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Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment

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Abstract

In a criminal system that tips heavily to the side of wealth and power, we routinely detain the accused in often horrifying conditions, confined in jails while still maintaining the presumption of innocence. Here, in the rotting jail cells of impoverished defendants, lies the Shadowlands of Justice, where the lack of criminal procedure has produced a darkness unrelieved by much scrutiny or concern on the part of the law.

This Article contends that our current system of pretrial detention lies in shambles, routinely incarcerating the accused in horrifying conditions often far worse than those of convicted offenders in prisons. Due to these punitive conditions of incarceration, pretrial detainees appear to have a cognizable claim for the denial of their Sixth Amendment jury trial right, which, at its broadest, forbids punishment for any crime unless a cross-section of the offender's community adjudicates his crime and finds him guilty. This Article argues that the spirit of the Sixth Amendment jury trial right might apply to many pretrial detainees, due to both the punishment-like conditions of their incarceration and the unfair procedures surrounding bail grants, denials and revocations. In so arguing, I expose some of the worst

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abuses of current procedures surrounding bail and jail in both federal and state systems. Additionally, I propose some much needed reforms in the pretrial release world, including better oversight of the surety bond system, reducing prison overcrowding by increasing electronic bail surveillance, and revising the bail hearing procedure to permit a community "bail jury" to help decide the defendant's danger to the community.

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I. Introduction: Diplomats, Detention, and Punishment

Notwithstanding crime, the decision to imprison a defendant before trial all too often hinges on wealth and power. For example, a promiscuous foreign diplomat is halted at the airport, ready to flee the country, after allegedly sexually assaulting a hotel chambermaid, and initially denied bail, but then is permitted to reside in a posh penthouse while electronically monitored, serving an extremely upscale version of "house arrest."[1] A lifestyle maven charged with perpetuating insider trading pleads not guilty and is released without bail, along with her stockbroker.[2] A well-known money manager, accused of

1. James Barron, *Strauss-Kahn Is Released from Jail*, N.Y. TIMES, May 20, 2011, at A6.

2. Richard Esposito, Betsy Stark & Ramona Schindelheim, *Martha*

running a $50 billion Ponzi scheme, is permitted basic freedom of movement within several states while awaiting trial, even after confessing to the crime and failing to live up to his original $10 million bail terms.[3] A prominent governor is charged with serious corruption and is not only released on minimal bail,[4] but is even allowed to take part in a Donald Trump reality show while charges are still pending.[5] A wealthy couple charged with enslaving and brutally mistreating two young maids—including starving, beating, and torturing—are permitted pretrial release[6] with electronic monitoring, due in part to their ability to afford a specialized security firm that functions as private bail guards for the very wealthy.[7] And a well-known alleged Mafia boss, charged with various racketeering charges (and suspected of inducing a variety of violent crimes as acting boss), is released on a $10 million bail, an oath to wear an electronic bracelet, and a guard at his Oyster Bay, Long Island mansion.[8]

Stewart Pleads Not Guilty, Resigns, ABC NEWS, June 4, 2003, http://abcnews.go.com/Business/story?id=86245&page=1 (last visited Sept. 24, 2012) (on file with the Washington and Lee Law Review).

3. Alex Berenson, *Authorities Ease Madoff's Bail Terms*, N.Y. TIMES, Dec. 18, 2008, at B1.

4. *Blagojevich Free on $4500 Bail After Arrest*, CNN, Dec. 9, 2008, http://articles.cnn.com/2008-12-09/politics/illinois.governor_1_76-page-affidavit-senate-seat-rod-blagojevich?_s=PM:POLITICS (last visited Sept. 24, 2012) (on file with the Washington and Lee Law Review).

5. Emily Miller, *Rod Blagojevich Will Star on 'Celebrity Apprentice' Despite Prosecutors' Concerns*, POLITICS DAILY, Jan. 5, 2010, http://www.politicsdaily.com/2010/01/05/rod-blagojevich-scheduled-for-celebrity-apprentice-despite-pro/ (last visited Sept. 24, 2012) (on file with the Washington and Lee Law Review).

6. Amrita Rajan, Long Island Indian Couple in Slavery Case Get Bail, DESICRITICS.ORG, May 31, 2007, http://desicritics.org/2007/05/31/135057.php (last visited Sept. 24, 2012) (on file with the Washington and Lee Law Review).

7. Alan Feuer, *Bail Sitters,* N.Y. TIMES, Dec. 27, 2009, at MB1. These kinds of "bail sitting" jobs often require bullet-proof vests, electronic ankle bracelet monitoring, and "the deployment of a chase car, a digital voice recorder, a broadband wireless router, several metal door bars and a high-resolution, vandal-resistant Nuvico day/night camera—the one with the plastic dome and manual zoom lens." *Id.*

8. Joseph Berger, *John Gotti's Son Is Freed on Bail of Ten Million*, N.Y. TIMES, Oct. 2, 1998, http://www.nytimes.com/1998/10/02/nyregion/john-gotti-s-son-is-freed-on-bail-of-10-million.html?pagewanted=all&src=pm (last visited Sept. 24, 2012) (on file with the Washington and Lee Law Review).

In contrast, a New Jersey barber is pulled over and arrested for a backlog of unpaid parking tickets and failing to register his new car. After his arrest, unable to make his $1000 bail, he is sent to serve his pretrial detention at a local halfway house, where he is robbed and murdered by three inmates for the three dollars in his pockets.[9] His predicament is all too common. The average defendant in pretrial detention has either committed a minor crime and cannot afford to pay the set amount of bail, or has somehow triggered a preventative detention hold—despite the fact that the science of predicting dangerousness can be dubious. Incarcerated, this impoverished defendant has little ability to contact an attorney or plan a defense. And this impoverished defendant is captive to a justice system that regularly allows commercial bail bondsmen to lobby against pretrial release based on inexpensive electronic monitoring, simply to increase their profits.

Although most convicted offenders are incarcerated at state or federal *prisons*, detainees are typically housed in local or municipal *jails* where "resources are scarcer, the staff is 'less professionalized,' classification of inmates is haphazard, and rapid turnover makes for generally chaotic conditions."[10] Once the average, nonprivileged, indicted defendant is detained, he is subject to all sorts of punitive conditions, as the state of many halfway houses and metropolitan and rural jails are truly reprehensible, even when measured against prisons. Frequently, these detention centers are vastly overcrowded. Abuse and even murder of pretrial detainees, either by guards or other prisoners, is endemic. Various infections and serious illnesses all too often rage unabated in local and county jails, with minimal health services provided because of the transient nature of the population. Often, not only are the jails themselves older and decaying,[11] but they also have various

9. Sam Dolnick, *At Penal House, Volatile Mix Fuels a Murder*, N.Y. TIMES, June 19, 2012, at A1.

10. David Gorlin, Note, *Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees' Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417, 419 (2009).

11. *See* AMANDA PETTERUTI & NASTASSIA WALSH, JUSTICE POLICY INSTITUTE, JAILING COMMUNITIES: THE IMPACT OF JAIL EXPANSION AND EFFECTIVE PUBLIC SAFETY STRATEGIES 15 (2008) (citing studies from the 1990s that show that 700 jails in the United States are older than fifty years old and 140 jails are

dangers associated with them, including mold, poor ventilation, lead pipes, and asbestos.[12]

In a criminal system that tips heavily to the side of wealth and power, routinely detaining the accused in often horrifying conditions, justice is frequently nowhere to be found. Here, in the rotting jail cells of impoverished defendants—still innocent before proven guilty—are the Shadowlands of Justice: the murky corners of the criminal justice system, where the lack of criminal procedure has produced a darkness unrelieved by much scrutiny or concern on the part of the law.

Our current framework of constitutional criminal procedure has primarily focused on the treatment of offenders once the trial or plea proceeding has begun and, to a lesser extent, once these offenders have been convicted and sent to prison. But until very recently, little attention has been paid to the plight of those pretrial defendants languishing in the intermediate world of *jails*. In part, this is due to the classification of a pretrial offender's treatment as "detention," as opposed to "punishment." As I will argue, however, the conditions of most pretrial detention differ little from punitive incarceration, subjecting these offenders to the worst of conditions without even a guilty verdict.

As such, these pretrial detainees would appear to have a cognizable claim for the denial of their Sixth Amendment jury trial right, which, at its broadest, forbids punishment for any crime unless a cross-section of the offender's community adjudicates his crime and finds him guilty. This Article explores how the animating principles of the Sixth Amendment community jury trial right would apply to defendants who are held under pretrial detention. In doing so, I look specifically at the procedures surrounding indicted offenders who are denied bail and confined in jail.

In *Blakely v. Washington*,[13] the Supreme Court clarified that a jury must determine any imposition of punishment.[14] The

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more than 100 years old).

12. *Id.*

13. *See* Blakely v. Washington, 542 U.S. 296, 305 (2004) (holding that a state trial court's sentence of more than three years above the statutory maximum "did not comply with the Sixth Amendment").

14. *See id.* at 304 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes

realities of bail and jail in today's criminal justice system, however, dictate that punishment is often imposed by nonjury, nonjudicial, and occasionally, private actors, such as bail bondsmen, probation officers, and correction officials. In other words, conditions tantamount to punishment are imposed, far from the oversight imagined by the Framers of the Constitution, and violating the true spirit of the Sixth Amendment jury trial right.

Although bail and detention was a popular scholarly topic a generation ago, only a few contemporary legal academics have scrutinized the current machinations of pretrial release,[15] with existing scholarship primarily focusing on Fourth, Fifth, or Eighth Amendment violations. None, however, have analyzed the results of the changes in pretrial release standards and the increasing relevance of the Sixth Amendment. This Article aims to fill that gap by studying the problems of our current pretrial detention system through a Sixth Amendment lens.

I contend that the spirit of the Sixth Amendment jury trial right might apply to many pretrial detainees, due to both the punishment-like conditions of their incarceration and the unfair procedures surrounding bail grants, denials, and revocations. In doing so, I also expose some of the worst abuses of current procedures surrounding bail and jail in both federal and state systems.

This Article proceeds in four parts. Part II of this Article exposes the often intolerable and primitive conditions of state and local jails, which end up punishing all those incarcerated in them, whether convicted or not. Part III traces the history of pretrial detention, focusing as well on the resurgence of the Sixth Amendment jury trial right. Part IV explores how pretrial confinement has become a kind of punishment imposed inconsistently, by fluctuating actors, and without proper predictive basis. This part focuses on both the failures of the 1984 Bail Reform Act as well as the complete lack of predictability that

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essential to punishment.'").

15. *See, e.g.*, Shima Baradaran & Frank McIntyre, *Predicting Violence,* 90 TEX. L. REV. 497, 499–556; Shima Baradaran, *Restoring the Presumption of Innocence,* 72 OHIO ST. L.J. 723, 724–76 (2011); Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 344 (1990).

the current dangerousness formula possesses. Part IV also discusses how the current system of bail and jail entirely bypasses the community role in both imposing punishment and creating a safer living area. Finally, Part V introduces some much needed reforms in the pretrial release world, including reforming the surety bond system, reducing prison overcrowding by increasing electronic bail surveillance, and revising the bail hearing procedure to permit a community "bail jury" to help decide the defendant's danger to the community.

Only recently has the national and local media shined a spotlight on both bail and jail procedures and their conditions and failures, exposing a dark corner of the criminal justice system where procedural fairness and due process are limited and sometimes nonexistent. This Article hopes to add a scholarly dimension to these troubling exposés, illustrating how pretrial detention violates the spirit of the Sixth Amendment and creates a Shadowlands within criminal justice.

II. Pretrial Detention as Punishment

Pretrial detention in the twenty-first century has evolved from a brief containment for a few accused deemed exceptionally dangerous to punishment for large numbers of accused awaiting trial. The combination of inhumane and degrading conditions, a corrupt and unregulated system of bail surety, bail bondsmen, and bounty hunters, and rising numbers of detainees, with the general absence of criminal due process in the pretrial realm, has resulted in a criminal justice system that punishes before it convicts. This contradicts the requirements of even our minimal pretrial protection for defendants, which holds that punishment can only occur after a conviction.[16] Punishing the accused before she is proven guilty violates every theory of punishment, but particularly retributive justice, which requires that punishment can only be imposed after a cross-section of the community has pronounced guilt—a far cry from the pretrial detention system we have now. Although the abuses of pretrial detention are

16. *See* Bell v. Wolfish, 447 U.S. 520, 536–37 (1979) (holding that due process requires that pretrial detainees be free from "punishment").

beginning to garner media attention, only a little scholarly attention has been paid.[17] It is time to remedy this oversight.

A. Bail Bondsmen, Bounty Hunters, and Corrupt Incentives

Our current bail system is by-and-large unregulated and plagued with corruption. First, numerous offenders languish in local jails for weeks for committing mere misdemeanors, simply because they lack the funds to post bail.[18] In New York City, for example, most of these charges are for minor quality-of-life offenses, such as smoking marijuana in public, jumping a subway turnstile, or shoplifting, and bail was set at $1,000 or less.[19] Yet, the overwhelming majority of defendants are unable to muster funds and are sent to jail, where they remain, "on average, for more than two weeks."[20] In a 2010 study, eighty-seven percent of the low-income defendants who were not released on their own recognizance were unable to post bail and went to jail to await guilty pleas or trial.[21]

What is even more disturbing is that many of the poorer defendants may have pled guilty at arraignment for sentences with no jail time, simply to avoid being behind bars while awaiting trial.[22] Impoverished defendants will often accept a guilty plea, even if innocent, in order to gain release from pretrial detention, even if this injures their long-term prospects.[23]

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17. *See, e.g.*, Baradaran & McIntyre, *supra* note 15; Baradaran, *supra* note 15.

18. Mosi Secret, *N.Y.C. Misdemeanor Defendants Lack Bail Money,* N.Y. TIMES, Dec. 3, 2010, at A27.

19. *Id*.

20. *See id*. (finding that 87% of defendants whose bail was set at $1,000 or less did not post bail).

21. HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF NONFELONY LOW-INCOME DEFENDANTS IN NEW YORK CITY 2 (2010), *available at* http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf.

22. *See id*. at 2–3 ("Most persons accused of low level offenses when faced with a bail amount they cannot make will accept a guilty plea; if they do not plea at arraignment, they will do so after having been in detention a week or two.").

23. Laura Sullivan, *Bail Burden Keeps U.S. Jails Stuffed with Inmates*, NPR, Jan. 22, 2010, http://www.npr.org/2010/01/21/122725771/Bail-Burden-

Inability to muster the appropriate funds for bail is not just a problem for misdemeanor felony defendants. Judges often set money bail at an amount the defendant cannot afford. In New York, for example, only ten percent of defendants in all criminal cases in which bail is set are able to post it at arraignment.[24] This is despite the fact that many states have laws that establish a preference for nonfinancial conditions of release or unsecured bonds.[25]

The existence of commercial surety bonds, or secured bonds, does not help low-income defendants. Commercial bondsmen rarely lend bail money of $1,000 or less, and their services are usually too expensive for low-income or indigent offenders.[26] Likewise, secured bonds are often not accessible for poor defendants, who usually do not have the property available to secure such bonds, or friends with such assets.[27] Under one bondsman's system, to obtain bail for even a minor felony or misdemeanor charge an indicted defendant must pay cash out of pocket, sign a twenty-page contract, and initial eighty-six separate paragraphs.[28]

If a defendant is fortunate enough to even qualify for secured bonds, then she must face the web of complex and innumerable fees charged for simple regulation. For example, in New York, a bondsman often charges the defendant a fee of $250 if the defendant misses a weekly check-in, and as much as $375 per

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Keeps-U-S-Jails-Stuffed-With-Inmates (last visited Sept. 24, 2012) (on file with the Washington and Lee Law Review).

24. *See* HUMAN RIGHTS WATCH, *supra* note 21, at 4.

25. *See id*. The federal government and the District of Columbia prohibit courts from imposing money bail that defendants cannot meet and which therefore results in their pretrial detention. *See* 18 U.S.C. § 3142 (2006).

26. *See* MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, MAKING BAIL IN NEW YORK CITY: COMMERCIAL BONDS AND CASH BAIL 6 (2010) (interviewing fourteen detainees with low bail amounts who were turned down by the bondsman). Bond agents typically charge a 10% fee for the first $3,000, 8% for the next $7,000, and 6% for amounts over $10,000. The fee is not refunded. Bondsmen also require collateral, typically cash, which is refunded unless bail is forfeited for failure to appear. *See id.* at 3.

27. In New York, for example, criminal procedure law authorizes the use of secured bail bonds secured by personal and real property; the surety may be provided by the defendant himself or someone other than the defendant.

