"WHAT WILL BECOME OF THE INNOCENT?"[1] Pretrial Detention, the Presumption of Innocence, and Punishment Before Trial

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Introduction

On any given day, approximately 500,000 individuals are in pretrial detention in the U.S., held in local jails not because they are considered a flight risk or a public safety risk, but because they are poor and cannot afford bail or a bail bond. Over the course of a year, millions of Americans cycle through local jails, most there for anywhere from a few days to a few weeks.[2] As with all aspects of the American criminal justice system, these individuals are disproportionately Black and poor.[3]

Unfortunately, these individuals are also dramatically understudied, their experiences largely missing from the sizable body of academic research on incarceration. Although the past decade has seen an increase in attention to pretrial detention by researchers within and outside of the academy, this work has been limited by the absence of qualitative research. This has meant that the voices and experiences of those who have been detained have not been a part of this work and have neither driven nor even really informed how scholars think about and understand pretrial detention. While most scholarship on pretrial detention focuses on increased rates of conviction for defendants who are being detained pretrial, this article, drawing on interviews with a group of individuals who were detained pretrial, argues that these experiences call for a revisiting of constitutional considerations related to pretrial detention. In particular, I argue that scholars must revisit and critique standing case law regarding the application—or lack thereof—of constitutional principles that guide the operation of the criminal justice system, particularly the presumption of innocence and the prohibition against punishment without trial.

Over the latter half of the 21st century, a series of Supreme Court decisions took an increasingly permissive interpretation of pretrial detention, eventually determining that pretrial detention violates neither the court-established doctrine of the presumption of innocence nor the fifth and fourteen amendment protections against punishment without due process. Taken together, these decisions laid the groundwork upon which this country experienced a double digit increase in the rate at which pretrial defendants are detained, as well as an exponential increase in the sheer number of such people detained. In this article, I take a sociological approach to the constitutional questions intrinsic to the pretrial incarceration of the unconvicted, focusing on the group of people whose pretrial detentions most directly complicate the Court's decisions: those people who are detained pretrial and then never convicted of the crimes for which they were held. Notably, despite the ways in which the

2. Ram Subramanian et al., *In Our Own Backyard: Confronting Growth and Disparities in American Jails*, Vera Institute of Justice (2015).

3. *Id.*; Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparities in State Prisons*, The Sentencing Project (2016); Bruce Western & Becky Petit, *Black-White Wage Inequality, Employment Rates, and Incarceration*, 111 Am. J. of Soc. 553 (2015).

experiences of these never-convicted people call into question case law regarding individuals receiving the presumption of innocence and due process protections against punishment before trial, this group is absent from contemporary criminological and sociological studies. I begin this article with a brief review of the key Supreme Court cases on the constitutionality of pretrial detention. I then provide an overview of current social science research on pretrial detention and situate this research therein, before describing my data and methods. I then present my findings, along with a discussion.

I. Literature Review

This section begins with a review of the Supreme Court cases that have addressed questions regarding the constitutionality of pretrial detention, with a particular focus on holdings related to the presumption of innocence and punishment before trial. This discussion is followed by a summary of the burgeoning body of contemporary social science research on pretrial detention as well as a discussion of older, more comprehensive pretrial detention research.

A. *Constitutional Considerations for Pretrial Detention*

The presumption of innocence was enshrined in American law in 1895 via a Supreme Court holding in *Coffin v. United States*, in which the Court ruled that a lower court judge had erred by refusing to instruct a jury that the defendants in the case were innocent until proven guilty.[4] After detailing the lengthy history of the presumption of innocence from the Old Testament through Greek, Roman, and British law, the Court declared that the "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."[5]

In contrast to the presumption of innocence, which is not written anywhere in the US Constitution (although has been interpreted by the Court to be part of the 5th, 6th, and 14th amendments), the prohibition against punishment before trial come directly from the Bill of Rights' fifth amendment protection, "No person shall be . . . deprived of life, liberty, or property, without due process of law"[6] and then restated in the fourteenth amendment declaration, "nor shall any State deprive any person of life, liberty, or property, without due process of law."[7]

Although neither case law establishing the presumption of innocence nor the 5th or 14th amendments mention pretrial detention, throughout most of American history, the right to release for defendants on bail was recognized as a Constitutional right tied to both due process and the presumption of innocence. As Baughman thoroughly details in

4. Coffin v. United States, 156 U.S. 432 (1895).
5. *Id*. at 453.
6. U.S. Const. amend. V.
7. U.S. Const. amend. XIV.

her analysis of the evolution of bail in American criminal justice, "Early US law recognized the importance of bail rights due to the presumption of innocence. Due process demanded that a person maintain liberty and not be imprisoned or punished without appropriate legal action."[8] Over the latter half of the 20th century, however, a series of Supreme Court rulings fundamentally altered the law, "determining that detention before trial was not punishment and did not violate due process."[9] These cases were *Stack v. Boyle*,[10] *Bell v. Wolfish*,[11] and *U.S. v. Salerno*.[12]

In *Stack v. Boyle* (1951), a group of defendants who had been charged with conspiring to violate the Smith Act[13] contested the bail set by the District Court. After several different motions to reduce bail were dismissed, they filed a request for review by the US Supreme Court. The petitioners argued that their bail, which was set at $50,000 per person, violated the Eighth Amendment's prohibition against excessive bail given their financial resources and low flight risk.[14] The Court agreed and explicitly tied this to the presumption of innocence, noting, "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[15]

This ruling notwithstanding, bail rulings beyond defendants' ability to pay remained common occurrences. In 1979, the Supreme Court fundamentally redefined the presumption of innocence and laid the foundation for the current reality in its ruling in a class action suit brought by individuals detained pretrial in New York City's Metropolitan Correctional Center (MCC). In *Bell v. Wolfish*,[16] individuals who were detained pretrial at MCC challenged the legality of conditions they experienced in detention, claiming that double-bunking, restrictions on reading materials, cavity searches, and shakedowns amounted to punishment before conviction. Both the district and appellate courts largely agreed with plaintiffs, but the Supreme Court did not. Instead, the Court noted that notwithstanding the punitive experience of detained individuals, their detentions served a regulatory function, not a punitive one, and thus did not legally constitute punishment: "Absent a showing of an expressed

8. Shima Baradaran Baughman, The Bail Book: A Comprehensive Look at the bail in America's Criminal Justice System 29 (Cambridge University Press 2018).
9. *Id.; see Id., History of Bail in America* and *Bail as a Constitution Right* for in-depth analyses of the history of bail and bail as a constitutional right in the US.
10. Stack v. Boyle, 342 U.S. 1 (1951).
11. Bell v. Wolfish, 441 U.S. 520 (1979).
12. United States v. Salerno, 481 U.S. 739 (1987).
13. 18 U.S.C. § 2385 (1940). The Alien Registration Act, more commonly known as The Smith Act, criminalized advocating the overthrow of the U.S. government by force or violence and required all non-citizen adult residents to register with the federal government. Defendants in *Stack v. Boyle*, who were members of the Communist Party, were accused of the former.
14. *Stack*, 342 U.S. at 3.
15. *Id.* at 4.
16. *Bell*, 441 U.S. at 520.

intent to punish, if a particular condition or restriction is reasonably related to a legitimate nonpunitive governmental objective, it does not, without more, amount to 'punishment.'"[17]

