

DEADLY DILEMMAS II: BAIL AND CRIME

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“The right to bail pending trial is absolute, except in capital cases, no matter how vicious the offense or how unsavory the past record of the defendant may be.”¹

“[U]nder American criminal jurisprudence pretrial bail may not be used as a device to protect society from the possible commission of additional crimes by the accused.”²

INTRODUCTION

The epigraphs above, while not reflecting the current state of constitutional law, may capture the current state of conventional thought about bail and preventive detention. Since Caleb Foote’s seminal work on bail,³ the prevailing view in the academy is that there should be a virtually absolute right to bail, and that the denial of bail violates fundamental human rights. Each of the Supreme Court’s cases that suggest a role for some form of preventive detention has provoked a litany of critical responses.⁴ One of the

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1. *Trimble v. Stone*, 187 F. Supp. 483, 485 (D.D.C. 1960). This sentiment is, for all its familiarity, an extraordinary misinterpretation of the historical main currents of Anglo-Saxon law. Ever since the Middle Ages, it has been understood that a legislature can designate whatever offences it wishes as non-bailable. The “right” to bail pending trial has never been absolute in common law countries. Indeed, a few years before *Trimble*, the Supreme Court had rejected the claim that defendants had a constitutional right to bail. *Carlson v. Landon*, 342 U.S. 524, 540 (1952).

2. H.R. REP. NO. 89-1541, at 2296 (1966).

3. Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959 (1965).

4. The Supreme Court addressed the constitutionality of limited pretrial detention in *United States v. Salerno*. 481 U.S. 739, 741 (1987) (upholding the constitutionality, on a facial challenge on due process and Eighth Amendment grounds, of the Bail Reform Act of 1984, allowing detention of an individual before trial if that individual could be shown to be dangerous to others in the community). Commentators have addressed *Salerno* and its application to a variety of topics. See, e.g., Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 426 (1990) (analyzing the debate surrounding *Salerno* and rejecting a dangerousness analysis of preventive detention in favor of an analysis based on denying bail to “highly criminous offenders” who commit serious crimes); LeRoy Pernell, *The Reign of the Queen of Hearts: The Declining Significance of the Presumption of*

consistent complaints about the treatment of the detainees at Guantanamo Bay, likewise, is that it amounts to indefinite pretrial detention.⁵ The four-

Innocence, 37 CLEV. ST. L. REV. 393, 400 (1989) (describing *Salerno* as the “death hand” for pre-trial presumptions of innocence); Edwards P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HASTINGS CONST. L.Q. 329, 378–84 (1989); Thomas E. Scott, *Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis*, 27 AM. CRIM. L. REV. 1 (1989) (a study of the empirical effects of the law upheld in *Salerno*); John B. Howard, Jr., Note, *The Trial of Pretrial Dangerousness: Preventive Detention After United States v. Salerno*, 75 VA. L. REV. 639, 672–77 (1989) (analyzing the potential scope of *Salerno*).

More recent Supreme Court decisions have examined the nebulous relationships between a state’s ability to protect itself and its citizens and the burdens of due process, particularly with regard to sex offenders. See *Kansas v. Hendricks*, 521 U.S. 346, 368–69 (1997) (upholding Kansas law allowing indefinite civil commitment for sex offenders with mental illnesses likely to lead them to engage in additional acts of predatory violence and finding restraining the dangerously mentally ill to be a legitimate government objective); see also *Kansas v. Crane*, 534 U.S. 407, 409–12 (2002) (interpreting the application of *Hendricks* as overly restrictive, and requiring a determination that an individual lacks a degree of self-control before allowing commitment).

A considerable academic discussion has grown up around *Hendricks*, *Crane*, and the legitimacy of detention of sex offenders in light of the presumption of innocence. For analysis after *Hendricks*, see generally Sherry F. Colb, *Insane Fear: The Discriminatory Category of “Mentally Ill and Dangerous”*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 341, 365–66 (1999) (arguing that *Hendricks* should lead courts to focus more on dangerousness and less on the “marginalization of the mentally disordered” in preventive detention); Michael Lewis Corrado, *Responsibility and Control*, 34 HOFSTRA L. REV. 59, 60–65 (2005) (analyzing the control doctrine, as set out in *Crane*); Wayne A. Logan, *The Ex-Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1312–16 (1998) (analyzing the *Hendricks*’s case in light of the idea that the Kansas law was ex post facto punishment designed to keep him and other sex offenders off the street passed after they committed their crimes); Grant H. Morris, *Defining Dangerousness: Risking a Dangerous Definition*, 10 J. CONTEMP. LEGAL ISSUES 61 (1999); Paul Robinson, Comment, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1455 n.87 (2001) (citing *Hendricks* while describing a trend in the criminal justice system from punishing for past crimes to preventing future crimes, alongside other examples such as three-strike laws and increased punishment under the Federal Sentencing Guidelines for repeat offenders). For commentary related to the Court’s modifications of the *Hendricks* rule in *Crane*, see generally Aman Ahluwalia, *Civic Commitment of Sexually Violent Predators: The Search for a Limiting Principle*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 489 (2006); Steve C. Lee, *How Little Control?: Volition and the Civil Confinement of Sexually Violent Predators in Kansas v. Crane*, 122 S. Ct. 867 (2002), 26 HARV. J.L. & PUB. POL’Y 385 (2003); John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391 (2006) (analyzing the use of risk assessment in areas such as the civil commitment of those with mental disorders or sexually violent predators); Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1324–27 (2008) (outlining of the preventative restraints created by modern communication and scientific technology and comparing them to preventative restraints, such as the sex offender laws at issue in *Crane*); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1 (2003).