28. John Eligon, *For Poor, Bail System Can Be an Obstacle to Freedom*, N.Y. TIMES, Jan. 10, 2011, at A15 [hereinafter Eligon, *Bail System*].

hour for obscure tasks like bail consulting and research.[29] These specified fees can grow much greater when bail bondsmen are assigned to other tasks, such as obtaining court documents or delivering release papers to jail.[30]

Even if an indicted defendant can afford a commercial surety bond, these commercial bonds are almost entirely unregulated and often corrupt. At the frontiers of criminal justice, bail bondsmen hold an immense amount of power over the bailees, despite the bondsmen's lack of legal, political, or police authority. Far from having a jury or a judge decide whether an indicted defendant should be incarcerated and punished, these bail bondsmen make such decisions in a completely unstructured universe, where they are both judge and jury. This kind of unauthorized decision-making surely violates the spirit of the Sixth Amendment, which at its very core requires legal conviction before punishment.

More troubling are the vast amounts, sometimes thousands of dollars, that a bail bondsman may charge if he makes the decision to revoke bail and return the defendant to jail.[31] These decisions, made entirely on the bondsman's own accord, with no regulation from any judicial, police, or legal authority, end up not only returning the defendant to jail but also costing him and his family a large percentage of the deposited bond, which is forfeited when the defendant is surrendered on the sole decision of the bondsman.

There are few state laws regulating when it is permissible for a bondsman to surrender a defendant, which leaves the bail system open to manipulation. New York bondsmen, among others, have been returning defendants to jail for questionable or unspecified reasons, and then withholding thousands of dollars to which the bondsmen may not be entitled.[32]

Because most state laws allow bondsmen to enter into private contracts with the people they bail out, it is hard for judges to regulate their behavior. And even in states that afford

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29. *Id.*

30. *Id.*

31. *See id.* (noting that one bondsman returned eighty-nine bailees over a four-month period and pocketed 15% of the bail when doing so).

32. *See id.*

some regulatory supervision, judges rarely take advantage of it. For example, in New York, although state law allows judicial consideration of the bondsman's background, character, and reputation when deciding whether to accept a bond, a judge rarely denies bond because of improper behavior.[33]

Instead of helping defendants stay out of jail, some bail bondsmen take advantage of the situation and disadvantage defendants to an even further degree.[34] In other words, as described by a New York attorney familiar with these sorts of abuses, an indicted offender "can be ordered imprisoned by a court based solely on the unsworn, untested word of a non-law-enforcement civilian, a civilian who stands to profit financially if the defendant is incarcerated."[35] This type of entirely unregulated, potentially improper bond revocation, requiring the defendant to return to jail on the whims of a private actor, is yet another example of how the world of pretrial detention operates at the fringes of justice.

If bailees fail to appear for their hearings, the bondsman owes the entire bail amount to the court.[36] This kind of financial liability has led to many bondsmen employing recovery agents, usually known as bounty hunters, to ensure that these indicted defendants appear for their court dates.[37] The last time the Supreme Court addressed the role of bounty hunters and bondsmen—one hundred and fifty years ago[38]—it acknowledged the historical common law privileges of both bondsmen and bounty hunters, holding that the right to apprehend a fleeing defendant originates from the contract relationship between bondsmen and their clients.[39] Despite vast changes in both

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33. *See* John Eligon, *New York Is Owed More than 2 Million Dollars in Delinquent Forfeitures*, N.Y. TIMES, Jan. 10, 2011, at A18.

34. *See* Eligon, *Bail System*, *supra* note 28 (recounting abuses of N.Y.C. bail bondsmen that have been investigated by the New York State Insurance Department).

35. *Id.*

36. *See* Stephen N. Freeland, Note, *The Invisible Badge: Why Bounty Hunters Should Be Regarded as State Actors Under the Symbiotic Relationship Test*, 49 WASHBURN L.J. 201, 207 (2010).

37. *See id.*

38. Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1872).

39. *See id.* at 370–71. The *Taylor* Court noted that bounty hunters could

criminal law and procedure, however, the Court has not addressed the topic since.

Bounty hunters do have a few regulations on their behavior, mostly codified in state law, though they vary widely from state to state.[40] Despite persistent effort, however, attempts to control bounty hunters through federal legislation have failed.[41] As should not be surprising in such a "wild west," behavior of some bounty hunters can be reprehensible. Beyond the showy brutality spotlighted in such reality shows as "Dog the Bounty Hunter,"[42] the rules and prohibitions that constrain the police do not generally apply to bounty hunters.[43] As a result, misconduct often occurs as bounty hunters take advantage of their legal privileges.[44]

Bounty hunters look and act like police, but lack the screening and training that law enforcement provides its

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"seize [delinquent defendants] at any time, detain them until trial, pursue them across state lines, and even break into their homes if necessary." *Id.* at 371. Some scholars, however, have argued that this statement by the *Taylor* Court is only dicta, and not binding on modern-day courts. *See, e.g.*, Todd Barsumian, Note, *Bail Bondsmen and Bounty Hunters: Re-Examining the Right to Recapture*, 47 DRAKE L. REV. 877, 887–88 (1999) (citing Landry v. A-Able Bonding, Inc., No. 1:92-CV-0257, 1994 WL 575480 (E.D. Tex. May 9, 1994), *aff'd in part*, *rev'd in part*, 75 F.3d 200 (5th Cir. 1996)).

40. Forty-seven states have some sort of statute regulating bounty hunting. *See* Freeland, *supra* note 36, at 210 n.70. For example, in 1997, Indiana, Nevada, and North Carolina started licensing bounty hunters, and Texas began to require warrants for bounty hunters as well as the assistance of licensed private investigators/security guards. Additionally, Florida, Illinois, Kentucky, and Oregon have banned commercial bail bond systems, and hence have no bounty hunters. *See id.* at 210 nn.66, 70.

41. *See id.* at 211–12 (noting that two bills that would have made bounty hunters subject to the same laws and constitutional constraints as police failed in the House of Representatives).

42. "Dog the Bounty Hunter" is a reality television show on A&E, which follows Duane Chapman as he hunts down defendants who have missed court appearances. *See* DOG THE BOUNTY HUNTER, http://www.dogthebounty hunter.com/ (last visited Sept. 24, 2012) (on file with the Washington and Lee Law Review). The website for the show proclaims, "Considered the greatest bounty hunter in the world, Duane 'Dog' Chapman has made more than 6,000 captures in his twenty-seven-year career." *Id.*

43. *See* JACQUELINE POPE**,** BOUNTY HUNTERS, MARSHALS, AND SHERIFFS: FORWARD TO THE PAST 4 (1998) ("Rules of law and conduct under which police function have no relevance for bounty hunters.").

44. *See* Freeland, *supra* note 36, at 212 (collecting stories of incidents).

recruits.[45] As a result, these recovery agents use dangerous and sometimes illegal tactics to retrieve defendants, property, or both, including confrontations at gunpoint, forced entries into homes without a search warrant, and the commandeering of vehicles on public roadways.[46] Indeed, in states where they are allowed to practice, bounty hunters can legally use stun guns, mace, and firearms while apprehending bailees. As a result, in the process of "recovering" the bailee, bounty hunters often complicate and endanger public safety.[47] Moreover, although bounty hunters play a police-like role, there is little constitutional protection against poor behavior because they are usually not considered state actors.[48]

In sum, the unregulated private actors, unsupervised and unaccountable bail bonding companies, complex and unfair fee structures, tremendous pressure to plead guilty, over-incarceration for minor offenses, and disproportionately high bail all combine to make our system of pretrial detention a nightmare to navigate and constitutionally questionable. That this system disproportionately affects the poor makes our current pretrial detention system all the more disturbing.

B. Increased Numbers of Poor Indicted Offenders Denied Bail

At any given moment, a large proportion of jail dwellers consist of felony and nonfelony pretrial detainees who are in jail because they have not posted bail. Of the nation's jail population, 60.2% are detainees awaiting trial.[49] Nationally, taxpayers spend $9 billion annually to incarcerate defendants held on bail.[50]

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45. Daniel Stanton, *Bondsmen Pose Danger to Public*, PORTLAND TRIB., May 12, 2011, http://www.portlandtribune.com/opinion/story.php?story_id=130514891339544200 (last visited Sept. 24, 2012) (on file with the Washington and Lee Law Review).

46. *Id.*

47. *Id.*

48. *See* Freeland, *supra* note 36, at 228 (discussing the inadequacy of the logic behind distinguishing police officers and bounty hunters).

49. TODD D. MINTON, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2011—STATISTICAL TABLES 1 (2011).

50. PRETRIAL JUSTICE INSTITUTE, JANUARY–DECEMBER 2011 ANNUAL REPORT 3 (2011).

The rate of pretrial incarceration (and incarceration in jails and other nonprison detention places in general) has continued to rise over the past ten years even though prison growth rates have been leveling off.[51] Indicted offenders are less likely to be released pretrial.[52] This includes not only those who have been indicted for violent offenses but also those who are awaiting trial for property, drug, and public-order-related charges.[53] Additionally, fewer indicted offenders are being released from jail on their own recognizance, and those who have been granted bail are often unable to afford it.[54] These types of high bail requirements make it very difficult for indicted defendants to obtain pretrial release, despite the fact that the vast majority of these offenders have been arrested for low-level, nonviolent offenses.[55]

Despite this increasing reliance on incarcerating indicted defendants before trial, communities are not necessarily any safer. The places with the highest incarceration rates have not necessarily seen violent crime rates fall.[56] In fact, quite to the contrary, New York City decreased its jail population and experienced a drastic reduction in crime rates.[57]

As Human Rights Watch has astutely noted in discussing the problems with pretrial detentions in New York City:

> Time in jail before one has had one's day in court is particularly troubling for the one in five detained non-felony defendants who . . . will not be convicted. It is also disproportionate in light of sentences typically imposed when there is a non-felony conviction: data from the New York State Division of Criminal Justice Services, for example, indicates that eight out of ten convicted misdemeanor arrestees receive sentences that do not include jail time.[58]

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51. PETTERUTI & WALSH, *supra* note 11, at 2.

52. *Id.* at 3.

53. *Id.* Indeed, as the report notes, three-quarters of those pretrial detainees charged with property, drug, and public order related charges are "significantly less likely" to be released. *Id.*

54. *Id.* As the report explains: "Once, more than half of those jailed received bail amounts of $5,000 or less; today, just about half of the people in jail receive the highest bail amounts ($10,000 to the maximum)." *Id.*

55. *Id.*

56. *See* HUMAN RIGHTS WATCH, *supra* note 21, at 4.

57. *See id.*

58. *Id.* at 2.

This is disturbing in regards to the large number of pretrial detainees who are indicted and held on misdemeanors, as detailed above. Incarcerating poor defendants for nonfelony offenses (primarily misdemeanors, but also violations and infractions)[59] is perhaps the most troubling aspect of this trend. This kind of jailing is "uniquely difficult to reconcile with the fundamental notions of fairness and equality that should be the cornerstones of criminal justice."[60] For these cases especially, pretrial detention is a disproportionate abbreviation of rights, particularly in light of the nonthreatening, petty nature of most of the charged nonfelony crimes.[61]

The increasing rate of pretrial detention is worrying, however, even for those defendants charged with more serious crimes, due to the conditions of the actual detention centers housing pretrial defendants. Although state and federal prisons are not generally known for their plush accommodations, the general state of the jails that hold pretrial detainees is so bad that simply to be incarcerated in them rises to a punitive experience.

C. The Punishing Conditions of Pretrial Detention

The substandard conditions of today's pretrial detention centers—our halfway houses and local and municipal jails—have transformed the detainee's experience into a punishing one. It is a little-known but unfortunate truth that pretrial detainees often undergo harsher conditions of confinement than those defendants who are convicted.[62] While state and federal prisons house most convicted prisoners, jails and county lockups house the accused who have either been denied bail or cannot afford to pay it.

Moreover, pretrial detainees are often incarcerated alongside the ten percent of convicted criminals who are housed in jails rather than prisons.[63] This indicates that the holding conditions for pretrial detainees are, at minimum, punishment-like, as it is

59. *Id.*
60. *Id.*
61. *Id.*
62. Gorlin, *supra* note 10, at 419.
63. PETTERUTI & WALSH, *supra* note 11, at 3.

precisely the same as that for some convicted offenders. The lines between prison and jail are becoming increasingly blurred, and not for the better.[64]

Historically, determining whether certain conditions rise to the level of punishment requires objective indicia. Specifically, in *Bell v. Wolfish*,[65] the Supreme Court held that courts can decide "'whether [the detainee's condition] has historically been regarded as punishment.'"[66] In addition, *Youngberg v. Romeo*[67] held that those forcibly committed to state institutions retain their substantive rights under the Due Process Clause.[68] As others have noted, the Court's holding in *Youngberg* indicates that, by the same token, criminal pretrial detainees' arguments should be analyzed objectively, instead of subjectively.[69]

There are numerous objective indicia of confinement that rise to the level of punishment for pretrial detainees. By far the most concerning—but not isolated—examples come from Rikers Island in New York, the municipal lockup for pretrial detainees, immigrants, juveniles, and any prisoner subject to rehearing or resentencing.[70] The jail on Rikers Island has been sued in recent years by more than a half-dozen Rikers inmates, all claiming to have been the victims of beatings by prisoners while guards ignored it, or worse, ordered the attacks.[71]

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64. *See id.* (noting that criminals are increasingly sent to jail, not prison).

65. *See* Bell v. Wolfish, 441 U.S. 520, 537 (1979) (holding that courts may decide "'whether [the detainee's condition] has historically been regarded as punishment'").

66. *Id*.

67. *See* Youngberg v. Romeo, 457 U.S. 307 (1982) (holding that a mentally handicapped prisoner had "constitutionally protected liberty interests under the Due Process Clause of the Fourteenth Amendment to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as reasonably may be required by these interests").

68. *Id.* at 315–16.

69. Gorlin, *supra* note 10, at 441.

70. *See* N.Y. DEP'T OF CORRECTION, AN OVERVIEW OF NEW YORK CITY DEPARTMENT OF CORRECTION FACILITIES, http://www.nyc.gov/html/doc/html/about/facilities_overview.shtml (last visited Sept. 24, 2012) (on file with the Washington and Lee Law Review). The Rikers Island complex contains nine separate centers for both sentenced defendants and pretrial detainees, including an adolescent male unit, detox and mental health, hospital, women and baby unit, misdemeanor unit, maximum security, extreme protective custody, and detainees unit. *Id.*

71. Benjamin Weiser, *Lawsuits Suggest Pattern of Rikers Guards Looking*

For example, in 2009, two Rikers guards were accused of recruiting inmates over a three-month period to assist in maintaining order in a housing unit for teen boys, including training the inmates in how to restrain and assault their victims, as well as deciding where and when attacks would occur.[72] The housing unit was run much like a Mafia organization, in which two correction officers were the bosses.[73] Even more troubling, the recent pattern of cases involving Rikers guards indicates that the management of the jail is, if not complicit in the abuses, at least marginally aware of it.[74]

The types of punitive violations occurring at Rikers do not just involve misconduct by guards. For years the jail had a policy of strip-searching all prisoners, even nonviolent ones charged with minor crimes, and, over an eight-year period, roughly 100,000 people were strip-searched after being charged with misdemeanors and taken to Rikers Island and other city correction facilities.[75] A majority of the strip-searched detainees were charged with trespassing, shoplifting, jumping turnstiles, or failing to pay child support,[76] minor offenses on even a misdemeanor scale. Considering most federal circuits have upheld laws banning strip-searches for detainees charged with minor offenses,[77] this course of action violated the pretrial

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Other Way, N.Y. TIMES, Feb. 4, 2009, at A21.

72. *Id.*

73. John Eligon, *Correction Officers Accused of Letting Inmates Run Rikers Island Jail*, N.Y. TIMES, Jan. 23, 2009, at A20. As the article explained, "guards reputedly sent inmates to intimidate, threaten and silence uncooperative prisoners with brute force. Inmates were ordered to turn over money, and their every move, including when they could use the bathroom, was controlled. If word of an assault got out, the guards would allegedly orchestrate a cover-up." *Id.*

74. Weiser, *supra* note 71.

75. Michael Schmidt, *City Reaches $33 Million Settlement over Strip Searches*, N.Y. TIMES, Mar. 23, 2010, at A22.

76. *See id.*

77. *See, e.g.*, Evans v. Stephens, 407 F.3d 1272, 1290–91 (11th Cir. 2005) (noting other cases where officers were required to have reasonable suspicion to strip search minor offenders); Doe v. Burnham, 6 F.3d 476 (7th Cir. 1993) ("'Law enforcement officers may not strip search an individual for contraband unless the officers have a reasonable basis to believe at the time of the search that the individual is concealing contraband on his or her body.'" (citing Bell v. Wolfish, 441 U.S. 520, 559 (1979); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1273 (7th Cir. 1983))).

detainees' Fourth Amendment rights and created an atmosphere of fear and punishment.

