

Costly Confinement: The Direct and Indirect Costs of Pretrial Detention in Mexico

English-language Summary

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Introduction

All governments have limited resources, and all policy decisions have costs. Every dollar or peso a government spends on incarceration is a dollar or peso that cannot be spent on healthcare or policing or education. As the Open Society Justice Initiative report *Costly Confinement* demonstrates, the costs of pretrial detention in Mexico are painfully high—for the state and its citizens in general, and for detainees and their families in particular. Moreover, the true cost of pretrial detention is often hidden, because the state counts only the direct costs of housing and feeding pretrial detainees and overlooks indirect costs such as the lost productivity and reduced tax payments of pretrial detainees who could have continued working if they were released before trial. Assessing the true costs of pretrial detention requires considering the social programs that could be funded with money that is currently being spent in locking up large numbers of people who pose little threat to society and who by law must be considered innocent. When the full costs of pretrial detention in Mexico are calculated, it becomes clear that alternatives are needed.

In Mexico, the use of pretrial detention—holding presumably innocent suspects in jail until and throughout their trial—is widespread, rigid, and excessive. For decades, pretrial detention has been the rule rather than the exceptional measure it is intended to be. The use of pretrial detention in Mexico is mandatory for persons charged with a wide range of crimes defined as “grave.” Departing widely from established international standards, Mexican law (aside from a few promising exceptions in reform-oriented states) compels judges to apply pretrial detention purely on the basis of the crime with which a defendant has been charged; no other factors may be considered.

In respect to less serious or “non-grave” offenses that carry possible prison terms, Mexican courts have the discretion to either release or detain a defendant pending trial. Even where pretrial release is possible, however, the lack of “middle-ground” alternatives to detention or unconditional release discourages many judges from allowing accused persons to return to their communities. Mexico’s legal system also sets onerous hurdles for financial bail, severely restricting the possibility of pretrial release for the indigent. For many accused, inadequate access to counsel vastly increases the chances of being detained.

Mexico’s pretrial detention data are shocking. The country’s pretrial detention population grew from 54,000 in 1998 to 91,000 in 2008—an increase of 67 percent over 10 years. The number of pretrial detainees, measured as a percentage of the general population, doubled over the same period, part of a decade-long trend in Mexico toward a much higher volume of incarceration.

In 2004, the Open Society Justice Initiative began to work on pretrial detention reform in Mexico, seeking to reduce the excessive and irrational use of pretrial detention by: (i) demonstrating the utility of pretrial services units that can help evaluate on a case-by-case basis the risks posed by release and supervise individual compliance with release conditions; (ii) raising awareness among government officials, the media, and the general public of the costs and other detrimental consequences of pretrial detention; and (iii) promoting a sustained government commitment to rights-based pretrial detention reform.

The Justice Initiative does not advocate for the abolition of pretrial detention in Mexico. Unlike, for example, cruel and unusual punishment or torture, pretrial detention does not, by itself, constitute a human rights violation. International human rights norms recognize the need for pretrial detention, provided it is applied fairly, rationally, and sparingly.

Benefits of an Inclusive Cost Analysis

Since 2008, the Justice Initiative has collaborated with local research experts to analyze the economic consequences of Mexico's pretrial detention laws and practices. The resulting report, *Costly Confinement*,¹ documents both the direct and indirect (or "hidden") costs of pretrial detention in Mexico as borne by the state, detainees and their families, and the general public. This summary presents for an English-speaking audience the principal findings and recommendations of that report.

Any society's public resources are of necessity limited. Every sum spent on pretrial detention represents an opportunity cost: a peso or dollar that could have been allocated elsewhere. Money spent on pretrial detention can be seen as resources which the state, an individual detainee and his family, or the general community could have used differently—on, for example, healthcare, education, or for that matter, more police on the streets. The goal of the Justice Initiative research is to determine the size and nature of this opportunity cost.

It is difficult to make a rational policy decision without an accurate sense of the economic cost of the policy in comparison to alternatives.² Yet, traditionally, the cost of pretrial detention (as publicly reported by governments) is calculated solely by adding the state's direct expenses accrued in accommodating, feeding, and caring for pretrial detainees. No effort is made to calculate the larger, indirect costs to society and the state of lost productivity, reduced tax payments, or diseases transmitted from prison to the community when detainees are eventually released, to name just a few examples. The traditional approach to calculating the costs of pretrial detention is thus both short-sighted and misleading.

