

Articles

DISCRETION AND DISPARITY IN FEDERAL DETENTION

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ABSTRACT—The uniquely American phenomenon of mass incarceration plagues the pretrial space. People awaiting trial make up roughly 20% of those held in criminal custody in the United States. Largely overlooked by bail-reform advocates, pretrial detention in the federal criminal system presents a puzzle. The federal system detains defendants at a much higher rate than the states—more than 60% of U.S. citizen-defendants were detained pending trial by federal courts last year. But federal defendants virtually never fail to appear in court, and they are rarely arrested for new crimes while on pretrial release. And unlike state court systems, cash bail is disfavored in federal courts. Most federal defendants who are released pending trial are released on personal recognizance or unsecured bond.

This Article argues that the federal experience with pretrial detention—beginning with its historical roots in old English law and ending with the enormous and disparate detention rates that I document today—provides important lessons for those seeking to reform bail in both federal and state law. This Article tackles a critical empirical question: does the modern, broadly discretionary, federal detention regime generate race- or gender-based disparities in pretrial detention? To answer this question, this Article leverages an expansive new dataset that covers more than 300,000 federal defendants sentenced between fiscal years 2002 and 2016. The results are sobering. White defendants are more likely to be released pending trial than otherwise similar Black and Hispanic defendants, and female defendants are more likely to be released pending trial than otherwise similar male defendants.

More importantly, a disparity analysis that recognizes the intersectional relationship between race and gender paints a more complex picture. The most extreme racial disparities are among male defendants—where Black men are four percentage points and Hispanic men are six percentage points more likely to be detained than similarly situated white men. Among female defendants, however, racial disparity presents the opposite relationship: Black women are more likely to be released pending trial than Hispanic and white women. Notably, this disparity pattern for women does not appear in

other studies of pretrial detention in state courts, where white women are often the most likely race–gender group to be released. Based on this empirical evidence, the Article assesses several possible legal changes to address disparity, including amending the federal Bail Reform Act to allow judges to consider costs in detention decisions, limiting or prohibiting the consideration of dangerousness, expanding appellate review, and narrowing or eliminating statutory presumptions of detention. The Article ends by offering cautionary lessons for states embarking on bail reform.

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INTRODUCTION

Pretrial release for criminal defendants, historically in the form of “bail,”¹ has existed since at least the thirteenth century. The Supreme Court explained a half-century ago that “[b]ail, of course, is basic to our system of law,”² and another court described bail as “necessary to an Anglo-American regime of ordered liberty.”³ Bail is imperative because, as the Supreme Court explained:

This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.⁴

Like mass incarceration, mass detention has not always been the American norm. Pretrial detention was severely circumscribed in colonial America and for centuries afterwards. It was limited to capital offenses and the few cases in which a defendant’s appearance for trial could not be otherwise secured. However, the era of “tough on crime” policies in the late twentieth century brought drastic changes to our centuries-old bail system. During this era, Congress passed the Bail Reform Act of 1984, which allowed judges to detain federal defendants based on their apparent danger to the community.⁵ By expanding pretrial detention to reach defendants who presented apparent danger—not just risk of nonappearance in court—the 1984 Act broadened judicial discretion to decide whom to release and whom to detain. As described in Part I, Congress acknowledged in 1984 that this change was “a significant departure” from centuries of practice⁶ but did not appear concerned about the broad grant of discretion for a fundamental right—the right to bail. The system established in 1984 has endured essentially unchanged to present day, creating the potential for disparate treatment between defendants and judges. For example, as this Article

¹ “Bail” is “the pretrial release of a criminal defendant after security has been taken for the defendant’s future appearance at trial.” Donald B. Verrilli, Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 329 (1982). Modern bail practice “requir[es] a bail bond or the deposit of a sum of money subject to forfeiture” if the defendant does not appear in court. *Stack v. Boyle*, 342 U.S. 1, 4–5 (1951).

² *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971).

³ *Hunt v. Roth*, 648 F.2d 1148, 1155 (8th Cir. 1981) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968)), *vacated on other grounds*, *Murphy v. Hunt*, 455 U.S. 478, 481 (1982).

⁴ *Stack*, 342 U.S. at 4 (citation omitted).

⁵ See 18 U.S.C. §§ 3141–3150.

⁶ S. REP. NO. 98-225, at 3 (1983).

describes, federal magistrate judges vary widely—even within their jurisdictions—in the rates at which they detain defendants pending trial.

Today, the federal criminal system detains people pending trial at an astonishing rate—more than 60% of the roughly 60,000 criminal defendants prosecuted for federal non-immigration offenses were detained pretrial in 2019.⁷ When defendants prosecuted for immigration offenses are included, the federal detention rate rises to 75%.⁸ In contrast, in 1979, the federal courts detained only 17% of all criminal defendants pending trial.⁹ And the detention rate for felony defendants prosecuted in state courts was around 38% in 2009—the most recent year for which data are available.¹⁰

In the federal criminal system, the loss of liberty associated with pretrial detention is especially grave. The average pretrial detention lasts more than eight months.¹¹ Because many federal judicial districts are geographically large, defendants can be detained far from their families and other community supports. Moreover, a growing body of empirical scholarship documents pretrial detention's destructive collateral consequences for defendants. Scholars have found that pretrial detention immediately affects a defendant's case, leading to a longer sentence, an increased likelihood of pleading guilty, and a reduced probability of receiving a sentencing reduction.¹² These findings mean that racial disparities observed in later

⁷ ADMIN. OFF. OF THE U.S. CTS., JUDICIAL BUSINESS: FEDERAL PRETRIAL SERVICES TABLES tbl.H-14A (2019), https://www.uscourts.gov/sites/default/files/data_tables/jb_h14a_0930.2019.pdf [<https://perma.cc/HY3Y-7FN7>] (showing that roughly 61% of federal defendants were detained pending trial in fiscal year 2019).

⁸ *Id.* at tbl.H-14.

⁹ BUREAU OF JUST. STAT., PRETRIAL RELEASE AND MISCONDUCT 1 (1985), <https://www.bjs.gov/content/pub/pdf/prm-foo.pdf> [<https://perma.cc/5Z72-FQYQ>]. Statistics from 1979 do not report detention rates by U.S. citizenship, so the 17% detention rate likely *overstates* the detention rate for U.S. citizen-defendants.

¹⁰ BUREAU OF JUST. STAT., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES 15 (2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf> [<https://perma.cc/3LDE-A2Z4>].

¹¹ Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 FED. PROB. J. 52, 53 (2017); Alison Siegler & Erica Zunkel, *Rethinking Federal Bail Advocacy to Change the Culture of Detention*, CHAMPION, July 2020, at 46, 47 n.18 (stating that the average federal pretrial detention in 2019 was 253 days).

¹² *See generally* Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 AM. L. & ECON. REV. 24 (2020) (finding that federal pretrial release reduces sentence length, increases the probability of receiving a sentence below the recommended sentencing range, and lessens the probability that a defendant will receive a mandatory minimum sentence); Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201 (2018) (finding that pretrial detention increases probability of conviction, primarily through increase in guilty pleas); Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471 (2016) (finding that assignment of money bail increases

stages of the criminal process, such as at sentencing, might be explained in part by racial disparities in pretrial detention.¹³ Pretrial detention also has long-term effects, increasing the likelihood of recidivism and generating worse employment-related outcomes for defendants who are detained pending trial.¹⁴

A comprehensive analysis of racial and gender disparities in federal pretrial release is essential to informing the ongoing policy debate around bail reform. Although federal detention's reach is wide, it is likely that detention is imposed unequally across the population. Using data covering more than 300,000 defendants sentenced in eighty of the ninety-four federal district courts over fiscal years 2002 through 2016, this Article is the first nationwide analysis of race- and gender-based disparity in federal pretrial detention.¹⁵ The data used in this Article contain detailed information about each defendant and their case, including the defendant's race, ethnicity, gender,¹⁶ level of formal education, age, past criminal record, and offense type.¹⁷

likelihood of conviction and increases recidivism); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529 (2017) (finding that pretrial detainment increases probability of conviction and increases recidivism); Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511 (2018) (finding that pretrial detention increases likelihood of conviction, length of incarceration sentence, and amount of non-bail court fees owed).

¹³ See, e.g., Leslie & Pope, *supra* note 12, at 531 (estimating that racial disparities in pretrial detention explain 40% of the Black–white incarceration gap and 28% percent of the Hispanic–white gap).

¹⁴ Dobbie, Goldin & Yang, *supra* note 12, at 201; Gupta, Hansman & Frenchman, *supra* note 12, at 471.

¹⁵ I am aware of only two papers that examine race-based disparities in some capacity in pretrial detention in federal courts. The first, published in 1989, uses data on roughly 6,000 male defendants sentenced in ten federal district courts. Celesta A. Albonetti, Robert M. Hauser, John Hagan & Ilene H. Nagel, *Criminal Justice Decision Making as a Stratification Process: The Role of Race and Stratification Resources in Pretrial Release*, 5 J. QUANTITATIVE CRIMINOLOGY 57, 64 (1989). The second, published in 2009, uses data on roughly 1,000 drug offenders sentenced in three federal district courts. Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 KAN. L. REV. 879, 883 (2009). There is much more work examining race-based disparities in pretrial detention in state courts. See, e.g., David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q.J. ECON. 1885, 1929 (2018) (finding substantial bias against Black defendants).

¹⁶ This paper refers to defendants as having a binary gender—male or female—because this is the categorization used in the U.S. Sentencing Commission data, which is described in Section II.A.1.

¹⁷ As described in Section II.B, the data's fulsomeness is critical to understanding the relationship between race and gender and detention. Having a rich dataset allows me to access roughly the same information that the judge had available to them in deciding release. Judges make detention decisions quickly with limited information. With so much detailed data about each defendant and case, it is unlikely that a judge will have made a detention decision in reliance on information that I, the researcher, do not observe. The comprehensive data also allow me to use many controls that may affect detention status

The empirical analysis first reveals disconcerting evidence that federal defendants experience disparate pretrial detention outcomes based on gender and race. In particular, white defendants are significantly more likely to be released pending trial than Black and Hispanic¹⁸ defendants, and female defendants are significantly more likely to be released pending trial than male defendants, even after controlling for a rich set of potentially confounding variables.¹⁹ Race-based favoritism toward white defendants is consistent with prior empirical scholarship finding that white defendants experience more favorable outcomes than defendants of color throughout the criminal process.²⁰

However, this analysis does not tell the whole story. The portrait is complicated when the Article expands beyond focusing on Black–white, Hispanic–white, and male–female disparity and instead examines disparity based on defendants’ intersectional gender–race groups. This deeper analysis illuminates disparities that are obscured in the initial analysis which separately considers race and gender. I find that although Black–white and Hispanic–white disparity favors white defendants in the full data, this result is driven by disparity among *male* defendants, who constitute around 85% of federal defendants.²¹ For female defendants, a different result emerges: Black female defendants are released pending trial more frequently than any other race–gender group. This larger release rate persists even after controlling for a rich set of control variables in the data. These results beg two questions: What explains racial disparity among male defendants,

(such as the severity of the offense charged) so that I can isolate the relationship between race, gender, and detention.

¹⁸ I use the term “Hispanic” rather than “Latinx” because this is the terminology used in the U.S. Sentencing Commission data, which is described in Section II.A.1.

¹⁹ See *infra* Section II.B. In particular, the empirical analysis controls for defendant and case characteristics that are fixed before the case begins (for example, the defendant’s level of formal education, or the severity of their criminal record) that could be correlated with both race and detention.

²⁰ See, e.g., Kate Antonovics & Brian G. Knight, *A New Look at Racial Profiling: Evidence from the Boston Police Department*, 91 REV. ECON. & STAT. 163, 177 (2009) (traffic stops); Roland G. Fryer Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210, 1258 (2019) (police use of force conditional on a police–civilian interaction); M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1350 (2014) (charging); Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75, 108 (2015) (sentencing); Max Schanzbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics*, 34 J. LEGAL STUD. 57, 72 (2005) (sentencing); David B. Mustard, *Racial, Ethnic and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 311–12 (2001) (sentencing).

²¹ See *infra* Table 1. The majority of ethnically Hispanic defendants charged with federal crimes are not U.S. citizens, and noncitizen-defendants are almost always detained pretrial. As described in more detail in Section II.A, the data used in this Article are restricted to defendants who are U.S. citizens in order to isolate disparity based on race and ethnicity separate from alienage.

which, as in other criminal contexts, benefits white defendants? And why are Black women released at higher rates than Hispanic and white women (and all men)?

The answers, I argue, could lie in the broadly discretionary nature of federal pretrial detention. Judges likely behave in two characteristic ways when making highly discretionary decisions like detention decisions. First, the type of discretionary decision-making that characterizes federal detention determinations—made with limited information, a short time frame, and little oversight—often leaves decision-makers susceptible to bias. I argue that the empirical findings are consistent with race–gender bias that is particularized against Black and Hispanic men via stereotyping. Federal bail decisions explicitly center on perceptions of dangerousness, which is an enduring and harmful stereotype against Black and Hispanic men.²² Second, discretionary decision-making with little oversight might lead judges to rule with pragmatism. In particular, I find evidence that suggests judges are sensitive to the collateral consequences of detention for defendants, particularly defendants with dependents. I show that parenthood helps explain the racial disparity results for women—who are more likely to be sole custodial parents than men.²³ I also explore whether racial disparities in charging can explain the findings, either through the Bail Reform Act’s presumptions of detention or through selection into the sample. Especially for female defendants, I cannot rule out the possibility that the racial disparity findings are created by earlier racial disparities in charging decisions.

In a study such as this one, which focuses on federal criminal defendants, it is important to note that the majority of criminal defendants in the United States are prosecuted in state courts and held in state carceral facilities.²⁴ The federal criminal system, however, is both an important and useful setting to study pretrial detention disparity. For one thing, the federal criminal system is vast: the federal incarcerated population is larger than that of any state.²⁵ The federal criminal system also detains defendants at an

²² See *infra* Section IV.A.

²³ See *infra* Section IV.C.

²⁴ In 2017—the last year for which data was available—a little more than 1.5 million people were under the legal jurisdiction of a state or federal correctional authority. Within this population, 88% of the people were under state jurisdiction and 12% were under federal jurisdiction. This figure largely excludes people held in local jails. JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUST. STAT., PRISONERS IN 2017, at 1, 3 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [<https://perma.cc/B3LZ-NZMJ>].

²⁵ *Id.* at 4. At the end of 2017, the federal incarcerated population comprised 183,058 prisoners, while the prison populations of the two largest states—California and Texas—were 131,039 prisoners and 162,523 prisoners, respectively.

enormous rate—more than 60% of federal criminal defendants were detained pending trial last fiscal year—and this rate has nearly quadrupled in the last four decades.²⁶ On any given day, roughly 50,000 people are detained pending trial within the federal criminal system.²⁷

The federal model also provides critical information for those seeking to reform bail at the state level. The federal criminal system contains several features that many state bail-reform advocates find desirable. Cash bail is strongly disfavored in federal courts. It is rare for a federal defendant to be held in pretrial detention because of their inability to post bond.²⁸ Also, in contrast to widespread bail practice in state courts, federal defendants are entitled to many procedural rights at the pretrial detention stage, including a right to a detention hearing at which the defendant enjoys rights to be represented by counsel, to testify, to present witnesses and evidence, and to cross-examine the government's witnesses.²⁹ Very few states provide such procedural protections to defendants at the pretrial detention stage.³⁰ As a result, in federal courts, bail determinations are highly individualized, as described in more detail in Section I.B.³¹

²⁶ See *supra* notes 7–9 and accompanying text.

²⁷ To arrive at this estimate, I note that in fiscal year 2019, 74,533 people were detained pending trial. ADMIN. OFF. OF THE U.S. CTS., *supra* note 7. In that fiscal year, the average detention period was 253 days. Siegler & Zunkel, *supra* note 11. This translates to $74,533 \cdot (253/365) \approx 51,663$ federal defendants detained on any given day in fiscal year 2019.

²⁸ See *infra* notes 78–84 and accompanying text (describing how the federal bail system is designed around ensuring court appearance and community safety, not about burdening the defendant with financial conditions).

²⁹ 18 U.S.C. § 3142(f)(2).

³⁰ Only eighteen states require detention hearings for at least some defendants. Amber Widgery, *Pretrial Detention*, NAT'L CONF. OF STATE LEGISLATURES (June 7, 2013), <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-detention.aspx> [<https://perma.cc/9LXY-MQ8K>]. The states that require detention hearings for at least some defendants are Alaska, Arizona, Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Louisiana, Maine, Massachusetts, Mississippi, Ohio, Oregon, Rhode Island, Texas, Washington, and Wisconsin. *Id.* In many instances, detention hearings are only a few minutes long (or less) and are often carried out without a lawyer present. See, e.g., Maya Dukmasova, *Cook County's Tradition of Using Bail as Punishment May Be Hard to Change*, CHI. READER (Sept. 19, 2017), <https://www.chicagoreader.com/Bleader/archives/2017/09/19/cook-countys-tradition-of-using-bail-as-punishment-may-be-hard-to-change> [<https://perma.cc/3EJG-GCN7>] (reporting that the average bond hearing in Cook County, Illinois ranges from thirty-seven seconds to two minutes).

³¹ In contrast, many state and local jurisdictions rely on *bail schedules* to determine pretrial release. A bail schedule is a scheme that translates the arrestee's alleged offense conduct into a specific bail amount, typically without regard for the arrested person's individual characteristics. See Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, 26 CRIM. JUST. 12, 13–14 (2011) (noting that in a recent poll, more than 60% of counties indicated that their jurisdiction uses a bail schedule); see also James A. Allen, *"Making Bail": Limiting the Use of Bail Schedules and Defining the Elusive Meaning of "Excessive" Bail*, 25 J.L. & POL'Y 637, 655–56, 665 (2017) (arguing that judicial overreliance on bail schedules leads to thousands in jail due to their inability to pay).

What are this Article's possible implications for states hoping to reform bail? The findings presented in this Article suggest that race- and gender-based disparities can and will persist in a pretrial detention regime that largely eschews cash bail and provides many procedural protections. If unwarranted disparity is fueled by racial bias, it is likely to endure in a pretrial detention regime that does not explicitly link liquid wealth to release. Racial disparities might even be exacerbated if a retreat from cash bail leads states to adopt preventative detention systems that center bail decisions around dangerousness.³²

The findings also inform the current debate surrounding algorithmic decision-making in the criminal system. As technology enters the criminal space, a fierce debate has emerged about the extent to which judges ought to rely on algorithmic prediction tools in deciding pretrial release and in sentencing defendants. Some states have turned to such risk-assessment tools to replace or reduce reliance on cash bail.³³ The extent to which risk-assessment instruments exacerbate or mitigate racial disparity in pretrial detention is hotly contested. Early empirical evidence, however, suggests that the adoption of risk-assessment technology in pretrial detention does not have much effect on racial disparity in detention.³⁴ One reason, I claim, is that in the absence of risk-assessment technology, detention decisions are

³² See Joe Hernandez, *N.J. Officials Finally Release Data on Bail Reform. Their Conclusion? It's Working*, WHYY (Apr. 2, 2019), <https://whyy.org/articles/n-j-officials-have-finally-released-data-on-bail-reform-their-conclusion-its-working/> [<https://perma.cc/NS7F-UJ6X>] (reporting that although New Jersey's elimination of cash bail reduced pretrial detention, it "had little impact on racial disparity"); see also Jeremy B. White, *California Ended Cash Bail. Why Are So Many Reformers Unhappy About It?*, POLITICO MAG. (Aug. 29, 2018), <https://www.politico.com/magazine/story/2018/08/29/california-abolish-cash-bail-reformers-unhappy-219618> [<https://perma.cc/3MHS-H6EE>] (describing how civil-rights organizations in California went from initially supporting California's bail reform bill to ultimately opposing it because although the bill (now law) eliminates cash bail, it creates a new pretrial detention regime that relies on algorithmic risk assessment and preventive detention). California's bail reform bill was rejected by California voters in 2020 and never took effect. Patrick McGreevy, *Prop. 25, Which Would Have Abolished California's Cash Bail System, Is Rejected by Voters*, L.A. TIMES (Nov. 3, 2020), <https://www.latimes.com/california/story/2020-11-03/2020-california-election-prop-25-results> [<https://perma.cc/6RNH-VLB3>].

³³ See, e.g., Jason Tashea, *Kentucky Tests New Assessment Tool to Determine Whether to Keep Defendants Behind Bars*, A.B.A. J. (Apr. 1, 2015), https://www.abajournal.com/magazine/article/kentucky_tests_new_assessment_tool_to_determine_whe_ther_to_keep_defendants [<https://perma.cc/E226-NM27>] ("Since July 2013, the commonwealth of Kentucky has served as the test case [for risk assessment]."); Bob Egelko, *New Snag in Effort to Abolish Cash Bail: 'Risk Assessment Tools' Called Racially Biased*, S.F. CHRON. (Feb. 24, 2020), <https://www.sfchronicle.com/news/article/New-snap-in-effort-to-abolish-cash-bail-risk-15081205.php> [<https://perma.cc/63PX-WGXR>] (noting that some advocates criticize California's bail reform bill because it requires local courts to use risk assessment).

³⁴ See, e.g., Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 309 (2018) (finding that racial disparities remained constant after Kentucky adopted a bail reform law that reduced the use of cash bail for many defendants).

made by individual judges. And as this Article shows, this form of decision-making also results in racial disparity. Thus, this Article suggests that while eliminating cash bail is an extremely important policy goal,³⁵ lawmakers ought to consider additional reforms that will more expressly target racial disparity in detention. Part V suggests that explicitly considering the costs of detention and limiting the consideration of dangerousness could be productive on this front.

The Article proceeds as follows. Part I begins by tracing the history of the law of pretrial detention in England and the United States and then describes how pretrial detention currently functions in federal courts. Part II describes the Article's data and introduces the empirical strategy. Many additional methodological details are contained in Appendix A. Part III presents estimates of gender- and race-based disparities in pretrial detention for federal criminal defendants. Part IV explores potential explanations for detention disparity, including racial bias, charging disparity, and sensitivity to detention's collateral consequences. Part V concludes by discussing how the findings should inform bail reform efforts in federal and state criminal systems.

