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Megan Stevenson

University of Virginia School of Law

Sandra G. Mayson

University of Pennsylvania Carey Law School

Author ORCID Identifier:

 Sandra Mayson 0000-0001-5651-7912

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PRETRIAL DETENTION AND THE VALUE OF LIBERTY

Megan T. Stevenson & Sandra G. Mayson***

How dangerous must a person be to justify the state in locking her up for the greater good? The bail reform movement, which aspires to limit pretrial detention to the truly dangerous—and which has looked to algorithmic risk assessments to quantify danger—has brought this question to the fore. Constitutional doctrine authorizes pretrial detention when the government’s interest in safety “outweighs” an individual’s interest in liberty, but it does not specify how to balance these goods. If detaining ten presumptively innocent people for three months is projected to prevent one robbery, is it worth it?

This Article confronts the question of what degree of risk justifies pretrial preventive detention if one takes the consequentialist approach of current law seriously. Surveying the law, we derive two principles: 1) detention must avert greater harm (by preventing crime) than it inflicts (by depriving a person of liberty); and 2) prohibitions against pretrial punishment mean that the harm experienced by the detainee cannot be discounted in the cost-benefit calculus. With this conceptual framework in place, we develop a novel empirical method for estimating the relative personal cost of incarceration and crime victimization that we call relative harm valuation: a survey method that

* Associate Professor, University of Virginia School of Law.

** Professor, University of Pennsylvania Carey Law School.

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asks respondents to choose between being the victim of certain crimes or being jailed for varying time periods. The results suggest that even short periods of incarceration impose grave harms, such that a person must pose an extremely high risk of serious crime in order for detention to be justified. No existing risk assessment tool is sufficient to identify individuals who warrant detention. The results demonstrate that the stated consequentialist rationale for pretrial detention cannot begin to justify our current detention rates. They suggest that the existing system is instead inflicting pretrial punishment, and they counsel a rethinking of pretrial law and policy.

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INTRODUCTION

Suppose we can avert an armed robbery by incarcerating ten people for thirty days each. We do not know which of the ten would otherwise commit the crime, and the incarceration is not justified as punishment. Is it worth it? How many people should we be willing to lock up to prevent one future crime?

“None!” you may answer, on the ground that the state may never lock up any person solely to prevent future crime—at least not any person who is a responsible agent with her cognitive faculties intact. We live in a liberal democracy, not a dystopia.¹ You may be forgiven; this view has wide currency among thoughtful people.²

But your indignation runs counter to the facts and the law. Contrary to common perception, preventive detention is not just the stuff of science fiction. Governments of contemporary liberal democracies routinely engage in preventive detention of many forms. Pretrial detention is one type. Other types include juvenile detention, immigration detention, and manifold variants of short- and long-term civil commitment.³ In each of these fields, the government claims authority to deprive people of liberty solely on the basis that custody is necessary to prevent a person from committing future harm.⁴ The state makes no claim that the person to be detained has forfeited her right to liberty or that the deprivation is deserved. The detention is not punishment. Instead, the detention is “regulatory.” The U.S. Supreme Court has long authorized such

¹ See generally *Minority Report* (20th Century Fox 2002) (depicting dystopian future in which future-criminals are incapacitated before they commit any crime).

² See, e.g., Laurence H. Tribe, *An Ounce of Detention: Preventative Justice in the World of John Mitchell*, 56 *Va. L. Rev.* 371, 376–77 (1970) [hereinafter *Tribe, An Ounce of Detention*]; Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 *Harv. L. Rev.* 1329, 1370 (1971); see also *infra* notes 78–79 and accompanying text (addressing this perspective).

³ See *infra* notes 58–64 and accompanying text.

⁴ There are also forms of preventive detention that seek to avert unintentional rather than, or in addition to, willful acts of harm. Examples include quarantine to prevent the spread of communicable disease, as we know all too well, and jury sequestration. For discussions of the law of jury sequestration, see, e.g., Marcy Strauss, *Sequestration*, 24 *Am. J. Crim. L.* 63 (1996); James P. Levine, *The Impact of Sequestration on Juries*, 79 *Judicature* 266 (1996).

practices.⁵ Indeed, it is hard to imagine functional governance without them.

Nonetheless, preventive detention is terrifying. It does not adhere to the central constraint on criminal punishment—that it may be imposed only for a past wrongful act.⁶ The justification for preventive detention is merely “risk,” and risk is amorphous. So the central question for any preventive detention regime is what kind and degree of risk is sufficient to justify the detention at issue. If we incarcerate people who have a 20% chance of otherwise committing an assault during the period of detention, for instance, we can expect to prevent one assault for every five detentions. Is such detention justified? How much liberty *should* we sacrifice to prevent one crime?

As is, there is nothing approaching a consensus answer to this question.⁷ Courts and legislatures routinely assert the regulatory power of the state to detain those who pose a great enough risk, but even in long-standing preventive detention regimes, the relevant legal standards are vague at best.⁸ Generations of scholars have lamented the lack of legal guidance. Few have offered specific guidance themselves.⁹ The problem is that the question requires an explicit tradeoff between liberty and security, values that are infrequently measured and difficult to compare.

Difficulties notwithstanding, the bail reform movement has now placed the question of what risk justifies preventive detention squarely at center stage.¹⁰ Jurisdictions around the country are forsaking money bail in favor of more intentional decisions about pretrial custody. The new systems aspire to detain those arrested persons who pose a true threat and release

⁵ See *infra* notes 34–43 and accompanying text.

⁶ See H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 1, 23 (2d ed. 2008) (explaining how this constraint on punishment “maximizes individual freedom within the coercive framework of law”); Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (2008) (describing conceptual constraints on punishment).

⁷ See generally Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 *Nw. U. L. Rev.* 1 (2003) (urging scholars and courts to develop more coherent standards for preventive deprivations of liberty).

⁸ See *infra* Section I.A.

⁹ See Alan Dershowitz, *The Origins of Preventive Confinement in Anglo-American Law — Part I: The English Experience*, 43 *U. Cin. L. Rev.* 1, 60 (1974) (“We have not even begun to ask these kinds of questions, or to develop modes of analysis for answering them.”).

¹⁰ See Sandra G. Mayson, *Dangerous Defendants*, 127 *Yale L.J.* 490, 494 (2018) [hereinafter Mayson, *Dangerous Defendants*] (“[Bail reform] holds great promise, but also raises an extremely difficult question: what probability that a person will commit unspecified future crime justifies detention . . . ?”).

everyone else on appropriate conditions.¹¹ Flight risk is also a concern in the pretrial context, but a distinctly secondary one in practice.¹² The aspiration to limit detention to the dangerous requires each pretrial system to decide what kind of threat justifies detention. The advent of statistical risk assessment has crystallized the question further by forcing courts and stakeholders to deal in quantified probabilities and to confront the limits of prediction.¹³ Every jurisdiction that authorizes pretrial detention, and every court that imposes it, must decide what degree of risk warrants depriving a person of liberty.

This Article tackles the question of when pretrial detention is warranted to prevent future crime.¹⁴ Whereas the great bulk of prior scholarship on pretrial detention has focused on the shortcomings of current law,¹⁵ we take existing law as a given. This is not to endorse existing law as representing the best possible policy approach to detention. The project, rather, is to take existing legal doctrine seriously and to ask when detention meets the law's criteria. We present a conceptual framework for answering the question and then a novel empirical method for implementing the framework.

The conceptual framework is a straightforward consequentialist one. Constitutional law authorizes pretrial detention when the government's interest in safety "outweighs" the individual's interest in liberty.¹⁶ On our

¹¹ See Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, Vox (Oct. 17, 2018, 7:30 AM), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality> [https://perma.cc/V3Q S-J69G].

¹² Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1344, 1351 (2014) ("Historically, the U.S. system of bail and associated pretrial detention was employed solely to prevent pretrial flight, but increasingly, the many individuals awaiting trial in jail are detained because a judge has deemed them potentially dangerous."). For a thoughtful discussion of the various kinds of risk, often lumped together as "flight risk," see Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677 (2018).

¹³ John Monahan & Eric Silver, *Judicial Decision Thresholds for Violence Risk Management*, 2 Int'l J. of Forensic Mental Health 1, 6 (2003) ("The necessity for choosing a decision threshold for risk management decisions, long implicit in clinical risk assessment, is made apparent in actuarial prediction.").

¹⁴ Cf. Mayson, *Dangerous Defendants*, supra note 10, at 557–60 (reserving judgment on the degree of risk that justifies preventive detention). This Article does not address the power of courts to detain an accused person who has violated a court-imposed condition of release.

¹⁵ E.g., Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 Mich. L. Rev. 510 (1986); Chalmous G. Reemes, *United States v. Salerno: The Validation of Preventive Detention and the Denial of a Presumed Constitutional Right to Bail*, 41 Ark. L. Rev. 697, 719–22 (1988).

¹⁶ See infra notes 29–44 and accompanying text.

reading, this doctrine establishes a simple cost-benefit framework.¹⁷ In order to be justified in those terms, pretrial detention must, at minimum, avert more harm than it inflicts. The most significant harms at stake are the cost of crime to the potential crime victim and the cost of pretrial detention to the detainee. Within this calculus, prohibitions against pretrial punishment mean that the well-being of the arrestee must be fully considered. The challenge is thus to develop a direct measure of the relative harms of incarceration and crime.

To meet the challenge, the Article deploys a novel form of contingent valuation that we call “relative harm valuation” (“RHV”).¹⁸ It aims to estimate the relative harm of incarceration versus crime victimization while avoiding some of the distortions that plague traditional cost-benefit and contingent-valuation methods. Our method is intentionally simple, and it echoes John Rawls’ famous notion that the principles of justice are those that a rational person would choose behind a “veil of ignorance” as to her own traits and position in society.¹⁹ Adapting his effort to detach normative analysis from self-interest, we conduct a survey that requires respondents to compare the costs of detention and crime directly, imagining themselves as both detainee and as crime victim. We ask questions like, “How much time in jail is as bad as being the victim of a burglary?” and, “If you had to choose between spending a month in jail or being the victim of a burglary, which would you choose?”²⁰

The survey results suggest that people view incarceration as an incredibly harmful experience. Most would choose crime-victimization over even short jail stints. The median respondent says that a single day in jail is as costly as a burglary, that three days are as costly as a robbery, and that a month in jail is as costly as an aggravated assault. Notably,

¹⁷ See *infra* Section I.B.

¹⁸ We developed this concept and conducted our first study in 2017 but learned in the spring of 2020 that others have used the same method in other contexts. Most notably, the legal scholars Jane Bambauer and Andrea Roth have used a similar survey method to estimate when carceral punishment becomes “excessive” for constitutional purposes. See *infra* note 119. Conversations with Bambauer and Roth were valuable in refining our approach. We consider the existence of these other efforts to be a strength of the present study rather than a weakness. The other studies to have deployed RHV have also documented a surprising degree of aversion to incarceration or involuntary commitment among a sizable portion of respondents. See *infra* note 141.

¹⁹ John Rawls, *A Theory of Justice* 118 (2d ed. 1999).

²⁰ This method is a variant of the survey technique formally known as “contingent valuation,” which has provided most of the commonly used estimates for the costs of crime. See *infra* notes 103–07 and accompanying text.

these results are very consistent across race, gender, and socioeconomic class of the respondent. They are also quite similar for those who have personal experience with incarceration or crime victimization. Aversion to incarceration is broad and widespread.

By focusing on costs to the crime victim and incarcerated person, our method puts aside indirect and fiscal costs. However, we expect these to accrue on both sides of the ledger. Crime can create fear in the community, but so can incarceration. Law enforcement and prosecution are expensive to the state, but so is incarceration. Including such costs might make the analysis more nuanced, but we do not think it would meaningfully change the main result: that even a short period of incarceration inflicts very grave harms.

The severity of the harm that incarceration inflicts (according to our median respondent) means that preventive detention can only be justified on consequentialist grounds if there is a very high risk that the person would otherwise commit serious crime. Jailing a person for thirty days is justifiable only if it is expected to prevent crimes at least as harmful as a serious assault. Jailing someone for just one day is justifiable only if it averts crime as serious as burglary. These risk thresholds are higher than we can meet with statistical evidence. In studies of one widely used risk assessment tool, for instance, even defendants in the highest risk group have only a 2.5% chance of rearrest for a violent offense within a month.²¹ We would have to detain forty such people for one month each, not just one person, to expect to avert one violent offense.

Given the high risk-threshold for preventive detention and the limits of our predictive abilities, pretrial detention on the basis of dangerousness should be rare. But it is not. On any given day, almost 500,000 people are held in jails awaiting trial.²² Many more cycle through pretrial detention each year.²³ A significant number of these detentions may be the unintentional result of a court setting money bail that the accused cannot afford.²⁴ A much smaller number may be justified on the basis of flight

²¹ See Thomas Blomberg, William Bales, Karen Mann, Ryann Meldrum & Joe Nedelec, Ctr. for Criminology and Pub. Pol'y Rsch., Validation of the COMPAS Risk Assessment Classification Instrument 47 tbl.8 (2010).

²² Zhen Zeng, Bureau of Just. Stat., Jail Inmates in 2017, 1 fig.1, 5 tbl.3 (2019), www.bjs.gov/content/pub/pdf/ji17.pdf [<https://perma.cc/NPM3-NP84>].

²³ *Id.* at 1.

²⁴ E.g., Sandra G. Mayson, Detention by Any Other Name, 69 Duke L.J. 1643, 1653 (2020) [hereinafter Mayson, Detention by Any Other Name] (citing statistics regarding detention on money bail).

risk—a ground for detention that this paper does not address.²⁵ Yet the centrality of public-safety discourse in the growing backlash to bail reform efforts demonstrates that crime risk dwarfs flight risk, in the view of both courts and the public, as a concern in the pretrial phase.²⁶ The focus on crime risk suggests that a substantial portion of the millions of people who cycle through jails each year are there because they were perceived to be dangerous.

There are many possible explanations for the dramatic gap between theory and practice. The most likely, we surmise, is that current practice reflects an implicit discounting of the value of detainees' well-being relative to the well-being of potential crime victims. This might be because accused people are viewed as criminals who have forfeited the right to liberty; because accused people are disproportionately Black, brown, and poor while the paradigmatic crime victim in the public imagination is white and wealthy; because pretrial detention is assumed to be credited against legitimate punishment imposed after conviction; or all of the above.

Some of these grounds for discounting the welfare of arrestees are easier to dismiss than others. The most difficult ground to dismiss is the idea that arrestees are not entitled to the same concern as crime victims because they are not wholly innocent; they are in some manner culpable for having created the risk at issue. As one of us has written elsewhere, this notion runs headlong into the presumption of innocence and prohibition on pretrial punishment, foundational principles of the American legal order.²⁷ It is extremely difficult to reconcile those principles with the idea that the state can discount the welfare of arrestees on the basis of their (probable) guilt. Yet the intuition that the state may treat accused persons as having impaired moral status is strong, and in some circumstances, it seems unjust *not* to discount an arrestee's welfare relative to a person the arrestee is credibly alleged to have threatened.

This Article does not resolve the conflict between the prohibition on pretrial punishment and the human impulse to discount the welfare of

²⁵ But see Wiseman, *supra* note 12, at 1349 (arguing that detention is rarely necessary to manage flight risk given advancing surveillance technologies).

²⁶ See, e.g., Jesse McKinley, *The Bail Reform Backlash that Has Democrats at War*, N.Y. Times (Feb. 14, 2020), <https://www.nytimes.com/2020/02/14/nyregion/new-york-bail-reform.html> [<https://perma.cc/NU9F-B3RZ>]; see also, e.g., H.R. 81, 2020 Leg., Reg. Sess. (Ala. 2020) (proposing amendment to state constitution to permit pretrial detention for dangerousness).

²⁷ Mayson, *Dangerous Defendants*, *supra* note 10, at 537–38.

arrestees in a cost-benefit calculus. Rather, it demonstrates that a rigorous consequentialist analysis raises deep questions about how the law ought to value individual liberty and welfare, questions that echo across many fields of law. It also demonstrates that, left unexamined, consequentialist rationales can mask decision-making processes that rely on judgments of worth or that are dictated by perverse incentives. Confronting these processes will be important to the long-term success of pretrial reform.

This Article makes four contributions. The first is to fully articulate the consequentialist conceptual framework for detention decisions that current law entails. The second is the method we devise to apply that framework: relative harm valuation, which allows for the comparison of intangible harms without resorting to the distorting intermediary of dollars. This Article's third contribution is the information the survey reveals: Even short periods of jail detention impose harms as grave as serious crimes. The logical corollary is that *if* we value the liberty of accused people and crime victims by a common standard, pretrial detention for the purpose of preventing crime is almost never warranted on cost-benefit grounds. Finally, in illuminating the chasm between the cost-benefit rationale for pretrial detention and our actual practices, this Article highlights the need for policymakers, courts, and bail reformers to grapple with the retributive impulse and institutional incentives that shape detention practice on the ground.

This Article proceeds in three Parts. Part I describes the legal doctrine that authorizes pretrial preventive detention on cost-benefit grounds. It extrapolates the consequentialist conceptual framework that this doctrine implies, then explains why existing empirical methods are inadequate to weigh the harm of criminal victimization against the harm of incarceration. Part II presents our relative-harm-valuation surveys and explains the results. Part III explores the implications of the survey results for pretrial policy and beyond.

I. WHAT DEGREE OF RISK JUSTIFIES DETENTION?

As interpreted by the Supreme Court, the U.S. Constitution authorizes pretrial preventive detention when the government's interest in security outweighs the individual's interest in liberty.²⁸ This raises the difficult question of when the security benefit of detention—averting some potential future harm—*does* outweigh its cost in liberty. How severe must

²⁸ United States v. Salerno, 481 U.S. 739, 750–51 (1987).

the potential harm be and how likely to occur within a given timespan? The question is of central importance to pretrial policy. Unfortunately, neither law nor prior scholarship offers much of an answer. The central obstacle has been the difficulty of valuing the intangible harms in the balance.

A. The Governing Law

The Due Process Clause prohibits pretrial punishment.²⁹ This is an undisputed precept of American constitutional law. In ordinary speech, both citizens and courts sometimes refer to this prohibition as the “presumption of innocence,” although technically the presumption is just “a doctrine that allocates the burden of proof in criminal trials.”³⁰ In its broader sense, though, the presumption stands for the proposition that the state may not subject a person to “the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement” except on proof beyond a reasonable doubt.³¹ The state may not impose punishment before conviction. In this sense, the presumption of innocence is a “bedrock” principle, “axiomatic and elementary,” the enforcement of which “lies at the foundation of the administration of our criminal law.”³²

The prohibition on pretrial punishment does not, however, preclude all pretrial deprivations of liberty. The government has an important interest in ensuring that criminal legal proceedings unfold fairly and promptly. It can limit individual liberty as necessary in order to protect that interest by requiring accused people and witnesses to show up for court, by imposing conditions of release, and, in some circumstances, by detaining an accused person or witness pending trial.³³ Such detention does not claim justification on the basis of guilt, but rather on the basis of a cost-benefit analysis; the state’s interest in ensuring the fair and prompt administration of justice simply outweighs the individual’s right to liberty.

²⁹ *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); see also *Salerno*, 481 U.S. at 746 (noting that pretrial punishment is unconstitutional).

³⁰ *Bell*, 441 U.S. at 533.

³¹ *In re Winship*, 397 U.S. 358, 367 (1970).

³² *Id.* at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

³³ *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (“The right to release before trial is conditioned upon the accused’s giving adequate assurance that he will stand trial and submit to sentence if found guilty.”).

United States v. Salerno tested the government's authority to detain an accused person for a different reason: to prevent the arrestee from committing other crimes unrelated to the pending charge.³⁴ The petitioners argued that such detention for dangerousness constituted pretrial punishment, but the Supreme Court disagreed.³⁵ The Court reasoned that the detention was not intended as punishment.³⁶ The government did not seek to justify the detention by reference to the petitioners' guilt for the offenses charged.³⁷ The government sought to justify the detention, instead, solely on the basis of danger. It claimed that, in view of the risk the petitioners posed, detention was necessary to protect public welfare.

Before the case reached the Supreme Court, the U.S. Court of Appeals for the Second Circuit had held that the government may not detain a person on grounds of dangerousness alone. Substantive due process, the Second Circuit held, categorically "prohibits the total deprivation of liberty simply as a means of preventing future crimes."³⁸ The Supreme Court rejected that view. It concluded that danger alone may indeed be a sufficient basis for pretrial detention because "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."³⁹

Salerno thus appeared to authorize pretrial preventive detention on pure cost-benefit—or consequentialist—grounds.⁴⁰ To say that detention is permitted when the government's interest in safety "outweighs" an individual's interest in liberty is to say that detention is permitted when the harm the government seeks to avert exceeds the harm that detention inflicts on the individual detained. Detention is permitted when its

³⁴ 481 U.S. at 741.

