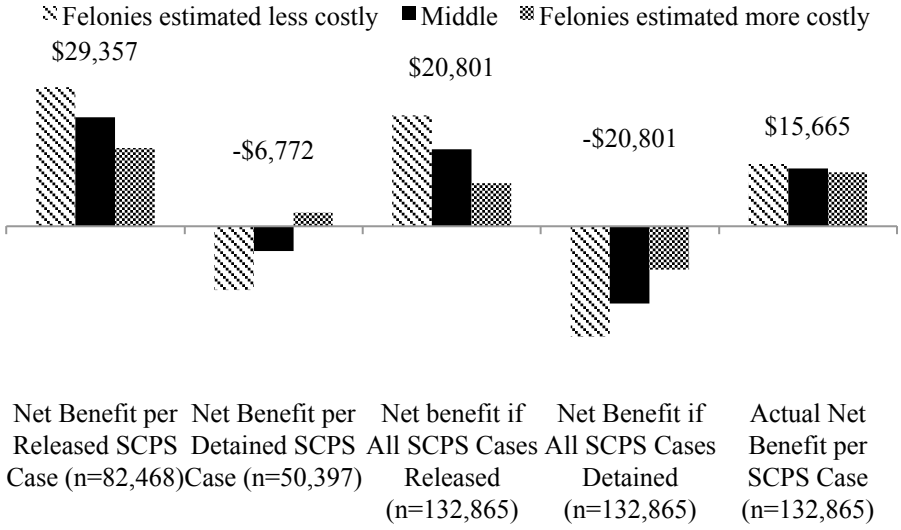
where N is the net benefit, E is the economic cost of detention, and S is the benefit (i.e., avoided cost of release) for each defendant in the sample.

For defendants detained pretrial, the formula is simply reversed. That is, a judge's decision not to release a defendant pretrial produces a net benefit if the avoided cost of release (i.e. monitoring, crime, failure to appear, etc.) exceeds the expense of detainment.

$$N_{itc} = S_{itc} - E_{itc}$$

The analysis that follows reports three different net benefit calculations in three different scenarios: (1) the net benefit of judges' actual pretrial detention decisions between 1990 and 2006; (2) the net benefit if all judges had released every defendant; and (3) the net benefit if judges had detained every defendant. Recall that Table 2 above reported a range of costs associated with each of sixteen felonies: a low estimate, a high estimate, and an average estimate. Figure 4 below presents each of those estimates in the three alternate scenarios.

Figure 4. Net Benefit Scenarios



Note that the actual decisions in practice produced a net benefit per defendant of around $15,664 but that the actual decisions to detain defendants produced a $6,771 loss on average. Compared to the actual benefits achieved, a policy of *universal* pretrial release would have produced approximately $5,000 in economic savings per defendant. Thus, even a universal pretrial release regime is better than the current system, at least as far as costs and benefits are concerned.

Of course, universal release is neither feasible nor the optimal policy from an efficiency standpoint as crime rates could potentially increase. Table 5 shows that 50% of all pretrial detentions produced an economic benefit, while around 20% of pretrial releases resulted in an economic loss. This result has broader implications for cost-benefit analysis in pretrial detention decisionmaking; that is, systematically fine tuning pretrial

detention decisions through cost-benefit analysis could result in significant economic savings to society.