Jails in other major metropolitan areas are rife with similar abuses. The Los Angeles County Men's Central Jail is notorious for overcrowding, forcing inmates to sleep on dirty floors, devoid of natural light, where inmates get only one two-hour outdoor recreation session per week on the jail's roof.[78] In Maricopa County's Tent City Jail, in Phoenix, Arizona, inmates are housed outdoors in military tents without air conditioning (despite over 100 degree temperatures in the summers), fed 15-cent meals only twice a day to cut costs, are forced to wear humiliating prison gear, and have very few amenities.[79] And in Washington, D.C.'s Central Detention Facility, there is overcrowding, serious health and sanitation issues (including broken showers, no running water in cells, and animal feces throughout the facility), and inadequate healthcare.[80] All this is in addition to the abuse that pretrial detainees can be subjected to in jails, ranging from violent treatment by other prisoners to more institutionalized practices.

On a somewhat less deadly scale, but still punitive in nature, are the fees now imposed on poor detainees by many jails. In Florida, for example, fees are imposed for the use of the public defender for misdemeanors,[81] which tend to include a large section of pretrial detainees who often cannot afford the fees to make bail.[82] Adding a $50 fee to even consult a public defender[83] undoubtedly has a chilling effect on many of these indicted offenders, who may go without counsel due to an inability to afford the fee. Moreover, failure to use the public defender can then lead to a cascade of effects, particularly for driving violations including court-ordered fees, followed by failure to pay, which can lead to more fees, more unlicensed driving, and sometimes incarceration.[84] Under Florida and North Carolina law, there are

78. PETTERUTI & WALSH, *supra* note 11, at 19.

79. *Id.*

80. *Id.*

81. REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE AT THE NEW YORK UNIV. LAW SCH., THE HIDDEN COST OF FLORIDA'S CRIMINAL JUSTICE FEES 4, 6 (2010), www.brennancenter.org/page/-/Justice/FloridaF%26F.pdf?nocdn=1.

82. *Id.* at 4.

83. *Id.* at 5–6. Specifically, there is a $50 "application fee." *See id.*

84. *Id.* at 4.

no exceptions or waivers for the indigent,[85] and the waiver is rarely utilized in Georgia.[86]

Likewise, in Louisiana, fees for using the public defender are imposed after the bail hearing.[87] All of the criminal courts of Orleans Parish impose fines and fees regardless of an indicted defendant's ability to pay them, and waiver is rarely granted.[88] For very poor defendants who often cannot come up with bail money, the imposition of another fee on top of the bail fee, for simply consulting the public defender, results in a fee-based punishment. This is exacerbated by the fact that when defendants are unable to pay their fines, fees, and costs, they may be incarcerated—even if they have been found not guilty of their original crime.[89] Once incarcerated, the indigent defendant is even less likely to be able to pay the fees, which compound, leading to higher debt and longer incarceration.[90] Because they can only afford to pay small amounts of their incomes to redeem their fees, many of these men and women can remain caught up in the criminal justice system for years, and they may find themselves back in jail when their legal debts become overwhelming.[91]

In impoverished states such as Michigan, some pretrial detainees are assessed a $12 jail entry fee, $60 per day for jail room and board, and additional reimbursement to the correctional facility for medical and other services.[92] One jail in Michigan requires the defendant to pay a $12 fee to be *released* from jail.[93] So for an indigent pretrial detainee who cannot afford

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85. *Id.* at 7.

86. ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR PRISONS 62 (2010). Georgia requires a $50 fee from all poor criminal defendants, including pretrial detainees, who simply request the services of a public defender. *See id.* Most of such defendants never get a chance to demonstrate their indigence and simply waive their right to counsel. *See id.*

87. *Id.* at 17. The public defender fee is usually $40. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 18. Late fees of $100 per payment are often imposed. *Id.* Defendants may also be sent to jail for fifteen to thirty days for failure to pay. *Id.*

91. *See id.* at 21.

92. *See id.* at 30.

93. *See id.* The aforementioned facility is the Saginaw County Jail, which is

to meet bail, extra costs are imposed, even if the original charges ultimately are not proven or are dropped.

Similarly, states such as Ohio frequently impose "pay-to-stay" programs on pretrial detainees. It took a federal lawsuit to stop an Ohio municipal jail from requiring detainees to pay a daily fee for their preconviction jail time.[94] A comparable payment program for pretrial detainees also existed in Georgia until recently, in which the sheriff of Clinch County routinely charged pretrial detainees for the costs of room and board well before conviction.[95] In certain cases, the sheriff even forced detainees to choose between signing a promissory note (to be later enforced) or being returned to jail.[96] This practice only stopped with the initiation of a federal lawsuit, which settled in 2006.[97]

These practices, taken together, have done much to transform pretrial detention into a modern-day debtor's prison, and transformed it from a regulatory to a punitive experience.

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the "only lockup facility in the county to hold people on initial arrests or those sentenced to time for a year or less." SAGINAW COUNTY, SAGINAW COUNTY MICHIGAN JAIL, *available at* http://www.saginawcounty.com/Sheriff/Corrections/Jail.aspx (last visited Sept. 24, 2012) (on file with the Washington and Lee Law Review).

94. *See* ACLU, *supra* note 85, at 53. The Hamilton County Jail, in Ohio, routinely charged its pretrial detainees a "pay to stay" fee until 2002, when the District Court for the Southern District of Ohio found this violated pretrial detainees' right to the Fourteenth Amendment's guarantee of due process, because the detainees were not given a predeprivation opportunity to be heard. *See* Allen v. Leis, 213 F. Supp. 2d 819, 832 (S.D. Ohio 2002) (holding jail's policy of appropriating cash immediately upon pretrial detainee's arrival at jail to cover "booking fee" violated defendants' due process rights under the Fourteenth Amendment).

95. ACLU, *supra* note 86, at 56.

96. *Id.* at 56–57.

97. *See* Complaint, Williams v. Clinch County, Ga., 231 F.R.D. 700 (M.D. Ga. 2004) (No. 7:04cv00124); Brief in Support of Plaintiff's Motion for Summary Judgment, Williams v. Clinch County, Ga., 231 F.R.D. 700 (M.D. Ga. 2004) (No. 7:04cv00124); *see also* Greg Bluestein, *South Georgia County to Repay Inmates Saddled with 'Jail Bills'*, ASSOCIATED PRESS (Apr. 8, 2006) *available at* http://www.schr.org/node/119 (last visited Sept. 24, 2012) (on file with the Washington and Lee Law Review).

D. Pretrial Incarcerative Harm

The offenders who are incarcerated pretrial suffer unquestionable harm from this detention.[98] In general, incarceration in jail negatively impacts the mental and physical health, employment, and family and community interactions of those incarcerated.[99] Pretrial incarceration is also particularly difficult for those indicted offenders who suffer from poor health, as jails rarely have adequate resources available to treat people with physical or mental health problems.[100] Additionally, the poor have a much thinner safety net keeping them from homelessness and abject poverty, and being incarcerated for potential crimes, even for a short time, can have a devastating effect.[101]

Moreover, jails can be dangerous and unhealthy environments, even more so than prisons. First, the jail buildings themselves are often old and decaying.[102] These old buildings can have various dangers associated with them, including mold, poor ventilation, lead pipes, and asbestos, all of which can be very detrimental to the health of pretrial detainees.[103] Second, the concentration of prisoners, wardens, and visitors in a jail make it a vector of contagious diseases.[104] This is in large part because serious infections and sexually transmitted diseases are highly concentrated and easily transmitted in jails,[105] and the ever-changing detainee population means the residents are constantly in flux.[106] For example, the MRSA drug-resistant superbug has been thriving in jails, with the potential to infect those detainees who are there even for only a short time.[107] Many jails are not

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98. *See* Gorlin, *supra* note 10, at 419.

99. *See* PETTERUTI & WALSH, *supra* note 11, at 3.

100. *Id.*

101. *See* ACLU, *supra* note 86, at 6.

102. *See* PETTERUTI & WALSH, *supra* note 11, at 15 (citing studies from the 1990s that show that 700 jails in the United States are older than fifty years old and 140 jails are more than 100 years old).

103. *See id.*

104. *See id.*

105. For example, HIV, antibiotic-resistant TB, and bacterial infections all exist at much higher rates in jails than in the general population. *See id.*

106. *See id.*

107. *See* Silja J.A. Talvi, *Deadly Staph Infection 'Superbug' Has a Dangerous Foothold in U.S. Jails*, ALTERNET.COM (Dec. 4, 2007), *available at*

properly equipped to treat serious health problems in their detainees, and what healthcare is available is hard to provide to jails' often short-term visitors.[108]

Drug and alcohol addiction and mental illness are an equally large problem in jails. There is minimal, if any, drug treatment, although as many as half or more of those arrested and detained have had issues with drug addiction, alcohol addiction, or both.[109] And ever since the wave of deinstitutionalizing the mentally ill thirty years ago, a large number of the jails' residents are mentally unstable.[110]

This is troubling for a number of reasons. First, incarceration—even short-term incarceration such as pretrial detention—tends to further traumatize people with mental illness, making them more at risk of harming themselves or others.[111] This is particularly true in regards to suicide, which is the second-highest reason for death after illness in jails.[112] These high suicide rates are closely linked with untreated depression, all too common in all correctional facilities.[113] To further complicate the situation, many jails lack the institutional mental health resources required to serve the needs of their detainees.[114]

Pretrial detention also exerts a burden on an indicted offender's family. Children of indicted offenders often end up in foster care or are otherwise taken away from their families and

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http://www.alternet.org/story/69576 (last visited Sept. 24, 2012) (detailing how Superbug spreads all too easily in jails because of problems like poorly ventilated living and sleeping quarters; overcrowded rooms; shared mattresses, toilets, and showers; and a preponderance of people who arrive with poor health, drug problems, and severely compromised immune systems) (on file with the Washington and Lee Law Review).

108. PETTERUTI & WALSH, *supra* note 11, at 15.

109. Sharon Dolovich, *Foreword: Incarceration American Style,* 3 HARV. L. & POL'Y REV. 237, 245 (2009).

110. PERERUTI & WALSH, *supra* note 11, at 3.

111. *See* MAEGHAN GILMORE & MARY-KATHLEEN GUERRA, NATIONAL ASSOCIATION OF COUNTIES, CRISIS CARE SERVICES FOR COUNTIES 1 (2010) (noting the detrimental effects of detention on juveniles with mental health disorders).

112. *See* PETTERUTI & WALSH, *supra* note 11, at 16 (finding that the suicide rate in jails is 42 per 100,000 compared to 11 per 100,000 for the general population).

113. *Id.*

114. *Id.* at 15.

are far more likely to fall into poverty.[115] Family members of the person in jail experience not only emotional and economic hardships, but some have also reported experiencing physical ailments and declining health.[116] In Michigan, courts have gone so far as to incarcerate a mother for being unable to pay for her child's incarceration costs, locking her up without even any crime charged.[117]

Pretrial detention also augments the possibility of conviction.[118] Incarcerated defendants before trial are more likely to be found or plead guilty and serve prison time than those released pretrial.[119] The mere possibility of pretrial imprisonment often compels defendants to plead guilty and give up their right to trial.[120] The prospect of being incarcerated, even for a short time, can look ruinous to poor defendants, as this often means the loss of their livelihood, severe disruptions to their family lives, or both. Accordingly, when confronted with an unaffordable bail, a large number of pretrial detainees simply plead guilty.[121] This rush to a guilty plea is often exacerbated by the application fee to use a public defender in some states, as detailed above.[122]

Finally, pretrial detention can, in some cases, be literally deadly. Privatization of jails, prisons and halfway houses in states such as New Jersey have resulted in the housing of violent

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115. Dolovich, *supra* note 109, at 247.

116. *See* PETTERUTI & WALSH, *supra* note 11, at 18 (finding that 48% of those related to a person in jail experienced declining health after the person was jailed and 27% reported that their children's health had dropped).

117. ACLU, *supra* note 86, at 35. The mother in question was also charged a room-and-board fee, a drug test fee, and a booking fee for her imprisonment in the jail. *Id.* at 35–36.

118. HUMAN RIGHTS WATCH, *supra* note 21, at 2.

119. *See* Baradaran & McIntyre, *supra* note 15, at 555. As the authors expound, "Detention leads to the loss of employment and other negative financial conditions, less likelihood to obtain private counsel, which harms defendant's chances to be acquitted or at sentencing." *Id.*

120. HUMAN RIGHTS WATCH *supra* note 21, at 3; *see also* Baradaran & McIntyre, *supra* note 15, at 555 ("[L]iving conditions in jail are often poor and have been shown to have a negative influence on defendant's trial demeanor.").

121. HUMAN RIGHTS WATCH, *supra* note 21, at 3. For example, guilty pleas account for 99.6% of all convictions of New York City misdemeanor defendants. *Id*.

122. *See supra* Part II.C.

convicted offenders with nonviolent pretrial detainees.[123] More than once, this mixture of low-level detainees with dangerous convicted felons has resulted in injury or death for those who cannot make bail for misdemeanor charges.[124]

All of these practices are transforming our imposition of pretrial detention from its original incarnation as brief confinement based on risk of flight to punitive incarceration decided by a fragmented and inconsistent variety of private and public actors. This creates two major problems: not only do our procedures for imposing jail and denying bail disproportionately affect the poor and disenfranchised, but, as I contend below, they also violate the spirit of the Sixth Amendment. Taken together, these practices have created a Shadowlands where the normal promises of substantive and procedural criminal justice do not apply.

E. Punishment Before Conviction Violates the Spirit of the Sixth Amendment Jury Trial Right

This prolonged pretrial incarceration feels troubling because it seems to punish accused offenders before conviction by members of the community, violating the very spirit of our criminal justice system. These offenders are considered innocent at this phase of the criminal process. Any discomfort we feel with such practices logically stems from the Sixth Amendment jury trial right, which holds that the accused "shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."[125] Our current pretrial detention practices violate the very tenets of the Sixth Amendment: the accused are incarcerated for lengthy periods, suffering punitive and dangerous conditions in jails and county lockups, based on decisions made by unaccountable private actors, harried magistrates, or line prosecutors.

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123. *See* Dolnick, *supra* note 9, at A1 (finding that Delaney Hall, a new Jersey halfway house, housed at least one person accused of murder).

124. *See id.* (detailing the murder of a man, arrested for unpaid parking tickets and failure to purchase car insurance, for the three dollars in his pocket).

125. U.S. CONST. amend. VI.

Punishment, in other words, is being imposed on those not yet convicted, without the imprimatur of the jury.

Our pretrial detention practices are even more questionable when contrasted against the Supreme Court's recent spate of opinions highlighting the Sixth Amendment right to a jury trial. Specifically, in the *Apprendi-Blakely* line of cases, the Supreme Court reinvigorated the Sixth Amendment jury right, concentrating on the need for the community, as jury, to impose punishment on *those found guilty*. By focusing on this basic idea—a valid conviction requires all aspects of a crime be determined by a jury—the Court "provided the basis for [its] . . . decisions interpreting modern criminal statutes and sentencing procedures."[126] The Court relied heavily on the historical role of the community as an arbiter of punishment to support its contention that only the jury could find facts that increased a convicted offender's penalty. In holding that a court can sentence a defendant only on facts found by the jury beyond a reasonable doubt or admitted by the defendant himself,[127] the *Blakely* Court gave strong support to the idea that the community must have the final word on criminal punishment. Thus, the basis of the Court's new focus on the rights of the jury in criminal adjudication rested on the importance of the community's determination of punishment.

Despite these recent decisions, bail and jail determinations still take place far from the community and the jury room, taking place in the barrens of procedural justice. The Court's focus on community participation in criminal adjudication was not limited to criminal trials, as is illustrated in its recent opinion in *Southern Union v. United States*,[128] holding that a jury must decide on the imposition of a criminal fine.[129] The Court's refusal to limit *Blakely/Apprendi* to jury trials leaves an opening to integrate the community jury right into the pretrial detention sphere. If the Supreme Court has focused on the jury as a

126. United States v. Booker, 543 U.S. 200, 230 (2005).

127. *See id.* at 313 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." (quoting Ring v. Arizona, 536 U.S. 584, 588–89 (2002))).

128. Southern Union Co. v. United States, 132 S. Ct. 2344 (2012).

129. *See id.* at 2357 (holding that *Apprendi* applies to criminal fines).

representative of the community, as the only appropriate body to impose punishment on a convicted offender, then how much more important is it that the community have a say in determining whether punitive conditions fall upon an unconvicted offender? The *Apprendi-Blakely* line of decisions, forbidding imposition of punishment until the jury has decided guilt or innocence, must inform our practices governing pretrial detention.

Imposing our bail and jail procedures upon pretrial detainees results in the imposition of unjustified punishment, taking place virtually unnoticed and unremedied. As such, the spirit of the Supreme Court's recent Sixth Amendment jurisprudence should also apply to pretrial detention in a variety of circumstances. Whenever detention turns from regulatory to punitive, the community must have a say in the punishment imposed.

Looking back at both our constitutional and historical understanding of bail, it is difficult to understand how we got here, routinely meting out punishment to an accused not yet convicted of a crime. Our historical bail practices differed greatly from the complicated and often bewildering array of rules that govern pretrial detention today. Thus, a thorough understanding of the history of pretrial detention is critical to fully comprehending the problems we face today.

