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LIBERTY TAKINGS:
A FRAMEWORK FOR COMPENSATING
PRETRIAL DETAINEES

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LIBERTY TAKINGS: A FRAMEWORK FOR COMPENSATING PRETRIAL DETAINEES

*Jeffrey Manns**

ABSTRACT: This Article shows how the application of a takings paradigm to pretrial detention can mitigate the distorted incentives which shape bail hearings and plea bargaining. The case for compensating pretrial detainees poses challenges because the existence of probable cause of having committed a criminal offense combined with the presence of other risk factors formally legitimizes bail hearing decisions. However, this Article analogizes the “taking of people” to the “taking of property” to argue that pretrial detention constitutes a liberty taking which inflicts punishment on unconvicted defendants and creates incentives for false pleas and other perversions of justice. While society faces potential risks and costs from pretrial release, this Article will argue that compensating detainees who are never convicted or whose ultimate conviction could not reasonably have justified the initial detention decision will help to level the playing field for defendants in bail hearings and plea bargaining. This Article will conclude by showing how liberty takings can be designed to produce significant incentives for state actors to screen cases more thoroughly and to rely more extensively on less restrictive alternatives than pretrial detention.

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I. INTRODUCTION

The Bush administration's detention of hundreds of alleged "enemy combatants" and illegal aliens with suspected terrorist links without trials, convictions, or compensation has exposed detention powers to unprecedented scrutiny.¹ Paradoxically, debate on the "war on terror" has obscured equally significant concerns surrounding the detention of tens of thousands of American citizens each year.² Federal and state prosecutors routinely use their charging powers and influence in bail hearings to put bail out of the reach of poor defendants.³ Placing defendants in pretrial detention creates tremendous pressure for guilty pleas regardless of actual culpability, and thus often allows prosecutors to accomplish "rough justice" without the constitutional protections of trials.⁴ This use of pretrial detention to encourage and expedite plea bargaining may conserve prosecutorial resources,⁵ but at the unconscionable price of perverting justice.⁶

¹ Both judges and academics have focused on delineating the contours of executive and judicial power in extraordinary contexts of terrorist threats or other national security emergencies. *See, e.g.*, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) (holding that due process requires that a U.S. citizen held as an enemy combatant must be given a meaningful opportunity to contest his confinement); *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2722-23 (2004) (holding that an alleged enemy combatant could only bring a habeas petition in the district where confined against the military commander of the detention facility); *Rasul v. Bush*, 124 S. Ct. 2686, 2696-97 (2004) (recognizing that the federal habeas statute conferred authority on the district court to hear Guantanamo Bay detainees' challenges to their detention); *see also* Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 374-75 (2004) (arguing that both the Geneva Convention and international humanitarian law guarantee enemy combatants the same rights as prisoners of war); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1260 (2002) (questioning whether the President has the authority to detain and try enemy combatants and alleged terrorists by military tribunals).

² Although precise statistics are unavailable, it is estimated that pretrial detainees make up almost half of the inmate population of state and federal prison systems. *See* Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 346 n.71 (1990).

³ *See* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 867-69 (1995).

⁴ *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2491-93 (2004) (discussing how pretrial detention creates significant incentives for plea bargains and diminishes the significance of the right to trial and the protections trials provide); Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2146 (1998) (noting that "[p]leading guilty at the first opportunity in exchange for a sentence of 'time served' is often an offer that cannot be refused. Accordingly, fully adjudicated cases may be too rare to serve as a meaningful check on the executive authorities."); MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 236 (1992) (finding that approximately four times as many defendants are detained prior to trial than are imprisoned after convictions).

⁵ This argument parallels the efficiency-enhancing effects of the plea bargaining process that its advocates have raised. *See* Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 290-91 (1983) (arguing that plea bargaining serves as a tool to maximize the deterrent effect of scarce prosecutorial resources). This Article makes no claims concerning what "efficient" enforcement levels would or should be, but merely notes that the rationale of

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While these uncompensated detentions are legal, they present a classic case in which a vulnerable minority is forced to bear a significant burden for the benefit of society.⁷ This context is a familiar one to the world of real property and takings law.⁸ This Article conceptualizes pretrial detentions as “liberty takings” by analogizing the taking of property to the “taking” of people by the state.⁹ It will show

efficiency implicitly underpins the current use of pretrial detention to incentivize and expedite plea bargaining.

⁶ Many critiques have been levied against the Federal Bail Reform Act of 1984, which establishes the ground rules for the federal use of pretrial detention. Debates on the injustices of pretrial detention have filled many law journal pages, but have had little resonance in public policy debates and resulted in still less legislative action. *See, e.g.*, Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 510-12 (1986) (arguing that the Bail Reform Act is unconstitutional because it allows detentions in the absence of strong preliminary proof of guilt); Kenneth Frederick Berg, *The Bail Reform Act of 1984*, 34 EMORY L.J. 685 (1985) (calling for the cautious application of the Bail Reform Act to avoid its indiscriminate application); Miller & Guggenheim, *supra* note 2, at 425-26 (arguing that the Bail Reform Act has dramatically increased the number of detentions based on inaccurate, unprovable predictions of dangerousness and threatens fundamental liberties). Articles have criticized courts’ deference to other state actors concerning pretrial detention decisions, *see, e.g.*, Michael Harwin, *Detaining for Danger Under the Bail Reform Act of 1984: Paradoxes of Procedure and Proof*, 35 ARIZ. L. REV. 1091, 1095 (1993) (criticizing the extent to which the Bail Reform Act relies on judicial deference to prosecutors); Jack F. Williams, *Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325, 326-29 (1994) (critiquing the Bail Reform Act’s approach to pretrial detention for failing to capture the complex gradations of factors and calculations that should go into bail determinations), the unfairness of preventive detention in general, *see, e.g.*, Krista Ward & Todd R. Wright, *Pretrial Detention Based Solely on Community Danger: A Practical Dilemma*, 1999 FED. CTS. L. REV. 2, 3-5 (1999) (calling for greater uniformity in judicial determinations of whether danger to the community forms a sufficient basis in itself to justify pretrial detention), and the unfairness of pretrial detention in particular applications, such as against alleged immigration law offenders, *see, e.g.*, Stephen Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AMER. L. REV. 531, 533 (1999); Donald Kerwin & Charles Wheeler, *The Detention Mandates of the 1996 Immigration Act: An Exercise in Overkill*, 75 INTERPRETER RELEASES 1433 (1998).

⁷ *See* *Barker v. Wingo*, 407 U.S. 514, 533 (1972) (“Imposing those consequences [of pretrial detention] on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.”).

⁸ “One of the principal purposes of the Takings Clause is ‘to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Numerous articles have grappled with the question of precisely what burdens the Takings Clause transfers from the shoulders of private parties onto the public as a whole. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 95 (1985) (making the expansive claim that all taxes, regulations, and changes in liability rules should constitute takings); WILLIAM A. FISCHER, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 289-324 (1995) (arguing that regulatory takings should be limited only to cases of political process failure at the expense of a minority); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1214-19 (1967) (arguing that government should only compensate for takings when the demoralization costs to the affected party are not outweighed by the transaction costs for compensation).

⁹ This Article’s conception of liberty takings for pretrial detainees is related to the long-standing debate on the use of liability, property, and inalienability rules to protect private interests and rights that was initiated by Guido Calabresi and A. Douglas Melamed in their seminal article,

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how the reasoning from existing takings case law establishes principled distinctions that can be used to underpin a statutory cause of action to compensate pretrial detainees for this “occupation” by the state. This approach is designed to help to level the playing field for defendants in bail hearings and plea bargaining by tempering the incentives for the state to use pretrial detention.¹⁰

Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (1972). Liability rules allow a party to pay for taking or encroaching on another’s private interest or right without the owner’s consent; property rules protect an interest or right from encroachment and only allow the owner to part with the interest or right; and inalienability rules impose a prohibition on any party’s transferring an interest or right. *Id.* at 1089-93. Many works have argued the merits of expanding the use of liability rules. *See, e.g.*, Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1338-40 (1986) (asserting the incompatibility of constitutional rights with liability rules); Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755, 790-91 (2004) (proposing a liability rule to allow judges to provide monetary compensation rather than injunctive relief for rights violations under extraordinary circumstances, such as mass detentions during national security emergencies); Meares, *supra* note 3, at 853-55 (arguing that offering financial rewards to prosecutors for ethical conduct rather than relying on liability rules or other means would provide the best incentives to reduce prosecutorial misconduct); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 719-23 (1996) (arguing that a prima facie case exists that liability rules should apply to resolve cases of harmful externalities, while a stronger case exists that property rules should govern possessory rights); Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191, 192-93 (2003) (calling for reparations to the descendants of slaves based on framing slavery as a form of takings). Kontorovich’s and Wenger’s contributions in applying liability rules to the cases of mass detentions in national security crises and slavery respectively are closest to this Article’s. But this Article breaks new ground in showing how the application of a takings paradigm to pretrial detention can remedy the distorted incentives which shape bail hearings and plea bargaining. The case for compensating pretrial detainees poses challenges because the existence of probable cause combined with the presence of other risk factors formally legitimizes bail hearing decisions. However, this Article analogizes the “taking of people” to the “taking of property” to argue that pretrial detention constitutes a liberty taking which inflicts punishment on unconvicted defendants and creates incentives for false pleas and other perversions of justice. While society faces potential risks and costs from pretrial release, this Article will argue that compensating detainees who are never convicted or whose conviction could not reasonably have justified the initial detention decision will help to level the playing field for defendants in bail hearings and plea bargaining. Although this proposal may lead to some perverse incentives and effects, this Article will show how liberty takings can be designed to produce significant incentives for state actors to screen cases more thoroughly and to rely more extensively on less restrictive alternatives than pretrial detention.

¹⁰ This Article will show how the reasoning from case law concerning either physical or regulatory takings can be used to delineate the scope of “liberty takings.” The physical takings jurisprudence is a largely settled area of law. *See* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 562 (2001) (describing physical takings of land as the well-defined core of takings doctrine). In contrast, the outer limits of regulatory takings are much more uncertain and hotly contested. *See, e.g.*, Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 566-67 (1984) (noting that regulatory takings doctrine suffers from ambiguity concerning what percentage diminution of value from a regulation may qualify as regulatory takings); James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143, 1150 (1997) (discussing the significant uncertainty concerning the contours of regulatory takings). While the contours of regulatory takings suffer from uncertainty, the core body of what constitutes regulatory takings is more clear as Part II.A.2 will discuss in detail.

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Each year tens of thousands of criminal defendants face periods of pretrial detention that can last weeks to months.¹¹ Judges detain a small minority without bail because they are deemed a flight risk or a danger to the community, and no other means may adequately ensure their presence at trial.¹² But the vast majority of detainees languish in detention primarily because they are guilty of being too poor to meet bail.¹³

An almost sinister logic appears to drive the extensive reliance of the criminal justice system on pretrial detention. Prosecutors have strong incentives to engage in “strategic charging” or “overcharging” by raising almost all conceivable charges against defendants.¹⁴ Even if prosecutors are unlikely to prevail on most charges, they lose little by raising charges and can gain leverage on defendants by invoking the specter of onerous sentences.¹⁵ Piling on charges allows prosecutors to tilt the scales in bail hearings heavily towards the imposition of high bail or the outright denial of bail. By cutting defendants off from family, friends, and jobs and subjecting them to the indignities of detention, prosecutors place defendants in a position where they face

¹¹ Thirty-eight percent of state felony defendants in the seventy-five largest counties were denied bail or could not meet bail in 2000. See BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2000 16 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc00.pdf> (last visited Oct. 15, 2004) [hereinafter FELONY DEFENDANTS]. In 2001, in the federal system, sixty percent of defendants were detained prior to trial (out of a total of over 75,000 defendants processed). See BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2001 37 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0103.pdf> (last visited Oct. 15, 2004). The periods of detention for federal detainees averaged approximately one month for individuals who were eventually able to meet bail, to eighty-one days for those never able to meet bail, and one-hundred-and-ten days for those denied bail. See *id.* at 40. The figures for pretrial detention by states for misdemeanor crimes are more difficult to confirm because national statistics are not routinely compiled. See Bibas, *supra* note 4, at 2491-92, 2492 n.113. However, even if more modest percentages of misdemeanor defendants are subjected to pretrial detention, this number would still be quite large as eighty to almost ninety percent of cases in state courts entail misdemeanor offenses that are punishable by up to one year’s imprisonment. See NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2002 54-55 (Brian J. Ostrom et al. eds., 2003).

¹² For example, only seven percent of state felony defendants were denied bail outright in 2000. See FELONY DEFENDANTS, *supra* note 11, at 16.

¹³ Almost five times more pretrial detainees facing state felony charges lacked the means to meet bail than were denied bail outright. Thirty-two percent of state felony defendants lacked the financial means to meet bail in 2000. See *id.* Indigents in particular may be perceived as posing significant flight risks because of their poverty and may have limited access to the funds of bail bondsmen because they and their extended families may lack jobs and financial resources. While the prosecution has the burden of establishing probable cause to hold these detainees, the detention of indigents prior to trial often turns on their lack of means rather than their guilt.

¹⁴ See Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 405-06 (1992); Meares, *supra* note 3, at 867-69.

¹⁵ Significantly, prosecutors are virtually immune from civil liability for their charging decisions. See *Burns v. Reed*, 500 U.S. 478, 483 (1991). In fact, charging decisions are rarely if ever subjected to judicial scrutiny. See *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (holding that there is no federal constitutional right to any review of prosecutorial charging decisions).

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great incentives to plea bargain to end or minimize the detention.¹⁶ As a result, pretrial detention has become a tool of prosecutorial efficiency to heighten pressure for plea bargaining and to serve as a means of informal punishment.¹⁷

The federal government and many states have tacitly recognized the costs inflicted on pretrial detainees by creating a system of “compensation” of limited scope and coverage. The most common form of compensation is a set-off of time served in detention against criminal sentences.¹⁸ Detainees may have legal recourse for financial compensation in extreme cases in which government officials engaged in misconduct or lacked probable cause to detain.¹⁹ However, a detainee who is never subsequently convicted of any crime generally has no recourse for compensation in the absence of egregious government conduct.²⁰ As significantly, even a system of set-offs for

¹⁶ This Article is not the first to note the distorted incentives that prosecutors face in charging defendants and the many disadvantages that defendants face in pretrial detention. *See, e.g.*, Bibas, *supra* note 4, at 2491-93; Lynch, *supra* note 4, at 2123; Miller & Guggenheim, *supra* note 2, at 339-43.

¹⁷ While an increased reliance on pretrial detention may fill detention centers and prisons, these costs do not impact prosecutors’ budgets and therefore only indirectly affect prosecutors. Weighing the scales of bail hearings towards pretrial detention enables prosecutors to handle a greater percentage of their case-loads through plea bargains and to focus prosecutorial resources on the most difficult cases or those in which prosecutors face well-financed defendants who seek a jury trial. The state as a whole gains in saving money by substituting the rough justice of plea bargaining for costly, time-consuming trials. *See* Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population Trends*, 26 CRIME & JUST. 63, 99 n.29 (1999) (noting that the rate of increase in corrections spending rose at a seventy percent higher rate than court spending from 1982 to 1993, which suggests that courts have been increasingly able to rely on plea bargaining to substitute for trials).

¹⁸ The underlying logic of offsetting time served in detention against a criminal sentence is that the conviction provides a full post-hoc justification for the detention. Therefore, the time served in detention is viewed constructively as partial or full fulfillment of the sentence. Even this “compensation” is limited, as detainees receive no additional compensation if time served in detention exceeds the criminal sentence. *See* 18 U.S.C. § 3585(b) (2000) (establishing that a convicted party must generally “be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences”). *But see* Reno v. Koray, 515 U.S. 50, 65 (1995) (holding that the release of a convicted party into a community treatment center pending sentencing is not tantamount to government detention and therefore does not merit set-off credit for sentencing under 18 U.S.C. § 3585(b)).

¹⁹ A variety of causes of action are available to pretrial detainees including § 1983 actions and common law torts for wrongful arrest, false imprisonment, and malicious prosecution. However, these causes of action may help only a slender percentage of detainees, because claimants must show that the government lacked probable cause in their arrest and detention or engaged in even more egregious misconduct. *See* Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 86-93 (1999).

²⁰ Technically speaking, individuals may only be found “not guilty,” as an assistant U.S. attorney in New Haven emphasized to me. This fact may merely reflect the exercise of prosecutorial discretion not to pursue a case further, but even this is unclear as prosecutors’ offices routinely use language of cases “dropping out” that appears intentionally to obfuscate the reason. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 50, 50 n.68 (2002). But in the United States presumptive innocence until proven guilty is not only a rule of evidence but also a cardinal principle of our system. Individuals who are found not guilty are therefore presumptively innocent and should be treated as such. *See* Steve

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time-served against convictions does not reflect how disadvantages caused by pretrial detention may have compromised the detainee's ability to defend herself.²¹

The liberty takings proposal is designed to fill the gaps in this system of compensation for pretrial detainees. This Article argues that any pretrial detention (above a *de minimis* threshold of forty-eight hours for a bail hearing²²) constitutes a taking of one's liberty by the state. A narrow view of liberty takings would posit that a conviction for any crime underpinning the detention justifies the detention and hold that the offset of time served therefore constitutes full compensation. If a detainee were not convicted of any of the underlying charges, then liberty takings would require compensation based on the individual's opportunity cost for the time detained.²³ Fairness considerations would suggest the desirability of employing a per diem floor and ceiling on compensation to ensure that the most vulnerable defendants receive a fair settlement and that high wage-earners are not automatically excluded from detention because of their high opportunity cost.²⁴ The advantage of this narrow view of liberty takings is its simplicity of administration as liability rules would be clear-cut, and the primary issue in dispute would be the proper measure for compensation.

The broad conception of liberty takings would seek to account for the fact that a conviction or plea on a minor charge may not vindicate the initial detention decision. The broad view would allow individuals to seek financial compensation if their ultimate conviction or guilty plea could not reasonably have justified the detention. By placing a rebuttable presumption against such compensation, claimants would face the burden of establishing that a reasonable judge would not have allowed the detention in the first place had prosecutors only raised the

Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1166-68 (2003).

²¹ As this Article will discuss in detail, a paradigmatic case concerning this point involved the guilty plea of nuclear scientist and alleged spy Wen Ho Lee to a minor offense that ended an over one-year detention and resolved a fifty-nine count indictment. Prosecutors could not have detained him for more than one day if they had only raised the single charge. But prosecutors implicitly used Lee's guilty plea to save face concerning the decision to detain Lee in the first place as the single conviction was used to offset the time in detention. See Matthew Purdy & James Sterngold, *Under Suspicion: The Prosecution Unravels: The Case of Wen Ho Lee*, N.Y. TIMES, Feb. 5, 2001, at A1.

²² See *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

²³ Foregone earnings or earnings power would serve as the primary proxy for opportunity cost, which is the closest analogue to the use of a land's fair market value (i.e., the present value of future stream of rents) to compensate for property takings. See Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75, 83-84 (2004).

²⁴ As Part II.B.2 will discuss, innocent detainees who are eligible for § 1983 actions or torts for wrongful arrest, false imprisonment, or malicious prosecution would be able to collect only the greater of compensation for one of these actions or for liberty takings. Since such detainees would already have adequate redress for the deprivations they suffered, this provision would seek to prevent them from gaining a windfall through liberty takings claims.

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charge(s) for which the detainee was convicted. Embracing a broad view of liberty takings could consume more judicial resources than limiting compensation solely to innocent detainees. But this approach would also help to prevent prosecutors from transforming liberty takings into a farce by making token guilty pleas a virtual condition of release to inoculate the state from liability.

This legislative proposal would borrow the reasoning from existing physical and regulatory takings doctrine to draw a sharp line between pretrial detention and lesser restraints on liberty, such as home detention or electronic monitoring. This distinction would seek to provide incentives for prosecutors to invest in greater screening of cases and to exercise charging powers with greater restraint and for judges to employ less restrictive alternatives that secure defendants' presence at trial.

The challenge facing this proposal is the practical stumbling blocks to implementation. This Article will show how costs can be contained to politically acceptable levels. While the full incentive effects on the state and individual state actors are admittedly difficult to gauge,²⁵ this Article will show how liberty takings can be designed to produce incentives for greater prosecutorial screening and a reduction in the state's reliance on pretrial detention.²⁶

Part I of this Article will lay out the significance and scope of the federal government's pretrial detention powers, the mechanics of the bail setting process, and the incentives that prosecutors and judges face in setting bail. This Part will highlight the real and substantial costs that pretrial detention inflicts on detainees. It will make the case for why compensating detainees may both offer the best means to remedy the injustices inflicted by pretrial detention and significant incentives for the state to secure defendants' presence at trial through less restrictive means.

Part II will develop the analogy between the taking of land and the taking of liberty that forms the basis for liberty takings. It will show how the reasoning from either physical or regulatory takings may underpin the construction of a framework to delineate liberty takings. This Part will lay out conditions for compensation designed to ensure adequacy of scope and coverage, show how the costs can be contained to manageable levels, and assess the incentive effects of liberty takings. Finally, this Article will conclude by exploring potential strategies for

²⁵ See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 414 (2000).

²⁶ Bail hearings entail a complex interplay of federal or state guidelines for bail setting, judges' discretion in implementing those guidelines, and prosecutors' roles in charging defendants and proposing bail. For this reason, it is admittedly difficult to gauge the full deterrence effect of liberty takings in causing prosecutors and judges to exercise restraint. However, this Article will suggest how compensation for liberty takings could be tailored to heighten the incentives for judges and prosecutors to rely less on pretrial detention. See *infra* Part II.C.4.

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overcoming the significant political obstacles to the enactment of liberty takings and for seeking to maximize the deterrent effect on judges and prosecutors.

II. THE PROBLEMS CONCERNING PRETRIAL DETENTION WITHOUT COMPENSATION

A. The Scope and Significance of Pretrial Detention Powers

1. The Significance of Pretrial Detention

The use of detentions in the war on terror has thrust the government's detention powers to the forefront of public debate. Academics have fixated their attention on critiquing the prolonged detentions of hundreds of enemy combatants and illegal aliens with suspected terrorist ties and the potential Pandora's Box these precedents may open.²⁷ This debate has served a valuable purpose in heightening popular awareness of the federal government's broad detention powers and serving as a clarion call of the need to maintain the U.S. commitment to civil liberties. But this criticism has focused primarily on the most extreme and exceptional threats to civil liberties posed by detentions related to national security concerns and largely overlooked the routine uses of detentions prior to convictions by all levels of government.²⁸

One might not realize it from reading newspapers or law reviews, but enemy combatants and illegal aliens are not the only individuals currently facing prolonged detentions without trials, convictions, or compensation. In fact, the tens of thousands of American citizens subject to pretrial detention each year dwarf the number of detentions related to national security concerns and may result in countless cases of unjust punishment or wrongful convictions.²⁹ These detentions take

²⁷ See, e.g., Jinks, *supra* note 1, at 374-75; Katyal & Tribe, *supra* note 1, at 1260.

²⁸ See, e.g., Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1955 (2004) (discussing how the emergency powers claimed by the federal government in the war on terror exceed those claimed by the government in the past and those exercised by other Western countries).

²⁹ See FELONY DEFENDANTS, *supra* note 11, at 16, 37 (documenting the tens of thousands of pretrial detainees held by the federal and state governments). It is admittedly difficult to estimate the extent of unjust punishment or wrongful convictions. The perverse incentives created by pretrial detention obscure the number of people who cop a false plea to get out of detention or face a longer sentence because they were able to mount a less effective defense from behind prison walls. In contrast, individuals who have copped a false plea have little incentive and even less ability to try to clear their names after the fact.

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place largely under the radar screen of public scrutiny,³⁰ yet it is surprising that the popular outrage surrounding the detention of enemy combatants has not extended to wider criticism of pretrial detention.

Part of the answer lies in the fact that a greater veneer of legal safeguards attempts to legitimize pretrial detentions of criminal defendants.³¹ But while the dearth of procedural checks on the detention of enemy combatants constitutes a glaring wrong,³² both forms of detention may inflict significant injustices on innocent people. Another part of the explanation may be that the sheer scale and routine use of pretrial detentions have desensitized the public to the practice, which contrasts with the novelty of national security detentions.

