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Article 2

Displacing Due Process

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DISPLACING DUE PROCESS

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ABSTRACT

Pre-trial detention is a major component driving mass incarceration in the United States. While over 11 million people are detained in jails annually, only a small portion—approximately 570,000—are given long-term prison sentences. Seventy percent of jail inmates are pre-trial detainees who were denied bail or had bail set at a price they could not afford. Although the unconvicted are legally innocent, millions face unnecessary incarceration and languish in jail.

How is this possible? This Article maintains that the overwhelming rate of "front-end" mass incarceration persists due to the lack of procedural protections at preventive detention hearings. This systemic failing has reduced a vital stage of criminal procedure—where one's liberty interest is at stake—to a perfunctory formality. As a result, too many defendants are unnecessarily detained while other defendants plead guilty just to escape the punishment of pre-trial incarceration.

Addressing this problem will require the criminal justice system to reconceptualize its "spectrum of process." This Article argues that procedural protections have been unjustly reserved for the trial stage based on the unrealistic assumption that a trial will be guaranteed—a phenomenon this Article labels "procedural displacement." In a pre-trial system dominated by plea bargaining, displacing meaningful process until trial strips defendants of fundamental procedural protections and effectively deprives millions of their liberty. This Article explores the historical justification for procedural displacement and assesses the viability of prospective procedural displacement given the current dynamic of the justice system. This Article argues that prospective procedural displacement should be rejected and sets forth solutions for state and local governments to adopt.

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Introduction

The term "mass incarceration" entered the mainstream lexicon in the early 2000s[1] at a time when the U.S. carceral population approached twenty-five percent of the world's prison population.[2] Mass incarceration has generally been defined as the disproportionate use

1. *Google Ngram Viewer: Mass Incarceration*, Google Books, https://books.google.com/ngrams/graph?content=mass+incarceration&year_start=1960&year_end=2008&corpus=15&smoothing=3&share=&direct_url=t1%3B%2Cmass%20incarceration%3B%2Cc0 (last visited June 26, 2017).

2. *See Incarceration Generation*, Justice Policy Institute, http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi_poster_final.pdf (last visited Jun 26, 2017).

of prisons for the purposes of sentencing.[3] But, given the rapid increase in carceral rates within both prisons and jails, it is clear prison populations are not the only component driving mass incarceration.[4]

Since the 1970s, the number of individuals incarcerated in the U.S. has increased by 700%.[5] Prison populations have been declining since 2012.[6] Jail populations, on the other hand, have experienced unprecedented growth.[7] People go to jail approximately 11 million times each year.[8]

Pre-trial detention is responsible for ninety-nine percent of the growth in jail populations over the last fifteen years.[9] This trend is grounded in the proliferation of conservative approaches to money bail and preventative detention that prioritize public safety over due process. This is a result of increasingly conservative approaches to addressing public safety concerns and violent crime such as money bail practices[10] or preventive detention.[11]

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3. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017).

4. The incarceration population was approximately 200,000 in the 1970s and has since grown exponentially.

5. *Era of Mass Expansion: Why State Officials Should Fight Jail Growth*, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/reports/jailsovertime.html#national_unadjusted (last visited June 15, 2017). For a non-exhaustive collection of articles on mass incarceration *see* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 611 n.1 (2014).

6. The total prison and jail population has increased by 500% over the past forty years. *Trends in U.S. Corrections,* THE SENTENCING PROJECT, https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf (last visited Aug. 5, 2017).

7. *Id.*

8. Peter Wagner & Bernadette Rabuy*, Mass Incercartion: The Whole Pie 2017*, PRISON POLICY INITIATIVE (Mar. 14, 2017), https://www.prisonpolicy.org/reports/pie2017.html.

9. *Era of Mass Expansion: Why State Officials Should Fight Jail Growth*, *supra* note 5.

10. Bail schedules and money bail schemes that exclude an individualized inquiry into a defendant's ability to pay have long been criticized because of the inherent wealth-based disparity they create. *See, .e.g.,* Standard 10-5.4 in American Bar Association, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: PRETRIAL RELEASE, (1980) (stating in 10-5.4(f) that "monetary conditions should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge but should be the result of an individualized decision, taking into account the specialized circumstances of each defendant"); John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 56 n.31 (1985); Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1089 n.96 (2013) (citing Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, 26 CRIM. JUST., 1, 12, 15 (2011)).

11. After conducting a 50-state survey based on 2013 data made available by the Prison Policy Initiative, a common and disturbing trend was immediately recognized: the majority of individuals held in local jails were not those convicted of crimes, but instead those awaiting trial. Across thirty-eight states, annual pre-trial populations exceeded the convicted populations. Seven states in addition to the District of Columbia were the exception to the new norm, where convicted individuals made up the majority of the jail population. And finally, five states did not have pre-trial data. *See Era of Mass Expansion: Why State Officials Should Fight Jail Growth*, *supra* note 5.

Bail reform has gone through many iterations over the past sixty years. The first generation of reform began in the 1960s and featured a nationwide movement to reduce the number of individuals held because they could not afford bail.[12] The debate changed course as violent crime became more prevalent in the 1970s and 1980s.[13] During this second generation of bail reform, terms like "public safety," "dangerousness," and "community safety" dominated the discussion and resulted in many states implementing preventive detention statutes that increased pre-trial incarceration rates.[14]

This push for a more conservative approach to pre-trial detention has retained its momentum. States are still adding to and broadening their preventive detention powers.[15] However, in the past few years, the public's awareness of the unfair and lopsided plight of pretrial detainees has increased and the pendulum of reform has started to modestly swing in the other direction.[16] The main focus of this new wave of reform has been easily assailable money-bail schemes that prey on the poor.[17]

While these reform efforts are encouraging, money-bail is low hanging fruit, and the more fundamental issue of a lack of procedural protections for defendants accused of a crime remains overlooked.[18] Debates on bail reform often focus on the "who"—who should be held without bail based on the charges. Instead, this debate should focus on the "how"—how do we ensure that those detained without a

12. For a detailed account of the history of bail reform—covering the discourse at both the national and state levels—beginning in the early 1960s through the implementation of The Bail Reform Act of 1984, *see* Goldkamp, *supra* note 10 (urging institutional players to thoroughly examine and balance the potential implications and costs associated with preventive detention to both the defendant and the justice system itself).

13. *Id.*

14. The term "second generation" of bail reform was first coined by John Goldkamp. *See generally* Goldkamp, *supra* 10.

15. At the time this Article was written, twenty-five states were in the process of either considering or adopting new and/or revising current preventive detention statutes through legislative initiatives.

16. Only recently have litigation efforts to challenge money bail taken root and are continuing to develop across the nation. For a comprehensive list of current reform litigation, *see generally* ACLU Campaign for Smart Justice/Color of Change, Selling Our Freedom: How insurance corporations have taken over our bail system 1 (May 2017), https://www.aclu.org/report/selling-our-freedom-how-insurance-corporations-have-taken-over-our-bail-system.

17. *Id.*

18. John P. Gross recently published a 50-state survey that identified fifteen states in which defendants are not afforded a right to counsel and yet also have preventive detention statutes. Thus, in these states a defendant could risk losing his liberty prior to trial without even the most basic of procedural protections—the right to counsel. *See generally* John P. Gross, *The Right to Counsel but not the Presence of Counsel*, 69 Fla. L. Rev. 831 (2017).

conviction are not erroneously denied liberty. Policies such as money bail and preventive detention are not facially harmful, but it is their implementation and the lack of procedural protections afforded to defendants that leads to the proliferation of pre-trial mass incarceration.

While the overall U.S. prison population is declining, the looming problem of "mass incarceration" persists.[19] Reform efforts have had little impact, but perhaps that is because the problem has been inaccurately defined. The "standard story" of mass incarceration focuses on the impact of federal policies—specifically the Nixon-era "tough on crime" agenda and the war on drugs.[20] Therefore, the frame of reference guiding reform efforts has been a single-minded focus on sentencing. As a result, the "standard story" has failed to view the criminal justice system as a fluid cycle comprised of many variables acting upon each other.[21]

Many have attributed the dramatic increase[22] in incarceration that began in the 1970s to the incarceration of low-level offenders.[23] This defined the "standard story" on mass incarceration. Recently, John Pfaff debunked the "standard story" and identified other contributing factors that led to the increase in carceral trends in the U.S.—namely poor state and local prosecutorial policies.[24] Other scholars, such as James Forman, Jr., also argue that the "standard story" underappreciates other contributing factors that desperately require reform, and as a result, these problems went unnoticed and compounded over time.[25]

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19. Erica Goode, *U.S. Prison Populations Decline, Reflecting New Approach to Crime*, N.Y. TIMES (July 25, 2013), http://www.nytimes.com/2013/07/26/us/us-prison-populations-decline-reflecting-new-approach-to-crime.html. Other scholars also address the role politics and criminal procedure have played in contributing to mass incarceration. *See, e.g.,* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993 (2010); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272 (2004).

20. PFAFF, *supra* note 3.

21. *Id*.

22. *Trends in U.S. Corrections*, THE SENTENCING PROJECT, http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf (last visited June 26, 2017).

23. PFAFF, *supra* note 3. JAMES AUSTIN ET AL., BRENNAN CENTER FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED?, https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated_0.pdf (last visited June 26, 2017).

24. PFAFF, *supra* note 3. *See also* Jeffery Bellin, *Reassessing Prosecutorial Power through the Lens of Mass Incarceration*, 116 MICH. L. REV. (forthcoming 2018) (critiquing the thesis of John Pfaff's latest book).

25. James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 21 (2012) (arguing that the *New Jim Crow* provides an "incomplete account of mass incarceration's historical origins, fails to consider black attitudes toward crime and punishment, ignores violent crimes while focusing almost exclusively on drug crimes, obscures class

Yet another factor that many do not focus on, including Pfaff and Forman, is pre-trial detention. The "front-end" of criminal detention has a direct and lasting impact on increasing incarceration trends, leading to community destabilization and recidivism.[26] Pre-trial detention deserves a larger role in the conversation concerning the reduction of mass incarceration. The destabilizing impact of pre-trial detention goes beyond the numbers; although hard to quantify, this stage is the gateway to the mass incarceration problem that scholars like Pfaff discuss.[27]

On its face, a snapshot of the U.S. incarceration population supports the assumption that conviction rates are the main culprit for mass incarceration. Approximately 59% of those incarcerated in the U.S. are serving sentences, while 20% are awaiting trial.[28] This snapshot, while technically accurate, is misleading because it does not take into account jail churn and admission rates.[29] Reports from the Prison Policy Initiative show that while 575,000 individuals are convicted and admitted to state prisons each year, over 7.7 million individual arrestees,[30] who are presumed innocent, are admitted to state and local jails annually.[31] The volume of pre-trial detention in the U.S. is stag-

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distinctions within the African American community, and overlooks the effects of mass incarceration on other racial groups").

26. There is a dearth of studies on pre-trial outcomes and its correlation to post-disposition recidivism. For a detailed report on the "costs" of pre-trial detention *see* CHRISTOPHER T. LOWENKAMP ET AL., ARNOLD FOUNDATION, THE HIDDEN COSTS OF PRETRIAL DETENTION (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf.

27. This Article does not analyze the post-disposition impact pre-trial detention has on defendants, however, based on the studies that do exist and qualitative experiences with the criminal justice system, it is clear that pre-trial incarceration has effects well beyond its regulatory intent. *Id.*; *see also* Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pre-trial Detention*, 69 STAN. L. REV. 711, 711 (2017) (addressing constitutional concerns of pre-trial detention and after an empirical study conducted across 70,000 misdemeanor cases in Harris County, Texas, finding that "detained defendants are 25% more likely than similarly situated releases to plead guilty, are 43% more likely to be sentenced to jail, and receive jail sentences that are more than twice as long on average").

28. *Era of Mass Expansion: Why State Officials Should Fight Jail Growth*, *supra* note 5. This percentage includes individuals who are detained prior to trial as well as those who were given a monetary bail that they could not afford.

29. The Prison Policy Institute estimated that pre-trial incarceration alone accounts for 99% of the growth in total U.S. incarceration rates over the past 15 years. Peter Wagner, *Jails matter. But who is listening?*, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/blog/2015/08/14/jailsmatter/ (last visited June 26, 2017).

30. A report by the Bureau of Justice Statistics in 2015 identifies that 63% of all 720,300 people in state and local jails were pre-trial detainees. TODD D. MINTON & ZHEN ZENG, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES IN 2015, NCJ 250394, (Dec. 2016).

31. E. Ann Carson, BUREAU OF JUSTICE STATISTICS, NCJ 248955, PRISONERS IN 2014, (2015), https://www.bjs.gov/content/pub/pdf/p14.pdf.

gering—proving it is a critical factor that must be included in the discourse on mass incarceration. To manage volume concerns, plea deals have taken the place of trials.[32] Plea bargaining has proven to be an efficient tool for resolving cases. This efficiency interest has seeped into other areas of criminal law in ways that undercut constitutional due process protections owed to defendants.

Our justice system has always engaged in some degree of "procedural displacement." This is the idea of delaying or weakening procedural protections based on the theory that requisite process will come at another stage. Procedural displacement at the pre-trial stage of the criminal process was originally justified based on the assumption that a future trial would provide all the due process necessary to ensure justice. Now, however, trials are seldom utilized as a means of adjudicating guilt.

This Article argues that the assumption that future process will be provided at trial is flawed and that the U.S. criminal justice system, therefore, improperly relies on procedural displacement prior to trial. Given plea-bargaining and similar efforts to cope with volume, the system needs to reintroduce more pre-trial procedural protections to reduce "front-end" incarceration.

Part I of this Article identifies prospective procedural displacement as a factor that deforms the substantive rights of pre-trial detainees. This Part asserts that procedural displacement stems from an inflexible assumption that the trial provides the pinnacle of process. This Part also discusses how limits to the presumption of innocence—the core doctrine of our justice system—have cultivated a breeding ground for prospective procedural displacement.