Table 5. Net Benefit by Release or Detention

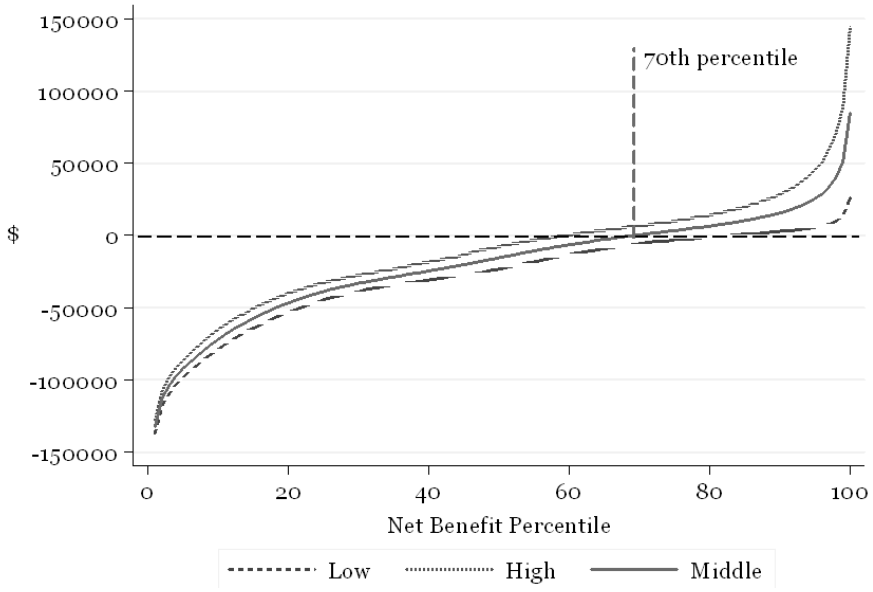
Category	% with Net Benefit	Benefit in $	% with Net Loss	Loss in $
Released (n=82,468)	80.2	40,483	19.8	15,525
Detained (n=50,397)	50.0	16,699	50.0	30,208

The critical task, then, is to identify those defendants for whom pretrial detention produces a net benefit. That task may be accomplished by finding subsets of defendants who share common characteristics that could lead to a general framework for making cost-benefit calculations in pretrial detention decisions. If these defendants share common characteristics that differ systematically from defendants for whom pretrial detention produces a net loss, then judges could use criteria backed by empirical data in order to promote more efficient and equitable decisions.

Figure 5 represents a first step in this direction. It displays the net benefit of pretrial detention for each defendant in the BJS data in order of lowest net benefit to highest. Note that 31% of all defendants would produce a net benefit if detained. This figure is seven percentage points lower than the 38% of defendants judges actually detained.[103] It likewise takes a substantially more middle ground approach: a 31% detention rate is a far more conservative, feasible, and preferable approach to a policy of universal release.

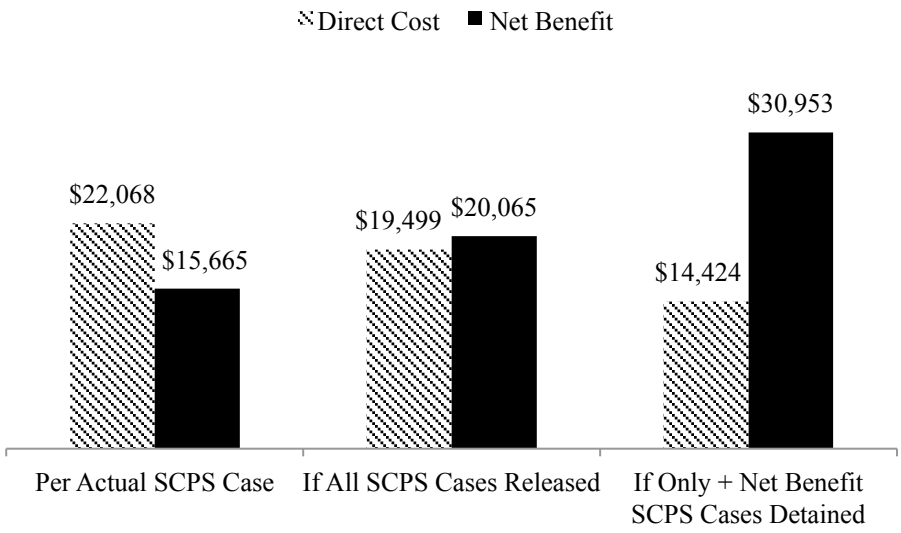
[103] COHEN & REAVES, *supra* note 40, at 2.