Nonetheless, there is no little irony in the fact that commentators have loudly decried the plight of enemy combatants from distant lands or focused on hypotheticals at home,³³ while tens of thousands of American citizens continue to languish in detention for prolonged periods in spite of having been convicted of little more than being poor.³⁴ This fact brings up a more sinister explanation. The administration of criminal justice often appears based on the implicit assumption that a large percentage of defendants who are not convicted of anything or anything serious are actually guilty of serious crimes.³⁵

³⁰ The Bail Reform Act of 1984 set the ground rules for a dramatic expansion of pretrial detention in federal courts and aroused significant controversy at the time of its enactment. *See, e.g.*, Miller & Guggenheim, *supra* note 2, at 425-26; Williams, *supra* note 6, at 326-29. But these criticisms fell on deaf ears, and time has likely led to even deeper public acquiescence to the widespread use of pretrial detention.

³¹ *See infra* Part I.A.3.

³² The need to establish probable cause for the arrest and the prospect of an eventual trial, however distant in practice, establishes some limits on the scope of those affected and the length of pretrial detention. In contrast, the Bush administration advanced sweeping claims of discretionary power to justify enemy combatant detentions. *See* Schulhofer, *supra* note 28, at 1910-15.

³³ In *Bleak House*, Charles Dickens paints a picture of the public-minded elite of Victorian England being fixated on the welfare of those in distant colonies, while being oblivious to the suffering of those at their doorstep. CHARLES DICKENS, *BLEAK HOUSE* 85 (Norman Page ed., 1971) (1853). While Guantanamo Bay is far closer to the United States than Dickens' mythical Borriboola-Gha in Africa was to England, much of the same logic may apply as it may be easier to get excited about a distant problem rather than about a means of informal punishment that routinely takes place in one's own city.

³⁴ Only a handful of alleged enemy combatants have been U.S. citizens, such as Yaser Esam Hamdi and Jose Padilla. *See, e.g.*, Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2635-36 (2004); Rumsfeld v. Padilla, 124 S. Ct. 2711, 2715 (2004). In contrast, the overwhelming majority of those subjected to national security detentions have been non-citizens. *See, e.g.*, Rasul v. Bush, 124 S. Ct. 2686, 2690 (2004) (noting that since early 2002 approximately 640 non-Americans have been detained at Guantanamo Bay). In contrast, the vast majority of the tens of thousands of pretrial detainees each year are U.S. citizens. One should not denigrate the significance of the issues raised in both citizen and non-citizen contexts, but the fact that U.S. citizens bear the burdens inflicted by pretrial detention makes this issue one that should strike close to home.

³⁵ *See* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1326, 1329-30 (1997) (noting the widespread belief that individuals who are charged with crimes are guilty, regardless of whether or not they are ultimately convicted).

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This assumption is better suited to an authoritarian regime oriented towards sustaining social control than to a system whose cornerstone is the presumption of innocence. But it is also a proposition of dubious validity as the literature on wrongful convictions attests.³⁶ Nonetheless, this conventional wisdom of the culpability of anyone that the government has probable cause to arrest goes far towards explaining popular apathy to pretrial detentions and the dearth of remedies for detainees who are not convicted.

A corollary to this point is that the public may turn a blind eye to pretrial detention because this burden falls disproportionately on the poor and racial minorities, takes potential threats from the streets, and subjects them to informal punishment.³⁷ The popular response might be quite a different story if a backlog of drug enforcement cases drew in large numbers of white middle class youth into prolonged pretrial detentions, but here the poverty and/or race of most victims has created little sympathy.³⁸ While there is little direct evidence that racial minorities face more onerous bail conditions than similarly situated white defendants, a disproportionate number of racial minorities face prosecution in the criminal justice system and generally have less resources to meet bail.³⁹ This fact means that racial minorities,

³⁶ See generally NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996) (suggesting that the rate of wrongful convictions is far greater than recognized); BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGFULLY CONVICTED 263 (2000) (discussing how a range of factors including mistaken identification, police misconduct, and false confessions account for wrongful convictions in many cases).

³⁷ This interpretation is supported by the fact that the U.S. public has acquiesced, if not embraced, a dramatic increase of approximately 110 inmates per 100,000 people in 1970 to approximately 700 inmates per 100,000 in 2002. This figure dwarfs the incarceration rates in other developed nations. See Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 328-29 (2004).

³⁸ See, e.g., David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1288-89 (1995) (discussing how the penalties for trafficking in crack cocaine are dramatically harsher than for more commonly used powder cocaine and attributing this difference to the fact that crack cocaine dealing and use are overwhelmingly concentrated in poor, African-American urban areas).

³⁹ Direct attempts to assess whether or how much race shapes bail setting decisions have been difficult. As Part I.A.3 will discuss, prosecutorial discretion in charging plays a salient role in the bail hearing process, and one of the main dangers of prosecutorial discretion is the systematic targeting of minority groups. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 22 (1969); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1539-43 (1981). Some regression analyses have suggested race is the determining factor in higher bail levels for racial minorities compared to whites, while seeking to control for permissible bail setting factors. See 2 REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES 141-54 (1991) (laying out evidence that racial minorities are subjected to racial discrimination in bail setting); FEELEY, *supra* note 4, at 207, 231, 312 n.10 (finding a statistically significant variance in the bail treatment of African-Americans compared to whites even though African-Americans were less likely to flee, yet concluding that there was no evidence of racial discrimination). But these studies suffer from omitted variable bias, as race may be correlated with unobserved variables that legitimately increase the bail for racial

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especially African-Americans, bear the burdens of pretrial detention in significantly greater numbers, just as they disproportionately face imprisonment.⁴⁰

2. The Broad Scope of the State's Detention Powers

Courts have long recognized that both the federal government and states have broad powers to detain individuals before trial.⁴¹ While courts have recently imposed limits on the federal government's detentions of enemy combatants,⁴² the government retains broad discretion to detain individuals in a wide range of contexts.⁴³ Suspects may be detained prior to a magistrate's determination of probable cause.⁴⁴ Thereafter, defendants may be detained without bail if judges

minorities. See Thomas J. Campbell, *Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 STAN. L. REV. 1299, 1305-12 (1984). However, Ian Ayres and Joel Waldfogel have produced convincing indirect evidence that racial minorities are subjected to higher bail than white defendants. See Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 1038-40 (1994) (arguing that the fact that bail bondsmen charge significantly lower bond rates to African-American and Hispanic defendants than white defendants provides market evidence that judges impose higher levels of bail that is necessary to reasonably assure the appearance of minority defendants at trial).

⁴⁰ Racial minorities, especially African-Americans, are both disproportionately prosecuted and represented in American prisons relative to their percentage of the population. See MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 28-31 (1995); MARC MAUER, *THE SENTENCING PROJECT, RACE TO INCARCERATE* 126 (1999) (noting that African-Americans are over seven times more likely than whites to face incarceration). While this result may be a product of African-Americans' committing proportionately more crimes than other groups, a number of empirical studies have found that a defendant's race at least in some instances does affect charging decisions and other stages of the criminal justice process. See Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1006-07 (2001); Randolph N. Stone, *The Criminal Justice System: Unfair and Ineffective*, in *CRIME, COMMUNITIES AND PUBLIC POLICY* 127 (Lawrence B. Joseph ed., 1995).

⁴¹ See *United States v. Salerno*, 481 U.S. 739, 741, 747 (1979); *Schall v. Martin*, 467 U.S. 253, 257 (1984) (justifying the pretrial detention of a juvenile defendant who posed a risk to the community as a regulatory measure rather than punitive act and holding that this detention did not violate the substantive due process clause of the Fourteenth Amendment).

⁴² See, e.g., *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2722-23 (2004); *Rasul v. Bush*, 124 S. Ct. 2686, 2696-97 (2004).

⁴³ For example, the federal government may detain resident aliens prior to deportation proceedings. See *Carlson v. Landon*, 342 U.S. 524, 537-42 (1952) (recognizing that the Executive Branch has sweeping powers to detain illegal aliens prior to deportation proceedings). But see *Clark v. Martinez*, 125 S. Ct. 716, 727 (2005) (holding that if there is not a substantial likelihood of removal of an alien deportee to any country willing to accept the deportee, then she must be released within six months); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (holding that the Immigration and Naturalization Act imposes an implicit reasonableness limitation on the length of detention of illegal aliens before final removal and positing that the presumptive limit to a reasonable removal period is six months).

⁴⁴ See *Gerstein v. Pugh*, 420 U.S. 103, 108 (1975).

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hold they pose a significant danger to the public,⁴⁵ or constitute a serious flight risk before trial.⁴⁶

The vast majority of defendants who are detained before trial are not denied bail outright, but rather are simply too poor to meet bail.⁴⁷ The irony is that federal law explicitly states that “[t]he judicial officer [in a bail hearing] may not impose a financial condition that results in the pretrial detention of the person.”⁴⁸ Most state constitutions expressly guarantee the availability of pretrial release during trial,⁴⁹ and the Eighth Amendment of the U.S. Constitution expressly prohibits excessive bail.⁵⁰ However, there is no federal constitutional right to bail, and courts have found that bail that is far in excess of an individual’s ability to pay does not necessarily constitute excessive bail.⁵¹ As a result, both the statutory and constitutional protections against excessive bail are toothless, and the “crime” of being too poor to meet bail is a frequent occurrence “punished” by pretrial detention.

United States v. Salerno is the seminal case in which the Supreme Court upheld the constitutionality of pretrial detention for those charged with non-capital crimes.⁵² The *Salerno* Court found that pretrial detention was justified because it was motivated by a “regulatory” rather than a “punitive” purpose.⁵³ The Court held that:

Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. There is no doubt that preventing danger to the community is a legitimate regulatory goal.

The *Salerno* Court attempted to underscore this regulatory purpose by noting that the Bail Reform Act of 1984 requires that detainees “be housed in a ‘facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending

⁴⁵ See, e.g., 18 U.S.C. § 3142(f)(2)(A) (2000); *Salerno*, 481 U.S. at 748-49 (holding that the Eighth Amendment is not violated if pretrial detention is based on the dangerousness of the defendant); *Addington v. Texas*, 441 U.S. 418 (1979) (upholding the detention of a mentally unstable individual who was deemed to pose a threat to the public); *Jackson v. Indiana*, 406 U.S. 715, 731-39 (1972) (upholding the detention of an individual deemed unfit for trial, yet still a threat to public); *Schall*, 467 U.S. at 257 (upholding the detention of a juvenile deemed to pose a threat to the public).

⁴⁶ See 18 U.S.C. § 3142(f)(2)(B); *Bell v. Wolfish*, 441 U.S. 520 (1979).

⁴⁷ See FELONY DEFENDANTS, *supra* note 11, at 16; *Bibas*, *supra* note 4, at 2492.

⁴⁸ 18 U.S.C. § 3142(c)(2).

⁴⁹ See RUSSELL L. WEAVER ET AL., CRIMINAL PROCEDURE 721 (2004).

⁵⁰ See U.S. CONST. amend. VIII.

⁵¹ See *United States v. Salerno*, 481 U.S. 739, 747 (1979).

⁵² See *id.* at 741 (upholding pretrial detention against a facial challenge under the Due Process Clause of the Fifth Amendment and the Excessive Bail Clause of the Eighth Amendment).

⁵³ See *id.* at 747; see also *Schall v. Martin*, 467 U.S. 253, 257 (1984) (establishing the regulatory/punitive distinction in the context of the pretrial detention of a juvenile defendant who posed a risk to the community and holding that this detention did not violate the due process clause of the Fourteenth Amendment).

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appeal.”⁵⁴ The fact that placement in separate facilities from the general prison population is not even legally required suggests that the Court’s holding turns solely on the (presumed) intent of prosecutors and judges, rather than the effects of detention on defendants. The irony is that most prison systems in practice do not separate pretrial detainees from the general prison population.⁵⁵

This Article does not question the legitimacy of pretrial detention as a tool to restrain defendants who pose an ongoing and immediate danger to the community or to ensure defendants’ presence at trial. But the distinction between a regulatory and punitive legislative purpose overlooks the punitive effects of pretrial detention and the very real costs that this “regulatory” measure inflicts on detained individuals, their families, and the wider communities. Before parsing out the punitive effects of pretrial detention, it is important to examine the bail hearing process and the intent that the *Salerno* Court raised as an issue: namely the incentives that prosecutors and judges face in the bail hearing process.

3. The Mechanics of the Bail Hearing Process

The Bail Reform Act of 1984 established the parameters for the federal exercise of pretrial detention powers.⁵⁶ An arresting officer must ensure that the defendant appears before a federal magistrate judge without “unnecessary delay.”⁵⁷ In practice, courts have held that bail hearings must ordinarily take place within forty-eight hours of arrest unless a continuance is granted to either party.⁵⁸ The judge must make a determination about whether and under what conditions to release the accused.⁵⁹ If the judge determines that there is “clear and convincing evidence” that the accused poses a potential flight risk or constitutes a danger to the community, then she may impose specific conditions for

⁵⁴ See *Salerno*, 481 U.S. at 747 (citing 18 U.S.C. § 3142(1)(2)) (emphasis added).

⁵⁵ Prison administrators generally consider pretrial detainees more dangerous than convicted criminals because they have not yet become acclimated to the conditions of prison life. For this reason pretrial detainees are often subjected to even greater restraints on their liberty than inmates in the general prison population, who may enjoy more privileges because of their record as prisoners. See Thomas M. Franklin & Victor C. Peters, *Standards for Local Detention Facilities: An Attempt at Statewide Management of Iowa County Jails*, 66 IOWA L. REV. 1071, 1092-93 (1981).

⁵⁶ See generally 18 U.S.C. § 3142.

⁵⁷ See FED. R. CRIM. P. 5(a).

⁵⁸ The time frame for a bail hearing generally parallels that for a hearing to determine probable cause in the cases of warrantless arrest. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). If the government fails to receive a probable cause determination within forty-eight hours, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstances. *Id.* at 56-57; see also 18 U.S.C. § 3142(f)(2) (stating that either party in a bail hearing may move for a continuance for up to five days).

⁵⁹ See 18 U.S.C. § 3142(a)-(f).

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release or deny bail entirely.⁶⁰ The Bail Reform Act mandates that these conditions should be the “least restrictive” means that may “reasonably assure the appearance of the person as required and the safety of any other person and the community.”⁶¹ If no conditions can reasonably safeguard against either of these risks, the judge must subject the accused to pretrial detention without bail until trial.⁶²

While the ability to deny bail entirely might appear to be the greatest threat to individual liberty, the process of setting a dollar amount for bail is the most important stage of the process for the vast majority of detainees.⁶³ In setting bail, judges are asked to balance the liberty interest of the individual with a range of societal concerns.⁶⁴ These four types of factors are the nature and circumstances of the charges, the weight of the evidence, the history and characteristics of the defendant, and the nature and seriousness of any threat the defendant’s release may pose to the community.⁶⁵ Prosecutors’ arguments and emphasis almost exclusively frame three of these factors, and may significantly shape the judge’s understanding of the history and characteristics of the defendant.⁶⁶

Defense attorneys may introduce countervailing factors such as the accused’s personal character, ties to the community, and substance abuse record, but these factors carry far less weight than issues raised by the prosecution.⁶⁷ Judges may also consider the financial resources of the defendant, which might appear key for determining the flight risk.⁶⁸

⁶⁰ See 18 U.S.C. § 3142(f)(2). The accused may be released on personal recognizance, or courts may condition release on terms such as an unsecured bond, cash bond, or surety bond or based on non-financial conditions such as house detention or submission of samples for ongoing drug tests. The federal and state governments require a surety bond in the vast majority of cases. See Eric Halland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement From Bail Jumping*, 47 J.L. & ECON 93, 94-96 (2004).

⁶¹ 18 U.S.C. §§ 3142(c)(1)(B), 3142(e); *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (“Bail set at a figure higher than an amount reasonably calculated to ensure [the presence of the accused] is ‘excessive’ under the Eighth Amendment.”).

⁶² 18 U.S.C. §§ 3142(c)(1)(B), 3142(e). Legislative and judicial exceptions allow bail to be denied outright in a number of contexts. These cases include charges related to capital offenses, recapture, and criminal contempt, or other considerations of criminal history or the nature of criminal charges. See 18 U.S.C. § 3142(c)-(e).

⁶³ See FELONY DEFENDANTS, *supra* note 11, at 16 (showing that five times more pretrial detainees facing state felony charges lacked the means to meet bail than were denied bail outright).

⁶⁴ See 18 U.S.C. § 3142(g).

⁶⁵ See *id.*

⁶⁶ See Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 58-60 (1968) (arguing that the strength of the case is the prosecutors’ main consideration in the charging, bail hearing, and plea bargaining process).

⁶⁷ See Pat Raburn-Remfry, *Expediting Arrest Processing*, 2 CORNELL J.L. & PUB. POL’Y 121, 124-25 (1992); PAUL B. WICE, BAIL AND ITS REFORM: A NATIONAL SURVEY 14-15 (1973) (noting that less than ten percent of judges, prosecutors, and defendants found that community ties were an important consideration and that many found inquiring about community ties was a “waste of time”).

⁶⁸ See 18 U.S.C. § 3142(g)(3)(A).

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But judges need not even consider whether a defendant can actually meet bail,⁶⁹ and therefore consideration of the defendant's financial circumstances appears to be a mere formality.⁷⁰ The high volume of bail hearings that judges face, the short time frame before the hearings, the brevity of bail hearings, and the defendant's presumptive bias in presenting evidence of risks means that bail inquiries concerning the personal circumstances of the defendant are cursory and/or given little weight.⁷¹ In contrast, judges generally place the greatest weight on more "objective" bases laid out by the prosecution, such as the nature and seriousness of the charges and the accused's prior criminal record.⁷² As a result, courts routinely impose monetary bail that far exceeds defendants' means.⁷³

In theory, the length of pretrial detention is limited by the Speedy Trial Act, which mandates that cases concerning pretrial detainees occur within ninety days.⁷⁴ This protection is somewhat illusory as the detention can be extended indefinitely if any one of eighteen open-ended exclusions is satisfied.⁷⁵ These exclusions include a continuance granted by a judge based on the interest of justice,⁷⁶ the need to locate an essential witness,⁷⁷ or the filing of interlocutory appeals or pretrial motions.⁷⁸ As a result, pretrial detainees routinely face detentions that well exceed the maximum of ninety days that the Speedy Trial Act authorizes.⁷⁹

⁶⁹ In contrast, some states require judges to consider the actual ability of defendants to meet bail. See, e.g., TEX. CRIM. PROC. CODE ANN art. 17.15 (Vernon 1977 & Supp. 2000).

⁷⁰ See WICE, *supra* note 67, at 14 (noting that judges believed that the financial circumstances of the defendant constituted the least important factor of the bail setting process).

⁷¹ See, e.g., *id.* at 24 (noting that bail hearings in Chicago averaged a mere fifty-seven seconds).

⁷² See Ebbe Ebbeson & Vladimir J. Konecni, *Decision-Making and Information Integration in the Courts: The Setting of Bail*, 32 J. PERSONALITY & SOC. PSYCHOL. 805 (1975) (discussing a study that found that although judges claimed to consider a range of factors in setting bail, the only factor that correlated with their bail decisions was the recommendation of prosecutors); JOHN S. GOLDKAMP, *TWO CLASSES OF ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE* 154-55 (1979) (finding that objective factors, such as charges and the defendants' criminal history, appeared to be the most important considerations in judges' decisions concerning release and bail setting).

⁷³ See FELONY DEFENDANTS, *supra* note 11, at 16.

⁷⁴ See 18 U.S.C. § 3164(b) (2000).

⁷⁵ See *id.* § 3161(h).

⁷⁶ See *id.* § 3161(h)(8).

⁷⁷ See *id.* § 3161(h)(3).

⁷⁸ See *id.* § 3161(h)(1)(E)-(F).

⁷⁹ See BUREAU OF JUSTICE STATISTICS, *COMPENDIUM OF FEDERAL JUSTICE STATISTICS*, 2001 40 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0103.pdf> (documenting that the average length of federal pretrial detentions is eighty-one days for those who lack the means to meet bail and one-hundred-and-ten days for those denied bail); Floralynn Einesman, *How Long is Too Long? When Pretrial Detention Violates Due Process*, 60 TENN. L. REV. 1, 14-16 (1992) (discussing the shortcomings in the design and application of the Speedy Trial Act that result in significant numbers of detainees waiting more than ninety days for trial).

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4. The Distorted Incentives Shaping Bail Hearings

This overview of the bail hearing process underscores the fact that prosecutors play the primary role in molding the judge's bail decisions. Prosecutors' charging power, indications of the strength of the case, and framing of the defendants' characteristics and potential threat to the community in the bail hearing allow prosecutors to push for onerous bail conditions.⁸⁰ Prosecutors' main leverage over defendants, both in the bail hearing and plea bargaining processes, lies in the fact that prosecutors enjoy sweeping discretion in charging defendants.⁸¹ Prosecutors have a wide and overlapping arsenal of criminal charges to choose,⁸² and the strong judicial presumption that a prosecutor acts in good faith all but inoculates charging decisions from judicial scrutiny.⁸³ So long as a prosecutor can establish that probable cause exists for a given offense, then a prosecutor is entitled to bring the charge.⁸⁴

The lack of judicial oversight over charging means that defendants face a highly uneven playing field, which legislatures have made even more favorable to prosecutors in recent years. The legislative response to popular concerns over criminal activity has been to create an overlapping and ever increasing arsenal of crimes.⁸⁵ This approach has given prosecutors wider discretion in charging as even a single criminal act may trigger multiple substantive charges as well as catch-all crimes,

⁸⁰ See Bibas, *supra* note 4, at 2470-74 (2004); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2557-58 (2004).

⁸¹ See DAVIS, *supra* note 39, at 188 (arguing that "the American legal system seems to be shot through with many excessive and uncontrolled discretionary powers, but the one that stands out above all others is the power to prosecute or not to prosecute"); Brown, *supra* note 37, at 331 (arguing that "prosecutors have essentially no formal external checks on their discretion").

⁸² See Gershman, *supra* note 14, at 405-06; ABRAHAM S. GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA* 5 (1981) (arguing that the prosecutor is treated as "so integral and expert a part of the executive branch that he may not be interfered with by the judiciary").

⁸³ See *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (holding that there is no federal constitutional right to any review of prosecutors' charging decisions); see also *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 380-81 (2d Cir. 1973) (discussing the difficulties that judges would face even if they did seek to scrutinize prosecutors' discretionary charging decisions); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 558 (1996) (noting that "[t]he commitment to prosecutorial discretion rules out aggressive equal protection review of charging decisions").

⁸⁴ See *Wayte v. United States*, 470 U.S. 598, 607 (1985); see also MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2000) (laying out the ethical principle that a prosecutor must "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause"). But see Bruce A. Green, *Ethics 2000 and Beyond: Reform or Professional Responsibility as Usual? Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1588 (noting that prosecutors' ethical requirement only to raise charges supported by probable cause is a tautology as the law already obliges prosecutors to adhere to this standard).

⁸⁵ See Stuntz, *supra* note 83, at 507; Gershman, *supra* note 14, at 406-07.

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such as conspiracy or racketeering.⁸⁶ Prosecutors routinely leverage this discretion by overcharging in two ways: by raising charges that are more serious than the facts may reasonably appear to justify and by breaking offenses into overlapping and component parts.⁸⁷

The enactment of the federal Sentencing Guidelines has provided a powerful complement to overcharging.⁸⁸ The Sentencing Guidelines stripped judges of most of their discretion in sentencing by imposing mandatory minimum sentences, and thus removed one of the last checks on prosecutorial charging powers.⁸⁹ Prosecutors can use the combination of overlapping charges and mandatory minimum sentences to seek high bail that is out of the reach of a large percentage of defendants. By raising the specter of onerous sentences, prosecutors can more effectively pressure defendants into plea bargaining and exercise this leverage to all but dictate the contours of potential punishment.⁹⁰

⁸⁶ While state criminal law broadly tracks the contours of common law offenses, the tangled thicket of federal laws provides a particularly fertile field for prosecutors to employ overlapping charges. See William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 CONTEMP. LEGAL ISSUES 1, 14-15 (1996).

⁸⁷ These two forms of overcharging are termed vertical and horizontal overcharging respectively. See Meares, *supra* note 3, at 867-69.

