

Early draft. Apologies for neglected sources and footnotes (I need to add much more!). I wanted to sketch out the full argument for your feedback. Thanks for reading! Kim

Why Credit Time Served?

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“Fifty dollars plus time served.” It was a refrain heard weekly during the 80’s. Before *Law and Order*, and every *CSI*, there was a quirky comedy with heart and grit. And the judge of *Night Court*—Harry T. Stone—consistently imposed one sentence: fifty dollars plus time served.¹ It seemed to be as commonplace as a cop show with Miranda warnings.

And indeed, credit for time served is commonplace. Throughout the United States, almost a half a million defendants are detained pretrial each year.² If the defendant is convicted, every state, as well as the federal government, will credit this period of pre-trial incarceration toward the post-conviction sentence.³ This conversion of confinement that the Supreme Court has repeatedly concluded *is not* punishment into credit *for* punishment is curious.⁴ Only two scholars have focused on this phenomenon, with one commentator calling it the “mystery of credit for time served” and the other arguing that our legal system allows for “time transformations.”⁵

Both commentators, however, began with the premise that giving credit for time served is a practice we should keep. But what happens if we question this practice? If we are fully justified in detaining someone, why is it that she would get to double count this detention at a later point? Perhaps we should solve the mystery, deny the transformation, and dump the practice. At the very least, we should not take an existing practice in the criminal justice system as normatively required.

The timing of this Article may seem amiss. Aren’t we questioning our carceral impulses at the moment? From the broad strokes of abolitionism to sweeping bail reform, now is the moment when we are asking whether incarceration should be abandoned or curtailed. And yet, it seems this Article aims

¹ [Night Court \(TV Series 1984–1992\) - IMDb](#); [Night Court \(TV Series 1984–1992\) - Harry Anderson as Judge Harry T. Stone - IMDb](#)

² 480,700 inmates in local jails are held for court action in 2019. [Jail Inmates in 2019 \(ojp.gov\)](#). Covid did decrease these counts in 2020. [Impact of COVID-19 on the Local Jail Population, January-June 2020 \(ojp.gov\)](#)

³ See *infra* Section XXX.

⁴ Salerno, pretrial detention is not punishment. *Bell v. Wolfish*, not punishment.

⁵ Kolber; Donelson.

to do just the opposite. It seems to suggest that we should ask the question whether ought to keep people incarcerated for longer periods of time.

However, analyzing the workings of time served reveals that all scholars should be concerned with the practice. Egalitarians, who seek to use time served to equalize the overall detention of rich defendants released on bail and poor defendants who are detained, should be deeply troubled that poor innocent defendants have no recourse under the time served model. Expressivists, who take punishment to serve a particular condemnatory function, should bemoan the conflation of pretrial *prevention* and postconviction *punishment*. Law and economics scholars should question the incentive effects that time served creates, as it does not require the state to internalize the costs of its unjustified detentions. Retributivists and other deontologists should condemn various implications, including that current practices unjustly detain innocent people, induce pleas that turn the innocent into the guilty, and potentially under punish those who actually have no complaint against their legitimate detentions. No matter how you look at it, credit for time served may be enabling perversity in the system.

This Article's contribution is threefold. First, it refines our thinking about pretrial detention, pushing us to more fully articulate our detention rationales. Second, in clearly delineating various detention rationales, it offers a decidedly nonconsequentialist approach to detention. For too long cost-benefit analysis has dominated the detention literature,⁶ but approaching detention as tradeoffs is a recipe for sacrificing the individual for the greater good. This approach reveals precisely how many of our detentions may actually be unjust. Third, it offers a theoretical framework in which to analyze the various functions of credit for time served, thus revealing that our practices are messy and confused and admit of no one clear rationale or function. Ultimately, this Article demonstrates how we have used time served as a safety valve for unjustified practices, leading to an approach that is grossly over and under inclusive. This safety valve is a poor substitute for the kind of widespread pretrial detention reform necessary.

This Article proceeds in four parts. Part I articulates the legal standards and scholarly criticism of pretrial detention and also sets forth the law for crediting time served, including the argument that time served is constitutionally required in some cases. Part II looks beyond the legal standards, asking why it is that we are entitled to detain individuals who might flee, obstruct, or be dangerous, and also suggests ways in which our current standards may be overinclusive or otherwise unjustifiable. Part III then asks

⁶ Cf Yang, *Toward an Optimal Bail System*, at 1405 ("Notably, these objective of the bail system would naturally arise from a standard, utilitarian social welfare function.... Thus, a cost-benefit approach is particularly appropriate in the pre-trial context....").

whether these various justifications support or undermine credit for time served and examines the specific arguments necessary to connect the dots from detention to later credit. After finding little normative justification for time served when pretrial detention is truly justified, Part IV demonstrates that theorists of all perspectives should be deeply troubled by our current practices. Criminal law may be trying to balance its books by crediting some defendants, but at the end of the day, our system's unjust practices leave it heavily in debt.

I. Pretrial Detention and Time Served: The Legal Framework

If the defendant is denied bail or if he cannot afford to pay bail, he will be detained pretrial. Upon later conviction, this time spent in jail may be credited against the period of incarceration the defendant would otherwise receive. To understand credit for time served, one must first understand who is detained and can receive the credit.

This Part begins by detailing the transformation of our rationale for pretrial detention through the prism of Supreme Court rulings. The purpose of pretrial detention has shifted over time, beginning with the goal of securing the defendant's appearance at trial and evolving to a view that focuses primarily on dangerousness. At each stage, the Supreme Court has blessed these changes, finding no constitutional infirmity in the detention statutes. Simultaneously, it has clarified how to understand what pretrial detention is, and currently, the Supreme Court's firm stance is that pretrial detention is not punishment.

With this general structure in place, this Part briefly surveys current frameworks for determining pretrial detention or release and discusses criticisms of our detention practices, including procedural objections to how determinations are made, substantive objections to the grounds for detention, and distributional objections to the disparate impacts on the poor and people of color. Finally, with an understanding of who is detained pretrial and why in hand, this Section turns to the law governing credit for time served. After noting such credit is available in every jurisdiction, and is mandatory in all but ##, this Section discusses ways in which some courts have held that credit for time served is constitutionally mandated, primarily as an equal protection claim that the poor should not be subject to more detention than the rich.

A. Pretrial Detention and Bail

1. Constitutionality and Characterization of Pretrial Detention

As the Supreme Court has adjudicated constitutional challenges to bail and pretrial detention, its jurisprudence in the area has importantly evolved from viewing bail's primary purpose as appearance at trial to constitutionally blessing the detention of dangerous offenders. In so doing, the Court at one point almost adopted a view that pretrial confinement was a form of punishment, before clearly and consistently taking the view that the two were completely distinct.

In 1835, the purpose of bail was appearance at trial. In *Ex Parte Milburn*,⁷ the defendant failed to appear and forfeited his bail money. He claimed that he could not then be tried for the offense, a jailable misdemeanor, for which he had forfeited bail by failing to appear because the bail forfeiture was already the punishment.⁸ The Court rejected the defendant's argument:

A recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon. It is not designed as a satisfaction for the offence, when it is forfeited and paid; but as a means of compelling the party to submit to the trial and punishment, which the law ordains for his offence.⁹

The Court is clear. The point of bail is to guarantee appearance at trial. It is not itself the punishment.

The Court then turned to pretrial detention in *Stack v. Boyle*, dismissing the habeas petition of Communists who contended that they were held by excessive bail without an individualized showing of flight risk.¹⁰ Here, too, the critical inquiry was appearance at trial. As Justice Jackson noted in his concurrence, "The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance."¹¹

Interestingly, some *dicta* treats pretrial detention (for failure to make bail) as punishment. The worry that unnecessary detention is expressed by the majority:

⁷ 304 U.S. 704 (1835).

⁸ *Id.* at 708.

⁹ *Id.* at 710.

¹⁰ 342 U.S. 1, 3-4 (1951) (dismissing habeas petition because defendants should have filed a motion to reduce bail).

¹¹ *Id.* at 9 (Jackson, J. concurring).

This traditional right to freedom before conviction permits the unhampered preparation of a defense, and *serves to prevent the infliction of punishment prior to conviction....* Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.¹²

This concern is echoed by the concurrence:

Without this conditional privilege [of granting bail], *even those wrongly accused are punished by the period of imprisonment* while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.¹³

Dangerousness became the central theme in *Carlson v. Landon*,¹⁴ in which the Court held that the prohibition on excessive bail did not mean that there was a right to bail in every case.¹⁵ In this case, non-citizens aliens were being held before potentially being deported for being members of the Communist party.¹⁶ Notably, the district judge, after indicating that he was not worried about failure to appear, stated, "I am not going to turn these people loose if they are Communists, any more than I would turn loose a deadly germ in the community."¹⁷ The Court agreed:

The refusal of bail in these cases is not arbitrary or capricious or an abuse of power. There is no denial of the due process of the Fifth Amendment under circumstances where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this government.¹⁸

After Congress passed the Bail Reform Act of 1966, the Court had occasion to investigate the conditions of pretrial detention in *Bell v. Wolfish*.¹⁹ There, the Court reversed the district and appellate courts, both of which found the conditions of confinement unconstitutional.²⁰ Importantly, the court noted that pretrial detention is not punishment and the conditions should not be evaluated as such: "[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."²¹

¹² *Id.* at 4 (majority opinion)(citation omitted)(emphasis added).

¹³ *Id.* at 8 (Jackson, J., concurring)(emphasis added).

¹⁴ 342 US 524 (1952).

¹⁵ *Id.* at 536-37.

¹⁶ *Id.*

¹⁷ *Id.* at 539 (J. Black, dissenting).

¹⁸ *Id.* at 542.

¹⁹ 441 US 520 (1979).

²⁰ *Id.* at 527.

²¹ *Id.* at 535.

Detention for dangerousness prior to trial was then blessed in *Schall v. Martin*, in which the Court upheld the constitutionality of juvenile detention before trial when there was a serious risk they would commit an offense.²² Whereas the Court of Appeals had found that the juveniles were detained “not for preventive purposes, but to impose punishment for unadjudicated acts,”²³ the Court claimed that “[t]he ‘legitimate and compelling state interest’ in protecting the community from crime cannot be doubted.”²⁴ This detention, concluded the Court, was not punishment.²⁵

The Supreme Court upheld the constitutionality of the Bail Reform Act of 1984 in *U.S. v. Salerno* against a facial attack that the statute violated substantive due process.²⁶ Again, the focus was dangerousness. Noting that the statute only applies to “extremely serious offenses,”²⁷ requires clear and convincing evidence²⁸ and contains numerous procedural safeguards including the right to counsel, to present witnesses, to testify, and to cross-examine,²⁹ the Court found that detention when “no release conditions ‘will reasonably assure...the safety of any other person and the community’” was constitutionally defensible.³⁰

The Court, while noting that detainees are not kept in prison,³¹ concluded that pretrial detention is regulatory, not penal.³² The Court reasoned that government has a regulatory interest in community safety, that specifically, the government’s interest in preventing crime by arrestees is both legitimate and compelling, and therefore that the individual’s liberty interest could be subordinated to the “greater needs of society.”³³

The *Salerno* case itself had interesting factual and procedural aspects. First, Salerno was the boss of the Genovese crime family and Cafaro, his co-defendant, was a captain.³⁴ Testimony and wire taps supported that they had been involved in conspiracies to commit murder.³⁵ In his dissent, Justice

²² 467 US 253 (1984).

²³ *Id.* at 262 (citations omitted).

²⁴ *Id.* at 264.

²⁵ *Id.* at 271.

²⁶ *U.S. v. Salerno*, 481 U.S. 739, 741 (1987).

²⁷ *Id.* at 750

²⁸ *Id.* at 742.

²⁹ *Id.* at 742.

³⁰ *Id.* at 741.

³¹ *Id.* at 748. There is a question whether current practice undercuts this assessment. Jails are sometimes worse than prisons. [Sacramento County Jails Struggle With Long-Term Inmates | The Marshall Project](#). Nevertheless, *Bell v. Wolfish* and *Salerno* combined are unlikely to yield that current conditions render pretrial detention unconstitutional.

³² *Id.* at 747.

³³ *Id.* at 748-51.

³⁴ *Id.* at 743.

³⁵ *Id.* at 743.

Marshall notes that Salerno’s claim was technically moot as Salerno had already, in a jury trial unrelated to the pretrial detention before the Court, been found guilty and sentenced to 100 years’ imprisonment.³⁶ Still, though these facts may undermine the Court’s taking this case, they also exhibit a compelling case for dangerousness. This is not a random felon about whom a court is predicting that he might commit some other offense. Salerno was the head of a criminal enterprise. Crime was his business. And, thus, the likelihood that he would commit further offenses upon release seemed extraordinarily likely.

In summary, the purpose of pretrial detention has evolved over time, and the Supreme Court has upheld the constitutionality of these purposes. Though interventions were once about appearance at trial, they now focus far more on dangerousness. Moreover, detentions, for dangerousness or for guaranteeing appearance, are definitively not punishment in the eyes of the Court.

2. Current Frameworks

The Bail Reform Act of 1984 provides a number of options for the treatment of defendants pending trial. Unless the “judicial officer determines that [release on personal recognizance] will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community,” the court “shall order” the release the defendant on his own recognizance.³⁷ The court can release but impose the least restrictive conditions to assure appearance and nondangerousness,³⁸ including for example, maintaining employment,³⁹ complying with a curfew,⁴⁰ or undergoing drug treatment.⁴¹ These conditions can include the execution of a bail bond.⁴² Detention is authorized based on a serious risk of flight,⁴³ a serious risk of obstruction,⁴⁴ or dangerousness.⁴⁵ In determining whether detention is authorized for these reasons, the court considers the nature of the crime charged, the weight of the evidence, the defendant’s character and community ties, the defendant’s legal status (such as on probation) at the time of the arrest, and “the nature and

³⁶ *Id.* at 756 (Marshall, dissenting).

³⁷ 18 U.S.C. § 3142(a)(1). The release is subject to not committing another criminal offense and cooperating with giving a DNA sample. *Id.* § 3142(b).

³⁸ *Id.* § 3142(a)(2).

³⁹ *Id.* § 3142(c)(1)(B)(ii).

⁴⁰ *Id.* § 3142(c)(1)(B)(vii).

⁴¹ *Id.* § 3142(c)(1)(B)(x).

⁴² *Id.* § 3142(c)(1)(B)(xii).

⁴³ *Id.* § 3142(f)(2)(A).

⁴⁴ *Id.* § 3142(f)(2)(B).