Part II explains the factors that have contributed to procedural displacement. These factors include the volume associated with an overburdened criminal justice system and attitudinal dissonance at the judicial and legislative levels.

Part III identifies how displacing process at sentencing, after a finding of guilt has occurred, has become the primary analogy justifying procedural displacement in our legal system. This Part then explains why this displacement analogy is illegitimate in the pre-trial context. This Part concludes by exploring how prospective procedural displacement affects the legitimacy of plea bargaining and discusses recent Supreme Court precedent that seeks to remedy the lack of regulation during plea bargaining.

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32. *See* Lafler v. Cooper, 566 U.S. 156 (2012).

Finally, Part IV concludes that prospective procedural displacement is not a sustainable option. The justice system needs more than minimal procedural safeguards to protect vulnerable defendants. The demands of pre-trial protections require state courts, legislators, and prosecutors to create mechanisms on the front-end of the criminal process to more efficiently filter out less meritorious cases and, in turn, reduce unnecessary and unjustified incarceration. This Article hopes to begin a conversation about increasing protections for defendants currently left vulnerable to the pressures of a displaced pre-trial system. Such a conversation will help raise much-needed awareness about the impact of pre-trial detention on mass incarceration.

I. The Problem with Pre-trial Detention

The mantra of our criminal justice system is well known—every person is "innocent until proven guilty."[33] In other words, the prosecution has a duty to ensure that the accused is not unduly or unfairly prosecuted for a crime that he did not commit.[34] An essential element of this is that courts must ensure that the defendant is not robbed of the due process to which he is entitled.[35]

One way to help conceptualize what due process means from a practical perspective in the context of a criminal prosecution is to view it as a spectrum. At various stages within this "spectrum of process," the amount of proof required to justify depriving the accused of his liberty varies. For example, in order to arrest a suspect police need "probable cause."[36] At trial, the state must prove the defendant's guilt "beyond a reasonable doubt."[37]

After arrest, the spectrum effectively divides into three stages: pre-trial, trial, and post-trial. The trial stage ensures the highest level of due process. The defendant is afforded an array of trial-related constitutional protections including the rights to counsel, to present evidence, and to cross-examine.[38]

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33. *See, e.g.,* Kaley v. United States, 134 S. Ct. 1090, 1114 (2014) (Roberts, J., dissenting) ("A person accused by the United States of committing a crime is presumed innocent until proven guilty beyond a reasonable doubt. But he faces a foe of powerful might and vast resources, intent on seeing him behind bars.").

34. The prosecutor is the "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." Berger v. United States, 295 U.S. 78, 88 (1935).

35. *See, e.g.,* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 3 (1997).

36. Gerstein v. Pugh, 420 U.S. 103 (1975).

37. *In re* Winship, 397 U.S. 358 (1970).

38. *See, e.g.,* Stuntz, *supra* note 35.

After trial, however, due process is less demanding. If the defendant is found guilty after trial, he is then sentenced. The same procedural strictures that apply at trial do not apply at sentencing.[39] For instance, information that might not have been unreliable for trial purposes, such as a hearsay statement, may be introduced and weighed by the court at sentencing.[40] By way of relaxing process after trial, sentencing employs "procedural displacement" to assess the appropriate punishment based on the theory that the trial sufficiently protected the defendant's substantive rights.

While this form of procedural displacement has been widely accepted in the sentencing context, this Article argues that a more dangerous form of displacement has developed at the opposite end of the spectrum. During the pre-trial stage, the judicial system operates on the ingrained assumption that abundant procedural protections will be afforded to the defendant at trial. Therefore, the logic goes, not very many procedural protections need to be observed in the pre-trial setting. My term for this phenomenon is "prospective procedural displacement."

Pre-trial detention is the jailing of individuals accused of a crime. It can take two forms: detention based on the inability to afford bail[41] or preventive detention (commonly referred to as "remand" or "holding without bail"). Preventive detention is a relatively new concept in criminal procedure and its introduction was a historical milestone as well as a tipping point in the erosion of procedural protections. Before pre-trial detention was acknowledged as a problem, overwhelming scrutiny was placed on the enormous costs associated with procedural protections at the trial stage. The following Section discusses how efforts to fix such trial-stage problems destabilized pre-trial procedural protections.

A. The Strengthening of Trial Rights and Its Costly Consequences

Legal scholars, most prominently William Stuntz, have criticized the Warren Court for creating costly procedural protections at trial that encouraged institutional actors[42] to seek out cheaper alternatives.[43] In his last book, Stuntz scrutinized the Warren Court's interpretation

39. FED. R. EVID. 1101(d)(3) (2011).

40. *Id*.

41. The need for bail reform and the deleterious impact that money bail has on poor defendants has become a nationwide issue. *See e.g.* Kamala D. Harris & Rand Paul, *Kamala Harris and Rand Paul: To Shrink Jails, Let's Reform Bail*, N.Y. TIMES (July 20, 2017), https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html.

42. Institutional actors include courts, legislators, and prosecutors.

43. STUNTZ, *supra* note 19.

of the Bill of Rights that tethered the Fourth, Fifth and Sixth Amendments to a rigid formulation of procedural due process.[44] Stuntz argued that these steps, while intended to level the playing field, instead created a labyrinth of procedural ins-and-outs that necessarily demanded a significant amount of time and resources from defense attorneys.[45]

This labyrinth continues to be built. In 2009, the Supreme Court in *Melendez-Diaz v. Massachusetts*, interpreted trial procedural protections with the utmost stringency, while disregarding practical utility.[46] In *Melendez-Diaz*, the Massachusetts trial court admitted an affidavit reporting the results of a forensic analysis of the drugs seized by police upon the defendant's arrest.[47] The affidavit was admitted to certify that the drugs recovered were cocaine.[48] The affidavit substituted for the live testimony of the forensic analyst because it would have purportedly been ineffective and too costly to fly the analyst in for what would likely not have resulted in any cross examination by the defense.[49] The question before the Supreme Court was whether the defendant's right of confrontation under the Sixth Amendment required live testimony by the analyst as opposed to an affidavit.[50]

Respondents argued that there are particular instances in the law where the constitutional protections afforded to the defendant are not served through an absolutist approach in the interpretation of the procedural protection that is due.[51] Here, they argued, live testimony would have served little utility and in all probability the analyst would not recall what he recorded without refreshing his memory with the report due to the time-lapse and the number of tests he performed in the interim.[52] Justice Scalia responded to this argument:

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44. Stuntz identified the most noteworthy cases: *Mapp v. Ohio* (1961), which excludes from trial evidence obtained through illegal searches; *Gideon v. Wainwright* (1963), which guarantees the right to counsel in felony cases; and *Miranda v. Arizona* (1966), which requires police to apprise suspects in custody of their rights to counsel and against self-incrimination. *Id.*

45. *Id.*

46. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307 (2009). This example was not provided to debate the particulars of *Melendez*-Diaz, but instead to demonstrate the disconnect between the application of theory at the federal level to the practical application at the state level.

47. *Id.*

48. *Id.*

49. *Id*.

50. *Id.*

51. "This absolutist approach to the Confrontation Clause would result in a significant waste of public resources, with no apparent gain in the truth-seeking function." Brief for Respondent, *Melendez-Diaz v. Commonwealth of Massachuse*tts (No. 07-591), 2008 WL 4103864, at *59–60.

52. *Id.*

> Finally, respondent asks us to relax the requirements of the Confrontation Clause to accommodate the "necessities of trial and the adversary process." It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.[53]

The *Melendez-Diaz* Court found the procedural protections at trial to be binding and inflexible, taking no pity on the burdens of volume plaguing lower state courts.[54] The lingering question left open by the court is if the purpose of confrontation could have been easily satisfied by presenting the certified affidavit of the analyst in lieu of his live testimony, then what substantive right did the decision further? If none, Stuntz argues, then process is simply an end in itself.

In *Melendez-Diaz* the Court articulated an absolutist perspective of due process protections in the trial context. In doing so, it sent the erroneous message to lower courts that procedural protections are absolute and inflexible to the practical realities and demands of individual cases.[55] The key point is that this case should have caused lower courts to be more protective of due process at trial. Counterintuitively, it had the effect of watering down procedural protections at the stages surrounding the trial in an effort to keep costs down based on the assumption that a trial would commence. Such cases placed trials on a pedestal—creating the false illusion that only a trial could impact the outcome of a defendant's case.

By holding that such protections are unwavering, the Supreme Court seemingly gave little thought to the application of this principle in State courts. State courts simply do not have the luxury of excess time. So State players began to consider the idea that while trial rights might not be flexible, perhaps other stages surrounding the trial could bend to accommodate the high-maintenance needs of trial. In other words, because procedural protections are so unwavering during trial, institutional players could conclude that other forms of robust procedural protections could be avoided until trial. Otherwise, allowing such protections to seep outside the confines of a trial-court room would create even greater costs.[56]

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53. *Melendez-Diaz*, 557 U.S. at 325.

54. *Id.*

55. *Id.*

56. *Id.*; Often, attorneys are required to make hard decisions on how to litigate—when to expend resources and challenge the claim based on its legality or to actually investigate the factual claim. Stuntz, *supra* note 35.

B. Watering Down Pre-trial Detention

During the Warren era[57], the Supreme Court became fixated on tweaking and fine-tuning criminal due process protections pertaining to defendant's trial rights. With a singular focus on perfecting the trial stage, the Court ended up making trials overly costly.[58] It also led to a restrictive interpretation of due process that could only be actualized if a trial took place.[59]

It is helpful here to think of every procedure as holding an inherent process value in order to assess its worth. Legal scholar Robert Summers writes in detail about process values in support of his assertion that "a legal process can be good, *as a process,* in two possible ways, not just one: It can be good not only as a means to good results, but also as a means of implementing or serving process values . . . ."[60] Summers focuses on process values because he argues that modern society has become far too result-oriented and therefore has failed to evaluate processes, not just for the ends they achieve, but the values those processes are intended to promote.[61] Thus, Summers argues, a result-oriented approach that focuses on process for the sake of process may be blind to the substantive rights affected.[62]

In the bail context for example, many would agree that the outcome of the bail hearing is not the envisioned end-game of criminal justice proceedings. Determining the verdict—guilty or not guilty—is the goal. Thus, one might think the process that helps dictate the outcome of the bail determination is less valuable than the process that helps the jury or judge come to the final verdict. This Article argues that devaluing the process required in bail hearings deforms substantive rights and handicaps individuals as criminal proceedings continue towards a final verdict. And while the objective of the bail process is to *predict* flight risk or dangerousness, those procedures are in place to protect liberty when there is no legal basis to determine that we must confine an individual.

An assessment of process cannot be accomplished if the objective of the process is misunderstood. In terms of pre-trial detention, historically the bail stage was seen as collateral to the trial. Bail was considered more like an administrative stage with the purpose of initiating

57. STUNTZ, *supra* note 19.
58. *Id.*
59. Bell v. Wolfish, 441 U.S. 520 (1979).
60. Robert S. Summers, *Evaluating and Improving Legal Processes – A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 4 (1974).
61. *Id.*
62. *Id.*

preliminary stages such as intake and booking. Thus, determining the requisite amount of process for this early stage was driven by an efficiency-based approach as opposed to an accuracy-based one. With this framework in mind, the following Sections explore the historical relationship between pre-trial detention and the presumption of innocence.

1. A Brief History of The Federal Bail Reform Act of 1984

Historically, bail was not the subject of significant procedural scrutiny because the trial was always viewed as the hallmark of criminal justice.[63] In its original form, bail was intended to set conditions of release aimed to ensure that the accused appeared for trial.[64] Therefore, the aim of bail proceedings for decades was to address a single question: which conditions of release, if any, would ensure the defendant's appearance for trial?[65] If the state was concerned that the defendant would abscond, the prosecutor had the burden of proving flight risk by a preponderance of the evidence.[66]

During the 1960s there was an initial wave of bail reform promulgated by the federal government.[67] Politicians, particularly the U.S. Attorney General Robert F. Kennedy, scrutinized unjust money bail schemes that prevented the poor from regaining their liberty.[68] While reform efforts seemed well received, there was also a growing concern

63. Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 61 n.118 (2006) (citing Baker v. McCollan, 443 U.S. 137, 143 (1979)) (emphasizing that "an adversary[ial] hearing is not required" to support the pre-trial detention of a criminal defendant); Ingraham v. Wright, 430 U.S. 651, 697–98 (1997) (noting that the Supreme Court has "rejected the argument that procedural protections required in [the Court's civil] due process cases should be afforded to a criminal suspect arrested without a warrant"); Gerstein v. Pugh, 420 U.S. 103, 125 n.27 (1975) (holding that the Fourth Amendment's non-adversary review procedures define the only "process that is due for seizures of person or property in criminal cases, including the detention of suspects pending trial"); Lem Woon v. Oregon, 229 U.S. 586, 590 (1913) (holding that due process does not require an adversary judicial hearing at outset of criminal prosecution). *See* generally 4 WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE, § 14.2(a) (2d ed. 1999) (noting that the Supreme Court has stated in some cases that "due process provides no procedural protection" for the defendant's interests in avoiding pre-trial restraints).

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

65. "In the trial court and in this court, the Government must establish risk of flight by a clear preponderance of the evidence, not by the higher standard of clear and convincing evidence." United States v. Motamedi, 767 F.2d 1403, 1406 (9th Cir. 1985).

66. *Id.*

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

68. Testimony by Attorney General Robert F. Kennedy on *Bail Legislation: Hearing Before the Subcomms. on Constitutional Rights and Improvements in Judicial Machinery of the Sen. Jud. Comm.*, 88th Cong. 63–65 (1964), https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf.

that dangerous defendants who were given bail would continue to commit crimes while awaiting trial.[69] Thus, a second wave of bail reform began in the 1970s as a response to increasing public concern over violent crime.[70] This sparked legislative efforts to implement preventive detention measures—the pre-trial detainment of defendants charged with any criminal act.