In addition to determining that uncomfortable conditions of pretrial detention did not constitute punishment before conviction, the Court also addressed and unambiguously rejected the contention that pretrial detention violated the presumption of innocence, ruling that "[t]he presumption of innocence is a doctrine that allocates the burden of proof in criminal trials," and, as such, "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."[18]

In 1987, the Supreme Court further entrenched the legitimacy of pretrial detention in *U.S. v. Salerno*,[19] upholding the 1984 Bail Reform Act's provisions allowing the government to detain an individual before trial.[20] The law in question was one that allowed for the intentional "preventive" detention of allegedly dangerous individuals through the denial of bail, rather than somewhat more incidental pretrial detention of individuals who cannot afford bail, but the Court's ruling still had repercussions for the latter, and more common, form of pretrial detention. In addition to ruling that the Eighth Amendment prohibition against excessive bail does not constitute a right to bail, the Court also cited the *Bell v. Wolfish* decision, noting that the Fifth Amendment's due process clause did not apply because if the intent behind pretrial detention is not punitive, the detention cannot be determined to be punishment: "Given the [Bail Reform] Act's legitimate and compelling regulatory purpose and the procedural protections it offers, [it] is not facially invalid under the Due Process Clause."[21]

In a forceful dissent, Justice Thurgood Marshall called out the majority's ruling as "sophistry" and took issue with the illogic of almost every argument therein. He took particular umbrage with two arguments in the majority ruling: first, the notion that the regulatory intent of pretrial detention precluded any consideration of its punitive effect and, second, what he viewed as effective elimination of the presumption of innocence.

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17. *Id.*
18. *Id.* at 533, 582 n.11.
19. *See Salerno*, 481 U.S. at 747.
20. The U.S. Supreme Court was not the only body that was moving toward a more restrictive approach for pretrial defendants over the latter half of the 20th century. Starting in the late 1970s/early 1980s, both the U.S. Congress and many state legislatures were beginning to enact the first generation of "tough on crime" laws, including those that increased the use of pretrial detention. Marc Mauer, Race to Incarcerate (2006). In 1984, Congress passed the Bail Reform Act, the most notable feature of which was the explicit allowance of preventive detention of defendants not accused of capital crimes. John S. Goldcamp, *Danger and Detention: A Second Generation of Bail Reform*, J. Crim. L. & Criminol. 76, 1 (1985).
21. *Salerno*, 481 U.S. at 739.

> But our fundamental principles of justice declare that the defendant is as innocent on the day before his trial as he is on the morning after his acquittal. Under [the Bail Reform Act] an untried indictment somehow acts to permit a detention, based on other charges, which after an acquittal would be unconstitutional. The conclusion is inescapable that the indictment has been turned into evidence, if not that the defendant is guilty of the crime charged, then that left to his own devices he will soon be guilty of something else. "If it suffices to accuse, what will become of the innocent?"[22]

B. *Pretrial Detention after* U.S. v. Salerno

The 20 to 30 years spanning the end of the 20th Century and beginning of the 21st Century saw the greatest increase in incarceration in American history and is the period of time most commonly associated with the rise of mass incarceration. While the dramatic growth of the American prison population during this period has garnered the most attention, jail populations also grew exponentially, driven primarily by the detention of unconvicted pretrial defendants (although the number of convicted individuals in jail serving short sentences also increased during this time). As the Vera Institute report, *Incarceration's Front Door: The Misuse of Jails in America* found, between 1983 and 2013, jail admissions almost doubled, increasing from 6 million to 11.7 million.[23] Over roughly the same period of time, the proportion of people in jail who were unconvicted increased from 53 to 64 percent[24]. Cumulatively, the increase in pretrial detention populations has been extreme. In 1983, a BJS jail census found that 113,984 unconvicted individuals were incarcerated in local jails awaiting adjudication.[25] By 2008, this number had more than quadrupled to 494,300.[26]

Amid this increase, the past fifteen years have seen a steady flow of research on pretrial detention, focusing primarily on the effect of pretrial detention on criminal justice outcomes. While specific findings have varied based on the study sample, jurisdiction, etc., the research has been overwhelmingly conclusive in demonstrating the negative effects of pretrial detention on case outcomes, including both convictions and sentence severity[27]. For example, the New York City Criminal Justice Agency

22. *Id.* at 764 (Marshall, T., dissenting).
23. Subramanian et al., *supra* note 2, at 7.
24. Leon Digard and Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, Vera Inst. of Just. (2019).
25. *Id.* at 5.
26. Todd D. Minton & William J. Sabol, Jail Inmates at Midyear 2008–Statistical Tables 9 (2009).
27. *See, e.g.*, Marian R. Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, 28 Crim. Just. Rev. 299, 300 (2003); Meghan Sacks & Alissa R. Ackerman, *Pretrial Detention and Guilty Pleas: If They Cannot Afford Bail They Must Be Guilty*, 25 Crim. Just. Stud. 265, 266–67 (2012); James C. Oleson et al., *The Effect of Pretrial Detention on Sentencing in Two Federal Districts*, 33 Just. Q.1103, 1115 (2014); Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan L. Rev. 711,714 (2017); Nick Petersen,

(NYCJA) recreated Caleb Foote's foundational 1958 New York Bail Study (discussed further below), but with a much larger dataset and with more advanced statistics.[28] Looking at more than 40,000 cases that proceeded through New York City's Criminal Courts between Oct. 1, 2003 and Jan. 31, 2004, NYCJA analysts found that, controlling for relevant defendant and case characteristics, pretrial detention status had large and statistically significant effects on rates of conviction, carceral sentences, and sentence length for both felony and misdemeanor defendants.[29]

In addition to consistently showing a strong positive relationship between being detained and being convicted and sentenced to incarceration, research on pretrial detention has repeatedly shown that racial disparities in pretrial detention explain some of the racial disparities in conviction and sentencing outcomes. Despite local variation in bail and pretrial detention practices across the U.S., Black defendants are more likely to be detained pretrial than other defendants, which then increases the likelihood that they will be convicted and receive more severe sentences.[30] Hart, MacDonald, and Raphael specifically highlight the explanatory power of pretrial detention status on racial disparities in case outcomes, underscoring the role of disparities in detention in driving disparities in incarceration.[31]

A much smaller body of work has sought to measure the effect of pretrial detention on outcomes beyond the criminal justice system. Using

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Cumulative Racial and Ethnic Inequalities in Potentially Capital Cases: A Multi-Stage Analysis of Pretrial Disparities, 45(2) Crim. Just. Rev. 225, 228 (2020).