5. The risk of a potential terror strike bears heavily on the various procedural disputes surrounding detention of terrorism suspects at place such as Guantanamo Bay. See generally Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007); Jenny S. Martinez, *Process and Substance in the “War on Terror”*, 108 COLUM. L. REV. 1013 (2008) (showing how “War on Terror” litigation has focused largely on ensuring proper process and not on the substantive underlying issues); Steven R. Swanson, *Enemy Combatants and the Writ of Habeas Corpus*, 35 ARIZ. ST. L.J. 939, 1002 (2003) (providing an overview of the history of habeas corpus limitations and the litigation surrounding the war on terror after September 11, 2001, and stating that a primary detention goal is to prevent “prisoners from assisting enemies of the United States”); Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008). The court has implicitly dealt with the danger assumption as well. *Hamdan v. Rumsfeld*, 548 U.S. 557, 621 (2006) (noting the government’s claim that

dation for these objections is surely complex and multifaceted, but significant to it is the tendency to focus on an individual right to the exclusion of other considerations and the related concern that denial of bail may mistakenly result in the pretrial imprisonment of an innocent person. Much current thinking about both bail and about errors in the criminal justice system is thus quite similar in its dual focus on vindicating the rights of individual defendants and the fear of making a wrongful conviction.

The moral impulse that underlies much of contemporary thought about errors is understandable and commendable, but it is at the same time incomplete and misguided. In a series of publications, we have been elaborating our concerns through an exploration of the legal system's treatment and legal scholarship's analysis of errors.⁶ These works have been motivated by two propositions that seem largely to have escaped the notice of those both constructing and critiquing the legal system.

First and more fundamental, even if invisible in contemporary discourse, is that the process of governing involves unavoidable conflict between equally laudatory goals.⁷ More dramatically, it appears as though the pursuit of any particular goal commonly has as its consequence precisely the kind of harm that is desired to be avoided. We send serious felons to prison, at least in part, to protect innocent parties from their future predations. But those same felons are then likely to prey upon fellow prisoners. Occasionally they will kill or rape one another. But prison slayings only begin the catalogue of "wrongful" consequences to "innocent" individuals flowing from incarceration.⁸ It seems to have escaped notice that, if it is sufficient to end a social practice because it causes innocents to die, then we are obliged to eliminate prisons—and hospitals for that matter. The point cuts even deeper. Virtually every governmental decision affects who will live and die—for example, whether roads are built, where, and to what standard of safety. Decisions on welfare programs do, as does the allocation of medical research funds or the choice to fund research instead of primary education, or vice-versa. And even if some choice could be articulated, the consequence of which was not life or death, trade-offs would still

the specific danger posed by Hamdan makes traditional standards of process impractical).

6. In chronological order, see generally Ronald J. Allen & Amy Shavell, *Further Reflections on the Guillotine*, 95 J. CRIM. L. & CRIMINOLOGY 625 (2005); Larry Laudan, *The Presumption of Innocence: Material or Probatory?*, 11 LEGAL THEORY 333 (2005); LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW 1–3 (2006); Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65 (2008); Larry Laudan, *The Elementary Epistemic Arithmetic of the Criminal Law*, 5 EPISTEME, 282 (2008).

7. See Allen & Shavell, *supra* note 6, at 628–30.

8. Allen & Laudan, *supra* note 6, at 73–74.

occur over desirable goals.⁹

The second proposition is that the explicit treatment of errors by both the legal system and legal scholars has been curious analytically and normatively. The simplest expression of this lies in the virtually exclusive focus of both on false positives (false findings of liability, civil or criminal) and false negatives (false findings of no liability). This neglects two fundamental issues: first that there are four possible findings at trial, the two mistakes and the two possible correct verdicts; second and even more importantly that sensible social regulation must be concerned not just with outcomes at trial and the resultant effect on litigation behavior but also with the effect of trial decisions on primary behavior.

A few examples of the consequences of this neglect¹⁰:

1. The hallowed Blackstone ratio, when applied to burdens of persuasion, justifies shocking results in some instances and is virtually empty in others; overall, it is just about useless as a guide to social policy. Under the baneful influence of Blackstonian logic, proof beyond reasonable doubt is often justified on the grounds that, as it is ten times or so worse to convict an innocent man as acquit a guilty one, proof beyond reasonable doubt should be set to effectuate that ratio of errors. This is defended as necessary to protecting the innocent. Well it might be, but it nonetheless has mighty peculiar consequences. Imagine that nine wrongful convictions occur out of every 100 cases that go to trial and that to ensure the number goes no higher the system is structured to generate the requisite ninety wrongful acquittals. In that case, a perfectly Blackstone compliant system generates mistakes in ninety-nine out of 100 cases that go to trial.

2. Consider another example. Assume that the conviction rate is fifty out of every 100 trials, and that five of those fifty are false. Again to protect against the number going higher, a Blackstone-compliant system would generate fifty false acquittals. But, there are only fifty cases left to allocate, so every other case must not only be an acquittal but a false acquittal. Summing up, this means that fifty guilty felons would go free and forty-five guilty felons would be convicted. But every innocent defendant is convicted. A guilty person thus has a fifty-three percent chance of being acquitted and an innocent defendant has a 100% chance of being convicted.

9. Hopefully it is obvious, but just to be sure, this is not to say that some policy judgments are not better than others, or that one cannot reduce the total cost of decisions, and so forth. Indeed, we make a suggestion at the end of this article that might well reduce overall costs. We are emphasizing that there is no costless decision, and that the costs of competing decisions are quite often reciprocals of each other.

10. The next three paragraphs are heavily indebted to Allen & Laudan, *supra* note 6, at 75–77, 79–80.

This is both perverse and Blackstone-compliant.