III. A Short History of Bailing and Jailing

Although the history of Anglo-American bail procedures has been well-covered, a brief review of how bail and jail evolved in this country both before and after the American Revolution will prove helpful in showing how far we have departed from our original understanding of both. Since the Supreme Court has shown a great fidelity to how bail was originally granted in deciding pretrial detention cases, we should strive to comprehend the actual working customs during the nation's earliest days.

A. Colonial Practices

The practice of bail came over from England with the first colonists.[130] The system of bail developed to free untried prisoners.[131] Like so many of our current criminal procedures, the bare bones of colonial bail were originally quite simple: the accused had a friend or neighbor take a pledge, backed by property, and assume responsibility for him until trial.[132] In determining bail, the judge usually considered such factors as likelihood of conviction, risk of flight, severity of sentence, and the character of the accused.[133] Many of these provisions were aimed at limiting judicial discretion in bail decisions, not at providing liberty for the defendant.[134] This is unsurprising, considering how much criminal justice in the Anglo-American world was focused on community justice. Early colonial communities were loath to allow a visiting magistrate to make any major decisions about one of their own offenders.[135]

In 1628, the English Petition of Right, thought by many to be the indirect progenitor of colonial bail law,[136] held that bail was to obtain "the liberty of the subjects"[137] from pretrial imprisonment.

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130. *See* W. THOMAS, BAIL REFORM IN AMERICA 11 (1976) ("The American system of bail is derived from practices that originated in medieval England.").

131. *See* Betsy K. Wanger, Note, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 YALE L.J. 320, 323 n.19 (1987). Wagner goes on to note that this system developed largely because magistrates in medieval England traveled among different counties, and permitting defendants to be released into the custody of friends or neighbors as a surety helped avoid their prolonged detention in jail. *Id.* Originally the surety had to deliver himself if the defendant absconded; later, the surety could forfeit money instead of his own person. *Id.*

132. DANIEL FREED & PATRICIA WALD, BAIL IN THE UNITED STATES: 1964, at 1–3 (1964).

133. June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 517 (1983).

134. *See* Hermine Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L.J. 1140, 1162–63 (1972) (indicating that the purpose of these provisions was to limit the "admittedly unlimited discretion" of the judges regarding bail to ensure that noncapital defendants had a right to bail).

135. *See id.*

136. *See* Donald B. Verrilli Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 350 (1982).

137. 3 How. St. Tr. 80–224.

It was this understanding of the right to bail that the colonists brought with them from the mother country. Excluding capital cases, defendants were guaranteed release on bail before trial.[138]

On the American continent, right to bail provisions existed in several colonial charters and was articulated as early as 1641 in the Massachusetts Body of Liberties.[139] Other colonies such as Pennsylvania,[140] Delaware,[141] and New York[142] followed suit. Of

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138. *See* Shima Baradaran & Frank McIntyre, *supra* note 15, at 499 n.1 (citing 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 289 (1676)).

139. *See* MASSACHUSETTS BODY OF LIBERTIES, art. 18 (1641), *available at* http://www.winthropsociety.com/liberties.php. Article 18 provided:

> No man's person shall be restrained or imprisoned by any authority whatsoever, before the law hath sentenced him thereto, if he can put in sufficient security, bail, or mainprise, for his appearance and good behavior in the meantime, unless it be in capital crimes, and contempts in open Court, and in such cases where some express act of Court doth allow it.

Id.

140. *See* FRAME OF GOVERNMENT OF PENNSYLVANIA, art. XI (May 5, 1682), *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, (FRANCIS N. THORPE, ED., Washington, D.C.: Government Printing Office, 1909), *available at* http://avalon.law.yale.edu/17th_century/pa04.asp. Article XI held that "all prisoners shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident, or the presumption great." *Id.*

141. Delaware adopted the Pennsylvania Frame of Government, including its bail provision, when it became a colony in 1702. Verrilli, *supra* note 136, at 337.

142. *See* NEW YORK CHARTER OF LIBERTIES, art. 19 (1683), *reprinted in* CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK (Rochester N.Y, 1906), *available at* http://www.montauk.com/history/seeds/charter.htm. Article 19 provided:

> THAT In all Cases whatsoever Bayle by sufficient Suretyes Shall be allowed and taken unlesse for treason or felony plainly and specially Expressed and menconed in the Warrant of Committment provided Alwayes that nothing herein contained shall Extend to discharge out of prison upon bayle any person taken in Execucon for debts or otherwise legally sentenced by the judgment of any of the Courts of Record within the province.

Id. However, there is some evidence that New York's right to bail provision was honored more in the breach than in the execution. Few acknowledged a right to bail in the eighteenth century. *See* J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 502–03 (1944) (finding that neither defendants nor courts in New York viewed bail as a matter of right).

course, as many major crimes were still classified as capital felonies during the colonial era,[143] any provisions granting bail in noncapital cases still excluded numerous defendants.

B. Bail Following the Constitution

Despite these specific discussions of bail in colonial documents, however, the Framers did not explicitly include a right to bail in the Constitution, only mentioning it in the context of the Eighth Amendment.[144] Depending on how colonial history is interpreted, the lack of an explicit right to bail in the Constitution can be seen either as a historical accident[145] or a deliberate decision.[146] There is minimal documentary evidence of the Framers' intent to support either position.[147] In contrast, the Judiciary Act of 1789 did specifically provide a right to bail for all noncapital cases,[148] although there is no evidence of any debate on that provision either.[149] The Northwest Ordinance, passed by

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143. *See* TODD R. CLEAR, GEORGE F. COLE & MICHAEL D. REISIG, AMERICAN CORRECTIONS 72–73 (2008) (noting that the Anglican Code in force during the mid-Eighteenth Century listed thirteen capital offenses). As the authors note, slightly more than twenty percent of felonies were capital ones in New York. *See id.* at 73.

144. The Eighth Amendment provides, among other things, that "[e]xcessive bail shall not be required." U.S. CONST. amend. VIII.

145. *See, e.g.*, Caleb Foote, *The Coming Constitutional Crisis in Bail,* 113 U. PA. L. REV. 959, 968–69 (1965) (arguing that the failure to include a right to bail in the Constitution was a historical accident).

146. *See, e.g.*, William F. Duker, *Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33 (1977) (arguing that nothing in the colonial history of bail or the history of the Bill of Rights evidences any intent to have a right to bail).

147. *See* Verrilli, *supra* note 136, at 338 n.58. According to the 1788–90 Annals of Congress, the discussion of the bail clause in the Eighth Amendment was limited to one comment. *See id.*

148. The Judiciary Act provided, in regards to bail:

> [U]pon all arrests in criminal cases, bail shall be admitted, except where punishment may be by death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstance of the offense, and of the evidence, the usages of law.

Judiciary Act of 1789 § 33 (codified as 1 Stat. 91) (repealed by 18 U.S.C. §§ 3141–3151 (1982)).

149. Verrilli, *supra* note 136, at 338 n.58.

Congress in 1787, also contained a right to bail.[150] On the whole, then, it is difficult to determine the particular intent of the Framers in regards to the right to bail.[151]

Following the ratification of the Constitution, the federal judiciary made clear that bail was the norm following indictment,[152] due to the presumption of innocence and due process.[153]

The right to bail after 1789 also solidified through the vehicle of state constitutions. Specifically, although only two of the original colonies—North Carolina and Pennsylvania—retained a specific right to bail in their state constitutions, every state that joined the Union after 1789, excluding West Virginia and Hawaii, included a right to bail.[154] This right managed to survive the "frequent redrafting of state constitutions that occurred during the nineteenth century."[155] Viewed another way, it was truly in the state constitutions that the American right to bail reached its full fruition.[156]

This fully articulated state right to bail is important for a variety of reasons. First, most criminal law is state law, not federal law, despite the scholarly and popular focus on federal law enforcement.[157] Second, bail rights expanded their reach as

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150. *See* Northwest Ordinance § 14, art. 2 (1787), *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Charles C. Tansill, ed., Government Printing Office 1927), H.R. DOC. NO. 398, *available at* http://avalon.law.yale.edu/18th_century/nworder.asp. The bail provision in Article 2 was identical to the Pennsylvania Frame of Government's bail provision, providing that "[a]ll persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great." *Id.*

151. *See* Verrilli, *supra* note 136, at 350 (finding that it is impossible to determine the Founders' intent by evidence drawn from before 1789).

152. Granted, many felonies during this time were classified as capital offenses. *See* Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 (including as capital crimes treason, murder, piracy, counterfeiting, and robbery on the high seas).

153. *See Ex parte* Milburn, 34 U.S. 704, 710 (1835) (holding that bail is not "designed as satisfaction for the offense, 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 offense"); *see also* Taylor v. Tainter, 83 U.S. 366, 371–72 (1872).

154. Verrilli, *supra* note 136, at 351.

155. *Id*. at 352.

156. *See id*. (detailing the history of bail provisions in initial state constitutions and right-to-bail amendments).

157. This is particularly true with bail, as state and local detention practices

most state criminal justice codes eliminated many felonies from the list of capital crimes, generally leaving only murder and treason.[158] Third, the historical right to bail, as articulated by the states, has only denied bail for reasons involving risk of flight, rejecting the newer preventative detention theories.[159] Finally, this development shows that the right to bail, although not firmly rooted in a specific constitutional provision, has been part of the American criminal justice system since the founding of the country.

Moreover, how a specific right developed in state statutes has often been important to the Supreme Court when analyzing the scope of rights in the federal constitution. For example, in *Jones v. United States,*[160] the Supreme Court looked at how the states treated certain aspects of an aggravated crime as either an element or a sentencing factor in determining whether the reach of the Sixth Amendment jury trial right required defining serious bodily harm as an element of federal carjacking, as opposed to a sentencing factor.[161] Similarly, in *Duncan v. Louisiana*,[162] the Supreme Court used the long history of jury trial rights in state constitutions to bolster its support for the jury trial right in the federal constitution.[163]

"have come to mold and define the operations and limits of the criminal justice system." Miller & Guggenheim, *supra* note 15, at 346.

158. *See* Verrilli, *supra* note 136, at 352 (noting that the constitutional amendments giving a right to bail occurred at a time where many states were pruning the definition of capital crimes to include only murder and treason).

159. Granted, many states have recently amended their constitutions to allow detention. Miller & Guggenheim, *supra* note 15, at 345.

160. Jones v. United States, 526 U.S. 227, 236 (1999) (stating that the court's finding of serious bodily injury after trial and consequent sentence enhancement was error since serious bodily injury was an element of the crime).

161. *See id.* at 236–37 (reviewing how "many States use causation of serious bodily injury or harm as an element defining a distinct offense of aggravated robbery").

162. Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (holding that the Fourteenth Amendment guarantees a right of jury trial in all state criminal cases which would come within the Sixth Amendment's guarantee if they were tried in a federal court).

163. *Id.* at 153 (discussing how every state joining the Union subsequent to formation had the right to a jury trial articulated in its constitution); *see also* Verrilli, *supra* note 136, at 354.

Thus the historical right to bail, both as commonly practiced around the time of the Founding and afterwards in the various states, has much to teach us about how bail rights today should be understood and defined, particularly in light of the preventative detention proposals that are currently fashionable.

C. Recent Bail Reforms

The basic form of bail, relying on the personal surety as the custodian of the defendant, remained unchanged until the mid-nineteenth century.[164] However, because these bail custodians had to be both known and acceptable to the courts, the personal surety system eventually morphed into the commercial bondsman system.[165] This switch "substantially reduced the courts' ability to assess the risks of pretrial release," and—combined with the decreasing number of nonbailable crimes—added to the general trend whereby judges set high bails exceeding a defendant's ability to pay.[166] The imposition of high bail remained the status quo in the state bail world.

Federal bail remained relatively unchanged from the Judiciary Act of 1789 until 1966, when Congress passed the first bail reform act.[167] The 1966 Bail Reform Act[168] marked a return to conditional release, and was designed in large part to reduce the high bails imposed by judges to prevent release of certain defendants.[169] The 1966 Bail Reform Act relied heavily on custodial supervision to ensure proper behavior, requiring judges to consider a variety of release conditions and release defendants under the most minimal

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164. Wanger, *supra* note 131, at 323–24.

165. *See id*. (finding that the increased urbanization of American society made finding a custodian known and acceptable to the court far more difficult).

166. *See id.*

167. *See* 18 U.S.C. §§ 3146–3153 (repealed 1983).

168. *Id.*

169. *See* S. REP. NO. 98-225, (quoting ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIMES, FINAL REPORT 50–51 (1981), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3187–88) (determining the goals of the 1966 Bail Reform Act were to "cut[] back on the excessive use of money bonds and provid[e] for flexibility in setting conditions of release appropriate to the characteristics of individual defendants"). *See generally* W. THOMAS, BAIL REFORM IN AMERICA 164 (1976).

release strictures possible.[170] A major goal of the 1966 Act was to reduce pretrial flight.[171] Pretrial detention based on future dangerousness was not envisioned.[172]

The difficulties of successfully implementing the 1966 Bail Reform Act, such as setting the terms of release and ensuring that conditions were met, along with worries about the crimes committed by defendants out on conditional release, led to the passage of the 1984 Bail Reform Act (BRA).[173] This federal statute was paralleled on the state level by no fewer than thirty-four states articulating specific statutory provisions allowing detention based on a defendant's dangerousness, as opposed to a risk of flight.[174]

The BRA was predicated on protection of the public and community safety, making this factor one of the most critical in the determination of whether to release or detain defendants before trial.[175] Most states have followed the path of the BRA, with forty-five states and the District of Columbia specifically permitting the determination of dangerousness as a predicate for denying pretrial release.[176]

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170. *See* 18 U.S.C. § 3142 (1966) (allowing release upon conditions such as personal recognizance; execution of an unsecured appearance bond; third party custody; travel, association or living restrictions; execution of an appearance bond; and/or execution of a bail bond).

171. Wanger, *supra* note 131, at 329.

172. *See* 18 U.S.C. §§ 3146–3153 (repealed 1983) (failing to consider pretrial detention based on future dangerousness).

173. *See* Miller & Guggenheim, *supra* note 15, at 344 (stating that crime committed by persons on pretrial release was a major concern for legislators after the 1966 Bail Reform Act).

174. *Id.*

175. The Act provides, among other things, that defendants should be granted bail "unless . . . such release will not reasonably assure the appearance of the person . . . or will endanger the safety of any other person or the community." 18 U.S.C. § 3142(b) (1988).

176. *See* Baradaran & McIntyre, *supra* note 15, at 507. As Baradaran and McIntyre note,

> In determining whether the accused is too dangerous to release prior to conviction, state courts consider three main categories: (1) the circumstances surrounding the present offense charged, (2) the defendant's past conduct, and (3) judicial discretion regarding the defendant's circumstances and character. Many states use the first two categories in an attempt to objectively determine which defendants pose a risk to public safety.

Id.

Technically, the 1984 Bail Reform Act reaffirmed the idea that pretrial release was to continue to be the norm.[177] However, the 1984 Act lacked neutrality regarding the determination of future dangerousness. For example, the Act contains little to balance out the reliance on predicting dangerousness for the defense side. Evidence of other crimes may be presented as hearsay, which is not subject to cross-examination.[178] There is no notice to defendants that prosecutors may seek pretrial detention based on prior crimes or behavior.[179] Additionally, the 1984 Act does not require that there be any confrontation between the defendant and the prosecutor who proffers the evidence.[180]

Moreover, purporting to be deeply concerned with "community safety," the 1984 Bail Reform Act allows federal prosecutors to request pretrial detention for any felony committed after two or more convictions of federal or state crimes of violence.[181] The Act contains a rebuttable presumption favoring detention whenever a defendant has a prior conviction of a violent crime less than five years prior and was arrested while on conditional release pending trial for another offense.[182] The BRA grants authority to the courts to confine an indicted individual based on "the danger a person may pose to others if released."[183]

Additionally, under the 1984 BRA, there is no requirement of evidence of a substantial possibility of the defendant's guilt.[184] And there are no limits on the length of detention beyond the requirements of the Speedy Trial Act and the vague limits of the Sixth Amendment. In sum, the requirements for pretrial detention under the 1984 Act only require a quick hearing with a

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177. *See* 18 U.S.C. § 3142(a) (1988).

178. *See* 18 U.S.C. § 3142(f) (1988) (providing that the "rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearings").

179. *See* Miller & Guggenheim, *supra* note 15, at 347.

180. 18 U.S.C. § 3142(f) (1988).

181. *See* 18 U.S.C. § 3142(f)(1)(A)–(E) (1988) (listing requirements for a request for detention).

182. 18 U.S.C. § 3142(e)(2) (1988).

