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THE TROUBLE WITH TIME SERVED

Kimberly Kessler Ferzan

Every jurisdiction in the United States gives criminal defendants “credit” against their sentence for the time they spend detained pretrial. In a world of mass incarceration and overcriminalization that disproportionately impacts people of color, this practice appears to be a welcome mechanism for mercy and justice. In fact, however, crediting detainees for time served is perverse. It harms the innocent. A defendant who is found not guilty, or whose case is dismissed, gets nothing. Crediting time served also allows the state to avoid internalizing the full costs of pretrial detention, thereby making overinclusive detention standards less expensive. Finally, crediting time served links prevention with punishment, retroactively justifying punitive, substandard conditions. The bottom line is this: Time served is not a panacea. To the contrary, it contributes to criminal justice pathologies.

This Article systematically details the rationales for pretrial detention and then analyzes when, given those rationales, credit for time served is warranted. The analysis reveals that crediting time served is a destructive practice on egalitarian, economic, expressive, and retributive grounds. Time served should be abandoned. Detainees should be financially compensated instead. Given that many detentions are premised upon a theory similar to a Fifth Amendment taking, compensation is warranted for all defendants—both the innocent and the guilty—and can lead to positive reforms. Only by abandoning credit for time served can the link between prevention and punishment be severed, such that detention will be more limited and more humane.

Word Count= 29,994 (with abstract)

THE TROUBLE WITH TIME SERVED

*Kimberly Kessler Ferzan**

Imagine you are a juror in a high-profile case. The court decides that you need to be sequestered, and rather than putting you up at the local Holiday Inn, the state provides its own “hotel.” You have a roommate, a toilet in the room, and bars instead of walls. Instead of a concierge, a guard subjects you to a cavity search. You are in jail.

This would clearly be unacceptable to you. You haven’t done anything wrong to warrant this sort of treatment by the state. Indeed, it would seem hard for you to believe that the state’s interest in this particular criminal case would override your rights so as to *justify* placing you in a cell.

Yet, we routinely treat people like this. Material witnesses—witnesses—are housed in our jails.¹ But jails are primarily intended for pretrial detainees. Throughout the United States, almost a half a million defendants are detained pretrial on any given day.² And, these detainees are disproportionately people of color.³

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¹ *Bell v. Wolfish*, 441 U.S. 520, 524-26 (1979) (evaluating conditions of confinement and noting that not just pretrial detainees but also material witnesses are housed in the correctional center). *See generally* Ronald L. Carlson and Mark S. Voelpel, *Material Witness and Material Injustice*, 58 WASH. U. L. Q. 1, 3 (1980) (noting the extensive use of material witness statutes such that some unaccused and clearly innocent individuals are detained simply because they are unable to pay bail).

² On a one-day snapshot, 480,700 inmates in local jails were held while awaiting court action in 2019. ZHEN ZENG & TODD D. MINTON, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., NCJ255608, JAIL INMATES IN 2019, at 1, 5 tbl.3 (2021), <https://bjs.ojp.gov/content/pub/pdf/ji19.pdf>. Covid did decrease these counts in 2020. TODD D. MINTON, ZHEN ZENG & LAURA M. MARUSCHAK, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., NCJ 255888, IMPACT OF COVID-19 ON THE LOCAL JAIL POPULATION, at 13 tbl.10 (2021), <https://bjs.ojp.gov/content/pub/pdf/icljppj20.pdf>.

³ ZENG & MINTON, *supra* note 2, at 1 (finding Black defendants are detained pretrial at three times the rate of white defendants); Brook Hopkins, Chiraag Bains & Colin Doyle,

The Supreme Court says that this treatment of pretrial detainees is not punishment.⁴ How could it be? Pretrial detainees have not had a trial to determine their guilt. They are presumed innocent at this point. The entire process for putting them behind bars took only a minute or two,⁵ and in some states, they would not have a right to an attorney before being jailed.⁶ Some will have their cases dismissed or will be found not guilty. But what would justify such treatment if it is not punishment?

Maybe the Supreme Court is wrong to say that pretrial detention is not punishment. At one point, it did seem to recognize that the promiscuous use of pretrial detention would effectively pre-punish.⁷ Other courts have

Principles of Pretrial Release: Reforming Bail without Repeating Its Harms, 108 J. CRIM. L. & CRIMINOLOGY 679, 681 (2018) (citing empirical research indicating that Hispanic and Black defendants are more often subjected to pretrial detention than similarly situated white defendants); Julian Adler, Sarah Picard & Caitlin Flood, *Arguing the Algorithm: Pretrial Risk Assessment and the Zealous Defender*, 21 CARDOZO J. CONFLICT RESOL. 581, 582 (2020) (noting that while algorithms may be intended to correct for subjective racial biases, they may nonetheless be “unfairly punitive to black defendants, placing them in higher risk categories at twice the rate of white defendants”); Ellen A. Donnelly & John M. MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. CRIM. L. & CRIMINOLOGY 775, 780–81 (2018) (“[B]ail and pretrial detention absorb much of the criminal processing disparities between Blacks and Whites. Pretrial conditions contribute to 3.5% of explainable Black-White disparity in convictions and 37.2% of the disparity in guilty pleas. These processes explain nearly 30% of the Black-White disparity in the decision to sentence a defendant to any period of incarceration and under a quarter of the disparity in average incarceration sentence length.”)

⁴ *United States v. Salerno*, 481 U.S. 739, 741, 748 (1987) (“We conclude, therefore, that the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.”). As the Court states in *Bell v. Wolfish*:

Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee’s understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into “punishment.”

441 U.S. at 537.

⁵ See *Bent on Bail*, INJUSTICE WATCH: UNEQUAL TREATMENT (Oct. 14, 2016), <https://www.injusticewatch.org/interactives/bent-on-bail> (finding hearings in Chicago took one to two minutes).

⁶ Douglas L. Colbert, *Prosecution without Representation*, 59 BUFF. L. REV. 333, 395–96 (2011) (using surveys to determine that ten states do not provide indigent defendants with counsel at their initial bail hearing). These defendants usually wait “a month or longer” before another hearing where they have an attorney. *Id.* at 387.

⁷ “This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.” *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (emphasis added) (citation omitted).

acknowledged the same fact.⁸ Scholars, journalists, and even the average person on the street consistently conflate the distinction between jail and prison.⁹ And then there are the conditions of our jails: if it looks like a duck, and quacks like a duck, then maybe it's really punishment.¹⁰

But there is one simple fact that puts the lie to our lips when we claim that pretrial detention isn't punishment and it is this: Every state and the federal government provide for credit for time served.¹¹ All that time spent in pretrial detention counts toward the punishment. We don't even blink at

⁸ *E.g.*, *Smith v. State*, 508 S.W.2d 54, 57 (Ark. 1974) (“Whatever it may be called, it is certainly a deprivation of liberty, which, in itself, is punishment to most human beings. We should not like to try to convince those held in such confinement, along with those undergoing punishment, of the soundness of such an argument. We reject it, as other courts have.”) (citations omitted).

⁹ See *Is It “Jail” or “Prison”?: How They Differ and Overlap*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/jail-vs-prison-difference> (last visited Jan. 11, 2022 (providing instances of conflation).

¹⁰ On jail conditions, see *infra* Part I.A.3.

¹¹ 18 U.S.C. § 3585; ALA. CODE § 15-18-5 (2018); ALASKA STAT. § 12.55.025 (2020); ARIZ. REV. STAT. ANN. § 13-712 (2021); ARK. CODE ANN. § 5-4-404 (2021); CAL. PENAL CODE § 2900.5 (2021); COLO. REV. STAT. § 18-1.3-405 (2021); CONN. GEN. STAT. § 18-98d (2021); *Crawford v. Comm'r of Corr.*, 982 A.2d 620, 642 (Conn. 2009) (“[I]n order for a petitioner to receive jail credit, he [or she] must request the credit and must do so *at the time of sentencing*.”); DEL. CODE ANN. tit. 11, § 3901 (West 2021); FLA. STAT. § 921.161 (2021); GA. CODE ANN. § 17-10-11 (2021); HAW. REV. STAT. § 706-671 (2020); IDAHO CODE § 18-309 (2021); 730 ILL. COMP. STAT. 5/5-4.5-100 (2021); IND. CODE § 35-50-6-3 (2021) (credit time classification for offenses prior to July 1, 2014); *id.* § 35-50-6-3.1 (2021) (credit time classification for offenses after June 30, 2014); *id.* § 35-50-6-4 (2021) (initial assignment to credit time classification); IOWA CODE § 903A.5 (2022); KAN. STAT. ANN. § 21-6615 (West 2021); KY. REV. STAT. ANN. § 532.120 (2021); LA. CODE. CRIM. PROC. art. 880 (2021); ME. STAT. tit. 17-A, § 2305 (2021); MD. CODE ANN., CRIM. PROC. § 6-218 (West 2021); MASS. GEN. LAWS ch. 279, § 33A (2021); MICH. COMP. LAWS § 769.11b (2021); MINN. CT. R. CRIM. P. 27.03; MISS. CODE ANN. § 99-19-23 (2021); MO. REV. STAT. § 558.031 (2021); MONT. CODE ANN. § 46-18-403 (2021) (crediting time served only for bailable offenses, to prevent inequities with indigent defendants); NEB. REV. STAT. § 47-503 (2021); NEV. REV. STAT. § 176.055 (2019–2020); N.H. REV. STAT. ANN. § 651-A:23 (2021); N.J. CT. R. 3:21-8; N.M. STAT. ANN. § 31-20-12 (2021); N.Y. PENAL LAW § 70.30(3) (West 2021); N.C. GEN. STAT. § 15-196.1 (2020); N.D. CENT. CODE § 12.1-32-02 (2021); OHIO REV. CODE ANN. § 2967.191 (2021); OKLA. STAT. tit. 57, § 138 (2021); OR. REV. STAT. § 137.320 (2019); 42 PA. CONS. STAT. § 9760 (2021); R.I. GEN. LAWS § 12-19-2 (2021); S.C. CODE ANN. § 24-13-40 (2021); S.D. CODIFIED LAWS § 23A-27-18.1 (2021); TENN. CODE ANN. § 40-23-101 (2021); TEX. CODE CRIM. PROC. ANN. art. 42.03(2) (West 2021); UTAH CODE ANN. § 76-3-403 (West 2021) (allowing up to ten days credit for every thirty days of incarceration upon good behavior); VT. STAT. ANN. tit. 13, § 7031(b) (2021); VA. CODE ANN. § 53.1-187 (2021); WASH. REV. CODE § 9.94A.505(6) (2021); W. VA. CODE § 61-11-24 (2021); WIS. STAT. § 973.155 (2019–20); *Petersen v. State*, 455 P.3d 261, 265 (Wyo. 2019) (giving trial courts discretion to award credit for time served).

the commensurability. At least Scotland is willing to call it what it is—they call their practice “backdating the sentence.”¹²

There is much to learn from examining our practice of giving credit for time served. Only two articles have given it any serious attention—both blessing the practice because as the authors see it, pretrial detention is punishment, or at the very least, the hard treatment inherent in punishment.¹³ Given that we subject individuals to conditions that are punishment-like as they await trial, it seems only fair that this time counts towards the punishment they receive. In a world of overcriminalization and mass incarceration, one cannot help but breathe a sigh of relief at what appears to be a rare moment of mercy and justice.

But appearances are deceiving. Here’s the problem. The time-served Band-Aid barely covers the gaping wound, and more concerningly, it may in fact contribute to the problem. Egalitarians, who seek to use time served to mitigate the injustice of releasing rich defendants on bail while poor defendants are detained, should be deeply troubled that defendants who are both poor *and* innocent have no recourse under the time-served model. Expressivists, who take punishment to serve a particular condemnatory function, should bemoan the conflation of pretrial *prevention* and postconviction *punishment*. Legal economists should question the incentive effects that time served creates. Capacious detention standards are cheap. In every case of conviction, the state does not pay both to detain the defendant pretrial *and* to punish him post-conviction.¹⁴ Hence, it is easier to afford to detain more people pretrial, thereby significantly impacting the lives of those who are detained and their families.¹⁵ Retributivists and other deontologists should condemn various implications of the time-served model, including that current practices unjustly detain innocent people,¹⁶ negatively impact

¹² *Prison Sentences*, SCOTTISH SENT’G COUNCIL, <https://www.scottishsentencingcouncil.org.uk/about-sentencing/prison-sentences> (last visited Jan. 11, 2022). The sentencing judge identifies the date that the sentence starts, and can have the sentence start at a date prior to conviction to take into account time spent in pretrial detention. Criminal Procedure (Scotland) Act of 1995, c. 46, § 210.

¹³ See generally Adam J. Kolber, *Against Proportional Punishment*, 66 VAND. L. REV. 1141 (2013); Raff Donelson, *Natural Punishment*, 100 N.C. L. REV. (forthcoming 2022).

¹⁴ To do the math on this, we would need to cash out the time value of money with the fact that jails offer fewer programs and benefits than prisons. See also text accompanying notes 146-47 (discussing Wisconsin’s analysis of cost saving when it adopted its credit for time served statute). It is true that many jurisdictions make defendants pay for the costs of their incarceration; however, these “pay-to-stay” fees are rarely recouped because defendants cannot afford to pay. See *infra* text accompanying notes 160-61.

¹⁵ See *infra* text accompanying notes 112-13.

¹⁶ See *infra* Part II.A.

trial outcomes,¹⁷ induce pleas that turn the innocent into the guilty,¹⁸ and potentially under punish those who actually have no complaint against their legitimate detentions.¹⁹ No matter how you look at it, credit for time served is perverse.

Because time served conceptually and legally links pretrial detention to punishment, it has to go. Time served makes us complacent about the harm we do by detention. It makes detention cost less, if not costless. And if we want not just *bail* reform, but *jail* reform, we need to stop thinking of our jails as places where we punish. We need to rip off the time-served Band-Aid.

To do this, we need to work through two things. First, we need to truly understand why we are detaining people and how time served relates to those rationales. Second, we need to figure out what we ought to do in time served's stead.

The first task takes up most of this Article. The justifications for our detention practices are complex, as is the relation of time served to those justifications. Because much of the current literature on pretrial detention takes a consequentialist tact, it has flattened the scholarly discussions into cost-benefit analysis.²⁰ But the normative landscape is far more nuanced than that, and only a rights-based analysis can truly do justice to precisely what is at stake when we restrict someone's liberty by choosing to place him in a cell. Moreover, understanding how and why time served is responsive to our rights in different ways in different kinds of cases is the first step in diagnosing how it goes awry. This Article is the first to systematically analyze how different rationales for pretrial detention relate to our rights—when such detention is justified because detainees have forfeited rights, when their rights are

¹⁷ Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 715 (2017) (finding in empirical study of misdemeanor cases that “pretrial detention causally increases the likelihood of conviction, the likelihood of receiving a carceral sentence, the length of a carceral sentence, and the likelihood of future arrest for new crimes”).

¹⁸ *Id.* at 716 (“Misdemeanor pretrial detention therefore seems especially likely to induce guilty pleas, including wrongful ones.”).

¹⁹ See *infra* Part III.C.

²⁰ See, e.g., Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1405 (2017) (“Notably, these objective of the bail system would naturally arise from a standard, utilitarian social welfare function. . . . Thus, a cost-benefit approach is particularly appropriate in the pre-trial context”); John F. Duffy & Richard M. Hynes, *Asymmetric Subsidies and the Bail Crisis*, 88 U. CHI. L. REV. 1285, 1298 (2021) (offering a cost-benefit account of why there should be an “equalization of subsidies” between bail and jail); Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty* (Univ. of Va. Sch. of L., Pub. L. & Legal Theory Paper No. 2021-14, 2021) (arguing current law adopts a consequentialist framework and seeking an empirical weighting of the various interests); Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1 (2017) (advocating for a cost-based decision-making model).

overridden, and when they are simply wronged by their detentions.

These distinct rights relations then have different implications. For instance, if we detain someone who is amorphously “high risk” because we decide it is more important to prevent him from committing any possible harm than to let him go, what we are doing is harming him for our benefit. The detention is a government taking: We are taking him, literally, to hold behind bars until trial.²¹ In contrast, if we detain someone because he has a current plan to harm others, our action is closer to self-defense, and the defendant has no right against such force.²² If we detain someone because we think he committed the crime charged, the detention is actually pre-punishment.²³ But our promiscuous use of “dangerousness” rhetoric about pretrial detention currently masks a self-defense theory, a takings theory, and a punishment theory.²⁴ Flight and obstruction add further complexity. Ultimately, there is a varied terrain of detention rationales.

After setting forth how detention relates to rights, the Article asks how time served should respond to these various detention rationales. We often owe compensation to detainees, either because their detention is wrongful or because it is a justified taking. Time served is a rough approximation of compensation, but is woefully underinclusive. There are also rare cases in which crediting time served is unjustified because the detainee is fully liable to the detention based on his goal of seriously harming another. Different reasons potentially undergird our current practices.

What becomes apparent is that this complexity masks incoherence. Far from being systematically responsive to detention rationales, time served offers an ad hoc, over- and under-inclusive response that contributes to criminal justice pathologies. Time served harms the innocent and induces the innocent to plead guilty.²⁵ It allows us to retroactively justify the evils that we do by counting them as punishment, all while the Supreme Court tells us that various rights do not attach at the pretrial stage because it is not punishment.²⁶

²¹ See *infra* Part II.B.2.

²² JEFF MCMAHAN, KILLING IN WAR 10 (2009) (“To attack someone who is liable to be attacked is neither to violate nor to infringe that person’s right, for the person’s being liable to attack *just is* his having *forfeited* his right not to be attacked, in the circumstances.”).

²³ See *infra* Part II.B.1.b.

²⁴ See *infra* Part II.B.1.a.

²⁵ See *infra* Part IV.A.3.

²⁶ See *United States v. Salerno*, 481 U.S. 739, 760 (1987) (Marshall, J. dissenting):

The majority proceeds as though the only substantive right protected by the Due Process Clause is a right to be free from punishment before conviction. The majority’s technique for infringing this right is simple: merely redefine any measure which is claimed to be punishment as “regulation,” and, magically, the Constitution no longer prohibits its imposition.

The Article closes with a preliminary sketch of a new model. We should abolish credit for time served and should compensate detainees instead. A compensation model is superior to credit for time served in several respects. First, it treats the innocent equally to the guilty. Our current time-served practices benefit guilty people and leave innocent people—usually *poor, innocent people*—with nothing. Second, compensation may limit our willingness to detain *ex ante*. Eliminating credit for time served will make the state internalize more of the fiscal cost of pretrial detention;²⁷ a requirement of compensation will make the state internalize some of the personal costs to defendants as well. Perhaps making the state bear the substantial costs of detention will mean that society can no longer afford its incapacitation addiction.²⁸ Third, compensation puts money in the pockets of detainees in ways that might provide the very bail needed for release or alter their negotiating power with prosecutors.²⁹ Finally, and perhaps most importantly, it will sever the intuitive, conceptual linkage between detention and punishment.

If you worry that this proposal will leave some guilty people worse off because they will suffer pretrial and not get credit at sentencing, that is because you assume that their pretrial conditions will be punitive. But it is time served that inexorably links them. Sever the two practices, and we create the space to ask, how ought we to treat our presumed-innocent detainees? How ought we to treat our material witnesses? Don't we owe them not just *compensation* but the same *conditions* that we owe you, our juror? So, although a compensation scheme is the first step in reform, the goal is also to create the dialogue not just about *when* we detain but also about *how* we detain. Eliminating credit for time served helps us move forward with this agenda.

The Article proceeds in four parts. Part I articulates the legal standards, confinement conditions, and scholarly criticism of pretrial detention, and also sets forth the law and purported rationales for crediting time served. Part II looks beyond the legal standards, asking why it is that we are entitled to detain individuals who might flee, obstruct, or be dangerous, and also suggests ways in which our current standards may be overinclusive or otherwise unjustifiable. Part III then asks whether these various justifications support or undermine credit for time served and examines the specific arguments necessary to connect the dots from detention to later credit. Part IV demonstrates that theorists of all perspectives should be deeply troubled by our current practice of giving time-served credit; far from having curative properties, it ultimately contributes to the disease of our

²⁷ See *infra* text accompanying note 146-47.

