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## Unnecessary Incarceration

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“‘[I]t takes a village’ to send someone to prison.”<sup>1</sup>

*Every pretrial detainee is presumed innocent. Despite this presumption, an individual accused of a crime may be detained prior to trial. If the accused is subsequently acquitted or the charges against her are dropped during her pretrial detention, then she has no recourse against the government for the time and liberty of which she was deprived. Without any hard consequences for unnecessarily incarcerating the accused, our criminal legal system operates without any meaningful checks at the pretrial stage.*

*One potentially powerful check would be monetary pretrial compensation. Unfortunately, pretrial compensation for unnecessary incarceration has not gained much traction in the United States for a number of deeply ingrained institutional reasons. This Article critically analyzes those reasons and sets forth a path forward to make pretrial compensation a reality.*

#### INTRODUCTION

Imagine someone is charged with a serious crime, and a judge must decide whether to release her before trial. That individual is presumed innocent, but her alleged behavior is worrying and dangerous. If the judge releases the individual and she goes on to commit more crimes while awaiting trial, then the public will cry out and complain that the individual should have been jailed. On the other hand, if the judge jails the individual pretrial and all the charges are

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<sup>1</sup> Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 181 (2019).

later dropped, then many may view the time she spent in jail as utterly unnecessary.

Prescriptively drawing a line between necessary and unnecessary pretrial incarceration is an incredibly difficult, perhaps impossible, task. The difficulty of such a task lies in the unknown, as a judge's decision to detain the accused is, at bottom, a preliminary and conjectural assessment of dangerousness.<sup>2</sup> The underlying fear of putting a dangerous person back on the street is a fundamentally human one that judges cannot escape.<sup>3</sup> Therefore, absent a rigorous factual inquiry that is characteristic of a trial, a pretrial detention hearing typically functions as a crude sorting mechanism that unnecessarily imprisons people.

There is no magic solution to this problem. In the past few years, reinvigorated consciousness about the pernicious effects of money bail has led to a wave of bail reform litigation<sup>4</sup> and legislation.<sup>5</sup> Although they are still in progress, reform efforts have motivated states to reevaluate arbitrary and unaffordable money bail practices. As a result, some states have scrapped money bail altogether or so circumscribed its use as to defang it of its worst aspects.<sup>6</sup> But a completely unintended result has occurred. As more states are turning to the law by implementing preventive detention statutes, release is becoming less common.<sup>7</sup> For instance, in Baltimore, 23% of individuals presented for

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<sup>2</sup> See David Cole, *The Difference Prevention Makes: Regulating Preventive Justice*, 9 CRIM. L. & PHIL. 501, 505 (2015) (“[H]owever difficult it may be under some circumstances to determine who did what in the past, it is not just difficult, but *impossible*, to predict with anything like an equivalent degree of certainty what an individual will do in the future, at least where free will is involved.”).

<sup>3</sup> Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2221 (2019).

<sup>4</sup> *E.g.*, *Caliste v. Cantrell*, 937 F.3d 525 (5th Cir. 2019); *Dixon v. City of St. Louis*, No. 4:19-cv-0112-AGF, 2019 U.S. Dist. LEXIS 97327 (E.D. Mo. June 11, 2019); *Daves v. Dallas County*, 341 F. Supp. 3d 688 (N.D. Tex. 2018); *Edwards v. Cofield*, No. 3:17-CV-321-WKW, 2017 U.S. Dist. LEXIS 80693 (M.D. Ala. May 18, 2017); *O'Donnell v. Harris County*, No. H-16-1414, 2016 U.S. Dist. LEXIS 115786 (S.D. Tex. Aug. 29, 2016); *Walker v. City of Calhoun*, No. 4:15-CV-170-HLM, 2016 U.S. Dist. LEXIS 12306 (N.D. Ga. Jan. 28, 2016); *In re Humphrey*, 228 Cal. Rptr. 3d 513 (2018); Complaint, *Parga v. Tulsa County*, No. 18-cv-00298 (N.D. Okla. June 8, 2018); Complaint, *Shultz v. State of Alabama*, No. 5:17-cv-00270-MHH (N.D. Ala. Aug. 1, 2017); Complaint, *Little v. Commissioner*, No. 6:17-cv-724 (W.D. La. June 5, 2017); Complaint, *Robinson v. Martin*, No. 2016 CH 13587 (Ill. Cir. Ct. Oct. 14, 2016).

<sup>5</sup> SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK* 181–83 (2018) (summarizing the states undergoing bail reform as of 2018).

<sup>6</sup> Wisconsin, Illinois, Kentucky, and Oregon eliminated their money bail schemes and replaced the system with nonmonetary-based pretrial release services. *Id.* at 181 n.158.

<sup>7</sup> In August 2018, the ACLU of Southern California withdrew support in what was intended to be a reformatory bill to eliminate money bail in California. After amendments,

a bail hearing were held without bail in 2014.<sup>8</sup> In 2017, money bail was effectively abolished in Maryland, and the percentage of individuals detained without bail skyrocketed to 52%.<sup>9</sup>

Many other well-intentioned solutions have been proposed or implemented to varying degrees, including risk assessment tools and nets of eligibility, to reduce the rate of pretrial incarceration.<sup>10</sup> But many of these reformative responses do little to connect the dots between coercive pretrial practices and trial outcomes. As a result, the public discourse on bail remains superficial, in that it fails to sufficiently engage with and understand the impact bail reform has on the criminal legal system as a whole.<sup>11</sup>

The incompleteness of the public discourse has academic parallels. Although the past year has seen a welcome increase in bail

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the bill instead replaced the existing money bail scheme with a new preventive detention scheme. *See* Press Release, ACLU of S. California, ACLU of California Changes Position to Oppose Bail Reform Legislation (Aug. 20, 2018), <https://www.aclusocal.org/en/press-releases/aclu-california-changes-position-oppose-bail-reform-legislation> [<https://perma.cc/W38Z-KDB4>] (“After further serious consideration, the ACLU of California has changed its position on the recently-amended SB 10 to oppose. As much as we would welcome an end to the predatory lending practices of the for-profit bail industry, SB 10 cannot promise a system with a substantial reduction in pretrial detention. Neither can SB 10 provide sufficient due process nor adequately protect against racial biases and disparities that permeate our justice system.”).

<sup>8</sup> Colin Starger, Baltimore City Pretrial Release Outcomes, COLINSTARGER DOT WEBSITE, <http://colinstarger.website/> [<https://perma.cc/25DW-TB4U>] (follow “MD Pretrial Justice” hyperlink; then follow “City Pretrial Outcomes” hyperlink; then select “BALR” in the “Hearing” drop-down menu, “1/1/2014” in the “Begin Date” drop-down menu, and “12/31/2014” in the “End Date” drop-down menu; then select “Get Results”).

<sup>9</sup> *Id.*

<sup>10</sup> *See infra* Part IV.

<sup>11</sup> Over the past several years, scholarship on bail has grown, but it has primarily focused on the effects of money bail. *E.g.*, Christine S. Scott-Hayward & Sarah Ottone, *Punishing Poverty: California’s Unconstitutional Bail System*, 70 STAN. L. REV. ONLINE 167, 168 (2018) (“[A]rgu[ing] that [money] bail schedules are unconstitutional because they are used presumptively in a way that typically denies defendants the individualized pretrial detention determination to which they are entitled.”); Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589 (2018) (analyzing the “wall of authority” supporting the doctrinal right to affordable money bail); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1399 (2017) (proposing a “broad conceptual framework for how policymakers can design a better bail system by weighing both the costs and benefits of pre-trial detention” as applied to the practice of money bail); Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1125 (2018) (“If risk assessments [in the context of money bail] are paired with adequate safeguards, sustained reductions in incarceration and progress toward equal treatment may be possible.”).

scholarship,<sup>12</sup> it has focused primarily on the particular evils of money bail and access to justice based on one's ability to pay, and it has overlooked the problem of outright pretrial detention.<sup>13</sup> This Article challenges legal scholars to look at pretrial detention as more than a "pretrial" problem and to see it as a symptom of larger systemic issues that require a broad-based response. Pretrial detention is, by nature, not a problem that can be fixed at the margins. It needs to be struck at its heart to be felled.

As a broad-based solution designed for maximum and immediate impact, I propose that states should be required to pay monetary compensation to an individual who suffers from time lost as a result of a pretrial detention determination that does not end with a conviction. This proposal may sound radical at first blush, but the idea of pretrial compensation is not far-fetched. In fact, our criminal legal system already provides for another form of compensation for time lost during pretrial detention—the amount of time a defendant spends in pretrial detention is credited toward their sentence.<sup>14</sup> This is known colloquially as "time served."

Crediting time served is a nearly universally accepted practice.<sup>15</sup> Indeed, this seemingly simple concept is the beating heart of the criminal legal system. For example, time served credits provide an effective platform for negotiating plea deals, particularly with individuals incarcerated pretrial.<sup>16</sup> Time served credits incentivize

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<sup>12</sup> Based on the author's survey of articles contained on WestLaw, in the past year, there were sixty law review and journal articles published on bail-related issues.

<sup>13</sup> E.g., Shaila Dewan, *Court by Court, Lawyers Fight Policies That Fall Heavily on the Poor*, N.Y. TIMES (Oct. 23, 2015), <https://www.nytimes.com/2015/10/24/us/court-by-court-lawyers-fight-practices-that-punish-the-poor.html> [<https://perma.cc/TDN3-G44T>]; 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://perma.cc/RH4E-Y72Z>]; Katie Lannan, *A Broad Push for Pretrial Justice Reforms from the States*, BOS. GLOBE (Aug. 8, 2017).

<sup>14</sup> The term "time served credits" refers to the number of days an individual is determined to have spent incarcerated prior to trial. If convicted, the individual's sentence is then reduced by the number of days he spent in pretrial detention. Time served credits can therefore be considered another form of compensation for those who lose time in jail prior to a conviction. I acknowledge that the form of compensation—actual money versus a shorter sentence—is fundamentally different, nonetheless this principle analogy is the focus.

<sup>15</sup> See, e.g., David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 487 (2016) (examining the mediator-like role that prosecutors play in the criminal legal system and the resultant flexibility they benefit from in order to secure convictions, including the use of plea bargaining).

<sup>16</sup> *Id.*

defendants to accept pleas as a way to negotiate down from the maximum penalty.<sup>17</sup> As such, without the option of credits, prosecutors would lose a valuable and time-tested bargaining chip for plea negotiations. Without time served credits, more cases might go to trial, and defendants would have to wait even longer for their day in court than they now do in our already backlogged system.<sup>18</sup> Additionally, time served credits play a vital role in reducing prison sentences for those convicted at trial.<sup>19</sup> The list goes on. In short, time served credits are critical to the operational functions of the criminal legal system.<sup>20</sup>

Interrogating the time served concept raises a fundamental question: If our legal system credits the guilty for time incarcerated prior to a conviction,<sup>21</sup> then why does no analogous form of compensation exist for individuals who spend the same amount of time in pretrial detention but are never convicted? As a baseline principal, this Article posits that it is illogical that the accused's time in pretrial detention holds value only if the accused is convicted. A legally innocent individual should be compensated just as well for the time lost prior to release. The likely result of this proposal would be more discerning police and pretrial practices that could reverse out-of-control carceral trends.<sup>22</sup>

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<sup>17</sup> Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1311–13 (2018) (“The core problem is twofold. First, while defendants always want to minimize their potential sentences, prosecutors rarely want to maximize them, hoping instead to obtain only their *preferred* sentence, in the most efficient way possible. This asymmetry allows prosecutors to trade away ‘extra’ years of incarceration that the defendant desperately wants to avoid but that the prosecutor doesn’t particularly value. As for the second problem: This free leverage is typically overwhelming, because most criminal codes authorize sentences much higher than what a typical prosecutor—or a typical person, for that matter—would actually want to see imposed in a given case. Thus, by threatening a seriously inflated set of charges and then offering to replace it with the charges that she truly desires, the prosecutor is able to control the defendant’s incentive to plead guilty, and with it the outcome of any subsequent ‘negotiation.’ In the aggregate, prosecutors so empowered can obtain more convictions, with longer sentences, at lower costs—all preconditions for mass incarceration.”) (internal citations omitted).

<sup>18</sup> Cf. William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. (forthcoming 2020) (summarizing the history and eventual normalization of plea bargaining as the primary vehicle for obtaining convictions in the criminal legal system).

<sup>19</sup> Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1970 (2005) (“When a detainee is subsequently convicted of an offense, the state can set off the sentence against time served and compensate (although incompletely) for the burdens of imprisonment before conviction.”).

<sup>20</sup> See sources cited *supra* notes 15–19.

<sup>21</sup> Scholars have used the phrase “compensation” to describe the process of crediting the convicted with the time spent while incarcerated prior to trial. See, e.g., John Martinez, *Wrongful Convictions as Rightful Takings: Protecting Liberty-Property*, 59 HASTINGS L.J. 515 (2008).

<sup>22</sup> See *infra* Part IV.

The goal is to return pretrial detention to the narrowly tailored and limited practice that it was intended to be at its inception.<sup>23</sup> Unfortunately, today's reality is that pretrial detention is so common that it has become normalized, numbing policy makers to the unfairness and ubiquity of unnecessary incarceration.<sup>24</sup> States are increasingly adopting pretrial detention statutes,<sup>25</sup> and the preventive measure has been applied far beyond anticipation. For instance, in 2013 the Department of Justice conducted a study on pretrial detention in federal district courts<sup>26</sup> and found that the percentage of defendants detained prior to case disposition increased from 59% in 1995 to 76% in 2010.<sup>27</sup> Further, the Prison Policy Institute observed that African Americans are five times more likely and Hispanics twice more likely to be incarcerated than Caucasian Americans.<sup>28</sup> Due to the swift-acting nature of preventive justice procedures, both formal and less formal checks on pretrial detention are few and far between, resulting in increasing carceral trends.

The title of this Article, *Unnecessary Incarceration*, coins a phrase to define a category of accused individuals who spend a prolonged period of time incarcerated prior to trial and who will later be cleared

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<sup>23</sup> Pretrial detention is permissible because it falls under the category of preventive justice. Preventive justice measures are used when the government permits temporary deprivations against an individual's liberty without many procedural protections. In the case of pretrial detention (also called preventive detention), the law permits an individual's detention prior to ascertaining his or her guilt based on clear and convincing evidence that he or she is a threat to the community (or another individual) such that the accused could not be safely afforded pretrial release. *See* *United States v. Salerno*, 481 U.S. 739, 751–52 (1987). When pretrial detention was federally implemented, Congress placed a substantial amount of procedural protections on preventive detention hearings to ensure no erroneous deprivations of liberty would occur and that the power to deprive the accused of his liberty prior to trial would not be abused. Federal Bail Reform Act of 1984, Pub. L. 98-473, tit. II, ch. 1, 98 Stat. 1976 (1984) (formerly S. 1762).

<sup>24</sup> *See infra* note 204.

<sup>25</sup> CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM (2016), <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> [<https://perma.cc/H2YL-76GN>].

<sup>26</sup> THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS (2013). Although this data reflects trends in federal courts, it is nonetheless relevant as an example for a nationwide trend toward increased reliance on pretrial detention.

<sup>27</sup> *Id.* at 3.

<sup>28</sup> LEAH SAKALA, PRISON POLICY INITIATIVE, BREAKING DOWN MASS INCARCERATION IN THE 2010 CENSUS: STATE-BY-STATE INCARCERATION RATES BY RACE/ETHNICITY (2014), <https://www.prisonpolicy.org/reports/rates.html> [<https://perma.cc/ME5X-AMYX>].

of all charges.<sup>29</sup> The word unnecessary should not be taken in the colloquial sense to mean “not needed,” as there are likely instances where preventive detention is legitimate<sup>30</sup> but the government fails to secure a conviction. This is by no means a perfect metric to gauge unnecessary versus necessary incarceration, but it is sufficient for the purposes of this Article to demonstrate the complexity of the problem the criminal system is faced with.<sup>31</sup> Here, the term unnecessary is also meant to broadly encapsulate the inequalities and deficiencies hidden in the steps that lead to the preventive detention determination itself, which include the arrest as well as the prosecutorial decisions made in anticipation of the hearing.<sup>32</sup>

This Article builds on my prior work, *Displacing Due Process*, which explained that, because heightened procedural due process protections are not applied at their maximum strength during the pretrial process, erroneous deprivations of liberty are rampant.<sup>33</sup> One of the key contributing factors to this dramatic increase in the use of pretrial detention is the sheer volume of arrestees.<sup>34</sup> This is the beginning of the negative feedback loop, where, in order to keep up with increasing intake, the system must develop “quick justice” techniques to move defendants in and out of the system at a faster

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<sup>29</sup> *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) (holding that an individual arrested without a warrant may be temporarily detained for up to twenty-four hours to ensure the timely administrative function of providing the arrestee with a probable cause hearing).

<sup>30</sup> See *Cole*, *supra* note 2; see also *infra* Part III.

<sup>31</sup> The use of the term “unnecessary” to describe this form of incarceration is unconventional and imperfect, but I am at a loss to find a word more fitting to describe the practice of detaining so many legally innocent individuals en masse. I appreciate the argument that not all those who escape their charges are innocent, but I think the more concerning issue is whether all those who accept guilty pleas are actually guilty. For a discussion on the benefits of overbreadth, see *infra* Part IV.

<sup>32</sup> See *infra* Part III.

<sup>33</sup> Zina Makar, *Displacing Due Process*, 67 DEPAUL L. REV. 425 (2018). The present Article pushes against the existing bail literature and scholarship that falls short of articulating the impact of bail reform on the criminal legal system as a whole.

<sup>34</sup> WENDY SAWYER & PETER WAGNER, PRISON POLICY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2019 n.2 (2019) (“More recently, we analyzed the 2014 National Survey of Drug Use and Health . . . from this source, we estimate that approximately 6 million unique individuals were arrested and booked into jails in 2014.”), <https://www.prisonpolicy.org/reports/pie2019.html> [<https://perma.cc/HAL7-66U9>].

rate.<sup>35</sup> The cost of quick justice is the erosion of procedural due process protections and skyrocketing rates of pretrial detention.<sup>36</sup>

Systemic injustices, although often discussed, are rarely resolved. Institutional players are most willing to police injustices when they are extreme and involve an easily identifiable bad actor, such as blatant acts of police misconduct or obvious abuses of prosecutorial privilege.<sup>37</sup> Such headline-grabbing occurrences are rare, however, and, unfortunately, the everyday injustice of inadequate procedural protections goes unnoticed, even as it allows for the incarceration of some of our community's most vulnerable.<sup>38</sup> Ultimately, it is the system that is to blame.<sup>39</sup> This leads to a compounding problem, as incarceration can fundamentally destroy the lives of such individuals. Beyond the lives it affects directly, unnecessary incarceration harms the legitimacy of the criminal legal system.<sup>40</sup>

The monetary compensation scheme that I propose in this Article for those subjected to unnecessary incarceration provides a dual-purpose solution: (1) it provides a meaningful remedy to such individuals for their time lost, and (2) it acts as an institutionalized check to reduce inaccuracies in the preventive justice system that are a result of the system's inherent procedural defects.

This Article is organized in the following Parts:

Part I reviews the existing literature on bail, identifying harms to the accused and drawing connections to the problems associated with preventive justice on a mass scale for "garden-variety" defendants.<sup>41</sup> This Part explains the magnitude of unnecessary incarceration and how that develops into a growing negative feedback loop with few avenues of recourse for the legally innocent.

