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ARTICLES

Jail as Injunction

RUSSELL M. GOLD*

Half a million people sit in jail every day in America who have not been convicted of a crime but stand merely accused. Detention can cost defendants their jobs, housing, or even custody of their children; detention makes defendants more likely to commit a crime and can harm them mentally and physically; it takes a toll on defendants' families and communities too. Courts simply ignore these serious harms when deciding whether a defendant should lose her liberty because of a mere accusation of wrongdoing. Yet in striking contrast to criminal cases, where the government so often succeeds in obtaining before trial the relief that it ultimately seeks—incarceration of the defendant—civil plaintiffs attempting to obtain before judgment the relief that they ultimately seek—by way of a preliminary injunction—face quite a challenge. Civil plaintiffs cannot obtain such prejudgment relief unless they demonstrate likelihood of irreparable injury and that denying interim relief would be more harmful to them than granting such relief would be to the defendant. This disparity between criminal pretrial detention and civil preliminary injunctions is both troubling and illuminating. It is troubling that the law affords more protection to the property interests of civil defendants than to the liberty interests of criminal defendants who are purportedly presumed innocent. But in this historical moment where pretrial detention and bail systems are changing in many jurisdictions, the preliminary injunction comparison offers a valuable lens through which to reconceptualize pretrial detention.

A more civil-like approach to pretrial detention would raise the threshold of government interest necessary to justify detaining an accused—not some minimal likelihood that the defendant might forget to appear in court or be accused of some minor crime such as jaywalking.

* Associate Professor, Wake Forest University School of Law. © 2019, Russell M. Gold. For helpful conversations and comments on earlier drafts I would like to thank Shima Baradaran Baughman, Jeffrey Bellin, Meghan Boone, Josh Bowers, Carissa Byrne Hessick, Jonathan Cardi, Erin Collins, Lauryn Gouldin, Michael Green, Jeff Greenberg, F. Andrew Hessick, Kate Levine, Kay Levine, Sam Levine, Courtney Lollar, Mary Susan Lucas, Tanya Marsh, Rebecca Morrow, Gregory Parks, Anna Roberts, Jocelyn Simonson, Colin Starger, Andrew Verstein, Maggie Wittlin, Ronald Wright, Vanessa Zboreak, and the participants in the Third Annual Civil Procedure Workshop, the Mid-Atlantic Junior Faculty Forum, and the faculty workshops at Washington and Lee University School of Law, William & Mary Law School, and the Wake Forest University School of Law. I would also like to thank Ashley Collette, V. Brooke Driver, and Jaelyn Malmed for excellent research assistance. In the interest of full disclosure, I represented parties in *Perry v. Schwarzenegger* discussed below. All views about this case are my own, and discussion about it is drawn from public records.

As in the civil system, criminal courts should not simply ignore the immense costs to a defendant of ordering pretrial detention. Rather, courts should consider those costs to defendants, their loved ones, and the broader public and should detain defendants only when the benefits outweigh those substantial costs. Finally, to detain a defendant, courts should require that the government demonstrate likelihood of success on the merits through evidence subject to the defendant's refutation. Such additional process would increase costs on the front end but would potentially lower the pretrial process costs overall by reducing rates of pretrial detention, post-trial incarceration, and recidivism caused by criminogenic jails and prisons.

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INTRODUCTION

On any given day in America, approximately half a million people sit in pre-trial detention—imprisoned though not convicted of a crime.¹ Those 500,000 people spend an average of one month in jail.² Some spend years.³ And the human consequences of pretrial detention are substantial. Lavette Mayes lost her home, her thriving small business collapsed, and her children were traumatized during the fourteen months that she spent in pretrial detention.⁴ David Jones lost his job and apartment and missed his son’s graduation while in pretrial detention even though he was assessed as a low risk for failure to appear or be rearrested; charges were dropped fourteen months later.⁵ Mustafa Willis lost his job and missed his cousin’s funeral while detained for months awaiting trial for a crime he did not commit.⁶ George Peters lost his full-time job and custody of his two children who were taken out of school and sent to live with their mother while incarcerated for forty-three days until prosecutors dropped all charges against him.⁷ Kalief Browder ended his life after many unsuccessful attempts on his life

1. ZHEN ZENG, U.S. DEP’T OF JUSTICE, JAIL INMATES IN 2016, at 9 (2018), <https://www.bjs.gov/content/pub/pdf/ji16.pdf> (reporting that there were 458,600 unconvicted defendants in jail at the end of 2016); Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POL’Y INITIATIVE (Mar. 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html> [<https://perma.cc/A9AG-HB7N>] (noting that the United States’s pretrial detainee population, which is “responsible for all of the [country’s] net jail growth” over the last two decades, totaled 536,000 in 2018); *see also* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 595 (2017) (“[H]undreds of thousands of defendants across America, disproportionately people of color, wait in local jails for dispositions of their cases, often held on \$500 bail or less.” (footnote omitted)).

2. SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* 158 (2018).

3. *See id.* at 168 (providing an example of a defendant who was detained for more than two years while “awaiting trial on bail of \$250,000”).

4. Teresa Wiltz, *Locked Up: Is Cash Bail on the Way Out?*, PEW CHARITABLE TRS. (Mar. 1, 2017), <http://pew.org/2lWNodH> [<https://perma.cc/6JLQ-TL3Z>]. She would have been detained even longer were it not for the community bail fund. *See id.* (“After she had spent 14 months in the Cook County Jail, the Chicago Community Bond Fund, a volunteer organization, helped Mayes make bail after a judge reduced the amount.”). *See generally* Simonson, *supra* note 1 (explaining bail funds’ important role in providing community voice).

5. Alysia Santo, *Kentucky’s Protracted Struggle to Get Rid of Bail*, MARSHALL PROJECT (Nov. 12, 2015), <https://www.themarshallproject.org/2015/11/12/kentucky-s-protracted-struggle-to-get-rid-of-bail> [<https://perma.cc/P2AB-2JUJ>].

6. Keith Romer & Joel Rose, *Episode 783: New Jersey Bails Out*, NPR (July 12, 2017, 5:49 PM), <http://www.npr.org/sections/money/2017/07/12/536905881/episode-783-new-jersey-bails-out> [<https://perma.cc/T6WC-83RW>].

7. PRETRIAL JUSTICE CLINIC, UNIV. OF BALT. SCH. OF LAW, YEAR-END REPORT: OUTCOMES, FINDINGS AND RECOMMENDATIONS 14 (2017), http://home.ubalt.edu/id86mp66/PTJC/PTJC_Year_End_Report_June_2017.pdf. George Peters is a pseudonym. *Id.*

made during and after the three years he spent in pretrial detention on Rikers Island.⁸ After being arrested on misdemeanor charges, Louis Fano slit his wrists in the first few hours of his pretrial detention; Fano was sent to solitary confinement for three months as a result and hanged himself in his cell two weeks later.⁹ These are just a few examples.

In the civil system, by contrast, courts are loath to award the plaintiff relief before trial; civil defendants' property interests are too important to do that lightly.¹⁰ Indeed, the Supreme Court describes the preliminary injunction as "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."¹¹ Preliminary injunction law imposes a high "barrier against the easy use of public power without a trial."¹²

It might be natural to explain this disparity by suggesting that criminal courts need to detain dangerous defendants. But that explanation does not wash.¹³ Bail was historically meant to ensure defendants' appearance at trial, not to prevent reoffending.¹⁴ And most pretrial detainees are detained not because a court has deemed them too dangerous to grant them their liberty but because they cannot afford bail.¹⁵ With a median pre-incarceration income of only \$15,109 per year, defendants are unsurprisingly unable to pay the median bail amount of \$10,000—two-thirds of their already-scant annual income.¹⁶ As the former U.S. Attorney

8. Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> [<https://perma.cc/XU4V-R29H>].

9. Melissa Fares & Charles Levinson, *In Louisiana Jail, Inmate Deaths Mount as Mental Health Pleas Unheeded*, REUTERS (May 31, 2018, 11:15 AM), <https://www.reuters.com/investigates/special-report/usa-jails-louisiana/> [<https://perma.cc/RT43-WXH6>].

10. For simplicity, this Article refers to the party seeking a preliminary injunction as the "plaintiff" and the party opposing it as the "defendant," although other permutations are possible.

11. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); see also 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948, at 122 (3d ed. 2013) (describing "the courts' general reluctance to impose an interim restraint on defendant before the parties' rights have been adjudicated").

12. DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 193 (3d ed. 2018).

13. See generally Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490 (2018) (arguing that the bases for detaining accused defendants apply just as strongly to equally dangerous people who have not been accused of a crime).

14. BAUGHMAN, *supra* note 2, at 21; see also Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 864.

15. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES 15 (2013), <http://www.bjs.gov/content/pub/pdf/fdluc09.pdf> (reporting that in 2009 only ten percent of defendants were detained due to outright denial of bail and the remaining ninety percent were detained because they could not afford to pay their bail); see also BERNADETTE RABUY & DANIEL KOPF, PRISON POLICY INITIATIVE, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME 1 fig.1 (2016), <http://www.prisonpolicy.org/reports/DetainingThePoor.pdf> ("Nationally, in 2009, 34% of defendants were detained pretrial for the inability to post money bail.").

Embedded in the frequently used term "pretrial release" is the problematic assumption that pretrial detention is the usual condition. To the extent possible without causing confusion, this Article uses "pretrial liberty" instead.

16. RABUY & KOPF, *supra* note 15, at 2–3 (using 2015 dollars); *id.* at 2 ("The median bail bond amount in this country represents eight months of income for the typical detained defendant.").

General put it, “When bail is set unreasonably high, people are behind bars only because they are poor. Not because they’re a danger or a flight risk—only because they are poor.”¹⁷ Regulating pretrial detention by setting money bail wastes money by incarcerating defendants who are not dangerous and jeopardizes safety by allowing dangerous, wealthy defendants to secure their pretrial liberty too easily.¹⁸

Pretrial detention regimes are in a great state of flux across the country, driven primarily by advocates hoping to eliminate these ills.¹⁹ On the federal level, Senators Rand Paul and Kamala Harris introduced bipartisan legislation meant to spur further state reform by providing federal block grants.²⁰ Several jurisdictions are eliminating or curtailing money bail.²¹ Some jurisdictions now require judges to consider the defendant’s ability to pay when they set bail;²² the Fifth Circuit

17. Loretta E. Lynch, U.S. Att’y Gen., Remarks at White House Convening on Incarceration and Poverty (Dec. 3, 2015), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-convening-incarceration-and> [<https://perma.cc/FNL7-D238>] [hereinafter Lynch Remarks]; see also Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 434 (2016) (“The majority of defendants awaiting trial in jail are detained because they could not afford the bail set for them, not because they were found to be dangerous or have a particularly high flight risk.”).

18. See, e.g., Gouldin, *supra* note 14, at 864 (explaining that “if a court views a defendant as being a high risk for committing a new crime on release, it does not seem appropriate to simply set a high price for release” because “[d]angerous defendants do not become less dangerous by paying bail”).

19. See, e.g., BAUGHMAN, *supra* note 2, at 181 (“There is a growing national consensus against commercial bail, and a concomitant effort to eliminate money bail altogether.”); CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 30 (2016), <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> (“The country’s approach to the pretrial process is undergoing intensive reexamination and may be on the verge of fundamental change. Money bail, nearly ubiquitous and deeply entrenched for decades, is now subject to scrutiny and criticism from a broad array of observers and advocates.”).

20. See Kamala D. Harris & Rand Paul, Opinion, *Kamala Harris and Rand Paul: To Shrink Jails, Let’s Reform Bail*, N.Y. TIMES (July 20, 2017), <https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html> [<https://nyti.ms/2tjr9kY>] (discussing the authors’ legislative proposal, entitled the Pretrial Integrity and Safety Act).

21. See, e.g., N.M. CONST. art. II, § 13; D.C. CODE § 23-1321(c)(1)(B)(xii)–(xiii) (2013); KY. REV. STAT. ANN. § 431.066 (West 2012); N.J. STAT. ANN. § 2A:162-15 to -26 (West 2017); S.B. 10, 2017–2018 Gen. Assemb., Reg. Sess. (Cal. 2018); ARIZ. R. CRIM. P. 7.3(b); N.M. CT. R. 6-401; see also Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589, 602 (2018) (“Bail reform efforts have gathered serious momentum over the past year as jurisdictions around the country have moved to limit or end money bail practices.”).

For a summary of state and federal reform efforts, see generally BAUGHMAN, *supra* note 2, at 181–83, and PRETRIAL JUSTICE INST., WHERE PRETRIAL IMPROVEMENTS ARE HAPPENING (2017), <https://higherlogicdownload.s3.amazonaws.com/NCJA/c3320104-776e-4e0e-b687-4ffa1fd54e8c/UploadedImages/National%20Forum/2017%20Forum/fanno-burdeen-where-pretrial-improvements-2017.pdf>.

22. See, e.g., *Brangan v. Commonwealth*, 80 N.E.3d 949, 957 (Mass. 2017) (“Based on our review of the applicable statute and relevant decisions, we are persuaded that a judge must consider a criminal defendant’s financial resources in setting bail.”); *People ex rel. Desgranges v. Anderson*, 59 Misc. 3d 238, 241 (N.Y. Sup. Ct. Dutchess Cty. 2018) (“It is clear to this court that a lack of consideration of a defendant’s ability to pay the bail being set at an arraignment is a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and of the New York State Constitution.”); *General Order No. 18.8a, Procedures for Bail Hearings and Pretrial Release*, CIR. CT. OF COOK COUNTY, ILL. (2017), <http://www.cookcountycourt.org/Portals/0/Orders/General%20Order%20No.%2018.8a.pdf> (requiring judges to consider defendants’ ability to pay bail and requiring judges who set bail to do so in an amount that the defendant “has the present ability to pay” and requiring consideration of defendant’s financial resources in

has indicated that it would do the same.²³ Several other legal challenges have also proven successful.²⁴ Some jurisdictions are increasingly employing citations instead of custodial arrests to avoid pretrial detention entirely.²⁵ Others also seem poised for sweeping reforms.²⁶

These reforms all far short in important ways. Scholarly treatment of bail has been thoughtful and insightful, but it has largely focused on the two doctrinal engines of bail analysis: “flight risk” and “dangerousness.”²⁷

determining bail amounts, which must not be “oppressive” in light of the availability of such resources); Richard A. Oppel Jr., *Defendants Can't Be Jailed Solely Because of Inability to Post Bail, Judge Says*, N.Y. TIMES (July 17, 2017), <https://www.nytimes.com/2017/07/17/us/chicago-bail-reform.html?mwrsm=Email&r=0> [<https://nyti.ms/2utqQYE>] (explaining that for “judges in Chicago . . . it will no longer be possible to set bail so high that people do not have enough money to pay for their release, which could mean they remain in jail for months or even years before a trial, a plea bargain or a dismissal”).

23. See *ODonnell v. Harris County*, 882 F.3d 528, 535, 541 (5th Cir. 2018) (affirming the grant of a preliminary injunction and holding that the plaintiffs are likely to succeed in demonstrating that Houston’s bail system unconstitutionally discriminates against the poor).

24. See BAUGHMAN, *supra* note 2, at 167–77 (detailing the various constitutional challenges to bail laws and practices around the country).

25. PRETRIAL JUSTICE INST., *supra* note 21, at 1–2; see also Adam M. Gershowitz, *Justice on the Line: Prosecutorial Screening Before Arrest*, 2019 U. ILL. L. REV. (forthcoming 2019) (arguing for prosecutor involvement in the decision to make a warrantless arrest to reduce the number of arrests that lead to dismissals); Rachel A. Harmon, *Why Arrest*, 115 MICH. L. REV. 307 (2017) (arguing that far fewer defendants should be custodially arrested).

26. See, e.g., Shaila Dewan, *When Bail Is Out of Defendant's Reach, Other Costs Mount*, N.Y. TIMES (June 10, 2015), <https://www.nytimes.com/2015/06/11/us/when-bail-is-out-of-defendants-reach-other-costs-mount.html> [<https://nyti.ms/1S3FkkG>] (discussing recent local, state, and federal moves toward bail reform); James C. McKinley Jr., *Cuomo, in Bid to Help Poor, Proposes Ending Cash Bail for Minor Crimes*, N.Y. TIMES (Jan. 2, 2018), <https://www.nytimes.com/2018/01/02/nyregion/cuomo-ending-cash-bail-state-of-the-state.html> [<https://nyti.ms/2EHUoEc>] (“Gov. Andrew M. Cuomo plans to ask the New York State Legislature to eliminate cash bail for many crimes and to speed up the disclosure of evidence in trials as part of a package of proposals intended [to] make the criminal justice system fairer for indigent defendants, his aides said.”).

27. See generally Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723 (2011) (contending that considering the likelihood of reoffending as a basis for pretrial detention violates the presumption of innocence); Laurn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677 (2018) (arguing that courts have used “flight risk” too broadly, sweeping in not only defendants actually absconding from the jurisdiction but also defendants who simply forget about their court dates); Gouldin, *supra* note 14, at 837 (discussing the often-overlooked “conflation (by judges and in statutes) of flight risk and danger”); Mayson, *supra* note 13 (considering the theoretical justification for preconviction detention based on dangerousness).

For recent analysis of the shortcomings of this two-part test, see generally Simonson, *supra* note 1, and Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399 (2017). For a multifaceted look at the many problems in America’s pretrial detention system, see BAUGHMAN, *supra* note 2.

Both of these terms are misleading: the term “flight risk” is used to evaluate the likelihood that a defendant may fail to appear for any reason rather than that a defendant will “flee a jurisdiction,” Gouldin, *supra*, at 683; “dangerousness” is used to mean merely the risk that the defendant will be accused of a future crime and not that a defendant poses a danger to anyone, Simonson, *supra* note 1, at 613–14 (discussing contemporary definitions of “dangerousness” in pretrial detention inquiries). To avoid these misleading impressions, this Article refers to the current standards as “risk of nonappearance” and “risk of rearrest.”

This Article wades into an active discussion in the popular press²⁸ and amongst legal scholars²⁹ about pretrial detention and bail reform. It fundamentally rethinks pretrial detention by contrasting it with a theoretically parallel procedure in the civil system—the preliminary injunction.³⁰ In the civil system, preliminary injunction standards seek “to minimize the probable irreparable loss of rights caused by errors incident to hasty decision” that must be made before the court can resolve a case on its merits.³¹ Preliminary injunctions minimize irreparable damage by balancing the harms that granting or denying the relief might impose on either side and considering the interests of nonparties. In some ways, criminal pretrial detention also seeks to minimize harm between case filing and disposition. This objective has become even more prominent since criminal law began allowing courts to consider the likelihood that the defendant will commit a crime while enjoying pretrial liberty to justify detaining a defendant or setting bail.³²

But criminal law doctrine, by contrast, takes a one-sided approach to the interim-harm analysis. It considers only how the defendant’s freedom could harm the public and overlooks the ways that pretrial detention harms the defendant, her loved ones, and the broader public. Indeed, defendants’ relatives are so thoroughly overlooked that children whose parents are jailed may be left to fend for themselves.³³ As with preliminary injunctions, criminal law too should consider the harm that awarding interim relief to the government—detaining a defendant pretrial—inflicts on the other side and on nonparties. Moreover, just as the civil system recognizes the extraordinary nature of depriving defendants of their property before judgment, at least the same degree of hesitation is warranted before depriving accused defendants of their liberty. Liberty interests are at least as

28. *E.g.*, Shawn Carter, *Jay Z: For Father’s Day, I’m Taking On the Exploitative Bail Industry*, TIME (June 16, 2017), <http://time.com/4821547/jay-z-racism-bail-bonds/> [https://perma.cc/PUW6-H9GE]; Keith Humphreys, *We’re Jailing Way More People Who’ve Been Convicted of Exactly Nothing*, WASH. POST (Apr. 24, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/04/24/were-jailing-way-more-people-who-ve-been-convicted-of-exactly-nothing/?utm_term=.e111e4bac1b6 [https://perma.cc/U7P2-2LEW].

29. *E.g.*, BAUGHMAN, *supra* note 2; Gouldin, *supra* note 27; Gouldin, *supra* note 14; Mayson, *supra* note 13; Simonson, *supra* note 1.

30. This is an exercise in domestic comparative procedure. *See* David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 683–84 (2006) (arguing for the importance of conducting “comparative work in civil and criminal procedure,” or “regularly contrasting American civil and criminal procedure with *each other*” as an overlooked but potentially “illuminating” area of research that could “provid[e] a more stable base for reform”). There is now a burgeoning such literature. *See infra* Part I.

31. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 540–41 (1978).

32. *See* BAUGHMAN, *supra* note 2, at 18–27 (explaining the historical development of courts considering a defendant’s potential future crime as a basis for pretrial detention).

33. *See, e.g.*, Cary Aspinwall, *Overlooked: As Women Go to Jail in Record Numbers, Who’s Watching Out for Their Kids? No One*, DALL. NEWS (June 22, 2017), <https://interactives.dallasnews.com/2017/overlooked/> [https://perma.cc/5VU2-GWYU] (“For nearly a month, [twelve-year-old] Kyliia and her two young sisters lived alone in a rented house in Arlington. No one involved in jailing their mother — not the police, not the courts, not the sheriff’s department — ever checked on them.”).

important as property interests, and pretrial detention will heavily influence a case's outcome on the merits.

To minimize interim harm and recognize the extraordinary nature of affording one party the relief she seeks before judgment, the preliminary injunction standard: (1) requires that the plaintiff demonstrate likely irreparable harm in the absence of an injunction to warrant such an extraordinary remedy, (2) balances the interests of both sides surrounding this interim relief and the interests of nonparties, and (3) considers who is likely to ultimately succeed on the merits based on evidentiary submissions.³⁴ Deciding whether a defendant should be detained before trial should similarly first require the government to show a likelihood of irreparable injury to the public if the defendant were granted her liberty. If the government can make such a showing, pretrial detention should turn on whether the likely harm to the public of granting the defendant liberty outweighs the likely harm of detention to the defendant, her loved ones, and the public. And as with preliminary injunctions, the government should have to demonstrate likelihood of success on the merits by relying on evidence that the defendant can contest; defendants should be afforded discovery to meaningfully contest this evidence.³⁵

Such an approach would heighten the government's burden from the status quo: when it seeks to detain an accused, the government would have to prove that the defendant's pretrial liberty will likely inflict irreparable harm to the public; the possibility that a defendant might be rearrested for a minor crime or miss a court date because of a work conflict would not suffice. Once the government satisfies that irreparable harm standard, defendants would be detained pretrial only when the benefits of detention outweigh its costs—an analysis that is strikingly incomplete in the current doctrine. Maybe Lavette Mayes, David Jones, Mustafa Willis, and many others should lose their homes, businesses, and miss important family events because of a pending charge. But they and theirs should be forced to bear those substantial costs only if the public interest in detaining them outweighs those costs and not merely because the law ignores them.³⁶

34. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

35. The likelihood of success inquiry need not occur simultaneously with the interest-balancing inquiry so long as both precede the decision to detain.