⁸⁸ Several recent Supreme Court decisions have cast some doubt on the future of the federal Sentencing Guidelines and its state equivalents. See, e.g., *United States v. Booker*, 125 S. Ct. 738, 756-57 (2005) (holding that the Sentencing Guidelines constitute an advisory, rather than mandatory system to guide judges in sentencing decisions); *Blakely v. Washington*, 124 S. Ct. 2531, 2537-38 (2004) (holding that a state judge violated the Sixth Amendment right to trial by jury by determining a sentence based on facts not reflected in the jury verdict or admitted by the defendant); *Apprendi v. New Jersey*, 530 U.S. 466, 496-98 (2000) (striking down part of a state hate crimes statute that allowed judges to make findings of fact that could raise the potential maximum sentence as a violation of the Sixth Amendment right to trial by jury). But Justice Breyer's opinion in *Booker* explicitly invited a legislative response to the Court's limits on the Sentencing Guidelines, *Booker*, 125 S. Ct. at 768, and Congress may well enact legislation that once again makes the Sentencing Guidelines binding on judges. Similarly, it is unclear whether judges will exercise their new discretion and significantly depart from the Sentencing Guidelines. See Henry Weinstein & David Rosenzweig, *How Judges Will Use Discretion Is the Big Question*, L.A. TIMES, Jan. 13, 2005, at A24.

⁸⁹ See GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 223-29 (2003) (arguing that plea bargaining makes sentences more predictable and greatly enhances incentives for defendants to plea bargain with prosecutors); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1260 (2004) (arguing that the "the reality of the federal system is that the sentencing power in individual cases is overwhelmingly a function of the prosecutor alone"); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1476 (1993) (arguing that the existence of the Sentencing Guidelines means "the prosecutor's control over the charge is effectively control of the sentence").

⁹⁰ See Standen, *supra* note 89, at 1505-17; Miller, *supra* note 89, at 1253 (arguing that the Sentencing Guidelines have dramatically increased the gap between the probable trial sentence and the sentences from plea agreements, and thus enhanced incentives to plea). One indicator of the power shift that the Sentencing Guidelines ushered in is the dramatic increase in plea bargaining over the past twenty years. Guilty pleas resolved approximately eighty percent of federal convictions in 1980. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL FACTS & FIGURES, at <http://www.uscourts.gov/judicialfactsfigures/table3.05.pdf> (Mar.

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Prosecutors do not share a uniform interest in maximizing the prison times of defendants.⁹¹ Political pressures, the culture of district attorney's offices, the prosecutor's reputation and ambitions, and the prosecutor's personal views on the crime and the defendant all may shape the charging, bail hearing, and plea bargaining decisions.⁹² But what prosecutors do generally share is an interest in reducing ever-burgeoning case loads, which creates strong incentives to resolve cases as rapidly as possible.⁹³ Prosecutors also share an interest in securing convictions. Non-prosecution poses salient reputational costs to prosecutors, and losing cases taken to trial may pose an even greater cost to prosecutors' ambitions and reputations.⁹⁴ In contrast, prosecutors face no cost for raising as many charges as possible,

2003). Twenty years later after the advent of the Sentencing Guidelines, almost ninety-five percent of convictions were resolved by guilty pleas. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 95 tbl. D-4 (2001), available at <http://www.uscourts.gov/judicialfactsfigures/table3.05.pdf> (last visited Feb. 1, 2005). While the Sentencing Guidelines' introduction of mandatory minimum sentences may or may not have been the decisive factor in enhancing the incentives for plea bargaining, the increase in prosecutorial power likely contributed significantly to this increase in plea bargains.

⁹¹ For an in depth discussion of the complex calculus of prosecutors, see Edward L. Glaser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 260-61 (2000); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 956-69 (1997); Brian Forst & Kathleen B. Brosi, *A Theoretical and Empirical Analysis of the Prosecutor*, 6 J. LEGAL STUD. 177, 183-91 (1977) (framing prosecutors as agents of the state and subject to similar problems of self-interest in the exercise of their powers, abuse of powers, and failure to observe mandates that are observed in other principal-agent contexts).

⁹² In contrast, the interests of criminal defendants are much simpler to capture as defendants understandably seek to avoid or minimize their term of imprisonment. See Stuntz, *supra* note 80, at 2554.

⁹³ This point is evidenced by the fact that state court felony prosecutions more than doubled from 1978 to 1991, while the number of prosecutors increased only just over fifteen percent from 1974 to 1990. See NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1984 189-90 tbl. 35; NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1991 37 tbl. 25; BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, PROSECUTORS IN STATE COURTS, 1990 2 (1992). In more recent years the percentage increase in prosecutors has grown at approximately double the rate of felony case growth, but prosecutors still face heavy case loads. See NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1998 tbl. 15; 2003 tbl. 15 (documenting a 23% increase in state felony cases from 1988 to 2002); BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, NATIONAL SURVEY OF PROSECUTORS (May 2002) (documenting a 39% increase in the number of state prosecutors from 1992 to 2001). Nonetheless, given the large caseload that prosecutors face, it is understandable how extensively prosecutors continue to rely on plea bargaining and tools such as pretrial detention to facilitate and expedite the plea bargaining process.

⁹⁴ Both prosecutors and the general public appear to assess the success of prosecutors by their conviction rate. See Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 51 (1988); Alissa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 JUDICATURE 335, 337 (1990). Plea bargains that dismiss the majority of charges help to secure a high conviction rate for prosecutors. In contrast, the ratio of "as charged convictions" to convictions generally goes unnoticed by the public, even though this figure may suggest overcharging. See Wright & Miller, *supra* note 20, at 35.

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charging for a given offense at a higher level than the facts may warrant, and pushing for onerous bail terms that lead to pretrial detention.⁹⁵

The liberal use of pretrial detention serves as a powerful tool to advance prosecutors' interests in dealing with cases expeditiously and in ensuring convictions. Pretrial detention offers prosecutors tremendous leverage over defendants, which they can in turn use to push for plea bargains.⁹⁶ Placing defendants "on ice" in pretrial detention may prevent a defendant from "meddling" with witnesses or potential evidence, may soften the accused up for a plea bargain, and may make it far less likely that the accused can mount an effective defense.

Given prosecutors' vast influence in bail hearings, prosecutors may easily exaggerate the flight risk or threat to society posed by a defendant to advance these illegitimate (and unspoken) motives by attempting to make bail as high as possible. The danger of even one defendant committing a high profile crime while released may also be enough to cause judges and prosecutors to attempt to detain as many defendants as possible.⁹⁷ Prosecutors may face reputational costs in extreme cases of misconduct that lead to extended pretrial detentions or false convictions, but guilty pleas generally inoculate these decisions.⁹⁸ While we can safely presume that prosecutors' incentives are generally not driven by punitive motives towards the detained, it is clear prosecutors gain much from stacking the deck against the accused in bail hearings.

Throughout the bail hearing and plea bargaining processes, defendants may have few ways to offset prosecutors' advantages, especially if they have meager resources and are forced to rely on public defenders, court appointed lawyers, or poor private representation.⁹⁹

⁹⁵ See Alschuler, *supra* note 66, at 85-105 (laying out the perverse incentives that prosecutors have to overcharge defendants); Meares, *supra* note 3, at 867-72.

⁹⁶ See Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1285-93 (discussing how charge bargaining serves as a means to gain leverage over defendants in order to secure guilty pleas). Ironically, defendants may be squeezed on both ends of the plea bargaining process as prosecutors and defense attorneys generally share an interest in the certainty of plea bargains over the uncertainties of trials, regardless of the actual guilt of defendants. See 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 131-32 (Alfred Blumstein et al. eds., 1983).

⁹⁷ Even if over ninety-nine plus percent of the time the government bail for defendants was set excessively high, the small minority of incidents of released convicts committing crimes will draw media attention and attract pressure to reduce the numbers of those released prior to trial. See Laurence H. Tribe, *An Ounce of Prevention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 372 (1970).

⁹⁸ These reputational costs generally only fall on the shoulders of individual prosecutors rather than on a prosecutors' office as a whole. Even the aggregate of these effects on the reputation of prosecutors does little to alter the great disadvantages that defendants face in bail hearings and plea bargaining. See Standen, *supra* note 89, at 1486-88.

⁹⁹ The fact that over half of criminal defendants are indigents that require government-funded lawyers reinforces the fact that a large percentage of defendants are often too poor to meet bail. See Bruce A. Green, *Criminal Neglect: Indigent Defense From a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1169 (2003).

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The very people who might need the most zealous representation to secure a financially viable bail may have their cases compromised during both the bail hearing and plea bargaining process by the perverse incentives of their overburdened and underpaid lawyers to spend as little time as possible on their cases.¹⁰⁰

One could argue that prosecutors do have some reputational concerns that may dampen their incentives to abuse their charging powers and to push for onerous bail conditions. Prosecutors are often repeat players with judges, and their present and future career prospects may turn on their reputation with the general public. However, the fact that approximately ninety-four percent of convictions are resolved by plea bargains means that prosecutors' tactics are rarely subject to outside scrutiny.¹⁰¹ Judges must formally confirm that a defendant is making a knowing and intelligent plea, but this is generally a mere formality.¹⁰² Reputational concerns with the general public also point strongly towards prosecutors' pushing for onerous bail conditions. In this way, prosecutors can appear tough on criminals to build their public image and to buttress their political ambitions.¹⁰³ While courtroom losses may inflict a reputational cost on prosecutors (and therefore prosecutors rarely assume this risk), the public is unlikely to notice dismissals of cases and guilty pleas to greatly reduced charges.¹⁰⁴

¹⁰⁰ Defense counsel for the indigent have economic incentives to settle because their compensation is often based on the number of cases resolved. *See id.* at 1179-80 (2003). But the heavy case loads that most defense lawyers face create stark incentives to plead most of their clients' cases away as soon as possible and to limit time spent in developing the cases in anticipation of trial. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 33-34 (1997).

¹⁰¹ *See* ADMIN. OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 95 tbl. D-4 (2001). Plea bargaining allows prosecutors to vindicate their prosecution and bail hearing decisions based on post hoc admissions of guilt. Gerald Lynch sums up the opaqueness of prosecutors' actions in plea bargains best. "[T]he defining characteristic of the existing 'plea bargaining' system is that it is an informal administrative, inquisitorial process of adjudication, internal to the prosecutor's office—in absolute distinction from a model of adversarial determination of fact and law before a neutral judicial decision maker." *See* Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1404 (2003).

¹⁰² Although judges formally review the validity of plea bargain agreements and can reject prosecutorial sentence recommendations, *see* FED. R. CRIM. P. 11(c)-(f), in general judges rubber stamp plea bargains. If there is any accountability to judges concerning charging strategies, it would be most likely to occur only in the minute percentage of cases that go to trial.

¹⁰³ The reputational benefits are obvious in the case of state prosecutors as ninety-five percent of them are elected and presumably often hope to pursue reelection or other offices. *See* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 734 (1996). In contrast, federal prosecutors are appointed, rather than elected, but these positions are also frequently leveraged to pursue further elected or appointed offices. *See* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 151-56 (2004).

¹⁰⁴ *See* Wright & Miller, *supra* note 20, at 73 n.167 (noting that the average dismissal rate is twenty-seven percent of cases, but that it is difficult even to find statistics on the frequency of guilty pleas in exchange for reduced charges).

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To the extent that judges do not defer to prosecutors in bail determinations, judges also have independent incentives to impose high bail. Like prosecutors, they too face burgeoning case loads and benefit from the criminal justice system's reliance on plea bargaining.¹⁰⁵ To the extent that excessive bail conditions expedite plea bargaining and reduce over-burdened dockets, the judges are also direct beneficiaries. Judges' ambitions for higher judicial posts or for an (or another) elected office may also cause them to err on the side of excessive bail.¹⁰⁶ Otherwise, they may risk looking too soft on alleged criminals, as they may face popular backlashes if the defendant disappears while on bail or commits further crimes.¹⁰⁷ In short, judges' incentives largely dovetail with those of prosecutors, and prosecutors have both the ability and the incentives to drive the criminal justice system's extensive reliance on pretrial detention.

B. The Dilemma Facing the Use of Pretrial Detention

1. The Case For Pretrial Detention

Putting aside the incentives of prosecutors and judges for the moment, it is clear that pretrial detention is a necessary evil in cases in which no alternative can reasonably secure both public safety and the accused's presence at trial. Decisions to allow defendants out *at all* may entail significant social costs. For example, approximately 200,000 felony defendants do not appear on their court date each year, and 60,000 stay on the run for over a year.¹⁰⁸ Approximately thirty-two percent of felony defendants engage in some form of misconduct while out on bail, ranging from a failure to appear at their court hearing to committing other criminal offenses.¹⁰⁹ These costs may waste the time

¹⁰⁵ See FISHER, *supra* note 89, at 116-36 (discussing how judges' burgeoning case loads, especially concerning civil suits, in the late nineteenth century led to judicial acquiescence to the large-scale use of plea bargaining by prosecutors).

¹⁰⁶ Since many state court judges are elected, the political considerations inherent in discretionary judicial calculations may be more salient in their bail determinations. See NATIONAL CENTER FOR STATE COURTS, CALL TO ACTION: STATEMENT OF THE NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION 12 (expanded ed. 2001), *available at* http://www.ncsconline.org/D_Research/CallToActionCommentary.pdf (last visited Feb. 1, 2005) (noting that thirty-nine states have elections for selecting or retaining judges).

¹⁰⁷ For example, the infamous "Willie Horton ad" was used to attack Democratic presidential candidate Michael Dukakis during the 1988 presidential election for his parole policies while he served as the governor of Massachusetts. The fear of an analogue to this ad for granting bail is likely a factor in setting bail conditions at systematically higher levels than reasonably necessary to secure the appearance of the accused at trial.

¹⁰⁸ See Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement From Bail Jumping*, 47 J.L. & ECON. 93, 93 (2004).

¹⁰⁹ Twenty-two percent of those released on bail fail to appear for their court appearance, and sixteen percent of released defendants were rearrested for committing new crimes while awaiting trial. See FELONY DEFENDANTS, *supra* note 11, at 21-22.

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of courts and lawyers who face delays, strain enforcement resources in relocating absconded defendants, and increase risks inflicted on the general public by potential crimes.¹¹⁰ These costs are significant enough to make a strong case for pretrial detention, and any plan to reduce reliance on pretrial detention may potentially magnify the social costs caused by released defendants.¹¹¹

Nonetheless, bail conditions that effectively imprison an individual before conviction go squarely against the basic legal principle that an individual is innocent until proven guilty.¹¹² The denial of bail must be based on “clear and convincing” evidence of a serious flight risk or threat to the community and the inability to find a less restrictive means to safeguard against these risks.¹¹³ But this standard falls far below the threshold of guilt beyond a reasonable doubt for a criminal conviction. Most importantly, judges fix the financial conditions for bail merely based on a balancing test of governmental interests versus liberty interests,¹¹⁴ yet these conditions may result in months to years of pretrial detention because of the accused’s inability or failure to post bail. The fact that the “playing field” of bail hearings and incentives of prosecutors and judges are significantly skewed against the defendant’s liberty interests should be troubling because of the heavy burdens pretrial detention places on unconvicted individuals.¹¹⁵

The state’s two compelling justifications for denying or imposing a high bail are the state’s interests in ensuring the presence of the defendant at trial and in protecting the community from any further threat.¹¹⁶ The objective of preempting serious risks of violence is the less controversial of these two justifications. As *United States v. Salerno* posited, “[t]he government’s interest in preventing crime by arrestees is both legitimate and compelling.”¹¹⁷ If the prosecution has

¹¹⁰ See Helland & Tabarrok, *supra* note 108, at 94.

¹¹¹ This point should not be overstated, as part of the problem lies in the legal system’s reliance on monetary bail as the incentive to appear in court, rather than more extensively relying on monitoring devices or other non-monetary incentives to secure a defendant’s presence at court. See JOHN CLARK & D. ALAN HENRY, THE PRETRIAL RELEASE DECISION MAKING PROCESS: GOALS, CURRENT PRACTICES, AND CHALLENGES 12-13 (1996), available at <http://www.pretrial.org/ptrdecision1996.doc> (last visited Feb. 1, 2005) (noting that approximately thirty-six percent of defendants are released on their own recognizance or on financial bail, while only thirteen percent of defendants are released subject to non-financial conditions such as electronic monitoring).

¹¹² Ironically, the federal statute on pretrial detention expressly states that “[n]othing in this section shall be construed as modifying or limiting the presumption of innocence.” 18 U.S.C. § 3142(j). This language appears designed to forestall constitutional challenges on this ground. However, pretrial detention compromises the presumption of innocence by inflicting a form of punishment before conviction, which provides great incentives for false pleas to end or limit the duration of detention.

¹¹³ See 18 U.S.C. § 3142(f)(2).

¹¹⁴ See *id.* § 3142(g).

¹¹⁵ See, e.g., Bibas, *supra* note 4, at 2491-93.

¹¹⁶ See 18 U.S.C. § 3142(f).

¹¹⁷ *United States v. Salerno*, 481 U.S. 739, 749 (1979).

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already established that probable cause exists that an individual committed a violent offense, it is understandable for a judge to determine that “clear and convincing evidence” exists that the societal interest in precluding the possibility of harm outweighs the individual’s liberty interest. The power to deny bail on this ground may be easily abused by judges and prosecutors because the standard of proof is so low compared to that for a criminal conviction. But most in society would understandably prefer to err on the side of caution when potential violence is the concern.

The state’s interest in ensuring the defendant’s presence at trial is more problematic. The state does have legitimate interests in securing a defendant’s presence to satisfy justice in the given case and to uphold broader deterrence concerns and respect for the criminal justice system. But both the determinations of the probability of flight and the bail required to minimize this risk are highly speculative and prone to abuse by prosecutors.¹¹⁸ As discussed in the previous section, the catch-all of securing the accused’s presence at trial may cover both judges’ and prosecutors’ more informal and less palatable reasons that may motivate the setting of high bail. But this potential for abuse does not negate the fact that ensuring a defendant’s appearance at trial is an important government interest and that in some cases monetary bail and/or the imposition of other conditions may not be reasonably adequate to secure the defendant’s appearance.

2. Counting the Costs of Pretrial Detention

Society’s interests in preempting violence or reducing the risk of flight may be significant enough in many cases to justify the imposition of pretrial detention. However, what is undeniable in all pretrial detention decisions is that someone must absorb the costs from a decision to free or detain a defendant. Either the detainee must endure imprisonment without conviction or compensation, or society must face higher risks of criminal activity or flight if defendants who would otherwise be detained are released prior to trial. The question is whether this choice should be as stark as it currently is with the default of detainees’ absorbing the costs for the sake of widely dispersed public benefits. When a detainee is subsequently convicted of an offense, the state can set off the sentence against time served and compensate (although incompletely) for the burdens of imprisonment before conviction.¹¹⁹ In extreme cases in which the state lacked probable cause or engaged in egregious abuse, former detainees may have recourse to

¹¹⁸ See *supra* Sections I.A.3, I.A.4.

¹¹⁹ See 18 U.S.C. § 3585(b).

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Section 1983 actions or torts of false imprisonment, wrongful arrest, or malicious prosecution.¹²⁰

But detainees who are found not guilty are often left with the scars from their imprisonment, no monetary compensation, and at best the message that their state-mandated sacrifice served a public good.¹²¹ This approach seems unconscionable in the cases of truly innocent individuals. But even in cases where a person is ultimately convicted of a minor offense, one must still ask why such a person must absorb the costs of pretrial detention. To place this point in context, the following section will provide an overview of the primary costs that pretrial detention inflicts.

Three main types of harms may arise from pretrial detention: the personal costs of deprivation; a higher probability of conviction and a longer sentence; and secondary societal harms. Some of these harms may arise in the case of detention of any duration and others may become more acute the longer the duration. Regardless of one's views on the merits of compensation, the costs are real and significant, and pretrial detention inflicts these types of costs on both guilty and innocent parties.

a. The Personal Costs of Pretrial Detention

It is difficult to capture the full personal costs imposed by detention on those who have yet to be convicted of any crime. Some instances of detention can be dismissed as *de minimis* and absolutely essential, such as the detention of prisoners who are arrested and released within forty-eight hours or a marginally longer period of time.¹²² Short-term needs for processing and case determination may make detentions of limited duration essential for the criminal justice system to function.¹²³ As the discussion of the Bail Reform Act highlighted, procedural and substantive safeguards ensure that detainees are detained because of probable cause of having committed a criminal offense coupled with a risk of flight, dangerousness to society, or both

¹²⁰ See Bernhard, *supra* note 19, at 86-93.

¹²¹ ABA STANDARDS RELATING TO PRETRIAL RELEASE § 1.1 (1968). (“Deprivation of liberty pending trial is harsh and oppressive in that it subjects persons whose guilt has not yet been judicially established to economic and psychological hardship, interferes with their ability to defend themselves and, in many cases, deprives their families of support.”).

¹²² The time frame for bail hearings generally parallels that for hearings to determine probable cause in the cases of warrantless arrests. See *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). If the government fails to receive a probable cause determination within 48 hours, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstances. *Id.*; *United States v. Adekunle*, 2 F.3d 559 (5th Cir. 1993).

¹²³ Even if bail hearings in a given jurisdiction required more than forty-eight hours to process, having compensation kick in at this early point would produce incentives for the expeditious processing of defendants.

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most commonly and tragically an inability to make bail.¹²⁴ While these safeguards require the government to have a substantial basis for the detention, these protections may offer cold comfort to innocent people who face the personal costs inflicted by pretrial detention for any time longer than a *de minimis* duration.

The personal costs of detention range from the demoralization effects of being placed in alien surroundings, cut off from friends and family, to the financial costs of loss of work, to the loss of reputation and self-esteem.¹²⁵ The psychological impact of the loss of liberty and degradations of imprisonment may be incalculable, and detainees may also face threats from other inmates, ranging from acts of humiliation to physical violence or even rape.¹²⁶ Even if the person is ultimately found not guilty, the detention may have caused the defendant to lose her job, to lose face and social standing in the community, and to face significant dislocation costs in adjusting back to life on the outside.¹²⁷ The irony of pretrial detention is that its effects may actually push innocent people on the margins of society towards committing future crimes upon their release by having strained or cut off detainees from their families, jobs, and other social networks.¹²⁸

A convicted party must face these costs as well. These costs are a necessary consequence of imprisonment, however, and setting the time served in pretrial detention against the ultimate sentence largely mitigates these costs. A convicted person whose sentence is less than the time served raises more troubling issues, although many of these costs would arise from any substantial time in detention or prison. The most troubling case of all is that of a person who is found to be innocent and who would otherwise not have had to bear the personal costs of detention. While the state may have had very legitimate reasons to detain these innocent people, these innocent detainees have the strongest claim to some form of redress.

b. The Higher Probability of Conviction and Severity of Punishment

Concerns about pretrial detention should not be limited to individuals found ultimately innocent. Numerous empirical studies

¹²⁴ See *supra* Part I.A.3, I.A.4.

¹²⁵ See Alschuler, *supra* note 6, at 517.

¹²⁶ For an overview of the many risks that detainees may face in prison, see generally MICHAEL C. BRASWELL ET AL., PRISON VIOLENCE IN AMERICA (2003). The recently enacted federal Prison Rape Elimination Act notes that by conservative estimates thirteen percent of inmates are sexually assaulted while in prison. See Adam Liptak, *Ex-Inmate's Suit Offers View Into Sexual Slavery in Prisons*, N.Y. TIMES, Oct. 16, 2004, at A1.

¹²⁷ See ROBERT J. SAMPSON & JOHN H. LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE 163-69 (1993).

¹²⁸ See *id.* at 167-68 (showing that there is a statistically significant correlation between a former inmates' extent of community ties and the risk of committing another offense).