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<sup>35</sup> See Jenny Roberts, *The Innocence Movement and Misdemeanors*, 98 B.U. L. REV. 779, 801 (2018) ("One facet that is often not discussed, but that is particularly relevant in the misdemeanor arena due to the sheer volume of cases in the lower criminal courts, is that law enforcement and prosecutors must be more selective about which misdemeanor cases they really want in the criminal justice system.").

<sup>36</sup> See generally Makar, *supra* note 33.

<sup>37</sup> See, e.g., Azi Paybarah, *Why the Central Park Five Matter*, N.Y. TIMES (June 3, 2019), [https://www.nytimes.com/2019/06/03/nyregion/newyorktoday/central-park-5-when-they-see-us.html# \[https://perma.cc/3ZTF-3LPW\]](https://www.nytimes.com/2019/06/03/nyregion/newyorktoday/central-park-5-when-they-see-us.html# [https://perma.cc/3ZTF-3LPW]).

<sup>38</sup> See, e.g., Carols Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187 (2018) (examining racial disparities in the plea-bargaining process).

<sup>39</sup> See generally Makar, *supra* note 33.

<sup>40</sup> See generally *id.*

<sup>41</sup> See *infra* Part I.

Part II analyzes the concept of time served as a form of compensation that should also be provided to individuals who suffer unnecessary pretrial incarceration.<sup>42</sup>

Part III explains the multilayered process that turns the legally innocent into the unnecessarily incarcerated. This Part shines a light on the implicit inequalities in the pretrial scheme that, in their own way, compound into one larger system that filters out the more advantaged and locks in the most vulnerable.<sup>43</sup>

Part IV reviews existing reform efforts, including risk assessment tools and nets of eligibility.<sup>44</sup> In doing so, this Article observes that many baseline reform efforts are low risk and low reward, therefore holding little promise of improving the equality disparity in and the accuracy of the justice system. This Part goes on to explain the benefits of a pretrial compensation scheme and addresses counterarguments.

## I

### DEFINING UNNECESSARY INCARCERATION

Defining the contours of unnecessary incarceration requires a review of the larger discourse of preventive justice measures, which have normalized and so ingrained the use of pretrial detention in our legal system. This Part further reviews the limitations for relief available to those detained prior to trial and uncovers a spectrum of losses—both foreseeable and unintended—created by incarcerating the legally innocent.

#### *A. Preventive Detention Normalized*

Preventive justice measures are predictive, formalized processes that often act against an individual or group.<sup>45</sup> The measures create a constraint against a person's liberty when normal state action is not effective.<sup>46</sup> As a result, preventive measures employ a lower threshold

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<sup>42</sup> See *infra* Part II.

<sup>43</sup> See *infra* Part III.

<sup>44</sup> See *infra* Part IV.

<sup>45</sup> Pretrial detention, also referred to as preventive detention, is one such preventive justice measure that this Article focuses on. *E.g.*, David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 695 (2009) (“In reality . . . preventive detention is already an integral feature of the American legal landscape.”); Stephen J. Morse, *Preventive Confinement of Dangerous Offenders*, 32 J.L. MED. & ETHICS 56, 56 (2004) (“[P]ure preventive detention is more common than we usually assume, but . . . this practice violates fundamental assumptions concerning liberty under the American constitutional regime.”).

<sup>46</sup> See Cole, *supra* note 2, at 5.

of procedural due process protections.<sup>47</sup> Effectively, formalized preventive justice procedures act as a gap-filling mechanism when the government cannot act swiftly enough to prevent what it believes to be an articulable threat.<sup>48</sup> Because it is expected that procedural safeguards will protect the individual later, a temporary deprivation is permitted now.<sup>49</sup> Preventive justice measures, which balance an individual's right to liberty and the government's need to protect against immediate threats, are considered constitutional in many contexts, including common criminal proceedings.<sup>50</sup> These measures are widely accepted because they protect the community from viable threats in the absence of more permanent and timely state action.<sup>51</sup>

Formal preventive justice refers to procedures that have been institutionally implemented, either via exigent emergency circumstances,<sup>52</sup> through legislation,<sup>53</sup> or Supreme Court validation.<sup>54</sup>

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<sup>47</sup> See *id.* at 6.

<sup>48</sup> See *id.*

<sup>49</sup> Similar in concept to the idea of preventive justice, the theory set forth in *Displacing Due Process* argues that procedural protections are wrongly displaced, specifically at the pretrial stage, because of the false assumption that any wrongs that occurred in the pretrial phase will be corrected through the enhanced procedural protections afforded at trial. The resultant effect is referred to as prospective procedural displacement. Problems associated with prospective procedural displacement—preventive justice gone unchecked—are discussed in depth in *Displacing Due Process*. Makar, *supra* note 33.

<sup>50</sup> *United States v. Salerno*, 481 U.S. 739, 764–52 (1987) (holding that the Bail Reform Act of 1984, which allows a judicial officer to detain a suspect upon a finding of clear and convincing evidence that the accused poses a flight risk or is a likely future danger to the community, is not facially unconstitutional); see also *infra* Section II.A and accompanying notes 138–39, 141–43 (summarizing *Salerno*).

<sup>51</sup> See *Cole*, *supra* note 2.

<sup>52</sup> See *id.* at 6; see also *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“[L]egal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . . Pressing public necessity may sometimes justify the existence of such restrictions . . . .”). The decision in *Korematsu* was only recently overruled by the Court in *Trump v. Hawaii*. 138 S. Ct. 2392, 2423 (2018).

<sup>53</sup> *E.g.*, Steven L. Chanenson & Jordan M. Hyatt, *The Use of Risk Assessment at Sentencing: Implications for Research and Policy*, in WORKING PAPER SERIES, VILLANOVA UNIVERSITY CHARLES WIDGER SCHOOL OF LAW 6 (2016), <https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1201&context=wps> [<https://perma.cc/99VE-KCUBU>] (discussing the use of risk assessment tools in sentencing hearings in order to decrease the likelihood of recidivism).

<sup>54</sup> The Supreme Court has validated a number of actions that require national security initiatives. See, *e.g.*, *Gerstein v. Pugh*, 420 U.S. 103 (1975) (holding that an individual arrested without a warrant may be temporarily detained for up to twenty-four hours to ensure the timely administrative function of providing the arrestee with a probable cause hearing). States have adopted preventive detention measures, such as stop and frisk. *Terry v. Ohio*, 392 U.S. 1, 10 (1968). The Court has also validated preventive detention in *Salerno*, 481 U.S. at 752.

One of the first instances of nationwide formal preventive justice was that of Japanese internment during World War II.<sup>55</sup> Although there have been grave criticisms of this approach, hindsight provided an opportunity for the political process to reform preventive justice procedures.<sup>56</sup> Over time, formal preventive justice processes were expanded to other areas of the law, rather than just national emergencies.<sup>57</sup> This includes involuntary civil commitment, the detention of juveniles pending trial, and, ultimately, the preventive detention of adult defendants charged with “serious crimes.”<sup>58</sup>

These measures have the Supreme Court’s stamp of approval, but the growing use of preventive justice to regulate garden-variety crime raises many constitutional concerns. Professor Frederick Schauer argues that preventive justice is ubiquitous in our criminal legal system and contends that punitive uses of coercion, like preventive forms of coercion, are all probabilistic at their core, specifically noting that both forms of coercion share similar ends.<sup>59</sup> In other words, Schauer argues that there is never a scenario where there will be complete accuracy,

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<sup>55</sup> See generally *Korematsu*, 323 U.S. at 214 (holding that an Executive Order mandating Japanese Americans to move into relocation camps following the attack on Pearl Harbor fell within the war powers of Congress and the Executive).

<sup>56</sup> *Trump*, 138 S. Ct. at 2423 (“*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—‘has no place in law under the Constitution.’” (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting))).

<sup>57</sup> The use of preventive detention for individuals accused of “serious crimes” was not a novel proposition by Congress. Here, Justice Rehnquist, writing for the majority, provided a laundry list of instances where the Court has upheld preventive detention:

We have repeatedly held that the Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest. For example, in times of war or insurrection, when society’s interest is at its peak, the Government may detain individuals whom the government believes to be dangerous. See *Ludecke v. Watkins*, 335 U.S. 160 (1948) (approving unreviewable executive power to detain enemy aliens in time of war) . . . . Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons. Thus, we have found no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings. *Carlson v. Landon*, 342 U.S. 524, 537–42 (1952); *Wong Wing v. United States*, 163 U.S. 228 (1896) . . . . If the police suspect an individual of a crime, they may arrest and hold him until a neutral magistrate determines whether probable cause exists. *Gerstein v. Pugh*, 420 U.S. 103 (1975). Finally, respondents concede and the Court of Appeals noted that an arrestee may be incarcerated until trial if he presents a risk of flight, see *Bell v. Wolfish*, 441 U.S. at 534, or a danger to witnesses.

*Salerno*, 481 U.S. at 748–49.

<sup>58</sup> *Id.* at 745, 749–52; *Schall v. Martin*, 467 U.S. 253 (1984).

<sup>59</sup> FRED SCHAUER, *The Ubiquity of Prevention*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 20–21 (Andrew Ashworth, Lucia Zedner, & Patrick Tomlin eds., 2013).

because both preventive measures and punitive schemes contain some variant of uncertainty.<sup>60</sup> Thus, preventive coercion should not raise normative concerns.<sup>61</sup> Schauer further contends that the “difference lies not in the existence or not of prevention, but rather in differences in degree, in differences in the burden of proof, and in differences in procedures.”<sup>62</sup> But that logic is inherently flawed. If the same procedures that are known to be inaccurate were used to detain preventively and then later relied upon to punish the accused for crimes that he is alleged to have committed, then prevention is doing more than its intended goal; instead it is adjudicating guilt.

What Schauer fails to recognize is that the goal of prevention is different from that of punishment. Theoretically, although his conclusion may be true, if procedures surrounding preventive measures were heightened, decisions would be less error prone, and the issues surrounding preventive detention would be nonexistent. But that is not the reality of our criminal legal system. Instead, normalization of prevention beginning at every level—from arrest to conviction—has developed a multilayer system that compounds inequalities, developing inaccuracies that are later relied upon as the accused progresses deeper into the legal system.<sup>63</sup>

Scholar David Cole directly addresses Schauer’s thesis, suggesting preventive measures *should* raise constitutional concerns but also noting that there are inevitable limits in the law’s ability to constrict them.<sup>64</sup> Instead, Cole identifies that “[a] number of informal, practical, and ‘soft law’ constraints may in fact do much of the day-to-day work in confining the scope of preventive justice.”<sup>65</sup> Soft law checks can be thought of as informal practices established to promote transparency and trust between the community and government. A common example of this is council meetings between police officers and community leaders to discuss policing objectives and strategies.<sup>66</sup>

Although Cole’s analysis elaborates on existing informal protections, more are needed. Specifically, it is vital to recognize that

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<sup>60</sup> See *id.* at 15–16.

<sup>61</sup> SCHAUER, *supra* note 59; see also Cole, *supra* note 2 (summarizing Schauer’s argument).

<sup>62</sup> SCHAUER, *supra* note 59, at 21.

<sup>63</sup> See *infra* Part III.

<sup>64</sup> See Cole, *supra* note 2, at 7–10.

<sup>65</sup> *Id.* at 20 (identifying “soft law” or informal checks as nonconstitutional or nonlegal constraints, including community responses that indicate the legitimacy of the preventive measure, resource constraints, and accountability mechanisms).

<sup>66</sup> *Id.* at 15.

pretrial detention is now a formal, fully normalized form of preventive justice.<sup>67</sup> Thus, it requires a formal, institutionalized deterrent to prevent abuse—soft law is not enough.<sup>68</sup>

Preventive justice measures that are used only during exigent circumstances are different in nature than measures that are formally employed and relied upon on a day-to-day basis. In cases of national security, the danger to the community could be devastating, and assessing the harm of the suspect could require the coordination of multiple agencies. Therefore, the swiftest action (and most likely to quickly incapacitate the suspect) is readily deployed and not questioned.<sup>69</sup> For instance, the horrific acts of 9/11 resulted in the U.S. government expanding the definition of terrorism “to make it easier to prosecute and convict individuals before they succeed in committing an actual terrorist act.”<sup>70</sup> In the case of garden-variety crimes that are likely to occur, the need to deploy a procedural process to assess dangerousness should hardly be a surprise. Therefore, mechanisms for incapacitation should contain the least onerous restrictions on one’s release as well as meaningful avenues of relief to counteract abuses of preventive powers.

Soft law or informal approaches might provide an appropriate check where preventive justice is not regularly relied upon as a normalized process in everyday criminal proceedings. Yet with the expansion of formal preventive justice measures to integral daily proceedings, like in bail hearings, the “gap” in the justice system is exploited. To the extent that soft law tactics could have been used, the overwhelming reliance on preventive measures to move cases forward diminishes the effectiveness of soft law tactics.<sup>71</sup>

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<sup>67</sup> John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 30 (1985) (“The difficulties associated with predictive decisions notwithstanding, prediction of future danger is an unavoidable reality in bail: it has not only been practiced traditionally by judges at their discretion, but has been institutionalized in many of the recent laws.”).

<sup>68</sup> See *infra* Parts II, IV.

<sup>69</sup> BAUGHMAN, *supra* note 5, at 130–32 (observing a distinction between bail laws for citizens charged with common crimes versus those charged as terror suspects).

<sup>70</sup> Cole, *supra* note 2.

<sup>71</sup> Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 857–73 (2018) (observing that traditionally, individuals who were charged with misdemeanors maintained the right to release, but over time, misdemeanors that include lesser offenses, such as vagrancy, were used punitively to control and detain minorities).

Preventive detention was certainly conceptualized to include limitations.<sup>72</sup> In a facial challenge to the Bail Reform Act of 1984, the Supreme Court upheld its validity, holding that multiple procedural protections would reduce the risk of erroneous deprivations of liberty.<sup>73</sup> These include heightened procedural scrutiny, enhanced adversarial hearings, and limitations to the length of detention.<sup>74</sup> In practice, these limitations are impossible to implement due to the sheer magnitude of cases that are processed through the criminal legal system.<sup>75</sup> The result of this overbroad application of preventive justice in daily bail proceedings is that too many people become incarcerated prior to trial.<sup>76</sup> The number of defendants with disposed cases who were detained pretrial increased by 184%, from 27,004 in 1995 to 76,589 in 2010.<sup>77</sup> This includes guilty pleas, trial convictions, dismissals, and acquittals.<sup>78</sup> In an analysis of felony cases in state court, approximately one in every five individuals detained prior to trial had their cases dismissed or acquitted<sup>79</sup>—preventive detention, in many cases, is all for naught.<sup>80</sup>

Many defendants affected by preventive detention are without a meaningful remedy. Because there is no effective check on the use of punitive preventive measures early in criminal proceedings, the intent of procedural due process protections is unrealized.<sup>81</sup> The accused is

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<sup>72</sup> *United States v. Salerno*, 481 U.S. 739, 747 (1987) (“[T]he maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act.”); see 18 U.S.C. § 3161 (2012).

<sup>73</sup> *Salerno*, 481 U.S. at 755.

<sup>74</sup> *Id.* at 746–47, 750.

<sup>75</sup> *E.g.*, Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 *FORDHAM URB. L.J.* 1043, 1086 (2013) (“Heavy caseloads and bulk processing wear down prosecutors, defense attorneys, and judges, causing them to lose touch with the individuating principles that are supposed to govern their respective roles.”); Manns, *supra* note 19 (identifying that judges and prosecutors alike “face burgeoning case loads and benefit from the criminal justice system’s reliance on plea bargaining.”).

<sup>76</sup> The American criminal justice system holds almost 2.3 million people in 1,719 state prisons, 109 federal prisons, 1,772 juvenile correctional facilities, 3,163 local jails, and 80 Indian Country jails as well as in military prisons, immigration detention facilities, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories.

SAWYER & WAGNER, *supra* note 34, at 1.

<sup>77</sup> COHEN, *supra* note 26, at 1.

<sup>78</sup> *Id.*

<sup>79</sup> THOMAS H. COHEN & BRIAN A. REAVES, *BUREAU OF JUSTICE STATISTICS, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS* 7 (2007).

<sup>80</sup> See *infra* Part IV.

<sup>81</sup> See Makar, *supra* note 33, at 429.

also effectively unable to challenge such preventive measures, rendering their innocence meaningless.

The following section addresses the barriers to relief that pretrial detainees face.

### *B. Barriers to Relief*

Opportunities for relief at the bail stage are limited.<sup>82</sup> If a defendant is incarcerated pretrial for a state crime, she may challenge the legality of her detention, either through a bail review proceeding or through a state habeas corpus petition.<sup>83</sup> Both options can be used during the accused's pretrial incarceration to obtain release (or to lessen the restrictions of his current pretrial release conditions). Depending on the jurisdiction, these challenges can take a few days, several weeks, or longer.<sup>84</sup> For individuals detained on misdemeanor charges, these options are inconsequential because most misdemeanor cases are resolved within thirty to ninety days.<sup>85</sup> Because a challenge to pretrial detention becomes moot rather quickly, bail reviews or habeas corpus petitions are not effective means of redress in misdemeanor cases. Instead, such challenges are meaningful avenues of relief only for individuals facing felony charges.<sup>86</sup> Even if relief is secured in the form of release, neither a bail modification nor a habeas petition provides a remedy for the accused to recover wages lost or any other monetary

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<sup>82</sup> See *Pretrial Release Conditions*, NCSL (Sept. 15, 2016), <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-conditions.aspx> [https://perma.cc/3DXN-SHQH] [hereinafter *Pretrial Release Conditions*] (providing a list of laws as of 2016).

<sup>83</sup> The National Conference of State Legislatures conducted a fifty-state survey of state pretrial release laws. As of 2016, nearly all states provided the option of pretrial release to the accused. *See id.*

<sup>84</sup> See Natapoff, *supra* note 75 (discussing how some defendants charged with misdemeanors may remain incarcerated for up to four weeks after arrest); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C.D. L. REV. 277, 280 (2011) (noting that a court date can be up to three weeks after arraignment for a misdemeanor).

<sup>85</sup> A study performed in New York City from 2009 to 2013 found that detention rates are higher for defendants in felony cases (43%) than defendants in misdemeanor convictions (12%). Also, in New York, pretrial detention lengths among detainees included 180 days for felony charges and 90 days for misdemeanor charges, as mandated by law. Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529, 536 (2017).

<sup>86</sup> Some jurisdictions treat defendants adversely if they seek relief in the form of release while they await trial. See Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3622–23 (2013).

damages incurred during pretrial detention. These legal vehicles simply address whether or not the individual should be detained.

If relief is denied, a defendant may apply for leave to appeal the bail determination.<sup>87</sup> Most states, however, do not provide an absolute right to appeal a bail determination because the bail proceedings are only the first step in the criminal proceedings.<sup>88</sup> Moreover, appellate review does little to assist the affected individual who has been destabilized as the individual's underlying criminal case may have already been resolved before appellate review is of any real benefit. But individuals who are able to use this vehicle should not be discouraged from doing so, as such litigation may establish good precedent to help future defendants subject to overbroad preventive justice schemes.<sup>89</sup>

Other litigation vehicles used to challenge wrongful detention include § 1983 claims<sup>90</sup> and tort claims for false imprisonment,<sup>91</sup> wrongful arrest, and malicious prosecution.<sup>92</sup> These options are not

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<sup>87</sup> See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 8-204 (West 2020).