3. More problematic still, this entire enterprise behaves as though the only issue is trial results, yet criminal trials are but one part of larger mechanisms of social control. Presumably trial outcomes affect plea bargaining, and thus a serious analysis of errors requires addressing that relationship. More fundamentally, presumably all of this affects primary behavior—surely the probability of crimes being committed is related to the probability of being caught and convicted for their commission—yet again that relationship goes largely unnoticed. A few cases of wrongful convictions are presented as the justification for trial rules that may make it more difficult to convict the guilty as well as the innocent, and thus make it more likely that more crimes will be committed; yet the chance of being wrongfully convicted of a serious crime over one's lifetime hovers at most around 0.25% whereas the chance of being the victim of a serious crime over one's lifetime is somewhere around eighty-three percent. It is certainly plausible, and we suggest eminently sensible, that social policy should be considerably more concerned about an eighty-three percent chance of a person being a victim of a serious crime than a 0.25% chance of being wrongfully convicted of one. This does not require that one think the two are equally harmful; it requires only thinking that being a victim of a wrongful conviction is not 332 times as bad as being a victim of a serious crime. Perhaps it is better to be brutally raped or beaten than to be wrongfully convicted of doing so, but we doubt many would think it better to be brutally raped or beaten 332 times rather than wrongfully convicted once.¹¹

In sum, we suggest that sensible social policy must involve an analytically sound approach to decisions involving such deadly dilemmas. As we have demonstrated previously, the failure to do so leads to both analytically and morally perverse results in some areas. We demonstrate that same failure here in the context of pre-trial release decisions. We also suggest a modification of current practice that might ameliorate costs without altogether eliminating bail.

I. PRE-TRIAL RELEASE

A person charged with a serious crime is—by an order of magnitude—more likely than not to receive bail,¹² even if he has been accused of

11. All of this, and more, is elaborated in Allen & Laudan, *supra* note 6, at 79–80.

12. In 2002, for instance, only six percent of those charged with a violent crime were denied bail. Another thirty-seven percent were held on bail that they could not meet. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NJC 221152, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004 (2008) [hereinafter FELONY DEFENDANTS IN LARGE URBAN COUNTIES 2004]. See Table II for

a violent crime, and more than half those accused of a violent crime will be able to raise bail, thus securing their freedom. Several factors can trigger a denial of bail. A person charged with homicide can be denied bail (forty percent are), on the ground that the punishment associated with this offense is sufficiently severe that he is too likely to become a fugitive rather than return for trial.¹³ If a suspect has made credible threats against witnesses or others, bail can be refused. In some jurisdictions, a defendant with a lengthy record of felony arrests and convictions may be denied bail, and a person charged with a violent crime may face a (readily rebuttable) presumption that bail will be denied. Bail can also be denied if the defendant previously violated the conditions of bail. In some states, the burden of persuasion rests on the state (sometimes by a preponderance, sometimes by clear and convincing evidence) to establish that bail should not be granted, whereas in others sometimes the burden falls on the defendant to show that applicable bail-denying conditions do not apply to him.

Collectively, the rules governing the granting of bail reflect a bias in its favor that in turn seems to rest on a version of the presumption of innocence. Indeed, academic discussions of bail explicitly tie it to the demands of the presumption of innocence.¹⁴ The Supreme Court, by contrast, has made clear that its understanding of that presumption generally does not reach to events that occur before trial.¹⁵ While one can find dicta from numerous justices that would date the activation of the presumption of innocence from the moment of arrest, a long series of majority rulings stress, on the contrary, the inapplicability of the presumption of innocence to events that occur before trial.¹⁶ For the Supreme Court, the presumption of innocence entails an instruction to jurors at trial to attribute no probatory significance to the facts that the defendant is on trial and that various parts of

references to data sources for most of the empirical claims in this paper.

13. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 210818, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002 13 tbl.11 (2006) [hereinafter FELONY DEFENDANTS IN LARGE URBAN COUNTIES 2002].

14. Perhaps the best known example is Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 373 n.6 (1970).

15. Justice Rehnquist, writing for the majority in *Bell v. Wolfish*, 441 U.S. 520, 533 (1979), found that the presumption of innocence simply did not apply to pre-trial events: "Without question, the presumption of innocence plays an important role in our criminal justice system. . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."

For a fuller discussion of the wavering views of the Supreme Court about the provenance of the presumption of innocence, see Laudan, *The Presumption of Innocence*, *supra* note 6.

16. See, for example, the dissent by Marshall in *United States v. Salerno*, 481 U.S. 739 (1987), where the justice argues the centrality of the presumption of innocence to bail policies. *Id.* at 762-63 (Marshall, J., dissenting). Marshall writes that: "It is not a novel proposition that the Bail Clause plays a vital role in protecting the presumption of innocence." *Id.* at 766 (Marshall, J., dissenting).

the justice system believe him to be guilty, and nothing more. On this gloss, it has nothing to do with decisions about bail.

What is it, then, that persuades sizable parts of the legal community and the larger society that generally someone accused of a violent crime is entitled to be at liberty until the end of his trial (and perhaps even until the results of any appeal he may file of his conviction)? We think the core intuition here—expressed vividly in the epigraph from the D.C. Circuit Court—is that it is unfair to deprive an innocent man of his liberty simply on the grounds that the state strongly suspects him of having committed a grave crime. Until the state has proven that suspicion to a demanding standard, the argument continues, respect for his dignitary and liberty interests requires that the state not deprive him of his freedom. Of course, there are exceptions (most notably, capital crimes and homicides) that we agonize over. But, at the end of the day, the default condition has to be that the accused remains a free agent until convicted. This sentiment of political morality is buttressed by a variety of procedural arguments. It is often said, for instance, that an innocent defendant's pending case can be better prepared and organized from outside the jailhouse than from inside it.¹⁷

