

THE DOWNSTREAM CONSEQUENCES OF MISDEMEANOR PRETRIAL DETENTION

Introduction

The United States likely detains millions of people each year for inability to post modest bail. There are approximately eleven million annual admissions into local jails.¹ Many of those admitted remain jailed pending trial. At midyear 2014, there were an estimated 467,500 people awaiting trial in local jails, up from 349,800 at the same point in 2000 and 298,100 in 1996.² Available evidence suggests that the large majority of pretrial detainees are detained because they cannot afford their bail, which is often a few thousand dollars or less.³

This expansive system of pretrial detention has profound consequences both within and beyond the criminal justice system. A person detained for even a few days may lose her job, housing, or custody of her children.⁴ There is also substantial reason to believe that detention affects case outcomes. A detained defendant “is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.”⁵ This is thought to increase the likelihood of conviction, either by trial or by plea, and may also increase the severity of any sanctions imposed.⁶ More directly, a detained person may plead guilty—even if innocent—simply to get out of jail.⁷ Not least importantly, a money bail system that selectively detains the poor threatens the constitutional principles of due process and equal protection.⁸

To date, however, empirical evidence of the downstream effects of pretrial detention has been limited. There is ample documentation that those detained pretrial are convicted more frequently, receive longer sentences, and commit more future crimes than those who are not (on average).⁹ But this is precisely what one would expect if the system detained those who pose the greatest flight or public safety risk. One key question for pretrial law and policy is whether detention actually *causes* the adverse outcomes with which it is linked, independently of other factors. On this question, past empirical work is inconclusive.¹⁰

This Article presents original evidence that pretrial detention causally affects case outcomes and the commission of future crimes. Using detailed data on hundreds of thousands of misdemeanor cases resolved in Harris County, Texas (the third-largest county in the United States¹¹), this Article deploys two quantitative methods to estimate the causal effect of detention: (1) a regression analysis that controls for a significantly wider range of confounding variables than past studies, and (2) a quasi-experimental analysis related to case timing. The results provide compelling evidence that pretrial detention causally increases the likelihood of conviction, the likelihood of receiving a carceral sentence, the length of a carceral sentence, and the likelihood of future arrest for new crimes.

This Article intentionally focuses on misdemeanor cases. “Misdemeanor” may sound synonymous with “trivial,” but that connotation is misleading. Misdemeanors matter. Misdemeanor convictions can result in jail time, heavy fines, invasive probation requirements, and collateral consequences that include deportation, loss of child custody, ineligibility for public services, and barriers to finding employment and housing.¹² Beyond the consequences of misdemeanor convictions for individuals, the misdemeanor

system has a profound impact because it is enormous: while national data on misdemeanors are lacking, a 2010 analysis found that misdemeanors represented more than three-quarters of the criminal caseload in state courts where data were available.¹³

For misdemeanor defendants who are detained pretrial, the worst punishment may come before conviction.¹⁴ Conviction generally means getting out of jail; people detained on misdemeanor charges are routinely offered sentences for “time served” or probation in exchange for tendering a guilty plea.¹⁵ And their incentives to take the deal are overwhelming. For defendants with a job or apartment on the line, the chance to get out of jail may be impossible to pass up. Misdemeanor pretrial detention therefore seems especially likely to induce guilty pleas, including wrongful ones.¹⁶ This is also, perversely, the realm where the utility of cash bail or pretrial detention is most attenuated. These defendants’ incentives to abscond should be relatively weak, and the public safety benefit of detention is dubious.¹⁷

Despite these structural problems, money bail practices that result in systemic misdemeanor pretrial detention have persisted nationwide. In Harris County, Texas--the site of this study--more than half of all misdemeanor defendants are detained.¹⁸ Other jurisdictions also detain people accused of misdemeanors at surprising rates.¹⁹ There are several possible reasons for this. A money bail system may be easier to operate than a system of broad release with effective pretrial services. The bail bondsman lobby is a potent political force.²⁰ The individual judges or magistrates who make pretrial custody decisions suffer political blowback if they release people (either directly or via affordable bail) who subsequently commit violent crimes, but they suffer few consequences, if any, for setting unaffordable bail that keeps misdemeanor defendants detained. In short, institutional actors in the misdemeanor system have strong incentives to rely on money bail practices that result in systemic pretrial detention.²¹