<sup>88</sup> Dorothy Weldon, *More Appealing: Reforming Bail Review in State Courts*, 118 COLUM. L. REV. 2401, 2419 n.123 (“[A]ppellate review is not constitutionally guaranteed . . . .”) (citing Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1221 (2013)). *But see* McKane v. Durston, 153 U.S. 684, 687 (1894) (“An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal.”).

<sup>89</sup> See, e.g., *Bradds v. Randolph*, 194 A.3d 444, 463 (Md. Ct. Spec. App. 2018) (accepting the argument that incarceration due solely to the imposition of an unaffordable monetary bond is illegal and ordered habeas relief granted based on a showing of inability to pay when only one of the three plaintiffs benefited from appellate review as the other two petitioners' underlying criminal cases were resolved prior to the Order and they subsequently were released from detention).

<sup>90</sup> Under 42 U.S.C. § 1983, Civil Action for Deprivation of Rights, a pretrial detainee may raise an excessive force claim against a jail official. To prove the excessive force claim, a pretrial detainee must show that the officers' use of force was objectively unreasonable. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015).

<sup>91</sup> See Mark Puente, *Baltimore Man Settles for \$200,000 in False Arrest Case*, BALTIMORE SUN (June 20, 2015), <https://www.baltimoresun.com/maryland/bs-md-reeping-lawsuit-20150630-story.html> [<https://perma.cc/64XM-N5LT>].

<sup>92</sup> Manns, *supra* note 19 (“A variety of causes of action are available to pretrial detainees including § 1983 actions and common law torts for wrongful arrest, false imprisonment, and malicious prosecution. However, these causes of action may help only a slender percentage of detainees because claimants must show that the government lacked probable cause in their arrest and detention or engaged in even more egregious misconduct.”) (citing Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 86–93 (1999)). A number of cases exist where defendants unsuccessfully sued for wrongful detention. One such case is *Smith v. City of Chicago*, No. 18 C 4918, 2019 U.S. Dist. LEXIS 601 (N.D. Ill. Jan. 3, 2019), *aff'd*, 2019 U.S. Dist. LEXIS 151957 (N.D. Ill. Sept. 6, 2019) (reviewing court treated a § 1983 claim against pretrial detention as a common law malicious prosecution claim and granted the motion to dismiss because the petition was time-barred and the state arguably offers an adequate remedy).

likely to provide immediate relief (like a bail modification or habeas corpus petition), and often the juice is not worth the squeeze. The amount incurred in attorneys' fees often outweighs the reward a defendant receives in monetary compensation.<sup>93</sup>

Even in instances of dismissals or acquittals, and regardless of whether she spent time incarcerated prior to trial, the defendant suffers from the stigma of an arrest on her record.<sup>94</sup> Expungement laws, which provide individuals who were arrested and charged but not convicted of crimes an opportunity to clear their records, are growing more common.<sup>95</sup> Although expungement may erase evidence of an arrest, it does not undo the lasting effects of that arrest and its resultant detention.<sup>96</sup> Expungement procedures do nothing to prevent the overbroad reach of preventive detention schemes.

In sum, challenges to pretrial detention during one's confinement can be slow and arduous, and they often do not result in any meaningful relief. As is, civil actions where defendants seek monetary compensation for their time lost are often not fruitful and can create an even greater financial burden on the accused. Individuals who seek compensatory damages for wrongful pretrial incarceration are limited by state immunity laws that protect state actors from liability.<sup>97</sup>

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<sup>93</sup> If a defendant is provided a public defender, the public defender may work only on the criminal aspect of the crime per state statute. Any collateral civil issues must be initiated by the defendant, whereby he would be required to hire and pay for his own attorney unless someone accepted the case pro bono.

<sup>94</sup> Linda S. Bueth, *Sealing and Expungement of Criminal Records: Avoiding the Inevitable Social Stigma*, 58 NEB. L. REV. 1087, 1090 (1979) ("Severe disabilities could result from disclosure of . . . arrest records even though the arrests did not result in convictions. The problem is that only lip service is given to the presumption that a person is innocent until proven guilty.").

<sup>95</sup> Eric Westervelt & Barbara Brosher, *Scrubbing the Past to Give Those with a Criminal Record a Second Chance*, NAT'L PUBLIC RADIO (Feb. 19, 2019, 4:58 AM), <https://www.npr.org/2019/02/19/692322738/scrubbing-the-past-to-give-those-with-a-criminal-record-a-second-chance> [<https://perma.cc/W2TH-5Q4B>] ("In the last two years [since 2019], more than 20 states have expanded or added laws to help people move on from their criminal records . . ."); *50-State Comparison of Relief Mechanisms*, RESTORATION OF RIGHTS PROJECT, <http://restoration.ceresourcecenter.org> [<https://perma.cc/T9CF-9D74>] (last visited Feb. 26, 2020).

<sup>96</sup> See Bueth, *supra* note 94, at 1090; Westervelt & Brosher, *supra* note 95.

<sup>97</sup> Manns, *supra* note 19, at 1951 n.15 ("[P]rosecutors are virtually immune from civil liability for their charging decisions."). See *Burns v. Reed*, 500 U.S. 478, 483 (1991). In fact, charging decisions are rarely if ever subjected to judicial scrutiny. See also *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (holding that there is no federal constitutional right to any review of prosecutorial charging decisions).

Ultimately, barriers to relief exist for pretrial detainees because at this stage the criminal proceedings are far from over.<sup>98</sup> But often it is the punitive-like nature of incarceration that brings the criminal proceedings to an end.<sup>99</sup> The following section articulates those punitive-like effects on pretrial detainees through an analysis of the losses pretrial detainees suffer.

### C. *The Meaning of Time Lost*

Pretrial detention is intended only to protect the public or ensure the defendant's appearance at trial.<sup>100</sup> Any other diminishment of rights that does not serve either aim is prohibited and may constitute punishment.<sup>101</sup> Despite this, with relief for pretrial detainees so limited, losses can seem limitless.

The foreseeable immediate consequences of detention include loss of job, housing, and educational opportunities.<sup>102</sup> These are the day-to-day losses that, as research has shown, can break the foundation of one's livelihood.<sup>103</sup> Over time these losses have become normalized—emphasizing these losses does little to sway legislators, judges, or other institutional players from pursuing pretrial detention.<sup>104</sup> But losses also include those that are unforeseeable and unintended. This predominately includes the loss of constitutional rights.<sup>105</sup>

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<sup>98</sup> *Gerstein*, 420 U.S. at 121–22. See generally Makar, *supra* note 33.

<sup>99</sup> Weldon, *supra* note 88, at 2424 (“Even short stays in local jails can be traumatizing or fatal. The outcome of bail hearings can thus create the ‘Sophie’s choice’ of remaining in jail and maintaining innocence, or pleading guilty and returning home with a criminal record that ‘follows them for the rest of their lives.’”).

<sup>100</sup> 18 U.S.C. § 3142 (2018).

<sup>101</sup> *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 n.8 (2017) (affirming *Bell v. Wolfish*, 441 U.S. 520 (1979)) (invalidating the proposition arising from *Bell v. Wolfish* that the presumption of innocence does not apply to persons detained prior to trial) (internal citations omitted).

<sup>102</sup> See Weldon, *supra* note 88, at 2424; see also Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713–14 (2017) (“A person detained for even a few days may lose her job, housing, or custody of her children.”).

<sup>103</sup> See Heaton et al., *supra* note 102, at 713.

<sup>104</sup> *United States v. Salerno*, 481 U.S. 739, 742 (1987) (stating that if a judicial officer is unable to find a condition of release that will “reasonably assure the appearance of the [accused]” and ensure the safety of any person or the community, then Section 3142(e) of the Bail Reform Act of 1984 requires a judicial officer to “order the detention of the person prior to trial”).

<sup>105</sup> Any form of incarceration will result in loss, but what is unclear is how much and what kind of loss someone who is presumed innocent and incarcerated must endure compared to someone who is incarcerated because he has been convicted.

### 1. *Foreseeable Losses*

Foreseeable losses can include any loss that affects the incarcerated—convicted or unconvicted—but specifically includes losses that society has accepted as the burden an individual must accept for endangering the community.<sup>106</sup> For instance, someone serving a sentence may be unable to make mortgage or rental payments due to loss of income.<sup>107</sup> Similarly, due to the abrupt nature of pretrial detention,<sup>108</sup> the accused may not be able to inform her employer of her absence or arrange afterschool childcare.<sup>109</sup> Particularly for pretrial detainees, their immediate community often suffers as a result of incarceration, creating an unstable environment for those returning from jail to daily life.<sup>110</sup> Once released, the accused must return to life with the stigma of someone arrested and who society believes has been involved in criminal activity.<sup>111</sup>

Losses to one's privacy are also common. Once admitted to a jail or prison, detainees lose certain Fourth Amendment protections and are subject to invasive searches.<sup>112</sup> Although reduced privacy is necessary

<sup>106</sup> Manns, *supra* note 19, at 1970 (“Society’s interests in preempting violence or reducing the risk of flight may be significant enough in many cases to justify the imposition of pretrial detention.”).

<sup>107</sup> *See id.* at 1971–72; Weldon, *supra* note 88, at 2424.

<sup>108</sup> For instance, there is often no warning because the accused could be arrested without a warrant.

<sup>109</sup> Manns, *supra* note 19, at 1971–72; *see also* Weldon, *supra* note 88, at 2424.

<sup>110</sup> *See* Makar, *supra* note 33, at 458 (“Particularly because the disparity in bargaining power is so skewed, those incarcerated pre-trial often accept plea deals to avoid spending time in jail waiting for vindication. . . . They may already be at risk of losing a job or losing housing because rent is not paid.”); *see also* Heaton et al., *supra* note 102, at 796 (“Consider, for instance, the case of Joseph Curry. . . . Curry had discovered in 2012 that there was a warrant out for his arrest, accusing him of petty theft at a Walmart he had never entered. When he called the Pennsylvania state police to clarify the situation, he was arrested and jailed. Bail was set at \$20,000, which he could not afford. In the months he was detained and waiting for his case to proceed, Curry ‘missed the birth of his only child, lost his job, and feared losing his home and vehicle. Ultimately, he pled *nolo contendere* in order to return home.”) (quoting *Curry v. Yachera*, 835 F.3d 373, 377 (3d Cir. 2016)).

<sup>111</sup> *See, e.g.*, Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 1025 (2019) (“[T]he defendant is seen as being in fact an offender, who awaits only the formal verdict of the court before receiving the punishment he deserves.”) (quoting R.A. Duff, *Pre-Trial Detention and the Presumption of Innocence*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 120, (Andrew Ashworth et al. eds., 2013)) (“[T]hat is why it is so easy (and so revealing) to slide into talking about the danger that the defendant will commit, not ‘offenses,’ but ‘further offenses’ while on bail.”).

<sup>112</sup> *See* *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 323, 339 (2012) (holding jail officials did not violate petitioner’s Fourth Amendment right to privacy by subjecting petitioner to a strip search, including the lifting of genitals, before allowing petitioner to return to general population). The Court in *Florence* further noted that “[p]eople detained

for the safety of correctional staff and other inmates, those who are ultimately never convicted of a crime can find these searches even more demoralizing.<sup>113</sup>

Not surprisingly, these losses (loss of wages, housing, invasions of privacy, etc.) are common to all individuals who are incarcerated pretrial, regardless of whether they are ultimately convicted or not.<sup>114</sup> The normalization of pretrial losses could be due to the similarities between preventive and punitive detention, which allows society to accept whatever occurs behind bars as something that happens only to the guilty—even if the accused is presumed innocent.

This prompts the question, should pretrial detainees—the legally innocent—be required to endure the same losses that legally guilty individuals must suffer as part of their punishment? Although the Supreme Court has held that conditions of incarceration may be equal,<sup>115</sup> the Court has yet to address what degree of losses are acceptable and what should be done when incarceration proves to be unnecessary.

It seems unlikely that a bright-line test will limit the type of foreseeable losses a pretrial detainee endures because such losses have been normalized.<sup>116</sup> But there are other losses that could violate the accused's constitutional rights—an unintended symptom of preventive justice.

## 2. Unforeseeable Losses

Pretrial detainees may also suffer a loss of constitutional rights, which is perhaps an unintentional and unanticipated byproduct of the

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for minor offenses can turn out to be the most devious and dangerous criminals," *id.* at 1520, and warned that "[j]ails can be even more dangerous than prisons because officials there know so little about the people they admit at the outset," *id.* at 1521.

<sup>113</sup> *Id.* at 1524.

<sup>114</sup> See Manns, *supra* note 19, at 1971.

<sup>115</sup> Prisoner's constitutional rights are subject to restrictions and limitations while incarcerated. *Bell v. Wolfish*, 441 U.S. 520, 546 (1979) ("This principle applies equally to pretrial detainees and convicted prisoners. A detainee simply does not possess the full range of freedoms of an unincarcerated individual.").

<sup>116</sup> News accounts are riddled with stories of how defendants are affected by pretrial detention. One such story that gained national attention was that of Kalief Browder, who, at seventeen years old, was wrongfully arrested and placed in pretrial detention for three years on a \$3,000 bail that he could not afford. Browder was subjected to several trips to solitary confinement and exposed to constant violence, all of which affected his mental health. See Jennifer Gonnerman, *Before the Law*, *NEW YORKER* (Sept. 29, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law> [<https://perma.cc/Q477-B2W5>].

preventive justice scheme.<sup>117</sup> This Article maintains that such losses may be akin to punishment, which is not a purpose of preventive justice.<sup>118</sup>

Prior to a conviction, the accused still retains, in theory, all the same rights as a free citizen, aside from those that interfere with his appearance at trial or relate to him posing a risk to the community.<sup>119</sup> For instance, the detainee should still retain the right of choice,<sup>120</sup> the right to vote,<sup>121</sup> and the right to educational access.<sup>122</sup> Additionally, although it is not explicitly constitutionally guaranteed, the accused has right to familial community.<sup>123</sup> In practice, these rights are not always honored.

The extent to which losses of constitutional rights occur varies in degree. Take voting rights as an example. More than six million U.S.

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<sup>117</sup> Infringements on one's privacy are typically not considered a constitutional violation as applied to detainees in a jail or prison setting. *See Price v. Johnston*, 334 U.S. 266, 287 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."). This reasoning is criticized by Justice Stevens in his dissent in *Bell*, 441 U.S. at 589–90.

<sup>118</sup> This Article does not go into depth on the distinction between unforeseeable punitive losses versus unforeseeable regulatory losses. This is perhaps better suited for a separate article.

<sup>119</sup> *Rhem v. Malcolm*, 371 F. Supp. 594, 623 (S.D.N.Y. 1974) ("[A] detainee retains all rights of the ordinary citizen except those necessary to assure his appearance for trial. . . . '[T]he conditions of incarceration for detainees must, cumulatively, add up to the least restrictive means of achieving the purpose requiring and justifying the deprivation of liberty.'" (emphasis in original) (quoting *Hamilton v. Love*, 328 F. Supp. 1182, 1192 (E.D. Ark. 1971)).

<sup>120</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) ("[T]he right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State.").

<sup>121</sup> *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections."); *see also McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 803 (1969) (discussing the right to obtain absentee ballots); *O'Brien v. Skinner*, 414 U.S. 524, 525 (1974).

<sup>122</sup> Although education may not be a fundamental right under the Constitution, the Court found that "[i]n addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause." *Plyler v. Doe*, 457 U.S. 202, 221–22 (1982).

<sup>123</sup> *See, e.g., Danushka S. Medawatte et al., Justice in Dire Straits: Unlawful Pretrial Detainees, Family Members and Legal Remedies*, 22 BUFF. HUM. RTS. L. REV. 189, 201 (2015–16) ("One of the main connections between unlawful pretrial detention and the family members of a detainee is that the family nexus is immediately affected by the detention."); *see also Rhem*, 371 F. Supp. at 601 (discussing the impact to incarcerated persons when prohibited from engaging in contact visits and its psychological effects).

citizens are disenfranchised because of a felony conviction.<sup>124</sup> Disenfranchisement laws vary widely across the United States.<sup>125</sup> Two states have adopted the most liberal position, and have done away with disenfranchisement, to ensure that everyone retains the right to vote.<sup>126</sup> On the other hand, three other states have adopted the most restrictive position that permanently disenfranchises individuals after a felony conviction.<sup>127</sup> The remaining states fall somewhere in between and enforce disenfranchisement laws for a set period of time.<sup>128</sup>

But for states that have disenfranchisement laws, they are triggered only by a felony conviction, as opposed to a misdemeanor conviction.<sup>129</sup> Therefore, citizens who are detained prior to trial or incarcerated for a misdemeanor offense still maintain the right to vote (notwithstanding any disqualifying felony convictions).<sup>130</sup> Unfortunately, a number of barriers exist that prevent these individuals from exercising their right to vote. These barriers primarily stem from inaccessibility making voting in jail either impractical or impossible.<sup>131</sup> For instance, while incarcerated individuals rely heavily on jail staff for information on policies and processes, the lack of education and preparation by jail staff to facilitate the registration of voters or provide absentee ballots often creates a barrier to vote.<sup>132</sup> Thus, the unavailability of voting ballots or access to polling stations has led to de facto disenfranchisement for pretrial detainees.<sup>133</sup>

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<sup>124</sup> *Six Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, THE SENTENCING PROJECT (Oct. 6, 2016), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/> [<https://perma.cc/SQ4V-3J8R>] [hereinafter *Six Million Lost Voters*].

<sup>125</sup> *Id.*

<sup>126</sup> The two states are Maine and Vermont. VOTING WHILE INCARCERATED, ACLU 1 (2005) [hereinafter VOTING, ACLU], <https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map> [<https://perma.cc/XV7Z-3QVP>].

<sup>127</sup> The three states include Iowa, Kentucky, and Virginia. *Id.*

<sup>128</sup> *Six Million Lost Voters*, *supra* note 124.

<sup>129</sup> *Id.*

<sup>130</sup> *See id.*

<sup>131</sup> Instances have been noted where misunderstandings have occurred among correction officials, such as officials incorrectly believing that *all* those who are incarcerated do not have a right to vote, etc. *See* VOTING, ACLU, *supra* note 126, at i. There are small, but growing, initiatives taking place in California and Illinois to increase voter rights education in jails. *See Disenfranchisement News: Expanding Voter Rights Education in Jails*, THE SENTENCING PROJECT (July 19, 2018), <https://www.sentencingproject.org/news/disenfranchisement-news-expanding-voter-rights-education-in-jails/> [<https://perma.cc/4ARE-DLJT>].

<sup>132</sup> *Id.*

<sup>133</sup> *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 590 n.22 (1978); *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802 (1969). Voting is a fundamental right for every U.S.

Slowly, courts are beginning to recognize the inherent problems with a criminal legal system that does not make a distinction between pretrial detainees and those serving a sentence.<sup>134</sup> Mere recognition, though, is not enough to remedy such deeply ingrained and normalized practices.

## II

### COMPENSATING FOR TIME LOST: AN ANALOGY TO TIME SERVED

As discussed above, litigation avenues may be ineffective at making individuals whole again, and it may be costly and impractical to create greater procedural protections beyond those required by the law.<sup>135</sup> The value of time lost by each individual who endures a period of unnecessary pretrial incarceration varies greatly and is difficult to quantify.<sup>136</sup> In an effort to address the multitude of problems with preventive detention, we must consider how best to assign value to the time lost by those unnecessarily incarcerated.