³⁵ *Id.* at 746–47.

³⁶ *Id.* at 747.

³⁷ *Id.*; see also *Addington v. Texas*, 441 U.S. 418, 428 (1979) ("In a civil commitment state power is not exercised in a punitive sense."); *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997) (holding "that involuntary confinement pursuant to the [Kansas Sexually Violent Predator] Act is not punitive").

³⁸ *United States v. Salerno*, 794 F.2d 64, 71–72 (2d Cir. 1986), *rev'd*, 481 U.S. 739 (1987).

³⁹ *Salerno*, 481 U.S. at 748.

⁴⁰ We recognize that this is not the only possible interpretation of *Salerno*; a deontological characterization of the Court's reasoning might also be possible. We adopt the consequentialist interpretation, however, because it is the most obvious and straightforward reading of the Court's language.

benefits exceed its costs.⁴¹ If, on the other hand, detention is an “excessive” response to the state’s concerns, either at the outset or because of its duration, the detention becomes punitive and violates due process.⁴²

Salerno left open the question of when exactly the governmental interest in safety *does* outweigh the individual’s interest in liberty: How dangerous must a person be to justify the state in locking her up for the greater good? The Court held that the federal preventive detention regime (as it existed in 1987) satisfied due process in part because the regime limited detention eligibility to those charged with “a specific category of extremely serious offenses” and required the state to prove that the individual posed a “demonstrable danger” that could not be managed through less intrusive means.⁴³ But the Court offered no further clarity about the type and degree of risk that constitutes a sufficient threat in an individual case.

The other layers of law that govern pretrial detention practice add some detail to *Salerno*’s broad consequentialist framework, but not all that much. In federal law, the Bail Reform Act of 1984 embeds the consequentialist framework that *Salerno* endorsed. As the *Salerno* Court noted, the Bail Reform Act permits detention only for those charged with certain offenses that Congress “specifically found” to denote a threat, and only if no condition of release can “reasonably assure” the safety of the community.⁴⁴ The implied logic of this scheme is that when a person is charged with an offense that indicates special risk and a court determines that the person poses a threat that cannot be managed through less intrusive means, the benefit of preventive detention outweighs its cost in liberty.

The implementation of the Act and its evolution over time have undercut its consequentialist logic, however. Following the lead of the Senate Report that accompanied the Act at its passage, courts have defined “safety” in extremely broad terms.⁴⁵ Congress has gradually

⁴¹ This is true at least in the pretrial context. The *Salerno* Court did not specify whether this reasoning applies to people not charged with any crime. *Salerno*, 481 U.S. at 748.

⁴² See *id.* at 747–48; *Bell v. Wolfish*, 441 U.S. 520, 538–39 (1979).

⁴³ *Salerno*, 481 U.S. at 747–50.

⁴⁴ *Id.* at 750; see also 18 U.S.C. §§ 3142 (e)-(f) (enumerating various criminal charges that raise a “rebuttable presumption” that the perpetrator will endanger “the safety of any other person or the community” before trial and is therefore eligible for preventative detention).

⁴⁵ S. Rep. No. 98-225, at 12 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3195 (“[T]he language referring to the safety of the community refers to the danger that the defendant might

expanded the list of detention-eligible offenses, as well as the circumstances that give rise to a “presumption” of dangerousness.⁴⁶ And the statute never did require the court considering detention to explicitly weigh the benefit of detention against its costs. So, although the Bail Reform Act pays lip service to consequentialist reasoning, it authorizes a great deal of preventive detention without rigorous cost-benefit analysis. As of 2018, federal pretrial detention rates were hovering around 70%, more than double what they were in 1988.⁴⁷ The federal detention regime does not provide any clarity as to when the benefit of detention in fact exceeds its costs.

One might look to state law for answers, given that many states have codified pretrial preventive detention provisions in their constitutions or statutory law. But existing state law is not much help either. As one of us recently summarized the field:

Six of the nineteen state constitutional provisions that authorize preventive [pretrial] detention condition it on a risk of violence. But ten condition it on a vaguely articulated “danger” or the need to ensure

engage in criminal activity to the detriment of the community.”); *id.* (advising that “safety” should “be given a broader construction than merely danger of harm involving physical violence”); *id.* at 13 (“The Committee also emphasizes that the risk that a defendant will continue to engage in drug trafficking constitutes a [relevant] danger”); see also, e.g., *United States v. Kelsey*, 82 F. App’x 652, 654 (10th Cir. 2003) (“Mr. Kelsey has demonstrated an inability to stay away from drugs and drug-related activity, thereby making him a danger to society.”); *United States v. Strong*, 775 F.2d 504, 506 (3d Cir. 1985) (finding that “Congress intended to equate traffic in drugs with a danger to the community”).

⁴⁶ Compare 18 U.S.C. § 3142(e)–(f) (1996), with 18 U.S.C. § 3142(e)–(f) (2018) (adding several additional criminal charges to the list of those that give rise to a presumption of dangerousness). The “presumption” imposes only a burden of production on the defendant; the government retains the burden of persuasion. E.g., *United States v. Stone*, 608 F.3d 939, 945 (6th Cir. 2010); see also Hearing on “The Administration of Bail by State and Federal Courts: A Call for Reform” Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. of the Judiciary, 116th Cong. 1 (2019) (testimony of Alison Siegler, Clinical Professor of Law and Director of the Federal Criminal Justice Clinic) (describing current federal detention practices); Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 *Am. Econ. & L. Rev.* 24, 51–53 (2020) (using an instrumental variables approach to analyze the effect of pretrial detention on federal case outcomes and finding that detention increases the likely sentence).

⁴⁷ Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate*, in *Context*, 82 *Fed. Prob.* 13, 13 (2018). This shift appears to be at least partly due to the high pretrial detention rate (around 95%) for immigration offenses, *id.* at 14 fig.3, which now constitute around a third of the federal docket. *Federal Judicial Caseload Statistics 2020*, U.S. Courts, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020> [<https://perma.cc/4UZ6-6FL6>] (last visited Oct. 31, 2021) (reporting that immigration offenses “constituted 36 percent of all criminal defendant filings” in federal court in 2020).

“safety,” and three do not articulate a severity-of-harm threshold at all. State statutory law varies tremendously, but rarely provides an explicit severity-of-harm threshold. . . . As for the likelihood of harm, most laws mandate restraint if it is necessary to “adequately protect” or “reasonably assure” the safety of the community.⁴⁸

These vague legal standards provide minimal guidance.

Many states aspire to do better. New Jersey and New Mexico have recently enacted new constitutional provisions and statutes governing pretrial detention.⁴⁹ In 2021, Illinois became the first state to eliminate money bail, which should have the effect of limiting pretrial detention to the circumstances in which the Illinois Constitution allows it.⁵⁰ Other state legislatures may pursue pretrial reform in coming years,⁵¹ and if they do they will look to the existing systems that minimize reliance on cash bail: the new regimes in New Jersey, New Mexico, and Illinois; the federal Bail Reform Act⁵² and the pretrial detention law of the District of Columbia;⁵³ the Uniform Law Commission’s (“ULC”) new Pretrial

⁴⁸ Mayson, *Dangerous Defendants*, *supra* note 10, at 561.

⁴⁹ N.J. Const. art. 1, ¶ 11 (amended 2017); N.J. Stat. Ann. § 2A:162-15 et seq. (West 2021); N.M. Const. art. II, § 13 (amended 2016); N.M. Dist. Ct. R. Crim. Proc. §§ 5-401, 5-409 (2020). California’s legislature passed a comprehensive bail reform statute, but the voters rejected it by referendum. E.g., Mathew Borges, *California Rejects Proposition to End Cash Bail*, *Jurist* (Nov. 5, 2020, 12:08 PM), <https://www.jurist.org/news/2020/11/california-rejects-proposition-to-end-cash-bail> [<https://perma.cc/KJ5Z-4A7W>]. New York enacted comprehensive bail reform but subsequently rolled it back substantially and remains alone among the states in prohibiting detention on the basis of dangerousness. Roxanna Asgarian, *The Controversy over New York’s Bail Reform Law, Explained*, *Vox* (Jan. 17, 2020, 8:30 AM), <https://www.vox.com/identities/2020/1/17/21068807/new-york-bail-reform-law-explained> [<https://perma.cc/3QHN-FRF2>]; Jamiles Lartey, *New York Rolled Back Bail Reform. What Will The Rest Of The Country Do?*, *The Marshall Project* (Apr. 23, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/23/in-new-york-s-bail-reform-backlash-a-cautionary-tale-for-other-states> [<https://perma.cc/5U5S-5ZC7>].

⁵⁰ VICTORY: Illinois Just Passed the Pretrial Fairness Act and Ended Money Bail, *Chi. Council of Lawyers* (Jan. 13, 2021), <https://chicagocouncil.org/illinois-just-passed-the-pretrial-fairness-act-and-ended-money-bail/> [<https://perma.cc/USK6-7XNM>]; Ill. Const. art. I, § 9 (permitting detention only for those charged with an offense punishable by death, life imprisonment, or mandatory prison time “when the court, after a hearing, determines that release of the offender would pose a real and present threat to the physical safety of any person”).

⁵¹ See, e.g., Naila Awan, *Winnable Criminal Justice Reforms in 2022*, *Prison Pol’y Initiative* (Dec. 2021), <https://www.prisonpolicy.org/reports/winnable2022.html> [<https://perma.cc/KQ6M-E9R3>] (advocating a number of pretrial reforms).

⁵² 18 U.S.C. § 3142 et seq. (2021).

⁵³ D.C. Code § 23-1321 et seq. (2021).

Release and Detention Act,⁵⁴ and statute templates developed by advocacy organizations.⁵⁵ All of these models share the same structure. They permit detention to prevent future crime when the risk is serious and when no intervention short of detention can adequately reduce it. The implied logic, again, is consequentialist. Each regime strives to articulate the conditions under which the benefit of detention outweighs its cost in liberty.

Even these vanguard regimes, however, are hazy about what risk is sufficiently serious to justify detention. The ULC Act, which is arguably the most specific, authorizes detention when a court finds by clear and convincing evidence that “it is likely that the individual will abscond, obstruct justice, violate an order of protection, or cause significant harm to another person,” or it is “extremely likely” that a person charged with a felony will not appear in court, and “no less restrictive condition is sufficient to address satisfactorily the relevant risk.”⁵⁶ The Act does not specify what constitutes “significant harm,” what probability of harm makes it “likely,” or what degree of risk reduction would address the risk “satisfactorily.” Nor does the Act designate specific detention-eligible offenses; it leaves that task to states that adopt it.⁵⁷

Lastly, one might look to the law governing preventive detention in other arenas for help. After all, pretrial detention is just one form of preventive detention among many.⁵⁸ Other routine forms of preventive detention include involuntary civil commitment,⁵⁹ material witness

⁵⁴ Pretrial Release & Det. Act (Unif. L. Comm’n 2020). One of the authors served as Associate Reporter for the Act.

⁵⁵ Andrea Woods & Portia Allen-Kyle, ACLU Smart Just., *A New Vision for Pretrial Justice in the United States* 1 (2019); Civ. Rts. Corps, *Pretrial Release and Detention Act 1* (2020); Timothy R. Schnacke, Ctr. for Legal & Evidence-Based Pracs., “Model” Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention 8 (2017); Colin Doyle, Chiraag Bains & Brook Hopkins, Harv. L. Sch. Crim. Just. Pol’y Program, *Bail Reform: A Guide for State and Local Policymakers* 1–2 (2019).

⁵⁶ Pretrial Release & Det. Act § 403 (Unif. L. Comm’n 2020).

⁵⁷ See *id.* § 102(4) and comment.

⁵⁸ See Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 Harv. Nat’l Sec. J. 85, 86–87 (2011) (“Preventive detention is not prohibited by U.S. law or especially frowned upon in tradition or practice. . . . The federal government and all 50 states together possess a wide range of statutory preventive detention regimes that are frequently used, many of which provoke little social or legal controversy.”).

⁵⁹ Megan Testa & Sara G. West, *Civil Commitment in the United States*, 7 *Psychiatry* 30, 31–38 (2010); Klein & Wittes, *supra* note 58, at 87 (noting the state’s “protective custody powers, permitting the noncriminal detention—often for their own protection—of, among others, the intoxicated, alcoholics, drug addicts, the homeless, and pregnant drug users”).

detention,⁶⁰ immigration detention,⁶¹ and the detention of juveniles who have been adjudicated delinquent.⁶² Less routinely, the state can detain individuals who present a national security threat in wartime.⁶³ And as we have all learned, the state can mandate and enforce quarantine to prevent the transmission of disease.⁶⁴ There are important differences across these contexts, but the justification for depriving a person of liberty is the same in each: the deprivation is necessary to avert some greater harm. The question is what risk is sufficient to restrict a person's liberty for the greater good.

The only lesson from this landscape, however, is that the question has proven intractable and enduring. Constitutional litigation has led the Supreme Court to articulate procedural requirements for detention decisions, but never a substantive risk standard.⁶⁵ Preventive detention

⁶⁰ Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Crim. Proc.* 673 (4th ed. 2004) (“Nearly all states have enacted provisions dealing with the pretrial confinement of material witnesses.”).

⁶¹ See, e.g., Frances M. Kreimer, Note, *Dangerousness on the Loose: Constitutional Limits to Immigration Detention as Domestic Crime Control*, 87 *N.Y.U. L. Rev.* 1485, 1485–89 (2012).

⁶² See, e.g., *In re Gault*, 387 U.S. 1, 14–19 (1967) (summarizing history and objectives of juvenile court system, in which “the procedures, from apprehension through institutionalization, were to be ‘clinical’ rather than punitive”); *Schall v. Martin*, 467 U.S. 253, 281 (1984) (rejecting constitutional challenge to juvenile detention pending adjudication).

⁶³ U.S. Const. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”); Klein & Wittes, *supra* note 58, at 87. The most infamous example of wartime preventive detention in U.S. history was the Japanese internment during World War II, upheld by the Supreme Court in two decisions that the Court has quite recently renounced. *Hirabayashi v. United States*, 320 U.S. 81, 91–92 (1943); *Korematsu v. United States*, 323 U.S. 214, 214–19 (1944), abrogated by *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“*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)). Notably, the Court found the Japanese internment retrospectively unconstitutional because the criterion for detention was race alone. *Trump*, 138 S. Ct. at 2423 (“The forcible relocation of U.S. citizens to concentration camps, *solely and explicitly on the basis of race*, is objectively unlawful and outside the scope of Presidential authority.” (emphasis added)).

⁶⁴ See, e.g., Polly J. Price, *Epidemics, Outsiders, and Local Protection: Federalism Theater in the Era of the Shotgun Quarantine*, 19 *U. Pa. J. Const. L.* 369, 420–22 (2016) (describing the federal government’s quarantine authority); Michael R. Ulrich & Wendy K. Mariner, *Quarantine and the Federal Role in Epidemics*, 71 *SMU L. Rev.* 391, 398–412 (2018) (discussing the legality of federal quarantine regulations).

⁶⁵ In the context of civil commitment, the Court has held that due process prohibits commitment in the absence of danger, *O’Connor v. Donaldson*, 422 U.S. 563, 573–76 (1975), and requires the state to prove “dangerousness” by clear and convincing evidence. *Addington*

statutes are notoriously non-specific. One treatise synthesizes the “dangerousness” standards in civil commitment statutes as follows:

[T]he potential harm must be serious or substantial, but the patient need not be homicidal. By some authority, the potential harm must be physical, but, by other authority, emotional injury to others may be sufficient. Potential harm to property may be sufficient, but there is contrary authority.⁶⁶

No standard civil commitment statute specifies the numerical probability of the relevant harm occurring within a given timespan that is sufficient to warrant confinement.⁶⁷ Statutes providing for the indefinite commitment of “sexually violent predators” are, for the most part, equally

v. Texas, 441 U.S. 418, 432–33 (1979). But it has not defined “dangerousness.” As a bevy of commentators has noted, the requirement of clear and convincing evidence of “dangerousness” is largely meaningless without some specification of the probability and magnitude of harm that constitutes “danger.” See John Monahan & David B. Wexler, *A Definite Maybe: Proof and Probability in Civil Commitment*, 2 L. & Hum. Behav. 37, 37–38 (1978) (pointing out the distinction between a procedural standard of proof like “clear and convincing evidence” and a substantive “standard of commitment”—the probability of harm that justifies a liberty deprivation); Eric S. Janus & Paul E. Meehl, *Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings*, 3 Psych. Pub. Pol’y & L. 33, 42–43 (1997) (describing a standard of proof as “a standard for measuring epistemological uncertainty,” whereas a standard of commitment is “a standard for measuring ontological uncertainty”); Fredrick E. Vars, *Delineating Sexual Dangerousness*, 50 Hous. L. Rev. 855, 855–60 (2013) (discussing this distinction further). With respect to “sexually violent predators” (“SVPs”), the Court has not specified what likelihood of a future sex offense over what timespan is sufficient to justify detention, nor what type of prospective sex offense is sufficiently severe. See *Kansas v. Hendricks*, 521 U.S. 346, 346–49 (1997); *Kansas v. Crane*, 534 U.S. 407, 409 (2002) (addressing and resolving other questions about SVP commitment, but not that one). Quarantine, meanwhile, is uncharted constitutional terrain at the Supreme Court. The Court has never determined whether due process sets a risk threshold for involuntary sequestration. See Ulrich & Mariner, *supra* note 64, at 403–23 (arguing that constitutional standards for involuntary civil commitment should apply equally to involuntary quarantine).

⁶⁶ 56 C.J.S. *Mental Health* § 46 (2021). There is similar variation with respect to the probability and imminence of the potential harm that justifies detention. *Id.*

⁶⁷ See, e.g., *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1240–41 (1974) (“The failure of present commitment standards to indicate what probabilities of various harms justify commitment creates the danger that courts will ignore the central question in police power commitments—the amount of anticipated social harm required before an individual can be deprived of his liberty for a specified period.”); Grant H. Morris, *Defining Dangerousness: Risking a Dangerous Definition*, 10 J. Contemp. Legal Issues 61, 71 (1999) (“The statement remains as true today as when it was made twenty-five years ago.”).

vague.⁶⁸ Most require the government to show that the person at issue is “dangerous”;⁶⁹ or it must show that it is “likely”⁷⁰ or that there is a “high”⁷¹ or “substantial[.]”⁷² risk that he will commit a sexual offense if not institutionalized. Although a handful of jurisdictions *do* require a finding that the potential harm is more likely than not (the probability exceeds 50%),⁷³ courts in other jurisdictions have explicitly rejected a numerical threshold.⁷⁴ To the authors’ knowledge, no statute or court has articulated

⁶⁸ Around half of the states have enacted such a statute. E.g., Sexually Violent Persons, Ariz. Rev. Stat. §§ 36-3701–17 (LexisNexis 2017); Sexually Violent Predators, Cal. Welf. & Inst. Code §§ 6600–09 (West 2014); Involuntary Civil Commitment of Sexually Violent Predators, Fla. Stat. §§ 394.912–.926 (2010); Sexually Violent Persons Commitment Act, 725 Ill. Comp. Stat. §§ 207/1–/99 (2013). So has Congress. 18 U.S.C. § 4248 (2006) (passed as part of the Adam Walsh Child Protection and Safety Act of 2006).

⁶⁹ E.g., N.Y. Mental Hyg. L. § 10.03 (Consol. 2018) (providing for commitment of those “likely to be a danger to others and to commit sex offenses”); D.C. Code §§ 22-3803(1), 22-3808 (2012) (providing for the commitment of a person “who by a course of repeated misconduct in sexual matters has evidenced such lack of power to control his or her sexual impulses as to be dangerous to other persons”).

⁷⁰ E.g., Ariz. Rev. Stat. § 36-3701(7)(b) (LexisNexis 2017); Cal. Welf. & Inst. Code § 6600(a)(1) (West 2019); Fla. Stat. § 394.912(10)(b) (2016); 2018 Kan. Sess. Laws 828; 1985 Mass. Acts 1190–91; Minn. Stat. § 253D.02(16)(a) (2021); 2006 Neb. Laws 24–31; 1998 N.J. Laws 660; N.D. Cent. Code § 25-03.3-01(8); N.Y. Mental Hyg. Law § 10.03(e) (Consol. 2018); S.C. Code Ann. § 44-48-30(9); Tex. Health & Safety Code Ann. § 841.003(a)(2); 2009 Va. Acts 82.