The argument in this Article is framed as one that legislatures should employ through statute or courts through rule changes. However, a similar claim could be framed as a procedural due process argument, and a more robust reading of the Eighth Amendment's Excessive Bail Clause could solve some of pretrial detention's ills. *See, e.g.*, Gouldin, *supra* note 27, at 696–701 (explaining the historical origins of the Excessive Bail Clause and a modern doctrinal hook for reading it more broadly than lower courts have done); Gouldin, *supra* note 14, at 871–72 (explaining the potential import of *United States v. Salerno*, 481 U.S. 739 (1987) for excessive bail arguments).

36. *See* Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 10 (2017) (arguing that the cost of detaining many defendants who are now detained exceeds the benefit and that a better policy could have saved \$78 billion over the past decade); Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 202, 214 (2017) (proposing “[i]ncorporating cost-benefit analysis more directly into statutory bail reform”); Yang, *supra* note 27, at 1469–70 (explaining “the [overlooked] social costs” of pretrial detention).

Borrowing from preliminary injunction law makes sense because pretrial detention shares important similarities with preliminary injunctions that scholars have not yet recognized. In short, both analyses resolve the question of what to do with the parties' rights before the merits can be adjudicated and allow the party initiating the case to obtain the relief it seeks before the court rules on the merits.

This Article proceeds in three parts. Part I explains the bases for comparing preliminary injunctions and pretrial detention. Part II addresses the existing disparities in procedure and substance between the two systems. Part III then re-visions a pretrial detention schema based on preliminary injunction law and explains why such a regime would be better than what we have now.

I. EXPLAINING THE COMPARISON

Civil and criminal procedure share important similarities that often make comparing them especially productive:

They are both, after all, systems of adjudicating—or otherwise resolving—disputes, and settling—or sidestepping—disagreements about historical facts. They both aim at fairness, accuracy, and efficiency—albeit in different mixtures. They share similar stages: pleading, discovery, trial or settlement, and appeal. They share the institution of the jury. They both have rules designed to protect the finality of judgments.³⁷

Indeed, the Federal Rules of Criminal Procedure were initially drafted to closely track the Federal Rules of Civil Procedure.³⁸ Scholarship in comparative civil and criminal procedure now exists, at varying levels of detail, on: settlement and methods of facilitating consensual resolution of cases;³⁹ pleading standards and motions to dismiss;⁴⁰ investigation and discovery;⁴¹ summary judgment and its

37. Sklansky & Yeazell, *supra* note 30, at 684.

38. See Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 *FORDHAM L. REV.* 697, 698 (2017) (describing the “[c]onfidential and never publicly circulated” first draft of the Federal Rules of Criminal Procedure as having “integrated the rules of *civil* procedure,” a “conception” that was ultimately discarded).

39. See Russell M. Gold, “*Clientless*” *Prosecutors*, 51 *G.A. L. REV.* 693, 709–21 (2017) (comparing the judicial role regarding consensual resolutions in class action law and with respect to plea agreements in criminal law); Russell M. Gold, Carissa Byrne Hessick & F. Andrew Hessick, *Civilizing Criminal Settlements*, 97 *B.U. L. REV.* 1607 (2017) (borrowing from civil procedure’s settlement system in considering how criminal procedure might better facilitate guilty pleas); Sklansky & Yeazell, *supra* note 30, at 696–705 (considering judges’ role in facilitating and approving consensual resolutions in both systems).

40. See Gold, Hessick & Hessick, *supra* note 39, at 1640–45 (arguing that criminal systems should heighten pleading standards and make motions to dismiss more robust more like what civil systems do).

41. See, e.g., *id.* at 1645–48 (suggesting more liberal discovery rules for criminal cases); Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 *BROOK. L. REV.* 1091 (2014) (illustrating the factual deficit inherent in the criminal discovery system through comparison to the civil discovery system); Sklansky & Yeazell, *supra* note 30, at 713–18 (contrasting discovery and investigation between civil and criminal procedure and discussing how criminal and civil discovery systems might borrow more from each other); Jenia I. Turner, *Managing Digital Discovery in Criminal Cases*, 109 *J. CRIM. L. & CRIMINOLOGY* (forthcoming 2019) (exploring criminal law e-discovery in part

lack of criminal counterpart;⁴² prior adjudication, such as preclusion and double jeopardy;⁴³ remedies for process failures and concerns about finality;⁴⁴ conceptions of pretrial procedural due process;⁴⁵ preliminary hearings and preliminary injunctions;⁴⁶ and greater accountability for prosecutors and class counsel.⁴⁷ One seemingly insurmountable difference between civil and criminal procedure is the divide between public and private law. But criminal law is not purely public law, nor is civil litigation purely private.⁴⁸

This Article draws a new comparison between civil and criminal procedure—one involving interim relief. More specifically, it compares civil preliminary injunctions with criminal pretrial detention to consider what criminal procedure can learn from its civil counterpart. Both processes address the question of what to do with the parties' interests prior to adjudication, including when to allow the party initiating the case to obtain some measure of the relief that it ultimately seeks without first proving its case on the merits.⁴⁹ Or put differently, both inquiries operate with a similar goal and at similar stages of their respective procedures.⁵⁰

Moreover, in the pretrial phase criminal procedure's objectives most closely resemble civil procedure's. Pretrial detention and bail seek to protect the court's

through comparison to civil e-discovery standards); Daniel S. McConkie, *Civilizing Criminal Discovery* 1 (Sept. 25, 2017) (unpublished manuscript) (on file with author) (arguing for "the civilization of criminal discovery" through the creation of a criminal "discovery phase").

42. See Gold, Hessick & Hessick, *supra* note 39, at 1648–51 (arguing that criminal systems should adopt a process akin to summary judgment).

43. See Sklansky & Yeazell, *supra* note 30, at 705–13 (comparing former adjudication in the criminal and civil systems).

44. See *id.* at 718–27 (analyzing the civil and criminal systems' differing reactions to and remedies for failed process); William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790 (2007) (considering what class action law can learn from habeas law about addressing finality concerns).

45. See Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 2 (2006) (discussing "an anomalous divergence between civil and criminal due process rules"); Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39 (2014) (explaining that civil defendants have greater pretrial due process protections than do criminal defendants).

46. See Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 518–19 (1986) (making passing reference to the comparison); Kuckes, *supra* note 45, at 24 & n.132 (same).

47. See Russell M. Gold, "Clientless" Lawyers, 92 WASH. L. REV. 87 (2017) (drawing on prosecutor-accountability literature to consider ways to improve the accountability of class counsel); Gold, *supra* note 39 (considering how class action accountability mechanisms could improve prosecutor accountability).

48. See Sklansky & Yeazell, *supra* note 30, at 701–02 (suggesting strains of public and private law in both criminal and civil law); see also Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (arguing that "the purpose of adjudication" is not merely private dispute resolution because it "uses public resources, and employs . . . public officials" whose "job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes"); Gold, *supra* note 47, at 99–100 (highlighting important similarities between civil class actions and criminal prosecutions, including in their public- and private-law objectives).

49. In the federal system, see FED. R. CIV. P. 65(a) and 18 U.S.C. § 3142(a)–(g) (2012).

50. See Sklansky & Yeazell, *supra* note 30, at 684 (explaining procedural parallels between civil and criminal process).

ability to effectuate a judgment and prevent the defendant from committing further harm while the case is pending.⁵¹ Although deterrence and retribution can do significant postjudgment work in criminal law as punishment principles,⁵² they should have no meaningful role in *pretrial* process. After all, pretrial detention is not considered punishment.⁵³ Rather, judicial efficacy and incapacitation should drive criminal pretrial decisionmaking.⁵⁴ Much as the criminal system seeks to prevent the defendant from absconding, preliminary injunctions may issue if the plaintiff demonstrates “a strong indication” that the defendant will become insolvent before a judgment can be collected;⁵⁵ both bases seek to ensure the integrity of judicial process. Moreover, that preliminary injunctions should not issue unless necessary to prevent the plaintiff from likely being irreparably injured somewhat parallels the notion that pretrial detention seeks to prevent the defendant from violating the law while the case is pending.⁵⁶ Indeed, the similarities between the two mechanisms increased when preventing a defendant’s potential criminal conduct during the pendency of a case became a permissible reason to detain pretrial.⁵⁷

Pretrial detention and preliminary injunctions share other important similarities. Whether a claimant obtains a preliminary injunction or the government succeeds in detaining the defendant pretrial are typically of great practical import and substantially affect the outcome of cases.⁵⁸ Moreover, sometimes the

51. See Gouldin, *supra* note 14, at 845–48 (recounting the development of the contemporary purpose of pretrial detention).

52. See, e.g., Adam J. Kolber, *Against Proportional Punishment*, 66 VAND. L. REV. 1141, 1143–49 (2013) (explaining the role that proportionality and intentional infliction of punishment play in retributivist punishment theory and explaining that granting convicted defendants credit for time served pretrial undermines proportionality).

Deterrence is also an important objective in American civil procedure because private enforcement supplements the limited resources of its public counterpart. See, e.g., Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 285 (2016) (explaining the benefits of redundant public and private enforcement); Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 721 (1941) (explaining the necessity of private enforcement to supplement the limited resources of public enforcement).

53. *United States v. Salerno*, 481 U.S. 739, 746–48 (1987); see also Kolber, *supra* note 52, at 1144 (“Many theorists [explain] that punishment must generally be intended as such.”).

54. See, e.g., Gouldin, *supra* note 14, at 844–52.

55. *Micro Signal Research, Inc. v. Otus*, 417 F.3d 28, 31 (1st Cir. 2005); see, e.g., 11A WRIGHT ET AL., *supra* note 11, § 2948.1, at 136–38 (“[A] risk that the defendant will become insolvent before a judgment can be collected[] may give rise to the irreparable harm necessary for a preliminary injunction.” (footnote omitted)).

56. A more detailed comparison reveals that criminal law’s pretrial detention standard is far less stringent in its requisite showing of harm than is the civil preliminary injunction standard—a divergence that features prominently in the discussion that follows. See *infra* Section II.B.

57. See BAUGHMAN, *supra* note 2, at 24–27 (explaining the historical development of the doctrine); see also *Salerno*, 481 U.S. at 747–52 (countenancing pretrial detention as a permissible means of preventing future crime).

58. See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 33 (2008) (explaining that preliminary injunctions may be “the whole ball game”); Simonson, *supra* note 1, at 589 (explaining that “[f]or most indigent defendants, bail is the ballgame”); see also 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) (demonstrating empirically that pretrial detention

preliminary injunction is, as a practical matter, all that the parties seek because the time horizon of the dispute is short.⁵⁹ Consider, for instance, the litigation challenging the first two versions of the executive order banning travel to the United States from several majority-Muslim countries.⁶⁰ The Supreme Court could not even reach whether the ban should be preliminarily enjoined because the ban had expired on its own terms, mooting the controversy.⁶¹

Civil and criminal procedure are somewhat different, and a few of these differences bear on the interim-relief comparison. Most of their differences suggest that any disparity between preliminary injunctions and pretrial detention should provide *more protection* to criminal than to civil defendants.⁶² First, and most obviously, criminal defendants lose their liberty (and often their property too) when they are restrained, whereas civil defendants lose, at most, only a property right. Liberty interests are so important that any disparity between the two systems should mean that incarceration were more hesitatingly deployed than any civil process affecting property rights.⁶³ Second, the typical civil defendant is better resourced than its adversary, but the typical criminal defendant is vastly out-resourced by the government.⁶⁴ A disparity should not cut against the criminal defendant, whom our system ostensibly presumes innocent,⁶⁵ nor should it treat out-resourced criminal defendants less favorably than their well-resourced civil counterparts. Third, at the time the movant seeks interim relief, prosecutors have better access to evidence because of their relationship with the police and its evidence-gathering apparatus than do civil plaintiffs that must depend on discovery

leads to adverse case outcomes); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017) (same).

59. Mary J. Davis, *Summary Adjudication Methods in United States Civil Procedure*, 46 AM. J. COMP. L. 229, 242 n.56 (1998).

60. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017).

61. *Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017) (mem.), *vacating as moot* 857 F.3d 554 (4th Cir.).

62. *Cf.* Gold, Hessick & Hessick, *supra* note 39 (arguing that criminal law should level up procedural protections to be at least on par with civil systems).

63. *See* Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 2019 (2005) (criticizing the “hypocrisy of a society that provides greater protection for the deprivation of property than for the seizure of people” in the context of pretrial detention and Takings law).

I take no position on whether preliminary injunctions are too difficult to obtain or whether there is too much process in at least some contexts where the property rights at stake are relatively insignificant. Such cases would be a far cry from criminal cases where detention is quite consequential to the outcome of the case and to the defendant’s life.

64. *See* Gold, *supra* note 47, at 123–24. In some preliminary injunction litigation, such as patent infringement cases, well-resourced plaintiffs may be more likely than in other civil litigation. *See, e.g.*, Motion for Preliminary Injunction, *Proctor & Gamble Co. v. Ranir, LLC*, No. 1:17-cv-00185-TSB, 2017 WL 4392008 (S.D. Ohio Mar. 24, 2017), ECF No. 8.

65. *E.g.*, *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (“Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”); *United States v. Barber*, 140 U.S. 164, 167 (1891) (“But in criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial . . . Presumptively they are innocent of the crime charged, and entitled to their constitutional privilege of being admitted to bail . . .”).

during the litigation to gather the evidence that they need.⁶⁶ Fourth, prosecutors' ethical obligations require them "to respect defendants' rights and embody [their] constituents' preferences," rather than be purely adversarial.⁶⁷ Finally, the one difference that does not suggest more procedural protection in criminal law is that the vast majority of criminal cases call on judges to decide whether to detain the defendant before trial, whereas a comparatively small portion of the civil caseload involves motions for a preliminary injunction.⁶⁸

That the prosecutor is a public official, unlike a plaintiff's lawyer, may suggest that greater judicial deference is due to the prosecutor's view of whether to impose an interim restraint. But criminal law should not place too much trust in even the most well-meaning prosecutors because "they must fly solo and fly blind" without information about broader case-processing trends and without meaningful input from their communities.⁶⁹ Indeed, the very existence of community bail funds that enable strangers from the community to contribute money to secure a defendant's pretrial liberty suggests that prosecutors are seeking and successfully obtaining pretrial detention in cases where detention does not advance the interests of the public—the prosecutor's client.⁷⁰ In the civil context, courts do not defer to government lawyers with regard to preliminary injunctions even at the part of the doctrine where such deference would make the most sense—determining whether an injunction would serve the public's interest.⁷¹ There is no reason to treat government lawyers differently in this regard in criminal procedure.⁷²

66. See Meyn, *supra* note 41, at 1124 (explaining that "[t]he State's formal discovery tools are in some instances more robust than tools afforded to civil litigants" because the state can conduct physical searches and seize property); see also Kevin J. Lynch, *The Lock-in Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779, 800 (2014) ("Plaintiffs often seek preliminary injunctions before discovery can be completed or even commenced, meaning that plaintiffs may not have the proof to show they can win, even where such proof exists.").

67. Gold, *supra* note 39, at 706. For the normative side of this debate, compare Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419 (2018) (arguing against the normative value of an adversarial role for prosecutors), with Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762 (2016) (exploring the potential benefits of a system in which prosecutors are more purely adversarial than they are under existing ethical rules).

68. Preliminary injunctions are atypical in cases seeking only damages because prejudgment interest awarded after a judgment can account for any harm in the interim period so long as there are no concerns about the defendant's solvency. See 11A WRIGHT ET AL., *supra* note 11, § 2948.1, at 136–38.

69. Ronald F. Wright, *Prosecutor Institutions and Incentives*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 49, 50 (Erik Luna ed., 2017), http://academyforjustice.org/wp-content/uploads/2017/10/Reforming-Criminal-Justice_Vol_3.pdf.

70. Simonson, *supra* note 1, at 599–621.

71. In limited circumstances, courts defer to government expert witnesses. See, e.g., *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24–25 (2008) (relying on military expert testimony about the national security implications of the case for purposes of a preliminary injunction). *But see* *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1186 (9th Cir. 2011) (holding that the district court erred by deferring to the government's forestry expert witnesses when ruling on a permanent injunction).

72. The quantity disparity between preliminary injunctions and pretrial detention—unlike many of the differences discussed—could suggest the need for somewhat less extensive pretrial detention process than for preliminary injunctions. This concern is addressed further below. See *infra* Section III.B.

The existence of a disparity between the two systems' approaches does not indicate which way—if at all—the disparity should be eliminated. This Article suggests that criminal procedure should look more like its civil counterpart in its balanced and cautious approach to interim relief⁷³ but takes no position on the optimality of the preliminary injunction standard for the civil system. Pretrial detention substantially and detrimentally affects defendants' lives and chances of prevailing on the merits of their cases, and it also costs taxpayer money.⁷⁴ Limiting use of pretrial detention to cases in which it is both necessary to avoid the likelihood of serious harm and more beneficial than costly is a worthwhile endeavor. And this is to say nothing of the potential monetary savings that reduced detention costs could yield.⁷⁵ Before taking up the lessons that civil procedure can offer to criminal procedure, Part II describes the procedural and substantive differences between the two regimes as they now exist.

II. EXISTING STANDARDS FOR INTERIM RELIEF

Although both pretrial detention and preliminary injunctions seek to resolve the same question of what happens to the parties' rights as the case progresses, their substantive standards and the procedures by which courts decide these questions differ greatly. Section II.A explains the procedural disparities. In short, motions for preliminary injunctions are resolved based on written briefing supported by sometimes-extensive evidentiary submissions and after often-lengthy hearings. Pretrial detention decisions, by contrast, churn through the criminal legal system at breakneck speed—affording defendants only a matter of minutes to explain why they should be permitted to enjoy their freedom pending trial. Factual disputes are “resolved” without evidence.

Section II.B considers the disparate substantive standards between preliminary injunctions and pretrial detention. In short, a preliminary injunction should not issue unless the plaintiff demonstrates a likelihood that she will suffer irreparable injury without interim relief—a stringent threshold designed to preserve the extraordinary nature of such relief. And even then, courts balance all relevant

73. See generally Gold, Hessick & Hessick, *supra* note 39 (suggesting leveling up criminal procedure to match civil procedure). Recent criminal law scholarship has argued for ratcheting up protections to address disparities. See, e.g., Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1202 (2016) (suggesting leveling up protections for all suspects to match those afforded to police suspects); Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 378 (2017) (suggesting that dismissals in furtherance of justice might shed light on ways to increase justice for all).

Indeed, simply leveling up criminal law to look more like civil procedure may not go far enough. The differences between the two systems—including liberty versus property—suggest that criminal law should be more protective of defendants' rights to avoid interim harm. But considering whether and how criminal law could be *more* protective than civil procedure of defendants' rights to avoid interim restraint is beyond the scope of this Article.

74. Cf. Roberts, *supra* note 73, at 341, 372–73 (recounting cases in which judges dismissed in furtherance of justice in part due to taxpayer expense and “cost-benefit analysis”). This Article briefly considers why the existing disparity exists. See *infra* text accompanying notes 198–203.

75. For more on the potential monetary savings of additional process, see *infra* Part III.

interests, including the harm the injunction might impose on the defendant during the pendency of the case before infringing on that defendant's property rights. By contrast, criminal law considers only the harms that releasing the defendant might inflict and not how harmful detention may be to the defendant, her loved ones, and the public more broadly. Moreover, criminal law does not impose a stringent threshold such as irreparable injury before depriving defendants of their liberty as their cases progress but looks instead for some unquantified prospect that the defendant might be accused of a crime while on pretrial liberty or not appear for later court dates.

A. PROCEDURAL COMPARISON

Procedural protections for defendants differ substantially between criminal pretrial detention and preliminary injunctions.⁷⁶ In some large jurisdictions, pretrial detention decisions are often made incredibly quickly, via videoconference, and without written briefing or counsel. Factual disputes may be “resolved” by the government’s lawyer proffering what she will prove later. In the civil system, by contrast, a preliminary injunction will issue only after written briefing supported by sworn evidence and an often-extensive hearing. Let us take up this procedural distinction in more detail by considering each system in turn below.

1. Criminal

Initial pretrial detention hearings (or bail hearings, as they are often known) can be shockingly brief.⁷⁷ In Houston, for example, “some hearings last[] approximately a minute.”⁷⁸ “Defendants are taken to a conferencing facility within the jail and participate in the hearing by speaking to a split video screen that shows a

76. There is not *one* civil or criminal system in the United States, and the comparison in the pages that follow accounts for differences across jurisdictions’ criminal systems to the extent feasible. *Cf.* Sara Mayeux, *The Idea of “The Criminal Justice System,”* 45 AM. J. CRIM. L. 55, 56–57 (2018) (explaining that the phrase “criminal justice system” misleadingly suggests procedural or substantive unity). On the civil side, the differences in how preliminary injunctions are handled across state civil systems is minimal for purposes relevant here. *See, e.g.,* Sun Oil Co. v. Whitaker, 424 S.W.2d 216, 218 (Tex. 1968) (reciting a standard similar to the federal one); Arthur D. Wolf, *Preliminary Injunction Standards in Massachusetts State and Federal Courts*, 35 W. NEW ENG. L. REV. 1, 7 (2013) (explaining similarities between preliminary injunction standard in Massachusetts federal court and in many Massachusetts state court cases).

For simplicity, this Article thus uses the federal civil standard as its basis for comparison; it provides an effective basis for restructuring criminal systems even in states that might approach preliminary injunctions slightly differently.

77. *See, e.g.,* Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, in 3 REFORMING CRIMINAL JUSTICE, *supra* note 69, at 21, 32 (“Currently, bail hearings in many jurisdictions are shockingly short: only a few minutes per case.”); *cf.* Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 1 (2008) (describing California bail hearings as “brief”). The lack of procedure in many criminal courts for this initial bail determination may violate due process. *See* Brangan v. Commonwealth, 80 N.E.3d 949, 961–67 (Mass. 2017) (reversing a bail order on procedural due process grounds).

78. Heaton, Mayson & Stevenson, *supra* note 58, at 730.

prosecutor and the magistrate handling the hearing.”⁷⁹ Defendants have no right to counsel, and few can afford to retain counsel.⁸⁰

A 2001 article depicts the system in Baltimore where incarcerated defendants had no counsel for a month or longer even though an overwhelming majority faced nonviolent charges, many of them misdemeanors.⁸¹ Their bail was set by a commissioner who spoke to the defendants through a speaker system in a plexi-glass wall in meetings that were open to the public in only the most technical sense.⁸²

Houston and Baltimore are not outliers. A recent study found that only about half of U.S. jurisdictions provided defendants with counsel at pretrial detention hearings,⁸³ and even that number is misleadingly high; many of the largest jurisdictions do not afford defendants counsel at pretrial detention hearings.⁸⁴ As of 2009, fifty-seven percent of jurisdictions conducted their pretrial detention hearings via videoconference rather than having the defendant physically present in a courtroom and able to make eye contact with the judge.⁸⁵ In Chicago, hearings often last less than two minutes.⁸⁶ North Dakota’s hearings last three minutes.⁸⁷

Although the government has a coercive evidence-gathering apparatus and ordinarily collects a good deal of evidence before charges are even filed,⁸⁸ the government need not introduce sworn declarations or other evidence.⁸⁹ A lawyer’s

79. *Id.*; see also Stevenson & Mayson, *supra* note 77, at 25 (describing pretrial detention hearings via videoconference).