II. DEADLY DILEMMAS REVISITED: THE COSTS AND BENEFITS OF BAIL¹⁸

The typical approach to bail is captured by the epigraphs from the D.C. Circuit Court of Appeals and the House of Representatives that suggest that the only costs of bail decisions worth considering are those to the suspect, specifically the defendant's liberty losses. This is wrong. All costs should be considered by those responsible for setting policy in the construction of social institutions (chiefly legislators); there is nothing peculiar about bail in this regard. Moreover, the failure to consider the total cost of bail decisions has plausibly again lead to analytically and morally perverse conclusions. Rather than be guided by the sentiments of the D.C. Circuit Court and the House of Representatives, we will explore precisely what they urge us not to inquire into and what conventional thought seems to ignore, to-wit: what are the costs of implementing the current policy of broadly granting bail? Once those costs are laid out reasonably clearly, it will be much easier to attempt a sober appraisal of whether the indisputable

17. It is much less often said, but equally plausible, that a *guilty* defendant can use his liberty on bail for intimidating witnesses, persuading other witnesses to leave the jurisdiction, destroying inculpatory evidence, and otherwise seeking to secure a false acquittal at trial. We do wonder why this point, like so many others in the discussion of criminal procedures, has a myopic focus on the innocent defendant.

18. We will say nothing about the thankfully unusual policy of granting bail *after* conviction for a violent crime, pending an appeal or sentencing. The focus here is entirely on pretrial bail.

intuitive attractions and objective benefits of a pre-trial presumption of liberty are sufficient to trump its costs. To keep things manageable, we will limit the discussion to the granting of bail specifically to those accused of violent crimes. Similar arguments may or may not apply to lesser felonies.

The benefits of the current system of generous bail provision are clear: the innocent persons among the accused are generally not deprived of their liberty, not even on a short-term basis. The costs of existing policy are more difficult to assess. For purposes of this analysis, we will make the simplifying assumption that those costs are to be measured in terms of the harms inflicted by those guilty persons who, but for a lax bail policy, would be sitting in jail rather than perpetrating crimes. To narrow the perspective still further, we will ignore the costs associated with their commission of misdemeanors and minor felonies and will examine those costs principally in terms of the violent crimes they commit while on bail.

The bail period is a relatively small window in time, except for those felons who break the window by turning themselves into fugitives. For persons charged with a violent crime and free on bail, the average time between being arraigned and the end of their trial is roughly 4.3 months (127 days).¹⁹ Among purportedly violent offenders, eight percent are denied bail. Another thirty-seven percent are granted bail but cannot meet it. So, we are speaking of the dangers posed by the fifty-five percent of defendants awaiting trial for a violent crime who are free on bail for about four months.

Clearly, some of those defendants on bail are innocent and will not prove a menace to anyone.²⁰ We don't know precisely how large this sample is but we can put an upper bound on its size. Roughly sixty percent of those released on bail are subsequently convicted (by contrast with seventy-eight percent of detained defendants who are eventually convicted).²¹ Hence, forty percent of those on bail will not be convicted and, if we are very charitable, we can suppose that everyone in this group is genuinely innocent. Since there are about 600,000 persons charged with violent crimes each year, it follows that some 330,000 people accused of grievous crimes are released on bail in any given year, of whom at least 198,000 will be convicted when they come to trial. Approximately 132,000 of those

19. For these and other unreferenced data, see Table II, which identifies the sources.

20. This may be an overly generous assumption to make, since many of those currently on bail and who will not be convicted of the crime with which they are charged nonetheless have lengthy rap sheets containing multiple prior arrests and convictions. There is thus no automatic license for supposing that, even if innocent of the crime with which they are currently charged, their four months of freedom will be cost- and crime-free.

21. See FELONY DEFENDANTS IN LARGE URBAN COUNTIES 2004, *supra* note 12, at 3.

released on bail annually will be “innocent,” in the narrow sense of not being convicted for the charged crime. This figure, then, can serve as an upper bound on the estimate of how many innocent persons profit annually from current bail policies with respect to violent crime. The downside of this calculation, obviously, is that current policies are putting some 200,000 felons, guilty of at least one violent crime (and frequently with multiple, prior felony convictions), back on the streets, while they await disposition of their cases.

Of this group of 330,000 persons on bail, some 79,000 (twenty-four percent) do not show up for their day in court. Most of these no-shows are duly apprehended and tried within twelve months of their flight but six percent of those released on bail (about 20,000) become fugitives, never voluntarily showing up for their trials and presumably committing multiple crimes along the way. Supposing that the average fugitive on the run commits two violent crimes per year²² and that a fugitive—defined as someone who has been in flight from bail for at least a year—is typically not caught until two years after his flight (often it is much longer than that, if ever), this means that we have some 80,000 violent crimes to be charged against current bail policies.

Leaving aside the full-blown fugitive, we have 59,000 of those released on bail who do not initially appear for their trial. Half of these are apprehended within three months.²³ Supposing (erring again on the side of modesty) that at least sixty percent of those who fail to appear for their trials are guilty and that the guilty fugitives commit a violent crime on average once every six months, we have another 18,000 serious crimes committed by those who skipped bail but were returned for trial in a relatively timely fashion.

We also know that eleven percent of those on bail who do not become fugitives are arrested for a new felony committed while they were on bail (leaving aside whatever crimes they committed while on bail but for which they were not charged).²⁴ This adds, at a minimum, another 45,000 felonies

22. The estimate that a serial felon, while free, commits on average two violent crimes a year, derives from an analysis of several studies that have interviewed repeat offenders. Whether originating in the US or the UK, such studies fix on a figure between two and four as the mean frequency of violent crimes committed annually by repeat offenders when not imprisoned. A discussion of the methodological issues involved in arriving at this estimate can be found in Larry Laudan, *The Rules of Trial, Political Morality and the Costs of Error: Or Is Proof Beyond a Reasonable Doubt Doing More Harm than Good?* 5 (unpublished manuscript, on file with author).

23. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 148818, *PRETRIAL RELEASE OF FELONY DEFENDANTS*, 1992 11 (1994) [hereinafter *PRETRIAL RELEASE 1992*].

24. A quarter of a century ago, David Rabinowitz claimed that “Studies have revealed a low recidivism rate for individuals on bail.” David Rabinowitz, *Preventive Detention and United States v. Edwards: Burdening the Innocent*, 32 AM. U.L. REV. 191, 201 (1982). More recent figures patently do

to the inventory. So, the present system of bail for those accused of violent crimes is responsible for some 122,000 violent crimes annually (and probably substantially more, given all the minimizing assumptions made here) that would not have been committed had bail been denied to all those charged with a violent crime.

The category of violent crimes, which is our focus here, includes a variety of sins, from homicide and rape to armed robbery and aggravated assault. Clearly, some of these crimes are much more egregious than others. In assessing the costs of current bail policies, it is important not to fall into the trap of assuming that such crimes as bailees commit are overwhelmingly of the less threatening variety. Indeed, bailees are unquestionably the most likely group—among those monitored by the criminal justice system—to commit homicides in the United States today; indeed, sixteen percent of all homicide arrests from 1990 to 2002 involved persons who were either on active bail or were fugitives from bail²⁵—an astonishing figure. Whether the motive for homicide is silencing witnesses or settling scores before going to prison or something else, it is clear that this group of accused felons commits murders with a higher frequency than any other well-defined set recognized within the categories of criminal justice statistics.²⁶ This statistic, standing on its own, should give us pause about whether the generous granting of bail to felony defendants furthers society's interests in protecting its citizens. Bear in mind, further, that those on bail commit most of these crimes during that brief, four-month window between arrest and trial. The bottom line: the typical felony bailee, during the time of his release, is 100 times more likely to commit homicide than an ordinary citizen.²⁷ There is arguably no simple step that the state could

not bear out that claim. Moreover, even utilizing the data available in the 1970s and used in the cited article, the claim of “low” recidivism rates is true only if one defines a recidivist as someone who is charged twice with the *same* category of crime. Thus, if a felon accused of armed robbery commits a rape while on bail, this doesn't count for Professor Rabinowitz as recidivism.

25. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 205289, VIOLENT FELONS IN LARGE URBAN COUNTIES 3 tbl.5 (2006) [hereinafter: VIOLENT FELONS 1990–2002].

26. It is not only homicide rates that are extravagant among bailees. We see the same picture with violent crimes in general. Over a period of seventeen months, at least one in every four persons on parole is known to commit a violent crime. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 149076, PROBATION AND PAROLE VIOLATORS IN STATE PRISONS, 1991 10 (1995). Over a period of thirteen months, at least one in every four parole violators will be charged with committing a violent crime. *Id.* Contrast those already gloomy statistics with the fact that one in every four persons on bail is known to commit one violent crime while awaiting trial. FELONY DEFENDANTS IN LARGE URBAN COUNTIES 2002, *supra* note 13, at 6. In short, those on bail are as likely to commit a violent crime in four months as those on parole are in seventeen months or as those on probation are in thirteen months. None of the figures cited in this note take into account the presumably myriad but unknown crimes committed by members of these cohorts.

27. There were roughly 1.1 million persons, arrested for felonies, released on bail in 2005. Of the 8900 homicide arrests in that year, some 1400 were of persons on bail for another offense. (Bear in

take that would do as much to lower the murder rate as the revision of current bail policies would.

However accurate our estimates—and we suspect they are conservative—there are obviously serious costs to the present bail practices. But what about the benefits?

Supposing, generously, that all those eventually acquitted or against whom charges were dropped were genuinely innocent, the current system of bail provides liberty to 132,000 “innocent” defendants, accused of a violent crime, for about four months each, when they would otherwise have been wrongly incarcerated.²⁸ That would appear to be about 44,000 man-years of freedom given annually to probably innocent defendants by current policies. This is no trivial matter by any means. Still, the benefits are probably a good deal smaller than this figure would suggest. While it is true that the average defendant accused of a serious felony, if released on bail, waits slightly more than four months to be tried, those whose bail is denied go to trial much more quickly. Specifically, the average person awaiting trial in jail spends forty-five days between arrest and trial.²⁹ So, the real gain for the innocent offered by a system of generous bail is more like 16,000 man-years of liberty, in comparison with a system that severely restricted bail.

When contrasted with the upwards of 122,000 violent crimes annually generated by the bail system (leaving aside the 125,000 attempted crimes of violence and all the other felonies and misdemeanors committed by bailees), the exchange seems considerably less sensible than it does when we consider only one side of the equation.³⁰ The average prison sentence for someone convicted of a violent crime is almost eight years.³¹ That sug-

mind that forty-six percent of all murder arrests are of persons with a criminal justice status (*i.e.*, on bail, on probation, on parole or in custody.) In short, among the 1.1 million bailees, some 1,424 are arrested for murder each year, while among the roughly 200 million adults without a criminal justice status, there are some 4,800 arrests for homicide. The known homicide rate among bailees is thus about 5400% higher than the homicide rate among ordinary citizens. Since persons on bail are generally at liberty for only about four months, this means that, *while on bail*, a released defendant is 15,000% more likely to commit homicide than an ordinary citizen during the same time frame. *See VIOLENT FELONS 1990–2002, supra* note 25.