Of course, states can attempt to reduce the costs of pretrial detention by squeezing ten detainees into a cell designed for four, supplying little or low quality food, and cutting

¹ Guillermo Zepeda (with contributions by Miguel La Rota), *La prisión preventiva en México: Dimensiones, características, costos, alternativas*, New York: Open Society Justice Initiative, 2009.

² Of course, government policies should not be judged on cost alone. Some government policies or services are considered so essential that almost any price must be borne. Some policies may be problematic for reasons other than cost: for example, because they entail serious rights violations and should be discarded even if they are relatively inexpensive and crudely effective. Frequent and lengthy pretrial detention implies significant rights violations; however, this paper focuses solely on the cost arguments against a policy of common pretrial detention. The effectiveness of policies is yet another crucial element in decision making, and the evidence from several Mexican jurisdictions suggests that pretrial detention is overwhelmingly used for relatively simple, non-violent offenses, and is not dispensed according to an assessment of the risk posed by an individual on release. At least one bail supervision program, in the Mexican state of Nuevo Leon, appears to have demonstrated that a much less costly alternative can be effective in ensuring that defendants get to trial without incident. See: Javier Carrasco, *Renace: Un modelo Mexicano de supervisión de fianzas*, Renace, Nuevo Leon, 2005, available at <<http://www.renace.org.mx/>>.

back on security and medical care. Such practices significantly reduce the marginal cost of pretrial detention. And yet, by skimping on expenses for the maintenance of pretrial detention facilities and the care of inmates, governments do not reduce the overall cost of pretrial detention. Rather, such costs are transferred elsewhere, usually to detainees, their families, and the broader community.

A more accurate approach to calculating the economic consequences of pretrial detention includes costs which are not always readily apparent. An inclusive approach provides the bigger picture policymakers need to make more informed decisions about the financial sacrifices required to sustain a pretrial detention regime. It is for these reasons that the Justice Initiative commissioned a report to calculate the direct and indirect costs of pretrial detention in Mexico.

In the past there was little debate about the cost of pretrial detention practices in Mexico, due to the pro-detention policies that dominated Mexican penal codes for decades. However, criminal justice reform is now on the government's agenda in Mexico. In this new environment, Mexican policymakers will need to know the total cost of their policy decisions, particularly at the state level, where the overwhelming number of criminal cases are processed.

The Real Cost of Pretrial Detention in Mexico

The findings of the Justice Initiative report on the cost of pretrial detention in Mexico are summarized in Table 1. The data contained in the table use Mexico's currency, the peso, at 2006 prices (the latest year for which data was available at the time the report was compiled).³

³ In 2006, 100 pesos were roughly equivalent to US\$9.30 or €7.30.

Table 1: Annual cost of pretrial detention in Mexico (in thousands of pesos)

	Median	Minimum	Maximum
1. Costs to the detainees			
a. Labor costs (absence of economic activity)	1,331,377	273,095	2,683,186
b. Risk of death and illness			
i. Risk of homicide	80,293	46,582	113,213
ii. Lack of medical attention	36,727	35,468	37,008
c. Employers' payments to Social Security	17,649	3,620	35,569
d. Extra-legal payments (corruption charges)	538,828	520,367	542,962
Total	2,004,873	879,133	3,411,938
2. Costs to the state			
a. Detainees' support	4,007,530	3,187,250	4,750,920
b. Criminal process			
i. Investigation	583,839	557,284	597,088
ii. Judicial process	1,108,967	1,058,527	1,134,134
iii. Public defense and social assistance	88,233	85,210	88,910
c. Health care provided to detainees' relatives	814	0	4,704
d. Employers' contributions to social security	5,455	1,119	10,994
Total	5,794,839	4,889,390	6,586,751
3. Costs to the families of the detainees			
a. Assistance / support to detainees	480,709	321,968	732,771
b. Time spent on visits to detainees	86,926	12,366	228,874
c. Representation by private attorneys	1,324,237	361,145	3,869,398
d. Extra-legal payments (corruption charges)	15,180	10,167	19,985
Total	1,907,053	705,646	4,851,028
4. Costs to the community			
a. Services by social organizations	72,169	69,697	72,723
b. Lost productivity	1,331,377	1,285,764	2,386,210
Total	1,403,546	1,355,460	2,458,933
Total social cost *	9,755,829	6,558,084	14,895,658

* The total social cost excludes items 1(c), 2(d), and 4(b) to avoid double counting certain costs. This is explained further in footnote 5 below.

