THE SQUARE ONE PROJECT

REIMAGINE JUSTICE

EXECUTIVE SESSION ON THE FUTURE OF JUSTICE POLICY

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THE "RADICAL" NOTION OF THE PRESUMPTION OF INNOCENCE

The Square One Project aims to incubate new thinking on our response to crime, promote more effective strategies, and contribute to a new narrative of justice in America.

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"It was the smell of [ ] death, it was the death of a person's hope, it was the death of a person's ability to live the American dream." That is how Dr. Nneka Jones Tapia described the Cook County Jail where she served as the institution's warden (from May 2015 to March 2018). This is where we must begin.

Any discussion of pretrial detention must acknowledge that we subject citizens—presumed innocent of the crimes with which they are charged—to something that resembles death.

American history is replete with instances of this country’s failure to ensure that the basic founding principle of the presumption of innocence was applied, and, when applied, done so equitably. We failed to afford this principle to enslaved people and, after the Civil War, to those who were emancipated. We failed after Reconstruction and well into the 20th century, when thousands of black Americans, mostly in the Jim Crow South, were lynched without the required process that the state must prove a crime had been committed through a trial resulting in a jury verdict of guilt (Equal Justice Initiative 2017). And today, we continue to ignore this principle when we unnecessarily hold people who are presumed innocent—disproportionately people of color, and overwhelmingly people without means—in pretrial detention, causing great harm and loss of liberty.

Let’s not forget that Kalief Browder spent three years of his life in Rikers, held on probable cause that he had stolen a backpack containing money, a credit card, and an iPod that the police did not find on him. Two of those years he spent in solitary confinement. And after he was released, as is well-known, Browder committed suicide. Today, during the current COVID-19 pandemic, jurisdictions are extending the grace period between a defendant’s arrest and her appearance before a judge to determine if she will be released pretrial, and, if so, under what conditions. In extending this timeline, the justice system is aborting the right to a quick bail hearing, and thus a speedy trial (Friedersdorf 2020).

In the face of contemporary practices across the United States, it is difficult not to conclude that commitment to the presumption of innocence is a radical idea. Given the evidence of the enduring inability of state bureaucracies to respect the presumption, we think it is necessary to support this bedrock principle with another presumption: a presumption of liberty.

In our view, commitment to the presumption of innocence prior to criminal adjudication requires that a presumption of liberty be ingrained in our system procedurally because the opposite of the presumption of liberty—pretrial detention—both feels and looks like punishment to those who are detained. It is clear, moreover, that detention can greatly hinder an individual's defense. In order to ensure that pretrial detention is exceedingly rare and actually limited to instances in which an individual presents a risk of fleeing and failing to appear at court, we argue that pretrial detention should occur only after a finding based on clear and convincing evidence that an individual is unlikely to appear before a court for adjudication of the offense with which she is charged. Ensuring that a defendant appears before a tribunal to have their guilt adjudicated in court is the only rationale for pretrial detention grounded in legal jurisprudence.

We believe the state may argue for pretrial detention only when the state can present articulated evidence to an adjudicator that the defendant poses a specific risk to the adjudication process, such as threatening harm to a witness or a victim, juror tampering, or a likelihood of flight from the jurisdiction. To be clear, threatening harm to a witness is different from arguments about general threats to the community. In our view the presumption of innocence does not allow room for arguments regarding the potential danger an individual may present to the community, in general terms, as the sole justification for pretrial detention as part of the trial process. Detention of a defendant for "dangerousness" is not rooted in law nor even in public safety if that assessment is based merely upon probable cause to believe that an individual committed a particular criminal offense, which is the basic finding of a court to hold a defendant for trial.

We believe, given our founding principles and advancements in technology, that the state is required to utilize other, less intrusive mechanisms apart from detention to ensure the defendant's presence at adjudication, such as passport surrender, asset freezing,

electronic monitoring, case management (supervision) related to behavioral health, and in some cases, even high monetary bail.

To explain our rationale, we will first discuss the current state of pretrial detention and the importance of the presumption of innocence. We will then turn to the effect of pretrial detention on Americans today and explain why it is critical to instill the presumption of liberty as a way to protect the presumption of innocence. Next, we will address the question of when pretrial detention is appropriate and when it is not, before discussing alternatives and concluding with a short agenda for change.

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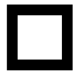
THE CURRENT STATE OF PRETRIAL DETENTION

The scale of pretrial detention is staggering and should shock the conscience of all Americans. Of the approximately 612,000 individuals that are currently being held in county jails, the vast majority, about 460,000, are awaiting some type of adjudication and thus are presumed innocent (Sawyer and Wagner 2019).

More concerning is that those who are locked up before trial often do not represent the most dangerous individuals or the highest flight risks—the two rationales often articulated for pretrial detention—but are simply our poorest citizens (Neal 2012:13; Bradford 2012). In addition, a huge number of those detained for some period prior to adjudication face misdemeanor charges. While it's true that the line between misdemeanor and felony can vary incredibly across jurisdictions—a domestic violence incident, for example, may be categorized as a misdemeanor but yet might result in a period of detention based on threat to the victim—misdemeanors are generally less serious and violent offenses than felonies. And FBI data on arrests show that roughly 80 percent of the approximately 10.3 million arrests in the country each year are for misdemeanor charges as opposed to felony charges (FBI National Press Office 2019). While national jail data from a decade ago suggests that roughly four in ten felony defendants in the largest urban counties are detained pretrial until their case is disposed, there are no national data that would help us to better understand pretrial detention rates for people charged with misdemeanors because the Bureau of Justice Statistics does not collect those statistics (Reaves 2013:15; Heaton, Mayson, and Stevenson 2017:732).[1]

Without good, recent data on the percentage of individuals detained pretrial for a misdemeanor or felony charge, we must resort to localized estimates of the rate and depth of this serious incursion on individual liberty. A recent article by economists Heaton, Mayson, and Stevenson found that