⁴⁵ *Id.* § 3142(f)(1).

seriousness of the danger to any person or the community that would be posed by the person's release."⁴⁶

Many state statutes look to the same factors as the federal model,⁴⁷ including the District of Columbia,⁴⁸ ... [add]

However rigorous these rules may appear to be, they result in a significant number of detentions.⁴⁹ Scholars have argued that in practice "trial court judges have virtually unlimited legal discretion in determining the amount of bail."⁵⁰ Christine S. Scott-Hayward and Henry F. Fradella's review of various studies found that "the two most important factors, those that best predict the bail decision, are (1) the seriousness of the charged offense and (2) the defendant's criminal history."⁵¹ The decisions are not typically individualized to take into account the defendant's ability to pay.⁵²

3. Critiques of Bail and Pretrial Detention

Our use of money bail and pretrial detention is prevalent. Sandy Mayson notes, "[S]ince 1990, both pretrial detention rates and the use of money bail have risen steeply; it is likely that we now detain millions of people each year for their inability to post even small amounts of bail."⁵³ Who is released prior to trial on felony charges is highly variable. As Shima Baradaran-Baughman observes, "Some counties report as low as a 30 percent release rate, and others release up to 90 percent of those arrested."⁵⁴

There is significant scholarly criticism of our bail and detention practices—procedurally, substantively, and distributionally. Procedurally, some scholars object that the use of the pending

⁴⁶ *Id.* § 3142(g).

⁴⁷ (BB25 says many states followed feds on this) [Check]

⁴⁸ DC Code 23-1322.

⁴⁹ BB26 says that in 2010 over 80 percent of federal defendants were denied bail (n29, ch 1)

⁵⁰ pp 9.

⁵¹ PP 39-40. The impact can be covert; for instance, crime severity might be taken into account in the prosecutor's bail request. (PP 51 citing study).

⁵² PP 42 (citing author's previous study).

⁵³ Mayson, DD, at 507.

⁵⁴ BB61

charge is antithetical to the presumption of innocence.⁵⁵ In addition, the brevity of bail hearings is an object of complaint.⁵⁶

Substantively, scholars argue that pretrial detention causes more harm than is typically understood. Defendants who are not held pretrial have been found to have more bargaining power.⁵⁷ Detainees can lose jobs, be attacked or sexually assaulted in custody, and have their family life disrupted.⁵⁸ Third party harms also occur, such as the impact of the detainee’s absence on her children.⁵⁹ Perhaps most shockingly, “pretrial detention is the single best predictor of case outcome, even after controlling for other factors.”⁶⁰ Among other things, it pressures defendants to plead guilty because confinement is so unpleasant.⁶¹ In other words, given that the Supreme Court views itself as trading off the interests of the accused against the interests of society, the complaint here is that the Court is getting the math wrong.⁶²

Distributionally, because the rich can more easily make bail than the poor, bail essentially detains the poor.⁶³ Very few defendants are denied bail outright.⁶⁴ Some scholars have argued that we are essentially punishing poverty.⁶⁵ The outcry over the link between race, poverty, and detention had led

⁵⁵ BB 30 “Contrary to a presumption of innocence, denial of bail and liberty results in unconstitutional punishment.”

⁵⁶ PP 38.

⁵⁷ BB 3.

⁵⁸ BB 86.

⁵⁹ BB88.

⁶⁰ PP5; Heaton, Mayson, and Stevenson, at 715 (finding in empirical study of misdemeanor cases that “pretrial detention causally increases the likelihood of conviction, the likelihood of receiving a carceral sentence, the length of a carceral sentence, and the likelihood of future arrest for new crimes.”).

⁶¹ PP5.

⁶² See also Stevenson and Mayson; Yang.

⁶³ BB 1. (“Poor defendants, who have committed minor, nonviolent crimes, are held in jail before trial while rich defendants charged with serious and sometimes violent crimes are released pending trial.”) BB 2 (“[T]he story of bail is one of poverty, inequality, and haste. . . . [B]ail is the single most preventable cause of mass incarceration in America.”) Christine S. Scott-Hayward and Henry F. Fradella, *Punishing Poverty: How Bail and Pretrial Detention Fuel Inequalities in the Criminal Justice System* k5 (2019) (“In New York City, where courts use bail far less than in many jurisdictions, roughly 45,000 people are jailed each year simply because they can’t pay their court-assigned bail.”).

⁶⁴ [Felony Defendants in Large Urban Counties, 2009 - Statistical Tables \(ojp.gov\)](#) (4% defendants denied bail outright, 48% murder defendants denied bail outright).

⁶⁵ BB30—“Following this logic, there is a compelling government interest in preventing crime that is more important than an individual’s due process interest. But when an individual can be released safely with some supervision or restrictions, then incarceration is just serving as punishment and should not be required. And when there is excessive delay between arrest and trial, and thus a longer period of detention, the distinction between pretrial detention and punishment is a mere façade.”

to bail reform within some jurisdictions, and innovative workarounds in others, such as communities paying for bail.⁶⁶

We are in the third generation of bail reform. Bail reform in the 1960s was focused on inappropriately holding poor defendants.⁶⁷ Although this complaint seems to be about poverty, and not dangerousness, one objection was that bail was being set too high to meet so as to detain dangerous actors without explicitly acknowledging that fact.⁶⁸ The 1980's bail reform movement was a profound public shift, with an "unmistakable public safety focus."⁶⁹

The third generation of bail reform frequently combines the impetus to decrease reliance on money bail with the drive to increase reliance on risk assessment tools.⁷⁰ Reformers argue we should use strong indicators of probable reoffending.⁷¹ For instance, Baradaran-Baughman identifies six factors that have the greatest influence on cost of release: "(1) original arrest for a violent crime, (2) four or more prior arrests, (3) prior incarceration, (4) a prior failure to appear, (5) an active criminal justice status, and, (6) aged nineteen or younger."⁷²

⁶⁶, see Jocelyn Simonson, *Bail Nullification*, 115 Mich. L. Rev. 585 (2017).

⁶⁷ According to Goldkamp, the critiques included:

- (1) [bail practices were] arbitrary and chaotic;
- (2) that they discriminated among defendants based on their relative wealth or lack of it;
- (3) that judges abused their discretion in deciding bail and wielded bail and detention punitively or in line with other nonlegitimate purposes;
- (4) that judges used bail not only to assure the appearance of defendants in court but to detain defendants they viewed as dangerous; and
- (5) that detention before trial was tantamount to punishment prior to adjudication.

John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. Crim. L. & Criminology 1, 3 (1985).

⁶⁸ Goldkamp, 16 ("Judges traditionally have responded to public safety concerns *sub rosa*, detaining defendants by setting unaffordable bail.") As Goldkamp summarizes,

Commentators objected to preventive detention based on public safety concerns using a cash bail system for many reasons: (1) the "danger" concern was not an appropriate constitutional orientation for bail (for its only legitimate use was to insure the appearance of defendants at court); (2) the cash system allowed danger-oriented detention decisions to be made *sub rosa* with no chance for redress by the defendant; (3) preventive detention was predicated on prediction of future conduct based on inconclusive data (such as arrest records) relating to past conduct; (4) judicial selection of particular cash bail amounts by judges had no practical relationship to the dangerous proclivities of defendants; and (5) defendants detained as a result of unaffordable bail were handicapped at later judicial stages.

Goldkamp at 4 (citations omitted).

⁶⁹ Goldkamp at 6.

⁷⁰ Gouldin, DFR, 716; [Perma | www.pretrial.org](http://www.pretrial.org), 2; Gouldin, *Defining Flight Risk* 681 (There is widespread enthusiasm for the prospect of "moneyballing" pretrial decisionmaking").

⁷¹ Mayson—shift to dangerousness. "The most recent reform model envisions actuarial risk assessment as the basis for pretrial release and custody decisions. Money bail is not to be used to mitigate danger." Mayson, DD, 515.

⁷² BB90.

Renewed emphasis on risk assessment requires us to figure out the degree of risk that justifies detention.⁷³ Scholars recognize that even these dangerousness assessments are far from perfect. Baradaran notes that since “there is no perfect decision in pretrial detention, and judges are largely doing a quick uninformed cost-benefit determination in each bail decision anyway, a proper consider of these costs and benefits is in order.”⁷⁴

In the many iterations of pretrial reform, problems have been solved and new problems have arisen. Although objective risk factors are lauded for not relying on the pure discretionary decisions of individual decision makers, risk assessment tools raise issues about gender and racial equity.⁷⁵ Not only are there objections to how we are detaining, but how many we are detaining.⁷⁶ Detention is costly.⁷⁷ In other words, this third wave of bail reform may resolve some procedural problems, such as judges making gestalt-based decisions about detention, and some distributive problems, such as requiring money bail from those who cannot afford it, but there remain two highly problematic issues. First, we have yet to answer the question of where to draw the line on “dangerousness” that authorizes detention. After all, having an accurate thermometer is useless unless you know what the relevant temperature is. Second, these metrics will inevitably embed distributive inequalities, even if they are not as patently obvious as the inability to pay money bail.

Ultimately, pretrial detention is deemed questionable by scholars either because it makes it impossible for the poor to be released on bond, even for petty offenses, or because the way that courts determine flight risk or dangerousness are either lacking guidelines or are employing algorithms that replicate distributive inequities in their inputs and outputs. But this is before we even begin to dig deeper and ask why it is that appearance at trial, obstruction, or dangerousness would ever justify detention. The bottom line is that these reasons do sometimes justify detention but we will have to further inquire as to why. Before turning to the underlying normative justifications, however, let us first take a look at how the law of credit for time served intersects with millions of people who have been detained pretrial.

⁷³ Mayson, DD, 490 “The adoption of risk assessment will require stakeholders to consider what degree of risk justifies restraint, moreover, because the new statistical methodology makes the question unavoidable in a way that it was not before.”

⁷⁴ BB 91.

⁷⁵ Cf. BB 72-73 (“The fact is men are much more likely to be rearrested pretrial than women, but risk predictions tools typically leave gender out of their formula.”) BB 73 (“risk assessments can be racially inequitable by giving more weight to certain facts that, although unrelated to race per se, are racially disparate”).

⁷⁶ BB75 (detailing research that only 1.9 percent of state felony defendants released are reoffending).

⁷⁷ BB ch 5.

B. Credit for Time Served

The federal government and every state have statutes that provide for credit for time served.⁷⁸ Although many states confine this credit to actual jail or incarceration,⁷⁹ others allow other kinds of liberty restrictions to count. For instance, California's statute gives credit "when the defendant has been in custody, including, but not limited to, any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution."⁸⁰ In Delaware, Iowa, Maryland, New Jersey, North Carolina, North Dakota, and Texas being confined for psychiatric treatment counts for such credit by statute.⁸¹

Some states, and federal circuits, take credit for time served to be constitutionally required in the case of indigent defendants who were unable to make bail. The constitutional claim is most frequently

⁷⁸ United States (Federal) (18 U.S.C.A. § 3585); Alabama (Code of Ala. § 15-18-5); Alaska (Alaska Stat. § 12.55.025); Arizona (A.R.S. § 13-712); Arkansas (Arkansas Code § 5-4-404); California (Cal. Penal Code § 2900.5); Colorado (C.R.S. 18-1.3-405); Connecticut (Conn. Gen. Stat. § 18-98d; *Crawford v. Comm'r of Corr.*, 294 Conn. 165, 982 A.2d 620 (2009): In order for a petitioner to receive jail credit, he or she must request the credit and must do so at the time of sentencing); Delaware (11 Del. C. § 3901); Florida (FL ST § 921.161); Georgia (GA ST § 17-10-11); Hawaii (HI ST § 706-671); Idaho (Idaho Code § 18-309); Illinois (730 ILCS 5/5-4.5-100 (Effective to June 30, 2021)); Indiana ("Ind. Code § 35-50-6-3 (credit time classification); Ind. Code § 35-50-6-3.1 (Applicability — Credit time); Ind. Code § 35-50-6-4 (Initial assignment to credit time classification)); Iowa (IA ST § 903A.5); Kansas (KS ST 21-6615); Kentucky (KY ST § 532.120); Louisiana (Louisiana Code of Criminal Procedure Art. 880); Maine (ME ST T. 17-A § 2305); Maryland (MD CRIM PROC § 6-218); Massachusetts (MA ST 279 § 33A); Michigan (MCLS § 769.11b); Minnesota (MN ST RCRP Rule 27.03); Mississippi (MS ST § 99-19-23); Missouri (MO ST 558.031); Montana (Mont. Code 46-18-403) (only bailable offenses (to prevent inequities with indigent defendants)); Nebraska (R.R.S. Neb. § 47-503); Nevada (Nev.R.S. 176.055); New Hampshire (RSA 651-A:23); New Jersey (Rule 3:21-8); New Mexico (N.M. Stat. Ann. § 31-20-12); New York (New York Penal Law §70.30(3)); North Carolina (N.C. Gen. Stat. § 15-196.1); North Dakota (N.D. Code, § 12.1-32-02); Ohio (ORC 2967.191); Oklahoma (OK ST T. 57 § 138); Oregon (ORS § 137.320); Pennsylvania (42 Pa. Cons. Stat. § 9760); Rhode Island (R.I. Gen. Laws § 12-19-2); South Carolina (S.C. Code Ann. § 24-13-40); South Dakota (SD ST § 23A-27-18.1); Tennessee (Tenn. Code § 40-23-101); Texas (Tex. Code Crim. Proc. Art. 42.03 (2)); Utah (Utah Code Ann. § 76-3-403) (requiring good behavior and 10 days credit for every 30 days of incarceration); Virginia (Va. Code § 53.1-187); Washington (Rev. Code Wash. (ARCW) § 9.94A.505 (6)); West Virginia (WV ST § 61-11-24); Wisconsin (Wis. Stat. § 973.155); Wyoming (*Petersen v. State*, 2019, 455 P.3d 261).

⁷⁹ *Bush v. State*, 338 Ark. 772 (1999): defendant enrolled in a home detention program with electronic monitoring was not entitled to credit at sentencing.