Table 1 categorizes the economic burdens of pretrial detention on four distinct groups: the detainees, the state, detainees' families, and the broader community. Each of these categories is further subdivided to reflect more specific costs. Because the available data does not permit a precise picture, a three-tiered range of assumptions (minimum, maximum, and median) about each cost factor are built into the calculation and reflected in three columns.

Cost to detainees

Based on the number of persons who were in pretrial detention in Mexico in mid-2006, the annual cost of detention for all pretrial detainees ranges between 0.8 billion and 3.4 billion pesos, with a median cost of 2 billion pesos (unless otherwise stated, the median cost will be used from here on). This is calculated by adding the following variables: the amount of income that pretrial detainees who were employed at the time of their arrest would have earned had they not been detained (1.3 billion pesos);⁴ the financial value of life lost or shortened due to the increased risk of homicide (80.3 million pesos) and

⁴ In many cases a portion of this cost is also borne by detainees' dependants who lose the financial support of their detained spouse, parent, or sibling.

illness (17.7 million pesos) pretrial detainees face; the annual value of the contribution the state and employers would have made to the social security funds of pretrial detainees who were employed at the time of their arrest (17.7 million pesos); and the amount of money pretrial detainees pay to corrupt guards and other detainees to, respectively, purchase favorable treatment and protection from prison gangs (538.8 million pesos), a widespread phenomenon in the deeply corrupt institutional culture of Mexico's custodial settings.

Cost to the state

The overall annual cost of detention to the state is 5.8 billion pesos. (This does not include the significant costs associated with the planning and construction of detention facilities, because reliable data on those costs are not available.) The largest portion of this expense is used for the management and administration of the country's detention facilities, including the cost of food, medicine, and clothes for detainees, and general prison maintenance and related expenses (4 billion pesos).

Other costs are the additional expenses incurred by the investigative and judicial authorities, and the public defender system, to deal with defendants detained awaiting trial (1.8 billion). On average, it is far more costly for the prosecutor's office to investigate a case involving a pretrial detainee than one in which the defendant is at liberty. This is because cases involving detainees must, by law, be expedited (e.g., defendants who the state wants remanded into detention have to appear before a court within 48 hours of their arrest). Once remanded, pretrial detainees face, on average, a higher number of court hearings than defendants who are not detained, and the state bears the cost of transporting these detainees between their places of detention and the courts. (Despite this, Mexican prosecutors exhibit a strong preference for pursuing cases with a suspect in detention, and judges rarely limit this tendency in their review of cases.)

The state also bears the public health care costs of detainees' dependants who lose access to private health care as a result of their relatives' pretrial detention (814,000 pesos). Finally, the state ultimately bears the cost of missed contributions to the Mexican Social Security Institute (a statutory body tasked with managing the country's public health, pension, and social security systems) which detainees' employers would have made had the former not lost their freedom (5.5 million pesos).

Cost to detainees' families

Detainees' families suffer an annual economic loss of 1.9 billion pesos as a result of their relatives' pretrial detention. This includes the cost of supporting their detained relatives with money, food, toiletries, medicines, clothes, and other miscellaneous items not supplied—or not adequately supplied—by the prison authorities (481 million pesos), and the economic value of the time spent visiting their detained relatives (87 million pesos).

Lawyers' fees are higher when defending pretrial detainees because the lawyers charge for the additional burden of having to arrange and undertake visits to their clients' places of detention and attending, on average, a higher number of pretrial hearings. Thus, the families of pretrial detainees incur an additional total cost of 1.3 billion pesos per year.

Despite the fact that criminal defendants are overwhelmingly poor and the cost of a private attorney is a significant burden, some 40 percent of detainees make use of a private lawyer. The others either go without legal representation or are fortunate to be provided with a lawyer by the state (in the latter case the cost is borne by the state—and, by extension, the taxpayer).

Finally, pretrial detainees' families pay some 15.2 million pesos annually in bribes to corrupt prison officials. Such payments are made to facilitate the transfer of gifts and messages to detainees.