I. THE HISTORICAL ORIGINS AND CURRENT LAW OF FEDERAL DETENTION

In every state and federal judicial district in the United States, an arrested person is entitled to a determination by a judicial officer of whether they should be released or detained pending trial.³⁶ In federal and state jurisdictions today, the decisions of whether to release a person and, if so, what conditions to impose on that person upon release are typically guided by two central goals: first, to ensure that, if released, the person will return to court; and second, to ensure that, if released, the person does not present a danger to the community. This Part describes—in broad terms—the historical context and contemporary practice of how federal courts carry out these goals. Section I.A begins by describing the history of federal pretrial

³⁵ Although outside the scope of this paper, there are many reasons to criticize cash-bail regimes that deprive people of liberty on the basis of poverty and disproportionately affect people of color. *See, e.g.*, Cherise Fanno Burdeen, *The Dangerous Domino Effect of Not Making Bail*, ATLANTIC (Apr. 12, 2016), <https://www.theatlantic.com/politics/archive/2016/04/the-dangerous-domino-effect-of-not-making-bail/477906/> [<https://perma.cc/6PJN-9D6D>]; Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> [<https://perma.cc/4GKW-F9HZ>].

³⁶ Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31 CRIM. JUST. 23, 23 (2016).

detention in England and the United States. Section I.B then describes current law and practice of pretrial detention in federal courts.

A. *The History of Pretrial Detention in England and the United States*

In the United States, pretrial detention is governed by the Eighth Amendment to the U.S. Constitution,³⁷ state constitutional law, federal and state statutory law,³⁸ and federal, state, and local rules of criminal procedure.³⁹ Statutory and constitutional bail law in the United States is based on old English law. This Section traces bail practice from its roots in thirteenth-century England, through its implementation in the American colonies, to present day. This history confirms two important features of bail. First, it demonstrates that beginning at least as early as 1275, legislatures attempted to constrain discretion in bail-setting to address corruption and abuse of the bail system—a persistent concern among lawmakers. Second, it shows that for centuries, bail was primarily conceptualized as a means of ensuring a defendant’s appearance in court. Outside of capital cases, the idea that bail could serve another purpose—protecting the public from dangerousness—did not surface until the mid-twentieth century in England and the United States. Thus, as described below, the Bail Reform Act of 1984, which governs federal pretrial detention today, not only dramatically expanded federal detention but also upended the policy goals that traditionally animated bail.

Until the thirteenth century, local sheriffs in England dictated whether an arrestee would either be detained or released with guarantees that they would return for trial.⁴⁰ The local sheriffs represented the crown’s sovereign authority and therefore “could use any standard and weigh any factor” in determining whether an arrestee could be released.⁴¹ Sheriffs had discretion to detain or release people, which inevitably led to abuses. Some sheriffs extracted bribes from those arrested for bailable offenses. Some arrested innocent people to extort bail payments.⁴² The poor could remain in prison for years.⁴³ As a result, the lack of limits on the sheriffs’ power in deciding detention was a major grievance, leading to the Statute of Westminster I,

³⁷ The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

³⁸ 18 U.S.C. §§ 3141–3150.

³⁹ FED. R. CRIM. P. 46(a).

⁴⁰ S. REP. NO. 98-147, at 3 (1983).

⁴¹ *Id.*

⁴² Hermine Herta Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L.J. 1139, 1155 (1972).

⁴³ *Id.*

which was enacted by the British Parliament in 1275.⁴⁴ The Statute of Westminster I “eliminated the discretion of sheriffs with respect to which crimes would beailable. Under the Statute, theailable and non-ailable offenses were specifically listed.”⁴⁵ Although “[t]he sheriffs retained the authority to decide the amount of bail and to weigh all relevant factors to arrive at that amount,”⁴⁶ the Statute provided sheriffs with definitive guidelines for the exercise of their discretion and threatened fines, “loss of office,” and even imprisonment for sheriffs who did not follow the Statute.⁴⁷ The Statute, however, did not bind justices of the peace or the king, who retained complete discretion over bail.⁴⁸

Over time, bail powers transferred from sheriffs to justices, and it became apparent in England that bail laws failed to provide protection against the complete discretion exercised by the justices. Although the British Parliament had extended the limitations of the Statute of Westminster I to reach the justices,⁴⁹ if an individual was charged with an offense listed asailable in the Statute, the justice could functionally deny the individual’s release by setting exorbitant bail. Thus, as a matter of practice, judicial officers retained immense discretion in deciding who would be detained. The British Parliament addressed this problem in 1689 in the English Bill of Rights. In the preamble, Parliament listed as one of its findings that “excessive Baile hath beene required of Persons committed in Criminall Cases to elude the Benefitt of the Lawes made for the Liberty of the Subjects.”⁵⁰ The English Bill of Rights thus stated that “excessive Baile ought not to be required.”⁵¹

⁴⁴ The Statute of Westminster provided, in relevant part, “AND Forasmuch as Sheriffs, and other, which have taken and kept in prison Persons detected of Felony, and incontinent have let out by Replevin such as were not replevisable, and have kept in Prison such as were replevisable, because they would gain of the one party, and grieve the other . . .” Statute of Westminster 1275, 3 Edw. 1 c. 15, *reprinted in* I STATUTES OF THE REALM 30 (emphasis in original).

⁴⁵ S. REP. NO. 98-147, at 3 (1983). The Statute of Westminster listed various offenses as nonailable, including murder, “those which have broken the King’s Prison, Thieves openly defamed and known . . . such as be taken for House-burning feloniously done, or for false Money, or for counterfeiting the King’s Seal . . . or for Treason touching the King himself.” Amongailable offenses, it listed those “indicted of Larceny . . . or for Petty Larceny,” “Receipt of Felons,” and “some other Trespass, for which one ought not to lose Life nor Member.” Statute of Westminster 1275, 3 Edw. 1 c. 15, *reprinted in* I STATUTES OF THE REALM, *supra* note 44, at 30.

⁴⁶ S. REP. NO. 98-147, at 3 (1983).

⁴⁷ Meyer, *supra* note 42, at 1155–56.

⁴⁸ *Id.* at 1156.

⁴⁹ *Id.* (citing 1 & 2 Phil. & M., c. 13 (1554)).

⁵⁰ The Bill of Rights, 1 W. & M. c. 2 (1689).

⁵¹ *Id.*

The English approach to bail—listing by statute bailable and nonbailable offenses while prohibiting excessive bail—made its way to the American colonies. For example, the Massachusetts Body of Liberties of 1641, the state’s legal code, declared, “No mans person shall be restrained or imprisoned by any Authority whatsoever, before the law hath sentenced him thereto, If he can put in sufficient securitie, bayle or mainprise, for his appearance . . . unlesse it be in Crimes Capital . . .”⁵² As in Massachusetts, it was typical in the American colonies that nonbailable offenses primarily consisted of capital offenses and almost all other offenses were bailable. For example, in 1682, Pennsylvania provided in its Frame of Government, the state’s constitution before American independence, that “all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great.”⁵³ Other states had similar provisions, and early Congress took the same approach, enacting in 1787 the Northwest Ordinance, which included a bail clause substantially identical to Pennsylvania’s.⁵⁴

Two years later, the First Congress passed the Judiciary Act of 1789.⁵⁵ Following the long trajectory from the Statute of Westminster I to Colonial Era laws, the Act provided for bail in all noncapital cases.⁵⁶ Even in capital cases, bail was available at the discretion of the judge.⁵⁷ At the same time that the First Congress passed the Judiciary Act, it also passed the Bill of Rights. The Eighth Amendment of the Bill of Rights prohibits excessive bail using language that is nearly identical to the language in the 1689 English Bill of Rights.⁵⁸ Together, the Judiciary Act and the Eighth Amendment idealized a pretrial detention regime in which the vast majority of criminal defendants were eligible for bail, which was required to be set at an amount they could afford.

Through the 1800s and most of the twentieth century, bail was conceptualized as a tool to ensure that defendants returned to court, and federal defendants were detained pending trial if they could not afford to post

⁵² Massachusetts Body of Liberties (1641), *reprinted in* THE COLONIAL LAWS OF MASSACHUSETTS § 18, at 37 (William H. Whitmore ed., 1889).

⁵³ PA. FRAME OF GOV’T of 1682, art. XI, https://avalon.law.yale.edu/17th_century/pa04.asp [<https://perma.cc/3BU2-SE7H>].

⁵⁴ Verrilli, *supra* note 1, at 337–38.

⁵⁵ Judiciary Act of 1789, ch. 20, 1 Stat. 73.

⁵⁶ *Id.* § 33.

⁵⁷ *Id.*

⁵⁸ Compare U.S. CONST. amend. VIII (“Excessive bail shall not be required . . .”), with The Bill of Rights, 1 W. & M., c.2 (1689) (“Excessive [b]ail[] ought not to be required . . .”).

bail.⁵⁹ Until the mid-twentieth century, federal bail practice did not receive much attention from the U.S. Supreme Court. In 1951, however, the Court began to clarify the limits and possibilities of federal bail practice. That year, the Court held in *Stack v. Boyle* that bail determinations must be reasonable and individualized.⁶⁰ In particular, the Court held that the Eighth Amendment's prohibition against excessive bail prevented a court from setting bail "higher than an amount reasonably calculated to" assure the defendant's appearance in court.⁶¹ The Court in *Stack* also held that bail determinations must be personalized, explaining that "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of *assuring the presence* of that defendant."⁶² The Court's ruling in *Stack* continued to make clear that bail was largely designed to serve one purpose: assuring the defendant's appearance in court.⁶³

Despite the Court's insistence in *Stack* that bail must be affordable, financial bond remained widespread for federal criminal defendants in the 1950s and 1960s.⁶⁴ In response to concerns about the bail regime's disproportionate impact on the poor, Congress made its first modern effort to improve bail with the Bail Reform Act of 1966 (the 1966 Act),⁶⁵ a central purpose of which was to reduce the use of financial bond in federal criminal cases.⁶⁶ Upon signing the law, President Lyndon B. Johnson remarked:

Th[e bail] system has endured—archaic, unjust, and virtually unexamined—ever since the Judiciary Act of 1789. Because of the bail system, the scales of

⁵⁹ *Ex parte Milburn*, 34 U.S. 704, 710 (1835) ("A recognizance of bail, in a criminal case, is taken to secure the *due attendance* of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon." (emphasis added)).

⁶⁰ 342 U.S. 1, 5 (1951).

⁶¹ *Id.* In *Stack*, the defendants—twelve members of the Communist Party—were arrested and charged with violating the federal Smith Act. Initially, bail was set at different amounts for each defendant, ranging from \$2,500 to \$100,000. Upon the government's motion to increase bail for some of the defendants, the court set bail at a uniform \$50,000 for each defendant. The only evidence the government offered to support its motion was evidence that four of the defendants had previously forfeited bail in another case. *Id.* at 3.

⁶² *Id.* at 5 (citing FED. R. CRIM. P. 46(c)) (emphasis added).

⁶³ Others have connected the Eighth Amendment protection against excessive bail to the presumption of innocence, which is generally recognized as part of the due process guarantee of the Fourteenth Amendment. *See, e.g.*, Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 1, 7 (2011) (citing *Hunt v. Roth*, 648 F.2d 1148, 1156 (1981)). The U.S. Supreme Court has held, however, that the presumption of innocence only operates to create a burden of proof for the government at criminal trials. *Bell v. Wolfish*, 441 U.S. 520, 533 (1979).

⁶⁴ Warren L. Miller, *The Bail Reform Act of 1966: Need for Reform in 1969*, 19 CATH. U. L. REV. 24, 25 (1969).

⁶⁵ Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214.

⁶⁶ Miller, *supra* note 64, at 30.

justice have been weighted for almost two centuries not with fact, nor law, nor mercy. They have been weighted with money. . . . The principal purpose of bail is to ensure that an accused person will return for trial, if he is released after arrest. How is that purpose met under the present system? The defendant with means can afford to pay bail. He can afford to buy his freedom. But the poorer defendant cannot pay the price. He languishes in jail weeks, months, and perhaps even years before trial. He does not stay in jail because he is guilty. He does not stay in jail because any sentence has been passed. He does not stay in jail because he is any more likely to flee before trial. He stays in jail for one reason only—he stays in jail because he is poor.⁶⁷

The 1966 Act sought to correct these injustices by requiring individualized assessments for bail determinations. The Act provided:

Any person charged with [a noncapital] offense . . . shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such release will not reasonably assure the appearance of the person as required.⁶⁸

Critically, the 1966 Act did not authorize judges to detain noncapital arrestees on the ground that they were dangerous. The only permissible reason for pretrial detention (outside capital cases) was to ensure the defendant’s appearance in court.⁶⁹

Nearly twenty years after its passage, Congress significantly amended the 1966 Act with the Bail Reform Act of 1984 (the 1984 Act).⁷⁰ The 1984 Act—the governing law today—added language allowing courts to impose conditions of release or order a defendant be detained pending trial in order to ensure the safety of the community.⁷¹ The Senate Judiciary Committee, in support of its proposal for reforming the 1966 Act, concluded “that federal bail laws must address the alarming problem of crimes committed by persons

⁶⁷ Lyndon B. Johnson, *Remarks at the Signing of the Bail Reform Act of 1966*, AM. PRESIDENCY PROJECT (June 22, 1966), <https://www.presidency.ucsb.edu/node/238665> [perma.cc/5YLJ-CMCV].

⁶⁸ Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214.

⁶⁹ The 1966 Act applied to federal courts. After the 1966 Act passed, some states implemented similar statutes while other states passed statutes that also included preventive detention. *Preventive Detention, PRETRIAL JUST. CTR. FOR CTS.* (2017), https://www.ncsc.org/_data/assets/pdf_file/0019/1594/preventive-detention-brief-final.ashx.pdf [perma.cc/DKR7-GLXM] (reporting that twenty-two states and Washington, D.C. authorize preventive detention for certain serious charges).

⁷⁰ 18 U.S.C. § 3142.

⁷¹ *Id.*

on release.”⁷² The Committee also gave ample weight to findings that judges employed “a widespread practice” of detaining dangerous defendants by setting excessive bail to ensure detention.⁷³ This practice was recognized as a *sub rosa* form of pretrial detention.⁷⁴ A later committee report concluded it was “intolerable that the law denies judges the tools to make honest and appropriate decisions regarding the release of such [dangerous] defendants.”⁷⁵ Congress linked this problem to a decline in judicial discretion. It found that “[t]he overall effect of the erosion of both the classical surety system and the ineligibility for bail based on grave offenses [due to narrowing of offenses that qualified as capital crimes] is a striking reduction in the discretion of the courts” to detain likely dangerous defendants.⁷⁶

Congress thus adopted changes in 1984 that for the first time in the nation’s history gave federal judges the discretion to detain defendants pretrial based on a perceived risk of dangerousness. The Committee acknowledged that “adoption of these changes marks a significant departure from the basic philosophy of the Bail Reform Act, which is that the sole purpose of bail laws must be to assure the appearance of the defendant at judicial proceedings.”⁷⁷ Congress placed few limitations on this new judicial authority to “deal with . . . a small but identifiable group of particularly dangerous defendants”—except to preclude the prior practice of *sub rosa* use of money bond to detain dangerous defendants.⁷⁸ Congress did so by inserting a statutory provision prohibiting judges from imposing a financial condition that results in pretrial detention.⁷⁹ The Committee believed the proper course was to “refrain[] from specifying what kinds of information are a sufficient basis for the denial of release, and has chosen to leave the resolution of this question to the sound judgment of the courts acting on a case-by-case basis.”⁸⁰

The 1984 Act imposed no limitations on what kinds of evidence the court could consider (or whether it must consider any evidence at all rather

⁷² S. REP. NO. 98-147, at 1–2 (1983).

⁷³ *Id.* at 20 (citing ATTORNEY GENERAL’S TASK FORCE ON VIOLENT CRIME: FINAL REPORT 51 (1981)).

⁷⁴ *Id.*; see also S. REP. NO. 98-225, at 5–11 (1984) (discussing the judicial practice of setting excessive bail to detain defendants).

⁷⁵ S. REP. NO. 98-225, at 5.

⁷⁶ S. REP. NO. 98-147, at 20.

⁷⁷ *Id.* at 2.

⁷⁸ S. REP. NO. 98-225, at 6.

⁷⁹ *Id.* at 16.

⁸⁰ *Id.* at 19.

than proceeding by evidentiary proffer), what factors it should weigh, how to weigh these factors, what it meant to present a “risk” of dangerousness, how much of a risk was sufficient to detain a defendant, how to balance this risk with the deprivation of liberty, what it meant to be “dangerous,” and so on. Instead, it placed a limitation on the types of cases in which *prosecutors* could move for detention.⁸¹ This lack of restraint was surprising because the 1984 Act was passed within the same comprehensive crime control act as the Sentencing Reform Act of 1984, which brought one of the most drastic changes to the nation’s federal sentencing laws by sharply *curtailing* judicial discretion in sentencing.⁸² In other words, while Congress was dramatically expanding judicial discretion at the start of a criminal case, it was sharply curtailing it at its end. Poignantly, in the same report in which the Committee extolled the virtues of “the sound judgment of the courts acting on a case-by-case basis” in pretrial decisions, it criticized, with respect to sentencing, that “[e]ach judge is left to formulate his own ideas about the factors to be considered in imposing sentence and the effect that each factor should have on the sentence imposed. The result is unwarranted disparities among sentences imposed by different judges.”⁸³ In fact, some of the impetus for severely circumscribing judicial discretion in federal sentencing was the belief that expansive judicial discretion had led to racial disparities. Such concerns apparently did not spread into the pretrial reform process. Thus, since the 1984 Act, federal pretrial detention is designed to serve two goals: (1) to assure the defendant’s appearance in court, and (2) to protect the safety of any other person and the community.⁸⁴ The following Section builds on this historical understanding by describing how pretrial detention works in federal courts today.

⁸¹ *Id.* at 20.

⁸² Such curtailment was later held unconstitutional by the Supreme Court in *United States v. Booker*, 543 U.S. 220, 267 (2005).

⁸³ S. REP. NO. 98-225, at 75.

⁸⁴ 18 U.S.C. § 3142(c)(1)(B). The 1984 Act’s preventive detention provision was challenged and subsequently upheld by the Supreme Court in *United States v. Salerno*, 481 U.S. 739, 755 (1987). In *Salerno*, the Supreme Court held that the preventive-detention provision of the 1984 Act violated neither the Eighth Amendment nor the Due Process Clause of the Fifth Amendment. *Id.* After the passage of the 1984 Act, many states enacted laws that were modeled after the 1984 Act. Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, 26 CRIM. JUST. 12, 13 (2011).

B. Present-Day Pretrial Detention, in Law and Practice

1. Conditions of Release and Preventative Detention

The 1984 Act governs federal pretrial detention today. Most federal pretrial detention decisions are made by federal magistrate judges,⁸⁵ based on information provided by prosecutors, defense counsel, and pretrial-services officers.⁸⁶ Despite allowing the court to detain defendants in some circumstances pending trial, the language of the 1984 Act expresses a clear preference for pretrial release. For most defendants, the 1984 Act directs the presiding judicial officer to release the defendant under the least restrictive conditions reasonably necessary to assure the appearance of the defendant in court and the safety of any other person and the community.⁸⁷ Moreover, the Act enumerates seven factors that will support detention. For example, the government may only move for detention based on dangerousness in cases involving certain identified offenses.⁸⁸ The Act makes clear that if a defendant does not fall into one of these seven categories, the defendant must be released.⁸⁹

The Act also expressly prohibits judges from imposing financial conditions that a defendant cannot afford.⁹⁰ Instead, federal magistrate judges often impose conditions of release that they believe will guarantee the defendant's return to court and the safety of the community.⁹¹ Conditions can include travel restrictions (including up to home detention), substance-abuse treatment requirements, weapons restrictions, promises to remain employed

⁸⁵ In prior work, I find that for more than 90% of federal criminal defendants, the first judge assigned to their case is a federal magistrate judge. Didwania, *supra* note 12, at 35.

⁸⁶ Pretrial-services officers are employees of the court who—among other duties—make release and detention recommendations. 18 U.S.C. § 3154(1).

⁸⁷ *Id.* § 3142(b)–(c).

⁸⁸ *Id.* § 3142(f)(1)(A)–(E).

⁸⁹ The categories are listed in 18 U.S.C. § 3142(f). *See* United States v. Dillard, 214 F.3d 88, 96 (2d Cir. 2000) (suggesting that if a defendant does not fall into one of the specific categories that permit detention, she must be released “no matter how obviously dangerous or how bent on committing an act of violence . . . [she] may be”). *But see The Administration of Bail by State and Federal Courts: A Call for Reform: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 116th Cong. 6 (2019) (written statement of Alison Siegler, Clinical Professor of Law and Director of the Federal Criminal Justice Clinic, University of Chicago Law School) [hereinafter *Administration of Bail*] (discussing a court-watching program, which found that in 95% of cases, the government did not cite any § 3142(f) factor to support detention); Siegler & Zunkel, *supra* note 11, at 8–10 (same).

⁹⁰ 18 U.S.C. § 3142(c)(2).

⁹¹ THOMAS H. COHEN, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 2008–2010, at 7 (2012), <http://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf> [<https://perma.cc/6BY8-T6CB>] (stating that 79% of released federal defendants were released with conditions).

or seek employment, and electronic monitoring.⁹² If no conditions exist that can reasonably assure the defendant's appearance and the safety of any other person and the community, then pretrial detention is appropriate under the Act.⁹³

Detention decisions thus involve considerable judicial discretion. By its terms, the 1984 Act instructs judges to evaluate two malleable factors: the defendant's perceived dangerousness and risk of flight. This statutory malleability coupled with the fact that detention decisions are rarely reviewed helps create a federal system in which federal magistrate judges vary widely in their propensities to release defendants pending trial. In recent work on the consequences of federal pretrial detention, I find that most lenient federal magistrate judge released 70% of defendants while the least lenient magistrate judge released just 4% of defendants.⁹⁴

Statistics on federal pretrial detention suggest that modern pretrial detention practice complies with the 1984 Act's requirement that pretrial release not be expressly connected to a defendant's ability to pay. In contrast to state court systems, where cash bail is widely used, the two most common types of pretrial release in the federal system are release on unsecured bond and release on personal recognizance.⁹⁵ Release on unsecured bond means a defendant promises to pay a specified sum if they break the conditions of release, but they do not have to pay any money upfront. Release on personal recognizance means a defendant will not pay any financial penalty if they do not return to court. A small share of federal defendants use a bail bondsman,⁹⁶ and it is rare for a federal defendant to be held in detention because they are unable to post bond. According to the most recent data (from 2008 to 2010), only 9% of federal defendants who were detained pretrial were subject to financial bond.⁹⁷ And, despite its minimal reliance on financial conditions, only 1% of released defendants in federal court failed to make court appearances, and 4% were rearrested for new offenses while released.⁹⁸

⁹² *Id.* at 8 tbl.6.