BY IMPOSING INCARCERATION BEFORE JUDICIAL DETERMINATIONS OF GUILT SOMEWHAT INDISCRIMINATELY, AS WE CURRENTLY DO, WE ERODE BASIC LIBERTIES AND CHEAPEN THE PUBLIC PERCEPTION OF JAIL CELLS AS A FORM OF PUNISHMENT.

approximately 53 percent of those charged with misdemeanors in Harris County, Texas, the Houston area, were detained pretrial for more than a week during the period studied (2017:733). Heaton and colleagues describe this rate as slightly higher than misdemeanor pretrial detention rates found in other cities—their calculations suggest that around 35 percent of misdemeanor defendants are detained pretrial for more than a week in New York City and 25 percent of misdemeanor defendants are detained for more than three days in Philadelphia (Heaton et al. 2017:732). Given that misdemeanors are much more numerous than felonies, and given that we are talking about misdemeanants arrested in metropolitan areas comprising populations of over 4 million, 8 million, and 1.5 million people, respectively, 53 percent or even 35 or 25 percent are high numbers in absolute terms of detained people likely to be considered a very low public safety risk, to the extent that one's charge is an accurate proxy for one's risk of reoffending.

But focusing solely on these aspects of the data can obscure the sheer mass of individuals entering and exiting our jails prior to any finding of guilt. Misdemeanants, after all, generally have shorter lengths of pretrial detention than those charged with a felony. A study of the Miami-Dade court system reveals that misdemeanor defendants were detained an average of six days compared to felony defendants, who were held an average of 43 days (Peterson 2019). The longer relative lengths of stay among felony defendants can then tip the scale in analyses focused on determining the proportion of jailed misdemeanor and felony defendants on any given day and make it falsely appear as if more felony defendants are impacted by pretrial detention. Moreover, analyses focused on charge-based detention differences likely conflate the utility of using one's charge to predict overall risk. To truly measure the impact of pretrial detention, it may be more helpful to look at the absolute number of bookings made over a year rather than the percentage of individuals held pretrial on any given day. In any case, it should be clear from even this short review of existing evidence that the problem of pretrial detention is a big one, affecting hundreds of thousands of people across the country. It is not site-specific or isolated.

Given the current reality of pretrial detention, we deliberately use irony in describing the presumption of innocence as "radical." Every American child learns that the presumption

of innocence is the bedrock principle on which our system of law is supposed to rest. Common law has long recognized this principle, with the 800-year-old Magna Carta declaring that the sovereign could not imprison a citizen "or in any other way ruin … except by the lawful judgment of his peers or by the law of the land" (British Library N.d.). We can find evidence for this principle in law hundreds of years before the Magna Carta. We can trace back its lineage 1,500 years to the Roman *Corpus Juris Civilis*, enacted by Emperor Justinian (Gebelhoff 2016). Even the eye-for-an-eye Code of Hammurabi, older still than Roman jurisprudence by 2,200 years and maybe the oldest written law, included this principle by providing the death penalty as punishment for those who accuse another of a capital offense before the elders without proof (Mandal 2019).

For generations, the presumption of innocence has been touted in the United States as essentially sacrosanct, with its supporters often citing our Founding Father and second President, John Adams: "It's of more importance to the community, that innocence be protected, than it is, that guilt be punished" (Adams 1770). Although the presumption is not located in the Constitution's text, it nonetheless plays a major role in American legal jurisprudence. The presumption was primarily an informal assumption at the beginning of American legal history, but the principle gained greater weight in *Coffin v. United States* (1895), when the U.S. Supreme Court acknowledged that the presumption of innocence for people accused of crimes is "undoubted law, axiomatic and elementary, and its enforcement lies in the foundation of administration of our criminal law" (Coffin v. United States, 1895). It is hard to find a criminal justice concept with deeper roots or more solid jurisprudential footing.

In contrast, the broad use of detention for safety's sake, an exception without clear footing in traditional legal jurisprudence, has evolved as a new principle for bail decisions over the past few decades. In 1970, the District of Columbia Court Reform and Criminal Procedure Act established the first legal basis for detaining an individual due to the risk they posed to the community (United States Congress 1970).[2] A little over a decade later, this became the national standard for federal courts under the Bail Reform Act of 1984 (United States Congress 1984). After being challenged in court, the U.S. Supreme Court upheld the notion of pretrial, preventive detainment in *U.S. v. Salerno*. According to the Court, preventive detention did not have the purpose of punishment when written into the Bail Reform Act by legislators, but rather could be considered the regulation of dangerous individuals. In this way, the government is able to act on behalf of the community's interest even if it conflicts with individual liberties (United States v. Salerno, 1987). In practice, the federal statutes since the

1990s have mainly had a "presumption of detention" that the *defendant* is required to overcome—a burden that is akin to having a trial at which the presumption is guilt and a person must prove their innocence. Not surprisingly, today the federal pretrial detention rate is around 75 percent; in places like Hernando County, Florida, the pretrial detention rate has reached as much as 81 percent (Rowland 2018:13; Vera Institute of Justice N.d.).

This approach has generated a dangerous precedent. As posed by Michael Louis Corrado (1996): "What of any violent offender who has been convicted several times? Does dangerousness alone give the state the right to regulate the freedom of those individuals?" (Corrado 1996:785). A government that is able to detain its citizens for an act it has not yet proved beyond a reasonable doubt to have occurred is a capricious government vulnerable to the whims of policymakers' and judicial actors' fears and beliefs about what connotes a threat of danger to the community.