Community costs

Universities and welfare organizations spend about 72.2 million pesos a year to, respectively, provide free legal assistance, and food, clothes, medication, job training, and other services to detainees and their families. Moreover, Mexico's pretrial detention practices cost society an estimated 1.3 billion pesos worth of lost productivity. This is the value of the economic output individuals working at the time of their arrest would have generated had they not been detained.

Total cost

To arrive at the total annual cost of pretrial detention practices in Mexico it is necessary to total the various detention-related costs listed in Table 1 above, excluding three cost items which, from an accounting point of view, would otherwise be counted twice.⁵ This exercise results in an annual cost of 9.8 billion pesos (with a possible range from a low of 6.6 billion pesos to a high of 14.9 billion pesos). This is a substantial amount, which in 2006 was equal to the average annual income of 91,000 Mexican families, or about half a billion pesos more than annual federal spending on public safety.⁶

Moreover, the median annual cost of pretrial detention is equivalent to a bit over a quarter (28 percent) of the money the state spends yearly on Oportunidades, Mexico's world-renowned government social assistance program, which has been replicated in at least 30 other countries. Oportunidades makes education possible for children who would

⁵ These three cost items are:

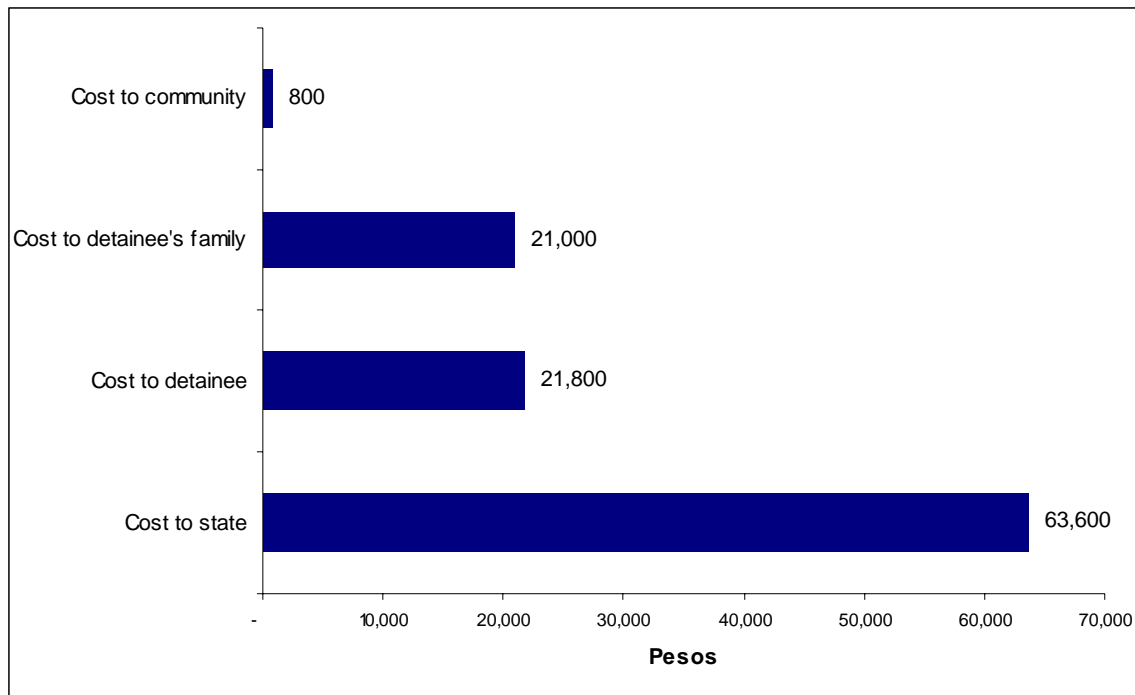
- The annual contribution the state and employers would have made to the social security funds of individuals who were employed at the time of their arrest and pretrial detention (17.7 million pesos). The fact that those contributions are not paid because a worker is detained is counteracted in equal measure by the amount of the social security fund contribution the state or employers no longer have to make. That is, while detainees who were previously employed suffer a loss or cost, the state and employers accrue a concomitant "benefit."
- The annual contribution employers would have made to the public social security fund on behalf of individuals who were formally employed at the time of their pretrial detention (5.5 million pesos). However, the state's loss is the employers' "gain" because they do not have to contribute for a detained employee.
- The annual cost to the community because of detainees' lost productivity (1.3 billion pesos). This cost is already counted under the amount of income detainees, who were employed at the time of their arrest, would have earned had they not been detained (see item 1(a), "labor costs" in Table 1). It would be deceptive to count this cost twice when calculating the overall societal cost of pretrial detention practices in Mexico.

