

Civil Due Process, Criminal Due Process

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Procedural due process has the comfortable feel of an old, familiar legal doctrine.¹ If defining the substantive standards imposed by due process can seem challenging,² procedural due process seems straightforward by comparison: a person may not constitutionally be deprived of “life, liberty or property” by governmental action without notice and a meaningful opportunity to be heard.³ These core procedural rules seem indisputable. In the American adversary tradition, after all, it is commonly said that “no better instrument has been devised for arriving at truth” than a contest between parties, presided over by a neutral arbiter.⁴ And yet, in criminal proceedings, even procedural due process is not quite so simple. In particular, this Article explores an anomalous divergence between civil and criminal due process rules, under which key notice-and-hearing rights that must be granted to civil litigants are not constitutionally required for criminal defendants in the pretrial stages of a criminal case, even if both are threatened with comparable losses.⁵

1. U.S. CONST. amend. V (providing that no person shall be “deprived of life, liberty, or property, without due process of law”); *id.* amend. XIV (providing that no state shall “deprive any person of life, liberty, or property, without due process of law”). The principle that “due process of law” requires the government to follow certain procedures in order to implement even valid actions against individuals has a long-standing pedigree. *See, e.g.,* Edward Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339, 339 (1987) (“By 1868, due process had come to connote a certain core procedural fairness when government moved against a citizen’s life, liberty, or property.”).

2. Much constitutional litigation, and academic debate, has raged over the substantive limits that due process imposes on governmental action—about the actions that a civilized government may not take, regardless of the fairness of procedures followed. *See, e.g.,* *State Farm Mut. Auto Ins. v. Campbell*, 538 U.S. 408 (2003) (discussing limits on punitive damages); *United States v. Salerno*, 481 U.S. 739 (1987) (discussing permissible rationales for civil detention); *Roe v. Wade*, 410 U.S. 113 (1973) (discussing the area of personal privacy); *Rochin v. California*, 342 U.S. 165 (1952) (discussing the limits on coercive investigative techniques). This Article focuses instead on modern application of the traditional due process doctrine that certain procedural hearing rights must accompany permissible governmental action against individuals. Even in this area, however, as explored in this Article, due process is not free from controversy.

3. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (“Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”); *see also* *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965) (to same effect); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (noting that the “central meaning of procedural due process” is the “right to notice and an opportunity to be heard . . . at a meaningful time and in a meaningful manner”). *See generally* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 475 (1986) (“The Supreme Court has often stated that the core rights of due process are notice and hearing.”).

4. *See, e.g.,* *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (“No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.”). Justice Frankfurter’s famous comment on the value of the adversary process has been repeated often in the Court’s due process decisions. *See, e.g.,* *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993) (quoting *McGrath*, 341 U.S. at 171-72 (Frankfurter, J., concurring)); *Connecticut v. Doehr*, 501 U.S. 1, 12-14 (1991) (same); *Fuentes*, 407 U.S. at 81 (same).

5. *Compare, e.g.,* *Morrissey v. Brewer*, 408 U.S. 471, 485-89 (1972) (holding that due process requires a preliminary adversary hearing to support the pretrial detention of a convicted felon in a civil parole revocation proceeding), *with* *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975) (holding that due process does not require an adversary hearing to support the pretrial detention of a criminal defendant).

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The conventional doctrine of procedural due process, applied in civil settings from low-level agency hearings to full-scale civil trials, grants a right to notice and a hearing whenever government action threatens a loss.⁶ This conception of procedural due process is familiar to a first-year law student:⁷ a citizen faced with a governmental deprivation of a liberty or property interest has a due process right to “some kind of hearing.”⁸ While the case often cited for this doctrine is the modern precedent of *Mathews v. Eldridge*,⁹ the idea that the essential character of procedural due process is a right to notice and a hearing has deeper roots.¹⁰

In criminal cases, however, there are respects in which procedural due process can apply quite differently. It may surprise those not steeped in the intricacies of criminal procedure to learn that hearing rights constitutionally required for individuals threatened with adverse government action in civil settings are not necessarily enjoyed by criminal defendants.¹¹ In particular, while the criminal trial, when it occurs, is the pinnacle of constitutional “process,”¹² it has long been recognized that criminal defendants

6. See *Fuentes*, 407 U.S. at 80 (noting that the “central meaning of procedural due process” is the “right to notice and an opportunity to be heard . . . at a meaningful time and in a meaningful manner”); *Bell v. Burson*, 402 U.S. 535 (1971) (holding that suspending a driver’s license requires prior “notice and opportunity for hearing appropriate to the nature of the case”); *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) (holding that indigent divorce litigants “forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard”). Compare, e.g., *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864) (recognizing a due process right to notice and hearing prior to a court’s adjudication of property rights), with *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (recognizing a due process right to notice and hearing prior to an administrative agency’s termination of welfare benefits). See generally *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (establishing a three-part test to determine the process due when government action threatens liberty or property).

7. See, e.g., Stephen C. Yeazell, *CIVIL PROCEDURE* 324-25 (6th ed. 2004) (stating that the fundamental requirement of due process is an opportunity to be heard at a meaningful time and in a meaningful manner).

8. See *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974) (“The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests.”); see generally Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1270-75 (1975) (discussing the Supreme Court’s development and elaboration of the due process hearing requirement).

9. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); see, e.g., CHARLES ALAN WRIGHT ET AL., 32 *FEDERAL PRACTICE & PROCEDURE* § 8129 (3d ed. 1999) [hereinafter *FEDERAL PRACTICE & PROCEDURE*] (describing *Mathews* as “the cornerstone for all analysis of procedural adequacy”).

10. See, e.g., 32 *FEDERAL PRACTICE & PROCEDURE*, *supra* note 9, § 8126 (observing that while the Supreme Court’s seminal due process cases issued in the 1970’s reflected “increased interest in that guarantee, the current law traces its origins back well beyond that era”); Eberle, *supra* note 1, at 362 (describing nineteenth-century judicial decisions that read due process to require notice, an opportunity to be heard, and a determination by a neutral decision-maker).

11. Knowledgeable commentators have remarked on the lack of basic due process protections in the pretrial stages of criminal cases. See, e.g., 4 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 14.2(a) (2d ed. 1999) [hereinafter *CRIMINAL PROCEDURE*] (noting that the Supreme Court’s “brusque rejection of a possible constitutional requirement of judicial screening for a charge which has not otherwise been screened by a neutral body . . . may seem surprising in light of the growth in due process”). Yet there has been surprisingly little attention paid to this doctrinal anomaly.

12. See Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court’s Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 391 (2001) (“[A] wide variety of

constitutionally may be arrested, detained, and suspended from government employment before trial with less meaningful hearing rights than comparable deprivations would require in civil litigation.¹³ Justice Stewart may best be known for his memorable quote on the difficulty of defining obscenity,¹⁴ but he also originated a pithy observation with respect to procedural due process when he complained that under the Court's different due process rules governing the pretrial process in civil and criminal matters, "the Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of garnishing a commercial bank account, . . . the custody of a refrigerator, . . . the temporary suspension of a public school student, or the suspension of a driver's license."¹⁵

The bedrock principle that trial must precede judgment is, of course, applied to civil and criminal cases alike.¹⁶ But in civil and administrative matters, this doctrine is also logically extended to every stage of the litigation process: as a matter of due process, for example, an appropriately tailored hearing must precede the issuance of a preliminary injunction, no less than the entry of a final civil judgment, because of the concern for the accuracy of both decisions—and the recognition that distinct harms to the individual may flow from each.¹⁷

In criminal cases, by contrast, there is no constitutional requirement that the defendant be permitted to test the factual basis for the government's charges prior to the criminal trial, even when those criminal charges are used to justify imposing restrictions on the defendant's liberty or property pending trial.¹⁸

due process limitations add considerably to the constitutional regulation of the [criminal] trial."); *see also infra* notes 94-103 and accompanying text (describing procedural protections constitutionally required at criminal trial).

13. *See infra* Section II.B.

14. *See* *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (commenting, with respect to hard-core pornography, that "I know it when I see it").

15. *See* *Gerstein v. Pugh*, 420 U.S. 103, 127 (1975) (Stewart, J., concurring) (citations omitted). Justice Stewart's observation in this regard was pointed but accurate. *Compare, e.g.*, *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972) (holding that notice and hearing must precede temporary seizure of household goods in civil litigation), *with Gerstein*, 420 U.S. at 123 (holding that notice and hearing are not required for pretrial detention of defendant in criminal litigation).

16. *See, e.g.*, *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."); *Chaloner v. Sherman*, 242 U.S. 455, 461 (1917) (stating that the "essential elements of due process of law were fully met" in a civil proceeding to appoint a trustee when the "plaintiff had notice and opportunity to be heard at each stage of these proceedings").

17. *See, e.g.*, *Fuentes*, 407 U.S. at 96-97 (noting that the court may issue an order, upon a creditor's motion, to seize property prior to final judgment only when the "creditors have tested their claim to the goods through the process of a fair prior hearing"); *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 831 (D.C. Cir. 1984) (finding that a preliminary injunction hearing satisfied the due process requirements enunciated in *Fuentes*).

18. *See* *Baker v. McCollan*, 443 U.S. 137, 143 (1979) (stating that "an adversary hearing is not required" to support the pretrial detention of a criminal defendant); *Gerstein*, 420 U.S. at 123 (noting

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Courts have not merely refused to grant due process hearing rights in the criminal pretrial process,¹⁹ but have affirmatively held that the grand jury's secret, one-sided indictment decision approving a prosecutor's criminal charges conclusively establishes that the criminal charges are supported by evidence.²⁰ The net result of these doctrines is that the main procedural event in a criminal case, from a due process perspective, is the criminal trial.²¹ The preliminary steps that occur prior to trial in a criminal case—arraignment, bail hearings and so on—are largely administrative steps designed to bring the defendant to trial, not meaningful adversary proceedings designed to review and test the government's evidence.²² Instead, the criminal defendant's primary constitutional protection with respect to the harms he may suffer in the pretrial criminal process is to insist on a (relatively) speedy trial.²³

Unresolved tension between the Supreme Court's procedural due process doctrines in civil and criminal matters emerged, most recently, in constitutional litigation over the due process rights of enemy combatants. *Hamdi v. Rumsfeld* was the "perfect storm" for divergent due process rules because it involved a basic dispute over whether the government could use civil processes to detain citizens accused of acting as "enemy combatants," or whether it must resort to the criminal process and obtain a conviction in order to imprison such persons.²⁴ Because both civil and criminal avenues were possible, the case required the Court to consider how due process might apply differently in each setting. Treating detention of enemy combatants as a permissible form of civil

that "the Constitution does not require an adversary determination of probable cause" to support the pretrial detention of criminal defendant); *Lem Woon v. Oregon*, 229 U.S. 586, 590 (1913) (noting that due process does not require an adversary judicial hearing at the outset of a criminal prosecution).