In 1984, Congress enacted the Bail Reform Act, which expanded the scope of pre-trial proceedings to go beyond an analysis of flight risk.[71] Through the Act, federal judges were able to deny bail if the prosecution could demonstrate that the accused was so dangerous that no conditions of pre-trial release would ensure the safety of the community.[72]

Three years later the Supreme Court in *U.S. v. Salerno*, affirmed the constitutionality of the Bail Reform Act.[73] The Court prefaced its holding with the condition that substantial procedural protections would be afforded to the accused.[74] The Court specifically called attention to the defendant's right to an "adversarial" hearing at the pre-trial stage.[75] This aspect of *Salerno* substantially deviated from lower courts' long-standing presumption that adversarial procedural protections did not attach until trial.[76] With this shift in federal law, many state courts incorporated preventive detention hearings into their own bail schemes.[77] But at the same time, many states failed to afford defendants the heightened safeguards required by the *Salerno* Court.[78]

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69. Goldkamp, *supra* note 67.

70. *See* S. REP. NO. 225, 98th Cong., 1st Sess. 8, at 6–7 (1983) [hereinafter cited as S. REP. NO. 225]; Goldkamp, *supra* note 67, at 1 ("Responding to heightened public fear of crime during the mid and late 1970's, legislatures increasingly have scrutinized bail practices during the 1980's.").

71. *See* Federal Bail Reform Act of 1984, Pub. L. 98-473, tit. II, ch. 1, 98 Stat. 1976 (1984) (formerly S. 1762) [hereinafter cited as Federal Bail Reform Act of 1984]; Goldkamp, *supra* note 67, at 23 ("The Federal Bail Reform Act of 1984 quite explicitly asks the judicial officer to consider 'the nature and seriousness of the danger to any person or the community that would be posed by the person's release.'").

72. 18 U.S.C. § 3142.

73. United States v. Salerno, 481 U.S. 739 (1987) (holding that the Federal Bail Reform Act of 1984 did not facially violate substantive due process in its authorization of pre-trial detention on the basis of future dangerousness).

74. *Id.* at 739 ("The Act provides arrestees with a number of procedural rights at the detention hearing, including the right to request counsel, to testify, to present witnesses, to proffer evidence, and to cross-examine other witnesses."). The Court, however, was silent on procedural protections pertaining to preventive detention hearings based solely on flight risk.

75. *Id.*

76. *See* Sec. II.A., *infra.*

77. *See supra* note 15 and accompanying text.

78. After completing a 50-state survey on preventive detention statutes, while many states mention "public safety" or some iteration of considering "dangerousness" in their bail schemes, nineteen states have yet to implement preventive detention statutes that reinforce the height-

2. The Erosion of the Presumption of Innocence

A central tenant of our criminal justice system is that the presumption of innocence may only be negated beyond a reasonable doubt. Well before *Salerno* was conceived, its durability was set up to be undermined through the erosion of this presumption. Until recently, the prevailing Supreme Court precedent maintained that the presumption of innocence should only be understood as a necessary jury instruction to help the lay juror interpret the meaning of "beyond a reasonable doubt" and to reiterate that the prosecution has the burden of proving guilt beyond a reasonable doubt.[79] Because this doctrine was historically addressed in the context of determining guilt, it was always interpreted as tethered to the trial stage.[80] As criminal procedure continued to bleed into and develop precedent around pre-trial detention, the presumption of innocence was further cemented in its original position, unable to attach in a meaningful way to bail.

The Supreme Court established the presumption of innocence in 1895.[81] In *Coffin v. U.S.*, the Court held that "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[82] The presumption of innocence was articulated as something separate and distinct from formal criminal procedure, holding value as a principle that protected substantive rights beyond a mere allocation of burden.[83] Shortly thereafter, legal scholars criticized the *Coffin* Court's notion that the presumption of innocence should not be used to convey anything beyond the facts presented by prosecutors and the defense.[84]

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ened standard—clear and convincing evidence—as demanded in *Salerno*. *See also* 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, 1793 nn.6–8 (2002) (finding at the time of publication of this article in 2002, sixteen states refused to provide the right to counsel at initial proceedings, twenty-six states only provided counsel at bail hearings in a handful of counties, and only 8 states in addition to the District of Columbia equally provided counsel to indigent defendants at bail hearings).

79. Bell v. Wolfish, 441 U.S. 520 (1979); see *infra* notes 82–84.

80. *Id*. at 520.

81. Coffin v. United States, 156 U.S. 432 (1895).

82. *Id*. at 453.

83. *Id.*

84. "While *Coffin* held that the presumption of innocence and the equally fundamental principle that the prosecution bears the burden of proof beyond a reasonable doubt were logically separate and distinct." *Id.* at 458–461. Some sharp scholarly criticisms have demonstrated the error of that view. See, *e. g.*, JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 551–76 (1898) (hereafter Thayer); 9 J. WIGMORE, EVIDENCE § 2511 (3d ed. 1940) (hereafter Wigmore); C. MCCORMICK, EVIDENCE 805–806 (2d ed. 1972) (hereafter McCormick). Taylor v. Kentucky, 436 U.S. 478, 483 (1978) (citations omitted).

Specifically, scholars believed that the presumption, if cited to as a form of evidence, would have a "salutary effect upon lay jurors."[85]

Eighty-three years later, the Court revisited its interpretation of the presumption of innocence in *Taylor v. Kentucky*.[86] Disparagement of the presumption of innocence by legal scholars encouraged the Court to limit the applicability of the presumption to merely an allocation of the burden of proof.[87] Specifically, the Court was asked to decide whether the Due Process Clause of the Fourteenth Amendment required that instructions on the defendant's presumption of innocence and an indictment's lack of evidence be provided to the jury upon the defendant's request.[88] The Court held, citing to a treatise written by legal scholar John Wigmore, "[i]n a criminal case the term [presumption of innocence] does convey a special and perhaps useful hint over and above the other form of the rule about the burden of proof, in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced."[89]

Notably, Justice Rehnquist, joined by Justice Stevens, dissented. Justice Rehnquist agreed with the notion that it was reversible error to refuse a request for such a jury instruction, but stated, "[t]hat is not, however, a sufficient reason for holding that such an instruction is constitutionally required in every criminal trial."[90] This statement, brief but powerful, made clear that Justice Rehnquist did not see the presumption of innocence as furthering any substantive rights beyond the procedural protections already afforded a defendant during trial. This was Justice Rehnquist's first opportunity to opine on the presumption of innocence; it would not be his last.

One year after *Taylor*, the Supreme Court addressed the applicability of the presumption of innocence again, albeit through dicta in *Bell v. Wolfish*.[91] In *Bell* the Court addressed a challenge by pre-trial detainees based on their conditions of confinement under the Eighth

85. *Id.*; *see also* William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329 (1995) (discussing the difference between legal and factual innocence and the need for factual innocence to be resurrected, as it once was in *Coffin*).

86. Taylor v. Kentucky, 436 U.S. 478 (1978).

87. *Id.* at 483 (1978) (citing *Coffin,* 156 U.S. at 458–461). At this stage, the Supreme Court only held that the presumption of innocence applied to allocating the burden of beyond a reasonable doubt and *a priori*, only limited to trial.

88. *Taylor*, 436 U.S. at 478.

89. *Id*. at 484–85.

90. *Id.* at 491 (Rehnquist, J., dissenting).

91. For some time, this 1979 decision was the only case law limiting the applicability of the presumption of innocence to trial. *Bell*, while only through dicta, furthered this view and has been the cause of much disconnect in the way institutional actors regard the pre-trial stage.

Amendment. Justice Rehnquist,[92] this time writing for the majority, discussed precedent such as *Coffin* and *Taylor* that addressed the presumption in terms of "criminal trials."[93] Here, he began to lay the framework for preventive detention. In *Bell*, Rehnquist concluded that the presumption of innocence "has no application to a determination of the rights of a pre-trial detainee during confinement before his trial has even begun."[94]

While *Bell* dealt with the conditions of pre-trial detention, not the detention itself, the Court implied that such types of pre-trial detention would not be construed as punishment, baldly stating that "[t]he presumption of innocence is a doctrine that allocates the burden of proof in *criminal trials* . . . ."[95] This statement was a blow to the applicability of the presumption of innocence, placing a nail in the "*Coffin*" with respect to the notion that the presumption of innocence could serve any greater utility in furtherance of protecting substantive rights outside of trial.

A few legal scholars have addressed the rhetoric and historical foundation supporting the need to restore the presumption of innocence as something more than a doctrine allocating the burden of proof.[96] These scholars discuss the fleeting presumption in the context of bail, as well as concern over the presumption's diminishment in the foundation of our justice system, resulting in a proliferation of assumptions of guilt.[97] But none have connected it with Justice Rehnquist's role.

Prior to his appointment to the Supreme Court, Justice Rehnquist was the Assistant Attorney General in the Office of Legal Counsel during the Nixon Administration.[98] During his term, Rehnquist played an instrumental role in drafting and garnering support for the District of Columbia's preventive detention statute.[99] The Federal

92. It is noteworthy to mention Justice Rehnquist's position in *Taylor*. In dissent, Rehnquist joined Stevens to express his belief that the presumption of innocence was not constitutionally necessary and the same purpose was served by stating that the prosecution had the burden of proving guilt beyond a reasonable doubt.

93. *Taylor*, 436 U.S. 478.

94. Bell v. Wolfish, 441 U.S. 520, 533 (1979).

95. *Id*. (emphasis added).

96. Laufer, *supra* note 85*;* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723 (2011).

97. *Id.*

98. Albert W. Alschuler, *Preventive Pre-trial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 569 (1986).

99. D.C. CODE ANN. § 23-1322 (1981); Alschuler, *supra* note 98, at 569; John B. Howard, Jr., *The Trial of Pre-trial Dangerousness: Preventive Detention After United States v. Salerno*, 75 VA. L. REV. 639, 679 (1989).

Bail Reform Act of 1984 relied upon and essentially mirrored the D.C. preventive detention statute.[100] Rehnquist was so integral to the eventual Bail Reform Act that legal scholar Albert Alshucher predicted that Rehnquist would recuse himself in *Salerno*.[101]

However, not only did Justice Rehnquist not recuse himself in *Salerno*, he wrote the majority opinion. By showing clear favoritism for community rights over individual rights, it seemed Justice Rehnquist was never truly able to put aside his prosecutorial bias in criminal due process cases. In his analysis of preventive detention after *Salerno*, John Howard noted that *Salerno* bore a "striking similarity" to *Schall v. Martin*[102] and *Bell v. Wolfish*[103]—both opinions where Rehnquist wrote on behalf of the majority.[104]

Justice Rehnquist controlled the conversation on the presumption of innocence from *Bell* to *Salerno*, gradually diminishing procedural protections for pre-trial detainees. It is evident that Justice Rehnquist wrote opinions to build upon each other methodically to create a line of precedent that would support his values within the criminal justice system.[105] But, Rehnquist never imagined a justice system packed full of procedural protections on paper, but watered down by displacement in practice. Unfortunately, the *Salerno* majority did not see how the prior jurisprudence on the presumption of innocence was staged to diminish pre-trial rights. Even though the majority acknowledged that a liberty interest exists for pre-trial detainees, safeguarding the defendant's liberty interest through heightened procedural protections,[106] the damage to the presumption of innocence had already been done. Given the general attitude towards the bail stage follow-

100. *Id.*; *see also* S. REP. NO. 225, 98th Cong., 1st Sess. 22 (1983) ("The authors of the Federal Bail Reform Act of 1984 borrowed many of the Act's procedural provisions from the District of Columbia legislation.").

101. Alschuler cites to instances where Rehnquist was involved in executive branch activities prior to joining the Supreme Court. These are instances where Alschuler believed that, as Chief Justice, Rehnquist should have recused himself but did not, raising concerns that Rehnquist's bias could have impaired his judicial decision making. *See Valid Doubts About Justice Rehnquist*, N.Y. TIMES, Sept. 11, 1986, at A26, col. 1 (criticism of Justice Rehnquist for failing to disqualify himself in Laird v. Tatum, 408 U.S. 1 (1972), despite apparent participation in executive branch deliberations on issues that the case presented).

102. *See* Schall v. Martin, 467 U.S. 253 (1984) (upholding a New York statute permitting detention of juvenile offenders for a period of seventeen days before trial).

103. Bell v. Wolfish, 441 U.S. 520 (1979) (holding that certain harsh conditions of pre-trial confinement do not, per se, amount to punishment).

104. Howard, *supra* note 99, at 679 (1989).

105. "In doing so, Justice Rehnquist weighed the public safety interests of the Government against the liberty interests of the detainee." Laufer, *supra* note 85, at 355.

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

ing *Gerstein*,[107] the erosion of the presumption of innocence further solidified an acceptance of prospective procedural displacement.

II. Factors Shaping Procedural Displacement

In the midst of the growing cost of criminal procedure during the 1960s, the criminal justice system was beginning to face docket-related constraints. Now, with upwards of 13 million arrests a year in the U.S.,[108] resources are pushed to their limits highlighting the imperfections in the system and ultimately prohibiting the majority of defendants, typically poor men of color,[109] from taking advantage of their procedural protections.

Those who have practiced criminal law, either as a prosecutor, private or public defense attorney, or a judge presiding over criminal cases, know how overburdened the criminal justice system is. Prosecutors mechanically convert the majority of arrests into charges.[110] With a seemingly endless docket, public defenders in particular feel the pressures of large caseloads and few resources. Defendants often feel the effects of this systemic aggregation through infrequent jail visits from counsel, priority of investigation based on trial date, and encouragement to plead guilty.[111] Lower courts also find themselves playing a managerial role with the objective of moving cases along as quickly as possible in order to get to the next.[112]

High-profile cases in the media portray a different narrative.[113] The generation that listened to the trials and tribulations of Serial's Adnan

107. 420 U.S. 103 (1975); *see also infra* Part II. Sec. B.1.