⁷¹ N.H. Rev. Stat. Ann. § 135-E:1 (2010).

⁷² 725 Ill. Comp. Stat. 207/5(f); Tenn. Code Ann. § 33-6-501(2) (2000).

⁷³ 1998 Iowa Acts 420; Mo. Rev. Stat. § 632.480(5) (2017); Wash. Rev. Code § 71.09.020(8) (2021); Wis. Stat. § 980.01(7) (2021); see also *Westerheide v. State*, 767 So. 2d 637, 652–53 (Fla. Dist. Ct. App. 2000) (defining “likely” as “having a better chance of existing or occurring than not”); *G.H. v. Mental Health Bd. (In re Interest of G.H.)*, 781 N.W.2d 438, 445 (Neb. 2010) (“Medical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least ‘probable,’ in other words, more likely than not.”).

⁷⁴ *People v. Superior Court (Ghilotti)*, 44 P.3d 949, 972 (Cal. 2002) (“[T]he statute does not require a precise determination that the chance of reoffense is *better than even*. . . . [T]he person is ‘likely’ to reoffend if . . . the person presents a *substantial danger*, that is, a *serious and well-founded risk*, that he or she will commit such crimes if free in the community.”); *Commonwealth v. Boucher*, 780 N.E.2d 47, 50 (Mass. 2002) (“While ‘likely’ indicates more than a mere propensity or possibility, it is not bound to the statistical probability inherent in a definition such as ‘more likely than not,’ and the terms are not interchangeable.”); *In re Civ. Commitment of Ince*, 847 N.W.2d 13, 16, 21 (Minn. 2014) (“The term ‘likely’ . . . does not indicate a defined numeric level of certainty We also conclude that ‘highly likely’ cannot be defined by a numeric value.”); cf. *In re Det. of Hayes*, 747 N.E.2d 444, 453 (Ill. App. Ct. 2001) (“We determine that the phrase ‘substantially probable’ in the Act also means ‘much more likely than not’ However, we emphasize that this definition cannot be reduced to a mere mathematical formula or statistical analysis.”).

a risk standard that anchors a numerical probability to a defined time period.

The vagueness of “danger” standards in the law of preventive detention has frustrated scholars for generations. As Eric Janus and Paul Meehl once explained, “Developing quantified measures for the standard of commitment is an essential step in assuring that the standard in use is indeed the high standard claimed, and that the standard can be enforced and applied fairly and uniformly in the trial and appellate process.”⁷⁵ Many others have echoed the point, urging legislatures and courts to specify the magnitude and probability of harm (over a specified timespan) that can justify detention in each context.⁷⁶ With few exceptions, their pleas have fallen on deaf ears.

The state of play, then, is that the Supreme Court has affirmed the government’s authority to preventively detain accused people on the basis of consequentialist balancing, but neither Supreme Court doctrine nor any other body of relevant law offers much guidance about how severe and how likely a potential future harm must be in order to justify depriving a person of liberty. Nonetheless, preventive detention regimes that invoke consequentialist logic are in operation across the country. More will be soon. The question of what risk justifies detention is as important as it is daunting.

B. Conceptual Framework

How should one evaluate when detention is justified in consequentialist terms? The subject is shockingly undertheorized.⁷⁷ This is, in significant

⁷⁵ Janus & Meehl, *supra* note 65, at 60.

⁷⁶ E.g., Dershowitz, *supra* note 9, at 59–60; Abhi Raghunathan, Note, “Nothing Else but Mad”: The Hidden Costs of Preventive Detention, 100 *Geo. L.J.* 967, 967 (2012) (lamenting that “for over thirty years, the Court has consistently refused to define the term *dangerous*”); Mayson, *Dangerous Defendants*, *supra* note 10, at 498–99; Eliot T. Tracz, *Mentally Ill, or Mentally Ill and Dangerous? Rethinking Civil Commitments in Minnesota*, 40 *Mitchell Hamline L.J. Pub. Pol’y & Prac.* 137, 139 (2019) (noting that the Minnesota Treatment and Commitment Act “lacks sorely needed definitions of ‘serious physical harm’ as well as ‘dangerous’ that would allow district courts . . . to make decisions in a consistent manner”).

⁷⁷ See Dershowitz, *supra* note 9, at 59 (“People are confined to prevent predicted harms without any systematic effort to decide what kinds of harms warrant preventive confinement; or what degree of likelihood should be required; or what duration of preventive confinement should be permitted; or what relationship should exist between the harm, the likelihood, or the duration.”); Morris, *supra* note 67, at 63 (noting that, since Dershowitz’s lament, “no jurisprudence of preventive detention has emerged”); Carol S. Steiker, Foreword: The Limits of the Preventive State, 88 *J. Crim. L. & Criminology* 771, 774 (1998) (calling for attention

part, because scholars revolt against it. Most people who write in this realm hold that the state may *never* detain people who are responsible agents solely to prevent future crime.⁷⁸ *Salerno* rejected that principle and drew a storm of criticism. The bulk of legal scholarship on preventive detention since has centered on why *Salerno* is wrong, or on developing theoretical models for preventive detention that invoke principles of forfeiture or self-defense in order to avoid resort to *Salerno*'s frank consequentialism.⁷⁹ But the scholarly hostility has not redrawn the legal landscape. Pretrial preventive detention is almost surely here to stay.⁸⁰

This Article instead takes *Salerno* as a starting point and asks when detention is justified on consequentialist grounds. This is not to endorse *Salerno*'s cost-benefit framework.⁸¹ Rather, we take existing law as a

to this area). More recently, scholarship on preventive restraint has proliferated, see Sandra G. Mayson, Collateral Consequences and the Preventive State, 91 Notre Dame L. Rev. 301, 305 nn.13–15 (2015) [hereinafter, Mayson, Collateral Consequences] (surveying literature of the “preventive state”), but very few scholars have attempted to identify just what magnitude and likelihood of harm justifies preventive incarceration.

⁷⁸ The academic orthodoxy is that a person who threatens harm is either “mad or bad.” The “bad”—people who possess agency, and thus responsibility—must be handled through the criminal law. Only the “mad”—who lack full agency—may be preventively incapacitated. To detain a person solely to prevent some act that is within her control, the theory goes, is to deny her agency. See, e.g., R.A. Duff, Pre-Trial Detention and the Presumption of Innocence, *in* Prevention and the Limits of the Criminal Law 123, 128–29 (Andrew Ashworth, Lucia Zedner, Patrick Tomlin eds., 2013) (explaining that, according to “traditional liberal” principles, “[r]esponsible agents ought to be left free to determine their own conduct . . . and are properly liable to coercion only if and when they embark on a criminal enterprise”); Stephen J. Morse, Blame and Danger: An Essay on Preventive Detention, 76 B.U. L. Rev. 113, 117–18 (1996) (explaining the mad-or-bad principle).

⁷⁹ See, e.g., Alschuler, *supra* note 15, at 536 (arguing that preventive detention requires a “moral predicate” of wrongdoing); Alec Walen, The Mechanics of Claims and Permissible Killings in War 10–13 (2019) (developing and applying a complex deontological framework to evaluate preemptive killing); Kimberly Kessler Ferzan, Preventive Justice and the Presumption of Innocence, 8 Crim L. & Phil. 505, 508–09 (2014) [hereinafter Ferzan, Preventive Justice] (arguing that states may restrain “[c]ulpable [a]ggressor[s]” who threaten future harm); Kimberly Kessler Ferzan, Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible, 96 Minn. L. Rev. 141, 146–47 (2011) [hereinafter Ferzan, Beyond Crime]; Alec Walen, A Punitive Precondition for Preventive Detention: Lost Status as a Foundation for a Lost Immunity, 48 San Diego L. Rev. 1229, 1240 (2011) [hereinafter Walen, A Punitive Precondition].

⁸⁰ See Crystal S. Yang, Toward an Optimal Bail System, 92 N.Y.U. L. Rev. 1399, 1450 (2017) (“[T]here is almost universal agreement that bail judges should be engaging in some form of cost-benefit analysis.”).

⁸¹ For critique of a cost-benefit approach, see, e.g., Alschuler, *supra* note 15, at 510; Bernard E. Harcourt, The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis, 47 J. Legal Stud. 419, 421–22 (2018). For a defense of a cost-benefit

given for now, and operate within it, as lawyers do when they make arguments in court.⁸² The goal is to understand when detention is justified according to the rationale that state governments have proffered and that the Supreme Court has endorsed.

Even for those who reject a strict consequentialist approach to pretrial preventive detention, the inquiry here is relevant. One might believe that preventive detention cannot be justified unless a person has forfeited her right against it, for instance. Or one might believe that the most important question is whether pretrial detention *policies* are justified, given their distributional effects. But even scholars who take those positions typically *also* believe that a given instance of detention must produce net benefit to be justified.⁸³ That is: net social benefit is a necessary condition for preventive detention, even if it is not a sufficient one.

To be justified in consequentialist terms, detention must produce net benefit both in absolute terms and relative to alternatives. The benefit of detention must outweigh its costs. Even if it does, detention is not justified if a less costly alternative—supportive therapy, say, or electronic monitoring—would produce comparable benefit. Detention is only justified in consequentialist terms if its *marginal* benefit outweighs its *marginal* cost, relative to alternative interventions.⁸⁴ That is: detention must produce greater net benefit than would electronic monitoring, mental health treatment with supervision, or any other alternative. The criterion of marginal net benefit translates loosely into the least-restrictive-means principle that anchors so many pretrial regimes.⁸⁵

For present purposes, however, we bracket the requirement of marginal net benefit and focus on the preliminary question of when preventive

approach, see Sandra G. Mayson, A Consequentialist Framework for Prevention, L. & Phil. (forthcoming 2022) [hereinafter, Mayson, Consequentialist Framework].

⁸² That is, we operate from a perspective “internal” to existing law.

⁸³ E.g., Alec Walen, A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists, 70 Md. L. Rev. 871, 938 (2011).

⁸⁴ See also Mayson, Collateral Consequences, *supra* note 77, at 322 n.102 (arguing that incapacitation is only justified if the incremental security benefit outweighs the incremental cost); Mayson, Dangerous Defendants, *supra* note 10, at 563 n.319 (arguing that the relevant question concerning pretrial detention is whether the incremental prevention benefit provided by detention outweighs the incremental cost of alternatives).

⁸⁵ E.g., 18 U.S.C.A. § 3142(c)(B) (West 2018) (directing courts to release arrestees on condition that they refrain from crime, provide a DNA sample, and “subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community”).

detention does more good than harm. This is a minimum requirement for preventive detention to be justified. To determine when detention does more good than harm, one must identify the benefits and harms at stake. The primary benefit of detaining a person perceived to be dangerous is preventing potential crime. The primary beneficiary is the person who would otherwise have been victimized, but avoiding a crime also provides indirect benefit to the would-be victim's family and diffuse benefit by improving the community's sense of security. On the other side of the balance are the costs of detention. These costs primarily befall the person deprived of liberty, but detention also inflicts indirect and diffuse costs, including hardship to the detainee's family and insecurity or fear of the police in his community. There are fiscal costs on both sides of the ledger as well: the costs of policing and prosecution; the costs of incarceration.

The point at which detention averts greater harm than it inflicts is a function of (1) the costs of detention, (2) the number and nature of crimes that detention will avert, and (3) the costs of those crimes. The analysis is complicated by the fact that we can never know in advance who would commit harm if not detained. We can never know the precise number and nature of crimes that a single detention would avert. The best we can do is estimate probabilities. This does not make the cost-benefit analysis of detention impossible. It just means that the risk threshold at which pretrial detention may be justified is based on *expected* harm.

By way of illustration, presume that Joe has a 10% likelihood of committing car theft if not detained. This is to say that Joe belongs to a group of people within which we expect the rate of car theft to be 10%. For this population, we can expect ten detentions to avert one car theft.⁸⁶ With much greater confidence, we can expect 1000 detentions to avert

⁸⁶ This statement simplifies complex principles of probability. If one understands the estimate that Joe has a 10% probability of stealing a car in frequentist terms, as we have described it in the text, it is simply a restatement of the estimate to say that detaining ten people like Joe is projected to avert one car theft. If one understands the estimate instead as conveying a quality specific to Joe, then detaining ten people like Joe (each of whom had a 10% chance of otherwise stealing a car) might avert anywhere from zero to ten car thefts. Each of the detainees might otherwise have stolen a car or might not have. There is a probabilistic distribution across those possibilities (from zero to ten thefts averted). It is exceedingly unlikely that ten detentions avert ten thefts. The most likely scenario is that they avert one—but it is almost as likely that they avert zero or two. We think the proposition that “we can expect to avert one car theft” is a fair layman's statement of this probabilistic distribution of potential outcomes.

around 100 car thefts.⁸⁷ The cost-benefit question is whether this tradeoff is worth it. Is car theft more than ten times as costly as each detention, such that we are justified in detaining ten people for every theft we avert? How much detention *should* we be willing to inflict to prevent the theft of a car?

The answer to the question of how much detention we should accept to prevent one crime translates into a risk threshold for detention. If car theft is twice as costly as one detention, we should accept up to two detentions in order to avert one theft. Detaining those with only a 10% chance of stealing a car is not cost-justified; it would result in ten detentions, not two, for every car theft averted, thereby inflicting much more harm than it averts. If car theft is twice as costly as detention, as we have been assuming, the risk threshold for detention is 50%. Below that threshold, the cost of detention will exceed the averted cost of crime, in aggregate. Above it, the reverse is true.⁸⁸

A last important point about the consequentialist framework is that, in weighing the costs and benefits of detention, there is no apparent basis to discount the well-being of the potential detainee. An arrested person has not been convicted of a crime. As one of us has argued extensively elsewhere, there is no clear ground to treat arrested people as having a different moral status, or a lesser right to liberty, than anyone else.⁸⁹ To invoke a person's culpability as justification for pretrial detention would seem to contravene the constitutional prohibition on pretrial punishment. The stated rationale for pretrial preventive detention, moreover—the one endorsed by *Salerno*—has nothing to do with culpability for past acts. It is forward-looking; the state claims authority to detain on the basis of risk alone. Lastly, there is no legal doctrine establishing that a mere accusation of criminal conduct reduces a person's right to liberty.⁹⁰ Given the prohibition on pretrial punishment and the absence of any clear ground for treating arrestees' well-being as less important than other people's, we assume—for now—that the government must value the liberty of an accused person just as it would value anyone else's liberty for cost-benefit purposes. The Article returns to this point in Part III below.

⁸⁷ By virtue of the “law of large numbers.” See, e.g., Michel Dekking, C. Kraaikamp, H.P. Lopuhaä & L.E. Meester, *A Modern Introduction to Probability and Statistics* 181–90 (2005).

⁸⁸ In reality, risk assessment (both clinical and actuarial) typically estimates a person's likelihood of committing various types of crime, rather than specific criminal offenses.

⁸⁹ Mayson, *Dangerous Defendants*, *supra* note 10, at 499.

⁹⁰ *Id.*

To summarize: the stated justification for pretrial preventive detention is the consequentialist notion of net social benefit. To be cost-justified, detention must, at a minimum, avert greater harm than it inflicts. In other words, detention must be expected to avert greater harm in terms of criminal victimization than it inflicts in terms of lost liberty. In determining when this is so, there is no reason to value the liberty of the putative detainee any differently than yours or mine.

C. Prior Estimates of the Risk Threshold for Detention

The central obstacle to determining what risk justifies detention is that it is thought to be difficult, if not impossible, to weigh the relevant harms—criminal victimization and incarceration—against each other. There is little scholarship that even makes an attempt. The scholarship that does falls into two categories. The first assesses what degree of risk various system actors *believe* is necessary to justify detention, as well as what risk thresholds they apply in practice. The second takes a traditional cost-benefit approach, translating both the benefits and costs of detention into monetary terms. Both bodies of literature primarily address detention in the context of civil commitment, but they are relevant to pretrial preventive detention too.

1. Risk Thresholds in Belief and Practice

Scholars who have opined on the degree of risk that justifies preventive detention typically believe that only very high risk should suffice. Steven Morse, for instance, has speculated that “[m]ost informed persons would probably agree that the ‘correct’ probability [of serious future harm] required for preventive detention is . . . in excess of 80%.”⁹¹ Grant Morris has argued that “preventive detention of an allegedly dangerous mentally disordered person should require a ninety percent probability that, in the absence of confinement, . . . violent crime, suicide or self-inflicted mayhem will occur within six months.”⁹² Morse and Morris, to be clear, are writing about indefinite civil commitment. Even with respect to more

⁹¹ Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disabled*, 70 *Calif. L. Rev.* 54, 74 (1982).

⁹² Morris, *supra* note 67, at 77; see also Mayson, *Dangerous Defendants*, *supra* note 10, at 560 (“[N]othing less than a substantial likelihood of serious violent crime within a six-month span can justify onerous restraints on liberty.”).

short-term preventive detention, though, scholars typically advocate a high risk-threshold.⁹³

Judges appear to use lower risk-thresholds in practice. In 2003, John Monahan and Eric Silver surveyed twenty-six practicing judges on “the lowest likelihood of violence to others” within twenty weeks that they would accept as demonstrating “dangerousness” for purposes of short-term civil commitment.⁹⁴ A majority expressed willingness to commit at a likelihood of 26%. Half the judges considered an 8% chance of violence to be sufficient, and three considered a 1% chance to be sufficient.⁹⁵ A 2016 study found that judges believe the risk threshold is much higher for indefinite commitment.⁹⁶ But these beliefs may not translate into practice. A 1997 quantitative analysis of indefinite “sex offender” commitments in Minnesota estimated that courts were indefinitely committing people with a 30% to 50% likelihood of recidivism.⁹⁷

Research on jurors, meanwhile, suggests that ordinary citizens are willing to commit a person indefinitely on probabilities of future harm well under 50%. A 2014 study that simulated civil commitment proceedings found that the simulation-jurors’ implicit risk thresholds for commitment ranged from a 20% to 40% probability of future sexual violence, with a mean of 31%.⁹⁸ Another 2014 study asked 153 actual

⁹³ Few, however, have offered a numerical threshold. Christopher Slobogin, for instance, argues that preventive detention must be constrained by a “proportionality principle,” which provides that only serious risk can justify serious preventive restraint, and a “consistency principle” requiring that the criteria for preventive detention be consistent inside and outside the criminal law. Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 *Nw. U. L. Rev.* 1, 4–5 (2003) (“The *proportionality principle* requires that the degree of danger be roughly proportionate to the proposed government intervention.”).

⁹⁴ John Monahan & Eric Silver, *Judicial Decision Thresholds for Violence Risk Management*, 2 *Int’l. J. of Forensic Mental Health* 1, 2–3 (2003). The participants were required to select among the five risk classification groups produced by the MacArthur Violence Risk Assessment Study, the lowest of which corresponded to a 1% chance of violence within 20 weeks of release and the highest of which corresponded to a 76% chance. *Id.*

⁹⁵ *Id.* at 4.

⁹⁶ Stephanie A. Evans & Karen L. Salekin, *Violence Risk Communication: What do Judges and Forensic Clinicians Prefer and Understand?*, 3 *J. of Threat Assessment & Mgmt.* 143, 143 (2016) (surveying 127 forensic clinicians and 192 judges; reporting majority view that 21–52% chance of future violence constitutes moderate risk and 53–99% constitutes high risk).

⁹⁷ Janus & Meehl, *supra* note 65, at 41, 45 (relying on Minnesota sex offender commitment cases and public information about sex offender recidivism and prediction to develop estimates for the probability of recidivism among members of the commitment classes).

⁹⁸ Nicholas Scirich & Daniel A. Krauss, *The Presumption of Dangerousness in Sexual Violent Predator Commitment Hearings*, 13 *L. Probability & Risk* 91, 91 (2014).

jurors who had adjudicated sexually-violent-predator commitment trials what probability of a new sex crime was sufficient to demonstrate that such a crime was “likely.”⁹⁹ More than half the jurors thought that a 1% chance was sufficient. More than 97% thought that a 25% chance was sufficient.¹⁰⁰

To our knowledge, there is only one similar study that addresses the pretrial context. In 2020, Nicholas Scurich and Daniel A. Krauss surveyed a representative sample of 420 Californians.¹⁰¹ The average respondent deemed a 60% chance that an arrested person would fail to appear or commit a new crime to be sufficient to justify detention until trial.¹⁰²

As a whole, this body of research suggests that there is wide variation in how individuals interpret terms like “likely,” as well as in the degree of risk that people think is sufficient to justify preventive detention. A non-trivial percentage of judges and jurors appear willing to commit people indefinitely on quite low probabilities of future harm—even if it is more likely than not, or *much* more likely than not, that the harm will not transpire.