²⁸ See *infra* Part IV.B.3.

²⁹ See *id.*

current system. The Part then sketches an alternative compensation model and raises potential objections to such an approach. Whether you endorse my reform proposal or offer a different one in its place, the current criminal justice reform agenda must consider the role that time served plays in creating and reinforcing injustice.

I. PRETRIAL DETENTION AND TIME SERVED: THE LEGAL FRAMEWORK

If a defendant is denied bail or if he cannot afford to pay bail, he will be detained pretrial.³⁰ Upon later conviction, this time spent in jail is credited against the period of incarceration to which the defendant would otherwise be sentenced.³¹ To understand credit for time served, one must first understand who is detained and can receive the credit. This Part provides an overview of current pretrial detention law and practice. Then, it briefly surveys current frameworks for determining pretrial detention or release and discusses the conditions of confinement as well as criticisms of our detention practices, including procedural objections to how determinations are made, substantive objections to the grounds for detention, and distributional objections to the disparate impacts on the poor and people of color. Finally, with an understanding of who is detained pretrial and why in hand, this Part turns to the law governing credit for time served. After noting such credit is available in every jurisdiction, the rationales and timing of statutory adoptions are discussed.

A. Pretrial Detention and Bail

1. Supreme Court Jurisprudence

Two lessons can be extracted from Supreme Court jurisprudence in this area. First, the Court has blessed the evolution of pretrial practices from the goal of securing appearance at trial to that of detaining the dangerous. Second, despite almost adopting a view that pretrial confinement was a form of punishment, the Court now clearly and consistently takes the view that the two were completely distinct.

In 1835, the stated purpose of bail was appearance at trial. In *Ex Parte Milburn*, the defendant failed to appear and forfeited his bail money.³² He claimed that he could not then be tried for the offense, a jailable

³⁰ See *infra* I.A.2.

³¹ See *supra* note 11.

³² 34 U.S. (9 Pet.) 704 (1835).

misdeemeanor, because the bail forfeiture was already the punishment.³³ The Court rejected his argument:

A recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon. It is not designed as a satisfaction for the offence, when it is forfeited and paid, but as a means of compelling the party to submit to the trial and punishment, which the law ordains for his offence.³⁴

Then, *Stack v. Boyle*, dismissing the habeas petition of Communists who contended that they were held by excessive bail without an individualized showing of flight risk, reaffirmed that the primary goal was appearance at trial.³⁵ As Justice Jackson noted in his concurrence, “The question when application for bail is made relates to each one’s trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance.”³⁶

Interestingly, both the *Stack* majority and the concurrence share the worry that unnecessary detention is punishment. The majority opines that bail “serves to prevent the infliction of punishment prior to conviction.” So, too, the concurrence echoes, “Without this conditional privilege [of granting bail], even those wrongly accused are punished by the period of imprisonment.”³⁷

Though dangerousness lurked in the background of early bail practices,³⁸ the Court embraced this rationale in *Carlson v. Landon*.³⁹ There, noncitizens were detained before potentially being deported for their membership in the Communist party.⁴⁰ Notably, the district judge, after indicating that he was not worried about failure to appear, stated, “I am not

³³ *Id.* at 708.

³⁴ *Id.* at 710. This is not the original conception of bail. The Anglo-Saxon English roots of our practice required the posting of the exact amount of the fine (the “bot”) for the private grievance. June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 519-21 (1983). Hence a forfeiture of the bail was the punishment for the crime. *Id.* at 520 (“Since the amount of the pledge and the possible penalty were identical, the effect of a successful escape would have been a default judgment for the amount of the bot.”).

³⁵ 342 U.S. 1, 6-7 (1951) (dismissing habeas petition because defendants should have appealed their motion to reduce bail).

³⁶ *Id.* at 9 (Jackson, J. concurring).

³⁷ *Id.* at 8 (Jackson, J., concurring) (emphasis added).

³⁸ Carbone, *supra* note 34, at 522 (noting that the offense of homicide became nonbailable in the twelfth century).

³⁹ 342 U.S. 524 (1952).

⁴⁰ *Id.* at 528-29.

going to turn these people loose if they are Communists, any more than I would turn loose a deadly germ in this community.”⁴¹ The Court agreed:

The refusal of bail in these cases is not arbitrary or capricious or an abuse of power. There is no denial of the due process of the Fifth Amendment under circumstances where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this government.⁴²

Soon after this initial endorsement of dangerousness, the Court had occasion to reconsider whether pretrial confinement constituted punishment. In *Bell v. Wolfish*, the Court found that a pretrial detention center’s invasive policies, including cavity searches, were constitutional.⁴³ Central to the Court’s analysis was that pretrial detention is not punishment and the conditions should not be evaluated as such.⁴⁴

Juvenile detentions and the enactment of the expansive pretrial detention regime within the federal Bail Reform Act of 1984 were similarly justified as preventive and similarly construed as nonpunitive.⁴⁵ In *Schall v. Martin*, the Court upheld the constitutionality of juvenile detention before trial when there was a serious risk the juvenile would commit an offense.⁴⁶ Whereas the Court of Appeals had found that the juveniles were detained “not for preventive purposes, but to impose punishment for unadjudicated acts,”⁴⁷ the Court claimed that “[t]he ‘legitimate and compelling state interest’ in protecting the community from crime cannot be doubted.”⁴⁸ This detention, concluded the Court, was not punishment.⁴⁹

And, in *United States v. Salerno*, the Court rejected a facial attack on the Bail Reform Act.⁵⁰ Again, the focus was dangerousness. Noting that the statute only applies to “extremely serious offenses,”⁵¹ requires clear and convincing evidence,⁵² and contains numerous procedural safeguards including the right to counsel, to present witnesses, to testify, and to cross-

⁴¹ *Id.* at 550 (Black, J., dissenting).

⁴² *Id.* at 542 (majority opinion).

⁴³ 441 U.S. 520, 523-24 (1979).

⁴⁴ *Id.* at 535.

⁴⁵ 18 U.S.C. § 3141 *et seq.* (Bail Reform Act).

⁴⁶ 467 U.S. 253 (1984).

⁴⁷ *Id.* at 262 (quoting *Martin v. Strasburg*, 689 F.2d 365, 372 (2d Cir. 1982)).

⁴⁸ *Id.* at 264.

⁴⁹ *Id.* at 271.

⁵⁰ 481 U.S. 739, 741 (1987).

⁵¹ *Id.* at 750.

⁵² *Id.* at 742.

examine,⁵³ the Court found that detention when “no release conditions ‘will reasonably assure . . . the safety of any other person and the community’” was constitutionally defensible.⁵⁴ Moreover, the Court, while noting that detainees are not kept in prison,⁵⁵ concluded that pretrial detention is regulatory, not penal.⁵⁶ The Court reasoned that the government has a regulatory interest in community safety, that the government’s interest in preventing crime by arrestees is both legitimate and compelling, and therefore that the individual’s liberty interest could be subordinated to the “greater needs of society.”⁵⁷

2. Current Legal Frameworks

Against this constitutional backdrop, defendants are detained pretrial via one of two routes. First, the accused can be denied bail. This denial can be because the offense itself is not bailable, or because the accused is deemed a high flight risk or sufficiently dangerous such that bail is not granted. Although many states have a constitutional right to bail, this requirement is far from universal.⁵⁸ Moreover, these constitutional rights are often qualified to exclude certain crimes or to allow for consideration of dangerousness.⁵⁹ Second, if the court sets bail too high, a defendant may be unable to pay, the result of which is the defendant is held pretrial.

The first type of case has rigorous rules.⁶⁰ As an exemplar, consider the federal system. Under the Bail Reform Act of 1984, detention is authorized based on a serious risk of flight,⁶¹ a serious risk of obstruction,⁶² or dangerousness.⁶³ In determining whether detention is authorized for these reasons, a court considers the nature of the crime charged, the weight of the evidence, the defendant’s character and community ties, the defendant’s legal status (such as on probation) at the time of the arrest, and “the nature and seriousness of the danger to any person or the community that would be posed

⁵³ *Id.*

⁵⁴ *Id.* at 741.

⁵⁵ *Id.* at 748. *But see infra* Part I.A.3 (noting how jails are worse than prisons).

⁵⁶ *Salerno*, 481 U.S. at 747.

⁵⁷ *Id.* at 748-51.

⁵⁸ AMBER WIDGERY, NAT’L CONF. OF STATE LEGISLATURES, THE STATUTORY FRAMEWORK OF PRETRIAL RELEASE 2-3 (2020), https://www.ncsl.org/Portals/1/Documents/cj/Framework-of-Pretrial-Release_v07_web.pdf

⁵⁹ *Id.* at 3.

⁶⁰ See Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643, 1651 (2020) (noting “robust procedural requirements” in both the federal and state systems).

⁶¹ 18 U.S.C. § 3142(f)(2)(A).

⁶² *Id.* § 3142(f)(2)(B).

⁶³ *Id.* § 3142(f)(1).

by the person's release."⁶⁴ Many state statutes look to the same factors as the federal model, including Delaware,⁶⁵ the District of Columbia,⁶⁶ Illinois,⁶⁷ Nevada,⁶⁸ New Jersey,⁶⁹ New York,⁷⁰ and Pennsylvania.⁷¹ California departs from the federal model as it does not enumerate the defendant's character as a factor,⁷² and Kentucky and Wisconsin streamline their analysis somewhat.⁷³

This is a marked contrast to the sort of state procedures that accompany the setting of bail, which (to put it mildly) can be quite brief and unstructured. As Sandy Mayson describes:

Magistrates announce bail amounts utterly beyond the capacity of the accused to meet in two-minute, uncounseled hearings, squinting at the accused on a videolink or in a crowded courtroom, one after the other, day in and day out. There are few limits and little process in these proceedings.⁷⁴

Scholars have argued that in practice "trial court judges have virtually unlimited legal discretion in determining the amount of bail."⁷⁵ Christine S. Scott-Hayward and Henry F. Fradella's review of various studies found that "the two most important factors, those that best predict the bail decision, are (1) the seriousness of the charged offense and (2) the defendant's criminal history."⁷⁶ Moreover, courts can illicitly detain for dangerousness *sub rosa* simply by setting bail too high for the defendant to meet.⁷⁷ And, even when

⁶⁴ *Id.* § 3142(g).

⁶⁵ DEL. CODE ANN. tit. 11, § 2105 (West 2021).

⁶⁶ D.C. CODE § 23-1322 (2021).

⁶⁷ 725 ILL. COMP. STAT. 5/110-5 (2021).

⁶⁸ NEV. REV. STAT. § 178.4853 (2021).

⁶⁹ N.J. STAT. ANN. § 2A:162-20 (West 2021).

⁷⁰ N.Y. CRIM. PROC. LAW § 510.30 (McKinney 2021).

⁷¹ PA. R. CRIM. P. 523 (2021).

⁷² CAL. PENAL CODE § 1275 (West 2021).

⁷³ KY. REV. STAT. ANN. § 431.066 (West 2021); WIS. STAT. § 969.035 (2019–20). *But see* Judicial Guidelines for Pretrial Release and Monitored Conditional Release, Order 2017-20 (Ky. 2017), <https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/201720.PDF> (specifying information that pretrial services should look to and largely mirroring the federal factors).

⁷⁴ Mayson, *supra* note 60, at 1645.

⁷⁵ CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM 9 (2019).

⁷⁶ *Id.* at 40. The impact can be covert; for instance, crime severity might be taken into account in the prosecutor's bail request. MARY T. PHILLIPS, N.Y.C. CRIM. JUST. AGENCY, INC., A DECADE OF BAIL RESEARCH IN NEW YORK CITY 68 (2012), <https://www.prisonpolicy.org/scans/DecadeBailResearch12.pdf> (noting significant role of prosecutors' recommendations and the significant role of crime severity in their requests).

⁷⁷ *See* Mayson, *supra* note 60, at 1659 ("The term "sub rosa detention" typically refers

bail is not being set to covertly detain for dangerousness, inattentiveness to the defendant's ability to pay in setting the bail figure can itself result in pretrial detention.⁷⁸

3. The Conditions of Pretrial Detention

When individuals are detained pretrial, they go to jail. Jails predominantly house pretrial detainees.⁷⁹ The average time spent in jail in 2019 was twenty-six days.⁸⁰ Although jails are often thought to be interchangeable with prisons, it is important to examine precisely how jails can and do function.

Because jails are for short-timers, they lack some of the programs that prisons have. Inmates lack access to educational, vocational, and life skills training.⁸¹ They get less physical exercise.⁸² And their housing includes less outside light.⁸³ Jails can be overcrowded. In 2019, Kentucky, West Virginia, and Virginia jails were all operating above capacity.⁸⁴

Conditions can be bleak. Indeed, some detainees may plead guilty just to get from jail to prison where the facilities are better.⁸⁵ Consider the Cuyoga County Corrections Center in Cleveland, Ohio, where, in 2010, a pretrial detainee would expect to spend fifty days.⁸⁶ A 2018 DOJ review

to the practice of setting unaffordable bail with the specific intention of detaining a defendant whom the court lacks authority to detain outright, or without having to comply with full detention process.”).

⁷⁸ SCOTT-HAYWARD & FRADELLA, *supra* note 75, at 42 (noting study showing defense counsel do not raise the issue and when raised, judges are not receptive).

⁷⁹ ZHEN ZENG & TODD MINTON, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 255406, CENSUS OF JAILS, 2005–2019 -STATISTICAL TABLES, at 2 (2021) [hereinafter ZENG & MINTON, CENSUS OF JAILS], <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cj0519st.pdf> (noting that in the majority of states, two-thirds of jail detainees are being held pretrial and in five states, the figure exceeds eighty percent).

⁸⁰ ZENG & MINTON, *supra* note 2.

⁸¹ Christopher Wildeman, Maria D. Fitzpatrick & Alyssa W. Goldman, *Conditions of Confinement in American Prisons and Jails*, 14 ANN. REV. L. & SOC. SCI. 29, 35 tbl.2 (2018).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ ZENG & MINTON, CENSUS OF JAILS, *supra* note 79, at 3.

⁸⁵ 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, 552 (2017) (noting this inducement for pleading guilty); Abbie VanSickle & Manuel Villa, *Who Begs to Go to Prison? California Jail Inmates*, MARSHALL PROJECT (Apr. 23, 2019, 7:20 PM), <https://www.themarshallproject.org/2019/04/23/who-begs-to-go-to-prison-california-jail-inmates> (comparing conditions).

⁸⁶ Cuyahoga County Sheriff, *FAQ's: Cuyahoga County Correction Center – “The Jail”*,

found that cells meant to house two people housed twelve with mattresses placed on the floor.⁸⁷ Despite the cells' extremely cold temperatures, inmates were denied a second blanket.⁸⁸ Cells lacked toilet paper and toothbrushes.⁸⁹ Shower facilities lacked curtains, leaving inmates fully exposed to the guards.⁹⁰ Food was below nutritional requirements, was not properly refrigerated, and was sometimes denied as a punitive measure.⁹¹ There was no infirmary.⁹² Within one year, fifty-five people attempted suicide and three succeeded.⁹³ And there were fifty-two Prison Rape Elimination Act incidents.⁹⁴ Inmate interviews revealed "strong and consistent allegation[s] of brutality, [use of force] punishment, and cruel treatments at the hands of the Security Response Team."⁹⁵

This is not an outlier case. Reports and lawsuits present numerous stories. Oklahoma County jail detainees faced bedbugs and were allowed to shower less than once a week.⁹⁶ In Sacramento, prisoners who were held on suicide watch were put in a room that had a grate instead of a toilet.⁹⁷ A tribal jail lacked potable water.⁹⁸ In Allegheny County, Pennsylvania, where the average detainee spends sixty-one days, a restraint chair was used for those with mental illness.⁹⁹ In Fulton County, Georgia, the jail's inability to cope with mentally ill inmates led to placing them in solitary, sometimes with

FACEBOOK (Feb. 8, 2010), <https://www.facebook.com/notes/cuyahoga-county-sheriff/faqs-cuyahoga-county-correction-center-the-jail/316139511063> ("The average length of stay for the Pre-Trial inmate is fifty days . . .")

⁸⁷DEP'T OF JUST., U.S. MARSHALS SERV., QUALITY ASSURANCE REVIEW: FACILITY REVIEW REPORT OF CUYAHOCA CNTY. CORR. CTR., 3-4, 35 (2018).

⁸⁸ *Id.* at 41.

⁸⁹ *Id.* at 3, 42.

⁹⁰ *Id.* at 3.

⁹¹ *Id.* at 3-4.

⁹² *Id.* at 31.

⁹³ *Id.* at 24.

⁹⁴ *Id.*

⁹⁵ *Id.* at 34.

⁹⁶ Nolan Clay, *Bedbugs, Moldy Showers: Dozens of Health Violations Found at Troubled Oklahoma County Jail*, OKLAHOMAN (Mar. 31, 2021, 11:14 AM), <https://www.oklahoman.com/story/news/2021/03/30/oklahoma-county-jail-has-dozen-health-violations-inspectors-say/4807430001>.

⁹⁷ VanSickle & Villa, *supra* note 85.

⁹⁸ Nate Hegyi, *Indian Affairs Promised to Reform Tribal Jails. We Found Death, Neglect and Disrepair*, NPR (June 10, 2021, 5:06 AM), <https://www.npr.org/2021/06/10/1002451637/bureau-of-indian-affairs-tribal-detention-centers-deaths-neglect>.

⁹⁹ Juliette Rihl, *"It Always Escalated to the Chair": Allegheny County Jail Used the Restraint Chair More Than Any Other County Jail in PA*, PUB. SOURCE (Mar. 6, 2021), <https://www.publicsource.org/restraint-chair-allegheny-county-jail-mental-health>.

horrific results.¹⁰⁰ One woman, charged with misdemeanor trespassing, was kept in isolation for over four months, and was denied clean clothes and the opportunity to bathe.¹⁰¹ Her condition declined and she required hospitalization.¹⁰² Women in Muskegon County Jail in Michigan sued for, among other things, being placed in cells covered in urine and vomit, being watched by male guards while they had to strip naked in order to use the toilet, and being denied feminine hygiene products.¹⁰³ The pandemic has exacerbated the horrors of confinement in jails as well.¹⁰⁴

To be sure, some of these conditions are in violation of the detainees' constitutional rights.¹⁰⁵ They are the easy cases. The question to ask, however, is how the state should treat those who are presumed innocent. We certainly could not sequester you, our hypothetical juror, in a jail like these. So, unless it is appropriate to get a head start on punishment (and it is not),¹⁰⁶ why would we be entitled to subject the presumed innocent to such dehumanizing conditions?

4. Critiques of Bail and Pretrial Detention

Just as current conditions of pretrial confinement draw criticism, so, too, do our current bail and pretrial detention practices and procedures. The use of money bail and pretrial detention is prevalent. Sandy Mayson notes, “[S]ince 1990, both pretrial detention rates and the use of money bail have risen steeply; it is likely that we now detain millions of people each year for their inability to post even small amounts of bail.”¹⁰⁷ Who is released prior to trial on felony charges is highly variable. As Shima Baradaran-Baughman observes, “Some counties report as low as a 30 percent release rate, and others

¹⁰⁰ Hannah Riley, *Judge Grants Injunction to Halt Solitary Confinement and to Remedy “Repulsive” Conditions for Women at South Fulton Jail*, S. CTR. FOR HUM. RTS. (July 25, 2019), <https://www.schr.org/judge-grants-injunction-to-halt-solitary-confinement-and-to-remedy-repulsive-conditions-for-women-at-south-fulton-jail>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Abuse and Neglect at Muskegon County Jail*, ACLU: MICH., <https://www.aclumich.org/en/abuse-and-neglect-muskegon-county-jail> (last visited Jan. 19, 2022).

¹⁰⁴ Rebecca Rhynhard, Opinion, *Philly’s Shockingly Inhumane Prison Conditions*, PHILA. INQUIRER (Oct. 6, 2021), <https://www.inquirer.com/opinion/commentary/philadelphia-prisons-correctional-officer-shortage-20211006.html>.