108. Howard N. Snyder, U.S. Dept' of Justice, Patterns & Trends: Arrest in the United States, 1990-2010 (2012), https://www.bjs.gov/content/pub/pdf/aus9010.pdf.

109. Stuntz, *supra* note 19, at 34 ("Today, among white men, the imprisonment rate stands just under 500 per 100,000 population: the highest in American history by a large margin. Among black men, the number tops 3,000; among black men in their twenties and thirties, the figure exceeds 7,000. If present trends continue, one-third of black men with no college education will spend time in prison. Of those who do not finish high school, the figure is 60 percent.").

110. Natapoff, *supra* note 10, at 1068.

111. Stuntz, supra note 19, at 228 n.44.

112. *See, e.g.,* Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. Rev. 531, 552 (1988); Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982).

113. Legal scholars have exhausted this point and therefore this Article need not dwell on it. For instance, Stuntz analyzed that "[t]he result is higher levels of litigation among those who can hire lawyers than among those who must take what the state gives them." Stuntz, *supra* note 35, at 35. Stuntz also cites to numerous other sources for the same proposition:

> See Dean J. Champion, Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records, and Leniency in Bargaining, 17 J. Crim. Just. 253, 258 (1989) (reporting that retained counsel are more likely to take cases to trial and more likely to obtain acquittals); Stevens H. Clarke & Susan T. Kurtz, *The Importance of Interim Decisions to Felony Trial Court Dispositions*, 74 J. Crim. L. & Criminology 476, 507

Syed, watched the remake of *The People v. O.J. Simpson*, or absorbed the frustrations felt by Steven Avery and his nephew in *Making a Murderer*, believe justice culminates in the form of a trial and that every defendant's case gets the same level of heightened scrutiny. Individuals who are well off have immense resources at their disposal. Many hire private attorneys, with multiple staff members focused on a limited number of cases. Those attorneys are typically not spread nearly as thin as public defenders, so criminal defendants who are well off can realize in full the procedural safeguards offered.[114] Naturally, those attorneys will demand their client be given individual scrutiny at every stage.[115] This is not representative of the criminal justice system, which is predominantly comprised of the poor.[116]

The practical demands of volume have affected the poor in such a way that providing them with higher levels of individual scrutiny has become too onerous.[117] The result is the displacement of scrutiny, at least until absolutely necessary.

A. Shaping Procedural Protections Through Volume Management

Prosecutors have many opportunities and mechanisms to control docket size. Some actions are favorable to defendants, such as when prosecutors simply dismiss a case. Prosecutors can also offer plea deals—this comes with its own set of criticisms that are discussed in

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(1983) (finding that retained counsel are more likely to obtain dismissal and that their clients are more likely to avoid prison sentences in nonviolent felony cases); Joyce S. Sterling, Retained Counsel Versus the Public Defender: The Impact of Type of Counsel on Charge Bargaining, in The Defense Counsel 151, 160–62 (William F. McDonald ed., 1983) (stating that retained counsel are more likely to obtain deferred disposition or charge reduction).

Stuntz, *supra* note 35, at 35 n.124.

114. *Id*. at 28. ("For the same reason, the prosecutor need not fear an O.J. Simpson-style drawn-out proceeding: The lawyer's resource constraints are too severe—far more so than any limits trial judges might impose were they free to do so.").

115. *Id.* ("Developments in the law of criminal procedure over the past three decades have substantially raised the cost of prosecuting defendants with money. Clients with the resources to pay for an aggressive defense can take full advantage of the large bodies of Fourth, Fifth, Sixth, and Fourteenth Amendment law that govern the criminal process.").

116. *Id*. at 7 n.9 ("According to the Bureau of Justice Statistics, the 'generally accepted indigency rate' for state felony cases in the early 1980s was 48%. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY 33 (1986). In 1962, the comparable figure was 43%. See LEE SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT 7–8 (1965). By 1992, the comparable figure was almost 80%. *See* Steven K. Smith & Carol J. DeFrances, *Indigent Defense*, BUREAU JUST. STAT. SELECTED FINDINGS, Feb. 1996, at 1, 4.").

117. In addition, it could be that the criminal justice system does not value poor defendants of color. This argument has been explored by many scholars. *See, e.g.,* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1504 n.17 (2005).

later Sections—where defendants can admit guilt on lesser charges in exchange for forgoing their trial rights. But these state actors also rely on the justice system's procedural protections to ensure that any short-cuts taken do not unduly harm the defendant. However, the "short-cut" that is most often pursued is how to best avoid a trial.

The criminal justice system's reliance on trials is based on the improper expectation that trial can expunge any legal errors that previously occurred. This expectation is a result of courts and prosecutors displacing procedure to cope with volume and a false reliance on the protections afforded at trial. Similarly, to be fair, defense attorneys may not have the resources to contest a pre-trial detainee's status and instead must pick and choose where their efforts will be most effective.[118] Thus, some defense attorneys must prioritize their trial strategy at the expense of their pre-trial strategy.[119]

Alexander Natapoff has made a similar point in the context of misdemeanor cases—identifying volume as the generator for "informal aggregation."[120] Natapoff defines informal aggregation as the abdication of individuation due to generic and informal institutional policies driving substantive decisions, such as volume and/or social and political motivations.[121] Natapoff correctly notes that the criminal justice system has built-in "antidotes" to combat informal aggregation.[122] However, those remedies have little potency when encountering deeply rooted informal aggregation that was meant to increase expediency and cut costs in overly burdened justice systems.[123]

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118. *See generally* Herbert Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964) (identifying two separate models of criminal process—one dictated by the controls of procedural due process called the Due Process Model, whereas the other model, the Crime Control Model, demonstrates policies made by institutional actors that are motivated out of a need to regulate crime).

119. *Id.*

120. *See generally* Natapoff, *supra* note 10.

121. *Id.* at 1048.

122. *Id.* at 1059.

123. *Id.* at 1059–60. ("In theory, the criminal process has numerous individuating procedures and opportunities that serve as antidotes to informal aggregation. A prosecutor screens police arrest decisions before filing charges to ensure that the particular defendant warrants prosecution. Defense lawyers not only evaluate cases but also create individual relationships with defendants to ensure that they understand their own cases and that their decisions are honored. Courts provide individual hearings—plea colloquies to establish knowing and voluntary pleas, or trials to establish factual guilt. The defendant himself has opportunities to express his individuality: to confer with a lawyer unfettered by conflicts; to testify at trial; to confront the witnesses against him; to knowingly and intelligently consent to a plea; to allocate at sentencing; and to self-represent. To be sure, aggregating features may influence each of these stages: generic prosecutorial policies, defense lack of resources, pressures on defendants to plead. But the mere existence of some aggregation or generalization is not lethal. The ideal is procedurally constructed to counter those tendencies and to provide a variety of individuating guarantees that the

One of the doctrinal antidotes built into the criminal procedure scheme, Natapoff explains, is evidentiary standards.[124] Theoretically, evidentiary standards create equally fair opportunities for a base level of scrutiny—even if it is not the highest level.[125] The idea is that reduced scrutiny would apply to the stages of criminal proceedings that face the most volume and are seemingly the least vital—pre-trial (probable cause hearings, bail, etc.) or post-trial (sentencing or plea deals).

There are three main evidentiary standards in criminal proceedings: (1) to charge an individual with a crime, a judicial officer must make a finding of probable cause;[126] (2) to incarcerate a defendant prior to trial, there must be clear and convincing evidence of dangerousness;[127] and (3) to be convicted, there must be certainty beyond a reasonable doubt.[128] At sentencing, however, the evidentiary bar is not even as high as probable cause; instead it involves introducing mitigating factors (with an exception for death penalty sentencing).[129] Each stage of process is "pre-assigned" a level of individuation and any deviation from that "norm" creates an inconvenience. It is easy to see the need for procedural displacement when additional scrutiny gets in the way of efficiency.

Theoretically, Natapoff explains, the allocation of different evidentiary burdens to the various stages of criminal proceedings has the effect of allowing lower courts to steadily move cases through the pipeline.[130] To momentarily place this in the context of prospective displacement, this means that less time is purportedly expended on cases that will likely be dismissed or pled out. Taking this argument to the next logical step, in theory, more scrutiny can be placed on cases where trial is anticipated.

This Article builds off Natapoff's scholarship on informal aggregation and supports her argument that informal aggregation has corrupted necessary individuation schemes, particularly for

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case is being decided on the evidence and in ways that the particular defendant understands and chooses.") (internal citations omitted).

124. *Id.*

125. *Id.* at 1063–64.

126. Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

127. United States v. Salerno, 481 U.S. 739 (1987). There is no Supreme Court standard on preventive detention for purposes of controlling flight risk. The federal standard commonly used is by a preponderance of the evidence. *See also* United States v. Motamedi, 767 F.2d 1403, 1406 (9th Cir. 1985). Ultimately, state courts are rarely concerned with flight risk and primarily deny bail based on dangerousness.

128. *In re* Winship, 397 U.S. 358, 361 (1970).

129. *See infra* note 172 and accompanying text.

130. Natapoff, *supra* note 10, at 1052.

misdemeanors.[131] However, Natapoff's informal aggregation scheme still does not fully explain the role preventive detention hearings have played in creating problems associated with volume. Because heightened evidentiary standards already exist in preventive detention, the problem may be rooted less in "evidentiary indicators" and more in the erosion of other stages of the criminal process.

1. Managing "Front-End" Volume

Gerstein v. Pugh most clearly frames the tension regarding volume management felt by institutional players during the 1970s, setting the stage for why so many institutional players resisted integrating procedural protections early on.[132] This case also provides a controversial example of pragmatic considerations by the Supreme Court and an attempt to undo the creation of Warren-Era procedural protections stemming from the Due Process Clause.[133]

In *Gerstein*, the Court addressed whether an individual arrested without a warrant is required to have a probable cause hearing in order for the police to temporarily detain the arrestee.[134] While the Supreme Court agreed with the lower court that a probable cause determination must be made, it reversed the lower court's holding that the probable cause hearing must be an adversarial proceeding.[135] The rationale offered by the Court was that an adversarial hearing would not provide any further benefit because the standard of probable cause is the same for arrest.[136]

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131. Individuals charged with misdemeanors can often be the most negatively impacted if they are detained prior to trial. By the time bail is revisited the individual will likely already have been presented with a plea offer or his trial date is so close that release, at most, provides a negligible benefit. Of course, each day matters, but so many resources were expended on pretrial to even obtain a bail modification that an attorney may not see the strategy as fruitful given that time could have been spent on preparing for trial.

132. Carol S. Steiker, *Solving Some Due Process Puzzles: A Response to Jerold Israel*, 45 ST. LOUIS U. L.J. 445, 451 (2001) ("[I]t is not at all surprising that the pressure to cabin the use of the due process clause would be exceedingly strong in 1975, the year in which Gerstein was decided. . . . [T]he Court's speedy incorporation of the criminal procedure protections of the Bill of Rights had already imposed huge costs in terms of reorganization and litigation in the state courts.").

133. *Id.*

134. Gerstein v. Pugh, 420 U.S. 103 (1975).

135. *Id*.

136. In *Gerstein*, Justice Powell opined:

> These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest. That standard—probable cause to believe the suspect has committed a crime—

However, an adversarial hearing would have provided the defense with the opportunity to question state witnesses and challenge the sufficiency of the evidence. Carol Striker aptly noted that the *Gerstein* Court was highly motivated by the implications of creating an adversarial hearing prior to trial due to the enormous costs it would place on the system, particularly in providing all defendants with court-appointed counsel.[137]

Theoretically, at this juncture, courts would argue that little harm can be done to the accused this early in the process, because substantive rights should never be altered on the basis of probable cause.[138] Additionally, so many people are charged with crimes that such a high level of scrutiny cannot realistically be afforded equally to everyone. In sum, the purpose of a probable cause hearing—to provide a formal process to initiate charging a defendant—would not be met by holding an adversarial hearing as it would create substantial delay in effecting this end.[139]

From a practical standpoint, many might agree that relaxed scrutiny in a probable cause hearing is common and legitimate.[140] Charging an individual with a crime is the first step in the criminal justice system—this is the point in the pipeline where volume is at its highest—and this determination does not impact the defendant's liberty. Neither the defense nor the prosecution has had the opportunity to collect and present any information. Further, those tasked with charging individuals with a crime—often court commissioners who are not attorneys or judges—are not able to make full-fledged legal or factual determinations. Therefore, probable cause determinations necessarily require less sophistication.[141]

Ultimately, swift action is required at the onset and the cost associated with robust procedural safeguards during a probable cause hear-

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> traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.

Id. at 120 (citations omitted).

137. *Gerstein*, 420 U.S. at 122 n.23 ("Criminal justice is already overburdened by the volume of cases and the complexities of our system."); *see also* Carol S. Striker, *Solving Some Due Process Puzzles: A Response to Jerold Israel*, 45 ST. LOUIS U. L.J. 445, 451 (2001).

138. While courts have recognized that substantive rights are not altered by probable cause hearings, the collateral consequences of a wrongful arrest are grave. *See, e.g.,* United States v. Marion, 404 U.S. 307, 320 (1971) ("Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends."). Nonetheless, the law offers little scrutiny at this stage.

139. *Id.*

140. *See supra* note 136.

141. Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) (citing for the proposition that courts acknowledge an "essential interest in *readily administrable rules*").

ing would present more of a burden than a benefit. But bail is different in nature than a probable cause hearing. A bail determination can change the defendant's liberty status prior to a conviction. It logically follows that bail determinations must face additional scrutiny. A key problem is the difficultly in conceptualizing such a dynamic shift in process when the bail hearing follows a probable cause determination by a matter of hours.