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have suggested that the longer a person spends time in pretrial detention, the more likely she will be convicted and the more likely that the sentence will be severe.¹²⁹ These effects of pretrial detention appear the same even after controlling for factors such as the seriousness of the charges, prior convictions, and evidence against the defendant.¹³⁰

Individuals fortunate or affluent enough to be free on bail enjoy significant advantages in either staving off convictions or reducing their ultimate sentences. They can enhance their credibility and appeal to jurors or judges by acquiring or maintaining a job, earning money to compensate victims, deepening their involvement in the community, and even just through maintaining a healthier appearance by living at home. As importantly, they have more opportunities to work with their lawyer to pursue a vigorous defense, and they have greater incentives to challenge prosecutors because imprisonment is a prospect rather than a grim reality for them.¹³¹ In contrast, prosecutors' ability to dangle the carrot of release to pretrial detainees may distort defendants' decisionmaking and pervert justice by providing great incentives for false guilty pleas to end or minimize the detention.¹³²

The irony is that even defendants not subject to pretrial detention face overwhelming incentives to plead guilty, especially in misdemeanor cases, which makes the pressure facing pretrial detainees appear even more stark.¹³³ While the personal costs of detention may be impossible to quantify fully, it is intuitive that a free man or woman would have greater wherewithal to resist acquiescing to a plea as a way

¹²⁹ See Stevens H. Clarke & Susan T. Kurtz, *Criminology: The Importance of Interim Decisions to Felony Trial Court Dispositions*, 74 J. CRIM. L. & CRIMINOLOGY 476, 502-05 (1983) (confirming the strong correlation between the length of pretrial detention and the likelihood of conviction and long sentences in a study of three counties in North Carolina); FEELEY, *supra* note 4, at 236 (finding that approximately four times as many defendants are detained prior to trial than are after conviction); John S. Goldkamp, *The Effects of Detention on Judicial Decisions: A Closer Look*, 5 JUST. SYS. J. 234, 245 (1980) (confirming this same point based on a study of Philadelphia's criminal justice system); William M. Landes, *Legality and Reality: Some Evidence on Criminal Procedure*, 3 J. LEGAL STUD. 287, 333-35 (1974) (finding a strong correlation between the length of pretrial detention and sentence length in New York City, but attributing this fact to judges' calculating bonds in ways that incorporate the probability of acquittal).

¹³⁰ See Charles E. Frazier & Donna M. Bishop, *The Pretrial Detention of Juveniles and Its Impact on Case Dispositions*, 76 J. CRIM. L. & CRIMINOLOGY 1132, 1139-52 (1985) (finding that holding all other variables constant, detained juveniles were more likely to be convicted and to face harsher sentences than those released on bail).

¹³¹ See Clarke & Kurtz, *supra* note 129, at 502; Patricia Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U. L. REV. 631, 632 (1964).

¹³² Paradoxically, one of the primary justifications for plea bargains is the fact that the convicted criminals have admitted their guilt. But the ability of prosecutors to offer reductions in the number and severity of charges the defendant faces, leniency in sentencing or release, and non-prosecution of or leniency towards a defendant's friends or family may all but coerce a false plea from a pretrial detainee. See Russell L. Christopher, *The Prosecutor's Dilemma: Bargains and Punishments*, 72 FORDHAM L. REV. 93, 108-09 (2003).

¹³³ See Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 951-55 (1983).

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of putting the ordeal behind them. While a free man or woman might see a false guilty plea as a loss, a detainee may sacrifice his innocence for the prospect of gaining freedom.¹³⁴ These factors combine to highlight why prosecutors have much to gain by setting bail high enough to keep a given individual in prison, and why a defendant's bail determination may have as much or more to do with the likelihood of conviction and term of sentence as the ultimate plea bargain or trial.

c. The Secondary Societal Costs

It would be unfortunate enough if detainees were the only individuals who were forced to bear the costs from pretrial detention. The problem is that the families of detainees and the wider community must absorb much of the cost from defendants' detention before trial.¹³⁵ The detention of a loved one may have both significant psychological and monetary impacts on many family members.¹³⁶ Children may suffer from both the absence of a detained parent, and from neglect from other family members who may be forced to spread their attention more widely or work to make ends meet.¹³⁷ While defendants may bear a social stigma from their detention, their family members and especially their children share this shame and may face social ostracism.¹³⁸ The families of those who cannot meet bail are by definition among the most economically vulnerable in society, and they face the prospect of coping with even less resources because of the detainees' foregone employment.

The combination of these factors may push at-risk children of detainees that much closer to the edge of temptation to engage in anti-social behavior.¹³⁹ The public as a whole may be left footing the bill in terms of greater Aid to Families with Dependent Children or greater

¹³⁴ See Bibas, *supra* note 4, at 2514-15 (discussing how a pretrial detainee may be more likely to view copping a plea through the lens of gain rather than through mitigating the degree of loss like most defendants who are free on bail).

¹³⁵ For an overview of these secondary societal costs of imprisonment, see John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, in 26 CRIME & JUSTICE: A REVIEW OF RESEARCH 121, 121-29 (Michael Tonry & Joan Petersilia eds., 1999).

¹³⁶ See ABA STANDARDS RELATING TO PRETRIAL RELEASE § 1.1 (1968) (noting that "the maintenance of jailed defendants and their families represents major public expense").

¹³⁷ See Donald Braman, *Families & Incarceration*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 117, 118-23 (Marc Mauer & Meda Chesney-Lind eds., 2002); Justin Brooks & Kimberly Bahna, "It's a Family Affair"—*The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 271-72 (1994).

¹³⁸ See Todd R. Clear, *The Problem with "Addition by Subtraction": The Prison-Crime Relationship in Low-Income Communities*, in INVISIBLE PUNISHMENT, *supra* note 137, at 190-91.

¹³⁹ See Jennifer Roback Morse, *Parents or Prisons*, 120 POL'Y REV. 49 (2003); see also Hagan & Dinovitzer, *supra* note 135, at 124-27.

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services for at-risk youth.¹⁴⁰ Even worse, the use of detention as an informal means of punishment may help to fuel criminal pathologies and family breakdown by destabilizing families who are already on the margins of society.¹⁴¹ These costs are not limited to the families themselves, but may extend to entire communities whose social networks and economy may be fractured by the disruptions and burdens detention inflicts on individuals and families.¹⁴²

The dislocation costs of detention for the detainee and the impact on the wider community's social capital and economy may be difficult to quantify. These factors, however, also would weigh heavily on the mind of detainees. If faced with the Hobson's Choice of a long detention in prison that may endanger their family's well being versus copping a false plea, many detainees may understandably choose the latter as a lesser evil. While defendants must state in open court that they recognize the implications of their decision to plead guilty to a particular crime,¹⁴³ the costs that pretrial detention inflicts on detainees and their families may be the unspoken part of the story that makes defendants' decision to plead not truly voluntary and thus often perverts our system of justice.

C. The Merits of Compensation

1. Potential Ways to Reduce the Reliance on Pretrial Detention

The costs that detention imposes on the state do create some incentives for the federal and state governments to limit the denial of bail or imposition of high bail. Governments face substantial costs in detaining prisoners that are as or more costly than the incarceration of convicted criminals for the same period of time.¹⁴⁴ In theory, these costs may exert a modicum of pressure on the federal and state legislatures to change bail hearing rules to limit the use of pretrial

¹⁴⁰ See Morse, *supra* note 139.

¹⁴¹ See MAUER, *supra* note 40, at 12 (discussing the significant impact incarceration has on African-American families and communities).

¹⁴² Pretrial detention is obviously only part of a larger problem plaguing many urban communities as convictions and even longer incarcerations may inflict an even greater harm on communities. See Roberts, *supra* note 40, at 1015-20.

¹⁴³ In federal court a judge must inform the accused of the nature of the charges and her rights, confirm the voluntariness of the plea, and determine that the factual circumstances accord with the plea. See FED. R. CRIM. P. 11(b).

¹⁴⁴ Federal and state costs per prisoner range from \$30,000 to \$50,000 per year. See Marilyn D. McShane, *Crowding*, in ENCYCLOPEDIA OF AMERICAN PRISONS 134, 134-35 (Marilyn D. McShane & Frank P. Williams III eds., 1996). The costs are potentially higher in the pretrial detention context because governments are obligated to make an effort to house detainees in separate facilities from general prisoners. The shorter duration of the average pretrial detention compared to the incarceration period for general prisoners may make sending pretrial detainees to less costly corrections centers impractical.

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detention. Judicial cognizance of limited enforcement resources and pressure from the legislature may provide a loose check on the overuse of pretrial detention. But prosecutors and judges face little if any accountability for the costs of maintaining pretrial detention facilities and prisons.¹⁴⁵ In an era where people are more willing to invest money in building prisons than in building schools, increased expenditures for detention centers appear to serve as a minor constraint, if any, on legislatures, judges, and prosecutors in using pretrial detention.¹⁴⁶ Since the incentives of prosecutors and judges coalesce on using pretrial detention to resolve cases expeditiously,¹⁴⁷ the costs imposed by detention serve as a weak check at best against using pretrial detention.

It is clear that the bail hearing and plea bargaining processes are significantly stacked against defendants in ways that may pervert justice, and that the costs of detention serve as a weak restraint on the use of pretrial detention. Therefore, the question arises of how best to level the playing field for defendants in these processes. Legislatures have a variety of ways to pursue this end.¹⁴⁸ One approach would be to reform the bail hearing process. Legislatures could mandate that judges examine the actual financial ability of a defendant to meet bail and weigh this factor heavily when making bail calculations.¹⁴⁹ Defendants could also be provided with greater opportunities to present character witnesses or other evidence of their ties to the community that would merit a lower bail. While there may be cases in which judges intend to place bail out of the hands of a defendant, heightening judicial awareness of the ability to meet bail and the extent of community ties may reduce the number of times when pretrial detention is a mere product of the poverty of the accused. The stumbling block for this approach may be the difficulties of actually determining the financial ability to meet bail, the need for quick resolution of bail hearings because of the sheer number of cases, and the strength of incentives that judges and prosecutors may face to give lip service to these other factors while making bail decisions based on the existing criteria.

¹⁴⁵ See Standen, *supra* note 89, at 1499.

¹⁴⁶ Even in times of state budget deficits, states have continued to maintain or increase prison spending, because no governor wants to appear soft on crime. See John M. Broder, *No Hard Time for Prison Budgets*, N.Y. TIMES, Jan. 19, 2003, § 4, at 5. However, with cash tight and mandatory minimum sentences bolstering prison populations, some states have begun to reconsider the costs and benefits of the sentencing policies that lead to long durations of incarceration. See Fox Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y. TIMES, Nov. 10, 2003, at A1.

¹⁴⁷ See *infra* Part I.A.4.

¹⁴⁸ See Stephanos Bibas, *Pleas' Progress*, 102 MICH. L. REV. 1024, 1042 (2004) (arguing that we need "counterweights and contrary incentives" to check prosecutors' power).

¹⁴⁹ Under the current system, the federal government and most states are required to consider a defendant's financial resources, see 18 U.S.C. § 3142(g)(3)(A), but bail hearing statutes generally do not require judges to consider the actual ability of a defendant to meet bail.

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Another possibility is to require prosecutors to release more information about the case at the time of the bail hearing.¹⁵⁰ There may be frequent contexts in which the police have just made a spot arrest and the prosecutors are still in the process of compiling a case at the time of the bail hearing. But often arrests are the culmination of lengthy investigations, and requiring more extensive disclosures by prosecutors at or before a bail hearing should often be a realistic objective. This approach may strengthen the hands of defense attorneys and allow judges to make a more informed decision in bail hearings. The problem with this approach may be that it may end up significantly delaying bail hearings and that it may be difficult to monitor whether prosecutors have made the required disclosures.¹⁵¹

Another avenue of reform would be to strengthen judicial oversight of prosecutors. Loosening the vice-like-grips that the Sentencing Guidelines impose on judges' discretion in sentencing would go far in checking prosecutors' charging power.¹⁵² By opening up more exceptions to mandatory minimum sentences, judges might be able to temper some of prosecutors' power in plea bargaining and provide defendants with more reason to hope for leniency if the case went to trial.¹⁵³ Another approach to temper prosecutors' ability to push for onerous bail conditions would be to heighten judicial scrutiny of charging decisions or to reduce judicial deference to prosecutors in the bail setting process. There is no reason to believe that courts are not capable of reviewing prosecutors' decisions, as courts routinely review a wide range of discretionary decisions by elected and bureaucratic officials.¹⁵⁴

¹⁵⁰ See Bibas, *supra* note 4, at 2531-32 (noting that the current system places few requirements on federal prosecutors to release information to defendants prior to trial).

¹⁵¹ For example, prosecutors may strategically decide not to process exculpatory or mitigating information until after the bail hearing to keep the information out of the hands of defendants. It will be difficult for defendants to discover violations of this disclosure rule as the prosecutor has sole possession of evidence and other relevant information, and the defendant and court may never learn of information that is wrongly withheld. This same critique could apply to whether prosecutors complied with *Brady* disclosures before trial. However, the difficulty of establishing the timing of whether a prosecutor learned of information prior to the bail hearing would make it even more difficult to determine whether a prosecutor complied with a pre-bail hearing disclosure requirement.

¹⁵² See Miller, *supra* note 89, at 1260 (arguing that one way to check prosecutorial power over sentencing is to give a variety of actors including judges more power over sentencing decisions). As noted earlier, the Supreme Court has moved in the direction of vesting greater discretion in the hands of judges by holding that the Sentencing Guidelines are advisory, rather than binding on sentencing decisions. See *United States v. Booker*, 125 S. Ct. 738, 756-57 (2005). Whether Congress effectively reverses this decision through new legislation or judges will actively exercise this sentencing discretion remains to be seen. See *id.* at 768 (Justice Breyer's noting that the Supreme Court's decision concerning the Sentencing Guidelines "is not the last word: The ball now lies in Congress' court").

¹⁵³ See Standen, *supra* note 89, at 1532-36.

¹⁵⁴ See Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROC. 47, 48-49 (2000).

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While heightening judicial scrutiny of prosecutors' charging decisions would be quite appealing, there are a myriad of obstacles that may make greater scrutiny of prosecutors' decisions impractical. These include the intrusiveness of judicial supervision of prosecutors,¹⁵⁵ the challenges in implementing effective relief for prosecutors' raising frivolous charges or failing to charge,¹⁵⁶ the difficulties in setting a standard of review for overseeing exercises of prosecutorial discretion,¹⁵⁷ and the question of who should have standing to challenge prosecutors' decisions.¹⁵⁸ In contrast, mandating greater scrutiny of prosecutors' recommendations at the bail hearing appears to have greater potential to temper prosecutors' power. However, the incentives judges themselves face to deal with cases as quickly as possible may frustrate this approach.

Legislatures could also seek to target prosecutorial charging discretion more directly. They could simplify the system of criminal laws to eliminate duplicative and overlapping charges.¹⁵⁹ This would help prevent the types of overcharging that can easily ratchet up prosecutors' bail recommendations. Another approach would be for legislatures to mandate that prosecutors adopt a more structured and reasoned charge selection process to heighten initial screening and seek to achieve greater proportionality between the alleged crime and the charges raised.¹⁶⁰ Legislatures could enact formal guidelines to channel exercises of prosecutorial discretion,¹⁶¹ call for prosecutors to subject charging decisions to a higher standard than probable cause,¹⁶² or divide charging, bail hearing, and plea bargaining decisions between different

¹⁵⁵ See *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 380-81 (2d Cir. 1973) (discussing the difficulties that judges would face even if they did actively attempt to scrutinize prosecutors' discretionary charging decisions).

¹⁵⁶ The issue of remedies would be difficult in challenges to non-prosecution for particular charges because prosecutors could then half-heartedly pursue those charges and undercut the effectiveness of the remedy. Alternatively, if a remedy entailed striking particular charges at the preliminary hearing or bail hearing, it might have perverse effects of causing prosecutors to dig in their heels with their remaining charges and to counter any setbacks by more zealously prosecuting affected defendants.

¹⁵⁷ In particular, it is difficult to imagine what the standard should be for considering potential equal protection violations concerning prosecutors' charging decisions. See *McKleskey v. Kemp*, 481 U.S. 279, 291-97 (1987).

¹⁵⁸ See, e.g., *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another.").

¹⁵⁹ See *Bibas*, *supra* note 148, at 1042.

¹⁶⁰ See *Wright & Miller*, *supra* note 20, at 51-58 (arguing that enhanced initial screening offers a way to encourage prosecutors to charge defendants more accurately and to reduce reliance on plea bargaining).

¹⁶¹ See *Vorenberg*, *supra* note 39, at 1560-72 (calling for guidelines to limit the exercise of prosecutorial discretion); *DAVIS*, *supra* note 39, at 188-214 (initiating the call for formal guidelines for channeling exercises of prosecutorial discretion).

¹⁶² See *Meares*, *supra* note 3, at 874-75 (arguing for financial incentives for prosecutors to subject evidence to a higher standard than probable cause to justify charging defendants).

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actors within a given prosecutors' office.¹⁶³ The challenge facing these types of internal reforms is the difficulty of monitoring prosecutorial compliance, as much of each proposal's effectiveness may turn on whether the head prosecutors actively seek to oversee these plans and other prosecutors embrace these reforms' underlying purpose. However, regardless of the efficacy of each of these reforms, any or all of these measures would represent steps of progress towards tempering prosecutorial power.

Lastly, legislatures could bolster the power of grand juries, which after all were originally intended to serve as a "protector of citizens against arbitrary and oppressive governmental action."¹⁶⁴ In practice, grand juries serve only as a weak and often formalistic check on prosecutors as "grand jurors hear only what the prosecution wants them to hear."¹⁶⁵ Reforming the institution of the grand jury could fill many articles in itself,¹⁶⁶ but the uncertainties inherent in overhauling as weak and malleable an institution as the grand jury makes this seem a speculative approach to tempering prosecutors' powers.¹⁶⁷ All of these potential reforms to level the playing field for defendants may represent steps of progress. However, these measures may provide grim solace for the many people who are never convicted yet are subjected to pre-trial detention for weeks or months and receive nothing in the end except for the restoration of their freedom.

¹⁶³ See Wright & Miller, *supra* note 20, at 56-57; H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 *FORDHAM L. REV.* 1695, 1714-18 (2000).

¹⁶⁴ *United States v. Calandra*, 414 U.S. 338, 343 (1974). In the federal system, the U.S. Constitution mandates the indictment by a grand jury for felony crimes. See *Stirone v. United States*, 361 U.S. 212, 215 (1961); FED R. CRIM. P. 7(a). Only about half of states require a grand jury indictment for serious felonies, and less than a third for all felonies. See SARA SUN BEALE & WILLIAM C. BRYSON, 1 *GRAND JURY LAW & PRACTICE* §§ 2.03-2.04 (1996).

¹⁶⁵ Andrew Leipold, *Why Grand Juries Do Not (And Cannot) Protect the Accused*, 80 *CORNELL L. REV.* 260, 267 (1995); R. Michael Cassidy, *Towards a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, 13 *GEO. J. LEGAL ETHICS* 361, 361-62 (2000).

¹⁶⁶ See, e.g., Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 *COLUM. L. REV.* 749, 819-20 (2003) (calling for a bar on the admission of hearsay evidence in grand jury proceedings to heighten the burden on the prosecution); Ric Simmons, *Re-examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 *B.U. L. REV.* 1, 71-74 (2002) (calling for a range of reforms to allow grand jury members to function as more active participants in grand jury proceedings).

¹⁶⁷ For states that do not employ the grand jury system, preliminary hearings serve as the screen for criminal charges. While preliminary hearings have the advantages of an adversarial process and a public hearing before a judge, they also serve as a fairly weak check on the prosecution. See DEBORAH DAY EMERSON & NANCY L. AMES, *THE ROLE OF THE GRAND JURY AND THE PRELIMINARY HEARING IN PRETRIAL SCREENING* 68 (1984). Strengthening scrutiny of prosecutors' charging decisions in this setting may also suffer from many of the same uncertainties facing reform in the grand jury context.

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2. The Benefits of Compensating Pretrial Detainees

While these alternatives offer some prospect of limiting prosecutors' power, this Article will argue that raising the cost of pretrial detention through compensating detainees may offer the best prospect of both justly treating the accused and diminishing the criminal justice system's extensive reliance on pretrial detention. As noted earlier, this objective of compensating detainees through a cause of action for liberty takings can be reframed as compensating *more* detainees *more* adequately. The federal government and many state governments already provide an incomplete form of compensation for two classes of detainees. Detainees who are later convicted have their time served in detention offset against their sentence.¹⁶⁸ Innocent victims of egregious government action have recourse to a number of causes of action for redress including § 1983 actions and torts for wrongful arrest, false imprisonment, and malicious prosecution.¹⁶⁹ The underlying logic of this "system" is that fairness dictates that convicted detainees should not be punished twice. More importantly, the existing causes of action utilize liability rules to deter government's most egregious abuses of pretrial detention powers and to compensate those affected by these abuses.

The common theme of the existing cause of actions is the narrow class of detainees that they protect, because they only offer redress for the most egregious government actions. For each cause of action, the existence of probable cause inoculates the government from liability for the arrest and the pretrial detention.¹⁷⁰ For example, to prove malicious prosecution, a claimant must establish the initiation of a prosecution against her, termination of the prosecution in her favor, a lack of probable cause, and the existence of actual malice.¹⁷¹ To prove false imprisonment, a claimant must prove she was knowingly and intentionally confined against her will without legal justification, but probable cause serves as a full defense.¹⁷² Similarly, a § 1983 action against state and local officers alleging the deprivation of civil rights through pretrial detention will not succeed if the initial arrest was made with probable cause.¹⁷³

¹⁶⁸ See 18 U.S.C. § 3585(b).

¹⁶⁹ See Bernhard, *supra* note 19, at 86-93.

¹⁷⁰ See *id.* at 86.

¹⁷¹ See *Bonide Products, Inc. v. Cahill*, 223 F.3d 141, 145 (2d Cir. 2000); see also *Murphy v. Lynn*, 118 F.3d 938, 944 (2d Cir. 1997) (noting a plaintiff also needs to establish a Fourth Amendment violation to prevail on a § 1983 action based on a claim of malicious prosecution).

¹⁷² See *Martinez v. City of Schenectady*, 761 N.E.2d 560, 564-65 (N.Y. 2001).

¹⁷³ See 42 U.S.C. § 1983 (2000); *Pierson v. Ray*, 386 U.S. 547, 555 (1967) ("A peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved."); see also *Monroe v. Pape*, 365 U.S. 167 (1961).

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Having probable cause for the arrest and detention serve as the boundary line for financial compensation only allows a narrow sliver of detainees access to full compensation for their detention.¹⁷⁴ While these causes of action exist to deter egregious state activity and to compensate those affected, these limits fail to do much of either in the context of pretrial detention. The existence of probable cause may be enough to vindicate arrests and prosecutions of innocent defendants in spite of the financial and reputational costs such acts inflict. But making financial compensation for pretrial detention turn on the existence of probable cause seems more unjust because of the much greater burden placed on detainees and prosecutors' incentives to exploit pretrial detention without compensation to make their prosecutions and plea bargaining quicker and easier.

The current system offers no recourse at all for innocent detainees who were not victims of the most egregious government actions. Even those convicted detainees who receive a set-off for their time served are systematically undercompensated. Empirical studies have repeatedly borne out the common sense insight that those mounting a defense behind prison walls suffer disadvantages that significantly increase their probability of being convicted or having to cop a guilty plea.¹⁷⁵

The challenge is to construct a system of compensation that more accurately accounts for the costs inflicted on pretrial detainees.¹⁷⁶ In the case of detainees who are ultimately convicted, proving the impact of this disadvantage in any given case may be as hard to establish as racial bias in a death penalty case.¹⁷⁷ Statistically, the disadvantage may exist in both cases, but the statistical determinations cannot show whether the given disadvantage was present or conclusive in any given case.¹⁷⁸

One approach to remedy the disadvantages that pretrial detainees face would be systematically to "compensate" convicted detainees, by providing a greater offset against their sentence than the actual time served based on an across the board fixed percentage. This may be

¹⁷⁴ Because an absence of probable cause is hard to prove except in the most egregious cases, even the sliver of detainees who would fall in this category may have difficulty successfully pursuing this claim.

¹⁷⁵ See Clarke & Kurtz, *supra* note 129, at 502-05; Goldkamp, *supra* note 129, at 245; Rodney J. Uphoff, *The Criminal Defense Lawyer: Zealous Advocate, Double Agent, or Beleaguered Dealer?*, 28 CRIM. L. BULL. 419, 438 & n.68 (discussing how an Ohio county frequently detained misdemeanor defendants for longer than their potential sentences, which produced incentives for plea bargains for time served).

¹⁷⁶ See Levinson, *supra* note 25, at 414 (questioning whether money and constitutional harms are in any way commensurable such that monetary damages can truly compensate for the harm inflicted by the constitutional wrong).

¹⁷⁷ See *McCleskey v. Kemp*, 481 U.S. 279, 325-27 (1987); see also Roberts, *supra* note 40, at 1006-07 (2001) (arguing that the disproportionate incarceration of African-Americans stems from a complex interplay of biased decisionmaking by individual actors and systemic factors that statistically suggest a racial injustice, but which is extremely difficult to prove in individual cases).