The central limitation of this literature, for our purposes, is that none of it reflects an actual cost-benefit analysis. Judges’ and jurors’ beliefs about when commitment is justified may be colored by a retributivist impulse to punish people for bad deeds, bad character, or projected future crime. Study subjects may also be influenced by perspective bias, such that they discount the well-being of potential detainees to whom they do not relate. Judges’ and jurors’ decisions in practice are almost certainly influenced by their incentive to detain, lest a release decision result in catastrophic harm. At the other end of the spectrum, scholars who assert high risk-thresholds may be operating on the premise that detention cannot be justified on pure consequentialist grounds alone. The risk threshold that people believe can justify preventive detention, or that they apply in practice, may have little connection to the threshold that a robust cost-benefit analysis would produce.

⁹⁹ Jefferson C. Knighton, Daniel C. Murrie, Marcus T. Boccaccini, & Darrel B. Turner, How Likely Is “Likely To Reoffend” in Sex Offender Civil Commitment Trials?, 38 L. & Hum. Behavior 293, 293 (2014). The jurors had participated in fourteen trials in total, each of which resulted in a verdict of commitment. *Id.*

¹⁰⁰ *Id.* at 300.

¹⁰¹ Nicholas Scurich & Daniel A. Krauss, Public’s Views of Risk Assessment Algorithms and Pretrial Decision Making, 26 Psych. Pub. Pol’y & L. 1, 1 (2020).

¹⁰² *Id.*

2. *Traditional Cost-Benefit Analysis*

The traditional approach to cost-benefit analysis of preventive detention is to price the various harms and benefits of detention in dollars, tally them up, and then see how much crime detention must avert to be worth the cost. There are two significant problems with this approach. The first is that, although there is a long literature estimating the dollar-value cost of crime-to-crime victims, there is almost no literature rigorously estimating the dollar-value cost of detention to detainees. The second problem is that quantifying everything in dollars can introduce distortion.

The cost-of-crime literature offers a helpful illustration of the challenges in monetizing non-market harms.¹⁰³ Broadly speaking, it uses two methods: contingent valuation and jury awards. Contingent valuation studies ask survey respondents how much they would pay to avoid or minimize some harm—how much a person would pay, for instance, to reduce the likelihood of a certain crime by 10%. The jury-award method exploits damage awards in civil suits against crime perpetrators. The average or median damages award for a particular crime type serves as an estimate of the cost of that crime to its victim. Both methods have advantages and limitations. Contingent valuation studies benefit from broader data, but survey answers are purely hypothetical and are shaped by the respondents' financial status. Jury awards are real, but rare—few crime victims bring civil suits—and likely skewed toward crimes committed by the wealthy, since wealthy perpetrators are the only ones it makes sense to sue.

The imprecision of these pricing methods produces cost-of-crime estimates that vary widely. Three respected estimates for the personal cost of a serious assault, for example, are \$28,346,¹⁰⁴ \$42,646,¹⁰⁵ and

¹⁰³ For an overview, see Mark A.R. Kleiman, Jonathan P. Caulkins & Peter Gehred, *Measuring the Costs of Crime* 5 (2014), <https://www.ojp.gov/pdffiles1/nij/grants/246405.pdf> [<https://perma.cc/U443-UUSB>] (comparing cost of crime analysis to cost of illness studies to provide a framework for policy makers).

¹⁰⁴ Mark A. Cohen, *Pain, Suffering, and Jury Awards: A Study of the Cost of Crime to Victims*, 22 *L. & Soc'y Rev.* 537, 546 (1988) (derived from jury awards; estimate is from Table 3).

¹⁰⁵ Ted R. Miller, Mark A Cohen & Brian Wiersema, *Victim Costs and Consequences: A New Look*, Nat'l Inst. of Just. Rsch. Rep. (1996) (derived by adding up victim costs; estimate is from Table 2 "Assault, NCVS with Injury").

\$103,314¹⁰⁶ (in 2021 dollars, scaled for inflation). Of note, though, there is substantial consistency across the cost-of-crime literature in the ordinal ranking of different offenses by cost. While the dollar amounts vary, the ordering usually doesn't: murder is more costly than robbery, robbery is more costly than petty theft, and so forth.

Imprecision aside, the most basic obstacle to a rigorous cost-benefit analysis of detention is that there is no reliable estimate of the personal costs of detention.¹⁰⁷ To our knowledge, there is only one prior estimate with respect to pretrial detention, derived by Abrams and Rohlfs in 2011.¹⁰⁸ Abrams and Rohlfs estimate the value of freedom (and the cost of its loss) on the basis of arrested individuals' willingness to pay cash bail. They conclude that the value of ninety days of freedom for the average person in their dataset is \$1,000, or \$11 per day. As they acknowledge, this methodology assumes the *ability* to post money bail. To the extent that people in their dataset remained in jail because they had no choice rather than because they made a choice, the estimate is skewed low.¹⁰⁹

One might construct a cost-of-detention estimate on the basis of jury awards in wrongful-conviction cases, which have proliferated in recent years.¹¹⁰ But these awards vary tremendously from case to case. It is extremely difficult, moreover, to separate out the extent to which the awards compensate victims for the stigma of having been wrongfully branded a criminal versus for the liberty deprivation *per se*. Still, one scholar, Frederick Vars, has used the lowest award in the sample he considered as a measure of the value of liberty: \$68,045 for one year.¹¹¹

¹⁰⁶ Mark A. Cohen, Roland T. Rust, Sara Steen & Simon T. Tidd, Willingness-to-Pay for Crime Control Programs, 42 *Criminology* 89, 89 (2004) (derived from contingent valuation estimate in Table 2).

¹⁰⁷ See Yang, *supra* note 80, at 1420. ("Unfortunately, very few studies have attempted to empirically estimate and quantify this loss [of freedom]."). There is a sizable literature exploring the post-release effects of incarceration on detainees and the broader public, but it focuses on incarceration imposed as punishment after conviction. In that context, it is not clear that the (theoretically) deserved loss of liberty should count as a relevant "cost." When the state seeks to preventively detain someone, on the other hand, the loss of liberty is not justified on the basis of desert, and the personal costs of incarceration are a first-order concern.

¹⁰⁸ David S. Abrams & Chris Rohlfs, Optimal Bail and the Value of Freedom: Evidence from the Philadelphia Bail Experiment, 49 *Econ. Inquiry* 750, 750 (2011) (estimating the value of freedom on the basis of cash bail data from New Haven jails).

¹⁰⁹ *Id.*

¹¹⁰ See Brandon L. Garrett, Innocence, Harmless Error, and Federal Wrongful Conviction Law, 2005 *Wis. L. Rev.* 35, 44–45 n.32, 49 n.63 (reporting recent awards).

¹¹¹ Fredrick E. Vars, Delineating Sexual Dangerousness, 50 *Hous. L. Rev.* 855, 889 (2013).

Notwithstanding the dearth of research on the personal costs of detention, a few scholars have undertaken cost-benefit analyses of preventive detention by traditional means. Vars, analyzing sexually-violent-predator commitment, concludes that “the minimum likelihood of future sexual violence within five years that should be required for a five-year commitment” is 75%.¹¹² Shima Baradaran Baughman, analyzing pretrial detention, finds that the average cost of detention outweighs the average benefit by a factor of two.¹¹³ She further concludes that detention would have produced net benefit for approximately 31% of the individuals in her data, and that courts could profitably detain 18% fewer people if they made release decisions on the basis of actuarial risk.¹¹⁴ Crystal Yang, incorporating “the best available evidence on both the costs and benefits of [pretrial] detention,” finds that “on the margin, pre-trial detention imposes far larger costs than benefits.”¹¹⁵ Her findings relate to the “marginal” defendant, whom some bail judges in her datasets would release and others would detain.¹¹⁶ Yang notes the limitations of existing data on the costs and benefits of detention, especially the cost of detention to detainees; like Baughman, she uses the Rolfs & Abrams estimate of \$11/day.¹¹⁷

These cost-benefit analyses, although valiant, rely heavily on the dubious translation of intangible costs—liberty deprivation and criminal victimization—into monetary terms.¹¹⁸ This is the second major

¹¹² *Id.* at 890.

¹¹³ Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 *B.U. L. Rev.* 1, 18 (2017). Baughman estimates the relative costs of pretrial detention and release by tabulating a long list of costs on both sides of the equation, including the cost of lost liberty to the detainee (taken from Abram & Rohlfs), the personal costs of crime victimization (taken from the studies discussed above), and the taxpayer expenses of administering jails and courts. *Id.* at 4–16. Perhaps because of the limitations of the Abrams & Rohlfs estimate, Baughman adds a number of other costs to the “personal costs” borne by the detainee, including lost employment, lost property and childcare expenses. *Id.* at 16–17.

¹¹⁴ *Id.* at 22. Baughman’s analysis is based on “134,767 randomly selected felony-arrest cases between 1990 and 2006” from the Bureau of Justice Statistics’ “State Court Processing Statistics” data on felony prosecutions in the nation’s seventy-five largest jurisdictions. *Id.* at 10 n.46 and accompanying text.

¹¹⁵ Yang, *supra* note 80, at 1407. Yang uses data from Miami and Philadelphia and draws on her own prior work estimating the casual effect of detention on case outcomes, future employment, and future interaction with the criminal justice system.

¹¹⁶ *Id.* at 1435–37.

¹¹⁷ *Id.* at 1420.

¹¹⁸ We are aware of one prior effort at cost-benefit analysis of pretrial detention that does not rely on monetization of the relevant costs and benefits: Larry Laudan & Ronald J. Allen, *Deadly Dilemmas II: Bail and Crime*, 85 *Chi.-Kent L. Rev.* 23, 29 (2010). Laudan and

limitation of traditional cost-benefit analysis. Money is an unstable metric. Its value depends on its context and the situation of the person who possesses it. Converting the harms of both crime and incarceration into dollar amounts in order to compare them introduces unnecessary noise into the comparison. It can also introduce bias. If the costs of incarceration are quantified on a group of people for whom money is very dear—the poor—while the costs of crime are quantified using wealthier respondents, the scale is tilted.

II. RELATIVE HARM VALUATION

We were sitting in the office one day, discussing the difficulty of determining when detention produces net benefit, when one of us asked: “Well, how long would *you* sit in jail to avoid getting robbed?” It struck both of us as a provocative question. We wanted to know what other people thought. We decided to ask. Using Amazon’s Mechanical Turk, an online platform that enables hiring people to perform short tasks, we surveyed roughly 900 respondents on the amount of time they would be willing to spend in jail rather than be the victim of various crimes. We called our unconventional survey method “relative harm valuation.” Over the course of the project, we learned that a few other scholars have independently arrived at the same methodology.¹¹⁹ Most recently, legal

Allen focus on those charged with violent felonies and rely primarily on BJS data from felony cases in the nation’s seventy-five largest urban jurisdictions between 1990 and 2004. They argue that current release rates for this group produce excessive rates of violent pretrial crime, and that we could achieve much greater net benefit by detaining all those charged with violent felonies who also have a serious criminal history. *Id.* at 34–41. Unfortunately, it is not possible to replicate the authors’ numerical calculations based on the sources the article cites.

¹¹⁹ Jane Bambauer & Andrea Roth, *From Damage Caps to Decarceration: Extending Tort Law Safeguards to Criminal Sentencing*, 101 *B.U. L. Rev.* 1667, 1705–06 (2021) (using a RHV survey to assess the relative harm of crime victimization and incarceration in order to determine when punishment is “grossly excessive”); Douglas Mossman & Kathleen J. Hart, *How Bad Is Civil Commitment? A Study of Attitudes Toward Violence and Involuntary Hospitalization*, 21 *J. Am. Acad. Psychiatry & L.* 181, 181 (1993) (survey study asking undergraduate and medical students whether they would prefer to be attacked by a man with a knife or spend a certain amount of time as a patient in a state psychiatric hospital); Nicolas Scurich, *Criminal Justice Policy Preferences: Blackstone Ratios and the Veil of Ignorance*, 26 *Stan. L. & Pol’y Rev. Online* 23, 23 (2015) (survey study eliciting the relative cost that respondents assigned to a wrongful conviction for assault versus being the victim of an assault). The technique also bears a loose kinship to Paul Robinson’s survey research on “empirical desert.” See, e.g., Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 *S. Cal. L. Rev.* 1, 18 (2007); Paul H. Robinson, Joshua Samuel Barton, & Matthew Lister, *Empirical Desert, Individual Prevention,*

scholars Jane Bambauer and Andrea Roth have used a similar method to estimate when carceral punishment becomes “excessive” for constitutional purposes.¹²⁰ To our knowledge, no other scholar has yet applied it to pretrial detention. We thus present our study as an exemplar of a novel empirical technique that is gaining academic currency, applied in a context to which it is particularly well suited: determining when preventive detention averts greater harm than it inflicts.

A. The Method

Our method presumes that there are two costs in the preventive detention calculus that swamp all the others. The first is the cost of crime to the crime victim. The second is the cost of detention to the detainee. If we can weigh these costs against one another, we can develop rough but useful estimates of the risk threshold at which pretrial preventive detention could be cost-justified. In other words, we posit that, to be cost-justified, detention must—at a minimum—avert greater harm *to crime victims* than it inflicts *on detainees*. This is an admittedly reductive formula. Yet we think that it captures the core tradeoff that preventive detention entails. We detain, at great personal cost to the detainee, to avoid harmful acts, primarily in the interest of those who would be harmed. Our survey method requires respondents to compare these two central harms directly against each other.

Asking respondents to compare detention against criminal victimization has two advantages over traditional contingent-valuation surveys. First, it avoids the need to quantify each harm in dollars. As noted above, the cost-of-crime literature demonstrates that people give widely divergent answers when asked to price some experience in monetary terms.¹²¹ On the other hand, people give highly consistent answers when asked to rank different experiences in terms of personal cost.¹²² Paul Robinson’s “empirical desert” surveys have documented similar patterns: there is no consensus among respondents about the appropriate sentence for any given offense, but respondents rank offenses by severity quite consistently.¹²³ This phenomenon suggests that asking

and Limiting Retributivism: A Reply, 17 *New Crim. L. Rev.* 312, 312 (2014). The other three studies to deploy RHV surveys found results quite similar to ours. See *infra* note 141.

¹²⁰ Bambauer & Roth, *supra* note 119, at 1667.

¹²¹ See *supra* notes 103–19 and accompanying text.

¹²² See *supra* notes 103–19 and accompanying text.

¹²³ Robinson & Darley, *supra* note 119, at 9–10; Robinson et al., *supra* note 119, at 336–37.

people to compare the experiences of crime and jail against each other is likely to produce more meaningful information than asking people to quantify the harm of each experience independently.

The second advantage of the method is that it requires people to imagine *themselves* experiencing both types of harms. This avoids the danger that the cost assessor might discount a harm because, consciously or unconsciously, she imagines it befalling only a vague and unappealing other. If we asked people to rate the harms of incarceration in more abstract terms, they might imagine the incarcerated person as Black, Brown, and/or poor. They might assume that this person had committed a crime. It would be difficult to disentangle the respondents' judgments about the harm of incarceration from their race or class bias, let alone their judgments about culpability and desert.

In asking people to imagine themselves in different situations, our survey operates on a logic that echoes John Rawls' theory of justice. Rawls famously posited that just social policy is that which a person would adopt in the "original position," where "no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like."¹²⁴ Our survey method does not place respondents behind the figurative "veil of ignorance," but it does, like Rawls, aspire to detach normative analysis from self-interest by having respondents imagine themselves as both crime victim and detainee.¹²⁵

An observant reader will note that our survey is actually a form of contingent valuation. Traditional contingent valuation studies ask people how much they would pay to avoid crime victimization, or to reduce the probability of being victimized by a certain amount. Our survey differs only in that it asks respondents to "price" crime victimization in jail days rather than dollars.

Finally, some readers may wonder why we should query lay people about the relative costs of crime victimization and jail detention rather than some set of experts—criminal justice system experts, say, or

¹²⁴ John Rawls, *A Theory of Justice* 118 (2d ed. 1999).

¹²⁵ For this reason, two prior RHV studies explicitly used Rawlsian terminology to describe the RHV approach. Mossman & Hart, *supra* note 119, at 185; Scurich, *supra* note 119. We initially termed our method "Rawlsian cost-benefit analysis," but we abandoned this formulation because, as helpful critics noted, we are not asking respondents to engage in a full-fledged Rawlsian policy analysis, but only to judge the relative subjective "badness" of two specified events.

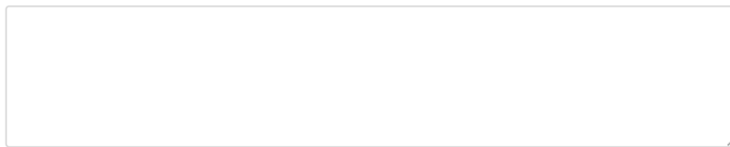
economists with expertise in cost-benefit analysis.¹²⁶ The answer is that it is precisely the judgments of lay people that matter. What we need to understand, in order to determine when the benefit of detention outweighs its cost, is how bad the experience of crime victimization is relative to the experience of jail detention. And those costs are a function of the subjective experience of ordinary people. Experts have no special purchase on how awful it is to suffer incarceration or be the victim of a crime. The one group that might have particular insight are those who have actually experienced these harms. We break out the responses of that group in our results and discuss them below.

B. The Surveys

To implement the relative harm valuation, we conducted an online survey on Amazon's Mechanical Turk. We conducted three separate surveys to price incarceration against three serious crimes: robbery, burglary, and aggravated assault. (Since the term "aggravated assault" may not be familiar to a lay audience, we use the term "serious assault" instead.) The three surveys are identical except for the crime names and definitions. We use the survey on robbery as an example in this Section.

Each survey has three parts. The first part asks participants to envision the experiences of incarceration and crime-victimization. The primary purpose of this section is to ensure that respondents have thought carefully about both experiences, making them salient for the purposes of comparison. We refer to these as our "priming" questions, and they are presented below (the order is randomized in the survey)¹²⁷:

Imagine you have to spend some time in jail. What would be the most difficult aspects of spending time in jail? Please list 4-5 things.

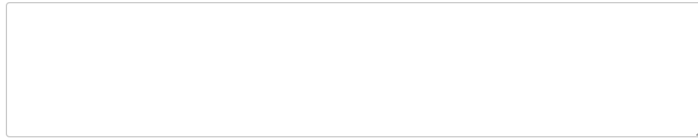


¹²⁶ This is a question we have repeatedly fielded.

¹²⁷ A reader who is interested in taking the survey herself may do so at the following links for burglary, robbery, and serious assault, respectively. https://virginia.az1.qualtrics.com/jfe/form/SV_bPoQ8VfJ6tZVdXf [<https://perma.cc/KBV4-XMKD>], https://virginia.az1.qualtrics.com/jfe/form/SV_4GXgcbe1aS7sL5P [<https://perma.cc/4KE3-3J2G>], https://virginia.az1.qualtrics.com/jfe/form/SV_8BVHkIaG86DBxAN [<https://perma.cc/P9TR-NK6Y>].

Imagine you are the victim of a robbery. Assume no one gets seriously injured. What would be the most difficult aspects of being the victim of a robbery? Please list 4-5 things.

(Robbery is defined as taking or attempting to take anything of value from the care, custody, or control of a person or persons by force or threat of force or violence and/or by putting the victim in fear.)



For each offense, we provide the Uniform Crime Report (“UCR”) definition in parentheses.¹²⁸ We also provide a few narrowing stipulations. For robbery, we stipulate that no one gets seriously injured. (A robbery in which someone gets seriously injured would effectively be two offenses: robbery and aggravated assault.) For serious assault, we stipulate that no one dies and that the assault is not so grave as to amount to attempted murder. (Otherwise, the offense would be murder or attempted murder, not aggravated assault.) For burglary, we specify that no one is home at the time the burglary takes place. (The residents are not home for the large majority of residential burglaries; in addition, we wanted at least one offense with no face-to-face contact with the perpetrator.)

The second part is the survey core. We begin by asking respondents to make a binary choice between two unpleasant experiences: being the victim of a crime or spending a certain amount of time in jail. The amount of time is randomized between three options: one week, one month, or three months.¹²⁹ Below is an example:

¹²⁸ The UCR definition of aggravated assault is “[a]n unlawful attack by one person upon another wherein the offender uses a dangerous weapon or displays it in a threatening manner or the victim suffers obvious severe or aggravated bodily injury, or where there was a risk for serious injury/intent to seriously injure,” and the UCR definition of burglary is “unlawful entry with intent to commit a larceny or felony.” See U.S. Dep’t of Just., 2021.1 National Incident-Based Reporting System User Manual 17 (2021), <https://www.fbi.gov/file-repository/ucr/ucr-2019-1-nibrs-user-manua-093020.pdf/view> [<https://perma.cc/9ZEL-FUYZ>].