⁹³ 18 U.S.C. § 3142(e).

⁹⁴ Didwania, *supra* note 12, at 30.

⁹⁵ COHEN, *supra* note 91, at 5 tbl.3 (stating that among released defendants in federal criminal cases in fiscal years 2008–2010, 39% were released with unsecured bond, 32% were released on recognizance, and 27% were required to pay a cash bond of some form). Release on unsecured bond means a defendant promises to pay a certain amount of money if he breaks the conditions of his bond but does not have to pay any money upfront. Release on personal recognizance means a defendant is permitted to return to his community without any financial penalty if he does not return to court. *Id.* at 18.

⁹⁶ *Id.* at 5.

⁹⁷ *Id.* at 6 tbl.4.

⁹⁸ *Id.* at 13 tbl.11.

Of course, federal arrestees with few resources undoubtedly face more challenges than wealthier defendants throughout the criminal process, including at the pretrial detention stage. Section III.B.2 shows that federal defendants with more financial means are less likely to be detained pending trial than defendants whose fines are waived by the court. And some magistrate judges *do* routinely require defendants to obtain a bail bond or post real property as security in exchange for release, conditions that disproportionately impact indigent defendants.⁹⁹ But the 1966 and 1984 Acts undoubtedly ushered in a new era of federal pretrial detention, eschewing reliance on cash bail and shifting the focus to individualized pretrial detention determinations and conditions.

2. *Presumptions of Detention Under 18 U.S.C. § 3142(e)*

Under the 1984 Act, certain offenses carry a rebuttable presumption of detention. The Act includes two presumptions. Under 18 U.S.C. § 3142(e)(3), sometimes called the “Drug and Firearm Offender Presumption,” detention is presumed to be warranted for any defendant charged with one of several enumerated offenses (largely drug and firearm offenses), regardless of the defendant’s criminal history. Under 18 U.S.C. § 3142(e)(2), sometimes called the “Previous Violator Presumption,” detention is presumed for defendants with certain prior convictions who are charged with one of several enumerated offenses (also largely drug and firearm offenses).

Most defendants who are subject to a presumption of detention are subject to the Drug and Firearm Offender Presumption, and there is also significant overlap between the two presumptions.¹⁰⁰ Roughly 40% to 45% of federal defendants are subject to the Drug and Firearm Offender Presumption.¹⁰¹ The Drug and Firearm Presumption has been criticized on the ground that it reaches too widely, applying a presumption of detention to many defendants (especially drug offenders) who pose a low risk of failing to appear, being rearrested, or violating a condition that would result in the revocation of pretrial release.¹⁰² For this reason, two years ago, the Judicial Conference of the United States’ Committee on Criminal Law recommended

⁹⁹ *Administration of Bail*, *supra* note 89, at 10. The Bail Reform Act allows these practices, although no nationwide data indicate how frequently they are used. 18 U.S.C. § 3142(c)(1)(B)(xii).

¹⁰⁰ Austin, *supra* note 11, at 54.

¹⁰¹ *Id.* at 55 fig.1. In the data used in this paper, I also estimate that roughly 45% of defendants face this presumption. See *infra* Appendix A for details on how this variable was coded.

¹⁰² Austin, *supra* note 11, at 60; see also *Administration of Bail*, *supra* note 89, at 13–15 (arguing that the presumptions of detention should be modified because they lead to unnecessary detention for many defendants who pose very low risk of danger to the community or failure to appear in court).

amending the 1984 Act to rein in the presumption, finding “the § 3142(e) presumption [is] unnecessarily increasing detention rates of low-risk defendants, particularly in drug trafficking cases.”¹⁰³ Section IV.C.1 examines the relationship between the presumptions and detention disparity.

3. *Detention Hearings Under 18 U.S.C. § 3142(f)*

Roughly two-thirds of released defendants are released at their initial appearance in court, and the other one-third of released defendants are initially detained and later released after a detention hearing.¹⁰⁴ As noted above, Congress limited “the requisite circumstances for invoking a detention hearing.”¹⁰⁵ For example, as described above, the government can only move for detention based on dangerousness if the case falls into one of seven categories listed in 18 U.S.C. § 3142(f)(1).¹⁰⁶ This limitation was “in effect . . . to limit the types of cases in which detention may be ordered prior to trial.”¹⁰⁷

The remaining released defendants are initially detained and later released after a detention hearing. To keep a defendant in pretrial detention, the court must conduct a detention hearing within five days of the defendant’s initial appearance.¹⁰⁸ A defendant also may consent to pretrial detention. For example, noncitizen-defendants sometimes consent to pretrial detention because pretrial release puts them at risk of being transferred to immigration custody.¹⁰⁹ Defendants who are not U.S. citizens are rarely released because they frequently have ties to another country that judges view as creating a risk of flight.¹¹⁰

At a detention hearing, the government must prove that no condition of release would reasonably ensure that the defendant will appear for trial and not pose a risk to the community.¹¹¹ At the hearing, the defendant has the

¹⁰³ JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 10–11 (2017), https://www.uscourts.gov/sites/default/files/17-sep_final_0.pdf [<https://perma.cc/H8YP-34QE>].

¹⁰⁴ COHEN, *supra* note 91, at 3 tbl.1.

¹⁰⁵ S. REP. NO. 98-225, at 20 (1983).

¹⁰⁶ 18 U.S.C. § 3142(f)(1).

¹⁰⁷ S. REP. NO. 98-225, at 20.

¹⁰⁸ 18 U.S.C. § 3142(f).

¹⁰⁹ LENA GRABER & AMY SCHNITZER, NAT’L IMMIGR. PROJECT OF THE NAT’L LAWS. GUILD, THE BAIL REFORM ACT AND RELEASE FROM CRIMINAL AND IMMIGRATION CUSTODY FOR FEDERAL CRIMINAL DEFENDANTS 1 (2013), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2013_Jun_federal-bail.pdf [<https://perma.cc/QEA5-Z5AE>].

¹¹⁰ In the U.S. Sentencing Commission data, around 8% of federal defendants who are not U.S. citizens were released pending trial, compared to around 40% of U.S. citizen-defendants.

¹¹¹ 18 U.S.C. § 3142(e).

right to be represented by a lawyer, to testify, to present witnesses and evidence, and to cross-examine government witnesses.¹¹² In deciding whether to release the defendant, the judge is directed to consider several factors, including: the nature and circumstances of the offense; the weight of the evidence; the history and characteristics of the defendant, including their 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; whether, at the time of the current offense or arrest, the person was on probation, parole, or other release for a criminal offense; and the nature and seriousness of the danger to any person or the community that would be posed by the person's release.¹¹³ Detention and release decisions made by magistrate judges can be appealed to the federal district court, which will review the detention decision *de novo*.¹¹⁴

II. DATA AND EMPIRICAL METHODOLOGY

This Part describes the data and empirical methodology used to estimate race- and gender-based disparities in federal pretrial detention. Section II.A briefly describes the data. Section II.B discusses the empirical approach in broad terms, examining its advantages and its limitations. Many additional methodological details are contained in Appendix A.

A. *The Data*

This Article uses a rich, new dataset of federal criminal defendants sentenced between fiscal years 2002 and 2016 in eighty of the ninety-four federal district courts. I constructed the dataset by merging data from two sources: the United States Sentencing Commission's annual data files (the Commission Data) and Executive Office of United States Attorneys (EOUSA) data that are compiled from the Legal Information Office Network

¹¹² *Id.* § 3142(f).

¹¹³ *Id.* § 3142(g).

¹¹⁴ *Id.* § 3145(a)–(b). Every federal circuit court has confirmed that a federal district court's review of a magistrate judge's detention decision is *de novo*. *United States v. Tortora*, 922 F.2d 880, 883 n.4 (1st Cir. 1990); *United States v. Leon*, 766 F.2d 77, 80 (2d Cir. 1985); *United States v. Delker*, 757 F.2d 1390, 1394 (3d Cir. 1985); *United States v. Williams*, 753 F.2d 329, 331 (4th Cir. 1985); *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985); *United States v. Hazime*, 762 F.2d 34, 37 (6th Cir. 1985); *United States v. Portes*, 786 F.2d 758, 761 (7th Cir. 1985); *United States v. Maull*, 773 F.2d 1479, 1481 (8th Cir. 1985); *United States v. Koenig*, 912 F.2d 1190, 1191 (9th Cir. 1990); *United States v. Cisneros*, 328 F.3d 610, 616 (10th Cir. 2003); *United States v. Hurtado*, 779 F.2d 1467, 1481 (11th Cir. 1985); *United States v. Smith*, 79 F.3d 1208, 1209 (D.C. Cir. 1996).

System (the LIONS Data). This Section describes the data from each of these two sources and provides a brief explanation of how the two datasets were merged. Additional details about data construction are provided in Appendix A.¹¹⁵

1. Commission Data

The United States Sentencing Commission annually publishes individual data files that include detailed information about federal defendants convicted of felonies and Class A misdemeanors. The Commission dataset includes thousands of variables about defendants and their cases. For example, the Commission dataset reports a defendant's racial or ethnic group, gender, age, level of formal education, and criminal history information. The Commission dataset also includes case information, including the type of offense, the precise statute or statutes of conviction, whether a weapon was charged, and the types and quantities of drug attributed to the defendant in the offense (if any). The Commission dataset also reports whether a defendant's fines were waived by the court, which is an important proxy for the defendant's income level, especially given the interconnected relationship between race, poverty, and pretrial detention. The Commission dataset also includes the month, fiscal year, and federal district court in which the defendant was sentenced. To the extent that detention rates vary over time and space, these variables allow me to control for this variation. Finally, the Commission dataset includes a variable that indicates whether the defendant was in custody or released prior to sentencing. I use this variable to capture the defendant's pretrial release status.¹¹⁶

2. LIONS Data

Like the Commission dataset, the LIONS dataset reports information about individual federal criminal cases. The LIONS dataset includes comprehensive information about each case but minimal information about defendants' personal characteristics. For purposes of this project, the LIONS dataset contains two important features. First, compared to the Commission

¹¹⁵ The data used in this paper were used in earlier work that estimates the effects of pretrial detention on case outcomes for federal criminal defendants, and the matching process is also thoroughly described in the text and appendix of that work. *See* Didwania, *supra* note 12, at 59–62.

¹¹⁶ A defendant's presentence status is not a perfect measure of their pretrial status because a defendant's release status can change between the time they are arrested and the time they are ultimately sentenced. For example, defendants who have a detention hearing will be detained until the hearing but might be released afterwards. Defendants who are released pending trial can have their pretrial release revoked while on pretrial release. Importantly, too, once a defendant pleads guilty, the Bail Reform Act creates a presumption of detention, which can lead the defendant to be detained for the period between pleading guilty and sentencing.

dataset, the LIONS dataset provides more precise geographic information about where the defendant lives and where their case was prosecuted, including the precise courthouse in which the case was prosecuted, rather than just the federal district court. This specificity allows the analysis to account for this relevant unit of geography, since cases are almost always prosecuted in the courthouse local to the offense. A second important feature of the LIONS dataset is that it contains offense information that is much more narrowly defined than the offense variables included in the Commission dataset. In particular, the LIONS dataset includes variables that indicate 105 different types of offenses, which allows me to control for fine-grained offense types in the robustness checks in Appendix B.

3. *Merged Data*

To merge the two datasets, I match defendants between the Commission data and the LIONS datasets using an iterative matching process described in Appendix A. The merged dataset contains defendants sentenced in fiscal years 2002 through 2016. Before matching defendants between the two data sources, I removed defendants who are not U.S. citizens and defendants prosecuted in federal districts that border Mexico.¹¹⁷ Noncitizen-defendants are removed from the data because they are unlikely to be released pending trial due to their citizenship status.¹¹⁸ Defendants in districts that border Mexico are excluded because these federal districts face uniquely intense caseload pressures that could influence pretrial detention decisions for U.S. citizen-defendants. For example, if pretrial detention facilities are pressed for space, U.S. citizen-defendants may be more likely to be released pending trial.¹¹⁹ In total, 396,061 out of the 521,023 U.S. citizen-defendants in nonborder districts match between the two datasets—a match rate of 76%. After matching, I restrict the data to courthouses that include at least twenty observations.¹²⁰ The final dataset used in this analysis contains 337,916 observations.

Table 1 presents summary statistics of the data. Although the data are representative of the federal defendant population,¹²¹ they do not represent

¹¹⁷ There are five border districts: the District of Arizona, the District of New Mexico, the Southern District of California, the Southern District of Texas, and the Western District of Texas.

¹¹⁸ In the Commission data, roughly 40% of U.S. citizen-defendants were released pending trial, while only 6% of noncitizen-defendants were released.

¹¹⁹ Despite comprising just five of the ninety-three federal district courts, the border districts listed in *supra* note 117 account for 34% of defendants in the Commission data.

¹²⁰ This restriction removes less than 1% of observations.

¹²¹ Readers who wish to evaluate how the data used in this sample compare to the full universe of Commission defendants may refer to *infra* Table A1, which compares summary statistics of the data used

the greater U.S. population. Notably, the federal defendant population includes larger proportions of men and people of color than the overall U.S. population. For example, in the data, 84% of defendants are male, whereas around half of the U.S. population is male. Among defendants in the data, 40% are Black, 11% are of Hispanic ethnicity, 45% are white, and 5% are another race.¹²² In contrast, the U.S. population in 2010—roughly the midpoint of the time period covered by the data—was 12% Black, 15% Hispanic ethnicity, 64% white, and 9% another race.¹²³

In the data, 60% of defendants were held in detention, while 30% were released with conditions and 10% were released on recognizance. These pretrial detention rates are consistent with other reported statistics of federal pretrial detention.¹²⁴

in this Article to the relevant universe of all federal defendants contained in the Commission data. Overall, Table A1 suggests that the matching process generated a dataset that very closely represents the full set of citizen-defendants in nonborder districts.

¹²² In the Commission dataset, defendants coded as “another race or ethnicity” include defendants who are American Indian/Alaskan Native, Asian or Pacific Islander, multiracial, or another race. U.S. SENT’G COMM’N, VARIABLE CODEBOOK FOR INDIVIDUAL OFFENDERS 39 (2015), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/datafiles/Individual_Codebook_FY99_FY14.pdf [<https://perma.cc/4T6G-SPAH>].

¹²³ These are the author’s own calculations from the U.S. Census Bureau data in *infra* Table 1. *Summary of Modified Race and Census 2010 Race Distributions for the United States* (US-MR2010-01), U.S. CENSUS BUREAU (2010), <https://www.census.gov/data/datasets/2010/demo/popest/modified-race-data-2010.html> [<https://perma.cc/5NSS-X2MY>]. Members of the U.S. population who reported being more than one race were coded as another race. Black and white populations exclude people of Hispanic ethnicity.

¹²⁴ For example, between 2008 and 2010, 79% of released defendants were released with conditions, according to the Bureau of Justice Statistics. COHEN, *supra* note 91, at 1. In the data, 75% percent of released defendants were released with conditions. On the other hand, the detention rates reported by the Bureau of Justice Statistics are lower than those in the data used in this paper. According to the Bureau of Justice Statistics, between 2008 and 2010, around 45% of U.S. citizen-defendants were detained. *Id.* at 10. In the data, the detention rate is around 60%. This discrepancy could be because the Bureau of Justice Statistics counts defendants as “released” if they are released for some of the pretrial period and later detained. In contrast, the Commission data used in this paper counts defendants as “detained” if they are detained prior to sentencing. On the other hand, the 60% detention rate in the data is slightly lower than the analogous “detained and never released” rate of 66% in 2009, as reported by the Administrative Office of the U.S. Courts. ADMIN. OFF. OF THE U.S. CTS., JUDICIAL BUSINESS: FEDERAL PRETRIAL SERVICES TABLES tbl.H-14A (2009), https://www.uscourts.gov/sites/default/files/statistics_import_dir/H14Sep09.pdf [<https://perma.cc/5ET7-8B4U>].

TABLE 1: VARIABLE MEANS IN THE SAMPLE

	Mean	Observations
<i>Defendant Characteristics</i>		
Male	0.84	337,916
Black	0.40	337,916
Hispanic	0.11	337,916
Other Race/Ethnicity	0.05	337,916
White	0.45	337,916
Age (years)	36.9	337,916
Less than High School	0.29	337,916
HS Only	0.40	337,916
Some College	0.23	337,916
College Graduate	0.08	337,916
Fines Waived	0.92	337,916
Criminal History Category (1–6)	2.65	337,916
<i>Case Characteristics</i>		
Drugs Involved	0.42	337,916
Base Offense Level (0–47)	19.3	335,406
Weapon	0.13	337,916
Year Case Began (median)	2007	337,916
Fiscal Year Sentenced (median)	2009	337,916
<i>Pretrial Detention Variables</i>		
Detention	0.60	337,916
Released on Conditions	0.30	337,916
Released on Recognizance	0.10	337,916

Note. All variables are indicator variables (0/1) except where units are noted.

B. *The Empirical Method*

The empirical analysis uses a linear probability model. This empirical method estimates linear regressions where the outcome variable can only take on two values (here, detained or released). This method thus captures the relationship between the binary outcome variable (detention status) and the many variables that are thought to be related to the outcome. In this Article, the key variables of interest are the defendant's race, gender, or race-gender group. Using regression analysis to estimate the extent to which race

and gender contribute to an outcome (here, whether a person is detained) is a traditional way that empirical scholars measure disparity.¹²⁵

A common concern with using regression analysis to quantify disparity is the possibility of *under-controlling* for relevant factors. In estimating the relationship between race or gender and detention status, there might be unobserved factors that are correlated with race or gender that affect the probability of being detained pretrial. For example, on average, male offenders commit more serious offenses than female offenders.¹²⁶ Because the defendant's offense conduct is a factor that (perhaps rightfully) influences the pretrial detention decision, one would expect male offenders to be detained at higher rates than female offenders, and one would likely not consider the male–female detention difference alone to be evidence of *unwarranted* gender disparity in detention. Therefore, a regression of detention on gender that does not control for the defendant's offense conduct will likely overstate unwarranted gender differences in pretrial detention because differential outcomes will be improperly attributed to gender, rather than to offense conduct. For this reason, the regressions in this Article include many control variables, including a control for offense severity.

Under-controlling, however, is not a substantial concern here for several reasons. First, as noted above, the dataset is rich with potential control variables. The regression analysis controls for many variables that could be correlated with race, gender, and detention, including age, education, financial status, geography, offense conduct, criminal history, and time. Second, the set of control variables used here widely covers the information a judge would have available when making a decision about pretrial release, which helps to address the problem that a judge might rely on information for which an empirical analysis cannot account. As described in Section I.B.3, pretrial detention decisions are made at earlier stages in a federal criminal case. While the magistrate judge will typically know some basic facts about the defendant and the case, they will not be operating with the type of detailed information that will typically be available at sentencing. As a result, it is unlikely that the analysis here will omit an important variable

¹²⁵ There are many examples using linear models in the sentencing context. *See, e.g.*, Yang, *supra* note 20, at 86; Schanzenbach, *supra* note 20, at 64; Mustard, *supra* note 20, at 297. Linear probability models work well because they produce estimates that are intuitive for readers to interpret as percentage changes. The results presented in this Article are robust to using logistic regression (results on file with journal).

¹²⁶ For example, in the data used in this paper, the average base offense level (a measure of offense severity) is 20.1 points for male defendants and 15.1 points for female defendants (on a scale of 1–43).

from the controls that is observed by the judge but not by the researcher—the archetypal under-controlling concern.

Many thoughtful researchers using regression analysis to estimate unwarranted disparity in the criminal system deeply engage with the under-controlling problem. The usual strategy that scholars deploy to address the problem is to include many control variables in their regression analysis.¹²⁷ Ideal control variables include defendant characteristics that are fixed before the case, such as the defendant’s level of education, criminal history score, and age. However, scholars sometimes include additional control variables that are *not* fixed at the time of the case—such as the defendant’s final offense level or presumptive sentence—in an effort to address the under-controlling problem.¹²⁸

This approach can lead to a second potential concern: *overcontrolling*. If a regression controls for characteristics of a case that could themselves be the product of discrimination, the analysis will mismeasure disparity.¹²⁹ To borrow an example from Professors Sonja Starr and M. Marit Rehavi, suppose prosecutors charge Black defendants more harshly than white defendants for the same criminal conduct.¹³⁰ This unwarranted disparity at charging means that Black defendants will enter the sentencing phase with, on average, higher recommended sentencing ranges than white defendants who committed the same criminal conduct. As a result, for any particular recommended guidelines range, the Black defendants in that range will have committed less serious offense conduct than the white defendants. If a researcher then estimates racial sentencing disparity while controlling for the defendant’s recommended sentencing range, the researcher will underestimate true Black–white disparity. Put another way, when a researcher obtains estimates of disparity after controlling for the defendant’s recommended guidelines range, those estimates do not represent the type of disparity that the law is usually interested in: the disparity between people who have committed the same criminal conduct.¹³¹ Instead, it simply

¹²⁷ See, e.g., Mustard, *supra* note 20, at 298–303 (describing estimates of racial disparity in federal sentencing that control for education, income, citizenship, number of dependents, and age).

¹²⁸ See Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 16–18 (2013) (describing problems with the “presumptive sentence” approach, which controls for defendants’ presumptive sentences in estimating racial disparities in sentencing).

¹²⁹ See *id.* at 19–20.

¹³⁰ *Id.* at 19.

¹³¹ 18 U.S.C. § 3553(a)(6) (commanding courts to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct” when sentencing defendants); UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL ch. 5, pt. H

represents disparity between people who are in the same recommended guidelines range.