⁸⁰ Cal. Penal Code § 2900.5

⁸¹ 11 Del. C. § 3901; IA ST § 903A.5 ("other correctional or mental facility"); MD CRIM PROC § 6-218 ("hospital, facility for persons with mental disorders"); New Jersey (Rule 3:21-8)("state hospital"); N.C. Gen. Stat. § 15-196.1 ("confinement in any State or local correctional, mental or other institution"); N.D. Code, § 12.1-32-02 ("mental institution"); Tex. Code Crim. Proc. Art. 42.03 (2) ("mental health facility"); *see also* *People v. Gravlin*, 52 Mich. App. 467, 217 N.W.2d 404 (1974): defendant confined in a mental hospital was entitled to credit for subsequent sentence; *State v. La Badie*, 1975-NMCA-032, 87 N.M. 391, 534 P.2d 483: Defendant who spent time in a mental hospital prior to sentencing was "in official confinement" and thus entitled to credit for time served at the hospital; *Marsh v. Henderson*, 221 Tenn. 42, 424 S.W.2d 193 (1968): defendant was entitled to receive credit for time spent in the maximum security unit of a state mental hospital.

grounded in the equal protection clause of the federal constitution,⁸² though courts have also endorsed double jeopardy reasoning⁸³ or relied on their own state constitutions.⁸⁴ Some jurisdictions limit their claims to when the time in pretrial confinement and the post-conviction sentence would together exceed the maximum sentence for the crime,⁸⁵ whereas other jurisdictions reason that any sentence

⁸² *State v. Sutton*, 521 P.2d 1008, 1010 (Ariz. 1974) (reasoning that a failure to credit presentence confinement to a maximum sentence amounts to a denial of equal protection required by the Fourteenth Amendment); *Smith v. State*, 508 S.W.2d 54, 57 (Ark. 1974) (reasoning that there is no rational basis for discriminating between two prisoners charged with the same crime, but one can post bond and the other cannot due to indigency, and thus denial of credit in these instances violates the Equal Protection Clause of the Fourteenth Amendment but denying applicability in this case because the defendant's pretrial detention, for a first-degree murder charge, was not due to his indigency); *In re Young*, 107 Cal. Rptr. 915, 918 (Cal. Ct. App. 1973) (finding that the disparity in length of confinement of those convicted of the same offense who are able to post bail and those who are financially unable to post bail and consequently have a presentence confinement constitutes an invidious discrimination that violates the Equal Protection clause of the Fourteenth Amendment); *MacPheat v. Mahoney*, 997 P.2d 753, 758 (Mont. 2000) ("Specifically, we hold that if the criminal defendant, for no other reason than his indigency, is unable to secure his pre-sentence freedom by posting bail, then he is entitled to good-time credit for the time he spends in the county detention facility, pre-sentence, to the same extent that the law allows good-time credit to the criminal defendant who is able to post bail and, thus, serve the entirety of his sentence in the state correctional facility."); *Mallory v. State*, 281 N.E.2d 860, 861–62 (Ohio Com. Pl. 1972) (granting credit for presentence commitment due to financial inability to post bond and reasoning that a failure to grant credit in this instance would violate the Equal Protection Clause of the Fourteenth Amendment); *State v. Green*, 524 N.W.2d 613, 615 (S.D. 1994) (holding that the Equal Protection clause of the Fourteenth Amendment requires that credit be awarded for all presentence custody resulting from indigency and inability to post bail); *Matter of Mota*, 788 P.2d 538, 540, 543 (Wash. 1990) (reasoning that a deprivation of liberty due to indigency triggers intermediate scrutiny analysis and failure to credit indigent defendants for presentence confinement does not further a substantial state interest, thus violating the Equal Protection Clause of the Fourteenth Amendment); *Klimas v. State*, 249 N.W.2d 285, 288 (Wis. 1977) (reasoning that denying indigent individuals jail time credit for a sentence less than a maximum sentence imposed also violates the Equal Protection Clause because it invidiously discriminates against indigent prisoners); *Gomez v. State*, 84 P.3d 417, 421 (Wyo. 2004) (credit for time served must be given to indigent prisoners to comport with equal protection); *Hoover v. Snyder*, 904 F. Supp. 232, 234 (D. Del. 1995) (reviewing a constitutional claim by a Delaware prisoner, noting that only if a defendant is sentenced to the statutory maximum, then denial of credit for pre-sentence jail time due to indigency violates the Equal Protection Clause of the Fourteenth Amendment, and denying the defendant's rights were violated in this case); *White v. Gilligan*, 351 F. Supp. 1012, 1013–14 (S.D. Ohio 1972) (finding that failure to provide credit for time spent in jail prior to sentencing violates the Equal Protection Clause of the Fourteenth Amendment); *King v. Wyrick*, 516 F.2d 321, 323–24 (8th Cir. 1975) (holding that denial of pre-sentence jail time where the indigent defendant was unable to post bond due to financial reasons violated the Equal Protection Clause of the Fourteenth Amendment)

⁸³ *Culp v. Bounds*, 325 F. Supp. 416, 419 (W.D.N.C. 1971) (holding that North Carolina's denial of credit for pre-sentence commitment due to an indigent defendant's inability to post bond violates the Double Jeopardy clause or, alternatively, constitutes unconstitutional discrimination on the basis of wealth, violating the Equal Protection Clause of the Fourteenth Amendment).

⁸⁴ *Martin v. Leverette*, 244 S.E.2d 39, 41–42 (W. Va. 1978) (choosing to anchor credit requirements for presentence jail time when the defendant is unable to post bail for indigency in the West Virginia Constitution's Equal Protection and Double Jeopardy clauses).

⁸⁵ *State v. Sutton*, 521 P.2d 1008, 1010 (Ariz. 1974) (addressing addition to maximum sentence); *Gelis v. State*, 287 So. 2d 368, 369 (Fla. Dist. Ct. App. 1973) ("[O]ne sentenced to a maximum term must be given credit for time spent in jail awaiting trial where the pre-trial detention was a consequence of the prisoner's indigency."); *Jimerson v. State*, 957 S.W.2d 875, 876 (Tex. App. 1997) ("When a defendant receives the maximum sentence authorized, the equal protection clause of the Fourteenth Amendment requires that he receive credit for pretrial jail time."); *Hart*

that ultimately leads to more time in confinement for the poor than the rich is constitutionally problematic.⁸⁶

In the context of these constitutional claims, some courts are explicit that the concern is the total amount of confinement, not punishment,⁸⁷ whereas others take pretrial detention to be punishment.⁸⁸ One court opined:

We find no merit in the argument sometimes advanced that presentence jail time should not be credited because it is not ‘punishment.’ Whatever it may be called, it is certainly a deprivation of liberty, which, in itself, is punishment to most human beings. We should not like to try to convince those held in such confinement, along with those undergoing punishment, of the soundness of such an argument. We reject it, as other courts have. . . .⁸⁹

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

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

That need of the state is enforced by confinement prior to trial or by imposition of bail terms that will assure the defendant's appearance at trial. Whether bail, once set, can be posted is dependent on the defendant's financial ability, but this implicit discrimination between the rich and the poor is

v. Henderson, 449 F.2d 183, 185 (5th Cir. 1971) (finding that a denial of credit for pre-sentence jail time against maximum sentences to be constitutionally impermissible when the defendant was financially unable to make bond); Jackson v. State of Ala., 530 F.2d 1231, 1236–37 (5th Cir. 1976) (holding that while there is no absolute constitutional right to pre-sentence credit, when the defendant is unable to post bail due to indigency and sentenced to the maximum sentence he is entitled to credit for pre-sentence jail time and holding in this case that because the defendant was not sentenced to the maximum, he was not entitled to habeas relief); Hall v. Furlong, 77 F.3d 361, 364 (10th Cir. 1996) (It is impermissible, under the Equal Protection Clause, to require that indigents serve sentences greater than the maximum provided by statute solely by reason of their indigency).

⁸⁶ Smith v. State, 508 S.W.2d 54, 57 (Ark. 1974); Klimas v. State, 249 N.W.2d 285, 288 (Wis. 1977) (explicitly extending earlier case law to reach sentences that are less than the maximum); Johnson v. Prast, 548 F.2d 699, 702 (7th Cir. 1977) (holding that the Equal Protection Clause of the Fourteenth Amendment requires pre-sentence jail time to be credited against all sentences for indigent defendants who were unable to post bond); King v. Wyrick, 516 F.2d 321, 323–24 (8th Cir. 1975) (Equal Protection violated for sentences under the maximum).

⁸⁷ State v. Sutton, 521 P.2d 1008, 1010 (Ariz. 1974) (“In short, we hold that while presentence incarceration may not qualify as ‘punishment’ under A.R.S. s 13-1652, it amounts to an infringement of freedom and deprivation of liberty and when added to the maximum deprivation of liberty allowed by law results in a denial of equal protection guaranteed by the 14th Amendment of the United States Constitution.”).

⁸⁸ Culp v. Bounds, 325 F. Supp. 416, 419 (W.D.N.C. 1971)(declaring pretrial detention and post-trial incarceration to constitute “multiple punishments for the same offense”).

⁸⁹ Smith v. State, 508 S.W.2d 54, 57 (Ark. 1974)(citations omitted).

tolerable in light of the state's overriding need to produce all defendants, rich or poor, at trial. Once the trial has been held, however, and the defendant found guilty, that particular overriding need of the state which may impel confinement prior to trial is at an end. There is no constitutionally sufficient reason to permit the pre-trial discrimination on the basis of whether to go unrectified, if it is at all possible to do so. The obvious method of rectifying the inequality is to credit the preconviction time in partial fulfillment of the sentence imposed upon conviction.⁹⁰

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

II. Justifying Detention

Myriad articles have been written about how to gauge dangerousness and when detaining the dangerous is permissible. The goal of this section is to abstract away from the empirical and legal questions and simply ask—what are the underlying justifications for pretrial detention? Clearly, no one thinks, “Well, the defendant may be found guilty so we might as well bank some time now toward that punishment.”

Despite its prevalence, pretrial detention is hard to justify. Indeed, even if we can easily tick off the purported reasons: failure to appear, obstruction, and dangerousness, we need to dig deeper to unpack precisely what it would be about failing to appear that would justify detaining someone. Or, what precisely do we mean in saying that we can lock someone up based on a prediction of future dangerousness? Before we ask whether individuals should get credit for time served, we must first ask why they are serving the time in the first place.

⁹⁰ *Klimas v. State*, 249 N.W.2d 285, 287-88 (Wis. 1977); see also *Culp v. Bounds*, 325 F. Supp. 416, 419 (W.D.N.C. 1971):

As outlined above, wealthy defendants (except where no bail is allowed) are able to remain out of prison until conviction and sentencing; the poor stay behind bars. While such a situation may often be compelled by the present (especially state) bail procedures, it should not be compounded by refusal to credit prisoners in *Culp's* situation with time incarcerated prior to trial and commitment. Such a distinction, which, in effect, provides for differing treatment on the basis of wealth, is unconstitutional absent some “compelling governmental interest.”

A. Unavoidable Errors and Unjust Detentions

Before discussing the reasons to detain someone, we should face the reality that it is undoubtedly true that we mistakenly or unjustly detain criminal defendants. These can be separated into **unavoidable errors** and **substantively unjust detentions**.

As I discuss below, we may ask the right questions and have the right epistemic burdens and still get the wrong answers. The criminal justice system can make mistakes. These mistakes are unlikely to be identified in the case of pretrial detention because the mistake preempts the proof to the contrary. That is, if you are worried the defendant will flee and you lock him up, you can never test the counterfactual where he actually does not flee if you release him on his own recognizance. Even a perfectly functioning system will have this sort of mistake.

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

B. Flight and Failure to Appear

The risk of flight may sometimes justify detention.⁹¹ Let's first drill down on exactly what flight is. Then, once this category is sufficiently narrowed and nuanced, we must ask how detention could be justified. Ultimately, I will suggest that some cases fall under a **duty to appear rationale**.

Lauren Gouldin argues that we need to distinguish three different ways that defendants can fail to appear.⁹² First, they can leave the jurisdiction.⁹³ Second, they can stay in the jurisdiction but try to avoid

⁹¹ There are empirical questions about how significant the failure to appear rate is. Some numbers show open warrants at 7.8 million, but the number of serious felonies with open warrants is likely closer to 100,000. Gouldin, DFR, 689-690 (analyzing data).

⁹² Gouldin, Defining Flight Risk, 683.

⁹³ Id. at 725.

law enforcement, what she calls “local absconders.”⁹⁴ Third, they can fail to appear through what might seem to be excusing or mitigating conditions, ranging from forgetting the date of a court appearance to logistical challenges posed by work or childcare to a general lack of capacity to navigate the system.⁹⁵ Gouldin’s agenda is to get us to track these differences and then have judges respond appropriately to the risk of nonappearance before them.⁹⁶ Someone who forgets court dates may just need a phone call.⁹⁷

For our purposes, I suggest we collapse “true flight” and local absconders. Ultimately, Gouldin takes the “key distinction between these two groups [to be] geographic.”⁹⁸ True flight, to Gouldin, is a problem because of financial and administrative headaches.⁹⁹ Basically, the only difference between the two is that it is just more costly to get someone across jurisdictional lines. But the first question is why we get to detain those who willfully won’t appear, and that question applies to both groups, even if there might be some consideration of the cost differential when it comes to proportionality calculations.

As discussed above, the original reason for bail was to ensure that the defendant would appear at trial. Bail was a guarantee that gave further weight to a promise. Antony Duff suggests that there is a limited justification for detention in instances in which the defendant might abscond.¹⁰⁰ Duff reasons that we all owe each other a degree of civic trust. Defendants who have given us reason to doubt that we can trust them have additional duties to reassure us that they are trustworthy. This might involve paying bail or relinquishing a passport. However, if a defendant who owes us this duty acts contrary to it, by, say, threatening a witness or trying to flee, then we have reason to stop him. This reason is not “(merely) pre-emptive: it is justified not as pre-empting a predicted future crime, but as preventing the completion of a criminal enterprise on which he has already embarked.” Duff believes there may also be cases in which defendants who in previous trials have tried to abscond or to obstruct have significantly undermined our civic trust such that we would be justified in detaining them.

Let’s unpack this just a bit more. The first step is to justify requesting bail. We can do that because we need some sort of assurance, some heft given to the promise that the defendant will return for trial. So, one aspect of Duff’s analysis is that we are justified in asking for bail and in questioning the sufficiency of bail, if the defendant has shown that we cannot trust her. But, Duff also relies on an

⁹⁴ Id. at 735.

⁹⁵ Id. at 729.

⁹⁶ Id. at 737-741.

⁹⁷ Id. at 731.

⁹⁸ Id. at 735.

⁹⁹ Gouldin, DFR, 725.

¹⁰⁰ PTD and POI;

“already embarked” criminal plan to justify detention for flight. Though we will see how complex this question may be with dangerousness, a category in which a defendant may not have a current plan to commit a future crime, here, the question is easier. The defendant either plans to return for trial or she does not. And arguably, the fact that a defendant has absconded in the past is evidentiary of the fact that the defendant has no intention to return this time. This current intention to abscond means the defendant does not intend to do her duty to answer for her crime. This not only undermines the instrumental, truth-seeking functions of a trial, but the criminal justice system itself. Some theorists may conceptualize this as flouting the very system from which the defendant benefits, whereas others, like Duff, will stress the duty to answer to one’s fellow citizens for a crime. But essentially, the defendant, by absconding, seeks to thwart this central, justice-seeking process.

Theoretically, this rationale should yield a small number of applications. What we take from the defendant—her liberty—is substantial, and so, we should want the kind of case to be significant before we would consider such a significantly invasive measure. That is, we may not think people should be detained for minor or even average crimes.¹⁰¹ We cannot detain these low level offenses because the detention could be disproportionate. Assume that Mary is going to pinch you, and the only way you can stop her is to shoot her. You would not be entitled to shoot her because although she should not pinch and it is entirely her fault that you are in this position, the amount of harm that she threatens to do and thus the rights that she has forfeited to prevent that violation are minor. So, too, it seems that even if the defendant will commit a wrong in failing to appear, putting that person in a cage to guarantee their appearance at trial is disproportionate to the duty they threaten to ignore.