2. Increasing "Front-End" Scrutiny

The Bail Reform Act of 1984 provided that federal courts could look to an additional factor, dangerousness, to deny the accused bail.[142] A determination of dangerousness, while not a determination of guilt, has many of the trappings of a finding of guilt without the corresponding procedural protections. For example, take someone who has never been stopped by the police in her lifetime. If she is charged with murder and there is no genuine prior criminal record of violence, then is a finding that she is "dangerous" not akin to guessing whether she is in fact guilty of the crime charged? One would hope that such a determination, which has her very liberty attached to it, would be full and fair.

In this vein, *Salerno* was a ray of hope for the pre-trial stage. *Salerno* created a new and heightened evidentiary standard for such a determination—clear and convincing evidence.[143] With this came the requirement that the bail hearing must be a "full-blown adversarial hearing."[144] This was a seismic shift from the presumptively non-adversarial nature of the probable cause hearing in *Gerstein* and bail hearings generally.[145]

The Supreme Court, by way of a facial challenge, held the Act was constitutional. The Court found that the government's interest in protecting the community may outweigh individual liberty in "carefully limited exceptions."[146] Recognizing the potential for abuse, the Court imposed a heightened burden of persuasion on the prosecution—clear and convincing evidence of dangerousness.[147] The Court also provided a substantial list of procedural safeguards and labeled the hearing "adversarial," a first in the pre-trial context. The safeguards

142. 18 U.S.C. § 3142(b)(2)(2012).

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

144. *Id*. at 750.

145. *Id.* at 745 ("The court construed *Gerstein* as limiting such detention to the 'administrative steps incident to arrest.'").

146. *Id.* at 755.

147. *Id.* at 749–51.

included the rights to counsel, to present evidence, and cross-examine witnesses. Moreover, the Federal Bail Reform Act itself only applied to a specific list of serious felony charges.[148]

While these procedural protections were implemented quickly, they were certainly not actualized in the same manner. Due to the preexisting culture around the pre-trial stage prior to *Salerno*, there was not much individuation occurring at the state level.[149] Requiring prosecutors, public defenders, and state courts to perform preventive detention hearings as laid out procedurally by *Salerno* required a different view of the trial system. The promulgation of additional procedures added to the attitudinal dissonance surrounding pre-trial detention hearings in state courts.[150]

Unfortunately, *Salerno* has been left to flounder. In practice, the allegations in charging documents carry the greatest weight at bail review hearings. Defendants have to produce an extraordinary amount of evidence to prove that release is appropriate[151] and even exonerating evidence might not be enough to release a defendant prior to trial. This standard is perverse in the sense that it flips the burden onto the defendant to put forth a coherent case supporting her release.

The failings of *Salerno*-protections highlight a greater problem in the justice system that goes beyond aggregation.[152] *Salerno* advocates for heightened procedural protections, but those protections are never actualized because of the assumption that further process is still forthcoming. The result is a deformation of substantive rights by way of deprivations of pre-trial liberty.

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148. *Id.* at 749.

149. *See generally* Gerstein v. Pugh, 420 U.S. 103 (1975).

150. *See supra* note 18.

151. In dissent, Justice Marshall immediately recognized the direction that Chief Justice Rehnquist was steering the *Bell* Court in and prophesied: "The Court holds that the Government may burden pre-trial detainees with almost any restriction, provided detention officials do not proclaim a punitive intent or impose conditions that are 'arbitrary or purposeless.'" Bell v. Wolfish, 441 U.S. 520, 563 (1979) (Marshall, J., dissenting). He also identified studies that revealed the progressively punitive manner in which bail determinations were made: "[S]tudies indicate that bail determinations frequently do not focus on the individual defendant but only on the nature of the crime charged and that, as administered, the system penalizes indigent defendants." See, *e. g.,* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PRE-TRIAL RELEASE 1–2 (1968); WAYNE H. THOMAS, BAIL REFORM IN AMERICA 11–19 (1976). *See also* NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 102–03 (1973); NATIONAL ASSOCIATION OF PRE-TRIAL SERVICE AGENCIES, PERFORMANCE STANDARDS AND GOALS FOR PRE-TRIAL RELEASE AND DIVERSION 1–3 (1978).

Id. at n.1.

152. Natapoff, *supra* note 10.

B. Attitudinal Dissonance at the Judicial and Legislative Levels

Another factor that has allowed procedural displacement to find footing is the clash between judicial and legislative agendas. In the past many scholars, including Stuntz, have questioned the over-corrective role courts and legislatures have played in shaping criminal procedure within the justice system.[153] The tension between courts and legislatures, Stuntz explains, is created by these two powerhouses that control the direction of the law.[154] For instance, the legislature, which manages the purse strings, may set rules with different goals in mind than courts that are reacting to case-specific issues.[155]

Stuntz set forth the proposition that criminal procedure is not set in a vacuum—often when one rule is created, another problem arises.[156] Instead, Stuntz explains, "[c]riminal procedure's rules and remedies are embedded in a larger system, a system that can adjust to . . . rules in ways other than obeying them. And the rules can in turn respond to the system in a variety of ways, not all of them pleasant."[157]

While the Supreme Court adorned the pre-trial stage with a miraculous number of procedural safeguards,[158] the manner in which the Court provided these preventive procedural safeguards cut against its legitimacy. The *Salerno* Court referred to preventive detention as "regulatory."[159] Justice Rehnquist cited to instances in the past where the Court had created an exception for the government to detain an individual prior to conviction out of a legitimate and/or compelling governmental interest to protect public safety.[160] Justice Rehnquist

153. Stuntz, *supra* note 35, at 1.
154. *Id.*
155. *Id.*
156. *Id.* at 3–4.
157. *Id.*
158. *See supra* Part II.A.2.
159. United States v. Salerno, 481 U.S. 739 (1987).
160. Justice Rehnquist cites to the follow bodies of law that have created an exception for detention prior to conviction:

> We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous. *See Ludecke v. Watkins,* 335 U.S. 160 (1948) (approving unreviewable executive power to detain enemy aliens in time of war); *Moyer v. Peabody,* 212 U.S. 78, 84–85 (1909) (rejecting due process claim of individual jailed without probable cause by Governor in time of insurrection). Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons. Thus, we have found no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings. *Carlson v. Landon,* 342 U.S. 524 (1952); *Wong Wing v. United States,* 163 U.S. 228 (1896). We have also held that the government may detain mentally unstable individuals who present a danger to the

reasoned that while the "general rule" remains that detention is not appropriate if there is no adjudication of guilt, precedent "show[s] a sufficient number of exceptions to the rule that [The Federal Bail Reform Act of 1984] can hardly be characterized as totally novel."[161] But the mere distinction between regulatory and punitive detention is trivial and has little impact on how lower courts and legislatures interpret the stages prior to trial.[162]

Many state courts do not provide defendants with immediate avenues of recourse to revisit the terms of pre-trial detention.[163] Particularly, for defendants charged with a misdemeanor, efforts to revisit bail can be fruitless. The life of a misdemeanor case is often very short, 30 to 45 days in most states. Because courts can take anywhere from two weeks to a month to process a bail modification, the case may be called for trial, or even dismissed, before any pre-trial remedy can be addressed.[164] Mootness, therefore, often destroys the possibility of appellate review.

Volume provides an additional burden that encourages procedural displacement to escape appellate review. Courts are bogged down by volume and see little value in expending more resources on a stage of the criminal process that does not readily impact the outcome of the case. In a system of finite resources, time spent on one client is time taken away from another. Thus, given the issues of mootness and fleeting resources, and a firm belief that procedural protections are reserved for trial, there are little to no incentives to address any procedural deficiencies at the pre-trial stage.

> public, *Addington v. Texas,* 441 U.S. 418, 99 S. Ct. 1804, 60 L.Ed.2d 323 (1979), and dangerous defendants who become incompetent to stand trial, *Jackson v. Indiana,* 406 U.S. 715 (1972); *Greenwood v. United States,* 350 U.S. 366 (1956). We have approved of post arrest regulatory detention of juveniles when they present a continuing danger to the community. *Schall v. Martin, supra.* Even competent adults may face substantial liberty restrictions as a result of the operation of our criminal justice system. If the police suspect an individual of a crime, they may arrest and hold him until a neutral magistrate determines whether probable cause exists. *Gerstein v. Pugh,* 420 U.S. 103 (1975). Finally, respondents concede and the Court of Appeals noted that an arrestee may be incarcerated until trial if he presents a risk of flight, see *Bell v. Wolfish,* 441 U.S. 534, or a danger to witnesses.

Id. at 748–49.

161. *Id.* at 749.

162. "On the due process side of this false dichotomy appears an argument concerning the distinction between regulatory and punitive legislation." See *Id.* at 767 (Marshall, J., dissenting).

163. *See supra* note 78 and accompanying text.

164. In Baltimore City, Maryland, it currently takes approximately three to six weeks after arrest for a misdemeanor case to be resolved. Securing review of an initial bail hearing often takes two to four weeks. While it takes only a week to a week-and-a-half . . . to file a petition, there is often a multiple-week bottleneck with the process of the court ordering an audio transcript of the initial bail hearing and reviewing the filed petition.

The legislature is no less complicit in allowing the displacement to overrun the pre-trial stage. If state legislatures were to acknowledge that pre-trial detention hearings should be full-fledged adversarial hearings, the pre-trial scheme would immediately pose an extraordinary "front-end" cost, a concern noted by the Court in *Gerstein*.[165] But, even at the most fundamental level, if not all states provide for counsel during bail, where is the check on the prosecution? Without accepting the front-end cost that pre-trial detention so clearly demands, procedural displacement will only continue to deform substantive rights.

The justice system—courts, prosecutors, and legislatures alike—have allowed pre-trial detention to slip into a dystopia of procedural displacement. Over time, the justice system has become less of a truth-seeking expedition and more of an assembly-line processing cases.[166]

III. Interrogating the Underpinnings of Procedural Displacement

Procedural protections are critically important to and go toward improving the legitimacy of the justice system, while increasing the accuracy of case dispositions.[167] However, trials have now effectively become a thing of the past due to their excessive costs and lengthy procedures.[168] The growing volume of defendants processed through the criminal justice system daily makes it unrealistic for every defendant to reap the benefits of a trial by a jury of his peers.[169] As a result, procedural displacement has arisen as a mechanism to cope with volume. Consequentially, displacement is being applied in such a way that the most vital procedural protections are being evaded.

Pre-trial detention and plea deals currently make up the two most traversed areas of the criminal process system. Oddly, they are also among the most unregulated areas of the law. This makes them susceptible to exploitation and abuses resulting in the unnecessary incarceration of many—on both the front-end and back-end.

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165. *See supra* Part II.A.1.

166. Akhil Reed Amar, The Constitution Today: Timeless Lessons for the Issues of our Era (2016).

167. Summers, *supra* note 60.

168. Stuntz, *supra* note 19.

169. Ninety-four percent of state convictions are a result of guilty pleas. John L. Kane, *Plea Bargaining and the Innocent*, The Marshall Project (Dec. 26, 2014, 1:05 P.M.), https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent#.4Q0L0Rfms.

The collateral consequences associated with pre-trial detention—lost wages, loss of employment, instability of familial and community life[170]—only sheds light on the cracks within our criminal justice, but does not address the larger problem. Pre-trial detention and plea deals do not rank high on the procedural "priority list," creating a breeding ground for inventive shortcuts. Currently those shortcuts are taking the form of procedural displacement. Relying on pre-trial detention and plea deals as the foundation of the justice system inflicts a harm that goes beyond the collateral consequences to defendants—it undermines the whole criminal justice system raising questions about its legitimacy, accuracy, and overall fairness.[171]

A. The Justification for Procedural Displacement

The harms of procedural displacement seem grave, but yet, it continues to find grounding in our criminal justice system. On the "spectrum of process," sentencing employs procedural displacement. This form of displacement relies on the prior foundation of procedural protections. Sentencing therefore receives the lowest level of procedural protections.[172] On principle, this makes sense—the defendant, represented by counsel benefited from a collection of full and fair procedu-

170. While this Article does not address the revolving door of recidivism rooted in pre-trial incarceration, studies exist that address this issue. *See, e.g.*, LOWENKAMP ET AL., *supra* note 2*6; see also* United States v. Marion, 404 U.S. 307, 320 (1971).

171. Summers, *supra* note 60.

172. The standard for introducing evidence at sentencing is a low bar. In the context of mitigation, evidence is relevant when it "tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." Tennard v. Dretke, 542 U.S. 274, 284–85 (2004). In her discussion of aggregation in sentencing, Natapoff does acknowledge that the capital sentencing scheme is necessarily an individuated process—different from sentencing hearings for lesser crimes. *See* Natapoff, *supra* note 10, at 1056 nn.43–46 (citing Roper v. Simmons, 543 U.S. 551, 589 (2005) (O'Connor, J., dissenting)) (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)); Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 304 (1976); *Roper*, 543 U.S. at 620 (O'Connor, J., dissenting).

There are of course pragmatic reasons for the lack of individuation in the sentencing of lesser crimes. Particularly, the application of trial-standard procedural protections used previously in the determination of guilt at the sentencing stage "could endlessly delay criminal administration in a retrial of collateral issues . . . . The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968) (citing 337 U.S. at 250–51). The standard for sentencing a death penalty case is much higher, because the punishment goes beyond a deprivation of liberty, it is the taking of one's life. A necessary exception exists in capital cases where "fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Natapoff, *supra* note 10, at 1056 (citing Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

ral protections at trial, therefore the guilty verdict is just. If after a full and fair trial the defendant is found guilty, she is not afforded the same extensive procedural safeguards at sentencing like she was at trial. This allows for the admission of otherwise inadmissible evidence that was not heard at trial. Some means of punishment are deemed appropriate in the defendant's case, but little needs to be protected at the sentencing stage, other than ensuring her punishment is not excessive. Thus, the limited procedural protections have little effect on substantive rights, and displacement is tolerated.