19. See generally 4 CRIMINAL PROCEDURE, *supra* note 11, § 14.2(a) (stating that despite the "burdens of accusation and litigation imposed upon a criminal defendant," the Supreme Court has held in some cases that "due process provides no procedural protection" for the defendant's interests in avoiding pretrial restraints).

20. In a criminal case, grand jury indictment alone suffices to establish conclusively that probable cause exists to believe that the defendant committed the crimes charged. See, e.g., *Gerstein v. Pugh*, 420 U.S. 103, 118 n.19 (1975) (stating that a grand jury indictment "conclusively determines the existence of probable cause" (quoting *Ex parte United States*, 287 U.S. 241, 250 (1932))).

21. See, e.g., Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing To Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 468 (1979) (observing that "our criminal justice system relies primarily on the trial as the appropriate occasion to vindicate" individual rights and to prevent conviction without adjudication).

22. See, e.g., *Baker*, 443 U.S. at 145 (noting that the primary constitutional protections in the pretrial process consist of "requirements that arrest be made only on probable cause and that one detained be accorded a speedy trial").

23. *Id.* Defendants may wait many months, or even years, for a criminal trial without their prosecution violating the constitutional speedy trial guarantee. See, e.g., *Barker v. Wingo*, 407 U.S. 514, 533-35 (1972) (upholding as constitutional a delay of over five years from arrest to criminal trial).

24. 542 U.S. 507 (2004); compare *id.* at 518 (O'Connor, J., plurality opinion) (treating the executive detention of enemy combatants as a valid "protective custody" measure), with *id.* at 556 (Scalia, J., dissenting) (distinguishing the detention of citizens as enemy combatants from permissible "non criminal detention" such as civil commitment of mentally ill).

detention,²⁵ a majority of the Justices applied traditional procedural due process doctrine to require notice and a hearing to test the factual basis for detention.²⁶ Even in this setting of heightened concern over national security and terrorism, the Court reaffirmed the basic tenets of procedural due process, holding that the government must extend to citizen detainees the core due process rights to notice and a hearing.

This much of the decision treads familiar ground, because it applies the familiar approach that immediately comes to mind when we think about procedural due process. What is more puzzling is the due process approach advocated by Justice Scalia, joined by Justice Stevens, who took the view that the government's claims against Yaser Esam Hamdi must proceed criminally.²⁷ Hinting at a constitutional dispute that has periodically emerged in Supreme Court precedents, these Justices argued that the *Mathews* decision, which reflects the conventional notice-and-hearing test for procedural due process, is inapplicable in criminal settings.²⁸ Instead, they argued, a criminal defendant's due process rights consist of those traditional rights historically afforded to defendants in the criminal process.²⁹ This is a distinctly different vision of procedural due process.

While *Hamdi* does not concern the criminal pretrial process—the focus of this Article—the competing due process approaches in that case aptly symbolize the Supreme Court's divergent approaches to procedural due process in criminal and civil litigation, which may differ in the hearing rights granted even when the interests at stakes seem quite similar.³⁰ Civil due process doctrine is consistent but flexible—some kind of hearing must be extended

25. *See id.* at 519 (O'Connor, J., plurality opinion) (emphasizing that detention of enemy combatants is permissible because it is nonpunitive).

26. *Id.* at 509 (O'Connor, J., plurality opinion, joined by Rehnquist, C.J., and Kennedy and Breyer, J.J.) (“[D]ue process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”); *see also id.* at 553 (Souter, J., concurring in the judgment, joined by Ginsburg, J.) (“[S]omeone in Hamdi's position is entitled at a minimum to notice of the Government's claimed factual basis for holding him, and to a fair chance to rebut it before a neutral decision maker.”).

27. *Id.* at 554 (Scalia, J., dissenting) (“When the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime.”).

28. *See id.* at 576 (arguing that *Mathews* has no application to due process inquiries when “the Constitution and the common law already supply an answer”).

29. *See id.* at 556 (“The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty or property. When a citizen was deprived of liberty because of alleged criminal conduct, those procedures typically required committal by a magistrate followed by indictment and trial.”).

30. By comparison with the vast gap between the procedural rights the plurality and the dissent would extend to Hamdi, the harms he suffers by virtue of his detention are far closer in nature. *See, e.g.,* *Breed v. Jones*, 421 U.S. 519, 530 (1975) (“Regardless of the purposes for which the incarceration is imposed, the fact remains that it is incarceration.”); *In re Gault*, 387 U.S. 1, 50 (1967) (“[C]ommitment is a deprivation of liberty. It is incarceration against one's will, whether it is called criminal' or 'civil.'”).