Looking to the states, it appears the presumption of innocence has not fared better, despite state statutes still having, for the most part, presumptions of pretrial release. Many state constitutions—40 of them—include a presumption in favor of releasing all but a few, specified types of defendants pretrial. Further, in eight of the ten that don't have such a provision in their constitutions, the presumption of release is dictated by statute (National Conference of State Legislatures 2013).[3] These constitutional provisions or statutes generally follow what is laid out in Article I, Section 8 of the Connecticut Constitution: "In all criminal prosecutions, the accused shall have a right…to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great…" (CT Const. art. 1 § 8). In most states, though, the presumption of pretrial release is ignored when capital offenses are charged, and some states specify other charges, including murder and treason (Indiana), offenses punishable by life in prison (Hawaii), and violent offenses and various drug-related offenses (Louisiana) (National Conference of State Legislatures 2013). We see a similar infringement upon the presumption of innocence when individuals are charged with a supervisory violation. Indeed, individuals on probation or parole can fare even worse in the court system. Often found guilty of technical violations due to a simple statement of the probation or parole officer, they too suffer detention spells, and if their violation is a criminal charge, may be automatically detained pretrial. In many states, such as New York, a criminal charge is not even needed for automatic and mandated pretrial detention, as an additional arrest, not a guilty verdict, violates the terms of supervision. In other words, if you are arrested while supervised but your charges are immediately dropped,

you will still face a stay in detention prior to adjudication before a judge to decide if you will be incarcerated for an additional arrest—an arrest for a criminal act that the state has already determined you didn't commit.

Beyond the statutory and constitutional standards, state pretrial detention practices vary widely—in terms of whether to require secured bonds, unsecured bonds, or neither for different charged offenses or risk profiles. The variants continue with regards to bail schedules and caps, the use of risk assessment tools, an ability-to-pay inquiry, and conditions placed on those released pretrial. For example, in Connecticut, police have wide discretion—and no statewide guidelines—to release on recognizance or require secured or unsecured bond amounts (Connecticut Sentencing Commission 2017:12). In Kentucky, on the other hand, it's illegal to profit off bail—so there are no private bail bond corporations (Santo 2015). New Jersey made great strides toward sweeping reform in 2017 and moved to a system that re-centered the presumption of innocence by expanding the use of summons, thus avoiding the use of any jail time for about 70 percent of defendants, only booking around 30 percent of people and then using a preventive detention hearing for those whose charges are fit criteria for detention (roughly 16 percent of defendants in 2018)(Grant 2019:18, 37). The result of New Jersey's reforms is that over 90 percent of people have their presumption of innocence supported by a presumption of pretrial release, and those who lose their liberty do so after a hearing at which the burden of proof was put to the state to show there were no risk-mitigation options (Ibid 8). Data from October 3, 2018 suggests New Jersey lowered their pretrial detention population by thousands of individuals compared to that same day six years prior, yet they have not seen a substantial increase in pretrial crime or failure to appear rates (Ibid 45). But variations continue across the Republic.[4] And, despite strong language in state constitutions and statutes, we know from the sheer number of individuals that are detained pretrial that states do not regularly follow the ideals set forth in their own laws.

We must work to change this. By imposing incarceration before judicial determinations of guilt somewhat indiscriminately, as we currently do, we erode basic liberties and cheapen the public perception of jail cells as a form of punishment. When both the innocent and guilty alike are held behind bars, jails also lose their power to even attempt to effectively rehabilitate sentenced individuals in their care (assuming one believes that is a relevant corrections goal) due to a larger strain on jail resources and can fail to deter individuals in the community from committing crime. In that sense, reform of pretrial detention could also serve a larger educative function by reminding people that any punishment should be done with deliberation and a distinct policy goal in mind.

WHY DOES THE PRESUMPTION OF INNOCENCE MATTER?

We have already noted the historical grounding of the presumption of innocence, but pointing to history is not enough to explain why it is important.

In criminal law, Blackstone's ratio presumes that there is a greater value to protecting one innocent man and letting multiple guilty people go free rather than harming an innocent (Volokh 1997:175; Adams 1770).

The presumption of innocence can be viewed as the practical outgrowth of this sentiment. In both the context of Blackstone's ratio and the presumption of innocence, the interpreted purpose of the formal legal process is to minimize undeserved suffering while attempting to hold the guilty accountable. Inherent in these maxims is an acknowledgement that by protecting the liberty of the innocent, society may give up some certainty of safety prior to an adjudication and determination of guilt.

Additionally, the presumption of innocence serves to protect against justice by "mob rule" and instill respect for due process. While professing respect for the innocent, society is also quick to judge individuals guilty in the public sphere—further underlining the importance of legal protections and due process. Often, these quick assumptions of guilt and support for punishment are due to a deep, almost moral revulsion to the alleged crime or a perceived threat to public safety. Again, constitutional processes of adjudication, elucidated by the Supreme Court, are designed to guard against the too-prevalent consequences of this concern. Indeed, as Michael Klarman has noted, "trials" by lynch mob of black people in the South motivated the very birth of modern constitutional criminal procedure in the 1920s through the 1930s, the foundation of which was the guarantee of the presumption of innocence by ensuring adjudication under rule of law (Klarman 2000:49).

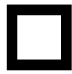
Some features of that jurisprudence include jury instructions on the presumption of innocence, which are supposed to remind the jury that indictment is not equivalent to evidence of guilt and temper jurors' propensity for prejudgment of an individual (Fox 1979:257). According to legal scholar George Fletcher, "[T]he ordinary citizen may well draw significant additional guidance" from this reminder (Ibid 266). The state's duty to prove to a judge or jury that the defendant has committed a charged offense "beyond a reasonable doubt"

offers additional procedural protection to the presumption of innocence. Indeed, the presumption of innocence and "beyond a reasonable doubt" standards work together to correctly remove the burden of proof from the defendant and place it on the state, represented by prosecutors. In all cases, presuming guilt violates individual liberties and puts individuals at risk of falling victim to government abuse. Other aspects of constitutional criminal procedure guarantee individuals a right to due process, but presuming guilt pretrial obviously interferes with these rights.