28. *See, e.g.*, Mary Phillips, *Pretrial Detention and Case Outcomes, Part 1: Nonfelony Cases*, New York City Criminal Justice Agency, Inc. (2007); Mary Phillips, *Pretrial Detention and Case Outcomes, Part 1: Felony Cases*, New York City Criminal Justice Agency, Inc. (2008); Mary Phillips, *A Decade of Bail Research in New York City*, New York City Criminal Justice Agency, Inc. (2012).
29. *Supra* note 28.
30. *See, e.g.*, Traci Schlesinger, *The Cumulative Effects of Racial Disparities in Criminal Processing*, 7 The J. of the Inst. of Just. & Int'l Stud. 261, 271 (2007); Michael R. Menefee, *The Role of Bail and Pretrial Detention in the Reproduction of Racial Inequalities*, 12 Socio. Compass 1, 6 (2018); Katherine Hood & Daniel Schneider, *Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation*, 5 The Russell Sage Found. J. of Soc. Sci. 126, 128–29 (2019); Marisa Omori & Nick Petersen, *Institutionalizing Inequality in the Courts: Decomposing Racial and Ethnic Disparities in Detention, Conviction, and Sentencing*, 58 Criminology 678, 680–81 (2020); Petersen, *supra* note 27, at 228; Nick Petersen & Marisa Omori, *Is the Process the Only Punishment?: Racial-Ethnic Disparities in Lower-Level Courts*, 42 L. & Pol'y 56, 56 (2020); Brandon P. Martinez et al., *Time, Money, and Punishment: Institutional Racial-Ethnic Inequalities in Pretrial Detention and Case Outcomes*, 66 Crime & Delinq. 837, 838 (2020).
31. Michelle Elizabeth Hart, Race, Sentencing, and the Pretrial Process (2006) (M.A. Thesis, University of Maryland) (on file with University of Maryland libraries); John MacDonald & Steven Raphael, An Analysis of Racial and Ethnic Disparities in Case Dispositions and Sentencing Outcomes for Criminal Cases Presented by the Office of the San Francisco District Attorney 5–8 (2017).

data from administrative court and tax records, Dobie, Golden, and Yang found that pretrial detention decreases employment in the formal sector and reduces the receipt of employment and tax-related government benefits.[32] Scott-Hayward and Fradella reviewed media stories about people detained pretrial to identify non-financial harms, highlighting familial disruption, including the loss of child custody for parents detained pretrial.[33]

The importance of this research notwithstanding, there are two distinct but interrelated gaps in this burgeoning body of work: first, the absence of qualitative research on pretrial detention and, second, the lack of attention to what is perhaps the most ethically egregious aspect of pretrial detention: the pretrial detention of people who are ultimately not determined to have committed a crime. Because the vast majority of research on pretrial detention is quantitative and the majority of people detained pretrial are convicted, the burgeoning contemporary body of research on pretrial detention has largely overlooked people who are detained but not convicted. Not since Caleb Foote's Philadelphia and New York Bail Studies in 1953 and 1957, respectively, have social scientists centered qualitative methods in their efforts to understand the implementation or effect of pretrial detention.

C. *Caleb Foote's Early Bail Studies*

Directed by Foote and carried out by Foote and a cadre of his students from the University of Pennsylvania Law School, the 1953 Philadelphia bail study and the 1957 New York bail study continue to set the standard for comprehensive research on pretrial detention.[34] Combining quantitative analysis of criminal court data with qualitative data garnered through courtroom observations, interviews with defendants, and in custody observations conducted by graduate students who obtained jobs as correctional officers, Foote and his students sought to understand:

> [T]he effect of bail administration upon the accused with regard to the likelihood that he would be able to obtain pretrial conditional release, the standards and practices employed in setting the amount of bail, the impact of pretrial imprisonment upon the accused's ability to prepare a defense, the disposition of the cases of those subjected to pretrial imprisonment, and the comparative dispositions of cases in which the convicted defendant had and had not been free on bail pending trial.[35]

32. Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 201, 201 (2018).
33. *See* Christine S. Scott-Hayward & Henry F. Fradella, Punishing Poverty: How Bail and Pretrial Detention Fuel Inequalities in the Criminal Justice System (2019).
34. *See* Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. Pa. L. Rev. 1031 (1954); *see also* George J. Alexander et al., *A Study of the Administration of Bail in New York City*, 102 U. Pa. L. Rev. 693 (1958).
35. Caleb Foote, *The Bail System and Equal Justice*, 23 Fed. Probation 43, 44–45 (1959).

Findings from both studies were very similar. Consistent with more recent research on pretrial detention, Foote found that defendants who were detained pending adjudication because they could not make bail were significantly more likely to be convicted and, if convicted, significantly more likely to be sentenced to prison than defendants who were out on bail during the adjudication process.[36] Although Foote acknowledged that these results were not necessarily causal given the numerous factors that affect case outcomes and sentencing, he argued that "the markedly similar differences [between the outcomes of detained and released defendants] obtained in both studies makes it difficult to escape the conclusion that pretrial incarceration disadvantages the accused in the disposition of his case."[37]

In addition to this, however, Foote and his students also called attention to the fact that somewhere between 10 and 20 percent of defendants who were incarcerated pending adjudication were never convicted of the crimes for which they were held.[38] Despite not being convicted, these defendants spent anywhere from 13 to 149 days in custody, a finding that Foote argued was in conflict with the presumption of innocence as "a basic foundation of our criminal procedure."[39] Subsequently, in 1965, Foote published a series of articles titled "The Coming Constitutional Crisis in Bail" in which he highlighted a number of constitutional concerns with the practice of bail and pretrial detention, including equal protection issues related to the financial discrimination inherent to cash bail and due process issues related to detaining unconvicted defendants.[40]

Much has changed since Foote's time and, yet, amid these changes, many of these issues persist. Thus, like much of Foote's work, this article underscores shortcomings in American criminal law based on the experiences of the lived experiences thereof. Below, I provide an overview of my research methods before moving into a discussion of findings and implications.

II. Data and Methods

This article draws on interviews I conducted with six people who were detained pretrial but never convicted of the crimes for which they were detained; these interviews were part of a larger research project in which I conducted interviews with 67 people who had previously been detained pretrial in the Cook County Department of Corrections, aka the Cook County Jail, in Chicago, IL. (The remaining 61 respondents all pled guilty, consistent with established research on pretrial detention.) While

36. *See, e.g.*, Foote, *supra* note 34, at 1053; Foote, *supra* note 35, at 47.
37. Foote, *supra* note 35, at 47.
38. *Id.*
39. *Id.* at 43.
40. *See* Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 965 (1965); *see also* Caleb Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. Pa. L. Rev. 1125, 1135 (1965).

six people is a small sample size from which to infer larger patterns, there are both methodological and substantive justifications for doing so.

First and foremost, despite the exponential rise in the number of people detained pretrial over the past thirty years, there is *no contemporary research* that focuses on the experiences and outcomes of people who are detained pretrial but never convicted; although this a minority experience among people who are detained, the number of people to whom this has happened likely numbers well into the millions, making it a small but nonetheless regular aspect of the criminal legal system. Despite the millions of people who have likely had this experience, intrinsic characteristics of the criminal legal system make it extremely difficult to identify and reach out to this population specifically. The people to whom this has happened are spread out across the 3,000 county criminal justice systems that exist across America; within each county, a multiplicity of criminal justice system actors play a role in pretrial detention and release, including judges, prosecutors, sheriffs, and defense counsel, at minimum. This means that there is no clear entry point for collecting either qualitative or quantitative data on this phenomenon.

Despite the inherent difficulty in collecting these data, they are important insofar as they offer a unique vantage point with which to consider how fundamental constitutional protections intended to safeguard innocent people operate in the age of mass incarceration. Moreover, as with all aspects of criminal justice system contact, this population is not evenly distributed across society, but is disproportionately Black, poor, and male. To truly understand the incursion of the criminal justice system into Black communities, we cannot ignore this phenomenon.