In the existing paradigm, there is a long-standing judicial practice of valuing time lost through time served credits.<sup>137</sup> The theory of crediting time served for individuals incarcerated prior to their conviction can be thought of as compensation for spending time in jail while legally innocent.<sup>138</sup> The practice of crediting defendants for time served

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citizen. The inability to exercise one's right as a citizen cannot be monetized. In instances such as this, where a deprivation is so large, pretrial compensation does not even come close to restoring right entitlements. But it is better than nothing.

<sup>134</sup> *Culp v. Bounds*, 325 F. Supp. 416, 419 (W.D.N.C. 1971) ("Pre-trial detention is nothing less than punishment. An unconvicted accused who is not allowed . . . bail is deprived of his liberty."); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 311 n.5 (E.D. La. 2018) ("This Court finds that the post-conviction detention cases, while not directly on point, are highly relevant because the liberty interests of presumptively innocent, pretrial detainees cannot be less than, and are generally considered greater than, those of convicted defendants.").

<sup>135</sup> *Displacing Due Process* argues for stronger adherence to the existing procedural protections, and further, that the existing ones are watered down based on the assumption that a trial will occur. Makar, *supra* note 33, at 450 ("*Salerno* advocates for heightened procedural protections, but those protections are never actualized because of the assumption that further process is still forthcoming. The result is a deformation of substantive rights by way of deprivations of pre-trial liberty.").

<sup>136</sup> See *supra* Part I.

<sup>137</sup> See Adam J. Kolber, *Against Proportional Punishment*, 66 VAND. L. REV. 1141, 1148 (2013).

<sup>138</sup> See Manns, *supra* note 19, at 1951 ("The federal government and many states have tacitly recognized the costs inflicted on pretrial detainees by creating a system of 'compensation' of limited scope and coverage. The most common form of compensation is a set-off of time served in detention against criminal sentences.").

provides a logical framework for understanding why our society currently does not compensate the accused for time lost through unnecessary incarceration.

This section will explore the principle of time served and discuss the inconsistencies it creates within our system between the legally innocent and the legally guilty.

### A. A Critical Analysis of Time Served Credits

If an individual is arrested, placed under preventive detention, and found guilty by means of a trial, it would make a good deal of sense that she be guaranteed a right to credit for the time she already spent incarcerated, as time spent in jail pretrial would appear to be equal to time spent in jail posttrial. But courts have rarely considered whether credit for time served prior to trial is constitutionally required.<sup>139</sup> Although there is no controlling Supreme Court case law entitling detainees to a constitutional right to time served credits,<sup>140</sup> many states voluntarily implemented statutes to prevent punishment in excess of a statutory maximum sentence.<sup>141</sup>

Even without an affirmative constitutional right to time served, federal and state statutes require providing credit for time served.<sup>142</sup> Despite the legally stated distinctions between preventive and punitive

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<sup>139</sup> Comment, *Credit for Time Served Between Arrest and Sentencing*, 121 U. PA. L. REV. 1148, 1148–49 (1973) (noting two predominant reasons: lack of standing and already existing legislative statutes that provide credit for time served).

<sup>140</sup> *See id.* at 1150 (“Three constitutional bases . . . from which to derive a right to credit for presentencing incarceration: the double jeopardy clause, the unconstitutional conditions doctrine, and the cruel and unusual punishment clause.”); *see also* *Gonzalez v. Comm’r of Corr.*, 68 A.3d 624, 641 (Conn. 2013) (holding that an attorney who *did not* seek a bond increase for his client in two prior cases in order to ensure the client was able to maximize the amount of presentence credit acted prejudicially and violated *Strickland*); Kolber, *supra* note 137, at 1149 (beginning a discussion of proportionality and credit for time served).

<sup>141</sup> *See also* Kolber, *supra* note 137, at 1148 (discussing that most jurisdictions will require judges to give credit for time served if the offender would otherwise be imprisoned for longer than the statutory maximum). In an analogous situation, the Supreme Court has said that prohibiting the credit for time served in reconviction cases would result in double jeopardy. *North Carolina v. Pearce*, 395 U.S. 711, 718–19 (1969) (footnote omitted) (“We hold that the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully ‘credited’ in imposing sentence upon a new conviction for the same offense. If, upon a new trial, the defendant is acquitted, there is no way the years he spent in prison can be returned to him. But if he is reconvicted, those years can and must be returned—by subtracting them from whatever new sentence is imposed.”), *overruled by* *Alabama v. Smith*, 490 U.S. 794 (1989). Although the Supreme Court has not addressed the exact issue, it is likely that *Pearce* would lead to the conclusion that time served credit is constitutionally required.

<sup>142</sup> 18 U.S.C. § 3585 (2012).

detention, such statutes act as an affirmative nod to the similarities between these two forms of detention. These similarities undermine the logic laid out in the landmark case, *United States v. Salerno*, which permits pretrial detention in criminal cases on the condition detention is not serving a punitive purpose.<sup>143</sup> In order for preventive detention to be permissible, *Salerno* requires that the government show by clear and convincing evidence that the accused poses a danger to an individual or a community that cannot be regulated by pretrial release conditions.<sup>144</sup>

*Salerno* opened the door for states to implement their own preventive detention statutes,<sup>145</sup> creating a slippery slope between *ex ante* (referred to as “regulatory”) and *post ante* (referred to as “punitive”) detention.<sup>146</sup> In explaining the distinction between the two forms of detention, the Supreme Court offered the overly simplistic definition that, as a matter of fact, regulatory incarceration (also known as pretrial detention or preventive detention) is pre-adjudicatory, and therefore, does not serve a punitive end.<sup>147</sup> This implies that conversely, punitive incarceration can only be post-adjudicatory.<sup>148</sup> The Court, however, did not opine in what instances, if any, pretrial detention might amount to punishment.

To ensure that maximum sentences are not exceeded, providing time served credits after a trial makes perfect sense. But, the concept of crediting time served is faced with some tension in the plea-bargaining context because it is difficult to conceptualize how much punishment is deserved and how to convert regulatory time to punitive time.

First, let us look toward proportionality in sentencing. The concept of proportionality in punishment is essential—much of the penal aspect of the criminal legal system is based on the idea of punishment and

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<sup>143</sup> *United States v. Salerno*, 481 U.S. 739, 751 (1987) (noting that pretrial detention hearings permit the accused to have a right to request counsel, to testify, to present witnesses, to proffer evidence, and to cross-examine other witnesses, but fail to limit crimes eligible for detention hearings).

<sup>144</sup> *Id.*

<sup>145</sup> Shima Baradaran Baughman, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 750 (2011).

<sup>146</sup> *Salerno*, 481 U.S. at 747 (internal citations omitted) (“Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on ‘whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].’”).

<sup>147</sup> *Id.* at 748–49.

<sup>148</sup> *Id.*

what the offender “deserves.”<sup>149</sup> Providing credit for time served is incongruent with many principles of proportionality in this sense because it permits reducing the punitive benchmark (in other words, deviating from sentencing guidelines) in exchange for guilty pleas.

Imagine an individual is charged with a crime that holds a maximum penalty of five years. She is held without bail, pursuant to her state’s preventive detention statute, for one year as she awaits trial. At this time, the prosecutor offers her a plea deal—that she plead guilty in exchange for four years of the maximum penalty suspended and credit for one of the five years as time already served. In other words, this deal would allow the defendant to walk out of jail as a free person in exchange for affirming her guilt.

To laypeople, the idea of allowing accused criminals to go free in exchange for a mere admission of guilt seems almost laughable (after all, the defendant was deemed dangerous enough to be held prior to trial). But to institutional players, it is barely noticed and is one of the most common exchanges in day-to-day courtroom proceedings.<sup>150</sup>

This example demonstrates the convenient logical shift that occurs when the legal system converts time spent incarcerated prior to trial from “regulatory” detention to “punitive” credits.<sup>151</sup> Dissecting the reasons for why the court system is so willing to characterize incarceration so differently depending on whether or not the accused has plead guilty is not a particularly easy task.<sup>152</sup>

One argument may be that regulatory and punitive detention are merely labels for a legal fiction. In other words, there really is no distinction between pretrial detention and post-conviction detention, and regulatory detention does have an element of punishment. That would mean that pretrial detention is the precursor for conviction—that the justice system assumes that those incarcerated pretrial are

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<sup>149</sup> For the purposes of this Article, I will limit the definition of proportionality to the idea of punishment that reflects the offense, but for a deeper discussion on proportionality and punishment see Kolber, *supra* note 137, at 1145 (addressing the various schools of thought on punishment and their responses to reconciling time served in the plea-bargaining context, noting that proportionality is the most widely captured idea by theorists).

<sup>150</sup> See generally Malcolm M. Feeley et al., *Between Two Extremes: An Examination of the Efficiency and Effectiveness of Community Service Orders and Their Implications for the U.S. Sentencing Guidelines*, 66 S. CAL. L. REV. 155 (1992).

<sup>151</sup> *Salerno*, 481 U.S. at 759 (Marshall, J., dissenting) (“The majority concludes that the Act is a regulatory rather than a punitive measure. The ease with which the conclusion is reached suggests the worthlessness of the achievement.”) (noting the Supreme Court explains this distinction with little detail, and Justice Marshall found the definition unpersuasive).

<sup>152</sup> See, e.g., Roberts, *supra* note 111.

incarcerated because they are guilty (regardless of whether they are actually convicted).

Alternatively, a second rationale could be that the criminal legal system may allow pretrial credits to be converted into punitive credits because our society acknowledges the importance of liberty. As such, even in recognizing the difference between regulatory and punitive detention, liberty taken prior to a legitimate conviction comes at such a grave cost that our legal system is willing to put aside principles of proportionality and compensate the defendant through a reduced sentence.

In order for the justice system to maintain its legitimacy, the answer must be the latter: regulatory and punitive detention are materially different. In some instances, such as those arising out of national security, the two forms of detention appear different in practice because regulatory detention is used sparingly.<sup>153</sup> When applied on a mass scale for common crimes, the argument is less convincing.

Compensation for time served is available only to individuals who served time prior to a conviction. An implicit assumption is that the time lost while legally innocent and incarcerated holds significant value, as sentence terms can be reduced to nothing after a plea is accepted. But that implicit assumption is not applied consistently. This raises the question: If we give compensation to the convicted for their time served, why do we not compensate those cleared of all charges for their time lost? The remainder of this Article seeks to answer this very question.

The concept of time served plays a significant role in the implementation of punishment and in an inmate's release.<sup>154</sup> The pragmatic benefits of time served credits (within the current scheme) are immense and have become ingrained in everyday practice: it provides for judicial economy by moving along plea deals<sup>155</sup> and it

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<sup>153</sup> See *supra* Part I.

<sup>154</sup> Kolber, *supra* note 137, at 1147–50 (discussing the history of time-served credits).

<sup>155</sup> Roberts, *supra* note 84, at 308 (“Perhaps the most coercive aspect of plea-bargaining in the lower criminal courts is pretrial detention for individuals held on bail that they cannot pay. In such cases, defendants must generally choose between remaining in jail to fight the case or taking an early plea with a sentence of time served or probation.”); see also Heaton et al., *supra* note 102, at 723 (“A defendant who is factually guilty and plans to plead guilty may wish to forgo bail simply to get the punishment over with, anticipating that she will receive credit for time served. On the other hand, a defendant who believes she has a strong case for innocence may have greater incentive to post bail to avoid being detained when innocent.”).

reduces the length of prison sentences.<sup>156</sup> And now, because pretrial detention is so widely used, time served provides a recognized safeguard for defendants by preventing double jeopardy<sup>157</sup> and excessive punishment.<sup>158</sup>

Even with the conflicting tensions between regulatory and punitive detention, there is a necessary practicality that time served credit extends. In applying time served credits, the criminal legal system seems to be willing to return the benefit received by society to the defendant. There is a sense that time spent incarcerated has value, and therefore the sentence should reflect the debt already paid.<sup>159</sup> Objectively, the benefits that preventive detention provides to society in terms of community safety and expedited plea bargaining outweigh widespread questioning for its lack of principled feasibility.<sup>160</sup>

### *B. The International Justification for Compensation*

Unfortunately, time lost cannot be given back when a defendant is not convicted and thus never sentenced to time in prison. The only remedy left is monetary compensation to the unnecessarily incarcerated.<sup>161</sup> The argument advocating for monetary compensation to those unnecessarily incarcerated, discussed above, is simple and logical, as it reduces the legal tensions created by the asymmetrical application of time served.<sup>162</sup>

Time served credits are the only form of compensation in the United States that is offered to pretrial detainees.<sup>163</sup> But some European countries have been providing compensation to pretrial detainees to varying degrees.<sup>164</sup> The most favorable policies for pretrial detainees

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<sup>156</sup> Kolber, *supra* note 137, at 1147.

<sup>157</sup> *North Carolina v. Pearce*, 395 U.S. 711, 711 (1969).

<sup>158</sup> *Id.*

<sup>159</sup> Martinez, *supra* note 21, at 516.

<sup>160</sup> Both defense attorneys and their clients rely heavily on plea deals and the use of pretrial credits to develop a case. A favorable outcome does not simply mean winning a dismissal or securing a not guilty verdict, now it also means ensuring that if any time must be spent in jail, that it be the shortest amount possible. See *Gonzalez v. Comm'r of Corr.*, 68 A.3d 624, 646 (Conn. 2013) (holding that an attorney who did not seek a bond increase for his client in two prior cases in order to ensure his client was able to maximize the amount of presentence credit acted prejudicially and violated *Strickland*).

<sup>161</sup> Colleen P. Murphy, *Money as a Specific Remedy*, 58 ALA. L. REV. 119, 120 (2006) (“The most common form of substitutionary relief is money.”).

<sup>162</sup> See *supra* Section II.

<sup>163</sup> Cf. Martinez, *supra* note 21.

<sup>164</sup> See generally Gabriel Doménech-Pascual & Miguel Puchades-Navarro, *Compensating Acquitted Pretrial Detainees*, 43 INT’L REV. LAW & ECON. 166, 168 (2015)

have been implemented in Sweden, where those held without bail are entitled to compensation if they are not convicted.<sup>165</sup> This Article refers to this policy as strict liability compensation. In such cases, a detainee is prohibited from receiving compensation only if she intentionally or negligently causes her own detention.<sup>166</sup> Mere suspicion of guilt after an acquittal or dismissal is not grounds for forfeiting one's right to pretrial compensation.<sup>167</sup>

Pretrial compensation policies have also been enacted as a response against overzealous state preventive detention policies.<sup>168</sup> For instance, Austria and Norway enacted strict liability compensation statutes similar to that of Sweden after the European Court of Human Rights "repeatedly ruled against these countries for violating the principle of the presumption of innocence."<sup>169</sup> Thus, pretrial compensation may be an effective deterrent against increasingly common cultures of incarceration.

Given the posture of the pretrial stage and the lack of remedies available,<sup>170</sup> it seems reasonable to advocate for a strict liability compensation scheme in the United States.<sup>171</sup> The following section elaborates on unidentifiable bad actors in the criminal legal system that make a compelling case for a strict liability-based solution, such as compensation.<sup>172</sup>

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(explaining that European countries' policies vary in how they decide whether to provide compensation. Some countries provide compensation only if the pretrial detention was unlawful, if there is a showing of negligence, or if the detainee is able to prove his innocence. The most favorable approach is a strict liability approach, whereby the detainee is entitled to compensation if he is not convicted).

<sup>165</sup> Hugo Tiberg, *Compensation for Wrongful Imprisonment*, in 38 SCANDINAVIAN STUDIES IN L. 479, 479–87 (2005).

<sup>166</sup> Doménech-Pascual & Puchades-Navarro, *supra* note 164, at 168–69.

<sup>167</sup> *Id.* at 169.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* (citing *Sekanina v. Austria* 13126/87 Eur. Ct. H.R. § 30 (1993); *Asan Rushiti v. Austria* 28389/95 Eur. Ct. H.R. § 31 (2000)).

<sup>170</sup> *See supra* Part I.

<sup>171</sup> *See infra* Part III.

<sup>172</sup> For the purposes of this proposal, it should be noted that the nuances of how such a policy should be drafted is not my focus. Rather, this Article seeks to shine a light on the gaping holes within our justice system and how a larger-scale solution can resolve them.

## III

PRETRIAL DETENTION AS PREVENTIVE JUSTICE:  
IDENTIFYING SYSTEMIC HURDLES AGAINST REFORM

On its face, the idea of preventive justice makes sense—the government should act swiftly to protect the community from any imminent threats. In practice, however, the reach of preventive justice is often too broad.

In analyzing compensation as a remedy to the unnecessary incarceration problem, the following sections explain two primary reasons why preventive justice fails in the everyday criminal legal system and why pretrial compensation has yet to gain traction: (1) a misguided application of legal innocence and (2) the compounding impact of predictive processes.

*A. The Application of Pretrial Innocence in the Shadows of the Innocence Movement*

The Innocence Movement has been the dominant contributor to our collective understanding and application of “innocence.”<sup>173</sup> Scholarship and the law, however, have created two distinct categories of innocence—factual versus legal—and one is valued more than the other.<sup>174</sup> These rhetorical distinctions, embedded in state statutes,<sup>175</sup> have calcified the common understanding of innocence, and created hurdles not only for those asserting post-conviction challenges but especially for those seeking pretrial relief.

The following sections address how legal and factual innocence are defined by scholars and how states translate those distinctions into law in both post-conviction and pretrial cases.

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<sup>173</sup> See Roberts, *supra* note 35, at 779 (“The Movement is a coalition of lawyers, activists, exonerated individuals, and others who have revealed the troubling reality and likely causes of erroneous convictions. The Movement’s core work has been exonerating wrongfully convicted individuals by proving their innocence and implementing legislative and other policy reforms designed to prevent future miscarriages of justice. Most exonerations have happened in serious felony cases, especially homicide and rape cases.”) (internal citation omitted).

<sup>174</sup> See *infra* notes 176–81.

<sup>175</sup> See *infra* notes 182–88.

### 1. *Post-Conviction Innocence*

Wrongful convictions are convictions that were challenged and later reversed.<sup>176</sup> This means that an individual found guilty, but whose conviction is reversed on appeal, becomes innocent in the eyes of the law.<sup>177</sup> Wrongful convictions can fall into two different innocence scenarios in the post-conviction context.<sup>178</sup> For instance, if evidence surfaces after a conviction that proves the convicted individual's innocence (DNA evidence is one well-known method of exoneration),<sup>179</sup> then her conviction would be overturned and she would be subsequently released.<sup>180</sup> This is referred to as factual or actual innocence.<sup>181</sup> Alternatively, the convicted individual could appeal an unfavorable verdict by challenging an improper procedure that occurred during the trial.<sup>182</sup> If she wins, her conviction would be overturned and remanded back to the lower court, where the prosecutor will decide whether to retry the case.<sup>183</sup> This is commonly classified as legal innocence.<sup>184</sup>

Some legal scholars have made the conscious decision to avoid terms like factual innocence and legal innocence. Instead they use

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<sup>176</sup> William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 385–86 (1995) [hereinafter Laufer, *Rhetoric of Innocence*].

<sup>177</sup> See, e.g., *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017) (“But once those convictions were erased, the presumption of their innocence was restored.”); *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988) (“After a ‘conviction has been reversed, unless and until [the defendant] should be retried, he must be presumed innocent of that charge.’”).

<sup>178</sup> Laufer, *Rhetoric of Innocence*, *supra* note 176, at 332 n.10.