80. BAUGHMAN, *supra* note 2, at 7; see Heaton, Mayson & Stevenson, *supra* note 58, at 730. So too may counsel be constitutionally required. BAUGHMAN, *supra* note 2, at 115–16.

81. Douglas L. Colbert et al., *Do Attorneys Really Matter?: The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1728–37 (2002).

82. See *id.* at 1733 & n.61 (explaining that although there was a room in the jail where these proceedings could be viewed on a televised broadcast there were no posted signs so indicating).

83. PRETRIAL JUSTICE INST., 2009 SURVEY OF PRETRIAL SERVICES PROGRAMS 45 (2009), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=77d36182-26c4-ec2c-ab29-c4c729c12033&forceDialog=0> [<https://perma.cc/6CWJ-2XR9>]; see also Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 386 (2011) (“[A]bout half of the country’s local jurisdictions persist in not providing counsel.”); Heaton, Mayson & Stevenson, *supra* note 58, at 773–74 (explaining that only ten states provide all defendants with counsel at their first appearance, whereas thirty do so in only some counties, and ten do not provide counsel for first appearance in any county).

84. See, e.g., Heaton, Mayson & Stevenson, *supra* note 58 (Houston); Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. L. ECON. & ORG. 511, 514 (2018) (Philadelphia).

85. PRETRIAL JUSTICE INST., *supra* note 83, at 45.

86. Injustice Watch Staff, *Unequal Treatment: A Series: Bent on Bail*, INJUSTICE WATCH (Oct. 14, 2016), <http://injusticewatch.org/interactives/bent-on-bail> [<https://perma.cc/FJF2-CBF9>].

87. *Length of a Bail Hearing in North Dakota: 3 Minutes*, NAT’L CTR. FOR ACCESS TO JUSTICE AT FORDHAM L. SCH. (Jan. 25, 2013), <http://ncforaj.org/2013/01/25/length-of-a-bail-hearing-in-north-dakota-3-minutes> [<https://perma.cc/2BP6-QHHQ>].

88. Indeed, filing charges without evidence would violate prosecutors’ ethical obligations to charge crimes only when supported by probable cause. MODEL RULES OF PROF’L CONDUCT r. 3.8(a) (AM. BAR ASS’N 2004).

89. BAUGHMAN, *supra* note 2, at 1; Kuckes, *supra* note 45, at 24 n.129. There is ample federal case law demonstrating this point. See, e.g., *United States v. Abuhamra*, 389 F.3d 309, 321 n.7 (2d Cir. 2004) (“Most [bail hearings] proceed on proffers.”); *United States v. Acevedo-Ramos*, 755 F.2d 203,

representations—known as a “proffer”—typically suffice, including when courts consider the “weight of the evidence” against the defendant to determine whether to detain her.⁹⁰ The defendant may be afforded an opportunity to rebut that proffer,⁹¹ but she typically has, at best, a limited right to discovery at that early stage of the proceeding to enable her to do so.⁹² The marked exception is New Jersey where promising recent reforms afford defendants broader rights to pre-detention-hearing discovery.⁹³

Defendants can later ask the court to revise its detention or bail determination, but even that process comes after defendants have spent more time in jail. And as with the initial bail determinations, a proffer by the government lawyer typically continues to suffice.⁹⁴ Just getting a hearing to revisit the bail decision may take weeks or months.⁹⁵

These bail revision motions are far from uniform across jurisdictions, and information about the extent of written briefing that typically supports such a motion in each state trial court is difficult to obtain without extensive qualitative study. But I have gathered what I can through internet research.⁹⁶ A New York treatise suggests that judges can increase bail without holding a hearing or taking evidence.⁹⁷ In Baltimore, defendants have a “bail review hearing” even without so requesting, but such a hearing consists only of a judge videoconferencing with twenty-five defendants sitting in a classroom in the jail.⁹⁸

206 (1st Cir. 1985) (“Often the opposing parties simply describe to the judicial officer the nature of their evidence; they do not actually produce it.”); *United States v. Little*, 235 F. Supp. 3d 272, 274–76 (D.D.C. 2017) (relying on the government’s proffer to evaluate the weight of evidence). The ABA Criminal Justice Standards too “do[] not contemplate a formal evidentiary proceeding” but rather provide that the parties “may proceed by proffer.” ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-5.10(a) cmt. (AM. BAR ASS’N, 3d ed. 2007).

90. *See supra* note 89; *see also* Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 408 (1990) (arguing that prosecutors should not be permitted to proceed by proffer but rather should have to call witnesses subject to confrontation).

91. *See, e.g.*, *United States v. LaFontaine*, 210 F.3d 125, 131 (2d Cir. 2000) (affirming the district court’s denial of the defendant’s request to call a witness whose testimony supported the government proffer but indicating that the defendant did call some witnesses); *Acevedo-Ramos*, 755 F.2d at 206 (“[B]ail hearings [are] typically informal affairs, not substitutes for trial or even for discovery . . .”).

92. *See* Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1, 43 (2015); *see also* 18 U.S.C. § 3500 (b) (2012) (providing that the government must produce witness statements only after the witness has testified on direct examination).

93. *See* *State v. Robinson*, 160 A.3d 1, 10 (N.J. 2017) (explaining that the New Jersey Rule “guarantees far broader discovery than federal law does”); N.J. CT. R. 3:4-2(c)(2) (West 2018) (providing that prosecutors “seeking pretrial detention” must provide to the defendant with discovery at least twenty-four hours before a detention hearing including “all statements or reports relating to the affidavit of probable cause,” “all statements or reports relating to additional evidence the State relies on to establish probable cause at the hearing,” and “all exculpatory evidence”).

94. *See supra* note 89 (listing federal precedent in support of this point). At least one state decision suggests an evidence-taking approach, however. *See* *State v. Blow*, 135 A.3d 672, 675 (Vt. 2015) (affirming the trial court’s decision to revoke bail based on “testimony and evidence” introduced after its initial bail decision).

95. PRETRIAL JUSTICE CLINIC, *supra* note 7, at 19.

96. More detailed study of these procedures could prove useful.

97. 3 ROBERT G. BOGLE, CRIMINAL PROCEDURE IN NEW YORK § 55:21 (2d ed. 2009).

98. Colbert et al., *supra* note 81, at 1733.

In at least a few jurisdictions, motions to reduce bail or for the defendant's release pending trial afford some aspects of a process resembling preliminary injunctions: meaningful written briefing addressing the statutory factors by which bail is to be set, supporting sworn evidence or declarations under penalty of perjury, or an in-person hearing.⁹⁹ A Michigan treatise suggests that before seeking a bail reduction at arraignment, defense counsel should file a written brief,¹⁰⁰ to which the government may sometimes respond by filing its own brief.¹⁰¹ At least for cases involving felonies, Florida requires that courts hear applications for bail modification in person with the defendant present.¹⁰² Utah requires sufficient notice for the other party to prepare for a hearing on a motion to modify the original bail order, but Utah also provides that such motions can be resolved based on various sources including information provided by a pretrial services agency or "any other reliable record or source."¹⁰³ For at least some felonies, California relies fairly heavily on bail schedules as its default but provides meaningful procedure allowing for deviations from that schedule in either direction.¹⁰⁴ Such a departure requires two-day written notice to opposing counsel, appointed counsel for unrepresented defendants, a hearing in open court where both sides have the opportunity to be heard, and a stated explanation from the court for the departure.¹⁰⁵ Moreover, California requires automatic review at a hearing of the initial bail determination for defendants still in custody five days after the arrest.¹⁰⁶ Motions to reduce bail in California may require supporting evidence, though in some courts a lawyer's proffer is sufficient.¹⁰⁷ For some felony offenses and for violating a domestic violence restraining order, setting bail above the scheduled amount requires the declaration of a peace officer under penalty of perjury setting forth the facts and circumstances demonstrating why higher bail is necessary to ensure the defendant's appearance or protect a victim.¹⁰⁸

99. See 8 C.J.S. *Bail* § 129 (2017) ("Upon a motion for reduction of bail, a court may neither deny a hearing nor accept ex parte in camera evidence." (footnote omitted)); cf. Michael S. Woodruff, Note, *The Excessive Bail Clause: Achieving Pretrial Justice Reform Through Incorporation*, 66 RUTGERS L. REV. 241, 275 (2013) (noting that "[w]hile statutory applications for bail review vary by state, they can be discussed in general terms" as to jurisdiction and methods for challenging unfavorable decisions).

100. See 1 GILLESPIE MICHIGAN CRIMINAL LAW AND PROCEDURE WITH FORMS § 13:9 (2d ed. 2017); see also MICH. CT. R. 6.106(H)(2) (2016) (providing for bail reduction procedures, including that the court may modify release decisions "on the motion of a party or its own initiative" prior to, at, or after arraignment).

101. See, e.g., People's Answer to Motion to Request Bond, *People v. Taylor*, No. CR-W-07-364-FC, 2008 WL 2035457 (Mich. Cir. Ct. Jan. 8, 2008).

102. FLA. STAT. ANN. § 903.035(2) (West 2018).

103. UTAH CODE ANN. § 77-20-1(5)–(6) (West 2017).

104. CAL. PENAL CODE § 1270.1 (West 2011). Its heavy use of bail schedules is very much in doubt. See *In re Humphrey*, 228 Cal. Rptr. 3d 513 (Ct. App.), review granted, 417 P.3d 769 (Cal. 2018). In the interest of full disclosure, I signed an amicus brief supporting Mr. Humphrey in that case.

105. CAL. PENAL CODE § 1270.1.

106. *Id.* § 1270.2.

107. LAURIE L. LEVENSON, CALIFORNIA CRIMINAL PROCEDURE § 4:22 (2018).

108. CAL. PENAL CODE § 1269c (West 2011).

A scant few defendants receive much more process. For instance, Paul Manafort and Richard Gates's bail hearing lasted thirty-eight minutes and found the government consenting to pretrial liberty on conditions.¹⁰⁹ When the government accused Manafort of tampering with witnesses while out on bail, he had eleven days of freedom and written briefing by his lawyers arguing that the quantity of evidence supporting those tampering allegations was sparse before he then received a one-hour hearing on the government's motion to revoke his bond.¹¹⁰ Most defendants would have been detained immediately.¹¹¹

2. Civil

Preliminary injunctions that determine the parties' rights until the court can resolve the merits follow written briefing supported by sworn evidence and often-lengthy hearings in open court. To adjudicate a preliminary injunction motion, courts resolve substantial factual disputes based on detailed evidentiary submissions.¹¹² Indeed, there is even a meaningful debate about the extent to which such evidence must satisfy the Federal Rules of Evidence.¹¹³ For that reason, the parties are typically afforded discovery to help resolve preliminary injunction motions.¹¹⁴ District courts must carefully consider the particular facts of the case and the legal standards; merely stating in cursory fashion that the factors are

109. See Minute Entry, *United States v. Manafort*, 314 F. Supp. 3d 258 (D.D.C. 2017) (No. 1:17-cr-00201), ECF No. 8.

110. See Peter Maass, *Paul Manafort Has Inadvertently Helped America by Showing the Absurdities of Its Bail System*, INTERCEPT (June 9, 2018, 9:04 AM), <https://theintercept.com/2018/06/09/paul-manafort-bail-inequality/> [<https://perma.cc/WDH7-A7W2>]; Tierney Sneed, *Judge Sends Manafort to Jail After Revoking His Bail*, TALKING POINTS MEMO (June 15, 2018, 11:44 AM), <https://talkingpointsmemo.com/muckraker/judge-sends-manafort-to-jail-after-revoking-his-bail> [<https://perma.cc/JZH7-3BMZ>].

111. For one particularly apt contrast, see Scott Hechinger (@ScottHech), TWITTER (June 9, 2018, 7:08 AM), <https://twitter.com/ScottHech/status/1005451651854098432> [<https://perma.cc/AD7C-5CJQ>] (“Last night: I argued bail on 8 cases in 20 minutes. Also last night: Manafort’s attorneys submitted a 9 page bail response, filed 5 days after Mueller requested to revoke release, all of which will be argued in a robust hearing next Friday, while he remains at liberty. 2 systems.”). See also Maass, *supra* note 110 (“[T]he process afforded to the privileged is not afforded to the majority of people who are arrested.”).

112. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (recounting the factual dispute); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (stating that the burden of proof on “motion for preliminary injunctive relief . . . is much higher” than on a motion for summary judgment); 11A WRIGHT ET AL., *supra* note 11, § 2949, at 237, 241–42 (“Evidence that goes beyond the unverified allegations of the pleadings and motion papers must be presented to support or oppose a motion for a preliminary injunction. Affidavits are appropriate on a preliminary-injunction motion and typically will be offered by both parties. . . . Depositions also may be introduced.”).

113. See generally Maggie Wittlin, *Evidence, Meta-Evidence, and Preliminary Injunctions* (Nov. 10, 2018) (unpublished manuscript) (on file with author) (explaining that under existing practice parties file evidentiary motions and judges consider evidentiary issues in the preliminary injunction context).

114. See, e.g., *Trefelner ex rel. Trefelner v. Burrell Sch. Dist.*, 655 F. Supp. 2d 581, 599 (W.D. Pa. 2009) (extending a temporary restraining order to permit discovery before a preliminary injunction hearing); see also *SEC v. Gonzalez de Castilla*, 184 F. Supp. 2d 365, 381 (S.D.N.Y. 2002) (granting leave to amend based on discovery related to the government’s preliminary injunction motion); FED. R. CIV. P. 26(d) advisory committee’s note to 1993 amendments (explaining that early discovery is “appropriate in some cases, such as those involving requests for a preliminary injunction”).

satisfied is insufficient.¹¹⁵

For a recent example of preliminary injunction litigation, consider a false advertising lawsuit regarding Arla Foods's publicity campaign against a hormone that Elanco produces to help increase lactation by dairy cows. Elanco supported its motion for a preliminary injunction with declarations under penalty of perjury by two high-ranking employees and one outside scientist substantiating the claims, which included an explanation of the science behind them and 317 pages of supporting exhibits.¹¹⁶ Elanco also filed a thirty-page written brief.¹¹⁷ The defendants responded with their own twenty-nine-page written brief,¹¹⁸ supported by declarations of the CEO and two scientists and 122 pages of documentary support addressing the science underlying the claims in detail (including the two scientists' CVs to demonstrate their qualifications).¹¹⁹ The court resolved the motion after a hearing that lasted more than five and a half hours, included the testimony of two witnesses, and generated a 231-page transcript.¹²⁰

For a public law example, consider recent litigation over the second iteration of the travel ban. Although the plaintiffs in the Maryland case filed their motion for preliminary injunction a mere four days after the revised executive order was issued and concurrently with their complaint, plaintiffs attached 420 pages of supporting evidence (in addition to the 166 pages they had filed supporting a similar motion earlier in the case challenging the first iteration of the travel ban).¹²¹ These documents included Trump's own statements belying his stated national security interest and declarations under penalty of perjury by the individual and organizational plaintiffs detailing the ways in which the executive order would harm them if enforced. The court then heard oral argument for more than ninety

115. See *Winter*, 555 U.S. at 26–27 (reversing the grant of a preliminary injunction based in part on the district court's "cursory" treatment of the balance of equities and public interest factors).

116. Declaration of Grady Bishop, Exhibits 1–13, *Eli Lilly & Co. v. Arla Foods Inc.*, No. 17-C-703-WCG, 2017 WL 4570547 (E.D. Wis. June 15, 2017), ECF No. 5; Declaration of Roger A. Cady, Ph.D., Exhibits 1–6, *Eli Lilly & Co.*, 2017 WL 4570547, ECF No. 6; Declaration of Robert J. Collier, Ph.D., Exhibits A–C, *Eli Lilly & Co.*, 2017 WL 4570547, ECF No. 21; Supplemental Declaration of Grady Bishop, Exhibit A–E, *Eli Lilly & Co.*, 2017 WL 4570547, ECF No. 30. I excluded cover pages from this count.

117. Brief in Support of Elanco's Motion for a Preliminary Injunction, *Eli Lilly & Co.*, 2017 WL 4570547, ECF No. 7.

118. Defendants' Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction, *Eli Lilly & Co.*, 2017 WL 4570547, ECF No. 25.

119. *Id.* Exhibits A–C.

120. Transcript of Preliminary Injunction Hearing at 1, 10, 44, 72–74, 110, 149, 192, 230, *Eli Lilly & Co.*, 2017 WL 4570547, ECF No. 14 (noting that the hearing began at 9:30 A.M. and ended at 4:52 P.M. and that recesses occurred from 10:33–10:45 A.M., 12:22–1:34 P.M., 2:29–2:40 P.M., and 3:51–3:57 P.M. and indicating that Elanco called two witnesses).

121. Joint App. at 39–204, 262–681, *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (No. 17-1351), ECF No. 34, *vacated*, 138 S. Ct. 353 (2017); Plaintiffs' Motion for a Preliminary Injunction and/or Temporary Restraining Order of the Exec. Order & Memorandum of Law in Support Thereof & Exhibit 12, *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017) (No. 8:17-cv-00361), ECF No. 95.

minutes.¹²² Based on the factual record, the lower federal courts concluded that the plaintiffs were likely to succeed on the merits of their Establishment Clause claim, that the plaintiffs had standing, and that they were likely to suffer irreparable harm.¹²³ In its ruling, the Fourth Circuit deemed the government's invocation of a national security interest "rote" based on its lack of evidentiary support;¹²⁴ it weighed that lack of evidence against the evidence demonstrating harm to the plaintiffs to support its conclusion that the balance of equities favored the plaintiffs.¹²⁵

3. Comparison

There are several important differences between the procedures afforded to civil defendants when opposing a motion for preliminary injunction and those afforded to criminal defendants seeking pretrial liberty or bail reduction. First, factual disputes can be "resolved" against criminal defendants by the government's lawyer merely proffering what she will prove later whereas civil plaintiffs must demonstrate their entitlement to relief through sworn evidence. Second, seeking bail *reduction* necessarily asks the court to recognize, at least impliedly, that its earlier decision was mistaken;¹²⁶ by contrast, when there are two different procedural devices—the temporary restraining order (TRO) and the preliminary injunction—a court can deny one after granting the other without implying any inconsistency between these rulings.¹²⁷ Criminal defendants have the onus of asking the court to revisit that initial determination, whereas civil plaintiffs must again demonstrate their entitlement to a preliminary injunction anew.¹²⁸ Lastly, even if the procedures were equal, it would nonetheless be more difficult for criminal defendants to coordinate with their lawyers from behind bars than for civil defendants who can much more easily aid their lawyers' investigations.¹²⁹

122. Transcript of Proceedings Hearing for Temporary Restraining Order at 1, 74, *in* Joint App., *supra* note 121, at 682, 755.

123. *Int'l Refugee Assistance Project*, 241 F. Supp. 3d at 549–52 (discussing standing); *id.* at 553–64 (discussing the likelihood of success on the merits); *id.* at 564–65 (discussing potential of irreparable harm); *see also Int'l Refugee Assistance Project*, 857 F.3d at 572 (describing "an Executive Order that in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination").

124. *Int'l Refugee Assistance Project*, 857 F.3d at 603–04.

125. *Id.* That the Supreme Court vacated the Fourth Circuit opinion as moot after the second version of the travel ban expired, *Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017), and ultimately upheld the third version of the travel ban, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), does not undermine the usefulness of the example for illustrating the process afforded.

126. *See* 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 12.1(c), at 13 (3d ed. 2007) (explaining that defense counsel "'usually comes into a case after the initial bail has been set,' and thus is in the disadvantageous position of trying 'to change a decision which was formulated without his presence'").

127. *But cf.* Lynch, *supra* note 66, at 800 (articulating concern that a court's determination regarding likelihood of success on the merits for purposes of preliminary injunction will overly sway its ultimate merits conclusion).

128. *See* 4 LAFAVE ET AL., *supra* note 126, § 12.1(c), at 13–15.

129. *See, e.g.,* BAUGHMAN, *supra* note 2, at 82–84; *see also* Stack v. Boyle, 342 U.S. 1, 4 (1951) ("This traditional right to freedom before conviction permits the unhampered preparation of a defense . . .");

In practice, the closer comparison to pretrial detention proceedings on the civil side is not preliminary injunctions but TROs. However, TROs presumptively cannot exceed fourteen days,¹³⁰ and even TROs require sworn evidence. Moreover, the fourteen-day period may be shortened because the defendant can be heard to dissolve or modify the TRO on two days' notice to the plaintiff.¹³¹ Through the lens of the TRO comparison, civil plaintiffs bear a greater burden to demonstrate why the defendant should not lose a property right for two weeks or less than the government does when it seeks to deprive an unconvicted defendant of her liberty for some undetermined period that may stretch for years.¹³² These disparities are troubling.¹³³

Other existing procedural protections might seem to allow criminal defendants to challenge weak cases against them, but they do not as a practical matter.¹³⁴ Unless a defendant has been indicted by a grand jury, a defendant can be detained only if, within forty-eight hours after arrest, a magistrate finds probable cause that the defendant committed the charged crime.¹³⁵ But this *Gerstein* hearing can occur after the defendant has already been jailed for two days (often in terrible conditions),¹³⁶ need not be adversarial, and does not afford a rigorous look at the merits.¹³⁷ In many jurisdictions, the government must also demonstrate probable cause at a preliminary hearing (or bindover hearing) for its case to proceed unless the defendant waives that right.¹³⁸ But defendants often waive that right, whether because they view the opportunity as rote process unlikely to yield any benefit,

Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471 (2016) (demonstrating adverse case outcomes for incarcerated defendants); Stevenson, *supra* note 84 (same).

130. FED. R. CIV. P. 65(b)(2).

131. *Id.* 65(b)(4).

132. Some defendants, like Kalief Browder, may spend years in pretrial detention before charges are dismissed. Gonnerman, *supra* note 8. See generally *supra* notes 2–8 and accompanying text (providing examples of defendants detained for lengthy periods of time but never convicted).

133. Below I suggest that the inverted power dynamic between the two systems may give rise to this disparity in both procedure and substance. See *infra* text accompanying note 202.

134. Cf. Kuckes, *supra* note 45, at 3 (“It may surprise those not steeped in the intricacies of criminal procedure to learn that hearing rights constitutionally required for individuals threatened with adverse government action in civil settings are not necessarily enjoyed by criminal defendants.”).

135. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (“[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*.”); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (requiring prompt judicial determination of probable cause).

136. See BAUGHMAN, *supra* note 2, at 6 (“Jail conditions nationally are dreadful The jail environment is often ‘chaotic’ because resources are scarce, staff often lack adequate training, classification of inmates is random, and turnover is quick. Despite some efforts at reform, there are countless stories of jail abuse, gang rapes, illness, overcrowding, and other unsafe and abusive conditions nationwide.” (footnote omitted)).

137. *Gerstein*, 420 U.S. at 120.