Accordingly, with mandatory minimums and sentencing guidelines, relaxed procedural protections and aggregation appears to be the norm at this end of the spectrum. But this was not always the case. Well before this was the accepted norm, Albert Alschuler lamented the aggregation of sentencing that doled out punishment based on the severity of the offense, as opposed to sentencing that considered the individual and the circumstances surrounding the offense he was found guilty of committing.[173] Alschuler explains that conventional wisdom originally promoted the use of guidelines and mandatory minimums because such schemes removed discretion from judges who might have been inclined to issue harsher sentences based on racial biases.[174] However, by taking out the individuating factors, those difficult-to-quantify circumstances that contributed to an individual narrative were ultimately lost.[175]

Nonetheless, relaxed procedures during the sentencing stage have become part of the normative scheme. While some protections are available, such as the right to counsel, the Federal Rules of Evidence do not place any evidentiary restrictions on the type of evidence that may be introduced at this stage.[176] Even so, judges often prefer more

173. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991).

174. *Id*. at 906 ("The principal argument for sentencing guidelines is not ease of administration. It is that, although aggregated sentences may prove unjust in many cases, they limit the play of judicial personality and inhibit discrimination on racial and other grounds. The injustice produced by grouping unlike cases, in other words, is justified as a means of preventing greater injustices.").

175. *Id*. at 915 ("Sentencing commissions can quantify harms more easily than they can quantify circumstances."). The concern of diminished individuation is not one that exists in the sentencing context only. A third generation of bail reform that is taking shape is the reliance of data-based risk assessment tools to determine the accused's flight risk and/or risk of danger to the community if released. For states that do not consider bail a critical stage and do not guarantee the right to counsel at the bail stage, a risk assessment tool could provide a short-term benefit. However, this generation of bail reform should be approached with caution, as the mere fact of its "objectivity" may come to outweigh the value defense counsel's advocacy efforts are intended to provide, especially in preventive detention hearings.

176. FED. R. EVID. 1101(d)(3).

relaxed sentencing procedures. This gives the hearing an informal feel, but also presents the judge with an opportunity to get to know the individual behind the conviction or the nature of the circumstances leading to the conviction.[177]

The changes in the sentencing phase provided the criminal justice system with the foundation to build on the idea that the system does not need to employ full procedural protections at every stage. These changes formed the ideological basis for allowing procedural displacement at other stages of the spectrum, particularly the pre-trial phase.

B. Plea Bargaining in the Shadows of Detention[178]

Once convicted, the presumption of innocence no longer exists, but the defendant still has a liberty interest in how long she is confined.[179] As discussed above, sentencing is therefore much less scrutinized, and justifiably so.[180] If the conviction was found on procedurally fair grounds, it is appropriate to relax procedural protections at a later

177. Carol S. Staiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital*, 102 YALE L.J. 835, 839 (1992) (reviewing BEVERLY LOWRY, CROSSED OVER: A MURDER, A MEMOIR (1992)) ("At the same time, the Court has identified a firm consensus against *procedures* that focus solely on the offense apart from the circumstances and characteristics of the offender. This Eighth Amendment right to "individualized" sentencing requires that states permit capital sentencers to consider, as a mitigating factor, *any* aspect of the defendant's background, character, or crime.") (citing Woodson v. North Carolina, 428 U.S. 280, 301 (1976)).

178. This title references a distinguished and important line of scholarship that began by analyzing plea bargaining in the looming anticipation of trial. Through a play on pre-existing scholarship, I hope to encourage conversation generated by this Article to expand to the pre-trial sector. *See e.g.* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior,* 11 J. LEGAL STUD. 225 (1982); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464 (2004).

179. For a discussion on the defendant's liberty interests at sentencing, see Scott M. Brennan, *Due Process Comes Due: An Argument for the Clear and Convincing Evidentiary Standard in Sentencing Hearings*, 77 IOWA L. REV. 1803, 1805 (1992); *see also* Kuckes, *supra* note 63, at 19 ("Modern due process doctrine recognizes that adversary procedural rights are needed at this stage, just as at the criminal trial, because the length and terms of the sentence implicate the defendant's liberty interests no less than conviction itself.").

180. Natapoff notes that:

> [c]ategorical sentencing is constitutionally permissible in non-capital cases, and with respect to these cases the Court has held that lighter punishments require less individuation. This linkage is embodied in the rule of *Scott v. Illinois*, in which the Court held that misdemeanor defendants who are not sentenced to prison are not entitled to counsel. Because counsel is the primary guarantor of accuracy and individuation, *Scott* effectively approved reduced individuation where there is minimal punishment.

Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1057 (2013) (citing *Woodson*, 428 U.S. at 304 (noting that individuation in non-capital cases reflects "simply enlightened policy rather than a constitutional imperative")));

stage.[181] But what if the conviction was a result of a plea deal where the defendant was incarcerated prior to trial—could we say that the procedure leading up to the plea deal was sound? Surely, most scholars would not be willing to advance such a notion.

Many have a fundamentally flawed understanding of plea deals. The idea being that, because the defendant has no right to a plea deal,[182] he is taking a gamble and foregoing the procedural protections in exchange for certainty, and theoretically, a significant amount of say in what his terms of punishment are (absent mandatory minimums). Moreover, many believe the defendant pleads guilty on the basis that he is in fact guilty.[183] However, this mainstream viewpoint fails to capture the pervasive reality that pre-trial detention is often used to extract guilty pleas from those who are innocent but simply want to get out of jail on time served or by accepting probationary supervision to return to their lives.[184]

Plea deals are unregulated because there is little opportunity to challenge and bring to light any misconduct—they are simply backroom deals that do not see the light of a court room until a deal has been brokered.[185] Because there is little to no opportunity for defense counsel to contest any part of the process, plea deals are a cost-efficient way of circumventing the trial process to, presumably, get to the same conclusion—the defendant is guilty.[186]

As noted above, conventional wisdom suggests that plea deals are permissible because they are premised on the fact that the acceptance

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Scott v. Illinois, 440 U.S. 367, 382 (1979); Alabama v. Shelton, 535 U.S. 654, 665 (2002) (deeming "conviction [to be] credited as reliable because the defendant had access to the 'guiding hand of counsel"') (quoting Argersinger v. Hamlin, 407 U.S. 25, 40 (1972)).

181. *See e.g.* David J. D'Addio, *Sentencing After Booker: The Impact of Appellate Review on Defendants' Rights*, 24 YALE L. & POL'Y REV. 173, 198 n.115 (2006) ("The Court permits less stringent procedural protections at sentencing primarily because 'criminal sentencing takes place only after the defendant has been adjudged guilty beyond a reasonable doubt. Once the reasonable doubt standard has been applied to obtain a valid conviction, 'the criminal defendant has been constitutionally deprived of his liberty . . . .'" McMillan v. Pennsylvania, 477 U.S. 79, 92 n.8 (1986) (quoting Meachum v. Fano, 427 U.S. 215, 224 (1976))). For a discussion on the defendant's liberty interests at sentencing, see Scott M. Brennan, *Due Process Comes Due: An Argument for the Clear and Convincing Evidentiary Standard in Sentencing Hearings*, 77 IOWA L. REV. 1803, 1805 (1992).

182. Missouri v. Frye, 566 U.S. 134, 148–49 (2012) ("[A] defendant has no right to be offered a plea, nor a federal right that the judge accept it.") (internal citations omitted).

183. *See infra* discussion on Blackledge v. Allison, 431 U.S. 63, 71 (1977).

184. *See e.g.* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 195 (1992).

185. *See infra* notes 189–90.

186. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 257 (Harvard Belknap 2011).

of a guilty verdict without a trial is voluntary and not coerced.[187] One could argue that another explanation for the proliferation of plea deals is that such deals yield lighter sentences.[188] On principle, those who know they are guilty might be more willing to plead out to protect their liberty interest to the extent possible.[189] In practice, trial places great burdens, time wise and cost wise, on the court and prosecutors, but there is a mutual benefit when a defendant willingly waives his right to a trial.[190] As many scholars have observed, plea deals are often the result of coercive practices rather than pure admissions of guilt.[191]

We must be skeptical about the coercion of those incarcerated prior to trial. Particularly because the disparity in bargaining power is so skewed, those incarcerated pre-trial often accept plea deals to avoid spending time in jail waiting for vindication.[192] Many who are in this position are poor individuals of color. They may already be at risk of losing a job or losing housing because rent is not paid. The list goes

187. *See infra* discussion on Blackledge v. Allison, 431 U.S. 63, 71 (1977).

188. Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html?_r=0 (last visited Jun 27, 2017) ("The proportion of federal cases that have been resolved with pleas has risen sharply since Nov. 1989, when federal sentencing guidelines were approved by the Supreme Court.") (citing Ronald F. Wright and Paul Hofer analysis of Bureau of Justice Statistics data).

189. *Id.*

190. Missouri v. Frye, 566 U.S. 133, 144 (2012) ("The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties.").

191. A wealth of scholarship exists discussing the coercive impact of plea bargaining. *See e.g.* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63 (2011); Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949 (2009); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295 (2006); Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CAL. L. REV. 1573 (2012); Stephanos Bibas, *The Duties of Non-Judicial Actors in Ensuring Competent Negotiation*, 51 DUQ. L. REV. 625 (2013); Richard L. Lippke, *Plea Bargaining in the Shadow of the Constitution*, 51 DUQ. L. REV. 709 (2013); Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559 (2013).

192. Disparities in bargaining power are well-documented by legal scholars. *See, e.g.,* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 950–51 (1983) ("most European nations require the trial of serious charges even when defendants admit their guilt and do not desire trials. Nevertheless, most Americans probably would consider a requirement of trial in no-dispute situations artificial."); Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 GA. ST. U. L. REV. 239, 249–50 (2011) (citing John Langbein in "describing plea bargaining as a form of torture and the defendants as unwilling victims of coercive incentives"); Gail Kellough & Scot Wortley, *Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions*, 42 BRIT. J. CRIMINOLOGY 186, 198 (2002); William M. Landes, *Legality and Reality: Some Evidence on Criminal Procedure*, 3 J. LEGAL STUD. 287, 329–69 (1974); MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 195 (1992).

on. Coercive plea bargaining shines a light on a very invidious sort of danger that erodes the fundamental principles of the justice system—namely accuracy and legitimacy.[193]

Even the Supreme Court in *Blackledge v. Allison* alluded to the harsh realities that play out between pre-trial detention and plea deals:

> Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.[194]

Here, the Supreme Court, in a case that predates *Salerno* by a decade, did not anticipate a justice system that would incarcerate defendants based on their charges. Instead, the Court focused on the familiar benefits of expediency and cost savings that a guilty plea provided.[195]

Expediency and volume management cannot be the only values provided by plea deals. Consider this common example. A complaining witness alleges that the defendant assaulted him. The defendant is subsequently charged with misdemeanor assault. Even though the defendant might have an alternate and plausible set of facts, his voice goes unheard and he finds himself incarcerated, either held without bail or an unaffordable secured bond, based on the mere fact and assumed truth of those allegations. The defendant remains incarcerated for several weeks, until he is presented with the opportunity to plead guilty. The defendant then accepts a guilty plea to get out of jail. But what if he never committed the crime? What if he only pleads guilty so he can be released? As opposed to waiting in jail to challenge the allegations made against him, he may choose the more efficient route.

This scenario, where a plea deal relies upon prospective displacement, calls into question the legitimacy of the plea. Defendants do not see the benefit in "waiting for procedural protections" while their

193. "Thus, pre-trial detention places a high premium on quick plea bargains in small cases, even if the defendant would probably win acquittal at an eventual trial. In other words, the shadow of pre-trial detention looms much larger over these small cases than does the shadow of trial." Bibas, *supra* note 178, at 2493 (citations omitted).

194. Blackledge v. Allison, 431 U.S. 63, 71 (1977).

195. *Id.*

liberty is being constrained.[196] A guilty plea with a chance to walk out of jail with probation is much more compelling than waiting several days, if not weeks or months, to vindicate one's name. An increasing number of studies have found a direct correlation between the likelihood of conviction through a plea deal and pre-trial custody status.[197]

Our criminal justice system has come to rely upon the less costly stages of criminal proceedings. As a result, these less critical stages have become the most vital to the defendants' outcome. While the concern over the legitimacy of plea deals has often been raised, little has been done to address the front-end problems that cause defendants to believe a plea deal is a better option than vindication. Even when pre-trial detention hearings come with a heightened evidentiary burden, procedural protections continue to be displaced until the trial. This is where the potential for coercive plea deals lurks in the shadows of pre-trial detention.

C. Is Protecting Plea Bargaining Enough?

While so many procedural protections exist for defendants, the reality is that those protections are sidestepped and plea deals are often relied upon for quick and cheap "justice."[198] While slow to address the procedural and substantive deficiencies at this stage, the Supreme Court recently addressed some of those systemic abuses defendants endure by adding procedural protections to plea bargaining.[199] In 2012, the Supreme Court, through two 5-4 decisions, *Missouri v. Frye*[200] and *Lafler v. Cooper*[201], effectively created a new field of

196. Legal scholars have identified a multitude of "process costs" associated with the criminal justice process—costs that bear too great on a defendant, making a trial to clear one's name far too onerous and not worth the immediate benefit. *See* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 984 (1983).

197. *See, e.g.*, ALISA SMITH & SEAN MADDAN, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 8 (2011); Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pre-trial Detention*, 69 STAN. L. REV. 711 (2017); Bibas, *supra* note 178, at 2547 (2004) (noting that one criminal court found a correlation between pre-trial incarceration and guilty pleas "[m]any of the pleas of guilty to misdemeanors were by defendants who could achieve their freedom only by pleading guilty. (Plead guilty and get out, maintain your innocence and remain incarcerated in lieu of bail.)") (citing People v. Llovet, N.Y.L.J., Apr. 24, 1998, at 29, 30 n.7 (King's Cty. Crim. Ct.)).