Because the detention decision happens early in the timeline of a case, it has the power to influence everything that happens later in a case. Prior work by the author has shown that pretrial detention can affect, for example, the chance that a defendant earns a below-guidelines sentence or a substantial assistance reduction for their cooperation with the government.¹³² A regression that controls for outcomes that pretrial release can itself affect (such as whether the defendant receives a substantial assistance reduction) will generate estimates that will usually understate the true extent of unwarranted disparity.

I address the overcontrolling problem by controlling for many characteristics of individual defendants and their cases that are largely fixed at the time the case commences that are likely to affect pretrial detention. These variables include the defendant's age, education level, indigence, and criminal record. My analysis also controls for time and geography by including variables for the precise courthouse and year in which the defendant was prosecuted. These variables are "fixed" in the sense that they cannot be manipulated as the case progresses.

I also control for offense severity because the severity of the offense likely contributes to a judge's decision on whether to detain. However, as just described, offense severity is not "fixed," and itself may be a product of racism or sexism in charging and in applying adjustments to the defendant's recommended sentence range while the case progresses. To capture offense severity, I therefore control for the defendant's base offense level. The base offense level is a number between 1 and 43 that largely reflects the severity of the defendant's *charged conduct*.¹³³ Although it will reflect unwarranted disparity in the charging decision, it is the best measure for offense severity. Indeed, Professors Starr and Rehavi describe the base offense level as "an improvement over the presumptive sentence approach" and "probably the best approach possible using only the sentencing-stage data from the Sentencing Commission."¹³⁴ In the end, I err on the side of overcontrolling, and I interpret the results as evidence of significant, unwarranted disparity, with the understanding that the results likely *understate* the true amount of disparity due to the inclusion of base offense level as a control variable.

(2018) (discussing the importance of avoiding unwarranted sentencing disparities when sentencing defendants).

¹³² Didwania, *supra* note 12, at 45 tbl.4.

¹³³ The base offense level does not purely capture charging severity because it also incorporates judicial fact-finding.

¹³⁴ Starr & Rehavi, *supra* note 128, at 20.

A third obstacle is the possibility of *selection bias*. Analyzing federal sentencing data excludes defendants who are not ultimately sentenced, as well as people who were not prosecuted at all. The estimates of disparity presented here—as in nearly all studies of disparity—are estimates of disparity conditional on these prior selection processes.

III. RACE- AND GENDER-BASED DISPARITY IN FEDERAL PRETRIAL DETENTION

This Part examines pretrial detention in the federal criminal system. Section III.A presents figures summarizing pretrial detention disparity in the raw data. Section III.B contains the main empirical analysis. That Section begins by documenting unexplained disparity by race and gender separately. The empirical analysis finds unexplained racial and gender disparity, meaning that defendants of color have worse outcomes than white defendants, and male defendants have worse outcomes than female defendants. Section III.B then emphasizes the importance of considering intersectional disparity. It demonstrates that a naïve analysis that does not account for race–gender intersectionality will present an overly simplified view of disparity in pretrial detention.

A. *A Preliminary Look at Detention Disparity in the Raw Data*

Before turning to regression results, this Section examines pretrial detention in the data and finds that pretrial detention rates are not uniform across defendants. Figure 1 displays rates of pretrial detention by race and gender. Black defendants are detained at the highest overall rate (68%), followed by Hispanic defendants (64% overall), then white defendants (51% overall). Male defendants (striped bars) are detained at significantly higher rates than female defendants (crosshatched bars) across all racial groups. Gender disparity is greatest, however, among Black defendants: Black women are detained at the *lowest* rate of any race–gender group (30% detained) while Black men are detained at the *highest* rate (75% detained).

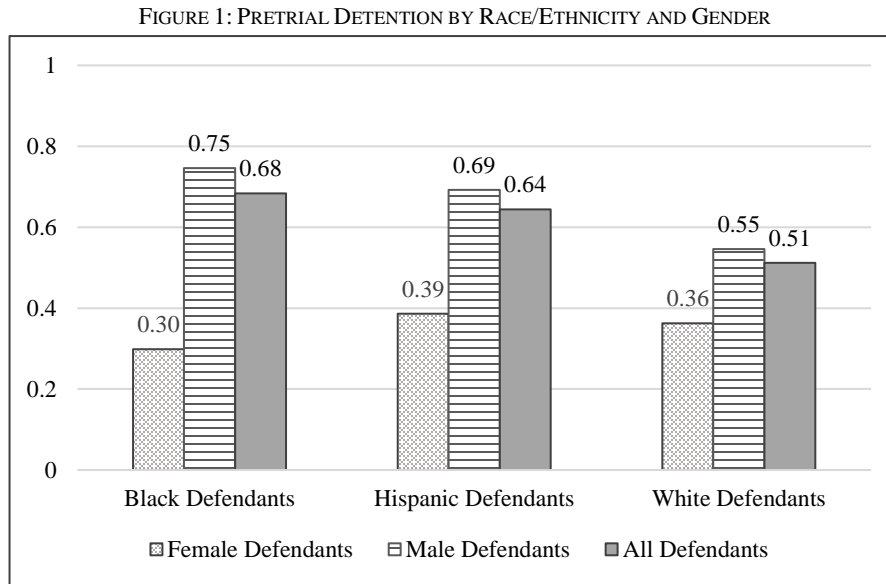
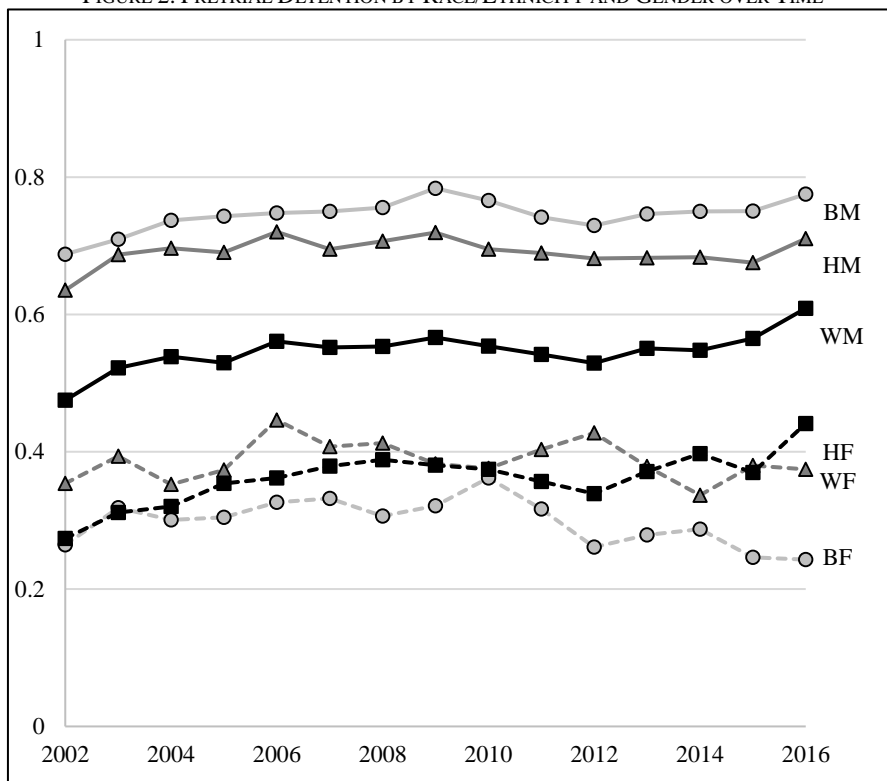


Figure 2 depicts the rates of pretrial detention by race and gender over time. Each data point is the average rate of pretrial detention in that race–gender group over a fiscal year. The race–gender trends are labeled with abbreviations. The first initial indicates the group’s race or ethnicity and the second initial indicates the gender group. Detention appears to be relatively stable over time for each group, although there is an upward trend (increased detention over time) for white men and white women.

While Figures 1 and 2 demonstrate differences in pretrial detention rates, it is important to remember that systematic differences in the offending behavior and criminal records between different racial and gender groups could account for at least some of these differences. The empirical analysis that follows thus includes many control variables in an attempt to isolate race- and gender-based disparity.

FIGURE 2: PRETRIAL DETENTION BY RACE/ETHNICITY AND GENDER OVER TIME



Note. Average rates of pretrial detention for defendants sentenced in fiscal years 2002 through 2016. The first initial represents the defendant's race/ethnicity (B=Black; H=Hispanic; W=white). The second initial represents the defendant's gender (F=female; M=male).

B. Unexplained Race- and Gender-Based Disparity in Pretrial Detention

This Section presents the main empirical analysis. Section III.B.1 provides evidence that unexplained disparity in pretrial detention status based on race and gender separately (that is, male–female, Black–white, and Hispanic–white disparity) favors white defendants and female defendants. Section III.B.2 considers disparity based on intersectional race–gender groups and finds that racial disparity for male defendants is different than for female defendants. While racial disparity among men favors white defendants, racial disparity among women appears to favor Black defendants.

1. Race- and Gender-Based Disparities, Separately

The first set of regressions separately assesses unwarranted racial and gender disparities in pretrial detention. In these regressions,¹³⁵ the control variables include the defendant's age; the defendant's level of education (no high school, high school only, some college, or college graduate); whether a weapon was charged; whether the defendant's fines were waived; the type of offense (from fifteen types); the month and year that the case was initiated; the fiscal year in which the defendant was sentenced; the courthouse in which the case was prosecuted; and the defendant's precise criminal history category-by-offense level cell. The coefficient estimates presented in the Tables are interpreted as percentage-point differences. Regressions results with additional, even more fine-grained controls are presented as robustness checks in Appendix B.¹³⁶

After including all of these controls, the regressions produce estimates of race- and gender-based disparity, which are presented visually in Figure 3. The point for each defendant characteristic (Male, Black, Hispanic, Other Race) represents the expected increase or decrease in the probability of detention after controlling for the variables listed above. The points in Figure 3 thus reflect unexplained disparity.

For male defendants, the point estimate lies at 0.089, which suggests that male defendants are 8.9 percentage points more likely to be detained pending trial than similarly situated female defendants after controlling for the complete set of control variables listed above. Similarly, Black defendants are 2.8 percentage points more likely and Hispanic defendants are 4.6 percentage points more likely to be detained than similarly situated white defendants. Defendants of another race, on the other hand, experience no unexplained disparity in pretrial detention relative to white defendants, as their point in Figure 3 hovers very close to zero at -0.6 percentage points.¹³⁷

A disparity estimate is statistically significant at the 95% level if the vertical bars extending from the point do not cross the x-axis. Thus, male–female, Black–white, and Hispanic–white disparities are all statistically significant. The only group for whom detention disparity is not statistically significant is defendants of another race, who experienced no increased or decreased likelihood of detention relative to similarly situated white defendants.

¹³⁵ All regressions are linear probability models so that the coefficient estimates presented in the Tables are interpreted as percentage-point differences.

¹³⁶ The robustness controls include narrow offense categories (eighty-eight offense types), the defendant's five-digit home zip code, and the average income in the defendant's home zip code. *See infra* Appendix B.

¹³⁷ *See infra* Table 2, column 6.

FIGURE 3: ESTIMATES OF GENDER AND RACE DISPARITIES IN PRETRIAL DETENTION

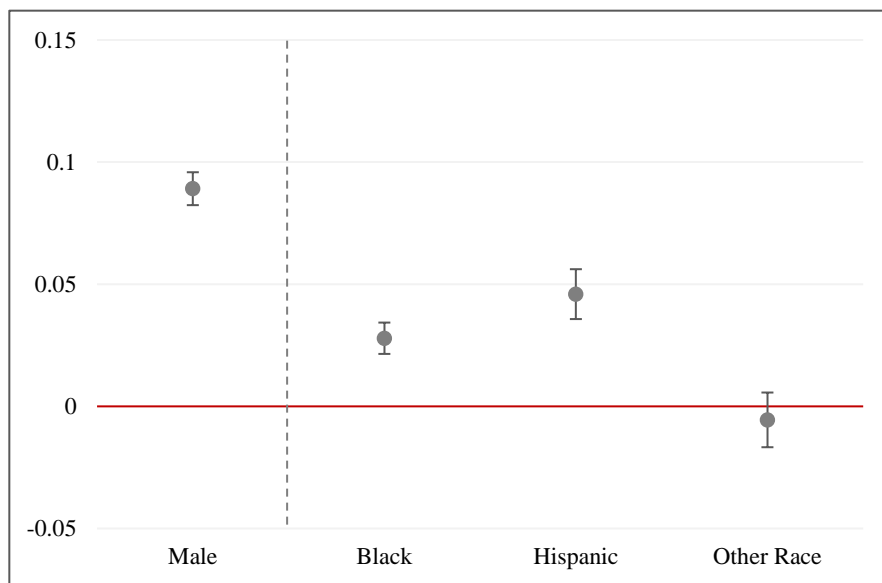


Table 2 shows the raw results of several regression analyses using various sets of controls. Each column presents the results of one regression. As a reader moves across the table from column 1 to column 6, the regression results include an increasing number of control variables, as indicated in the bottom rows of the Table. Column 6 contains the results using the full set of controls, which are plotted in Figure 3. Column 1 presents estimates when there are no control variables and finds significantly larger detention disparities than in the regression in which all control variables are included in column 6. For example, male–female disparity without full controls is 29.0 percentage points. As described in the prior paragraph, male–female disparity with full controls is 8.9 percentage points. This means that roughly 70% of the male–female detention gap can be explained by other variables in the data, while the remaining 30% of the gap is left unexplained. Similarly, the control variables explain roughly 82% of the Black–white gap and roughly 57% of the Hispanic–white gap, leaving significant unexplained racial disparity.

TABLE 2: ESTIMATES OF RACE AND GENDER DISPARITIES IN PRETRIAL DETENTION

	(1)	(2)	(3)	(4)	(5)	(6)
<i>Race and Gender</i>						
Male	0.290*** (0.007)	0.162*** (0.005)	0.094*** (0.004)	0.097*** (0.004)	0.101*** (0.004)	0.089*** (0.003)
Black	0.158*** (0.010)	0.041*** (0.007)	0.008 (0.007)	0.008 (0.007)	0.031*** (0.003)	0.028*** (0.003)
Hispanic	0.124*** (0.017)	0.108*** (0.012)	0.058*** (0.008)	0.056*** (0.009)	0.067*** (0.006)	0.046*** (0.005)
Other Race/Ethnicity	0.029 (0.028)	0.050* (0.026)	0.008 (0.015)	0.006 (0.015)	-0.007 (0.005)	-0.006 (0.006)
<i>Other Defendant and Case Characteristics</i>						
Age	-	-	-0.002*** (0.0001)	-0.002*** (0.0001)	-0.002*** (0.0001)	-0.002*** (0.0001)
HS Only	-	-	-0.036*** (0.003)	-0.037*** (0.002)	-0.035*** (0.002)	-0.032*** (0.002)
Some College	-	-	-0.068*** (0.003)	-0.069** (0.003)	-0.067*** (0.003)	-0.061*** (0.003)
College Grad	-	-	-0.103*** (0.004)	-0.100*** (0.004)	-0.092*** (0.004)	-0.078*** (0.004)
Weapon Charged	-	-	0.134*** (0.005)	0.134*** (0.005)	0.129*** (0.005)	0.104*** (0.004)
Fines Waived	-	-	0.085*** (0.007)	0.084*** (0.007)	0.080*** (0.006)	0.065*** (0.005)
<i>Control Variables</i>						
Criminal History	No	Yes	Yes	Yes	Yes	No
Offense Type (15 categories)	No	No	Yes	Yes	Yes	Yes
Starting Month/Year	No	No	No	Yes	Yes	Yes
Sentencing Fiscal Year	No	No	No	Yes	Yes	Yes
Courthouse	No	No	No	No	Yes	Yes
Criminal History × Severity	No	No	No	No	No	Yes
Observations	337,916	337,916	337,916	337,916	337,916	334,987

Note. OLS regressions of whether a defendant was detained pretrial on demographic characteristics, case characteristics, and fixed effects as indicated. ***: $p < 0.01$; **: $p < 0.05$; *: $p < 0.10$. Standard errors are clustered at the courthouse level and reported in parentheses. The offense category includes fixed effects for fifteen distinct offense types. Column 6 has fewer observations due to missing data in the base-offense-level variable and restricting to base-offense-level-criminal-history cells with at least 20 observations.

Column 5 is the first column in Table 2 in which geographic controls are added to the regression. Compared to column 4, adding geographic controls has little effect on the estimate of male–female disparity, but significantly changes the estimates of Black–white and Hispanic–white disparity by increasing these disparity estimates. The reason why controlling for geography affects the coefficient estimates for the race and ethnicity but not gender variables is because geographic regions tend to be segregated on the basis of race and ethnicity but not on the basis of gender. That the estimates on the race variables *increased* when geographic controls were added suggests that regions of the country with larger minority populations also have lower rates of detention.

2. *Intersectional Race–Gender Detention Disparity*

Especially because the above regression analysis found disparity by both race and gender, it is important to analyze the intersection of the two. As Professor Kimberlé Crenshaw explained more than thirty years ago, “[D]ominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis.”¹³⁸ Professor Crenshaw rejected this “single-axis framework” and argued that the failure of courts and advocates to consider the intersectionality of gender and race has obscured discrimination that does not result from one discrete source.¹³⁹ Professor Crenshaw’s theory of intersectionality observes and critiques the ways in which the experiences of Black women are often excluded or minimized in discussions about racial discrimination.¹⁴⁰ Recognizing, as Professor Paul Butler explains, “that discrimination against

¹³⁸ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Gender: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140.

¹³⁹ *Id.*

¹⁴⁰ For example, the #SayHerName campaign underscores instances of police violence towards Black women. See #SayHerName Campaign, AFR. AM. POL’Y F., <https://aapf.org/sayhername> [<https://perma.cc/4KDM-F8NP>]; see also, e.g., Christina Maxouris, *Cases Like Breonna Taylor’s Highlight Black Women Are ‘Not Safe Anywhere,’ #SayHerName Campaign Founder Says*, CNN (Sept. 25, 2020), <https://www.cnn.com/2020/09/25/us/breonna-taylor-say-her-name-founder/index.html> [<https://perma.cc/J3QS-DKHV>].

[B]lack men sometimes might take different forms than discrimination against [B]lack women,” and that “gender matters for [B]lack men[,] as well,” this Section explores intersectional disparity.¹⁴¹ It finds that the intersectional race–gender group to which a defendant belongs is a more pertinent unit of analysis for pretrial detention disparity than the defendant’s race or gender alone.

As Figure 1 demonstrates, in the raw data, gender disparity varies by race and racial disparity varies by gender. For example, gender disparity is most pronounced for Black defendants: Black male defendants are detained at the *highest* rate of any group (75%) and Black female defendants are detained at the *lowest* rate of any group (30%). In contrast, gender differences among white defendants are smaller: 55% of white men are detained, while 36% of white women are detained. Among female defendants—at least in the raw data—Black–white disparity takes on the opposite sign than some might expect: Black women are *less* likely to be detained than Hispanic and white women. Any thoughtful analysis of pretrial detention disparity, then, ought to consider gender and race as an intersectional group, rather than as separate, unrelated characteristics.

Figure 4 plots the race–gender results. The points are plotted from the results of the intersectional regression with the same full set of controls used in the previous regression analysis.¹⁴² These results are reported in Table 3. Each point in Figure 4 represents the unexplained difference in the probability of pretrial detention for that race–gender group relative to white female defendants. Because white female defendants are the reference group, this group is not included in Figure 4. As above, the first initial of the group abbreviation indicates race or ethnicity.

A point that lies above the red line (that is, greater than zero) indicates that defendants in that race–gender group were *more* likely to be detained pending trial than similarly situated white female defendants. A point below the red line (that is, less than zero) indicates that similarly situated defendants in that race–gender group were *less* likely to be detained than white female defendants.

The vertical bars extending from each point in Figure 4 represent 95% confidence intervals around the estimate. If either of the vertical bars crosses

¹⁴¹ PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 8–9 (2017).

¹⁴² The full set of controls include: the defendant’s age; the defendant’s level of education (no high school, high school only, some college, or college graduate); whether a weapon was charged; whether the defendant’s fines were waived; the type of offense (from fifteen types); the month and year that the case was initiated; the fiscal year in which the defendant was sentenced; the courthouse in which the case was prosecuted; and the defendant’s precise criminal history category-by-base-offense level cell.

the red line (that is, if zero is included in the 95% confidence interval), the difference in detention probability between the race–gender group and white female defendants is not statistically significant.

Male defendants in all racial groups are more likely to be detained pending trial than white women, as demonstrated by the fact that their corresponding points all lie well above the red line at zero in Figure 4. The detention outcomes are the worst for Hispanic and Black men, and significantly better for white men and men of another race. Because male defendants comprise 85% of federal criminal defendants, racial disparity among men mirrors racial disparity in the full sample: white men are detained less often than similarly situated Black and Hispanic men and at nearly identical rates as men of another race.

The results for female defendants present a different pattern. For Hispanic female defendants and female defendants who are another race, the 95% confidence intervals include zero, which means there is not a statistically significant difference in the probability of detention for white versus Hispanic women, and there is not a statistically significant difference in the probability of detention for white women versus women of another race. Black female defendants are the only group whose point falls below the red line, which means Black women are significantly less likely to be detained pending trial than white women, after controlling for many variables.

FIGURE 4: ESTIMATES OF RACE–GENDER DISPARITY IN PRETRIAL DETENTION

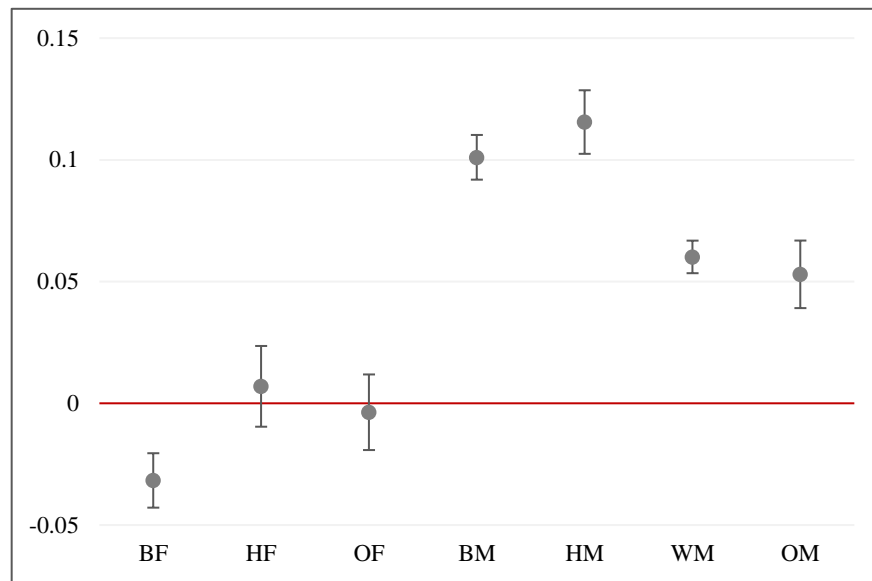


Table 3 presents the full regression results that are displayed in Figure 4. The outcome variable indicates whether the defendant was detained pending trial, and the key explanatory variables are the race–gender groups. White women—the reference category—are omitted, and the coefficients estimates for each race–gender group represents the increased or decreased probability of detention in that group relative to similarly situated white women. The coefficients from column 6—the regression with the full set of controls—are plotted in Figure 4.