183. S. REP. NO. 98-225, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185.

184. *See* Miller & Guggenheim, *supra* note 15, at 348 (stating that Congress expressly rejected the District of Columbia Act's requirement of evidence of a substantial possibility of the defendant's guilt).

few limited procedural protections, primarily focusing on whether the defendant's prior acts or convictions make it "necessary" to deny bail for community safety purposes.[185]

Finally, applying the seven-part test laid out by the Court in *Kennedy v. Mendoza-Martinez*[186] to determine whether an Act of Congress is penal or regulatory in character proves that the 1984 BRA, as it operates today, is fairly punitive in nature. The *Mendoza-Martinez* test has seven distinct questions to determine the character of a Congressional Act:

> [W]hether it involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter,* whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[187]

Applying *Mendoza-Martinez* to the 1984 BRA illustrates its largely punitive nature. Five out of its seven factors point to this conclusion. First, the Act involves an obvious restraint: pretrial detention. Second, detention has been traditionally regarded as a punishment in this country,[188] so much so that bail was historically required in all but the most heinous of charged crimes. Third, pretrial detention cannot promote either retribution or deterrence, because it is imposed before conviction. Fourth, the behavior to which the Act applies may be a crime, but that fact has not yet been determined, by either a jury or a judge.

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185. *See id.* at 349 (detailing the shortcomings of the act).

186. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

187. *Id.* at 168–69.

188. Two glaring exceptions to this general rule, of course, are the administrative detentions of immigration holds and continuing civil incarceration of sex offenders. *See, e.g.*, *Matter of Sanchez,* 20 I&N Dec. 223, 225 (BIA 1990) (characterizing an immigration detainer as "merely an administrative mechanism to assure that a person subject to confinement will not be released from custody until the party requesting the detainer has an opportunity to act") (citing Moody v. Daggett, 429 U.S. 78, 80 n. 2 (1976)); *see also* United States v. Comstock, 130 S. Ct. 1949 (2010) (holding that the federal civil-commitment statute authorizes the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released).

On the other hand, the Act applies with no regard to scienter, just a mere showing of probable cause by the prosecutor. This disregard for criminal intent points to a more neutral, non-punitive rationale for the Act. Moreover, it can be argued that the stated alternative purpose for pretrial detention—incapacitation—is rational, although tremendously overused. Overall, however, putting the Act through the seven *Mendoza-Martinez* questions shows that it is currently penal in character.

Despite the Act's flaws, the Supreme Court upheld the 1984 Bail Reform Act against a substantive due process facial challenge in *United States v. Salerno*.[189] Decided on narrow grounds, *Salerno* concluded that the Act was not unconstitutional in its determinations weighing the defendant's interest in liberty against the government's interest in community safety.[190] Rejecting the Southern District of New York's reasoning that our criminal justice system can only hold persons accountable for *past* actions, not anticipated future ones,[191] the *Salerno* Court found that merely detaining a person "does not inexorably lead to the conclusions that the government has imposed punishment."[192] The *Salerno* Court's conclusion was based on its belief that the regulatory goal that Congress sought to achieve in the 1984 BRA was not punishment, but public safety.[193]

The *Salerno* Court carefully noted that it was only looking at the 1984 Bail Reform Act as created by Congress, not as actually applied. As such, it reserved the right to decide the point "at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal."[194] It is possible that by doing so, the Court was signaling that it would prefer to wait and strike down a particular detention order when the defendant could show his interest in liberty outweighed the state's interest in community

189. United States v. Salerno, 481 U.S. 739, 746–51 (1987) (upholding the constitutionality of federal pretrial detention of a defendant in order to protect the community from danger).

190. *See id.* at 741 ("We hold that, as against the facial attack mounted by these respondents, the Act fully comports with constitutional requirements.").

191. *Id.* at 745.

192. *Id.* at 746.

193. *Id.* at 747.

194. *Id.* at 747 n.4.

safety.[195] Nonetheless, the *Salerno C*ourt's upholding of the Bail Reform Act struck a blow to concepts of retributive criminal justice (the belief that a wrongdoer can only be punished for crimes he or she has actually committed).

The *Salerno* Court, however, used some sleight of hand between the actual language of the 1984 Bail Reform Act and the way it justified the Act. One of the ways the Court defended the idea of pretrial detention exclusive of the risk of flight was by arguing that the government had a legitimate and compelling interest in preventing crime by arrestees.[196]

Preventing future crime, though, is a different endeavor than public safety for the community, the purported reasons behind the 1984 BRA. Although of course crime prevention does, in a very general sense, enhance public safety, few crimes are so dangerous that their very potential requires detention of a suspect. And the most dangerous of them, murder, is usually barred from bail release in any case. Nonetheless, the *Salerno* Court easily conflated future crime prevention and community safety into one amorphous concept. Moreover, as other scholars have noted, the Court evaded the BRA's underlying problem of identifying the actual circumstances that transform detention into punishment.[197]

Salerno also specifically addressed two constitutional claims involving the Fifth and Eighth Amendments, quickly dismissing them both.[198] Regarding the Fifth Amendment substantive due process claim—that pretrial detention constituted impermissible punishment before trial[199]—the Court held that because the

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195. *See* Miller & Guggenheim, *supra* note 15, at 351 ("[T]he Court would likely prefer instead to wait and declare unconstitutional any particular detention order in which the defendant could show that the state's interest in community protection failed to outweigh his or her interest in liberty.").

196. *See* United States v. Salerno, 481 U.S. 739, 748–49 (1987) (stating that the government may utilize pretrial detention when its regulatory interest in community safety outweighs an individual's right to liberty and giving examples).

197. *See* Miller & Guggenheim, *supra* note 15, at 353 ("The Court avoided, however, the underlying problem of identifying circumstances that make detention punishment.").

198. *See Salerno,* 481 U.S. at 746, 751–52 (rejecting a facial challenge under the Fifth and Eighth Amendments).

199. *See id.* at 746 (summarizing respondents' argument).

legislative intent of Congress in the Bail Reform Act was not punitive, the pretrial detention was not punishment, but regulation.[200]

As for the Eighth Amendment claim—that the 1984 Bail Reform Act violated the Excessive Bail Clause because this clause grants a defendant the right to bail based solely on the considerations of flight[201]—the *Salerno* Court flatly rejected this argument, holding that nothing in the text of the Bail Clause limits bail decisions solely to questions of flight.[202] However, the *Salerno* Court did not provide any historical evidence to support this conclusion about the Eighth Amendment, simply leaving the assertion to stand alone.[203] As discussed briefly above,[204] although the specific intent of the Framers regarding bail cannot be conclusively determined, all the available evidence points to the fact that pretrial detention, both under English common law and at the time the Constitution was written, was limited to flight risks. Thus, the *Salerno* Court's rejection of the Eighth Amendment challenge on this basis is undersupported at best.

Given the changes made to the historical right to bail, our newfound reliance on preventative incarceration, and the Supreme Court's recent focus on the Sixth Amendment's jury trial right, our current pretrial detention procedures may require some substantive changes. In Part IV, I explore the problem with our current system's reliance on future dangerousness to routinely imprison indicted offenders and contend that this violates our understanding of the role of punishment as dictated by the Sixth Amendment.

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200. *Id.* at 747.

201. *See id.* at 752 (summarizing respondents' argument).

202. *Id.* at 754.

203. *Id.* at 753. The *Salerno* Court did carve out a space to decide later whether "the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail," but maintained the validity of the Bail Reform Act even then. *Id.* at 754.

204. *See supra* Part III.B.

IV. Preventative Detention, Future Dangerousness, and the Sixth Amendment

There is convincing evidence that modern-day bail and jail practices result in punishment for the indicted defendant incarcerated before trial. Although usually the underlying reasoning for the imposition of pretrial detention is not based on a punishment rationale, the consequences of such decisions are often so severe that the end results are punitive.

This punishment before conviction creates numerous problems for our current bail and jail structure. First, many offenders are denied bail based on the relatively new field of preventative detention, which is one riddled with errors, both in theory and in practice. Second, although *Salerno* has seemingly closed off both due process and Eighth Amendment attacks against the 1984 Bail Act, there have not yet been any challenges based on the Sixth Amendment ban on punishment imposed before a conviction and without a jury's imprimatur. Third, and relatedly, if we follow the dictates of the Sixth Amendment jury trial right, the community must take part if any punishment is to be imposed on an offender. Below I explore how these factors—the mistaken reliance on preventative detention, the holes left by *Salerno*, and the requirements of the Sixth Amendment—all converge to make our current pretrial detention hearings in need of reform.

A. The False Promise of Preventative Detention

In the federal system, preventative incarceration, or detaining the accused based on the potential of future crime, did not become popular until the 1984 Bail Reform Act.[205] In the last twenty years or so, many states have followed suit, allowing their criminal justice systems to detain the indicted individuals based on their future dangerousness. Both judges and academics have challenged the bases for this type of determination, however, putting the entire theory to question.

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205. 18 U.S.C. § 3142 (1988).

1. Barefoot v. Estelle

One year before Congress passed the 1984 Bail Reform Act, the Supreme Court discussed a similar issue regarding the propriety of nonjury actors determining and punishing for future dangerousness. In *Barefoot v. Estelle*,[206] the Supreme Court agreed with the lower trial court that the use of psychiatric experts to discuss the potential dangerousness of the defendant *at trial* was permissible because this type of determination was for the jury to decide: "Such disputes are within the province of the jury to resolve. Indeed, it is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters . . . ."[207] Put another way, the majority of the *Barefoot* Court underlined the importance of the community's role in deciding whether a fellow member of the public is so dangerous as to deserve incarceration on that basis. This decision, however, focused on the propriety of determining dangerousness during an actual trial, not during a pretrial detention hearing.

More important for our purposes, the dissent in *Barefoot* highlighted the role of the jury as the proper arbiter of decisions involving a defendant's incarceration. Penned by Justice Marshall, the dissent noted that psychiatrists and other experts might actually be "less accurate predictors of future violence than laymen,"[208] in part because the lay public lacks a personal bias leaning towards predicting violence, which can arise from being responsible for the erroneous release of a violent individual.[209] If this is true for psychiatric experts, it is also likely to be true for magistrates and trial judges, especially those state court judges who must submit to the pressures of periodic re-election.

The dissent also focused on a key critique that applies widely to all determinations of potential future dangerousness: the

206. *See* Barefoot v. Estelle, 463 U.S. 880, 903 (1983) (finding that "[e]xpert testimony, whether in the form of an opinion based on hypothetical questions or otherwise, is commonly admitted as evidence where it might help the factfinder do its assigned job").

207. *Id.*

208. *Id.* at 922 n.4 (Marshall, J., dissenting).

209. *Id.* at 922 n.4.

general unreliability of these predictions.[210] Citing several studies, the dissent pointed out that long-term prediction of future violence by psychiatrists continues to be extremely inaccurate.[211] This is due in part to the difficulty of identifying any sub-class of offenders who have a greater than fifty-fifty chance of re-engaging in assaultive conduct,[212] the conduct with which future dangerousness is most concerned. Indeed, a ninety percent error rate is common.[213]

All these concerns are focused, of course, on testimony given to the jury by expert psychiatric witnesses during an actual trial. How much more unreliable are those hasty predictions by an untrained magistrate or trial judge, determining future dangerousness of a person who has not yet been convicted? At the minimum, the incarceration of an accused individual due to his potential to commit more crimes should be based on stronger science than gut feelings or past conduct, and should admit some aspect of community participation.

2. Preventative Detention's Binary Nature

The unreliability of accurately determining future dangerousness, however, is not the only problem with current imposition of pretrial detention. As other scholars have argued, our present pretrial detention model is extremely binary, refusing to account for gray areas.[214] Gray areas, however, repeatedly occur in determining eligibility for pretrial release: "[A] binary model requires a decision maker to round off the evidence and

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210. *See id.* at 920 (discussing how "'the unreliability of . . . predictions of long-term future dangerousness is by now an established fact within the profession,'" and noting that "two out of three predictions of long-term future violence made by psychiatrists are wrong" (citing Brief for American Psychiatric Association as Amicus Curiae Supporting Petitioner at 12, 463 U.S. 880 (1983) (No. 82–6080))).

211. *Id.* at 920.

212. *Id.* (citing Wenk, Robinson & Smith, *Can Violence Be Predicted?*, 18 CRIME & DELINQ. 393, 394 (1972)).

213. *Id.* at 921 n.2.

214. *See* Jack F. Williams, *Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325, 327 (1994) ("The prevalence of pretrial detention is largely a function of our bivalent system of law . . . .").

confine the case to total truth or no-truth to make a decision."[215] Accordingly, our current bail system fails to account for the varying degrees of detainability, dangerousness, and culpability that indicted offenders present.[216]

Due to the limitations of the binary model, many of the judicial determinations that lead to pretrial detention are overly harsh or punitive.[217] This is especially true when it comes to predicting future dangerousness. Neither experts nor courts have had much success in accurately determining if and when an offender might commit more crimes.[218] Granted, there have been some more recent studies that have provided a far better prediction rate than the older evidence.[219] Despite the existence of such new predictive materials, however, many harmless defendants are still unfairly detained as dangerous based on old or outdated beliefs.[220]

The term *dangerous* itself can be quite vague when it comes to detaining pretrial defendants. The 1984 Bail Reform Act failed to define the term at all.[221] Thus the idea of determining dangerousness to the community is an incredibly broad concept, which could encompass almost anything, from physical danger to conspiracy. The problem with this imprecision of terminology is that accurately determining dangerousness requires a narrow focus, which the determination of bail so notably lacks.

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215. *Id.*

216. *Id.* at 327–28.

217. *See id.* at 327 (criticizing the binary model for its inability to take into account "partial degrees of truth").

218. *See* Barefoot v. Estelle, 463 U.S. 880, 919–22 (Marshall, J., dissenting) (emphasizing this problem with the current system); *See also* Joseph J. Cocozza & Henry J. Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence,* 29 RUTGERS L. REV. 1084, 1097 (1976) (finding "dangerous" patients no more so than nondangerous patients); John Monahan, *The Prediction of Violent Behavior: Toward a Second Generation of Theory and Policy,* 141 AM. J. PSYCHIATRY 10 (1984) (arguing that dangerousness predictions are wrong approximately 95% of the time).

219. *See generally* Baradaran & McIntyre, *Predicting Violence*, *supra* note 15, *passim*.

220. *See, e.g.*, MICHAEL R. GOTTFREDSON & DON M. GOTTFREDSON, DECISIONMAKING IN CRIMINAL JUSTICE: TOWARDS THE RATIONAL EXERCISE OF DISCRETION 122–27 (1980) (articulating reasons that predictions of dangerousness for indicted offenders are often unreliable).

221. *See* 18 U.S.C. § 3142(e)–(g) (2006) (failing to define the term).

All of this imprecision means that judging future dangerousness within our current pretrial detention scheme can be quite arbitrary. Forcing a black or white decision onto a mass of gray evidence (particularly since it is evidence that has not yet been proven beyond a reasonable doubt) makes many bail hearings unreliable and inconsistent.

3. Adjudicating Dangerousness

The problems with determining future dangerousness, however, do not end there. Even if future dangerousness can be accurately predicted, should that necessarily mean that dangerousness should always equal detention and punishment?

Although the question of dangerousness has been widely discussed in terms of sentencing, the scholarly exploration of the topic, both procedurally and jurisprudentially, has been rather limited as applied to pretrial detention. It is this gap that I aim to fill.

Norval Morris famously addressed using predictions of future behavior to determine whether a criminal should be imprisoned after conviction.[222] As he noted, "as a matter of justice we should never take power over the convicted criminal on the basis of unreliable predictions of his dangerousness."[223] Morris was concerned that dangerousness was so expansive a concept that "the punitively minded" would use it to classify all offenders, deserving or not.[224]

Moreover, as other scholars have observed, dangerousness is "peculiarly seductive" because it can be ascribed as a personal characteristic of the offender, not a judicial imposition.[225] And when dangerousness is seen as a personal trait, it leads to confusion between the determination of dangerousness and the determination of desert, when both usually animate the reasons underlying punishment.[226] Likewise, Andrew von Hirsch has

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222. *See generally* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (1974).

223. *Id.* at 73.

224. *Id.* at 72.

225. *See* Franklin E. Zimring & Gordon Hawkins, *Dangerousness and Criminal Justice*, 85 MICH. L. REV. 481, 492 (1986).

226. *Id.*

argued that the moral argument against predictive detention "is that it is not deserved. This objection stands even were the prediction of future criminality accurate."[227]

If all these objections exist for the convicted defendant, how much more do they resonate for the offender who is only indicted? In 1968, before the passage of the 1986 Bail Reform Act, the American Bar Association rejected pretrial preventative detention, even for "dangerous" offenders, because too little was known about the actual need for this type of detention and of the predictive techniques used.[228] Although this ship has clearly sailed, the theoretical issues still remain.

Whether one's take on desert is animated by limits, proportionality, or by the parity principle, the theory of desert is simply inapplicable to pretrial detention because no determination of crime has yet been made. Predictive dangerousness, when not based on accurate, up-to-date empirical evidence, has no place in any rational system of retributive justice, and yet it is a commonplace determination in American bail hearings, where it seems least appropriate.