¹²⁹ The time periods were based on the distribution of responses in a test survey.

If you had to choose between spending one month in jail or being the victim of a robbery, which would you choose? Assume that no one gets seriously injured in the robbery.

- One month in jail
- Robbery

If the respondent chooses jail time over the robbery, they are presented with a second binary-choice option where the amount of time is randomly selected to be either six months, one year or five years. However, if the respondent chooses the robbery over jail, their next binary-choice option has shorter jail times: one hour, one day or three days. For example:

If you had to choose between spending three days in jail or being the victim of a robbery, which would you choose? Assume that no one gets seriously injured in the robbery.

- Three days in jail
- Robbery

These binary-choice questions are designed to be useful stepping-stones on the way to our ultimate question: how much jail time is equivalent, in terms of harm, to a robbery? We expect the binary questions to be easier to answer than the more open-ended question. They also might help resolve potential doubts about whether the two types of harms can be meaningfully compared. For instance, virtually all of our respondents reported that they would choose burglary over five years in jail. And virtually all of our respondents reported that they would choose one hour in jail over robbery. At least in these extreme examples, respondents can easily and consistently choose between options.

Once the participants have completed two binary-choice questions, they confront the main question of our survey:

Imagine you had to choose between spending a certain amount of time in jail and being the victim of a robbery. How much time in jail is equally as bad as being the victim of a robbery? Assume that no one gets seriously injured in the robbery.

Amount of time	Hour(s)	Day(s)	Week(s)	Month(s)	Year(s)
<input type="text"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Following this question, we ask participants to provide a brief one-or two-sentence explanation of their answer. This is mostly for diagnostic

purposes, to evaluate whether respondents have read and understood the question.

Part three of the survey collects background information. We ask whether the participant or anyone close to them has ever been a victim of a robbery or spent time in jail or prison. We also collect demographic information: age, race, ethnicity, income, and education.

We used three methods to filter out survey responses that do not reflect a good-faith effort to answer the questions.¹³⁰ First, we dropped any respondent who left the two initial priming questions blank or wrote something non-responsive. Second, we dropped any respondent who was inconsistent across the binary-choice questions and the open-answer question. An inconsistent respondent would, for example, choose robbery over one week in jail but then state that robbery was as bad as six months in jail.¹³¹ Third, we dropped anyone whose explanation for their final answer demonstrated that they had misinterpreted the question to ask how much *punishment* was warranted for the crime in question.¹³² Since the first and third attention check entail some subjectivity, we asked two research assistants to read the survey responses, and dropped only those responses that both research assistants flagged for removal. Dropping these responses changes the distribution of results somewhat but does not qualitatively affect the main takeaway from our study. Appendix A includes examples of dropped responses.

¹³⁰ Studies commonly insert an “attention check” question, the sole purpose of which is to verify that respondents are reading the prompts.

¹³¹ More formally, inconsistency is defined as choosing crime-victimization over a certain amount of jail time in one of the binary choice questions, but then stating that crime-victimization is equally as bad as a longer period of time.

¹³² The survey we describe here is the result of several rounds of iteration. Our first survey was conducted in 2016, also on Mechanical Turk. It was similar to this one in structure, and the results were similar as well. In our second round, we appended a single question—the open answer question that asks how much time is equally as bad as crime victimization—to a survey that was implemented by RAND. Our goal was to reach a nationally representative sample, but ultimately we think this iteration was not a success. Our question wound up sandwiched in between a series of questions on dental hygiene. Without the priming and binary-choice questions described above, we could not feel confident that the respondents were giving our question the consideration we wanted them to, particularly when it came after such unrelated material. Furthermore, without the priming and binary-choice questions we no longer had an attention check that allowed us to drop results from people who were not answering in good faith.

C. Survey Results

We collected responses until we had a sample of about 300 respondents per offense type after dropping those who had failed the attention check.¹³³ Table 1 shows responses to our primary survey question. The mode is the most common response; the twenty-fifth percentile is defined so that 25% of responses are less than or equal to it; the fiftieth percentile is the middle response, also known as the median, and so forth.

More than half of respondents stated that a single day in jail would be as bad as being the victim of a burglary, and more than half of respondents stated that spending three days in jail is as bad as being the victim of a robbery. When asked to explain this response, many people noted that, however unpleasant, a robbery or burglary occurs quickly and is over. For example, one respondent stated, “In jail I lose all my freedom and have to live with some very bad and dangerous people. Robberies are usually fast crimes so they are over quickly.” People were more averse to the idea of being the victim of a serious assault than a robbery or burglary. Nonetheless, more than half of respondents thought that a month in jail caused harms at least as grave as a serious assault.¹³⁴ As one respondent wrote, “The isolation and loneliness of being in jail for 1 month would become unbearable.” Some respondents also noted that incarceration could also lead to an assault: “While being assaulted would have serious consequences, being in jail for any length of time may result in more than one serious assault.”¹³⁵ The most common response, across all three offense categories, was that a single day in jail would be as bad as or worse than being the victim of a crime.

¹³³ Each respondent was only permitted to complete a single survey.

¹³⁴ Although the purpose of our study is not to produce dollar-value estimates of the liberty cost of detention, we note that it is simple to convert our estimates into dollar-value terms, given the existing economics literature estimating the cost of crime victimization in dollars. We can combine our contingent valuation results with the cost-of-crime estimates from prior literature to generate monetary estimates of the cost of detention for the detainee. For example, the median respondent says that a month in jail is equivalent to a serious assault. One mid-range estimate of the cost of serious assault is \$42,646. See *supra* note 105 and accompanying text. Our survey thus suggests that one month of jail has a personal cost to the detainee of \$42,646. Needless to say, this is considerably higher than the Abrams & Rolfs estimate of \$1,000 for ninety days.

¹³⁵ If we included the respondents who failed the attention check, the median response would be two months for serious assault, three days for burglary, and seven days for robbery.

Table 1: Distribution of Responses to the Question “How Much Time in Jail is as Bad as Being the Victim of a [Crime]?”

	Assault	Robbery	Burglary
10 th percentile	1 day	1 hour	1 hour
25 th percentile	5 days	6 hours	5 hours
50 th percentile	1 month	3 days	1 day
75 th percentile	6 months	2 weeks	1 week
90 th percentile	3.5 years	1 month	2 months
Mode ¹³⁶	1 day	1 day	1 day
# of responses	297	290	321

Although most respondents selected relatively short lengths of time, a few reported crime-equivalent jail times that are many times longer than the median respondent. This may simply be due to noise: despite our attention checks, some people are responding thoughtlessly, or are answering a different question. For instance, one respondent who reported having been the victim of a serious assault said that being the victim of a serious assault was equally as bad as spending ninety-nine years in jail. When asked to explain this response, she said “A victim of assault with live [sic] this problem for the rest of their lives.” It is possible that she believes that spending the rest of one’s life in jail is preferable to having to live with the aftermath of a serious assault. But it is also possible that her answer was simply another way of saying, “It was really bad” or “I think people who assault others should be punished harshly.”

Some variation in responses is to be expected, but variation would be particularly important if it demonstrated systematically different views among those who have actually experienced incarceration or crime-victimization and so are better informed about their costs. Table 2 breaks the responses out by subgroup, including those who have personal experience with either crime victimization or incarceration.¹³⁷

¹³⁶ In calculating the mode, we round each response up to the nearest day.

¹³⁷ “Experienced with crime victimization” means that either the respondent or someone close to them has been the victim of the type of crime that is the focus of their survey (assault, robbery, or burglary). “Experienced with incarceration” means that either the respondent or someone close to them has spent time in jail or prison.

Table 2: Responses by Subgroup

	Assault	Robbery	Burglary
Respondents experienced with crime victimization			
Median	1 month	3 days	1 day
Mode	1 day	1 day	1 day
<i># of responses</i>	86	130	157
Respondents experienced with incarceration			
Median	1 month	3 days	1 day
Mode	1 day	1 day	1 day
<i># of responses</i>	101	117	118
Black respondents			
Median	3 weeks	3 days	1 day
Mode	1 day	1 day	1 day
<i># of responses</i>	36	25	30
White respondents			
Median	1 month	3 days	1 day
Mode	1 day	1 day	1 day
<i># of responses</i>	231	224	255
Female respondents			
Median	1 month	2 days	1 day
Mode	1 day	1 day	1 day
<i># of responses</i>	126	112	168
Male respondents			
Median	1 month	3 days	1.75 days
Mode	1 day	1 day	1 day
<i># of responses</i>	170	173	152
Employed respondents			
Median	1 month	3 days	1 day
Mode	1 day	1 day	1 day
<i># of responses</i>	263	248	279
Unemployed respondents			
Median	6 months	3 days	2 days
Mode	1 day	1 day	1 day
<i># of responses</i>	21	30	31
College graduates			
Median	1 month	2 days	1 day
Mode	1 day	1 day	1 day

<i># of responses</i>	181	165	206
Respondents with no college degree			
Median	1 month	5 days	3 days
Mode	1 day	1 day	1 day
<i># of responses</i>	116	125	115

Both the median and the modal responses for experienced respondents are exactly identical to the full sample. There is no evidence that evaluations of the relative harms of crime victimization and incarceration are meaningfully different for those who have first-hand experience compared to those who do not. Responses are also remarkably similar across race, gender, employment, and education status. Respondents who are unemployed or lack a college degree tend to be slightly less averse to incarceration relative to crime victimization, but the differences are not substantial.¹³⁸ This helps ease concern about the Mechanical Turk sample being non-representative.¹³⁹ If responses are consistent across demographic groups within our study, then we expect them to be relatively consistent across groups outside of our study too.

D. The Risk Threshold for Pretrial Detention

Translating the survey responses into a risk threshold for pretrial detention requires just a few more steps. First, we need to select a metric to summarize the distribution of responses. The two logical candidates are the mean and the median. The mean is not ideal because it is easily skewed by outlier responses; if a single respondent said that burglary was equivalent to 1000 years in jail this would dramatically inflate the mean. The median, on the other hand, is not affected by extreme outliers. Another advantage of the median is that it is very close to the modal response for robbery and burglary. Therefore, it not only captures the

¹³⁸ The one instance in which the median response is substantially different is for unemployed people answering the serious assault survey. However, this sub-sample is small, and the difference is not statistically significant using quantile regression.

¹³⁹ In terms of race and ethnicity, our respondents are not too dissimilar from the US population. Our respondents are 78.1% White, 10% Black, and 7% Hispanic. In contrast, the US population is 76.3% White, 13.4% Black, and 18.5% Hispanic. Quick Facts, U.S. Census Bureau (July 1, 2019) <https://www.census.gov/quickfacts/fact/table/US/PST045219> [<https://perma.cc/R9ZP-4KUR>]. They are, however, slightly more likely to be male (55%) and young. The median age was 36 and only 4% of our sample was older than 65. They also report being more educated than the average adult: 61% report being a college graduate, compared to 32.1% of the adult population in the United States. *Id.*

“middle” response, but also is close to the most frequent response for those crime types.

Taking the median respondent as our metric, one month of detention imposes harms as grave as serious assault. Three days of detention imposes harms as grave as robbery. And even a single day of detention imposes harms as grave as burglary. We can now evaluate what type of risk might justify pretrial detention.

If we detain those with a 50% chance of committing serious assault within a month for one month each, we sacrifice two months of liberty for every serious assault we expect to prevent. On the basis of our median respondent, that tradeoff is not cost-justified. Detention might be justified, however, for someone with a 50% chance of committing serious assault within the next *two weeks*, if we limited detention to two weeks. In that case, we would sacrifice only thirty days of liberty for every averted assault. A 50% chance of committing a serious assault within two weeks is thus one way of describing the risk-threshold for pretrial detention that the survey generates: only those whose risk of serious assault is higher than 50% within two weeks could possibly be detained with net benefit.

As a reminder, the risk threshold is only a lower bound on the risk level that justifies detention in consequentialist terms. Within the consequentialist framework, those whose risk is below the threshold should never be detained. Those whose risk is above it are candidates for detention, but detention is still not necessarily cost-justified. First, detention is not cost-justified if less-restrictive alternatives can produce comparable or greater net benefit by sufficiently reducing the risk of crime at lower cost to liberty. Second, the early days of incarceration are likely to impose the most serious costs, due both to the psychological adjustment and to the disruption to employment, housing status, childcare arrangements, and other life circumstances. Detaining two different people for two weeks each likely creates greater harm than detaining a single person for one month—and therefore greater harm than the serious assault that it is expected to avert.

Even as a lower bound, though, the risk threshold that emerges from the RHV survey is very high. Someone who is expected to commit crimes as grave as serious assault within thirty days, crimes as grave as robbery within three days, or crimes as grave as burglary within a single day, is extraordinarily high-risk. As we discuss in Part III, it is extremely difficult to identify people who pose that degree of risk. If the justification for

pretrial preventive detention really is a matter of consequentialist harm-balancing, such detention is rarely justified.¹⁴⁰

The extremity of this risk threshold is a function of just how awful—how costly—people believe it is to go to jail.¹⁴¹ To be jailed is to lose one’s freedom and dignity. It is to be isolated from family and friends. And contemporary American jails are not pleasant places. They are rife with violence and disease, quotidian humiliation, and pervasive fear. Whereas a crime victim has at least the sympathy of family, neighbors, and employers, a jail detainee must endure their anger and distrust. A person hospitalized with an injury can still communicate freely with the outside world. Not so a person in jail, which is one reason that even a few days in jail can cost a person his job, housing, and custody of his children.¹⁴² In abstract policy discussions it is easy to forget just how

¹⁴⁰ Not only is detention unjustified according to *Salerno*’s consequentialist framework if the harm to liberty outweighs the benefit in security; it might veer into pretrial punishment. The Supreme Court has held that a pretrial deprivation of liberty becomes punishment when it is “excessive” in relation to the goal that it seeks to achieve. *United States v. Salerno*, 481 U.S. 739, 747 (1987); *Bell v. Wolfish*, 441 U.S. 520, 538 (1979). If detention inflicts more harm than it averts, it is arguably excessive in relation to its goal of preventing harm. Cf. *Bambauer & Roth*, *supra* note 119, at 1667, 1676 (arguing that punishment that inflicts more than ten times the harm of the crime for which it is imposed is “grossly excessive” for constitutional purposes).

¹⁴¹ Interestingly, the other studies to have deployed RHV surveys have found similar results. The median respondent in the survey conducted by *Bambauer and Roth* stated that aggravated assault was equivalent to one month in jail and burglary was equivalent to an hour or less in jail. *Bambauer and Roth*, *supra* note 119, at 1713. *Mossman and Hart* were surprised to learn that “over a fourth of the undergraduates expressed an implicit preference for being attacked over undergoing a three-day hospitalization in a public psychiatric facility,” and that the medical students’ “aversion to involuntary hospitalization was nearly as great as the undergraduates.” *Mossman & Hart*, *supra* note 119, at 193. *Scurich* found that 75% of participants would rather be violently assaulted than convicted of violent assault. *Scurich*, *supra* note 119, at 29. Among that group, the median respondent equated five false negatives with one false positive, which *Scurich* interpreted to mean that they “prefer to be violently assaulted 5 times [rather] than spend a single day in prison.” *Id.* at 30–31. Even among respondents who would prefer to be convicted of violent assault over being assaulted, the median respondent “would prefer to spend 30 days in prison [rather] than be violently assaulted” but would presumably prefer victimization over longer periods of incarceration. *Id.* at 31.

¹⁴² See, e.g., *Curry v. Yachera*, 835 F.3d 373, 377 (3d Cir. 2016) (“Unable to post his bail, 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.”); *Nick Pinto, The Bail Trap*, *N.Y. Times* (Aug. 13, 2015), <http://nyti.ms/1INtghe> [<https://perma.cc/AKV3-JN8X>] (reporting the story of a woman who, “five months after her arrest, . . . was still fighting in family court to regain custody of her daughter”). Our empirical results also support arguments that arrest is overused. Arrest is the initial detention decision and can often lead to a day or

terrible a cost the system inflicts when it puts a person in jail. To our survey respondents, this cost was very vivid.

E. Technical Objections

We do not present the RHV-derived risk threshold as the final answer to the question of what risk justifies pretrial preventive detention. We offer it instead as a proof of concept. One can, in a principled fashion, develop estimates of the risk threshold for pretrial preventive detention. The harms of crime victimization and incarceration may be different, but they can be meaningfully compared. Unless we want to leave this calculus in the hands of bail judges and risk-assessment tool developers, such analysis must be done, and can be done. We believe, moreover, that our survey yields estimates that are ballpark-correct. Granted, the method intentionally simplifies a complicated determination. One can raise numerous sensible objections to it. We do not think, however, that any of these objections fundamentally change the central takeaway. We discuss technical objections to the method below—claims that we have omitted or miscalculated relevant costs and benefits. We consider objections to our consequentialist framework in Part III.

1. Omitted Costs

Perhaps the most obvious potential objection is that the survey method ignores manifold costs on both sides of the detention balance: the harms that crimes inflict, indirectly, on victims' families and communities, as well as perpetrators' families and communities and the similar harms that incarceration inflicts. As noted above, however, we expect such costs to exist on both sides of the balance. Crime harms the loved ones of those who suffer it and so does detention. Crime can increase fear and lead members of the community to invest in precautionary measures, even those who have not been directly victimized. But pretrial detention can also foment fear, and lead members of the community to take costly precautionary measures to avoid interaction with police that might lead to arrest. Both crime and incarceration impose indirect costs on taxpayers.

two in jail before the bail hearing. Given that a single day in jail produces harms as grave as being the victim of a burglary, arrest requires substantial justification. Rachel Harmon, *Why Arrest?*, 115 Mich. L. Rev. 307, 308–09 (2016).

We see no reason to expect that incorporating additional costs would shift the scale dramatically in either direction.¹⁴³

A related objection is that relative harm valuation prioritizes individual welfare costs over social welfare costs, and the response is similar. As the survey responses illustrate, most respondents contemplated potential harm to their careers and loved ones as they weighed the harm of criminal victimization against the harm of incarceration. In this sense, RHV does account for some social welfare costs. To the extent that the respondents' assessments failed to account for broader social harms, we expect those harms to accrue roughly equally on both sides of the balance.

2. Underspecified Harm

A second objection might be that the scenarios we ask each participant to envision are underspecified. Does robbery include a gun pointed at your head? Does aggravated assault result in permanent disability or disfigurement? We do not say. It is therefore possible that different participants are envisioning fundamentally different events.

The decision to leave the details of detention and crime largely unspecified was intentional, however, and we see this as a strength rather than a weakness of the survey design. The possible variation among the experiences that our respondents envision is a useful reflection of reality. Crime victimization and incarceration each encompass a wide range of experiences. No two assaults are alike. We do not attempt to describe a "median" instance of serious assault or incarceration because it does not exist. Our method relies on the virtues of aggregation. We expect that the participants' responses reflect a variety of experiences and perspectives. The median response should capture a median perspective within that range.

3. Distorting Perceptions About Justice

A third potential objection is that, when considering the harms of incarceration, respondents may be considering the justice of that

¹⁴³ Another variant on the omitted-costs objection is that our survey respondents cannot truly imagine the experience of criminal victimization because a central element of that experience is the terror of being killed or seriously hurt (a scenario that our survey precludes). However, it seems likely that a similar fear is equally central to the experience of jail detention, given current jail conditions, and is equally precluded by our survey. So, again, we think this limitation applies to both sides of the balance.

experience in ways that distort their responses. For instance, a respondent might imagine that she is being detained wrongfully or irrationally and perceive that injustice to compound the costs of incarceration. Alternatively, a respondent might imagine that she must have committed some crime to warrant the incarceration and perceive the justice of her detention to mitigate its cost.

As an empirical matter, respondents did not frequently report such assumptions when describing the challenges of jail time or explaining their responses. A few did, but by far the most frequently reported factors in respondents' deliberations were isolation, danger, stigma, uncomfortable living conditions, separation from family, exposure to other inmates, and job loss. If assumptions about the justice or injustice of the detention did affect responses, they do not appear to have affected responses very much. On a conceptual level, moreover, it is not clear that respondents' assumptions about the justice or injustice of their detention should be understood as distorting. Detainees, after all, also perceive their detention to be just or unjust, and that perception affects their experience. Absent some indication that respondents' perceptions about the justice of their detention differ systematically from detainees', such perceptions should be included in assessing the costs of detention.