Interpreting race-based disparity among female defendants is straightforward because white women are the omitted race–gender group in Table 3. Therefore, the coefficient estimate on the Black-female variable (-0.032 in column 6) indicates that Black women are 3.2 percentage points less likely to be detained pending trial than similarly situated white women. This difference is highly statistically significant. In contrast, Hispanic women are not detained at statistically different rates than similarly situated white women—the estimate of disparity is 0.007 and is not statistically significant.

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TABLE 3: ESTIMATES OF DISPARITIES IN PRETRIAL DETENTION BY RACE-GENDER INTERACTION

	(1)	(2)	(3)	(4)	(5)	(6)
<i>Race and Gender</i>						
Black and Female	-0.064*** (0.011)	-0.074*** (0.008)	-0.064*** (0.008)	-0.060*** (0.007)	-0.038*** (0.006)	-0.032*** (0.006)
Hispanic and Female	0.024 (0.019)	0.052*** (0.014)	0.011 (0.011)	0.011 (0.011)	0.024*** (0.009)	0.007 (0.008)
Other Race and Female	-0.006 (0.027)	0.025 (0.025)	0.002 (0.017)	0.002 (0.017)	-0.015* (0.008)	-0.004 (0.008)
Black and Male	0.383*** (0.012)	0.171*** (0.010)	0.082*** (0.009)	0.086*** (0.009)	0.113*** (0.005)	0.101*** (0.005)
Hispanic and Male	0.329*** (0.020)	0.228*** (0.014)	0.127*** (0.010)	0.131*** (0.010)	0.145*** (0.007)	0.116*** (0.007)
Other Race and Male	0.219*** (0.030)	0.162*** (0.028)	0.067*** (0.015)	0.069*** (0.015)	0.061*** (0.007)	0.053*** (0.007)
White and Male	0.184*** (0.007)	0.107*** (0.006)	0.058*** (0.004)	0.063*** (0.004)	0.068*** (0.004)	0.060*** (0.003)
<i>Other Defendant and Case Characteristics</i>						
Age	-	-	-0.002*** (0.0001)	-0.002*** (0.0001)	-0.002*** (0.0001)	-0.002*** (0.0001)
HS Only	-	-	-0.036*** (0.003)	-0.037*** (0.002)	-0.034*** (0.002)	-0.032*** (0.002)
Some College	-	-	-0.067*** (0.003)	-0.068*** (0.003)	-0.067*** (0.003)	-0.060*** (0.003)
College Grad	-	-	-0.102*** (0.004)	-0.099*** (0.004)	-0.091*** (0.004)	-0.077*** (0.004)
Weapon Charged	-	-	0.132*** (0.005)	0.133*** (0.005)	0.128*** (0.005)	0.103*** (0.004)
Fines Waived	-	-	0.085*** (0.007)	0.084*** (0.007)	0.080*** (0.006)	0.065*** (0.005)
<i>Control Variables</i>						
Criminal History	No	Yes	Yes	Yes	Yes	No
Offense Type (15 categories)	No	No	Yes	Yes	Yes	Yes
Starting Month/Year	No	No	No	Yes	Yes	Yes
Sentencing Year	No	No	No	Yes	Yes	Yes
Courthouse	No	No	No	No	Yes	Yes

Criminal History × Severity	No	No	No	No	No	Yes
Observations	337,916	337,916	337,916	337,916	337,916	334,987

Note. OLS regressions of whether a defendant was detained pretrial on demographic characteristics, case characteristics, and fixed effects as indicated. ***: $p < 0.01$; **: $p < 0.05$; *: $p < 0.10$. Standard errors are clustered at the courthouse level and reported in parentheses. The offense category includes fixed effects for fifteen distinct offense types. Column (6) has fewer observations due to missing data in the base offense level variable and restricting to base offense level–criminal history cells with at least 20 observations.

Because white women make up the reference group, computing race-based disparity among male defendants requires subtracting the coefficient estimates. For example, the coefficient estimate on the white-male variable in Table 3, column 6 is 0.060, while the coefficient estimate on the Black-male variable is 0.101. For men, Black–white disparity is the difference in these two numbers: 0.101 and 0.060. Thus, Black men are 4.1 percentage points more likely to be detained than similarly situated white defendants. Hispanic men are 5.6 percentage points more likely to be detained than similarly situated white defendants. Both of these differences are statistically significant.¹⁴³ The next Part considers several possible reasons for these findings.

IV. THE ROOTS OF DISPARITY

Part III presented evidence of unexplained disparity in federal pretrial detention. Overall, it found significant unwarranted racial disparity, which favors white defendants and female defendants. This disparity cannot be explained by other characteristics of defendants or their cases, or systematic detention patterns by geography or over time. Section III.B.2, however, included one result that might surprise readers: among women, Black defendants are significantly *less* likely to be detained pending trial than any other group, including similarly situated white and Hispanic women. This Part evaluates three potential mechanisms that could be generating these disparities.

Several characteristics of pretrial detention decision-making inform this Part’s analysis. First, as emphasized in Part I, federal detention decisions are the product of nearly unfettered judicial discretion. The Bail Reform Act instructs federal magistrate judges to weigh two malleable factors—risk of flight and dangerousness—and pretrial detention decisions are very rarely

¹⁴³ Results on file with journal.

reviewed. Discretionary decisions like these are likely to be subject to two behavioral phenomena.

First, an environment that requires quick decisions with limited information could lead judges to make decisions based on bias or heuristics. In Section IV.A, I argue that the results are consistent with racial bias against men of color. As other empirical work has found, stereotyping can lead to racially disparate treatment. I argue that stereotyping is likely to be particularly harmful against men of color in the context of pretrial detention because the Bail Reform Act instructs judges to evaluate dangerousness, which is the content of persistent and prevalent stereotypes about men of color.

Second, I consider the possibility that race- and gender-based disparities in pretrial detention stem from earlier disparities in charging. There are two ways that charging disparities could influence detention disparity. First, as described in Section IV.B.1, detention disparities could stem from charging disparity via the detention presumptions contained in the 1984 Act. The detention presumptions are one of the few ways that the 1984 Act constrains judicial discretion. If there is racial disparity in which defendants face a presumption of detention, this could create racial disparity in detention itself. Section IV.B.1, however, does not find evidence that the detention presumptions affect racial disparity in detention.

Charging disparity might also affect detention disparity by creating a selected sample. If white people are less likely to be prosecuted than people of color for the same underlying criminal conduct, one would expect white defendants in the data to be, on average, more serious offenders than defendants of color. In this case, selection bias would cause the estimates to *understate* the true magnitude of racial disparity between otherwise similar defendants.¹⁴⁴ I explore this idea in Section IV.B.2.

Third, as I explore in Section IV.C, magistrate judges might make detention decisions based on their perceptions of the collateral consequences of detention on defendants' lives and livelihoods. Although some collateral consequences are outside the formal scope of the Bail Reform Act, detention decisions are rarely appealed, usually do not produce a written decision, and do not need to be explained in detail by the judge. Section IV.C suggests that the results for female defendants can be explained—in part but not whole—

¹⁴⁴ Many empirical studies of racial disparity face this potential problem. *See, e.g.*, Starr & Rehavi, *supra* note 129, at 19 (describing this problem). Professors M. Marit Rehavi and Sonja B. Starr make progress on this front by using data that includes detailed arrest information. *See generally* Rehavi & Starr, *supra* note 20. But of course, and as they acknowledge, even detailed arrest information is not a perfect measure of a person's underlying conduct, *id.* at 1321, and racial discrimination in arrests will bias estimates of racial disparity in later processes.

by showing that judges appear to be sensitive to the collateral consequences of detention, especially for women who are parents.

A. Racial Bias

This Section explores the role and form that racial bias against men plays in explaining the results. More than 80% of federal criminal defendants are men, so race-based disparity across all federal defendants largely reflects race-based disparity among male defendants. Recall that Section III.B.2 showed that Black men are roughly 4 percentage points more likely to be detained pending trial and Hispanic men are roughly 5 percentage points more likely to be detained pending trial than similarly situated white defendants. Male defendants who are another race are virtually equally likely to be detained pending trial as white men. In this Section, I argue that racial bias could explain racial disparity, especially because the 1984 Act focuses detention decisions around dangerousness.

Research in social psychology has long documented persistent stereotypes that associate men of color—especially Black men—with criminality and dangerousness.¹⁴⁵ As Professor Jennifer Eberhardt explains, “[O]ne of the strongest stereotypes in American society associates blacks with criminality.”¹⁴⁶ In one study, for example, one group of police officers was primed to think about crime, while a separate control group of officers was not.¹⁴⁷ After the priming task, all officers were shown a screen with one white male face and one Black male face. The officers who were prompted to think about crime during the priming task were more likely to look at the Black male face, while officers in the control group were more likely to look at the white male face. The authors concluded that priming the officers to think about crime drew their attention to Black male faces, demonstrating “the influence of strong, stereotypic associations on face processing mechanisms in particular.”¹⁴⁸

Racial stereotypes do not just involve crime in general but are also specific to dangerousness. People are more likely to view Black men as

¹⁴⁵ See, e.g., Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 889–91 (2004); Mary Beth Oliver, *African American Men as “Criminal and Dangerous”*: Implications of Media Portrayals of Crime on the “Criminalization” of African American Men, 7 J. AFR. AM. STUD. 3, 4 (2003); BUTLER, *supra* note 141, at 2124.

¹⁴⁶ JENNIFER L. EBERHARDT, *BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO* 6 (2019).

¹⁴⁷ Eberhardt et al., *supra* note 145, at 886.

¹⁴⁸ *Id.* at 888. A similar study with undergraduate participants produced the same results. *Id.* at 882–83.

taller, heavier, and stronger than white men, even if the photo only shows faces, or if the skin tone is racially ambiguous and the research participant is only told of the person's race.¹⁴⁹ White participants are more likely to rate Black men as capable of harm than white men of the same size and stature.¹⁵⁰ Stereotypical associations also link Black men with weapons. Undergraduate students were quicker to identify photos of weapons after being primed with Black faces than white faces but exhibited no difference in how quickly they could identify objects that were not weapons.¹⁵¹ A setting like pretrial detention—where a magistrate judge must form predictions about a person's future dangerousness—is ripe for racial bias, which is likely to be particularly harmful for men of color.

Quantitative empirical scholars have also exhaustively documented racial disparities at every stage of the criminal process, from policing, to charging, to conviction, and to sentencing.¹⁵² This prior work does not simply find that Black people are overrepresented at each stage of the criminal process compared to the U.S. population, but also that Black defendants are disproportionately represented compared to observably similar white defendants. The breadth of these findings—across different federal and state court systems, different parts of the country, and different types of offenses—suggests persistent disparate treatment of minority defendants, which has led many to conclude that racial bias is responsible. Some of this research is directly applicable to the findings here. Recent work by Professors David Arnold, Will Dobbie, and Crystal Yang found that racial disparity in bail in two state courts is likely the product of judges making racially biased prediction errors.¹⁵³ The authors explain that if judges disproportionately detain Black defendants, one would expect to see fewer Black defendants committing pretrial violations, which is what the study found. Professors Arnold, Dobbie, and Yang's theory of bias, developed by others in earlier work on racial stereotypes, is that if minority defendants are

¹⁴⁹ John Paul Wilson, Kurt Hugenberg & Nicholas O. Rule, *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. PERSONALITY & SOC. PSYCH. 59, 74–75 (2017).

¹⁵⁰ *Id.*

¹⁵¹ Eberhardt et al., *supra* note 145, at 880.

¹⁵² See *supra* note 13.

¹⁵³ Arnold et al., *supra* note 15, at 1917–18. In contrast, some earlier work suggests that Black defendants are not subject to higher bail amounts than white defendants after controlling for defendants' criminal records and specific charges, and that Black defendants are not more likely to be detained pending trial than white defendants after controlling for the probability of rearrest for violent crime. Frank McIntyre & Shima Baradaran, *Race, Prediction, and Pretrial Detention*, 10 J. EMPIRICAL LEGAL STUD. 741, 769 (2013). These findings, however, might underestimate racial disparities if racial bias influences these rearrest rates.

overrepresented among the most serious offenders, but roughly similar to white defendants in offense severity on average, judges will overestimate the severity of *all* minority defendants because of stereotyping.

Given the rarity at which federal defendants fail to appear in court or are rearrested while released,¹⁵⁴ Professor Arnold, Dobbie, and Yang’s test of racial bias is not well suited to this study.¹⁵⁵ Still, the principles animating their findings can be applied here. As the authors noted, in their research setting, “mostly untrained bail judges must make on-the-spot judgments with limited information and little to no interaction with defendants. These institutional features may make bail decisions particularly prone to the kind of inaccurate stereotypes or categorical heuristics that exacerbate racial bias.”¹⁵⁶

B. Charging Decisions

As described in Part III, the data used in the empirical analysis encompasses federal defendants who are ultimately sentenced under the U.S. Sentencing Guidelines. As a result, the empirical analysis does not account for any disparity that occurs earlier in the case, including in policing and charging. Instead, the disparity results are conditional on being sentenced under the Guidelines. This Section explores two ways in which the empirical results might be generated—or undermined—by disparity earlier in the criminal process.

1. The Presumption of Detention

As described in Part II, the 1984 Act establishes a rebuttable presumption of detention for certain arrestees. The rebuttable presumption is one of the few tools in the Bail Reform Act that cabins judicial discretion. The presumption of detention largely applies to defendants facing mandatory

¹⁵⁴ See COHEN, *supra* note 91, at 13 and accompanying text.

¹⁵⁵ In contrast to the federal system, where the most recent statistics report that 4% of released defendants are rearrested for a new offense, COHEN, *supra* note 91, at 13, Professor Arnold and his coauthors document that 24% of released defendants are rearrested prior to disposition in their study of pretrial detention in Philadelphia and Miami-Dade counties, Arnold et al., *supra* note 15, at 1907.

¹⁵⁶ Arnold et al., *supra* note 15, at 1887 (first citing Roland Fryer & Matthew O. Jackson, *A Categorical Model of Cognition and Biased Decision Making*, 8 B.E.J. THEORETICAL ECON. 1 (2008); and then citing Pedro Bordalo, Katherine Coffman, Nicola Gennaioli & Andrei Shleifer, *Stereotypes*, 131 Q.J. ECON. 1753 (2016)); see also Aurélie Ouss & Megan Stevenson, *Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors* 5 (June 22, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3335138> [<https://perma.cc/TD2C-T8EU>] (evaluating Philadelphia’s prosecutor-led bail reform and concluding that “[judicial] discretion can dilute reform’s impacts, and lead to racial disparity in the allocation of its benefits”).

minimum sentences for drug and firearms offenses.¹⁵⁷ Prior empirical scholarship has found racial disparities in mandatory-minimum charging.¹⁵⁸ It is therefore plausible that race- and gender-based disparities in pretrial detention could be generated through the presumptions of detention contained in the 1984 Act, which largely apply to defendants facing mandatory minimum sentences for drug and firearms offenses. This Section investigates this theory and finds that, although Black and Hispanic men are more likely to be subject to presumptive detention than similarly situated white men, this does not appear to explain race-based disparity in detention.

To carry out this analysis, I code whether each defendant is likely to be subject to a presumption of detention based on the charges brought against them.¹⁵⁹ Appendix A provides details about how this variable is coded. In all, roughly 46% of defendants are coded as likely to be subject to the presumption, which is very similar to other studies' estimates of the presumption's prevalence in the federal criminal-defendant population.¹⁶⁰ 48% of men and 33% of women are coded as subject to the presumption in the data.

Columns 1 and 2 of Table 4 suggest race-based disparity in the prevalence of the presumption for male defendants. The results for male defendants are found in column 2. Black and Hispanic men are around 1.5 percentage points more likely to face a presumption than similarly situated white defendants. This disparity is smaller than overall Black–white and Hispanic–white detention disparity for male defendants (4.1 percentage points and 5.6 percentage points respectively), so the presumption will potentially be, at most, an incomplete explanation for detention disparity among male defendants.

For female defendants, reported in column 1, neither Black nor Hispanic women are more likely to face a presumption than similarly situated white defendants—the point estimates are close to zero and statistically insignificant. Because similarly situated Black, Hispanic, and white women face the presumption at indistinguishable rates, one would not expect the presumption to influence Black–white or Hispanic–white detention disparity for women.

¹⁵⁷ See *supra* Section I.B.2.

¹⁵⁸ See Rehavi & Starr, *supra* note 20, at 1323; Yang, *supra* note 20, at 108; Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729, 730 (2012).

¹⁵⁹ Because the presumption depends in part on the nature of the defendant's prior convictions—which are not coded in the data—the variable is not a perfect measure of whether a defendant is subject to the presumption.

¹⁶⁰ Austin, *supra* note 11, at 55 (estimating that between fiscal years 2005 and 2015, the Drug and Firearm presumption applied to between 42% and 45% of cases).

TABLE 4: THE PRESUMPTION OF DETENTION

	Faced Presumption?		Detained?		Detained?	
	(0/1)		(no presumption control)		(control for presumption)	
	Female (1)	Male (2)	Female (3)	Male (4)	Female (5)	Male (6)
Black	-0.001 (0.003)	0.014*** (0.002)	-0.027*** (0.005)	0.040*** (0.004)	-0.027*** (0.005)	0.039*** (0.004)
Hispanic	-0.005 (0.004)	0.016*** (0.003)	0.017** (0.008)	0.053*** (0.006)	0.018** (0.008)	0.051*** (0.005)
Other Race	-0.010** (0.005)	-0.001 (0.003)	-0.006 (0.009)	-0.008 (0.007)	-0.005 (0.009)	-0.008 (0.007)
Presumption	-	-	-	-	0.125*** (0.013)	0.082*** (0.005)
Observations	54,943	281,822	54,943	281,822	54,536	281,822

Note. OLS regressions of whether a defendant was detained pretrial. ***: $p < 0.01$; **: $p < 0.05$; *: $p < 0.10$. Standard errors are clustered at the courthouse level and reported in parentheses. All regressions include controls listed in Table 2, column 6.

Columns 3 through 6 demonstrate that the presumption of detention does not appear to influence detention disparity. These columns compare the estimates of intersectional detention disparity from the main analysis described in Part III with analogous estimates that also control for whether the defendant faced a presumption of detention. The regressions are separated by gender due to likely differences in racial disparity between male and female defendants, as described in Section III.B.2. The regression results in columns 3 and 4 of Table 4 suggest that the presumption is an important predictor of detention—it increases the probability of detention by 8.2 percentage points for men and 12.5 percentage points for women, even after controlling for all of the control variables included in the main analysis, including (but not limited to) the defendant's base offense level, criminal-history category, and whether a weapon was charged. Columns 3 through 6 show, however, that adding this control variable leaves the disparity estimates virtually unchanged, which suggests that the presumption does not offer much explanatory power over race- and gender-based disparity in pretrial detention.

2. Underlying Conduct

The data include defendants who were sentenced under the U.S. Sentencing Guidelines. Put another way, the data exclude defendants who

were acquitted and whose charges were voluntarily dismissed by the government. The data also excludes people who prosecutors affirmatively declined to prosecute, people who were convicted of certain misdemeanors or petty offenses, or whose criminal activity was unknown to prosecutors. All of the estimates contained in this Article are conditional—they represent race- and gender-based disparity conditional on these earlier selection processes.

These earlier selection processes—whose criminal behavior is detected, which cases are declined, whose charges are dismissed, and who is acquitted—might themselves be infected by racial discrimination. If these earlier selection processes are discriminatory against people of color, the regression analyses contained here will *underestimate* racial disparity. If these earlier selection processes are discriminatory against men, the regression analyses contained here will *underestimate* gender disparity.

Without data on the underlying conduct of people, including those who are not charged with a federal crime, one cannot know how severe the underestimates are. At the least, it suggests that the results among male defendants are likely to understate the true magnitude of racial disparity. For female defendants, in which racial disparity favors Black women, the possibility of selection bias suggests that one should be cautious in viewing these results.

C. Collateral Consequences

Detaining a person pending trial creates many abrupt collateral consequences. For example, detention interrupts a detainee's employment, housing, medical treatment, and community ties. Because federal judges enjoy wide discretion in detention decisions, they might be influenced by the perceived collateral consequences of detaining or releasing defendants. This Section presents evidence that is suggestive of such influence.

Perhaps the most severe consequences of pretrial detention are the consequences for children and parents who are separated while the parent is detained. Nearly three million of America's seventy-four million children have at least one parent who is held in carceral custody.¹⁶¹ More than one-third of these children have a parent who is held in local jail—the facilities typically used for pretrial detention and to incarcerate those serving short sentences.¹⁶² When a child's parent is held in physical custody—especially

¹⁶¹ PEW CHARITABLE TRS., COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 18 (2010) (stating that there are 2.7 million children with parents in criminal custody).

¹⁶² See Kevin Johnson, *Who's Watching the Kids When Parents Get Arrested?*, USA TODAY (July 31, 2014, 7:55 AM), <https://www.usatoday.com/story/news/nation/2014/07/31/children-left-behind->

with little warning—several immediate and long-term consequences follow for both the child and the parent.