28. We put scare quotes around ‘innocent’ to remind ourselves that this is the number of persons who will be found not-guilty or against whom charges will be dismissed. They are almost certainly not all innocent, so this figure overstates, perhaps generously, the liberty losses borne by the genuinely innocent bailees.

29. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 214994, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 7 (2007) [hereinafter PRETRIAL RELEASE IN STATE COURTS 1990–2004].

30. According to BJS figures, there is roughly one failed, violent crime attempt for every completed one. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 104274, LIFETIME LIKELIHOOD OF VICTIMIZATION 2 tbl.1 (1987).

31. In 2004, the average sentence for someone imprisoned for a violent crime was ninety-two

gests that society regards the costs of a violent crime (particularly murder and rape) as very high. Some forty-five days in jail awaiting trial pales by comparison with an eight-year stretch in prison. Once the costs are on the table, it becomes clear that the real policy question that must be addressed by legislators involves the choice between (a) enabling 120,000+ violent crimes (including more than 3,000 homicides and rapes) or (b) denying some 125,000 arguably innocent defendants their liberty for forty-five days.³²

This establishes that a system of denying bail to all defendants would probably be preferable to the current system. This result, while mildly interesting, still leaves us with a stark choice between bad alternatives. Interestingly, there may be a way to improve over this Hobson's choice, to which we now turn.

III. A MODEST PROPOSAL

A simple adjustment could be made to bail policies (and is already being made half-heartedly in some jurisdictions) that would probably represent a decided improvement over both the present practice and the wholesale elimination of bail.³³ It would grant bail to those who pose a relatively modest risk of committing a violent crime and deny bail to those who pose a significant risk of further crimes. Among those currently released on bail, serial offenders (persons with more than one felony conviction within the last three years) are much more prone to commit violent crimes during their time on bail than are those without a recent criminal record.³⁴ Specifically, such offenders are two-to-three times more likely (thirty percent) to be arrested for a new felony while on bail than non-serial offenders are (twelve percent). Those bailees with ten or more prior convictions are 320% more likely to commit a felony than a bailee with no prior convictions is. Serial felons are also presumably much more likely to

months. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL SENTENCING STATISTICS, <http://www.ojp.usdoj.gov/bjs/sent.htm> (last visited Nov. 15, 2009).

32. The loss to guilty defendants is pertinent, too, but typically this is zero as time served pre-trial is accounted for in their sentence. Another question to address is the effect of bail on accurate adjudication. As we mentioned, those on bail have a lower probability of conviction. Bail could increase, decrease, or have no effect on the probability of accurate convictions. We know of no good estimates of its actual effects.

33. In what follows, for ease of exposition we are assuming a static system, but obviously it is dynamic. It is beyond the scope of this preliminary effort to attempt to create a dynamic model. Nonetheless, we should note that we cannot see any variable that would likely overwhelm the results we discuss in the text. If anything, the system might move to a more favorable equilibrium.

34. According to figures released in 2006, fifty-six percent of felony defendants with two to four prior convictions are released and forty-four percent of those with five or more go free on bail. FELONY DEFENDANTS IN LARGE URBAN COUNTIES 2002, *supra* note 13, at 20 tbl.18.

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commit serious crimes while fugitives from the law than first-time offenders are, although we have no hard data to back up this intuition.

If serial felons are three times more likely to commit a felony while free than are those without a criminal record, and if serial offenders are three times as likely to commit serious crimes if they become fugitives as the putative first-time offenders are, a plausible policy would be to deny bail to all serial offenders accused of a violent crime while granting bail to all first- and second-time offenders, unless the state can prove that there are compelling grounds (threats to witnesses, for instance) to believe that the latter are a danger to the community or likely to become fugitives.

Table I			
Known Offenses Committed by Serial Offenders on Bail, by Prior Convictions³⁵			
Prior History	Proportion among those released	Rearrested	Known new Felonies/100 released ³⁶
No prior convictions	56%	7%	3.8
1 prior	15%	10%	1.4
2-4 priors	17%	14%	2.4
5-9 priors	9%	19%	3.6
≥ 10 priors	4%	27%	1.3
Total			12.5

Implementation of this policy would change several elements of our calculation of costs and benefits for bail:

1. *Liberty losses for the innocent.* This proposal would have about thirty-five percent fewer persons released on bail than existing policies. Instead of releasing 330,000 defendants accused of a violent crime every year, the system would release about 214,000. Of the 116,000 additional persons jailed awaiting trial, no more than forty percent (and probably much less), or 46,000, would be innocent. As we have seen, criminal trials for those who are not released on bail tend to occur much more quickly than for those on bail. The typical accused felon sitting in jail has his case heard and settled within forty-five days of his arrest instead of the 127-day interval usual for those released on bail.³⁷ Supposing that practice would continue, the innocent persons denied bail on this scheme would incur collectively some 5,671 man-years of liberty losses, in comparison with the current regimen.

2. *Victimization gains for the innocent.* Chronic offenders released under current policies, as Table I shows, commit roughly fifty-eight percent

35. These figures come from data presented in PRETRIAL RELEASE 1992, *supra* note 23, at 11 tbl.15. Although there are more recent sources, none gives as detailed a breakdown of serial offenders on bail as this study from a decade ago.

36. This column gives the total number of known felonies committed by each of groups in the rows. For example, of every 100 people released, fifty-six percent have no prior convictions, and that group commit on average 3.8 felonies. As the last row demonstrates, four percent of those released have ten or more prior convictions, and that group commits on average 1.3 known felonies.

37. PRETRIAL RELEASE IN STATE COURTS 1990–2004, *supra* note 29, at 7.

of known crimes committed by those now released on bail. Presumably they likewise commit at least about the same percentage of unknown crimes. Accordingly, this policy would likely reduce violent criminal victimization levels pursuant to the granting of bail from 140,000 annually to about 53,000.