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whenever a deprivation is threatened, but the contours of that hearing can vary quite significantly.³¹ Criminal due process doctrine, by comparison, can seem rigid and uneven. At a criminal trial, if it occurs, not only will the factual basis for the government's criminal charges be fully aired, but the government will bear a heavy burden to establish that the facts are as it contends.³² Before a criminal trial, however—at the time when the defendant is presumptively innocent—the defendant lacks certain basic due process hearing rights.³³

While this debate provides a contradiction rich in issues, the particular focus of this Article is on the criminal model of procedural due process invoked by Justice Scalia.³⁴ In particular, the Article considers whether the Court's distinctive approach to criminal cases, insofar as it rejects the application of conventional notice-and-hearing principles to pretrial criminal litigation, can be justified on the rationales offered. In Part I, the Article outlines the conventional model of due process in civil settings, exemplified by Justice O'Connor's *Hamdi* opinion, with its premise that notice and a hearing should precede liberty or property deprivations. In Part II, the Article turns to the very different model of procedural due process in criminal litigation, symbolized by Justice Scalia's *Hamdi* dissent, which combines minimal pretrial procedures with extensive protections at a criminal trial. In Part III, the Article considers the problematic consequences of allowing two distinct approaches to procedural due process to coexist, one applicable to civil settings and the other to criminal matters, without conceptually integrating the two doctrines. Finally, in Part IV, the Article turns to the explanations offered by the Supreme Court to justify tolerating different analytical approaches to procedural due process in civil and criminal matters. Rejecting these as insufficient, the Article argues for a rational, integrated model of criminal and civil due process, and considers how this might change the criminal pretrial process.

31. See *supra* note 8.

32. See *In re Winship*, 397 U.S. 358, 363 (1970) (holding that the “reasonable-doubt standard” is the burden of proof constitutionally required at a criminal trial).

33. See *Baker v. McCollan*, 443 U.S. 137, 143 (1979) (emphasizing that “an adversary hearing is not required” to support the pretrial detention of a criminal defendant); *Ingraham v. Wright*, 430 U.S. 651, 697-98 (1977) (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 nonadversary 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 CRIMINAL PROCEDURE, *supra* note 11, § 14.2(a) (noting that some Supreme Court cases have discussed how “due process provides no procedural protection” for the defendant’s interests in avoiding pretrial restraints).

34. While this Article focuses on respects in which applying standard notice-and-hearing rights could usefully improve criminal adjudication, an equally interesting approach would look at the opposite side of the analytical gap—how the superior rights afforded at a criminal trial might usefully inform the comparatively minimalist procedures approved in civil cases like *Hamdi*. Whether Justice O’Connor’s civil due process model may be unduly flexible presents a valid and interesting question, but is largely beyond the scope of the present Article. See *infra* Section IV.B.

I. THE CONTOURS OF CIVIL DUE PROCESS

The Due Process Clause of the Fifth Amendment simply states that no person shall be “deprived of life, liberty, or property, without due process of law.”³⁵ This short phrase has, of course, been the subject of extensive interpretation and debate. While an early school argued that “due process of law” simply requires the government to proceed based on established rules announced in advance,³⁶ the Supreme Court long ago rejected this limited view.³⁷ Instead, the Court has read the cryptic phrase “due process of law” to impose certain requirements, both substantive and, more often, procedural in nature.³⁸ This Article focuses on the latter.

Briefly stated, the essential element of procedural due process, as clearly established in civil settings, is that notice and a hearing must ordinarily precede any governmental deprivation of a liberty or property interest.³⁹ “Civil due process” is the shorthand this Article uses to describe this constitutional test. The understanding that due process requires “some kind of hearing” to test the basis for adverse government action is not, of course, limited to civil settings.⁴⁰ The very premise of a criminal trial is that a defendant should not be condemned without notice and an opportunity to be heard,⁴¹ while the core principle that due process grants notice-and-hearing rights has also been articulated in the Court’s criminal precedents.⁴² Nonetheless, it is useful to refer

35. See U.S. CONST. amend. V.

36. See Israel, *supra* note 12, at 311 (stating that as generally understood by English courts and writers, due process simply prohibited the imposition of sanctions upon an individual except by jury verdict or “alternative procedures clearly established in the standing law (i.e., the law of the land)”).

37. See *Hurtado v. California*, 110 U.S. 516, 528 (1884) (“[D]ue process of law must mean something more than the actual existing law of the land . . .”).

38. *United States v. Salerno*, 481 U.S. 739, 746 (1987) (stating that the Due Process Clause “protects individuals against two types of government action” through substantive due process and procedural due process doctrines); *Rochin v. California*, 342 U.S. 170, 208 (1952) (describing the Due Process Clause as “the least specific and most comprehensive protection of liberties”).

39. See, e.g., *Mullane v. Cent. Bank & Hanover Trust Co.*, 339 U.S. 306, 313 (1950) (“Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”).

40. See generally Friendly, *supra* note 8, at 1267-68.

41. See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 n.17 (1951) (Frankfurter, J., concurring) (describing as an established principle of “natural justice” the proposition that “[n]o party ought to be condemned unheard” (citation omitted)); *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864) (“Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence.”).

42. See, e.g., *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986) (explaining that due process entitles a defendant to a “meaningful opportunity to present a complete defense” at his criminal trial, because “an essential component of procedural fairness is an opportunity to be heard” (citation omitted)); *California v. Trombetta*, 467 U.S. 479, 485 (1984) (explaining that through the Due Process Clause and other provisions, the Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense”); *In re Oliver*, 333 U.S. 257, 273 (1948) (explaining that due process requires that a criminal defendant be given “reasonable notice of a charge against him, and an opportunity to be heard in his defense”).