198. There is an overwhelming amount of scholarship discussing this point. For a sample, *see, e.g.*, Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior,* 11 J. LEGAL STUD. 225 (1982); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979); Bibas, *supra* note 178, at 2464.

199. Missouri v. Frye, 566 U.S. 133 (2012); Lafler v. Cooper, 566 U.S. 156 (2012).

200. *Missouri,* 566 U.S. at 133.

201. *Lafler*, 566 U.S. at 156.

law—"plea bargaining rights." Rooted in the Sixth Amendment right to counsel, the Court's rulings signify its recognition and concern regarding the growing trend of convictions that arise from pleas as opposed to jury verdicts.

These cases demonstrate a substantial deviation from the Court's prior perspective of the trial process. As discussed above, the Court previously viewed the trial process as the anchor of the criminal justice system that each defendant is entitled to. The *Frye* and *Lafler* Courts instead entered new terrain and took a more pragmatic view of the criminal justice system by recognizing that the trial stage is almost non-existent for the majority of defendants.[202]

Frye addressed whether a defendant who pled guilty could assert a claim of ineffective assistance of counsel by alleging that but for counsel's error in failing to communicate a plea offer, he would have pleaded guilty with more favorable terms.[203] Similarly, the *Lafler* Court addressed whether the defendant was entitled to relief when his counsel advised him to reject a favorable plea bargain but the defendant was ultimately convicted and sentenced to a longer period of time than that offered in the plea deal.[204]

The tests applied by the Court are less important for the purposes of this Article than the proposition that they stand for. While the Supreme Court limited the scope of its holdings in both *Frye* and *Lafler* to Sixth Amendment violations, these cases may stand for the proposition that a procedurally sound trial does not necessarily remedy all errors that may occur outside of the trial itself.[205] Simply stated, these cases detail an appreciation for the other stages that surround the trial stage.[206] More importantly, they acknowledge that if an error occurs outside of the trial, the defendant can be prejudiced in such a way that even a fair and just trial cannot remedy the harm. By extension, heightened scrutiny cannot solely be reserved for trial.

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202. In the majority opinion, Justice Kennedy cites several reports to point out the undeniable role plea deals play in the justice system. *Missouri*, 566 U.S. at 143. The Court noted, "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Id.* (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.22.2009, http://www.albany.edu/sourcebook/pdf/t5222009.pdf.

203. *Id.* at 133.

204. *Lafler*, 566 U.S. at 156.

205. "The Court, moreover, has not followed a rigid rule that an otherwise fair trial remedies errors not occurring at the trial itself." *Id*. at 165.

206. Notably, the Court does not stop at acknowledging the shift from a trial-driven adversarial system, but also legitimizes the government's interest in saving administrative costs. Missouri v. Frye, 566 U.S. 133 (2012) (citing Lafler v. Cooper, 566 U.S. 156 (2012)).

These opinions respond to the problem of coerced plea deals by trying to add a component of regulation.[207] This demonstrates an effort to re-create some procedural protections that would have fallen by the wayside due to forgoing trial. These enhanced regulations demonstrate an effort by the Court to increase fairness, and perhaps legitimacy, within the criminal justice system. However, even these additional opportunities to challenge a sentence do nothing to address the heart of the problem—coercion caused by pre-trial detention.

Instead of addressing the root of the problem—the process that often leads to a plea deal—the Court focused on the back-end of the spectrum as opposed to the front-end. While the Supreme Court may have taken proactive steps, the Court has done little to prevent defendants from arriving at that vulnerable position to begin with.[208] Plea bargaining is but one part of a greater cycle and increasing procedural protections is only a half-step in addressing the deficiencies in due process.

IV. Replacing Procedural Displacement

A. The Future Viability of Prospective Displacement

Procedural displacement, while seemingly legitimate in some areas such as sentencing, has spread throughout the justice system leaving defendants unprotected. It is during the pre-trial stage that plea bargaining occurs and incarcerated defendants face pressure to plead guilty to offenses they did not commit just to get out of jail on probation or time served. Extremely coercive in nature, pre-trial detention can function as a proxy for punishment when the processes of trial are never actualized.

Procedural displacement is so deeply rooted in our system that it is almost beyond question. Docket management and legislative budgets depend on procedural displacement to keep the criminal justice system "manageable."[209] Yet the problem of mass incarceration and the

207. These discussions are rooted in the fact that plea deals have become the mode in which many cases are resolved. It follows that it is therefore necessary to regulate the most utilized form of procedure that results in case dispositions.

208. *See Lafler*, 566 U.S. at 185–86 (citing Alschuler, *Plea Bargaining and its History*, 79 Colum. L. Rev. 1, 38 (1979); Stephanos Bibas, *Regulating the Plea–Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117, 1138 (2011)). Other scholars, such as Adam Zimmerman and David Jaros, write about the benefits of a legal system that would encourage more judicial involvement at the settlement stage. Zimmerman and Jaros face the same criticism posed against the Court—that such intervention may come a little too late. David M. Jaros & Adam S. Zimmerman, *Judging Aggregate Settlement*, 94 Wash. U. L. Rev. 545 (2017); *See also supra* note 18.

209. *See generally supra* Part II.

quest for justice demand we interrogate the theoretical underpinnings of procedural displacement as our system relies less on trial as the primary means to establish guilt. The idea that a trial will provide the process to protect liberty is an illusion. Additionally, the implicit analogy between the sentencing phase and pre-trial hearings must cease.

The spectrum of process was envisioned to be like a bell-curve: at both ends of the spectrum of process (pre-trial and post-trial) procedural protections are at a minimum, separated by the trial which is the zenith of the curve. The criminal system was not constructed to rely solely upon these two outlier stages.[210] However, as a result of the increased cost of trial, the post-trial end of the spectrum relies on the front-end for procedural safeguards, thus demanding we think carefully about the impact foregoing these vital steps has on defendants and their case outcomes.

Procedural displacement serves the value of increasing expediency within the legal process—a legitimate concern for all involved, including the defendant.[211] However, the focus on expediency has been at the expense of promoting legitimacy, fairness, and accuracy. The Supreme Court's holdings that add some structure to the plea deal process are only a half-step toward protecting defendants and reviving legitimacy in our justice system.[212] The pre-trial stage is central to the plea negotiation process. Nonetheless, there has been little effort to protect defendants from the consequences that arise from pre-trial detention.[213]

1. Exploring Solutions

Procedural displacement has disrupted the due process protections beyond what we should be comfortable with. Therefore, additional

210. Currently, bail is not classified as a "critical stage" by the Supreme Court. *See e.g.* Douglas L. Colbert, *Coming Soon to A Court Near You-Convicting the Unrepresented at the Bail Stage: An Autopsy of A State High Court's Sua Sponte Rejection of Indigent Defendants' Right to Counsel*, 36 SETON HALL L. REV. 653 (2006). Legal scholar Douglas Colbert has provided a compelling argument on the need to designate bail as a "critical stage." *See* Colbert, *supra* note 78. Being from a state where defendants are afforded the right to counsel at bail hearings, the problems described in this Article are very prevalent. While it is painful to think of the scenarios where defendants could be denied bail without counsel, designating bail as a critical stage would be a step forward, but would not resolve the attitudinal problems that exist due to where bail is placed on the spectrum of process. A goal of this Article is to begin a discussion that goes beyond placing labels and identify deficiencies within the scheme of criminal procedure.

211. Summers cites to timelines and finality as core process values as well. Robert S. Summers, *Evaluating and Improving Legal Processes – A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 27 (1974) ("Regardless of whether or not processes improve results by disposing of issues in a timely fashion, timeliness is itself valuable and thus qualifies as a process value.").

212. *See supra* Part III.C.

213. *See generally supra* Part III.

scrutiny must be implemented during pre-trial hearings to counteract the negative effects of prospective displacement. Given our current political climate it is incumbent upon institutional players to collaborate in order to replace the procedures that have been displaced and return scrutiny to the pre-trial stage.[214] Courts must be vigilant in enforcing the pre-existing heightened safeguards available to defendants and hold prosecutors to their burden. Likewise, legislatures must be willing to provide avenues of relief. This relief may include improving pre-trial service agencies that would increase pre-trial release rates or increasing funding for state defense attorneys. Even creating an avenue for relief, such as restitution, that former pretrial detainees could benefit from if they are wrongfully detained would act as a check on the justice system.[215] And finally, prosecutors have the most important job of all. They must be watchful gatekeepers, only seeking pretrial detention when absolutely necessary.

Many scholars may view increasing front-end scrutiny with skepticism. But perhaps scholars such as Stuntz would not disagree with adding more process at such an early stage because it adds such a critical value that has been missing. Even though more scrutiny on the front-end would add more time to the process, this would act as a much needed filter for a system burdened by volume. Thus, by creating a high threshold of scrutiny early in the process courts and prosecutors could ferret out meritless cases at the onset. In doing so, our justice system could achieve three main goals: (1) reduce unnecessary incarceration, (2) rejuvenate the reliance on trials, and (3) increase the accuracy and legitimacy of plea bargaining.

By increasing scrutiny on the front-end, the opportunity for defendants to be improperly detained prior to trial becomes limited because accuracy in the decision-making process will improve. Encouraging prosecutors to assess the merits of the case early on would also reduce the number of cases that could potentially go to trial and reduce the number of individuals held prior to trial. This would reduce volume

214. There is a third generation of bail reform underway centered around science-based risk assessment tools. This Article does not discuss those risk-based assessments in depth, because they are not currently adopted widely by all states and they vary in their application. Briefly, Jocelyn Simonson addresses the idea of bail nullification and writes, "Professor Malcolm Feeley and other scholars studying those reforms have concluded that what is needed for true reform is not an improvement in the 'science' of bail or the creation of new agencies, but rather the political will to release more defendants pretrial." Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 623 (2017). The proposed solutions embody the assertion in this Article that procedural displacement is capable of being replaced.

215. In a work in progress titled *The Cost of Accidental Incarceration*, I explore the novel possibility of expanding restitution relief beyond wrongful conviction cases to pre-trial detention. Such a solution and could provide a much needed limitation on preventive detention.

on the front-end, ultimately saving resources. With greater flexibility in resources and a lighter caseload, prosecutors and defense attorneys would be more willing to rely on trials for assessing guilt or innocence. At the very least, guilty pleas would not hinge on a defendant's pre-trial detention status. These measures would restore accuracy and promote the protection of substantive rights for vulnerable defendants. To actualize these substantive rights, we must constantly interrogate the purpose of the procedures, lest we forget the end that was intended to be achieved.

The solution to increase scrutiny at the pre-trial stage does not propose reengineering the criminal justice system to rid our system of trials. Trials will always be indispensable. Instead, this Article hopes to revitalize the role trials play in our criminal justice system so they are utilized more often. By prioritizing certain cases and dismissing meritless cases earlier on, not only will there be less pre-trial incarceration, but also less cases. This will make caseloads more manageable and trials less dreaded.[216] This Article hopes to begin a conversation on how we can replace that which has been displaced. By removing negative incentives to plead guilty, reducing recidivism, and increasing community and family stability we can perhaps restore what has been lost through the reduction of trials.[217]

Currently, because of how rarely trials are actually utilized, the pre-trial stage is often the only meaningful interaction that defendants have with the court system. Perhaps in time, docket sizes will be reduced and trial rates will proliferate, thus making the pre-trial stage seem somewhat irrelevant. But for the time being, our justice system has proven to be a reactionary one—creating loopholes where there are no prohibitions. The pre-trial stage is one of those loopholes that requires regulation. Otherwise it risks imperiling the legitimacy of the entire justice system.

In the abstract, if trials did not exist, the only two stages of the justice system would be bail hearings and plea bargaining. Of course, that is not our reality and it is hard to predict from the onset which case will be dismissed, pled out, or go to trial. But if we imagined such a scenario—an extreme of what our criminal justice system could be-

216. Press Release, Am. Civil Liberties Union, ACLU Sues over Public Defender Shortage and Resulting Wait List in New Orleans (Jan. 15, 2016).

217. While the focus of this Article is not on money bail issues, my hope is that these policies, which require increased scrutiny, are applied to conditional release equally and encourage release on recognizance when appropriate to prevent erroneous detention for those who simply cannot afford to buy their freedom.

come—it would be imperative to provide defendants with additional procedural due process protections.

2. *Addressing Skeptics*

Increasing front-end scrutiny may seem impractical to some, namely institutional players and public safety groups. Prosecutors and judges may argue that increased scrutiny will result in further costs to the justice system by way of mini-trials or by creating additional avenues of litigation that can be abused by defense counsel.[218] Public safety groups may argue that violent crime would increase if pre-trial detention were overly scrutinized and more people were released prior to trial. This Section attempts to respond to these concerns.

a. Prosecutors and Judges' Counterarguments

Prosecutors and courts may argue that adding more process to the front-end will increase the costs and time associated with the bail stage. They may add that criminal cases will also require time to progress. At bail, all of the facts are not readily available and prosecutors may argue that a full investigation is not possible due to the lack of discovery, therefore charges need to be taken at face value. This is an insular view of the criminal justice system that fails to see the pre-trial stage's impact on case dispositions.