Additionally, as a functional matter, presuming guilt rather than innocence (as required) exacerbates the power disparity between the individual and the state. If a person is presumed guilty, the burden of proof of innocence effectively is placed on the less-resourced individual rather than the state. The presumption of innocence thereby stands not only as a cornerstone principle of American jurisprudence but as one of the foremost protectors of innocence, equality, and liberty under the law.

We have described processes indicating that the presumption of innocence is accepted as a part of trial procedure, but it is clear that the principle has yet to be fully embraced at all points in the legal process—especially prior to trial. One scholar notes "if the presumption of innocence were a true presumption with actual evidentiary effect, it might well be used to invalidate long standing pretrial practices, such as bail and pretrial detention" (Ibid 261). In many states, individuals may have their bail set by a lay magistrate with minimal training and education and without a solid legal background (Trautman and Felton 2019). Incredibly, bail hearings in which a person's liberty is at stake may occur over a video conference call and can last several minutes or less than a minute (Stevenson 2017:4; Heaton et al. 2017; Rahman and Mai 2017).[5] Defendants may not have counsel present to represent their concerns and the decision to detain, to assess cash bail, or to release—a decision with far-reaching consequences for a defendant's life and presumption of innocence—is made with only a passing thought to many involved (Stevenson 2017:26; Heaton et al. 2017:11; Rahman and Mai 2017). Current failures to extend the presumption of innocence to all parts of the legal process—including determinations of bail and pretrial detention—directly threaten to undermine core American values of justice.

Newly prominent risk assessment tools also potentially impact the presumption. Approximately a quarter of the U.S. population lives in a jurisdiction utilizing a validated pretrial risk assessment tool (Pretrial Justice Institute 2017:13). These risk assessment tools were developed to help courts follow state statutes requiring them to consider a host of factors beyond the charge in making pretrial detention



IF A PERSON IS PRESUMED GUILTY, THE BURDEN OF PROOF OF INNOCENCE EFFECTIVELY IS PLACED ON THE LESS-RESOURCED INDIVIDUAL RATHER THAN THE STATE. THE PRESUMPTION OF INNOCENCE THEREBY STANDS NOT ONLY AS A CORNERSTONE PRINCIPLE OF AMERICAN JURISPRUDENCE BUT AS ONE OF THE FOREMOST PROTECTORS OF INNOCENCE, EQUALITY, AND LIBERTY UNDER THE LAW.

decisions.[6] They encourage judges to make decisions about bail conditions based on the tool’s prediction of someone’s likelihood to make scheduled court appointments without a new arrest. In many places, this judgement about whether a defendant is “high risk” results in courts holding people in jail in advance of an adjudication of a pending charge, typically by setting a high secured money bond. Estimates compiled from a 2009 survey conducted by the Pretrial Justice Institute suggests that the vast majority of pretrial service agencies (9 out of 10 surveyed) rely on some assessment of risk to inform pretrial decision-making, although a 2015 report found that statewide risk assessment tools are still relatively rare (Pretrial Justice Institute 2009:35–36; Pretrial Justice Institute 2015:2–4).

But while these tools may help inform judicial decisions to detain individuals, they don’t rule out detention’s impact on the presumption of innocence nor the weight of pretrial detention. When we impose punishment—and this is what pretrial detention, in practice, equates to—on people who have not been convicted and are presumed innocent, we must have a good reason grounded in legal jurisprudence and practical realities. Yet today, we are often imposing the ultimate sanction—incarceration—in the absence of adequate process or proof. For this reason, we ought to have a presumption of liberty in which we use lesser sanctions to ensure appearance at court or to dissuade any harm to the court process or witnesses.

THE IMPACT OF PRETRIAL DETENTION

The evidence demonstrates that pretrial detention is one of the clearest examples of a violation of the presumption of innocence. Individuals are held behind bars pretrial (often in the same place they will be incarcerated if they are found guilty) because of a cursory assessment of their likely future behavior.

Recall, importantly, that they have been brought into that assessment process based only on a minimal amount of evidence, nothing more than probable cause to believe they have committed a crime.

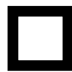
While concerns about flight risk are grounded in the court's concern for due process and the right to a speedy trial, pretrial detention on account of perceived danger to the community at large is orthogonal to the presumption of innocence. It goes almost without saying that one can be "dangerous" and not involved in the criminal justice system at all. There may be other people in the community that present a risk of "danger" just as high (or low) as the average detainee, but the courts clearly have no jurisdiction to grab those people off the street and assess them for potential danger (Mayson 2018). In fact, we have procedures to address these limited circumstances in which a person has been perceived to be dangerous to the community or themselves without being charged with a crime that provide individuals with greater process than a typical bail hearing, which we will discuss below. For now, we note that it is the simple fact of having been arrested that allows a court to reach into a person's life and restrict constitutionally protected liberties in this very serious way. To us, the probable cause finding to support an arrest is insufficient to support the kinds of liberty deprivations we describe above, and short, assembly-line bail hearings do little to cure the inadequacy of the initial findings.

We want to emphasize that the issue of pretrial detention extends beyond innocent people being temporarily locked away. There are additional costs to this practice.

We know that pretrial detention, along with denying liberty, severely impedes a defendant in defending her case (Baker v. Wingo,1972).[7] Practically speaking, a jailed defendant has a limited ability to communicate with her attorneys or to assist them with her case. Many defendants are impoverished and, when detained, may lose their job, further increasing the likelihood that they will be forced to use under-resourced, court-appointed attorneys, many of whom are juggling a myriad of other cases.[8] And during times like these, being held pretrial may also present a clear threat to one's life: social distancing is impossible behind bars, and prisons and jails are now becoming centers of the COVID-19 pandemic (Al-Hlou, Bracken, Davis, and Rhyne 2020).