Given the inertia, misdemeanor bail policy is unlikely to shift in the absence of compelling empirical evidence that the status quo does more harm than good. This Article provides such evidence through the use of two types of quantitative analysis. The first is a regression analysis that controls for a wide range of confounding factors: defendant demographics, extensive criminal history variables, wealth measures (zip code and claims of indigence), judge effects, and 121 different categories of charged offense. Importantly, the analysis also controls for the precise amount of bail set at the initial hearing, meaning that the effects of bail are assessed by comparing defendants presumably viewed by the court as representing equal risk but who nonetheless differ in whether they are ultimately detained. In addition, this Article undertakes a quasi-experimental analysis that, akin to a randomized controlled trial that would be used to determine the effect of a treatment in an experimental setting, measures the effects of detention by leveraging random variation in the access defendants have to bail money based on the timing of arrest. These quasi-experimental results are very similar to those produced through regression analysis with detailed controls.

This Article finds that defendants who are detained on a misdemeanor charge are much more likely than similarly situated releasees to plead guilty and serve jail time. Compared to similarly situated releasees, detained defendants are 25% more likely to be convicted and 43% more likely to be sentenced to jail. On average, their incarceration sentences are nine days longer, more than double that of similar releasees. Furthermore, we find that pretrial detainees are more likely than similarly situated releasees to commit future crimes. Although detention reduces defendants’ criminal activity in the short term through incapacitation, by eighteen months post-hearing, detention is associated with a 30% increase in

new felony charges and a 20% increase in new misdemeanor charges, a finding consistent with other research suggesting that even short-term detention has criminogenic effects. These results raise important constitutional questions and suggest that with modest changes to misdemeanor pretrial policy, Harris County could save millions of dollars per year, increase public safety, and reduce wrongful convictions.

Interest in pretrial policy is now surging. In the months prior to publication of this Article, several other studies have been released that also use both a natural experiment and complex multivariate regression to estimate the effects of pretrial detention.²² Those studies are set in Philadelphia, New York City, Pittsburgh, and Miami, and they too find that pretrial detention has a causal adverse effect on case outcomes.²³ As a whole, this body of research presents compelling evidence that detention effects exist across case types and jurisdictions. This Article offers a unique contribution by focusing on misdemeanor cases, setting its analysis in Harris County, and putting its empirical findings in constitutional context. . .

II. Misdemeanor Pretrial Detention in Harris County

A. The Misdemeanor Pretrial Process

The present analysis focuses on Harris County, Texas, the third-largest county in the United States. Countywide, around 70,000 misdemeanors are processed each year, and these cases are adjudicated by the Harris County Criminal Courts at Law.⁷⁵ Indigent defense in the county was historically provided through an appointed private counsel system, but a public defender office was established in 2010 and has gradually expanded.⁷⁶ Still today, though, the public defender office handles only a small subset of misdemeanor cases, with the remainder of cases assigned to appointed private counsel.⁷⁷

After arrest and booking, alleged misdemeanants are held at the county jail in downtown Houston until a bail hearing occurs.⁷⁸ Bail hearings are held continuously every day during the year and nearly always occur within twenty-four hours of the initial booking.⁷⁹ To manage the large volume of new defendants who arrive each day, the county has developed a videoconferencing process for bail hearings. Defendants are taken to a conferencing facility within the jail and participate in the hearing by speaking to a split video screen that shows a prosecutor and the magistrate handling the hearing.⁸⁰ Bail hearings are typically handled in an assembly-line fashion, with some hearings lasting approximately a minute.⁸¹ Unless they have somehow managed to retain counsel, which is very rare, defendants are not represented at the bail hearings.⁸²

Magistrates making bail determinations have access to information from a pretrial services report that includes the defendant's prior criminal record and can also ask the defendant questions during the bail hearing.⁸³ Texas statutory law defines bail as "the security given by the accused that he will appear and answer before the proper court the accusation brought against him."⁸⁴ Notwithstanding this unitary focus on ensuring appearance, the law also directs the officer who sets bail to consider public safety in determining the bail amount.⁸⁵

In Harris County, bail is typically set according to a bail schedule promulgated by the county courts. The schedule proposes bail of \$500 for a low-level misdemeanor by a defendant with no prior criminal record and escalates bail in \$500 increments according to the seriousness of the charged offense and the

number of prior felony and misdemeanor convictions, up to a maximum of \$5000.⁸⁶ Although release without bail--referred to as a "personal bond" in Harris County--is allowed, it is not included on the schedule and occurs infrequently.⁸⁷ Prosecutors have an opportunity during the bail hearing to argue for departures from the schedule.