I recruited study respondents at various Cook County Courthouses; through social service agencies; on internet message boards; and by word of mouth. Per Institutional Review Board (IRB) Human Subjects guidelines, respondents had to be at least eighteen years old to participate.[41] All respondents had to have spent at least two nights in jail following an arrest but without having been convicted of that crime; the majority had been detained much longer, with most respondents having been detained for at least a month and about one-quarter having been detained pretrial for six months or more. Most respondents had been detained once in their lives, although approximately one-third had multiple detention experiences. In the case of respondents who had experienced multiple pretrial detentions, each detention was addressed separately in the interview. The charges for which respondents had been arrested ranged from shoplifting to murder, although by far the majority were either drug possession or domestic violence. I interviewed 39 Black men, 7 White men, 14 Black women, and 7 White women, who ranged in age from 18

41. *See* 705 Ill. Comp. Stat. Ann. 405/5-410 (2019). Illinois is one of the few states that allows seventeen year-olds to be held in adult jails if minor is being charged as an adult.

to 60.[42] Interviews addressed a wide range of topics, including respondents' arrest, detention, and court experiences; employment status and economic well-being before and after detention; interactions with attorneys; relationship and contact with family and friends during detention; case outcomes and sentence; and more. The interviews were conducted in semi-private locations, such as neighborhood library branches, community centers, or offices at the courthouses, and lasted from 30 to 90 minutes; all but two were recorded.

III. "What Will Become of the Innocent?": Learning from the Experiences of Defendants Who Are Detained but Never Convicted

I begin this Part with in-depth overviews of the experiences of two of the people I interviewed who were never convicted of the crimes for which they were detained. These overviews function almost as case studies, allowing me to provide a detailed examination of defendants' pretrial processes in order to elucidate the constitutional considerations discussed above. Following these case studies, I move into separate discussions of the presumption of innocence and punishment before trial, layering in the experiences of four other respondents who were detained but never convicted. I draw particular attention to cases involving allegations of domestic violence or drug possession, two of the most common types of allegations for which people are detained but never convicted.

Calvin and Aaron were both arrested for crimes they did not commit, both were formally charged with those crimes, and both spent time in jail because they could not afford to pay bail. Ultimately, both were released from custody absent a finding of guilt, Calvin because the prosecutor dismissed all charges in a *nolle prosequi*, or "decline to prosecute," and Aaron because he was acquitted at a bench trial. Their experiences, described below, provide a window into one of the most disturbing—and yet often ignored—aspects of pretrial detention: the incarceration of those individuals who are never convicted of a crime.

A. *Calvin*

I interviewed Calvin at the South Shore Cultural Center, a historic landmark operated by the Chicago Park District on the southeast side of the city along the shore of Lake Michigan. Calvin and I had agreed to meet on the second floor of the Cultural Center in one of the classrooms that are used for clubs and afterschool programs. One of the first things that stood out to me about Calvin was the packet of papers he held. "I brought these to show you," he told me, handing me the packet before we even introduced ourselves or sat down to begin our conversation.

42. This was a convenience sample, not a random sample. White respondents were overrepresented in my sample and the absence of any Latino/x respondents is a shortcoming; Latino/x comprise approximately 15 percent of the Cook County Jail population.

Looking down at the papers in my hand, I quickly recognized them as a State of Illinois Record of Arrests and Prosecutions, more commonly known as a "RAP sheet." As we sat down, Calvin told me that he had been arrested five times in his life, and held in jail on three of those occasions. Every time, the charges had been dismissed anywhere from a few days to a few weeks later. Despite Calvin never having been convicted of a crime, it was clear that these experiences had a lasting effect on his life. From his perspective, everything began about six years earlier when he was arrested for the first time.

At the time of his arrest, Calvin had recently been discharged from the Army and had walked to a local convenience store with friends to pick up beer on a Saturday afternoon. Unbeknownst to them, Chicago was in the midst of an overdose epidemic tied to fentanyl-laced heroin, and the Chicago Police Department (CPD) was on high alert. Walking out of the convenience store holding a 40 oz bottle of beer, Calvin greeted a couple of men who were standing outside the store dealing drugs. "I knew them and I knew what they was doing, but that wasn't part of my life," Calvin noted, pointing out that the guys selling the heroin were from his neighborhood and that he had not seen them since being discharged from the army a few weeks prior. Nonetheless, the conversation appeared incriminating and a few minutes later, a group of officers swooped in to arrest the men, including Calvin. "[The officer] saw me coming from the store and I had a forty-ounce beer, it wasn't open yet. He . . . grabbed me and arrested me. That's how I got my first case, right there . . . that's my first trip going [to jail]. It was just like 'wow!' I just got out the Army and I wasn't dealing heroin."

Calvin was handcuffed and taken down to the local police station and then transported to the courthouse, where he was placed in a holding cell with several dozen other men who had been arrested in the past twenty-four hours. Although he assumed that he was being arrested for dealing drugs based on conversations he overheard from the officers, Calvin did not learn what he was being charged with until he appeared before a judge at bond court almost twelve hours later. Appearing before the judge, next to a public defender he had never spoken with before, Calvin learned that he was being charged with attempted murder, as the heroin that he had not been involved in distributing was being connected to a series of fentanyl-related overdose deaths around the city.

The bond hearing was a blur, lasting no more than thirty seconds, and at the end, the judge set bail at $320,000. In Illinois's Deposit bond, or "D-bond," system, this meant that Calvin would need to come up with $32,000 to obtain his release. He was placed back in the "bullpen" with the other defendants and, at the end of the bond court session, transported to the jail through the underground complex that links Cook County's Criminal Courthouse with its jail. When he finally got access to a phone several hours later, Calvin made collect calls to his girlfriend and his mother to tell them what had happened and try to allay their concerns

about his sudden disappearance the day before. There was no discussion of trying to find $32,000 to bail him out, so he began the waiting process, mentally preparing to exonerate himself at his next court hearing.

The preparation turned out to be unnecessary. Exactly six weeks later, having had no contact with the public defender's office and no further information about his case, Calvin was brought from the jail to his next court hearing and told that the prosecution was dismissing the charge. Again, the court process occurred so quickly that Calvin barely understood what happened; it was not until several years later when he learned that he could request his RAP sheet that he saw that he had been "*nolle'd*". As he described it: "No sentence, whatever that means [pointing to the words *Nolle Prosequi* on his RAP sheet] . . . I don't even know what that means. They just threw it off."

Given the seriousness of the charge—attempted murder—one can only assume that the prosecution did not make the *nolle prosequi* decision because the charge was not worth pursuing, but rather that they lacked evidence to support this charge in court—never mind any less serious drug distribution charges. After telling the judge that Calvin was too dangerous to be out on the streets and requesting a bail amount to demonstrate this, the prosecution implicitly acknowledged its mistake, by *nolle'ing* all charges. The judge then ordered Calvin released, the Sheriff's Office complied, and Calvin was a free man. Of course, no one ever apologized to Calvin, nor did anyone ever give him any kind of explanation for what happened. Moreover, no one could take back the trauma that he had experienced over those six weeks, or the ways in which that experience framed much of his life in the following years. But more on that later.