Of course, even in our earliest bail jurisprudence, some serious crimes were not bailable. Does the crime the defendant is charged with matter, or are we implicitly introducing dangerousness if we care about the underlying criminal allegation? It is true that all failures to appear equally threaten the authority of the state. And, all of them are essentially the same wrong—the failure to do one’s duty as a citizen and be called to account for one’s alleged crimes. This could lead us to question the importance of crime severity. All failures to appear threaten the authority of the state and they all threaten the authority of the state in the same way.

¹⁰¹ Gouldin arguably misses the importance of offense seriousness. She notes that more serious cases present a stronger argument for the loss that happens, but she then notes, “While this argument is compelling, it does not alter the predictive value of offense seriousness. Instead, it suggests that for more serious offenses, judges will be more risk averse.” DRF, 706. She is correct that this does not alter the tradeoffs, she assumes the only question is the cost-benefit calculation as opposed to how the crime charged relates to the strength of the duty.

There is some truth to this contention, but it is too quick. It is true that both instances threaten the state's authority to run its criminal justice system, but it is not the case that all "callings to account" are alike. Your friend might lose your pen, stand you up for dinner, or sleep with your spouse. If you are then going to meet to discuss her wrongdoing, it would be far more significant for her to fail to appear to discuss the adultery than to discuss the pen loss. That is, it is not just the value of being in a criminal trial but being in a criminal trial for a particular crime that matters. For this reason, absconding from a serious offense may justify liberty deprivation when absconding when charged with a minor offense would not. The seriousness of the offense matters to the import of the proceedings, even separate and apart from the fact that the proceedings may instrumentally further the underlying justifications for punishment as well. That is, it is important to show up for your murder trial even if you are not guilty and will be acquitted.¹⁰²

Interestingly, though our armchair speculation would be that crime seriousness also serves the epistemic function of likelihood of flight, the empirics do not bear this out. "[D]ecades of studies" challenge the claim that crime seriousness correlates with likelihood of flight.¹⁰³ Here, of course, Gouldin's claim becomes all the more important. Theoretically, we may be entitled to detain those who will flee and not face trial for serious offenses, but we will always need to know epistemically whether we have accurately determined who those actors are. If we sloppily conjoin the person who flees to Russia because of no extradition with the person who does not show up for court because she can't find someone to watch her two children, we will simply lack reliable metrics for determining who is actually likely to willfully fail to do her duty.

To this point I have argued that for serious offenses, we may have reason to detain someone who will otherwise willfully flee because of the person's duty, as part of the political community, to participate in just and fair legal processes. I have suggested crime severity matters, not as a proxy for dangerousness or likelihood of flight, but because the value of this calling to account will vary in conjunction with the crime severity. I have not yet addressed whether serious crimes can justify the detention of the excusable nonappearances that form Gouldin's third category. Let me briefly address this question.

One can fail to do one's duty nonculpably. If I forget my child's birthday, even because of the good excuse that I am tending to my sick mother, I have still forgotten my child's birthday. That is, it is

¹⁰² Cf. Trial on Trial 7, rejecting the "standard view" that the only value of the trial is instrumental in advising the state whom it may punish.

¹⁰³ Gouldin, DRF, 705 (noting "[t]hese studies conclude that other factors, such as employment, family ties, community reputation, and prior record of appearances, are better predictors of nonappearance").

possible to view the person who fails to appear, whatever her reason, as failing to do her duty. Now, we should immediately recognize that the state has a range of interventions short of detention, including instructing and clarifying how trials work, making phone calls to remind individuals, or granting continuances to assist with work or child care. Moreover, as a bit of armchair empirics, it seems unlikely that those who fail to appear for these reasons have been accused of serious offenses. With all of that said, if there were truly nothing that could guarantee appearance besides detention and the crime charged was spectacularly serious, I do believe the duty view would have the resources to justify detention of the defendant.

I am not going to solve the empirical question here of when individuals are likely to flee nor am I going to draw a precise normative line for willful and innocent nonappearances. Where this leaves us is that we may have good reason to detain some defendants pretrial when we have epistemically sufficient grounds to believe that they will abscond (or simply fail to appear) if they are not detained. Undoubtedly, in practice, the criminal justice system is far too aggressive in its detention practices. Still, if we think that a wealthy serial killer,¹⁰⁴ with homes in non-extradition countries, will not appear even with an ankle bracelet and the forfeiture of his passport, we will have some cases for detention. For these defendants, we are thus effectively enforcing their duty to appear by giving them no choice but to do so.

C. Witness Intimidation and Obstruction

Sometimes the reason that we detain someone is not because we think that she might commit some other random crime but because we worry that she will impact this trial. If defendants have an obligation to stand trial and respect our rule of law, they have an even greater obligation not to interfere. Such interference could be destroying evidence, intimidating witnesses, or even killing witnesses. For our purposes, let us call this the ***obstruction rationale***.

Just as the duty to appear has two components that determine its severity—both the failure to answer for one’s crime and the seriousness of the underlying charge—obstruction has both features as well. The easiest detentions to justify are those where the defendant has directly threatened to seriously injure or kill a witness. This is a defensive/pre-emptive rationale. To see its contours, let’s take a step back and work through the requirements for self-defense. We typically think of self-defense in

¹⁰⁴ E.g., Robert Durst. See generally Gouldin, DRF, 707 distinguishing “likely” to flee from “able to flee” and noting factors such as ties outside the jurisdiction, resources, and anchors to the community. *Id.* at 708-711.

the individual context as governed by proportionality, necessity, and imminence concerns. For proportionality, the harm or wrong threatened by the “aggressor” dictates the amount of harm that may be imposed on her. A defender may not kill an aggressor to prevent a paper cut. Although this can be quite fine-grained morally, the criminal law often roughly cuts this into non-deadly and deadly force, with only some crimes warranting the use of deadly force.

The necessity requirement has a number of philosophical nuances, but we can simplify the question here to simply whether or not one would need to use the force to stop the harm. So, if an aggressor threatens deadly force and the defender can successfully defend either by slapping the aggressor or shooting the defender, shooting is unnecessary. Finally, although the imminence requirement is invoked in cases of individual self-defense, most theorists claim that imminence mediates the citizen/state boundary such that the state ought to intervene before a threat is imminent. This understanding would yield that there is no imminence requirement before the state can intervene. An alternative understanding, such as the claim that the imminence requirement serves as an *actus reus* for aggression, would ask what minimum act is required before the state takes action.

With these in mind, then, let’s return to the case where the defendant will kill a witness. Proportionality may be easily satisfied here. Surely, we are entitled to detain someone to stop her from killing someone else. For necessity, we would take into account whether a restraining order would be sufficient. In some instances, the answer will be no. We might also consider whether we could just protect the witness.¹⁰⁵ We might then ask how to do this trade-off—as between an individual witness who would otherwise lead her own life and the defendant who poses the threat, who should bear the harm of the liberty deprivation?

Notably, as opposed to punishing the defendant for the crime charged, we are, as Duff notes, intervening in a different crime. Indeed, the state’s typical intervention is to make such threats their own crime—attempts and obstructions that exist over and above the underlying criminal charge. Elsewhere, I have argued that preparatory offenses should not be punished as crimes, but rather, should be part of a scheme of preventive interference by the state. Pretrial detention makes this sort of move—the threatened crime first and foremost grounds the state’s preemptive action (though some acts by the defendant could lead to additional liability for attempt or obstruction).

¹⁰⁵ One would have to protect the witness in case in which the defendant could harm the witness even while imprisoned. But, a defendant who has repeatedly attempted to kill his wife may not be able to contract out that killing, such that locking him up just is protecting her.

Detention to prevent serious, obstructive acts is likely to be justified. Someone who threatens to kill the key witness against him, when he is charged with a serious offense, aims not only to prevent calling him to account for his wrong but also committing an additional serious offense to do so. Here, detaining him before trial is proportionate to the interests he threatens.

Notably, I have assumed the conjunction of two serious wrongs. First, I assumed that he was being called to account for a serious wrong. Second, I have assumed that the kind of obstruction with which he aims to engage (killing a witness) is a serious wrong. Let's relax these assumptions.

Although it is hard to believe that one would kill to prevent being called to account for a less serious wrong, it seems as though someone who poses a deadly threat to another may be detained even if the crime she aims to obstruct is very low level. If you plan to kill the security guard to prevent a shoplifting conviction, you still have no claim against being detained to prevent you from killing the guard. (Indeed, perhaps the fact that you have so little at stake makes the planned crime worse.) It may be that the pending offense does little work here. The state has grounds to stop anyone who plans to kill someone else, irrespective of their commission of an offense. This is just typically filtered back into the criminal justice system through attempts, stalking, threats, and other offenses.

Conversely, we might consider far less serious acts of obstruction. Even if the obstructive act is not particularly serious on its own, it could have the potential to thwart a serious case. Absconding does not hurt anyone else; it just thwarts the case. So, too, it may be that the intention to destroy documents that would thwart a murder trial could also justify detention.

In contrast, low level obstruction of a low level offense is far less likely to justify detention. Consider the *Yates* case, where the fisherman threw fish overboard to get rid of the evidence that his fish were unlawfully small.¹⁰⁶ Even if this is the only way to prevent the defendant from throwing the fish overboard, and the illegal size of the fish is itself a crime, the wrong of obstructing and the wrong of illegal fishing still do not appear in the aggregate to justify a serious liberty deprivation of the defendant. It seems disproportionate. Ultimately, this may turn on how many days in jail the defendant would be detained, and what the actual conditions of detention are, but with current trial delays and current jail conditions, this seems far too restrictive a penalty.

Of course, we face an epistemic question. What kind of evidence must we have? How confident must we be? And to be sure, we will need to work out the answers to these questions before

¹⁰⁶ We can disregard the fact that the Supreme Court ultimately held that fish aren't tangible objects under Sarbanes-Oxley for our purposes.

can fully justify our detention practice on these grounds. However, we can imagine that a suitably tailored system will allow for the detention of these individuals.

My goal is not to draw a precise line for when these detentions are permissible. There are likely clear cases in which the defendant has threatened witnesses and detention may be all that will prevent the defendant from doing so. These defense of others/obstruction cases may be easy calls. So, too, are cases at the other end of the spectrum—no one would have detained Yates just to prevent him from throwing some tiny fish overboard. In between, there will be difficult cases dealing with both the crime charged, the way the defendant intends to obstruct the proceeding, and the sufficiency of the quality and quantity of the evidence.

D. Dangerousness

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

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

1. Forfeiture

Let's start with forfeiture. It is crucial to distinguish two sorts of forfeiture claims. The first claim would be that the defendant's commission of the charged offense forfeits his rights. To illustrate, our ability to incarcerate someone on incapacitation grounds is thought to follow from his being found guilty of the crime charged. The second claim would be that the defendant's behavior vis-à-vis committing a future crime is itself sufficient to forfeit rights. As an example, if you are pointing a gun at Tom and I shoot you in the leg to stop you from killing him, it is your decision to pose a culpable threat

that justifies the use of force. It is decidedly unclear what is doing the work in actual practice, but let's at least endeavor to get the theory straight.

a. Forfeiture based on crime charged: Desert-based dangerousness detention

Are we allowed to detain individuals as dangerous because they have committed the crime with which they are charged? Let's call this idea ***desert-based dangerousness detention***. This immediately leads to the question of whether this detention somehow flouts the presumption of innocence. If the defendant is thought to be innocent of the crime charged, how can it give us grounds to incapacitate him to prevent him from committing another offense?

As a constitutional matter, this objection fails given how the presumption has been interpreted. Under Supreme Court jurisprudence, the presumption of innocence has never meant anything more than that proof beyond a reasonable doubt is required at trial. Moreover, practically, it could not mean that suspicion, without trial, is insufficient for justified state intervention. After all, the state's decision to search, arrest, and charge are done with far less evidence. So, the presumption of innocence does not mean that a defendant is entitled to proof beyond a reasonable doubt that he committed this crime before suspicion that the defendant committed the offense can ground adverse state interventions.¹⁰⁷

But we need to be precise here. The specific claim under examination is, "The defendant does not have a right against detention because he committed this offense." To be sure, this claim undermines our procedural morality even if it does not undermine the presumption of innocence as understood in U.S. law. If we have trials for the purpose of determining what negative consequences follow from the defendant's having committed the crime, then we must first determine that the defendant has actually committed the crime. A claim that potential guilt for the commission of the offense itself grounds some sort of forfeiture or lesser standing undermines the entire purpose of the criminal process.

Although I take this concern to be decisive and thus contend that any detention on this basis is thereby unjust, let us consider the best argument for the state. It is that if the defendant is actually guilty, then the person has forfeited rights against punishment, thereby opening up the door to giving them the negative desert they deserve as well as invoking consequentialist goals like incapacitation. The claim would be that though we wrong the defendant in not deciding in the right way, the defendant

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

does not truly have a claim against this kind of detention if she is guilty and we are legitimately incapacitating based on that guilt.

Basically, the idea is this. A defendant who is convicted of an offense is thought to have no complaint against detention (within proportionality bounds)—incapacitation is an explicit justification for punishment. So, here, the idea is that the state is doing just this. It is just doing it pretrial. For the guilty defendants, they are receiving punishment they deserve and thus from an objective standpoint have no complaint against the deprivation of their liberty.

Again, it is obviously problematic to punish people by holding them pretrial to determine if they are guilty of the crime for which they are charged. One significant problem is that with different burdens for detention than for punishment, you can be punishing the innocent. The other is that even the guilty are owed the trial before you punish them. However, when we ask how the guilty are wronged, they are wronged by being deprived of the trial to which they are entitled, not by being punished for a crime they did not commit. Given the substantial amount of work that the crime charged does in our actual detention practices, we cannot ignore this as a potential ground for what courts are actually doing, even if we should be highly skeptical of it.

b. Forfeiture based on crime intended: Defense-based dangerousness detention

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

Elsewhere, I have argued that some forms of preventive interference (not necessarily pretrial detention) can be justified on similar grounds.¹⁰⁸ Specifically, I have claimed that if someone has a current intention to commit an offense (manifested by an overt act¹⁰⁹), and the state is convinced of this beyond a reasonable doubt (or at least by clear and convincing evidence),¹¹⁰ then the state should intervene with the least restrictive means possible. I have also argued that when we are convinced that a criminal intention is present, the state need not wait until the threat is imminent. If you knew that Alice intended to kill you, then you should not have to wait for her to attack you before you use some sort of force to prevent her.

¹⁰⁸ Ferzan, *Beyond Crime and Commitment*; Ferzan, *Inchoate Crimes at the Prevention/Punishment Divide*.

¹⁰⁹ The overt act requirement is in place to limit government overreaching, but is not required on a purely philosophical level.

¹¹⁰ Ferzan, *Inchoate Crimes at the Prevention/Punishment Divide* tentatively endorses BARD.

My aim is not to defend my earlier work here. Rather, it is merely to set forth that we may think that there are plausible times for the state to intervene prior to the commission of the crime. Indeed, I argue that most inchoate offenses are actually masked preventive interventions. Whether one wants to add a preventive regime to our current state resources or not, the question under consideration is whether the one we have, as it applies to pretrial detainees, is justifiable. That is, pretrial detention is justified if there is a forfeiture condition that goes beyond statistical probability—the formation of an intention (and act in support of it), and there is an epistemic requirement (of at least clear and convincing evidence if not proof beyond a reasonable doubt).