Figure 5. Net Benefits of Detention by Percentile



Clearly, an optimal pretrial detention policy would detain only those individuals for whom detention will on average produce a net benefit to society. Figure 6 shows the significant savings of such a policy compared to actual pretrial detention decisions and universal release. Note that the net benefit per defendant in the optimal scenario is almost $30,000, which represents savings of approximately $10,000 per defendant under universal release and approximately $15,000 compared to judges' actual pretrial detention decisions.

Figure 6. Direct Cost and Net Benefit of Release of SCPS Cases



To determine the characteristics that best predict criminal behavior during release, I model the expected net benefit of detention as a function of the category of a defendant's original arrest (i.e. violent, property, drug-related, or public order), age, year, prior criminal history, and geographic location. Thus, the economic benefits *b* of detaining person *i* in year *t* living in county *c* are determined by

$$\log b_{itc} = \alpha_t + X_{itc}\beta + Z_{tc}\gamma + \epsilon_{itc}$$

where *X* are a defendant's observed characteristics, *Z* are county characteristics, and ϵ is an unobserved error term.[104] Using the BJS data, I estimate the model using an ordinary-least squares regression, the results of which are reported in Table 6 below.

[104] The net benefits variable has undergone a log transformation because it was not normally distributed. Taking the natural log of net benefits more accurately reflects the relationship between the net benefits of detention and the predictor variables.

Table 6. Log of Benefits List Regressed on Predictor Variables[105]

Variable	Coefficient	Standard Error
Type of original crime		
Violent	--	--
Property	-0.818***	0.003
Drug	-0.651***	0.007
Public Order	-0.674***	0.004
Prior arrests		
None	--	--
One	-0.246***	0.007
Two or Three	-0.128***	0.013
Four or more	0.622***	0.005
Prior Incarceration	0.314***	0.002
Multiple Charges	-0.131***	0.004
Prior Failure to Appear	0.434***	0.005
Active Criminal Justice Status	0.454***	0.004
Felon	-0.162***	0.004
Age		
19 or less	--	--
20 to 24	-0.559***	0.004
25 to 29	-1.287***	0.009
30 to39	-1.605***	0.011
40 to 49	-2.324***	0.018
50 or more	-1.850***	0.008
Constant	9.559***	0.082
Year Dummies	YES	
County Characteristic Controls	YES 132,865	

[105] See Appendix A for year and county coefficients. Note that N =132,865. Note that *** denotes a coefficient is statistically significant at the $p \leq .001$ level.

Critically, the course of this regression analysis reveals six defendant-specific factors with the greatest influence on the net benefit derived from detention in a particular case: (1) original arrest for a violent crime, (2) four or more prior arrests, (3) prior incarceration, (4) a prior failure to appear, (5) an active criminal justice status, and (6) aged nineteen or younger. These six characteristics, then, are those that have the potential to be the most useful in making cost-benefit calculations for pretrial detention decisions.

The analysis also demonstrates that releasing an individual with any one of these six characteristics results in the direct costs of $159,519. Yet, judges released 30% of defendants with these characteristics.[106] Conversely, releasing individuals who possess none of these characteristics results in an average cost of $4,181 per defendant. Yet, judges detained 18.6% of these defendants.[107]

The impacts of these variables on the net benefits of detention are striking and substantial. On average, detaining a defendant with four or more prior arrests produces a net benefit 82% higher than detaining a defendant with no prior history. Likewise, detaining a defendant who has either a prior incarceration or a prior failure to appear produces net benefits 37% and 54% higher, respectively, than defendants with neither. Finally, detention of a defendant with active criminal justice status produces net benefit 57% higher than detention of a defendant without active status. With respect to the type of offense, detaining a defendant arrested for a violent crime produces average net benefits 44% higher than a defendant arrested for a property crime, 52% higher than a defendant arrested for a drug crime, and 51% higher than defendants arrested for public order crimes.[108] It thus seems that a middle-ground approach to pretrial detention, in which judges decide to release some offenders and detain others based on statistical risk, is economically preferable to any system of universal release or detention. The middle-ground approach is likewise preferable to the current pretrial detention system.