¹⁰⁵ For a survey of the jurisprudence and a proposed standard, see generally, Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009 (2013).

¹⁰⁶ See *infra* Section I.B.1.b.

¹⁰⁷ Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 507 (2018).

release up to 90 percent of those arrested.”¹⁰⁸

Scholars criticize our bail and detention practices on procedural, substantive, and distributional grounds. Procedurally, some scholars object that the use of the pending charge is antithetical to the presumption of innocence.¹⁰⁹ In addition, the brevity of bail hearings is objectionable.¹¹⁰

Substantively, scholars argue that pretrial detention causes more harm than is typically understood. Defendants who are not held pretrial have been found to have more bargaining power.¹¹¹ Detainees can lose jobs, be attacked or sexually assaulted in custody, and have their family lives disrupted.¹¹² Third-party harms also occur, such as those to a detainee’s children, caused by her absence.¹¹³ Detention pressures defendants to plead guilty because confinement is so dreadful.¹¹⁴ Perhaps most shockingly, “pretrial detention is the single best predictor of case outcome, even after controlling for other factors.”¹¹⁵ One study in the federal system found that pretrial *release* decreases sentencing length by 67.5%, increases the probability of a below-guidelines sentence by 56.2%, decreases the probability of receiving a mandatory minimum by 36.5%, and increases the chances of receiving a sentencing reduction for assisting the government by 32.7%.¹¹⁶ In other words, detention has profound negative impacts. Scholars thus contend that

¹⁰⁸ SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* 62 (2018).

¹⁰⁹ *Id.* at 31 (“Contrary to a presumption of innocence, denial of bail and liberty results in unconstitutional punishment.”).

¹¹⁰ SCOTT-HAYWARD & FRADELLA, *supra* note 75, at 38 (surveying studies and finding “little evidence” that bail hearings are long or contested).

¹¹¹ 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 (2018) (“[I]nitial pretrial release affects case outcomes primarily through a strengthening of defendants’ bargaining positions before trial, particularly for defendants charged with less serious crimes and with no prior offenses”).

¹¹² BARADARAN BAUGHMAN, *supra* note 108, at 86.

¹¹³ *Id.* at 88-89.

¹¹⁴ Time served plays a role in the plea. Leslie & Pope, *supra* note 85, at 552 (“One relevant feature of the criminal justice system is that detainees who are ultimately convicted and sentenced to serve time have the time they spent awaiting adjudication counted against their sentences. This policy lowers the cost of pleading guilty for detainees relative to released defendants because detainees have paid part of the price of conviction already.”).

¹¹⁵ SCOTT-HAYWARD & FRADELLA, *supra* note 75, at 5; Heaton, Mayson, and Stevenson, *supra* note 17, at 715 (finding in empirical study of misdemeanor cases that “pretrial detention causally increases the likelihood of conviction, the likelihood of receiving a carceral sentence, the length of a carceral sentence, and the likelihood of future arrest for new crimes.”); *see also* Leslie & Pope, *supra* note 85, at 530, 547 (finding that pretrial detention increases the probability of conviction by 13% for felony offenses and 7.4% for misdemeanors).

¹¹⁶ Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 *AM. L. & ECON. REV.* 24, 45 tbl.4, 46 (2020).

if the Supreme Court views itself as trading off the interests of the accused against the interests of society, the Court is getting the math wrong.¹¹⁷

Distributionally, because the rich can more easily make bail than the poor, bail essentially detains the poor.¹¹⁸ Very few defendants are denied bail outright.¹¹⁹ However, since the poor cannot afford their bail, some scholars have argued that we are essentially punishing poverty.¹²⁰ Detentions are also racially unjust. Data suggest that Black defendants are detained at a rate of three times that of white defendants.¹²¹ The outcry over the link between race, poverty, and detention has led to bail reform within some jurisdictions,¹²² and innovative workarounds in others, such as communities paying for bail.¹²³

¹¹⁷ See also Stevenson & Mayson, *supra* note 20, at 7 (demonstrating “that a rigorous consequentialist analysis raises deep questions about how the law ought to value individual liberty and welfare”); Yang, *supra* note 20, at 1407 (conducting “a partial cost-benefit analysis that incorporates the best available evidence on both the costs and benefits of detention, [and] finding that on the margin, pre-trial detention imposes far larger costs than benefits”).

¹¹⁸ BARADARAN BAUGHMAN, *supra* note 108, at 2. (“Poor defendants, who have committed minor, nonviolent crimes, are held in jail before trial while rich defendants charged with serious and sometimes violent crimes are released pending trial.”); *id.* (“[T]he story of bail is one of poverty, inequality, and haste. . . . [B]ail is the single most preventable cause of mass incarceration in America.”); Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> (“In New York City, where courts use bail far less than in many jurisdictions, roughly 45,000 people are jailed each year simply because they can’t pay their court-assigned bail.”).

¹¹⁹ BRIAN A. REAVES, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., NCJ 243777, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES, at 15 (2013), <https://bjs.ojp.gov/content/pub/pdf/fdluc09.pdf> (calculating that 4% of defendants were denied bail outright and 45% of murder defendants were denied bail outright); Mayson, *supra* note 60, at 1649-54 (describing “the current incoherence in bail practice: we carefully limit the explicit denial of bail but impose no limits on the functional denial of bail”).

¹²⁰ As Baradaran Baughman argues:

Following this logic, there is a compelling government interest in preventing crime that is more important than an individual’s due process interest. But when an individual can be released safely with some supervision or restrictions, then incarceration is just serving as punishment and should not be required. And when there is excessive delay between arrest and trial, and thus a longer period of detention, the distinction between pretrial detention and punishment is a mere façade.

BARADARAN BAUGHMAN, *supra* note 108, 31-32.

¹²¹ ZENG & MINTON, *supra* note 2, at 1.

¹²² See Diana Dabruzzo, *New Jersey Set out to Reform its Cash Bail System. Now, the Results Are in.*, ARNOLD VENTURES (Nov. 14, 2019), <https://www.arnoldventures.org/stories/new-jersey-set-out-to-reform-its-cash-bail-system-now-the-results-are-in>.

¹²³ See Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017).

We are in the third generation of bail reform. First reformers focused on inappropriately holding poor defendants.¹²⁴ The second set of reforms was a profound public shift, with an “unmistakable public safety focus.”¹²⁵ Now, the third generation of bail reform focuses on “the prospect of ‘moneyballing’ pretrial decisionmaking.”¹²⁶

Issues remain. Renewed emphasis on risk assessment requires us to figure out the degree of risk that justifies detention.¹²⁷ Scholars recognize that even these dangerousness assessments are far from perfect. Baradaran Baughman notes that since “there is no perfect decision in pretrial detention, and judges are largely doing a quick uninformed cost-benefit determination in each bail decision anyway, a proper consideration of these costs and benefits is in order.”¹²⁸

In addition, although objective risk factors are lauded for not relying on the pure discretionary decisions of individual decisionmakers, risk assessment tools raise issues about gender and racial equity.¹²⁹ As Mayson’s title pithily summarizes, “bias in, bias out.”¹³⁰ Not only are there objections to how we are detaining, but how many we are detaining.¹³¹ Detention is costly.¹³²

Thus, this third wave of bail reform may resolve some procedural problems, such as judges making gestalt-based decisions about detention, and some distributive problems, such as requiring money bail from those who cannot afford it, but there remain two highly problematic issues on the

¹²⁴ John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 3 (1985) (noting bail critique for wealth disparities).

¹²⁵ *Id.* at 6.

¹²⁶ Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 716, 681 (2018) (“There is widespread enthusiasm for the prospect of “moneyballing” pretrial decisionmaking.”); *see also* Mayson, *supra* note 107, at 515 (“The most recent reform model envisions actuarial risk assessment as the basis for pretrial release and custody decisions. Money bail is not to be used to mitigate danger.”) (footnotes omitted).

¹²⁷ Mayson, *supra* note 107, at 496 (“The adoption of risk assessment will require stakeholders to consider what degree of risk justifies restraint, moreover, because the new statistical methodology makes the question unavoidable in a way that it was not before.”).

¹²⁸ BARADARAN BAUGHMAN, *supra* note 108, at 91.

¹²⁹ Cf. *id.* at 72 (“The fact is men are much more likely to be rearrested pretrial than women, but risk predictions tools typically leave gender out of their formula.”) and *id.* (“risk assessments can be racially inequitable by giving more weight to certain facts that, although unrelated to race per se, are racially disparate”).

¹³⁰ Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2234-58 (2019) (noting algorithmic risk assessment will have a disparate racial impact because the inputs are backward looking on a racially stratified world, with disproportionate enforcement, and where different crimes are committed by different demographics).

¹³¹ BARADARAN BAUGHMAN, *supra* note 108, at 75 (detailing research that only 1.9 percent of state felony defendants released are reoffending).

¹³² *Id.* ch 5.

reformer's own terms. First, we have yet to answer the question of where to draw the line on "dangerousness" that authorizes detention. After all, having an accurate thermometer is useless unless you know what the target temperature is. Second, these metrics will inevitably embed distributive inequalities, even if they are not as patently obvious as the inability to pay money bail.

B. Credit for Time Served

What happens to pretrial detainees? If convicted, they will get credit for time served. As the New York statute simply states, "An inmate is entitled to have all time spent in custody on a criminal charge credited to the sentence that the inmate receives upon conviction of that charge."¹³³ The federal government and every state provide for credit for time served by statute, rule, or case law.¹³⁴ Ankle bracelets and home detention do not count as confinement;¹³⁵ however, a wide range of custodial arrangements do. For instance, California's statute gives credit "when the defendant has been in custody, including, but not limited to, any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution."¹³⁶ In Delaware, Iowa, Maryland, New Jersey, North Carolina, North Dakota, and Texas, being confined for psychiatric treatment counts for such credit by statute.¹³⁷

Time-served provisions vary in the timing of initial adoption. Pennsylvania had a law on the books by 1937.¹³⁸ New Jersey provided for time served for pretrial detention by 1953.¹³⁹ The first federal provision came

¹³³ N.Y. PENAL LAW §70.30(3) (West 2021).

¹³⁴ *See supra* note 11.

¹³⁵ *Bush v. State*, 2 S.W.3d 761 (Ark. 1999) (holding that a defendant enrolled in a home detention program with electronic monitoring was not entitled to credit at sentencing); *State v. Higgins*, 593 S.E.2d 180 (S.C. Ct. App. 2004) (house arrest did not count for purposes of time served).

¹³⁶ CAL. PENAL CODE § 2900.5 (West 2021).

¹³⁷ DEL. CODE ANN. tit. 11, § 3901(c) (West 2021) ("in an institution under involuntary restraint"); IOWA CODE § 903A.5(1) (2022) ("other correctional or mental facility"); MD. CODE ANN., CRIM. PROC. § 6-218(b)(1) (West 2021) ("hospital [or] facility for persons with mental disorders"); N.J. CT. R. 3:21-8(a) ("state hospital"); N.C. GEN. STAT. § 15-196.1 (2020) ("confinement in any State or local correctional, mental or other institution"); N.D. CENT. CODE § 12.1-32-02(2) (2021) ("mental institution"); TEX. CODE CRIM. PROC. art. 42.03(2)(a)(3) ("mental health facility") (West 2021); *see also* *People v. Gravlin*, 217 N.W.2d 404 (Mich. 1974) (holding that a defendant confined in a mental hospital was entitled to credit for subsequent sentence).

¹³⁸ Act 283 of 1937, 1937 Pa. Laws 1036, §§ 1–3 (codified as amended at 42 PA. CONS. STAT. § 9760 (2021)).

¹³⁹ N.J. R. 3:7-10(g), *in* SUP. CT. OF N.J., REVISION OF THE RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY 176-77 (1953).

in 1960,¹⁴⁰ and the Model Penal Code provided for credit for time served by the end of that decade.¹⁴¹ The next twenty-five years saw a flurry of statutory adoptions.¹⁴²

The rationales for adoption also varied. One underlying assumption is that pretrial detention is punishment-like, even when drafters are unwilling to state that assumption explicitly. For instance, the Model Penal Code Commentaries note, “The unfavorable conditions that frequently characterize such presentence detention emphasize the justice of this requirement.”¹⁴³ Another concern was equal treatment: Although the federal provision originally only provided for credit towards sentences with a mandatory minimum,¹⁴⁴ Congress expanded the provision in the Bail Reform Act of 1966 as it saw no principled reason for restricting credit to sentences with mandatory minimums.¹⁴⁵ Cost savings could also have been a factor because

¹⁴⁰ Act of Sept. 2, 1960, Pub. L. No. 86-691, 74 Stat. 738 (codified as amended at 18 U.S.C. § 3585). S. 2932, 86th Cong. (1960) and H.R. 12208, 86th Cong. (1960) were introduced in 1960 to credit time “spent in custody for want of bail.” *See* H.R. REP. NO. 86-2058 (1960); S. REP. NO. 86-1696 (1960). According to the House and Senate Judiciary committee,

The primary purpose of the bill is to eliminate the disparity in sentences under certain statutes requiring mandatory terms of imprisonment. Under existing law a person charged with violating a statute requiring the imposition of a minimum mandatory sentence may not be credited with the time spent in custody for want of bail while awaiting trial. The result is that a sentencing court lacks authority to differentiate between the offender who has been free on bail before trial and one who has been in custody, because it is required to impose the same minimum mandatory sentence to each.

H.R. REP. NO. 86-2058, at 2 (1960). [S. REP. NO. 86-1696, at 2 (1960)]. The Senate bill was passed that September. *See* 74 Stat. 738.

¹⁴¹ MODEL PENAL CODE § 7.09 (AM. L. INST. 1962).

¹⁴² *E.g.*, Act No. 58, § 1 1975 Ala. Laws 185 (codified as amended at ALA. CODE § 15-18-5 (2021)); Act of Dec. 14, 1971, § 2, 1971 Cal. Stat. 3683, 3686, ch. 1732 (codified as amended at CAL. PENAL CODE § 2900.5 (West 2021)); Act of July 20, 1965, § 70.30(3), 1965 N.Y. Laws 2343, 2370, ch. 1030 (codified as amended at N.Y. PENAL LAW § 70.30(3) (McKinney 2021)); Act of May 16, 1978, § 9, 1977 Wis. Sess. Laws 1362, 1364-65, ch. 353 (codified as amended at WIS. STAT. § 973.155 (2019–20)).

¹⁴³ MODEL PENAL CODE § 7.09, cmt. 1 at 308 (AM. L. INST., Official Draft and Revised Commentaries 1985).

¹⁴⁴ *See* Act of Sept. 2, 1960, Pub. L. No. 86-691, 74 Stat. 738 (crediting time served only “where the statute requires the imposition of a minimum mandatory sentence”).

¹⁴⁵ “The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.” Bail Reform Act of 1966, Pub. L. No. 89-465, § 4, 80 Stat. 214, 217. As the Senate Judiciary Report on the bill explained, “It is ironic that persons accused of such serious crimes should be assured of receiving credit for pretrial custody, while those convicted of less serious crimes for which no minimum mandatory sentence is required have the benefit of no such assurance.” S. COMM. ON THE JUDICIARY, BAIL REFORM ACT OF 1965, S. REP. NO. 80-750, at 21 (1965).

states get to count the pretrial detention time as punishment, thereby avoiding paying for the later imprisonment. Wisconsin's bill analysis included a fiscal impact statement noting a potential savings of \$1,163,000 a year in 1977.¹⁴⁶ Although this estimate was later revised because Health and Social Services had already been giving such credit in practice, it is nevertheless notable that any jurisdiction that looked at the math would be motivated to give credit. The savings were \$5.3 million dollars by today's standards,¹⁴⁷ and our confinement numbers are substantially in excess of what they were in the seventies.

The development of federal law, along with evolving Supreme Court Equal Protection jurisprudence, likely initiated further adoptions. In 1970, the Court decided *Williams v. Illinois*, wherein an indigent defendant was required to serve additional time because of his inability to pay a fine.¹⁴⁸ However, this additional time in addition to the imprisonment already ordered exceeded the maximum sentence.¹⁴⁹ The Court held, "The Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status."¹⁵⁰

In the wake of *Williams*, numerous courts determined that credit for time served is constitutionally required. The constitutional claim is most frequently grounded in the equal protection clause of the federal

¹⁴⁶ S. DOCS. ON S. 159, 1977-78 Sess. at 55 (Wis. 1977) (on file with author).

¹⁴⁷ US INFLATION CALCULATOR (last visited Jan. 11, 2022) (type "1977" into the "If in" box; then, type "2022" in the "then in" box; then, type "1163000" in the "I purchased an item for \$" box; and then click "Calculate").

¹⁴⁸ *Williams v. Illinois*, 399 U.S. 235, 236-37 (1970).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 244.

constitution,¹⁵¹ though courts also endorse double jeopardy reasoning¹⁵² or rely on their own state constitutions.¹⁵³ Some jurisdictions limit their claims to when the time in pretrial confinement and the post-conviction sentence would together exceed the maximum sentence for the crime,¹⁵⁴ whereas other

¹⁵¹ *E.g.*, *State v. Sutton*, 521 P.2d 1008, 1010 (Ariz. Ct. App. 1974) (reasoning that a failure to credit presentence confinement to a maximum sentence amounts to a denial of equal protection required by the Fourteenth Amendment); *Smith v. State*, 508 S.W.2d 54, 57 (Ark. 1974) (reasoning that there is no rational basis for discriminating between two prisoners charged with the same crime, where one can post bond and the other cannot due to indigency, and thus denial of credit in these instances violates the Equal Protection Clause of the Fourteenth Amendment); *In re Young*, 107 Cal. Rptr. 915, 918 (Cal. Ct. App. 1973) (finding that presentence confinement for those financially unable to post bail, leading to disparities in confinement length of individuals convicted of the same offense, constitutes an invidious discrimination that violates the Equal Protection clause of the Fourteenth Amendment); *Mallory v. State*, 281 N.E.2d 860, 861-62 (Ohio Ct. Com. Pl. 1972) (granting credit for presentence commitment due to financial inability to post bond and reasoning that a failure to grant credit in this instance would violate the Equal Protection Clause of the Fourteenth Amendment); *State v. Green*, 524 N.W.2d 613, 615 (S.D. 1994) (holding that the Equal Protection clause of the Fourteenth Amendment requires that credit be awarded for all presentence custody resulting from indigency and inability to post bail); *In re Mota*, 788 P.2d 538, 540, 543 (Wash. 1990) (en banc) (reasoning that a deprivation of liberty due to indigency triggers intermediate scrutiny analysis and failure to credit indigent defendants for presentence confinement does not further a substantial state interest, thus violating the Equal Protection Clause of the Fourteenth Amendment); *Klimas v. State*, 249 N.W.2d 285, 288 (Wis. 1977) (reasoning that denying indigent individuals jail time credit for a sentence less than a maximum sentence imposed also violates the Equal Protection Clause because it invidiously discriminates against indigent prisoners); *Gomez v. State*, 85 P.3d 417, 421 (Wyo. 2004) (credit for time served must be given to indigent prisoners to comport with equal protection).

¹⁵² *E.g.*, *Culp v. Bounds*, 325 F. Supp. 416, 419 (W.D.N.C. 1971) (holding that North Carolina's denial of credit for pre-sentence commitment due to an indigent defendant's inability to post bond violates the Double Jeopardy clause or, alternatively, constitutes unconstitutional discrimination on the basis of wealth, violating the Equal Protection Clause of the Fourteenth Amendment).

¹⁵³ *E.g.*, *Martin v. Leverette*, 244 S.E.2d 39, 41-42 (W. Va. 1978) (choosing to anchor credit requirements for presentence jail time when the defendant is unable to post bail for indigency in the West Virginia Constitution's Equal Protection and Double Jeopardy clauses).