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to the notice-and-hearing model as a “civil” model of due process because it is in civil settings that this test is clearly established as the single constitutional approach to procedural due process. When a majority of Justices in *Hamdi* agreed on the core requirements of procedural due process, for example, they applied a classic civil formulation—the right to notice and an opportunity to be heard before an impartial adjudicator—as the correct constitutional approach to due process even for the executive detention of enemy combatants, a new and controversial civil setting.⁴³

The case often used to express the civil model of due process is *Mathews v. Eldridge*.⁴⁴ In *Mathews*, which concerned an agency proceeding to terminate disability benefits, the Supreme Court affirmed that the “right to be heard before being condemned to suffer grievous loss of any kind” is a basic constitutional principle.⁴⁵ In so holding, the Court applied a principle reflected in numerous prior and subsequent Supreme Court decisions.⁴⁶ The Court went on, in *Mathews*, to articulate the now familiar three-part test used to determine the particular hearing procedures due in a given setting, which balances the private interests at stake, the risk of error and value of additional procedures, and the interests of the government.⁴⁷ The *Mathews* model is sometimes described as a modern due process model, and some would limit its relevance to modern administrative settings.⁴⁸ Yet the core *Mathews* holding—that the

43. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (“An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.” (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)) (internal quotation marks and citations omitted)).

44. 424 U.S. 319 (1976); see 32 FEDERAL PRACTICE & PROCEDURE, *supra* note 9, § 8129 (noting that the *Mathews* analysis has “guided due process analysis ever since” it was issued).

45. *Mathews*, 424 U.S. at 333 (quoting *McGrath*, 341 U.S. at 168 (Frankfurter, J., concurring)).

46. A classic formulation of this notice-and-hearing principle is found in the Supreme Court’s decision in *Fuentes v. Shevin*, 407 U.S. 67 (1972). There, the Court emphasized that “[f]or more than a century the central meaning of procedural due process has been clear: ‘Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.’” *Id.* at 80 (quoting *Baldwin*, 68 U.S. (1 Wall.) at 233 (1864)); see also *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993); *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

47. *Mathews*, 424 U.S. at 333. The three-part *Mathews* test provides that for any cognizable deprivation of liberty or property, the procedures constitutionally due are determined by considering:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335; see also *Hamdi*, 524 U.S. at 529 (O’Connor, J., plurality opinion) (applying the three-part *Mathews* test). The Court has characterized the *Mathews* test as its “general approach” for testing the sufficiency of procedures challenged under due process. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 599 (1979).

48. See, e.g., *Hamdi*, 542 U.S. at 575-76 (Scalia, J., dissenting) (arguing that the *Mathews* line of cases is limited to “newly recognized property rights”). One might validly argue that the three-part test articulated in *Mathews* can be unduly flexible. In the pretrial stage of criminal cases, however, it is not

opportunity to be heard is the essence of due process protection—is uncontroversial, at least in civil settings.

At heart, the notice-and-hearing approach to due process reflected in such decisions is simply an expression of basic values of the American adversary system of justice.⁴⁹ The notion is simple. If each person is allowed to argue his own side and to respond to the views of the other, and if a decision is then rendered by someone partial to neither, it will best air the issues and lead to a just result.⁵⁰ Cases like *Mathews* simply implement the same due process values developed within the court system in other settings, whether administrative agency proceedings or judicial settings outside of trial.⁵¹ The basic premise of the civil due process model, in this respect, is both longstanding and uncontroversial.⁵²

Within this civil model of procedural due process lie at least four distinct elements, explained in greater detail below: participatory procedures (the affected party is present); an unbiased adjudicator (the decision-maker is a neutral nonparty); prior process (the hearing precedes the adverse action); and continuity (hearing rights attach at all stages). These features are worth highlighting because, as we shall see, assumptions about due process that are fundamental in civil settings can be absent from the constitutional doctrines that govern the pretrial criminal process.

First, as applied in civil settings, due process places central importance on the participation of the affected party in decision-making. *Ex parte* procedures

simply the *Mathews* test that is inapplicable but the very premise that adversary hearings should precede governmental deprivations. See *infra* Section II.B. This reflects a more fundamental disagreement.

49. See, e.g., *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (emphasizing that “our adversary system of justice” is “premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question” (internal quotation marks omitted)); *United States v. Cronin*, 466 U.S. 648, 654 (1984) (“The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975))).

50. See, e.g., *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (“Our system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.”); *Gardner v. Florida*, 430 U.S. 349, 360 (1977) (“[D]ebate between adversaries is often essential to the truth-seeking function”); *McGrath*, 341 U.S. at 171-72 (Frankfurter, J., concurring) (“No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.”).

51. See, e.g., Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates*, 1 J. EMPIRICAL LEGAL STUD. 783, 807 (2004) (explaining that in entitlement cases such as *Goldberg v. Kelly*, the Supreme Court “required that final decision making about government entitlements employ judicial modes of process to ensure fairness”).

52. See, e.g., *Boswell’s Lessee v. Otis*, 50 U.S. (9 How.) 336, 350 (1850) (“No principle is more vital to the administration of justice, than that no man shall be condemned in his person or property without notice, and an opportunity to make his defence.”); *Oakley v. Aspinwall*, 4 N.Y. 513, 518 (1851) (“It is a first principle in the administration of justice, that no one shall be condemned, nor be made to suffer, either in his person, fame, or estate, before he has had an opportunity to be heard in his defence.”). More controversial is *Mathews’* three-part test, which might reasonably be critiqued for its lack of guidance and undue flexibility.

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are the exception, while participatory procedures are the rule.⁵³ Notice and an opportunity to be heard is, obviously, the principle without which a participatory model of justice cannot work effectively. Unless a party is notified that there is a controversy, it cannot participate in decision-making; unless a party has the opportunity for a hearing, it cannot present its side of the controversy; and unless the decision-maker hears from both parties, there cannot be a meaningful ruling.⁵⁴ This is the adversary system's vision of justice.