Even if an individual who is detained is ultimately found not guilty, the fact that they were held pretrial may still interfere with that person's reputation and relationships within the community. In an attempt to aid government transparency, booking photos and identifying information may be made publicly available and have the collateral consequence of inflicting permanent harm to an individual's image. Defendants held before trial are also susceptible to pressure to accept plea bargains, as they are desperate to be released (Bowers 2008). Along with the loss of liberty, detention often brings the mental anguish of being separated from one's family and a loss of income or housing—a ripple effect of punishment for both a defendant and their family. This anguish may also manifest in higher levels of anxiety and depression as defendants behind bars are held in limbo while awaiting their trial with little certainty as to the timeline and outcome—something a plea deal can short-circuit (Peterson 2019). This confinement places extraordinary pressure on such people to accept plea bargains, regardless of their actual guilt (Bibas 2004:2493; Bowers 2008:1132–1139). This pressure is especially salient for alleged misdemeanants who are less likely to face punishment behind bars after adjudication of their offenses because they are more likely to receive credit for time served and so are less likely to receive an additional sentence of incarceration post adjudication than those charged with felonies (Peterson 2019: supra note 23). For these individuals, this comparison makes the relative cost of detention and going to trial even greater and thus a plea deal and quick resolution to their cases becomes all the more attractive. It should therefore be of little surprise that study after study has shown that pretrial detention often increases an individual's chance of conviction—in part, due to a greater number of plea deals, many of which are likely wrongful convictions (Dobbie, Goldin, and Yang 2018; Gupta, Hansman, and Frenchman 2016).

As if the loss of liberty that impairs a defendant's ability to defend themself is not enough, those who are detained pretrial, especially for felony offenses, seem to generally have significantly harsher sentences when their cases ultimately are adjudicated than similarly situated individuals who were free while their cases moved forward (Lowenkamp, VanNostrand, and Holsinger 2013a:14).[9] The main reason for this disparity is predictable: the prosecution wields additional leverage—in this case, the power to offer a plea deal that allows them to exit pretrial detention or delay their trial to prolong their detainment—over those who are in pretrial detention. But it also goes deeper: those who are free can "prove" their trustworthiness by not committing any more crimes and ensuring they comply with all of their pretrial release conditions. Thus, those released can show their suitability for probation programs instead of incarceration—something that is categorically impossible to show for those locked up in pretrial detention (Bibas 2004:2493). On the flip side, those detained may face additional penalties for misbehavior that occurs during their detention, even if it is connected to understandable circumstances resulting from their detention. For example, an individual struggling with mental health may be detained and, upon being disconnected from treatment and prescribed medication, act up, incurring disciplinary infractions or incidents that can then be referenced during a trial or disposition. Put simply, the presumption of liberty can be both a vehicle and argument for a strong defense, while pretrial detention functions as an effective presumption of guilt.



A PRESUMPTION OF LIBERTY ... CALLS THE SYSTEM TO A HIGHER STANDARD—ONE IN WHICH SYSTEM ACTORS BEAR THE BURDEN OF PURSUING ALL OTHER ALTERNATIVES TO MITIGATE RISK OF FLIGHT OR DANGER TO THE TRIAL RATHER THAN RELYING ON PRETRIAL DETENTION.

Finally, for some, pretrial detention is a more severe punishment than what they would or could incur if they were found guilty—millions of individuals who are found guilty of crime go on to be supervised in the community (Kaeble 2018).[10] In a study analyzing over 165,000 cases from 2012 to 2015 in Miami Dade County, sociologist and legal scholar Nick Petersen found about 81 percent of misdemeanor defendants were predicted to be given credit for time served as their sentence—meaning no additional jail time—as were 37 percent of felony defendants (Peterson 2019). And felony defendants were even more likely to be sentenced to probation than those charged with misdemeanors (Ibid).

For all of these reasons, the only way to truly uphold one of our most important first principles—the presumption of innocence—is to create and respect a presumption of liberty for those accused of crimes. A presumption of liberty does not mean that every man or woman goes free on his or her own recognizance, but rather calls the system to a higher standard—one in which system actors bear the burden of pursuing all other alternatives to mitigate risk of flight or danger to the trial rather than relying on pretrial detention.

Given pretrial detention's incredibly large impact on individuals, families, livelihoods, and justice, one would think that the decision to detain would only be made in circumstances in which the benefit of detention is significantly greater than the harm to personal liberty and livelihood. After all, according to Supreme Court Chief Justice Rehnquist, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception" (United States v. Salerno, 1987). Additionally, a recent benefit-cost analysis of pretrial detention by economist Michael Wilson suggests that the costs of pretrial detention may outweigh the benefits for all but the most truly high, high risk individuals (2014). Because our system relies on cursory assessments of flight risk and dangerousness based primarily upon a probable cause finding, our current system fails to weigh these costs, imposing a huge loss in economic welfare on our society. Bail and detention decisions may be made over a video call and take a series of minutes. Magistrates often serve as judicial officials and set bail and, in some cases, may not have law degrees. Monetary bail amounts are often assessed too high—out of reach of those most impoverished. As a result, many individuals who pose no great risk of flight are detained pretrial in American jails across the nation. For example, in a recent study, more than half of individuals accused of misdemeanors from 2008 to 2013 in Harris County, Texas, were detained pretrial; those detained had an average bail amount of $2,786 (Heaton et al. 2017:13). In contrast,

those who pose similar risk but have greater financial means may escape the same loss of liberty.

In sum, the use of pretrial detention comes with ill-effects for defendants, the principle of justice, and greater public safety. As noted by the U.S. Supreme Court in *Stack v. Boyle* (1951),

> *This traditional right to freedom [or right to bail] before conviction permits the unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning* (Stack v. Boyle, 1951).

This means it is all the more important that our decisions to use detention are limited to certain parameters and are made with purpose. In the next two sections, we will discuss the history of punishment and the parameters in which detention is or is not appropriate and its alternatives in the pretrial setting.

WHEN IS PRETRIAL DETENTION APPROPRIATE?