<sup>179</sup> According to the National Registry of Exonerations, of the 139 exonerations added to the registry in 2017, seventeen exonerations (approximately 13%) were based on DNA evidence. In its executive report, the Registry reports that DNA exonerations now account for 21% of exonerations in the registry from 1989. Nevertheless, despite the popularity in DNA exonerations, eighty-four exonerations in 2017 were due to official misconduct by a government official. See *Exonerations in 2017*, THE NAT’L REGISTRY OF EXONERATIONS 1, 2 (Mar. 14, 2018), <https://www.innocenceproject.org/report-exonerations-in-2017/> [<https://perma.cc/EME6-C3W3>].

<sup>180</sup> Although this example is an oversimplification, it effectively conveys the dichotomy between factual and legal innocence as most scholars have recognized the weight factual innocence holds in exonerations. See generally Laufer, *Rhetoric of Innocence*, *supra* note 176.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*; see also Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1174 (2013) (“[C]ommentators typically use terms like ‘legal innocence’ to describe defendants whose convictions resulted from significant procedural error but who are not factually innocent, or at least cannot establish their factual innocence.”).

<sup>183</sup> Laufer, *Rhetoric of Innocence*, *supra* note 176, at 332 n.10.

<sup>184</sup> *Cf. id.* at 331 n.4.

terms that place emphasis on the error, as opposed to the individual.<sup>185</sup> For instance, terms such as substantive error and procedural error are commonly used to categorize the different forms of wrongful convictions.<sup>186</sup> Professor John Martinez explains that the term substantive error still “refers to someone who is factually innocent of the offense for which they were convicted.”<sup>187</sup> On the other hand, a wrongful conviction due to procedural error “refers to someone . . . convicted through tainted procedures, such as denial of Miranda warnings or prosecutorial concealment of exculpatory evidence from the defense.”<sup>188</sup>

Both sets of terms effectively have the same meaning, but the way they frame the issue of innocence is materially different. Legal innocence focuses on the defendant herself, as if to imply that some degrees of innocence are lesser than others.<sup>189</sup> The term procedural error instead highlights that the error was committed by the system.<sup>190</sup>

The rhetoric used to conceptualize wrongful convictions matters because it demonstrates a preconceived notion that values one form of innocence over another.<sup>191</sup> In the past, this has affected advocacy efforts that attempted to increase compensation schemes for exonerees who may have benefited from a procedural error as opposed to a factual one, resulting in the politicization of such issues.<sup>192</sup>

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<sup>185</sup> Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1645–51 (2008) (Although “[t]he word ‘innocence’ is used casually in the media and by lawyers, convicts, scholars, and courts,” some scholars have defined the term more narrowly as “those who did not commit the charged crime.”); Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1090 (2011) (“[P]itting actual innocence against legal innocence dilutes what innocence means.”).

<sup>186</sup> Martinez, *supra* note 21, at 517–18 (internal citations omitted).

<sup>187</sup> *Id.* at 518 (internal citations omitted). Note that while this source uses the term substantive “wrongfulness,” this Article will continue to use the synonymous term “error” for clarity and consistency.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* (“‘Innocence Projects’ throughout the United States are focused on helping factually innocent people—those who ‘didn’t do it’—as opposed to those who might have been convicted through a procedural irregularity.”).

<sup>190</sup> *Id.* at 518–19.

<sup>191</sup> See Roberts, *supra* note 35, at 816–19.

<sup>192</sup> Common shortcomings in existing compensation legislation include

*[r]efusing to enact uniform, statutory access to wrongful conviction compensation. Some states opt to compensate the wrongfully convicted only via ‘private compensation bills.’ This approach[] politicizes compensation based on the individuals and policymakers involved; requires exonerees to mount costly and demanding political campaigns; and threatens to deny appropriate—or any—compensation to those who truly deserve it.*

The type of innocence at issue influences institutional players' assumptions about the previously convicted, resulting in skewed applications of law.<sup>193</sup> A review of state compensation statutes demonstrates how some of these distinctions between legal and factual innocence are cemented into law. For instance, Colorado,<sup>194</sup> Florida,<sup>195</sup> New Hampshire,<sup>196</sup> and Missouri<sup>197</sup> all require exonerees to be found "actually innocent" in order to receive compensation for time incarcerated. Some states do not provide any form of compensation for exonerees,<sup>198</sup> and others offer a pittance.<sup>199</sup>

The shift in innocence rhetoric by scholars—from distinguishing between the types of innocence to the errors that resulted—is a step toward holding the criminal legal system accountable for some of its deeply rooted flaws. At present, however, many of the same trappings from the Innocence Movement that originally focused on the type of innocence are mirrored in the pretrial context. As explained below, this

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*See Compensating the Wrongly Convicted*, INNOCENCE PROJECT [hereinafter INNOCENCE PROJECT], <https://www.innocenceproject.org/compensating-wrongly-convicted/> [<https://perma.cc/Z35F-ASYX>] (last visited Feb. 26, 2020).

<sup>193</sup> Scholar William Laufer has written at great length about the rhetoric of innocence in the post-conviction context. To briefly summarize, Laufer observed early on that "Blackstonian maxims suggesting that society places greater value on freeing the guilty over convicting the blameless underscore the disutility of erroneous convictions. Given the reverence for this disutility it is not surprising that rhetoric has developed around those stages of the criminal process where guilt determinations are made." Laufer, *Rhetoric of Innocence*, *supra* note 176, at 387 (citations omitted).

<sup>194</sup> COLO. REV. STAT. § 13-65-103(1) (2018).

<sup>195</sup> FLA. STAT. § 961.03 (2018).

<sup>196</sup> N.H. REV. STAT. ANN. § 541-B:14(II) (2019).

<sup>197</sup> MO. REV. STAT. § 650.058(1) (2016).

<sup>198</sup> The following states do not have a wrongful conviction compensation statute: Alaska, Arizona, Arkansas, Delaware, Georgia, Idaho, Indiana, Kentucky, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Wyoming. *See* INNOCENCE PROJECT, *supra* note 192. In 2012 in Arizona, a state without a wrongful conviction compensation statute, Khalil Rushdan was released after being wrongfully convicted for first degree felony murder in 1997. A federal district court overturned Khalil's conviction on evidence of vindictive prosecution. *See Khalil Rushdan*, AZ JUSTICE PROJECT, <https://www.azjusticeproject.org/khalil-rushdan> [<https://perma.cc/N7SN-LB67>] (last visited Feb. 26, 2020). Even in states where compensation statutes are in place, a lack of state funding often leads to delays in compensation. *See, e.g.*, George Hunter, *State Says It's Short on Cash for the Wrongfully Convicted*, DETROIT NEWS (Feb. 11, 2019), <https://www.detroitnews.com/story/news/local/michigan/2019/02/11/not-enough-money-wrongfully-convicted-compensation-fund/2788073002/> [<https://perma.cc/5E67-XT98>].

<sup>199</sup> *E.g.*, Wisconsin compensates petitioners found innocent by a state claims board at a rate of \$5,000 per year, not to exceed \$25,000. WIS. STAT. § 775.05(4) (2018).

*idée fixe* with the form of innocence is most obviously embodied in false assumptions of guilt stemming from arrests.<sup>200</sup>

## 2. Pretrial Innocence

Unlike in wrongful conviction cases, the lines between factual innocence and legal innocence in the pretrial context are blurred.<sup>201</sup> In the event you are arrested and detained prior to trial, imagine two different (and highly probable) scenarios that may result in your release. One, the prosecutor drops the charges against you because they lack sufficient evidence. Two, you take a plea for a lesser charge to get out of jail. These scenarios have little to do with your “factual” innocence; either scenario could occur regardless of whether you committed the crime you were arrested for. Instead, these scenarios demonstrate that pretrial exoneration depends more on “legal” or “procedural” innocence.<sup>202</sup>

Yet, just as in wrongful conviction cases, “legal innocence” appears to be less valuable than “actual innocence.” States functionally treat pretrial innocence as legal innocence when it comes to restitution and compensation (in other words, there is virtually no opportunity for recourse against the state).<sup>203</sup>

The rhetoric used by institutional players has also imported the negative influence of our understanding of post-conviction innocence to the pretrial context. For instance, a Baltimore district court judge authorized release with home detention for Phillip Stanley West, who was charged with fatally shooting another individual at a local bar.<sup>204</sup> The decision to release<sup>205</sup> West garnered significant public backlash

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<sup>200</sup> See *infra* Section III.A.2.

<sup>201</sup> See Roberts, *supra* note 111.

<sup>202</sup> These scenarios do not consider the possibility of a pretrial detainee going to trial as the primary goal of this Article is to demonstrate the arbitrary relationship between pretrial detention outcomes and conviction outcomes.

<sup>203</sup> In the post-conviction context there is “an assumption that society is unwilling to pamper criminals.” Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009, 1033 (2013). In the same way that society does not wish to “pamper” criminal offenders who “got off” on a procedural error by providing monetary compensation for time wrongfully served, the same sentiment is likely shared toward pretrial detainees, who are often perceived as guilty upon arrest. See, e.g., Roberts, *supra* note 111.

<sup>204</sup> Tim Prudente, *Judge Grants Bail to Baltimore Man Accused of Barroom Murder in Fells Point*, BALT. SUN (Jan. 17, 2019), <https://www.baltimoresun.com/news/crime/bs-md-ci-west-bail-20190116-story.html> [<https://perma.cc/4M4M-E95U>].

<sup>205</sup> It should be noted that much of the public commentary on this case deemphasized the fact that West was released with the condition of private GPS home monitoring that he had to pay for out of pocket. Instead, many commentators made it appear as if West was

from prominent government officials and the police commissioner.<sup>206</sup> But even when the presumption of innocence is honored, public outrage can reverse course. Several months later, a circuit court judge revoked West's bail without evidence that he violated the terms of his pretrial release.<sup>207</sup> Public comments made by institutional players credited with knowing the ins-and-outs of the justice system fuel public opinion and inform the way society feels about those accused of a crime.<sup>208</sup>

In our society, the stigma of an arrest often overshadows<sup>209</sup> the presumption of innocence.<sup>210</sup> When we see someone being placed in the back of a cop car, the first thought that comes to mind is "what did that guy do?"<sup>211</sup> The popular narrative is that someone arrested is as good as guilty, despite the principle of "innocent until proven guilty."<sup>212</sup>

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released unconditionally. GPS monitoring is one of the more onerous pretrial release restrictions, particularly when an individual is subjected to home detention. In the eyes of the law, home detention is equivalent to pretrial detention, and time served credit is often given to individuals who are restricted to home detention. See Hope Caldwell, *Strong Dissent, But House Arrest on Parole Equals Time Served*, 6 LAW. J. 2 (2004).

<sup>206</sup> Thiru Vignarajah, *Release of Murder Suspect a Symptom of Baltimore Ills*, BALTIMORE SUN (Jan. 23, 2019, 9:20 AM), <https://www.baltimoresun.com/news/opinion/oped/bs-ed-op-0124-bail-baltimore-20190123-story.html> [https://perma.cc/D5V5-MS83] (calling for West to be held without bail, assuming that "[p]rosecutors should have no trouble getting this dangerous error swiftly reversed"). City Councilman Zeke Cohen, representative of Fells Point, stated on Facebook, "This is not about the presumption of innocence . . . . This defendant will have his day in court. This is about public safety." Tim Prudente, *Baltimore Judge Revokes Bail for Man Accused of Barroom Murder in Fells Point*, BALTIMORE SUN (Apr. 12, 2019), <https://www.baltimoresun.com/news/crime/bs-md-ci-west-bail-revoked-20190412-story.html> [https://perma.cc/Y8H6-VEY3]. Interim Police Commissioner Gary Tuggle also previously stated, "When we see individuals being let out, that goes to whether or not there's a deterrent to committing crime . . . . We need to have that bail process be a reflection of deterrence." *Id.*

<sup>207</sup> See Prudente, *supra* note 206.

<sup>208</sup> See generally Anna King & Shadd Maruna, *The Function of Fiction for a Punitive Public*, CAPTURED BY THE MEDIA: PRISON DISCOURSE IN POPULAR CULTURE 16 (Paul Mason ed., 2006).

<sup>209</sup> Brandon L. Garrett, *The Myth of the Presumption of Innocence*, 94 TEX. L. REV. 178, 180 (2016) ("Observers have long described the oft recited 'myth that a person is presumed to be innocent until proven guilty' following arrest."); see also Jeff Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 WIS. L. REV. 441, 441 (1978).

<sup>210</sup> See Baughman, *supra* note 145, at 727–38 (summarizing the history of presumption of innocence as it pertains to bail).

<sup>211</sup> Cf. Robert Siegel, *All Things Considered: See Why the Public Perception of Crime Exceeds the Reality*, NPR (July 26, 2016, 4:24 PM), <https://www.npr.org/2016/07/26/487522807/why-the-public-perception-of-crime-exceeds-the-reality> [https://perma.cc/D3J5-J6ES] ("[T]he news media has always over-reported violent crime . . . . You know, if it bleeds it leads, particularly in local television news.").

<sup>212</sup> Martin Schönsteich, *Presumption of Guilt: The Global Overuse of Pretrial Detention*, OPEN SOC'Y FOUNDS. 1, 8 (2014), <https://www.justiceinitiative.org/uploads/de4c18f8->

Professor Anna Roberts conducted an extensive analysis demonstrating this point.<sup>213</sup> In her article, *Arrests as Guilt*, Professor Roberts catalogs the various instances in which this illegitimate fusion between arrests and assumptions of guilt occurs.<sup>214</sup> For example, instead of calling the arrested individual “the accused,” he is referred to as “the offender.”<sup>215</sup>

This tension has played out in courts as well. In the past, the Supreme Court implicitly discounted the idea that the presumption of innocence should be factored into pretrial release decisions.<sup>216</sup> Specifically, in *Bell v. Wolfish*, a case challenging the jail conditions of the petitioner’s pretrial detention, Justice Rehnquist introduced the notion that “[t]he presumption of innocence is a doctrine that allocates the burden of proof in criminal trials.”<sup>217</sup> Using this statement as support, some have claimed that the presumption of innocence is *only* a trial-based right and nothing more.<sup>218</sup> Therefore, the presumption of innocence, according to this view, does not provide procedural protections at the pretrial phase.

Fast-forward to 2017 (almost four decades after *Bell*), and Justice Rehnquist’s line was used in *Nelson v. Colorado* to justify the Government’s refusal to return funds that an exoneree paid to the State for a conviction that was later overturned.<sup>219</sup> The Government’s argument in *Nelson* was that *Bell* held that the presumption of innocence does not apply outside the trial, stating that “[t]he presumption of innocence applies only at criminal trials’ and thus has

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ccc1-4eba-9374-e5c850a07efd/presumption-guilt-09032014.pdf [https://perma.cc/2GVA-NCW5] (“Little public sympathy exists for pretrial detainees and their plight. Many people mistakenly believe that detainees should be presumed guilty by virtue of their detention status.”).

<sup>213</sup> See generally Roberts, *supra* note 111 (arguing that the concept of arrests and guilt are often illegitimately fused together resulting in significant consequences for the arrested individual as he proceeds through the criminal legal system).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 1005.

<sup>216</sup> *Bell v. Wolfish*, 441 U.S. 520, 533 (1979).

<sup>217</sup> *Id.*

<sup>218</sup> Laufer, *Rhetoric of Innocence*, *supra* note 176, at 335 n.26 (“The presumption of innocence is commonly thought of as a factual presumption when it is at most a presumption of legal innocence and, at least, an ineffective rhetorical device. It is often said that ‘one is presumed innocent, until proven guilty.’ This maxim has come to mean that the burden of production and persuasion falls on the prosecution to prove guilt beyond a reasonable doubt.”).

<sup>219</sup> See *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 n.8 (2017).

no application here.”<sup>220</sup> Justice Ginsburg explicitly noted that this statement was an incorrect interpretation of *Bell*.<sup>221</sup>

Justice Ginsburg wrote, “Our opinion in [*Bell*] recognized that ‘under the Due Process Clause,’ a detainee who ‘has not been adjudged guilty of any crime’ may not be punished.”<sup>222</sup> Through this *dicta*, the Court makes clear that the only instance where the presumption of innocence does not apply is after conviction—that is, punishment.<sup>223</sup> In other words, the presumption does more than merely place the burden on the State to prove guilt during a hearing, as Justice Rehnquist suggested; it applies well before the trial, meaning the legally innocent have the right to receive property that was taken as part of a punishment that is now overturned.<sup>224</sup>

This opinion is a turning point because it emphasizes legal innocence as grounded in a due process right and mandates the return of property to remedy the constitutional violation.<sup>225</sup> Although *Nelson* is not a case concerning pretrial detention, it is nonetheless pivotal because the majority’s holding is based on the fact that the individual’s legal status has changed from legally guilty to *legally innocent*.<sup>226</sup> This is a significant deviation from the treatment of innocence in post-conviction cases, discussed above.

Even with this shift in analysis, many may struggle with the idea of holding the criminal legal system accountable when no bad actor is identified. It is true that the State cannot provide a remedy for every harm that occurs, especially when that harm caused appears to be

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<sup>220</sup> *Id.* at 1255.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *See id.*

<sup>224</sup> *See id.* at 1256. This decision is based on the defendant’s return to “innocence” and will be discussed in greater depth below.

<sup>225</sup> *Id.* at 1260–61. Justice Alito lamented about how pivotal this opinion could be, as it arguably entitled the defendant to recover for other losses as well:

For example, if the *status quo ante* must be restored, why shouldn’t the defendant be compensated for all the adverse economic consequences of the wrongful conviction? After all, in most cases, the fines and payments that a convicted defendant must pay to the court are minor in comparison to the losses that result from conviction and imprisonment, such as attorney’s fees, lost income, and damage to reputation.

*Id.*

<sup>226</sup> *Id.* at 1258 (“In holding that these payments must be refunded, the Court relies on a feature of the criminal law, the presumption of innocence.”).

negligence.<sup>227</sup> We must consider what happens, however, when the cause is negligence compounding upon negligence. The following section explores this argument.

### *B. The Compounding Impact of Predictive Processes*

Preventive justice requires overgeneralizations and stereotypes to determine where the largest concentration of danger may occur.<sup>228</sup> Whenever each player in the system—police officer, prosecutor, and judge—is forced to engage in a predictive assessment, errors compound upon errors.<sup>229</sup> Consequently, inequalities are highlighted through this error-prone system, resulting in a disproportionate number of marginalized community members being jailed.<sup>230</sup>

Let us consider a typical case, taken from my own practice representing individuals charged with crimes in Baltimore. Let us call the accused Romero Jones.<sup>231</sup>

In early May 2017 in southwest Baltimore City, a BOLO (“be on lookout”) went out to all dispatched officers after an armed robbery. The BOLO described the perpetrator as an African American man wearing jeans, an orange T-shirt, and a baseball cap. At 1:00 a.m., police apprehended Romero Jones. Romero matched the description—black male, orange T-shirt, wearing jeans—and was sitting on a bench, smoking a cigarette in the vicinity of the crime. When Romero was arrested, officers did not recover from his person any of the items that were reported stolen—no iPhone, no wallet, no knife.

When he was brought before the judge to determine whether he would be released before trial, the evidence adduced so far was thus

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<sup>227</sup> Cf. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 52–56 (2018) (identifying that the concept of qualified immunity is derived from the common law good-faith defenses).