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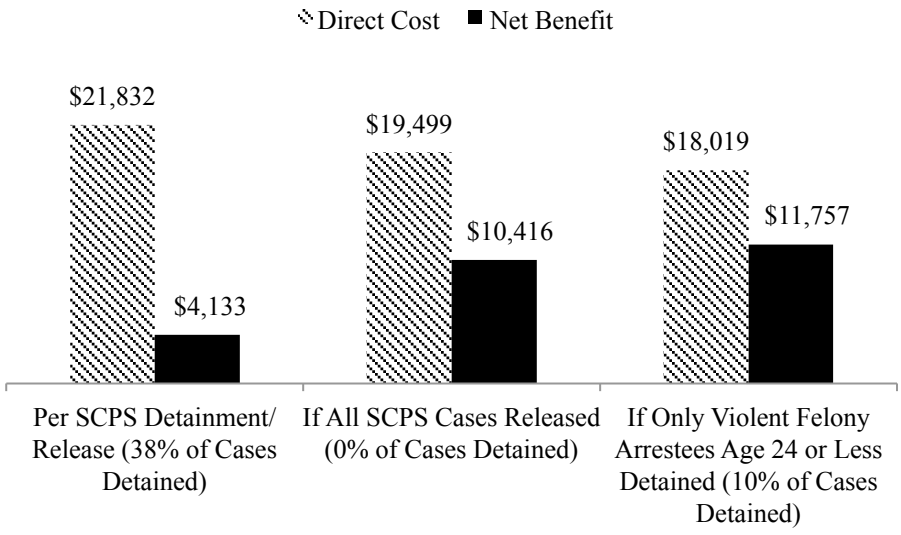
[106] COHEN & REAVES, *supra* note 40. This is not to say that judges should detain all defendants under the age of 19, regardless of their prior criminal history.

[107] *Id.*

[108] *See* J.M. WOOLDRIDGE, INTRODUCTORY ECONOMETRICS: A MODERN APPROACH 636 (2009).

Given the sheer number of felony arrests per year,[109] pretrial detention policies that incorporate judicial consideration of these characteristics could save billions of dollars per year. For example, Figure 7 below shows how accounting for some of the characteristics identified in Table 6 could result in significant savings. Even a simple policy, such as universally detaining any defendant under the age of twenty-four who was arrested for a violent felony and releasing all others, produces a higher net benefit than either a universal release policy or judges' actual detention decisions. Such a policy saves an average of $7,624 per defendant relative to judges' actual detention decisions and $1,341 compared to universal release.[110] Note that these savings would accrue despite employing a detainment rate that is twenty-eight percentage points lower than the actual detention rate.[111]

Figure 7. Direct Cost and Net Benefit of Detainment Violent Felony Arrests, Age 24 or Less



[109] *See generally* HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, ARREST IN THE UNITED STATES, 1990-2010 (2012) (reporting detailed statistics and information about the number of arrests in the United States from 1990 to 2010).

[110] COHEN & REAVES, *supra* note 40.

[111] *Id.*

Multiplying the economic savings per defendant calculated in Figure 7 by the number of felony arrests in America[112] yields savings of $78 billion compared to current policies and $14 billion compared to universal release.

Clearly, the dollar net savings realized from utilizing this cost-benefit approach are substantial. Yet a look beneath the bottom line reveals something far more interesting. The reason why such an amount can be saved is because, at least in the context of pretrial detention decisions, it is statistically more costly to detain some defendants than it would be to release them, and vice versa. As explained above, the balancing test in which judges engage in making pretrial detention or release decisions requires judges to weigh a detainee's liberty interest against the risk of the detainee committing a crime while freed on bail. This implies that judges take into account the nature of the crime for which a detainee is accused, because the risk of releasing a detainee accused of, say, murder, is probably greater than the risk incurred for releasing an individual accused of a nonviolent crime, such as property damage or petty larceny.