138. See 4 LAFAYE ET AL., *supra* note 126, § 14.1(a), at 274; see also, e.g., N.C. GEN. STAT. ANN. § 15A-606 (West 2017).

because they obtain something valuable in exchange, or both.¹³⁹ And preliminary hearings are typically not required when prosecutors charge by indictment.¹⁴⁰ Many jurisdictions allow the government to rely on inadmissible evidence at the preliminary hearing, including hearsay.¹⁴¹ Lastly, the probable cause standard that the government must meet at a preliminary hearing is lower than the likelihood of success standard for preliminary injunctions.¹⁴² As one commentator puts it:

[D]efendants constitutionally may be arrested, charged, prosecuted, and detained in prison pending trial with fewer meaningful review procedures—that is to say, procedures to test the legitimacy of the underlying charges—than due process would require in the preliminary stages of a private civil case seeking the return of household goods.¹⁴³

In sum, although there are several procedures that ostensibly protect defendants from unwarranted criminal process, they are far less meaningful in practice. Thus, criminal law's additional procedures do not justify the broader disparity between procedural protections for civil versus criminal defendants regarding interim relief.

B. SUBSTANTIVE COMPARISON

The substantive comparison between pretrial detention and preliminary injunction standards also reveals a stark disparity. Preliminarily enjoining a defendant is an “extraordinary and drastic remedy,”¹⁴⁴ and thus the civil system requires plaintiffs to demonstrate “likelihood of irreparable injury” to obtain a preliminary injunction.¹⁴⁵ In criminal law, the threshold for the public's interest in detention is set quite low—some likelihood that the defendant will be accused of another crime, however minor, or some likelihood that the defendant will not appear for further proceedings.

Civil systems seek to minimize harm during the pendency of the case by requiring judges to explicitly balance each side's interests: the harms that would befall the plaintiff absent the injunction versus the harms that the injunction

139. See, e.g., 4 LAFAVE ET AL., *supra* note 126, § 14.2(e), at 311 (“[W]aivers by the defense exceed fifty percent in a substantial number of jurisdictions which provide quite extensive preliminary hearings.”); see also Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 576 (“[E]ven where a defendant has a right to a preliminary hearing, it has become so meaningless in some jurisdictions that the defendant typically waives the right . . .”).

140. See FED. R. CRIM. P. 5.1(a)(2); 4 LAFAVE ET AL., *supra* note 126, § 14.2(c)–(d), at 300–08.

141. 4 LAFAVE ET AL., *supra* note 126, § 14.4(b), at 341–43.

142. Alschuler, *supra* note 46, at 519; Kuckes, *supra* note 45, at 24 n.132; see also, e.g., Desper v. State, 318 S.E.2d 437, 445 (W. Va. 1984) (stating that magistrates can manage preliminary hearings to prevent them from becoming an “endless wrangle relating to the existence of probable cause”).

143. Kuckes, *supra* note 45, at 22.

144. 11A WRIGHT ET AL., *supra* note 11, § 2948, at 119 (footnotes omitted).

145. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 21 (2008) (emphasis added).

would impose on the defendant.¹⁴⁶ In criminal law, by contrast, courts analyze pretrial detention questions with a sole focus on the extent to which not detaining the defendant may harm the public—either because a defendant is accused of a crime while on pretrial liberty or fails to appear for later court dates. Such analysis ignores important harm—harm that detention inflicts on that defendant, her loved ones, and the broader public.¹⁴⁷

Chart 1 below illustrates the contrast between comparable aspects of the existing civil and criminal standards. Let us then consider each system in more detail.

CHART 1

| Preliminary Injunctions | Pretrial Detention |
|---|--|
| Likelihood of irreparable harm | Some likelihood that the defendant will: (1) be accused of a crime, however minor, or (2) not appear for proceedings |
| Balance equities | Harm to defendant and her loved ones not analyzed |
| Likelihood of success based on evidence | Likelihood of success based on lawyers' say-so |

1. Criminal

In criminal law, pretrial detention decisions doctrinally turn on two questions: if granted pretrial liberty, does the defendant pose a risk of (1) rearrest or (2) failure to appear for a future court date?¹⁴⁸ Most pretrial detention statutes direct courts to rely on a relatively similar set of factors to resolve those two questions: “the ‘nature and circumstances’ of the charged offense; the defendant’s criminal history (including the defendant’s record of prior appearances at court proceedings; the defendant’s ‘character, physical and mental condition’ (including any substance abuse history); and his or her ties to the jurisdiction (employment,

146. *Id.* at 24.

147. See Simonson, *supra* note 1 (explaining the serious harms that pretrial detention causes). Notions of justice as accounting for harm to family members have ancient origins. See, e.g., CALEB BINGHAM, THE COLUMBIAN ORATOR 36 (David W. Blight ed., N.Y. Univ. Press Bicentennial ed. 1998) (1797) (explicating *Genesis* 44:18–34, including Judah’s plea to Joseph to not punish Benjamin because of the pain it would bring to his father Jacob: “Have pity. I beseech you, on the deplorable condition of an old man, stripped of his last comfort; . . . Grant this request, not so much for the sake of the youth himself, as of his absent father . . .”).

148. See BAUGHMAN, *supra* note 2, at 18–27; Gouldin, *supra* note 14, at 845–52; see also, e.g., 18 U.S.C. § 3142(e) (2012) (permitting pretrial detention if no release conditions “will reasonably assure the appearance of the person as required and the safety of any other person and the community”); *United States v. Salerno*, 481 U.S. 739, 742 (1987) (quoting § 3142(e)).

family, or length of residence).”¹⁴⁹ Many jurisdictions also consider the “weight of the evidence against the person” as part of determining the defendant’s dangerousness or likelihood not to appear,¹⁵⁰ a few jurisdictions do not.¹⁵¹ Some generalized facts about the defendant or her offense factor into the analysis but only to help the court consider the likely harm from her pretrial liberty; none of the analysis bears on how pretrial detention would harm the defendant or others.¹⁵² In short, judges in criminal law consider only the potential harm that allowing the defendant to enjoy her liberty may cause and ignore any harm of detention or benefits of pretrial liberty.

Some court systems rely on data-driven algorithmic measures of pretrial risk to measure risk of rearrest and nonappearance.¹⁵³ Unfortunately, most risk-assessment tools do not separately score those two risks,¹⁵⁴ which—as Lauryn Gouldin persuasively explains—is quite problematic.¹⁵⁵

Many risk-assessment tools place defendants in the highest risk of rearrest category at strikingly low probabilities. For instance, one tool labels defendants with a ten percent chance of being arrested for any crime during the pretrial period as “high risk.”¹⁵⁶ Other tools place defendants in the highest risk category who have a fifteen or seventeen percent chance of being accused of a crime while on pretrial liberty.¹⁵⁷ A couple of tools use a threshold of forty-two percent or greater if stretched over a longer period, but they do so by counting arrests of all types, including for traffic offenses.¹⁵⁸

149. Gouldin, *supra* note 14, at 865–66.

150. NAT’L CRIM. JUSTICE ASS’N, PROJECT TO DEVELOP A MODEL ANTI-STALKING CODE FOR STATES 58–60 (1993), <https://hdl.handle.net/2027/mdp.39015050309775> [<https://perma.cc/E2Y6-FCSR>]; *see also, e.g.*, 18 U.S.C. § 3142(g)(2) (2012); FLA. STAT. § 903.046(2)(b) (2016); N.Y. CRIM. PROC. LAW § 510.30(2)(a)(viii) (McKinney 2012); OHIO REV. CODE ANN. § 2937.222(C)(2) (West 2014). Federal law first countenanced weighing the evidence in the criminal rules in 1944, but early U.S. law allowed courts not to presume that capital defendants were entitled to bail so long as “there was significant proof that the person committed the alleged crime.” BAUGHMAN, *supra* note 2, at 18, 21–22.

151. NAT’L CRIM. JUSTICE ASS’N, *supra* note 150, at 58–60; *see also, e.g.*, CAL. PENAL CODE § 1275 (West 2018) (making no mention of the “weight of the evidence”).

152. *Cf.* Simonson, *supra* note 1, at 606–21 (arguing that community bail funds demonstrate that the public’s interest is often better served by pretrial liberty rather than detention); Yang, *supra* note 27, at 1404 (arguing that pretrial detention overlooks costs to defendants and their loved ones).

153. Gouldin, *supra* note 27, at 713–14 (explaining problems with risk-assessment tools); Mayson, *supra* note 13, at 508–18 (explaining the newfound prevalence of algorithmic pretrial-risk-assessment tools and categorizing their various features).

154. Gouldin, *supra* note 14, at 867–71; Mayson, *supra* note 13, at 512.

155. Gouldin, *supra* note 14, at 867–71. These tools also give rise to a host of other concerns. *See* Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT’G REP. 237 (2015) (arguing against risk-assessment tools because their use of prior criminal records proxies for race due to disparities in criminal law enforcement); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 821–62 (2014) (arguing that use of risk-assessment tools at sentencing violates the Equal Protection Clause).

156. Mayson, *supra* note 13, at 514.

157. *Id.*

158. *Id.* at 515. It is not always clear what “any new arrest” encompasses for each tool, but the most natural reading seems to include traffic offenses.

Most tools also do not distinguish between the risks of being accused of a violent versus a nonviolent crime.¹⁵⁹ But even the risk-assessment tools that distinguish violent from nonviolent crime risk place the accused into the “high risk” category for rearrest for a violent crime at a strikingly low likelihood. Defendants accused of violent crimes are placed in the highest risk categories with an 8% likelihood of rearrest according to one tool and an 8.6% likelihood of rearrest according to another.¹⁶⁰

Moreover, these tools estimate the likelihood that the defendant will be *arrested* rather than the likelihood of *conviction*. In other words, they look to the likelihood of being *accused* of a crime, not the likelihood that the defendant will actually do something illegal.¹⁶¹

After assessing the possibility that the defendant will be accused of a crime while on pretrial liberty and the possibility that the defendant will not appear for further proceedings, judges decide whether to: release the defendant on her own recognizance without conditions, release the defendant with conditions, or simply order the defendant detained.¹⁶² The most common condition on pretrial liberty—and most common resolution of whether to allow a defendant to have pretrial liberty—is money bail. Most defendants (sixty-one percent) are detained unless they can post bail.¹⁶³

Money bail requires the defendant to post a certain amount of money to secure her pretrial liberty that will be returned to her when she appears for further legal proceedings. Some statutes and rules sensibly provide that pretrial detention or financial conditions on pretrial liberty should be last resorts.¹⁶⁴ Bail should not be set so high, several statutes provide, that it serves as a backdoor to detention

159. *Id.* at 511–12.

160. *Id.* at 514.

161. See Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. (forthcoming 2019), <https://ssrn.com/abstract=3167521> [<https://perma.cc/D8T7-YTNQ>] (arguing that, although they stem from mere accusations, arrests are often treated practically and rhetorically as indicating guilt).

162. For a more detailed explanation of pretrial liberty in its various permutations, see BAUGHMAN, *supra* note 2, at 37–59.

163. JESSICA EAGLIN & DANYELLE SOLOMON, BRENNAN CTR. FOR JUSTICE, REDUCING RACIAL AND ETHNIC DISPARITIES IN JAILS: RECOMMENDATIONS FOR LOCAL PRACTICE 19 (2015), <https://www.brennancenter.org/sites/default/files/publications/Racial%20Disparities%20Report%20062515.pdf>.

164. See, e.g., 18 U.S.C. § 3142(b) (2012) (“The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.”); *id.* § 3142(c) (providing that “[i]f the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community,” the judicial officer shall impose “the least restrictive further condition[s]” necessary to achieve those goals); see also Amber Widgery, *Guidance for Setting Release Conditions*, NAT’L CONF. OF ST. LEGISLATURES (May 13, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx> [<https://perma.cc/6LNL-S77T>] (listing which jurisdictions require courts to presume that defendants should be released on recognizance or unsecured bail).

because the defendant cannot pay it.¹⁶⁵

Nonetheless, judges frequently set bail that defendants cannot afford.¹⁶⁶ Ninety percent of pretrial detainees are there not because a judge has deemed them too dangerous for pretrial liberty but simply because they cannot afford to pay their bail.¹⁶⁷ This is partly because some defendants cannot afford what must seem to judges like paltry sums.¹⁶⁸ In total, sixty percent of defendants are detained before trial, whether because they cannot afford their bail or because the judge denied bail entirely.¹⁶⁹

Our current money bail systems detain defendants based principally on whether they are poor.¹⁷⁰ This disparity has received plenty of popular attention recently.¹⁷¹ Money bail systems detain too many people who are not dangerous and grant liberty to defendants who are.¹⁷² In short, money bail systems are fundamentally flawed.¹⁷³

Sometimes bail is set merely by reference to a schedule that considers only the charged offense and perhaps the defendant's criminal history. The Houston bail schedule system has been preliminarily enjoined since a district court found that plaintiffs were likely to succeed in demonstrating that it discriminates against the poor.¹⁷⁴ Before the recent litigation, Houston set bail by reference to a schedule

165. *See, e.g.*, § 3142(c)(2) (“The judicial officer may not impose a financial condition that results in the pretrial detention of the person.”); ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 89, § 10-5.3 (a), at 17 (“The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.”).

166. *See, e.g.*, Gouldin, *supra* note 14, at 863 (“Thirty-plus years after federal and state statutes were rewritten to fix this precise problem by permitting judges to order dangerous defendants to be detained, money bail is still used as a back-door means to manage dangerousness”); Dewan, *supra* note 26 (“The bail is really being set to keep the person in custody. You have to kind of concede that,” said a California judge, W. Kent Hamlin of Superior Court in Fresno County. “It’s not supposed to be that; it’s supposed to guarantee their appearance in court. They’re innocent until proven guilty, but the bail system assumes they’re guilty.”).

167. REAVES, *supra* note 15, at 15.

168. In New York City, thirty-one percent of misdemeanants were incarcerated because they could not afford \$500 or less to make bail. RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 32 (2015).

169. BAUGHMAN, *supra* note 2, at 4.

170. *See, e.g.*, Heaton, Mayson & Stevenson, *supra* note 58, at 737–38 (finding in Harris County, Texas that defendants from the poorest zip codes are detained much more frequently than similarly-situated defendants from high-income zip codes).

171. *See, e.g.*, Carter, *supra* note 28 (articulating problems with the U.S. pretrial detention system); Casey Tolan, *Making Freedom Free*, SLATE (Mar. 29, 2017, 10:15AM), http://www.slate.com/articles/news_and_politics/trials_and_error/2017/03/poor_defendants_get_locked_up_because_they_cant_afford_cash_bail_here_s.html?wpsrc=sh_all_tab_tw_ru [<https://perma.cc/6QVF-ZSWA>] (“[L]ess affluent defendants are stuck in jail for low-level crimes while wealthy ones can buy their freedom by writing a check.”); *supra* note 17 and accompanying text (relaying the remarks of U.S. Attorney General Loretta Lynch).

172. Stevenson & Mayson, *supra* note 77, at 28.

173. *See, e.g.*, BAUGHMAN, *supra* note 2, at 157–85; Gershowitz, *supra* note 25 (manuscript at 23–24). This Article does not seek to demonstrate the problems with money bail but focuses instead on reconceiving pretrial detention more broadly.

174. *ODonnell v. Harris County*, 892 F.3d 147, 157, 166–67 (5th Cir. 2018), *aff’d* 251 F. Supp. 3d 1052, 1107 (S.D. Tex. 2017).

where bail for low-level alleged misdemeanants without a criminal record was set at \$500.¹⁷⁵ It did not consider defendants' ability to pay. Houston is hardly alone in its use of bail schedules.¹⁷⁶ In most jurisdictions, specific facts about the defendant or the charged crime that might bear on harm to the government from pretrial liberty—namely, criminal history or a more serious charged offense—warranted higher bail.¹⁷⁷

Judges all too frequently seem to assume that detention better serves the public's interest than pretrial liberty because detention protects safety.¹⁷⁸ This assumption is shortsighted. Community bail funds involve members of a community posting bail for strangers, demonstrating that the community would be better served if some defendants who are now detained were afforded pretrial liberty.¹⁷⁹ Many prosecutors and law enforcement officials have recognized that the current state of pretrial detention increases criminality and “has adverse consequences for public safety.”¹⁸⁰ Moreover, current money bail systems create a perception of unfairness that risks undermining safety because it can decrease the willingness of victims and witnesses to cooperate with police—a procedural justice concern.¹⁸¹ Communities might rather have their residents free to earn money at work, raise their children, and have a fighting chance to contest criminal charges against them, except in cases where the defendant poses serious public safety risks.¹⁸²

In sum, the criminal legal system currently decides which defendants are granted liberty before trial and which remain incarcerated by considering only the harm that their liberty might cause the public and ignoring any countervailing considerations. And after making that decision, the criminal legal system often requires defendants to pay for their freedom, which many cannot do.¹⁸³

175. Heaton, Mayson & Stevenson, *supra* note 58, at 730.

176. *See id.* at 733 & n.105 (providing that “the use of a schedule specifying bail amounts based on the charge and prior convictions is not uncommon” and is the subject of “ten class action challenges in eight states”).

177. NAT'L CRIM. JUSTICE ASS'N, *supra* note 150, at 58–60.

178. *See* Simonson, *supra* note 1, at 615 (“[J]udges routinely name protecting the ‘community’ as a reason for a bail decision.”).

179. *See id.* at 628; *see also* Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1365 (2012) (proposing a “bail jury” to better represent the community’s voice than existing structures).

180. Amici Curiae Brief of Current and Former Prosecutors and Law Enf’t Officials in Support of Respondent Kenneth Humphrey at 10–12, *In re Humphrey*, 417 P.3d 769 (Cal. 2018) (No. S247278) [hereinafter *Humphrey*, Current and Former Prosecutors’ Brief], <https://fairandjustprosecution.org/wp-content/uploads/2018/10/Humphrey-Amicus-Brief-FINAL.pdf>.

181. *Id.*

182. Simonson, *supra* note 1, at 615.

183. *See generally* Russell M. Gold, *Paying for Pretrial Detention* (Aug. 14, 2018) (unpublished manuscript) (on file with author) (discussing in detail the concerning financial incentives that criminal law uses surrounding pretrial detention and comparing it to preliminary injunctions’ use of financial incentives).

2. Civil

By contrast, preliminary injunctions set a high threshold for the interest necessary to secure relief before judgment and balance all relevant interests during the pendency of the case. They do so because preliminary injunction doctrine treats interim relief as an extraordinary measure and sensibly seeks to minimize interim harm—that is, harm caused by granting or denying preliminary relief in a way that does not accord with the later merits decision.¹⁸⁴

Preliminary injunctions are “extraordinary remed[ies] never awarded as of right” but only after courts “balance the competing claims of injury and . . . consider the effect on each party of the granting or withholding of the requested relief.”¹⁸⁵ A preliminary injunction is warranted only when irreparable injury to the plaintiff in its absence is *likely*.¹⁸⁶ Mere possibility is not enough.¹⁸⁷

Doctrinally, the Supreme Court has articulated a four-factor test to implement this principle of minimizing harm caused by an erroneous preliminary injunction ruling. Courts cannot grant a preliminary injunction unless the plaintiff demonstrates that: (1) she will likely suffer irreparable harm without preliminary relief, (2) the balance of equities between the parties favors preliminary relief, (3) she is likely to succeed on the merits, and (4) an injunction serves the public interest.¹⁸⁸

There are sensible critiques of some of the particulars, such as the algebraic formula that Judge Posner has sought to impose on this area of law¹⁸⁹ and whether to recognize some extent of uncertainty in the ultimate merits

184. See Leubsdorf, *supra* note 31, at 541 (“The danger of incorrect preliminary assessment is the key to the analysis of interlocutory relief. It requires investigating the harm an erroneous interim decision may cause and trying to minimize that harm.”); Douglas Lichtman, *Irreparable Benefits*, 116 YALE L.J. 1284, 1287 & n.3 (2007) (identifying “minimiz[ing] deviations from what will be the ultimate ruling on the merits” as “the goal according to virtually every scholarly and judicial account” of preliminary injunctions); see also, e.g., *Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986) (deploying an algebraic formula for minimizing probable harm through interim relief).

One interesting article suggests that courts should deploy preliminary injunctions to maximize social welfare rather than simply to minimize harm. See generally Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381 (2005). But these authors recognize that they are prescribing an approach that does not align with current doctrine. *Id.* at 389.

185. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (quotation omitted).

186. *Id.* at 22.

187. *Id.*

188. *E.g., id.* at 20; see also 11A WRIGHT ET AL., *supra* note 11, § 2948, at 123–24 (explaining the preliminary injunction standard). As a practical matter, although all four prongs come into play, likelihood of success on the merits can play an outsized role. See John Leubsdorf, *Preliminary Injunctions: In Defense of the Merits*, 76 FORDHAM L. REV. 33, 35 (2007) (“Under existing law as well as the Leubsdorf–Posner formulation, the strength of the plaintiff’s case under the substantive law—usually referred to as the plaintiff’s likelihood of prevailing—is an important, perhaps the most important, factor in determining whether the plaintiff can obtain preliminary relief. Courts often decide motions for preliminary injunctions almost entirely on this ground.”). Criminal procedure should not embrace the civil standard in this respect.

189. See Linda S. Mullenix, *Burying (With Kindness) the Felicific Calculus of Civil Procedure*, 40 VAND. L. REV. 541, 545–48, 550 (1987); Linda J. Silberman, *Injunctions by the Numbers: Less Than the Sum of Its Parts*, 63 CHI.-KENT L. REV. 279, 280–82, 287, 304 (1987); see also *Am. Hosp. Supply v. Hosp. Prods. Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986) (discussing the preliminary injunction formula).

decision.¹⁹⁰ But on the broad parameters relevant to this Article, preliminary injunction law is quite consistent.¹⁹¹

Depriving a defendant of its property interest before the case is resolved on its merits is an extraordinary remedy. That is why preliminary injunctions cannot issue unless the plaintiff can demonstrate that she will likely suffer irreparable harm without preliminary relief.¹⁹² Or as one leading hornbook puts it, “the irreparable harm requirement serves a special purpose; it provides a barrier against the easy use of public power without a trial.”¹⁹³ In addition to this high threshold for granting relief without trial, because courts seek to minimize the harm of granting or denying such preliminary relief they need to account for and balance all relevant interests that would be affected by interim relief.¹⁹⁴ Lastly, because courts do not want to award preliminary relief to those who will not ultimately be entitled to relief after judgment, so too do they require plaintiffs to demonstrate likelihood of success on the merits to obtain a preliminary injunction.¹⁹⁵ This multipart inquiry seeks to ensure that courts do not often deprive a party of its rights before judgment, inflict more harm than good while the case is pending, or grant relief to those unlikely to warrant it.

3. Comparison

The differences—both procedural and substantive—between pretrial detention and preliminary injunctions are striking. A civil plaintiff cannot obtain preliminary relief unless she makes several showings through actual evidence—typically sworn declarations. She must show first that she will likely be irreparably harmed absent that relief. Second, the plaintiff must prove that she will be harmed more without the preliminary injunction than the defendant will be harmed by the injunction. And third, the plaintiff must prove that she is likely to succeed on the merits of her claim. Before such an injunction can issue, the defendant has an opportunity to be heard through robust briefing and a hearing.¹⁹⁶

190. See generally Joshua P. Davis, *Taking Uncertainty Seriously: Revising Injunction Doctrine*, 34 RUTGERS L.J. 363 (2003) (advocating that courts should account for uncertainty about the merits decision when deciding whether to grant preliminary injunctions).