<sup>228</sup> See Cole, *supra* note 2 (“The impossibility of predicting the future means that when we impose sanctions based on future concerns rather than past acts, we inevitably must accept a lower standard of proof, and far greater risk of error . . .”).

<sup>229</sup> See cf. Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309 (2017) (discussing the ways in which cumulative constitutional rights can be established by considering individual actions that if viewed in the aggregate can demonstrate a cognizable constitutional harm, whereas actions taken individually may not demonstrate a constitutional harm). Mayson, *supra* note 3, at 2251 (“The premise of prediction is that, absent intervention, history will repeat itself. So what prediction does is identify patterns in past data and offer them as projections about future events. If there is racial disparity in the data, there will be racial disparity in prediction too.”).

<sup>230</sup> See SAKALA, *supra* note 28.

<sup>231</sup> The name used is a pseudonym to protect the privacy of a former client. The facts provided are true.

mixed. On the one hand, Romero matched the description and was in the area of the crime. On the other hand, the description was very general, and nothing specific connected him to the crime. Nonetheless, given the random nature of the alleged crime, the bail review judge believed there was a risk that Romero was a danger to the community, and so he was held without bail.

Can we second-guess this decision? Considering that the underlying crime was seemingly unprovoked and involved a weapon, it was in the government's interest to detain the individual who engaged in this act. At this stage, it was safe to conclude that a robbery did occur and that another member of society was harmed. Without more information, however, it was impossible to know that Romero was in fact the culprit, or even that the attack was unprovoked. Therefore, it was also impossible to know whether Romero's detention was necessary to keep the community safe.

As it happens, after twenty-eight days of pretrial incarceration, Romero had all the charges dropped and was released from jail. Yet during this period of ultimately pointless incarceration, Romero lost primary custody of his child and was evicted from his apartment, which he had resided in for the past four years, for failure to pay rent. Moreover, Romero's release was prompted because police caught the real culprit at a pawn shop selling the stolen goods that were never recovered from Romero. As it turns out, the night that Romero was arrested, he had attended an Orioles game where thousands of other individuals were also wearing orange T-shirts and baseball caps. Essentially, Romero lost his child and his home because he was in the wrong place at the wrong time, rooting for the wrong team.

Surely police can catch the right offender in the first instance and prosecutors are able to tender a justly earned conviction, demonstrating that preventive justice measures can work. But in cases like Romero's, we realize that the criminal legal system is imperfect, and that the wrong people may be unintentionally implicated.

Preventive justice measures are inherently predictive, operating on fewer procedural safeguards so that the government can act fast.<sup>232</sup> When the government is permitted to act quickly, however, it is necessarily permitted to act without the complete picture.<sup>233</sup> As such,

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<sup>232</sup> See Cole, *supra* note 2, at 505 ("The impossibility of predicting the future means that when we impose sanctions based on future concerns rather than past acts, we inevitably must accept a lower standard of proof, and far greater risk of error . . .").

<sup>233</sup> See *id.* This applies equally to policing strategies and prosecuting strategies. See discussion *infra* Sections III.B.1–4.

that translates to acting on a lack of information (which is common at the early stages of the criminal legal system), but that cannot be the justification for someone like Romero to face such devastating losses such as primary custody of a child or housing.

Romero's example reflects a multilayered system that is based on small probabilities that build upon and validate each other in order to get to the final decision. The following sections dissect the stages of Romero's case that began with his arrest and ended with his release to explain the compounding impact predictive processes have on a defendant as his case proceeds through the various "checkpoints" in the criminal legal system.

### *1. Predictive Policing*

Police officers routinely engage in predictive analysis in order to increase successful outcomes in the future.<sup>234</sup> Police departments use data to determine what modes of enforcement are successful and then replicate similar policing patterns.<sup>235</sup> For instance, in order to determine which neighborhoods need the most surveillance, officers might use data and geographical arrest statistics, which have been collected over the years, to make a prediction.<sup>236</sup> But because that data may be based on dirty policing tactics, it may reinforce negative associations with particular neighborhoods, seemingly by way of scientific validation.<sup>237</sup> Consider fixed surveillance—when an officer is "staked out" in a certain location in an effort to observe crime that may or may not occur. Based on an officer's prior experiences or the shared experiences of the precinct, an officer may be stationed at a

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<sup>234</sup> See Rashida Richardson et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U. L. REV. ONLINE 192, 196 (2019), <https://www.nyulawreview.org/online-features/dirty-data-bad-predictions-how-civil-rights-violations-impact-police-data-predictive-policing-systems-and-justice/> [<https://perma.cc/WK6A-JHZG>] (noting recent police departments across the nation, such as the NYPD (2015) and the Baltimore Police Department (2018), who sought out or employed predictive policing software).

<sup>235</sup> *Id.* at 218.

<sup>236</sup> *Id.*; Issie Lapowsky, *How the LAPD Uses Data to Predict Crime*, WIRED (May 22, 2010), <https://www.wired.com/story/los-angeles-police-department-predictive-policing/> [<https://perma.cc/W25L-56YF>].

<sup>237</sup> U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 10 (2016); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 11 (2015), [https://www.justice.gov/crt/file/883296/download/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/crt/file/883296/download/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/22AX-9ZLB>].

particular street corner even if the officer has no reason to believe crime is afoot or likely to occur in that area at that time.<sup>238</sup>

This approach, although seemingly effective in the sense that officers may identify individuals who are engaging in illicit acts at that specific location, also creates disparities in police presence across different zip codes.<sup>239</sup> It is certainly smart to station more officers where crime has been historically shown to be more likely, but if more police officers are stationed in one area—regardless of whether it is *actually* a “high-crime area”—officers are bound to report more crimes than in an area where fewer officers are stationed. Because of predictive policing, some areas designated as high crime are bound to that fate.<sup>240</sup> Such phrases have become shorthand legal speak that permits an officer to use his surroundings as a basis for probable cause to arrest (validating hunches as opposed to actual observations).<sup>241</sup> It is not far-fetched to assert that predictive analysis tools generate negative feedback loops that result in the police not just responding to high crime areas, but *creating* high crime areas.<sup>242</sup>

Romero was likely a victim of predictive policing. No evidence was found on him to indicate that he was involved in the robbery. Nonetheless, he was found in a high crime area, which also happened to be a few blocks from his home.

Romero is a living example of how an individual’s zip code can be a representation of his socioeconomic level and his likelihood of

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<sup>238</sup> Richardson et al., *supra* note 234, at 197.

<sup>239</sup> *See id.* at 218 (“If a group or geographic area is disproportionately targeted for unjustified police contacts and actions, this group or area will be overrepresented in the data, in ways that often suggest greater criminality.”).

<sup>240</sup> Andrew G. Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1109, 1148–49 (2017) (“The targeting of certain areas or certain races creates the impression of higher crime rates in those areas, which then justifies continued police presence there. . . . Essentially, high-crime areas . . . might only be considered ‘high’ because police already have data about those areas . . .”).

<sup>241</sup> *See Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000) (noting this is the first case that the Supreme Court gave extensive thought to the “high-crime area” factor); *see also* Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CALIF. L. REV. 345 (2019) (conducting an empirical analysis on the impact of *Illinois v. Wardlow* by examining data on investigative stops conducted by the New York Police Department).

<sup>242</sup> *E.g.*, Roberts, *supra* note 35, at 822 (“[W]hile class and particularly racial bias are problematic in the felony context, these injustices are amplified with misdemeanors. This is because most misdemeanor convictions flow from discretionary arrests made by police officers on the street. Those officers make decisions about which neighborhoods to police and who to arrest.”) (citations omitted); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 630 (2014) (observing that misdemeanor arrests are “largely an artifact of policing practices”).

arrest.<sup>243</sup> Marginalized individuals of color represent the majority of individuals in the jail system, even though they are not the majority of the U.S. population.<sup>244</sup> That does not necessarily mean that they commit higher rates of crime, it just means they get caught more frequently.<sup>245</sup> The increased frequency at which marginalized individuals are arrested makes their representation in the criminal legal system disproportionate.<sup>246</sup> In the end, it is a self-fulfilling prophecy. There may very well be some areas that require visible police presence for community safety. But those areas should be consistently reassessed in the hopes of withdrawing police presence. Proper data validation practices help prevent such false validations.

Nonetheless, predictive policing is only one link in a chain of problems. To be sure, officers do not make decisions regarding charges,<sup>247</sup> only arrests. Yet even before the bail hearing stage, it is easy to see how the demographics of the accused are often already prefiltered by predictive policing. The following section considers the next stage, prosecution.

## 2. *Selective Prosecuting*

Like police officers, prosecutors have limited powers. At the end of the day, prosecutors do not decide to hold a particular defendant with or without bail—only a judge does.<sup>248</sup> Similarly, prosecutors might have the power to make broad decisions regarding what they will or

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<sup>243</sup> Heaton et al., *supra* note 102, 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); Greg Kaufmann, *Why Achieving the American Dream Depends on Your Zip Code*, TALKPOVERTY (Dec. 17, 2015), <https://talkpoverty.org/2015/12/17/american-dream-zip-codes-affordable-housing/> [<https://perma.cc/W3HW-HYT4>] (stating that a zip code is reflective of socioeconomic level).

<sup>244</sup> Reshaad Shirazi, *It's High Time to Dump the High-Crime Area Factor*, 21 BERKELEY J. CRIM. L. 77, 87 (2016) (noting that African Americans account for 17% of drug users nationwide but account for 37% of all those arrested for drug-related offenses); *see also* Steven Raphael & Melissa Sills, *Urban Crime, Race, and the Criminal Justice System in the United States*, in A COMPANION TO URBAN ECONOMICS 515, 529 (Richard J. Arnott & Daniel P. McMillen eds., 2006) (noting that African Americans commit 25% of all violent offenses in the United States, but account for only 13% of the population); *see also* Frank Rudy Cooper, *We Are Always Already Imprisoned: Hyper-Incarceration and Black Male Identity Performance*, 93 B.U. L. REV. 1185, 1200 (2013) (“[P]eople searched incident to arrest will disproportionately be men of color.”).

<sup>245</sup> *See generally* Shirazi, *supra* note 244, at 87.

<sup>246</sup> Robin G. Steinberg, *Police Power and the Scaring of America: A Personal Journey*, 34 YALE L. & POL'Y REV. 131, 132 (2015).

<sup>247</sup> *See* Bellin, *supra* note 1, at 204–05.

<sup>248</sup> *Id.* at 205.

will not prosecute, but they cannot dictate what other actors do.<sup>249</sup> For example, a prosecutor could decide they are no longer prosecuting marijuana crimes. But until the legislature makes a decision regarding marijuana crimes, police officers can still arrest people for marijuana crimes. Therefore, in that situation, the legislature arguably holds more power than prosecutors. The intentional selection of deciding whether to prosecute or not to prosecute a case is one way to imagine selective prosecution. In the alternative, a defendant may raise selective prosecution as a defense, asserting that the prosecutor brought a charge for reasons antecedent to equal protection.<sup>250</sup>

Based on the interplay between other external actors, Professor Jeffrey Bellin contends that prosecutors are not vested with significant power and are merely facilitating their own goals that are approved by other more powerful actors.<sup>251</sup> In the pretrial context, however, prosecutors arguably wield the most power because they can significantly influence the court. As such, less obvious forms of selective prosecuting can still occur in three discrete ways: (1) deciding who to charge, (2) deciding what to charge, and (3) deciding what release recommendations to offer at the bail hearing.

First, with regard to how prosecutors identify who to charge, internal prosecutorial policies have been largely a black box. Current studies provide limited revealing statistics regarding selective prosecution.<sup>252</sup> This is due in part by the fact that most prosecutorial offices have lacked transparency-forward policies.<sup>253</sup> As such, much of this assertion is based on courtroom anecdotes provided by public defenders.<sup>254</sup>

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<sup>249</sup> *Id.* at 183–84.

<sup>250</sup> *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“One of [the constitutional] constraints imposed by the equal protection component of the Due Process Clause of the Fifth Amendment is that the decision whether to prosecute may not be based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification.’”) (internal citations omitted).

<sup>251</sup> Bellin, *supra* note 1, at 200.

<sup>252</sup> Numbers associated with selective prosecution are largely unknown because the only people who would know the data are prosecutors. *See generally Armstrong*, 517 U.S. at 456.

<sup>253</sup> *See* NICOLE ZAYAS FORTIER, AM. CIVIL LIBERTIES UNION, UNLOCKING THE BLACK BOX: HOW THE PROSECUTORIAL TRANSPARENCY ACT WILL EMPOWER COMMUNITIES AND HELP END MASS INCARCERATION 8 (2019), [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_smart\\_justice\\_prosecutor\\_transparency\\_report.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_smart_justice_prosecutor_transparency_report.pdf) [<https://perma.cc/WP3F-8RAR>] (advocating for the implementation of the Prosecutorial Transparency Act as part of the ACLU’s Campaign for Smart Justice).

<sup>254</sup> Since bail decisions are made by magistrates who work for the judiciary, not for the prosecutor’s office, a prosecutor’s power is often considered informal or influential at best. *See, e.g.,* Aurelie Ouss & Megan Stevenson, *Bail, Jail, and Pretrial Misconduct*:

Second, prosecutors also have discretion when deciding what charges to bring (such as deciding between felony versus misdemeanor charges).<sup>255</sup> This is particularly important at the bail stage and creates an immense advantage for the prosecutor. For instance, when deciding whether to charge a felony or misdemeanor assault, the prosecutor is indicating the severity of the alleged crime to the judge.<sup>256</sup> Prosecutors are known for overcharging to their advantage.<sup>257</sup> Prosecutors primarily upcharge to secure a conviction, which in the event they are unsuccessful on the top count, they are more likely to secure a conviction on lesser counts.<sup>258</sup> But upcharging also places the prosecutor in a better position at bail, because a higher charge may facially indicate a higher level of dangerousness to some.<sup>259</sup>

In Romero's case, the victim reported that he was assaulted with a knife. Romero was never found with a knife. Although prosecutors

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*The Influence of Prosecutors* (George Mason Legal Studies Research, Working Paper No. LS 19-08, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3335138##](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335138##) [<https://perma.cc/9XXS-X2R7>] (“Progressive prosecutors frequently feature a promise to get rid of cash bail as part of their election platform. This is in line with public attention on the shortcomings of the current bail system in recent years. However, prosecutors have no direct power over bail. They can make requests and offer advice, but cannot decide outcomes. If they are influential at all, it is through informal channels. And these informal channels of influence rely on the discretion of numerous criminal justice actors with varying objective functions.”).

<sup>255</sup> Bellin, *supra* note 1, at 181 (“A prosecutor has discretion to choose . . . what crime to select. And within broad boundaries, the charging decision typically cannot be overruled by the courts or other actors, such as victims or police.”).

<sup>256</sup> For a discussion on charge piling see Crespo, *supra* note 17, at 1316–23.

<sup>257</sup> For example, based on my anecdotal experience litigating cases in Maryland, first-offender juveniles are automatically afforded pretrial release with nonmonetary conditions, with the exception of first-degree assault or higher. If charged with one of these more serious felonies, the juvenile is taken before a judge for a bail hearing where he could be detained prior to trial. The Pretrial Justice Clinic at University of Baltimore (UB) Law represented a juvenile who was charged with throwing a punch during an after-school sporting event on school property in Baltimore City. Instead of resolving the case internally, police were called, and the juvenile was arrested. On the bare facts alone, many would consider this a misdemeanor assault. Instead, the juvenile was charged with a first-degree assault felony. This triggered a different protocol, where he was taken to a judge and held without bail. This juvenile missed a significant amount of school days. His case was ultimately dismissed. *See also* Crespo, *supra* note 17, at 1313 n.31 (discussing the impact a prosecutor has by piling on the quantity and quality of charges against the accused).

<sup>258</sup> *Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting) (“[Plea bargaining] presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense . . .”).

<sup>259</sup> These shorthand indicators of dangerousness, like the charge itself, are impermissible but are nonetheless exploited by prosecutors to convey to the court that the defendant is dangerous by mere association with a certain charge. Unfortunately, it often works. *See supra* notes 204–07.

could not initially prove a knife was used, let alone by Romero, he was still charged with felony armed robbery—a crime with a maximum penalty of twenty years, as opposed to misdemeanor theft under \$1,000, which holds a maximum penalty of ninety days. If it were the latter charge, the prosecutor may have recommended that Romero be released on his own recognizance with pretrial release supervision. But with a heightened charge, we see how the prosecutor has more leverage to make harsher pretrial recommendations.

Third, in deciding what release recommendations to offer, prosecutors often ground recommendations in concerns over larger societal issues that the crime at issue may represent.<sup>260</sup> Drug-related crime is the most common example of this.<sup>261</sup> For instance, if an individual is caught with a large amount of contraband—no weapons, just contraband—prosecutors may argue that he is not only a danger to the buyer but the public as well because he is perceived to be the anchor of a community’s drug addiction problem.<sup>262</sup> Some prosecutors may even argue that the sale of drugs is a violent crime. The issue of violence arises not because weapons were involved or an assault occurred but because the presence of drugs, many believe, often leads to the use of guns.<sup>263</sup> This is of course speculative, but the prosecutor making this argument would effectively be saying that if we do not incarcerate this individual, he will continue to engage in criminal acts that will more likely than not lead to worse problems down the road.<sup>264</sup>

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<sup>260</sup> The rules of evidence do not apply during bail hearings, and as a result, prosecutors will often make loftier arguments as to how one individual’s alleged criminal conduct contributes to a larger problem within the community. Such anecdotes are rarely documented, unless they make headlines. *See, e.g., supra* notes 205–08.

<sup>261</sup> At least eight states have declared the opioid crisis a state of emergency. *See, e.g.,* Bill Turque, *Maryland Governor Declares State of Emergency for Opioid Crisis*, WASH. POST (Mar. 1, 2017), [https://www.washingtonpost.com/local/md-politics/hogan-declares-opioid-state-of-emergency/2017/03/01/5c22fcfa-fe2f-11e6-99b4-9e613afeb09f\\_story.html?utm\\_term=.bbb64354b2e9](https://www.washingtonpost.com/local/md-politics/hogan-declares-opioid-state-of-emergency/2017/03/01/5c22fcfa-fe2f-11e6-99b4-9e613afeb09f_story.html?utm_term=.bbb64354b2e9) [<https://perma.cc/5JMF-PGWK>].

<sup>262</sup> *United States v. Hardy*, 895 F.2d 1331, 1333–34 (11th Cir. 1990) (“Congress mandated severe penalties for drug distribution, reflecting legislative sentiment that commercial trafficking and drug distribution had the dangerous effect of drawing others into the web of drug abuse. . . . In reviewing narcotics convictions, the Court must be careful to maintain the distinction, created by Congress in the statute, between distribution and personal drug abuse.”).

<sup>263</sup> Stephen Changary, *Drugs, Not Guns, Cause Gun Violence*, DAILY ADVANCE (Feb. 1, 2018), <http://www.dailyadvance.com/Letters/2018/02/01/012918changarylet.html> [<https://perma.cc/5ZQQ-UFVW>] (“So the real problem of gun violence is a drug problem . . .”).

<sup>264</sup> Press Release, Commonwealth of Pa. Office of Att’y Gen., Office of Attorney General Seeks \$1 Million Bail for Drug Dealers (Sept. 13, 2017) (on file with the Office of Attorney General) (“Nine drug dealer suspects arrested in Philadelphia following a major

These discretionary elements of prosecuting at the pretrial stage have the ability to cause significant damage in terms of increasing carceral trends. The leverage afforded to the prosecution in seeking a denial of bail through an error-prone system that lacks adequate checks necessarily taints any positive correlations that can be drawn between these denials of bail and case outcome, particularly guilty pleas. Nonetheless, correlations are likely made, reinforcing a negative feedback loop of information.