¹⁷⁸ *McCleskey*, 481 U.S. at 318-19.

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politically controversial, and the uncertainties of whether the detention resulted in a wrongful conviction or a longer sentence in a given case may make it too sweeping a remedy that is either too generous or too inadequate in any given case. A modified approach would be to vest judges with discretion to reduce sentences for those who faced significant periods of pretrial detention prior to conviction and could demonstrate significant resulting disadvantages in defending themselves.¹⁷⁹ This would be an extension of the existing bases under the federal Sentencing Guidelines which allow judges to reduce sentences in limited circumstances.¹⁸⁰ Empowering judges to exercise this discretion would open up the possibility for judges to redress some of the more obvious cases of disadvantage caused by pretrial detention. This would be a clear improvement, but it may prove to be a tool of limited efficacy as both the state as a whole and judges may have little incentive to employ this discretionary power to reduce sentences.¹⁸¹

While either of these steps may help convicted detainees, nothing short of financial compensation for innocent detainees may both adequately compensate innocent detainees for the costs of detention and at least partly deter state actors from excessive reliance on pretrial detention.¹⁸² “Liberty takings” sets out to fill this need by analogizing the taking of people to the taking of property. Existing takings case law provides a set of principles for framing when compensation would be appropriate in the pretrial detention context. By having compensation turn on the detention itself, rather than on the probable cause for the arrest and detention, liberty takings will seek to provide a financial disincentive for relying on pretrial detention. As the following section will show, either the analogy to physical or regulatory takings could

¹⁷⁹ One could argue that the disadvantages posed by pretrial detention merit some form of compensation for all detainees. One class of individuals is subjected to a loss of liberty to enhance the welfare of society. In contrast, those free on bail impose greater risks on society (in a statistical sense at least), yet enjoy significant advantages in defending their cases.

¹⁸⁰ Under the Sentencing Guidelines, the primary justifications for reducing a sentence are substantial assistance to the government in the given prosecution or related prosecutions and the defendant’s contrition. See 18 U.S.C. § 3553(e) (2000); UNITED STATES SENTENCING GUIDELINES MANUAL § 5K1.1 (2003).

¹⁸¹ Given how judges are some of the strongest critics of the constraints imposed by the Sentencing Guidelines, there is reason to expect that judges would welcome greater sentencing discretion in this area. See Richard T. Boylan, *Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges?*, 33 J. LEGAL STUD. 231, 235 (2004) (noting how in a 1997 survey eighty-six percent of federal judges felt that the Sentencing Guidelines had vested too much power in prosecutors and eighty percent of judges expressed the desire for greater sentencing discretion).

¹⁸² It is difficult to gauge to what degree compensation for liberty takings will successfully deter state actors from relying on pretrial detention in cases when less restrictive alternatives are viable. However, the combination of liberty takings with complementary efforts to shape prosecutors’ and judges’ incentives may offer ways to reduce the state’s reliance on pretrial detention. See *infra* Section II.C.4.

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serve as a foundation to ground a new statutory cause of action for liberty takings.

III. THE CASE FOR LIBERTY TAKINGS

A. The Liberty Takings Framework

1. The Analogy Between the Taking of Property and the Taking of People

The Fifth Amendment establishes that no person shall “be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”¹⁸³ The constitutional text’s use of liberty and private property in the same sentence suggests that these two concepts have independent significance. Courts have never recognized a “property right over one’s own person” or applied the takings clause to the deprivation of liberty.¹⁸⁴ Nonetheless, a strong analogy can be drawn between the taking of property and the taking of people,¹⁸⁵ and the reasoning of takings case law can provide an appropriate framework for compensating pretrial detainees.

While the idea of liberty obviously cannot (and should not) be fully reduced to the sum of its economic parts,¹⁸⁶ aspects of liberty can be conceptualized as forms of property that people choose to employ in markets or to withhold from markets every day. Strictly speaking, a person cannot literally sell one’s liberty.¹⁸⁷ But the ability to contract

¹⁸³ U.S. CONST. amend. V.

¹⁸⁴ Margaret Radin has argued “the body is quintessentially personal property because it is literally constitutive of one’s personhood.” Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 965-66 (1981) (arguing that Lockean analysis establishes self-ownership in one’s body).

¹⁸⁵ Other scholars have recognized that the Takings Clause could serve as a springboard for calling for compensation in cases of deprivations of liberty. *See, e.g.*, DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 293-94 & n.99 (1997) (noting that the Takings Clause provides a potential principle for compensating Japanese-American detainees during World War II); Kontorovich, *supra* note 9, at 790-91 (arguing that judges should have the ability to provide monetary relief in extraordinary circumstances, such as mass detentions during a national security crisis); Wenger, *supra* note 9, at 192-93 (framing slavery as a form of takings).

¹⁸⁶ *See* Levinson, *supra* note 25, at 414-15.

¹⁸⁷ Of course, this limitation is only a matter of contemporary law, as indentured servitude is a “time-honored” American tradition that lives on through the underworld economy of large-scale human trafficking. Often the quid pro quo for securing illegal entry is years of almost complete deprivations of liberty by unscrupulous employers. *See, e.g.*, Peter Landesman, *The Girls Next Door*, N.Y. TIMES, Jan. 25, 2004, § 6 (Magazine), at 30 (discussing how it is estimated that there are 30,000 to 50,000 illegal aliens in the United States who have been forced to work as prostitutes to earn their passage).

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with an employer or to engage in non-market activities, such as care for a child or elderly parent, housework, or leisure, are all derivative of personal liberty. While the state has sweeping powers to regulate and even ban economic and non-economic activities, the defining features of liberty are the individual's freedom from complete control or occupation by the state and the right to exercise that liberty in markets or in the private sphere.¹⁸⁸ These features of liberty distinguish a free man from a slave, and can generally be forfeited to the state for periods of time only because of convictions for criminal acts.¹⁸⁹

English and American history is replete with examples of more stark acknowledgements that property interests are intimately intertwined with liberty. For example, during the height of the feudal era, no man was his own master save the King.¹⁹⁰ Serfs were literally part of their lords' estate, and their liberty as economic actors was limited to the residual of time after the fulfillment of their feudal duties.¹⁹¹ During the first 250 years of American history and for over seventy years after the ratification of the Constitution, private property rights over the liberty and labor of slaves were given the full protection of the law.¹⁹² For much of the same period indentured servants frequently contracted out their liberty for fixed periods of time in exchange for the passage to the New World.¹⁹³ In England, through the early nineteenth century, convicts, including even vagrants, could be sold as indentured servants, because their criminal acts forfeited their property rights over their own person for the period of their sentence.¹⁹⁴ Debtors' prisons were once a symbol in the United States of how even free men could forfeit their liberty due to no criminal act, but simply because of their failure to pay debts.¹⁹⁵

¹⁸⁸ Obviously, the state limits our autonomy through laws and regulations; individuals voluntarily curtail their autonomy through contractual labor; and our neighbors, friends, and foes shape our lives in limited senses through social norms. The idea of control used in this Article, however, suggests comprehensive or near total control or ownership by one person over another.

¹⁸⁹ Certain exceptions exist such as jury duty and military conscription. While compensation for both jury duty and military service may often seem nominal particularly in relation to the risks of military service, these burdens carried by the few for the sake of many are both less comprehensive in scope and generally better compensated than pretrial detention.

¹⁹⁰ Each individual enjoyed control of his land, personal property, and ultimately himself only at the deference of his feudal lord. This order was symbolized by the King's ultimate ownership of all land. See Richard Rivera, *Evolution of Landlord & Tenant Law*, 6 PLI/NY 7, 14-16 (1997).

¹⁹¹ See Irma W. Merrill, *Landlord Liability for Crimes Committed Against Third Party Tenants*, 38 VAND. L. REV. 431, 433 (1985).

¹⁹² See Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 313-22 (2004).

¹⁹³ Indeed, many illegal immigrants to the United States continue to engage in indentured servitude to the present day as the price for their passage. See Landesman, *supra* note 187.

¹⁹⁴ In the United States the even more sinister analogue to these laws was the enactment of "Black Codes" in many southern states following the civil war. These laws made indentured servitude the punishment for vagrancy and targeted the newly freed African-Americans. See W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA 167-75* (1962).

¹⁹⁵ Debtors' prisons existed in Massachusetts until 1857, and they had been fixtures of early

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The Thirteenth Amendment formally abolished the full alienability of liberty as a form of property.¹⁹⁶ However, this Amendment did not change the tight interconnection of liberty and property as we all “sell” our liberty at fixed increments as employees or entrepreneurs. What the Thirteenth Amendment did was to make the full deprivation of liberty a state monopoly that can only be used for limited public purposes.¹⁹⁷ These deprivations of liberty are not limited to pretrial detention. Jury duty, the military draft, forced confinement, and/or submission to vaccinations in times of plagues are all examples of civic duties that may entail literal physical occupations by the state over the individual.¹⁹⁸

Because of the close interconnection of liberty and property, it is intuitive that an analogy can be drawn between the taking of property and the taking of people by the state. The former is a case of taking physical capital, while the latter is a case of taking human capital and all of the productivity and potential it may entail. Just as in the taking of real property, the mere fact that the detention may be in the public interest and accord with due process should not obscure the very real costs it inflicts on detainees, and the resulting need for compensation. To some, equating liberty with a property interest might denigrate the significance of this core American principle. However, the current system of treating the liberty of a detainee as a non-compensable, non-property interest that can be seized by the state appears even more insulting to the dignity of an individual and to the idea of liberty itself.

2. An Overview of Physical and Regulatory Takings

To explain how the reasoning from takings law doctrine could provide a framework for delineating what constitutes liberty taking, it is necessary to provide a brief overview of takings doctrine. The Takings Clause of the Fifth Amendment prohibits the government from taking private property for public purposes without offering just compensation.¹⁹⁹ Two major branches of takings law exist: physical takings and regulatory takings.²⁰⁰ The federal government must give owners just compensation whenever the government physically seizes

American society through the early decades of the nineteenth century. *See* CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 52 (1935).

¹⁹⁶ *See* U.S. CONST. amend. XIII.

¹⁹⁷ *See* Standen, *supra* note 89, at 1472-75 (framing the state as a monopsonist of criminal justice powers and prosecutors as its primary agents).

¹⁹⁸ *See* Gary Lawson & Guy Seidman, *Taking Notes: Subpoenas and Just Compensation*, 66 U. CHI. L. REV. 1081, 1096-97 (1999) (noting that courts have applied civic duty analysis to appropriations of personal time and labor).

¹⁹⁹ U.S. CONST. amend. V.

²⁰⁰ *See* FISCHER, *supra* note 8, at 2-6.

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or occupies private property, regardless of the economic impact.²⁰¹ Landowners face a much higher burden in the context of regulatory takings, however, as they must either show that the regulation precludes any economic value or use of property or prevail in a balancing test weighing the government's interest and means chosen versus the economic impact of the regulation.²⁰²

The permanent physical seizure or occupation of property by the state has long been recognized as a *per se* taking, which requires just compensation.²⁰³ The seminal contemporary case for permanent physical takings is *Loretto v. Teleprompter Manhattan CATV Corp.*, which affirmed that the prohibition against the permanent occupation of property by the state without just compensation is almost absolute.²⁰⁴ In this case a permanent taking was found even in the absence of a showing of economic damage because of a city mandate that an apartment building owner allow a third party to permanently install a cable television antenna.²⁰⁵ The *Loretto* Court concluded that "a permanent physical occupation of another's property" is "perhaps the most serious form of invasion of an owner's property interests."²⁰⁶

A *per se* rule of compensation also applies to temporary seizures or occupations of land if the state exercises the effective rights of possession.²⁰⁷ In *Tahoe-Sierra Preservation Council*, the Supreme Court affirmed that "compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes,

²⁰¹ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). The federal government and state governments also face a "public use or purpose" requirement that theoretically serves as a barrier to takings. But in practice this barrier is generally a formalistic limit to takings as almost any government occupation of property may be framed as advancing the public interest. The Supreme Court is currently considering whether and how a state actor can satisfy the public use or purpose requirement if it condemns private property in the name of economic development in order to transfer the property to another private party. See *Kelo v. City of New London*, 843 A.2d 500, 527-29 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (2004).

²⁰² See *Lucas v. S.C. Coastal Comm'n*, 505 U.S. 1003, 1019 (1992); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

²⁰³ See *Michelman*, *supra* note 8, at 1184 (arguing that "[t]he one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership"); see also *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002) ("[The] plain language [of the Fifth Amendment] requires the payment of compensation whenever the government acquires private property for a public purpose.").

²⁰⁴ 458 U.S. 419 (1982); see also *United States v. Causby*, 328 U.S. 256 (1946) (recognizing a permanent physical takings in the government's use of private airspace for the approach to a government airport); *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871) (initially establishing the permanent physical takings doctrine).

²⁰⁵ See *Loretto*, 458 U.S. at 433-38.

²⁰⁶ See *id.* at 435.

²⁰⁷ See *id.* at 435 n.12; see also *United States v. General Motors Corp.*, 323 U.S. 373, 380-81 (1945) (finding compensation due for complete physical occupation of property even if the taking is only for one day).

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even though that use is temporary.”²⁰⁸ However, not every “temporary physical invasion” is a taking, as there may be circumstances of very short duration, such as state responses to intermittent floods, which may require temporary and partial government entry of private land for public purposes.²⁰⁹ In these cases of temporary occupations of property that “do not absolutely dispossess the owner of his rights to use, and exclude others from his property,” takings claims should be determined based on a balancing test of government and landowner interests.²¹⁰ This test is presumably analogous to the *Penn Central* test for regulatory takings, which is discussed later in this section.²¹¹

The notable exception to physical takings is the civil or criminal forfeiture of property²¹² used in or purchased with the proceeds of specified illegal acts, such as drug trafficking or the traffic in illegal aliens.²¹³ Civil and criminal forfeiture laws date almost to the founding of the United States,²¹⁴ and are based on the premise that the criminal acts forfeit the criminal’s right to the fruits of her crimes or to the instruments that facilitated the criminal activities.²¹⁵

Regulatory takings are of a more recent vintage than physical takings.²¹⁶ The existence of regulatory takings stems from attempts by judges to balance the Takings Clause’s commitment to protecting private property with the rise of the administrative state and the pervasive regulation of property rights.²¹⁷ Justice Holmes’ famous analysis in *Pennsylvania Coal Co. v. Mahon* captures the uncertainties with which judges have grappled in defining regulatory takings.²¹⁸ Justice Holmes established that “[t]he general rule at least is, that while

²⁰⁸ See *Tahoe-Sierra*, 535 U.S. at 322; see also *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951); *United States v. Petty Motor Co.*, 327 U.S. 372, 380 (1946); *General Motors Corp.*, 323 U.S. at 380-81.

²⁰⁹ See *Loretto*, 458 U.S. at 435.

²¹⁰ See *id.* at 435 n.12.

²¹¹ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (laying out the regulatory takings balancing test).

²¹² Criminal forfeiture proceedings are in personam against a given criminal offender, while civil forfeiture proceedings are in rem actions against the targeted property that was used to facilitate a crime or the fruits of a criminal offense.

²¹³ For example, the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 511, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. § 881 (1988)), empowered federal officers to proceed in rem against illegal drugs, as well as facilities used for their manufacture or transport. Over time, the federal government’s power has been expanded to allow civil forfeiture in other drug-related areas, such as the seizure of any property, real or personal, used in money laundering. Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 18 U.S.C. § 981 (2000)).

²¹⁴ See, e.g., *Austin v. United States*, 509 U.S. 602, 613 (1993) (noting that “[t]he First Congress passed laws subjecting ships and cargos involved in customs offenses to forfeiture”).

²¹⁵ See David Fried, *Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. 328, 386 n.269 (1988).

²¹⁶ See generally *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922) (establishing the existence of regulatory takings).

²¹⁷ See FISCHER, *supra* note 8, at 20-21.

²¹⁸ *Mahon*, 260 U.S. at 415.

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property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”²¹⁹ Judges have admittedly had difficulty determining precisely what “too far” is, and the uncertainties about the outer limits of regulatory takings have fueled vigorous debate.²²⁰

The fact that a haze may surround the outer limits of regulatory takings obscures the fact that there is a clear category of regulations that constitute regulatory takings. *Lucas v. South Carolina Coastal Commission* established a categorical rule that “when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”²²¹ This categorical form of regulatory taking is a direct analogue to physical takings as it represents the state’s constructive occupation of land through regulation rather than physical seizure.

This standard is difficult for landowners to meet because oftentimes a regulation precludes many, but not all, of the beneficial uses of a property. However, only complete deprivations of all economically beneficial uses or value constitute a categorical regulatory taking.²²² As significantly, the Supreme Court has chosen not to apply a per se rule to temporary regulatory takings, but instead held in *Tahoe-Sierra* that a regulation which has “effected a temporary taking ‘requires careful examination and weighing of all the relevant circumstances.’”²²³

If a regulation only temporarily or partly eliminates a property’s economic use or value, then the Court must use “essentially ad hoc, factual inquiries” and balance public and private interests to determine if a regulatory taking has occurred.²²⁴ The *Penn Central* balancing test requires courts to consider the nature of the government action, the public benefits, and the economic impact on and the reasonable investment-backed expectations of the landowner.²²⁵ In practice, courts

²¹⁹ *Id.* at 415.

²²⁰ See, e.g., Rose, *supra* note 10, at 562 (criticizing ambiguity in the regulatory takings doctrine); Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1711 (1988) (arguing that there is a need for a more comprehensive approach to regulatory takings).

²²¹ See *Lucas v. S.C. Coastal Comm’n*, 505 U.S. 1003, 1019 (1992).

²²² See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 330 (2002) (stressing that the Supreme Court’s holding in *Lucas* “was limited to ‘the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted’”) (citations omitted); see also *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (noting that “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking”).

²²³ See *Tahoe-Sierra*, 535 U.S. at 335 (denying a temporary regulatory taking for a temporary government ban on land development) (quoting *Palazzola v. Rhode Island*, 533 U.S. 606, 636 (2001) (O’Connor, J., concurring)).

²²⁴ See *Tahoe-Sierra*, 535 U.S. at 330; *Lucas*, 505 U.S. at 1019-20; *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

²²⁵ See *Penn Cent.*, 438 U.S. at 125-27.

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have often been deferential to the government when applying this balancing test to a regulation that deprives an owner of less than the almost complete beneficial use or value of the property.²²⁶

3. Providing a Grounding for Liberty Takings

The principles underpinning physical or regulatory takings case law may form a basis for delineating the contours of liberty takings. While claimants face a much higher standard to prove regulatory takings than physical takings,²²⁷ the comprehensiveness of pretrial detention's deprivation of liberty could be framed as satisfying either test's requirements. The question would be whether pretrial detention is best conceptualized as a literal occupation/seizure of a person by the state and therefore constitutes a physical taking.²²⁸ Alternatively, pretrial detention could be framed as an all-encompassing regulation of activity that effectively precludes all beneficial uses of the detainee's person and liberty and therefore constitutes a regulatory taking.²²⁹ Since liberty takings are designed to be a statutory cause of action, the text of a statute establishing liberty takings can resolve any significant uncertainty in the principles underpinning taking case law or in their specific application to the taking of people.²³⁰

On its face the case for analogizing liberty takings to temporary physical takings appears the most compelling. Pretrial detention literally appears to be the seizure or occupation of an individual by the state. The seizure of unconvicted individuals for weeks or months should be as much or more of an affront to our sensibilities as the seizure or occupation of physical property for equal or far greater amounts of time, however necessary either takings may be to further a public purpose.

The case could be made that the seizure of an individual prior to conviction of a crime constitutes a physical taking both in the case of individuals who are convicted and those who are never ultimately convicted. However, one way to distinguish the physical takings of those who are convicted of crimes would be to draw an analogy with the longstanding practice of criminal forfeiture of private property that facilitates criminal activity.²³¹ By analogy one could reason that a

²²⁶ See *Tahoe-Sierra*, 535 U.S. at 322.

²²⁷ See *Penn Cent.*, 438 U.S. at 124 (“A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by Government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”).

²²⁸ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433-38 (1982).

²²⁹ See *Tahoe-Sierra*, 535 U.S. at 330.

²³⁰ See *infra* Part II.C.

²³¹ See *Fried*, *supra* note 215, at 386 n.269 (discussing how criminal forfeiture functions).

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conviction means criminals forfeit their right to exercise the liberty that facilitated criminal activity for the duration of the criminal sentence. Therefore, no financial compensation would be needed in the case of convicted defendants, and granting a set-off against sentences for time served in detention would retroactively reflect the criminal conviction. In contrast, the analogy with criminal forfeiture would break down in the case of pretrial detention of individuals who are never convicted. This “punishment” is by definition inflicted irrespective of conviction, and the nature and effects of the deprivation of liberty are far greater than for the seizure of real or personal property.²³² For this reason, drawing the line for liberty takings at the issue of guilt is analogous to the reasoning underpinning the criminal forfeiture of real and personal property and offers a principled way of distinguishing when financial compensation would be most appropriate.²³³

In contrast, the detention of an individual who is never convicted of the alleged crime would clearly appear analogous to a physical taking. By seizing and holding the individual, the state is asking her to bear a burden of detention for the sake of the society.²³⁴ As a matter of administrative necessity, a *de minimis* taking of an innocent defendant for up to forty-eight hours of processing time for a bail hearing should be non-compensable, even though following the spirit of physical takings law might suggest the need for even *de minimis* compensation.²³⁵ There are two ways to frame this issue consistently with takings principles. One approach would be to analogize the duration of a pre-bail hearing detention to a public necessity of a fire truck or emergency vehicle occupying real property for the duration of the emergency, which does not trigger the need for compensation under the Takings Clause.²³⁶ Alternatively, time spent in detention prior to a

²³² A logical extension of this Article’s argument for liberty takings could be that innocent defendants should be compensated for the opportunity cost of the time that real or personal property is held for civil or criminal forfeiture, if it is later returned following a failure to convict or overturning of a conviction. The financial consequences of the seizure of property may be immense and even irreversible for an individual or business. However, the economic burdens of civil or criminal forfeiture pale in comparison to the myriad of burdens and disadvantages placed on pretrial defendants by the deprivation of their liberty. Therefore, the case for compensation for the temporary seizure of real or personal property is far less than that for liberty takings.

²³³ As this Article will discuss later, having liberty takings turn on the ultimate conviction of a detainee for any of the underlying charges may overlook the fact that both the convictions and their duration may reflect the disadvantages of detention as much or more than the actual guilt. However, this narrow conception of liberty takings captures the most clear cases that merit compensation and closely mirrors the distinction between criminal forfeiture and physical takings. *See infra* Part II.B.3.

²³⁴ *See* *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

²³⁵ *See* *United States v. General Motors Corp.*, 323 U.S. 373, 380-81 (1945) (establishing that a complete occupation of property for even just one day necessitates compensation).

²³⁶ *See* Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U. L. REV. 627, 653-57 (1987-1988) (discussing cases in which courts have found that government actions were justified by a “public necessity”). This is analogous to the discussion in *Loretto* concerning the application of a balancing test to temporary physical takings of limited scope and duration. The

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pre-bail hearing could be framed as a civic duty (much as it is already is) to ensure that true flight risks and threats to the public do not escape detection.²³⁷

While the analogy to physical takings appears the strongest, it is also possible to frame pretrial detention as a form of regulatory takings. It is admittedly counter-intuitive to conceive of pretrial detention as a mere regulatory measure given the almost complete control the state assumes over the detainee.²³⁸ However, pretrial detention could satisfy the reasoning that underpins regulatory takings under either the categorical regulatory takings test in *Lucas*, which requires the deprivation of all beneficial economic use or value of property, or the *Penn Central* balancing test that is applied to all lesser regulatory burdens on property.²³⁹

The comprehensiveness of governmental control in pretrial detention suggests that detainees are required “to sacrifice *all* economically beneficial uses [of their ability to exercise their liberty] in the name of the common good, that is, to leave his property economically idle.”²⁴⁰ As emphasized earlier, pretrial detention imposes a complete deprivation of liberty and effectively forces individuals to leave their productive potential idle for the detention’s duration.²⁴¹

However, the analogy between pretrial detention and categorical regulatory takings faces two potential stumbling blocks: the question of whether pretrial detention necessarily entails a total denial of any economically beneficial use or value of one’s liberty and the temporary nature of pretrial detention. As the pretrial detention of former Serbian president Slobodan Milosevic admittedly demonstrates, individuals can still appear productive in preparing their defense behind prison walls in spite of the many disadvantages they face.²⁴² The generous accommodations of facilities and resources afforded to Milosevic while in detention,²⁴³ however, are far different from the deprivations faced by the typical pretrial detainee. A pretrial detainee generally lacks the

scope of the deprivation of liberty in the case of pretrial detention is not limited. However, the duration of up to a forty-eight hour detention and its resulting costs are limited, and the rationale for the pre-bail hearing detention is analogous to a public necessity. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982); see also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 132 (1978).