B. *Aaron*

I met with Aaron in a cubicle at the Cook County Adult Probation Department's office in the basement of the Cook County Criminal Court Building. In contrast to Calvin, who has been arrested several times but never convicted of a crime, Aaron did end up being convicted of a felony in a subsequent case, about a year after being accused of the crime for which he was detained pretrial and, after nine months in custody, acquitted. At the time of our interview, Aaron was on felony probation for a drug-related charge and had been at the courthouse to check in with his probation officer. While Calvin was emphatic and outraged at how he had been treated by the criminal justice system, Aaron was understated and matter-of-fact, seemingly resigned to his circumstances. Aaron was also young. He was eighteen at the time of our interview, and seventeen at the time of the arrest that would result in him spending nine months in Cook County Jail before his acquittal.

Growing up in a low-income Black neighborhood on the South Side of Chicago, he had long seen police in his neighborhood and knew a number of people, including those his age or younger, who had been

arrested. Aaron's first personal experience with the criminal justice system occurred when he was seventeen. He was hanging out with a couple of friends after school one afternoon, cruising around the neighborhood in a friend's car, when police sirens and lights went on and the group was pulled over. Ordering everyone out and searching the car, the officers quickly found what they had been looking for: an expensive jacket that had been forcibly taken from another teenager in the neighborhood earlier that afternoon. The young man's mother had called the police and CPD had been looking for the car that Aaron was in.

Aaron and his friends were arrested on the spot and taken to the police station where they were booked for armed robbery and, because seventeen year-olds who are accused of felonies are considered adults in Illinois's justice system, transported to the Cook County Criminal Court to face criminal charges. At bond court the following morning, Aaron met briefly with a public defender who asked a short list of questions that might affect bond determination—prior criminal history, ties to the community, education and employment status—and then he appeared before the judge. At the end of a bond hearing that was even shorter than Aaron's meeting with the public defender, the judge made his decision: $30,000 "D," or $3,000 deposit to obtain release. By almost all objective measures, a more lenient bail determination would have been appropriate: although robbery is a class two felony, Aaron posed neither a danger to the community nor a high flight risk. He had no prior criminal record; as a teenager who lived at home, attended school regularly, and had lived in the same neighborhood his whole life, he was unlikely to abscond; in addition, he had no income of his own and came from a poor family.

When I asked Aaron what he thought when he learned that he could get out for $3,000, he told me, "It was like no thought behind it because, like, me staying in a household with my mother, it's already a struggle for her to come up with what she has for the rent once a month. I'm like wow, there's no thought that I'm going to leave here. It's either I'm in the cell for a long time or until the truth come out."

"The truth," that Aaron referred to was simple and uncontested by anyone involved in the jacket robbery: Aaron had not participated in any way, was not with the other young men at the time, and had no way of knowing what they had done. Upon being arrested, Aaron's friends vouched for him, telling CPD that he had not been involved while acknowledging that they had. The victim, too, told the police and later the prosecutor that he had been robbed by three teenagers and that Aaron was not one of them.

When Aaron finally got in touch with his mother and told her what had happened, she was adamant that he not plead guilty to something he hadn't done. Concerned that the public defender would not take the case to trial, Aaron's mom reached out to his uncle, who agreed to pay for a private attorney. Nine months after his arrest, a few months after his eighteenth birthday, Aaron was tried in front of a judge at a bench trial.

The young men he had been in the car with, who had since plead guilty, and the young man who was robbed of his jacket, all testified that he had had nothing to do with the robbery. The judge found Aaron not guilty and he was released. I asked Aaron how he felt when the judge declared him not guilty:

> To me, it was like, I wish instead of taking nine months that it did that it could have been a lot more sooner than it was, you know. Just so what was said out of my mouth about what I know that I did—nine months, you see something different after nine months compared to what was being said at day one?

As with Calvin, Aaron's life was indelibly marked by his detention, regardless of the fact that he was acquitted. Below, I use the experiences of Calvin and Aaron, as well as those of four other people who were detained but not convicted to examine how the presumption of innocence and due process protections against punishment before trial are experienced in their lives.

C. *Presumption of Innocence*

Unsurprisingly, neither Calvin nor Aaron perceived a presumption of innocence during the course of their detentions. Instead, both noted that they were treated as if guilty from the moment they were arrested. As Aaron recalled, despite knowing that he had done nothing wrong, the way he was treated at the point of arrest convinced him that he would be found guilty. "It was like, the officers, as I was being arrested, one of the officers was telling me what the charges was, how much time that it carries. I'm like man, that's where I'm going to be." Calvin concurred: "I guess as soon as you get arrested all of your rights are gone out the door." Bringing up a similar point later in our interview, Calvin again pointed to the experience of the criminal justice system and the actions of the criminal justice system actors as demonstrating their presumption of his guilt: "Just being in the County [jail], the way they treat you like you already convicted. Like they already got your clothes ready for you to go down [to the penitentiary]."

While Calvin and Aaron's experiences may not technically conflict with the presumption of innocence as redefined by the Supreme Court's 1979 *Stack v. Boyle* ruling, their experiences and those of others who are detained but never convicted belie the functional utility of this principle when so defined. As the only person I interviewed whose case went to trial, Aaron's experience highlights the unique irony of being presumed innocent at trial while simultaneously being detained in a correctional setting. For the other respondents I interviewed, the presumption of innocence is even more irrelevant, a constitutional protection that never applies to them or their cases since they, like the majority of criminal defendants, never go to trial.[43]

43. While there are no national statistics on the number or percentage of individuals detained only to be released upon dismissal of charges prior to trial, available

Below, I detail the experiences of other defendants who were detained but never convicted in order to highlight the meaninglessness of the Court's definition of the presumption of innocence. As discussed below, there are two types of criminal allegations for which people are especially frequently detained but not convicted: drug possession and domestic violence.

1. "It Was Zero Point Zero Zero Percent of Drugs."

One of the most common reasons why defendants spend time in jail before having their charges dismissed is because they are awaiting results from the drug lab. According to Richard Devine, who was the Cook County State's Attorney from 1996 through 2008, approximately 30 percent of drug cases in Cook County are dismissed upon completion of lab results. Nonetheless, because bail determinations are based primarily on charges, defendants often sit in jail in the meantime. Moreover, although lab results are supposed to be completed within a couple days of arrest, in Cook County—as in many jurisdictions around the country—the lab is overworked and under-funded and results routinely take 4–6 weeks to be completed. The experiences of Sam and Nicole, described below, provide a window into this experience for innocent defendants.

Sam, a white man in his mid-30's, spent a month and a half in jail awaiting lab results. He was pulled over on a routine traffic stop and arrested for possession of a controlled substance (PCS) when the police officer mistook a bag of laundry detergent for cocaine:

> I had a box of detergent and some detergent in a zip lock bag with soap and washing supplies, bleach for laundry. They took the Ziploc bag and assumed it was cocaine. Even though it was written on there, 'soap'—it had all the soap and washing products right there. I couldn't pay $6,600 to get out. I was very frustrated. One, I knew that I didn't have any cocaine. The police officers didn't listen to me, didn't believe me. They jumped a leap there with looking at a bunch of bleach and washing detergent and then assume it's cocaine when one could see with the blue little crystals in the soap, it didn't look like what they ought to know cocaine looks like and smells like . . . it was unjust and I was presumed guilty . . .