Is this a trade-off that we should be willing to make? The answer appears to be decidedly affirmative. To begin with, it would prevent at least 87,000 violent crimes per year (including some 900 homicides and 2,000 rapes).³⁸ For every innocent person jailed for a month and a half, we would be reducing the rate of violent crime by more than 1.9 victimizations annually (87,000 violent crimes divided by 46,000 innocents incarcerated). We incline to suppose that, behind Rawls' veil of ignorance, even innocent persons given the choice between forty-five days in jail awaiting trial or suffering 1.9 violent crimes (whether murders, rapes or beatings) would have little doubt about which to choose. (Again, these numbers leave all *attempted* violent crimes—nasty as they can sometimes be—to one side.)

Of course, this proposal is not cost-free. There are still 53,000 violent crimes per year and an additional 46,000 “innocent” persons locked up for forty-five days. Is this really better than a policy of no bail, under which we would be jailing another 86,000 possibly innocent defendants? Roughly, the modest proposal is preferable to a policy of no bail provided that the social costs of jailing one innocent for a brief period is greater than the cost of 0.6 violent crimes.³⁹ That can doubtless be debated. But either of these proposals is clearly preferable to current bail policy, unless we are prepared to believe that a brief detention of one innocent person is more costly than two violent criminalizations.⁴⁰

Further, this proposal would vastly simplify bail decision-making. The

38. According to the twenty-year summary of the distribution of violent crimes (covering the period from 1987 to 2006), 1.3% are homicides, 6.2% are forcible rapes, 34.9% are armed robberies and 57.6% are aggravated assaults. See CRIME IN THE UNITED STATES 2006, TABLE 1, http://www.fbi.gov/ucr/cius2006/data/table_01.html (last visited Nov. 15, 2009).

39. The present system of bail releases about 132,000 “innocent” people. Comparing a “no bail” system to the one proposed thus increases the number of “innocent” people not let out on bail by 86,000 (132,000-46,000 = 86,000). Eliminating bail would also result in about 53,000 violent crimes per year, which means there would be a savings of 0.6 violent crimes at the cost of the temporary incarceration of one “innocent” person (53,000/86,000=0.616).

40. Here is a brief illustration of how the three schemes would play themselves out:

	No bail	Current Policy	Modest Proposal
Released on bail	0	330,000	214,000
Detained	600,000	270,000	386,000
Innocents among detained	191,000	59,000	105,000
Violent Crimes by Bailees	0	140,000	53,000

current policy of treating each case ostensibly on its merits (where the judge has to guess whether each defendant will flee or will pose a grave risk to the community) is not only very time- and resource-consuming but it is demonstrably less good at predicting such matters than would be the use of prior convictions as a leading indicator of the risk posed by someone accused of a violent crime.

Laurence Tribe once claimed that: “There is no basis for the assumption that bringing dangerousness to the surface as a criterion for pretrial detention would significantly improve the predictive performance of the judges administering the system.”⁴¹ That protestation of ignorance may have been valid in 1970, though we doubt it.⁴² It is patently false now. Fully fifty-eight percent of the felonies committed by those on bail for violent crimes are committed by that thirty percent of bailees with two or more prior convictions. In short, a bailee with multiple prior convictions is more than fifty percent more likely to commit serious crimes while on bail than a person without a long felony record is. A bailee with ten or more prior convictions is 3.2 times more likely to be convicted of committing a felony while on bail than is a bailee with no prior convictions.⁴³ This group of professional felons poses a disproportionately large risk of violent criminal activity while on bail. Under such circumstances, it is scarcely rocket science to suggest—contra Professor Tribe—that utilizing dangerousness as a criterion for pretrial detention, and defining it in terms of prior convictions, would dramatically improve the predictive performance of the bail system. With that improvement in predictive reliability would come a sharply reduced risk of serious delinquency among the population on pretrial release. Instead of those on bail being responsible for sixteen percent of all homicide arrests, that figure would fall to about six percent.⁴⁴

41. Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 373 n.6 (1970).

42. Even by the mid-1980s, appellate courts were insisting that violent behavior of bailees could be foreseen and predicted. As the Second Circuit wrote in 1984:

Our cases indicate, however, that from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct. . . . [W]e have specifically rejected the contention . . . “that it is impossible to predict future behavior and that the question is so vague as to be meaningless.”

Schall v. Martin, 467 U.S. 253, 278–79 (1984) (citation omitted).

43. This ratio is extracted from Table II, *infra*. Bailees with no priors commit crimes twelve percent of the time on bail and serial felons with ten or more convictions do it thirty-eight percent of the time, thus yielding the 3.2 ratio.

44. As can be seen from the table in note 40, *supra*, there are approximately 140,000 violent crimes currently committed by bailees per year. As we calculate there, this figure would, on our proposal, be reduced to 53,000 violent crimes. That is a reduction of sixty-two percent. Supposing that this reduction applies alike to all four types of violent crimes, then the rate of murders committed by those on bail would decline by about sixty-two percent. Since bailees (as previous data cited in the paper show) are currently responsible for sixteen percent of all homicide arrests. (and if that figure is reduced

The proposal on offer here would not preclude a defendant with multiple prior convictions from seeking his pretrial liberty.⁴⁵ Nevertheless, it would shift the burden of proof from the prosecutor to the defendant with multiple felony convictions to show that, despite being a serial offender, he is not a risk to the community.⁴⁶ We are not quite sure what such a proof might look like in its specifics but we have little doubt that, if the judge takes seriously the kind of data we have been surveying, the granting of bail to such repeat offenders would not be the commonplace that it now is.