Second, a core element of procedural due process is that the decision-maker must be scrupulously neutral—neither biased in favor of either side, nor charged with responsibilities that would interfere with her ability “to hold the balance nice, clear and true” between the parties.⁵⁵ This is an indispensable element of procedural due process, applicable even when circumstances call for only a rudimentary due process hearing.⁵⁶ A neutral decision-maker, required by due process principles, is not simply a person without a financial interest in the outcome of the case, but more broadly a person who is not affiliated with, or biased in favor of or against, one side or the other.⁵⁷ This rule too is a natural corollary of the party-dominated adversary process. A decision-maker cannot act as both a party and a neutral, because the two roles are fundamentally

53. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (“[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights.” (quoting *McGrath*, 341 U.S. at 170 (Frankfurter, J., concurring))).

54. See, e.g., *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864) (“Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.”).

55. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (O’Connor, J., plurality opinion) (noting that due process requires an “impartial adjudicator”). The cases expressing this principle are too numerous to list; for some notable examples, see *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Ward v. City of Monroeville*, 409 U.S. 57 (1972); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *In re Murchison*, 349 U.S. 133 (1955); and *Tumey*, 273 U.S. 510. Indeed, Professors Redish and Marshall argue that the “participation of an independent adjudicator” is the core procedural due process requirement, more paramount even than participatory rights to notice and an opportunity to be heard. See Redish & Marshall, *supra* note 3, at 475.

56. See, e.g., *Marshall*, 446 U.S. at 242–43 (emphasizing that the Court has “jealously guarded” the due process requirement of a neutral decision-maker by applying this requirement “in a variety of settings,” including warrants issued by justices of the peace, state optometry board disciplinary hearings, and parole revocation proceedings); *Tumey*, 273 U.S. at 523 (holding that a liquor possession charge tried before a city mayor who receives a share of the fees imposed does not satisfy the due process requirement for a disinterested judge). In *Hamdi*, similarly, while the Court’s plurality would have allowed a relatively minimal hearing on a detainee’s status as an “enemy combatant” to satisfy due process, it insisted that the person presiding over the hearing be a “neutral decision-maker.” 542 U.S. at 537 (O’Connor, J., plurality opinion) (holding that “interrogation by one’s captor” does not satisfy due process impartiality requirements).

57. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 486 (1972) (holding, in a parole revocation case, that due process requires that review of a challenged government action be conducted “by someone not directly involved in the case”). As Justice O’Connor emphasized in *Hamdi*, a fair and impartial adjudicator cannot have an “interest in the controversy.” See 542 U.S. at 537 (O’Connor, J., plurality opinion) (“[I]nterrogation by one’s captor . . . hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker.”).

incompatible.⁵⁸ This is encapsulated in the traditional statement of due process: “[N]o man shall be a judge in his own cause.”⁵⁹

The third critical component of procedural due process, as conventionally understood, is that process must ordinarily precede rather than follow the deprivation. In the classic due process model used in civil cases, the constitutionally required notice and hearing must be provided at a “meaningful time.”⁶⁰ This model has little tolerance for governmental actions that deprive persons of protected interests without first offering some notice-and-hearing process. The default rule is that notice and a hearing must be provided *before* the government takes adverse action, except in exigent circumstances.⁶¹ In the limited circumstances when the government may take action before a hearing, the process required must be provided as soon as possible thereafter.⁶² When a hearing can be readily provided prior to the deprivation, a post-deprivation hearing will not suffice to satisfy due process.

Finally, due process hearing rights come into play for any deprivation that is “not de minimis,” and they apply to interim as well as final deprivations.⁶³ Civil precedents reflect a continuum in which procedural due process protections come into play whenever governmental action threatens a cognizable deprivation of private interests, but the extent of those protections varies with the severity of the deprivation and the importance of the government’s interest.⁶⁴ Due process requires hearing procedures with respect to temporary or preliminary deprivations, as well as for those that are final and permanent.⁶⁵

58. *Tumey*, 273 U.S. at 534 (“A situation in which an official performs two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.”).

59. See *Arnett v. Kennedy*, 416 U.S. 134, 197 (1974) (White, J., concurring in part and dissenting in part) (quoting *Dr. Bonham’s Case*, (1610) 77 Eng. Rep. 646, 652 (K.B.)).

60. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (“It is . . . fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.” (internal quotation marks omitted)).

61. *Id.* at 90-91 (“Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing.”); see, e.g., *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (“We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in ‘extraordinary situations.’”); *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971) (noting the “root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event”).

62. See, e.g., *Morrissey*, 408 U.S. at 485 (stating that a preliminary hearing to support a parolee’s arrest and detention on charges of parole violation should be held “as promptly as convenient after arrest”).

63. *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (noting that due process hearing rights attach to the suspension of a public school student for ten days or less).

64. See *Boddie*, 401 U.S. at 378 (stating that the formality of due process hearing procedures “can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings”).

65. See, e.g., *Fuentes*, 407 U.S. at 85 (noting that it is “now well settled that a temporary, nonfinal deprivation of property” falls within due process protection).