²³⁷ See Lawson & Seidman, *supra* note 198, at 1096-97.

²³⁸ See *infra* Part II.A.2.

²³⁹ See *Lucas v. S.C. Coastal Commission*, 505 U.S. 1003, 1019-20 (1992); *Penn Cent.*, 438 U.S. at 124.

²⁴⁰ See *Lucas*, 505 U.S. at 1019 (emphasis in original); see also *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 318 (1987).

²⁴¹ See *infra* Part I.B.2.

²⁴² See Marlise Simons, *Milosevic Opens His Defense Case by Going on the Offensive*, N.Y. TIMES, Sept. 1, 2004, at A7.

²⁴³ See *The Lesson of Slobodan Milosevic’s Trial and Tribulation*, ECONOMIST, Feb. 15, 2003.

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means to be productive in any meaningful way during the duration of her detention, and thus the deprivation of liberty appears comprehensive. Pretrial detention is by definition limited in duration. For this reason determining whether it constitutes a temporary categorical regulatory taking may “require[] careful examination and weighing of all the relevant circumstances” of a detention to determine eligibility for compensation.²⁴⁴ Here the nature and effects of the deprivation of liberty and its comprehensiveness for the duration of the detention make it appear analogous to a categorical regulatory taking.

But even assuming pretrial detention can be distinguished from a categorical regulatory taking, a strong case would exist for finding a regulatory taking under the *Penn Central* balancing test.²⁴⁵ In fact, applying the balancing test approach offers a distinct advantage by making it easier to justify the exclusion of an up to forty-eight hour detention for bail processing from a liberty takings of longer duration. For a detention of up to forty-eight hours or a marginally longer period, there is a very strong government interest in holding detainees until a bail hearing can be held to determine if they are a flight risk or pose a threat to society, and to set the appropriate bail. While the deprivation of liberty is still comprehensive,²⁴⁶ this holding period is analogous to a public necessity of short duration,²⁴⁷ and the burden on the detainee pales by comparison to the significance of the public interest at stake. Additionally, the up to forty-eight hour detention of the individual may be the only way to compile adequate information for a bail hearing and thus to secure important government interests.

In contrast, for detentions beyond the *de minimis* threshold, the case for compensation would be much stronger and would arguably satisfy the *Penn Central* balancing test. The public benefits of detention of a defendant may still exist after a reasonable time for a bail hearing to be held. However, this interest would be less strong once the risk of flight or threat to the public has been determined. At that time the government would generally have recourse to less restrictive means than detention to secure that interest. Additionally, the economic (and as importantly, non-economic) impact of this occupation of the individual by the state would likely appear so significant and comprehensive for detentions above forty-eight hours that it would outweigh the government’s interests and mandate compensation.²⁴⁸

²⁴⁴ See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 335 (2002) (quoting *Palazzola v. Rhode Island*, 533 U.S. 606, 636 (2001) (O’Connor, J., concurring)).

²⁴⁵ See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 132 (1978).

²⁴⁶ Even the costs of up to a forty-eight hour detention are less, because the economic cost to the detainee is likely to be modest and the long-run impact minimal.

²⁴⁷ See Karlin, *supra* note 236, at 653-57.

²⁴⁸ See *Penn Cent.*, 438 U.S. at 124.

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4. Distinguishing Liberty Takings From Partial Restraints On Liberty

As discussed above, the reasoning underpinning either physical or regulatory takings can be used to delineate the contours of liberty takings. By inference under either framework, any restraint placed on a defendant that falls short of detention would appear to constitute a mere restraint on liberty that need not be compensated. Given the significant difference in the degree of deprivation of liberty between detention and home arrest or electronic monitoring, these lesser burdens would not approximate physical occupation by the state or tip the scales in a balancing test away from regulatory takings.²⁴⁹

One counterargument to this approach would be the claim that pretrial detention is designed not to be as onerous as imprisonment in the general prison population. The *Salerno* Court gives some support to this point by distinguishing between the regulatory purpose of pretrial detention and the punitive purpose of formal imprisonment. The *Salerno* Court noted that the Bail Reform Act of 1984 requires that detainees “be housed in a ‘facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal.’”²⁵⁰ Detention centers may offer marginally less restraint on the liberty of detainees and inflict lower potential costs on them than imprisonment with long-term inmates. But separation of defendants from the general prison population is not required, and in fact the empirical evidence suggests that pretrial detainees face greater deprivations than long-term inmates.²⁵¹ Regardless of this point, the comprehensive nature of the deprivation of liberty and its consequences are substantially similar for both detainees and prisoners, and appear far more onerous than the burdens imposed by lesser restraints on liberty.

Pretrial detention imposes a special set of harms. Detention not only deprives individuals of their liberty and ability to work, but also imposes costs that impair defendants’ effectiveness to defend themselves and may inflict lasting emotional and psychological damage

²⁴⁹ This analogy is consistent with case law holding that home confinement is not tantamount to pretrial detention and therefore does not qualify for sentencing set-offs under federal law. *See, e.g., Reno v. Koray*, 515 U.S. 50, 56-58 (1995) (holding that convicted felons may receive sentencing credit for time served in pretrial detention only if they were held in a penal or correctional facility subject to the control of the Bureau of Prisons); *United States v. Reyes-Mercado*, 22 F.3d 363, 367 (1st Cir. 1994) (holding that the fact that home confinement is potentially a condition of probation, but not a substitute for imprisonment, indicates that Congress did not consider home confinement tantamount to imprisonment); *United States v. Phipps*, 68 F.3d 159, 163 (7th Cir. 1995) (holding that home detention with electronic monitoring while awaiting trial did not constitute pretrial detention for the purposes of a sentencing set-off because the U.S. Sentencing Guidelines differentiate between “home detention” and “imprisonment”).

²⁵⁰ *United States v. Salerno*, 481 U.S. 739, 748 (1979) (citing 18 U.S.C. § 3142(i)(2)).

²⁵¹ *See Franklin & Peters, supra* note 55, at 1092-93.

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on innocent detainees, their families, and their communities.²⁵² In contrast, home detention or electronic monitoring may inflict only some of these costs. Even in the most extreme case of detention at home twenty-four hours a day, seven days a week, the defendant still enjoys liberty and the ability to engage in productive activities to a dramatically greater degree than a detainee who is subjected to direct control by the state in a detention facility. Individuals may still suffer a significant reputational cost from being confined to their home or being subjected to electronic monitoring. Individuals may suffer a significant economic cost as well if they are cut off from their work (although home detentions may allow individuals a reasonable period of day-time freedom to pursue employment).²⁵³ Even assuming that individuals may be cut off from their current jobs, individuals detained at home are not necessarily cut off from other forms of home-based income producing activities. All of these costs appear objectively far less than those imposed by pretrial detention.

Most significantly, defendants under home detention or lesser restraints must not suffer the deprivations that formal detention inflicts. Cabin fever may impose its own set of costs, but these do not compare to the psychological, emotional, and even physical effects of formal detention or imprisonment.²⁵⁴ Individuals subject to home detention can enjoy all of the comforts of home and are not cut off from their friends and family. They are not subject to the indignities of life behind bars and must not live in fear of physical brutality and anomie from the loss of all autonomy. Home detainees will also have all of the time in the world to meet with their legal counsel and to plan their case.

For all of these reasons restraints that fall short of formal pretrial detention arguably result in only a partial deprivation of liberty and do not approximate a physical taking or satisfy the *Penn Central* balancing test for regulatory takings. This approach advances one of the underlying objectives of the Bail Reform Act of 1984. The Act called for judges to adopt the least restrictive means to secure the state's objectives of securing the presence of the defendant at trial and preventing further harms to the community while the defendant is out on bail.²⁵⁵ Recognition of a compensable taking only in cases of pretrial detention would thus provide the state with financial incentives to abide by this largely overlooked objective and encourage the use of less restrictive means than pretrial detention to safeguard state interests.²⁵⁶

²⁵² See *infra* Part I.B.2.

²⁵³ See Charles Strum, *Fearing Felons on the Loose, New Jersey Reviews Monitoring*, N.Y. TIMES, June 7, 1992, § 1, at 31.

²⁵⁴ See *infra* Section I.B.2.

²⁵⁵ See 18 U.S.C. § 3142(c), (e).

²⁵⁶ Placing a financial sanction on the state as a whole will not necessarily deter individual actors, a topic that will be discussed in Part II.C.4.

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This approach could admittedly have some perverse effects in denying compensation to individuals subjected to conditions that fall just short of pretrial detention. For example, court-mandated confinement in a community treatment center prior to trial represents a hard case in between pretrial detention and home detention, which could fall between the cracks of an analogy to physical or regulatory takings.²⁵⁷ Community treatment centers have many facets similar to detention centers in restrictions on liberty and the ability to work. However, the detainee's choice to participate in this rehabilitative program rather than to be placed in a pretrial detention center makes this case appear to fall outside of a personal taking.

While the reasoning that underpins physical or regulatory takings case law could form a framework for liberty takings, the fact that liberty takings would be a statutory cause of action offers some significant advantages. A liberty takings statute could codify the principal distinctions of takings law rather than attempt to fully incorporate existing takings doctrine. In this way a statute could clarify any ambiguities in existing takings doctrine or difficulties in applying these principles to the taking of people. Legislatures would understandably want to delineate these limits, rather than to delegate to courts broad discretion to define when liberty takings occur. Legislatures could also streamline the adjudication process to minimize administrative expenses and increase certainty both for the state and affected individuals concerning when and what form of compensation would apply. This could make liberty takings both more viable to implement and more politically palatable. The following section will explore the potential mechanics of implementing compensation for liberty takings and lay out some of the potential implications that could result from this plan.

B. Conditions for Compensation

1. The Standard for Compensation

Two significant concerns remain for defining the parameters of liberty takings: determining what standards for compensation should be adopted and what classes of detainees should be eligible for compensation. As discussed earlier, states and the federal government need a *de minimis* window of up to forty-eight hours for administrative purposes to prepare for a bail hearing.²⁵⁸ This period should be

²⁵⁷ In *Reno v. Koray*, the Supreme Court rejected a due process claim by a pretrial detainee who objected to the fact that his time spent in a community drug treatment center was not set off against his ultimate sentence under 18 U.S.C. § 3585(b); see *Reno v. Koray*, 515 U.S. 50, 64-65 (1995).

²⁵⁸ See *supra* Part II.A.3.

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excluded from any taking calculation, and the trigger event for compensation should be the conclusion of the bail hearing. At this point it would be reasonable for the clock for compensation to begin ticking if a liberty taking is later found to apply.

The standard of compensation for physical or regulatory takings of real property is generally based on the fair market value of the property at the time of the taking.²⁵⁹ In the case of a temporary taking, compensation would reflect the value of a leasehold over real property for the duration of the taking.²⁶⁰ While it may be easy to compare the value of houses in a given neighborhood, it is more difficult to measure the value of individual liberty. The closest analogue is the opportunity cost of pretrial detention for the defendant. An opportunity cost approach would seek to estimate the “rent” that one would receive from selling one’s labor. While the simplest way to approximate opportunity cost would be to determine lost wages or to assess earning power, this opportunity cost would admittedly only capture a significant percentage of the value placed on the lost liberty. This approach obviously would not capture the full endowment effect that an owner attributes to withholding her labor from labor markets or using her liberty according to her own wishes.²⁶¹

Nonetheless, an individualized assessment approach has tremendous appeal. A judge or magistrate could take into account the opportunity cost of pre-trial detention for a given individual. Relying solely or primarily on a benchmark for opportunity cost, such as foregone wages, would be relatively easy to administer and to confirm in most cases. At the same time, an opportunity cost standard would mean the cost of a given person’s detention would depend primarily on her vocation. This point has troubling implications as the detention of poor people could be virtually costless compared to the detention of more affluent people. This danger can be mitigated by imposing a cap and floor on opportunity cost based compensation, an approach this section will subsequently explore.

A judge could also potentially consider the larger context of costs that detention inflicts. For example, awards could include additional compensation to offset the effects of separation from family or the indignities of detention. This practice could be similar to the practice of paying market value plus a modest premium percentage to compensate for the personal value that a particular owner places on owning her

²⁵⁹ See *Olson v. United States*, 292 U.S. 246, 257 (1934) (holding that the standard for fair market value is “the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy”).

²⁶⁰ See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002).

²⁶¹ For a discussion of the endowment effect premium that an owner attributes to her property, see Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1483 (1998).

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parcel of land.²⁶² In this case different individuals would have different degrees of emotional distress inflicted because of how the impact of detention could vary by individual. Giving a judge some leeway to take this factor into account would allow compensation to reflect the real costs of pretrial detention more comprehensively. Alternatively, the award of a fixed premium or percentage could recognize these additional costs, yet minimize the need for judges to make subjective decisions about the emotional impact of detention in a given case.

The problems with an individualized assessment of opportunity cost and potentially other non-economic costs are twofold. First, these hearings could put a large strain on state resources. This point would be especially true if these determinations went beyond the opportunity cost of employment to more subjective questions of the impact of detention on the former detainee. Concerns for judicial economy may require a focus on the question of the economic opportunity cost of detention, even though this approach may result in the systematic underestimation of the true costs of detention. Judges would value reliance on easily confirmable proxies, such as foregone earnings, because of the need to minimize the burden liberty takings cases would place on their dockets. By limiting proceedings to economic costs inflicted by detention, this approach might be more palatable to legislatures who would wish to minimize administrative costs.

The second concern is the class and economic bias that would likely result from an opportunity cost standard. White-collar criminal defendants already have great advantages in the criminal justice process, if only because of their greater financial ability to meet bail and to secure skilled counsel able to enforce their rights zealously.²⁶³ They are already disproportionately represented in the percentage of cases that go to trial because they have the means to meet bail and to exploit every advantage that defendants hold in the criminal justice system.²⁶⁴ Individualized assessments would enhance the advantages that white-collar criminal defendants enjoy. Courts would be more reluctant to detain white-collar criminal defendants because of the need to compensate them for their high opportunity costs of detention if they are acquitted. In contrast, the same people who are guilty of being too poor to make bail would also likely have a low opportunity cost for imprisonment and a lower likelihood of retaining zealous advocates to secure their acquittal and subsequent compensation.²⁶⁵

²⁶² Paying a premium for the takings was a traditional English practice that is still used in Canada and many other Commonwealth countries. See Parchomovsky & Siegelman, *supra* note 23, at 139-40.

²⁶³ See William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1714-15 (1993).

²⁶⁴ See *id.* at 1715.

²⁶⁵ See Richard Klein, *The Eleventh Commandment: Thou Shall Not be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 364-65 (1993).

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For this reason, a flat per diem standard of compensation might seem more appropriate both to satisfy concerns about fairness and to minimize administrative costs.²⁶⁶ In theory, pretrial detention or imprisonment partly serves as a means of saying that all people are equal before the law. Treating all detainees the same in terms of compensation regardless of the opportunity costs or other factors might reinforce this message.²⁶⁷ But a per diem standard could also end up defeating the purpose of liberty takings by serving as symbolic but nominal compensation that does not approximate the costs pretrial detention inflicts on the individual.

The solution to reconcile these competing concerns would be to create a hybrid system that gives courts flexibility to use individual opportunity cost to determine appropriate compensation between a per diem floor and cap. The floor of per diem compensation would be designed to ensure that the most economically disadvantaged detainees with low opportunities costs receive reasonable compensation for the costs inflicted by their detention. The cap would be designed to ensure a measure of class equity, so that a high opportunity cost person would not automatically be exempted from pretrial detention because of concerns of potentially paying their opportunity cost of detention down the line. By employing an opportunity cost system between the cap and floor, courts would be empowered to seek compensation that more accurately reflects the particular costs that individuals were forced to bear in detention.

The difficulty would be establishing what per diem rate would be appropriate for a cap and floor. A per diem floor should be designed with the goal of creating a credible incentive for the state to use less restrictive means than pretrial detention. At the same time, there is a danger of a moral hazard if the compensation levels for a per diem floor are too high. It may be hard to imagine that individuals would eagerly seek to “come to the takings” and voluntarily subject themselves to the deprivation of their liberty for the sake of liberty takings compensation.²⁶⁸ But generosity in compensating those subjected to pretrial detention should be tempered by considerations of not wanting to create an incentive for coming to the liberty taking or embroiling the state in litigation on this point. This issue is all the more significant as

²⁶⁶ See Michael King, *Bail Reform: The Working Party and the Ideal Bail System*, 1974 CRIM. L. REV. 451, 452-53 (calling for the compensation of acquitted pretrial detainees based on a system of fixed per diem compensation).

²⁶⁷ This approach would be analogous to the uniform per diem compensation for jury duty. But jury duty offers only a limited comparison as jury duty compensation is generally nominal and can be as low as \$10 per day. See Evan R. Seamone, *A Refreshing Jury COLA: Fulfilling the Duty to Compensate Jurors Adequately*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 289, 315, 339 (2002).

²⁶⁸ See Henry A. Span, *Public Choice Theory and the Political Utility of the Takings Clause*, 40 IDAHO L. REV. 11, 100-02 (2003) (discussing the “coming to the takings” problem in the context of regulatory takings).

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perceptions of excessive generosity could be politicized to attack the legitimacy of either a legislative program or judicial determinations of liberty takings. On the other extreme, the cap should at least reflect the economic costs that middle class Americans would face, so that judges would have flexibility to make average Americans as close as possible to whole again financially.

2. The Narrow Conception of Liberty Takings

Having established the contours of a framework for compensation, the question remains of what categories of detainees merit compensation. The following two sections will make the case first for a narrow conception of liberty takings and then for a broader view that seeks to take into account how guilty pleas for nominal charges may mask the coercive power of pretrial detention.

The narrow conception of liberty takings would closely follow the reasoning of physical and regulatory takings.²⁶⁹ While any pretrial detention may technically constitute a form of taking by the state, this approach would draw the line of eligibility for financial compensation on the question of whether the state ultimately secured a guilty plea or conviction for one of the charges underpinning the pretrial detention. A single guilty plea or conviction would vindicate the pretrial detention decision. Offsetting time served against the ultimate sentence would serve as full compensation for the duration of the detention, which is the existing practice followed by the federal government and many states.²⁷⁰ In contrast, individuals who are never convicted of the crimes underpinning the detention would be eligible for financial compensation under a cause of action for liberty takings.

As noted earlier, this view would accord with the distinction between recognizing compensable physical takings when the state seizes property in the absence of a criminal act and the non-compensable forfeiture of property that is involved in or acquired through specific types of criminal activity.²⁷¹ Alternatively, one could analogize this to the distinction between compensable regulatory takings that deny all of an owner's economically beneficial use of property with non-compensable bans on using property for specific illegal purposes.

The virtue of this approach is that the determination of a personal taking would be very straightforward and easy to administer. The occurrence of pretrial detention would be an uncontested fact as would be the implications of verdicts of not guilty, a decision to rescind all

²⁶⁹ See *supra* Section II.A.

²⁷⁰ See, e.g., 18 U.S.C. § 3585(b).

²⁷¹ See *supra* Part II.A.3.

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charges, or an admission of guilt or conviction. This could potentially make the process of determining and enforcing liberty takings impose a low burden on courts. Limiting financial compensation only to those not convicted of any charges also provides the strongest platform for appealing to the sense of fairness of the general public and politicians in advocating the enactment of liberty takings.

Some former detainees would presumably be eligible for both liberty takings claims and for Section 1983 actions or torts for wrongful arrest, false imprisonment, or malicious prosecution.²⁷² The wrong inflicted by pretrial detention in these cases would generally be derivative of these other claims. Therefore, claimants should be able to collect compensation for either one or more of these actions or for liberty takings, but not both. Since such detainees would already have adequate redress for the deprivations they have suffered, this provision would seek to prevent them from gaining a windfall through a liberty taking claim.

Although the narrow view of liberty takings would make defining eligibility for liberty takings fairly simple, its criteria would still create problems in some cases, such as a verdict of not guilty by reason of insanity. In these instances a judge or jury confirms that the defendant committed the criminal act(s), but the defendant lacked the requisite *mens rea* because of a mental condition.²⁷³ Two main questions arise. First, should a court recognize a liberty takings for the pretrial detention of a person found not guilty by reason of insanity? Second, should those found not guilty by reason of insanity be eligible for a personal taking if they are confined to a mental health facility after trial? The answer to both questions is likely that no liberty takings would occur. The Supreme Court in *Foucha v. Louisiana* argued that those not guilty by reason of insanity “have not been convicted of crimes, neither have they been exonerated.”²⁷⁴ This insight captures the point that the presumption of innocence that comes with a “not guilty” verdict or even the exercise of prosecutorial decision to rescind charges is fundamentally different from the case of a holding of not guilty by reason of insanity. In the cases of exculpation by reason of insanity, the verdict itself confirms that the underlying act was committed and that there may exist an ongoing threat to the public to justify uncompensated institutionalization in a mental health facility.²⁷⁵ While institutionalization in a mental health facility may impose many of the same burdens as pretrial detention, these burdens are less and the underlying goals of the institutionalization are different in seeking to

²⁷² See Bernhard, *supra* note 19, at 86-93.

²⁷³ See Christopher Slobogin, Estelle v. Smith: *The Constitutional Contours of the Forensic Evaluation*, 31 EMORY L.J. 71, 82 n.48-49 (1982).

²⁷⁴ See *Foucha v. Louisiana*, 504 U.S. 71, 121 (1992).

²⁷⁵ See Slobogin, *supra* note 273, at 108.

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remedy the effects of mental illness. This analysis could also apply to justify the uncompensated confinement of sexual predators in mental health facilities following the end of their criminal sentences.²⁷⁶

3. The Case for a Broader Conception of Liberty Takings

Allowing a single guilty plea to vindicate pretrial detention decisions has many advantages. But the shortcoming of the narrow view of liberty takings is that it overlooks one of the primary problems caused by pretrial detention: the tremendous incentives that detainees face to plead guilty in spite of their innocence.²⁷⁷ The leverage of prosecutors and hardships of pretrial detention mean that innocent detainees who can withstand these pressures and not cop a token plea to get out of jail may be few and far between.²⁷⁸ The fact that the overwhelming majority of cases are resolved by plea bargain may reflect the effective screening of prosecutors.²⁷⁹ Much more likely it underscores the incentives of any accused party, and especially those in pretrial detention, to agree to a plea bargain to end or minimize their hardship.

The contrasting experiences of alleged nuclear secrets spy Wen Ho Lee and acquitted murder suspect and former football star O.J. Simpson highlights the need for a broader conception of liberty takings to account for cases in which a token conviction or plea bargain would never have justified the detention in the first place. The most visible abuse of pretrial detention is the story of how heavy-handed tactics by the FBI led to the nine-month detention of alleged nuclear secrets spy Wen Ho Lee.²⁸⁰ Lee was detained without bail because the government alleged fifty-nine counts related to espionage. In the end the government settled for a guilty plea on a single minor count and a sentence of time served, an outcome that was almost universally acknowledged as a travesty for the FBI.²⁸¹ Wen Ho Lee would not have been imprisoned but for the extreme number of largely unfounded allegations levied against him, and he would never have been detained without bail for the single count to which he pled guilty.²⁸² Lee's career

²⁷⁶ See *In re Young*, 857 P.2d 989, 994 (Wash. 1993).

²⁷⁷ See Clarke & Kurtz, *supra* note 129, at 502-05; Goldkamp, *supra* note 129, at 245.

²⁷⁸ See Bibas, *supra* note 4, at 2492.

²⁷⁹ See ADMIN. OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 95 tbl. D-4 (2001).

²⁸⁰ See David Johnston, *From the First, A Feud Between the Justice Dept. and the F.B.I.*, N.Y. TIMES, Sept. 15, 2000, at A29.