Before defining parameters for the appropriate use of pretrial detention, one must first understand the history of punishment in America. After all, minimizing harm to the innocent is one of the core demands of a society which holds true to the presumption of innocence.

Additionally, detaining individuals or setting a high bail as a form of punishment is in clear violation of the right to due process as articulated in the 5th and 14th Amendments (University of Minnesota N.d.). Thus any intervention by the justice system which looks like punishment conflicts with these demands.

Historically, the punishment for crimes was death, banishment, and the cutting off of limbs. Our nation was founded in part by individuals who came to the new country as part of their punishment. Roger Williams, one of the founders of Rhode Island, started his journey after being exiled for his religious beliefs (Palmer 2013). Although many states specifically precluded banishment in their Constitutions, others still allowed for exile or banishment as a form of punishment (Office of the Chief Clerk of the Senate 2014; Delegates of Maryland 1776; Palmer 2013). More often the punishment for committing a crime in the colonies, especially felonies, was death (Gertner 2010:692). The severing of limbs, although a more common punishment in the Middle Ages, is practiced in some countries even in the modern era (Newsweek Staff 2010).

Punishment also historically included shaming—a concept still present in modern modes of punishment today. During the colonial era, colonists could be held in stockades as targets of public ridicule (Barnes 1921:36). A few centuries later, stockades were included by one Arkansas town as a possible form of punishment for parents whose child violated curfew a second time after the parents had received written notice of a first violation (Freeman 1989). Today, public shaming is

often amplified by mass media and the digital age—something as simple as a booking photo can be used to shame a convicted individual for decades to follow and to punish individuals who have not been found guilty.

Eventually, punishment came to be identified with incarceration.[11] Indeed, incarceration was a way of ensuring equality in punishment, in contrast to shaming penalties, and reinforcing the idea that in a democratic republic, a citizen’s most sacred treasure was her liberty.[12] In America today, incarceration remains a primary mode of punishment, and the prison cell is the most powerful symbol of (in)justice. But the message of equality and the sacred idea of liberty is undermined, if such liberty was ever real or fought for on behalf of all in American society, when the “Land of the Free” is the number one incarcerator in the world, renowned for locking her people up and throwing away the key. Make no mistake: pretrial detention is one factor that drives that reputation.

Given this history lesson and the necessity that punishment not be delivered prior to a determination of guilt, the problems with pretrial detention are apparent. When an individual is detained prior to trial or assessed a high bail that cannot be paid and then locked up, he or she faces the same set of circumstances that one would receive if found guilty and delivered punishment.

Our argument places a premium on the importance of punishment following adjudication. Thus, we note that risk of flight or corruption to the trial—whether by intimidation of witnesses or court proceedings—is the only basis for the setting of bail and pretrial, preventive detention historically grounded in our jurisprudence. As Appleman notes, “although the specific intent of the Framers regarding bail cannot be conclusively determined, all available evidence points to the fact that pretrial detention, both under English common law and at the time the Constitution was written, was limited to flight risks” (Appleman 2012:1335). The setting of bail has historically been allowed to differ between defendants according to his or her flight risk as noted in as noted in *Stack v. Boyle* (Stack et al. v. Boyle, 1951).

In contrast, pretrial detention used preventively to promote public safety is improperly used much too often to restrict liberty and rationalize the use of high monetary bail and detention. In these circumstances, detention is purportedly not being used as punishment but rather to protect the public from harm by incapacitating the defendant so they cannot commit any new crimes outside of jail. But this rationale is problematic for at least two reasons.

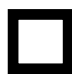
First, it is not at all clear that pretrial detention advances public safety in a straightforward way. Research suggests that pretrial detention can actually *promote* future criminal activity (Heaton et al. 2017:22, 33).[13] One study found that after only two or three days in detention, individuals deemed to be "low-risk" were about 40 percent more likely to commit a crime pretrial upon release when compared to other low-risk individuals who were detained for 24-hours or less (Lowenkamp, VanNostrand, and Holsinger 2013b:3,22). This sad statistic gets worse with time: low-risk individuals who were held for 31 days or longer were almost 75 percent more likely to commit a crime upon release than those whose presumption of innocence was honored (Ibid 11). While research has not totally captured why this is the case, it's not hard to fathom some of the factors: due to detention, individuals may lose their hope, jobs, and stable housing only to come home to the numerous family problems that are related to being locked in a cell. It's no wonder Dr. Tapia described jail as smelling of the loss of hope and the American Dream.

Pretrial detention, even in what one might consider to be "small doses", is what those in the medical profession would call iatrogenic—a well-intended approach that actually creates disease—and let's not forget: first do no harm. For example, research suggests individuals who are detained for several days pretrial but ultimately deemed low-risk and therefore released in advance of trial have a 22 percent higher chance of failing to appear after they are finally released than those who are in similar circumstances but held for 24 hours or less (Ibid 10). Individuals who are held in detention for longer periods of time in advance of trial, for 2 weeks to a month before being released, have a 41 percent likelihood of failing to appear over those not held in pretrial detention (Ibid 10).[14] One must wonder why these people were ever detained at all. Making matters worse, the system and the public then evaluates recidivism based on the person's post-adjudication behavior without taking into context the harm the criminal justice process has done to the individual—isolation from family, loss of employment, stigmatization. They then use this statistic, again without context, as proof of an individual's incorrigibility or lack of rehabilitative potential. Pretrial detention clearly is misused under the current system and actually serves to undermine its purported goals.

Second, current normative justifications for detaining someone for the supposed danger they present to society in the future lack proper legal footing. Mechanisms which predict an individual's risk of committing a new crime are, in part, based on the assumption that the accused is guilty of the alleged offense, violating the presumption

of innocence. And in bail proceedings, individuals are to be given a presumption of release. Additionally, there may be many individuals who are guiltless yet appear to pose an additional risk to society. Imagine, for example, the individual with mental illness who exhibits erratic behavior. Although innocent, this individual may be more quickly detained than an individual who has committed crime but appears to be more mentally competent. Not only is this unjust, but by detaining the individual with mental illness pretrial rather than getting them help in the community, we've further disconnected them from the services and environment critical to addressing their illness. As a result, we are promoting their likelihood of actually committing a crime in the future.