Legally, the presumption of innocence means that if Sam had gone to trial, the judge and jury would have to presume his innocence and the prosecution prove his guilt "beyond a reasonable doubt." Practically speaking, however, Sam was treated as guilty at every step of the way. First, the police "jumped a leap" and assumed his laundry supplies were drugs. At court, the prosecution assumed the police's interpretation to be correct and filed criminal charges for possession of a controlled substance. Based on the type and volume of drugs Sam was alleged to have possessed—a large Ziploc bag, filled with cocaine—the judge set his bail

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data on criminal trials makes clear the rarity with which people who are detained pretrial ever make it to trial in order to experience the presumption of innocence.

at $66,000 "D," requiring a $6,600 deposit bond to get out. Unable to afford bond, Sam had no choice but to stay in custody until his next court date, the preliminary hearing, which the judge scheduled for 39 days later. When Sam finally returned to court after almost 6 weeks in jail, the lab report had still not arrived. At the assent of the prosecution and the defense, the judge was about to issue a continuance, sending Sam back to jail for another month. Desperate and feeling like he had nothing to lose, Sam spoke up:

> Sam: I was in court and the judge said, 'Was the lab back?' [and the prosecutor said] no. I grabbed the public defender and I said, 'Look, I told them, this was for washing my clothes. Please ask them to call the lab right now. It's been 40 days. Can you please call them?' He asked the judge if I could speak. I told the judge and the judge said 'If you're lying, I'm going to slam you when it comes back.' I said 'I'm not lying to you.' The judge called back. Made me go in the back and wait about another 30 minutes. Finally, I came back in and they realized it was laundry soap.
>
> Author: They dismissed the charges?
>
> Sam: Yes. [I was] very, you know, upset, angry, I felt like the system didn't work for me. I understood if I did something wrong. Or if there was even suspicion. I was pulled over on a traffic stop and I had a box of laundry supplies.[44]

Nicole's experience largely echoed Sam's. A Black woman in her mid-50's, Nicole had never had a run in with the criminal justice system before being pulled over for a routine traffic violation and arrested for possession of a controlled substance. Like Sam, she waited almost six weeks before lab results confirmed that a vial of liquid in her car was not PCP, although unlike Sam, she was only detained ten days before she was able to borrow money for bail. For Nicole, the ordeal began when she was pulled over for running a red light and, in what was perhaps the unlikeliest of errors, the police officer arrested her when he mistook a vial of holy oil for PCP:

> He stopped me up in like an alley. I had to get out of the car. He wanted to search the car and search me. My daughter was with me. He did all of that and then he came back and said, 'Yeah, we found drugs.' Why would I ask him to search everything if I had drugs! It was not looking good. But the drugs he thought he had found was holy oil that my daddy had given me. [The police officer] said it was PCP. I said no. If it was like marijuana or something—but PCP? I'm scared of that! I said 'open it up and smell it.' He's like, 'no because if I touch it, it will be on my hands.' He acted like it was acid. So of

44. It does not seem coincidental that one of the few white people I interviewed was also the only person to report being allowed to address the judge directly. *See generally* Nicole Van Cleefe, Crook County: Racism and Injustice in America's Largest Criminal Court (2016), for a detailed analysis of widely held race-based assumptions among judges and defense counsel in Cook County. These biases likely worked in Sam's favor.

> course, they locked me up. They put handcuffs on me. I'm like oh this is not comfortable!

Nicole's car was impounded and she and her fourteen-year-old daughter were taken down to the police station, where the police officer let Nicole call a friend to pick up her daughter before booking her on PCS charges:

> They took my car. I'm like, oh my goodness! There's too much going on. I'm brand new to this whole thing. I don't know what to do or say. You say one wrong thing. I didn't say much of nothing because I was just amazed. I didn't want to go to jail. I had to spend the night [at the police station]. After that it got worse. Just worse, worse, worse.

When Nicole got to court, her bail was set at $9,000 "D," requiring a $900 deposit bond to get out. Fortunately for Nicole, after ten days in detention, her pastor was able to lend her enough money to get out on bail. By that time, the cost of getting her car out of the city impoundment lot was another $800. "My pastor gave me $900 to get me out because I was working [at the church] then. By the time I got through it was income tax time. My car was $800 to get out. I'm like oh, this is a lot!"

Nicole went to court for her preliminary hearing only to have the judge continue her case because the lab results were not in. Finally, a month after being released from jail and six weeks after being arrested, the lab results came back and she was cleared:

> I went down there and when they finally called my case, the judge called me up there and he read off all the charges and stuff. He said let's get to the drug thing. I couldn't wait for him to get to it because it wasn't drugs. The judge said, 'it was zero point zero zero percent of drugs.' Most of the court laughed. The police is thinking I'm going down. It was just a moment. [The judge said] 'You supposed to have been in traffic court.' [I told him,] 'I tried to tell everybody and nobody wanted to hear me.' The judge laughed a little. Then he let me finish it off with traffic court. I went to traffic court and I paid some fines and then it was a wrap.

Although the bond money Nicole had borrowed from her pastor was refunded after the charges were dismissed, the $800 she had paid to get her car out of the impoundment lot was not recoverable, even though the charges upon which the impoundment had been predicated were proven false. Like Sam, Nicole's experience made her mad:

> Actually, to tell you the truth after I went through all that, I hated police for a minute, I just hated them. I wasn't no lawbreaker. The fact that they can get what they want and do what they want. It was just not, I'm thinking about all the other folks in there. Most of them aren't real criminals. The REAL criminals y'all ain't caught. You wasting my time.

2. "I Wasn't Guilty, I Was Innocent. Three Weeks Wasted of My Life."

Domestic violence charges were one of the most common reasons why the individuals I interviewed were arrested and detained, and were charges for which many insisted on their innocence. Domestic violence is, of course, a notoriously difficult offense to prove and one for which prosecutions are rare, which means that the rate of incidence is undoubtedly much higher than the rate of criminal prosecution and conviction. At the same time, there is evidence to suggest that the shift toward greater enforcement of domestic violence laws over the last 40 years has—like much criminal justice enforcement—ensnared innocent people.[45] Here, too, bail determinations based on charges mean that innocent individuals often spend time in jail based on little evidence.

Beginning in the 1970s, jurisdictions across the United States began changing their approach to domestic violence, shifting from a paradigm that treated intimate partner violence as a private matter to one that recognized it as a criminal act.[46] As part of this shift, law enforcement agencies were increasingly encouraged to arrest alleged perpetrators—often through "mandatory arrest" laws or "preferred arrest" laws that require or encourage law enforcement officers to make an arrest whenever there is probable cause to believe that domestic violence may have occurred.[47] Even in states like Illinois, where there is not a statutory mandate to make an arrest in these cases, both law and policy strongly encourage law enforcement officers to do so. For 22-year-old Marlon, this meant three weeks in jail following an argument with a neighbor.

Offended that Marlon had not invited her to a party he was having, Marlon's neighbor came over to interrupt the party and give Marlon a piece of her mind. The argument soon became heated and, when the neighbors called the police, Marlon's uninvited neighbor told the responding officers that he had "put his hands on her." Despite the fact that no witnesses supported this accusation, the officers arrested Marlon for battery, a misdemeanor. At bond court the following morning, Marlon's bail was set at $25,000 "D," requiring a $2,500 deposit bond for release. As with the experiences of other respondents, nothing about the process felt fair to Marlon, nor did he feel like he was presumed innocent.