Nearly all misdemeanor defendants in Harris County are theoretically eligible for appointed counsel in the event of indigence.⁸⁸ To apply for appointed counsel, defendants must complete a form that asks about their income and other assets.⁸⁹ Judges may also direct questions regarding defendants' financial circumstances from the bench either during the bail hearing or in later proceedings.⁹⁰ When it would facilitate a more orderly transaction of court business, particularly when defendants appear pro se (without a lawyer), the judge may appoint indigent counsel without a formal request.⁹¹ Although Texas law and the county's written policy prohibit judges from considering whether a defendant made bail in deciding whether she qualifies for appointed counsel (except to the extent it reflects her financial circumstances),⁹² there is considerable anecdotal evidence suggesting that this rule is violated in practice.⁹³ Thus under the current system, one potential impact of posting bail may be to alter one's chances of receiving an appointed attorney.

B. Representativeness of Harris County's Misdemeanor Pretrial System

The study is set in a populous urban area with criminal justice structures comparable to those in many large cities in the United States. Harris County is the third-largest county in the United States and is home to Houston, the nation's fourth-largest city.⁹⁴ Harris County boasts a diverse population of about 4.5 million residents, 19.6% of whom are African American, 42% Hispanic/Latino, 25.3% foreign-born, and 17.3% living below the federal poverty line.⁹⁵ In Houston, which houses nearly half the county's population, the 2014 Federal Bureau of Investigation (FBI) index crime rate was 1 per 100 residents for violent crime and 5.7 per 100 residents overall, placing Houston thirtieth among the 111 U.S. cities with populations above 200,000.⁹⁶

While the Bureau of Justice Statistics has collected extensive information about more serious crimes,⁹⁷ there are no nationally representative data available on the numbers of misdemeanor arrests and convictions, let alone data about pretrial detention rates, bail, or sentencing. Nonetheless, other empirical studies on the effects of pretrial detention provide some insight into misdemeanor pretrial practices in other large urban areas and suggest that Harris County is not an outlier. In New York City, about 35% of misdemeanor defendants spend more than a week detained pretrial⁹⁸ and 14% of misdemeanor defendants remain in jail during the entire pretrial period.⁹⁹ Sixty-seven percent of misdemeanor defendants in New York City are convicted, and the vast majority of these convictions are guilty pleas.¹⁰⁰ Ten percent of misdemeanor defendants in New York City receive a sentence of incarceration.¹⁰¹

In Philadelphia, 25% of misdemeanor defendants remain in jail for more than three days after the bail hearing, and 50% are found guilty of at least one charge.¹⁰² Philadelphia, however, differs from many other jurisdictions in its broad use of bench trials (trials in front of a judge instead of a jury), which are the default for misdemeanor cases.¹⁰³ As a result, the plea rate is much lower: only half of misdemeanor convictions in Philadelphia are achieved through plea negotiation. Sixteen percent of misdemeanor defendants receive a sentence of incarceration, including those who receive a sentence of time served.

The statistics in Harris County differ somewhat, but not dramatically, from those in New York City and Philadelphia.¹⁰⁴ The detention rate is a bit higher: about 53% of misdemeanor defendants in Harris County are detained for more than seven days. The conviction rate is similar (68%), and, as in New York City, most convictions come about through guilty pleas (65%). The misdemeanor incarceration rate in Harris County is much higher than in the other two cities; 58% of those convicted receive a jail sentence, including time served. The average jail sentence, however, is relatively short at less than a month.

Other pretrial practices in Harris County are regularly observed in other jurisdictions. For example, the use of a schedule specifying bail amounts based on the charge and prior convictions is not uncommon.¹⁰⁵ A 2009 survey of pretrial services around the country indicates that 57% of jurisdictions use videoconferencing for bail hearings,¹⁰⁶ as Harris County does. This same survey also indicates that about half of U.S. jurisdictions, like Harris County, do not provide representation at bail hearings. The use of commercial bail bondsmen is also fairly widespread. Four states--Illinois, Kentucky, Oregon, and Wisconsin--have banned the commercial bail bond industry, but bail bondsmen remain a common source for bail funds in most other states.¹⁰⁷ Thus, although Harris County has unique features, it is similar to many other jurisdictions in detaining substantial numbers of misdemeanor defendants pretrial; in its reliance on a cash bail schedule; in holding short, videoconference bail hearings without court-appointed representation for the accused; and in the prominent role of a commercial bail bond industry.