Although the Supreme Court in *Salerno* rejected both the procedural[229] and substantive[230] due process claims, it failed to discuss the more theoretical problems with judging future dangerousness. The *Salerno* Court took for granted that dangerousness is a fixed term with a fixed meaning, as opposed to its actual amorphous nature, difficult to chart or pin down. As such, it is truly inappropriate for use at the pretrial detention hearing, at which judges have neither the time nor the

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227. ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENT 125 (1976). Granted, von Hirsch admits a small fraction of offenders should be confined by preventative detention, including those who have extensive violent records and who were convicted of serious assault crimes. *Id.* at 125–26.

228. *See* Zimring & Hawkins, *Dangerousness and Criminal Justice*, *supra* note 225, at 496 n.28 (citing ABA Standards Relating to Pretrial Release § 5.5 commentary at 69 (1968)).

229. *See* United States v. Salerno, 481 U.S. 739, 755 (1987) (holding that "the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception").

230. *See id.* at 750–51 (rejecting the claim that an individual's right to liberty always outweighs the government's interest in protecting the community).

inclination to theorize about how desert might be applied to offenders who have not yet been convicted.[231]

This uncertainly and ambiguity of standards in pretrial detention matters because determining dangerousness is a central preoccupation of the criminal justice system.[232] In part because of this, the reliability of preventative detention is a hotly debated topic. As Christopher Slobogin has noted, there is a two-part challenge to the reliability of predictive dangerousness: (1) persons should not be denied liberty on dangerousness grounds unless there is a high degree of certainty that the person will offend in the near future; and (2) this sort of proof of dangerousness is nearly impossible to obtain.[233] Responses to these concerns have included the charge that even proof beyond a reasonable doubt has its own unreliabilities as an indicator of culpability and predictor of future dangerousness.[234]

For example, the *Barefoot* Court held that the inconsistencies inherent in predicting future dangerousness, even in regards to the death penalty, are largely eradicated by the adversarial process, which usually exposes erroneous views.[235] As the

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231. As Dan Markel and Eric Miller noted in an op-ed for the New York Times, "state and municipal judges, who handle the overwhelming number of criminal cases, face less public scrutiny than federal judges," and thus worry less about the social repercussions of pretrial detention. Dan Markel & Eric Miller, Op-Ed., *Bowling, as Bail Condition*, N. Y. TIMES, July 14, 2012, at A17.

232. *See* Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 2 (2003) (stating that dangerousness assessments play a role in "death penalty determinations, non-capital sentencing, sexual predator commitment, civil commitment, pretrial detention, and investigative stops by the police").

233. *Id.* at 3.

234. *See id.* at 7–8. As Slobogin explains in greater detail:

> First, imposition of the reasonable doubt standard [for predictive detention] is overly stringent when the state's goal is to prevent rather than to punish. Second, the belief that the criminal law permits conviction only when there is no reasonable doubt about blameworthiness is based on a misconception about the reliability of assessments made in criminal cases; in fact, the culpability determinations that provide the primary basis for criminal punishment are subject to serious inaccuracy. Third, requiring a high degree of danger is inconsistent with the fact that many of the crimes that penalize dangerous activity require very little in the way of predictive validity.

Id. at 6–7.

235. *See* Barefoot v. Estelle, 463 U.S. 880, 901 (1983).

argument goes, if we can rely on the shaky credibility of predictive dangerousness to justify an execution, how could it not justify regular pretrial detention, where no life is lost?

The answer, of course, is specific to pretrial detention. First, there is no adversarial contest in the typical pretrial detention hearing, as there is no right to appointed counsel during bail determination. As the vast majority of those detained without bail are those who cannot afford counsel on their own, it is rare to see defense counsel appear at these hearings.[236] Accordingly, the prosecutor usually presents her reasons why the indicted offender should not be granted bail, with no response by the defense, and the judge decides.

Second, there is a large difference between assessing future dangerousness for a convicted offender, who is subject to punishment of some kind, and assessing the same for someone who has not even been subject to conviction. Taking away the liberty of a person convicted beyond a reasonable doubt (or who has admitted his or her guilt) is a far more acceptable matter than imprisoning someone whose very guilt is still in doubt.

Finally, as Paul Robinson has convincingly argued, "[i]t is impossible to punish for dangerousness."[237] This is because, in both theory and actuality, deserved punishment can only exist in relation to actual wrongs done, not potential or imagined future wrongs.[238] In other words, "one can restrain, contain, or incapacitate a dangerous person, but one cannot logically punish dangerousness."[239] Thus it is not only unfair but theoretically unsound to punish indicted offenders with pretrial detention for

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236. Although in *DeWolfe v. Richmond*, No. 34, Sept. Term, 2011, 2012 WL 10853 (Md. Ct. Spec. App. Jan. 3, 2012), the Maryland Court of Appeals recently attempted to require counsel for all pretrial detainees, in April 2012 the Maryland Legislature amended the public defender statute to remove the right to counsel at commissioner hearings but mandated counsel at the initial judicial bail review. *See* Maryland Public Defender Act, MD. CODE ANN., CRIM. PROC. §§ 16-101 to -403; *see also* Paul DeWolfe, *Reducing Pretrial Detention in Maryland*, Audacious Ideas (Apr. 30, 2012, 8:04 AM), http://www.audaciousideas.org/2012/04/reducing-pretrial-detention-in-maryland/ (last visited Sept. 24, 2012) (on file with the Washington and Lee Law Review).

237. Paul Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1432 (2001).

238. *Id.*

239. *Id.* at 1432.

their potential future dangerousness. Dangerousness and desert are two very different concepts,[240] and should not be conflated together in the realm of pretrial detention.

4. Empirical Evidence and National Trends

The actual work of determining dangerousness is a chancy business, filled with pitfalls and indeterminacy. To predict the dangerousness of the defendant, courts tend to analyze the nature of the charged crime and combine this information with their knowledge of his or her past conduct.[241] The court then adds to this assessment its own determination of the accused's circumstances and character.[242] In many states, a more subjective judicial assessment permits courts to consider the totality of the defendant's circumstances and character.[243] This aspect of determining dangerousness, then, is highly influenced by the court's personal feelings and quirks. Despite the claim for scientific accuracy, the determination of dangerousness is far more based on subjectivity than objective factors.

As a whole, predicting pretrial crime is a dubious science.[244] In fact, our assumptions about who might be mostly likely to reoffend before trial are often not borne out. For example, as demonstrated by one of the few large empirical studies done on defendants released before their trials, those charged with violent crimes are *not* necessarily more likely to be rearrested pretrial.[245]

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240. *Id.* at 1438.

241. *See* Baradaran & McIntyre, *supra* note 15, at 508–10. As Baradaran and McIntyre show, there are five states that allow for an even deeper look into a defendant's background by allowing judges to factor the defendant's past conduct into their determination. *Id.* at 511.

242. *See id.* (noting that this factor is much broader to allow for judicial discretion).

243. *See id.* at 510. As the authors note, some state statutes include a list of factors with an "including but not limited to" clause, or permit judicial officers to consider "any other factor" relevant to making a determination of dangerousness. *Id.* at 511.

244. *Id.* at 523.

245. *See id.* at 528. As the authors point out:

> The highest rearrest rates pretrial are for defendants charged with drug sales or robbery (21%), followed by motor vehicle theft (20%), and burglary (19%). Those released who are charged with the 'more

Nationally, 16% of defendants released on bail are rearrested for any reason, and 11% are rearrested for a felony.[246] Particularly important for our purposes, only 1.9% of all defendants released on bail before trial are rearrested for a violent felony.[247] Thus, one prong of the furor over "dangerous" indicted defendants is blunted; if only a tiny percentage of all defendants released on bail go on to reoffend with violent crimes, then perhaps our fear over the danger posed by the pretrial defendant to the community is overblown.

Moreover, this same study shows that those charged with violent crimes are *not* necessarily more likely to be rearrested pretrial.[248] Critically, the research done by Baradaran and McIntyre illustrates that although those defendants charged with violent crimes have the highest likelihood of being rearrested on bail, there is still huge variation in how dangerous these violent crime defendants can be, depending on the specific crime charged.[249] Thus, simply being charged with a violent crime does not automatically create a presumption of dangerousness as many courts believe. Ultimately, despite the large variety of assessments of pretrial "dangerousness," the defendants granted bail before trial are often far less threatening to public safety than most people would anticipate.[250]

Interestingly, the greatest predictor for future pretrial crime, dangerous or not, is the existence of past arrests.[251] It is

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> dangerous crimes,' such as murder, rape, and felony assault, have much overall lower rates of pretrial rearrest at 12%, 9% and 12% respectively.

Id.

246. *See id.* at 527.

247. *See id.*

248. *See id.* Granted, those charged with violent crimes are more likely to be rearrested for violent crimes on release. *See id.*

249. *See id.* at 528. For example, those defendants charged with murder have a 6.4% violent crime rearrest rate, one of the highest. Similarly, those defendants charged with robbery have a 5.8% chance of rearrest for violent crime, those defendants charged with rape at 3.2% chance of rearrest for violent crime, and those defendants charged with assault reoffend at a rate of 2.9%. *See id.* at 528–29.

250. *See id.* at 529.

251. *See id.* at 536 ("A person's number of previous arrests is a large predictor of future rearrest; however, whether or not that prior arrest turned into a conviction is largely irrelevant as an additional predictor.").

important to note that analysis of prior convictions shows that even defendants with multiple prior convictions are still unlikely to be rearrested for a new violent crime while on release.[252]

This information can help us find a better way of predicting "dangerousness" than our current fumbling in the dark. The charged crime, by itself, is a poor predictor of a threat to the community, except for the most violent ones (such as murder, which usually is statutorily prevented from bail release in any case). The existence of multiple past convictions for similar crime seems to have the most predictive effect, although even those pretrial recidivism rates are low.

Accordingly, relying on our current system of judicial and prosecutorial decision-making regarding pretrial release—which relies primarily on the charged crime—is not only unfair, but largely ineffective. And considering that roughly 62% of the overall jail population consists of pretrial detainees,[253] these decisions make a huge difference. Accordingly, if we are going to continue to use predictions of future dangerousness to determine the imposition of pretrial detention, as is likely, we should at least provide courts with the best and latest empirical evidence on the subject.

Finally, on the broadest level, post-9/11 case law has also raised important questions about the permissible scope of all pretrial confinement.[254] Do the 9/11 detainee cases affect the law governing other detainees, whether held in state or in federal custody, either before or after conviction?[255] At least one prominent scholar has answered the question affirmatively,

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252. *See id.* (finding that only 5% of all defendants have more than a 5% chance of being rearrested on a violent felony charge when released on bail).

253. *See id.* at 37 (finding that in 2007, 62% of the overall jail population consisted of pretrial detainees).

254. *See* Judith Resnik, *Detention, the War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan,* 110 COLUM. L. REV. 579, 586 (2010) ("The 9/11 case law has prompted diverse assessments, with arguments that the judiciary has done too much, or too little, or left unanswered important questions about the permissible scope of executive detention and surveillance powers.").

255. *See id.* at 583. Resnik points out that "As [Henry] Monaghan noted, these questions are at the core of the shifting conception of federal courts jurisprudence, once preoccupied with the 'relationship between state and federal law' and the sometimes 'irritating difficulty' of sorting between the two kinds." *Id.* at 583 n.19. These issues arise with state courts as well.

arguing that the law created in addressing the extraordinary detainment of prisoners in Guantanamo Bay is "continuous with judicial responses to the central challenges, faced daily, by governments trying to maintain peace and security and, hence, incapacitating some individuals feared likely to inflict grave harm to the social order."[256] This is because the criminal justice system has always had to address uncertainty about how much harm a detainee might do, whether in the context of 9/11 or of more familiar kinds of criminality and border regulation.[257]

Put another way, criminal charges range in a wide continuum from minor crimes to terrorism. In all these cases, however, the government "must still distinguish among and classify detainees to justify why a particular subset is to be confined in more restrictive conditions than others, and for longer periods of time."[258] The crimes may differ, but the determinations are still the same.

The six post-9/11 cases decided by the Supreme Court have held that the Constitution requires some procedural justice for all detainees, even those held at Guantanamo Bay.[259] Applied to pretrial detention, this conclusion signals that it is time to import some fairness and procedural justice into the bail hearing, since it is part of the same continuum of pretrial detention.

Integrating emerging 9/11 law with state and local laws governing confinement is an important task. Doing so highlights, among other things, the state's job in addressing serious challenges in securing safety, whether locally, nationally, or worldwide.[260] As Judith Resnik has pointed out, "[s]orting the dangerous from the benign is a daunting task."[261] This is particularly true because neither courts nor legislatures have

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256. *Id.* at 584.

257. *Id.* at 585. As Resnik notes, "Governments regularly desire to obtain information through intense interrogations aimed at preventing injuries and at apprehending wrongdoers, and governments regularly detain various persons. Courts in turn have, over the last several decades, ruled many times on the legality of detention and of confinement conditions." *Id.* at 584.

258. *Id.*

259. *Id*. at 581.

260. *See id.* at 587 ("[T]he state regularly faces tremendous challenges in securing safety, at both local and global levels.").

261. *Id*.

been able to come to any sort of consensus over the years regarding who should be detained and who may be freed.[262]

For example, in *Ashcroft v. Iqbal*,[263] the defendant, a Pakistani national, was detained for almost a year in the Metropolitan Detention Center in New York. Part of that time he was in solitary confinement, because of a claim that his identity papers were false.[264] Iqbal was deported to Pakistan after his period of governmental detention.[265] Iqbal sued the government for his treatment period of confinement, during which he alleged that he was subjected to cruel and inhumane conditions.[266] The *Iqbal* Court held, among other things, that courts could limit individual accountability and civil liability for the harms imposed during detention, thereby protecting those officials who were involved in such detention programs.[267] Although *Iqbal* is obviously a case that can be classified as a post-9/11 terrorism case, its disturbing lesson resonates for all pretrial detainees, and illustrates how the lack of proper bail procedures can extend to defendants both high and low.

Ultimately, similar problems plague both the general procedures of pretrial detention and the small body of 9/11 law. This includes the existence of only a tiny batch of procedural remedies instead of a more robust body of constitutional constraints in response to wide-ranging complaints of abuse.[268] The lax oversight, minimal supervision, and extreme deference to governmental decisions and jailors continue to be issues for 9/11 detainees, detained aliens on immigration holds, and indicted defendants confined in pretrial detainment. All three are held with little procedural justice due to often nebulous fears of dangerousness. All three types of experiences linger in the arena of pretrial detention.

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262. *See id.* at 588 (discussing the historical conflicts between legislature and judiciary).

263. *See* Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009) (finding that "qualified immunity . . . shields Government officials").

264. *See id.* at 667.

265. *See id.* at 668.

266. *Id.*

267. Resnik, *supra* note 254, at 633.

268. *Id.* at 635.

B. Salerno*, the 1984 Act, and the Sixth Amendment*

The problems with *Salerno* are larger than just its failure to grapple with the concept of future dangerousness. Viewed in the aftermath of the Court's subsequent decisions in the *Apprendi-Blakely* line of cases, *Salerno*'s decision that a court may incarcerate a defendant on the basis of potential danger to the community seems to contradict the spirit of the Sixth Amendment. If, as I contend, the imposition of pretrial detention in today's jails is a form of punishment, then the community must have some say in the matter. Although there have been numerous challenges to the 1984 Bail Reform Act, none have been based on the Sixth Amendment jury trial right. Below, I detail how and why such a challenge might be successful.

1. Salerno *Did Not Close the Door*

Most practitioners and scholars have concluded that the Supreme Court's decision in *Salerno* pronounced the death knell for challenges to preventative detention. This is not entirely true. The *Salerno* Court specifically noted that it was foreclosing a *facial* challenge to the 1984 Bail Reform Act,[269] not foreclosing all challenges for the future: "We hold that, as against the facial attack mounted by these respondents, the Act fully comports with constitutional requirements."[270] As such, an as-applied challenge to the 1984 Act is still entirely feasible.

The *Salerno* Court seemed to leave more than one door open to indicate its willingness to revisit its decision upholding the constitutionality of the 1984 Act. First, it began the analysis of the Act with a warning that a facial challenge to a legislative act was one of the most difficult at which to succeed, since the challenged "must establish that *no set of circumstances* exists under which the Act would be valid."[271] In other words, for the

269. As the *Salerno* Court held, "We are unwilling to say that this congressional determination . . . on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment." United States v. Salerno, 481 U.S. 739, 755 (1987).

270. *Id.* at 741.