²⁸¹ For an overview of the Wen Ho Lee affair and the FBI's litany of errors, see DAN STOIBER & IAN HOFFMAN, *A CONVENIENT SPY: WEN HO LEE AND THE POLITICS OF NUCLEAR ESPIONAGE* (2001); WEN HO LEE, *MY COUNTRY VERSUS ME* (2001).

²⁸² See Mathew Purdy, *The Prosecution Unravels: The Case of Wen Ho Lee*, N.Y. TIMES, Feb.

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was ruined, his name disgraced, and he bore the scars of months of detention. Nonetheless, under the narrow view of liberty takings, Lee's guilty plea would vindicate the government's detention decision to detain him and leave no possibility for financial compensation.²⁸³

In contrast, the equally high profile case of O.J. Simpson would lead to a different set of results and a requirement to compensate. O.J. Simpson was detained for almost one year before and during the course of his murder trial that led to his acquittal on all charges.²⁸⁴ Under a narrow conception of liberty takings O.J. Simpson would receive compensation because he was found "not guilty," regardless of the likelihood of jury nullification at his trial.²⁸⁵ The irony of these two outcomes is that a large consensus exists that Wen Ho Lee was a victim of the criminal justice system, while even apologists for O.J. Simpson may have a hard time claiming his complete innocence with a straight face. The successful \$33 million civil suit against O.J. Simpson would mean that any compensation for pretrial detention would likely go to the heirs of his alleged victims.²⁸⁶ This fact means this particular outcome of compensation would likely enjoy popular acceptance, but there may be many other cases in which popular opinion might perceive compensation as unjust.

The desire to compensate innocent individuals who have been subjected to pretrial detention may require erring on the side of over-inclusiveness. At first glance placing the burden on former detainees to prove their actual innocence for liberty takings claims might appear attractive.²⁸⁷ But requiring plaintiffs to establish actual innocence and courts to verify these claims would be difficult, time consuming, and costly, and courts rarely even attempt to address this question.²⁸⁸ For

5, 2001, at A1.

²⁸³ Wen Ho Lee is currently suing the U.S. government for leaks of private information to the press, but this lawsuit is unrelated to his pretrial detention. See Jacques Steinberg, *Times Reporters to Be Deposed in Scientist's Case Against U.S.*, N.Y. TIMES, Dec. 18, 2003, at A41.

²⁸⁴ See Charlie LeDuff, *A Celebrity Home That's Not on the Star Maps*, N.Y. TIMES, Nov. 16, 2002, at A12.

²⁸⁵ See POSTMORTEM: THE O.J. SIMPSON CASE 1, 15-18 (Jeffrey Abramson ed., 1996).

²⁸⁶ See *Simpson Fights Verdict*, N.Y. TIMES, Apr. 27, 2002, at A15 (noting that O.J. Simpson has only paid a few hundred thousand dollars of the \$33.5 million he owes from the wrongful death civil suit).

²⁸⁷ A few countries, such as Denmark and Norway, have placed the burden on the former detainee to prove her innocence as a condition for claims of compensation. See Hans Gammeltoft-Hansen, *Compensation for Unjustified Imprisonment in Danish Law*, 18 SCANDANVIAN STUD. L. 29, 32 (1974). In contrast, former pretrial detainees who are never convicted are eligible for compensation under the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and domestic law in several European states, such as Germany and the Netherlands. See Carolyn Shelbourn, *Compensation for Detention*, 1978 CRIM. L. REV. 22, 25 (1978); Adam Tomkins, *Civil Liberties in the Council of Europe: A Critical Survey*, in EUROPEAN CIVIL LIBERTIES AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMPARATIVE STUDY 1, 1-9 (Conor A. Gearty ed., 1997).

²⁸⁸ See Givelber, *supra* note 35, at 1322-23.

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the sake of limiting the costs of administration of liberty takings claims, the O.J. Simpsons of the world should receive compensation regardless of how the courts of popular opinion have resolved their guilt.

Cases, such as Wen Ho Lee's, underscore the more troubling issue that the government may have tremendous leverage to extract guilty pleas from those whom it holds in pretrial detention. In the case of Wen Ho Lee, the failures of the government's case were manifest, but the government used the quid pro quo of Lee's freedom to extract the face saving guilty plea. One might imagine Wen Ho Lee's incentives to plead guilty to any charge would be different if he had the prospect of compensation for the time he was subject to pretrial detention if he held out and was found not guilty. At the same time, an innocent person in prison would likely value their freedom much more than waiting in detention longer for the sake of a speculative prospect of future compensation. If compensation were relatively low, this point might be especially true for a man with a high earning potential, such as a scientist like Lee.²⁸⁹

The prosecution not only has the carrot of letting a detainee out of prison to secure a plea bargain, but also has the more implicit additional sticks of retaliating against the defendant in the present or future cases. This fact means that irritating prosecutors by not copping a plea could lead to further charges, a longer detention, a higher probability of eventual conviction, or even charges against friends and loved ones.²⁹⁰ In contrast, cooperation with the prosecution might lead to a compromise that empties the prosecutor's desk of the file and allows the former detainee to put the painful experience of detention behind her.

To overcome these stark incentives, a broader conception of liberty takings would allow former detainees to file for compensation when the eventual guilty plea or conviction could not reasonably have justified the pretrial detention decision. This broader view would create a rebuttable presumption against financial compensation in the cases of a conviction or guilty plea. Former detainees would have the burden to show that the detention would not have been reasonable had prosecutors only raised the charge(s) for which the detainee was convicted.

Wen Ho Lee's experience would be an easy case to establish a financial claim for liberty takings given how fifty-nine charges were reduced to one nominal plea and his release for time served. It would be more difficult to distinguish closer cases. For example, the prosecution may have good faith reasons to seek the pretrial detention of a suspect and a court may simply convict on lesser charges, or other

²⁸⁹ Depending upon the guilty plea's ramification for his professional career, this point might not be true. But one would imagine that high earners would have greater incentives to plead guilty to get out of pretrial detention than lower earners for whom the potential compensation would represent a higher percentage of their prospective earnings.

²⁹⁰ See Christopher, *supra* note 132, at 108-09.

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priorities on prosecutors' dockets may lead to a plea bargain that was generous to the defendant. The legitimate concern could be raised that we would not want to minimize incentives for generosity towards defendants simply because of the specter of liberty takings compensation.

This broader conception of liberty takings would also be more administratively cumbersome and significantly more expensive to the state. The more narrow conception of liberty takings could easily resolve the issue of financial liability and would allow courts to focus solely on the question of the appropriate compensation for those not convicted of any crime. In contrast, determining whether a conviction or guilty plea reasonably justified the detention could consume far more judicial resources. In addition, detainees who were found not guilty or against whom charges were dropped form a small percentage of cases compared to those convicted or pleading guilty to at least some portion of the alleged offenses.²⁹¹ Allowing suits in these latter instances could amount to little more than an employment act for the plaintiff's bar by opening up the possibility of literally millions of lawsuits against federal and state governments.²⁹² While expanding liberty takings to encompass these claims would dramatically expand the pool of potential liberty takings claimants, the rebuttable presumption against such a claim in the case of a conviction or plea bargain is designed to stem the floodgates of litigation and to limit claims to clear abuses of pretrial detention.

While these caveats are significant, liberty takings may have no teeth if all it takes is a guilty plea on a single count to void the financial claim, regardless of the duration of the detention and the heavy-handedness of the prosecution. Currently, prosecutors seek token plea bargains when their cases turn out to be weaker than anticipated to preserve their reputations and vindicate the decision to prosecute by securing a conviction.²⁹³ But if a single conviction or plea would

²⁹¹ It is difficult even to find statistics on the frequency of guilty pleas in exchange for reduced charges, so it is hard to estimate what percentage of defendants would be eligible for this broader view of takings. See Wright & Miller, *supra* note 20, at 73 n.167. Given that ninety-five percent of those convicted plead guilty, the potential pool of claimants is a substantial one although limited by placing the burden on claimants to show that the detention would not have been reasonable if the only charges raised were those for which they were convicted.

²⁹² See Thomas H. Barnard, *The Americans with Disabilities Act: Nightmare for Employers and Dream for Lawyers?*, 64 ST. JOHN'S L. REV. 229, 230 (1990) (arguing how the expansion of rights for the disabled may end up making lawyers the biggest beneficiaries through attorney's fees for litigation to enforce the rights).

²⁹³ Plea bargains allow prosecutors to avoid the risk of failure (and its political/reputational costs). See George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 867-68 (2000); see also FISHER, *supra* note 89, at 223-29. Ironically, plea bargains can be used to reinforce the reputation of the system as a whole. The existence of a plea bargain in theory at least removes the danger of factual or legal error, because a party who cops a plea is unlikely to challenge that plea at a later date. Fisher, *supra*, at 867-68.

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inoculate the state from liberty takings liability, this could simply serve as another incentive for prosecutors to keep detainees on ice until they break down and cop a plea. If a detainee could still gain financial compensation in spite of a token plea, prosecutors would be less able to undermine the purpose of a cause of action for liberty takings. Because plea bargains have become so central to an overburdened criminal justice system,²⁹⁴ allowing detainees to plea without waiving their right to compensation may help to level the playing field for defendants without providing significant incentives for them not to bargain at all with prosecutors.

A related question is whether compensation should stop at only those detained or rather should extend to individuals who post bail yet are never convicted of any crime. The argument would be that at minimum defendants lose the opportunity cost of the money they post for bail. More significantly, poor defendants often have to go through bail bondsmen to secure their bail, who often charge large non-refundable fees for posting bail.²⁹⁵ The economic harm caused by posting bail may be significant and may constitute an uncompensated burden placed on innocent defendants for the benefit of society. However, this monetary impact pales in comparison to the potential myriad of harms inflicted by pretrial detention, and the fact that no deprivation of liberty is involved means it would fall short of liberty takings.²⁹⁶

²⁹⁴ The criminal justice system's reliance on plea bargaining is in large part a product of both the rising number of civil cases and the spiraling time and financial costs of jury trials. See John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261, 262 (1979). While the criminal justice system's reliance on plea bargaining grew into the vast majority of cases last century, it has become the unquestioned centerpiece of the criminal justice system since the Supreme Court affirmed plea bargaining's constitutionality in *Brady v. United States*, 397 U.S. 742 (1970).

²⁹⁵ For example, in Connecticut, state law allows bail bondsmen to charge up to a ten percent fee for the first \$5,000 of bail and then up to a seven percent fee for bail above that amount. See CONN. GEN. STAT. ANN. § 29-151 (West 2000). This amount may seem small, but to indigents and their families such non-refundable costs may have a significant impact on their lives.

²⁹⁶ It is outside the scope of this work, but the financial burden inflicted in posting bail could be mitigated by offering some form of interest on bail, such as the interest given for overpayments on federal taxes, to offset the opportunity cost of money. Alternatively, the state could offer full compensation to innocent detainees or sidestep private bonds-bailsmen by creating publicly-financed bond programs modeled after existing deposit bond programs (in which the defendants post a percentage of the bond with the court). See, e.g., MICHAEL D. KANNENSOHN & DICK HOWARD, BAIL BOND REFORM IN KENTUCKY AND OREGON 5-14 (1978) (detailing how Kentucky and Oregon have prohibited private bail bondsmen and created deposit bond systems). But see Halland & Tabarrok, *supra* note 60, at 97-98 (arguing how bail bondsmen are highly effective as private enforcers in monitoring defendants out on bail and securing their appearance at trial or their recapture after flight). This same logic applies to the question of whether a defendant should receive compensation for the opportunity cost of real or personal property seized and later released by the police following a failure to convict or an overturning of a conviction. The temporary seizure of real or personal property could be framed as the functional equivalent of cash bail, which may impose significant economic costs, yet is a far less significant burden on defendants than the deprivation of liberty. See *supra* text accompanying

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C. The Questions of Political Viability and Degree of Deterrence

This Article has suggested how a cause of action for liberty takings could go far towards compensating pretrial detainees for the burden that they bear for the sake of society. Crucial questions remain concerning the ability to contain the costs of administration, the incentive effects for state actors and defendants, and the political obstacles to enactment.

1. Containing the Costs of Liberty Takings

The biggest obstacles to this proposal are likely not to be principled objections, but rather pragmatic concerns about the costs involved and the incentive effects for state actors.²⁹⁷ Liberty takings would entail new costs and pose dangers of perverse or unintended consequences that may come from changing a single facet of the criminal justice system. This section will show how the administration costs can be contained to manageable levels. While the proposal may admittedly have some perverse effects on the incentives of prosecutors, it will show how the existence of liberty takings may produce incentives for greater prosecutorial screening and a reduction in the state's reliance on pretrial detention.

Under the current system, criminal justice costs largely fall into three categories: pretrial costs, plea bargaining and/or trial costs, and the costs of pretrial detention and imprisonment.²⁹⁸ First, there are costs for

note 232.

²⁹⁷ Numerous commentators have objected to the potential “commodification” of constitutional rights and the danger that this approach may perversely encourage state actors to regard rights violations as mere transaction costs for governmental activities. *See, e.g.*, AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 115 & n.112 (1997) (arguing against the use of liability rules for constitutional rights on these grounds); Coleman & Kraus, *supra* note 9, at 1338-40 (asserting the incompatibility of constitutional rights with liability rules). *But see* Kontorovich, *supra* note 9, at 771-79, 811-13 (arguing that concerns over commodification of rights are overstated and showing how constitutional rights can be adequately protected by liability rules, at least under extraordinary circumstances). However, the issue of commodification of rights appears to be of little concern in the context of pretrial detention. First, almost all commentators acknowledge that pretrial detention is a necessary evil in at least some cases and that the existence of probable cause of committing an offense, combined with other bail factors, may legitimize the pretrial detention decision and not infringe on other rights. Second, an incomplete system of compensation for pretrial detainees already exists. The federal government and most states compensate convicted individuals for time served in pretrial detention by offsetting this period against the ultimate sentence. Former pretrial detainees are eligible for causes of action in the case of egregious abuses by state actors. For these reasons this proposal is about filling the gaps of compensation in this existing system, and concerns with this proposal will likely not center on issues of principle, but rather on whether the costs and incentive effects of liberty takings would justify broadening the scope of eligibility for and the extent of compensation.

²⁹⁸ The state's costs include a range of police, prosecutorial, and judicial resources, but this

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state actors to detect crime, to locate and arrest defendants, to compile and assess evidence to establish probable cause of particular offenses, and to make bail decisions. Second, prosecutors must employ time and resources to prove defendants' guilt through trial (and consume judicial resources in the process) or more commonly produce only the evidence necessary to secure plea bargains.²⁹⁹ Third, the state incurs substantial costs to house detained individuals prior to trial and to incarcerate them following convictions.

Liberty takings would impose three new types of costs: the costs of administration, adjudication, and payment for liberty takings; the costs incurred from defendants' and prosecutors' adjustments to changed incentives in charging, bail hearing, and plea bargaining processes; and costs from state and/or prosecutorial efforts to reduce exposure to liberty taking claims, such as through greater prosecutorial screening. These economic and non-economic costs would impose burdens on state actors during the pretrial and trial or plea bargaining stages. However, enacting liberty takings may ultimately make the criminal justice system more cost-effective by providing incentives to enhance prosecutorial screening and to reduce the number of cases in which innocent people are subjected to pretrial detention and convictions. This result may ultimately decrease the state's reliance on and extensive spending for pretrial detention and imprisonment.³⁰⁰

The issue of administrative costs looms large in defending the proposal's viability.³⁰¹ The state would incur costs to administer and adjudicate liberty takings claims, as well as to pay for actual liberty takings judgments. For this reason, the narrow conception of liberty takings appears to be the most appealing. Under this framework, liberty takings eligibility would turn on the lack of any conviction to justify retroactively the pretrial detention. The only issue for judges or other administrative officials to determine would be the opportunity cost of detention using wages as the proxy, which would be bounded by a cap and floor on damages. This analysis could be simply and swiftly resolved by requiring written documentation and confirmation of the

brief review of costs provides a baseline for considering how costs would change following the enactment of liberty takings.

²⁹⁹ As discussed earlier, the criminal justice system's reliance on plea bargaining reduces much of the costs of proving guilt by reducing the need for trial and allowing police and prosecutors to spend less time building their case before securing a conviction. *See* Standen, *supra* note 89, at 1505-17; Miller, *supra* note 89, at 1253.

³⁰⁰ These savings could be quite substantial given the fact that federal and state costs per prisoner range from \$30,000 to \$50,000 per year. *See* McShane, *supra* note 144, at 134-35.

³⁰¹ *See, e.g.*, Michelman, *supra* note 8, at 1214-19 (arguing that transaction costs should be among the primary considerations in delineating takings claims); Calabresi & Melamed, *supra* note 9, at 1093-97 (framing transaction costs and administrative costs as key criteria in determining whether to rely on a liability rule to protect a right or interest).

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former detainee's salary or the application of a standard default of a compensation floor.

In contrast, a broader conception of liberty takings could be more taxing to prosecutorial and judicial resources. Use of this framework would expand the number of potential claims and focus the inquiry on the more contentious and difficult issue of whether the ultimate conviction could have reasonably justified the pretrial detention decision. Imposing strict limits on oral argument concerning this issue and/or limiting debate to written submissions could go far towards cabining these costs. Eliminating or limiting grounds or avenues of appeal could also help to minimize costs.

Another key element would be to ensure access for prospective plaintiffs yet to contain legal costs. Indigents generally have no right to counsel for civil damage claims.³⁰² Allowing contingent fees could ensure access, but could also lead to lawyers' consuming much of the liberty takings proceeds. This outcome would not reduce the deterrent effect of liberty takings on state actors, but may significantly undermine the goal of compensating detainees, unless lawyers' fees came on top of liberty takings payouts.³⁰³ The solution may be to implement a fixed fee compensation system or to impose a low cap on compensable hours of work performed by lawyers of successful litigants in order to ensure legal access but to attempt to contain the costs.³⁰⁴ The costs of administering and paying liberty takings claims may admittedly be significant depending on how high the floor for compensation is set. However, the costs of pretrial detention and incarceration are also high, and a reduced reliance on pretrial detention could go far towards offsetting these costs.

Assuming the costs of administration for a broad conception of liberty takings can be contained to politically palatable levels, critics may still oppose this proposal for siphoning off badly needed funds away from securing adequate representation for defendants or other equally worthy purposes.³⁰⁵ The ideal system would ensure that all

³⁰² See *Lassiter v. Dep't of Soc. Servs. of Durham, N.C.*, 452 U.S. 18, 26-27 (1981).

³⁰³ If the Equal Access to Justice Act applies to the proposal, then the federal government would be liable for attorneys' fees for successful litigants, which would be above and beyond any liberty takings compensation. See 28 U.S.C. § 2412(d)(1)(A) (2000).

³⁰⁴ This approach could create similar incentives to those that public defenders face in plea bargaining and encourage lawyers to settle liberty takings as quickly as possible at a discount for the state. This result could partly frustrate the goal of compensating former detainees, but attempts to make the conditions for liberty claims as formulaic and simple to determine as possible will hopefully mitigate this concern. However, the fixed fee approach would give incentives to plaintiffs' lawyers to minimize the administrative costs of liberty takings settlements or proceedings.

³⁰⁵ Resources allocated to greater screening of prospective defendants and the costs of defending against, adjudicating, and paying off liberty takings claims must come at the expense of other legislative and prosecutorial priorities. Efforts to defend the indigent and to vindicate the wrongfully convicted are already significantly underfunded both at the federal and state level, and

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defendants have adequate legal representation. But the reality is that both literal indigents and individuals of modest means receive inferior legal services that place these defendants at a significant disadvantage vis-à-vis prosecutors in bail hearing and plea bargaining processes.³⁰⁶

Liberty takings is not designed as a holistic solution to the problems posed by inadequate legal representation. Instead, liberty takings aspires only to address one of the worst areas for abuse that results from the lack of a level playing field for defendants. The costs of liberty takings may even exceed the costs of financing more effective counsel in the case of valid claims. But valid liberty takings claims would likely constitute only a small percentage of criminal cases once prosecutors adjust to the new incentives created by liberty takings.³⁰⁷ As the following section will discuss, the potential incentive effects of liberty takings are as or more important than actual compensation in seeking to foster greater prosecutorial screening of cases and greater proportionality between charges and convictions.

2. Assessing the Incentive Effects of Liberty Takings

The incentive effects of liberty takings entail costs and risks of some perverse consequences. However, the benefits from incentives for heightened prosecutorial screening and a reduced reliance on pretrial detention arguably outweigh these costs. The section will address concerns about potential tradeoffs from liberty takings in marginal cases of questionable guilt and assess liberty takings' impact on plea bargaining processes. It will acknowledge that liberty takings may result in seemingly perverse effects for some pretrial detainees, but suggest how these outcomes are likely to be consistent with greater prosecutorial screening. It will show how liberty takings can be designed to align the incentives of individual state actors with the policy objectives of liberty takings and suggest how to overcome the political challenges to enactment.

One concern with this proposal is that the incentives created by liberty takings may have too chilling an effect on the decisionmaking of state actors and frustrate competing objectives of the criminal justice system. For example, the state would face additional costs to prove

a valid concern is that we may live in a zero sum world at best when it comes to budgeting for the criminal defense needs of the indigent. See Daryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument From Institutional Design*, 104 COLUM. L. REV. 801, 801 (2004) (arguing that the “underfunding of criminal indigent defense services is a long-term reality”).

³⁰⁶ In fact, only eight states and the District of Columbia uniformly provide counsel for the indigent at bail hearings. Many states do not provide indigents with lawyers until after bail hearings. See Douglas L. Colbert et. al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1723-24 (2002).

³⁰⁷ See *infra* Part II.C.2.

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guilt because defendants would have incentives to hold out for greater evidence of the strength of the state's case before copping a plea, and a higher percentage of cases may go to trial. Prosecutors have limited time and resources to enforce the law and face procedural hurdles in prosecuting defendants.³⁰⁸ Prosecutors may have to deal with more cases than their resources allow them to resolve in more than cursory fashion. Devoting greater resources to screening and developing cases may come at the expense of prosecuting marginal cases of questionable guilt and allow guilty parties to go unpunished.

The threat of liberty takings claims may lead to non-prosecution or reduced sentences in some marginal cases, but this proposal would have little to no impact on the incentives of prosecutors and defendants in cases in which the government has substantial evidence of guilt. Liberty takings may heighten incentives to develop evidence of guilt, but even this effect would be mild if the writing is on the wall. There would be risks of jury nullification, sloppy or corrupt prosecution, or exquisite defense work that could end up thwarting convictions in these types of cases. But these risks already exist under the current system, and it is unlikely that coupling these dangers with the risk of compensation for pretrial detention would change incentives or outcomes. Therefore, the potential for liberty takings claims would not factor into bail hearing and plea bargaining processes in cases of substantial evidence of guilt.

The impact of liberty takings would be seen in cases in which the government has enough evidence to satisfy probable cause, yet faces uncertainty as to whether it can satisfy the beyond a reasonable doubt standard at trial. The more dubious the government's ability to prevail at trial, the more the possibility of a liberty takings claim may factor into decisions of both prosecutors and defendants. These are precisely the types of cases in which we would want prosecutors to invest more resources in developing the cases and to be reluctant to push for pretrial detention. Similarly, strengthening the hands of defendants to hold out for trial or a more favorable plea bargain may advance the cause of justice. Admittedly, this effect may lead to tradeoffs of non-prosecution or acquiescence to pleas highly favoring defendants in close cases, but that may be the price of heightening accuracy in charging and convictions.

The incentives created by liberty takings may also reduce the rate of conviction among those individuals who would otherwise have failed to meet bail, yet would now end up avoiding pretrial detention. This outcome may partly reflect the many advantages that free men and

³⁰⁸ Procedural protections for defendants are extensive in theory, but limited in practice as they generally only apply to trials. These protections matter little to most defendants whose cases are resolved in the shadow of plea bargaining and the largely unbridled prosecutorial power that drives this process. See Bibas, *supra* note 4, at 2491-93.

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women enjoy in conducting their defense and advance the intended goal of lowering the number of convictions of innocent people.³⁰⁹ However, it may also reflect the reduced willingness and ability of prosecutors to pursue close cases because of the higher costs of prosecuting individuals released on bail (due in large part to the higher probability of going to trial). Additionally, a percentage of cases that prosecutors would have resolved by plea-bargains under the existing system may now go to trial and lead to erroneous acquittals. This tradeoff of some guilty parties going unpunished or receiving lesser penalties may be necessary for the sake of creating incentives for greater prosecutorial screening to reduce the number of innocent people who are subjected to pretrial detention and/or wrongfully convicted as a result.