¹⁵⁴ *Sutton*, 521 P.2d at 1010 (addressing addition to maximum sentence); *Gelis v. State*, 287 So. 2d 368, 369 (Fla. Dist. Ct. App. 1973) (per curiam) (“[O]ne sentenced to a maximum term must be given credit for time spent in jail awaiting trial where the pre-trial detention was a consequence of the prisoner's indigency.”); *Jimerson v. State*, 957 S.W.2d 875, 876 (Tex. App. 1997) (“When a defendant receives the maximum sentence authorized, the equal protection clause of the Fourteenth Amendment requires that he receive credit for pretrial jail time.”); *Hart v. Henderson*, 449 F.2d 183, 185 (5th Cir. 1971) (finding that a denial of credit for pre-sentence jail time against maximum sentences is constitutionally impermissible when a defendant is financially unable to make bond); *Jackson v. State of Alabama*, 530 F.2d 1231, 1236-37 (5th Cir. 1976) (holding that while there is no absolute constitutional right to

jurisdictions reason that any sentence that ultimately leads to more time in confinement for the poor than the rich is constitutionally problematic.¹⁵⁵

In the context of these constitutional claims, some courts are explicit that the concern is the total amount of confinement, not punishment,¹⁵⁶ whereas others take pretrial detention to be punishment.¹⁵⁷ One court opined:

We find no merit in the argument sometimes advanced that presentence jail time should not be credited because it is not ‘punishment.’ Whatever it may be called, it is certainly a deprivation of liberty, which, in itself, is punishment to most human beings. We should not like to try to convince those held in such confinement, along with those undergoing punishment, of the soundness of such an argument. We reject it, as other courts have¹⁵⁸

Though it is dubious that such a claim would survive the Supreme Court’s current jurisprudence, it will not be tested because federal law now provides for credit for time served across the board.

Of course, this constitutional concession is too little, too late. The true distinction is drawn not at the time that the rich versus poor defendant is sentenced, but at the time that the rich man is released and the poor man is detained. Occasionally, courts come to grips with this problematic feature:

Whether bail, once set, can be posted is dependent on the defendant’s financial ability, but this implicit discrimination between the rich and the poor is tolerable in light of the state’s overriding need to produce all

pre-sentence credit, when the defendant is unable to post bail due to indigency and sentenced to the maximum sentence, he is entitled to credit for pre-sentence jail time); *Hall v. Furlong*, 77 F.3d 361, 364 (10th Cir. 1996) (It is impermissible, under the Equal Protection Clause, to require that indigents serve sentences greater than the maximum provided by statute solely by reason of their indigency).

¹⁵⁵ *Smith*, 508 S.W.2d at 57; *Klimas*, 249 N.W.2d at 288 (explicitly extending earlier case law to reach sentences that are less than the maximum); *Johnson v. Prast*, 548 F.2d 699, 702 (7th Cir. 1977) (holding that the Equal Protection Clause of the Fourteenth Amendment requires pre-sentence jail time to be credited against all sentences for indigent defendants who were unable to post bond); *King*, 516 F.2d at 323-24 (ruling that the Equal Protection clause can be violated for sentences less than the maximum).

¹⁵⁶ *Sutton*, 521 P.2d at 1010 (“In short, we hold that while presentence incarceration may not qualify as ‘punishment’ under A.R.S. § 13–1652, it amounts to an infringement of freedom and deprivation of liberty and when added to the maximum deprivation of liberty allowed by law results in a denial of equal protection guaranteed by the 14th Amendment of the United States Constitution.”).

¹⁵⁷ *Culp*, 325 F. Supp. at 419 (declaring pretrial detention and post-trial incarceration to constitute “multiple punishments for the same offense”).

¹⁵⁸ *Smith*, 508 S.W.2d at 57 (citations omitted).

defendants, rich or poor, at trial. Once the trial has been held, however, and the defendant found guilty, that particular overriding need of the state which may impel confinement prior to trial is at an end. There is no constitutionally sufficient reason to permit the pre-trial discrimination on the basis of wealth to go unrectified, if it is at all possible to do so. The obvious method of rectifying the inequality is to credit the preconviction time in partial fulfillment of the sentence imposed upon conviction.¹⁵⁹

Ultimately, then, poor defendants who are convicted have the wrong of disparate treatment rectified by credit for time served. Now, in the wake of statutes that give credit to all defendants, rich defendants who are detained also get credit. However, poor defendants, who cannot afford bail but whose charges are dismissed or who are found not guilty, do not have this discrimination remedied.

One final wrinkle in the legal relationship between pretrial detention and credit for time served is that jurisdictions may make defendants pay the costs of their own incapacitation.¹⁶⁰ These fees can be crippling for the indigent, who leave in debt, and rarely cost-justified for the state because defendants can't afford the fees anyway.¹⁶¹ These fees have been deemed

¹⁵⁹ *Klimas*, 249 N.W.2d at 287-88.

¹⁶⁰ *E.g.*, OKLA. STAT. tit. 22, § 979a. Actual numbers are difficult to gather. For instance, NPR found forty-one states with pay-to-stay programs, but did not distinguish between pretrial detention and post-conviction incarceration. *State-by-State Court Fees*, NPR (May 19, 2014, 4:02 PM), <https://www.npr.org/2014/05/19/312455680/state-by-state-court-fees>. And as one exemplar of the parsing difficulties, a recent University of Chicago Law Review article cited Wisconsin for both (1) charging pretrial detainees, and (2) not differentiating between those convicted and those who are not. Duffy & Hynes, *supra* note 20, at 1341 n.201, 1342 n.205 (2021) (referencing WIS. STAT. § 302.372(2)(a) (2019–20)). Yet, the statute is ambiguous as to the former point, and a discussion of actual practice in one case indicated that the county had a new policy (in 2013) of not charging for pretrial detention as well as a longstanding policy of refunding fees for those who were not convicted. *Barnes v. Brown County*, No. 11-00968, 2013 WL 1314015, at *1, 2 (E.D. Wis. Mar. 30, 2013). With the intermingling of jails and prisons in our nomenclature, the different statuses of the incarcerated, and the ability of any given county's practice to vary in reality, it would be a daunting empirical project to map our actual practices. Suffice it to say, however, that those who are detained pretrial may also be billed room and board.

¹⁶¹ Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor> (finding hundreds of people who were jailed for failure to pay court debts); Steven Hale, *Pretrial Detainees Are Being Billed for Their Stay in Jail*, THE APPEAL (July 20, 2018), <https://theappeal.org/pretrial-detainees-are-being-billed-for-their-stay-in-jail/> (“The city’s pretrial fees were both punitive and hardly worth the trouble in financial terms. During a three-year period ending in 2017, Nashville collected just \$533,873.42 of the \$11,411,448.55 in pretrial jail fees billed to defendants. So, the city simply saddled thousands of low-income residents with debt while collecting little in the way of revenue.”).

constitutional by at least one court as a “reasonable user fee.”¹⁶²

* * * *

Pretrial detention is authorized to prevent flight, obstruction, and dangerousness. The Supreme Court has blessed the expansion of detention rationales from failure to appear to dangerousness, while maintaining that harsh detention conditions are not punishment. Scholars have been critical of where our standards are set and of whom they impact the most.

Simultaneously, far less appreciated is the granting of time-served credit to convicted detainees. Spurred by concerns about equal treatment of rich and poor defendants, cost savings, and the conditions of confinement, our criminal justice practices do count preventive detention as punishment.

Both practices call out for a more sustained analysis of two questions: First, how does pretrial detention relate to our rights? Second, how is time served responsive to those detention rationales? It is to those questions we now turn.

II. JUSTIFYING DETENTION

To this point, I have set forth the constitutional and legal guardrails. But these legal positions presuppose underlying *moral* justifications for pretrial detention. Even if we can easily tick off the purported reasons (risk of flight, obstruction, and dangerousness), we need to dig deeper to unpack precisely what it would be about a risk of flight that would justify detaining someone. Or, what precisely do we mean in saying that we can lock someone up based on “dangerousness?” This Part seeks to unearth the moral justifications that could potentially ungird the law’s purported detention rationales. As we will see, some reasons are stronger than others.

A. *Unavoidable Errors and Unjust Detentions*

At the outset, we should face the reality that it is undoubtedly true that we mistakenly or unjustly detain criminal defendants. These problematic cases can be separated into unavoidable errors and substantively unjust detentions.

As I discuss below, we may ask the right questions and have the right epistemic burdens and still get the wrong answers. The criminal justice system can make mistakes. These mistakes are unlikely to be identified in the case of pretrial detention because the mistake preempts the proof to the

¹⁶² Slade v. Hampton Rds. Reg'l Jail, 407 F.3d 243, 254 (4th Cir. 2005).

contrary. That is, if you are worried the defendant will flee and you lock him up, you can never test the counterfactual where he actually does not flee if you release him on his own recognizance. Even a perfectly functioning system will have this sort of mistake.

But we also have detentions that are simply unjust. We are making substantive mistakes in our laws and our applications. We fail to focus upon, and attend with precision to, what would justify detaining someone. Ordering money bail on a misdemeanor when the defendant lacks the ability to pay is simply unjust. It shows a failure to attend to reasonable alternatives, to take into account how exacting the bail should be, and to truly ask whether a misdemeanor charge could justify putting someone in jail. As I discuss what does justify detention below, I do not wish to be misunderstood as suggesting that all or most of our current practices are justified. As will be seen, we need to be far more exacting when we ask why we are detaining someone, and it may very well be that most of our detention practices are not morally justified at all.

B. Dangerousness

The main argument given for detention these days is dangerousness.¹⁶³ Notice that dangerousness is forward looking. We detain individuals to prevent them from committing completely different crimes. What would ground our ability to interfere with someone's liberty because she might commit a future offense? Here, there are two answers. First, the defendant may have forfeited a right against this preventive interference. Second, we may be overriding the defendant's rights for the greater good.

Let me briefly clarify what I mean by a forfeiture account. The idea is simply that no right stands in the way of the action taken against the defendant.¹⁶⁴ If Alice tries to kill Bob, she is not wronged if Bob defends himself, even with deadly force. If Carla commits arson, she is not wronged if she is imprisoned for six months because she deserves it. Generally, one can understand the amount of this forfeiture through the concept of proportionality.¹⁶⁵ Although theorists often capture this idea in different ways—some may say the defendant is liable, others will say he has a duty, and still others may say that one simply has no right against force proportionate to one's wrongdoing—the idea is that the defendant has done

¹⁶³ See *supra* Parts I.A.1 and 2.

¹⁶⁴ See, e.g., MCMAHAN, *supra* note 22, at 10 (“To attack someone who is liable to be attacked is neither to violate nor to infringe that person's right, for the person's being liable to attack *just is* his having *forfeited* his right not to be attacked in the circumstances.”).

¹⁶⁵ HELEN FROWE, DEFENSIVE KILLING 118 (2014) (noting that determining how much force one is liable to is to ask how much force is proportionate).

something impermissible such that she is not wronged by the responsive harm that is imposed on her.¹⁶⁶

Overriding accounts, in contrast, do not depend on the loss of the defendant's right, but instead take the defendant's right to be overridden by more weighty considerations.¹⁶⁷ When we override someone's rights for the greater good, we owe them compensation.¹⁶⁸ This principle is not only embodied in the constitutional conception of takings but also in private law doctrine, such as when the boat owner had to pay for the *justified* damage to the dock in *Vincent v. Lake Erie Transportation Co.*¹⁶⁹

1. Forfeiture and Detention

Let's start with forfeiture accounts. It is crucial to distinguish two sorts of forfeiture claims that may be at work when we rely on the amorphous concept of dangerousness. The first claim would be that the defendant's commission of the charged offense forfeits his rights. To illustrate, our ability to incarcerate someone on incapacitation grounds is thought to follow from his being found guilty of the crime charged. The second claim would be that the defendant's intent to commit a future crime is itself sufficient to forfeit rights. As an example, if you are pointing a gun at Juan and I shoot you in the leg to stop you from killing him, it is your decision to pose a culpable threat that justifies the use of force. It is decidedly unclear what is doing the work in our actual pretrial detention practices, but let's at least endeavor to get the theory straight.

a. Desert-based dangerousness detention

Are we allowed to detain individuals as dangerous because they have committed the crime with which they are charged? Let's call this idea **desert-based dangerousness detention**. This immediately leads to the question of

¹⁶⁶ Compare MCMAHAN, *supra* note 22, at 10 (using liability and forfeiture) with Victor Tadros, *Causation, Culpability, and Liability*, in THE ETHICS OF SELF-DEFENSE 113-18 (Christian Coons & Michael Weber eds., 2016) (arguing for a more capacious account including the existence of duties).

¹⁶⁷ Judith Jarvis Thomson, *Self-Defense and Rights*, reprinted in RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY 33, 42-43 (William Parent, ed. 1986); Frederick Schauer, *Rightful Deprivation of Rights* 4 (Univ. of Va. Sch. of L. Pub. L. & Legal Theory Rsch. Paper 2018-43, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3221184 ("It is commonplace among philosophers that rights may be overridden.").

¹⁶⁸ See *infra* Section IV.B.2 (defending this compensatory right).

¹⁶⁹ 124 N.W. 221 (Minn. 1910); see also Schauer, *supra* note 167, at 14-15 (noting that the Fifth Amendment and *Vincent v. Lake Erie* are standard examples of the need to compensate after overriding a right).

whether this detention somehow flouts the presumption of innocence.¹⁷⁰ If the defendant is thought to be innocent of the crime charged, how can it give us grounds to incapacitate him to prevent him from committing another offense?

Detaining that is justified by the defendant's guilt for the crime charged undermines our procedural morality, even if it does not undermine the presumption of innocence as understood in U.S. law.¹⁷¹ If we have trials for the purpose of determining what negative consequences follow from the defendant's having committed the crime, then we must first determine that the defendant has actually committed the crime. A claim that potential guilt for the commission of the offense itself grounds some sort of forfeiture or lesser standing undermines the entire purpose of the criminal process.¹⁷² Simply put, the state may not get a head start on punishment before the defendant is even convicted.

b. Defense-based dangerousness detention

In contrast to a forfeiture that is grounded in the defendant's having committed an offense, we might think that defendants can forfeit rights because of the offenses they plan to commit. This is, after all, what self-defense and defense of others authorize—the use of force to stop an individual from committing an act. Let's call this **defense-based dangerousness detention**.

This is a defensive/preemptive rationale. To see its contours, let's take a step back and work through the requirements for self-defense. We typically think of self-defense in the individual context as governed by proportionality, necessity, and imminence concerns.¹⁷³ For proportionality,

¹⁷⁰ Shima Baradaran, *The Presumption of Punishment*, 8 CRIM. L. & PHIL. 391, 401-02 (2014) (arguing that the presumption of innocence and due process forbid pretrial weighing of the evidence against the defendant); R.A. Duff, *Pre-Trial Detention and the Presumption of Innocence*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 115, 119 (Andrew Ashworth, Lucia Zedner and Patrick Tomlin, eds. 2013) (asking whether pretrial detention is compatible with the presumption of innocence).

¹⁷¹ That said, it does not technically violate the legal presumption of innocence. *Bell v. Wolfish*, 441 U.S. 520 (1979); LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW 40 (2006) (“[Beyond a reasonable doubt] was meant to codify the meaning of the presumption of innocence of the accused.”).

¹⁷² *Accord* Mayson, *supra* note 107, at 537 (“The central problem with each of these moral-predicate theories is that they justify pretrial deprivations of liberty by pointing to a defendant's responsibility for the charged offense. But to invoke a defendant's guilt as justification for pretrial restraint threatens fundamental due process values, which tend to run under the head of the “presumption of innocence.”).

¹⁷³ See Kai Draper, *Necessity and Proportionality in Defense*, in THE ETHICS OF SELF-

the harm or wrong threatened by the “aggressor” dictates the amount of harm that may be imposed on her.¹⁷⁴ A defender may not kill an aggressor to prevent a paper cut. The necessity requirement has a number of philosophical nuances, but we can simplify the question here to whether or not one would need to use the force to stop the harm.¹⁷⁵ So, if an aggressor threatens deadly force and the defender can successfully defend either by slapping the aggressor or shooting the aggressor, shooting is unnecessary. Finally, although the imminence requirement is invoked in cases of individual self-defense, many theorists claim that imminence mediates the citizen/state boundary such that the state ought to intervene before a threat is imminent.¹⁷⁶ This understanding would yield that there is no imminence requirement for pretrial detention because it is state action. An alternative understanding of the imminence requirement as serving as an actus reus for aggression, would ask what minimum act is required before the state takes may act preemptively.¹⁷⁷

Elsewhere, I have argued that some forms of preventive interference (not necessarily pretrial detention) can be justified on similar grounds.¹⁷⁸ Specifically, I have claimed that if someone has a current intention to commit

DEFENSE, *supra* note 166, at 171, 171 (“[T]he right to defend the innocent against unjust aggression is limited to the infliction of necessary harm and is further limited to the infliction of proportionate harm.”); Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 223 (2004) (noting right to self-defense requires imminent, unlawful force).

¹⁷⁴ FROWE, *supra* note 165, at 118.

¹⁷⁵ See Kimberly Kessler Ferzan, *Stand Your Ground*, in THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW 731, 734 (Larry Alexander & Kimberly Kessler Ferzan eds., 2019) (noting different constructions of the necessity requirement). For a masterful demonstration of the complexities of the necessity requirement, see Patrick Tomlin, *Distributive Justice for Aggressors*, 39 LAW & PHIL. 351 (2020).

¹⁷⁶ E.g., David Gauthier, *Self-Defense and the Requirement of Imminence: Comments on George Fletcher's Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 615, 616-17 (1996) (“If the absence of imminent attack leaves the individual space to appeal to the protection the law claims to offer, then the individual must make that appeal; she may not choose instead to rely on her own force and effort.”); George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 570 (1996) (“Similarly, when an attack against private individuals is imminent, the police are no longer in a position to intervene and exercise the state's function of securing public safety.”).

¹⁷⁷ Ferzan, *supra* note 173, at 217 (“Imminence serves as the actus reus for aggression, separating those threats that we may properly defend against from mere inchoate and potential threats.”).

¹⁷⁸ Kimberly Kessler Ferzan, *Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible*, 96 MINN. L. REV. 141, 163 (2011) (“[T]he same normative considerations that justify self-defense will justify other forms of preventive intervention”).

an offense (manifested by an overt act¹⁷⁹), and the state is convinced of this beyond a reasonable doubt (or at least by clear and convincing evidence),¹⁸⁰ then the state should intervene with the least restrictive means possible. I have also argued that when we are convinced that a criminal intention is present, the state need not wait until the threat is imminent.¹⁸¹

My aim is not to defend my earlier work here. Rather, it is merely to demonstrate that a defense-based theory can ground prevention by the state. Pretrial detention is justified if there is a forfeiture condition that goes beyond statistical probability—the formation of an intention (and act in support of it), and there is an epistemic requirement (of at least clear and convincing evidence if not proof beyond a reasonable doubt). The bottom line is that even if one rejects my theory of how self-defense works, *a theory* of self-defense will justify some interventions by the state against dangerous individuals.

Notably, bail hearings on dangerousness are wildly overinclusive, extending their reach beyond those cases grounded in self-defense. Current statistical measures do not demonstrate that individuals will commit a crime in the future. They do not even purport to guesstimate whether the defendant *currently has a criminal intention*. Nevertheless, when these conditions are met, preventive detention is justified. That is, if someone has a current plan to commit a serious criminal offense, the state is justified in stopping her, even if it means detaining her.

In practice, this would mean that the state is permitted to detain someone like Earl Shriner. Shriner was released from prison in May 1987, after completing a ten-year sentence for kidnaping and assaulting two teenage girls.¹⁸² During his last months in prison he wrote in his diary detailed plans to maim and kill children upon release, and he told his cellmate that he wanted a van customized with cages so he could pick up children, molest them, and kill them.¹⁸³ And when Shriner got out, he abducted a child, sexually assaulted him, and killed him.¹⁸⁴ Certainly, at the pretrial stage, someone who is voicing such plans may be detained.

¹⁷⁹ *Id.* at 168. The overt act requirement is in place to limit government overreaching, but is not required on a purely philosophical level. *Id.*

¹⁸⁰ Kimberly Kessler Ferzan, *Preventive Justice and the Presumption of Innocence*, 8 CRIM. L. & PHIL. 505, 523 (2014) (tentatively endorsing beyond a reasonable doubt as the standard, but expressing sympathy for clear and convincing evidence).