4. Jail is Less Bad for the Average Detainee

A last objection might be that jail is less bad for the average pretrial detainee than the median person if pretrial detainees are more accustomed to life disruptions or more in need of food and a place to sleep. A principled cost-benefit analysis, the argument goes, should faithfully weigh the liberty loss on an individualized basis, accounting for the subjective experience of the deprivation.

Authorizing the state to incarcerate certain people for longer than others because their poverty makes incarceration relatively less awful raises thorny legal and moral questions. Principles of equality probably prohibit the state from tailoring the pretrial detention decision in this way.¹⁴⁴ Allowing otherwise would open the door to race and class bias.

¹⁴⁴ In fact, some might argue that we should raise the risk threshold for disadvantaged groups in order to wind down disparities within the criminal justice system. See, e.g., Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 *Duke L.J.* 1043, 1131 (2019) (arguing that, where preventive coercion by law enforcement aims to prevent "less serious crime," "the existence of negative spillovers for black families and communities warrants a more stringent risk threshold for the racial minority").

Moreover, the survey results produce no evidence that the harm of incarceration varies substantially by race, class, or prior experience with incarceration.¹⁴⁵ Respondents who are unemployed, Black, or previously incarcerated also report high levels of aversion to spending even a short amount of time in jail.

III. THE DISCREPANCY BETWEEN THEORY AND PRACTICE

The very high risk-threshold that emerges from the RHV survey raises two core questions. The first is when, if ever, we can identify risk that is grave enough to warrant detention under the survey-derived standard. The second is whether our basic premise—that the consequentialist analysis must not discount the welfare of arrestees relative to crime victims—might be misguided. This Part addresses those questions.

A. In Theory, Detention Is Rarely Justified

1. Statistical Risk Is Generally Insufficient

As bail reform gathered momentum, stakeholders placed a great deal of hope in actuarial risk assessment tools as mechanisms to make pretrial release and detention decisions. Hundreds of jurisdictions have now adopted such tools.¹⁴⁶ To build them, developers analyze large data sets to identify correlations between case and defendant characteristics and future offending (or some proxy for future offending, like arrest).¹⁴⁷ Each defendant receives a risk score based on their statistical likelihood of future arrest. The instrument divides these scores into categories, often

¹⁴⁵ See *supra* Table 2 and accompanying text. The one exception is that the median unemployed respondent rated six months of jail, rather than one, as equivalent to suffering an aggravated assault. The sample size for this group was quite small, however, and it is difficult to tell if this variance is meaningful or is just noise.

¹⁴⁶ Movement Alliance Project & MediaJustice, National Landscape: Mapping Pretrial Injustice, Pretrial Risk <https://pretrialrisk.com/national-landscape> [<https://perma.cc/9F5U-9QTW>] (last visited Oct. 31, 2021).

¹⁴⁷ For additional background on pretrial risk assessment, see, e.g., Mayson, *Dangerous Defendants*, *supra* note 10, at 507–16; Megan Stevenson, *Assessing Risk Assessment in Action*, 103 *Minn. L. Rev.* 303, 314–17 (2018); Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 *Emory L.J.* 59, 67–72 (2017); Sarah L. Desmarais & Evan M. Lowder, *Pretrial Risk Assessment Tools: A Primer for Judges, Prosecutors, and Defense Attorneys*, *Safety & Just. Challenge* 4–6 (2019), <http://www.safetyandjusticechallenge.org/resource/pretrial-risk-assessment-tools-a-primer-for-judges-prosecutors-and-defense-attorneys> [<https://perma.cc/J39Q-X3FP>].

“low risk,” “moderate risk,” and “high risk.”¹⁴⁸ Actuarial risk assessment tools are widely believed to be more accurate in predicting future offending than human intuition, even the intuition of an experienced judge.¹⁴⁹

Can today’s pretrial risk assessment tools identify defendants who are so dangerous as to require detention pursuant to our survey results? The evidence is not promising.

The first problem is that most current tools assess the likelihood of arrest for anything at all, including minor offenses.¹⁵⁰ Given that our median survey respondent deems a few days in jail to be as bad as being robbed, it seems safe to posit that a risk of minor crime probably never justifies detention. The likelihood of “any future arrest” is simply not relevant to detention decisions.

Some pretrial risk assessment tools do assess the likelihood of arrest for a violent offense, but even among those classified as high-risk, rates of rearrest for violence are quite low. In one widely used risk assessment tool, the PSA, defendants classified in the highest-risk category for “new violent criminal activity” had a less than 4% rearrest rate for violence during the pretrial period (six to nine months).¹⁵¹ For the COMPAS risk assessment tool, only 2.5% of defendants in the highest risk group were rearrested for a violent offense within a month; 8% were rearrested for a

¹⁴⁸ A crucial step in implementing a risk assessment tool is determining what risk threshold should divide the different categories. Let us say a jurisdiction recommends pretrial detention only for defendants in the highest risk category. The risk assessment designer (and the task force overseeing the process) must determine what statistical risk should separate the moderate- from the high-risk category. This decision process is almost never conducted in a transparent manner. Nonetheless, some process occurs, and at the end of the day, a decision is made. See Eaglin, *supra* note 149, at 85–88 (explaining the process by which risk assessment tool developers choose the “cut-off points” that create risk classifications).

¹⁴⁹ Robyn M. Dawes, David Faust & Paul E. Meehl, *Clinical Versus Actuarial Judgment*, 243 *Science* 1668, 1669 (1989), <https://courses.washington.edu/pbafhall/514/514%20Readings/clinical%20versus%20actuarial.pdf> [<https://perma.cc/RL4U-MFGS>].

¹⁵⁰ Mayson, *Dangerous Defendants*, *supra* note 10, at 509–14.

¹⁵¹ Matthew DeMichele, Peter Baumgartner, Michael Wenger, Kelle Barrick & Megan Comfort, *Public Safety Assessment: Predictive Utility and Differential Prediction by Race in Kentucky*, 19 *Criminology & Pub. Pol’y* 409, 419 (2020). The pretrial period was between six and nine months for most defendants. This study does not specify which crimes are included in their measure of violent rearrest. Matthew DeMichele et al., *The Public Safety Assessment: A Re-Validation and Assessment of Predictive Utility and Differential Prediction by Race and Gender in Kentucky* 51 (Apr. 25, 2018) (unpublished manuscript) (on file with author).

violent offense within six months.¹⁵² Other studies of pretrial risk assessments report similarly low rates of violent recidivism.¹⁵³

With such low rearrest rates for violent crime even within the highest risk group, it appears unlikely that any existing pretrial tool is capable of identifying the degree of risk that could justify detention. Our survey found that one month of detention is as bad as an aggravated assault; to be justified, one month of detention must avert at least one aggravated assault. Detaining all those classified as high-risk for violence by the COMPAS, for instance, is projected to avert only twenty-five violent offenses for every *thousand* people detained for one month. This is the equivalent of trading forty months of liberty to prevent one violent offense. The average “violent offense,” moreover, is less serious than an aggravated assault.¹⁵⁴

¹⁵² Blomberg, *supra* note 21, at 22, 48–49 (defining “violent crimes” to include “murder, manslaughter, sex offenses, robbery, assault, battery, or other crimes in which the description indicates a person was harmed or under the threat of bodily injury”).

¹⁵³ A study of the federal Pretrial Risk Assessment, for instance, found that 2.9% of those classified in the highest-risk group were rearrested for a violent offense during the pretrial period (11 months, on average). Thomas H. Cohen, Christopher T. Lowenkamp & William E. Hicks, *Revalidating the Federal Pretrial Risk Assessment Instrument (PTRA): A Research Summary*, 82 Fed. Prob. 23, 25–26 (2018). This study defined violent crimes to include “homicide and related offenses, kidnapping, rape and sexual assault, robbery, and assault,” both felony and misdemeanor. *Id.* at 25 (citing Christopher T. Lowenkamp, Alexander M. Holsinger & Thomas H. Cohen, *PCRA Revisited: Testing the Validity of the Federal Post Conviction Risk Assessment (PCRA)*, 12 Psych. Servs. 149, 151 (2015)). We note that as this article was approaching publication, two validation studies of the PSA in California were released that documented much higher rates of rearrest for violent offenses among those “flagged” as high-risk for violence. James Hess & Susan Turner, *Validation of the PSA in Los Angeles County* 34 tbl.4.A.4.a (last updated 2021), <https://ucicorrections.seweb.uci.edu/2021/02/03/validation-of-the-psa-in-los-angeles-county> [<https://perma.cc/RRU9-YPK4>] (reporting that approximately 36% of those scoring in the two highest risk brackets were rearrested for a violent offense during the pretrial period); Alissa Skog & Johanna Laco, *Validation of the PSA in San Francisco* 21 tbl.14 (2021), <https://www.capolicylab.org/wp-content/uploads/2021/08/Validation-of-the-PSA-in-San-Francisco.pdf> [<https://perma.cc/G7EJ-X4V3>] (reporting that 36% of those flagged for violence risk by the PSA were rearrested for violence during the pretrial period).

¹⁵⁴ The validation studies cited above define “violent offense” to include simple assault and battery. See Blomberg, *supra* note 21, at 22; Advancing Pretrial Pol’y & Rsch., *Guide to the PSA Violent Offense List 5* (last updated 2020), <https://advancingpretrial.org/guide/guide-to-the-psa-violent-offense-list/> [<https://perma.cc/JV9V-6KK9>]. They do not specify rates of rearrest for different subsets of violent offenses. Considering that the arrest rate for simple assault and battery is much higher than for other violent crimes, it stands to reason that the average cost of the violent offenses represented in these studies is lower than the cost of aggravated assault, robbery, or burglary. In other words, if incarcerating 1000 people for a month averts twenty-five violent crimes, the harm of those crimes is expected to be less than

It is true that rearrest rates in validation studies might understate the number of crimes that the highest risk groups would actually commit because validation studies suffer from selection bias. We only see the pretrial rearrest rate for people who are *not* detained. Detained defendants may pose a higher crime risk than those who are released; if courts are judging risk accurately, this should be the case! The rearrest rate among released defendants might therefore understate the statistical meaning of a high-risk classification. Furthermore, the rearrest rate may understate the true number of crimes, since not all offenses result in arrest.

In Appendix B, we conduct some back-of-the-envelope calculations to estimate what the true rate of serious crime is for those classified in the highest risk category for violent crime. We make a series of extreme assumptions designed to favor detention, yet still find that a high-risk classification does not indicate a degree of risk even close to severe enough to justify pretrial detention.¹⁵⁵ It is possible that our risk assessment capacities could improve in the future. But no one should hold their breath. Recent studies have found that complex machine-learning algorithms do not usually offer large improvement over simple checklist-style instruments with as few as two input variables.¹⁵⁶ These studies suggest that interaction between input factors is not especially important to prediction,¹⁵⁷ and that the marginal value of additional data is relatively

the harm of twenty-five serious assaults. See Unif. Crime Reporting Program, FBI, 2017 Crime in the United States, at tbl.35, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables> [<https://perma.cc/AZR7-VBWW>] (last visited Jan. 18, 2022) (reporting that in 2017, the arrest rate for simple assault was three times as high as for aggravated assault, five times as high as for burglary, twelve times as high as robbery, forty-seven times as high as for rape, and ninety-five times as high as for murder).

¹⁵⁵ If one were to combine all of our extremely conservative assumptions at once, pretrial detention might be justified for the highest-risk category. However, we expect that these conservative assumptions are much too conservative. See Appendix B.

¹⁵⁶ See, e.g., Jongbin Jung, Connor Concannon, Ravi Shroff, Sharad Goel & Daniel G. Goldstein, Simple Rules for Complex Decisions (Stan. Univ., Working Paper No. 978, 2017); Elaine Angelino, Nicholas Larus-Stone, Daniel Alabi, Margo Seltzer & Cynthia Rudin, Learning Certifiably Optimal Rule Lists for Categorical Data, 18 *J. Mach. Learning Rsch.*, 2018, at 1, 1; Julia Dressel & Hany Farid, The Accuracy, Fairness, and Limits of Predicting Recidivism, 4 *Sci. Advances*, Jan. 2018, at 1, 3.

¹⁵⁷ For instance, consider the input factors of age and current charge. It might be the case that age predicts future arrest differently for people charged with drug offenses than for people charged with property offenses. Complex machine-learning algorithms can identify and learn from such interactions in the data. If such interactions are substantial, machine learning algorithms should substantially outperform the simpler tools. But they do not.

low once a handful of important factors are accounted for.¹⁵⁸ The best available research suggests that future crime is simply hard to predict and will remain so.

2. When Detention Is Warranted

The fact that contemporary risk assessment tools cannot justify pretrial detention on their own does not mean that detention is never warranted. As an initial matter, our survey results (and the risk threshold they generate) presume status quo conditions of detention. The respondents deemed even short stints in jail to be as bad as criminal victimization because jail is a terrible place to be. With adequate political will, U.S. jails could be substantially less awful. Minimizing the costs of detention to detainees would lower the risk threshold that justifies detention.¹⁵⁹ Even under status quo conditions, though, there are likely some cases that meet the survey-derived risk threshold.

i. Murder, Rape, and Domestic Violence

We have thus far omitted the risk of murder, rape, or domestic violence in our analysis. Murder and rape are extremely severe harms, and we don't expect our RHV survey method to function well for these types of crimes. It is not meaningful to ask how long someone would stay in jail to avoid being murdered; most everyone would agree to a lifetime. One could ask respondents how much time they would spend in jail to eliminate a given probability—say 10%—of being murdered, but then we are heavily leaning on people's ability to evaluate small risks. Rape poses similar challenges, with the added difficulty that the boundaries of the

¹⁵⁸ Age and criminal history are usually the best predictors of future crime. See Megan T. Stevenson & Christopher Slobogin, *Algorithmic Risk Assessments and the Double-Edged Sword of Youth*, 98 *Wash. U. L. Rev.* 681, 696 (2018).

¹⁵⁹ In addition to improving conditions of confinement, we might consider compensating detainees for non-punitive confinement. See generally Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 *Cardozo L. Rev.* 1947, 1979–82 (2005) (proposing that the criminal justice system should compensate pretrial detainees to account for their costs); Michael Louis Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, 86 *J. Crim. L. & Criminology* 778, 814 (1996) (“It would thus seem both fair and efficient to compensate [a person preventively detained] for the loss of [his freedom]—fair because he is paying out of his own resources to prevent harm to others and efficient because if he is compensated the community will not be likely to squander his freedom without justification.”); Zina Makar, *Unnecessary Incarceration*, 98 *Or. L. Rev.* 607, 611 (2020) (advocating compensation for pretrial detention).

crime itself are deeply contested.¹⁶⁰ Domestic violence, meanwhile, differs from most other crime in that any given incident often belongs to an ongoing pattern of abuse.¹⁶¹ The harms to the victim encompass the experience of living in an abusive relationship.¹⁶² Considering the costs of one incident in isolation, as we do with burglary, robbery, and assault, would tend to understate its harm.

That being said, one could easily extend our framework to include such offenses if one were willing to make an assumption about how the harms of these crimes compare to the ones analyzed here. For instance, if one were to assume that rape imposes harms that are ten times as grave as serious assault, then it could be justified to detain someone for a month if they pose a 10% risk of committing rape within a month if not detained. At this point we are not prepared to make such assumptions. We allow that there are likely instances in which people pose a grave enough risk of murder, rape, or domestic violence to justify pretrial detention. Exactly how many, we do not know. But we expect that only a minority of pretrial detainees are being held based on risks as specific as these. Most, we expect, are being held based on a much more nebulous conception of crime-risk.

ii. Case-Specific Evidence of Risk

Risk assessment tools are not perfect, but there is broad consensus that they can predict future offending better than human beings.¹⁶³ If risk assessment tools cannot identify a group of defendants who meet the risk threshold, judges will generally not be able to either.

Yet courts may sometimes be able to identify individuals who present a substantial enough risk to warrant preventive detention on the basis of the particular facts of a case. Imagine a person charged with attempting to assault a man he believes to have slept with his wife. The defendant has repeatedly vowed to hurt this man at the first opportunity. He has a record of violence. He has little to lose. He goes so far as to tell the court that there is nothing the court can do, short of killing him; whenever he

¹⁶⁰ See, e.g., Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 *Calif. L. Rev.* 881, 885 (2016).

¹⁶¹ Cora Peterson et al., *Lifetime Economic Burden of Intimate Partner Violence Among U.S. Adults*, 55 *Am. J. Preventive Med.* 433, 434 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6161830> [<https://perma.cc/FY3F-SMTJ>].

¹⁶² *Id.*

¹⁶³ Dawes, *supra* note 149, at 1669–70.

gets out, he will exact his revenge.¹⁶⁴ He does not intend to kill his rival, just to seriously injure him. The court might justifiably conclude, in this scenario, that there is something like a 75% chance of this man committing a serious assault within a week of release. That degree of risk might justify detention for that week. If, at the end of the week, the degree of risk remained as high, it would justify detention for another week. Continued detention might be justified until adjudication.

We expect instances of case-specific risk that are substantial enough to warrant preventive detention to be exceedingly rare. Take our hypothetical defendant. If the most precise risk we can articulate is a 75% chance of serious assault *within thirty days*, it does not warrant preventive detention for thirty days under the survey risk-threshold. If there is less than 100% certainty that the assault will actually happen within a month, the projected harms of detention for the potential assailant outweigh the projected benefits of averted crime for the potential victim.

This application of the analysis defies common moral intuitions. One's instinct is to say that the would-be assailant should be detained in order to avert the harm that he threatens. Where have we gone wrong?

Let us change the story slightly. Imagine that a defendant, Abe, has promised to assault someone named Carlos unless James, an innocent third party, is placed in jail for thirty days. Is it justifiable to detain James to avert the assault on Carlos? Here the intuitive answer is different. We venture to suggest that most people would feel that detaining James is not justified.

We surmise that the reason it feels justified to detain Abe, but not James, in order to prevent an assault on Carlos is because the risk that Abe poses makes us care less about his well-being.¹⁶⁵ In the cost-benefit

¹⁶⁴ These hypothetical facts very loosely recall the situation in *Hendricks*, in which the (convicted) defendant told the court “that the only sure way he could keep from sexually abusing children in the future was ‘to die.’” *Kansas v. Hendricks*, 521 U.S. 346, 355 (1997).

¹⁶⁵ In philosophical terms, one might intuit that Abe is culpable for threatening the harm; he has forfeited his right against preventive confinement, see Walen, *A Punitive Precondition*, supra note 79, at 1230; he is a “[c]ulpable [a]ggressor” who we may justifiably restrain on Carlos’ behalf, see Ferzan, *Beyond Crime*, supra note 79, at 160; he has incurred a duty to dispel the threat, see Duff, supra note 78, at 13; Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* 268–72 (Oxford Univ. Press 2011); or perhaps he should even be subject to punishment for his culpable act, see Douglas Husak, *Lifting the Cloak: Preventive Detention as Punishment*, 48 *San Diego L. Rev.* 1173, 1992 (2011). Alternately, the intuition may be that detaining James to protect Carlos violates the Kantian prohibition on using people purely as a means. E.g., Samuel Kerstein, *Treating Persons as Means*, Stan.

analysis, we discount the harm that he would suffer from incarceration. We do not care as much that he may feel frustrated, powerless, bored, and afraid. It does not bother us that he may be eating gray baloney and sleeping with cockroaches. We have judged Abe to be at fault, and his discomforts weigh little on our conscience. This scenario takes us to the question of whether it is permissible to discount arrestees' well-being in a cost-benefit calculus, as we are inclined to discount Abe's.

B. Discounting Arrestees' Well-Being

Our surveys suggest that preventive detention should be exceedingly rare. Yet, on any given day, there are almost 500,000 people detained pretrial in the United States.¹⁶⁶ And these “moment in time” numbers understate the number of individuals who experience pretrial detention, because more than ten million people cycle through the jails annually.¹⁶⁷ Current statistics do not disclose what fraction of them are detained pretrial, or for how long, but the number is likely to be in the millions.

The reasons for pretrial detention vary. Some people are detained to prevent flight or evidence-tampering. Others might be detained inadvertently because they were unable to pay the bail amount set. Nonetheless, we expect that a substantial portion of those detained each year (including those held on unaffordable bail) are detained due to concerns about crime-risk. Public discourse around pretrial detention has focused largely on public safety, suggesting that, at least in the public mind, crime risk is an important justification for detention rates.¹⁶⁸ Judges frequently cite danger to the community when setting high bail or denying bond.¹⁶⁹

What accounts for the disconnect between theory and practice? Our hypothesis is that pretrial detention rates are high—and will remain high in the absence of constraints—in large part because judges, lawmakers, and ordinary citizens discount the well-being of potential detainees relative to the well-being of potential crime victims. This relative indifference can manifest itself in a judge's high bail decision, in press

Encyc. of Phil. (Apr. 13, 2019), <https://plato.stanford.edu/archives/sum2019/entries/persons-means> [<https://perma.cc/3CR4-YQGJ>].