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If extensive proceedings will ultimately take place before a final decision, this may affect the hearing procedures required at the outset.⁶⁶ If government rules provide, for example, for a full evidentiary hearing after termination of government employment, the pretermination hearing may be more limited.⁶⁷ If a full civil trial will ensue, a preliminary hearing on the interim seizure of the disputed property may provide more minimal review.⁶⁸ Still, in the classic due process model, “some kind of hearing” generally must be provided whenever a cognizable deprivation is threatened, and that hearing must meet certain minimum notice-and-hearing requirements.⁶⁹

In the ordinary course, the government cannot dispense entirely with a pre-deprivation hearing before a neutral adjudicator, even if it is willing to offer extensive procedural protections after the fact. In a civil suit, for example, a court could not constitutionally issue a preliminary injunction *sua sponte* enjoining a company from operating its business on the sole ground that the company will have a full opportunity at trial to demonstrate that its business is lawful. Separate due process hearing rights attach to the preliminary injunction itself.⁷⁰

In sum, the civil due process model reflected in cases like *Mathews* is grounded in a large body of constitutional precedent interpreting procedural due process as a basic requirement for notice and a hearing. These due process principles are thought to vindicate both the American abhorrence of arbitrary government action and the value Americans place on direct citizen participation in government decision-making.⁷¹ As a logical matter, it is hard to see why

66. See *Boddie*, 401 U.S. at 378 (“The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.”).

67. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985) (finding that when a terminated government employee will be “later entitled to a full administrative hearing and judicial review,” the pre-termination hearing may simply provide a “determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action”).

68. See, e.g., *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 343 (1969) (Harlan, J., concurring) (finding that when a civil defendant will ultimately receive a “plenary adverse adjudication of the underlying claim against her,” the due process hearing to support a pretrial property seizure should be aimed at establishing the “probable validity” of the underlying claim).

69. *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 (1972); see, e.g., *Goss v. Lopez*, 419 U.S. 565, 576 (1977) (“Appellees were excluded from school only temporarily, it is true, but the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, ‘is not decisive of the basic right’ to a hearing of some kind.” (citation omitted)).

70. See sources cited *supra* note 17.

71. See, e.g., *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (explaining that the “two central concerns of procedural due process” include “the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process”). Social science data support the soundness of the theoretical premises of the notice-and-hearing model of due process. See, e.g., Stephen Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. EMPIRICAL LEGAL STUD. 973, 976 (2004) (“What people generally look to in assessing legitimacy is just what the Supreme Court seems to suggest: neutral, respectful, and participatory procedures.”).

notice-and-hearing rights would not attach to any government deprivation of liberty or property, whether in a civil matter or in criminal litigation. Yet this is not always so in criminal cases, as this Article explores below.

II. THE CONTOURS OF CRIMINAL DUE PROCESS

The Supreme Court approaches procedural due process quite differently in its criminal and civil decisions, both in how it talks about due process and how it conceptualizes what due process requires. While the Court's civil and administrative precedents express a clear due process approach, exemplified in *Mathews*, no single doctrinal approach to procedural due process emerges from the Court's criminal decisions.⁷² Equally significant, procedural due process rules in criminal cases can be quite different from their civil counterparts. The body of criminal due process precedents is highly protective of defendants in many regards.⁷³ At the same time, due process hearing rights that are routine in the pretrial stages of civil cases can be absent from parallel stages of the criminal process, despite the comparable or greater interests at stake.⁷⁴ Both the Court's talk and its walk are important elements of its distinctive approach to "criminal due process." Each of these aspects is explored below, beginning with the way the Court talks differently about procedural due process in its criminal cases.

In a civil case, the courts approach procedural due process challenges in a straightforward fashion by asking, first, whether there is a protected "liberty" or "property" interest at stake.⁷⁵ If so, a constitutional right to a participatory hearing exists, and the question becomes how formal or informal that hearing must be.⁷⁶ This is the civil due process approach, laid out above, which applies in court cases as well as administrative proceedings. In criminal cases, by contrast, there is no clear or uniform doctrinal approach to procedural due process claims.⁷⁷ For a period of time, the Supreme Court applied the same

72. In Professor Israel's impressive and comprehensive article on free-standing due process in criminal cases, he thoroughly canvasses the varied doctrinal approaches used by the Supreme Court to determine the content of due process in criminal cases before finally concluding that in the criminal arena, the Court has used "inconsistent guidelines" and failed to attach "precedential weight to its general descriptions of the character of due process." Israel, *supra* note 12, at 429.

73. See *infra* Section II.A.

74. See *infra* Section II.B.

75. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 672 (1977) (noting that the first stage of the "familiar two-stage analysis" for procedural due process is to determine "whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty or property'").

76. See, e.g., *id.* (noting that in the second stage of the "familiar" due process inquiry, "if protected interests are implicated, we then must decide what procedures constitute 'due process of law'").

77. Indeed, the Supreme Court at times decides due process claims in criminal cases not only without articulating a general test, but without explaining whether the due process claim is substantive or procedural in nature. See *Albright v. Oliver*, 510 U.S. 266, 301-02 (1994) (Stevens, J., dissenting) ("[I]n *Winship*, we found it unnecessary to clarify whether our holding rested on substantive or procedural due process grounds; it was enough to say that the 'Due Process Clause' itself requires proof

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Mathews test used in civil settings to decide procedural due process challenges in criminal proceedings as well, although not frequently.⁷⁸ More recently, in *Medina v. California*, the Court reversed course, concluding that *Mathews* is not applicable to criminal prosecutions (at least not to state prosecutions).⁷⁹ In this case, the Court opted instead for a historic approach to deciding procedural due process challenges in criminal cases.⁸⁰ The decision is better read, however, as a rejection of the *Mathews* balancing test than as a departure from its core idea that due process grants hearing rights.⁸¹ It is clear from precedents contemporaneous with *Medina* that history alone is not the determinative factor; basic principles about notice and the right to a meaningful hearing continue to inform the Court's rulings in criminal as well as civil due process challenges.⁸² In short, to the extent a dominant approach is reflected in the Court's recent criminal cases, it suggests that the process due in criminal cases

beyond a reasonable doubt." (citing *In re Winship*, 397 U.S. 358, 364 (1970)); *Winship*, 397 U.S. at 363 (reasoning simply that "[t]he reasonable-doubt standard plays a vital role in the American scheme of criminal procedure").