This cost-benefit analysis took these necessarily vague and indefinite risk calculations, and attached quantified costs incurred and avoided for the detention of specific subsets of detainees. The main takeaways from this Article are as follows. First, there are ways for judges to know which defendants are more likely to pose a threat pretrial.[113] Second, this analysis shows not merely that release of pretrial detainees is less costly overall, but that it is more cost effective to release some and detain others. Specifically, it is more cost effective to detain individuals who pose a violent crime risk *because of the costs imposed* if these individuals commit crimes similar to those for which they are accused while on bail. Conversely, it is more cost effective to release nonviolent detainees because the costs to the individual and society are significantly lower if these individuals commit similar crimes while on bail. Finally, the reason *why* cost-benefit analysis may result in substantial savings to society comes from classifying pretrial detainees into subsets, aggregating costs associated with detention or release, and allowing judges to render decisions accordingly.

III. LIMITATIONS AND DIRECTIONS FOR FUTURE RESEARCH

[112] SNYDER, *supra* note 109, at 2 tbl.1.

[113] *See also* Baradaran & McIntyre, *supra* note 7, at 557–58 (discussing the most common predictive factors of pretrial crime that judges should be mindful of).

In the pretrial arena, cost-benefit analysis may prove to be an effective tool to help judges rationally decide whether economics support releasing or detaining defendants pretrial. My goal has been to identify what benefits and costs are implicit in both decisions and to discover a means of accomplishing this analysis for the ultimate benefit of society. There are certainly limitations with this approach. I suggest that, despite the limitations discussed below, a cost-based pretrial detention method is, if not necessarily the *best* approach, an important consideration for legislative policy and judicial evaluation for pretrial detention.

A. Impact of Latent Variables on Estimates

The analysis detailed above relies on the assumption that, in data collected by the BJS, judges did not rely on any characteristics of the defendants or the crime they were accused of that were not subsequently collected by the survey. To the extent that judges used unreported information available to them to correctly detain defendants of greater hazard to the community, the cost benefit calculations in this Article will be incorrect. To use an extreme hypothetical: if all of the defendants actually detained would have committed murder had they been released prior to trial, and the judge detained them because of unreported knowledge (i.e. perhaps they made threats at a hearing), then the decision making framework suggested in this Article vastly overestimates the hypothetical benefit of releasing such defendants.

Because some jurisdictions have a much higher rate of pretrial detention than others for similar crimes, it's unlikely that latent variables have played a significant, systematic role in judicial decisionmaking. Creating decisionmaking criteria that do not suffer from latent variable bias would require collecting data from defendants whose pretrial detention decision was made without any judicial discretion whatsoever. This could be accomplished if a jurisdiction adopted a universal release policy, randomly released half of all defendants, or used some other explicit heuristic such as the one suggested earlier in this Article.

B. Impact of Release Conditions on Analysis

This analysis does not explicitly consider the conditions of release. Simplifying the release choice into a simple choice of release-or-detain simplified the data collection and analysis, but may not reflect the reality of practice. Release conditions might include house arrest, an anklet monitoring system, or a restraining order. The use of such conditions may

have substantially decreased the rate of criminal acts by defendants that were released. One could imagine a pretrial release granted with severe restrictions on interaction with the public, including a house arrest, an ankle tracking system, and an injunction against using communication technology such as the telephone or internet. Given that such restrictions on freedoms may have significantly reduced the rate of criminal activity perpetrated by defendants in the past, it would be inappropriate to conclude from this analysis that heuristics suggesting release should necessarily be without such restrictions in the future.

C. Impact of Explicit Heuristic Release Criteria on Charging and Plea Bargaining

Currently, prosecutors have extensive discretion in choosing what charges to bring against a defendant, and judges have discretion to determine pretrial detention based on the charges brought as well as the circumstances as presented to them by the prosecutor. To the extent that a district adopted heuristics for pretrial detention based on the crime charged, prosecutors might alter their choice of charges brought to influence or fix the pretrial detention determination. Similarly, the presence of explicit formula in determining pretrial detention decisions might influence defendants to be more willing to accept a plea bargain if they knew they were going to be detained, much in the same way that child support formulas have decreased litigation in the family law context.[114] Conversely, those defendants who knew that they would not be detained based on a formula might be less likely to accept a plea bargain if it meant they would have to immediately forfeit their freedom.