¹⁸¹ Ferzan, *supra* note 178, at 174-76 (discussing and rejecting an imminence requirement before the state intervenes preventively against a culpable aggressor).

¹⁸² ROXANNE LIEB, WASH. INST. FOR PUB. POL'Y, WASHINGTON'S SEXUALLY VIOLENT PREDATOR LAW: LEGISLATIVE HISTORY AND COMPARISONS WITH OTHER STATES 1 (1996).

¹⁸³ *Id.* at 1 n.1.

¹⁸⁴ *Id.* at 1.

Ultimately, my goal is not to defend a precise test for when the state may be permitted to detain someone based on these dangerousness grounds. Instead, my goal is simply to articulate one way to think about dangerousness. When a defendant intends a serious criminal offense, he forfeits the right against force, and detention to prevent that offense may be necessary, proportionate, and justified in defense of others.

2. Overriding/Violating Rights and Dangerousness Detention

Let's assume that we cannot punish prior to trial (desert-based dangerousness detention) and that the defendant does not harbor the kind of intention required for forfeiture (defense-based dangerousness detention). Are we stuck? Can't we just detain someone if we think there is a good chance that she will commit a serious crime later? Let's consider **pure prevention dangerousness detention**.

To assess this ground for detention, let's move from a clear case of self-defense to an ambiguous one. Assume that Alice is unsure whether Betty is attacking her. We might think that for Alice to give due respect to both her life and Betty's, she must think it more likely than not that Betty is an actual attacker before she kills Betty in self-defense.¹⁸⁵ It would give Betty too little respect if Alice killed her on a hunch, but it would give Betty too much respect if Alice has to absorb a substantial risk of injury before taking action. They are both equals.

Consider now a further complication. What if Betty is (perhaps) threatening both Alice and Albert? Or Alice, Albert, Anja, and Antonio? Does the degree of confidence that Alice must have before killing Betty decrease as more lives are at stake? The answer should be "no." The reason is that we owe Betty a certain degree of respect before we decide that she has forfeited her rights. That degree of respect does not alter with the stakes.¹⁸⁶ This claim is deontological.

But, you may think, surely Alice may kill Betty if there are a thousand lives at stake. Notice, though, that on this logic Alice may be permitted to kill Bob, a completely innocent person, if there are a thousand lives at stake. That is, the initial rationale for defending against Betty was that she had

¹⁸⁵ The law often reduces the inquiry to whether Alice "reasonably believes" that Betty is threatening her. Elsewhere, however, I have argued that a standard, such as preponderance of the evidence, is preferable to asking whether a defender *believes* the aggressor is attacking her. See generally Kimberly Kessler Ferzan, *Deontological Distinction in War*, 129 ETHICS 603 (2019).

¹⁸⁶ *Id.* at 617 (arguing "the level of confidence does not decrease when more lives are at stake because of a concern with aggregation[, and therefore, no] person's liability threshold should be affected by how many people will be on the other side").

forfeited a right, whereas the rationale for harming Bob is that his rights are overridden by public need.¹⁸⁷

To be clear about the scope of this sort of “overriding” argument, assume there is a 10% chance that you have a deadly disease that will kill a million people. Would the state be justified in putting you in quarantine for two months to prevent the spread of the disease? Here, we might think the answer is yes. Although we do not have significant evidence, the threat is so large that we are entitled to override your rights to save so many others. In such a case, however, you would be entitled to a comfy bed and some compensation. After all, we are harming *you* for *us*.¹⁸⁸

Dangerousness detention can be framed similarly. The defendant’s rights are being outweighed by the greater good. It is not about what the defendant has done but about a risk-based prediction of what the defendant will do. We override rights when we quarantine, when we tie yachts to docks during storms, and so forth.

Despite its superficial appeal, dangerousness-based detention premised on this sort of argument violates our rights and is normatively objectionable. It is disrespectful of the agent. It does not *deny* that the agent has autonomy or the ability to choose rightly, but it does suggest that we do not trust the agent to choose rightly. A stance that detains someone because we do not want to run the risk of their wrongdoing is a stance of the state as distrusting its citizenry.¹⁸⁹ This is distinct from merely overriding a right. We are not simply turning a trolley from five people to one person; this is turning the trolley to the one because we believe the person may act impermissibly. The harm is eliminative. We aim to harm the agent to eliminate the threat, not as a side effect of helping others.¹⁹⁰ Although the state may have reasons to detain nonresponsible agents on the basis of their dangerousness, there are strong reasons to object to the state locking us up

¹⁸⁷ Cf. ADIL AHMAD HAQUE, *LAW AND MORALITY AT WAR* 122 (2017) (“In principle, it may be epistemically permissible to kill a person whom you reasonably believe is innocent if the expected value of doing so is vastly greater than the expected disvalue.”).

¹⁸⁸ See generally Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029, 1062-66 (2004) (calling for compensation of detained innocents); Michael Corrado, *Punishment, Quarantine, and Preventive Detention*, 15 *CRIM. JUST. ETHICS* 3, 11 (1996) (arguing the State should compensate the preventively detained for their loss of liberty); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 *HARV. L. REV.* 1429, 1446 (2001) (“[I]f a person is detained for society’s benefit rather than as deserved punishment, the conditions of detention should not be punitive.”); see also *infra* Part IV.B.2.

¹⁸⁹ Duff, *supra* note 170, at 120 (arguing that state owes us respect and trust).

¹⁹⁰ ALEC D. WALLEN, *THE MECHANICS OF CLAIMS AND PERMISSIBLE KILLING IN WAR* 41-42 (2019) (noting that the justificatory structure of an eliminative killing runs through eliminating the threat he poses and is distinct from the justificatory structure for harming someone as a side-effect).

because it fears us.

Although I take this objection to be decisive and therefore pure preventive dangerousness detention to be unjust, there is no point in belaboring the point given how rampant the practice is. Instead, it is essential to note that even its proponents must recognize that this theory, construed in its best light, is an instance of overriding a right. That is, the best case for this sort of treatment is that it is like *Vincent v. Lake Erie*. And that requires compensation and satisfactory conditions.¹⁹¹

3. Disentangling Dangerousness

As you can now see, the rhetoric of dangerousness can mask three distinct rationales for detention. First, like incapacitation after a criminal conviction, we might detain the dangerous because their culpable past crime forfeits the right to liberty. Second, like self-defense, we might detain the dangerous because their culpable intent to commit future crime forfeits the right to liberty. Third, like quarantine, we might confine the dangerous because the public good outweighs their right to liberty. Notably, and importantly, two of these rationales—defense-based detention and pure prevention—*apply to everyone*. That is, there is nothing special about the crime charged except that the state actually has its hands on the detainee. But if the state is justified in detaining on the basis of a future threat alone, the pendency of the criminal case is doing no justifying work. The commission of the charged offense is at best evidentiary of future conduct.¹⁹²

To identify these three rationales is not to endorse them all. Two are deeply problematic: We should not pre-punish individuals while they await trial. And we should not lock someone up because we do not trust them to choose rightly. In addition, whatever the rationale for detention is, there is a further question as to where the burden of proof should be set. How confident must we be that the relevant facts obtain such that we may detain someone

¹⁹¹ Cf. Duff, *supra* note 170, at 132 (“A recognition of that cost should have implications for how such defendants are treated: for the conditions under which they are detained, and the efforts that must be made to allow them to maintain as much connection with their ordinary lives as possible’ for the compensation that may be due to them.”).

¹⁹² One interesting question is whether the defendant’s desert impacts the degree of confidence that the state must have. That is, rather than justifying that the defendant forfeits his right against punishment (desert-based dangerousness detention), the thought is that the defendant forfeits a high burden of proof before being detained because of potential dangerousness. However, the same procedural morality questions arise if we use guilt as a forfeiture condition. Indeed, Alec Walen, who proposes this “lost status” view, deploys it as a form of punishment once guilt has been determined beyond a reasonable doubt. See Alec Walen, *A Punitive Precondition for Preventive Detention: Lost Status as an Element of Just Punishment*, 63 SAN DIEGO L. REV. 1229 (2011).

on these distinct dangerousness grounds? Each rationale requires its own analysis and answer. For our purposes of merely identifying the potential grounds of detention, I can leave this question unanswered,¹⁹³ but it is of tremendous importance if we wish to justify detention.

C. Flight

Let us now turn to flight.¹⁹⁴ Underpinning this reason are similar rights-forfeiture and rights-overriding justifications. Detaining based on flight concerns may, in some circumstances, be justified because the defendant has a current intention to flee the jurisdiction, thus violating her duty to appear. And again, though it seems dubious, there is the potential to make an argument that we may override someone's right to liberty to secure their appearance at trial.

Lauren Gouldin argues that we need to distinguish three different ways that defendants can fail to appear.¹⁹⁵ First, they can leave the jurisdiction.¹⁹⁶ Second, they can stay in the jurisdiction but try to avoid law enforcement, what she calls "local absconders."¹⁹⁷ Third, they can fail to appear through what might seem to be excusing or mitigating conditions, ranging from forgetting the date of a court appearance, to logistical challenges posed by work or childcare, to a general lack of capacity to navigate the system.¹⁹⁸ For our purposes, I suggest we collapse "true flight" and local absconders, as the only difference between the two is that it is just more costly to get someone across jurisdictional lines.¹⁹⁹

Some cases of detention may be justified under a **duty to appear rationale**. A defendant with a current intention to abscond does not intend to do her duty to answer for the crime charged.²⁰⁰ This not only undermines the instrumental, truth-seeking functions of a trial, but the criminal justice system itself. For instance, Antony Duff, Lindsay Farmer, Sandra Marshall, and Victor Tadros, have developed a theory of the criminal trial that takes the

¹⁹³ *But see* note 180 (providing my defense of beyond a reasonable doubt).

¹⁹⁴ There are empirical questions about how significant the failure to appear rate is. Some numbers show open warrants at 7.8 million, but the number of serious felonies with open warrants is likely closer to 100,000. Gouldin, *supra* note 126, at 689-690 (analyzing data).

¹⁹⁵ *Id.* at 683.

¹⁹⁶ *Id.* at 725.

¹⁹⁷ *Id.* at 735.

¹⁹⁸ *Id.* at 729.

¹⁹⁹ *Id.* at 725, 735.

²⁰⁰ Duff, *supra* note 170, at 127 (justifying detention against defendants who intend to abscond because the state is thwarting the criminal attempt on which the defendant has already embarked).

trial's adjudicative role to be valuable independent of the instrumental values achieved through adjudication. Though they slightly back off this strong normative claim in the context of criminal adjudication, they most forcefully state their case in the interpersonal context:

[I]n ordinary social circumstances, where one individual legitimately calls another to answer a charge concerning their behaviour, and to account for their conduct if they are responsible for it, we appropriately characterize the call as a *demand*. I think that you have been spreading gossip about me at work. I call you to answer. I outline the reasons that I think this, and if they are good reasons it seems that there is a legitimate *demand* that you answer. Answering, in these circumstances, is a moral *obligation*, and participation in the conversation is a moral *requirement*. This seems right even if you are in fact innocent of spreading gossip about me. In that case, you have an obligation to dispel my fears.²⁰¹

However, detention is only proportionate to those who have chosen to flout their duty to be called to account for severe crimes.²⁰² Even if the defendant will commit a wrong in failing to appear, putting that person in a cage to guarantee their appearance at trial is disproportionate to the duty they threaten to ignore. It is true that all failures to appear threaten the state's authority to run its criminal justice system, but not all "callings to account" are alike. Your friend might lose your pen, stand you up for dinner, or sleep with your spouse. If you are then going to meet to discuss her wrongdoing, it would be far more significant for her to fail to appear to discuss the adultery than to discuss the pen loss. It is not just the value of being in a criminal trial but being in a criminal trial for a particular crime that matters. It is important to show up for your murder trial even if you are not guilty and will be acquitted.²⁰³ For this reason, an intent to abscond from a serious offense may justify liberty deprivation when the intent to abscond when charged with a

²⁰¹ ANTONY DUFF, LINDSAY FARMER, SANDRA MARSHALL & VICTOR TADROS, 3 THE TRIAL ON TRIAL: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL LAW 209 (2007).

²⁰² We might doubt whether the duty can even bear this weight. After all, the duty applies to the innocent as well as the guilty. But if an innocent actor indicates that she plans to flee to a non-extradition country and avoid her serial murder trial, is the mere fact that she has a duty to answer for the crimes (that she did not commit) sufficiently weighty to justify detention? This sort of proportionality question crucially depends upon the quality and duration of the pretrial detention.

²⁰³ Cf. DUFF, FARMER, MARSHALL, AND TADROS, *supra* note 201, at 7 (rejecting the "standard view" that the only value of the trial is instrumental in advising the state whom it may punish).

minor offense would not.²⁰⁴

Can the truth-seeking function of the criminal trial justify overriding the rights of someone who does not have a current plan to flee? Such a question applies both to the person whom we suspect may form the intent to abscond in the future, but does not have one now, as well as the defendants who fall into Gouldin's third category and fail to appear for reasons such as simply forgetting their court dates.

We should be highly skeptical that even trials for serious crimes can justify putting someone behind bars because of what we think she may choose to do in the future. This raises the same question of disrespect as pure preventive dangerous detention, but with a significantly reduced state interest. As for nonculpable nonappearances, if we lock up someone because we think she will forget, we are not treating her as a responsible agent. Moreover, the reasons she will simply fail to appear do not warrant our distrust, as much as our empathy and accommodation. At bottom, we have no more right to detain the criminal defendant based on a prediction than we do a material witness, and to detain them there must be probable cause to believe the witness won't appear and there will be a *failure of justice*.²⁰⁵

D. Intimidation and Obstruction

Intimidation and obstruction, *obstruction rationales*, are simply instantiations of our earlier reasons. Instead of being worried that the defendant is simply dangerous, we believe he poses a specific danger to someone (akin to dangerousness rationales) or we believe he poses a danger to the trial process (akin to flight rationales). These interferences could take the form of destroying evidence, intimidating witnesses, or even killing witnesses.

Just as the duty to appear has two components that determine its severity—both the failure to answer for one's crime and the seriousness of the underlying charge—obstruction has both features as well. The easiest detentions to justify are those where the defendant has directly threatened to

²⁰⁴ Perhaps this is part of why, even in our earliest bail jurisprudence, some serious crimes were not bailable. Carbone, *supra* note 34, at 522 (noting that the offense of homicide became nonbailable in the twelfth century).

Interestingly, though our armchair speculation would be that crime seriousness also serves the epistemic function of likelihood of flight, the empirics do not bear this out. “[D]ecades of studies” challenge the claim that crime seriousness correlates with likelihood of flight.” Gouldin, *supra* note 126, at 705 (noting “[t]hese studies conclude that other factors, such as employment, family ties, community reputation, and prior record of appearances, are better predictors of nonappearance”).

²⁰⁵ Bacon v. United States, 449 F.2d 933, 942 (9th Cir. 1971).

seriously injure or kill a witness. These cases are akin to defense-based dangerousness except that the crime is not just a general offense but one directed at the particular criminal proceeding.

Detention to prevent serious, obstructive acts is likely to be justified, irrespective of the crime charged. If you plan to kill the security guard to prevent a shoplifting conviction, you still have no claim against being detained to prevent you from killing the guard. (Indeed, perhaps the fact that you have so little at stake makes the planned crime worse.) The pending offense does little work here. The state has grounds to stop anyone who plans to kill someone else, irrespective of their commission of an offense.

Conversely, even if the obstructive act is not particularly serious on its own, it could have the potential to thwart a serious case. Absconding does not hurt anyone else; it just thwarts the case. So, too, the intention to destroy documents that would thwart a murder trial could also justify detention.

In contrast, low level obstruction of a low-level offense is far less likely to justify detention. Consider the *Yates* case, where the fisherman threw fish overboard to get rid of the evidence that his fish were unlawfully small.²⁰⁶ Even if detention would somehow prevent the defendant from throwing the fish overboard, the wrong of obstructing and the wrong of illegal fishing still do not appear in the aggregate to justify a serious liberty deprivation of the defendant.

Ultimately, this rationale faces the same two questions. Has the defendant already formed the intention to obstruct in such a significant way such that she is liable to be stopped by being detained? If not, do the ends sought substantially outweigh the defendant's liberty interests?

E. Failure to Make Bail

Many pretrial detainees are not in jail because the court has found that there is no condition of release to secure their appearance.²⁰⁷ Instead, the court has imposed a secured financial condition of release and the defendant cannot pay it. Morally, detaining her requires a two-step justification: It requires us to explain why bail may be imposed, and it requires us to explain why she may be detained if she cannot pay her bail.

Can the imposition of bail be justified? As construed by the Court and in its best normative light, bail is a guarantee that gives further weight to a promise to appear.²⁰⁸ Antony Duff reasons that we all owe each other a

²⁰⁶ 574 U.S. 528 (2015). We can disregard the fact that the Supreme Court ultimately held that fish aren't tangible objects under Sarbanes-Oxley for our purposes.

²⁰⁷ See *supra* notes 74-75.

²⁰⁸ See *supra* text accompanying note 34.

degree of civic trust.²⁰⁹ Defendants who have given us reason to doubt that we can trust them have additional duties to reassure us that they are trustworthy.²¹⁰ This might involve posting cash bail, relinquishing a passport, or submitting to other minor restrictions on their liberty pending trial.²¹¹

Notice that the normative argument for why we can ask for bail does not provide the normative justification for what we may do if the defendant cannot afford to pay bail. One thing to note is that if the defendant cannot afford to pay, the bail request is probably unjust and any resulting detention unjustified. Our criminal justice system should only impose fair conditions, not ones the defendant cannot meet. If we truly distrust defendants, then we ought to meet the test for detaining them outright rather than setting conditions that de facto detain them.²¹²

However, even if the request is a fair one, if the defendant cannot then meet the condition, we need a justification for imposing the further hardship of detention. Let's say your friend owes you \$10, but she only has a \$50 bill on her. It does not follow from the fact that she owes you \$10 that you get the fifty. So, too, even if we are allowed to ask for some reassurance, that does not mean that if that reassurance cannot be provided, the result ought to be detention. This same issue appears if the imposition of bail is in response to a forfeiture rationale. For instance, imagine the defendant currently has an

²⁰⁹ Duff, *supra* note 170, at 123. As he goes on to argue, “we do owe it to each other to recognize each other as fellows: not to assume in advance that others are enemies who might attack us, and against whom we need to guard ourselves.” *Id.*

²¹⁰ *Id.* at 126 (arguing it is fair to require reassurance “[g]iven the pressures created by facing trial, given the temptations that they can generate to abscond or to obstruct justice, given our awareness of our common human fallibility, we can see the context of a defendant awaiting trial as one such context”); *cf.* Mayson, *supra* note 107, at 540 (noting that there may be reasons to treat those for whom we have probable cause to believe they committed an offense somewhat differently than an equally dangerous non-defendant).

²¹¹ John Duffy and Rich Hynes argue that originally bail required someone else, a surety, to guarantee presence. Duffy and Hynes, *supra* note 20, at 1291-02. It was the surety that stood to lose financially if the defendant failed to appear. *Id.* As noted above, the earliest origins of bail required the surety to post the exact amount of the punishment. *See supra* text accompanying note 34. As our country evolved, so, too, did bail. WAYNE H. THOMAS, JR. BAIL REFORM IN AMERICA 11-12 (1976) (noting the American frontier made it difficult to have close friends to serve as sureties while simultaneously offering easy escape for those who wished to abscond). But the ultimate question is normative. What do we want bail to do? What would justify taking money from anyone? Although there is not space to defend this claim fully here, I think we should be highly suspicious that we should be vesting authority in third parties to ensure the defendant's appearance at trial. Instead, Duff's view that bail is about giving heft to a promise, given reasons for distrust, seems far more in keeping with how we ought to treat each other and what we may fairly ask of each other.