Notably, bail hearings fall far short of these normative requirements. Current statistical measures do not demonstrate that individuals are very dangerous in that they will commit a crime in the future. And, these assessments do not even purport to guestimate whether the defendant *currently has a criminal intention*. Nevertheless, when these conditions are met, preventive detention is justified. That is, if someone has a current plan to commit a serious criminal offense, the state is justified in stopping her, even if it means detaining her.

Perhaps the reader has shifted from worrying that my view is too permissive to thinking it is too restrictive. Does anyone satisfy the stringent requirement of an actual intention? First, yes. Consider Earl Shriner. Earl Shriner was released from prison in May 1987, after completing a ten-year sentence for kidnaping and assaulting two teenage girls. During his last months in prison he wrote in his diary detailed plans to maim and kill children upon release, and he told his cellmate that he wanted a van customized with cages so he could pick up children, molest them, and kill them.¹¹¹ And when Shriner got out, he abducted a child, sexually assaulted him, and killed him.¹¹² Certainly, at the pretrial stage, someone who is voicing such plans may be detained.

Interestingly, *Salerno* itself may be a case that justifies this sort of forfeiture finding. Salerno was the boss of the Genovese crime family. While the case that was the subject of the Court's ruling was pending, Salerno was already being sentenced to 100 years in prison for other crimes. His business was crime. It may be possible to prove that he intended to commit a future crime. In contrast, the run-of-the-mill criminal is unlikely to be plotting his next offense while sitting in booking.

Ultimately, my goal is not to defend a precise test for when the state may be permitted to detain someone based on these dangerousness grounds. Instead, my goal is simply to articulate one way to think about dangerousness. In these forfeiture/defense of others cases, we are simply stopping

¹¹¹ *Id.*

¹¹² *Id.*

the defendant in his tracks. Here, the bottom line is that when a defendant intends a serious criminal offense, detention to prevent that offense may be necessary and proportionate.

c. Overriding Rights: Pure Prevention Dangerousness Detention

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

To assess this ground for detention, let's move from a clear case of self-defense to a problematic one. Assume that Alice is unsure whether Betty is attacking her. The law often reduces the inquiry to whether Alice "reasonably believes" that Betty is threatening her. However, the language of belief can prove problematic in various respects.¹¹³ Instead, we may ask whether Alice has some degree of confidence—a credence—that Betty is attacking her. Here, we might think that for Alice to give due respect to both her life and Betty's, she has to think it more likely than not that Betty is an actual attacker. It would give Betty too little respect if she killed her on a hunch, but it would give Betty too much respect if Alice has to absorb substantial risk of injury. They are both equals.

Consider now a further complication. What if it is Alice and Albert? Or Alice, Albert, Anne, and Andrew? Does the degree of confidence that Alice must have decrease the more lives that are at stake? Here, the answer should be "no." The reason is that we are deciding that someone is going to harm us, and we owe that person a degree of respect before we decide the person has forfeited her rights. That degree of respect does not alter with the stakes.¹¹⁴ This claim is deontological.

But, you may think, surely Alice may kill (or harm) Betty if there are a thousand lives at stake. Notice, though, that Alice may be permitted to kill (or harm) Bob, a completely innocent person, if there are a thousand lives at stake. That is, the rationale for defending against Betty was that she had forfeited a right, whereas the rationale for harming Bob is that his rights are overridden by public need. This means that even if Alice lacks sufficient confidence that Bob is actually an attacker, she is still permitted to harm him if doing so will save many people.

¹¹³ [INTRO BELIEF PROBS].

¹¹⁴ Ferzan, Deontological Distinction, Ethics.

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

One way to frame dangerousness detention is similar to this. The defendant's rights are being outweighed for the greater good. It is not about what the offender has done but about a risk-based prediction of what the defendant will do. We override rights when we quarantine, when we tie yachts to docks during storms, and so forth.

Dangerousness-based detention premised on this sort of argument should worry us. First, it is disrespectful of the agent. We are not denying that the agent has autonomy or does not have the ability to choose rightly. But we are suggesting that we do not trust the agent to choose rightly. A stance that detains someone because we do not want to run the risk of their wrongdoing is a stance of the state as distrusting its citizenry. This is not simply overriding a right. We are not simply turning a trolley from five people to one person; this is turning the trolley to the one because we believe the person will act impermissibly. Second, unlike turning a trolley where the one person is harmed as a side-effect, the detention here is the means by which the harm is averted. To see this clearly, imagine that we could lock up A's daughter, B, and this would prevent A from choosing to commit an offense. Locking up B then is the *means* by which we avert the harm. If it seems wrongful to do this to B, then it should be equally wrongful to do this to A, given that we are positing that A is an innocent person who has not forfeited any rights. Although the state may have reasons to detain nonresponsible agents on the basis of their dangerousness, there are strong reasons to object to the state locking us up because it fears us.

Still, if I am wrong and this practice is defensible, then, at best, this kind of rationale can be justified as overriding the right of an innocent. In detaining the dangerous, there are really only two options here: either the defendant has forfeited a right or his right is overridden. But in overriding his right, we are not entitled to discount his value based on a prediction he might do wrong. If we were to do this, then our value as people would vary with the stakes of the determination. If it is even remotely justified in any actual cases of pretrial detention, then this person is entitled to assumptions of innocence and the same treatment we would give to someone in quarantine. As Antony Duff argues, we should recognize that this detention is *unjust*—"A recognition of that cost should have implications for how such defendants are treated: for the conditions under which they are detained, and the efforts that

must be made to allow them to maintain as much connection with their ordinary lives as possible' for the compensation that may be due to them.”

Of course, once pretrial detention is stripped of its criminal aura, the idea that anyone could just be detained on dangerousness grounds seems far more intrusive and far less plausible. What is the requirement? Mayson, who argues that this sort of detention, when justified, applies to defendants and non-defendants alike, does not take the implication of her argument to be that all dangerousness detention is impermissible.¹¹⁵ She just thinks the threshold is quite high. Specifically, “a substantial risk of serious violent crime in a six-month span.”¹¹⁶ Though I am inclined to think that even if this is too insubstantial a showing, we need not settle on the numbers. The question ought to be: may we subject a wholly innocent person to this sort of harm in order to stop the kind of threat that we believe is presented?

d. Disentangling Dangerousness

As you can now see, dangerousness can serve three distinct functions. First, like incapacitation after a criminal conviction, we can detain the dangerous. Second, like self-defense, we can stop the dangerous. Third, like quarantines, we can confine the potentially dangerous.

Although we may be able to specify these distinct grounds for detention with precision in theory, we may wonder what “does the work” in any individual case. To explicate the difference in our theories, let us consider a hypothetical that Rick Lippke posed to Antony Duff,¹¹⁷ asking about “a defendant who has several prior convictions for rape with a distinctive MO, who is now charged with a rape that (according to the police evidence) involved the same MO, and perhaps also DNA evidence linking him to the crime, and perhaps also a record of prior rapes while on bail.” This hypothetical was meant to challenge Duff’s firm stance against detention for dangerousness.

Desert-based dangerousness detention is problematic. Though it is true that the defendant may be confined for his prior convictions, limited by his desert, if the defendant is now out of prison, he has already been punished. For the crime charged, the concern here is that we are undermining what we owe the defendant—a trial—in determining that we can now hold him based on the pending charge.

¹¹⁵ Mayson, DD.

¹¹⁶ Mayson, DD at 501.

¹¹⁷ N.46.

In contrast, defense-based dangerousness detention could be plausible. One could argue, like the Federal Rule of Evidence uses of 404(b) evidence to show purpose or plan,¹¹⁸ the prior criminal acts are evidence that the defendant has an overarching and continuing plan and intention to commit assault. The prior crimes, combined with the likelihood of that the defendant committed this offense, are all evidentiary that he has the current intention to commit another rape. This is akin to Ted Bundy, not Brock Turner.

Finally, consider pure prevention dangerousness detention. Let's say that we are worried that using a 404(b) argument akin to intent/plan is truly about propensity and that we believe that if we are being truly honest, we do not have enough to put a criminal intention in the defendant's head. Do we have sufficient evidence to detain? Under Mayson's test, do we have enough evidence to suggest a substantial risk of a serious violent crime in a six-month span? Here, a court may find that we do, and that it is appropriate to hold the defendant until we can adjudicate his guilt for the criminal charge such that we can justly lock him up on a desert-based rationale after conviction.

Goldkamp, in his survey of state bail statutes, found that the pending criminal charge was the primary criterion of dangerousness.¹¹⁹ For pretrial detention, then, the question is whether it is consistent with the respect that we owe the defendant to detain him based on some chance that he will commit a criminal offense. And, we should ask this through these different prisms of dangerousness.

E. Summary

In order to keep track of our various detentions and rationales, particularly as we try to match these to the potential rationales for credit for time served, below is a summary table.

¹¹⁸ Notably, however, there is often slippage from plan to propensity. See, Ferzan, #WeToo.

¹¹⁹ Goldkamp at 25 ("predominant criterion for defining a defendant's eligibility for pretrial detention under the recent pretrial danger laws is the criminal charge. Although rarely the sole eligibility criterion for pretrial detention, it is the main criterion in many states.")

Detention-Type	Rationale/Grounding/Justification
Unavoidable Errors	Have given defendant fair hearing, made error
Substantively Unjust Detention	None
Duty to Appear	Fear of Flight/Willful Absconding: Enforcement of Defendant's Duty to Support and Participate in Just Institutions
Obstruction	Forfeiture/Defensive rationale. Defendant intends impermissible act and thus has no right against the state's use of necessary, proportionate force to stop him.
Desert-Based Dangerousness Detention	Defendant's commission of a crime leads to no right against further incapacitation by the state, constrained by proportionality (e.g., a criminal sentence that is justified, in part, on incapacitation grounds).
Defense-Based Dangerousness Detention	Forfeiture/Defensive rationale. Defendant intends impermissible act and thus has no right against the state's use of necessary, proportionate force to stop him.
Pure Prevention Dangerousness Detention	Defendant is treated as innocent but his right is overridden for the greater good, akin to quarantine.

III. Why Might We Give Credit for Time Served?

Does credit for time served match the reasons that we detain people? That is, how do we make sense of this practice that by almost retroactive magic takes something that the Supreme Court has decisively stated *is not punishment* and turn it into punishment? Unfortunately, this admits of no easy answer and is highly dependent upon the reason for detention in the first place.

Some of our detention rationales can be grouped for purposes of this question. First, we might ask whether credit for time served is appropriate for detentions that are simply unjust. Second, we can separately examine detention that is justified by desert for the underlying offense. Third, we can turn to those detentions that are duty or forfeiture-based, including duty to appear, obstruction, and defense-based dangerousness detention. Finally, the rationale of pure prevention dangerousness detention, unavoidable errors, as well as some application gaps are best viewed together as override cases.

A. Unjust Detentions

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

1. Compensation

Adam Kolber rejects that a compensation account is itself sufficient to justify credit for time-served. First, he questions the commensurability of detention (which is not supposed to be punishment) and punishment.¹²⁰ Second, he suggests that we could financially compensate detainees, though he curiously qualifies this with the claim that crime victims should be compensated first.¹²¹ Third, he notes that this credit does not look like compensation because it is not transferrable; for instance, it cannot be used as credit against future crimes.¹²²

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

But let me suggest that this might be slightly more plausible than we take it to be. First, one point about commensurability is that you shouldn't cash out cash against incarceration. Pay them, says Kolber. But payment is already presupposing the commensurability of the wrong done (detention) and the compensation (cash). Simultaneously, we take punishment to come in different modes from incarceration to fines to home detention. If we can debate whether to punish something with a fine or with home detention, we are already assuming some metric for comparison. Now, one might think there is something special about punishment. I will unpack this objection about how we ought to understand the prior treatment and whether it can be set off against it next. But ask this question:

¹²⁰ Kolber, APP, 1151

¹²¹ Kolber, APP, 1152.

¹²² Kolber, APP, 1152.

Assume the state has made a tax error and owes David \$250. Now assume that David commits a crime for which he is fined \$250. If David could direct the state to simply transfer the money, would we require that the state first pay David, David then deposit the money, and David go to the courthouse and pay the fine? What if David's credit card gets the credit and then he pays by credit card? Okay, now? Now, what if he can just redirect the state cashier to credit the funds to his criminal fine? It seems that we should not reject out of hand that an unjust earlier liberty deprivation can be set off against a later punishment.

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

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

Compensation, then, could be a justification for our practice; it just fails to fully explain what we do. It also fails to fully compensate those who deserve it. This remedy is wildly underinclusive as it is only available to those who are actually convicted. Although courts maintain that it is unconstitutional to subject the poor to more detention than the rich, the fact that we distinguish between the innocent rich and the innocent poor remains.¹²³ If guilty indigent defendants are entitled to credit, then innocent indigent defendants are at least equally entitled to some sort of credit.

2. Punishment

The courts that considered credit for time served to sometimes be constitutionally required did not think that this credit was compensation. They thought the detention was relevant to the punishment. As noted above, some courts saw this as a total amount *of punishment* while others saw

¹²³ Accord Kolber, APP, 1153.

this as a total amount of *liberty deprivation*. Whereas Raff Donelson takes the first approach, Kolber argues that proportionality is about harsh treatment, which the detained person experienced. Both assume that what has happened to the defendant is being set off against the punishment, either because the detention counts as punishment or because the harsh treatment counts.

Notably, neither theorist restricts his analysis to unjust cases. Rather, both aim to give an account for our current practice of time served which does not ask why the defendant was held pretrial in the first place. My goal, in contrast, is to show that a discerning account of why the defendant is being held may yield that central cases do not warrant such credit even if the unjust cases do support it. This section reveals that there are plausible theoretical accounts that would allow us to think of unjust detentions as legitimately taken into account for determining the total amount of punishment. Notably, any path we take would require radical revision of our practices if it were thoroughly and consistently adopted.

Consider the punishment claim first. Recently, Raff Donelson has defended the idea of “natural punishment.”¹²⁴ Donelson uses an example where a robber accidentally shoots himself while running away, and a mother who negligently killed her baby by wedging the car seat in an overcrowded car.¹²⁵ “Roughly, the idea is that, in such cases, *the world* punishes the wrongdoer.”¹²⁶ More specifically, Donelson confines natural punishment to three elements: “(1) adversity, (2) caused by wrongdoing, and (3) not caused by anyone’s intention to extract retribution on the wrongdoer.”¹²⁷ Donelson’s proposal is to treat some natural punishment as what he calls “constitutional punishment,” which is natural punishment for legal wrongs that have been discovered by the state.¹²⁸

Donelson’s case to call pretrial detention punishment, in the face of Supreme Court jurisprudence decreeing that detention is not punishment, is:

[T]he American legal system sometimes allow these *time transformations*. In such time transformations, before a certain point in time, a particular harm is *not* legal punishment, but after that point in time, that very same harm, that already happened *is* legal punishment. I suggest we think about natural punishment similarly.¹²⁹

¹²⁴ Raff Donelson, *Natural Punishment*, 100 N.C. L. Rev. ___ (2022). Pages to SSRN Ms.