CONCLUSION

Deontologists among our colleagues may respond, in keeping with the sentiments voiced in the epigraph, that none of these data about the dangers posed by granting bail to serial offenders are pertinent since “the right to bail is absolute.” Well, few rights are genuinely absolute, particularly not those that blatantly conflict with the rights of others.

In the bail context that we have been considering, the situation we face is that we have a defendant who is accused of a very serious crime. The fact that he is arrested and charged with the crime makes it likely that he is guilty. If the defendant is, to boot, a serial offender, we know that it is likely that, if granted bail, he will commit other serious misdeeds. That euphemistic characterization disguises what is really going on. By granting bail to a serial felon, who has probably just committed another crime for which he is now charged, we are putting at significant risk innocent citizens in the community. Those citizens have a right to be protected from criminal victimization. That premise is at the core of any acceptable version of the social contract. Given that, if the state—having in its custody someone it believes committed a crime and who is known to have a history of criminal proclivity—nonetheless releases an individual into the community while he awaits trial, then the state bears a direct responsibility for such harm as that individual wreaks. But for the state’s low standards for granting bail, this individual would be locked up until trial instead of preying on his neighbors. Why, under such circumstances, is the right to bail “absolute” while the right not to be victimized by a serial felon gets no weight in the

by sixty-two percent), it goes down to less than six percent.

45. We note in passing that some defendants will try anything: in *United States v. Fisher*, 137 F.3d 1158, 1162 (9th Cir. 1998), defendant on bail was charged with not appearing in court for his trial. He challenged the charge, arguing that he had not received the notice of the time and date of his trial, while conceding that the reason for non-receipt was that he had become a fugitive from justice. *Id.*

46. In theory, errors in bail determination could be more finely turned through burdens of persuasion that are sensitive to differing conditions. We note the point but do not explore it because we are doubtful that burdens of persuasion in practice can play very effectively their theoretical role.

bail policy calculation? Surely these two fundamental rights have to be balanced off against one another, unless we believe that the state has no duty to protect its innocent citizens from those likely to do them harm. Shielding the possibly innocent—but probably guilty—defendant from losing his liberty briefly (which is a nontrivial loss) has to be weighed against the unquestionably egregious loss to innocent citizens apt to be preyed upon by guilty defendants granted bail, despite their seriality and their probable guilt in the instant case.

TABLE II: SUMMARY OF BAIL-RELATED DATA

Violent crimes/yr. ⁱ	1,750,000
Persons charged with a violent crime/yr. ⁱⁱ	586,500
Violent defendants denied bail ⁱⁱⁱ	8%
Violent defendants released ^{iv}	322,575 (55%)
Ave. time on bail (arrest to end of trial) ^v	4.3 months
Average time lapse for nonreleased defendants ^{vi}	45 days
Bail given to defendants with prior arrests ^{vii}	54%
Bail given to defendants with prior convictions ^{viii}	45%
Bailees with prior felony convictions ^{ix}	27%
Release granted to those with prior convictions for violent crimes ^x	9%
Bailees convicted of a violent crime as charged ^{xi}	60%
Crimes <i>known</i> to be committed by those on bail	29,031
% of bailees re-arrested for to having committed a felony while on bail ^{xii}	11%
% of bailees without prior arrests or convictions known to have committed crimes while on bail ^{xiii}	12%
% of bailees with prior arrests known to have committed crimes while on bail ^{xiv}	20%
% of bailees with prior felony convictions known to have committed crimes while on bail ⁴⁷	25%
% of bailees with >10 prior convictions known to have committed crimes on bail ⁴⁸	38%
Bailees who don't appear for trial ⁴⁹	23%
Bailees still fugitives after one year ⁵⁰	6%
Percentage of all homicides committed by <i>all</i> bailees ⁵¹	16%

47. PRETRIAL RELEASE IN STATE COURTS 1990–2004, *supra* note 29, at 9 tbl.7.48. PRETRIAL RELEASE 1992, *supra* note 23, at 12.49. PRETRIAL RELEASE IN STATE COURTS 1990–2004, *supra* note 29, at 7.50. *Id.* at 8.51. VIOLENT FELONS 1990–2002, *supra* note 25, at 3 tbl.5.

i. This figure includes only *completed* crimes of violence. There were an additional 3,500,000 *attempted* rapes, robberies and aggravated assaults. If you regard such crimes as serious, then *all* the risks of victimization described in this article should be trebled. Victimization studies that include attempted violent crimes peg the total figure at approximately 5.2 million violent crimes per year (as of 2007). See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION SUMMARY FINDINGS (2009), <http://www.ojp.usdoj.gov/bjs/cvictgen.htm>.

- ii. FELONY DEFENDANTS IN LARGE URBAN COUNTIES 2004, *supra* note 12.
- iii. FELONY DEFENDANTS IN LARGE URBAN COUNTIES 2002, *supra* note 13, at 17 tbl.14.
- iv. FELONY DEFENDANTS IN LARGE URBAN COUNTIES 2004, *supra* note 12. We assume here that the pattern of release found in the seventy-five largest urban counties is replicated elsewhere.
- v. PRETRIAL RELEASE IN STATE COURTS 1990–2004, *supra* note 29, at 7.
- vi. *Id.*
- vii. PRETRIAL RELEASE 1992, *supra* note 23, at 6 tbl.7.
- viii. *Id.* at 7 tbl.10.
- ix. *Id.* at 8 tbl.11.
- x. *Id.*
- xi. PRETRIAL RELEASE IN STATE COURTS 1990–2004, *supra* note 29, at 7 tbl.5.
- xii. *Id.* at 7.
- xiii. *Id.* at 9 tbl.7.
- xiv. PRETRIAL RELEASE 1992, *supra* note 23, at 11 tbl.15.