²¹² *See* Mayson, *supra* note 60, at 1679 (arguing “an order imposing unaffordable bail is an order of pretrial detention and must be treated as such”).

intention to flee rather than be tried for a nonviolent crime, and the court requires a \$300,000 secured bond in response. What justifies the detention if the bail isn't paid? If I am attacking you and plan to punch your arm, such that I am liable to a proportionate response, you would not be justified in throwing me over a bridge, as that would be disproportionate to the degree of my forfeiture.

Here again, the only justification for so doing is that the defendant's right is being overridden. It is an overriding justification that makes up the difference between what the defendant owes or has forfeited and the greater hardship we impose on her.²¹³ Recall the reasoning of the *Klimas* court: "Whether bail, once set, can be posted is dependent on the defendant's financial ability, but this implicit discrimination between the rich and the poor is tolerable in light of the state's overriding need to produce all defendants, rich or poor, at trial."²¹⁴ The person who cannot afford bail has not forfeited rights up to the level of detention. Instead, we are *taking* her and overriding her rights for the greater good. In these sorts of cases, the defendant is entitled to adequate conditions of confinement and compensation for all that she loses as a result of serving the government's ends. Again, an overriding rationale places these detentions in their best normative light. However, it is more likely that these detentions are simply unjust, as they ask the defendant to make a promise he is simply incapable of making.

* * * *

Inability to make bail. Dangerousness. Obstruction. Flight. These are the legal categories that purport to justify detention. Underpinning these rationales, however, are three different rights relationships. First, sometimes defendants simply have their rights violated. The state uses an overbroad test and imposes a harm that is unjustified. Second, sometimes defendants have forfeited their liberty interests against the detention—because they deserve it, because they intend a future criminal act, or because they plan to flout their duty to answer in a serious case. Third, sometimes, defendant's rights are being overridden. Though I have suggested reasons to be deeply skeptical of this final rationale, it is the one employed by the Court, allowing a defendant's liberty interest to be subordinated to the "greater needs of society."²¹⁵

²¹³ Saba Bazargan, *Killing Minimally Responsible Threats*, 125 ETHICS 114, 129 (2014) (proposing a hybrid justification in self-defense cases that combines forfeiture and lesser-evils justifications).

²¹⁴ *Klimas v. State*, 249 N.W.2d 285, 287-88 (Wis. 1977).

²¹⁵ *United States v. Salerno*, 481 U.S. 739, 741, 748-51 (1987).

III. WHY GIVE CREDIT FOR TIME SERVED?

As discussed in Part I, every jurisdiction gives credit for time served.²¹⁶ And, the purported rationales for so enacting were the view that detention is punishment, that time served saves money, or that time served ensures that the poor are treated equally to the rich.²¹⁷ But little thought has been given to drawing direct and explicit connections between the reasons why we detain and the moral justifications for giving credit.²¹⁸

Let us take a step back, then, and ask from the theoretical perspective: Does credit for time served match the reasons that we detain people? That is, how do we make sense of this practice that by almost retroactive magic takes something that the Supreme Court has decisively stated *is not punishment* and turn it into punishment? Now that we see that some detentions are unjust, some are a response to rights forfeiture, and some require us to override the defendant's liberty interest for the greater good, we can ask whether time served is an appropriate response to these detention rationales.

A. Unjust Detentions

Our current practices detain people whom we ought not to detain. If a defendant is indigent and entitled to bail, she should not be held. Intuitively, it seems that the least we can do is give her credit for time served. One way to think about credit for time served is that it *compensates* the unjustly detained, and the other way is to think that this time in detention justifiably counts toward the *punishment*. This section examines both approaches. Ultimately, there is theoretical support for using credit for time served in either way. However, both approaches are underinclusive in failing to account for those who are not found guilty, and both approaches have far-reaching implications for the criminal justice system generally, thus rendering credit for time served meager and ad hoc.

1. Compensation

Adam Kolber rejects that a compensation account is itself sufficient to justify credit for time-served.²¹⁹ First, he questions the commensurability of detention (which is not supposed to be punishment) and punishment.²²⁰

²¹⁶ See *supra* note 11.

²¹⁷ See *supra* text accompanying notes 151-59.

²¹⁸ The two exceptions, Kolber and Donelson, are discussed *infra* Part III.A.

²¹⁹ Kolber, *supra* note 13, at 1151-53.

²²⁰ *Id.* at 1151

Second, he suggests that we could financially compensate detainees.²²¹ Third, he notes that this credit does not look like compensation because it is not transferrable; for instance, it cannot be used as credit against future crimes.²²²

The heart of the objection is commensurability. At first, this seems to be decisive. Imagine that a state employee hit you with her vehicle while pursuing her official duties. It would seem decidedly odd to argue that you ought to be able to use the compensation owed against the sentence in your forthcoming criminal case.

But let me suggest that this might be slightly more plausible than we take it to be. First, one point about commensurability is that you shouldn't cash out cash against incarceration. Pay them, says Kolber. But payment is already presupposing the commensurability of the wrong done (detention) and the compensation (cash). Simultaneously, we take punishment to come in different modes from incarceration to fines to home detention. If we can debate whether to punish something with a fine or with home detention, we are already assuming some metric for comparison.

Kolber, who is looking for an explanation sufficient for all creditings of time served, also raises the problem of transferability. This is a problem with current practice. Jurisdictions that give credit for time served require that the detention be related to the crime for which they are being sentenced.²²³ But if the point is that the state has detained the defendant unjustly, and is giving a coupon to be spent on time incarcerated, why does the state get to limit the coupon's effect to "this visit only?"

Perhaps the idea is that although as a theoretical matter, the state owes the defendant credit, it does not want to authorize the defendant to commit additional wrongs. It seems like a "get out of jail free" card. Accordingly, this credit is limited so that the state is not seen as authorizing additional wrongdoing. Still, this does not explain why the defendant could not be given credit for other pending charges, even ones for which she was not being detained. Given that there really is no legitimate basis for the detention, why shouldn't this debt be recognized for any offense?

²²¹ *Id.* at 1152.

²²² *Id.*

²²³ *Commonwealth v. Milton*, 690 N.E.2d 1232, 1237 (Mass. 1998) (refusing to give credit to a later charge for 410 days spent in jail because "[t]o allow prisoners to 'bank time' in such a manner would be a matter of great concern, because it could in effect grant prisoners a license to commit future criminal acts with immunity"); *see also* *Commonwealth v. Carter*, 93 Va. Cir. 129 (Cir. Ct. 2016) ("The statute only requires jail credit on the offense for which the defendant is 'awaiting trial.'"); WIS. STAT. § 973.155(1)(a) (2019–20) (Requiring custody be "in connection with the course of conduct for which sentence was imposed").

Compensation, then, could be a justification for our practice. However, this remedy is wildly underinclusive as it is only available to those who are actually convicted and only applies to the crime for which they were charged. Moreover, although courts maintain that it is unconstitutional to subject the poor to more detention than the rich, the fact that we distinguish between the innocent rich and the innocent poor remains.²²⁴ If guilty, indigent defendants are entitled to compensation, then innocent, indigent defendants are as well. Crediting for time served might be compensatory for some, but it leaves the innocent empty handed.

2. Punishment

Is pretrial detention really just punishment or the hard treatment inherent in punishment? Whereas Raff Donelson takes the first approach,²²⁵ Kolber argues that proportionality is about harsh treatment, which the detained person experienced.²²⁶ This section reveals that there are plausible theoretical accounts that would allow us to think of unjust detentions as legitimately taken into account for determining the total amount of punishment. Notably, any path we take would require radical revision of our practices if it were thoroughly and consistently adopted.

Consider the punishment claim first. Recently, Donelson has defended the idea of “natural punishment.”²²⁷ Donelson uses an example where a robber accidentally shoots himself while running away, and a mother who negligently kills her baby by wedging the car seat in an overcrowded car.²²⁸ “Roughly, the idea is that, in such cases, *the world* punishes the wrongdoer.”²²⁹ More specifically, Donelson confines natural punishment to three elements: “(1) adversity, (2) caused by wrongdoing, and (3) not caused by anyone’s intention to extract retribution on the wrongdoer.”²³⁰ Donelson’s proposal is to treat some natural punishment as what he calls “constitutional punishment,” which is natural punishment for legal wrongs that have been discovered by the state.²³¹

Donelson’s argument for calling pretrial detention punishment, in the face of Supreme Court jurisprudence decreeing that detention is not

²²⁴ Accord Kolber, *supra* note 13, at 1153.

²²⁵ See *infra* text accompanying notes 227-33.

²²⁶ Kolber, *supra* note 13, at 1155 (“Though detention is not punishment, it is still harsh treatment and should therefore make an offender less deserving of additional harsh treatment.”).

²²⁷ Donelson, *supra* note 13.

²²⁸ *Id.* at 3.

²²⁹ *Id.* at 3.

²³⁰ *Id.* at 7.

²³¹ *Id.* at 18.

punishment, is:

[T]he American legal system sometimes allow these *time transformations*. In such time transformations, before a certain point in time, a particular harm is *not* legal punishment, but after that point in time, that very same harm, that already happened *is* legal punishment. I suggest we think about natural punishment similarly.²³²

As to whether pretrial detention qualifies as natural punishment, Donelson is unequivocal: “Natural punishment is not merely *similar* to that other pre-trial practice; pre-trial detention before a rightful conviction just *is* natural punishment.”²³³

Kolber, however, previously argued against this kind of retroactive characterization.²³⁴ The problem, Kolber claims, is consistency. Applying Kolber’s concern to Donelson’s argument yields this question: If we erroneously convict someone and find out a decade later, what is to prevent us from *time transforming* this into non-punishment?²³⁵

Nevertheless, Donelson’s proposal opens up two inquiries. First, is there a justification for “time transformation?” Second, is there a reason to credit the detention as punishment?

Let me suggest that the answer to the first question is no, but the second may be yes. The bottom line is that Donelson thinks these detentions should count, and we do later call them punishment, so it appears that we have retroactively decreed them punishment. Welcome to the actual practice of the criminal law, which is often confused and unprincipled. But this does not mean that scholars should take these things on board, bless them, and give them labels. There is no reason to think that at t_2 something becomes punishment when at t_1 it was not. And, for the cases under consideration—defendants who were held unjustly because they should not have been detained—it is hard to say that we are ultimately going to count this as justly punishing them.

Still, we might think that t_1 hardships should count against later punishment. That is, there may be good reason to count pretrial detention. Let me suggest four potential arguments that support the proposition that t_1 hardships matter. Bottom line—yes, pretrial detention may be the sort of hardship that should “count” for punishment purposes. But it is hardly the only sort of hardship, and our practices thus select out some people for credit,

²³² *Id.* at 26.

²³³ *Id.*

²³⁴ Kolber, *supra* note 13, at 1150-51.

²³⁵ *Id.* at 1151.

but exclude others.

First, there is the argument that some prior acts are punishment at the time they are inflicted. Donelson is not interested in these cases, as he specifically exempts cases where individuals aim to exact retribution, but Doug Husak has presented a compelling argument that sometimes individuals may “already be punished enough.”²³⁶ Husak argues that stigma and hard treatment are components of punishment, and that it is not truly the state, but society, that imposes stigma.²³⁷ Accordingly, if someone has already been subjected to substantial social stigma, Husak believes that this should result in less punishment by the state. If we are allowing stigmatic harms to count towards punishment, then, our sentencing practices should consider them far more widely.

Second, we might think that hard treatment, without stigma, particularly when imposed by the state, should count toward what is proportionate. Kolber explicitly pursues this line of inquiry: “Though detention is not punishment, it is still harsh treatment and should therefore make an offender less deserving of harsh treatment.”²³⁸ Kolber notes there are “tricky details” about what counts, including whether it can be from other people or nature and the timing, but that “pretrial detention is surely an easy case.”²³⁹ From here, he states that, “We can also understand certain debates about credit for time served as reasonable efforts to untangle the nature of the harsh treatment that should count for purposes of proportionality.”²⁴⁰ Notably, if “harsh treatment” counts as part of punishment, the buck does not stop with pretrial incarceration; all kinds of collateral consequences might likewise count.²⁴¹

Third, we could simply embrace a “whole life” view of desert.²⁴² This would mean that earlier undeserved harms—perhaps stemming from poverty, racism, or other systemic injustices—count against deserved harms later. This would be far for expansive, as it would include harms that did not result from state action. It would embrace a view that justice is about evening up

²³⁶ Douglas N. Husak, *Already Punished Enough*, PHIL. TOPICS, Spring 1990, at 79.

²³⁷ *Id.* at 88 (“If stigma itself is not created by the state in the way the state imposes hard treatment and deprivation, but depends upon social convention, it becomes important to identify the social conventions from which stigma derives.”).

²³⁸ Kolber, *supra* note 13, at 1153.

²³⁹ *Id.* at 1156.

²⁴⁰ *Id.* at 1157.

²⁴¹ *Id.* at 1158 (“Shifting from proportional punishment to proportional harsh treatment, however, only solves the myself of credit for time served by generating even deeper problems that strike at the very heart of retributivist proportionality in familiar forms.”).

²⁴² W.D. ROSS, *THE RIGHT AND THE GOOD* 59 (1930) (arguing we should take into account the defendant’s life “taken as a whole”); Gertrude Ezorsky, *The Ethics of Punishment*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT xi, xxii-xxvii (Gertrude Ezorsky, ed., 2d ed. 2015) (setting forth the whole life view).

the scales at the end, as opposed to doing time slice justice.²⁴³ Admittedly, most scholars (and all practitioners) would balk at this kind of view, as theoretically it seems to embrace “get out of jail free” cards and practically it simply is not administrable for courts.²⁴⁴ Nevertheless, this sort of view would support the notion that undeserved confinement can count against later punishment. However, again, accepting a view like this would mean that credit for time served would just be the tip of the iceberg.

Finally, one might not need to endorse any of these views about how to characterize the earlier detention to get to the view that this should be set off against later punishment. Instead of thinking that the earlier detention is directly set off against punishment, as if they are on the same metric, one might think instead that the earlier detention gives a reason not to give the person what she otherwise deserves. Consider the mother who causes the death of her child. One way to think about this case is that the earlier suffering counts against the total that she deserves.²⁴⁵ The other way to think about this is that although at the time of sentencing, the mother still deserves the full quantum of punishment, there is a reason not to give her what she deserves because of the earlier undeserved suffering. This would then be akin to the way that sentencing courts often take into account mitigating factors in ways that are not easily reduced to sentencing guidelines. Under this theory, many other hardships would warrant consideration, making this justification, like the other ones, too strong in comparison to our actual punishment practices. But perhaps it is also too weak; this depends upon how one construes the reason not to give the person what she deserves.

In summary, what this section suggests is that there are theoretical justifications for crediting time served against the punishment in instances in which the defendant was unjustly detained in the first instance. All of these theories reveal that our current treatment of unjustified harms is wildly underinclusive, only taking into account some of the instances in which some sort of compensation, credit, or mercy is deserved or warranted. In other words, if we were to truly commit to endorse any of these theories, we would have to radically revise our sentencing practices in myriad other respects.

²⁴³ Adam J. Kolber, *The Time Frame Challenge to Retributivism*, in *OF ONE-EYED AND TOOTHLESS MISCREANTS: MAKING THE PUNISHMENT FIT THE CRIME?* 183, 183 (Michael Tonry ed., 2020) (“The whole-life view examines all of offenders’ good and bad deeds and all of the good and bad things that have happened to them in order to impose penal treatment proportionate to moral desert.”).

²⁴⁴ *Id.* at 205 (“I suspect many readers would happily give up the whole-life view. It is impractical and would not only fail to adequately deter crime but might encourage it with get-out-of-jail-free cards. While a justification of punishment can idealize away from some real-world complications, the whole-life view does so too much to be of practical use.”).

²⁴⁵ See SHELLY KAGAN, *THE GEOMETRY OF DESERT* 18 (2012) (“[T]o say that something is better with regard to desert is not yet to say whether it is better overall . . .”).

After all, pretrial detainees are not the only individuals who are stigmatized, are subjected to hard treatment, experience undeserved injuries, or provide reasons against punishment. Taking any of these views seriously would require a rigorous and calculated lowering of sentences, not just giving detainees credit for time served.²⁴⁶ We should also not forget that defendants whose charges are dropped or who are acquitted receive nothing under this regime.

B. Desert-Based Dangerousness Detention

There is one rationale for detention that we can easily justify in giving credit for time served. Recall that the grounding for desert-based dangerousness detention is that the state is using the defendant's commission of the charged offense as a reason why he now lacks a claim against the state stopping him from committing future offenses. Again, importantly, we ought to be extremely skeptical that this kind of detention can be justified. It would require us to essentially prejudge the defendant's guilt for the criminal case and use that determination as a reason to already be intervening against future offenses. These cases are truly instances of substantively unjust detentions. If that is true, then for the reasons given above, the defendant may be entitled to credit for time served.

Likewise, if we determine that this category can be normatively defended, the defendant would be entitled to credit for time served. Here, the forfeiture that allows the punishment is being generated by the defendant's guilt for the charged offense. If the deserved punishment is indeed what justifies the detention, then the defendant ought to receive credit for that punishment after conviction. Of course, because innocent defendants are held, giving credit for time served does nothing to account for their incarceration. They are being pre-punished for a crime that we ultimately determine that they did not commit.

C. Forfeiture: Flight, Obstruction, and Defense-Based Dangerousness Detention

Sometimes the defendant is being detained in order to prevent her from acting on a current intent to interfere with the adjudication process (by absconding or interfering with witnesses or evidence) or to commit an

²⁴⁶ To be sure, defense attorneys make these arguments and judges take them into account. Prosecutors even use these facts in determining what to charge. Nevertheless, these discretionary practices are nothing like the systematic credit given for pretrial detention.

unrelated crime. In these cases, we should rightly question whether she is entitled to credit for time served. That is, if Alex attacks Betty and Betty punches him in the face, would Alex be entitled to argue that the harm he has already suffered (a black eye) should be set off against the punishment he will receive? It depends. While some consequentialist justifications for punishment might be happy to double dip on the earlier detention, other consequentialist reasons, along with retributive arguments, should reject that forfeiture-based pretrial detention can do double duty as punishment. Bottom line: Not all pretrial detainees should receive credit for time served.

1. Justifications for Punishment

As we discuss the interaction of defense and punishment, it is crucial to attend to the justifications for punishment more precisely. Here, I want to clarify how to think about consequentialist justifications, and then how to parse negative and positive retributivism.

The typically invoked consequentialist justifications for punishment are general deterrence, specific deterrence, incapacitation, and rehabilitation.²⁴⁷ The justification most likely to allow for credit for time served is general deterrence. If we think that the way that general deterrence functions is that the *sentence imposed* is what generates the deterrence—e.g., bank robbers get 10 years—then a general deterrence theorist would want a total of ten years of pain imposed because of the bank robbery. Since the general deterrence theorist just wants ten years, she should be happy to include any time spent in pretrial detention toward that ten. The fact that forfeiture/self-defense was the initial reason for imposing the harm will be of little consequence to the deterrence theorist so long as the detention can be claimed to be imposed by the state in a way that counts toward deterring the general populace.

In contrast, rehabilitation, specific deterrence, and incapacitation are not about general messaging. These forward-looking inquiries will take into account the amount of time spent in detention, but not a granting of “credit.” If the detention makes the defendant worse, then she arguably needs more time in prison. If detention has scared her straight, then she needs less time. But the detention is merely an input in the calculation, and once that calculation is made, there is no reason to subtract out the detention from the sentence. That is, once the defendant needs four more years for specific deterrence, then the time she spent in detention before should not be credited against the formal sentence by either the judge or the prison administrators.

Now, let us focus on two different concerns. First, retributivists, as

²⁴⁷ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.03[A][2] (8th ed. 2020).

well as most theorists who subscribe to some sort of side-constraint or limitation on punishment, will be concerned with proportionality.²⁴⁸ The question for them is whether the total amount of punishment received exceeds what is proportionate. Second, many retributivists take it to be intrinsically good for people to get what they deserve.²⁴⁹ If defendants are not entitled to get credit, and they do, then a positive retributivist would think that the defendant is not getting her full just deserts. Clearly, punishing someone more than she deserves is more problematic than punishing her less. But we should ask whether a defendant is entitled to credit for the harm she suffers in self-defense as part of her punishment. After all, we just gave four retributivist accounts of why *unjust detentions* can count as part of the punishment. In what follows, I will discuss the relationship between the defensive-based rationales and retributive punishment because this presents greater complexity than the consequentialist math above.