271. *Id.* at 745 (emphasis added).

defendants to succeed in challenging the 1984 Act on facial grounds, they would have had to prove that the Bail Reform Act could never operate constitutionally.[272] The *Salerno* Court even hinted that it might be willing to find some aspect of the 1984 Bail Reform Act unconstitutional under certain circumstances, but simply not here: "The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid."[273]

Moreover, the *Salerno* Court carefully carved out space for future, as-applied challenges to the Act, noting in a footnote that they "intimate[d] no view on the validity of any aspects of the Act that are not relevant to respondents' case."[274] Although not precisely an invitation to bring an as-applied challenge, the Supreme Court certainly allowed for the future possibility.

2. Pretrial Detention as Punishment Under the 1984 BRA

Even in its rejection of the defendants' facial challenge, the *Salerno* Court carved out an exception to its holding: when pretrial detention becomes punishment. Of course, simply because a defendant is detained does not mean that he is being punished.[275] Traditionally, we look to legislative intent to determine whether a restriction on liberty, like pretrial detention, is more like punishment than like regulation.[276] Unless Congress intended on imposing punishment, whether a restriction on liberty is classified as punitive or regulatory depends on whether there is an alternative purpose related to the restriction and whether this restriction seems excessive in

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272. *Id.*

273. *Id.*

274. *Id.* at 745 n.3.

275. *See* Bell v. Wolfish, 441 U.S. 520, 537 (1979) ("Not every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense.").

276. *See* Schall v. Martin, 467 U.S. 253, 269 (1984) ("Absent a showing of an express intent to punish on the part of the State, that determination generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.'" (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963))).

relation to the original goal.[277] In *Salerno*, the Supreme Court decided that the 1984 Act, addressed facially, had a legitimate regulatory goal (preventing danger to the community) and that the incidents of pretrial detention were not excessive in relation to that regulatory goal.[278]

Whether the Act's legislative intent was regulatory or not, however, the constitutionality of the scheme is far different when the effect of pretrial detention results in punishment. The *Salerno* Court itself reserved the right to decide on the constitutionality of a situation in which "detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal."[279] This was particularly important in this case because, as a facial challenge, *Salerno* only addressed theoretical pretrial detention, not actual pretrial detention as experienced by indicted defendants.

Much of pretrial detention, whether based on fears for community safety or flight risk, has an effect virtually indistinguishable from punishment. Thus, despite *Salerno*'s decision facially upholding the 1984 Act, there is nothing precluding a court from finding pretrial detention unconstitutional under certain punitive circumstances.

3. Applying the Sixth Amendment to the BRA

Salerno rejected the facial challenge to the 1984 Act under both the Fifth and Eighth Amendments, but did not evaluate any Sixth Amendment claims. As such, there is nothing prohibiting an attack on *Salerno*'s defense of predictive dangerousness based on the argument that only a jury can make factual findings that result in the imposition of punishment on an offender.

In *Salerno,* the Court first tackled the Fifth Amendment claim, in which the defendants argued that the Act violated the substantive Due Process Clause because the pretrial detention it authorized constituted impermissible punishment.[280] The Supreme Court rejected this argument, focusing on the

277. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963).

278. United States v. Salerno, 481 U.S. 739, 747 (1987).

279. *Id.* at 747 n.4.

280. *See id.* at 746 (summarizing respondents' argument).

regulatory nature of the Act.[281] Next, the Court addressed the Eighth Amendment argument, in which the defendants argued that the Act violated the Excessive Bail Clause.[282] The defendants argued that the Excessive Bail Clause granted them a right to bail calculated solely upon considerations of flight.[283] The *Salerno* Court also rejected this argument, holding that "nothing in the text of the Bail Clause limits permissible Government consideration solely to questions of flight."[284]

Salerno, however, did not address the Sixth Amendment implications for the 1984 Act, as the defendants did not raise the issue on appeal. Additionally, a Sixth Amendment claim at the time of the *Salerno* decision, in 1986, would have been fruitless. Now, however, after the *Apprendi-Blakely* line of cases, an application of the current understanding of the Sixth Amendment jury trial right, focusing on the community's right to be the arbiter of punishment, makes more sense.

Although it did not address the issue, *Salerno* left room for the application of our more recent understanding of the Sixth Amendment. First, in its discussion of the Due Process Clause challenge, the *Salerno* Court noted that even the Government had not argued that pretrial detention could be upheld if it were punishment.[285] Second, as noted above, the Court carved out an exception for cases in which detention might become "excessively prolonged," thereby converting to punishment.[286]

In its discussion of the Eighth Amendment excessive punishment challenge, the *Salerno* Court was careful to note that its decision did not implicate the question of whether the Excessive Bail Clause affects the legislative power to delineate who might be eligible for bail.[287] In this way, the Court left room to determine whether and how pretrial detention can be punishment. It is this space that I will explore through the dimensions of the Sixth Amendment community jury trial right.

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281. *See id.* (concluding that the detention imposed by the Act is regulatory, not punitive).

282. *See id.* at 752–53 (summarizing respondents' argument).

283. *Id.*

284. *Id.*

285. *Id.* at 746.

286. *See id.* at 749 n.4.

287. *See id.* at 754.

C. Punishment, Community Rights, and Pretrial Detention

In *Blakely v. Washington*,[288] the Supreme Court held that the jury is the only body that can find facts that increase the maximum punishment for an offender.[289] Put another way, *Blakely* contended that a criminal offender must have a jury, or the local community, make the determination to impose any type of punishment.[290] Our revitalized understanding of the Sixth Amendment jury trial right applies to all aspects of our criminal justice system, from indictment to criminal fines[291] post-prison release. In fact, our Sixth Amendment constitutional guarantees should apply with more force to the pretrial stage, since at this point the offender still maintains the presumption of innocence. Yet, the spirit of the Sixth Amendment jury trial right has yet to be applied to the pretrial detention determination stage.

1. Future Dangerousness in Adversarial Context

When we apply the spirit of the Sixth Amendment jury trial right to the pretrial detention hearing, many problems with our bail procedures are illuminated. One such problem is the lack of adversarial context when determining the future dangerousness of an indicted offender. Since the adversarial process is crucial for the proper community understanding and imposition of punishment, the lack of it raises equity and possibly even constitutional concerns.

Although the 1984 Bail Reform Act does permit a federal indicted defendant the right to legal assistance, the right to cross-examine prosecution witnesses, and the right to testify and

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288. *See* Blakely v. Washington, 542 U.S. 296, 296 (2004) ("Because the facts supporting petitioner's exceptional sentence were neither admitted by petitioner nor found by a jury, the sentence violated his Sixth Amendment right to trial by jury.").

289. *Id*.

290. *See, e.g.*, United States v. Booker, 543 U.S. 220, 226 (2005) (applying *Blakely* to Federal Sentencing Guidelines, making Guidelines advisory); *Blakely*, 542 U.S. at 296.

291. *See* Southern Union v. United States, 132 S. Ct. 2344 (2012) (applying *Apprendi-Blakely* to the imposition of criminal fines).

present witnesses in her own defense,[292] the accused does not have a right to compulsory process.[293] Indeed, evidence submitted by the prosecutor may be submitted by proffer.[294] Moreover, in the states, the amount of disclosure required varies widely; some districts comport with *Brady* requirements, and some do not. Moreover, the lack of the right to *appointed* counsel at the pretrial detention stage means that the vast majority of defendants do not have any legal representation.[295]

The failure to require full disclosure of evidence by the prosecutor at the pretrial detention stage means that indicted defendants often cannot challenge the evidence presented by the Government to establish the accused's future dangerousness. Although the Supreme Court has held that the pretrial detention hearing does not generally require "the full panoply of adversary safeguards,"[296] the establishment of potential dangerousness by the government is such a questionable area that perhaps this is one aspect of the hearing that the adversary process should apply. Especially because the standard of evidence required from the prosecutor at this stage is relatively low—only probable cause[297]—it seems only fair that the accused get a greater disclosure of evidence when she is subject to potential detention based on dangerousness.

More and better disclosure of prosecutorial evidence is important to help the offender challenge the request for pretrial detention.[298] When the defense lacks knowledge of the evidence

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292. 18 U.S.C. § 3142(f) (2006).

293. Rinat Kitai-Sangero, *Due Process at the Pretrial Detention Stage—What Will Become of the Innocent?—A Call for Pretrial Discovery Rules*, 46 CRIM. L. BULL. 452, 452 (2010).

294. *Id.*

295. *But see* DeWolfe v. Richmond, No. 34, Sept. Term, 2011, 2012 WL 10853 (Md. Ct. Spec. App. Jan. 3, 2012) (mandating appointed counsel for all pretrial detainees).

296. Gerstein v. Pugh. 420 U.S. 103, 119 (1975) (stating that probable cause determination can be made using informal procedures and without an adversary hearing).

297. *See id.* at 464 (stating that "the prosecutor is only required to show probable cause that the accused has committed the offense attributed to him in addition to proving the ground of detention: obstruction of justice or dangerousness").

298. *See id.* at 465 ("Disclosure could be of paramount importance to the accused in contesting the evidence against him.").

against him, the defendant cannot properly challenge the detention request, meaningfully participate in the hearing, or refute any secret evidence because the proceeding is one-sided.[299]

This lack of adversary context and one-sided nature of the detention hearing also implicates the spirit of the Sixth Amendment jury trial right. If, as the *Apprendi-Blakely* line of cases instructs us, the community is supposed to decide all potential punishments for an offender after observing the adjudicatory process, *and* punishment is being imposed on the offender during pretrial detention, then there should be some sort of adversarial process during the detention hearing. Although a full adversarial procedure would not be feasible, a detention hearing should provide a few more procedural safeguards. At the very least, this should include the requirement of a minimum proffer of prosecutorial evidence at the hearing, proved by a standard of probable cause, in any case in which the indicted defendant might potentially be detained due to community safety concerns. Of course, for this proffer to have meaning, defense counsel would have to be provided for those indigent offenders at the hearing.

*2. Post-*Blakely*, Community as Only Arbiter of Punishment*

Of even more concern to the application of the Sixth Amendment jury trial right is the belief that the community should be the primary arbiter of punishment for all offenders. The guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury" promises a criminal offender that "all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury."[300] This interpretation of the Sixth Amendment jury trial right ultimately became law in *Blakely*.[301]

This animating principle behind *Blakely*—that the community should determine all punishment to be meted out to

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299. *Id.* at 466.

300. Apprendi v. New York, 530 U.S. 466, 499 (Scalia, J., concurring).

301. Blakely v. Washington, 542 U.S. 296, 301–02 (2004) (holding that to increase a sentence beyond the maximum suggested by the Guidelines, a jury must find the aggravating factors beyond a reasonable doubt).

the defendant—has import for not just the jury trial, but for other areas of criminal procedure too. *Blakely* applied first and foremost to sentencing, but there is no reason why it should not be applied to the pretrial detention hearing as well. This holds particularly true after the Supreme Court's recent decision in *Southern Union*, holding that any punishment rendered by the courts, including criminal fines, should have its facts determined by a jury, beyond a reasonable doubt.[302] *Southern Union* helps bolster the belief that *Blakely* is applicable to all types of criminal procedures, from the front-end to the back-end.

Recent conditions in pretrial detention centers have rendered any sort of time in them a form of punishment in addition to all the negative externalities that flow from a pretrial loss of liberty. Not only is this punishment imposed before a determination of guilt, but it is also imposed by a judge, not a jury—a violation of the Sixth Amendment jury trial right to determine facts relevant to punishment for a criminal offender. The question becomes, then, under what circumstances does the judicial determination of pretrial detention transform into punitive measures? When denial of bail results in an imposition of punishment, this might mean that the community should play a role, particularly in determinations of its own safety.

3. The Community Should Decide Danger to Itself

Considering that a very popular aspect of pretrial detention confines indicted offenders due to an alleged threat to community safety, it is ironic that this determination entirely lacks community imprimatur. In many cases, members of the community would be more familiar with who might be dangerous, particularly when it comes to nonviolent drug crimes. In contrast, a line prosecutor often has other concerns on his or her mind when determining whether an indicted offender may post bail before trial. Additionally, judges are not always part of the communities they govern, and may be more interested in uniformity (or in some cases, re-election) than individual justice. Thus there may be a true need for the community voice within

302. Southern Union Co. v. United States, 132 S. Ct. 2344 (2012).

the bail hearing procedure. The prosecutor is both technically and legally the public's representative.[303] The prosecutor's function as the people's representative, however, can be subsumed by a gradual inclination to align with the government and a desire to achieve a positive win-loss record. Too often, prosecutors have "their own agendas, both personal and administrative."[304] For prosecutors, the concepts of *public interest* or *justice* can be too diffuse and elastic to constrain them. A prosecutor's simultaneous representation of both the state and the people can get submerged in the everyday details of doing her job, particularly when the indicted offender is a high-profile defendant and there is considerable media scrutiny and pressure on the case.

Allowing some slice of the community to help determine whether the accused is truly a threat to community safety, then, makes both logical and ethical sense. First, the community often knows the offender far better than either the prosecutor or the judge, especially in a state, municipal or local forum. Despite the persistent fear of crimes perpetuated by strangers, people tend to commit most crimes within their communities.[305] As such, some representation from the community might help make the best determination as to whether the accused might pose a danger if granted bail.

Additionally, granting the community some power to determine whether pretrial detention should be imposed would also foster a feeling of participation and investment in the criminal justice system, something that many members of the public lack. Being given the opportunity to make real decisions on community safety would hopefully make these citizens, and by association, their families and friends, feel far more connected to how the criminal justice system works. Put another way, instead of envisioning the criminal justice system as a faceless, remote

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303. As the Supreme Court has noted, the prosecution's interest "is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

304. Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 49 S.M.U. L. REV. 567, 569 (1996).

305. *See* Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 508, 516 (1995) (noting that "most crime is local in nature, and consequently, the local community feels the brunt of the offense").

entity, the local public, through their participation in the pretrial detention hearing, would realize that they are part of the justice system as well. This would generally promote the legitimacy and public confidence in the justice system, something that has been lacking of late.

Finally, having the community become involved with pretrial detention determinations will result in the public's increased understanding of the criminal justice system. Particularly with high-profile cases, the current nontransparent procedures determining pretrial detention can create both disappointment and a sense of helplessness in the local community. For example, when disgraced financier Bernie Madoff was granted bail after his confession to the police, the local and international public were angered and dismayed.[306] The public's integration into the pretrial detention hearing through participation in the procedure can eliminate some of the concerns inherent in imposing pretrial detention or granting bail by exposing the public to the actual discussion and debate over individual bail determinations.

4. Laymen and Members of Community As Predictors of Danger

Having an informed segment of the community take part in pretrial detention determinations will also help the accuracy of the "future dangerousness" predictions. Currently, judges tend to use their own intuition to determine how dangerous an indicted offender might be, or they rely on a prosecutor's statement of disrupted community safety. This can result in an overprediction of future dangerousness. Naturally a prosecutor would have an interest in the defendant remaining in custody as long as

306. *See Madoff Debate: Should He Be Free on Bail?*, MSNBC.COM (Jan. 7, 2009), http://www.msnbc.msn.com/id/28540171/ns/business-us_business/t/madoff-debate-should-he-be-free-bail/ (last visited Sept. 24, 2012) (discussing how investors, editorial writers, and the general public expressed outrage regarding the granting of Madoff's bail, while prosecutors argued Madoff should be thrown behind bars because he could flee or hide his assets) (on file with the Washington and Lee Law Review); *see also* Larry Neumeister, *Bernie Madoff Escapes Jail, Judge Declines to Revoke Bail*, HUFFINGTON POST (Jan. 12, 2009), http://www.huffingtonpost.com/2009/01/12/bernie-madoff-jail-hearin_n_157049.html (last visited Sept. 24, 2012) (discussing how "[t]here is a thirst for blood that transcends just those who have been victimized") (on file with the Washington and Lee Law Review).

possible, both to ensure cooperation and to make sure no further crimes happen that might reflect negatively on the prosecutor's office itself. Although communities can also fall prey to overpredicting dangerousness, in many situations, particularly those not involving violent crime, the local public has a more nuanced view of the potential liabilities.

Judges can have a tendency to be biased in favor of predicting dangerousness, in part because they will be responsible if they erroneously release a violent individual.[307] Additionally, judges, like all experts who routinely make these types of dangerousness determinations, may also have a tendency to generalize from experiences with past offenders on bases that have few, if any, relationships to future violence.[308]

Members of the community, on the other hand, lack some of these pressures and biases. First, even if they participate in some sort of pretrial detention hearing, they would not bear any ultimate responsibility if the indicted offender were to commit another crime before trial. Equally important, the small cross-section of the public that would be involved in determining whether the accused obtained bail would not have the aforementioned tendency to generalize from prior experiences, allowing them to make the determination of pretrial detention from a fresh perspective.

5. Attacking the Problems of Race & Gender in Pretrial Detention

Like the rest of the criminal justice system, the pretrial detention procedure is rife with racial and gender-based disparities. First, people of color are disproportionately confined

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307. *See* J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 13, 22–25 (1981) (noting that psychiatrists might be less accurate predictors of future violence than laymen because of personal bias arising from fear of responsibility for erroneous release of a violent person).