¹²⁵ *Id.* at 3.

¹²⁶ *Id.* at 3.

¹²⁷ *Id.* at 7.

¹²⁸ *Id.* at 18.

¹²⁹ *Id.* at 26.

As to whether pretrial detention qualifies as natural punishment, Donelson is unequivocal: “Natural punishment is not merely *similar* to that other pre-trial practice; pre-trial detention before a rightful conviction just *is* natural punishment.”¹³⁰

Kolber, however, argues against this kind of retroactive characterization.¹³¹ The problem, Kolber claims, is consistency. If we erroneously convict someone and find out a decade later, what is to prevent us from *time transforming* this into non-punishment?¹³²

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

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

Still, we might think that t_1 hardships should count against later punishment. That is, there may be good reason to count this hardship. Let me suggest four potential arguments that support that t_1 hardships matter. Each view, however, commits us to a far more expansive approach to set offs with far more applicability within criminal law.

First, there is the argument that some prior acts are punishment at the time they are inflicted. Donelson is not interested in these cases, as he specifically exempts cases where individuals aim to exact retribution, but Doug Husak has presented a compelling argument that sometimes individuals may “already be punished enough.” Husak argues that stigma and hard treatment are components of punishment, and that it is not truly the state, but society, that imposes stigma.¹³³ Accordingly, if someone has already been subjected to substantial social stigma, Husak believes that this should result in less punishment by the state. Notably, given the Supreme Court’s stance that this detention *is not punishment*, it would be odd to decree that it now is. But if we are allowing stigmatic harms to count towards punishment, then, our sentencing practices should consider them far more widely.

¹³⁰ *Id.* at 26.

¹³¹ Kolber, APP, 1150-51.

¹³² Kolber, APP, 1151.

¹³³ Husak, Already punished enough.

Second, we might think that hard treatment, without stigma, particularly when imposed by the state, should count toward what is proportionate. Kolber explicitly pursues this line of inquiry: “Though detention is not punishment, it is still harsh treatment and should therefore make an offender less deserving of harsh treatment.”¹³⁴ Kolber notes there are “tricky details” about what counts, including whether it can be from other people or nature and the timing, but that “pretrial detention is surely an easy case.”¹³⁵ From here, he states that, “We can also understand certain debates about credit for time served as reasonable efforts to untangle the nature of the harsh treatment that should count for purposes of proportionality.”¹³⁶ Ultimately, however, this characterization is not an olive branch by Kolber. He deploys harsh treatment to show how problematic being proportionate to harsh treatment is, thereby undermining proportionality in toto (at least according to desert or blameworthiness).¹³⁷

As Kolber notes, this approach solves the problem by creating a much larger one for the criminal law. We will face a boundary problem of precisely which hardships can count. To be sure, the state detaining a defendant is an easy case, but does it also include a terrible childhood? And, what kinds of collateral consequences also count toward the harm that is imposed? Notably, one need not abandon her commitments to retributivism, desert, and proportionality in the face of Kolber’s challenge, but one does need an account of what would then count. And that account will be far more capacious than simply giving credit for time served.

Third, we could simply embrace a “whole life” view of desert. This would mean that earlier undeserved harms count against deserved harms later. This would be far for expansive, as it would include harms that did not result from state action, as it would embrace a view that justice is about evening up the scales at the end, as opposed to doing time slice justice. Admittedly, most scholars (and all practitioners) would balk at this kind of view, as theoretically it seems to embrace “get out of jail free” cards and practically it simply is not administrable for courts. Nevertheless, this sort of view would support that undeserved confinement can count against later punishment. However, this credit would just be the tip of the iceberg.

Finally, one might not need to endorse any of these views about how to characterize the earlier detention to get to the view that this should be set off against later punishment. Instead of thinking

¹³⁴ Kolber, APP, 1153.

¹³⁵ Kolber, APP, 1156.

¹³⁶ Kolber, APP, 1157.

¹³⁷ Kolber, APP, 1158 (“Shifting from proportional punishment to proportional harsh treatment, however, only solves the myself of credit for time served by generating even deeper problems that strike at the very heart of retributivist proportionality in familiar forms.”).

that the earlier detention is directly set off against punishment, as if they are on the same metric, one might think instead that the earlier detention gives a reason not to give the person what she otherwise deserves. Consider the mother who causes the death of her child. One way to think about this case is that the earlier suffering counts against the total that she deserves. The other way to think about this is that although at the time of sentencing, the mother still deserves the full quantum of punishment, there is reason not to give her what she deserves because of the earlier undeserved suffering.¹³⁸ This would then be akin to the way that sentencing courts often take into account mitigating factors in ways that are not easily reduced to sentencing guidelines. Under this theory, many other hardships would warrant consideration, making this justification, like the other ones, too strong in comparison to our actual punishment practices. But perhaps it is also too weak; this depends upon how one construes the reason not to give the person what she deserves.

In summary, what this section suggests is that there are theoretical justifications for crediting time served against the punishment in instances in which the defendant was unjustly detained in the first instance. All of these theories reveal that our current treatment is wildly underinclusive, only taking into account some of the instances in which some sort of compensation, credit, or mercy is deserved or warranted. In other words, if we were to truly commit to the underlying justification to give this credit, we would have to radically revise our sentencing practices in myriad other respects. We should also not forget that defendants whose charges are dropped or who are acquitted receive nothing under this regime.

B. Desert-Based Dangerousness Detention

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

¹³⁸ See SHELLY KAGAN, *THE GEOMETRY OF DESERT* 18 (2012).

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

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

Sometimes the defendant is being detained in order to enforce her duty to appear or to prevent her from committing a crime. In these cases, we should rightly question whether she is entitled to credit for time served. This section begins with defense-based cases and then turns to the duty to appear, concluding that in these instances, the pretrial detention is fully justified and thus later credit would be unwarranted.

1. Obstruction and Defense-Based Dangerousness Detention

Obstruction and defense-based dangerousness detention present the same question with respect to credit for time served. In both instances, the claim is that the defendant has a current intention to cause harm, and the significance of that harm warrants the use of force (in the form of liberty deprivation) to stop the defendant. Although what precisely goes into the proportionality and necessity calculation differs with respect to these two justifications, they are both premised on a preventive/defensive rationale, and thus, they should both have the same implications for credit for time served.

Generally, we do not treat injuries inflicted in self-defense as also inflicting punishment.¹³⁹ Assume that Albert attacks Betty, and to prevent Albert from harming her, Betty stabs Albert in the arm with a steak knife. When Albert is sentenced, it would be odd for him to make the argument to the

¹³⁹ Kimberly Kessler Ferzan, *Defense and Desert: When Reasons Don't Share*, 55 *San Diego L. Rev.* 265, 266 (2018): Most cases of self-defense are not instances of punishment. And, there are rare cases in which adding self-defense and punishment can justify inflicting more harm. . . . [W]hen desert and defense are both sufficient reasons to justify both the rights forfeiture and the infliction of harm, both reasons are not simultaneously operative.

court that the stabbing is a harm that he has already received such that he should be punished less.¹⁴⁰ As an initial starting point, then, we should be skeptical of giving credit when these justifications are in play.

To take a step back, consider the earlier two accounts. If the imposition of defensive harm is simultaneously the imposition of punishment, then like desert-based dangerousness prevention, the harm imposed should be offset. In contrast, the argument for crediting time served for *unjust* detentions was that this undeserved, unjustified harsh treatment could count. But harms imposed in self-defense are not unjustified. So, if a harm imposed in self-defense is justified at the time, is it simultaneously punishment? Or is it only self-defense such that the reason to punish remains until punishment is imposed?

Elsewhere, I argued that desert and defensive reasons “don’t share.” What this means is that when an act is fully justified as defense, it is not simultaneously punishment and the reasons to impose punishment remain. I will briefly sketch this decisive objection to giving credit to time served. However, I will also suggest that one need accept only a far more modest version of my argument in order to find credit for time served objectionable.

a. Preliminaries

One way reasons can interact is that there can be a set off principle at work. If Alice owes Betty \$14, and when they go to lunch Betty forgets her wallet and Alice picks up Betty’s \$7 lunch, then this \$7 is set off against Alice’s debt such that Alice now only owes Betty \$7. The one act counts against the other. The question for us is whether pretrial confinement can also be set off against punishment.

That said, you would not want double counting. Let’s say that Alice owes Betty the \$14 because Betty paid for her lunch on Monday (\$7) and Tuesday (\$7). Certainly, if on Wednesday Alice pays for lunch at \$7, she could not say, “This counts for both Monday and Tuesday.” This is because Alice’s debts aggregate such that she owes \$14, something that cannot be satisfied by paying Betty \$7.

Sometimes reasons do not aggregate but are mutually reinforcing. For instance, assume you are deciding where you want to go to dinner. You might choose to go to a restaurant both because 1) it is

¹⁴⁰ Ferzan, *Defense and Desert*, 278.

close to the house and it is raining, and 2) because it is your partner's favorite and you want to be nice to them. These reasons support each other toward the same thing.

One crucial distinction between these is that in the first instance, Alice has incurred a debt. She has a duty to pay Betty, and those duties aggregate, such that $7+7=14$. Spoiler alert: I am about to contend that liability/forfeiture looks like this. In contrast, going to the restaurant is not about anyone's rights. Rather, it is simply to ask what reasons might support the choice, and those can be mutually reinforcing. (Of course, sometimes reasons can point in different directions, but we need not attend to this complication for our purposes.)

b. Punishment Reasons and Forfeiture

Consider now how these sorts of concepts work with punishment. Punishment has features that might be seen as forfeiture as well as reason-giving features. "Negative retributivism," the idea that disproportionate punishment including punishment of the innocent is impermissible, is a forfeiture-type claim.¹⁴¹ That is, unless someone has done something to forfeit her rights against this kind of hard treatment, such treatment may not be imposed on her. One need not be a retributivist to think that punishment has some sort of constraint here. Mitch Berman offers "responsibility-constrained pluralism." Antony Duff suggests the idea of "side-constrained consequentialism." And, Victor Tadros takes a duty view to determine the extent to which one may be liable to harm.

If someone is liable to a certain amount of punishment, then desert and instrumental values give us reasons to impose that punishment. This imposition of harm is limited by the defendant's forfeiture/desert. Even if there are reasons to impose greater punishment, such additional punishment--punishment that goes beyond the bounds of desert--would be unjustified. But within those bounds, different reasons can support punishing the defendant up to the proportionate maximum. For instance, positive retributivists take it to be intrinsically good to give people what they deserve. A deterrence theorist may take it to be a good reason to punish someone that it will prevent other offenses. If the defendant is found guilty of the offense, say arson, and is determined to have thereby forfeited rights

¹⁴¹ Michael S. Moore, *Justifying Retributivism*, 27 *ISR. L. REV.* 15, 16 n.2 (1993) (quoting J. L. Mackie, *Retributivism: A Test Case for Ethical Objectivity*, in *PHILOSOPHY OF LAW* 677, 678 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991)). Moore construes negative retributivism as forfeiture; he believes defendants "forfeit such rights precisely by the culpable wrongdoing that constitutes desert." *Id.* at 36; see generally Christopher Heath Wellman, *The Rights Forfeiture Theory of Punishment*, 122 *ETHICS* 371 (2012). Alternatively, Mitchell Berman opts for a specification view. Mitchell N. Berman, *Punishment and Justification*, 118 *ETHICS* 258, 281 (2008) ("The right rearticulation approach I have sketched on behalf of retributivists contrasts with moral forfeiture theory in not suggesting that the offender has forfeited any right. The offender has forfeited nothing.").

against hard treatment, then these instrumental reasons weigh in favor of punishing the defendant, limited/constrained by the defendant's desert. These various reasons are often concurrently reinforcing. The desert reason may support up to five years' imprisonment and the deterrence reason also supports five years. Then, the defendant gets five years for two reasons. Notably, these reasons don't aggregate to support ten years.¹⁴²

In contrast, desert premised on two different grounds does aggregate. If Matt steals two candy bars, he is punished more than for stealing one. If Bob steals two cars, he receives more punishment than for just one car theft. And so forth.¹⁴³ This is a function of both the forfeiture being aggregative and the positive desert reason being aggregative. Admittedly, there are times when this is not strictly additive. This may be because the law currently punishes overlapping offenses as distinct crimes such that crimes must be grouped together at the sentencing stage.¹⁴⁴ And, aggregation more generally may be responsive to more concerns than just simple addition.¹⁴⁵ But these complexities need not detain us here.

This distinction between when reasons operate concurrently and are mutually reinforcing or separately and independently is crucial to asking how to think about credit for time served. We know that we are combining a punishment theory with something else, and we must ask how that punishment intersects with the justification for the initial detention.

One crucial note before we continue. As the reader may notice, when I discuss a punishment reason, I am assuming a retributive justification for punishment. Here is why. First, I think most people subscribe to some sort of side-constraint or limitation on punishment.¹⁴⁶ For retributivists, these are linked—one forfeits the amount one deserves to be punished. Second, if one is just a consequentialist about punishment, then these questions look entirely different. At the time of the imposition of punishment, the court should be asking what amount of punishment will deter, incapacitate, and so forth. It would be odd to then give the defendant "credit." That is, at the time of sentencing after the defendant has already been incapacitated for some time, if the defendant needs three years of punishment to deter him, then giving credit would undermine the three-year determination.¹⁴⁷ Time

¹⁴² Ferzan, *Defense and Desert* 273.

¹⁴³ Ferzan, *Defense and Desert* 273.

¹⁴⁴ Ferzan, *Defense and Desert* 273.

¹⁴⁵ See generally Ferzan, *Punishment, Proportionality, and Aggregation*.

¹⁴⁶ Mitch, *Blameworthiness/Desert*.

¹⁴⁷ Both Donelson and Kolber think that pretrial detention is consistent with consequentialist justifications for punishment. I think this is misguided for the reasons above. E.g., Donelson, at 12 ("Whether construed broadly or more narrowly, natural punishment can fulfill the role of making it less likely that the wrongdoer reoffends."). Kolber, for instance, argues that "as a rough-and-ready guide, we expect that the benefits of confinement will

served is simply irrelevant to a forward-looking consequentialist calculation. The only argument to count time served would simply be that people think it should count, and this perception should itself matter to the general efficacy of the criminal justice system.¹⁴⁸ Finally, reasons to incapacitate, deter, rehabilitate and so forth float freely away from any particular adjudication. A consequentialist may always see a reason to rehabilitate, though doing so would violate the rights of a responsible agent. Those reasons always exist, irrespective of whether there has been a self-defensive act, a pre-punishment, or any other intervention.

c. Conjoining Defense and Desert

Self-defense operates with a forfeiture principle such that the victim does not wrong the aggressor, as well as often generating a reason to impose harm (to stop the attack). Desert has a similar structure. It has a forfeiture principle, as well as generating a reason to impose harm (positive desert). Elsewhere, I have argued that we can aggregate defensive and desert reasons to impose greater harm. That is, these reasons are not concurrently reinforcing. I argued that if Alice can only prevent Bob from groping her by tasing him, then even if tasing would be disproportionate to just stopping the attack, as a theoretical matter, she could aggregate the punishment due and the defensive force to which Bob is liable to impose the combined amount.¹⁴⁹ The idea is that Bob is liable to harm as a matter of stopping him, and that Bob is liable to harm as a matter of retributive desert. Given that there are two forfeitures, Alice may impose greater harm (which she has reason to do because that is what is necessary to avert the threat), and Bob has no complaint against that harm being imposed. Essentially, the forfeitures aggregate and then the reason to stop the attack justifies the imposition of force up to the aggregated forfeitures.