191. See, e.g., Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 111 n.4 (2001) (“[A]lthough the circuits sometimes differ in their articulation of the factors, the differences generally do not reflect substantive disagreement as to the proper areas of inquiry.”).

At a more granular level, preliminary injunction law does not live in a state of beautiful harmony across the circuits. See, e.g., George P. Sibley III & Jonathan L. Caulder, *An Empirical Look at Preliminary Injunctions in Challenges Under Environmental Protection Laws*, 47 ENVTL. L. REP. 10397 (2017) (detailing the circuit split); Bethany M. Bates, Note, *Reconciliation after Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522 (2011) (same). For now, however, I have obscured these differences because they do not bear on the primary objective of this Article—considering the conceptual lessons that the preliminary injunction standard offers for pretrial detention. I take up the somewhat-varying standards below, to some extent. See *infra* Part III.

192. See *Winter*, 555 U.S. at 22 (reversing the Ninth Circuit in part for requiring that the plaintiff show only a “possibility” of irreparable injury).

193. DOBBS & ROBERTS, *supra* note 12, at 193.

194. See *Winter*, 555 U.S. at 20 (holding that courts must balance the equities before granting preliminary injunctive relief).

195. *Id.*

196. FED. R. CIV. P. 65(a).

By contrast, in some jurisdictions, the government can successfully deprive people not convicted of a crime of their liberty so long as they are too poor to pay for their freedom and the government can meet its pro forma obligation to demonstrate probable cause.¹⁹⁷ In other jurisdictions, the government can incarcerate the accused based on whether an algorithm indicates a nontrivial risk that the defendant will forget about her court date. And in striking contrast to the civil context, defendants often get about a two-minute hearing and no opportunity for briefing before the judge decides to lock them up.

These disparities between the civil and criminal context are troubling. If there were to be a disparity between the two systems, the one that incarcerates people and purports to presume people innocent until proven otherwise should give *more* opportunity to defendants and require *more* proof from the government. Strong empirical evidence that defendants who are incarcerated before trial face worse outcomes—in both likelihood of conviction and length of sentence¹⁹⁸—makes this comparison all the more concerning. Even though defendants are more likely to be convicted of crimes and incarcerated longer, face a whole host of collateral consequences and challenges upon reentry, and (unlike civil defendants) are out-resourced by their adversaries,¹⁹⁹ our justice system nonetheless affords them less process and requires their opponent to satisfy a less stringent test than civil defendants' adversaries before imposing an interim restraint.

One possible way to explain the existing disparity is that our legal procedures place greater importance on property rights than liberty rights, but that distinction does not hold up. Looking at civil forfeiture law suggests that wealth and power drive the existing disparity between pretrial detention and preliminary injunctions. Civil forfeiture allows the government to seize property from criminal defendants with far less process than we would otherwise expect before the government seizes property from a private citizen.²⁰⁰ And according to Justice

197. Such an approach runs into substantial problems with the Excessive Bail Clause of the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment. *See, e.g.,* O'Donnell v. Harris County, 892 F.3d 147, 161–63 (5th Cir. 2018) (discussing the Equal Protection Clause). But this Article focuses on the notion that it is bad policy and neither legislatures nor courts—in their administrative capacities—should permit it.

198. *See, e.g.,* CHRISTOPHER T. LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 10 (2013), https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf (“[D]efendants detained until trial or case disposition are 4.44 times more likely to be sentenced to jail and 3.32 times more likely to be sentenced to prison[.] . . . [and] [t]he jail sentence is 2.78 times longer for defendants who are detained for the entire pretrial period, and the prison sentence is 2.36 times longer.”); Dobbie et al., *supra* note 58, at 203 (“[I]nitial pretrial release decreases the probability of being found guilty by 14.0 percentage points”); *cf.* Gupta et al., *supra* note 129, at 471 (arguing that use of money bail increases the likelihood of conviction). One explanation for longer sentence lengths is that pretrial detention may result in job loss and that lack of employment, in turn, can remove a potential mitigating factor at sentencing. Yang, *supra* note 27, at 1419.

199. Gold, *supra* note 47, at 123–24.

200. *See, e.g.,* Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting denial of certiorari) (describing the civil forfeiture system as one “where police can seize property with limited judicial oversight and retain it for their own use,” which produces “egregious and well-chronicled abuses”); *see also* Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 MICH. L. REV. 1910, 1911 (1998) (reviewing LEONARD LEVY, *A LICENSE TO STEAL: THE FORFEITURE*

Thomas, “[t]hese forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings.”²⁰¹ Civil forfeiture thus suggests that courts afford more process to (likely wealthy) civil defendants than to (likely poor) criminal defendants, no matter whether property or liberty is at stake.²⁰² Indeed, the lack of process for accused criminal defendants helps reveal a criminal legal system that too often equates accusation with guilt and implicitly embodies a notion that the accused are bad and therefore deserve the rough treatment including incarceration that criminal law affords.²⁰³

The conceptual objectives of preliminary injunctions are limiting prejudgment relief and balancing all interests to enjoin a defendant only when doing so would be more beneficial than costly. By contrast, the current judicial inquiry for pretrial detention is a one-sided affair where courts consider only the potential risks to the public that pretrial liberty would pose and ignore all interests that cut the other way—setting a low threshold for prejudgment relief all the while. These disparities are not justifiable.

III. ENVISIONING PRETRIAL DETENTION AS INTERIM RELIEF

Although the purported aims of pretrial detention—preventing flight risk and future harm—are worthy objectives,²⁰⁴ there is little to commend the meta-stasizing of pretrial detention and the current systems in which detention is largely regulated through money bail. The scope of pretrial detention alone is concerning. Since the late 1990s, “the United States has gone from releasing

OF PROPERTY (1996)) (“[C]ivil *in rem* forfeiture proceedings have been used — and increasingly are being used — as an expedient to circumvent the usual protections accorded to defendants in criminal proceedings, and to augment federal, state, and local treasuries.”).

201. *Leonard*, 137 S. Ct. at 848.

202. Gold, *supra* note 47, at 141–42. Defending in detail the view that wealth and power rather than liberty versus property provides the operative distinction here is beyond the scope of this Article. For a more detailed discussion see Gold, *supra* note 183.

203. See, e.g., ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 2–5 (2018) (arguing that lower criminal courts provide a form of social control and surveillance that extends well beyond convictions and sentences including marking individuals for further surveillance and subjecting them to the procedural hassle of legal proceedings); Roberts, *supra* note 161 (manuscript at 12–32) (detailing ways that criminal law equates arrest and guilt).

204. Shima Baradaran Baughman convincingly explains why the latter objective is inconsistent with the presumption of innocence. See generally Baradaran, *supra* note 27. But the Supreme Court does not agree. See *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (tying the presumption of innocence to the burden of proof in criminal trials and explaining that “it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun”); see also *United States v. Salerno*, 481 U.S. 739, 755 (1987) (Marshall, J., dissenting) (“This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court holds otherwise.”); Baradaran, *supra* note 27, at 738–54 (describing the Supreme Court’s doctrinal undermining of the presumption of innocence).

62% of defendants to only 40%.”²⁰⁵ It would be difficult to make the case that this massive pretrial detention is necessary to promote public safety; “65% of pretrial detainees were held on nonviolent charges only, and 20% were charged with minor public-order offenses.”²⁰⁶ Despite the decline in crime, jail populations have continued to grow as more arrestees are detained before trial.²⁰⁷ This heavy use of pretrial detention is all the more concerning when, as one empirical study found, arrest while on pretrial liberty “is actually quite unlikely,” and “about half of those detained have a lower chance of being rearrested pretrial than many of the people released.”²⁰⁸ So too does detention *decrease* the likelihood that the defendant will appear for her legal proceedings.²⁰⁹ And even in the more immediate term, jails are not free; overusing them wastes tax dollars.²¹⁰

This Part envisions a pretrial detention regime that more closely resembles the civil preliminary injunction standard insofar as it requires a significant burden to warrant granting the “plaintiff” the relief she seeks before resolving the merits and accounts for all relevant interests. Section III.A explains that pretrial detention would look much more stringently for likelihood of irreparable harm to the public from the defendant’s pretrial liberty before ordering a defendant detained than it does now. Neither a probability that the defendant may forget about her court date nor that she may be accused of a nonviolent misdemeanor would justify detention (whether directly or by setting unaffordable bail). Section III.B explains how such a model would consider harm from pretrial detention to the defendant and her loved ones and balance that harm against any benefit from detaining the defendant to the government and other nonparties such as victims. Section III.C explains that courts would consider likelihood of success on the merits based on evidence rather than mere proffers, and they would afford the defendant some opportunity for discovery to contest the government’s allegations on this point. Before analyzing each component, Chart 2 demonstrates the comparison at a glance.

205. Baradaran, *supra* note 27, at 725; *see also* BAUGHMAN, *supra* note 2, at 3 (“[S]ince the 1984 reform, pretrial detention has become the norm rather than the exception.”); Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 501 (2012) (“[I]n the last several years, national pretrial detention rates have increased significantly without any scholarly comment and without a determination of whether increased detention is reducing crime.” (footnote omitted)).

206. Stevenson & Mayson, *supra* note 77, at 23.

207. Humphreys, *supra* note 28.

208. Baradaran & McIntyre, *supra* note 205, at 557–58.

209. BAUGHMAN, *supra* note 2, at 82. This metric assumes, of course, that the defendant is released at some point. It does not suggest that defendants fail to appear while in pretrial detention.

210. *See* Grover Norquist, *Conservatives for Criminal Justice Reform*, WALL ST. J. (Sept. 26, 2017, 6:12 PM), <https://www.wsj.com/articles/conservatives-for-criminal-justice-reform-1506463970> [<https://perma.cc/B2C9-AU83>] (detailing budget-driven conservative successes in criminal justice reform to reduce prison populations by focusing on which offenders need to be incarcerated).

CHART 2

| Preliminary Injunctions | Current Pretrial Detention | Toward an Improved Pretrial Detention Regime |
|---|--|---|
| Likelihood of irreparable harm | Some unquantified likelihood that the defendant will: (1) be accused of a crime, however minor or (2) not appear for proceedings | Likelihood of irreparable harm—serious risk that the defendant will: (1) commit a crime that harms someone while on pretrial liberty or (2) abscond from the jurisdiction |
| Equities balanced | Harm to defendant and her loved ones not considered | Balance: (1) defendant-specific harms, (2) non-defendant-specific harms, (3) harms to nonparties like defendant's loved ones; and (4) jail defendant only when benefit outweighs these combined harms |
| Likelihood of success based on evidence | Considered without evidence | Require government to introduce evidence to demonstrate likelihood of success |

A. IRREPARABLE HARM TO PUBLIC

A civil defendant will not be enjoined from behaving as it wishes before a court resolves the merits of the case unless the plaintiff is able to establish that not enjoining that activity will likely result in *irreparable injury*. By contrast, criminal law purports to care about presuming defendants innocent until proven guilty, but the threshold for depriving a defendant of her liberty is far lower. The potential that an accused will forget about a court date or that an accused might later be arrested for any crime—however minor or unfounded the allegations—is used to justify physically restraining liberty through pretrial detention. That disparity is unjustifiable; the criminal standard too should require likely irreparable harm before incarcerating an accused.

The labels that criminal law now uses when analyzing the need for pretrial detention—dangerousness and flight risk—sound like serious requirements equivalent to irreparable injury. They aren't. Those labels are misleading.²¹¹ And those misleading labels obscure important, unjustifiable discrepancies between the civil and criminal systems regarding interim relief.

211. See *infra* Sections III.A.1–2.

A criminal standard that more closely adheres to the civil one would require not merely some likelihood of rearrest on any crime while on pretrial liberty or some likelihood that the defendant might forget about her court date. Rather, likelihood of irreparable harm would mean likelihood of actual dangerousness or actual flight risk—a far cry from the way those labels are now used. Dangerousness should mean a substantial risk that the defendant will commit—not merely be accused of—a *violent* crime while on pretrial liberty. Flight risk should mean a serious risk that the defendant will abscond from the jurisdiction. Either of those alone or a combination of the two could constitute likely irreparable injury to the public adequate to justify pretrial detention.²¹² But both would be substantially more stringent than avoiding some modest possibility of rearrest and nonappearance that purport to justify pretrial detention now.

1. Likelihood of Committing Future Crime as Irreparable Injury

The government could satisfy a likelihood of irreparable injury standard by demonstrating a substantial risk that the defendant will seriously and unlawfully harm an actual victim. That proposed standard departs from current practice in several ways. First, it looks to actual commission of a crime rather than a mere arrest (although conviction will have to proxy for factual guilt). Second, it distinguishes based on the seriousness of the offense as current doctrine and many risk predictors do not. Third, serious thought should be given to what constitutes sufficient “likelihood” in this context rather than reflexively deeming some arbitrary, unquantified likelihood as sufficient or adhering to labels such as “high risk” that a risk-assessment tool provides.

Many court systems have begun to rely on data-driven measures of pretrial risk of rearrest.²¹³ The vast majority of these risk-assessment tools do not distinguish between violent and nonviolent crime risks.²¹⁴ Tools that separate out risk of rearrest on a *violent* charge from other risks therefore have more to recommend them than tools that do not.²¹⁵ But even the risk-assessment tools that distinguish violent from nonviolent crime risk place an accused into the “high risk” category for rearrest on a violent crime at a strikingly low threshold. One tool deems an eight percent risk of rearrest for a violent crime “high risk,” and another places that threshold at 8.6%.²¹⁶

Estimating the likelihood that the defendant will commit a crime while on pretrial liberty based on likelihood of *arrest* rather than likelihood of *conviction* is problematic because it hinges not on a finding of guilt but a mere accusation of

212. Cf. Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1152–59, 1158 & n.163 (2018) (creating a taxonomy of mixed-motive standards, one of which includes two independently insufficient causes that are sufficient when combined).

213. E.g., Mayson, *supra* note 13, at 507–18 (explaining the newfound prevalence of algorithmic pretrial-risk-assessment tools and categorizing their various features).

214. *Id.* at 511–12.

215. See *id.* The Public Safety Assessment-Court (PSA) tool developed by the Laura and John Arnold Foundation is in use throughout Arizona, Kentucky, New Jersey, and several other jurisdictions across the country. PRETRIAL JUSTICE INST., *supra* note 21, at 4.

216. Mayson, *supra* note 13, at 514.

wrongdoing.²¹⁷ And that accusation is levied by police officers via an arrest.²¹⁸ The likelihood that a defendant will be rearrested depends on how heavily the neighborhood where she lives is policed. That is a troubling idea when neighborhood often proxies for race and class and when poorer and minority neighborhoods tend to be more heavily policed than white affluent ones.²¹⁹

With more precise terminology, an eight percent risk of rearrest for any crime—the current standard for those classified as having high risk of dangerousness under one popular tool—is a far cry from likelihood of irreparable harm. A standard that actually required irreparable harm in the criminal context as to the defendant’s future conduct would require a substantial risk that the defendant will be convicted of a future crime that injures a particular victim.²²⁰ The ideal metric would count whether the defendant in fact will seriously unlawfully harm someone. But because crime commission cannot be measured directly, likelihood of either arrest or conviction could serve as a proxy. Both would be over- and underinclusive. Arrest data will be overinclusive because it will sweep in innocents,²²¹ but so too will it be underinclusive because some guilty defendants evade arrest. Criminal law’s reasonable doubt burden is meant to make acquitting the guilty more likely than convicting the innocent, and thus convictions can be underinclusive. But so too can convictions be overinclusive as a proxy for guilt.²²² The vast majority of convictions follow guilty pleas²²³ where reasonable

217. See Roberts, *supra* note 161 (manuscript at 1–32) (arguing that arrests are often treated practically and rhetorically as if they indicate guilt even though they are mere accusations).

218. That police officers and prosecutors are not detached and neutral actors is why prosecutions without a grand jury indictment require a judicial finding of probable cause at an early stage to detain a defendant. *Gerstein v. Pugh*, 420 U.S. 103, 112–14 (1975).

219. See, e.g., Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. ONLINE 33, 39 (2017) (“After controlling for local crime rates, a neighborhood’s racial composition predicted the police response in terms of proactivity. In other words, proactivity was about more than crime; it was also about race.” (footnote omitted)); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 462 (2000) (“[T]he implementation of Broken Windows policies [in New York City] was disproportionately concentrated in minority neighborhoods and conflated with poverty and other signs of socio-economic disadvantage.”).

That *rearrest* while on pretrial liberty may pose a public-relations risk for the judge is not a sufficient reason to rely on arrest data. See Gouldin, *supra* note 14, at 889 (“When judges release potentially dangerous individuals who subsequently inflict harm, ‘the error will be emblazoned across the front pages’” (quoting David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 696 (2009))); Wiseman, *supra* note 17, at 417 (“[Judges] face the possibility of public scorn (and for elected judges, lost votes) for releasing defendants who flee or commit crimes.”); Wiltz, *supra* note 4 (quoting a Minnesota judge: “The fear is I’m going to let somebody go and they’re going to go out and do something terrible.”).

220. This Article’s primary objective is conceptual; as such, defining the detailed contours of this requirement are beyond its scope.

221. See Roberts, *supra* note 161 (manuscript at 3–32) (explaining that legal actors erroneously equate arrests to guilt in many contexts).

222. Anna Roberts, *Convictions as Guilt* (unpublished manuscript) (on file with author) (manuscript at 1–6).

223. See, e.g., Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 341 (2012) (“About 95 percent of felony convictions follow guilty pleas” (footnote omitted)); Murat C. Mungan & Jonathan Klick, *Identifying Criminals’ Risk Preferences*, 91 IND. L.J. 791, 816 (2016) (“It is

doubt casts, at best, a narrow shadow on plea bargaining.²²⁴ For the rare cases that go to trial, juries are fallible, and there are structural barriers to defendants demonstrating their innocence.²²⁵ Because of the presumption of innocence in the criminal system and concerns about discrimination in policing, relying on conviction data in the pretrial detention inquiry is the better choice.²²⁶

Finally, pretrial detention law needs to think seriously about what quantity of future crime risk is sufficiently serious to warrant pretrial detention.²²⁷ Perhaps an eight percent likelihood that the defendant would commit a serious crime that harms many people should be enough to detain someone presumed innocent, but that is not obvious.²²⁸ Maybe it should be forty percent. The threshold matters in many cases: less than four percent of all defendants are more than twenty-six percent likely to be rearrested while on pretrial liberty.²²⁹

Perhaps the nature of the accusations against the defendant should help calibrate what likelihood of future crime is sufficient to warrant pretrial detention. If the allegations involve serious, violent crimes, a lesser probability of a future occurrence might suffice because that would yield a similar expected cost. Consider, for instance, someone arrested on a domestic violence charge caught holding a knife over his spouse or someone found with a huge cache of weapons. Whatever computer models may suggest, judges in those cases may sensibly find likelihood of irreparable injury on a lower probability of a future offense than in a drug possession case. And as a practical matter, it is hard to see any judge releasing such a defendant. Where risk-assessment tools already account for the nature of the pending charge, as several do,²³⁰ judges should not double count.

2. Flight Risk as Irreparable Injury

The risk that the defendant will abscond from justice to evade punishment could also constitute irreparable harm to the public. But absconding from justice

often stated that over 90% of convictions in criminal cases in the United States are obtained through plea bargains.”).

224. See generally Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464 (2004) (explaining many reasons that plea bargaining does not neatly fit the idea of both sides bargaining in the shadow of trial and discounting by likelihood of victory).

225. See Roberts, *supra* note 222 (manuscript at 2–5) (explaining constraints on defense representation such as lack of resources, large caseloads, and pretrial detention).

226. Conviction data also suffers from biases, but one can hope they are less pronounced than biases in arrest data that lack any check on police discretion. Cf. *Gerstein v. Pugh*, 420 U.S. 103, 112–14 (1975) (requiring judicial finding of probable cause to detain a defendant who has not been indicted).

227. Mayson, *supra* note 13, at 559–60.

228. See *id.* at 560 (“[N]othing less than a substantial likelihood of serious violent crime within a six-month span can justify onerous restraints on liberty.”).

229. Baughman, *supra* note 36, at 13. There is a fair degree of uncertainty about the likelihood of the future conviction, but so too is there uncertainty in preliminary injunction proceedings. See Davis, *supra* note 190 (advocating an approach to preliminary injunctions that takes into account a court’s level of uncertainty); Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. CHI. L. REV. 197 (2003) (advocating an approach that accounts for both courts’ uncertainty about the estimate of harm and prediction of the decision on the merits).

230. Mayson, *supra* note 13, at 512 (charting which risk-assessment tools account for the nature of the charged offense in predicting risk).

is not the same as the term “flight risk” that courts currently use quite loosely to mean risk of nonappearance.²³¹ When an accused misses a court date because she must show up for work to avoid being fired, her absence is thought to count as “flight.”²³² This is so even though many statutes direct courts to consider the risk of “nonappearance” rather than flight risk.²³³ None of the risk-assessment tools analyze the real cause for concern—“flight risk”—but instead measure the broader category of risk of nonappearance.²³⁴

A genuine flight risk where the defendant is likely to abscond from the jurisdiction should, with sufficient proof, warrant pretrial detention to protect the court’s ability to enforce its judgment.²³⁵ It makes sense to call preventing operation of the criminal process irreparable harm to the public that could justify incarcerating someone who has not been convicted of a crime. But this genuine-flight-risk standard should be as difficult to meet as is its civil counterpart. A preliminary injunction to ensure that the court can enforce its judgment requires “a strong indication” that the defendant will become insolvent before a judgment can be collected.²³⁶

A defendant who forgets about her court date or misses a court date because of a work conflict does not irreparably injure the public. These more modest problems in ensuring defendants’ appearances can be solved in more modest ways that do not require pretrial detention such as flexible scheduling for judicial proceedings and reminder calls and text messages.²³⁷ In sum, criminal law should

231. See Gouldin, *supra* note 27, at 687; *supra* Section III.A.1.

232. See Gouldin, *supra* note 27, at 687 (“[J]udges making bail determinations use the term ‘flight risk’ to refer to all nonappearance risks, whether or not the individual is actually likely to flee the jurisdiction. Scholars and reformers do the same.” (footnotes omitted)).

233. *Id.* at 701; *see, e.g.*, 18 U.S.C. § 3142(b) (2012) (requiring judges to release defendants unless “release will not reasonably assure the appearance of the person as required”); D.C. CODE § 23-1322 (2013) (“The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth . . . will reasonably assure the appearance of the person . . .”).

234. Gouldin, *supra* note 27, at 716–17; Mayson, *supra* note 13, at 509–10.

235. See Gouldin, *supra* note 27, at 724–25 (arguing that absconders from the jurisdiction are different from those who deliberately do not appear but remain in the jurisdiction and from those whose failure to appear is inadvertent).