If the detained parent is the only custodial parent of a minor child, they must immediately try to arrange for a relative or friend to care for their child or children, which, unsurprisingly, can be very difficult for a parent to do when they are arrested.¹⁶³ If the parent is able to secure a family member or friend to care for the child, that caregiver must be approved by the state's child-protection agency. If no family members or friends are available and approved, the child or children will be placed in a temporary foster home. As one might expect, this process is extremely hard on children. Much social-science research has documented associations between parental incarceration and behavioral, emotional, and economic instability for children.¹⁶⁴

The consequences of pretrial detention can also be devastating for parents. Under the federal Adoption and Safe Families Act, states *must* move to sever a parent's parental rights after a child has spent fifteen of the last twenty-two months in foster care (the 15/22 rule).¹⁶⁵ Roughly one out of eight incarcerated parents lose their parental rights regardless of the severity of their offenses¹⁶⁶—depriving these parents of what the U.S. Supreme Court has described as “perhaps the oldest of the fundamental liberty interests recognized” by the Due Process Clause.¹⁶⁷

parents-arrested/13333909/ [https://perma.cc/JB6X-NY3F] (reporting that 1.7 million children have a parent in prison, and this “number of children jumps to about 2.7 million when parents detained in local jails are included”).

¹⁶³ See, e.g., *Incarcerated Parents Manual: Arrest*, LEGAL SERVS. FOR PRISONERS WITH CHILD., <http://www.prisonerswithchildren.org/pubs/ipm/arrest.htm> [https://perma.cc/G3YQ-SXVR] (describing what happens to children after their parent is arrested in California).

¹⁶⁴ See, e.g., Yvonne Humenay Roberts, Frank J. Snyder, Joy S. Kaufman, Meghan K. Finley, Amy Griffin, Janet Anderson, Tim Marshall, Susan Radway, Virginia Stack & Cindy A. Crusto, *Children Exposed to the Arrest of a Family Member: Associations with Mental Health*, 23 J. CHILD FAM. STUD. 214, 219–20 (2014) (finding that exposure to the arrest of a family member is significantly associated with behavioral and emotional challenges for children); Amanda Geller, Irwin Garfinkel, Carey E. Cooper & Ronald B. Mincy, *Parental Incarceration and Child Well-Being: Implications for Urban Families*, 90 SOC. SCI. Q. 1186, 1198–1200 (2009) (finding increased economic and residential instability for children of incarcerated parents).

¹⁶⁵ 42 U.S.C. § 675(5)(E).

¹⁶⁶ Eli Hager & Anna Flag, *How Incarcerated Parents Are Losing Their Children Forever*, MARSHALL PROJECT (Dec. 2, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever> [https://perma.cc/4FMK-E4CF].

¹⁶⁷ *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”).

The Adoption and Safe Families Act includes three exceptions to the 15/22 rule. A state agency is not required to move to terminate parental rights if (1) a relative is caring for the child, (2) the foster care agency has not provided appropriate services, or (3) termination would not be in the child's best interests. To succeed on prong 3, a parent will typically need to demonstrate regular contact with their caseworker and frequent visits with their child, which is, of course, extremely difficult when a parent is detained. For example, in the United States, a person held in jail can expect a fifteen-minute phone call home to cost around \$6, and in some jurisdictions more than \$20.¹⁶⁸

This Section tests the hypothesis that familial status in part explains the finding that Black–white disparity among women favors Black defendants. Although the statistics are dated, in 2004 white women who were incarcerated in federal prisons were less likely to be parents of minor children than Black and Hispanic women. Forty-seven percent of white women in federal prison reported having minor children, compared to 55% of Black women and 63% of Hispanic women.¹⁶⁹ Although the Commission data report the defendant's number of dependents rather than minor children, the statistics are similar.¹⁷⁰ On average, Black mothers are also more likely to parent without a partner than Hispanic or non-Hispanic white mothers.¹⁷¹ These statistics suggest that pretrial detention is likely to be especially harmful for Black women and their dependents.¹⁷² And as Professor Dorothy

¹⁶⁸ The average was computed by the author from Appendix Table 2 in Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, PRISON POL'Y INITIATIVE (Feb. 2019), https://www.prisonpolicy.org/phones/appendix_table_2.html [https://perma.cc/5WVD-XYMF].

¹⁶⁹ See LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., PARENTS IN PRISON AND THEIR MINOR CHILDREN 14 tbl.3 (2010), <https://www.bjs.gov/content/pub/pdf/pptmc.pdf> [https://perma.cc/UA6U-GY7J].

¹⁷⁰ In the dataset used in this paper, white women are also the least likely and Hispanic women are the most likely to have dependents. In the dataset used here, 54% of white women, 64% of Black women, and 66% of Hispanic women have dependents. These rates are not directly comparable with the parenthood rates reported by the Bureau of Justice Statistics, *id.*, both because the data used in this paper spans the years 2002 through 2016 and because some defendants in the data might have dependents who are not children.

¹⁷¹ These are the author's own calculations from U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2018 tbl.H3 (2018), <https://www.census.gov/data/tables/2018/demo/families/cps-2018.html> [https://perma.cc/8GK7-FJHC].

¹⁷² Grassroots efforts have also sought to address this problem. For example, National Bail Out's #FreeBlackMamas initiative is an annual, nationwide campaign that raises money to pay cash bail for Black caregivers who are held in detention on Mother's Day. *History of Black Mama's Bail Out*, NAT'L BAIL OUT COLLECTIVE, <https://www.nationalbailout.org/history> [https://perma.cc/FL3Y-K9RS]; see also Erin E. Evans, #FreeBlackMamas Works to Bail Black Mothers Out of Jail in Time for Mother's Day, NBC NEWS (May 11, 2019, 11:16 AM), <https://www.nbcnews.com/news/nbcblk/freeBlackmamas->

Roberts explains, the U.S. prison and foster-care systems intersect to uniquely punish Black mothers.¹⁷³ Magistrate judges might be sensitive to these harms. When deciding on detention, federal magistrate judges typically have parental information available through the pretrial-services report that contains details about the defendant's social history.¹⁷⁴ Although detention decisions rarely result in reasoned, written opinions by magistrate and district judges, those that do sometimes make note of the defendant's caretaking considerations.¹⁷⁵ Thus, familial status might explain the racial disparity findings among women defendants.

I test this possibility with two checks. First, if familial status can help explain the intersectional disparity results, one would expect the results among women to be stronger for women who are parents than for women who are not parents. Second, one would not expect parenthood to be as strongly correlated with the intensity of racial disparity among men because men are significantly less likely than women to be a sole custodial parent of minor children.¹⁷⁶ This pattern appears to be replicated among the incarcerated population, in which 11% of mothers rely on foster care to provide daily care for their children, while only 2% of incarcerated fathers

works-bail-Black-mothers-out-jail-time-mother-s-n1004511 [https://perma.cc/L5UD-7BRP] (describing the National Bail Out organization's #FreeBlackMamas movement and its efforts).

¹⁷³ Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1476 (2012).

¹⁷⁴ 18 U.S.C. § 3154 allows pretrial-services officers to collect, verify, and report information from defendants and others about bail and to make recommendations to the court as to whether the defendant should be detained pending trial.

¹⁷⁵ See, e.g., *United States v. Arias*, No. 97-20388, 1997 WL 367860, at *1 (5th Cir. 1997) (holding that the district court abused its discretion in denying release and noting that defendant was a single mother); *United States v. Smith*, 34 F. Supp. 3d 541, 544 (W.D. Pa. 2014) (finding a single mother presents neither escape nor danger risks in part due to her children); *United States v. Hooks*, 330 F. Supp. 2d 1311, 1313–14 (M.D. Ala. 2004) (finding a single mother presents neither escape nor danger risks in light of her children and that parental status constitutes “exceptional reasons” warranting release before serving sentence); *United States v. Hudspeth*, 143 F. Supp. 2d 32, 37 (D.D.C. 2001) (considering that defendant cares for his elderly mother and supports his fourteen-year-old son as reasons that “weigh strongly in favor of pretrial release”); *United States v. Lizardi–Maldonado*, 275 F. Supp. 3d 1284, 1290, 1300 (D. Utah 2017) (releasing a noncitizen-defendant charged with an immigration offense pending trial because he had two citizen-children for whom he was the primary caretaker after the children's mother died of cancer the year before). *But see United States v. Stuart*, 784 F. App'x 186, 190 (5th Cir. 2019) (“That she is a single mother of a teenage daughter should have motivated her to abide by the conditions of her pretrial release, rather than, as she argues on appeal, constitute a reason for the district court to overlook her noncompliance.”).

¹⁷⁶ In the United States, households led by fathers without a partner are significantly less prevalent than those led by mothers without a partner. According to the most recent census estimates, there are more than five times as many households led by a mother with no partner present than households led by a father with no partner present. See U.S. CENSUS BUREAU, *supra* note 171, tbl.H3.

rely on foster care.¹⁷⁷ As with mothers, Black men are more likely to parent without a partner than non-Hispanic white fathers.¹⁷⁸

I first analyze race-based detention disparity by gender and parenthood status. In other words, I separately estimate race-based detention disparity for women who are parents, women who are not parents, men who are parents, and men who are not parents using the same regression strategy described in Part III. If judges exercise discretion (on average) in favor of single parents, we should see Black and, to a lesser extent, Hispanic women who are parents fare better than those who are not parents in disparity relative to white women.

Figure 5 depicts the regression results, which are also contained in Table A2. Panel A plots regression results for female defendants, and each label includes initials that indicate the defendant's racial group (B=Black, H=Hispanic, O=other race) and whether the defendant was a parent (P=parent, N=nonparent). The results are consistent with the theory that familial status plays an important role in explaining the racial detention gaps among women. As Figure 5 shows, for Black and Hispanic women, the estimate of disparity relative to white women is smaller, or lower, for parents than for defendants who are not parents. For example, Hispanic women who are parents ("HP" in Panel A) have only slightly worse outcomes than similarly situated white women, but Hispanic women who are not parents ("HN" in Panel A) are much more worse off relative to similarly situated white women. Put another way, Black and Hispanic women do better relative to white women in the parent population than in the nonparent population. Black women are even more likely to be released relative to white women when the sample is restricted to defendants with children. Similarly, being a parent virtually erases Hispanic-white disparity, which only presents among women who are not parents.¹⁷⁹

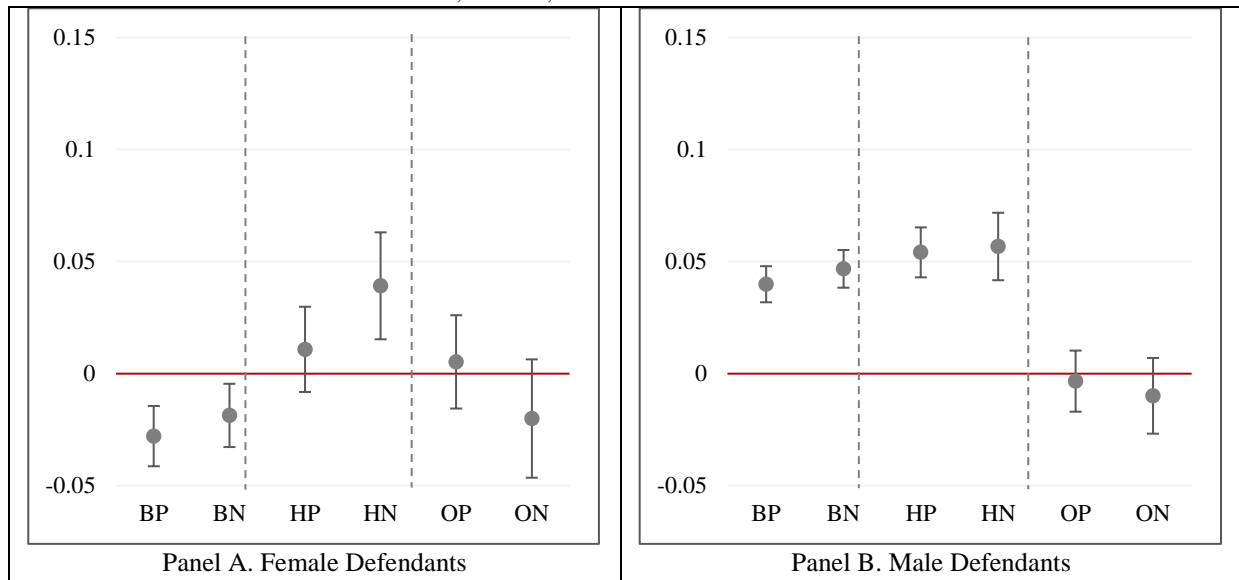
As predicted, however, this result does not present for male defendants, as depicted in Panel B of Figure 5. For male defendants of each racial group, the estimates of race-based detention disparity are virtually identical between parent and nonparent defendants. These findings suggest that judges are sensitive to the spillover consequences for sole custodial parents held in detention, who tend to be women, and their children.

¹⁷⁷ CREASIE FINNEY HAIRSTON, ANNIE E. CASEY FOUND., KINSHIP CARE WHEN PARENTS ARE INCARCERATED: WHAT WE KNOW, WHAT WE CAN DO 7 (2009).

¹⁷⁸ U.S. CENSUS BUREAU, *supra* note 171, tbl.H3.

¹⁷⁹ For Black and Hispanic women, the differences in the estimates of detention disparity for parents compared to nonparents are statistically significant. For women who are another race and ethnicity, the estimate of detention disparity is lower for women who are *not* parents, but this difference is *not* statistically significant. Women who are another race and ethnicity make up around 1% of the data.

FIGURE 5: ESTIMATED RACE, GENDER, AND PARENTHOOD EFFECTS ON PRETRIAL DETENTION



The parenthood explanation, however, is incomplete. Familial status does not wholly explain the racial disparity results among women because even when restricting attention to women without dependents, Black–white detention disparity favors Black women. One possible reason is that—as described in Section IV.A—the result could be caused by stereotyping: if Black women are more prevalent among caregivers, judges might engage in representativeness stereotyping and assume that *most* Black women are caregivers of minor children.

It is also possible that other collateral costs of detention are more acute for Black women. Black women are among the defendants in the criminal system with the fewest resources. In the data, for example, Black women are more likely to have their fines waived and have on average obtained less formal education than white women. Pretrial detention is especially harmful for defendants with few resources. An arrested person with a low-wage job will not usually be able to return to their employment after the interruption of pretrial detention, and an arrested person with little savings will not be able to pay housing costs while in detention.

The results among female defendants therefore suggest that some federal magistrate judges might exercise discretion to consider the actual impacts of pretrial detention. This finding is buttressed by the fact that this disparity pattern among women appears to be a uniquely *federal* phenomenon. Prior empirical scholarship that examines bail in state courts has largely reported that Black–white disparity in detention favors white

women.¹⁸⁰ This difference could derive from the highly discretionary nature of detention determinations in federal courts. In most state courts, which rely on cash bail, liquid wealth is explicitly connected to release, so people with fewer resources are more likely to be detained. Because Black and Hispanic women are, on average, less wealthy than white women, disparity at the state level is likely driven in part by income differences.¹⁸¹

It is important to note that the findings do not necessarily imply that magistrate judges deviate from the 1984 Act if they do consider these impacts. As described in Section I.B, the Act instructs judges to weigh two factors in deciding release: (1) the defendant's risk of nonappearance, and (2) the defendant's risk of posing danger to the community. It seems plausible that women with minor children are less likely to abscond. Fleeing a jurisdiction is costly and logistically difficult—even more so if a parent is the sole caregiver of minor children, or if the person has few resources.¹⁸² A parent who is also a sole caregiver might be more likely to comply with the terms of release. A magistrate judge may properly consider these factors. For example, when evaluating the risk of nonappearance, a magistrate judge might conclude that primary caregivers are less likely to flee. As discussed further below, the double-edged nature of federal detention disparity has policy implications for those who seek to reduce race-based disparity in pretrial detention determinations at both the federal and state levels.

V. ADDRESSING INEQUALITY IN FEDERAL DETENTION AND LESSONS FOR THE STATES

Part IV sought to explain why male defendants are significantly more likely to be detained pending trial than otherwise similar female defendants, Black and Hispanic male defendants are significantly more likely to be

¹⁸⁰ See, e.g., WILL DOBBIE, JACOB GOLDIN & CRYSTAL S. YANG, ONLINE APPENDIX: THE EFFECTS OF PRE-TRIAL DETENTION ON CONVICTION, FUTURE CRIME, AND EMPLOYMENT: EVIDENCE FROM RANDOMLY ASSIGNED JUDGES 2 tbl.A2 (2017), <https://assets.aeaweb.org/asset-server/files/6277.pdf> [<https://perma.cc/NC6C-AQZZ>] (presenting summary statistics indicating that the release rate for white women was around 65%, while the release rate for Black women was around 58%); Stephen Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 SOC. PROBS. 222, 222–42 (2004) (analyzing pretrial release among a sample of felony defendants in the seventy-five most populous U.S. counties over the years 1990–1996 and finding that white women were more likely to be released than any other gender–racial/ethnic group).

¹⁸¹ For a thoughtful examination of racial disparity in income in the United States, see generally Raj Chetty, Nathaniel Hendren, Maggie R. Jones & Sonya R. Porter, *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, 135 Q.J. ECON. 711 (2020).

¹⁸² In this way, the 1984 Act can favor detaining wealthy defendants. See, e.g., *United States v. Boustani*, 932 F.3d 79, 82–83 (2d Cir. 2019) (upholding the district court's imposition of pretrial detention where the defendant frequently traveled internationally, lacked connections in the United States compared to his extensive foreign ties, and was extremely wealthy).

detained than non-Hispanic white defendants, and Black female defendants are significantly less likely to be detained than otherwise similar white female defendants. It argued that because federal detention decisions are quickly made, highly discretionary, and rarely reviewed, they are likely influenced by two potential behavioral responses. First, detention decisions are susceptible to bias, and the results are consistent with stereotyping that particularly harms minority men. This is perhaps because the Bail Reform Act directs judges to consider dangerousness, which is a persistent stereotype against men of color. Second, judges appear to be sensitive to some collateral consequences of detention, especially for female defendants who are parents. Third, for women defendants, it is possible that the disparity results reflect racial disparities in the decision to prosecute.

This Part considers the path ahead. Section V.A explores four potential federal reforms that could reduce federal pretrial detention and lessen disparity: considering costs in detention decisions, limiting or prohibiting the consideration of dangerousness, expanding appellate review, and narrowing or eliminating the Bail Reform Act's presumptions of detention. Section V.B applies the Article's empirical findings to the states, where nearly all efforts to reform bail have focused. Section V.B argues that the federal experience provides important lessons for these state-level reform efforts. Most importantly, states should understand that eliminating cash bail—while a crucial first step in reforming pretrial detention—is likely to be insufficient to address race disparities in pretrial detention, especially if a state replaces its cash-bail system with a regime that permits preventative detention on the basis of dangerousness.

A. Potential Federal Reforms

It is difficult to avoid the conclusion that the federal criminal system overdetains people pending trial. The federal system detains people at an extraordinary rate, and federal defendants who are released very rarely commit new crimes or fail to appear in court. Even more disturbing, this liberty deprivation is unequally imposed across the population, which—given pretrial detention's immediate and long-term consequences—likely perpetuates inequality throughout the federal criminal process and beyond. This Section evaluates the benefits and drawbacks of four possible reforms that Congress might implement to improve federal pretrial detention.

1. Considering Costs

Congress could reform pretrial detention by amending the Bail Reform Act to explicitly allow judges to consider the costs that pretrial detention imposes on individual defendants, their dependents, their communities, and the public at large. Pretrial detention is extremely costly. In addition to the

fiscal costs borne by the public (it costs nearly \$27,000 per year to detain a person pending trial in the federal system), there is growing evidence of the costs that pretrial detention imposes on defendants themselves, their dependents, and their local communities.¹⁸³ But these costs are not expressly incorporated into the statutory balancing the Bail Reform Act requires. There is no sound reason why the arbiters of pretrial detention decisions should not consider those costs. As described in Section IV.C, it is likely that some judges already do for some defendants, either consciously or implicitly. Making the directive explicit, however, would allow defense attorneys to present direct evidence as to costs, and judges could expressly base rulings on that evidence.

The Department of Justice very recently embraced accounting for detention's potential risks in the context of the novel coronavirus epidemic. In an April 6, 2020 memorandum to all federal prosecutors entitled "Litigating Pre-Trial Detention Issues During the COVID-19 Pandemic," Attorney General William Barr instructed federal prosecutors to weigh the risks of COVID-19 against the defendant's risk of dangerousness and flight in making detention recommendations. He instructed prosecutors:

[Y]ou should now consider the medical risks associated with individuals being remanded into federal custody during the COVID-19 pandemic. Even with the extensive precautions we are currently taking, each time a new person is added to a jail, it presents at least some risk . . . That means you should consider not seeking detention to the same degree we would under normal circumstances—specifically, for those defendants who have not committed serious crimes and who present little risk of flight (but no threat to the public) and who are clearly vulnerable to COVID-19 under CDC Guidelines. In this analysis, the risk of flight and seriousness of the offense must be weighed against the defendant's vulnerability to COVID-19.¹⁸⁴

Barr's memorandum justified the instruction to consider public-health risk—not a traditional factor in determining detention—by citing 18 U.S.C.

¹⁸³ *Supervision Costs Significantly Less than Incarceration in Federal System*, U.S. CTS. (July 18, 2013), <https://www.uscourts.gov/news/2013/07/18/supervision-costs-significantly-less-incarceration-federal-system> [<https://perma.cc/36L7-W9KX>] (reporting that in 2012, pretrial detention cost \$26,654.69 annually per person while pretrial supervision cost \$2,643.50 annually per person). For a more expansive accounting of pretrial detention's costs, see Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 5–7 (2017); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1417–28 (2017).

¹⁸⁴ Memorandum from Att'y Gen. William Barr to All Heads of Dep't Components and All U.S. Att'ys 2 (Apr. 6, 2020) [hereinafter Barr Memorandum], <https://www.justice.gov/opa/press-release/file/1001886/download> [<https://perma.cc/6Q3M-WAML>].