Of course, we want our criminal justice system to keep us safe, but we must acknowledge the long history of preventative detention being overused and done so inequitably. In contrast, other alternatives to pretrial detention may be better able to assuage community safety concerns without infringing on individual liberty.



OF COURSE, WE WANT OUR CRIMINAL JUSTICE SYSTEM TO KEEP US SAFE, BUT WE MUST ACKNOWLEDGE THE LONG HISTORY OF PREVENTATIVE DETENTION BEING OVERUSED AND DONE SO INEQUITABLY.

WHERE DO WE GO FROM HERE? ALTERNATIVES TO AND SAFEGUARDS AROUND PRETRIAL DETENTION

We have argued that detention pretrial should be exceedingly rare, used only to assure a defendant’s presence at the adjudication of the crime with which he has been charged or to protect that adjudication by keeping those associated with the trial such as judges, jurors, and witnesses safe.

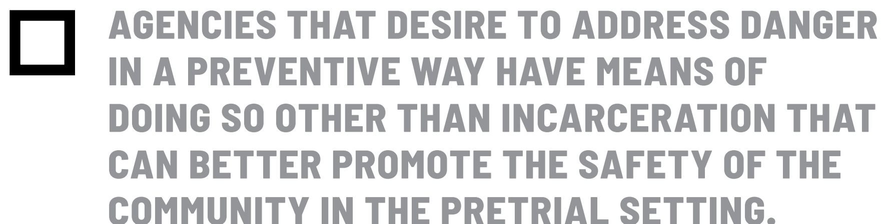
Our approach does not imagine any room for predictions of danger to the community in general, unconnected to the defendant’s trial process, as a basis for pretrial detention. While we have removed this rationale altogether, incremental reform that moves us toward a presumption of liberty that protects the innocent is still possible and necessary.

Agencies that desire to address danger in a preventive way have means of doing so other than incarceration that can better promote the safety of the community in the pretrial setting. Critically, in addition to being more effective and likely less expensive, these other mechanisms can be more clearly differentiated from punishment.

There is, for example, a long history and practice of involuntary commitment of people with mental illnesses to treatment facilities under much more carefully prescribed criteria than those we use today to detain individuals prior to adjudication of their crimes (and usually for much shorter periods of time). Moreover, and similarly, under even more constrained and circumscribed determinants than those applicable to civil commitment, the state can contain individuals with contagious diseases in places separate from the general population for public health reasons (Center for Disease Control 2020). Obviously these actions limit an individual’s freedom for the public good, but they do so, at least in the modern era, in places that typically do not smell nor look like death, and, critically, are not associated with the social meaning of jail because their primary aim is treatment provision and not punishment.[15] Of course we acknowledge there are those that would argue that many mental health facilities represent an American parade

of horribles, but an important difference between these facilities and jails is that their purpose is not explicitly designed around restricting freedom as a punishment for criminal offending. Instead, for good or ill, the purpose of freedom restriction is maximizing social good usually for health reasons. While there may well be overlapping consequences of the hospital and the jail, the logic of the jail is not the logic of the quarantine, and that is a difference that matters to procedures designed to place people in the relevant spaces. We already know of, and already have in place, procedures for more careful determinations of dangerousness before depriving a person of their freedom. We do not think it is too much to ask that states follow such familiar practices if they insist that pretrial detention is necessary.

Even if they do believe it necessary, we hope that state officials will agree with us that there are other much less restrictive means of assuring that individuals show up for adjudication than detention. We can, for example, send text reminders so people don't forget their court dates or have individuals check-in with supervision officers via phone calls or mobile apps. If needed, we can also place people on pretrial supervision with electronic monitoring so long as they can receive case management related to behavioral health, substance abuse, etc. (whatever is the risk factor thought to make them dangerous). This is already something which is occurring in multiple jurisdictions that have embraced bail reform. Indeed, in Washington, D.C., roughly 90 percent of individuals arrested were released pretrial without having to secure cash bail in 2015 (Marimow 2016). And if the impetus for denying bail and ordering pretrial detention is risk of flight, judges can use other tools such as ordering passports to be surrendered or assets to be frozen to ensure their presence at court. By bolstering the use of these alternatives and greatly limiting the circumstances in which detention and cash bail, which in



practice leads to detention, can be assessed, we move one step toward presuming innocence. Of course, while doing so we must ensure alternatives to cash bail and detention do not result in over-monitoring or burdensome requirements that result in technical violations and a return to jail.

Another way to bolster a presumption of liberty is to ensure defendants have counsel present at bail hearings and that bail decisions are made with ample time, consideration, and gravity. Giving people two or three minutes time to lay out the circumstances and their arguments for bail make the presumption of innocence and justice a mockery to all. And when counsel is absent, the burden of proof tilts toward the defendant rather than the state.

Finally, in the hopefully rare instances in which pretrial detention is deemed necessary, jurisdictions should do their best to ensure a defendant's right to a speedy trial. Often, individuals held pretrial may wait months—and sometimes years—until their case is decided (Kovaleski 2017). In some cases, this occurs as part of a defense strategy to have more time to work out a plea, with the knowledge that judges often reward credit for time served, and other times it is the fault of prosecutors. Changing state statute or local bail policy to order that individuals held pretrial have their hearing within weeks—or at most several months—is critical to limiting the harm to the presumption of innocence as well as the defendant. For example, in New Jersey, an individual cannot be held in jail more than 90 days prior to their indictment or 180 days before the beginning of his or her trial following an indictment (Grant 2019:37–38). Other jurisdictions should consider adopting similar statutes.