> You don't get to talk to the judge or try to plead your case. You talk to these public defenders basically and they tell you, well they ask you a lot of questions, you know. Things that they can tell the judge that make your case better so you can get a lower bond. I told my

45. As a colleague who has worked as a public defender and as a prosecutor reminds me, the intimate nature of romantic relationships also creates unique motivations for false accusations, including custody battles, financial disputes between partners, and anger over infidelity or alcohol use, to name a few.

46. See David Hirschel et al., Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions, 98 J. Crim. L. & Criminology 255, 257– 58 (2007).

47. *See Id.* at 265.

> public defender basically that I was in school, I had a son, I had a job interview the next day, and everything. So, I guess that they take that to the judge and the judge looks it over or whatever, and they set your bond. I got a high bond and no one could pay to get me out so I had to stay in jail . . .

Three weeks later, when Marlon's neighbor did not show up to testify at his preliminary hearing, the judge dismissed the charges and Marlon was released. When I interviewed him only a few weeks later, Marlon was still in shock. "I had a domestic charge—a domestic violence charge! And basically, off of somebody's word I was taken to jail and I felt like that was unfair."

As with Calvin, Aaron, Sam, and Nicole, the way that Marlon describes his experience evidences the extent to which being put in custody makes clear to defendants that the criminal legal system presumes their guilt. The fact that the majority of unconvicted people I interviewed—like the vast majority of criminal defendants—never even went to trial further underscores the disjuncture between the Supreme Court's interpretation of the presumption of innocence and practical reality thereof.

D. *Punishment Before Trial*

As noted above, at the time of his detention, Marlon was a full-time student and a parent, who was actively looking for a new job to support his young son. Shortly before his arrest, he had lost his job at a downtown retail chain and had been busy looking for something else. The week before he was arrested, Marlon had an interview that went well at another retail outlet and he had been asked to come back for a second interview and to bring his ID and social security card. Unfortunately for him, that interview was scheduled for the day after he was arrested, and he never made it:

> Author: You mentioned you had this job interview the next day?
> Marlon: Yes, I was worried about that because I just recently lost my job in April and I was working downtown at [a department store] and I lost my job and I was going through it because you know, I have a son to take care of and I needed money and I just finally got this, this job offer basically. The lady basically told me 'Oh, okay, come in for the interview but when you come make sure you bring your ID and your social security card.' So I was thinking okay, well, you know, I'm gonna get this job and now I'm going to jail the day before.

Although Marlon tried to get a family member to contact the store, it did not work out, and he lost the job opportunity. Compounding his frustration, when he was released from jail three weeks after his arrest, he quickly discovered that he had missed too much schoolwork to complete the semester and would have to restart the classes the next term:

> Author: You said you were in school. So what happened with your school for those three weeks?

> Marlon: Actually, I lost three weeks of school. So, I have to do that whole semester over, 'cause I was too far behind. So, I gotta get back, get back on that, on top of that, next, next month.
> Author: It feels like a lot?
> Marlon: Yeah . . .

Beyond these challenges, being in custody was scary, lonely, and isolating. "Emotionally I was just, I just felt lonely, like nobody cared about me. Um, personally, um, I don't know, I just felt all by myself. Nobody, you know, nobody was there to help me."

Legally, of course, none of this constituted punishment—not the separation from his child, not the loneliness, not the financial losses associated with missing school and a potential job opportunity. As the Court noted in 1979, "[a]bsent a showing of an expressed intent to punish . . . it does not, without more, amount to 'punishment.'"[48]

Legal and sociological scholars of punishment have long disagreed. Writing in 1990, three years after the Supreme Court reiterated the legitimate, non-punitive nature of pretrial detention in *U.S. v Salerno*, law professors Miller and Guggenheim analyzed normative social and legal conceptions of "the essential notion of punishment" and noted even a cursory assessment of the effects of pretrial detentions evidences their punitiveness.[49] The importance of determining the punitive effect of pretrial detentions notwithstanding, they also argued that pretrial detentions are punitive in a more fundamental sense, regardless of their consequences for people's lives. Pointing out that "imprisonment is the modern norm of punishment," they argue that imprisonment for any reason cannot be stripped of its inherent punitiveness: Stated directly, "nature of detention [is] rarely benign from any perspective."[50]

The people I interviewed would certainly agree. When I asked Calvin to describe what it is like to be in jail, his words showed not only the extent to which detention is inherently punitive, but also the indistinguishability of detention from prison in his view, as he repeatedly referred to other unconvicted inmates as "prisoners":

> [Being detained is d]emeaning. First, it's like you not, you not anything. In other words, you're just a piece of meat. 'Get in there and do this'. It's just you gotta have a lot of strong will when you get up in there. The first thing you can't show weakness and they sense, the guards and the other prisoners, you gotta go in there with a strong mentality . . . It's basically just, I guess it's just a part of you being in there. They say 'Well you in here, you deserve to get treated like this.'

When describing his time in custody, Aaron repeatedly conveyed a lack of differentiation between his detention and incarceration as punishment for a crime, referring to himself as having "done nine months" at multiple points in our conversation. Asked at the end of our interview to

48. *See Bell*, 441 U.S. at 538-39.
49. *See* Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 Minn. L. Rev. 335, 342, 357 (1990).
50. *See Id.* at 368-69.

reflect on his experience, the language he uses evidences pretrial detention and intentionally punitive forms of incarceration as interchangeable in his mind. His description of the experience demonstrates why:

> I say incarceration is not worth it. It ain't. There ain't no excitement in there. It's a lot that go on in there. A lot of people would never think what goes on if you never been there. A person that's been locked up been through a lot more than another person would think about being locked up for a certain time it ain't too much. But, you know, sometimes you gotta think about being locked up for a certain time, you got a lot of time, being with a lot of different attitudes. Not just the inmates. The officers and, you know, a lot of different attitudes that you around, then the stressful cause you going through. You don't have no, you don't have no walls, no door to walk out, to walk this thing, to walk that thing. You just get a thought in your head that's the only way, you know, you can relieve any type of stress. You can't get a clear thought.

This description of his detention, with its focus on being trapped, was one that Aaron brought up repeatedly throughout the course of our discussion:

> It's like so much stuff you try to avoid being locked up but you really can't because you just stuck. You know, it ain't like you can walk around the corner or walk to the store, you just stuck. You wake up the same person with the same problems, the same thing went on the next day. Being locked up, it ain't, I don't think it's for nobody.

More than anything, he noted, the total deprivation of freedom and complete lack of control over his own life—the very characteristics that define incarceration as a form of punishment—were the most difficult aspects of his detention:

> It's, like, really having to be told what to do. It's not even like what you're being told to do, like you know just something outrageous, but just having to totally say well, 'you all says, such and such.' That ain't something I feel I can keep living life going through.

Nicole, recalling conversations she had while detained with women who had been to prison before, put it succinctly: "Locked up is locked up. I just need to be free."

1. "My Mom Was Really, Like, Going Through the Worries."

Of course, the people in custody are not the only ones being punished. For Aaron, the hardest part was balancing his own loneliness with his desire not to burden his already struggling family. Knowing that his mother did not have the financial resources to pay for collect calls from the jail or to contribute funds for the commissary, Aaron, at seventeen, did his best to ask for nothing:

> I'm really just trying to go through it like basically by myself. Me knowing that my mom had the house problems with the bills—she got seven kids including me, so that's six in her household that gotta be tooken care of. When it came to commissary, you know, it weren't

> really too much I could get at the commissary. I rather for her not to send no money to me, just spend it on the household and my sisters and brothers.