¹⁶⁶ Zeng, *supra* note 22, at 5 tbl.3.

¹⁶⁷ *Id.* at 1.

¹⁶⁸ See *supra* note 26 and accompanying text.

¹⁶⁹ See, e.g., Mayson, *Detention by Any Other Name*, *supra* note 24, at 1663–64 (citing *State v. Anderson*, 127 A.3d 100, 107 (Conn. 2015)).

coverage that erupts in outrage every time a person on pretrial release commits a crime while remaining silent on most instances of detention, and in the laws and incentive structures that policymakers construct for the pretrial process.

The impulse to privilege crime victims over (possible) past and future crime perpetrators is understandable, but it is important to try to disentangle the grounds for discounting the costs of detention to detainees in order to assess whether they are sound. The discussion that follows evaluates four distinct arguments that our conceptual framework and survey method are misguided in valuing the welfare of arrestees by the same standard as the welfare of potential crime victims. Each argument claims that the harm of detention to detainees should be systematically discounted in some way for purposes of the cost-benefit analysis.

1. *Time Served*

A first argument is that our survey results overstate the cost of pretrial detention because, in reality, the time that people spend detained before trial will be credited toward any jail or prison sentence they receive.¹⁷⁰

There are three problems with this proposition. First, discounting someone's well-being in the present on the grounds that they may be convicted in the future looks a lot like pretrial punishment. Second, many detained defendants are not convicted or are not sentenced to incarceration; their time in detention is not credited toward anything.¹⁷¹ Third, discounting the costs of detention on the "time-served" basis does not even make sense in a consequentialist framework. If crediting pretrial detention toward punishment reduces its costs, it also reduces its benefits. Imagine a hypothetical defendant, Amy, whose pretrial detention is credited against her sentence of one year's incarceration. Given that Amy would have spent a year incarcerated regardless, whatever benefit her detention had—whatever crime it averted—is a benefit that her sentence would have produced in any case. One year's imprisonment is one year's imprisonment whether it begins in July or October. If one treats Amy's

¹⁷⁰ Mayson, *Dangerous Defendants*, supra note 10, at 549–51 (analyzing this basis for discounting the value of pretrial detainees' liberty).

¹⁷¹ See Colin Starger, *The Argument that Cries Wolfish*, MIT Computational Law Report (Aug. 14, 2020), <https://law.mit.edu/pub/theargumentcrieswolfish/release/2> [<https://perma.cc/4F85-7NH3>] (finding that in 7% of all cases filed in Maryland District Court in Baltimore City between 2013–2017, defendants were detained pretrial and subsequently had their cases dropped prior to adjudication).

detention as cost-free for purposes of the analysis because it gets absorbed into her punishment, one must also treat it as benefit-free. Her detention simply drops out of the cost-benefit calculus altogether.¹⁷² This is conceptually coherent, after all; her detention has been converted into punishment, such that neither its costs nor its benefits belong in a cost-benefit analysis of regulatory pretrial detention.¹⁷³

Finally, it seems worth noting the perversity of the time-served argument given that many “time-served” sentences are, in fact, a direct result of pretrial detention.¹⁷⁴ When a person is detained on minor charges prosecutors will typically offer a sentence of “time served” if the person pleads guilty. The incentive is overwhelming, even if the person might have fought the charges if she had been at liberty. People plead guilty to go home. A not-insignificant number of people whose detention is ultimately credited toward their sentence of incarceration would not have received a sentence of incarceration at all had they not been detained—or would have received a shorter one.¹⁷⁵ To treat pretrial detention as costless in these cases is to allow detention to justify itself. Detention produces a

¹⁷² See Yang, *supra* note 80, at 1432–33 (“[I]f a defendant would be incarcerated post-trial regardless of pre-trial detention, and the defendant is given credit for time spent in jail pre-trial, the gains from reducing pre-trial crime are merely shifted forward in time and should generally not be included in a cost-benefit analysis.”).

¹⁷³ It is actually possible that the effects of a year’s incarceration might vary to some extent on the basis of the timing of the incarceration (i.e., pretrial or postconviction). It is not clear to us, however, that serving some of the year pretrial would necessarily entail more benefit and less cost than serving it all post-conviction, rather than more cost and less benefit.

¹⁷⁴ As a growing body of empirical scholarship has demonstrated, pretrial detention causally increases the likelihood of conviction, the likelihood of a carceral sentence, and the expected length of the sentence. Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 *Am. Econ. Rev.* 201, 203, 225, 234–37 (2018); Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 *J. Legal Stud.* 471, 472–76 (2016); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *Stan. L. Rev.* 711, 714–15 (2017); 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, 530–31 (2017); Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 *J.L. Econ. & Org.* 511, 512–13, 537 (2018); Christopher T. Lowenkamp, Marie VanNostrand & Alexander Holsinger, *The Hidden Costs of Pretrial Detention* 4 (2013) (associating longer pretrial detention period with increased failure to appear and new criminal activity pending trial; associating pretrial detention lasting two or more days with probability of post-disposition recidivism).

¹⁷⁵ Heaton, *supra* note 174, at 715, 767–68 (empirical study finding that misdemeanor pretrial detention causally increases the likelihood of conviction and of receiving a custodial sentence).

carceral sentence that justifies detention! It is dazzling alchemy, but it is perverse.

2. “Correct” Detentions as Cost-Free

A second argument is that only erroneous detentions should count as costs in the consequentialist calculus—that is, detention of those who would *not* actually have committed the harm in question. Most of the scholars who have considered preventive detention in cost-benefit terms have assumed this proposition. If they are right, then it is appropriate to discount the cost of detention by excluding “correct” detentions, the detentions of those who would in fact have committed crime if not detained.

The notion that errors are the relevant costs is familiar from the context of criminal adjudication. The costs of concern there are wrongful convictions and wrongful acquittals, Type I and Type II errors, and insofar as we invoke cost-benefit analysis to inform our adjudication structures we strive to weigh the relative costs of these errors. Jurists and scholars have typically deemed a wrongful conviction to be much more costly than a wrongful acquittal. Thus, Blackstone famously wrote that “it is better that ten guilty persons escape, than that one innocent suffer.”¹⁷⁶ It is ten times worse, in other words, to wrongfully convict than to wrongfully acquit. In statistical terms, a false positive is ten times as costly as a false negative. This “cost ratio” translates loosely into the requirement of proof beyond a reasonable doubt.¹⁷⁷ We require such proof in order to minimize wrongful convictions, even at the cost of letting additional guilty people go free.¹⁷⁸

¹⁷⁶ 4 William Blackstone, Commentaries 352 (Oxford, Clarendon Press 1769).

¹⁷⁷ *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring) (“Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.”); *id.* at 372 (“I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”); *Addington v. Texas*, 441 U.S. 418, 428 (1979) (“The heavy standard applied in criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free.”).

¹⁷⁸ To adhere to the Blackstone ratio exactly, we should calibrate our standard for conviction such that it allows up to ten false negatives for each false positive. Precisely what degree of statistical confidence in guilt this would require depends on the base rate of guilty versus innocent people in the trial pool. The base rate will also affect “the *actual* ratio of errors” that a 10:1 cost ratio produces. Nicholas Scurich & Richard John, *The Normative Threshold for*

A direct translation of the Blackstone ratio to the preventive detention context would also consider errors. Alan Dershowitz undertook such a translation when he noted, in 1974, that “[t]here is no comparable aphorism for preventive confinement” and asked what it might be: “[I]s it better for *X* number of ‘false positives’ to be erroneously confined (and for how long?) than for *Y* number of preventable harms (and of what kind?) to occur? What relationship between *X* and *Y* does justice require?”¹⁷⁹ Other scholars have also assumed that errors are the relevant costs to balance to determine when preventive detention is justified.¹⁸⁰

But a focus on errors is inappropriate in the preventive context. A costs-of-error framework makes sense for adjudications of guilt, where it is permissible to discount the harm inflicted on a person who is accurately convicted and punished because, at least in theory, that harm is deserved. In the preventive detention context, by contrast, the harm inflicted on the person detained is never justified by a finding of guilt. The determination that justifies detention is an *ex ante* assessment of the likelihood of future harm. And a person cannot be held responsible for possible future harm. Thus, *all* preventive detention is costly, in the sense that the state makes no claim that it is deserved. Every single instance of detention subordinates the welfare of the detained person to the public good. There is simply no conceptual basis to discount the welfare of those who, in a hypothetical counterfactual universe, would have committed harm.¹⁸¹

Psychiatric Civil Commitment, 50 *Jurimetrics J.* 425, 438 (2010). It is important to note, moreover, that this is not a universal interpretation of Blackstone’s principle. Some scholars, including Professor Laurence Tribe, believe the point of the principle is to preclude rather than to minimize false positives. Tribe, *An Ounce of Detention*, *supra* note 2, at 385–87.

¹⁷⁹ Dershowitz, *supra* note 9, at 60 (“We have not even begun to ask these kinds of questions, or to develop modes of analysis for answering them.”).

¹⁸⁰ E.g., *id.*; John Monahan, *Strategies for an Empirical Analysis of the Prediction of Violence in Emergency Civil Commitment*, 1 *L. & Hum. Behav.* 363, 370 (1977) (“[I]t may be better that ten ‘false positives’ suffer commitment for three days than that one ‘false negative’ go free to kill someone during that period.”); Scurich & John, *supra* note 178, at 431, 438–39 (interpreting *Addington v. Texas* to hold “that in the context of civil commitment the cost of a false positive is greater than a false negative”; inferring the requirement for civil commitment that false positives cannot outnumber false negatives; analyzing a dataset, and concluding that only the highest-risk group that the MacArthur Violence Risk Assessment tool can identify, for whom the projected rate of violent crime is 52.7%, should be committed); Vars, *supra* note 111, at 887–90 (treating “correct” detentions as having no cost relevant to a cost-benefit analysis of detention).

¹⁸¹ The concept of a “false positive” is arguably not even coherent in the context of a probabilistic assessment of risk. Whereas an adjudication of guilt is a factual determination made *ex post*, preventive detention decisions require a probabilistic assessment of the likelihood of future harm made *ex ante*. We can never know when we have “erroneously”

3. *Culpability for Risk*

A related notion is that, even if the state cannot discount the value of arrestees' welfare on the basis of their counterfactual future guilt, it can discount the liberty of those who pose a risk. The idea is that people are generally responsible for whatever traits make them risky, and they are culpable for having those traits or for failing to correct them.¹⁸² The problem with this logic is that the traits that make someone high-risk may be entirely beyond a person's control. As a statistical matter, for instance, age and gender are among the most powerful predictors of future criminal activity.¹⁸³ Teenage men are the highest-risk demographic across time and national boundaries.¹⁸⁴ Even assuming that some people are responsible for some of the facts that render them risky, like gang involvement, invoking that responsibility as grounds for discounting their welfare raises a difficult due process question: Is it permissible for the state to invoke a person's culpability for past acts as grounds for discounting their welfare, without a finding of guilt beyond a reasonable doubt and rigorous adversarial process? That question brings us to the most obvious ground for discounting the welfare of arrestees relative to crime victims and the ground that is most difficult to resolve.

4. *Culpability for Past Conduct*

Barring unlawful arrests, there is probable cause to believe that every arrestee is guilty of a crime. As between a person for whom there is probable cause to believe her guilty of a crime and a person for whom there is no such cause, it is a human tendency to privilege the well-being of the latter. The arrested person (probably) did something wrong! Her

detained someone, because we can never know what that person would have done had she not been detained. Even if we could know that she would have committed no harm, it is not clear that the detention was "in error" if the risk was great enough. See Sandra G. Mayson, *Bias In, Bias Out*, 128 *Yale L.J.* 2218, 2244 (2019) ("If an event assessed as likely does not transpire, it does not render the initial probabilistic assessment 'false.'"). Finally, at a metaphysical level, unless one believes that the future is wholly determined (excluding even quantum indeterminacy), the problem with holding someone accountable for crime they would have committed in a counterfactual universe is not just epistemic but ontological: there is no truth of the matter about what would have happened under counterfactual conditions.

¹⁸² See Husak, *supra* note 165, at 1193–94.

¹⁸³ See, e.g., Stevenson & Slobogin, *supra* note 158, at 689–700.

¹⁸⁴ Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 *Am. J. Soc.* 552, 556 fig.1 (1983).

liberty does not deserve the same protection as the liberty of a wholly innocent person.

The problem with this rationale is that it involves differential treatment on the basis of guilt, or possible guilt, prior to a criminal conviction. One of us has evaluated this rationale for discounting arrestees' welfare in a prior article, *Dangerous Defendants*.¹⁸⁵ As that article notes, private citizens may be justified in treating accused persons with less concern than potential crime victims, but the government is in a different position. Due process prohibits the government from subjecting a person "to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him."¹⁸⁶ This is because such judgments inflict profound and unique expressive harm. "Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."¹⁸⁷

It is the difficulty of assessing guilt fairly that creates a "pretrial" phase in the first place. The entirety of the procedural regime that governs criminal proceedings is designed to prevent the state from lending its power to casual, arbitrary, vindictive, or incorrect judgments of guilt.¹⁸⁸ Given the importance of these protections, the possible guilt of pretrial detainees is, at best, a dubious ground for discounting the value of their liberty before trial.

The argument against taking culpability into account is not watertight, however. At least one Supreme Court opinion has deemed a person's

¹⁸⁵ See Mayson, *Dangerous Defendants*, supra note 10, at 537–41 (developing this point in more depth).

¹⁸⁶ *In re Winship*, 397 U.S. 358, 367 (1970); see also *id.* at 361–63 (holding that only proof beyond a reasonable doubt is sufficient to convict). Cf. Ferzan, *Preventive Justice*, supra note 79, at 508–09, 523 (arguing that a state may preventively restrain "[c]ulpable [a]ggressors" but should be required to prove culpability beyond a reasonable doubt).

¹⁸⁷ *In re Winship*, 397 U.S. at 363–64. As *Winship* itself demonstrates, the Constitution demands this protection even for civil proceedings that trigger (purportedly) non-punitive consequences only. *Id.* at 365–67 (explaining that "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts"). See also, e.g., *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813) (stating that probable cause "means less than evidence which would justify condemnation"); *Brinegar v. United States*, 338 U.S. 160, 176 (1949) (noting that the function of the probable cause determination is "to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime").

¹⁸⁸ *In re Winship*, 397 U.S. at 362–63; see also *infra* notes 29–33 and accompanying text (asserting that a defendant's "presumption of innocence" is fundamental to criminal legal proceedings).

apparent culpability for creating a risk to be relevant to how his interests should be weighed. In *Scott v. Harris*, the Supreme Court considered whether Scott, a police officer, violated the Fourth Amendment by using a “PIT maneuver” to run Harris’ car off the road after Harris fled a traffic stop, leaving Harris a quadriplegic.¹⁸⁹ Writing for an eight-justice majority, Justice Scalia explained that the reasonableness of a seizure for Fourth Amendment purposes is a matter of interest-balancing.¹⁹⁰ In Scott’s case, Scalia reasoned, it was appropriate “to take into account not only the number of lives at risk, but also their relative culpability.”¹⁹¹ Since Harris had “intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight” his welfare was entitled to less weight than that of innocent people he had put at risk.¹⁹² The Court held that Officer Scott was entitled to summary judgment because his conduct was reasonable as a matter of law.

There are reasons not to accord too much weight to the culpability language in *Scott*. It is arguably dicta. The Court’s assessment of the parties’ relative culpability is questionable; there is a plausible argument that Scott and the other officers who chased Harris were the ones who created the unnecessary risk.¹⁹³ Finally, *Scott* might have it wrong. It is far from clear that police officers should be weighing moral responsibility to make split-second decisions about whether to use deadly force, or that the constitutionality of that force should be contingent on the moral status of the person they hurt or kill.¹⁹⁴

¹⁸⁹ *Scott v. Harris*, 550 U.S. 372, 374–75, 375 n.1 (2007).

¹⁹⁰ *Id.* at 383 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

¹⁹¹ *Id.* at 384.

¹⁹² *Id.*

¹⁹³ The record is somewhat unclear, but presumably the officers had Harris’ license plate number and could have tracked him down after the fact rather than chasing him immediately. *Id.* at 393.

¹⁹⁴ Prior to *Scott*, the Court’s seminal opinion on police use of deadly force to stop a fleeing suspect was *Tennessee v. Garner*, 471 U.S. 1 (1985). In that case, too, the Court engaged in interest balancing. The Court reasoned, for instance, that “[i]t is not better that all felony suspects die than that they escape.” *Id.* at 11. The Court ultimately held that the Fourth Amendment permits “the use of deadly force to prevent the escape of an apparently unarmed suspected felon” only when “it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.” *Id.* at 3. The Court did not suggest that, by attempting to flee or by having (probably) committed a recent crime, a suspect diminished his own right to liberty or the weight that should be afforded to it in the balance. *Id.* at 10–11. To the contrary, with respect to Garner’s personal interests, the Court merely said: “The suspect’s fundamental interest in his own life need not be elaborated upon.” *Id.* at 9.

Yet Scalia's abstract point is hard to dismiss. It seems unjust to ask a potential victim to bear as much of a burden as a person we have good reason to believe has culpably created a risk.¹⁹⁵ Even progressive bail reform strategies seem tied to ideas of desert. Many bail reform advocates, for instance, would limit eligibility for pretrial detention to those charged with serious offenses on strong evidence.¹⁹⁶ Most people see pretrial detention as particularly unjust when charges are eventually dropped.¹⁹⁷ If the ground for detention is risk, this focus on the charge is misplaced. Except in edge cases, like the hypothetical arrestee who credibly threatens imminent harm, current charges tend to provide little information about the likelihood of future criminal conduct. Many pretrial risk assessment tools do not even include the current charges as a risk factor. Reform strategies focused heavily on the charged offense may be motivated in part by the sense that people charged with minor crimes or charged on weak evidence do not deserve to be incarcerated before trial.¹⁹⁸

The sense that culpability should inform pretrial detention practice is eminently understandable. No one likes the idea of detention on grounds of risk alone.¹⁹⁹ And it is hard to shake the feeling that "bad" people should be stopped from hurting "good" people. Did you worry about Harvey Weinstein being stuck in jail? On an emotional level, we cannot help but feel that *some* people deserve to be subject to heightened restraint, presumption of innocence be damned.

At the start of this Article, we assumed that this kind of reasoning would run afoul of the constitutional prohibition on pretrial punishment, but the reality is more complex. On one plausible definition of punishment, the feature that distinguishes it from other forms of hard

¹⁹⁵ See, e.g., Ferzan, *Preventive Justice*, supra note 79, at 508–09 (arguing that some acts of preventive interference by the state can be justified in the same way that self-defense is justified against "[c]ulpable [a]ggressors").

¹⁹⁶ See sources cited supra notes 49–55 (model pretrial release and detention schemes).

¹⁹⁷ Starger, supra note 171 (using an "original dataset of over 150,000 Maryland District Court cases" to show that "every year thousands of accused persons are routinely jailed for extended periods on charges that are ultimately dropped").

¹⁹⁸ The alternate motivation for limiting pretrial detention by certain charge-based constraints is simply to ensure some categorical limits on detention, as American bail law has historically done. Mayson, *Detention by Any Other Name*, supra note 24, at 1649–52 (describing the historical right to bail in state law).

¹⁹⁹ But see Mayson, *Consequentialist Framework*, supra note 81 (manuscript at 3, 14) (arguing that a frank consequentialist approach to preventive state coercion might be more liberty-protective than the deontological approach that current dominates theory and jurisprudence).

treatment is that punishment is inflicted in order to convey moral censure, and it is thus inflicted because of, rather than in spite of, the suffering it entails.²⁰⁰ If one adopts this view, discounting the value of an arrestee's welfare on the basis of apparent culpability does not, alone, amount to punishment. The government can accord her welfare less value in a cost-benefit analysis with no specific intent to convey moral censure. It will regret having to detain her, locking her up despite, rather than because of, what she will suffer. We could conceivably design a pretrial detention regime where a preliminary judgment of culpability is necessary to authorize detention, and detention is limited by the degree of apparent guilt. Whether such detention would constitute "punishment" is an open question, both in terms of theory and in terms of constitutional doctrine.