CONCLUSION

Rampant pretrial detention erodes the meaning of the presumption of innocence (Justice and Meares 2014). Pretrial detention, as currently used, tears apart individual lives, families, and entire communities. It hurts our local economies while further burdening taxpayers. It puts public health at risk. And it risks rather than promotes long-term public safety. But, perhaps most importantly of all, it is a direct contradiction of the principles upon which this nation is founded.

Adams' quote mentioned above, as powerful as it is, is too often cut short. Adams continues after his epigram that "[i]t is more important that innocence be protected than it is that guilt be punished." Indeed, Adams continues with a warning:

> *For guilt and crimes are so frequent in this world that they cannot all be punished. But if innocence itself is brought to the bar and condemned, perhaps to die, then the citizen will say, 'whether I do good or whether I do evil is immaterial, for innocence itself is no protection,' and if such an idea as that were to take hold in the mind of the citizen that would be the end of security whatsoever* (Adams 1770).

We must understand the presumption of innocence represents more than punchlines about current social media movements—it's part of the fabric that makes up the Republic. It protects our citizens from something that smells like death, it protects hope, it protects the American Dream.

We are aware that there are some pragmatic difficulties with our position, but the legal history is indisputable and understanding the legal truth is the first step at creating good policy. Courts should uphold the presumption of liberty or release and move to creating preventive detention standards that permit only those who pose a danger of flight or failure to appear or potential harm to the trial process. Prior to being detained, prosecutors should have to argue their case in a detention hearing with a higher burden of proof—clear and convincing evidence—placed on the state. At the state and local level, jurisdictions can work to expand their network of detention alternatives—through mechanisms such as pretrial services, electronic monitoring, or behavioral case management—to meet the needs of and concerns around high-risk defendants. Indeed, by following the precedent of areas such as the District of Columbia and New

Jersey, we can effectuate an upholding of both our laws and ideals, keep witnesses and victims safe, and ensure that juries are free to consider the evidence before them without threat from the defendant.

When young and old, black and white, and rich and poor are treated differently—presumed to be more or less innocent—on account of their age, race, ethnicity, or wealth, equality is violated. Furthermore, the trust in the legal system previously held by those who have faced such discrimination, and often their communities, is broken, making public safety that much harder to secure. In a truly just system, the aims of public safety, order, and individual liberty must be more carefully balanced by using meaningful procedures that respect the rights of individuals at issue.

PRETRIAL DETENTION, AS CURRENTLY USED, TEARS APART INDIVIDUAL LIVES, FAMILIES, AND ENTIRE COMMUNITIES. IT HURTS OUR LOCAL ECONOMIES WHILE FURTHER BURDENING TAXPAYERS.

ENDNOTES

1 Most felony defendants held pretrial in the large urban counties studied were assessed bail but were unable to pay; few were denied bail outright.

2 For a brief history of the rise of "dangerousness" as a rationale for the setting of high bail or detention, *see* Goldkamp (1985).

3 Maryland and North Carolina have neither constitutional nor statutory provisions regarding pretrial release eligibility.

4 California got rid of money bail by law, but the law's fate will be decided in a November 2020 referendum after both bail industry interest groups and anti-carceral advocates argued that it would either result in the release of violent offenders, or lead to more preventive detention. *See* Ulloa (2020).

5 For example, in several New York counties, in Philadelphia, and in Harris County (Houston), Texas, defendants may not have a lawyer present at their arraignment when bail is set. *See* Stevenson (2017:5).

6 Risk assessment tools are increasingly being used to inform bail decisions. *See* Desmarais and Lowder (2019).

7 See case section describing the disadvantages to an accused of lengthy pretrial detention.

8 For instance, studies have shown that pretrial detention can result in lower formal sector employment three to four years after a bail hearing. *See* Dobbie et al. (2018).

9 In one study in Philadelphia, pretrial detention led to a 42 percent increase in sentence length. *See* Stevenson (2018), supra note 18. In another study in Harris County, Texas, misdemeanants detained pretrial were found to be 25 percent more likely to see their case result in a conviction and 43 percent more likely to be sentenced to jail time. *See* Heaton et al. (2017). This is true for both high and low risk individuals (based on numerous factors including criminal history records, the crime charged, and ties to community.

10 Over three million individuals were on probation, which is typically used as an alternative to incarceration under the adult criminal justice system at year end 2016. *See* Kaeble (2018), page 3.

11 For a history of the rise of the prison system in America, *see* Barnes (1921).

12 Reinforcing this idea was the fact that enslaved peoples were not incarcerated in the antebellum South.

13 It should be noted that many of these studies are looking at individuals who were given bail they couldn't pay and not ordered detained. This study in particular concerns misdemeanors in Harris County.

14 It is absolutely true that one could interpret these numbers to suggest that the poorest in our society are also going to have troubles in areas of work, lack of community connections, and family support, so they are also the same people who will be detained longer. This theory, therefore, suggests that defendants with a propensity to commit crimes or fail to appear will also be the same people who lack the sophistication to obtain their release within 24 hours—therefore there is a high correlation between time in preventive detention and the likelihood of committing a crime upon release. To be sure there are some that fall squarely into this logic map. However, were this strictly true, we would not see the drastic difference in time held between low-risk and what many would call high-risk defendants. Indeed, those that in the high risk category have

very little correlation between time in jail and the likelihood of crimes upon release. The same holds true for the likelihood of high-risk individuals failing to appear.

15 We hate to say it again and again, but it matters that the time limits of confinement in these other institutions typically are much shorter than the period people often spend in jail, and when they are not, there are legislated requirements that the state officials who seek to detain must, on a regular basis, demonstrate that there is a continuous threat, illness, etc, presented to the public by the person the state seeks to detain.

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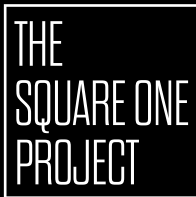

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