C. Data Description

Study data are derived from the court docket sheets maintained by the Harris County District Clerk.¹⁰⁸ These docket sheets include the universe of unsealed criminal cases adjudicated in the county and document considerable detail regarding each case. This Article focuses on 380,689 misdemeanor cases filed between 2008 and 2013. For each case, the docket data include the defendant's name, address, and demographic information; prior criminal history; and most serious charge. To obtain information about the neighborhood environment for each defendant, the court data were linked by the defendant's zip code of residence--which was available for 85% of defendants--to zip code-level demographic data from the 2008-2012 American Community Survey.¹⁰⁹ The docket data also report the time of the bail hearing; the bail amount; whether and when bail was posted, the judge and courtroom assignment; motions and other metrics of procedural progress; and the final case outcome, including whether the case was resolved through a plea.

The discussion and analysis below focus on the bail amount set at the initial hearing, which is likely to have a disproportionate impact on detention both because it is the operative bail during the early period when most defendants who post bail do so and because it serves as a reference point for any further negotiations over bail. However, in Harris County, as in other jurisdictions, judges can exercise discretion to adjust bail as additional facts about a particular defendant or case come to light. . .

Table 1 above presents summary statistics describing the sample of misdemeanor defendants examined in the study. Any individual who did not post bond within the first seven days following the bail hearing is categorized as detained. The data reveal stark differences in plea rates, conviction rates, and jail sentences for detainees as compared to those who are able to make bail. However, detainees are also different from releasees across a number of preexisting characteristics that seem likely to be related to

case outcomes. For example, detainees are much more likely to request appointed counsel due to indigence (71% versus 33%), are disproportionately charged with more serious Class A misdemeanors (34% versus 27%), and have more extensive prior criminal records. Thus, it remains unclear to what extent the differences in case outcomes reflect the effect of detention versus other preexisting differences across the two groups.

Table 1

Characteristics of Defendants by Pretrial Release Status

	OVERALL	DETAINED	RELEASED
Convicted	68.3%	79.4%	55.7%
Guilty plea	65.6%	76.8%	52.8%
Any jail sentence	58.7%	75.0%	40.2%
Jail sentence days	17.0	25.4	7.4
Any probation sentence	14.0%	6.2%	22.9%
Probation sentence days	49.4	22.5	79.9
Requested appointed counsel	53.2%	71.3%	32.6%
Amount of bail	\$2225	\$2786	\$1624
Class A misdemeanor	30.7%	33.5%	27.4%
Male	76.8%	79.8%	73.5%
Age (years)	30.8	31.6	30.0
Black	38.9%	45.6%	31.3%
Citizen	74.1%	71.5%	77.0%

Prior misdemeanors	1.51	2.08	0.85
Prior felonies	0.74	1.11	0.31
<i>Sample size</i>	<i>380,689</i>	<i>202,386</i>	<i>178,303</i>

D. Pretrial Detention and Wealth

Not listed in Table 1 because it is unobserved in the data--though probably the most obvious characteristic that would differentiate the detained and released--is wealth. A clear concern with a predominantly cash-based bail system as exists in Harris County is that individuals with money or other liquid assets will be most able to make bail, skewing the system in favor of the wealthy. Although the individual wealth of each defendant is unobserved, one can proxy for defendant wealth based upon median income in each defendant's zip code of residence. To illustrate the prominent role of wealth in the pretrial system, Figure 1 below calculates the pretrial detention rate for defendants residing in each of the 217 zip codes observed in the data that contain at least fifty defendants and plots this against the median household income in the zip code.

The pattern is striking. Those who come from poorer zip codes are substantially more likely to be detained than those from wealthier zip codes. Only about 30% of defendants from the wealthiest zip codes are detained pretrial, versus around 60-70% of defendants from the poorest zip codes. . .Nor does the lower detention rate of wealthier defendants appear to be caused solely by differences in evidence or other factors related to public safety.. .

[T]he actual detention rates for the poorest defendants are substantially above those that would be predicted based upon their assigned bail and the reverse is true for the wealthiest defendants. Defendants in the lowest-income decile are about 15% (8 percentage points) more likely to be detained than would be expected based on their court-assigned bail. Those in the top decile are 19% (9 percentage points) less likely to be detained. Because these comparisons already account for the bail amount, the differences cannot be plausibly attributed to anything in the court record that might implicate worthiness for bail. It thus appears that wealthier defendants are advantaged in their ability to obtain pretrial release beyond what would be expected simply based on the merits of their case.