### 3. *Equitable Interpretation*

Courts rely heavily on prosecutors and their recommendations when making bail determinations for two simple reasons: (1) judicial economy and (2) lack of information.<sup>265</sup>

First, state courts are plagued by large numbers of cases, requiring courts to move cases forward at a faster clip.<sup>266</sup> In order to cope with the number of cases, lower courts have adopted a practice of equitable interpretation—applying the law in a manner that is most reasonable given the system they are operating within.<sup>267</sup> This means that full procedural protections are often pushed to the wayside. This is because the general sentiment is that a bail hearing should not become a minitrial because there is simply not enough time and resources to provide the necessary amount of individualization.<sup>268</sup>

Second, there is an information deficit at the bail stage. Although a significant number of facts can be adduced within the first twenty-four or forty-eight hours after a crime occurs, the theory of the case is still in development and evidence is still being processed at the crime lab. At this point, prosecutors have the most complete picture of the crime. Defendants are at an information deficit because not all discovery has

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raid that resulted in the seizure of 30,000 to 40,000 bags of suspected heroin and fentanyl . . . . The Office of the Attorney General is seeking high bail, citing the dealers' danger to the community . . . . "These drug dealers put an entire community at risk by their criminal conduct . . . drug dealing is not a victimless crime."").

<sup>265</sup> See Makar, *supra* note 33, at 448–49.

<sup>266</sup> Appellees noted in a 2016 filing that Harris County judges held approximately 50,000 bail hearings for individuals charged with misdemeanors in 2015 alone. *O'Donnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018).

<sup>267</sup> See generally Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 711, 713 (2018).

<sup>268</sup> Zina Makar, Opinion, *Bail Reform Begins with the Bench*, N.Y. TIMES (Nov. 17, 2016), <https://www.nytimes.com/2016/11/17/opinion/bail-reform-begins-with-the-bench.html> [https://perma.cc/Z3AH-DLY6] (“Judges routinely refuse to review other evidence—from, say, cellphone videos or alibi witnesses—that may ultimately exonerate an individual, stating it can only be introduced at trial.”).

been turned over. As such, a prosecutor's recommendation carries immense weight in the eyes of the court, which can ultimately skew results to the detriment of the defendant.

The state district court in Romero's case did not question the prosecutor's recommendation. The seriousness of the crime and the matching clothing description were enough to hold Romero without bail.

Relatedly, access to counsel at the pretrial stage also works to convey the importance of a pretrial hearing to the court. Although Romero had a public defender who pointed out the discrepancies in the statement of probable cause, defendants in other states can be much worse off.<sup>269</sup> Certain state policies have contributed to the perception that fewer precautions are necessary during the bail stage.<sup>270</sup> For instance, several states, such as North Carolina, do not guarantee a right to counsel at the bail stage.<sup>271</sup> That is problematic, particularly for individuals facing possible loss of liberty.<sup>272</sup> Lack of counsel creates the impression that pretrial hearings are not critical or that such hearings do not affect case outcomes.<sup>273</sup>

Although state laws may differ, there is an overall reluctance to reform the front end of the system due to the perceived unimportance of the pretrial stage and the anticipation of the trial stage. This reluctance to reform the pretrial system is also demonstrated by the fact

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<sup>269</sup> 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, 1722–23 (2002) (conducting an empirical study on the impact defense attorneys have in bail hearings).

<sup>270</sup> Failure to provide counsel in preventive detention hearings where the potential is high for the loss of individual liberty prior to trial is one such example. Such state failings undercut the federal requirement mandated in *United States v. Salerno*, which is arguably applicable to the states through the Fourteenth Amendment. See, e.g., John P. Gross, *The Right to Counsel but Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FLA. L. REV. 831 (2017) (arguing that the failure of the Supreme Court to hold the bail stage as a critical stage has allowed states to withhold providing counsel during bail hearings resulting in higher rates of pretrial incarceration).

<sup>271</sup> N.C. GEN. STAT. § 7A-451 (2008); see also Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 11 n.43 (1998).

<sup>272</sup> See *supra* Section I.B.

<sup>273</sup> See Megan Stevenson & Sandra Mayson, *Pretrial Detention and Bail*, in 3 THE ACADEMY FOR JUSTICE, REFORMING CRIMINAL JUSTICE 21, 32 (Erik Luna ed., 2017) (citing Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 389 (2011)) (stating that, based on a 2008–09 survey, only ten states ensure representation within forty-eight hours of the initial bail hearing).

that the accused has virtually no avenues for recourse for unnecessary incarceration.<sup>274</sup>

#### 4. *The Ineffectiveness of “Gap Filling”: A Negative Feedback Loop*

The above analysis is a sampling of the errors and inaccuracies that occur at each stage. Taken individually, each actor that Romero encountered may appear to be acting negligently, but their actions surely do not constitute malicious behavior. Romero’s circumstances demonstrate, however, that those harms should not be considered individually; instead, together the actors are responsible for creating a flawed process. Theoretically, each of these actors is supposed to be a check on the other: prosecutors assessing the evidence and accuracy of the arrest and courts neutrally weighing and analyzing the information presented to them. When each check is acting negligently, however, the compounding impact experienced by the accused is a result of more than mere negligence. Consequently, the most vulnerable members of society are pushed into a system that lacks critical checks that can prevent against erroneous deprivations of liberty or, to go one step further, against coerced convictions.

This analysis is at odds with Schauer’s opinion that preventive measures such as pretrial detention do not pose any normative concerns.<sup>275</sup> This level of layered inaccuracy built around a system of inequality is profoundly disturbing. Yet, this appears to be how most of our convictions originate.

To think of the pretrial stage as something detached from case outcomes is a grave mistake. There is often a temptation to address pretrial reform by focusing on a singular issue that is ripe for reform, such as bad policing practices; however, the system is so beset with an interlocking web of problems that any singular fix will unfortunately fail to achieve a net effect. What is the best remedy when there is no identifiable “bad” actor? Are informal checks still feasible, or must the response be formalized?<sup>276</sup>

When the entire system is to blame, the solution must therefore be of equal breadth. The following section addresses the benefits of a strict liability approach to pretrial compensation in comparison to other more informal checks.

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<sup>274</sup> See *supra* Section II.B.

<sup>275</sup> See *supra* Section I.A.

<sup>276</sup> See Cole, *supra* note 2.

## IV

PRETRIAL COMPENSATION: A SOLUTION FOR THE LARGER CRIMINAL  
LEGAL SYSTEM

The following sections provide an overview of the formal and informal checks available at the pretrial stage, followed by an examination of existing reform policies and why such methodologies are inadequate when compared to strict liability-based pretrial compensation.

*A. Formal Versus Informal Checks*

Pretrial detention was intended to be a small speck on the full trajectory of a criminal case.<sup>277</sup> Due to the perceived dichotomy in interests, this becomes a technically challenging area of reform: How do we protect the rights of the legally innocent while also protecting the public? The Supreme Court's answer is that pretrial detention is only temporary, so the harm is temporary.<sup>278</sup> Although many are now understanding that the damage done (no matter how short the deprivation of liberty may be) is often permanent and irreversible, solutions continue to fall short.<sup>279</sup>

The idea behind “informal” or “soft-law” checks is something akin to an honor system. Such checks assume good intentions and an interest in safeguarding the legitimacy of the greater system.<sup>280</sup> That may work in some instances, where the majority sees itself as potentially affected by preventive justice measures.<sup>281</sup> Here, in the pretrial detention scheme, society sees crime (and race) as an “us” versus “them” problem.<sup>282</sup> Moreover, because the implementation of soft-law checks relies on the majority of self-interested actors—police officers, prosecutors, and judges—to fundamentally change the nature of their practices, it is likely a futile endeavor.

As described above, unchecked preventive justice measures harm efforts to ensure accuracy in the justice system. Formal checks, such as legal rules specifically designed to deter overbroad preventive justice

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<sup>277</sup> See generally *United States v. Salerno*, 481 U.S. 739 (1987) (affirming the Constitutionality of the Bail Reform Act); Federal Bail Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 1, 98 Stat. 1976 (1984) (formerly S. 1762).

<sup>278</sup> *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) (holding that twenty-four-hour liberty deprivations are permissible for the administration of justice).

<sup>279</sup> See *supra* Section I.C.

<sup>280</sup> See *Cole*, *supra* note 2, § IV.

<sup>281</sup> See *id.*

<sup>282</sup> *Roberts*, *supra* note 111, at 1021–22 n.243.

measures, can demand a change to existing practices. Although Schauer argued that all pretrial detention determinations risk inaccuracy due to the fact that nothing is based on pure certainty,<sup>283</sup> that should not justify turning a blind eye to inaccuracies that we know are caused by inherent inequalities.<sup>284</sup> Through systemic reform, these are inaccuracies that can be checked.

A combination of formal and informal checks exist to address some pretrial issues, particularly with regard to individuals charged with low-level crimes.<sup>285</sup> Unfortunately, such solutions are few and far between, creating two overarching issues: (1) because current reform efforts are occurring on a micro-level for low-level offenders, we overlook and exacerbate the problem for individuals charged with more serious crimes,<sup>286</sup> and (2) as detailed in *Displacing Due Process*, a systemic front-end solution is critical, as flaws in the pretrial system have produced many macro-problems, including increasing carceral trends, destabilized communities, and inaccuracies in terms of case outcomes.<sup>287</sup> The problem of unnecessary incarceration is not one isolated simply to “bail reform,” it is one that has ramifications affecting the disposition of many cases. Thus, we must think of reform in terms of its impact on the criminal legal system as a whole.

### B. The Risk of Reform

By better understanding the scope of preventive justice and how it has been applied in pretrial detention cases, we are able to identify both the surface-level problems that are created as well as the deeper systemic problems that lurk untouched in everyday criminal cases. It is an established fact that there are significant inequalities in the criminal legal system.<sup>288</sup> This is not a new story; what is new is a solution that addresses it on the front end before it even becomes a problem.

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<sup>283</sup> SCHAUER, *supra* note 59.

<sup>284</sup> *See supra* Section III.B.4.

<sup>285</sup> *See infra* Section IV.B.

<sup>286</sup> A significant amount of bail scholarship focuses on resolving systemic issues by focusing predominantly on misdemeanor offenses, and for good reason: misdemeanors make up the majority of cases in the criminal legal system. *See, e.g.*, Roberts, *supra* note 35. Additionally, misdemeanor crimes do not encompass much violence, and allegations of violence are much less politically palpable. As a result, reformers are less willing to focus on individuals charged with more serious crimes because those are more difficult to defend in the eyes of the public. *See, e.g.*, Prudente, *supra* note 206.

<sup>287</sup> *See* Makar, *supra* note 33.

<sup>288</sup> *See supra* Section III.B.

The following sections address existing solutions that are arguably low risk and raise concerns about their viability to address the multilayered tiers of inequality discussed above. Such reform is less effective compared to the proposed solution of pretrial compensation. Counterarguments are addressed in turn to persuade readers about the effectiveness of such a proposal.

### *1. Low-Risk, Low-Reward Reform*

Advocates eager to identify solutions have proposed reforms that would reduce the number of individuals incarcerated prior to trial.<sup>289</sup> Many of these reforms address surface-level problems, identify success by numbers, or tackle low-hanging fruit at the expense of individuals who face more serious charges.<sup>290</sup> Let us briefly consider two reform policies that are currently being pursued in the pretrial context: (1) risk assessment tools and (2) nets of eligibility.<sup>291</sup>

The use of risk assessment tools has been growing in popularity among states trying to reform their bail laws.<sup>292</sup> Risk assessment tools are essentially a scoring sheet that assigns a value of low, medium, or high risk depending on specific background criteria that are indicative of a defendant's failure to appear or, more commonly, recidivism.<sup>293</sup> These scores are intended to be guiding factors for judges to consider during a bail hearing.<sup>294</sup> Risk assessment tools can be biased against those who rent rather than own a home, those who do not live with their biological families, and individuals with a prior arrest record but no convictions.<sup>295</sup> Ultimately those with nontraditional living styles,

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<sup>289</sup> See *supra* notes 4 and 13 and accompanying text.

<sup>290</sup> See *supra* notes 4 and 13 and accompanying text.

<sup>291</sup> For the purposes of this Article, I analyze risk assessment tools and nets of eligibility because those are the most commonly discussed reform vehicles today in the context of excessive preventive detention practices. Other methods of reform include community bail funds, which can be an effective way of nullifying an arbitrary money bail. See Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 585 (2017) (“[C]ommunity bail funds have the potential to change how local criminal justice systems operate on the ground, shifting and shaping political and constitutional understandings of the institution of money bail.”).

<sup>292</sup> Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 492–93 (2018) (providing detailed information on risk assessment tools).

<sup>293</sup> Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1131 (2018).

<sup>294</sup> George Joseph, *Justice by Algorithm*, CITYLAB (Dec. 8, 2016), <https://www.citylab.com/equity/2016/12/justice-by-algorithm/505514/> [<https://perma.cc/Y8G6-GL7C>].

<sup>295</sup> This is intended to serve as an example of some of the ways in which risk assessment tools can lead to biased outcomes. *Id.*

which largely includes those in minority communities, are the most discriminated against by such tools.<sup>296</sup>

The focus of these tools is to assess risk to the community and public safety.<sup>297</sup> In some instances, where a judge is unsure if release is appropriate, a risk assessment tool could encourage the court to release the accused back to her community while she awaits trial.<sup>298</sup> Release is the intent.<sup>299</sup> As such, risk assessment tools were created with the intent to provide judges with a, theoretically, unbiased justification to make those hard decisions that may be unfavorable in the eyes of the larger community, particularly releasing an individual whose charges appear facially dangerous.<sup>300</sup>

Yet the use and application of risk assessment tools widely differ.<sup>301</sup> This is demonstrated by the fact that judges ultimately have full discretion to make a ruling that is inconsistent with what the risk assessment calls for.<sup>302</sup> As such, risk assessments tools have been met with resistance due to their potential for manipulation and their reliance on data that is already inherently biased.<sup>303</sup> Since the data in the system are based on individuals who are both selectively arrested and

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<sup>296</sup> There is a continuous effort by reformers to make risk assessment tools better. For instance, many are trying to rephrase risk of future dangerousness in terms of success for release. *Laura and John Arnold Foundation Launches PSA to Improve Risk-Based Decision-Making*, ARNOLD VENTURES (Oct. 15, 2015), <https://www.arnoldventures.org/newsroom/laura-and-john-arnold-foundation-launches-psa-to-improve-risk-based-decision-making> [<https://perma.cc/A4C3-7QFG>]. *But see* Sarah Desmarais et al., *Risk Assessment Tools Are Not a Failed 'Minority Report'*, LAW 360 (July 19, 2019), <https://www.law360.com/access-to-justice/articles/1180373/risk-assessment-tools-are-not-a-failed-minority-report-> [<https://perma.cc/5W8S-QDFM>] (“While risk assessment tools may not eliminate racial, ethnic or other biases, there is no evidence that they exacerbate them either.”).

<sup>297</sup> Mayson, *supra* note 292.

<sup>298</sup> Chelsea Barabas et al., *The Problems with Risk Assessment Tools*, N.Y. TIMES (July 17, 2019), <https://www.nytimes.com/2019/07/17/opinion/pretrial-ai.html> [<https://perma.cc/M2AD-7APK>] (“One judge explained his thinking to us. ‘You don’t want to be the judge that releases someone,’ he said . . . . This fear has led judges to systematically overestimate pretrial violence . . . . To fix this, jurisdictions across the country have embraced algorithmic risk assessments. The hope is that these tools can harness big data to help judges make more informed, accurate decisions, thereby reducing jail populations while maintaining public safety.”).

<sup>299</sup> *See generally* John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725 (2018) (discussing the goal of reform efforts).

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *See, e.g.*, Joseph, *supra* note 294.

<sup>303</sup> BAUGHMAN, *supra* note 5.

prosecuted, bad outcomes provide the basis for the tools' perceived reliability.<sup>304</sup>

Ultimately, risk assessment tools are a numbers game. The tools look toward final case outcomes to validate the data used to make future determinations.<sup>305</sup> Although reducing pretrial carceral populations is the end goal, these tools remove a layer of individualization that benefits only defendants charged with less serious crimes.<sup>306</sup> Risk assessment tools will likely benefit individuals charged with misdemeanors and maybe a few low-level felonies with securing release because those individuals are facially perceived to be the least dangerous.<sup>307</sup> But if the tool rates the accused as high risk, the defense attorney's ability to advocate for release becomes a fruitless endeavor in the face of an algorithm.<sup>308</sup> As such, through a blind acceptance of the numbers,<sup>309</sup> risk assessment tools may benefit individuals charged with less serious crimes, while simultaneously eroding pretrial procedural protections that are especially needed for defendants facing more serious crimes.

Nets of eligibility are another form of risk assessment, although, unlike risk assessment tools, they do not involve a formal computation.<sup>310</sup> A net of eligibility is established by state rules or statutes that expressly permit the imposition of pretrial detention for

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<sup>304</sup> See *supra* Section III.B; Barabas et al., *supra* note 298 (arguing that risk assessment tools provide a false form of validation when assessing the likelihood of future dangerousness).

<sup>305</sup> See *supra* Section III.B.

<sup>306</sup> See Barabas et al., *supra* note 298.

<sup>307</sup> See Roberts, *supra* note 35.

<sup>308</sup> Most states require courts to consider and weigh multiple factors when making a bail determination. The extensive list of factors indicates that courts should not rely solely on one factor, such as the charges or the results of a risk assessment tool, when making such a determination. See, e.g., ABA RULES ON PRETRIAL RELEASE STANDARDS 10-1.1–10 (AM. BAR ASS'N). Each hearing is required to be an individualized review, and defense counsel plays an integral part in this by raising significant factors that weigh in favor of his client's release. See generally Colbert et al., *supra* note 269. However, the fear is, the scientific effect of risk assessment tools effectively places blinders on the court whereby the court may fear to release someone simply because the tool indicates the accused is high risk.

<sup>309</sup> Cf. Mayson, *supra* note 3, at 2221–27 (arguing that pervasively disparate racial risk assessment outcomes made using risk assessment tools merely institutionalize the pervasively disparate racial risk assessments outcomes historically made by human decision makers in an apparently neutral medium because the risk assessment tools are partly based on historical metadata).

<sup>310</sup> See COHEN, *supra* note 26, at 2; COLIN DOYLE ET AL., HARVARD LAW SCH., CRIMINAL JUSTICE POLICY PROGRAM, BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICY MAKERS 11 n.78 (2019), [http://cjpp.law.harvard.edu/assets/BailReform\\_WEB.pdf](http://cjpp.law.harvard.edu/assets/BailReform_WEB.pdf) [<https://perma.cc/64N8-ZYAJ>].

certain charged offenses, the most typical being capital offenses.<sup>311</sup> This has the effect of prohibiting detention for individuals charged with low-level misdemeanors that pose little threat to public safety.<sup>312</sup> For instance, Mississippi's net of eligibility includes crimes punishable by life in prison or by twenty years or more if the accused has been previously convicted for a capital offense or committed a felony while on pretrial release.<sup>313</sup> By contrast, Washington State's net of eligibility is limited only to capital offenses.<sup>314</sup> Though many of these statutes do offer case-by-case exceptions, the intent is that the use of preventive detention will be heavily restricted.<sup>315</sup>

Logically, one would expect that if a limited number of crimes are eligible for pretrial detention, then pretrial incarceration levels will naturally diminish. That is not always the case because a net of eligibility creates a stronger emphasis on the charge itself, in turn making the prosecutor's discretion to selectively prosecute and upcharge a crime more consequential.<sup>316</sup> Such rules might also imply that, for all crimes included in the net of eligibility, anyone charged with a pretrial detention-eligible crime would effectively suffer from a presumption of detention based on the nature of the offense. Again, although nets of eligibility try to address the overall carceral numbers, individuals charged with certain crimes may be arbitrarily alienated. There is an obvious failure in this solution by allowing the discretion inherent in selective prosecution to continue to go unchecked.