§ 3142(e)(3), which allows judges to consider the person’s “physical and mental condition” in determining release.¹⁸⁵

Several progressive prosecutors around the United States have recently begun sharing cost information with state sentencing judges.¹⁸⁶ For example, Philadelphia District Attorney Larry Krasner, a reformist prosecutor elected in 2018, instructed the prosecutors in his office to inform judges how much recommended prison sentences would cost.¹⁸⁷ Philadelphia prosecutors are encouraged to compare the costs of a year of incarceration—around \$42,000 in Pennsylvania—with the salary of a starting teacher, police officer, or social worker.¹⁸⁸

But the costs of pretrial detention are not just the fiscal costs paid by the government.¹⁸⁹ They also include costs borne by the defendant, their dependents, and their local communities. These costs include those associated with loss of income, interruption of housing, job loss, and other immediate collateral consequences for the defendant.¹⁹⁰ Costs also include the consequences of detention for minor children or others for whom the defendant is a caregiver. Costs also incorporate the additional harms of pretrial detention that recent empirical scholarship has documented—the increased probability of conviction and sentence length and the long-term, employment-related consequences of detention.¹⁹¹

Of course, instructing judges to explicitly consider costs raises many questions. Does the defendant have to prove their costs? If so, how will defendants be expected to do so? How should judges weigh costs against the “benefits” of detention (reduced risk of flight and dangerousness)? Although directing judges to consider costs would entail some vagaries, it is hard to

¹⁸⁵ *Id.*

¹⁸⁶ See, e.g., Samantha Michaels, *Should Judges Have to Weigh the Price Tag of Sending Someone to Prison?*, MOTHER JONES (Jan. 8, 2020), <https://www.motherjones.com/crime-justice/2020/01/judges-cost-incarceration-district-attorney-biberaj-krasner-boudin/> [<https://perma.cc/NR86-PDY8>] (discussing policies implemented by some progressive prosecutors’ offices to require prosecutors to include the cost with their recommended sentence).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* The article also notes that Chesa Boudin, San Francisco’s recently elected District Attorney, plans to introduce a similar policy after taking office in January 2020. *Id.*

¹⁸⁹ See Austin, *supra* note 11, at 53; *supra* note 11 and accompanying text.

¹⁹⁰ See Austin, *supra* note 11, at 53; *supra* note 11 and accompanying text; see also Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty* 6 (Va. Pub. L. & Legal Theory Rsch. Paper No. 2021-14, 2021), <https://papers.ssrn.com/a=3787018> [<https://perma.cc/K8BP-SZU6>] (presenting survey evidence suggesting “that people view incarceration as an incredibly harmful experience” and that most would prefer being a victim of a crime “over even short jail stints,” which suggests that pretrial detention is extremely costly to detained people).

¹⁹¹ See *supra* notes 12–14 and accompanying text.

imagine that these vagaries are any more amorphous than the current statutory scheme, as described in Section I.A.

2. *Prohibiting or Limiting Consideration of Dangerousness*

As described in Part I, dating back to at least the thirteenth century, bail was designed to ensure that defendants appeared in court. The idea of detaining people pending trial based on the risk that they would present danger to the community is a fairly recent development—first codified in federal law in 1984. As scholars have found, pretrial detention decision-making today appears to focus *more* on dangerousness than risk of nonappearance.¹⁹² In a further step away from bail’s original aims, “dangerousness” has been expansively conceptualized to include the risk of being rearrested while on release—even for crimes that are not dangerous.¹⁹³

Some legal scholars argue that the risk of future dangerousness does not justify detaining defendants pending trial on constitutional, moral, or practical grounds.¹⁹⁴ The federal government, however, takes the opposite view. Barr’s recent memorandum relating to detention during the COVID-19 epidemic also emphasized detention’s important role in preventing danger, explaining:

We simply cannot agree to anything that will put the public at risk. COVID-19 presents real risks, but so does allowing violent gang members and child predators to roam free. When you believe a defendant poses a risk to the safety of any person or the community at large, you should continue to seek [detention] as zealously today as you would have before the pandemic began, in accordance with the [1984 Act’s] plain terms. Protecting the public from criminals is our *paramount obligation*.¹⁹⁵

¹⁹² See Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 494 (2018) (finding that the focus of bail reform has been limiting pretrial detention to defendants who pose a risk to public safety); Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 163 (2013) (finding that judges appear to make release decisions based on defendants’ perceived risk of violent crime more than risk of flight); Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 546–47 (2012) (noting that judges relied more on predictions of dangerousness than on flight risk when determining whether to detain or release a defendant).

¹⁹³ For example, the legislative history of the Bail Reform Act seems to suggest that lawmakers equated *dangerousness* with the risk of *rearrest*. See S. REP. NO. 98-225, at 6 (1983) (stating that the “broad base of support for giving judges the authority to weigh risks to community safety in pretrial release decisions is a reflection of the deep public concern, which the Committee shares, about the growing problem of crimes committed by persons on release,” and citing studies estimating the rates at which defendants who were released pending trial were rearrested).

¹⁹⁴ See generally Mayson, *supra* note 192, at 518–56 (arguing that there are no constitutional, practical, or moral justifications for the state to restrain a defendant’s liberty more than that of an equally dangerous nondefendant).

¹⁹⁵ Barr Memorandum, *supra* note 184, at 1.

As Section IV.A suggested, a detention framework that centers around “dangerousness,” interpreted broadly to mean risk of rearrest, is likely to land unequally. Dangerousness analyses are likely to trigger stereotypes against Black men. And unwarranted racial disparities in policing will translate into increased risk of being rearrested, perpetuating racial disparities in detention. One way Congress could constrain the way judges evaluate dangerousness would be to amend the Bail Reform Act to restrict preventive detention to certain specified and narrow situations. For example, in its recent bail reform bill, the Illinois Pretrial Fairness Act, the Illinois legislature voted to abolish cash bail in the state.¹⁹⁶ Unlike the federal Bail Reform Act, the Illinois bill does not authorize broad preventive detention. Instead, the bill allows a judge to detain defendants pending trial only if they pose a “specific, imminent threat of serious physical harm to an identifiable person or persons,” and are charged with certain offenses that include certain forcible felony offenses, stalking offenses, domestic abuse offenses, and firearms offenses, or if they have a “high likelihood of willful flight.”¹⁹⁷

Moreover, refocusing detention decisions on the risk of intentional flight—the original animating purpose of bail—could also reduce federal detention. Only 1% of federal defendants fail to make court appearances.¹⁹⁸ In the information age, it is difficult for a person to completely abscond, and interventions as simple as text-messaging reminders have proven effective in reducing failures to appear.¹⁹⁹

3. *Expanding Appellate Review*

Congress might also consider amending the standard of appellate review of detention decisions as a way to cabin judicial discretion.²⁰⁰ For reputational and workload reasons, district and magistrate judges often seek to avoid reversal from appellate courts.²⁰¹ Because district and magistrate

¹⁹⁶ The Illinois Pretrial Fairness Act, H.B. 3653, 101st Gen. Assemb. (Ill. 2021), was passed on January 13, 2021 and was signed by the Governor on February 22, 2021.

¹⁹⁷ *Id.* §§ 110-4, 110-6.1 (listing offenses)

¹⁹⁸ See COHEN, *supra* note 91, at 13.

¹⁹⁹ See BRICE COOKE, BINTA ZAHRA DIOP, ALISSA FISHBANE, JONATHAN HAYES, AURELIE OUSS & ANUJ SHAH, USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES 4 (2018), <https://www.ideas42.org/wp-content/uploads/2018/03/Using-Behavioral-Science-to-Improve-Criminal-Justice-Outcomes.pdf> [<https://perma.cc/CEG9-7KCA>] (finding that reminder messages could reduce failure to appear by 26%).

²⁰⁰ See Joshua B. Fischman & Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, 40 J. LEGAL STUD. 405, 406–07 (2011) (finding that changes in the standard of appellate review of federal sentencing decisions affects lower court judges).

²⁰¹ In the sentencing context, for example, research has found that federal district judges were less likely to depart from the U.S. Sentencing Guidelines after Congress created *de novo* appellate review of

judges enjoy broad discretion in the pretrial context, a possible reform would be to impose stringent appellate review standards for detention decisions. It is possible that such stringency would cause district and magistrate judges to narrow the circumstances in which they will depart from the Bail Reform Act's preference for release and order detention.

A natural experiment suggests that such an approach is unlikely to reduce disparity. The federal circuit courts are split on the standard of review to apply when reviewing detention decisions, with some federal circuit courts giving more deference than others.²⁰² To check if appellate review is successful at reducing racial disparities, Appendix Table A4 assesses whether disparities are reduced in those circuits with more stringent appellate review standards. Unfortunately, this is not the case. There appears to be no correlation between appellate review standards and levels of disparity. For example, as Table A4 demonstrates, Black–white disparity among men is

such sentences. Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker*, 89 N.Y.U. L. REV. 1268, 1290 (2014).

²⁰² The Second, Fourth, and D.C. Circuits give substantial deference to a district court's findings by applying a "clearly erroneous" standard. *See, e.g.*, *United States v. Sabhnani*, 493 F.3d 63, 75 (2d Cir. 2007) ("As a rule, we apply deferential review to a district court's order of detention and will not reverse except for clear error . . ."); *United States v. Williams*, 753 F.2d 329, 333 (4th Cir. 1985) (applying the "clearly erroneous" standard to reverse that the district court's factual findings and subsequent decision); *United States v. Manafort*, 897 F.3d 340, 345–46 (D.C. Cir. 2018) (noting that although the standard of review remains an open question for the court, both parties agreed that the appropriate standard was clear error). The First, Third, and Seventh Circuits give the least deference by conducting an "independent review" of the decision and the record, giving only some deference to the district court's determination. *See, e.g.*, *United States v. O'Brien*, 895 F.2d 810, 814 (1st Cir. 1990) (concluding that the court will adopt the review standard based on Congress's intent for "the appellate courts to independently review all detention decisions, giving deference to the determination of the district court"); *United States v. Delker*, 757 F.2d 1390, 1399 (3d Cir. 1985) ("An independent determination by the appellate court would seem appropriate . . ."); *United States v. Portes*, 786 F.2d 758, 762 (7th Cir. 1985) ("We join the majority of the circuits in adopting the so-called 'independent review' standard."). The Fifth Circuit uses the traditional "abuse of discretion" standard. *See, e.g.*, *United States v. Fortna*, 769 F.2d 243, 250 (5th Cir. 1985) (explaining that as an appellate court, the "supported by the proceedings below" standard of review is appropriate). The Sixth, Eighth, Ninth, and Eleventh Circuits apply a slightly more stringent level of review than abuse of discretion by using the "clearly erroneous" standard to facts found by the district court, but a more independent review of mixed questions of law and fact. *See, e.g.*, *United States v. Hazime*, 762 F.2d 34, 37 (6th Cir. 1985) (applying the "clearly erroneous" standard for factual findings and applying a more independent standard for "reviewing mixed questions of law and fact and the legal conclusions"); *United States v. Maull*, 773 F.2d 1479, 1487 (8th Cir. 1985) ("We believe that . . . the clearly erroneous standard should be applied to factual findings made by the district court However, conclusions and reasoning relating to the ultimate questions flowing from such factual considerations . . . should be the subject of independent review."); *United States v. Motamedi*, 767 F.2d 1403, 1406 (9th Cir. 1985) (holding that the applicable standard of review is "clearly erroneous" standard for factual findings "coupled with" an "independent examination of the facts, the findings, and the record"); *United States v. Hurtado*, 779 F.2d 1467, 1470–72 (11th Cir. 1985) (explaining why the court adopts the "clearly erroneous" standard to factual findings and a more independent standard of review for mixed questions of law and fact).

highest in the First, Second, and Third Circuits. Hispanic–white disparity among men is highest in the First, Third, and Eighth Circuits. The First and Third Circuits—where disparity is the highest for Black and Hispanic men—has the most stringent standard of review. Black–white disparity is lowest in the Fifth, Sixth, Eleventh, and D.C. Circuits, while Hispanic–white disparity is lowest in the Fifth, Ninth, and Eleventh Circuits. The Fifth and Eleventh Circuits—where disparity is lowest for Black and Hispanic Men—use a less stringent standard of review.

There could be several reasons for the lack of correlation between disparity and standards of review. One is that there are very few circuit court appeals of detention orders.²⁰³ A possible solution might be to impose mandatory appeals of detention orders, but this would likely prove unworkable given the volume of detention decisions.²⁰⁴ Appeals courts would be overwhelmed if they had to deal quickly with a large volume of appeals and conduct an independent review of each detention decision, especially because the appeals would have to be handled immediately because the detention represents an ongoing harm. Moreover, as described above, much of the harm from detention happens within the first days or weeks of detention. Thus, an appeal is unlikely to serve as a substantial check on lower court judges’ discretion. This may be a reason why there are so few detention appeals in the first place.

A second reason for the low number of appeals is that there is already one level of built-in review. Since most detention decisions are made by magistrate judges, a defendant can appeal the detention decisions to district judges. Defendants may believe that they are unlikely to succeed on appeal to a circuit court if they have already lost twice in the district court, especially because district court review of magistrate judge detention decisions are *de novo* in all circuits that have considered the question.²⁰⁵ Moreover, defendants who appeal their detention to a federal appellate court will have already been subject to detention for several weeks or months and suffered

²⁰³ In 2019, for example, a Westlaw search produced twenty-seven opinions (nine of which were published opinions) of the federal circuit courts that cite the Bail Reform Act. Due to the unique threat the COVID-19 pandemic poses to people held in carceral custody, litigation around federal pretrial detention has increased. In 2020 there were fifty-one opinions of federal circuit courts that cite the Bail Reform Act, eight of which were published opinions.

²⁰⁴ In 2018, for example, federal courts filed around 89,000 criminal cases per year. ADMIN. OFF. OF THE U.S. CTS., CRIMINAL STATISTICAL TABLES FOR THE FEDERAL JUDICIARY tbl.D (2018), <https://www.uscourts.gov/statistics/table/d/statistical-tables-federal-judiciary/2018/12/31> [<https://perma.cc/DZ7S-GMFV>].

²⁰⁵ See *supra* note 114.

the concomitant harms. Thus, imposing further review does not appear to be a viable avenue for reducing racial disparities.

4. *Narrowing the Detention Presumptions*

Some have argued that Congress should amend the Bail Reform Act's presumptions of detention under § 3142(e) because the presumptions are overbroad, operating in many cases where a defendant is unlikely to present danger to the community or a risk of flight.²⁰⁶ In particular, a presumption applies to any defendant charged with a drug offense for which the statutory maximum sentence is ten years or more—which encompasses “virtually all federal drug offenses.”²⁰⁷ In September 2020, Senators Chris Coons (Democrat of Delaware), Dick Durbin (Democrat of Illinois), and Mike Lee (Republican of Utah) introduced a bill that would eliminate the presumption of detention for drug offenders.²⁰⁸ Will amending or mitigating the presumption affect detention rates and disparity? The answers are “maybe” and “probably not.” Some have asserted that being subject to a detention presumption is an “almost de facto detention order,”²⁰⁹ but this characterization seems overblown. For male defendants in the data, around 74% of presumption-defendants are detained pending trial, while around 55% of nonpresumption-defendants are detained.

Even if *all* of this difference could be attributed to the presumption (which would ignore all differences in offense characteristics and criminal records between the two groups), this would suggest that the presumption was responsible for a 19 percentage-point increase in the probability of detention. For female defendants, the presumption is associated with a larger increase in the detention rate, with 55% of female presumption-defendants in the data detained and 24% of female nonpresumption-defendants detained. But it is similarly likely that at least some (and perhaps nearly all) of this gap

²⁰⁶ *Administration of Bail*, *supra* note 89, at 3.

²⁰⁷ *Id.* at 16. Even more absurdly, the presumptions of detention are unmoored from dangerousness and flight risk. For example, a federal defendant charged with murder or sexual assault will not be subject to a presumption of detention under the Bail Reform Act, but a federal defendant charged with a low-level, nonviolent drug offense could be. *See also* Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 233 (2015) (arguing that “there is weak evidence to support the assumption drugs cause violence”).

²⁰⁸ S. 4549, 116th Cong. (2020). The same senators plan to introduce a bill with the same title this session. Press Release, Dick Durbin, U.S. Sen., Durbin, Lee, Coons to Introduce Bipartisan Smarter Pretrial Detention for Drug Charges Act (Feb. 11, 2021), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-lee-coons-to-introduce-bipartisan-smarter-pretrial-detention-for-drug-charges-act> [<https://perma.cc/TSC9-YQZ3>].

²⁰⁹ Austin, *supra* note 11, at 61.

is explained by differences in the offense severity and criminal records of the defendants facing the presumption and those not.²¹⁰

While amending the presumptions contained in § 3142(e) is a deserving mission, the empirical evidence presented in Section IV.B.1 shows that it is unlikely that reforming—or even eliminating—the presumption of detention for drug offenses would do much to reduce racial disparity in pretrial detention. This is because when the regression analysis controls for whether the defendant is subject to the presumption, the estimates of race-based disparity barely change. If racial disparity in the application of the presumptions was generating racial disparity in detention, including this control would reduce the estimates of racial disparity, but this is not what Section IV.B.1 observes. Thus, addressing the presumptions of detention could plausibly lead to a reduction in federal detention *overall*, but it seems unlikely to meaningfully address detention *disparity*.

B. Lessons for States

As scholars, advocates, and policymakers have sought to reform pretrial detention in the states that currently rely on cash bail, a central debate has emerged. Many jurisdictions have recently begun to use actuarial tools to try to predict a defendant's likelihood of complying with the terms of release, both in conjunction with or as a substitute for cash bail.²¹¹ For the remainder of this Article, I call such tools *risk-assessment instruments*. A risk-assessment instrument uses data about an arrestee, such as their age, criminal record, employment status, charged conduct, and other factors that are thought to predict compliance with the terms of release, to generate a risk score that reflects the algorithm's prediction about the probability that the arrestee will comply with the terms of release—typically these include appearing in court and not being rearrested during the period of pretrial release. Some risk-assessment instruments also use subjective factors, like the person's "demeanor" (as reported by the employee entering the data) or personality and attitude questions. I am not aware of any risk-assessment instrument that uses race as an input.²¹²

²¹⁰ For example, in the data, female defendants who are coded as likely to be subject to a detention presumption have an average base offense level of 31.2 and an average of 2.7 criminal history points. In contrast, female defendants who are coded as not likely to be subject to a detention presumption have an average base offense level of 13.2 and 2.0 criminal history points.

²¹¹ Madeleine Carlisle, *The Bail-Reform Tool that Activists Want Abolished*, ATLANTIC (Sept. 21, 2018), <https://www.theatlantic.com/politics/archive/2018/09/the-bail-reform-tool-that-activists-want-abolished/570913/> [<https://perma.cc/L7DW-D8N8>] (reporting that forty states use the PSA).

²¹² For a summary of the risk factors used in several risk-assessment instruments, see Mayson, *supra* note 192, at 512.

Risk assessment already plays an opaque, but likely small, role in federal detention decisions. Since 2010, the federal courts have employed a risk-assessment instrument called the Pretrial Risk Assessment Instrument (PTRA).²¹³ The PTRA was implemented with the expectation that its use would lead to increases in pretrial release for defendants receiving low or moderate risk scores.²¹⁴ There is little publicly available information about how the PTRA is used by federal magistrate judges, and a search of federal district court dockets reveals scant evidence of judges using PTRA assessments in making detention decisions.²¹⁵ Instead, to the extent that PTRA assessments influence detention decisions, it is likely via the recommendations of pretrial-services officers (PSOs),²¹⁶ who prepare PTRA assessments and submit detention and release recommendations to the court. Although a 2018 report produced by the federal Probation and Pretrial Services Office stated that “75 percent of PTRAs are being completed before the judicial decision on pretrial release,”²¹⁷ only five federal judicial districts include the PTRA score in the PSO’s report.²¹⁸ Anecdotal evidence also suggests that PTRA results are often not communicated to the judge.²¹⁹ The fact that detention rates have increased since the PTRA was implemented also suggests that it is not especially influential.²²⁰ Judges might disregard PTRA assessments because judges were not involved in the PTRA’s creation and because PTRA assessments are not directly connected to the Bail Reform Act.²²¹

²¹³ Thomas H. Cohen & Amaryllis Austin, *Examining Federal Pretrial Release Trends over the Last Decade*, 82 FED. PROB. 3, 5 (2018).

²¹⁴ *Id.* at 10.

²¹⁵ See, e.g., *United States v. Walker*, No. 20-10028-20-EFM, 2020 U.S. Dist. LEXIS 56640, at *6 (D. Kan. Mar. 30, 2020) (“The Court does not consider the PTRA score.”); *United States v. Dokku*, No. 3:18-cr-341-S (1), 2020 U.S. Dist. LEXIS 74847, at *14, *16–17 (N.D. Tex. Apr. 28, 2020) (declining to alter release conditions even though defendant was assessed at the lowest PTRA level).

²¹⁶ See Cohen & Austin, *supra* note 213, at 6.

²¹⁷ Thomas H. Cohen, Christopher T. Lowenkamp & William E. Hicks, *Revalidating the Federal Pretrial Risk Assessment Instrument (PTRA): A Research Summary*, 82 FED. PROB. 23, 29 (2018).

²¹⁸ Cohen & Austin, *supra* note 213, at 9.

²¹⁹ FED. JUD. CTR., OFF PAPER EPISODE 2, at 1, 16 (2017), <https://www.fjc.gov/sites/default/files/off-paper-episode-2.pdf> [<https://perma.cc/49N4-E7XH>]. As federal defender Kathy Nester explained, “[T]he only person who really was even aware of the PTRA scores or the PTRA risk assessment results was the probation officer. And in our district, our probation officer wasn’t even conveying those risk analysis [sic] to the court. The court was not aware of the PTRA or what it meant.” *Id.*

²²⁰ Cohen & Austin, *supra* note 213, at 10 (finding that release rates decreased after the implementation of the PTRA even though it was deployed with the hope that it “might lead to an increase in release rates for defendants classified as either low . . . or moderate risk . . . by the PTRA”).

²²¹ Brandon L. Garrett, *Federal Criminal Risk Assessment*, 41 CARDOZO L. REV. 101, 109–10 (2019).