One argument against my view is that the forfeiture for defense and desert is premised upon the same facts and thus it is difficult to see why they would aggregate. But facts can often ground multiple implications. If a professional athlete engages in horrific behavior, he may lose both his job and his wife. If someone has sexually assaulted a child, it may be appropriate both to punish him and to bar him from teaching elementary school.

largely be a function of its duration and severity no matter whether we call it pretrial detention or punitive confinement.” Kolber, APP, 1175..”

¹⁴⁸ Cf. Robinson, empirical desert. Ferzan, Sound and Fury from Kaplow and Shavell.

¹⁴⁹ Accord Nozick, McMahan

Now, even if these two forfeitures can aggregate, this is not sufficient to say that when defense is imposed (without including the desert), the desert reason remains. That is, maybe Alice may impose greater harm, but if lesser harm stops Bob, why not think he is being punished simultaneously?

One easy out would be to say that punishment requires an intention. If the defender does not intend to punish, she can't be punishing. (One might also think in the case of individuals, rule of law considerations make her unable to avail herself of this reason, absent extraordinary circumstances.¹⁵⁰) But we saw above that this argument won't be sufficient. The pretrial detention cases are instances in which the state is explicitly disclaiming that the detention is punishment. Nevertheless, I suggested above that the detention could count against punishment.

Here are two ways to support a considered judgment that the desert reason remains. First, consider our widespread sentencing practices. We simply do not routinely credit defensive woundings against the deserved sentence. Now, to be sure, there are cases in which we are inclined to "call it even." If two boys, David and Earl, get in a fight at school and each gives the other a black eye, we might think that is good enough and punishment is not necessary. But this kind of case is only a counterargument if we think that David's black eye was appropriately caused by Earl, and vice versa. If instead, we are saying that they were both unjustly harmed, this goes no distance in showing that self-defensive injuries count against punishment.

Second, consider this hypothetical case:

*Second Dessert.*¹⁵¹ Assume that I take my child and a friend to a movie, and decide to buy them both ice cream afterwards. The reason that justifies this is something akin to "this is a nice thing to do for both of them." Now imagine that my child also got an A on a recent history test and that I always take him for ice cream to celebrate. I think that he would have a complaint against me if I said that the post-movie ice cream trip also counted as his deserved reward for his grade. That is, although I had two reasons on that first occasion to get him an ice cream cone, the fact that one of those reasons was sufficient led to the other reason continuing to exist. He continues to have a desert-based reason to get a second dessert.¹⁵²

¹⁵⁰ That is, if Alice kicks Bob to prevent him from groping her, and says, "take that as punishment," we may think that Alice is not permitted to punish because of the state's monopoly, and her act remains justified, if at all, only as self-defense. However, there are cases in which citizens may potentially punish. In Firth and Quong's example where Fran breaks Eric's wrist during an assault but that is insufficient to stop the assault, we may think that Fran's action is justified as punishment even if it cannot be self-defense because it is unnecessary (because insufficient) to stop the attack. Ferzan, *Defending Honor*.

¹⁵¹ Defense and Desert.

¹⁵² The case can be constructed to render a different conclusion. Assume that an A on a history test is rare for my son *and* that I almost never take kids for ice cream after a movie. I might decide that I am going to reward my son

If you believe that my child can claim that he is entitled to another ice cream—and *let's face it, all children would make that claim*—it is because the earlier reason was itself sufficient to justify the purchase of the cone and the positive desert reason continued to exist until satisfied. If you find these cases persuasive, they support the view that full punishment remains on the table for detainees. However, even if you are unpersuaded, the case that credit is inappropriate in these circumstances can still be made.

d. A More Modest Argument

To this point, I have been arguing that defense and desert have their own forfeitures bases and that when an act is imposed defensively, the desert reason continues to exist until the actor is given what he deserves. But we might ask the converse question. Why wouldn't we count the harm the defendant received against his desert? Viewed through this prism, I believe we may more easily see why retroactively decreeing defensive pretrial detention as punishment is problematic.

Return first to the arguments for crediting unjust detentions. We saw that hard treatment and undeserved suffering might count against later desert. The question here is whether *justified* treatment counts against later punishment.

Our intuitions can be tricky here. Often the earlier hard treatment is punishment, so it is justified and it should be credited. That is the “already punished enough” claim. What we are looking for are instances in which things went badly for a defendant for good reason, and the defendant then says, “look how hard my life has been: my wife left me when I cheated on her, I lost my job when I opted to play video games instead of operating on my patient, I went to prison for arson, and so forth.” The question is why this earlier justified hardships would count.

This brings us to the oddity of thinking that pretrial detention is also punishment. They are arguably for wholly unrelated forfeitures. The detention is justified based on a forward looking prediction that the defendant will commit a future crime that she intends. The punishment is justified based on the crime charged. This is as if Alice kicks Bob to stop him from groping her on the subway and Bob wants credit against his sentence for car theft, where the only link between the two is the contingent fact that Bob was on the way to the courthouse for the sentencing when he decided to grope Alice.

and because it would be rude not to give the other child an ice cream too, I buy him one as well. In that case, because the desert reason was in play, my son would not be entitled to a second dessert!

Less theoretically, an understanding that detention, even fully justified, will ultimately become punishment commits the state to a decidedly odd practice. Because the state denies that it is punishing when it detains someone pretrial, it would need to avail itself of some sort of justification for its “time transformation.” That argument would require the state to have some sort of conditional intention, “We currently intend to detain the defendant but if the defendant is convicted of an offense, we intend this time to also be punishment.” Only this sort of move would allow for defendants who are acquitted to not be punished while convicted defendants are punished. One would also have to question whether the Supreme Court would endorse a view that allows a conditional intention not to count as an intention for purposes of its jurisprudence with respect to criminal rights and entitlements. If detention can retroactively become punishment, and the state recognizes this at the time it imposes the detention, why wouldn’t the state be required to treat this as punishment at the time of initial imposition?

e. Counterarguments

Although I have said quite a bit, let me take on two other potential counterarguments. One is the way we run punishment concurrently. The other is the fact that we take incapacitation into account—that is, dangerousness—at sentencing. Both of these suggest that desert will share with (other) desert or with incapacitation.

[Double checking when concurrent punishment is actually imposed. Basically, I am going to argue that we only impose concurrent punishment for overlapping wrongs.]

It is important to ask what we are doing when we incapacitate based on dangerousness. This justification for punishment does not turn on a defense-based rationale. Rather, the idea is simply that once someone has forfeited rights against punishment, then various reasons to punish can come into play—desert, deterrence, and incapacitation. But this kind of dangerousness is not premised upon a true self-defense rationale, as there need be no showing that the defendant currently intends a future crime or has otherwise forfeited his rights. That is, we aren’t saying the defendant is liable to be stopped because of her culpable choices to engage in future conduct. We are saying the defendant is liable to be stopped because of the commission of her past act, and once that liability/forfeiture is established, we are allowed to engage in various reasons to incapacitate her, including the consequentialist goal of preventing future harm. But this forward-looking aspect of punishment is distinguishable from saying that someone who is being held only on a forward-looking rationale that is fully justified as prevention, can now have that detention count against later punishment.

2. Duty to Appear

A similarly justified preventive act is detaining individuals because they will abscond. Should one get credit for time served if the rationale for one's detention is that one might flee? The answer is no. But to see this, let's distinguish its nearby cousin that seems to be a "yes."

The general purpose of bail is to assure appearance at trial. So, if one gives the court money and then shows up, one gets one's money back. This might lead us to think that one should get one's time in detention "back," but the latter does not follow from the former.

Bail is a way of giving particular heft to one's promise.¹⁵³ From pinky promises, to marital vows, to blood oaths, there are ways that we commit and demonstrate the sincerity of those commitments. One way to say that one is very serious about keeping one's promise is to turn something over that the other party may keep if one fails to keep the promise. Holding this in trust is a way of indicating the solemnity of one's vow.

But when we detain someone, we are saying that there isn't something they can turn over to show they are going to keep their promise. We are saying they are unreliable and we are going to enforce compliance with the duty because we cannot trust them. Forcing someone to do what they have a duty to do is not something to which we need to give someone something back. If you owe me \$5 and I take it out of your wallet, I get to keep the five dollars.

Now, one could wonder whether detention can be proportionate to appearance at trial. It is a lot to take from someone. But our inquiry at this point already cabins detention to those cases that are morally justified.

This should lead to the conclusion that no credit is due because all we are doing is enforcing the duty. Before we fully reach this conclusion, it is perhaps useful to compare how we treat pretrial detainees in comparison to non-defendants who can also be subject to government intervention and detention: material witnesses.

¹⁵³ Given this rationale, community nullification, wherein someone else pays the defendant's bail, seems normatively problematic, even if we understand that in practice this is preventing the unnecessary incarceration of the poor.

Federal law authorizes the detention of material witnesses.¹⁵⁴ Notably, material witnesses cannot be detained if they can be deposed.¹⁵⁵ To arrest and detain a material witness, there must be probable cause to believe the witness won't appear and there will be a failure of justice.¹⁵⁶ If someone is arrested as a material witness, she is subject to 18 U.S.C. § 3142—that is, the Bail Reform Act.¹⁵⁷ That said, material witnesses may *not* be detained on the basis of dangerousness.¹⁵⁸ The government must make bi-weekly reports about material witnesses.¹⁵⁹ Just as is true with criminal defendants, material witnesses who cannot afford their bail remain detained.¹⁶⁰ Witnesses are entitled to compensation of \$40 a day, and the government absorbs the cost of the subsistence in providing the detainee with food and shelter in jail.¹⁶¹

¹⁵⁴ If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title [18 USCS § 3142]. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

18 U.S.C. § 3144.

¹⁵⁵ *Id.*; see also Fed. R. Crim. Pro. 15.

¹⁵⁶ *Bacon v. United States*, 449 F.3d 933, 942 (1971) (noting the applicability of the Fourth Amendment).

¹⁵⁷ 18 U.S.C. § 3144.

¹⁵⁸ *United States v. Awadallah*, 349 F.3d 42, 63 n.15 (2003)(noting that dangerousness considerations of Bail Reform Act are “inappropriate in the material witness context”).

¹⁵⁹ Fed. R. Crim. Pro. 46(h)(2):

Reports. An attorney for the government must report biweekly to the court, listing each material witness held in custody for more than 10 days pending indictment, arraignment, or trial. For each material witness listed in the report, an attorney for the government must state why the witness should not be released with or without a deposition being taken under Rule 15(a).

¹⁶⁰ Joseph Casula & Morgan Dowd, Comment, *The Plight of the Detained Material Witness*, 7 CATH. U. L. REV. 37, 40 (1958) (“In point of fact an overwhelming number of our state statutes affirmatively declare that inability to find a surety demands commitment to prison.”)

¹⁶¹ 28 U.S.C. § 1821(b), (d).

(b)

A witness shall be paid an attendance fee of \$40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

(d)(4)

When a witness is detained pursuant to [section 3144 of title 18](#) for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

States may also allow for the detention of material witnesses. New York allows for the detention of material witnesses.¹⁶² New York compensates detainees at \$3/day.¹⁶³ In contrast, if a witness fails to appear in Texas, the witness not only forfeits her right to appearance fees and is detained but is also subject to a fine of up to \$500, though that fine may be set aside after she testifies.¹⁶⁴

United States v. Hurtado provides a useful prism for the justification for detaining material witnesses.¹⁶⁵ There, Mexican citizens had been transported illegally into the United States, and they were being held as material witnesses against those who brought them in.¹⁶⁶ Interpreting an early iteration of the compensation statute, the Supreme Court held that the \$20/day compensation applied for days they were confined and the trial was ongoing, and \$1/day compensation for confinement where they were not yet a “witness” because the trial had not commenced.¹⁶⁷ The detainees argued that giving them only a dollar a day was an unlawful taking under the Fifth Amendment.¹⁶⁸ The Court disagreed:

But the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed....It is beyond dispute that there is in fact a public obligation to provide evidence...and that this obligation persists no matter how financially burdensome it may be.¹⁶⁹

Notably we pay all witnesses for showing up and doing their duty, just like we pay jurors. One might ask if they have a duty, why we need to pay them at all. Indeed, *Hurtado* suggests as much. Still,

¹⁶² N.Y. Crim. Proc. Law § 620.20 (generally setting forth the regulatory provisions); 620.50 (allowing for bail or detention).

¹⁶³ N.Y. Crim. Proc. Law § 620.80

¹⁶⁴ **Tex. Code Crim. Proc. Ann. art. 24.22** (Witness fined and attached). If a witness summoned from without the county refuses to obey a subpoena, he shall be fined by the court or magistrate not exceeding five hundred dollars, which fine and judgment shall be final, unless set aside after due notice to show cause why it should not be final, which notice may immediately issue, requiring the defaulting witness to appear at once or at the next term of said court, in the discretion of the judge, to answer for such default. The court may cause to be issued at the same time an attachment for said witness, directed to the proper county, commanding the officer to whom said writ is directed to take said witness into custody and have him before said court at the time named in said writ; in which case such witness shall receive no fees, unless it appears to the court that such disobedience is excusable, when the witness may receive the same pay as if he had not been attached. Said fine when made final and all costs thereon shall be collected as in other criminal cases. Said fine and judgment may be set aside in vacation or at the time or any subsequent term of the court for good cause shown, after the witness testifies or has been discharged. The following words shall be written or printed on the face of such subpoena for out-county witnesses: “A disobedience of this subpoena is punishable by fine not exceeding five hundred dollars, to be collected as fines and costs in other criminal cases.”

¹⁶⁵ 410 U.S. 578 (1973).

¹⁶⁶ *Id.* at 579.

¹⁶⁷ *Id.* at 586-88.

¹⁶⁸ *Id.* at 588.

¹⁶⁹ *Id.* at 588-89 (citations omitted).

we might think that if I need to save your life at the expense of damage to my expensive car, even if I have a duty to rescue you, I might be owed compensation for the harm to me. Accordingly, witnesses and jurors who lose valuable time in their lives could be owed compensation while still having a duty. However, *Hurtado* suggests that the time we spend detaining them so that they can do their duty need not be compensated. And this is precisely what we are doing to criminal defendants.¹⁷⁰

Hurtado, and the earlier federal compensation statute for material witnesses, may have had this right. If you are not willing to do your duty, then that is a cost you are imposing upon yourself, and it is not a cost for which you should be compensated. This would mean that neither material witnesses nor defendants should be compensated for time detained when they are detained based on their own potential misbehavior.