236. *E.g.*, *Micro Signal Research, Inc. v. Otus*, 417 F.3d 28, 31 (1st Cir. 2005); *see also Surplec, Inc. v. Me. Pub. Serv. Co.*, 495 F. Supp. 2d 147 (D. Me. 2007) (denying a preliminary injunction when the plaintiff demonstrated only the mere possibility that the defendant might have insufficient assets to satisfy a monetary judgment); *Sieren v. William R. Hague, Inc.*, 999 F. Supp. 1244 (E.D. Wis. 1998) (denying a preliminary injunction when the plaintiff failed to demonstrate that the defendant firm would not be able to pay its sales representatives).

237. *See, e.g.*, WENDY F. WHITE, COURT HEARING CALL NOTIFICATION PROJECT 2 (2006), <https://community.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=34fdcae8-c04e-a57d-9cca-e5a8d4460252> [<https://perma.cc/5G93-ZL9R>] (reporting a forty-nine percent decrease in one Arizona county’s failure-to-appear rate because of a phone-call reminder program); Mitchel N. Herian & Brian H. Bornstein, *Reducing Failure to Appear in Nebraska: A Field Study*, 13 NEB. LAW. 11, 12 (2010) (“[R]eceiving any type of postcard reduced the [failure-to-appear] rate from 12.6% to 9.7%” and some forms of the postcard reduced the rate even further); Timothy R. Schnacke et al., *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders*, 48 CT. REV. 86, 89, 92 (2012) (finding that phone call reminders in one Colorado county led to forty-three percent fewer failures to appear during the program’s pilot phase and a fifty-two percent decrease in the program’s first six months); Jason

require the government to show likelihood of irreparable injury as a prerequisite to detention; irreparable injury means genuine dangerousness, genuine flight risk, or both.

B. BALANCING HARM TO THE DEFENDANT

If a plaintiff can demonstrate likely irreparable injury absent a preliminary injunction, to minimize the probability of interim harm, preliminary injunction analysis balances the harms that granting or denying interim relief would impose on the parties and considers the interests of nonparties.²³⁸ Balancing all relevant harms makes sense in the criminal context too for pretrial detention. Courts determining whether to preserve the defendant's liberty pending trial should explicitly consider the harm that the defendant and her loved ones would suffer from pretrial detention and balance those harms against the benefits of detention.²³⁹ Without accounting for these important costs, courts will tend to overuse pretrial detention as they do now.²⁴⁰

Whether and how pretrial detention would harm the defendant is now absent from the pretrial detention analysis.²⁴¹ Courts do not consider the ways in which incarceration harms defendants generally, and they do not consider the ways in which some defendants are particularly harmed by immediate pretrial incarceration. Courts do not, for instance, evaluate whether detention will cost a defendant her job, housing, or custody of her children, nor do they consider the harm those

Tashea, *Text-Message Reminders Are a Cheap and Effective Way to Reduce Pretrial Detention*, ABA J. (July 17, 2018, 7:10 AM), http://www.abajournal.com/lawscribbler/article/text_messages_can_keep_people_out_of_jail/ [<https://perma.cc/JN7W-DXJF>] (recounting study results indicating that text-message reminders lower failure-to-appear rates).

Manhattan has piloted a project to add evening court hours that will be scaled up if successful. *Mayor de Blasio and Chief Judge Lippman Announce Justice Reboot, an Initiative to Modernize the Criminal Justice System*, N.Y.C. (Apr. 14, 2015), <http://www1.nyc.gov/office-of-the-mayor/news/235-15/mayor-de-blasio-chief-judge-lippman-justice-reboot-initiative-modernize-the> [<https://perma.cc/5NPP-6SL9>].

238. *E.g.*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

239. *See* Bierschbach & Bibas, *supra* note 36, at 202, 214 (proposing “[i]ncorporating cost-benefit analysis more directly into statutory bail reform” so that serious costs of pretrial detention for defendants and nonparties are “balanced carefully against the benefits of reducing the risk of flight and future crimes”); Yang, *supra* note 27, at 1416, 1469–70 (arguing that courts now consider only benefits of pretrial detention and that considering costs would increase social welfare); *see also* *United States v. Salerno*, 481 U.S. 739, 748 (1987) (conceiving of pretrial detention as categorically balancing the government’s regulatory interest in safety and the individual’s liberty interests); *cf.* Roberts, *supra* note 73, at 341, 371–75 (explaining that courts already use cost-benefit analysis, including accounting for the opportunity costs of particular prosecutions when dismissing cases in furtherance of the interests of justice or as *de minimis*). The preliminary injunction standard too accounts for interests of nonparties. *Winter*, 555 U.S. at 20.

240. *See* Yang, *supra* note 27, at 1404 (explaining that failing to account for costs in pretrial detention has led to loss of social welfare).

241. *Id.*; *cf.* Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 342 (2004) (“In criminal law, prosecution of offenders has obvious and vivid benefits, but its costs are diffuse, externalized, and largely off-screen.”). Baughman recognizes the costs that detention inflicts on defendants and their loved ones but does not ask courts to account for them directly. Baughman, *supra* note 36, at 4–6; *see also* BAUGHMAN, *supra* note 2, at 82–91 (detailing the costs of pretrial detention to defendants and their families).

outcomes might inflict on the defendant's family.²⁴² Neither do they consider whether pretrial detention will lead to job loss for years to come.²⁴³ Many pretrial detention statutes require courts to consider characteristics of the defendant, but they do so to analyze likelihood of nonappearance or rearrest rather than to consider the costs of pretrial detention to the defendant, her family, or the community.²⁴⁴ Under federal law, for instance, courts should consider "family ties, employment, [and] financial resources."²⁴⁵ But courts are asking those questions only to discern likelihood of appearance based on connections to the community and ability to pay bail. If the defendant has a family, she is thought less likely to flee. So too if the defendant has a job.

To the extent that current law accounts for the interests of defendants in avoiding pretrial detention, it does so through a generalized notion that incarceration is bad and therefore that pretrial liberty or an unsecured bond should be the default resolutions to the pretrial detention question.²⁴⁶ Those defaults are sensible, but submerging the defendant's interests into the background while focusing case-specific attention on the government's interests poses two problems. First, such an approach fails to account for the particularized ways that pretrial detention harms some defendants because of their individual circumstances. Second, it advantages the government's interests in detention over the defendant's interests in avoiding detention by increasing the salience of the former but not the latter; it thus likely causes courts to undervalue how pretrial detention harms all defendants.²⁴⁷ Let us consider each in turn.

1. Defendant-Specific Harms

Minimizing harm of an erroneous interim ruling would require judges to consider the interests of actual defendants and the likely costs of ordering them detained before deciding to detain someone who has not been convicted of a crime.²⁴⁸ For some defendants, immediate incarceration will mean missing work,

242. See Harris & Paul, *supra* note 20 (expressing concern about these overlooked costs).

243. See Dobbie et al., *supra* note 58, at 227 (finding that detained defendants are significantly less likely to have any household income for four years after their bail hearing than nondetained defendants).

244. Cf. Roberts, *supra* note 73, at 371–72 (explaining that when dismissing in furtherance of justice courts consider costs to the defendant, her family, and nonparties as well as opportunity costs of the prosecution).

245. 18 U.S.C. § 3142(g)(3)(A) (2012).

246. See, e.g., *id.* § 3142(b) (establishing these defaults). ABA standards suggest similar defaults. ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 89, § 10-1.1, at 36 ("The law favors the release of defendants pending adjudication of charges."); *id.* § 10-5.1(a), at 14 ("It should be presumed that defendants are entitled to release on personal recognizance . . .").

247. Defendant-specific harms versus non-defendant-specific harms is not the only way to categorize these overlooked costs. See Yang, *supra* note 27, at 1417–29 (describing five categories of private and social costs of pretrial detention).

248. The Supreme Court has recognized the important consequences that pretrial detention may impose on defendants. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) ("Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."); *Barker v. Wingo*, 407 U.S. 514, 532–33 (1972) ("The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. . . . Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or

which will financially harm families who may rely on that defendant for support.²⁴⁹ Missing work may mean that defendants lose their jobs.²⁵⁰ Over the long term, serving time reduces hourly wages for men by eleven percent and annual earnings by forty percent.²⁵¹ For some, being detained may mean losing custody of a child.²⁵² Or detention may mean missing important life events.²⁵³ And even after release, these financial consequences may mean missed rent payments or car insurance payments.²⁵⁴ These sorts of stories have been well documented in mainstream media recently, and some of those stories were recounted in the Introduction to this Article. Indeed, numerous current and former prosecutors have recently articulated these concerns in amicus briefs that side with criminal defendants.²⁵⁵ Compounding the problems, every jurisdiction in the country can order defendants to pay costs related to their defense, and the inability to pay that recoupment debt can limit employment, housing, and public benefits and lead to further arrest, probation revocation, and incarceration.²⁵⁶

otherwise prepare his defense.”); *see also, e.g.*, Bierschbach & Bibas, *supra* note 36, at 202 (discussing serious harm to defendants and others from pretrial detention).

249. *E.g.*, Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1356 (2014); Dewan, *supra* note 26; *see also* BAUGHMAN, *supra* note 2, at 89 (recounting study showing that families’ incomes fell by twenty-two percent while a family member was incarcerated and remained fifteen percent lower in the year after release); Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 872 (2018) (describing costs of pretrial detention to those accused of misdemeanors as similar to those accused of felonies including employment, housing, and sometimes children and family stability).

250. *E.g.*, Simonson, *supra* note 1, at 599; Wiseman, *supra* note 249, at 1356; Dewan, *supra* note 26; *see also* 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/9W63-GCWU>] (quoting a criminal defense lawyer: “Most of our clients are people who have crawled their way up from poverty or are in the throes of poverty Our clients work in service-level positions where if you’re gone for a day, you lose your job. . . . People who live in shelters, where if they miss their curfews, they lose their housing.”).

251. BAUGHMAN, *supra* note 2, at 86; *see also* PEW CHARITABLE TRS., COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 11 (2010), https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf.

252. *E.g.*, Simonson, *supra* note 1, at 589; Dewan, *supra* note 26.

253. *See, e.g.*, Curry v. Yachera, 835 F.3d 373, 377 (3d Cir. 2016) (“Unable to post his bail, Curry was sent to jail and waited there for months for his case to proceed. While imprisoned, he missed the birth of his only child, lost his job, and feared losing his home and vehicle.”); Romer & Rose, *supra* note 6 (recounting the story of Mustafa Willis who missed his cousin’s funeral, among other consequences, because he was detained pretrial for a crime he did not commit).

254. Simonson, *supra* note 1, at 589; Wiseman, *supra* note 249, at 1357.

255. *See Humphrey*, Current and Former Prosecutors’ Brief, *supra* note 180, at 8 (“[D]etention before trial, even briefly, can result in the loss of employment, shelter, government assistance, education, and child custody. An individual detained in jail—even though still presumed innocent—may be unable to access necessary mental-health and medical treatment, including drug therapy.”); Brief of Amici Curiae Current and Former Dist. and State’s Attorneys, State Attorneys Gen., U.S. Attorneys, Assistant U.S. Attorneys, and Dep’t of Justice Officials, in Support of Plaintiffs—Appellees at 7, *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018) (No. 17-20333), ECF No. 130 [hereinafter *ODonnell*, Current and Former Prosecutors’ Brief] (“As prosecutors, amici know that detention of a misdemeanor defendant before trial may result in loss of employment, shelter, education, and even child custody.”).

256. Beth A. Colgan, *Paying for Gideon*, 99 IOWA L. REV. 1929, 1931–39 & n.4 (2014); John D. King, *Privatizing Criminal Procedure*, 107 GEO. L.J. 561 (2019) (discussing the practice of surcharging defendants who exercise their constitutional rights).

The types of harms at issue here—such as loss of employment, custody of a child, or housing—will also necessarily impose costs on defendants' loved ones if they depend on the defendant for support, care, or a roof over their heads.²⁵⁷ For some, the lost paychecks may simply mean tightening the budget for the duration of detention. But for many defendants' families who live paycheck to paycheck, a single missed check could mean hunger or even homelessness. It is hard to see why those costs to persons not even accused of a crime should be overlooked when seeking to minimize harm of an erroneous interim ruling. And beyond the harms that the defendant's family will face while she is incarcerated, that pretrial detention is criminogenic means that the risk of defendants' families being harmed later also increases if the defendant is detained now.²⁵⁸

For defendants' children, the story gets worse. “[C]hildren with incarcerated parents are more likely to . . . engage in future criminal activity themselves.”²⁵⁹ Since 1991, “[t]he number of children with an incarcerated parent has increased by almost 80 percent.”²⁶⁰ “[A]t least one in three children in contact with the child welfare system has had a primary caregiver arrested.”²⁶¹ One study found that parental incarceration was worse than divorce when measuring ADD or ADHD, children's behavioral or conduct problems, and developmental delays;²⁶² incarceration of a parent is even worse than death of a parent when measuring ADD or ADHD.²⁶³

To be clear, considering the harms of detention on defendants and their loved ones does not mean that defendants should never be forced to bear the cost of losing their jobs, families, or housing following arrest.²⁶⁴ Nor even does it suggest

257. See BAUGHMAN, *supra* note 2, at 78 (explaining and seeking to quantify the harms that pretrial detention of parents imposes on children).

258. See CHRISTOPHER T. LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 19 (2013), https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf (finding that “[d]efendants detained pretrial were 1.3 times more likely to recidivate compared to defendants who were released at some point pending trial” and that “the longer an individual stays in pretrial detention, the higher the likelihood of [recidivism]”); Gupta et al., *supra* note 129, at 494–96 (finding that money bail increases the likelihood of recidivism by nine percent based on data from Philadelphia and Pittsburgh); Heaton, Mayson & Stevenson, *supra* note 58, at 759–68, 794 (finding based on regression analysis of data from Harris County, Texas that those who were detained pretrial had a thirty-one percent increase in felonies within eighteen months after their bail hearing and a twenty-two percent increase in misdemeanor crime within a year after their bail hearing).

259. BAUGHMAN, *supra* note 2, at 88.

260. *Id.*; ANNIE E. CASEY FOUND., WHEN A PARENT IS INCARCERATED: A PRIMER FOR SOCIAL WORKERS 2 (2011), <https://www.aecf.org/m/resourcedoc/aecf-WhenAParentIsIncarceratedPrimer-2011.pdf>.

261. BAUGHMAN, *supra* note 2, at 88.

262. Kristin Turney, *Stress Proliferation Across Generations? Examining the Relationship Between Parental Incarceration and Childhood Health*, 55 J. HEALTH & SOC. BEHAV. 302, 311–14 (2014).

263. *Id.*

264. Considering the interests of nonparties when deciding on pretrial liberty or detention is not foreign to criminal law. Victims' interests already factor into such decisions. *E.g.*, 18 U.S.C. §§ 3771(a)(1), (a)(4) (2012) (providing victims “[t]he right to be reasonably protected from the accused” and “[t]he right to be reasonably heard at any public proceeding in the district court involving release”); see also 4 LAFAYE ET AL., *supra* note 126, § 12.1(f), at 19 (explaining that two-thirds of state constitutions recognize a right for the victim to be heard at a public proceeding involving pretrial liberty).

that defendants should never feel additional pressure to plead guilty because they are locked up before trial. It means that these hefty costs should be imposed only when their offsetting benefits justify doing so.²⁶⁵

If judges accounted for the potential loss of employment, housing, custody, or other defendant-specific costs, the pretrial detention question would privilege people who have children or employment over those who do not but are otherwise similarly situated. It might seem strange that these factors which have no bearing on the defendant's culpability or deserts would affect whether she is detained pending trial. We typically think that defendants who have committed similar crimes warrant similar treatment. But proportionality is a punishment principle, and pretrial detention is purportedly not punishment, says the Supreme Court.²⁶⁶ Thus, it makes sense to allow courts to view each defendant's harm of incarceration differently based on her circumstances, just as courts do when assessing the benefits of detention through defendants' individualized risk.²⁶⁷

2. Non-Defendant-Specific Harms

Even setting aside the defendant-specific harms just discussed, pretrial detention harms all defendants, and courts should account for and articulate these harms and then decide whether they are worth inflicting in each case.²⁶⁸ For defendants generally, pretrial detention (1) increases the likelihood of conviction, (2) increases sentence length, (3) subjects them to awful jail conditions, and (4) increases their future criminality while reducing their risk of appearance for court proceedings.

Defendants who are initially released before trial are twenty-four percent less likely to be convicted than those initially detained, according to a recent study.²⁶⁹ For alleged misdemeanants, one recent study found that pretrial detention is associated with a twenty-five percent increase in the likelihood of conviction.²⁷⁰

Misdemeanants are also forty-three percent more likely to be sentenced to jail if they are detained pretrial and receive sentences that are more than double that of defendants who were not detained, according to that study.²⁷¹ In the federal system, pretrial release reduces defendants' sentence length by sixty-seven

265. Cf. Baughman, *supra* note 36, at 10 (arguing that a better pretrial detention system that detained fewer people would have saved \$78 billion over the past decade, accounting for costs imposed on society of reoffending or failures to appear while on pretrial liberty). Indeed, even a policy of universal pretrial liberty would save money over the current regime using a similar calculus. *Id.* at 21.

266. See *United States v. Salerno*, 481 U.S. 739, 748 (1987) (reasoning that pretrial detention is not punishment and that it therefore can be consistent with due process). *But see* Roberts, *supra* note 73, at 372 n.333 (collecting cases that refer to pre-adjudication harm as "punishment").

267. See Yang, *supra* note 27, at 1440 (arguing that considering individualized costs to defendants is the logical extension of individualized risk).

268. See *Humphrey*, Current and Former Prosecutors' Brief, *supra* note 180, at 8–9 (explaining that detained defendants have "a greater likelihood of conviction and a greater likelihood of longer sentences compared to those who are released").

269. Dobbie et al., *supra* note 58, at 225.

270. Heaton, Mayson & Stevenson, *supra* note 58, at 744.

271. *Id.* at 747.

percent, another study found.²⁷² For alleged felons, one study found that pretrial detention leads to a forty-two percent increase in the maximum days of an incarceration sentence—or 124 days—and a 136-day increase in the number of days before parole eligibility.²⁷³ Let us unpack why pretrial detention increases likelihood of conviction and sentence length.

Pretrial detention makes defendants more likely to plead guilty.²⁷⁴ The effect is particularly pronounced for alleged misdemeanants who may face the choice of going home on a time-served sentence if they plead guilty or staying in jail to await trial.²⁷⁵ Shima Baradaran Baughman's book tells the story of Raul Hernandez, who was charged for drug possession after dropping an empty plastic bag containing heroin residue.²⁷⁶ Hernandez could not make his \$500 bail; after nine days in jail, when the police officer was unavailable to testify at a hearing Hernandez pleaded guilty to get out of jail instead of awaiting further delays from behind bars.²⁷⁷ This decisionmaking is hurried for defendants itching to get home and out of terrible jail conditions, which in turn jeopardizes "extended discussions with counsel, case investigation, or discovery from the prosecution."²⁷⁸ For defendants who refuse to plead guilty and opt to contest the charges against them, it is more difficult to mount a defense from behind bars. Pretrial detention may also yield longer sentences to the extent that it causes job loss because lack of employment removes a potential mitigating factor at sentencing.²⁷⁹

Moreover, jail conditions are awful,²⁸⁰ and incarceration can inflict significant physical and psychological harm.²⁸¹ The psychological harm from imprisonment is sometimes extreme, such as in the case of Kalief Browder, who died by suicide

272. Stephanie Holmes Didwania, *The Immediate Consequences of Pretrial Detention: Evidence from Federal Criminal Cases 30* (Feb. 17, 2018) (unpublished manuscript), <https://ssrn.com/abstract=2809818> [<https://perma.cc/D8W4-MZPB>].

273. Stevenson, *supra* note 84, at 20.

274. Dobbie et al., *supra* note 58, at 203; Gouldin, *supra* note 14, at 860; Mayson, *supra* note 13, at 556; Simonson, *supra* note 1, at 609.

275. *O'Donnell v. Harris County*, 251 F. Supp. 3d 1052, 1107 (S.D. Tex. 2017) (finding that the evidence "overwhelmingly prove[d] that thousands of misdemeanor defendants each year are voluntarily pleading guilty knowing that they are choosing a conviction with fast release over exercising their right to trial at the cost of prolonged detention"); *O'Donnell*, Current and Former Prosecutors' Brief, *supra* note 255, at 7 ("[T]he accused may see an early guilty plea as the most expedient way to obtain release, as many misdemeanor defendants are sentenced to time served. This in turn may result in the conviction of innocent people . . ."); Wiseman, *supra* note 249, at 1356 ("In some cases, the periods that defendants spend in jail awaiting trial is comparable to, or even greater than, their potential sentences, thus substantially incentivizing quick plea deals regardless of guilt or innocence." (footnote omitted) (citing Bibas, *supra* note 224, at 2492)); *Frontline: The Plea* (PBS television broadcast June 17, 2004), <http://video.pbs.org/video/2216784391/> [<https://perma.cc/A8Q9-7BTQ>] (explaining the pressures faced by even innocent defendants to plead guilty when the sentence would result in immediate release from jail).

276. BAUGHMAN, *supra* note 2, at 85.

277. *Id.*

278. Simonson, *supra* note 1, at 589.

279. Yang, *supra* note 27, at 1419.

280. *E.g.*, BAUGHMAN, *supra* note 2, at 6.

281. *See* Fares & Levinson, *supra* note 9.

after being wrongfully incarcerated on New York's Rikers Island.²⁸² Sandra Bland too provides a well-known example of someone who, it appears, took her own life while in pretrial detention.²⁸³

Pretrial detention also causes systemic harm that thwarts the ostensible objectives of bail and pretrial detention. Pretrial detention makes the defendant *more* likely to commit a future crime²⁸⁴ and makes defendants *less* likely to appear for their legal proceedings.²⁸⁵

To minimize the harm of an erroneous interim ruling, even in cases without defendant-specific harms, judges should articulate the harms of pretrial detention that befall jailed arrestees generally.

* * *

Incorporating harms to the defendant into the pretrial detention analysis and balancing them against the likely harm to the public if the defendant is afforded pretrial liberty helps the judicial system reach a more efficient outcome whereby defendants are detained pretrial only when detention yields more benefit than cost.²⁸⁶ Courts should explicitly consider these very serious costs that remain largely hidden in the pretrial detention inquiry to equalize the salience of costs and benefits of detention.²⁸⁷ In the criminal law context, employment, marital attachment, costs to families, and costs to communities are precisely the sorts of costs that criminal law is likely to overlook without cost-benefit analysis.²⁸⁸ Cost-benefit analysis provides a formalized structure that helps eliminate cognitive shortcuts and provides a checklist of sorts to help prevent overlooking costs or benefits.²⁸⁹ Moreover, that judges announce reasoning to support whichever decision they reach and that they have to articulate these harms to the defendant may

282. Gonnerman, *supra* note 8.

283. Wiltz, *supra* note 4. These are, unfortunately, far from the only examples. *See, e.g.*, Fares & Levinson, *supra* note 9 (providing more examples of defendants who died in Louisiana jails); Nick Wing, *A Black Teen Died This Week in an Alabama Jail Cell, and Authorities Say it Was Suicide*, HUFFINGTON POST (July 24, 2015, 8:50 AM), https://www.huffingtonpost.com/entry/kindra-chapman-death_us_55a9063fe4b04740a3dfa844 [<https://perma.cc/VD9P-LTYU>] (discussing an eighteen-year-old who died about an hour after being booked in pretrial detention).