308. *See* Saleem A. Shah, *Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology*, 33 AM. PSYCHOLOGIST 224, 229–30 (1978) (arguing that when prior probabilities of the outcome, or base rates, are very low, the predictions are of poor reliability). Of course, one way to combat this problem of the courts relying on intuition is to provide them with accurate empirical studies of which offenders are most likely to offender, such as that provided by Baradaran & McIntyre.

in jail, whether for pretrial detention or other reasons.[309] Recent analysis has shown that both the race and gender of an offender can have a significant effect on the likelihood of pretrial detention.[310]

For example, in federal cases, an offender's sex affected pretrial custody for both black and white offenders; pretrial detention was less likely for both black and white females than for males of their respective races.[311] Likewise, the likelihood of pretrial custody was substantially higher for black male offenders than for other offenders—twice those for white males, and over three times more likely than for black or white females.[312] The author of the study has suggested that some of this may be due to judicial stereotyping of black or male defendants as more dangerous than their white or female counterparts, particularly when dealing with drug crimes.[313] Finally, Latinos are most likely of all races to suffer the negative consequences of pretrial detention: they are most likely to have to pay bail (as opposed to being released on their own recognizance); courts tend to set them the highest bail amounts; they are least likely to be able to pay; and they are by far the least likely to be released prior to trial.[314]

Although there is no guarantee that the local community or general public would hold less prejudicial attitudes toward

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309. *See* PETTERUTI & WALSH, *supra* note 11, at 4 ("Latinos are more likely than are whites or African Americans to have to pay bail, and they have the highest bail amounts, are least likely to be able to pay, and are by far the least likely to be released prior to trial.").

310. Caasia Spohn, *Race, Sex and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 U. KAN. L. REV. 879, 893 (2009). The data analyzed in this article showed that race and gender affected pretrial detention determinations even after excluding the offender's dangerousness, community ties, financial resources, criminal history, and crime seriousness. *Id.*

311. *Id.* at 891.

312. *Id.* at 895–96.

313. *Id.* at 898–99. *See generally* Sara Steen, Rodney L. Engen & Randy R. Gainey, *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing,* 43 CRIMINOLOGY 435 (2005) (discussing their study of adult drug offenders in Washington and finding that those who most or least resemble a dangerous drug offender receive harsher or more lenient punishment, respectively).

314. PETTERUTI & WALSH, *supra* note 11, at 4.

defendants based on race or gender, in some communities, the presence of community members could make a difference in terms of expanding diversity and representation. Although strides certainly have been made to diversify the bar and the bench, the fact remains that magistrates and trial judges are primarily white[315] and defendants are often minorities.[316] In certain districts, such as the Bronx or East Los Angeles, the presence of a few community members would make some diversity that much more likely.

Additionally, the presence of representatives from historically minority communities would help make the ultimate decision to either grant bail or impose pretrial detention more understandable to the local public as well as explain how the pretrial detention decision might impact the community. Because many minority communities tend to feel alienated or distanced from the criminal justice system, the incorporation of some public representatives into the bail determination hearing would help reduce some of this distance.

V. Proposal: Reform and Revision

A. Reforming Bail Bondsmen and Pretrial Release

One problem that plagues several states is the problem of commercial bondsmen. Some states have no commercial bondsmen at all, which results in serious problems for the poor, who often cannot afford even the small amount comprising their bail. Other states have bail bondsmen who do not provide loans for small bail amounts. There are a couple of ways to solve this problem.

First, states and counties could expand and better fund their pretrial release programs, changing their general policy to one that assumes the granting of bail unless there is a serious or

315. AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES—DIVERSITY OF THE BENCH (Oct. 2009), *available at* http://www.judicialselection.us/judicial_selection/bench_diversity/index.cfm?state=.

316. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.6.0022.2011 (2011), *available at* http://www.albany.edu/sourcebook/pdf/t600222011.pdf (stating that federal prisons populations are composed of 56.8% white and 37.9% black prisoners).

violent crime involved. Pretrial release programs often allow nonviolent or low-level offenders out on bail with supervision, using GPS, ankle bracelets, and monitoring.[317] Allowing indicted offenders out on bail with the help of electronic monitoring permits them to save their jobs, pay their bills, keep their homes and see their families.[318] This would not only prevent nonviolent indicted offenders from suffering the dangers and indignities of pretrial detention, but also save counties and states thousands of dollars in incarceration costs.

However, pretrial release programs across the country are all too often fighting a futile battle with bail bond companies trying to either limit these types of programs or completely shut them down.[319] As one pretrial release program official notes, commercial bail bondsmen lobby to keep these programs as miniscule as possible, so that they do not siphon off any paying customers, even if that means thousands of inmates wait in jail at the taxpayers' expense.[320]

Thus, one way to improve the current pretrial detention system is to increase local and county pretrial supervision programs in conjunction with much broader granting of bail, combined with providing appointed counsel for all indigent defendants in bail hearings.[321] Although these services do cost money, in the long term they end up saving far more taxpayer dollars, as it is far more expensive to imprison those indicted offenders waiting for trial than to supervise them electronically at home.[322]

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317. Laura Sullivan, *Bondsman Lobby Targets Pretrial Release Programs*, NATIONAL PUBLIC RADIO (Jan. 22, 2010), http://www.npr.org/templates/story/story.php?storyId=122725849 (last visited Sept. 24, 2012) [hereinafter Sullivan, *Bondsman*] (on file with the Washington and Lee Law Review).

318. *Id.*

319. *Id.*

320. *Id.*

321. As Yale Kamisar has long argued, the bail hearing is a critical phase, deserving of effective assistance of counsel. *See, e.g.*, YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 872 n.8 (8th ed. 1994).

322. Sullivan, *Bail Burden*, *supra* note 23.

B. Revising the Bail Hearing Procedure

Some of the ills of our criminal justice systems can be traced to the dissociation between our local communities and their ability to effect change on the system. Insufficient local control is a serious issue, pervading all aspects of criminal justice. As Bill Stuntz persuasively argued,

> To the suburban voters, state legislators, and state and federal appellate judges whose decisions shape policing and punishment on city streets, criminal justice policies are mostly political symbols or legal abstractions, not questions the answers to which define neighborhood life. Decisionmakers who neither reap the benefit of good decisions nor bear the cost of bad ones tend to make bad ones. Those sad propositions explain much of the inequality in American criminal justice.[323]

This is particularly true in pretrial detention hearings, at which the question of whether an indicted defendant is released or not before his trial often rests on decisions made by remote legislators or senior district attorneys. The local community has little or no say in the matter.

But this result is neither preordained nor necessary. One way to get the community more involved in the criminal justice process—thus making them feel more invested in the system—is to invite their participation in the pretrial detention hearing, allowing them to give their opinion on whether the suspect is a true threat to community safety.

Having the community actually involved in determining what would best serve community safety, and possibly being more lenient regarding the pretrial release of indicted, low-level offenders is not such a novel idea. Various scholars have noted in the past ten years the social consequences of mass incarceration: by incarcerating too many nonviolent criminals, either before or after conviction, not only are poor and minority communities increasingly harmed by the massive scale of incarceration, but many of these nonviolent offenders do become dangerous after being exposed to violent criminals in jail or prison.[324] Thus, the

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323. William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1974 (2008).

324. *See, e.g.*, Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6

short-term decision to incarcerate pretrial offenders for purposes of "community safety" ends up backfiring on a number of levels in the long run.

However, incorporating the community into the bail hearing would have many positive results. These positive aspects include the public's increased understanding of the criminal justice system, a restoration of criminal adjudication's educative function, and a sense of investment and trust for the local community.

First, and most basically, the current bail hearing process—like so much else in the criminal justice system—functions out of sight from the average citizen. The local public has a meaningful interest in uncovering the procedures involved in denying or granting bail, especially because so many taxpayer dollars are being used to incarcerate those who have not yet been determined guilty.

Moreover, enhancing local, popular participation within an existing criminal justice institution,[325] such as the bail hearing, combines the positives of community involvement without requiring new courts or immense change in the existing system. Additionally, through citizen involvement, the "cynicism and contempt" for the criminal justice system that is invariably created by more secret proceedings will be minimized.[326] This is especially important for communities that have felt distanced and isolated by the criminal justice system; by allowing these communities to determine whether one of their own is "safe" enough to release pretrial, the local public may feel some investment or purchase into the workings of the system.

As Judith Resnik has powerfully argued, "[t]hird-party scrutiny illuminates the treatment of suspects, detainees,

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OHIO ST. J. CRIM. L. 173, 201–05 (2008) (discussing the social consequences of mass incarceration); James Forman, Jr., Book Review, 108 MICH. L. REV. 993, 999 (2010) (reviewing PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE (2009)).

325. *See* Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 363 (2005) ("The best way to introduce the community justice goal of greater citizen input into the administration of justice is not to scale up current community justice programs, but to provide for enhanced local, popular participation within existing criminal justice institutions.").

326. Kenneth Kipnis, *Plea Bargaining, A Critic's Rejoinder*, 13 LAW & SOC'Y REV. 555, 557 (1979).

prisoners, and immigrants, all reliant on government for their well-being."[327] Allowing the community to observe and participate in the routine preventative detention hearing of a domestic defendant, then, would vindicate a number of rights, including, of course, the Sixth Amendment's jury trial right. Resnik has made a similar suggestion concerning the imposition of detention on various detainees or prisoners, proposing a more audience role for the public.[328] Her comment, however, applies equally to both her proposal and mine: "[L]aw ought to oblige open decision making when confinement is at stake."[329]

Moreover, allowing a cross-section of the community to make decisions on questions of "dangerousness" along with the court would provide a less jaded sensibility to the pretrial detention determination. Although normally we defer to courts to make such decisions, having fresh eyes look at each individual situation, from a body that is not beholden to re-election or re-appointment processes, would inject both transparency and fairness into the proceedings. A bail jury, in other words, could make decisions informed by their own knowledge of the community and unburdened by judicial pressures and biases, providing a different view that could be added to the court's determination to provide the fullest range of opinion before decision-making.

This kind of open decision making—and open participation by the local public—is most likely to take place in the state court system, which processes a vast percentage of pretrial detainees in the country. As Resnik notes, "[t]he last few decades have brought attention to state courts as a font of constitutional

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327. Resnik, *supra* note 254, at 670. Although Resnik is primarily envisioning courts as this public oversight, she admits to a possible role for other third parties. As she notes, speaking of the general public's right of audience during these impositions of detention, "[e]mpowered, participatory audiences can therefore see and then debate what legal parameters ought to govern." *Id.*

328. *Id.* at 671. As Resnik argues, "law could require that some members of the public (subject to appropriate security screening) be permitted to observe decisions resulting in the long-term detention of persons, whether alleged to be terrorists, illicit migrants, or misbehaving prisoners." *Id.*

329. *Id.* This is particularly true when, as now, the Court has "repeatedly insulated the federal judiciary from addressing the merits to decide when an individual is wrongfully convicted or detained in intolerable conditions." *Id.* at 681.

jurisprudence that can be more rights-protective than federal precepts."[330] Because of this, it would be easy enough to draw from the county jury rolls to create a body of local fact finders for bail hearings, who would be selected in a manner similar to those citizens selected for the grand jury.

These "bail juries" could sit for a week or two at a time, focusing their decisions on the community safety issue; in other words, whether the indicted defendants brought before the court would be eligible for bail. If the "bail jury" deemed the defendant safe for release out into the community, perhaps using a preponderance of the evidence standard,[331] and the court had no substantive objection, then barring any true evidence of danger to the public, he or she would be released either on their own recognizance or electronically monitored until trial or guilty plea date. If the bail jury's determination differed from the judge's, then the court could call for more information from both sides to further illuminate the issue, until an agreement is reached.

C. Potential Problems

The major possible critiques of a bail jury are two-fold. First is one of history: the question of bail has always been left to the court, and not the community. Second is the cluster of concerns centering around the implementation of a bail jury, its potential costs, complexity, and delay. I address both these concerns below.

1. Lack of Historical Precedent

Since the practice of granting bail began, the traditional arbiter of detention or release has been the court. However, as discussed infra Part II, the decision of whether to detain a defendant pending trial was always left to the community—literally, as a friend or neighbor had to stand surety for the defendant and house him or her in their own residence.[332] The various rules that developed regarding bail were, as noted above,

330. *Id.* at 682.

331. Thanks to Dan Markel for flagging this issue.

332. *See* i*nfra* Part II.A.

aimed more at limiting judicial discretion than anything else—always a concern in both seventeenth-century England and colonial America. Thus even in the earliest of bail systems, the community's voice was heard.

Additionally, pretrial detention as originally configured was based only on risk of flight. There was no incarceration, at a neighbor's house or in a local jail, ever predicated on future dangerousness, or community safety. Thus, there is no historical precedent limiting the bail decision solely to the judge. On the contrary, returning some power to the community would be a return to the original bail granting practice, upon which our Constitution is based.

Moreover, the use of a bail jury meshes neatly with the recent interest in local control over local environments.[333] Various advocates of localism argue that "local governments are more responsive to the specific needs of unique communities and that local institutions can provide better and increased services."[334] These arguments parallel the one that can be made for the bail jury—that the local input is critical in implementing our criminal justice system, particularly for issues of community safety.

2. Impracticality/Cost/Delays

A second, potentially more serious, critique of the bail jury is its impracticality, both in terms of cost and delay. In these fiscally stringent times, any procedure that would add to the cost structure of the criminal justice process is viewed dubiously at best. And incorporating a bail jury into the pretrial detention hearing would potentially increase costs; although the bail jury could be drawn from the same rolls as the grand jury, the more citizens drawn, the more money needed to fund per diems, reimburse transportation costs, and pay court staff to organize such juries.

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333. *See* Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 380 (2001) (finding an "increasing insistence on and institutionalization of local control over local environment"). Schragger points out that this new localism has arisen as a response to urban disorder and the problems of urban governance. *Id.*

334. *See id.* at 381.

As noted above, however, the potential amount of savings that a properly working bail jury would provide could be vast. Even a thirty percent reduction in those incarcerated before trial could save the state thousands of dollars. And while there are no guarantees that a bail jury would be more lenient on matters of pretrial release than the traditional judicial arbiter, it is likely that a more informed body of decision makers—i.e., a cross-section of the community—might not believe that every indicted offender is a threat to public safety.

As for delays, it is possible that the incorporation of the bail jury would slow down the pretrial detention somewhat. But that is not necessarily a bad thing. Part of the problem with our current bail hearings is the speed at which these critical determinations happen. Since there is no right to appointed counsel at a bail hearing, often they are very fast, as the prosecutor presents evidence regarding defendant's incarceration and the court makes a decision. Reducing the haste of the process might also ensure that both the court and the prosecutor take the process more seriously; since the bail jury will not be criminal justice insiders, they will likely focus on each individual case more intensely, and require the prosecutor to more fully explain her reasoning for denying bail. The court, too, may spend more time on the decision, as it will need to incorporate the bail jury's decision into its own. Thus, the delay in imposing pretrial detention or granting bail might be a positive one, opening up the procedure to some much needed sunshine and scrutiny.

Although the bail jury does not tidily solve all of the problems of our framework of bail and jail, it provides a partial solution to some of the glaring inequities of pretrial detention.

VI. Conclusion

Reform is desperately needed in the realm of pretrial detention to remove it from the Shadowlands of justice. As Resnik has persuasively argued, in protecting and preserving rights, "Article III judges—the exemplars of independent jurists—can never be enough."[335] This is equally true for state court judges

335. Resnik, *supra* note 254, at 685. As Resnik argues, "[a]s the constitutional law of detention makes painfully clear, if American law is to

and magistrates, many of whom are at the mercy of re-election cycles, overwhelming caseloads, and restrictive statutes.

Although there is no one perfect solution, the use of a bail jury, combined with increasing monitored pretrial release, would begin to solve both constitutional and procedural problems. First, the bail jury would help ameliorate the Sixth Amendment issue, allowing the community a chance to help decide any pretrial punishment imposed on indicted offenders. Additionally, giving local citizens a say in who is released back into their community has a practical aspect to it; instead of having the prosecutor and the judge, both representatives of the government, be the only ones to determine community safety, it makes sense to have some input from the very community that the government is trying to protect. Second, the addition of increased electronic monitoring of those offenders released before trial would be a relatively easy, cost-effective way to permit those accused who either cannot afford to make bail or about whom the community or judge still have some reservations to escape remaining in jail until their trial.

As both a practical measure and a fundamental matter of constitutional fidelity, the people should be involved in the machinations of criminal punishment. This includes the procedures that happen before trial. Our current system of pretrial detention lies in shambles, incarcerating those not yet convicted in punitive conditions often far worse than those existing in prisons. Allowing the community a say in the matter and broadening the ambit of those who can be released pretrial is one way to shine light into the darkness.

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cherish human dignity, it will be because more than life-tenured judges make it do so." *Id*.