This Article cannot resolve the question of whether the government should be permitted to discount the value of arrestees' welfare, relative to potential crime victims, on the basis of their apparent culpability for charged conduct. But we urge caution. American law has built an elaborate procedural edifice to protect against unwarranted governmental judgments of guilt. We *have* a system for punishing Harvey Weinstein: criminal sentencing. It happens after conviction for good reason. Retributivism and consequentialism will always co-exist awkwardly in the criminal justice system. However, the current scale of pretrial incarceration suggests that the retributive impulse has been running without check in an environment in which it should be, at most, an occasional and suspect guest.

C. Implications for Bail Reform

In theory, bail determinations are relatively straightforward. Magistrates are supposed to evaluate any relevant risk that defendants pose and determine how to mitigate it in the least restrictive way possible. The challenges of this task are largely technical. It demands skills in prediction as well as knowledge about what type of interventions best mitigate risk for defendants with different needs. It is not supposed to

²⁰⁰ E.g., Mitchell N. Berman, *The Justification of Punishment*, in *The Routledge Companion to Philosophy of Law* 141, 143 (Andrei Marmor ed., 2012) (defining punishment as infliction of hard treatment "*because of, and not despite*" the suffering it will cause); Douglas Husak, *supra* note 165, at 1189 ("[A] sanction is not a punishment without a purpose to deprive and censure."); Mayson, *Dangerous Defendants*, *supra* note 10, at 539–40, 539 n.234.

entail the evaluation of culpability or worth. The perception of the bail hearing as largely administrative helps to explain its lack of procedural protections. Bail hearings tend to be brief, often only one or two minutes. Many jurisdictions do not recognize a right to counsel for the accused. Bail magistrates may not even be lawyers, let alone judges. In the judicial hierarchy, bail magistrates live near the bottom.

This Article suggests, however, that bail magistrates are *not* engaged in a straightforward cost-benefit analysis. Perhaps their decisions are influenced by their perception of arrestees' culpability or worth. Or perhaps they are simply responding to structural incentives and detaining individuals who pose *any* risk to avoid being excoriated in a front-page news story for having released someone who then commits a terrible crime.²⁰¹ Whatever the mechanisms at work, bail magistrates seem to be engaged in a mental and moral calculus outside of a technical evaluation of risk.²⁰²

The disconnect between theory and practice may shed light on why certain reform strategies have faltered. If the bail decision is purely consequentialist, then adopting tools that aid bail magistrates in predicting reoffending, like actuarial risk assessment tools, should be a no-brainer. But magistrates' response to risk assessment algorithms has been lukewarm.²⁰³ They ignore the recommendations associated with the risk assessment more often than not, and use fades over time.²⁰⁴ The usual explanation is that judges are irrationally distrustful of the technology, or overly confident in their ability to predict. If the bail determination is not primarily an evaluation of risk, on the other hand, the problem may be that the technology doesn't match the task as magistrates perceive it.

²⁰¹ See, e.g., Aurélie Ouss & Megan Stevenson, *Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors* 3 (Apr. 2021) (unpublished manuscript) (explaining how magistrates are incentivized to err on the side of being unnecessarily harsh on a defendant who would not have reoffended; arguing that "magistrates will tend to set bail higher than is necessary to ensure good conduct" since type II errors are more salient than type I errors); W. David Ball, *The Peter Parker Problem*, 95 N.Y.U. L. Rev. 879, 886–87 (2020) (arguing that people tend to perceive an action taken ("abnormal") as more salient than inaction ("normal"), so pretrial detention's default status—where release is perceived as action rather than inaction—exacerbates judges' concerns).

²⁰² See also Sandra G. Mayson, *After Money Bail: Lifting the Veil on Pretrial Detention*, Law & Pol. Econ. Project Blog (Feb. 15, 2020), <https://lpeproject.org/blog/after-money-bail-lifting-the-veil-on-pretrial-detention> [<https://perma.cc/9YBZ-WCAQ>] ("[W]e have been using money bail, and the detention it produces, to meet a host of social needs.")

²⁰³ Stevenson, *supra* note 147, at 373 (reporting that judges deviated from the recommendations associated with the risk assessment more often than not).

²⁰⁴ *Id.* at 308–09.

Recognizing that judgments of desert—conscious or unconscious—may play a role in bail determinations also helps to illuminate certain hazards for reform. Bail scholarship, for instance, has tended to assume that magistrates are engaged in a consequentialist cost-benefit analysis.²⁰⁵ This assumption influences how empirical results are interpreted, as well as what policy changes seem sensible. For instance, one prominent paper has attributed racial disparity in bail decisions to prediction errors: a belief that Black defendants pose a higher crime risk than they actually do.²⁰⁶ The authors infer that we can reduce disparity by improving prediction, either through the use of risk assessment tools or through experience and training.²⁰⁷ If the bail decision is not primarily a consequentialist one, both the diagnosis of the problem and the proposed solution are less likely to be correct.

Bail reformers, meanwhile, face a difficult question about whether to insist on consequentialist principles or to embrace some retributive criterion for pretrial detention. On the one hand, a pure cost-benefit approach is the cleanest. Discounting the well-being of arrestees prior to conviction is anathema to liberal values. As our analysis suggests, moreover, strict adherence to consequentialist principles should produce extremely low rates of pretrial detention. On the other hand, pure consequentialism can be a bitter pill to swallow. Many advocates recoil at the idea of considering demographic factors (like age, gender, neighborhood characteristics, etc.) in a risk assessment, even if such factors are relevant to the risk of future crime. Rejecting the inclusion of non-culpable factors in the evaluation of risk is an implicit endorsement of the principle that culpability is relevant to restrictions on pretrial liberty.

Finally, reformers must reckon with the human impulse to evaluate culpability and worth when determining whom to detain and whom to release. Whether or not the law permits bail magistrates to discount the well-being of arrestees in the risk calculus, human beings are inclined to do so. This is happening regardless of our formal disapproval. Bail magistrates are engaging in a complex, messy, and fraught determination

²⁰⁵ See, e.g., Jon Kleinberg, Himabindu Lakkaraju, Jure Leskovec, Jens Ludwig & Sendhil Mullainathan, *Human Decisions and Machine Predictions*, 133 *Q.J. Econ.* 237, 239 (2018); David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 *Q.J. Econ.* 1885, 1887 (2018).

²⁰⁶ Arnold, Dobbie & Yang, *supra* note 205, at 1889–90.

²⁰⁷ *Id.* at 1929.

that melds risk and worth, with liberty in the balance. If we decide that culpability is relevant to bail determinations, those determinations will require clear guidance and much greater care.²⁰⁸ Assembly-line hearings are not appropriate to official determinations of desert. Conversely, to the extent that determinations of pretrial liberty *should* adhere to strictly consequentialist criteria, the realities of human psychology mean that we will need to alter the incentive structure for magistrates and implement structural constraints on detention that can withstand pressure over time.

CONCLUSION

Purely preventive detention is a fixture of governance. Yet despite hundreds of years of practice, the law provides little guidance about what type and degree of risk justifies a complete deprivation of liberty. This lack of guidance has become more salient with the spread of pretrial risk assessment, because a jurisdiction that adopts statistical tools must explicitly decide what risk-threshold divides those who may warrant preventive detention from those who do not.

This Article has offered an analytical framework for deriving a risk-threshold for pretrial preventive detention and an empirical method to implement it. Our results demonstrate a profound disconnect between theory and practice. If bail courts were faithfully employing the consequentialist principles entailed by constitutional doctrine, pretrial detention on the basis of dangerousness would be exceedingly rare. Instead, it is exceedingly common. Consequentialism may be the stated rationale for depriving people of pretrial liberty, but it is not the governing force behind daily practice.

Consequentialist interest balancing is the rationale for preventive detention in other arenas as well. Whenever a person is detained in whole or in part to prevent future harm, there must be some tradeoff between the harm averted and the harm imposed.²⁰⁹ The framework and tools

²⁰⁸ See Mayson, *Dangerous Defendants*, *supra* note 10, at 540–41 (pointing out a multitude of unanswered questions in allowing probable guilt to justify preventive restraint).

²⁰⁹ Things get complicated when the state claims that the detention is deserved or that the detainee had a limited right to liberty in the first place. The conceptual framework developed here therefore does not apply cleanly to punitive incapacitation, juvenile detention, or immigration detention. To develop a coherent justification framework in such circumstances, one must establish what exactly the detainee deserves and how desert relates to utilitarian benefit as a justification for detention, or, in the case of limited a priori liberty rights, how to weigh the detainee's liberty interest in a cost-benefit calculus. See, e.g., Douglas Husak, *Retributive Desert and Deterrence: How Both Cohere in a Single Justification of Punishment*,

developed in this Article apply directly to settings where the state detains individuals with no claim that detention is deserved, including material witness detention, involuntary commitment, quarantine, and wartime detention of citizens. The particular judgments from our jail-versus-crime survey translate best to other forms of detention to prevent intentional future harm: sex offender commitment, material witness detention, and, loosely, traditional civil commitment.

Perhaps in other preventive detention settings there will be a closer accord between theory and practice. But without interrogating the nature and degree of risk that justifies a particular deprivation of liberty, we cannot know. The state's authority to deprive a person of freedom on the basis of potential future harm is one of its most fearsome powers. Unless we are willing to confront the difficult tradeoffs that preventive detention requires, we risk the possibility that vague consequentialist reasoning will serve to cloak other, and uglier, forces.

APPENDIX A

The two tables below show a sample of responses from the serious assault survey. The first table shows the first ten responses that were dropped from the analysis because a research assistant flagged them as failing our attention checks. In some, the respondent has included unresponsive text that was likely copied from the internet. Alternatively, the respondent might be a bot using text analysis to complete the survey. In some, the person answered one or two questions in good faith, but subsequent responses were nonsensical, blank, or only tangentially related to the question. The second table shows the first ten responses that were included in the analysis for serious assault. For each table, the first two columns show answers to the initial priming questions, the third and fourth columns show responses to the core open-answer question, and the final column shows the respondent's explanation for their answer.

Examples of Dropped Responses				
Difficulties of jail	Difficulties of serious assault	Crime-equivalent jail time		Explanation
In examining this topic, we reviewed research and scholarship from criminology, law, penology ... Prisons in the United States are for the most part remote, closed ... Although individual prisons can vary widely in their nature and effects, a ... the prison yard, reducing the time prisoners could spend watching television, placing ...	In order to call a death a homicide, we must find the following facts to be true: ... Suppose that a police officer lawfully orders a fleeing felon to halt, but that the felon ... or resistance by the victim, such as robbery, rape, or aggravated assault), that ... is sufficient under Indiana law to constitute an attempt to commit an offense.	1000	Month(s)	NICE
READ BOOKS DO SOME PHYSICAL WORKS JAIL IS THE DIFICULT PLACE	ALWAYS HAVE A KNIFE WHAT EVER INFORM TO THE NEAR BY POLICE STATION ALWAYS HAVE SOS MESSAGING SYSTEM	20	Day(s)	FOR DOING SOME THEFT IN THE SHOP
I LOVE VERY MUCH	GOOD VERY LIKE	3	Month(s)	GOOD VERY LIKE
boring time, cleanness, beaten, mental torture.	finger print, forgotten things, weapons, dress,	3	Month(s)	some of the land problem in near my relatives.

<p>The hardest thing about being in prison is not the time the judge gives you, but ... a man who was incarcerated at 22 and has spent the last 30 years in prison. ... I had no idea how much pain I would be forced to carry alone.</p>	<p>characteristics, a victim's ability to cope with the impact of crime depends on a variety ... Generally, violent crime victims have a more difficult time coping than property ... Become familiar with the culture and traditions of the populations being served. ... or child sexual assault, as well as observing the serious injury or death</p>	96	Week(s)	ok good
<p>All right from pre task, we're gonna be in this mechanical room walking through it not working in it. So right away there is a, there is a safety hazard right away or safety concern. We've got a big, big step right here that we got to go over and then the piping. Once we get to the pipe over the piping was over that ladder. And we're gonna be working on this chiller right here. Other</p>	<p>All right from pre task, we're gonna be in this mechanical room walking through it not working in it. So right away there is a, there is a safety hazard right away or safety concern. We've got a big, big step right here that we got to go over and then the piping. Once we get to the pipe over the piping was over that ladder. And we're gonna be working on this chiller right here. Other than that, I mean there's</p>	10	Month(s)	All right from pre task, we're gonna be in this mechanical room walking through it not working in it. So right away there is a, there is a safety hazard right away or safety concern. We've got a big, big step right here that we got to go over and then the piping. Once we get to the pipe over the piping was over that ladder. And we're gonna be working on this

than that, I mean there's really nothing else. Be careful with. There's water. It's wet out here.	really nothing else. Be careful with. There's water. It's wet out here.			chiller right here. Other than that, I mean there's really nothing else. Be careful with. There's water. It's wet out here.
		1000	Month(s)	
Good	good	10000	Year(s)	Good
feel very bad in jail because that place is not in freedom	robbery	1	Month(s)	the assault is very dangerous to try it
i don't told anything for my nation	i think first save my nation next save other member after me saving	5	Year(s)	long time i need for my nation

Examples of Included Responses				
Difficulties of jail	Difficulties of serious assault	Crime-equivalent jail time		Explanation of answer
Not being able to smoke. Losing my job. Being lonely. Being scared. Losing all freedom.	Traumatic stress. Nightmares. Never trusting anyone again. Being jumpy all the time.	1	Day(s)	I could do one day easily.
Being away from my kids, money for extra food or phone calls, no privacy, dealing with other inmates all the time.	Healing, explaining to people what happened, having to relive the attack, possible nightmares, medical expenses	2	Week(s)	Assult i would heal within that time i think

The gross food Missing my cats No alone time Being trapped in a cell	Trouble sleeping Trouble trusting people Living in fear Physical scars/damage	6	Month(s)	I think being in jail for 6 mos would start to impact you mentally and would stay with you for a while. The same goes for an assault. It would be hard to move past it.
no freedom not being able to make choices being around so many different people not seeing family	not feeling safe having to retell the story multiple times to law enforcement memories/flashbacks nightmares	6	Month(s)	I value time with my family to the point that I would rather survive an assault than to have time away from them.
1. Fear of inability to assimilate to jail life 2. Lack of respect of inmates towards one another 3. Spiral into a life of further crime and/or more jail time 4. Removed from society, family, and friends	1. Fear of a second attack from any stranger you encounter 2. Lack of trust in society and people in general overall 3. Inability to do certain activities like be alone or out at night 4. Memory of the attack living in your mind forever	5	Day(s)	I feel like jailtime screws up your professional life and career, while the equivalent assault screws up your personal and emotional life.
isolation panic anxiety fear loneliness	Trauma nightmares ptsd loss of security fear	1	Month(s)	the isolation and loneliness of being in jail would become unbearable after 1 month

Communal living conditions. Time alone. Regimented activities. Surveillance. Intimidation of peers and guards. Time apart from loved ones. Lost time.	Physical problems. Loss of productive time. Fear of it happening again.	5	Month(s)	Three months can go by pretty quick, 4 is borderline but 5 is kind of long, it depends on how much injury is involved.
Lack of sleep Sharing space with strangers Bad Food Not seeing family and friends	Thinking it's going to happen again Pain Ongoing medical issues Fear of going out	6	Month(s)	If you were going to recover eventually, 6 months is probably when you would recover mostly. So I think that is fairly equivalent.
The embarrassment would be a huge factor. That and the record that comes with being in jail. Court costs would hurt. Losing my job would be a big deal as well	The physical fear afterwards of it being able to happen at any time again. The fear that people are out there... waiting to hurt you. Hurt anyone. Willing to kill you for whatever you got. Willing to hurt you because you disagree with them or have something they don't have.	1	Year(s)	I don't want to be hurt
Not seeing family, having a poor diet, going mentally insane, and being scared of others.	It would be extremely traumatizing. I would have to deal with that and also paranoia. I would live with the mental scars of it all. Additionally, the	1	Year(s)	This was tough so I went with an arbitrary period of time.

	physical pain endured would be tough.			
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APPENDIX B

Rearrest rates in validation studies might understate the number of crimes that the highest risk groups would actually commit because validation studies suffer from selection bias. We only see the pretrial rearrest rate for people who are *not* detained, and detained defendants may pose a higher crime risk than those who are released.

It is impossible to know the severity of selection bias, but we can assume the worst and see how it affects the analysis. Let us assume that 50% of high-risk defendants are detained (a realistic assumption),²¹⁰ and that every single one of them would otherwise be arrested for a violent crime within a month (an extraordinarily unrealistic assumption). Finally, assume that the violent-arrest rate for released high-risk defendants is 2.5% within a month, as in the COMPAS study, which reported the highest recidivism rates among available studies. On these assumptions, a high-risk classification corresponds to a 51.25% chance of violent rearrest within a month, absent detention.²¹¹ Even this probability of violence does not meet the survey-based risk threshold. Detaining a thousand people who pose this degree of risk, for one month each, is projected to avert 512.5 violent offenses. But according to our survey-based standard, one thousand months of detention would have to avert the equivalent of 1000 serious assaults to be cost-justified.²¹² A 51.25% chance of violent rearrest *within fifteen days* might justify fifteen days of

²¹⁰ None of the validation studies discussed here reports the release rate for the highest-risk group. But in data used by one of us in a separate paper, 50% of defendants flagged as high risk for violence by the PSA were detained throughout the pretrial process. Stevenson, *supra* note 147, at 354.

²¹¹ All of the detained defendants (100% of 50%) in addition to 2.5% of the released defendants (2.5% of the other 50%) would be rearrested for a violent offense; equivalently $(0.5 * 1) + (0.5 * 0.025) = 0.5125$, or 51.25%, of all defendants.

²¹² Given that the average “violent offense” is likely to be less grave than serious assault, it is unlikely that offense severity makes up the difference. See *supra* note 154.

detention.²¹³ But even on extreme assumptions about selection bias, contemporary risk assessment tools do not appear capable of identifying crime-risk sufficient to justify typical preventive detention.²¹⁴

There is, however, a second reason that the rearrest rate of high-risk defendants might understate the riskiness of that group: not all crimes result in arrest. Table 3 shows 2017 estimates of the national number of arrests and crime victimizations for robbery, aggravated assault, burglary, and simple assault.²¹⁵ The final column shows the crime-to-arrest rate for each offense.

Table 3: National Arrest Versus Crime-Victimization Rates

	Arrests	Crimes	Crimes per arrest
Robbery	94,046	613,837	6.53
Ag. Assault	388,927	993,173	2.55
Burglary	199,266	2,538,165	12.74
Simple Assault	1,062,370	3,611,678	3.4

We can account for this concern by using the crime-to-arrest ratio to “scale up” the rearrest rates reported in the risk assessment validation studies. A violent-rearrest rate of 2.5% within a month implies that for every thousand people released, twenty-five will be rearrested for violence within thirty days. Detaining one thousand such people for a month, conversely, is projected to avert twenty-five violent rearrests. The highest crime-to-arrest rate in Table 3 is 12.74, for burglary. Applying this very conservative ratio, we assume that averting twenty-five arrests means averting 318 crimes. Yet even if all 318 crimes were for serious assault—an unlikely assumption²¹⁶—this still would be far too low a

²¹³ Note that even if 99% of the highest-risk group would commit serious assault within a month if released, a month of preventive detention would still not be warranted. Our survey respondents saw 100 months of lost liberty as a greater cost than 99 assaults.

²¹⁴ If 90% of the high-risk defendants were detained, the average violent rearrest rate would be 90.25% ($.9 * 1 + .1 * .025$)—still too low.

²¹⁵ Arrest rates are nationally representative estimates from the FBI’s Uniform Crime Reports. See *Crime in the United States 2017*, supra note 154, at tbl.29. Crime victimization rates are nationally representative estimates from the National Crime Victimization Survey (“NCVS”). See Rachel E. Morgan & Jennifer L. Truman, Bureau of Justice Statistics, *Criminal Victimization, 2017*, 1, 3–4 (2018), <https://bjs.ojp.gov/content/pub/pdf/cv17.pdf> [<https://perma.cc/V9UR-7T7Q>].

²¹⁶ See supra note 154.

number to justify preventive detention using our survey-based standard. To justify the detention of a thousand people for one month each, we would have to prevent the equivalent of at least 1000 serious assaults, not 318.

If one were to combine all of our extremely conservative assumptions at once, pretrial detention might be justified for the highest-risk category. However, we expect that these assumptions are much too conservative—under a more realistic combination of assumptions, we think it is highly unlikely that the highest-risk category of defendants pose a risk that would warrant preventive detention.