A reduced reliance on pretrial detention may also increase crime on the margins. Individuals released on bail may commit further crimes, and others who are not prosecuted or convicted because of the incentives liberty takings creates may go on to commit future crimes.³¹⁰ But this concern should not be overstated. There is good reason to believe that liberty takings may actually heighten deterrence by providing incentives for enhanced screening of cases. Prosecutors may then end up focusing more enforcement on truly guilty parties and mitigate perceptions of arbitrary punishment by reducing the number of erroneous pretrial detentions and wrongful convictions.³¹¹

Another understandable concern would be the degree to which liberty takings would impair prosecutors' ability to resolve cases through plea bargaining.³¹² Both prosecutors and defendants would know that the longer the defendant held out without copping a plea, the

³⁰⁹ See *supra* Part I.B.2.

³¹⁰ See FELONY DEFENDANTS, *supra* note 11, at 21-22 (noting that approximately thirty-two percent of felony defendants released on bail engage in some form of misconduct while released). Additionally, one can easily surmise that even innocent parties who are subjected to pretrial detention under the current system generally must have some risk factors that supported the arrest and bail hearing decisions. Therefore, in a statistical sense this pool of individuals may be more likely to commit crimes than the general population, and the failure to detain or convict these individuals may end up increasing crime rates.

³¹¹ The threat of liberty takings claims may also slow down the arrest process in close cases. Prosecutors would have incentives to develop cases more thoroughly and to screen out weak cases before proceeding to arrest and prosecute. Alternatively, legislatures or local governments may even order state actors to initiate prosecutions and/or employ pretrial detention only if they have strong enough evidence to avoid the risk of a liberty takings claim. Slowing down the arrest process may lead to some individuals committing further crimes or escaping justice, but the benefits of greater screening in close cases arguably outweighs these risks.

³¹² This concern should not be overstated. While the enactment of liberty takings might produce a greater reliance on trials, this tradeoff is neither inevitable, nor is it necessarily undesirable. See Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 542, 626-42 (1990) (arguing that the French experience in relying less on plea bargaining than the United States has not resulted in an appreciably greater number of trials); Wright & Miller, *supra* note 20, at 42-50 (showing how a reduced reliance on plea bargaining may not result in a significantly increased reliance on trials).

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greater potential liability the state might risk assuming. In a world without liberty takings defendants often can only lose by holding out as the benefits of a possibility of having one's name cleared may be far less than the economic and non-economic costs of pretrial detention. In a world of liberty takings the defendant would have at least one trump card to hold onto in order to secure a more favorable plea or to persuade prosecutors to drop charges earlier if they face the potential cost of liberty takings. The criminal justice system's focus on plea bargains is unlikely to change, but the threat of liberty takings may expedite the process and enhance the terms for defendants.

While the potential for liberty takings may give pretrial detainees some leverage, prosecutors have their own trump cards. Prosecutors may seek to sidestep the force of a liberty taking by extracting waivers of compensation from detainees as an official or unofficial condition of their release. Similarly, cost-conscious municipalities might simply respond to the threat of liberty takings by formally or informally instructing prosecutors to make a waiver of compensation eligibility a virtual condition of plea agreements with pretrial detainees. Incorporating waiver provisions in plea agreements would almost explicitly make liberty takings claims a bargaining chip in plea bargaining negotiations.³¹³ There is a danger that the ability to waive liberty takings claims may undermine some of the incentive effects of liberty takings by allowing prosecutors to exploit their many forms of leverage over detainees.³¹⁴ However, this bargaining chip could provide detainees with significant leverage for securing a release from detention without having to cop a false plea or for obtaining more favorable plea agreement terms.

³¹³ This approach has appeal because of the clear parallel with the real property context. A landowner could consent to the indefinite occupation of his land by the government without compensation, such as to fight a pestilence or another state purpose that may have nothing to do with the landowner herself. Similarly, one could argue that an individual could consent to his pretrial detention without compensation either before or after the fact as part of a settlement with the state.

³¹⁴ On the surface, it might appear appealing to make liberty takings claims non-waivable to protect defendants from prosecutorial coercion and to keep the possibility of liability salient in the mind of prosecutors during plea bargaining negotiations. Nonetheless, it may be quite difficult, if not impossible, to make liberty takings claims truly non-waivable. Even if liberty takings claims were non-waivable, one can easily imagine tacit bargains taking place between prosecutors, defense attorneys, and defendants that release is conditioned upon a commitment not to raise a liberty takings claim. Defense attorneys are often repeat players with prosecutors, and they would face significant pressure to live up to their end of the bargain in thwarting such claims or face retaliation from prosecutors in future cases. Former defendants also face an array of potential threats from prosecutors that range from close policing of their post-release activities, to threats of future prosecutions, or, worse still, threats of prosecutions of friends and loved ones. Over time the gap between the letter of the law of non-waivability and circumvention in practice would likely become so wide to the point of making a non-waivability provision all but meaningless.

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3. The Paradoxical Impact of Liberty Takings on Detainees

One paradox of this proposal is that individuals free on bail, who would otherwise have been detained under the existing system, would greatly benefit, while those who continue to be subjected to pretrial detention may actually be worse off. Individuals free on bail or subject to conditional release would be the greatest beneficiaries of liberty takings, because they would be in much stronger bargaining positions with prosecutors and face a lower probability of conviction and the prospect of shorter sentences.³¹⁵ In contrast, pretrial detainees would only gain more limited leverage against prosecutors because of the possibility of a liberty takings claim.³¹⁶

Additionally, pretrial detainees may actually face greater formal criminal punishment than they face under the current system. An increase in criminal punishment might seem a perverse result at first glance, yet it may represent progress in pressuring the state not to use pretrial detention as a form of informal criminal risk management. Detention is arguably a form of punishment in all but name, and the federal government and many states tacitly recognize this fact by setting off time served against detention against criminal sentences.³¹⁷ Under the current system many individuals are released without a conviction, and the time served functions as a rough, informal punishment. Liberty takings would provide state actors with incentives to formalize this punishment by attempting to secure a conviction commensurate with the initial decision to detain. Even convictions with sentences of time served would serve as recognition that punishment took place for crimes committed and help to legitimize the pretrial detention decisions.³¹⁸

Another potential implication of liberty takings is that incentives to dedicate more resources to prosecutorial screening and greater development of cases may reveal greater culpability and lead to more convictions and longer sentences.³¹⁹ However, there is no reason to

³¹⁵ See *supra* Part I.B.2.

³¹⁶ For example, the state would have incentives to process these cases more quickly to reduce prospective liberty takings liability. This incentive may not necessarily lead to more just outcomes, but it may lead to more favorable plea bargains for defendants. Nonetheless, pretrial detainees would still incur the many disadvantages of pretrial detention. See *supra* Part I.B.2.

³¹⁷ See 18 U.S.C. § 3585(b).

³¹⁸ Admittedly, convictions may constitute more than a mere formality for pretrial detainees. Defendants who are convicted will have the conviction added to their criminal history, which may heighten the length of sentences for future convictions under the federal Sentencing Guidelines. In contrast, pretrial detainees who only face informal punishment and are eventually released may have no mark on their record. Nonetheless, shifting to a liberty takings regime would have the primary impact of formally recognizing that the use of pretrial detention constitutes a form of criminal punishment.

³¹⁹ If liberty takings succeed in creating incentives for greater prosecutorial screening, then those individuals subjected to pretrial detention would be more likely to be guilty and to be guilty

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believe that in most cases the net time served in detention and imprisonment would differ for detainees than under the existing system.³²⁰ For these reasons, seemingly perverse outcomes for some pretrial detainees appear consistent with the effects of greater prosecutorial screening.

4. Safeguards to Ensure State Actors' Incentives Align with the Policy Objectives

Much of this discussion has focused on the danger that liberty takings may have too chilling an effect on decisionmaking or lead to perverse results. However, it is important to consider the possibility that liberty takings may be less effective than intended in shaping the incentives of individual state actors. For this reason this proposal includes additional safeguards to attempt to ensure that the incentives of state actors align with the policy objectives of liberty takings.

When individuals or even corporations face costs, it is reasonable to believe that the costs will directly shape their behavior.³²¹ In contrast, the effects of financial liability on government actions, and in particular on the incentives of individual state actors, are admittedly more uncertain.³²² Prosecutors and judges both benefit from defendants being subjected to pretrial detention because it expedites plea bargaining and therefore reduces the trial load that they face.³²³ The government as a whole benefits from the efficient administration of criminal cases even if it comes at the cost of justice by disadvantaging defendants and encouraging false pleas to secure release or minimize the period of detention.

of more significant crimes than defendants currently subject to pretrial detention. Facing reduced concerns that they are punishing the innocent, prosecutors may impose stiffer conditions for plea bargains.

³²⁰ A related danger for pretrial detainees is that a state legislature might enact liberty takings, but take with the left hand what it gives with the right by continuing to expand the number of overlapping crimes. This result could hollow out the significance of liberty takings by making it easier for prosecutors to secure convictions. This threat is particularly significant in the case of a narrow conception of liberty takings as a single conviction would vindicate the detention decision, and recourse to additional overlapping crimes would simply increase the incentives for prosecutors to pile on charges to make pretrial detention and a plea more likely. However, the broader conception of liberty takings avoids much of this danger by making eligibility for liberty takings turn on whether the charge(s) underpinning the ultimate conviction could have reasonably justified the pretrial detention decision. Certainly, if a legislature were intent on engaging in eviscerating the substance of liberty takings, it could do so, but the broad conception of liberty takings mitigates this particular risk.

³²¹ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 58 (1992).

³²² See Levinson, *supra* note 25, at 350.

³²³ See *supra* Part I.A.4.

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While the benefits to state actors of relying extensively on pretrial detention are clear, there is admittedly some uncertainty as to the degree of responsiveness of the state as a whole and individual actors to the prospect of liberty takings compensation. The legislature would feel the financial effects directly as added costs to the budgets, but the judges and prosecutors who combine to make bail decisions would only indirectly feel the impact from this new demand on public monies. For this reason liberty takings should be designed to ensure that state actors must take into account the costs of liberty takings.

The fact that a cause of action for liberty takings would be a product of political action rather than the creation of the courts is significant. Financial costs are only one part of the calculations of government actors, and the combination of government liability with political pressure may be essential to reduce the reliance on pretrial detention.³²⁴ If a legislature enacted liberty takings, its passage should be linked to parallel efforts to place greater pressure on judges and prosecutors to minimize monies expended on compensation for liberty takings. One way to do that would be to attempt to raise reputational costs for prosecutors and judges by highlighting the degree to which they detain innocent individuals.³²⁵ State legislatures or even independent watchdog groups could easily track this data and publicize the number of liberty takings cases and their resulting costs to pressure judges and prosecutors who have repeatedly “failed” in detaining individuals whose actual offenses did not merit such treatment.³²⁶

If shaming were deemed too weak or unpredictable a tool,³²⁷ another alternative would be to link liberty takings compensation to prosecutors’ budgets or to prosecutors’ individual compensation by reducing their salary or bonus in proportion to the number of successful liberty takings claims. Linking liberty takings compensation to prosecutors’ budgets may not be politically viable because a community may not want to give the impression that the ability of prosecutors to prosecute crime could be imperiled by compensation for pretrial detention. But linking prosecutors’ bonuses or promotions to liberty takings compensation may provide prosecutors with a direct incentive to seek alternatives that fall short of pretrial detention.

³²⁴ See Levinson, *supra* note 25, at 353-54.

³²⁵ See Bibas, *supra* note 148, at 1042 (making a related argument that “greater transparency and publicity of large charge reductions could deter overcharging”).

³²⁶ While individual monetary incentives can spur responsiveness, lawyers’ competitiveness concerning their political and professional reputations may be as or more important an impetus in shaping their decisions. See Thomas Church & Milton Heumann, *The Underexamined Assumptions of the Invisible Hand: Monetary Incentives as Policy Instruments*, 8 J. POL’Y ANALYSIS & MGMT. 641, 653-54 (1989).

³²⁷ See James Q. Whitman, *What is Wrong With Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1088 (1998).

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The hope would be that judges and prosecutors would respond to a combination of state liability and increased political pressure from state legislatures by reducing their reliance on pretrial detention. Faced with a choice of funding liberty takings compensation or expending more resources for alternatives to pretrial detention, state legislatures may also equip judges and prosecutors with funding to expand dramatically the scope of alternatives such as home detention or electronic monitoring.³²⁸ Historically, the cost of funding less restrictive alternatives to pretrial detention has been a stumbling block to this reform.³²⁹ However, home confinement has become a far more cost-effective option than detention. It costs the federal government on average \$64 per day to detain a defendant, while the average cost of electronic monitoring and home confinement is approximately \$18 per day.³³⁰ Cost savings alone may not be sufficient to spur greater reliance on home confinement over pretrial detention, but the existence of liberty takings may make the cost calculus of governments tilt towards greater reliance on these alternative restraints.

5. A Safe Harbor to Heighten Incentives for Prosecutorial Screening

Having discussed many of the costs and potential incentive effects, it is important to underscore one of the proposal's most important objectives: heightening incentives for greater prosecutorial screening. Liberty takings would give states incentives to invest in greater prosecutorial screening and efforts to tailor criminal charges more closely to expected trial or plea bargaining outcomes. These changes would impose costs, but may also pay significant dividends in the long run by screening out cases of arrests and detentions of individuals whose ultimate convictions (or lack thereof) would not have justified pretrial detention.

To this end, one extension of this proposal could be to temper the force of liberty takings with a safe harbor provision that is designed to heighten procedural protections for defendants.³³¹ For example, a safe

³²⁸ Electronic monitoring and home confinement are currently only used sparingly. As of 1995, thirty states either confined or monitored 30,000 individuals. See Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 374 (1995).

³²⁹ See Betsy Kushlan Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 YALE L.J. 320, 321-22 (1987) (discussing how administrative costs have served as a stumbling block to the conditional release of defendants).

³³⁰ See Darren Gowen, *Overview of the Federal Home Confinement Program 1988-1996*, 64 FED. PROBATION 11, 11 (2000) (noting that in 1997 it cost the federal government on average \$64.32 per day to detain a defendant, yet only cost \$17.98 to monitor home confinement).

³³¹ Reforms implemented in the New Orleans prosecutor's office demonstrate how an agenda of enhancing prosecutorial screening is realistic and may have concrete results in improving the quality of the criminal justice system. See Wright & Miller, *supra* note 20, at 51-58.

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harbor for a state liberty takings statute could allow localities to avoid liability for liberty takings if they systematically implement a higher standard for bail hearings. Most jurisdictions employ a standard of “clear and convincing” evidence to determine whether bail should be denied because the defendant poses a flight risk or threat to public safety.³³² A safe harbor provision could mandate that the standard comes significantly closer to the trial standard of beyond a reasonable doubt.³³³ This approach may lead to enhanced prosecutorial screening of cases and significantly reduce the error rate for both pretrial detentions and convictions.

Additionally, a safe harbor provision could mandate shifting the balancing test for bail setting to favor defendants more or to weigh more heavily particular factors, such as the defendant’s actual ability to meet bail. Few could contest the benefits of greater prosecutorial screening, if only to reduce social and government waste from wrongful prosecutions and detentions. Weighing factors in bail setting to favor defendants might be more controversial. But this approach could be designed to focus on the defendant’s financial circumstances, a factor that should drive most monetary-based bail calculations yet is generally not even considered.³³⁴

Even the most thorough screening system would still leave a subset of defendants who are subjected to pretrial detention yet never convicted of any crime. In an ideal world, these individuals could still receive compensation, and liberty takings could be bundled together with other reforms. But as a second best solution, the safe harbor approach is appealing because it could offer localities a viable alternative to provide greater procedural protections for defendants.

6. The Political Challenge

The question of political viability is a difficult one, as creating a cause of action to enhance the rights of defendants would face significant political stumbling blocks. The political culture on defendants’ rights has shifted in a significantly more conservative direction over the past generation.³³⁵ Politicians win points by closing

³³² See, e.g., *United States v. Salerno*, 481 U.S. 739, 750-51 (1979).

³³³ Completely conflating the bail hearing and trial standard would be too strict, especially given the significant societal interests at stake in detaining defendants who may pose an ongoing threat to society. But elevating the standard of proof to some level between clear and convincing evidence and beyond a reasonable doubt may substantially decrease the number of innocent defendants who are subject to pretrial detention.

³³⁴ Some states already require judges to consider the actual ability of defendants to meet bail. See, e.g., TEX. CRIM. PROC. CODE ANN. art. 17.15 (Vernon 1977 & Supp. 2000).

³³⁵ See Darryl K. Brown, *The Jurisprudential Legacy of the Warren Court: Reform of Criminal Procedure in the States: The Warren Court, Criminal Procedure Reform, and*

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alleged loopholes in the criminal law and showing they are tough on crime by narrowing opportunities for parole.³³⁶ Since politicians disproportionately come from the ranks of former prosecutors, one can imagine they may have the least qualms about a system of rough justice through the use of pretrial detentions.³³⁷

The group most affected by our system's extensive reliance on pretrial detention is low-income people of all races whose crime may be simply being too poor to meet bail, and therefore this group is also likely to lack the means to mount an effective defense.³³⁸ This politically powerless group lacks both the fundraising power and the organizational clout of other discrete groups that may be more able to capture the attention of politicians and the public. It is precisely this type of situation that has motivated others in the past to appeal to the conscience of judges to discover new sources of jurisdiction and new interpretations of rights to secure the civil liberties of the vulnerable.³³⁹ But regardless of the wisdom of this path, the judicial culture of today is far more cautious than that of the Warren era in finding new ways to safeguard civil liberties.³⁴⁰

The label of "liberty takings" might appear to be a call for judges to reinterpret the Takings Clause.³⁴¹ However, framing this cause of action as a personal taking is designed to cast the issue of pretrial detention in terms that may resonate with the public. The Takings Clause symbolizes our nation's commitment that society should not force an individual to bear a burden for the sake of society as a whole.³⁴² The analogy between the taking of property and the taking of people speaks for itself as it underscores the hypocrisy of a society that provides greater protection for the deprivation of property than for the seizure of people. Framing pretrial detention as a form of taking is

Retributive Punishment, 59 WASH. & LEE L. REV. 1411, 1423-26 (2002) (discussing how pressures from both the left and the right of the political spectrum pushed the American criminal justice system along a more punitive path over the past generation).

³³⁶ See Williams, *supra* note 6, at 326 (noting that "[p]retrial detention is politically popular because it symbolizes a government tough on crime"); see also Tribe, *supra* note 97, at 373-74 (making a similar point).

³³⁷ See Medwed, *supra* note 103, at 153.

³³⁸ See Miller & Guggenheim, *supra* note 2, at 339-40.

³³⁹ See Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869, 884-919 (1994) (discussing how the Supreme Court transformed the relationship of federal and state courts through its civil rights decisions in the 1950s and 1960s).

³⁴⁰ See Mark Tushnet, *The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 64 (1999).

³⁴¹ It is a time-honored American litigation tactic to cloak any number of alleged wrongs under the rubric of another recognized legal right. In this case, the clear text of the Fifth Amendment precludes such an interpretation, and liberty takings is designed as a legislative proposal, which is based on the appeal of the analogy to the taking of property.

³⁴² See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (noting the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

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designed to appeal simultaneously to the public's sense of fairness and to build off of an awareness of the government's obligation to compensate whenever it takes private property.

The challenge in problem construction is often in identifying and highlighting a *causè celebrè* which can open popular eyes to a particular injustice.³⁴³ Wen Ho Lee's high-profile prosecution and nine-month detention and the government's scandalous exaggeration of its case to secure his pretrial detention may serve as a compelling "poster child" case.³⁴⁴ While the government secured a token plea, the backlash of popular opinion to the government's treatment of Lee suggested that the public felt this use of pretrial detention was an abuse of state power.³⁴⁵ One powerful symbol may be enough to spur a movement or at least to prick the popular conscience. On the other hand, the controversy surrounding enemy combatant detainees has captured public attention, and the war on terror may continue to divert attention from the much larger and equally significant issue of the costs inflicted on detainees by the routine use of pretrial detention.

Nonetheless, the fact that the government's detention powers have risen to the forefront of public debate may ultimately be fruitful in facilitating a discussion of liberty takings. Creating a potential new drain on public resources may not be popular in a time of growing budget deficits. But casting the idea as one of providing incentives for recourse to less restrictive means than pretrial detention to secure a defendant's presence at trial may enhance its appeal.³⁴⁶ This framing may help the concept gain traction as a potential way of ultimately saving money that may now be wasted on housing and, at times, ensuring the wrongful conviction of pretrial detainees. It would be unrealistic to hope that the federal government would enact liberty takings at any time in the foreseeable future. However, it is possible that individual states which have had historic commitments to the public defense of indigents might have a political climate which would make it favorable towards their serving as a laboratory of democracy in experimenting with compensation for pretrial detainees.³⁴⁷ The political

³⁴³ See Jeffrey Manns, Note, *Insuring Against Terror?*, 112 YALE L.J. 2509, 2528-29 (2003) (discussing the significance of problem construction for mobilizing popular support).

³⁴⁴ See *id.*

³⁴⁵ See David Johnston & Don Van Natta Jr., *Wary of Risk, Slow to Adapt, F.B.I. Stumbles in Terror War*, N.Y. TIMES, June 2, 2002, § 1, at 1.

³⁴⁶ The American public in recent years appears to have had a virtually boundless acceptance of high levels of incarceration that are amongst the highest in the world. However, the fact that incarceration rates have been dramatically lower for most of American history suggests that the American public may accept tools that reduce reliance on pretrial detention. See Brown, *supra* note 37, at 365-66.

³⁴⁷ See Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 908-09 (2004) (discussing the depth of Massachusetts' commitment to enhancing public defender support for the defense of indigents).

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road may be admittedly steep, but the beauty of federalism is that a single state can be a trailblazer in enacting the idea.

IV. CONCLUSION

Almost all observers agree that the deck is stacked in favor of prosecutors at almost every step of the criminal justice process. Defenders of the current system will emphasize that the deck is stacked for a reason and that the resulting leverage of prosecutors over defendants serves the interests of justice. An implicit instrumentalism has justified sacrificing the liberty of detainees for the sake of facilitating expeditious plea bargaining and a rough system of justice. While defendants have recourse to some checks on the state,³⁴⁸ in the end defenders of the current system simply posit that we must trust government decisionmakers to exercise their discretionary powers responsibly and accept pretrial detention as a form of rough justice.

This proposal's conception of liberty takings offers a way to help to level a highly uneven playing field for criminal defendants in bail hearing and plea bargaining processes.³⁴⁹ The idea of compensating individuals for infringements of liberty could be extended into other spheres,³⁵⁰ but this Article has consciously cabined liberty takings to the context of pretrial detention in the hope of making the proposal politically plausible. Otherwise, the specter of opening up a Pandora's Box of financial liabilities for encroachments on liberty may take the air out of this initiative for tempering the power of prosecutors and compensating pretrial detainees.

This proposal is not a panacea, but rather represents progress in leveling the playing field in bail hearings and plea bargaining that may be complemented by other efforts to temper prosecutorial discretion and to expand prosecutorial screening. Liberty takings admittedly faces an uphill political climb. But this Article has shown how the analogy with the taking of property provides the basis for a principled framework for

³⁴⁸ In a world of plea bargaining, most legal checks may be moot, as those who lack the means to meet bail are also those most likely to be unable to have adequate legal counsel to exercise the advantages that the criminal justice system affords them.

³⁴⁹ See Brown, *supra* note 37, at 330-31 (arguing that under the current system "there is little effective pressure from the defense side to moderate government policy on criminal justice").

³⁵⁰ It is easy to see how this idea could extend to other areas, such as to the detention of material witnesses prior to trial, see *Hurtado v. United States*, 410 U.S. 578, 583 (1973) (sidestepping the issue of whether a takings claim could be made in the case of individuals detained as material witnesses), or to the detention of alleged illegal immigrants prior to civil deportation proceedings. See Legomsky, *supra* note 6, at 533. Others have sought to expand the reach of liability rules to encompass these and many other state encroachments. See, e.g., EPSTEIN, *supra* note 8, at 95 (arguing that "[a]ll regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state").

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compensating pretrial detainees and for providing incentives for the state to rely less on pretrial detention as a tool of rough justice.