284. *See, e.g.*, LOWENKAMP ET AL., *supra* note 258, at 19; Gupta et al., *supra* note 129, at 495; Heaton, Mayson & Stevenson, *supra* note 58, at 762; Simonson, *supra* note 1, at 619 n.176.

285. *See* BAUGHMAN, *supra* note 2, at 82 (recounting findings that “[d]efendants held for 2–3 days were 22 percent more likely to fail to appear in court than similarly situated defendants who were held for less than 24 hours” and that “[d]efendants held for 15–30 days” failed to appear forty-one percent of the time).

286. *Cf.* Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 91–112 (2011) (arguing for better flow of cost information in criminal prosecution to improve efficiency).

287. *See generally* Brown, *supra* note 241 (advocating additional uses of cost-benefit analysis in criminal law); *see also, e.g.*, Edward J. McCaffery, *Behavioral Economics and the Law: Tax*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 599, 609 (Eyal Zamir & Doron Teichman eds., 2014) (“*Salience* is key to many behavioral effects: individuals overreact to highly salient matters, and underreact (or fail to react at all) to low-salient ones.”).

288. Brown, *supra* note 241, at 345–49.

289. *Id.* at 343, 359; *cf.* Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1064–73 (2000) (discussing the cost-benefit analytical process in the context of regulation).

also help de-bias their decisionmaking.²⁹⁰

That a judge would hear from the defendant (or her lawyer) and then be required to articulate the defendant's interests in pretrial liberty helps prevent the cost-benefit analysis here from becoming wholly rote as other aspects of criminal law judging have.²⁹¹ So too does it afford defendants a greater measure of participation and respect than they now receive.²⁹² Focusing the judge on individualized information about the defendant might improve judicial decisionmaking by reducing the influence of stereotypes.²⁹³ From a procedural justice standpoint, seeing defendants being treated as individuals rather than as entries on a bail schedule could improve citizens' perceptions of the fairness of criminal procedure law and thus aid crime control.²⁹⁴

For meaningful case-by-case analysis of the balance of harms, defendants need both counsel and the right to be heard.²⁹⁵ Recall that bail hearings—especially

290. See, e.g., Philip E. Tetlock, *Accountability: A Social Check on the Fundamental Attribution Error*, 48 SOC. PSYCHOL. Q. 227, 233–34 (1985) (explaining that telling people in advance that they will be held accountable for their decisions leads to better decisionmaking).

291. See Gold, *supra* note 39, at 714–17 (explaining that judicial approval of plea agreements is rote and accordingly not particularly meaningful). An example of a checklist for structuring this inquiry appears in the Appendix.

292. See Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1450–51 (2005) (explaining that defendants are often silent in their own cases but that speaking in court has dignitary and expressive benefits for defendants).

293. See, e.g., Wayne Chan & Gerald A. Mendelsohn, *Disentangling Stereotype and Person Effects: Do Social Stereotypes Bias Observer Judgment of Personality?*, 44 J. RES. PERSONALITY 251, 255–56 (2010) (finding that providing individuating information to subjects made them far less likely to describe a person based on stereotypes); Ziva Kunda & Paul Thagard, *Forming Impressions from Stereotypes, Traits, and Behaviors: A Parallel-Constraint-Satisfaction Theory*, 103 PSYCHOL. REV. 284, 291–92 (1996) (finding consistent with previous literature that individuating information about particular behaviors dominates the effect of stereotypes when the individuating information is unambiguous).

294. Procedural justice scholarship suggests that improved perception of fairness improves crime control efforts. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 161–62 (2006) (concluding based on an empirical study “that legitimacy plays an important role in promoting compliance” with the law and explaining that views about legitimacy of authority “are strongly connected to judgments of the fairness of the procedures through which authorities make decisions”); see also *Humphrey*, Current and Former Prosecutors’ Brief, *supra* note 180, at 10–12 (explaining the way that unaffordable bail undermines crime control and the role that perceptions of fairness play in advancing policing); Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 857 (2008) (explaining that a system in which the court does not hear from the accused “appears unfair and dictatorial”).

295. This suggestion to appoint counsel for bail hearings does not arise directly from the comparison to preliminary injunctions because civil defendants have no constitutional right to counsel in such proceedings. See U.S. CONST. amend. VI (affording a right to counsel in “criminal prosecutions”); *Lassiter v. Dep’t of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 25 (1981) (“The pre-eminent generalization that emerges from this Court’s precedents on an indigent’s right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.”). Nonetheless, because many criminal defendants cannot afford to hire their own counsel, see *Appleman*, *supra* note 179, at 1343, there is reason to think that appointing counsel would make a substantial practical difference in courts’ abilities to carefully balance harms in each case. Because civil defendants typically have their own counsel—and corporate defendants must because they cannot appear pro se, e.g., *Rowland v. Cal. Men’s Colony*, 506 U.S. 194, 202 (1993)—this same need for appointed counsel does not arise on the civil side for the procedure to work well.

initial ones—can be exceptionally short, occur over videoconference rather than in person, be conducted by a commissioner or other nonjudicial official for later review by a judge, and are typically held without counsel present.²⁹⁶ This state of affairs cannot accommodate a meaningful case-by-case inquiry akin to preliminary injunctions.²⁹⁷ Second, the defendant needs the opportunity to be heard about the particularized harms that she would incur if she were detained.²⁹⁸ And as with other important criminal proceedings, defendants should have counsel to help them most effectively convey the relevant facts.²⁹⁹ As several scholars have argued, slowing down pretrial detention hearings is also a worthwhile step to improve deliberation.³⁰⁰

Affording more judicial process to the pretrial detention question opens these important proceedings to the public in a more meaningful way. And in a system where few cases go to trial and many cases are resolved through plea bargaining that is invisible to the public,³⁰¹ public nontrial proceedings are all the more important.³⁰² Open proceedings both provide a check on the exercise of prosecutorial power and serve the ideals of democratic self-governance.³⁰³ This opacity critique is familiar to civil procedure scholars in the settlement and mandatory

296. See *supra* Section II.A.1.

297. See, e.g., CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 19, at 26 (arguing for individual hearings in which defendants are represented by counsel to determine whether they should be detained before trial).

298. See Wiseman, *supra* note 17, at 446 (explaining that, in most pretrial detention hearings, “the judge spends several minutes, if that, hearing a defendant’s story”).

299. See BAUGHMAN, *supra* note 2, at 202–03 (arguing that defendants should be afforded counsel at bail hearings); Appleman, *supra* note 179, at 1343 (“As the vast majority of those detained without bail are those who cannot afford counsel on their own, it is rare to see defense counsel appear at these hearings. Accordingly, the prosecutor usually presents her reasons why the indicted offender should not be granted bail, with no response by the defense, and the judge decides.” (footnote omitted)); Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 8–13, 38–40, app. 1b.B at 55–58 (surveying the availability of counsel at initial bail proceedings in state courts); *id.* at 21–37 (arguing that federal constitutional law warrants counsel at bail hearings); Colbert et al., *supra* note 81, at 1731–36 (recounting the successful results of a law clinic project to provide counsel to otherwise unrepresented defendants at bail hearings in Baltimore).

300. E.g., Stevenson & Mayson, *supra* note 77, at 32; see also Appleman, *supra* note 179, at 1368 (proposing a “bail jury” and arguing that such an entity would slow down decisions on pretrial detention, which is beneficial).

301. See, e.g., Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 951 (2006) (discussing the opacity of plea bargaining); cf. Gold, *supra* note 39, at 722–49 (proposing more judicial involvement in substantively reviewing plea agreements in a public proceeding with a written record).

In some jurisdictions, judges involve themselves in plea bargaining and do so in the courtroom on a written record. Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 338–56 (2016). Such a process improves transparency and accountability. But there is no reason to think that is the norm. Indeed, federal rules prohibit judicial involvement in plea bargaining. FED. R. CRIM. P. 11(c)(1).

302. See Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2195–205 (2014) (explaining why the right to a public trial extends to nontrial proceedings).

303. *Id.* at 2195–202 (grounding the democratic accountability point in the Supreme Court’s First Amendment jurisprudence).

arbitration contexts.³⁰⁴ Lack of public access means that the public cannot know whether its tribunals are meting out justice fairly and impartially.³⁰⁵

Having articulated these benefits of a more robust process that balances the harms of pretrial detention against its benefits, let us return here to the potential concern about volume differences between the two procedures: judges decide far more requests for pretrial detention than motions for preliminary injunction, and thus perhaps less process is simply a necessary prerequisite to avoid grinding the criminal system to a halt. For instance, New Mexico's governor argued for the repeal of her state's recent bail reform because some judges were holding "mini-trials" to decide whether to detain a defendant.³⁰⁶ But there are a number of problems with this volume objection: (1) affording counsel to defendants and providing them the opportunity to articulate the harms of detention may save the government money on balance because it could mean detaining fewer defendants pre- and post-trial; (2) prosecutors control how many cases to charge and in how many cases to seek pretrial detention and thus could simply put this process into action less frequently; and (3) if prosecutors end up too tightly constrained by existing budget constraints and added process, that could spark an important political conversation about increasing the budget. Let us take these in turn.

First, affording counsel should mean less detention.³⁰⁷ One study found that defendants who are represented by counsel are 2.5 times more likely to be released on recognizance than if they were not represented.³⁰⁸ Detaining fewer defendants pretrial would, most immediately, save money on jails. Some of those savings could come from simply not spending money on cases that prosecutors

304. See, e.g., Fiss, *supra* note 48, at 1085–87 (explaining how settlement prizes peace over justice by undermining courts' law-declaring function); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *YALE L. J.* 2804, 2811 (2015) (explaining that arbitration "strips the public of its rights of audience to observe state-empowered decision makers imposing legally binding decisions").

305. Resnik, *supra* note 304, at 2816–17.

306. Dan McKay & Maggie Shepard, *Gov. Martinez Calls for Repeal of Bail Reform Amendment*, *LAS CRUCES SUN NEWS* (Oct. 18, 2017, 11:55 AM), <http://www.lcsun-news.com/story/news/local/new-mexico/2017/10/18/gov-martinez-calls-repeal-bail-reform-amendment/776475001/> [https://perma.cc/3ULJ-KSCZ].

307. The Pre-Trial Advocates program of the Philadelphia Public Defender's Office provides counsel to defendants before bail hearings and has reduced—or, in some cases, eliminated—defendants' time in pretrial detention. See Janet Moore, *Tipping the Outhouse or Storming the Mansionhouse?: New Trends in Securing Early Access to Criminal Defense Counsel* 17–18 (June 12, 2018) (unpublished manuscript) (on file with author) (citing an interview with representatives of the public defender's office).

Law clinic students in Baltimore watched judges decline to change the initial bail set in eighty-five to ninety percent of their cases before the students got involved. Colbert et al., *supra* note 81, at 1735–36. After they got involved, seventy percent of their clients were afforded pretrial liberty, either on recognizance or because the court reduced bail to an affordable amount. *Id.* Even had these been publicly funded lawyers, this reduction in detention costs would seem to more than offset the cost of counsel.

308. *Id.* at 1753.

will ultimately decline in any event.³⁰⁹ That jails are criminogenic and thus impose societal costs—not only of dollars to fund jails in the short term but also of future crime—makes the cost-saving calculus more complex but suggests that more process will yield less pretrial detention and less postconviction incarceration over the longer term.³¹⁰

Because pretrial detention increases the likelihood of conviction, less pretrial detention will tend to mean fewer convictions and therefore less money spent on prisons. For defendants who are not detained pretrial but are convicted nonetheless, the resulting postconviction sentences will tend to be shorter and thus cheaper than they would have been for a detained defendant.³¹¹

On the other hand, that less pretrial detention would entail fewer defendants pleading guilty might mean more prosecutor resources expended on each case. Thus, the direction that more robust process would move spending is not clear in the abstract. It is clear that saving money is incredibly important in criminal law reform,³¹² and there is plenty of money to be saved in pretrial detention. The current bail system costs about \$14 billion per year,³¹³ and a more robust cost-benefit analysis that goes beyond the mere expenditure of dollars calculates that pretrial detention reform could save \$78 billion.³¹⁴

Second, it bears remembering that prosecutors control the spigot. They can charge fewer cases or decline to seek pretrial detention in all or nearly all cases of a certain type such as nonviolent misdemeanors.³¹⁵ Or prosecutors can get more involved in prearrest screening to obviate the need for pretrial detention in some cases.³¹⁶ Likewise, prebooking diversion programs or citations instead of custodial arrests would also reduce the need for judicial determinations regarding pretrial detention.³¹⁷

309. *See, e.g.*, REAVES, *supra* note 15, at 24 tbl.21 (indicating that prosecutors dismiss about twenty-five percent of felony charges with no conviction entered); Gershowitz, *supra* note 25 (manuscript at 2 n.4) (suggesting that including misdemeanors would increase the percentage of felony charges dismissed without conviction); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 645 (2014) (finding that prosecutors in New York City decline to prosecute between 17,000 and 30,500 misdemeanor arrests each year).

310. *E.g.*, LOWENKAMP ET AL., *supra* note 258, at 19; Gupta et al., *supra* note 129, at 494–96; Heaton, Mayson & Stevenson, *supra* note 58, at 759–68, 794.

311. *E.g.*, LOWENKAMP ET AL., *supra* note 198, at 4; Heaton, Mayson & Stevenson, *supra* note 58, at 747.

312. *See* Norquist, *supra* note 210 (discussing the focus among conservative lawmakers on reducing costs in criminal law and their law-reform successes).

313. PRETRIAL JUSTICE INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST? 2 (2017), <https://university.pretrial.org/viewdocument/pretrial-justice-how-much-does-it> [<https://perma.cc/W8E8-8KEJ>].

314. Baughman, *supra* note 36, at 10 (calculating these savings over a decade).

315. *See* Tolan, *supra* note 171 (arguing that prosecutors can and should seek to have money bail set less frequently and pointing to Houston and Chicago as places where prosecutors have recently made promising reforms in this way). At year-end 2016, there were 178,800 people detained pretrial who were charged with only misdemeanors. ZENG, *supra* note 1, at 9.

316. *See* Gershowitz, *supra* note 25 (manuscript at 33–35) (advocating such an approach for all warrantless arrests in large and medium-sized counties).

317. *See* PRETRIAL JUSTICE INST., *supra* note 21, at 1–2 (describing prebooking diversion efforts in various cities); *see also* Rebecca Pirius, *Citation in Lieu of Arrest*, NAT'L CONF. OF ST. LEGISLATURES (Nov.

Concern that too much process would not allow the government to prosecute as much crime as it wishes gets the relevant questions exactly backwards. For considering how much process to afford, we should not start with an assumption that *X* number of people need to be charged with crimes or that we can calculate some socially optimal level of prosecutions from which we then determine how much procedure allows the government to hit that enforcement target. Rather, we should weigh error costs.³¹⁸ Making the criminal process too cheap enables prosecutors to file more cases than they could if process were more extensive and expensive.³¹⁹ That we have too many people incarcerated and too many criminal cases in the United States—which is conceivably debatable in its own right—does not necessarily mean that criminal process is too cheap. But I think it is. Sixty seconds for a defendant to justify why she should not be incarcerated on a mere accusation of wrongdoing and without any opportunity to explain the severe harm that detention could cause seems like far too little process in a free society that purports to presume the accused innocent. That pretrial detention encourages defendants to waive their constitutional rights and accept incarceration no matter whether they violated the law so that they can get home sooner than if they remained in jail pending trial is even more troubling.

Third, if indeed more process were unattainable given current budget constraints to reach the caseload that prosecutors think would serve their minister-of-justice duty,³²⁰ then politicians and relevant stakeholders could have an important conversation about whether to increase the budget.³²¹ Although prosecutor organizations are typically an important and influential lobbying force and might secure a larger appropriation without too much difficulty,³²² fiscal pressures would at least make this a non-obvious outcome. Perhaps prosecutors would

1, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx#fiftyState> [<https://perma.cc/MX6P-UF6Y>] (charting each state's laws regarding citation in lieu of custodial arrest).

318. See *Mathews v. Eldridge*, 424 U.S. 319, 341–48 (1976) (setting up a balancing test regarding error costs to determine procedural due process).

319. See Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183 (2014) (arguing that increased efficiency in criminal law can be perverse insofar as it enables more prosecutions); see also Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1059, 1094–98 (2015) (describing decriminalization of misdemeanors as “the next generation of the ‘net-widening’ phenomenon”). I do not seek to defend here that there are too many prosecutions or that criminal process is too cheap, though elsewhere I unify several strands of criminal law literature that support this theme of making criminal law too cheap. Gold, *supra* note 183.

320. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2004) (articulating the minister-of-justice responsibility).

321. New Mexico seems to have somewhat bipartisan consensus on the need for greater funding to support its bail reforms. See Fernanda Lopez, *Lawmakers Talk Solutions to “Bail Reform” Constitutional Amendment Problem*, KRQE (Oct. 27, 2017, 12:56 PM), <http://krqe.com/2017/10/27/legislative-criminal-justice-subcommittee-discusses-bail-reform-friday/> [<https://perma.cc/M33A-2RDX>].

322. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 728–29 (2005) (describing prosecutors as “one of the most—if not *the* most—powerful lobbying groups in criminal law”); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 534 (2001) (explaining that the “natural alliance” of prosecutors’ and legislators’ interests “should make prosecutors (along with police) a very powerful lobby on criminal law issues”).

instead be pressed to better prioritize their use of existing resources. And even a conversation that yields greater resources for prosecutors at least increases the political salience of pretrial detention's excesses.

To the extent that cost is a significant concern, a more robust pretrial detention inquiry can be systematized to keep it manageable. The Appendix provides a checklist that judges could follow to ensure that they consider each relevant factor without unnecessary delay. Lastly, if this more robust process—even as streamlined in the Appendix—becomes debilitating, initial determinations could be made more quickly with this more robust process to follow a few days later for only those who remain incarcerated.³²³

Others might worry that advocating for defense counsel at additional proceedings and arguing that counsel should have access to discovery to prepare a meaningful argument faces practical difficulties in the large number of cases where defendants are represented by public defenders. Caseloads in many public defender offices are already extremely high and perhaps unconstitutionally so.³²⁴ Thus, simply asking lawyers to do more in each case is not a good answer. Additional funding for public defender's offices would be necessary for the pretrial detention system proposed here to function. It may be that increasing public defender budgets in some jurisdictions is a political nonstarter even if such an increase would yield overall savings to the government. Fortunately, at least a few states require increase to public defender funding when legislatures increase prosecutor funding.³²⁵ Absent automatic statutory increases that accompany increased prosecutor funding, improving funding might require a judicial finding

323. Cf. Manns, *supra* note 63, at 1952 (arguing that Takings Clause analysis should apply to pretrial detention of more than forty-eight hours).

324. See Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 394 (2016) ("According to national guidelines, public defenders should only handle '150 felonies; 400 misdemeanors; 200 juvenile [delinquency matters]; 200 mental health cases; or 25 appeals' each calendar year. In the nation's largest 100 counties, public defenders routinely handle an average of 530 cases annually, which can consist of cases exclusive to one genre or a mixed caseload. This finding means that, on average, even if a defender works every single day without taking breaks for weekends or holidays, that defender cannot devote even one full day each year exclusively to each case on her docket." (alteration in original) (footnotes omitted)); see also Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045–46 (2006) (describing "compelling evidence of a true constitutional crisis" surrounding "the defense function for poor people" in the U.S. criminal justice system being "drastically underfinanced"); Tina Peng, Opinion, *I'm a Public Defender. It's Impossible for Me to Do a Good Job Representing My Clients*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken-its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html [<https://perma.cc/FT47-88DJ>] ("[T]he constitutional guarantee of effective representation for all has fallen short. The funding crisis is nationwide, and it is dire.").

325. Tennessee statutorily links public defender funding to prosecutor funding, and thus a funding increase for prosecutors' offices would require the same for public defenders. See, e.g., TENN. CODE ANN. § 16-2-518 (2016) (providing that public defender's offices receive an increase of seventy-five cents for each dollar that the district attorney receives in additional funding in the same county). Other states do so at least with regard to salaries. Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 232–33 (2004) (cataloging states that statutorily require salary parity between prosecutors and public defenders and noting that this parity occurs in practice in some localities).

that current funding systems are so deficient that they violate the constitutional right to counsel.³²⁶

Thus far this Article has discussed balancing harms between releasing or detaining a defendant. And if a defendant is either detained without bail or cannot make bail, that liberty interest is the correct one to consider on the defendant's side of the ledger. If a defendant can make bail, the relevant harm to the defendant and her loved ones would be not her loss of liberty but rather her loss of property paying a bail bondsman.³²⁷ This Article takes no position on whether affordable secured money bail would be preferable to a binary system of detain or afford liberty.³²⁸ It does, however, seem unlikely that affordable bail can exist for some defendants.³²⁹

C. LIKELIHOOD OF SUCCESS ON THE MERITS

As part of minimizing probable interim harm, civil plaintiffs must show, among the other points already discussed, that they are "likely to succeed on the merits."³³⁰ In so requiring, courts seek to avoid awarding a party the relief she seeks before judgment, only to later rule that she is not entitled to that relief. Thus, to secure such extraordinary relief, plaintiffs in preliminary injunction proceedings must provide evidence to support their likelihood of success on the

326. *See, e.g.*, *Yarls v. Bunton*, 231 F. Supp. 3d 128, 129 (M.D. La. 2017) (abstaining from ruling on a case arguing that New Orleans's public defender funding crisis creates waiting lists that deny defendants the right to counsel while describing "a state system, that, according to all parties to this dispute, is broken"); Order Granting Motion for Class Certification at 4–5, 27, *Tucker v. State*, No. CV-OC-2015-10240 (Idaho Dist. Ct. Jan. 17, 2018), https://www.acluidaho.org/sites/default/files/field_documents/tucker_v_idaho_order_granting_class_certification_2018-01-17.pdf (granting class certification for claims that Idaho's public defender system is so underfunded that it deprives defendants of their right to counsel).

327. With commercial bail bonds, the property deprivation would be ten percent of the bail amount—the typical fee for commercial bondsmen. BAUGHMAN, *supra* note 2, at 40. If the court were to directly accept a ten percent deposit on the bail amount that it would return when the defendant appears for further legal proceedings, then the interest at stake would be only the temporary deprivation of property and its opportunity cost. *Id.*

328. It is not clear, however, what useful purpose secured money bail actually serves. Washington, D.C. does not use money bail but relies instead on pretrial supervision. There, for Fiscal Year 2015, ninety-one percent of defendants afforded liberty on recognizance remained arrest-free while their cases were pending, and ninety percent made all scheduled court appearances. *Performance Measures, PRETRIAL SERVS. AGENCY FOR D.C.*, https://www.psa.gov/?q=data/performance_measures [<https://perma.cc/GNW4-4ME9>] (last visited Dec. 28, 2018). A study by the Pretrial Justice Institute found that releasing defendants subject to an unsecured bond that did not come due unless the defendant failed to appear was equally effective at protecting public safety and ensuring defendants' court appearances. MICHAEL R. JONES, PRETRIAL JUSTICE INST., UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION 10–11 (2013), <https://pdfs.semanticscholar.org/5444/7711f036e000af0f177e176584b7aa7532f7.pdf>.