State legislators have turned to risk-assessment instruments to fill the void left when cash bail is eliminated. For example, in September 2018, California attempted to become the first state to fully eliminate the use of cash bail, and the state’s new law provides for the use of risk-assessment technologies in deciding pretrial release.²²² The Public Safety Assessment (PSA), a risk-assessment tool developed by the Laura and John Arnold Foundation, is used in forty jurisdictions, including California.²²³ Then-Senator Kamala Harris (Democrat of California) and Senator Rand Paul (Republican of Kentucky) introduced a bail reform bill in 2017 that both promoted the use in state courts of “individualized, pretrial assessments that . . . measure the risk of flight and risk of anticipated criminal conduct posed by a defendant while on pretrial release,” but also insisted that such tools “not result in unwarranted disparities on the basis of any classification protected under Federal nondiscrimination laws or the nondiscrimination laws of the applicable State.”²²⁴

Critics argue, however, that these two goals are incompatible—that is, that a risk-assessment instrument that relies on inputs that are themselves the product of discrimination will necessarily generate discriminatory predictions. For example, consider the PSA. Although the PSA does not explicitly consider race as an input into its prediction algorithm, five of the nine factors the PSA uses to generate a prediction about a defendant’s post-release behavior are based on the arrestee’s criminal history.²²⁵ To the extent that a person’s criminal history is a product of prior discrimination, an algorithmic tool that relies on criminal history to make predictions will likely generate biased results.

²²² In 2018, the California legislature passed, and the Governor signed into law, Senate Bill 10, which eliminated cash bail. The law also established “Pretrial Assessment Services” that would “assess the risk level of persons charged with the commission of a crime, report the results of the risk determination to the court, and make recommendations for conditions of release of individuals pending adjudication of their criminal case.” S.B. 10, 2017–2018 Leg., Reg. Sess. § 4 (Cal. 2018) (amending CAL. PENAL CODE § 1320.7(g)). In November 2020, however, California voters rejected Proposition 25, which overturned the law. *See* McGreevy, *supra* note 32.

²²³ Carlisle, *supra* note 211.

²²⁴ Pretrial Integrity and Safety Act of 2017, S. 1593, 115th Cong. § 3032(c)(2)(A)(i)–(ii) (2017).

²²⁵ The PSA considers nine factors to generate a prediction about whether an arrestee is likely to fail to appear or be rearrested if released pending trial. The nine factors are as follows: age at current arrest; current violent offense; pending charge at the time of the offense; prior misdemeanor conviction; prior felony conviction; prior violent conviction; prior failure to appear in the past two years; prior failure to appear older than two years; and prior sentence of incarceration. LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA 2, <https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/PSA-Risk-Factors-and-Formula.pdf> [<https://perma.cc/BL5M-NSDJ>].

Critics have reversed their support of some bail-reform proposals in the face of this potential problem. In response to California’s efforts to replace cash bail with risk-assessment technology, more than 100 civil rights organizations including the American Civil Liberties Union and the NAACP reversed their earlier support of the bill and released a joint statement condemning the use of risk-assessment instruments in determining pretrial release.²²⁶ They premised their opposition on the grounds that “automated predictions based on [biased] data—although they may seem objective or neutral—threaten to further intensify unwarranted discrepancies in the justice system and to provide a misleading and undeserved imprimatur of impartiality for an institution that desperately needs fundamental change.”²²⁷ In November 2020, California voters overturned California’s bail-reform law.²²⁸

Critically, most of the debate around risk assessment in pretrial detention centers around the tools themselves. Proponents of risk assessment often argue that these tools either can or do reduce disparity.²²⁹ Others argue that risk-assessment instruments work best as a screening tool to identify defendants who pose little risk of violating the terms of release and thus can be released right away. Another potential benefit of risk assessment, motivated by behavioral economics, is that these algorithmic tools might give cover to judges who are risk-averse about releasing defendants.

On the other hand, scholars have put forth serious legal and normative arguments against the use of risk-assessment instruments in legal decision-making. The use of risk assessment in criminal cases raises important questions relating to equal protection, due process, and even intellectual-property law.²³⁰ But perhaps the most intense criticism of risk-assessment

²²⁶ LEADERSHIP CONF. EDUC. FUND, THE USE OF PRETRIAL “RISK ASSESSMENT” INSTRUMENTS: A SHARED STATEMENT OF CIVIL RIGHTS CONCERNS 1, 10 (2018), <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf> [<https://perma.cc/7QW8-DUCJ>]; *see also* White, *supra* note 32 (reporting that “[t]he ACLU, NAACP and Human Rights Watch all abandoned their support” for California’s bail reform bill); *ACLU of California Changes Position to Oppose Bail Reform Legislation*, ACLU N. CAL. (Aug. 20, 2018), <https://www.aclunc.org/news/aclu-california-changes-position-oppose-bail-reform-legislation> [<https://perma.cc/ZZN5-XWB6>] (stating that “[a]fter further serious consideration, the ACLU of California has changed its position on the recently-amended SB 10 to oppose”).

²²⁷ LEADERSHIP CONF. EDUC. FUND, *supra* note 226, at 10.

²²⁸ *See supra* note 222.

²²⁹ *See* Cass R. Sunstein, *Algorithms, Correcting Biases*, 86 SOC. RSCH. 499, 499 (2019); Jon Kleinberg, Himabindu Lakkaraju, Jure Leskovec, Jens Ludwig & Sendhil Mullainathan, *Human Decisions and Machine Predictions*, 133 Q.J. ECON. 237, 241 (2017).

²³⁰ *See generally* John Villasenor & Virginia Foggo, *Artificial Intelligence, Due Process, and Criminal Sentencing*, 2020 MICH. ST. L. REV. 295 (proposing changes to the way algorithms are used in the criminal justice system to ensure due process); Rebecca Wexler, *Life, Liberty, and Trade Secrets:*

instruments is that they are likely to perpetuate racial disparity because they rely on variables that themselves might be the product of discrimination or structural racism, as described above.²³¹

The nascent empirical evidence, however, finds that the use of risk-assessment instruments does not have much effect on racial disparity.²³² At first look, these findings are astonishing given the intense public debate around risk assessment. But the authors of these studies understand that risk assessment does not exist in a vacuum—it is used (or ignored) by human decision-makers. In other words, the growing empirical literature around risk assessment suggests that risk-assessment instruments should not only be analyzed on their own terms, but also relative to their plausible alternatives.

For a jurisdiction seeking to eliminate cash bail, the most plausible alternative to a risk-assessment instrument is individual decision-making by judges. And even in jurisdictions that use risk assessment, the technology usually provides recommendations (not commands) to judges. Professors Megan Stevenson and Jennifer Doleac reach a similar conclusion, finding that risk assessment does not lead to reductions in incarceration in Virginia, despite evidence that judges rely on risk assessment in sentencing nonviolent offenders.²³³ The reason, Professors Stevenson and Doleac explain, lies in

Intellectual Property in the Criminal Justice System, 70 STAN. L. REV. 1343 (2018) (examining, in part, the implications of trade secret law on risk assessment tools used at sentencing); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014) (arguing that algorithmic tools violate equal protection principles by allowing for discriminatory criteria to be used in purportedly scientific forms); see also generally Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043 (2019) (arguing that equal protection doctrine is ill-equipped to address racial inequity in algorithmic tools used in criminal justice decision-making).

²³¹ Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/UD2S-SRDQ>] (analyzing risk predictions from COMPAS and arguing that the algorithm is biased against Black defendants); Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 237 (2015); Stephanie Lacambra, Jeremy Gillula & Jamie Williams, *Recidivism Risk Assessments Won't Fix the Criminal Justice System*, ELEC. FRONTIER FOUND. (Dec. 21, 2018), <https://www.eff.org/deeplinks/2018/12/recidivism-risk-assessments-wont-fix-criminal-justice-system> [<https://perma.cc/W974-AH9E>]. But see Sam Corbett-Davies, Emma Pierson, Avi Feller & Sharad Goel, *A Computer Program Used for Bail and Sentencing Decisions Was Labeled Biased Against Blacks. It's Actually Not That Clear.*, WASH. POST (Oct. 17, 2016, 4:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/17/can-an-algorithm-be-racist-our-analysis-is-more-cautious-than-propublicas/> [<https://perma.cc/QST5-7GGE>] (discussing that COMPAS may be biased depending on the standard of fairness applied).

²³² Megan T. Stevenson & Jennifer L. Doleac, *Algorithmic Risk Assessment in the Hands of Humans* 1, 2 (IZA Inst. Lab. Econ., Discussion Paper No. 12853, 2019).

²³³ See *id.* (finding that adoption of risk assessment in sentencing for nonviolent felony offenders and sex offenders had little effect on racial disparity in sentencing); Stevenson, *supra* note 34, at 309 (racial disparities remained constant within counties after Kentucky adopted risk assessment for pretrial release); CarlyWill Sloan, George Naufal & Heather Caspers, *The Effect of Risk Assessment Scores on Judicial*

how judges exercise discretion, particularly in sentencing young offenders. In Virginia, the risk-assessment algorithm frequently predicted young offenders to be at high risk of reoffending.²³⁴ But the algorithm did not understand that judges traditionally show leniency toward young offenders. Because judges have discretion to not follow the risk-assessment tool, Professors Stevenson and Doleac explain, they simply deviated in sentencing many young offenders.²³⁵

Any effort to reform bail should understand the promise and pitfalls of vesting the detention decision with human actors, as this Article shows. As a result, states should explicitly seek to address racial disparity. As a state that has recently eliminated cash bail, New Jersey's experience with bail reform is instructive. Until 2014, New Jersey used a pretrial release system that operated, in large part, by requiring arrestees to post money bail to secure release.²³⁶ The New Jersey constitution did not allow judges to detain a defendant based on danger to the community.²³⁷ New Jersey's cash-bail system—like all cash-bail systems—perpetuated poverty and inequality and imposed substantial unwarranted costs on individuals and the public. In response, in 2014, New Jersey amended its constitution and state law to create a pretrial detention system that broadly resembles the federal system.²³⁸ New Jersey now determines pretrial release based on an individualized evaluation of whether a defendant is a flight risk or presents a danger of committing a crime while on release. The goal of the reform was to “promote defendants’ liberty interests by significantly reducing the number of defendants held in jail before trial.”²³⁹ New Jersey also now uses

Behavior and Defendant Outcomes 1, 12 (IZA Inst. Lab. Econ., Discussion Paper No. 11948, 2018) (finding that the adoption of risk-assessment technology in a Texas county did not increase racial disparity in pretrial detention).

²³⁴ Stevenson & Doleac, *supra* note 232, at 3.

²³⁵ *Id.* at 4.

²³⁶ N.J. CTS., REPORT OF THE JOINT COMMITTEE ON CRIMINAL JUSTICE 18–19 (2014), <https://www.njcourts.gov/courts/assets/criminal/finalreport3202014.pdf?c=3qG> [<https://perma.cc/4KF6-LDRP>].

²³⁷ In 2014, New Jersey amended its constitution to permit preventive detention with New Jersey Senate Concurrent Resolution No. 128, § 1, which was approved at the general election on November 4, 2014. Before this amendment, the relevant constitutional provision did not allow preventive detention. S. CON. RES. 128, 216th Leg. (N.J. 2017).

²³⁸ N.J. CONST. art. I, § 11 (“All persons shall, before conviction, be eligible for pretrial release. Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person’s appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process.”).

²³⁹ N.J. CTS., *supra* note 236, at 3.

the PSA to provide judges with a prediction about whether an arrestee presents a low or high risk of noncompliance with the terms of release.²⁴⁰

The early results of New Jersey's bail reform found that the jail population decreased as a result of the reforms—fewer people are now detained pending trial than in the years before the reform. The effects of the reforms on racial disparity are more complicated, but mirror the findings contained in this Article. Black–white disparity among female arrestees fell after the law was implemented—Black women made up 44% of women held in detention before the legal change and 34% of women held in detention after, while white women became more represented in the jail population, increasing from 44% to 54% of women in the jail population after bail reform. Black–white disparity among men, however, did not budge. Black men made up 52% of male arrestees held in detention both before and after bail reform in New Jersey, leading the state's Administrative Office of the Courts to conclude that “[t]he overrepresentation of [B]lack males in the pretrial jail population remains an area in need of further examination by New Jersey's criminal justice system as a whole.”²⁴¹

New Jersey's experience with bail reform exemplifies the importance of directly focusing on reducing racial disparity in pretrial detention. As this Article demonstrates, racial disparities among men are likely to persist even if lawmakers eliminate cash bail. This Article also makes clear that policymakers must consider the unique challenges that are faced by Black and Hispanic *men*. I do not mean to suggest that Black women are not uniquely harmed by the criminal system, overrepresented relative to white women, and subject to disproportionate and unequal policing. But the intersectional results in this Article suggest that when it comes to pretrial detention, Black and Hispanic men are subject to a unique and cumulative disadvantage that typically characterizes intersectional critiques of single-axis conceptions of disparity. Those seeking to address this disadvantage must confront it head on.

²⁴⁰ CHLOE ANDERSON, CINDY REDCROSS, ERIN VALENTINE & LUKE MIRATRIX, MDRC CTR. FOR CRIM. JUST. RSCH., EVALUATION OF PRETRIAL JUSTICE SYSTEM REFORMS THAT USE THE PUBLIC SAFETY ASSESSMENT: EFFECTS OF NEW JERSEY'S CRIMINAL JUSTICE REFORM 2 (2019), https://www.mdrc.org/sites/default/files/PSA_New_Jersey_Report_%231.pdf [https://perma.cc/374A-DUHM].

²⁴¹ GLENN A. GRANT, ADMIN. OFF. OF THE N.J. CTS., Jan. 1–Dec. 31 2018 REPORT TO THE GOVERNOR AND THE LEGISLATURE 7 (2019), <https://njcourts.gov/courts/assets/criminal/2018cjrannual.pdf> [https://perma.cc/GDL9-JFE4].

APPENDIX A: DATA CONSTRUCTION

Matching Defendants

The data are matched between the Commission and LIONS datasets using an iterative matching process described here. The purpose of the matching process is to merge the two datasets into one cohesive dataset. The matching variables used for the process are as follows:

Federal judicial district	Length of probation imposed
Sentencing year	Gender
Sentencing month	Offense type
Sentencing day, where available ²⁴²	Substance type, where available
Months of incarceration imposed	Lead charge title in the U.S. Code
Days of incarceration imposed	Lead charge section in the
Length of supervised release imposed	U.S. Code

I designed the matching process to balance two competing challenges in selecting variables on which to match. First, with too few matching variables, the matching process is likely to generate excess many-to-many matches. In other words, as the number of matching variables decreases, it is increasingly difficult to *uniquely* identify matches. Second, with too many matching variables, however, the matching process is likely to miss matches because the LIONS data has many missing values and is potentially susceptible to human error. In other words, as the number of matching variables increases, it is increasingly difficult to identify *slightly imperfect* matches.

The iterative process begins by trying to find perfect matches: defendants in the two data sources who uniquely match on every matching variable. After noting these matches and removing them from each data source, the process gradually relaxes the number of variables upon which the defendants must match, in order to find as many matches as possible.

Representativeness of the Matched Sample

Table A1 compares variable means for defendants in the matched sample to defendants in the full Commission data. Overall, the matching process generated a matched sample that is very similar to the full universe.

²⁴² This variable is only available for defendants sentenced in fiscal years 2002 and 2003.

The Presumption of Detention

The presumption of detention variable is coded as 1 in the following cases: (a) convictions in cases involving drugs for which the statutory maximum is at least 120 months; (b) convictions under 8 U.S.C. § 924(c); (c) convictions under 18 U.S.C. § 956; (d) convictions under 18 U.S.C. § 2332(b); (e) convictions under U.S.C. Title 77; and (f) convictions for sex offenses.

APPENDIX B: ADDITIONAL TABLES

This Appendix presents additional robustness checks of the results. Table A1 compares variable means for defendants in the matched sample to defendants in the full Commission data to assess representativeness of the sample. Table A2 presents the results by parenthood status, which are used to generate Figure 5 in the Article. Table A3 presents results that control for narrow offense categories, the average income in the defendant's home zip code in 2013 (logged), and fixed effects for the defendant's home zip code. As described in Section II.B, the home zip code variable is taken from the LIONS data and contains many missing values. Moreover, I remove zip codes from the sample if they include fewer than twenty defendants. As a result, the sample used with zip code controls is much smaller than the data sample used in the Article. The results are largely robust to all of these controls with the exception of Hispanic–white disparity among female defendants, which is not statistically significant in any of the specifications.

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TABLE A1: REPRESENTATIVENESS OF THE SAMPLE

	Data Used in This Paper	Matched Sample	Commission Data
<i>Defendant Characteristics</i>			
Male	0.84	0.83	0.83
Black	0.40	0.39	0.40
Hispanic	0.11	0.12	0.11
Other Race/Ethnicity	0.05	0.05	0.05
White	0.45	0.44	0.44
Age (years)	36.9	36.9	36.8
Less than High School	0.29	0.30	0.30
HS Only	0.40	0.39	0.39
Some College	0.23	0.23	0.23
College Graduate	0.08	0.08	0.08
Fines Waived	0.92	0.92	0.91
Criminal History Category (1–6)	2.65	2.62	2.64
<i>Case Characteristics</i>			
Drugs Involved	0.42	0.41	0.42
Base Offense Level (0–47)	19.3	19.1	19.2
Weapon	0.132	0.13	0.14
Year Case Began (median)	2007	2007	-
Fiscal Year Sentenced (median)	2009	2009	2009
<i>Pretrial Detention Variables</i>			
Detention	0.60	0.59	0.59
Released on Conditions	0.30	0.31	0.31
Released on Recognizance	0.10	0.10	0.10
Observations	337,916	396,061	521,023

Note. All variables are indicator variables (0/1) except where units are noted.

TABLE A2: PARENTHOOD AND PRETRIAL DETENTION

	Is a Parent? (0/1)		Parents		Nonparents	
	Female (1)	Male (2)	Female (3)	Male (4)	Female (5)	Male (6)
Black	0.065*** (0.006)	0.134*** (0.005)	-0.028*** (0.007)	0.040*** (0.004)	-0.019** (0.007)	0.047*** (0.004)
Hispanic	0.103*** (0.008)	0.120*** (0.005)	0.011 (0.010)	0.054*** (0.006)	0.039*** (0.012)	0.057 (0.008)
Other Race	0.071*** (0.011)	0.063*** (0.009)	0.005 (0.011)	-0.003 (0.007)	-0.020 (0.013)	-0.010 (0.009)
Mean	0.593	0.591	0.322	0.645	0.351	0.643
Observations	54,282	278,408	31,541	164,184	21,302	113,520

Note. OLS regressions of whether a defendant was detained pretrial. ***: $p < 0.01$; **: $p < 0.05$; *: $p < 0.10$. Standard errors are clustered at the courthouse level and reported in parentheses. All regressions include controls listed in Table 2, column 6.

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TABLE A3: ROBUSTNESS

	Main Results	Narrow Offense Type Controls	Income (Zip) Control	Narrow Offense and Zip Code Income	Zip Code Fixed Effects
<i>Race and Gender</i>					
Male	0.089*** (0.003)	0.089*** (0.003)	0.089*** (0.004)	0.089*** (0.004)	0.100*** (0.006)
Black	0.028*** (0.003)	0.028*** (0.003)	0.027*** (0.004)	0.027*** (0.004)	0.011*** (0.004)
Hispanic	0.046*** (0.005)	0.046*** (0.005)	0.051*** (0.006)	0.050*** (0.006)	0.028*** (0.006)
Other Race/Ethnicity	-0.006 (0.006)	-0.005 (0.006)	-0.005 (0.007)	-0.004 (0.007)	-0.015*** (0.008)
<i>Race-Gender</i>					
Black and Female	-0.032*** (0.006)	-0.029*** (0.006)	-0.027*** (0.008)	-0.025*** (0.008)	-0.043*** (0.009)
Hispanic and Female	0.007 (0.008)	0.007 (0.008)	0.004 (0.011)	0.004 (0.010)	-0.024* (0.014)
Other Race and Female	-0.004 (0.008)	-0.007 (0.008)	-0.002 (0.010)	-0.004 (0.011)	-0.013 (0.015)
Black and Male	0.101*** (0.005)	0.101*** (0.005)	0.101*** (0.006)	0.101*** (0.005)	0.088*** (0.006)
Hispanic and Male	0.116*** (0.007)	0.117*** (0.007)	0.122*** (0.007)	0.122*** (0.007)	0.104*** (0.008)
Other Race and Male	0.053*** (0.007)	0.055*** (0.007)	0.053*** (0.009)	0.056*** (0.009)	0.047*** (0.009)
White and Male	0.060*** (0.003)	0.061*** (0.003)	0.060*** (0.004)	0.060*** (0.004)	0.063*** (0.006)
Observations	334,987	334,908	165,945	166,328	104,490

Note. OLS regressions of whether a defendant was detained pretrial on demographic and case characteristics and fixed effects as indicated. ***: $p < 0.01$; **: $p < 0.05$; *: $p < 0.10$. Standard errors are clustered at the courthouse level and reported in parentheses. In addition to controls indicated in the Table, all regressions include controls listed in Table 2, column 6.

TABLE A4: DISPARITY BY CIRCUIT: MALE DEFENDANTS

	Independent Review			Abuse of Discretion	Clear Error (Facts) + Independent Review (Law)					Clear Error	
	1st	3d	7th		5th	6th	8th	9th	11th	2d	4th
Black	0.082*** (0.007)	0.072*** (0.009)	0.033*** (0.011)	0.009 (0.010)	0.030*** (0.010)	0.045*** (0.008)	0.030*** (0.009)	0.025 (0.009)	0.083*** (0.013)	0.052*** (0.006)	
Hispanic	0.100*** (0.014)	0.102*** (0.015)	0.058*** (0.015)	0.021* (0.011)	0.082*** (0.010)	0.099*** (0.013)	0.026*** (0.009)	0.031* (0.017)	0.062*** (0.014)	0.092*** (0.017)	
Other Race	0.053 (0.031)	-0.021 (0.022)	0.018 (0.022)	-0.047** (0.020)	0.045* (0.022)	0.038** (0.014)	-0.030*** (0.009)	-0.023 (0.024)	-0.005 (0.018)	-0.005 (0.018)	
Mean	0.682	0.573	0.634	0.693	0.620	0.695	0.649	0.638	0.548	0.688	
Observations	7,077	19,375	21,065	22,905	38,818	27,855	31,287	34,578	23,419	33,584	

Note. OLS regressions of whether the defendant was detained pretrial. ***: $p < 0.01$; **: $p < 0.05$; *: $p < 0.10$. Standard errors are clustered at the courthouse level and reported in parentheses. All regressions include controls listed in Table 2, column 6.