What prosecutors do not admit is that pre-trial detention provides them with an unrivaled advantage. Prosecutors often criticize the justice system for its leniency on defendants, arguing that convictions by trial can be difficult to secure—complaining witnesses fail to show up, police officers commit Fourth Amendment violations, defense attorneys are able to suppress the defendant's statements, the list goes on. However, if the defendant is detained prior to trial, the prosecutor can still "win" because only one of two things can happen: either the case is dismissed and the defendant serves some time in jail or the defen-

218. Kuckes, *supra* note 63, at 61 ("One issue lurking below the surface, for example, was the contemporaneous debate over criminal discovery rules. In criminal cases, unlike civil litigation, the entitlement to discover an opposing party's evidence in advance of trial can be quite limited. *See, e.g.*, FED. R. CRIM. P. 16. If adversary pre-trial hearings were routinely required in criminal cases, they would have provided a backdoor avenue of discovery not otherwise available to the criminal defendant. *See, e.g.*, Sciortino v. Zampano, 385 F.2d 132, 134 (2d Cir. 1967) (acknowledging that in a preliminary hearing 'there is necessarily some discovery of the government's evidence,' but that this is not the purpose of the hearing); *cf.* United States v. Contreras, 776 F.2d 51, 55 (2d Cir. 1985) (noting that allowing the defendant to review the government's evidence of probable cause at a pre-trial detention hearing would 'serve as a discovery tool' and undermine the 'carefully limited' discovery rules provided in criminal cases)"). *Id.* at 49 n.263.

dant pleads guilty to time served or additional time. Regardless, a jail sentence is tendered.

However, the purpose of preventive detention was never to give prosecutors an advantage or place the defendant in a worse position before trial. Yet, prosecutors enjoy an immense amount of power from the onset. The decision to charge a case as a felony or a misdemeanor dictates how long the case may last. If a defendant is charged with a felony as opposed to a misdemeanor, a judge setting bail may give weight to this decision and conclude that the crime alleged is more serious, potentially increasing the likelihood of preventive detention. Once detention is ordered the "exit doors" prosecutors have the ability to open generally will come with a price.[219]

Would increased front-end scrutiny hinder a prosecutor's ability to prosecute cases? No. Some of these concerns can be remedied by "in-house" prosecutorial policies. For instance, promoting prosecutorial screening would be an immediate filter that would likely cost little, but produce immense results in terms of volume control and reducing unnecessary incarceration.[220] Currently, prosecutors take little to no investigative initiative at the bail stage.[221] This is problematic. Without an investigation, the prosecutor can only make a recommendation for bail based on the charges, giving unequal weight to one narrative—that of the arresting officer or complaining witness. Reliance on the mere fact of charges contributes to the continuing erosion of the presumption of innocence and unnecessary incarceration.

Without additional process on the front-end, prosecutorial power goes unchecked. These small, almost administerial decisions that prosecutors make daily have a significant and lasting impact on the accused. With additional scrutiny, as well as pressure from courts and legislatures to implement the process, the front-end would create a deterrent for prosecutors. Unable to litigate each pre-trial detention case, prosecutors would be far less likely to bring meritless cases.

219. Bellin, *supra* note 24.

220. Natapoff identified several studies that demonstrated prosecutors forgo screening procedures and therefore accept the vast majority of cases recommended by arresting officers. As a result, prosecutors would not review the merits of the case until trial. Natapoff, *supra* note 10, at 1067–68 ("Central to the prosecutor's task is the screening of police arrest decisions and sorting through which cases should proceed as formal criminal cases. This is supposed to be an individuated inquiry on a number of fronts: prosecutors consider the evidence, but also make equitable and policy decisions about what cases deserve prosecution. With respect to minor offenses, however, prosecutors in some jurisdictions forgo the screening inquiry and convert arrests into charges more or less automatically. This fact is reflected in low rates at which prosecutors decline cases.").

221. *Id.*

That is to say, prosecutors would not be able to rely on preventive detention to "tire out" the defendant and extract an easy plea deal.

Legal scholars, including Pfaff and Jeffery Bellin, have similarly noted the need for reform amongst institutional players. In his latest book, Pfaff blames state and local prosecutorial policies for the current carceral trends and offers new rules and regulations designed to "reign in prosecutorial discretion."[222] Like Bellin, who critiques Pfaff's argument that prosecutors are not the only villain in this scheme and courts and legislatures are equally to blame, this Article maintains that increased scrutiny must come from all levels in order to achieve meaningful results.[223]

b. Public Safety Group Counterarguments

Community members concerned with public safety may emphasize that the overarching goal of pre-trial detention is public safety. Public safety is indeed the one legitimate goal of pre-trial detention; however, this pretext of protecting the public has deafened the conversation to the real harm done to pre-trial detainees. The current conversation undervalues the harsh and long-lasting harm caused to communities that are destabilized by the wanton hoovering up of their young people. This harm is very difficult to quantify as its impact is rooted in each individual that the system touches. Its cumulative effect is immense and beyond what any one statistic or anecdote can truly grasp.

Violent crime is indeed a problem plaguing many cities, but the vast majority of those detained prior to trial are not dangerous. If we deem every crime dangerous, it would promote a carceral state and thwart the very purpose of our justice system.[224] How do we determine the defendant is dangerous if we do not know whether he is

222. Bellin, *supra* note 24.

223. Bellin critiques Pfaff's argument that prosecutors are solely to blame, stating:

> [T]he unregulated [prosecutorial] power Pfaff aims to constrain is really the power to dispense leniency. There are already a series of rules that restrict prosecutors' ability to "impose" incarceration. Grand juries screen felony charges, petit juries determine guilt, judges select sentences, and defendants must agree to any plea deal. Those are as powerful a set of rules as anything reformers can conjure up. The one thing existing rules don't constrain is prosecutorial leniency, the ability to quietly open exit doors.

Bellin may very well be correct in that Pfaff's empirical analysis and proposed solutions may exacerbate the problem even further. But Bellin too falls prey to the trappings of a criminal justice system that on paper provides procedural protections, but in reality those protections fail to be actualized. Bellin, *supra* note 24.

224. Many states do not have limiting statutes that mimic those in the Federal Bail Reform Act of 1984. This means that even first-time arrestees charged with misdemeanors can be detained without bail.

guilty of what he is accused? Further, how can we be assured that the community is vindicated when the guilty plea was extracted from someone simply because he was incarcerated prior to trial?

Justice Marshall cautioned the majority in *Salerno* that the only reason the dangerousness of the accused comes into question during a bail hearing is because the defendant is being charged of a crime.[225] If the defendant is presumed innocent, then it seems difficult to argue that he is dangerous. In other words, a finding of dangerousness is akin to making an assessment of guilt based on the charges. One particularly perplexing circumstance is if the prosecution uses pre-trial detention as leverage to extract a guilty plea from the defendant that allows him to walk free on time served. Does his admission of guilt render him no longer too dangerous to rejoin the rest of society?[226] This is an absurd proposition that has only been made possible by the erosion of the presumption of innocence and the bail stage's likeness to non-adversarial probable cause hearings. That said, as a society, the legitimacy of our justice system is attacked when we allow charging documents to be elevated to grounds for pre-trial detention.[227]

The traditional understanding of public safety needs to be expanded. We need a more patient justice system that is capable of effectively ferreting out baseless claims that can have such far reaching effects.

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225. United States v. Salerno, 481 U.S. 739, 767 (1987) (Marshall, J., dissenting).

226. Bibas, *supra* note 178, at 2547 ("First offenders will be more reluctant to sully their clean records by pleading guilty. This is especially true if they have reasonable chances of acquittal and particularly if their employers, friends, and family would disapprove of a criminal conviction. Repeat offenders probably are less reluctant to add a conviction to their existing rap sheet, at least if the new conviction is not much more stigmatizing than the previous ones.") (citing HANS ZEISEL, THE LIMITS OF LAW ENFORCEMENT 48 (1982) (explaining that defendants' desire to win immediate release gives prosecutors much more leverage to extract pleas from detained defendants than from those free on bail)).

227. Policing issues are worth mentioning because a defendant's first interaction with the justice system is the result of police engagement. Police officers often have the ability to frame the quality of the defendant's initial interactions based on how the incident is narrated—particularly with regard to bail. Based on recent DOJ investigations of various police departments and our society's heightened awareness of over policing, many may think that the rise of incarceration is connected to improper policing. There is no doubt that policing may be a contributing factor. Recent U.S. Department of Justice investigations taken place after police shootings of Black men, uncovered disturbing details about improper policing techniques and racial bias. *See, e.g.,* Mark Berman & Wesley Lowery, *The 12 key highlights from the DOJ's scathing Ferguson report*, WASH. POST (Mar. 4, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/03/04/the-12-key-highlights-from-the-dojs-scathing-ferguson-report/?utm_term=.b03e71f4420a (last visited Jun 19, 2017); Zina Makar, *Bail Reform Begins with the Bench*, N.Y. TIMES (Nov. 17, 2016), https://www.nytimes.com/2016/11/17/opinion/bail-reform-begins-with-the-bench.html (last visited Jun 19, 2017) (identifying a causal relationship between faulty police reports and unnecessary pre-trial incarceration).

B. Leveraging Emerging Supreme Court Trends

In addition to his concerns over pre-trial detention, Justice Marshall lamented Justice Rehnquist's treatment of procedural due process. But the two are not mutually exclusive. Justice Marshall identified that the most critical misstep taken by the Court was its restriction of the presumption of innocence. The words of Justice Marshall still ring true: "But at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves."[228] The erosion of the presumption of innocence has become one of the greatest hurdles to reforming and increasing pre-trial scrutiny.

Recently, the Supreme Court was presented with another opportunity to address the presumption of innocence in *Nelson v. Colorado*.[229] The Court addressed the question of whether Colorado is "obliged to refund fees, court costs, and restitution exacted from the defendant" if his conviction is overturned.[230] The Colorado law at issue required the formerly convicted defendant to file a separate civil suit to prove affirmative innocence in order to gain back restitution fees.[231] The Court emphatically reaffirmed the significance of the presumption of innocence by stating, "Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions."[232]

Fortunately, the Court in *Nelson* addressed the misgivings raised by *Bell v. Wolfish*.[233] The Court opined, "Colorado misapprehends *Wolfish*."[234] Justice Ginsburg, writing for the majority, clarified the remarks made by Chief Justice Rehnquist almost four decades ago and stated, "*Wolfish* held only that the presumption does not prevent the government from 'detain[ing a defendant] to ensure his presence at trial . . . so long as [the] conditions and restrictions [of his detention] do not amount to punishment, or otherwise violate the Constitution.'"[235] Justice Ginsburg further qualified Justice Rehnquist's statement and cautioned that a criminal procedure could violate due process if it "'offends some principle of justice so rooted in the tradi-

228. United States v. Salerno, 481 U.S. 739, 767 (1987) (Marshall, J., dissenting).
229. 137 S. Ct. 1249, 1252 (2017).
230. *Id.*
231. *Id.*
232. *Id*. at 1251.
233. *See supra* Part I.B.2. for a discussion on *Bell v. Wolfish*.
234. Nelson v. Colorado, 137 S. Ct. at 1255 n.8.
235. *Id.*

tions and conscience of our people as to be ranked as fundamental.' The presumption of innocence unquestionably fits that bill."[236]

Through *Nelson* the Court breaks the once rigid understanding of the presumption of innocence and demonstrates its long reach to wrongful conviction cases.[237] It is unclear how broad the Court will go in interpreting the presumption of innocence, but like *Frye* and *Lafler* in the plea-bargaining context, *Nelson* is an indication that the Court believes the presumption of innocence provides protection to defendants outside of the trial stage.

State institutional actors should seize *Nelson* as an opportunity to leverage and recharge the presumption of innocence in pre-trial hearings.[238] Improving procedural protections in a pre-trial and post-trial dominated spectrum is critical to ensuring a just legal system.

Conclusion

The criminal justice system has progressed into a merciless cycle that displaces procedural protection based on the false assumption that a trial will guarantee a just result. With little regard to the dynamic needs of individual cases, the majority of defendants pass through the criminal justice system with little to no scrutiny given to their cases. The steps taken to manage the volume plaguing the justice system have deformed substantive rights by displacing vital procedural protections. The harms of this displacement are most visible in the bail context and trickle down to the plea-bargaining phase. Due to procedural displacement, the pre-trial stage, a regulatory stage that

236. *Id*. at 1256 n.9 (internal citations omitted).

237. "Even in the context of restitution after a wrongful conviction, Respondents rely on the plain language of *Bell v. Wolfish*, stating, 'The presumption of innocence applies only at criminal trials, not at hearings to establish compensation for defendants whose convictions have been overturned.'" Brief for Respondent at 40, Nelson v. Colorado, 37 S. Ct. 1249 (2017) (No. 15-1256), 2016 WL 7368656.

238. As briefly mentioned *supra* note 215, my work in progress explores solutions to limit preventive detention statutes. I end this Article with *Nelson* because I believe Justice Alito's concurrence provides a rare moment in the Supreme Court's discourse that will continue the constitutional dialogue of the presumption of innocence and pre-trial detention. In his concurrence, Justice Alito critiques the legal vehicle in which Justice Ginsburg, and the majority, chose to analyze the case before it. Justice Alito writes, "The Court cannot convincingly explain why *Mathews*' amorphous balancing test stops short of requiring a full return to the status quo ante when a conviction is reversed." *Nelson*, 137 S. Ct. at 1261. This is a critical point—could the application of the *Mathews* test prove to be unintentionally prophetic and open the door to restitution-like remedies for wrongful pre-trial detention? While rare, the transformation of a critique in a dissent has occasionally found its way to becoming the guiding logic in future majority opinions. *See, e.g.,* Garrett Epps, *In Praise of Dissent*, The Atlantic (June 5, 2017), https://www.theatlantic.com/politics/archive/2016/06/in-praise-of-dissent/485531/.

was intended to initiate criminal proceedings, has become punitive because the presumption of innocence fails at its core.

This Article is intended to bridge the gap between the pre-trial, trial, and post-trial phases of the justice system by establishing the foundation for further discussion on the presumption of innocence, bail reform, and effects of mass incarceration. Bail is traditionally viewed as an outlier stage, and this Article hopes to change that perspective by demonstrating the need to view bail as a vital part of criminal proceedings that goes hand-in-hand with case outcomes.