CONCLUSION

This nation spends billions of dollars detaining roughly half a million suspects pretrial on any given day.[115] While these detentions are arguably

[114] RALPH WARNER ET AL., LIVING TOGETHER: A LEGAL GUIDE FOR UNMARRIED COUPLES 237–38 (15th ed. 2013) (discussing how the Child Support Enforcement Act has required states to adopt child support formulas, which has subsequently resulted in less litigation).

[115] Shima Baradaran, *The State of Pretrial Detention*, *in* The State of Criminal Justice 2011, at 187, 190 (Myrna S. Raeder ed., 2011) (estimating that there are 500,000 total pretrial detainees in the United States);

constitutionally and morally suspect, this Article focused on the costs incurred on society and to the defendant to detain this group of individuals. While local, state, and national governments have all lamented the costs incurred by incarceration, this Article provides the first cost-benefit analysis of the pretrial detention decision. It considers the risk of crime posed by each group of defendant and proportionately compares this to the number and type of defendant released. It then considers the costs to the defendant of being detained and to society, but also the costs of releasing defendants, including consideration of the crimes these defendants may commit. While much legal scholarship has advocated for cost-benefit analysis in other areas of criminal law, little work has been done to investigate whether and how the same could be accomplished in pretrial detention decisions. Utilizing recent existing research and my own research, I have calculated the benefits and costs, both primary/secondary and direct/indirect, of pretrial detention. I also calculated the net benefits and costs of pretrial detention decisions in actual cases, with some important ramifications.

The primary finding of this Article is that systematically fine tuning pretrial detention decisions through cost-benefit analysis could result in billions of dollars of economic savings to society, compared to current policies. Using explicit heuristics to guide their decisions, judges can release significantly more defendants without increased economic or social costs. The model suggests that only 50% of all pretrial detentions produced an economic benefit, while a mere 20% of pretrial releases resulted in an economic loss. Like any human decision maker, judges cannot make good choices without having quantified estimates of the risks and benefits of the options before them. In addition to providing those estimates, this Article has suggested a simple detention heuristic based on readily identifiable defendant-specific factors.[116]

This analysis contains admitted weaknesses and limitations. As with all cost-benefit analyses, quantifying the costs incurred and saved is necessarily easier on paper than implementing them in real life. It is impractical to control for all potential factors in conducting such an analysis. For instance, putting temporal limitations on a particular analysis is bound to be uncertain, as the effect of costs on an individual or on society will inevitably shift alongside changing circumstances. It is likewise nigh impossible to anticipate the secondary effects of a proposed policy, the

[116] As listed above, the six defendant-specific factors are: (1) original arrest for a violent crime; (2) four or more prior arrests; (3) prior incarceration; (4) a prior failure to appear; (5) an active criminal justice status; and (6) aged nineteen or younger.

occurrence of which could change the outcome of the analysis significantly. Even monetizing direct costs and benefits is a potentially perilous endeavor given the sheer amount of the data available. But even if there was a way to conduct a perfect analysis, this Article does not ignore the inherent undemocratic nature of cost-benefit analysis and the potential pitfalls surrounding that.

And indeed, nothing in this Article is intended to argue against the relative importance of constitutional rights or equity, fairness, and justice—all arguments that pose valid critiques of cost-benefit analysis. Rather, this Article claims that, while no perfect solution exists, when implemented correctly, cost-benefit analysis can at least inform judicial decisionmaking in the pretrial process. And despite its empirical limitations, the cost-benefit analysis provided here could allow judges to release more defendants (while maintaining or lowering crime rates), and save this country a substantial amount of money.