⁶ During the 2006 fiscal year, federal budgeted expenditure on public safety was 9.3 billion pesos.

otherwise be kept at home to work by making cash payments to families whose children regularly attend school. Payments are also used to encourage other salutary behaviors, such as visits to health clinics. As of 2006, around one-quarter of Mexico’s population—some 27 million people—was participating in Oportunidades. If Mexico’s government could reduce by half the costs it incurs from pretrial detention, it would save enough to reach nearly another two million people through this program.

As seen in Table 2, the overall annual cost per average detainee is 107,200 pesos or approximately US\$11,000. This translates to a cost of 63,600 pesos to the state, 21,800 pesos to the detainee, 21,000 pesos to the detainee’s family, and 800 pesos to the community.

Table 2: Median annual detention cost per detainee borne by the state, detainee, detainee’s family, and the community



Costly Confinement excludes a number of cost variables because of a lack of reliable data, resulting in an inherently conservative cost estimate. Cost variables for which data was unavailable include the following:

- psychological costs incurred by detainees (and their families) as a result of being detained in overcrowded, violent, and abusive conditions, especially for detainees who are eventually acquitted of the charges against them
- loss of employment opportunities for detainees because of the possible interruption of on-the-job trainings and studies (some 60 percent of all prisoners in Mexico are between the ages of 16 and 30 years of age) or because of the social stigma of detention

- cost to detainees’ families and communities of communicable diseases transmitted by detainees infected while in detention
- costs associated with the planning, design, and construction of detention facilities.

Conclusion

The annual direct and indirect costs of pretrial detention in Mexico are significant. For example, they exceed the annual income of more than 90,000 average Mexican families, or the federal public safety budget. Given this, it is important to explore ways in which the excessive and arbitrary use of pretrial detention in Mexico can be reduced without undermining public security.

One potential solution can be found in the pretrial evaluation and supervision services successfully employed in various countries to reduce the use of pretrial detention without sacrificing public security.⁷ Such services typically assess the risk—if a defendant is released pretrial—of his absconding, committing an offense, or interfering with the criminal investigation. These services also supervise defendants released from custody during the pretrial period and report to the court on their compliance.

Pretrial evaluation and supervision services can minimize unnecessary pretrial detention, reduce jail crowding, increase public safety, ensure that released defendants appear for scheduled court events, and lessen discrimination between rich and poor in the pretrial process.⁸ These services also empower judicial officers by providing them with more accurate information that leads to well-reasoned and fair decisions on pretrial release or detention.

Not all pretrial evaluation and supervision services are alike. Some are elaborate institutions which collect and verify information on defendants at risk of being detained awaiting trial, undertake risk assessments on such defendants, make release recommendations to the court, and undertake the supervision of high-risk defendants who have been released pending their trial. Other pretrial evaluation and supervision services perform only one or two of these functions.

Mexican policymakers and criminal justice practitioners need to decide which type of model best suits their needs, given available financial resources and the requisite political will. As this study demonstrates, resources spent on responsibly reducing pretrial detention are likely to pay greater dividends than some policymakers realize.

⁷ Pretrial evaluation and supervision services exist in various guises in the United States (where they are known as Pretrial Services), the United Kingdom (Bail Information and Supervision Service), Australia (Bail Assessment Program), and South Africa (Pretrial Services).

⁸ Barry Mahoney et al, *Pretrial Services Programs: Responsibilities and Potential*, U.S. Department of Justice, National Institute of Justice, Washington DC, March 2001, pp 22-34.

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The Open Society Justice Initiative, an operational program of the Open Society Institute (OSI), pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies worldwide. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in the following priority areas: anticorruption, equality and citizenship, freedom of information and expression, international justice, and national criminal justice. Its offices are in Abuja, Brussels, Budapest, London, New York, and Washington DC.

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