2. Retribution and the Relatedness Objection

The first objection to crediting the detention against the punishment is that the two have nothing to do with each other. The punishment is for the crime with which the defendant was charged. But the forfeiture-based detention was justified based upon another potential wrong. If Alice is convicted of bank robbery but was detained because she was going to kill Mary, the witness, why should the harm that Alice suffers in preventing her from killing Mary be credited against the bank robbery that Alice committed?

Because this detention appears within the context of the criminal case, we are lulled in the false sense that these two acts by the state are related. However, they are not. We are not asking whether Joe is simultaneously punishing and preventing Bob if Joe punches Bob to stop Bob from stabbing him. This would be more akin to asking whether such a punch would simultaneously be preventing Bob from the stabbing and punishing Bob for cheating on his tax returns last year.

3. Retribution and the Argument from Desert

Though the relatedness objection may seem decisive for some, more

²⁴⁸ For discussion of the various positions, see generally Mitchell N. Berman, *Proportionality, Constraint, and Culpability*, 15 CRIM. L. & PHIL. 371 (2021).

²⁴⁹ Alec Walen, *Retributive Justice* § 3.2, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2021), <https://plato.stanford.edu/archives/sum2021/entries/justice-retributive> (describing positive retributivism as including the view that it is intrinsically good for people to get what they deserve).

argument may be necessary. Recall that when we were giving credit for unjust detentions, we were potentially willing to count a necessarily unrelated hardship against the punishment.²⁵⁰ Indeed, a whole life view of desert would seemingly count any undeserved hardship in the calculus.

The claim here—a bad thing happened to me and it should count against my punishment—at first seems quite appealing. Indeed, our intuitions about “already punished enough” are what led us to think that crediting unjust detentions was unproblematic. But the distinguishing feature here is that the harm is not unjustified. The defendant’s culpable plan to harm someone else led to his liberty restriction. These cases are more akin to the defendant who says, “look how hard my life has been: my wife left me when I cheated on her, I lost my job when I opted to play video games instead of operating on my patient, I went to prison for arson, and so forth.” The question is why these earlier *justified* hardships would count against punishment on a whole life view. Ultimately, this turns on what we take retributive desert to require. If we take a simplistic view that it only requires suffering or hard treatment, then the defendant has suffered or been treated harshly. But if we believe that what desert requires is suffering or hard treatment that brings him below the moralized baseline of where he is entitled to be, then some prior suffering—that which was imposed justifiably—does not count against what the defendant can deserve now on a whole life view.²⁵¹ Again, the claim under examination here is akin to the argument that if Alex is harmed in self-defense when he attacks Betty, he ought to receive credit for his scratched face, not even in a conviction for assaulting Betty, but in a later carjacking conviction.

Here’s where we are. The defendant has been detained pretrial on forfeiture grounds. She now claims that it would be appropriate to give her credit for her detention, just as we are willing to give credit to the unjustly detained. We have seen that consequentialists may come out differently, but that retributivists should reject giving credit to this group because of 1) the relatedness objection and 2) the fact that receiving one’s just deserts does not include harms that are already justified on other grounds. This means that the pretrial detainee cannot argue that the hardship she suffers can do double duty: it cannot be forfeiture-based justified prevention and retributively justified punishment.

²⁵⁰ See *supra* text accompanying notes 242–44.

²⁵¹ Admittedly, this places a lot of weight on the determination of when a prior act is justified and when it counts in the balance. For exploration, see LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, REFLECTIONS ON CRIME AND CULPABILITY: PROBLEMS AND PUZZLES 205-07 (2018) (describing when suffering does not count as punishment).

D. Overriding Cases: Pure Prevention Dangerousness Detention, Unavoidable Errors, and Gaps

As noted above, sometimes the justification for detaining someone is that her rights are overridden for the greater good. Most notably is the case of pure prevention dangerousness detention. This is likely what courts and legislators believe they are doing. Judges detain based on statistical evidence of likelihood of offending or gestalt determinations. They are not inquiring into an actual intention to commit another offense. They are just predicting. Indeed, today our goal is to find better predictive instruments. As mentioned above, this sort of prediction does not require the defendant to do anything that forfeits her rights. So, her rights remain in full force. Accordingly, the only thing that justifies detaining an innocent person (as we should treat her) based on prediction of harm is that we are entitled to override her rights if the stakes are high enough. Above, I suggested that we should be deeply skeptical of this sort of detention, but even viewed in its most favorable light, it is about overriding the defendant's rights.

There are two other cases that can fall in this category. When we make unavoidable errors, there is a question of how to understand these acts. Mitchell Berman argues that our accidental punishment of the innocent can only be justified through overriding the innocents' rights, as they certainly do have rights against the suffering that is imposed upon them.²⁵² So, too, unavoidable errors in pretrial detention are justified in this way.

Then, there are "gaps." Assume that we are justified in asking for bail but the defendant cannot pay it. Even if the detention is not wholly unjust, as there is (let us assume) a rationale for requiring bail, we are still imposing greater harm on the defendant than we would prefer to do. It is simply that we do not have a mechanism that will achieve our goals short of detention.

If the defendant's rights are being overridden, then we need to cause him minimal harm and compensate him after the fact. This is not akin to the person who will not do his duty or who has forfeited rights by aiming to obstruct or flee. This is akin to what we owe an innocent person whom we harm because their interest is overridden by the greater good.

For the reasons suggested above dealing with unjust detentions, time served is appropriate. It is a way of giving the defendant back what we took from her. It is arguably the same as compensating the dock owner for the extent of damage caused by the yacht that slammed against it in the storm. Once again, however, it leaves the innocent completely uncompensated.

²⁵² Mitchell N. Berman, *Punishment and Justification*, 118 *ETHICS* 258, 289 (2008) (noting "the peripheral cases of "misfiring" are pretty obviously not justified in the normal situation . . . except as unavoidable consequences of a practice that is justifiable even accounting for these costs").

* * * *

The practice of giving credit for time served may be justified in some cases as either compensation or punishment. When detention is unjust, time served can count as time spent being punished or compensation for the harm of detention. When detention is only justified as a taking, time served can play the role of serving as just compensation. In contrast, when detention is justified because the defendant has forfeited her right against the liberty restriction, credit for time served is unwarranted as deserved compensation or punishment.

IV. BEYOND TIME SERVED

Time served is a one-size-fits-all response to our detention practices. To be sure, sometimes, legal rules will need less nuance. Indeed, I will propose an alternative one-size-fits-all solution in what follows. The problem is that this singular cure is ill suited to the disease, and in fact, may exacerbate it. After discussing the trouble with time served, this Part closes with a sketch of an alternative compensatory framework that is not only more responsive to our detention rationales and equality concerns but also aims to drive further criminal justice reform.

A. Why Time Served Is Objectionable

We have adopted a “one size fits all” solution to a complex set of rationales. But credit for time served is ill suited to be fully responsive to detention rationales. It is under inclusive if there are reasons to treat it as punishment. It is under inclusive if aims to compensate, as it ignores an entire class of detainees. It is over inclusive in giving credit to those who forfeit. It is morally objectionable if it countenances the prepunishment of those presumed innocent.

Notably, as set out in Part I.B., jurisdictions adopted time served for reasons other than an attempt to provide a nuanced response to nuanced detention rationales. The legislative history is not replete with accounts of forfeiture and overriding. Rather, some code drafters, like the American Law Institute, thought “well, pretrial detention is punishment.”²⁵³ Others, like Wisconsin, cared that it was a cost-cutting measure.²⁵⁴ For still others, like California, it aimed to equalize treatment of rich and poor defendants.²⁵⁵

²⁵³ See *supra* text accompanying note 141.

²⁵⁴ See *supra* text accompanying note 146.

²⁵⁵ James D. Robinson, Comment, *Presentence Custody Time Credit Under California*

However laudable these goals may be, time served operates in ways that exacerbate criminal justice problems. This Part details why egalitarians, expressivists, deontologists, and legal economists should all seek to reform our practices.

1. The Egalitarian or Rule-of-Law Objection

There has been one familiar refrain throughout our analysis and that is that defendants whose cases are dismissed and defendants who are acquitted do not reap the benefits of our current practices. This is striking. Consider the case of a poor person unable to make bail. A rich person—guilty or innocent—who is able to make bail is not detained. A guilty, poor person who is detained receives credit against his sentence. But the poor, *innocent* person is left completely uncompensated. A compensatory scheme that selects out poor, innocent people as the group to receive nothing is incoherent and unfair.

Moreover, while poverty is a driver for many detainees,²⁵⁶ the same objection remains for any defendant whose case is dismissed or who has been found not guilty, and is thereby treated differently than a guilty person. If a rights-overriding justification is at work, then the detainee is entitled to compensation. That we would choose to compensate only those found guilty is wildly counterintuitive.

Rule-of-law values that require us to treat citizens as equals cannot countenance giving a benefit only to the guilty. Although compensating some individuals may be better than compensating no individuals, this sort of concession to our nonideal realities is simply insufficient if we can do better. The sheer irrationality of the law's unequal treatment cries out for a better approach to compensating our detainees.

Penal Code Section 2900.5, 3 PEPP. L. REV. 157 (1975) (suggesting multiple rationales for adoption including developments in federal law, equity between wealthy and poor defendants, and civil rights law).

²⁵⁶ The Prison Policy Initiative studied the demographics of people unable to meet bail: We find that most people who are unable to meet bail fall within the poorest third of society. Using Bureau of Justice Statistics data, we find that, in 2015 dollars, people in jail had a median annual income of \$15,109 prior to their incarceration, which is less than half (48%) of the median for non-incarcerated people of similar ages. People in jail are even poorer than people in prison and are drastically poorer than their non-incarcerated counterparts.

BERNADETTE RABUY & DANIEL KOPF, PRISON POL'Y INITIATIVE, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME 6 (2016), <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf> (footnotes omitted).

2. The Prevention-Is-Not-Punishment Objection

Different aspects of our criminal justice system are thought to serve different functions. The Supreme Court has repeatedly noted that our detention practices, which have preventive goals, are not punishment.²⁵⁷ In contrast, our punishment practices are intended to convey stigma and inflict suffering.²⁵⁸ Indeed, the import and solemnity of punishment is supported by our commitments to proof beyond a reasonable, requirements of confrontation, and a host of protections that must exist before we do something as serious as punishing another person.²⁵⁹

Time served threatens this division of labor. During the time in detention, the defendant has not been convicted. He may feel that he is being “punished,” but the state has not pronounced his guilt and he does not understand his detention as warranted punishment. So, too, victims and victims’ families cannot understand pretrial detention as part of what the defendant deserves. If punishment is thought to serve communicative goals, our current practice sends decidedly mixed messages.

Conversely, to the extent that defendants and victims do perceive detention as punishment, this, too, is problematic because punishment is not authorized. The defendant has not been afforded the kind of procedure, with the correct evidentiary standard, that warrants this treatment. We are unjustified in sending this message.

We should not be retroactively taking a practice that is thought to be non-punitive, and treating it as punishment after the fact. There are no “time transformations,” just legal sleights of hand.

Moreover, by allowing the ultimate conflation of prevention with punishment through the grant of credit for time served, we hamper jail reform. If pretrial detention were seen as a taking, similar to what we owe the sequestered juror, we would not allow the conditions of our state “hotels” to be punitive. And, once they were not punitive, we would be hard pressed

²⁵⁷ See *supra* Section I.A.1.

²⁵⁸ See *Bell v. Wolfish*, 441 U.S. 520 (1979) (pretrial detention); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (involuntary commitment of sex offenders); *Addington v. Texas*, 441 U.S. 418, 427-28 (1979) (stating that the criminal burden of proof is inapplicable to review a civil commitment because civil commitment is not punishment).

²⁵⁹ *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”); *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (defining confrontation right); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020) (“There can be no question either that the Sixth Amendment’s unanimity requirement applies to state and federal criminal trials equally.”).

to see why they should count as punishment. Our practice deprives detainees of the procedural rights of punishment while allowing our treatment of detainees to be punitive because we count it as punishment on the back end.

3. The Deontological Objection

Rights theorist should also be troubled by our current practices. We detain people unjustly. We turn the innocent into the guilty. And we under punish some defendants. Although one can be a deontologist (who thereby cares about rights) without being a retributivist, I combine these views here as nothing turns on it.

Under punishing the guilty is the least worrisome in this context. Over punishing is more troubling than under punishing. Nevertheless, the defendant who truly deserves to be punished is receiving credit even though she is locked up because she plans to kill a witness.²⁶⁰ If we think that someone's getting what she deserves is intrinsically good, we are failing to achieve that good.

However, given that retributivists generally agree that the current practice of criminal law is over inclusive and punishes too much and not too little,²⁶¹ the real worry here is rights violations. There are people we shouldn't be detaining. It is better not to wrong them in the first place than to seek to compensate them after the fact. Crediting for time served seeks to hide the wrong we do when we unjustly detain.

A final concern for the retributivist is the practical reality of what credit for time served does. It induces the innocent to plead guilty. A defendant charged with a misdemeanor has significant incentives to simply plead guilty if that means she gets out now as opposed to fighting the case at trial.²⁶² As Josh Bowers poignantly argues:

²⁶⁰ See *supra* Part III.C (rejecting credit for time served when the defendant is detained on forfeiture grounds).

²⁶¹ Retributivists of late have been getting a bad rap, but they are just as worried about current criminal justice pathologies as others. See Douglas Husak, *Retributivism and Over-Punishment*, LAW & PHIL. 22 (Sept. 4, 2021), <https://doi.org/10.1007/s10982-021-09422-w> (“[R]etributivists should be encouraged to promote themselves as part of the solution rather than as a cause of the problem of mass incarceration and over-punishment.”).

²⁶² As Samuel Wiseman notes:

[M]any defendants detained pretrial are charged with relatively low-level crimes with short sentences, and when pretrial detention counts toward their sentence, these defendants serve only a few days post-conviction. Thus, a plea often results in a quicker release than contesting the case, whatever the ultimate outcome.

Samuel R. Wiseman, *Bail and Mass Incarceration*, 52 GA. L. REV. 235, 241 (2018).

If the defendant can get a plea to a misdemeanor and time served, then the process constitutes the whole punishment. Any plea that frees this defendant may be more than advisable—it may be salvation. No matter how certain of acquittal, she is better off pleading guilty. She is the defendant who benefits most from plea bargaining, and she is the very defendant who most frequently is innocent in fact.²⁶³

Even if our practices are not so coercive as to undermine consent, we should still worry that our practices serve as a compelling reason for a person to accept punishment she does not deserve.²⁶⁴

4. The Law and Economics Objection

The economist should be troubled by the incentive effects created by our current practices. The state fails to internalize the costs of its detention practices in two ways. First, the innocent defendants who are inappropriately detained are uncompensated. Though the state pays to detain the defendant, it does not pay for its mistake. Second, the state does not have to fully internalize the cost of its overzealous pretrial detention practices, practices that disproportionately externalize the costs onto people of color. If the state gets to credit the detentions against future punishment, then the state pays for less total incarceration. This means that detention is not nearly as expensive for the state as it should be. The state should have to justify the cost of detention—the cost of taking the person—as well as justify the cost of punishment.

B. The Path Forward

It is apparent that time served is problematic. But we have to question whether to rip off the Band Aid. The idea that criminal defendants suffer in punitive conditions and then receive no credit hardly seems like the better solution.

²⁶³ Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1136-37 (2008); accord Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2492-93 (2004) (“The pretrial detention can approach or even exceed the punishment that a court would impose after trial. . . . The defendant’s best-case scenario becomes not zero days in jail, but the length of time already served.”); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2146 (1998) (“Pleading guilty at the first opportunity in exchange for a sentence of “time [already] served” is often an offer that cannot be refused.”) (alteration in original).

²⁶⁴ Accord Heaton, Mayson, and Stevenson, *supra* note 17, at 716 (“Misdemeanor pretrial detention therefore seems especially likely to induce guilty pleas, including wrongful ones.”).

From my ivory tower, it is easy to see what should be done. Stop detaining so many people. Then, most defendants who are legitimately detained will require nothing, and we can simply compensate when rights are being overridden. Add to that my sympathies for whole-life desert views,²⁶⁵ and I could present a nuanced and detailed account of who gets what and when.

But I can scarcely see the abyss of the real-world practice of criminal law from high in my ivory tower. Our practices are so defective and so far from just that what might be the ideal solution in a far more ideal world could leave us decidedly worse off in this one. After all, the abolition of credit for time served with nothing to replace it would result in more injustice than simply leaving this ad hoc and unprincipled practice in place.

What the actual criminal law needs is a replacement that 1) places pressure on our pretrial detention practices so as to minimize unjust detentions, 2) treats innocent people (at least) equivalently to the guilty, 3) is responsive to the real world fact that most detentions are either unjust or in need of compensation, and 4) makes room for jails to be nothing like prisons. Accordingly, I propose we compensate all pretrial detainees, while simultaneously recognizing that the conditions of confinement ought to be improved substantially. Let me sketch out such a compensation model and defend against potential objections.

1. Compensating Detention

We pay material witnesses.²⁶⁶ We pay jurors.²⁶⁷ We should pay pretrial detainees. Specifically, jurisdictions, in addition to providing the kind of room and board that we give to jurors, should compensate detainees at least at the juror's daily rate. If we detain them for us, we should pay them for serving us.²⁶⁸

²⁶⁵ Kimberly Kessler Ferzan, *Defense and Desert: When Reasons Don't Share*, 55 SAN DIEGO L. REV. 265, 287 (2018) (confessing to being "slightly more than tempted" by the view).

²⁶⁶ 28 U.S.C. § 1821(b), (d) (government pays \$40/day plus food and shelter).

²⁶⁷ *Juror Pay*, U.S. CTS., <https://www.uscourts.gov/services-forms/jury-service/juror-pay> (last visited Jan. 20, 2022)(jurors receive \$50/day).

²⁶⁸ This is not to endorse the use of fines. First, I take it fines are objectionable because they are imposed on people who cannot afford them, furthering a cycle of poverty and inhibiting reentry. MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST., *THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTIES* 6-7 (2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines>. In contrast, this compensatory scheme is decidedly not about punishment. Second, though one might worry that I am making detention and compensation

This is a one-size-fits-all rule. We should be clear why this rule is superior to making distinctions along three lines: 1) the rationale for detention, 2) the guilt or innocence of the defendant, and 3) the defendant's preference for credit versus compensation.

First, as we have seen, detentions are sometimes justified because the detainee is liable, sometimes justified as overriding the right (provided compensation is granted), and sometimes simply wrong the detainee. We might start by trying to come up with a nuanced statutory scheme that is responsive to these disparate rationales. It would release those whom we would otherwise be wrong, and it would provide for compensation only for those whose rights are overridden (as opposed to those who have forfeited rights). However, this would require considerable precision in distinguishing forfeiture and overriding cases, something that would itself be quite expensive in increasing adjudication time, and moreover, would be prone to placing pressure on judges to find that defendants have forfeited rights, as that would substantially decrease the cost for the state. Given how few defendants actually fall in this category, the cost of identifying them, and the likelihood we would ensnare actors who are not liable in the net, caution dictates that we opt for a rule that is overinclusive in its compensation.

Second, this compensation should likewise make no distinction between the guilty and the not guilty. Of course, at the moment only the guilty are compensated (with credit for time served), but we should not do a full about face and only compensate the innocent. Whether the defendant is guilty of the offense is a wholly different question from whether we can justify detaining the defendant. It is appropriate to punish the defendant for her crime. It is not appropriate to leave her uncompensated when we only detain her because we apply a predictive dangerousness test. Even if there are some incentive effects that may result from compensating only the innocent, by, for example, causing prosecutors to only pursue stronger cases,²⁶⁹ this would ignore the simple fact that the forward-looking detention

commensurable (the mirror image of Kolber's objection *supra* Part III.A.1), the simple fact is that we accept this in law. Takings are paid with money, as are damages in a range of tort actions from wrongful death to loss of consortium.