Despite his loneliness, he also discouraged his family from visiting, partially to protect himself from the difficulty of seeing them leave and partially to protect himself from seeing how devasting this detention was for them. "[My mom] was really, like, going through the worries . . . Then for me to know that she was going to go through worries, I really didn't want to communicate with her, what she knowing I was gonna be at . . . my mom would come to see me, she be crying." In spite of his best efforts to shield himself, it was clear that being in custody took a toll on Aaron.

Two months after he was found not guilty and released from jail, Aaron was arrested again, this time for drug possession. After spending nine months in custody fighting the charges the first time he was arrested, he had learned his lesson and decided to plead guilty right away:

> I was only out exactly 2 months, I was out 2 months from doing 9 months when I caught the drug case . . . I thought 'I want to be outside. I am going take anything today to get off this hopefully.'

Despite the fact that Aaron was found not guilty of the charge that lead to his 9-month pretrial detention, his time in custody still caused irreparable harm and, in some sense, did lead to an eventual guilty plea and conviction.

Calvin, by contrast, had never been convicted of any crime when I interviewed him ten years after his detention. Nonetheless, he made clear the damage wrought both during and in the aftermath of his detention. Unsurprisingly, Calvin's detention was hard on his family, who knew that he was innocent but still worried that he might be convicted. "It took a toll on my mother especially when she knew I didn't do anything like that. Because they know the type of person I am. I'm big and burly, but I'm not the type just to go out there and start anything . . . It hurts them just to see me go through that stuff and I hate to have to hurt them like that." The stress took an even heavier toll on Calvin's girlfriend, who was pregnant at the time. Shortly after he was released, she miscarried; to Calvin and her, it was clear that the stress of his detention and the surrounding uncertainty was the primary cause of the miscarriage. Not long after his release, they broke up, the combined stress of his detention and the miscarriage being more than they could handle:

> My first girlfriend, she—when I got arrested and had to do the time—she, it worried her so much she had a miscarriage. So, you know, it strained on that relationship. Then we broke up after that but now I, I still talk to her . . . But I didn't want her to go through that and I didn't know she was pregnant but she was 2 months pregnant but then she came down [to the jail], I think like a week later after I got out, she had a miscarriage because of all the stress that was going on. It really affected her too.

Having just gotten home from the army, Calvin was not fully employed yet at the time of his detention but had picked up some odd jobs working under the table for a friend who ran a moving company. She quickly restaffed him after his release, but what Calvin thought had been a temporary job to tide him over while he found something more formal became increasingly permanent as he found that, even without having been convicted, his arrest record was scaring off potential employers:

> Calvin: After that, you know what I'm saying, I left, when I left the Army after four years, after I got that arrest, a lot of stuff changed too because, you know what I'm saying, I missed job opportunities and by that being on my record, it's hard for me to get a job now.
> Author: Even though you weren't convicted?
> Calvin: Just the arrest, it being on my record. Especially, I could beat up or stab or rob somebody but you got a heroin [charge], they either think I'm heroin addict or a dealer. And I was never either one of them. And so, I been trying since then, [but] I really never had a regular job.

Although most research examining the effect of criminal records on employment has focused on individuals with felony convictions, there is a small but growing body of research examining whether and to what extent lower-level forms of criminal justice contact, like arrests, affect people's job attainment.[51] This work validates Calvin's experience, with a recent audit study showing that, while arrests do not affect employment as negatively as felony convictions do, they nonetheless do reduce the likelihood that an employer will contact a job applicant.[52] An older economics analysis analyzing the relationship between arrest and employment for Black versus white men found that arrests have a long-term effect on employment and account for almost one-third of the difference in employment outcomes for Black and white men.[53] While this study did not differentiate between arrests that did and did not result in convictions, it is nonetheless compelling evidence of the effect of arrests on employment, especially for Black men. In testimony to the U.S. Equal Opportunity Employment Commission, Amy Solomon, Senior Advisor to the Assistant Attorney General in the Obama Administration, corroborated the prevalence of this issue, talking at length about the inclusion of arrest records in criminal background checks, noting that while up to one-third of felony arrests do not lead to

51. *See generally* Issa Kohler-Hausmann, Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing (2018), for an extensive discussion of how various forms of criminal justice record keeping, including dismissals, "mark" defendants and affect their lives.
52. *See* Christopher Uggen et al., *The Edge of Stigma: An Experimental Audit on the Effects of Low-level Criminal Records on Employment*, 52 Criminology 627, 642 (2014).
53. Jeff Grogger, Arrests, Persistent Youth Joblessness, and Black/White Employment Differentials, 74 Rev. of Econ. and Stat. 100, 105-06 (1992).

a conviction, arrested individuals nonetheless do have a criminal record that shows up on a background check.[54]

Toward the end of my interview with Calvin, I asked him if he could sum up how he thought his experience with the criminal justice system had affected him. More than ten years after his arrest and detention, it was clear that the impact was both deep and long-lasting, and that he was still struggling to come to terms with it:

> I would say, it made me more aware of the things that—my record is holding me back. But and it also showed me how people would rather judge you on a piece of paper before they get to know you from what you really you are. And so, I really don't know how much financially it really hurt because I hadn't gotten it yet to lose it, you got to have it to lose it, so I really don't know how that affected me. But I know I haven't showed the world my full potential. Because I know what I can do but it's not, it's a lot of people out there not giving me the chance of showing what I can do . . . Then I see it's on my record because I know they'll look at that paper first before they get to know me and then if the people take the chance and just say, let me try him out for 2 weeks to see how he really works . . . And I just wait. My time is gonna come and it's gonna show that I'm a better person that I want to be, you know what I'm saying. A person for myself, a better person of myself is gonna come out and I'm just waiting on that time. I just, I know I got this record but someone out there is gonna take a chance on me and the rest of the world gonna see what they missed.

Conclusion

Does the pretrial detention of individuals who are not convicted of crimes undermine the presumption of innocence? Does it conflict with due process protections against punishment before trial? Over the latter half of the 20th century, the Supreme Court's response to these questions progressed to a resounding no. And yet, as the Court's decisions enabled an exponential increase in the number of people detained pretrial, for those who are detained, the emptiness of these supposed protections is clear.

Practically speaking, what did it mean for Aaron to be presumed innocent at trial after having been incarcerated for nine months, forcibly removed from his home and family, unable to "walk around the corner or walk to the store," just "stuck"? Moreover, what does it mean to legally define this detention as "reasonably related to a legitimate nonpunitive governmental objective" and thus not "punishment"? Everything about the experiences of Aaron, Calvin, Nicole, Sam, and Marlon makes clear the "sophistry" to which Justice Marshall objected in response to the

54. *See* Amy Solomon, Briefing on the Impact of Criminal Background Checks and the EEOC's Conviction Records Policy on the Employment of Black and Hispanic Workers (2007) (Written Statement for the U.S. Commission on Civil Rights).

assertion that detention is not punitive. More generally, these experiences, and likely millions more like them, make clear the need for a new approach to pretrial justice, one in which the law accurately reflects how it is lived.