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

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

There are two other cases that can fall in this category. When we make unavoidable errors, there is a question of how to understand these acts. Mitch Berman argues that our accidental punishment of the innocent can only be justified through overriding the innocent's rights, as they certainly do have rights against the suffering that is imposed upon them. We might also place "gap" cases in this category. Assume that we are justified in asking for bail but the defendant cannot pay it.

¹⁷⁰ For parity, we might consider whether defendants should be compensated at the material witness rate for the days before the trial commences. Ironically, for poor defendants who cannot make bail *paying* them to be detained might lead to them being able to make bail before the trial begins.

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

There is a deep philosophical debate about how to understand what I am characterizing as overriding the person's rights. Some theorists believe that rights are overridden, whereas others believe that when the stakes are high enough, one lacks the right in the first place—the right is specified. In the famous case of *Vincent v. Lake Erie*, the question is whether the dock owner is in fact wronged (though justifiably) or whether he is not wronged at all. Notably, however, even those who take a specificationist approach to rights, and thus do not believe the right is violated, contend there may be reasons to compensate the dock owner. For our purposes, then, I will not enter the fray over how best to understand the structure of rights at work.

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

1. Pure Prevention Dangerousness Detention

How, then, should we think about these cases? Take pure prevention dangerousness detention first. Importantly, it is this language, of overriding for the greater good, that is most typically invoked by the Supreme Court. Its view has always been that this is simply interest balancing. And, the interest of the individual is giving way.

So assume that we owe the detainees something. Compare this to quarantine. Although the United States lacks a consistent and thorough response for those whom we ask to quarantine *for us*, some jurisdictions, in the wake of COVID-19, did provide for paid sick leave for those who had to isolate.¹⁷¹ In contrast, to isolate “the dangerous,” we put him in a jail in ways that detrimentally impact his health and employment. We owe the defendant compensation for what we are taking from him.

First and foremost, there is the usual objection—that credit for time served does nothing to compensate the defendants who are not ultimately convicted. Putting that objection to the side, we might ask whether these cases call out for monetary compensation to account for the gap between what we did and what we owe.

¹⁷¹ Ny; San Fran. Need to follow up on this.

Still, for the reasons suggested above dealing with unjust detentions, time served is appropriate. It is a way of giving the defendant back what we took from her. This is the closest cousin to what has happened to her. It is arguably the same as compensating the dock owner for the extent of damage caused by the yacht that slammed against it in the storm. [Admittedly, I am not sure this is precisely right. Is there some discounting here based on the harm that the dock owner would have a duty to absorb under a duty to rescue? Or should we be compensating individuals for harms they incur as part of the duty to rescue?]

2. Unavoidable Errors and Gaps

Now consider unavoidable errors. This category of detainees are those who are held based on legitimate substantive tests and the correct application of evidentiary burdens, but who would not have fled, obstructed, or committed an offense. This category is akin to the defendant who is actually innocent but is convicted after a fair trial under a substantively just statute.

In the vast majority of cases, there is simply no way to know whether we made a mistake. We can't run the counterfactual where the defendant is let out. And thus, we will never face the fact that we have made a mistake. In addition, if our systems are run appropriately then these unknown cases will be few and far between. Thus, a practice of giving everyone credit for time served because we will make a few mistakes is equivalent to letting everyone out of prison because some of those we convict are actually innocent. In other words, it is wildly overinclusive and unless we have some other reason we ought not to be detaining someone, inures to the benefit of those who do not deserve such a benefit.

Still, we might ask whether we should give a defendant credit for time served if we were to somehow become aware of the error at the time of trial. (Perhaps it becomes clear that the person who testified that the defendant intended to kill a witness was lying.) If we override this person's rights to justify the detention, then they should be treated in the same way as pure preventive dangerousness detention.

The same analysis likewise applies to "gap" cases. If money bail is a legitimate practice, and if that practice cannot help but inevitably detain some indigent people simply because they cannot raise the funds, then these individuals are unavoidably detained for the greater good. (To be clear, I am not contending this is true. Just that if money bail is not simply unjust, then this is how we ought to think about these cases.) This then leads us to how courts found an equal protection violation. Even if ex ante we must detain the indigent, there is no reason not to give them credit ex post.

E. Summary

Below is a table summarizing the rationales and their relationship to time served. Let me suggest two takeaways. First, there are normatively attractive reasons to detain individuals. When these reasons are invoked, there is rarely any reason to give credit for time served. Second, it is highly likely that in practice, the vast majority of cases do not fall within these categories. Those defendants may be entitled to credit for time served. In all of those cases, defendants who are found not guilty or who have their cases dismissed, do not benefit from this, or any other form, of “compensation.”

Detention-Type	Rationale/Grounding/Justification	Credit for Time Served?
Unavoidable Error	Have given defendant fair hearing, made mistake nevertheless	<i>Yes in theory, no in practice</i> Given extremely small number of cases to which this rationale applies, it would be wildly overinclusive to give all defendants credit for time served. Would need to be able to identify such cases
Substantively Unjust Detention	None	<i>Potentially.</i> Compensation in the form of credit for time served may be justifiable under various theories; however, it will be radically underinclusive in taking into account hardships suffered by the undeserving
Duty to Appear	Fear of Flight/Willful Absconding: Enforcement of Defendant’s Duty to Support and Participate in Just Institutions	<i>No.</i> Compensation in form of time served should not be provided because the defendant has the duty to appear which is being enforced.
Obstruction	Forfeiture/Defensive rationale. Defendant intends impermissible act and thus has no right against the state’s use of necessary, proportionate force to stop him.	<i>No.</i> Forfeiture/Defense fully justifies detention such that there is no reason to

		give credit for time served.
Desert-Based Dangerousness Detention	Defendant's commission of a crime leads to no right against further incapacitation to the state, constrained by proportionality (e.g., a criminal sentence that is justified, in part, on incapacitation grounds).	Yes. Detention is punishment for crime charged on this rationale. Remains problematic that innocent defendants can be punished on these grounds.
Defense-Based Dangerousness Detention	Forfeiture/Defensive rationale. Defendant intends impermissible act and thus has no right against the state's use of necessary, proportionate force to stop him.	No. Forfeiture/Defense fully justifies detention such that there is no reason to give credit for time served.
Pure Prevention Dangerousness Detention	Defendant is treated as innocent but his right is overridden for the greater good, akin to quarantine.	Yes. Credit for time served compensates for infringing the defendant's right. However, this remedy is underinclusive as it provides no compensation for innocent defendants.

F. A Few Practical Wrinkles

In asking how to give credit for time served, this Part has abstracted away from a couple practical considerations that would bear on the ultimate analysis. Let me explain how three practicalities would impact cases. First, we should ask about forms of liberty deprivation short of detention. Second, we should ask how to think about credit for time served given the empirical evidence that pretrial detention increases sentence length. Third, we should consider how to think about the uncertainty of the length of pretrial detention at the time the detention decision is made.

1. Of Ankle Bracelets and Surrendered Passports

Not all pretrial measures result in detention.¹⁷² If the defendant is detained in home detention, should this count? As you might expect, the answer is sometimes.

First, note that jurisdictions do not give credit for these lesser sorts of detention. That means that we tend to think there is something special about incarceration, as opposed to thinking there is something special about pretrial liberty deprivations.

Second, when we use lesser means, it is clear that we are tailoring the detention to the justification. If an ankle bracelet ensures the defendant won't abscond, we just use that. And, note, that we do not feel remotely compelled to give credit when these lesser actions are fully justified. This intuition supports my argument, as we do not feel remotely compelled to give individuals credit for liberty deprivations that are narrowly tailored to flight, obstruction, or dangerousness.

With that said, to the extent that we are overinclusive in our use of these liberty deprivations or otherwise override the defendant's rights, there is still an argument for crediting these deprivations against the later punishment. Notably, there would not be a one day to one day correlation where the earlier liberty deprivation is less significant than the later incarceration.

2. Increasing Sentences

Sadly, there is empirical evidence that defendants who are incarcerated prior to trial receive longer sentences than those who are let out on bail. One might then ask whether credit for time served is really doing nothing other than undoing the damage that detention itself causes.

I think there are reasons to reject this. First, for fully justified detentions, increases in punishment severity would have to be part of the proportionality calculation in the first place. Second, for unjustified detentions, the increased length increases the wrong. Third, speculating, I doubt judges know (and certainly legislatures who enacted time served statutes did not know) that there is this impact. This collateral consequence of detention is something to be addressed directly and should not be viewed as the motivating force for crediting after the fact.

3. Uncertain Detention Length

How long the defendant is incarcerated pretrial is highly variable. Although substantively unjust detentions simply remain substantively unjust, just detentions can become disproportionate after some period of time. One important question beyond the scope of this paper is how to practically implement

¹⁷² I thank Paul Heaton for pressing me on this question.

review of detention decisions to determine whether detention remains warranted. A second theoretical question is what follows when the full time of detention is ultimately disproportionate but the decision to incarcerate at this point continues to make sense.¹⁷³ For our purposes, however, the answer is simple. If there becomes a point in time at which the detention becomes unjustified then credit for time served is due at that point. So, a defendant who continually harbors an intention to kill a witness is not entitled to credit for time served whether he is detained for three months or three years, but a defendant who is detained to appear at a trial for arson may have a detention that becomes so long that it is no longer just to hold him simply so that he can be called to answer for his crime.

IV. Time Served is Sometimes Justified, Sometimes Not. What Follows?

This Article does not offer a silver bullet. Rather, it suggests that theorists of all stripes should be deeply troubled by our current practices and that everyone has a reason to want reform. This Part details how egalitarians, expressivists, deontologists, and law and economics scholars should all seek to reform our practices. It also details how epistemic uncertainty about our detention practices complicates this question. Notably, compensatory schemes—though unlikely in our current criminal justice practice—can fill some voids, but true reform will only come from reforming our pretrial detention practices themselves.

A. The Egalitarian Objection

We want the rich and the poor to be treated equally. Yet, rich defendants make bail and poor defendants remain detained. As noted above, courts were live to this concern and indeed found time served to be constitutionally required to equalize treatment.

Nevertheless, there has been one familiar refrain throughout our analysis and that is that defendants whose cases are dismissed and defendants who are acquitted do not reap the benefits of our current practices. Poor innocent people are treated much worse than rich innocent people.

Hence, egalitarians should have two items on their agenda. At the very least, those who are acquitted or have their cases dismissed should receive compensation. And, more importantly, courts should work to limit the number of defendants who are detained to begin with. No one who believes in

¹⁷³ Sunk costs war literature applies here.

equality should find our current remedial practices to be remotely sufficient for the disparate treatment inherent within our system.

B. The Expressivist Objection

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

Time served threatens this division of labor. Procedurally, it deprives punishment of its import. Substantively, it tells the detained person that this might or might not be part of the punishment. Indeed, if punishment is part of the communication to the offender, our current practice sends decidedly mixed messages.

For the expressivist, we should never rely on time served to fulfill punishment goals. Instead, any unwarranted detention should be compensated. This will allow us to keep the sharp divide between our practices.

C. The Deontological Objection

Rights theorist should also be troubled by our current practices. We detain people unjustly. We turn the innocent into the guilty. And we under punish some defendants.

The last objection may be the least worrisome in this context. Over detaining is more troubling than under punishing. Nevertheless, the defendant who truly deserves to be punished is receiving credit because she is locked up because she plans to flee. If we think that someone's getting what she deserves is intrinsically good, we are failing to achieve that good.

More troubling, we continue to unjustly detain individuals. We could compensate everyone—both the convicted and the acquitted, but a rights theorist should be quick to note that the better answer is not to violate a right and then to pay for it, but simply *not to violate the right at all*. That is, we should be aiming for narrower pretrial detention tests and then supplementing those tests with compensation when we override people's rights.

A final concern for the deontologist is the practical reality of what credit for time served does. It induces the innocent to plead guilty. A defendant charged with a misdemeanor has significant incentives to simply plead guilty if that means she gets out now as opposed to fighting the case at trial. Even if our practices are not so coercive as to undermine consent, we should still worry that our practices serve as a pragmatic reason for a person to accept punishment she does not deserve.

D. The Law and Economics Objection

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

E. The Epistemic Obstacle to Reform

As noted, our current practices are overinclusive. But even if we wished to credit only those who deserved credit, we face a significant hurdle. We do not know why anyone is being detained. To reform time served, we must reform our pretrial practices in ways that clearly and specifically articulate the grounds for the detention. We can no longer rely on an amorphous sense of dangerousness because “dangerousness” masks rationales that point in different directions.

Now, having judges engage in more rigorous proceedings is already on the law reform agenda. And, requiring them to more clearly articulate their reasons is not an impossible leap. Interestingly, one might wonder what the impact of reforming time served will be. If we alter the metrics, we could question whether the legal actors will simply adapt toward their preferred normative outcome.

One thing is true, however. Even if time served is a problematic practice, abolishing it is not clearly the right answer. If we were to do so, we would take away a small bit of justice or mercy for some in hopes of more broadly reforming our system for everyone. We need significant confidence that we

would be able to reform this system before we should abandon this practice. We may believe in laboratories of democracy, but we ought not to use the innocent as guinea pigs.

Conclusion

Here is where we are. If we took seriously our obligations to only detain those whom we are fully justified in detaining, then we should detain those who will flee, those who will significantly obstruct, and those who currently harbor criminal intentions. And, if we limited our pretrial detention practices to those individuals, we should eliminate credit for time served.

In contrast, our current practices are wildly over inclusive. We essentially detain people because they are poor. We confuse excusable failures to appear with true flight. We decide people are “dangerous” and cannot walk among us. We reduce people to “germs” we cannot “let loose” on society.

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

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

Third, our practices turn the innocent into the guilty. As has been established, defendants who are held pretrial are more likely to be found guilty. Indeed, our ability to detain someone and then offer them the prospect of release with no more than time served can be said to coerce pleas. The innocent defendant may simply want to get out, and we offer him freedom. Time served is an inducement.¹⁷⁴

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

Of course, even if time served induces some guilty pleas and fails to require the state to internalize the cost of its detention practices, there is a separate empirical question as to whether we

¹⁷⁴ Accord Heaton, Mayson, and Stevenson, at 716, “Misdemeanor pretrial detention therefore seems especially likely to induce guilty pleas, including wrongful ones.”

should rip off the Band-Aid. We would need to know whether removing this safety measure would ultimately lead to more radical reform than leaving it in place. My arm chair speculation is that we would do more harm than good.

But, as we go about bail reform and reconsider our detention practices, we should remember that our crediting of time served is an insufficient measure to remedy grave injustices done by our system. We should recognize that criminal law's creative accounting, of pretending we are in the black while actually incurring debts we cannot pay, is not a legitimate approach to detention.