²⁶⁹ Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 2011 (2005):

The impact of liberty takings would be seen in cases in which the government has enough evidence to satisfy probable cause, yet faces uncertainty as to whether it can satisfy the beyond a reasonable doubt standard at trial. The more dubious the government's ability to prevail at trial, the more the possibility of a liberty takings claim may factor into decisions of both prosecutors and defendants.

See also Murat C. Mungan & Jonathan Klick, *Reducing False Guilty Pleas and Wrongful Convictions Through Exoneree Compensation*, 59 J. L. & ECON. 173 (2016) (demonstrating

rationale and the backward-looking punishment question are fully distinct. If we detain someone for what she may do in the future, and for that we owe her compensation, then what she has done in the past is simply irrelevant.

Third, this scheme should not allow detainees to opt for credit for time served as opposed to compensation. Admittedly, there are reasons for such a system. It would allow the guilty who are later convicted to cash out their detention against their sentence while compensating the innocent. Given the horrendous detention conditions, it seems, well, unfair, not to allow this hard treatment to count as punishment.

Here are two reasons not to opt for such a system. A minor reason is that this could be hard to administer. Detainees should be compensated weekly so that they can provide for their families, and otherwise use the funds. This would make it difficult for defendants to predict future consequences or to change their minds.

The more substantial reason, however, is that one goal is jail reform. And jail reform is not possible so long as jail is commensurable with prison. We want to improve jail conditions and free them from anything punitive, placing the least restrictive conditions necessary in them. To do that, we have to break the link.

Admittedly, this could make some inmates worse off in the short term, and reformers should make changes with their eyes wide open. It may be that compensation for substandard conditions should be an additional charge against the state until it meets the juror's Holiday Inn standard of detention.

2. Justifying Compensation

This scheme depends upon a right to compensation, so let me spend a moment further defending that claim. At the moral level, compensation is due to those whose rights are violated or infringed.²⁷⁰ Violations are the easy case. We clearly understand why if I punch you for no reason, defame you, trample your roses, and so forth, I am required to pay you for harms that I do to you intentionally. If our rules are unjustifiably overinclusive (or if you join me in being highly suspicious that pure prevention dangerous detention is justified), then compensation is due for our intentionally putting people in cages without a good reason to do so.

that exonerate compensation decreases wrongful convictions); Richard Hynes, *The Optimal Evidence Threshold: Balancing the Frequency and Severity of Wrongful Punishment*, 26 S. CT. ECON. REV. 113, 131 (2019) (arguing that rewarding the innocent will prevent chilling benign behavior).

²⁷⁰ Notably, not all government actions require compensation. Specifically, when everyone reciprocally benefits from a government practice that is distributively just, there is no need to compensate. Thus, you are not compensated for going through airport security because you are also a beneficiary of the practice.

Additionally, philosophers have long maintained that when a right, such as the right to liberty, is outweighed by more significant reasons, it is permissible to infringe the right but the right-holder must be compensated. If I must trample on your roses to get my sick child to the hospital, I may so trample, but I owe you compensation for the harm I cause.²⁷¹

My claim is not that the current law clearly and consistently requires this compensation, nor that it is demanded by an interpretation of the Fifth Amendment itself.²⁷² Instead, the argument is that the theoretical underpinnings we see in *Vincent v. Lake Erie* and the Fifth Amendment's taking clause, have equal if not more applicability when we physically take someone and put them in jail for our benefit.

I am not the first to recognize that these sorts of rights infringements call out for compensation. Bruce Ackerman notes the absurdity that we compensate “[w]hen a small piece of property is taken to build a new highway,”²⁷³ yet deny compensation for those wrongfully convicted or preventively detained.²⁷⁴ He argues, “Not only is this callous treatment scandalously unjust, but it cannot be justified by any of the theories of just compensation law that are taken seriously by the courts or commentators.”²⁷⁵ Other scholars have echoed these calls for compensation for wrongful convictions,²⁷⁶ for preventive detention,²⁷⁷ and for pretrial detainees.²⁷⁸

One objection to this line of argument is that although *private necessity* is not a defense to trespass, *public necessity* is. Isn't this a public necessity case?

Two points here. First, doctrinally, public necessity only applies to property damage.²⁷⁹ Kenneth Simons, the Reporter for the Restatement

²⁷¹ Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUBLIC AFFAIRS 93, 102 (1978) (arguing one owes compensation when one infringes a right).

²⁷² Cf. Manns, *supra* note 269.

²⁷³ Ackerman, *supra* note 188, at 1063.

²⁷⁴ *Id.* at 1063-64.

²⁷⁵ *Id.* at 1064-65.

²⁷⁶ John Martinez, *Wrongful Convictions as Rightful Takings: Protecting Liberty-Property*, 59 HASTINGS L.J. 515 (2007).

²⁷⁷ Corrado, *supra* note 188; Robinson, *supra* note 188.

²⁷⁸ Although Manns and I both offer compensation schemes for pretrial detainees, our arguments and rationales are quite distinct. Manns does not unpack the underlying rights relationships; he leaves time served in place for the guilty; and he justifies the pretrial/postconviction detention linkage on a problematic forfeiture theory. See, e.g., Manns, *supra* note 269, at 1981 (continuing time served), and 1990 (relying on guilt as forfeiture). In terms of implementation, his article presents a more legalistic argument for linking his “liberty takings” to the actual law of takings. See *id.* at 1985-89, 1992 (arguing pretrial detention is akin to a regulatory taking).

²⁷⁹ Kenneth W. Simons, *Self-Defense, Necessity, and the Duty to Compensate*, in *Law and Morality*, 55 SAN DIEGO L. REV. 357, 372 (2018).

(Third) of Torts, found no cases in which public necessity was a defense to overriding other's bodily rights to avoid the greater evil.²⁸⁰

Second, as Simons rightly points out, the fact that the do-gooder who intervenes for the public does not owe the victim any compensation does not resolve the question of whether there ought to be mechanisms for the state to compensate.²⁸¹ In asking that question, Simons answers in accord with the view expressed here:

[T]he community ought to take steps to provide some form of compensation to the innocent victim. For example, compensation could be funded out of general taxes. When a person is deliberately harmed for the public good or to avoid a greater evil, she has an especially powerful claim to be made whole or at least to have her burden alleviated. Similarly, when government officials deliberately infringe the property and personal rights of citizens in order to avoid a greater evil, the government should pay compensation.²⁸²

That we do not have such a compensatory scheme is a failure of justice. And the fact that individual plaintiffs cannot recover from the do-gooder defendant in tort goes not distance in showing that individual plaintiffs have not been wronged when their rights are overridden for the sake of the public

3. Impacts

There are several goals for this compensatory approach. First, for defendants whom the state wrongs by detaining them when it should not, and for the defendants who are being "taken" for the greater good, the defendant is receiving compensation she is due. This compensation is available to defendants whether they are guilty or innocent. After all, both the guilty and the innocent are having their rights overridden.

Second, this compensatory scheme makes pretrial detention more expensive.²⁸³ This scheme forces the state to pay 1) for housing the detainee, 2) for "taking" the detainee, and 3) for (when convicted) punishing the detainee. This increases costs substantially. Although we may aim to cut

²⁸⁰ *Id.* at 372.

²⁸¹ *Id.* at 373.

²⁸² *Id.*; see also Zachery Hunter, Note, *You Break It, You Buy It—Unless You Have a Badge? An Argument Against a Categorical Police Powers Exception to Just Compensation*, 82 OHIO ST. L.J. 695, 701 (arguing for compensation for property damage caused by police).

²⁸³ *Accord* Manns, *supra* note 269, at 1979 (noting that raising costs of pretrial detention may curb over reliance).

costs and to minimize the carceral state, sometimes cost cutting is not a good thing. Maybe detention ought to be expensive enough that when we cannot do it right, we should just do without. If the state must pay for its overinclusive practices, it will have to think twice about whether to be overinclusive.²⁸⁴

Third, this reform empowers defendants. Imagine that detainees were to receive what a federal juror receives—\$50 a day.²⁸⁵ Detainees spend an average of twenty-six days in jail.²⁸⁶ This would result in \$1300 for that detention.

Consider how this compares to the average detainee’s monthly income. In 2002 dollars, Rabuy and Kopf’s 2016 study found that the average monthly income for someone held in jail was \$1,061 for men and \$671 for women.²⁸⁷ Black men had an average income of \$900 a month, and Black women \$568.²⁸⁸ Adjusted for inflation to 2022 but without any other altered assumptions, those figures are \$1644.30 (average male income), \$1039.89 (average female income), \$1394.78 (average Black male income), and \$880.26 (average Black female income).²⁸⁹ These amounts are more than the amounts preventing many defendants from making bail at all.²⁹⁰ This would mean that defendants will be less likely to plead to crimes they did not commit simply to secure their release. It would mean that they would be less

²⁸⁴ Economists frequently advance this sort of argument with respect to deterring government overreach by making it pay for regulatory takings. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 58 (4th ed. 1992) (“The simplest economic explanation for the requirement of just compensation is that it prevents the government from overusing the taking power.”); Richard A. Epstein, *From Penn Central to Lingle: The Long Backwards Road*, 40 J. MARSHALL L. REV. 593, 595 (2007) (arguing that Supreme Court decisions narrowing the scope of compensable takings had the effect of “enlarging state power”); Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 999 (1999) (suggesting that one of the primary purposes of the Takings Clause is to deter overuse of government takings); John D. Echeverria, *The Costs of Koontz*, 39 VT. L. REV. 573, 573 (2015) (explaining how, in the context of environmental conservation, stricter judicial review under the Takings and Due Process Clauses leads to “greater . . . constraints on government action”).

²⁸⁵ *Juror Pay*, U.S. CTS., <https://www.uscourts.gov/services-forms/jury-service/juror-pay> (last visited Jan. 20, 2022).

²⁸⁶ See *supra* note 80.

²⁸⁷ BERNADETTE RABUY & DANIEL KOPF, *supra* note 256.

²⁸⁸ *Id.*

²⁸⁹ US INFLATION CALCULATOR (last visited Jan. 11, 2022).

²⁹⁰ MARIE VANNOSTRAND, *NEW JERSEY JAIL POPULATION ANALYSIS: IDENTIFYING OPPORTUNITIES TO SAFELY AND RESPONSIBLY REDUCE THE JAIL POPULATION* 13 & tbl.11 (2013), https://drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf (“[T]here were approximately 800 inmates held in custody who could have secured their release for \$500 or less.”).

likely to plead to crimes when the state cannot meet its constitutional burden of proof beyond a reasonable doubt. It would mean that after a few days, some defendants would have the money in hand to pay their bail. And it also means that at least some of the costs of their incapacitation (on income, child care, and the like) may be offset by the fact that they are being compensated for their detention.

Fourth, a recognition that this is a taking fundamentally alters our perception of detainees themselves. When we think about detainees as “germ[s]” who cannot be “turn[ed] loose . . . in th[e] community,” we treat people as fundamentally lesser.²⁹¹ When we recognize that we are harming them for us, and they are entitled to compensation because of our harm to them, we shift the perspective. We incarcerate too many people because we undermine their moral worth.²⁹²

Fifth, from a racial justice standpoint, it is imperative to reduce the number of people of color who are currently detained. Because our system, either through requirements of unmettable bail or through racially-biased dangerousness assessments, contributes to and exacerbates inequalities, the more we limit who is detained, the better.²⁹³ The more we put money in people’s pockets to make bail, the better. And, the more that we require our system to recognize equality before the law by paying the people we detain for the harm we do them, the better.

Finally, this scheme fundamentally severs the linkage to punishment. Imagine that you, our juror, are convicted of a crime three years from now. You then ask the court to take into account the time you spent as a juror sleeping at a Holiday Inn. Absurd! That’s the point. Jail should never be commensurate with punishment.

4. Objections

I have gestured at compensation as a replacement for time served. It is my aim to start a dialogue about an underappreciated pathology, not to offer the final word. And, admittedly, my solution is open to potential objections and counter arguments. Let me offer five.

²⁹¹ *Carlson v. Landon*, 342 U.S. 524, 550 (1952) (Black, J. dissenting) (quoting the trial court’s reference to detainees).

²⁹² Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity through Modern Punishment*, 51 *HASTINGS L.J.* 829, 897 (2000) (contending that our discourse “portrays the offender only in the monodimensional light of his potential dangerousness to society and, in so doing, makes him society’s ultimate scapegoat”).

²⁹³ See *supra* note 3.

a. Constitutional requirements

Recall that one motivation for credit for time served was that courts thought that there were constitutional infirmities with detaining the poor but not the rich. Will this compensatory provision be constitutional?

In a word: Yes. First, Supreme Court jurisprudence has evolved in ways that firmly deny that defendants are punished for their pretrial detentions. Accordingly, decisions relying on equating detention and punishment would not withstand current doctrine.²⁹⁴

More importantly, the animating concern is a failure to treat people equally. This proposal does eliminate inequality. It not only eliminates inequality between the guilty rich and the guilty poor, but it eliminates inequality between the innocent poor and the guilty poor. A scheme aimed at making defendants whole will not present constitutional problems.

b. It's not enough

Another worry is that the amounts that I propose are not enough. I won't even begin to deny that. It is undoubtedly true that detaining people raises myriad secondary harms for which the juror rate may be insufficient. Ultimately, I worry that offering too much money simply isn't politically feasible. I also believe that we should not underestimate the good that would come from compensating the myriad individuals who are currently left with nothing.

c. Why not eliminate cash bail?

We might think that the first step is to eliminate cash bail. Undoubtedly, eliminating cash bail is important for eliminating inequities. And, my proposal is not offered in lieu of bail reform.

Problems remain, however. First, early research about New Jersey's experience with bail reform indicates that racial inequities persist.²⁹⁵ Second, we should not lose sight of those whom we still choose to detain. We detain individuals simply because we think they are dangerous, and when we do this, we detain them *for us*. Eliminating cash bail, subsidizing home

²⁹⁴ *E.g.*, *United States v. Salerno*, 481 U.S. 739 (1987).

²⁹⁵ GLENN A. GRANT, N.J. CTS., 2018 CRIMINAL JUSTICE REFORM REPORT TO THE GOVERNOR AND THE LEGISLATURE 7 (2018), <https://www.njcourts.gov/courts/assets/criminal/2018cjrannual.pdf> (noting that, despite some improvements in the overall demographics of those detained pretrial, black males continued to be overrepresented in the pretrial jail population).

monitoring,²⁹⁶ and other reforms may decrease the number of people who are in pretrial detention, and that is a significant step forward. But these reforms do nothing for how we think of those we choose to detain. And some states, in the wake of changes in cash bail, contemplate detaining more people as dangerous, not fewer.²⁹⁷

Reimagining pretrial detention requires a comprehensive rethinking. We need jail reform as much as we need bail reform. And we cannot lose sight of the myriad defendants who will be detained under any system we adopt.

d. Will judges detain more frequently?

We might worry that these reforms will increase the likelihood that judges detain people pretrial. Imagine jails are nicer. Imagine detainees get paid. Doesn't that lower the bar for a judge to feel comfortable locking someone up?²⁹⁸

Three thoughts. First, if the worst case scenario of my proposal is that we put more people up at Holiday Inn-like accommodations and pay them, it still seems better than where we are. Second, it seems just as likely that judges are influenced in the reverse. Perhaps they think that they don't want the state to pay for a misdemeanor to be compensated and given accommodations by the state. It may be that paying detainees, and being less

²⁹⁶ Duffy and Hynes, *supra* note 20 (arguing that monitoring should be subsidized); Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1364-80 (2014) (advocating for electronic monitoring in lieu of money bail to address flight risk).

²⁹⁷ Emily Hamer & Sheila Cohen, *Poor Stay in Jail While Rich Go Free: Rethinking Cash Bail in Wisconsin*, WIS. PUB. RADIO (Jan. 21, 2019, 6:00 AM), <https://www.wpr.org/poor-stay-jail-while-rich-go-free-rethinking-cash-bail-wisconsin> (“Kremers said what Wisconsin needs is a law that would allow judges to hold defendants who pose significant public safety risks with no option to bail out. Those not considered dangerous could be released without bail—taking a defendant’s ability to pay out of the equation.”); Jamiles Lartey, *New York Rolled Back Bail Reform. What Will the Rest of the Country Do?*, 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> (noting availability of dangerousness detention in Colorado and Illinois and pushback that has resulted from New York’s bail reform because it does not allow for judicial discretion to assess dangerousness).

²⁹⁸ This is akin to the argument that fines become prices. See Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 15-16 (2000) (finding that day care fines for late arrivals increased the number of parents who arrived late because they treated it as a price). But see Cherie Metcalf, Emily A. Satterthwaite, J. Shahr Dillbary & Brock Stoddard, *Is a Fine Still a Price? Replication as Robustness in Empirical Legal Studies*, INT’L REV. L. & ECON., Sept. 2020, at 1, 24 (article no. 105906) (failing to replicate Gneezy and Aldo’s study and finding the fines did decrease the behavior).

punitive, is simply less appealing (particularly to those judges and prosecutors who would never admit it, but are actually relying on a desert-based dangerousness justification of detention). Finally and most importantly, this compensation scheme is not a strategy that aims to change the incentives for prosecutors or judges. Rather, the targets are the legislative and executive branches, which will find pretrial detention too expensive. If judges start to increase this cost, then we should expect their discretion to be statutorily limited by the other branches.

e. Exacerbating injustice

We all know the saying that “you cannot get blood from a stone.” If the criminal justice system is woefully underfunded, it seems unlikely that putting financial pressure on states will improve conditions. The system I imagine is expensive, and states aim to reduce costs.

This is a real worry. And the case against putting financial pressure on states is not simply that we don’t have funding. It is how we wind up making up the difference. To save money on its prisons, Arizona reduced heat and air conditioning, added fees, bought damaged food, and created female chain gangs who worked for fifty cents an hour in the blistering heat.²⁹⁹ Alternatively, states could turn to more arduous fines to make up the difference.³⁰⁰ When our criminal justice system needs to cut costs, the measures it uses rarely inure to the benefit of prisoners.

It is simply true that this policy proposal requires a commitment to how much should be spent by the state per detainee. If we are unwilling to pay this amount, we should be unwilling to detain. If we pay for the property we intend to take for the greater good, we must be willing to do the same for people. And reformers will need to remain vigilant in ensuring that these reform measures are not counterproductive.

CONCLUSION

Here is where we are. If we took seriously our obligations to only detain those whom we are fully justified in detaining, then we should detain those who harbor the intention to flee, obstruct, or harm others. And, if we limited our pretrial detention practices to those individuals, we should eliminate credit for time served.

In contrast, our current practices are wildly over inclusive. We essentially detain people because they are poor. We confuse excusable

²⁹⁹ MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 54, 63 (2015).

³⁰⁰ *See supra* note 160 on pay-to-stay.

failures to appear with true flight. We decide people are “dangerous” and cannot walk among us. We reduce people to “germs” we cannot “let loose” on society.

Time served has allowed for creative accounting and a lack of full recognition of what we are doing and to whom. Our practices are concerning in a number of ways. First, the state has not had to internalize the cost of its wrongdoing. Instead of facing the overwhelming number of detentions and our addiction to incarceration, the state has been able to credit the former against the latter. That means that many of the state’s errors cost far less than they otherwise would.

Second, our practices, even with time served, mistreat the legally innocent. Defendants who are detained but have charges dismissed or who are found not guilty are not entitled to such credit. The wrong we do to them remains unremedied.

Third, our practices turn the innocent into the guilty. As has been established, defendants who are held pretrial are more likely to be found guilty. Indeed, our ability to detain someone and then offer them the prospect of release with no more than time served can be said to induce pleas.

In other words, we write off our overzealous detention policies by setting off the time. We ignore the tremendous debt that we owe the innocent. And, we shift our debts from the red to the black by influencing who is convicted and who is not.

It is time to recognize the tragic human debt that we are creating. It is time to stop treating jail as punishment. This Article aims to begin the dialogue of what should replace time served. It has gestured at a fairer compensatory scheme. But whether we adopt compensation, or some other reform, we cannot move forward until we sever detention and punishment. Time served must go.