These solutions, although minimally effective, are likely to be implemented more broadly in the near future because they are low risk. Such solutions resolve issues that are low-hanging fruit in the justice system, and most can agree on the need for this type of reform.<sup>317</sup> For example, I would be hard pressed to find someone who would disagree that the majority of nonviolent, low-level misdemeanants who face a sixty-day maximum penalty should ever be held without bail. Although judges are not formally prohibited from detaining community members charged with such misdemeanors, most judges now do not detain them. Instead, we are more likely to see such persons held on a monetary bond they cannot afford.

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<sup>311</sup> *Id.*

<sup>312</sup> See Joseph, *supra* note 294.

<sup>313</sup> MISS. CONST. art. III, § 29.

<sup>314</sup> WASH. CT. R. 3.2(a).

<sup>315</sup> See COHEN, *supra* note 26, at 2; DOYLE ET AL., *supra* note 310, at 11 n.78.

<sup>316</sup> See *supra* Section III.B.2.

<sup>317</sup> See sources cited *supra* note 11.

Although these well-intentioned solutions provide some promise, they are only base-level solutions that provide imperfect fixes to smaller pretrial-specific issues. These solutions do not address the macro-level problems that trickle down after substantial inaccuracies have already manifested in a preventive detention scheme.

## 2. *High-Risk, High-Reward Reform*

Compared to risk assessment tools and nets of eligibility, which can be tacked on to the existing system, pretrial compensation is a high-risk reform proposal. Unlike these other types of reform that are more palatable, pretrial compensation would be a massive overhaul to the justice system and would potentially affect the diversion of funds to meet compensation standards, how officers make arrests, how prosecutors investigate and charge cases, and how judges enforce procedural protections.

Let us now address the potential yield of reward as well as the perceived risks for a pretrial compensation proposal.

### *a. Budget Allocation*

When it comes to state budgets, politics usually beat logic.<sup>318</sup> State detention facilities often compete with educational funding; unfortunately, detention facilities usually come out on top.<sup>319</sup> Our nation's current pretrial detention scheme costs taxpayers approximately \$13.6 billion a year.<sup>320</sup> An empirical study conducted by Professor Shima Baradaran Baughman estimates that the “cost of [pretrial] detention exceeds the cost of release by approximately \$20,000; detaining a defendant, on average, results in \$40,300 in direct costs, while the average cost of releasing a defendant pretrial is just \$19,500.”<sup>321</sup>

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<sup>318</sup> See, e.g., INNOCENCE PROJECT, *supra* note 192.

<sup>319</sup> Mirko Bagarlic & Daniel McCord, *Decarcerating America: The Opportunistic Overlap Between Theory and (Mainly State) Sentencing Practice as a Pathway to Meaningful Reform*, 67 BUFF. L. REV. 227, 237 (2019) (“This large expenditure on prisons necessarily means significantly less money that can be spent on productive social services, such as education and health.”).

<sup>320</sup> Bernadette Rabuy, *Pretrial Detention Costs \$13.6 Billion Each Year*, PRISON POL. INITIATIVE (Feb. 7, 2017), [https://www.prisonpolicy.org/blog/2017/02/07/pretrial\\_cost/](https://www.prisonpolicy.org/blog/2017/02/07/pretrial_cost/) [<https://perma.cc/SM5L-V936>].

<sup>321</sup> Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 27 (2017) (conducting an empirical study on the costs of pretrial detention or release to the detainee as well as the community, and concluding that a cost-benefit approach to release

Initially, in order to implement a pretrial compensation scheme, funding would need to be allocated.<sup>322</sup> In order to be an effective deterrent against unnecessary incarceration, money supporting a pretrial compensation scheme could initially draw from existing police, prosecutor, court, and jail budgets.<sup>323</sup> The idea is that by implementing a compensation scheme that affects their budgets, institutional players would be encouraged to engage in more conscious and fair decision-making.<sup>324</sup>

Eventually, this deterrent would be so effective that fewer and fewer individuals would be incarcerated unnecessarily.<sup>325</sup> A reduction in pretrial detentions would provide cost savings realized by the justice system,<sup>326</sup> which could then be spent on supporting community members through less onerous nonmonetary pretrial release services.<sup>327</sup> It is not the case that a pretrial compensation scheme would eventually cost nothing.<sup>328</sup> Instead, money spent on detention facilities would eventually be appropriated to nonmonetary pretrial release programs.<sup>329</sup>

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would yield approximately \$78 billion in economic value saved through the detention of fewer individuals charged with violent crimes).

<sup>322</sup> The formulation would be similar to that of wrongful conviction budgets.

<sup>323</sup> A main critique of § 1983 litigation against police misconduct is that the money paid out to the victims does not come from the police officer's budgets, diluting any potential deterrent value litigation has against those officers. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266–67 (1981) (“Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct . . . . Regarding retribution, . . . an award of punitive damages against a municipality ‘punishes’ only the taxpayers, who took no part in the commission of the tort . . . .”).

<sup>324</sup> See *supra* Part III.

<sup>325</sup> See *supra* Part III.

<sup>326</sup> SAWYER & WAGNER, *supra* note 34 (“Over 540,000 people are locked up who haven’t even been convicted or sentenced.”).

<sup>327</sup> Nonmonetary pretrial release services are typically defined as release programs that involve some level of supervision and support services for individuals while pending trial. *E.g.*, DOYLE ET AL., *supra* note 310, at 29. This could include drug rehabilitation and testing, electronic monitoring, in-home or phone check-ins, etc. See, *e.g.*, *id.* at 37–38.

<sup>328</sup> Some Scandinavian countries currently implement pay structures for those who suffer the consequences of unnecessary incarceration. These pay structures are based on a standard computation using a fixed monetary value for a single day incarcerated and multiplying it against the total days spent unnecessarily detained. See *supra* Part II.

<sup>329</sup> Many jurisdictions offer nonmonetary pretrial release programs. *Guidance for Setting Release Conditions*, NAT’L CONFERENCE OF STATE LEGISLATURES (May 13, 2015), <https://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx> [<https://perma.cc/NWW2-APXK>].

The benefits of pretrial service programs outweigh the costs of the risks associated with releasing the accused.<sup>330</sup> Jails that house pretrial detainees are different from prisons, which house those convicted of crimes for longer periods of time.<sup>331</sup> Because of their temporary nature, fewer rehabilitative programs are offered to inmates in jails than are offered in prisons.<sup>332</sup> Increasing the investment in pretrial release services may establish a more community-oriented focus on rehabilitation that would hopefully deter future criminal acts.<sup>333</sup>

*b. Arrest Practices and Data Collection*

Citizens may be concerned that pretrial compensation would prevent or deter officers from effectively regulating crime, but pretrial compensation should not have this effect. The idea is not to curb an officer's ability to arrest someone but to encourage conscious and fair policing practices.

The real bulk of the reform is intended to encourage more scrutiny by prosecutors and judges,<sup>334</sup> not necessarily to deter officers from reporting crime. Because pretrial compensation is geared toward long-term reform with an ultimate goal of enabling the justice system to produce more accurate results (less coercive case dispositions by way of plea deals), the idea is that policing agencies will follow their arrests and analyze resultant case dispositions in order to help gauge the accuracy of their policing efforts. This is something that neither risk assessment tools nor nets of eligibility would promote. Given how outcome-focused pretrial compensation practice would be, it would behoove police agencies to collect data on arrests and disposition outcomes.<sup>335</sup>

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<sup>330</sup> See Baughman, *supra* note 321, at 19.

<sup>331</sup> Margo Schlanger, *Differences Between Jails and Prisons*, in PRISONS READING PART A 42, 42 (2003), [https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/The\\_Difference\\_Between\\_Jails\\_and\\_Prisons%20.pdf](https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/The_Difference_Between_Jails_and_Prisons%20.pdf) [<https://perma.cc/G5WF-FYMH>].

<sup>332</sup> *What Is the Difference Between Jail and Prison?*, HG.ORG, <https://www.hg.org/legal-articles/what-is-the-difference-between-jail-and-prison-31513> [<https://perma.cc/AYZ7-5M73>] (last visited Feb. 22, 2020).

<sup>333</sup> See, e.g., Mayson, *supra* note 292, at 546 n.251 (noting the complexity of quantifying a cost-benefit analysis to the incarcerated and his community); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017) (arguing that community bail funds provide a community-based incentive to investment in individuals who enter the criminal justice system).

<sup>334</sup> See discussion *supra* Sections IV.B.2.C–D.

<sup>335</sup> This is assuming prosecutors do not engage in “dirty policing” practices. See sources cited *supra* note 237.

*c. Prosecuting Practices*

A question raised by this proposal might be whether prosecutors will be held liable for bail recommendations that result in unnecessary incarceration or harm to the community. Increased forms of nonmonetary pretrial release should prevent the latter, but, of course, that cannot be guaranteed.<sup>336</sup> As for the former, this proposal does not require that individual prosecutors be held directly liable (stripped of their absolute immunity) if they have acted negligently.<sup>337</sup> As discussed above, at the bail stage, it is often difficult to find an explicitly malicious bad actor; instead, it is the system that generates inaccuracies, with each individual inaccuracy contributing to what, at first, appears to be a negligible role. As a result, this proposition does not seek to blame any one prosecutor directly, making the proposal slightly more politically palpable.

Alternatively, some may question whether compensation would make prosecutors less willing to dismiss cases. In short, it should not. If anything, it may increase the speed with which prosecutors arrive at a case theory in order to assess the objective strength of the case.<sup>338</sup> For example, if a prosecutor wants to detain someone prior to trial, the prosecutor would have to obtain a larger amount of evidence to properly secure detention for the accused. Due to limited time, prosecutors are generally unable to conduct an investigation on the front end, at least within the first twenty-four hours after arrest. In turn, prosecutors would have to be more judicious in selecting cases for pretrial detention. The prosecutor is also not limited from holding a pretrial detention hearing several days after the arrest or applying for a

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<sup>336</sup> See discussion *supra* Sections IV.B.2.C–E.

<sup>337</sup> Many proposals offer larger frameworks to incentivize prosecutors to buy into the reform. See, e.g., Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, 397 (2009) (arguing to expand the doctrine of command responsibility to incentivize supervising prosecutors to “develop a culture of ethical compliance within their organizations”). In an effort to ensure interest alignment by prosecutors, this proposal attempts to avoid immediate aversion by prosecutors but could go further to hold prosecutors directly accountable, in earlier stages of criminal proceedings. For the time being, it is hard to see how more direct reform would materialize given the lack of transparency in prosecutorial offices. See *supra* notes 253–55. This issue is much larger and better left for another article.

<sup>338</sup> Cf. Crespo, *supra* note 17, at 1354 (“[F]or the difficulty defendants typically face when pushing back against legal overreach is not finding a procedural device through which to mount their challenge but rather pinning the prosecutor to a specific legal theory of liability in the first place. Criminal charging instruments, after all, are much sparser than civil complaints, often alleging little more than the time and place of the offense.”).

new bail hearing in the future. Moreover, it does not mean that the accused would be released on his own recognizance—the accused will likely be held accountable through nonmonetary conditions. In sum, this may lead to a positive trend of increasing the number of dismissals at a faster rate if a prosecutor is better equipped (or incentivized) to assess the merits of each case in a timelier manner.

In order to avoid false incentives, it should be cautioned that implementation of a pretrial compensation scheme should prohibit “dismissal-bargaining.” In other words, prosecutors must be prohibited from negotiating the dismissal of a case conditioned on the accused waiving his right to compensation. If not prohibited, dismissal-bargaining may undo any of the deterrent effects of pretrial compensation as it may create a scheme in which prosecutors dismiss a case only if a defendant agrees he will not seek pretrial compensation for his time incarcerated.

In the alternative, if he is incarcerated prior to trial, there is also the possibility that the accused may be incentivized not to accept a plea in the hopes that he will not be found guilty and receive compensation. The negative implication being that this could slow down the system as a whole. At this stage, however, the accused should have received or hired a defense attorney. The defense attorney will advise clients on the strength of the State’s case. With this in mind, the accused’s concern of obtaining a maximum penalty will likely outweigh the potential benefit of monetary compensation that could be provided.<sup>339</sup>

#### *d. Judicial Practices and Sufficiency of Procedural Protections*

Judges preside over a large number of bail hearings daily.<sup>340</sup> As such, judges might wonder if pretrial compensation will lead to longer pretrial hearings or minitrials.<sup>341</sup> In short, yes—that is what was envisioned when the Supreme Court held that pretrial detention was facially constitutional.<sup>342</sup> But prosecutors should be less likely to seek

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<sup>339</sup> See generally Russel D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1249 (2008) (“[T]he only types of disagreements that will result in rejection of a plea bargain are those in which the government estimates the value of a case as worth more . . . than the defendant.”).

<sup>340</sup> See, e.g., *supra* text accompanying note 266 (discussing the number of bail hearings in Harris County, Texas, in 2016).

<sup>341</sup> This is not to imply that the rules of evidence would be applied here.

<sup>342</sup> In *United States v. Salerno*, the Court reviewed the district court’s record and noted that in addition to a detailed proffer, the Government presented wiretap evidence demonstrating “participat[ion] in wide-ranging conspiracies to aid their illegitimate

pretrial detention, so fewer cases will be brought before the court for preventive detention hearings. Thus, a judge should hear only cases that a prosecutor truly believes requires pretrial detention.

By reducing the number of preventive detention cases brought before state courts, the accuracy issues raised by prospective procedural displacement would also be minimized.<sup>343</sup> This is the idea that if courts have sufficient time and appreciate the risks associated with preventive detention, heightened procedural protections will be afforded to the accused. In sum, if pretrial detention is properly implemented and used sparingly, courts should not be overburdened.

Relatedly, critics of pretrial compensation might not buy into the theory that society should simply accept the burden that befalls the accused when the justice system gets it “wrong.” There are many reasons a case may be dismissed prior to trial, and there are many reasons that a jury could acquit someone who is guilty. Critics of pretrial compensation may assert that the probable cause arrest standard lends its way to a certain level of culpability<sup>344</sup>—one that the accused brought upon himself. This is not a viable argument. The Supreme Court mandated a heightened standard of procedural protections in *Salerno*, and given what we know now about the compounding effect of inequality beginning with arrest, probable cause is simply not sufficient to detain the accused.<sup>345</sup>

#### *e. Overbreadth and Community Investment*

Of course, there are instances that we cannot control, and the criminal legal system is imperfect in more ways than its incarceration of arrestees prior to trial. It is also imperfect in terms of outcomes—innocent individuals may take plea deals or be convicted at trial, and guilty individuals may have their charges dropped or be acquitted. These flaws will arise no matter what, but concerns regarding the overbreadth of a pretrial compensation scheme benefiting the potentially guilty should be limited for the following reasons.

When an individual is incarcerated pursuant to an arrest, society theoretically receives a benefit of safety from the individual’s

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enterprises through violent means” as well as offering the testimony of two witnesses. 481 U.S. 739, 743 (1987). In state court, this level of detail is not proffered.

<sup>343</sup> See generally Makar, *supra* note 33 (arguing that procedural due process protections are displaced at the pretrial stage with the anticipation that such protections will be provided at trial).

<sup>344</sup> See *Gerstein v. Pugh*, 420 U.S. 103, 120–21 (1975).

<sup>345</sup> See *supra* Part III.

incarceration.<sup>346</sup> Concerns of public safety drive in favor of pretrial detention. But to consider the benefits to public safety only in a situation where another member of society is arrested is a one-dimensional, but fairly common, perspective.<sup>347</sup>

Consider an individual who is released and later convicted. Perhaps the community feels the conviction is more just than not because the pressures of pretrial detention did not sway the accused from accepting a guilty plea. Ultimately, society feels vindicated and feels that the conviction is legitimate. A similar logic follows for someone who is released and not convicted.

For individuals who are remanded and convicted, however, there is some uncertainty and unease in the validity of the outcome. This is because there is a potential that the conviction may have been secured through an illegitimate process if pretrial detention was used to leverage the accused into taking a plea.<sup>348</sup> This may be less of a concern if the defendant is ultimately convicted through a trial;<sup>349</sup> nonetheless, there is a significant disadvantage for the accused to assist his defense counsel during trial preparation if incarcerated.<sup>350</sup>

Society assumes that it is receiving a significant benefit from guilty outcomes, not only in the form of public safety through pretrial detention but also validation that police officers are effective and that prosecutors are accurately ensuring justice is being done. In some cases this may be true, and in some cases it may not be.

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<sup>346</sup> *Salerno*, 481 U.S. at 750–51.

<sup>347</sup> *See, e.g., id.* at 751 (discussing that where the Government establishes by clear and convincing evidence that the accused presents a threat to the community, she may be detained prior to trial). *Salerno* does not discuss other factors that must be considered prior to determining that pretrial detention is permissible.

<sup>348</sup> Stevenson & Mayson, *supra* note 273, at 22 (“No fewer than five empirical studies published in the last year, . . . have shown that pretrial detention causally increases a defendant’s chance of conviction . . . . The increase in convictions is primarily an increase in guilty pleas among defendants who otherwise would have had their charges dropped. The plea-inducing effect of detention undermines the legitimacy of the criminal justice system itself . . .”).

<sup>349</sup> *See* Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 515 (2018). Using web-scraped data to conduct a quasi-experiment, this study found that pretrial detention led to a 13% increase in the likelihood of being convicted of at least one charge. *Id.* at 511. This study noted that pretrial detention affects not only the accused’s ability to assist in mounting a defense but also affects the accused’s ability to attend rehabilitative courses, such as anger management, which might help prevent future detention. *Id.* at 515.

<sup>350</sup> *Barker v. Wingo*, 407 U.S. 514, 532–33 (1972) (“The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.”).

In sum, every solution will have its consequences. Should our justice system not address unnecessary incarceration, the resultant negative feedback loop that such incarceration engenders will persist, rendering the criminal stages beyond pretrial hearings ineffective and inaccurate.

#### CONCLUSION

Preventive justice theory provides a lens to analyze the viability of pretrial detention practices in its current state. Although the criminal legal system's main goal is to regulate crime and encourage rehabilitation, this long-term goal seems to be lost in favor of short-term fixes to deter the overuse of pretrial detention, a result of procedural displacement practices. Pretrial detainees that either endure prolonged periods of incarceration and wait to be cleared of all charges or otherwise accept a guilty plea to escape wrongful detention suffer unjustifiably.

Considering a pretrial compensation scheme as a remedy for unnecessarily incarcerated individuals allows us to compare the effectiveness of other reforms. It is clear that the problem goes much deeper than what many call "bail reform." If meaningful reform is to happen in the name of increasing equality and accuracy in the criminal legal system, then larger-scale reform needs to occur to deter invidious practices at their root.