329. Only about nineteen percent of defendants who have bail set at \$500 or less can afford to pay it at their arraignment. Robert Lewis, *No Bail Money Keeps Poor People Behind Bars*, WNYC NEWS (Sept. 19, 2013), <https://www.wnyc.org/story/bail-keeps-poor-people-behind-bars/> [<https://perma.cc/F4W6-7QY3>]. In New York City in 2013, thirty-one percent of misdemeanants were incarcerated because they could not afford \$500 or less to make bail. SUBRAMANIAN ET AL., *supra* note 168, at 32. Commercial bail bonds are unavailable in low amounts, and the opportunity cost of the bond company's take—typically ten percent—to an indigent criminal defendant is significant. BAUGHMAN, *supra* note 2, at 40.

330. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

merits, and defendants may introduce countervailing evidence.³³¹ Requiring the government to introduce evidence in criminal cases to demonstrate likelihood of success on the merits—rather than merely proffers to demonstrate probable cause³³²—and affording defendants greater opportunity to refute the government’s case at that early stage could help avoid awarding interim relief to the government to which it would not later be entitled on the merits.

When preliminary injunctions arise in disputed factual contexts,³³³ courts consider evidence from both sides to resolve disputes over factors including likelihood of success on the merits. For instance, in the California same-sex marriage litigation, the plaintiffs filed declarations recounting their own experiences and the importance of marriage to them, and the Defendant-Intervenors countered with scholarly publications regarding the effects of marriage on children.³³⁴ Similarly, criminal defendants should be able to rebut the likelihood of success on the merits with countervailing evidence at the *Gerstein* hearing or a preliminary hearing, at least to the extent feasible at this early stage of the process.³³⁵ Rendering the defendant’s hearing testimony inadmissible in future proceedings would encourage more defendants to avail themselves of this opportunity.³³⁶

As in civil procedure, awarding interim relief in the form of pretrial detention skews the merits outcome—indeed, seemingly more so in criminal law.³³⁷ Interim relief in criminal law should therefore similarly not be awarded unless the government can satisfy a robust inquiry into likelihood of success judged on evidentiary submissions.³³⁸

The experience of defendants who choose to testify before New York grand juries suggests that an early opportunity to contest the government’s charges can

331. *E.g.*, *supra* Section II.A.2.

332. *See supra* Section II.A.1 (explaining the current process for pretrial detention hearings).

333. *See, e.g.*, *Winter*, 555 U.S. at 14 (recounting the factual dispute).

334. *See* Plaintiffs’ Notice of Motion and Motion for a Preliminary Injunction, and Memorandum of Points and Authorities in Support of Motion for a Preliminary Injunction, Attachments 1–4, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292-VRW), ECF Nos. 7-1 to 7-4; Proposed Intervenors’ Opposition to Plaintiffs’ Motion for Preliminary Injunction, Exhibits D & F, *Perry*, 704 F. Supp. 2d 921, ECF Nos. 36-4 & 36-6.

335. *See* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1547 (1981) (proposing more robust preliminary hearings).

336. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE, *supra* note 89, § 10-5.10(d), at 23 (“The testimony of a defendant [at a pretrial detention hearing] should not be admissible in any other criminal proceedings against the defendant in the case in chief, other than a prosecution for perjury based upon that testimony or for the purpose of impeachment in any subsequent proceedings.”); *see also* Colbert et al., *supra* note 81, at 1773 n.181 (collecting cases demonstrating a divide of authority regarding whether an unrepresented defendant’s statement during a bail hearing is later admissible).

337. *See, e.g.*, Gouldin, *supra* note 14, at 860; Mayson, *supra* note 13, at 556; Simonson, *supra* note 1, at 595; *see also Frontline: The Plea*, *supra* note 275 (explaining the pressure on innocent detained defendants to plead guilty when their sentence would result in immediate release).

338. As a practical matter, pretrial detention serves as an advance on the sentence the government seeks after trial because defendants receive credit for pretrial detention against the ultimate sentence. *See, e.g.*, 18 U.S.C. § 3585(b) (2012). That too is a reason for requiring likelihood of success on the merits in pretrial detention.

be valuable.³³⁹ Some New York defendants choose to testify even though such testimony necessarily reveals important case strategy and risks retaliation from the prosecutor in the form of less favorable plea offers.³⁴⁰ Defendants against whom the government has a marginal case are the ones most likely to testify, and they are precisely the sort of defendants who we should most want to testify so that they may avoid facing added pressure to plead guilty. Defendants against whom the government has a strong case would be far less likely to avail themselves of the opportunity to introduce evidence early; this proposal therefore need not result in additional process in every case.³⁴¹

The likelihood of success inquiry need not be wrapped up with balancing the equities in detention against pretrial liberty. Indeed, it would be better if it weren't. The comparison to preliminary injunctions suggests only that the likelihood of success inquiry should be determined based on evidence and should precede a decision to detain a defendant. Judging likelihood of success during a *Gerstein* hearing or preliminary hearing may make judges less likely to outweigh likelihood of success as a reason to detain defendants when interest balancing does not support that outcome. The suggestion here would raise the government's existing burden of proving probable cause at a *Gerstein* or preliminary hearing to instead require proof of likelihood of success on the merits rather than merely probable cause.³⁴²

To make defendants' responses as effective as possible, criminal systems should afford defendants early discovery as New Jersey recently did.³⁴³ Allowing early discovery comes at a cost of at least some prosecutor time (even if only to copy the file) and likely some additional court time if defendants have more evidence to present.³⁴⁴ But the benefits of defendants making decisions about their

339. See Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 23 & n.102 (2002); see also *id.* at 23 n.103 (collecting citations to other jurisdictions that allow the defendant to testify before a grand jury).

340. *Id.* at 37–38.

341. See also 4 LAFAYETTE ET AL., *supra* note 126, § 14.4(d), at 358 (“The conventional wisdom frowns upon defense presentation of its own witnesses at a preliminary hearing absent most unusual circumstances” because “the defense anticipates a bindover”).

342. Increasing the court's focus on the merits of the case at an early stage runs in some tension with the presumption of innocence. See Baradaran, *supra* note 27, at 731 (arguing that courts were not historically permitted to consider the merits of the case before trial because such an approach would violate the presumption of innocence). It seems quite fair to say that treating likelihood of success as sufficient to detain a defendant would violate the presumption of innocence. But it is less convincing to say the same of treating likelihood as a necessary condition such that its absence can help defendants secure pretrial liberty. And the Supreme Court has been unwilling to put teeth into the presumption of innocence aside from the burden of proof at trial. See *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (tying the presumption of innocence to the burden of proof in criminal trials and explaining that “it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun”).

343. See N.J. CT. R. 3:4-2(c)(2) (West 2018) (requiring the prosecutor to provide discovery at least twenty-four hours before a pretrial detention hearing including all exculpatory evidence).

344. The history of the New Jersey rule suggests as much; the court struck a compromise to avoid overly burdening prosecutors. See *State v. Robinson*, 160 A.3d 1, 9–10 (N.J. 2017) (recounting the rule's history).

liberty and having a chance to contest the charges with a clearer picture of the evidence against them are significant.³⁴⁵

The civil procedure literature recognizes that assessing likelihood of success on the merits at an early stage requires the court to rely on an incomplete factual record.³⁴⁶ Yet that incomplete record does not stop courts from considering the merits in the preliminary injunction context.³⁴⁷ And in the criminal context, the government has coercive evidence-gathering ability that civil plaintiffs lack. Thus, the government should be able to put a more complete factual record before the court than do civil plaintiffs.

Conceiving of likelihood of success as a prerequisite to pretrial detention offers judges an intermediate remedy short of the simple binary choice between dismissing the charges for failure to state a crime and keeping the defendant detained until trial. Because outright dismissal seems like such a heavy cost to the government, courts hesitate to do that.³⁴⁸ Conceiving of pretrial liberty as an intermediate remedy less extreme than dismissal may make judges more likely to afford some remedy than none³⁴⁹ in a criminal process without meaningful opportunities for innocent defendants to escape the system.³⁵⁰

The presumption of innocence marks an important difference between the civil and criminal systems that affects how judges should account for likelihood of success on the merits when deciding whether to detain a defendant pretrial. In all circuits, the plaintiff must make a sufficient showing on all four prongs of the test to obtain a preliminary injunction: likelihood of irreparable harm, that the balance of equities favors her, likelihood of success on the merits, and that an injunction favors the public interest. But once a plaintiff makes a sufficient showing on each, some circuits allow a strong showing on the balance of equities to overcome a weaker showing regarding likelihood of success on the merits.³⁵¹ The Fourth Circuit, by contrast, requires the plaintiff to make “a clear showing” both that she

345. See Gold, Hessick & Hessick, *supra* note 39, at 1645–48 (arguing for greater discovery in part to allow defendants to make more informed decisions); see also Baer, *supra* note 92, at 38 (explaining why “the disclosure of exculpatory and impeachment evidence is more costly to the prosecutor during later stages of a case than it is during earlier stages of a case”). See generally Meyn, *supra* note 41 (explaining discrepancies between civil and criminal discovery).

346. E.g., Leubsdorf, *supra* note 31, at 532; Lynch, *supra* note 66, at 779.

347. See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (requiring courts to evaluate the likelihood of success on the merits before granting a preliminary injunction).

348. See Gold, Hessick & Hessick, *supra* note 39, at 1641 (explaining that “although judges have the authority to dismiss an indictment for failure to state a crime, they almost never do so”); see also James M. Burnham, *Why Don't Courts Dismiss Indictments?*, 18 GREEN BAG 2D 347, 356 & nn.24–26 (2015) (collecting cases that uphold indictments because they track statutory language).

349. Cf. Andrew Blair-Stanek, *Tax in the Cathedral: Property Rules, Liability Rules, and Tax*, 99 VA. L. REV. 1169, 1200–03 (2013) (explaining in the tax context that the IRS almost never rescinds tax-exempt status because that remedy is too draconian).

350. See Gold, Hessick & Hessick, *supra* note 39, at 1639–52.

351. See, e.g., *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131, 1134–35 (9th Cir. 2011) (explaining the continuing validity of a sliding-scale test after *Winter*); see also Sibley & Caulder, *supra* note 191, at 10399 (same); Bates, *supra* note 191, at 1523 (detailing a circuit split on the continuing validity of such a test).

is likely to suffer irreparable harm absent interim relief and that she is likely to succeed on the merits at trial; the scale does not slide between these prongs.³⁵²

In the criminal context, it makes sense to allow a strong showing on the balance of hardships to excuse a somewhat lesser showing on likelihood of success so that the most dangerous defendants are detained pretrial. But that is the extent to which the scale should slide. Allowing a strong showing of likelihood of success to make up for weaker showings on the other prongs would mean detaining a defendant whose pretrial liberty affords more benefit than cost and runs in tension with the presumption of innocence. Such an approach would allow a preliminary assessment of guilt to be the but-for cause of incarceration in some cases.³⁵³

* * *

Similar cost-benefit analysis would help judges regulate whether to afford defendants pretrial liberty subject to conditions such as electronic monitoring. Electronic monitoring is not costless to a defendant or to the public, but its cost is far lower than incarceration.³⁵⁴ The harms from electronic monitoring or other forms of non-carceral pretrial restraint for defendants would need to be better understood through detailed qualitative research to refine exactly when each would be justified by its offsetting benefits. In sum, judges should impose electronic monitoring somewhat hesitantly but should consider whether this less costly alternative to custodial detention would sufficiently achieve the government's objectives.

Some might expect judges to detain similar numbers of people before trial with or without this proposal because judges are risk averse or simply dislike criminal defendants. Some supporting evidence for that concern arises insofar as judges in some jurisdictions cannot statutorily or constitutionally set unaffordable bail as a backdoor to pretrial detention.³⁵⁵ And yet judges do so

352. *United States v. South Carolina*, 720 F.3d 518, 533 (4th Cir. 2013).

353. This approach resembles the Ninth Circuit's slightly sliding scale for preliminary injunctions in *Wild Rockies*, 632 F.3d at 1131, 1134–35.

354. See Brian K. Payne & Randy R. Gainey, *The Electronic Monitoring of Offenders Released from Jail or Prison: Safety, Control, and Comparisons to the Incarceration Experience*, 84 PRISON J. 413, 420–30 (2004) (explaining perceptions regarding differences between incarceration and electronic monitoring); NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, ELECTRONIC MONITORING REDUCES RECIDIVISM 1–2 (2011), <https://www.ncjrs.gov/pdffiles1/nij/234460.pdf> (reporting that monitored defendants believed that monitoring stigmatized them, negatively affected their children because it provided a constant reminder of potential incarceration, and made employment more difficult); Wiseman, *supra* note 249, at 1364–82 (arguing for electronic monitoring as a lesser form of pretrial restraint than incarceration); Yang, *supra* note 27, at 1480–83 (explaining that electronic monitoring seems to hold promise as better balancing costs and benefits in some cases than incarceration, in part because the cost of monitoring a defendant is much lower than detaining that defendant).

355. See, e.g., 18 U.S.C. § 3142(c)(2) (2012) (“The judicial officer may not impose a financial condition that results in the pretrial detention of the person.”); N.M. CONST. art. II, § 13 (“A person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond.”); KY. REV. STAT. ANN. § 431.066(3)–(4) (2012) (providing pretrial release or unsecured bond as the default positions for defendants who pose low or moderate risks of flight, nonappearance, or danger to others, perhaps subject to monitoring for those in the moderate-risk category); N.C. GEN. STAT. ANN. § 15A-534(b) (2017) (providing that judges should release a defendant on recognizance, unsecured

anyway.³⁵⁶ Risk-averse judges—especially those who must stand for election³⁵⁷—do not want to bear the risk of releasing a defendant who then commits a heinous crime.³⁵⁸

New Jersey gives reason to think that despite risk aversion judges might indeed reduce the pretrial detainee population if urged to focus on deciding whether there was good reason to detain a defendant rather than reflexively setting bail that many defendants cannot afford. Since New Jersey eliminated money bail and left judges to choose between detaining and releasing defendants, its jail population has dropped significantly.³⁵⁹ By contrast, in Prince George’s County, Maryland, reforms meant to limit money bail have indeed done so in their first year but have concomitantly increased the number of defendants detained without bail.³⁶⁰ Those early results indicate that when pretrial detention hearings last only a matter of minutes and pretrial services are underresourced, as in Prince George’s County, courts cannot support additional pretrial liberty on recognizance or subject to monitoring.³⁶¹ The empirical evidence in New Mexico is

bond, or to a particular individual absent a finding of reason to do otherwise); *see also* Widgery, *supra* note 164 (charting important features of each state’s statutory scheme on setting pretrial release conditions in 2015).

356. *See* Gouldin, *supra* note 14, at 862 (“[J]udges continue to set unpayable bail figures to manage perceived public safety risks.”); *cf.* Dewan, *supra* note 26 (“‘The bail is really being set to keep the person in custody. You have to kind of concede that,’ said a California judge, W. Kent Hamlin of Superior Court in Fresno County.”).

357. *See, e.g.,* Gouldin, *supra* note 14, at 889 (noting that judges’ tendencies to overdetain defendants may be even stronger for elected judges).

358. *See, e.g., id.* (“Judges who perceive that they bear sole personal responsibility for a detention decision will deliberately err on the side of over-detention. When judges allow liberty for potentially dangerous individuals who subsequently inflict harm, ‘the error will be emblazoned across the front pages,’ but when ‘a judge detains an individual who would not have committed any wrong had he been released, that error is invisible—and, indeed, unknowable.’” (footnote omitted) (quoting Cole, *supra* note 219, at 696)); Wiseman, *supra* note 17, at 417 (“Judges receive little to no recognition for releasing defendants who pose little threat of flight or violence and are subject to few penalties for detaining them. Yet they, unlike legislators, face the possibility of public scorn (and for elected judges, lost votes) for releasing defendants who flee or commit crimes.”); Wiltz, *supra* note 4 (quoting a Minnesota judge: “The fear is I’m going to let somebody go and they’re going to go out and do something terrible, or they won’t come back, so I’ll set bail”).

359. CRIMINAL JUSTICE REFORM INFO. CTR., N.J. COURTS, CRIMINAL JUSTICE REFORM STATISTICS: JAN. 1 – NOV. 30, 2018, at Chart C: Nonsentenced Pretrial Jail Population (2018), <https://www.njcourts.gov/courts/assets/criminal/cjrreport2018.pdf?cacheID=UIMqLi6> [<https://perma.cc/FMR7-FL2F>] (reporting a 29.5% decrease in the New Jersey state jail pretrial detainee population from January 1, 2017—when money bail was eliminated—to November 30, 2018).

360. PROGRESSIVE MD. & COLOR OF CHANGE, PRINCE GEORGE’S COUNTY: A STUDY OF BAIL 4 (2018), https://static.colorofchange.org/static/v3/pg_report.pdf?akid=14740.3112990.hZo0eM&rd=1&t=8 [<https://perma.cc/HG3Z-EYTK>].

361. *Id.* at 13 (describing bail hearings in Prince George’s County as “profoundly lacking in procedural protections,” evidenced in part by their “rapid pace,” with “most lasting no more than five minutes, and some concluding within one minute”); Lynh Bui, *Reforms Intended to End Excessive Cash Bail in Md. Are Keeping More in Jail Longer*, *Report Says*, WASH. POST (July 2, 2018), https://www.washingtonpost.com/local/public-safety/reforms-intended-to-end-excessive-cash-bail-in-md-are-keeping-more-in-jail-longer-report-says/2018/07/02/bb97b306-731d-11e8-b4b7-308400242c2e_story.html [<https://perma.cc/53F3-JNWZ>] (recounting the acting district public defender’s explanation of these results as due in part to inadequate resources for pretrial services).

unclear, but the former Governor complained that the reforms release too many arrestees.³⁶²

Any procedural change that tends to favor criminal defendants runs the risk of becoming merely a bargaining chip in a criminal system where prosecutors basically hold all the cards vis-à-vis the defendant.³⁶³ So it is conceivable that prosecutors could use their leverage over defendants to prod defendants into declining to contest pretrial detention. But because pretrial detention is so costly and its burdens so immediately felt, it seems unlikely that defendants will take that offer except when the payoff is substantial.³⁶⁴ When the payoff is substantial, allowing the defendant to trade time incarcerated now to save more time incarcerated later makes sense even if defendants may sometimes do so irrationally.

That the pretrial detention regime suggested here is modeled on the preliminary injunction inquiry with which judges are already quite familiar should make judges at least somewhat more likely to employ it. And indeed, some judges are quite aware of the problems with the bail systems now in place. In Chicago, for instance, the recent move to abandon money bail as a backdoor to detaining defendants came from the Chief Judge.³⁶⁵ It was federal judges who preliminarily enjoined the Houston bail system as unconstitutional.³⁶⁶ Thus, there is reason to hope that judges might be willing to adopt a pretrial detention analysis that looks much more like the one they use in the preliminary injunction context than does the status quo for pretrial detention.

CONCLUSION

For a civil plaintiff it is quite difficult to obtain what she seeks before trial via preliminary injunction. Criminal law, by contrast, unflinchingly provides the government in most cases with the relief that it seeks before trial: caging the accused. This disparity is unjustifiable. It is troubling that people can lose their liberty without having been convicted of a crime more easily than a corporation can be ordered to stop doing some activity until the court can figure out who is right. That criminal law does not provide those protections suggests that the criminal system does not meaningfully presume defendants innocent nor does it actually prefer 100 guilty people freed to one innocent jailed.

362. *E.g.*, McKay & Shepard, *supra* note 306.

363. *See, e.g.*, Gold, Hessick & Hessick, *supra* note 39, at 1652–54 (discussing whether prosecutors' leverage over defendants could result in defendants waiving the procedural changes the article proposes).

364. Some people, however, might prefer to immediately bear the cost of incarceration rather than be afforded pretrial liberty and dread bearing that cost later. *Cf.* JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* 96 (2012) (discussing cognitive biases regarding delaying losses and gains).

365. *See* Oppel, *supra* note 22 (discussing the order issued by the chief judge of the Circuit Court of Cook County, Illinois); *see also* *General Order No. 18.8a*, *supra* note 22.

366. *O'Donnell v. Harris County*, 892 F.3d 147, 157, 166–67 (5th Cir. 2018), *aff'g* 251 F. Supp. 3d 1052, 1107 (S.D. Tex. 2017).

Pretrial detention is in great flux across the country—in Congress, state legislatures, city councils, and courts. This Article fundamentally re-envisioning pretrial detention law to more closely resemble preliminary injunction law. Such an approach would first require the government to demonstrate likelihood of irreparable injury from pretrial liberty such as the defendant committing a violent crime against an identifiable victim or the defendant absconding from the jurisdiction. Second, it would depart from the current one-sided analysis and examine how interim restraint of defendants would harm the defendant, her loved ones, and non-parties. That inquiry would require judges to explicitly analyze how detention would harm each defendant in ways specific to that defendant—such as loss of employment, custody of a child, or housing—or in ways that any defendant would be harmed. Third, it would require the government to introduce evidence to demonstrate its likelihood of success on the merits and allow defendants discovery and opportunity to refute that showing. Such an approach would better recognize the extraordinary nature of affording one side the relief that it seeks before judgment. It would recognize that pretrial detention severely harms defendants, their families, and their communities. And it would force accused defendants who are presumed innocent to bear these massive costs only when the benefits of detention outweigh its costs.

APPENDIX - PRETRIAL DETENTION CHECKLIST

- Has the government demonstrated that releasing the defendant would likely cause irreparable injury?
 - How significant of a threat does the defendant pose to others if allowed pretrial liberty? (Account here for seriousness of the accusations.)
 - Is the defendant likely to be *convicted* of another serious crime while on pretrial liberty?
 - How likely is the defendant to flee the jurisdiction?
- How significantly would pretrial detention harm the defendant and others?
 - Does the defendant face a serious risk of losing custody of a child if detained?
 - Does the defendant face a serious risk of losing housing if detained?
 - Does the defendant face a serious risk of losing employment if detained?
 - Has the court articulated and considered that detaining a defendant increases the pressure for her to plead guilty?
 - Has the court articulated and considered that defendants detained pretrial have greater likelihood of conviction and serve longer sentences?
 - How would detaining the defendant affect nonparties such as the defendant's loved ones?
 - How would granting the defendant liberty affect nonparties such as victims?
- Are the risks of granting the defendant liberty sufficient to outweigh these costs?
 - Would a lesser restraint such as pretrial liberty on conditions better balance the benefits of restraint with its costs than would detention?
- Has the government demonstrated with evidence that it is likely to succeed on the merits?
 - Has the defendant been afforded discovery and an opportunity to refute the government's likelihood of success on the merits?