78. See, e.g., *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citing *Mathews* for the proposition that government action that deprives an individual of life, liberty, or property "must still be implemented in a fair matter" as a matter of procedural due process even if the action "survives substantive due process scrutiny"); *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (applying the *Mathews* test to a due process challenge to a state's refusal to provide the defendant access to psychiatric assistance in preparing his defense); *United States v. Raddatz*, 447 U.S. 667 (1980) (applying the *Mathews* test to a due process challenge to criminal procedures that allowed a magistrate to hear suppression motions).

79. 505 U.S. 437, 445-46 (1992) (concluding, in a due process challenge to a state criminal prosecution, that a "narrower inquiry" is more appropriate than the *Mathews* balancing test). A prime justification for the more deferential approach adopted in *Medina* was that "dealing with crime is . . . the business of the States." *Id.* at 445 (citing *Irving v. California*, 347 U.S. 128, 134 (1954)). See generally 1 CRIMINAL PROCEDURE, *supra* note 11, § 2.7(b) (stating that in more recent decisions, the Court "has concluded that it should not apply to the criminal justice process the utilitarian balancing approach commonly used in determining the independent content of due process as applied to administrative proceedings").

80. See *Medina*, 505 U.S. at 445-46 (arguing that instead of the *Mathews* test, due process in criminal cases requires application of the more deferential test of *Patterson v. New York*, 432 U.S. 197, 202 (1977), which considers whether the challenged procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental").

81. The Court has made clear in other contexts that the *Mathews* balancing test is distinct and separable from the core *Mathews* premise that notice and a hearing should precede deprivations of liberty and property. See, e.g., *Dusenbery v. United States*, 534 U.S. 161, 167-68 (2002) (rejecting the application of the *Mathews* test while reaffirming that due process guarantees that "individuals whose property interests are at stake are entitled to 'notice and an opportunity to be heard'" (citation omitted)); *Weiss v. United States*, 510 U.S. 163, 176-79 (1994) (rejecting the applicability of *Mathews* while reaffirming that "a fair trial in a fair tribunal is a basic requirement of due process" (citation omitted)).

82. See *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (considering whether a state criminal procedure challenged under the Due Process Clause "imposes a significant risk of an erroneous determination"); *Morgan v. Illinois*, 504 U.S. 719, 727 (1992) (emphasizing in a criminal prosecution that due process requires that the jury be "impartial and indifferent"); *Lankford v. Idaho*, 500 U.S. 110, 121 (1991) (emphasizing in a criminal due process challenge "the importance that we attach to the concept of fair notice as the bedrock of any constitutionally fair procedure"). See generally 1 CRIMINAL PROCEDURE, *supra* note 11, § 2.7(b) (observing that the concern expressed in cases like *Medina* "has not prevented the Court from imposing due process requirements invalidating practices that had been followed for many years in many states").

should be heavily influenced by historic tradition,⁸³ but this doctrine has neither the clarity nor the consistency of the civil due process test.

Hamdi is symbolic of this doctrinal split between the clear due process rules on the civil side and the more vague criminal approach. While Justice O'Connor argued that *Mathews* provides the "ordinary mechanism" for determining the procedures called for by due process,⁸⁴ Justice Scalia countered that *Mathews* is inapplicable in criminal litigation.⁸⁵ While Justice O'Connor applied the conventional notice-and-hearing approach to Hamdi's civil detention,⁸⁶ Justice Scalia's vision of criminal due process was a historic model that incorporates "those common-law procedures traditionally deemed necessary before depriving a person of life, liberty or property."⁸⁷ In his view, due process should have afforded Hamdi the right to be charged with whatever criminal conduct the government believed it could sustain, and to be detained and tried through the regular criminal process, from accusation to trial.⁸⁸ Though Justice Scalia was, of course, addressing the same due process right as Justice O'Connor—the "due process" guarantee of the Fifth Amendment—there is no readily apparent common ground between the criminal process model of due process he advanced and her notice-and-hearing formulation.

More fundamentally, the problem is not simply that the Supreme Court *talks* differently about due process in criminal cases, but that it also *applies* due process quite differently in criminal settings. The basic assumption about due process in the civil model—that government deprivations of liberty or property should be accompanied by hearing rights—has not been applied to all stages of a criminal case as it has in civil litigation. In civil settings, as noted, procedural

83. See, e.g., *Medina*, 505 U.S. at 446 ("Historical practice is probative of whether a procedural rule can be characterized as fundamental."); see also, e.g., *Montana v. Egelhoff*, 518 U.S. 37, 43-44 (1996) (same); *Cooper*, 517 U.S. at 355-56 (same); *Herrera v. Collins*, 506 U.S. 390, 407-08 (1993) (same). But see *Medina*, 505 U.S. at 454 (O'Connor, J., concurring) (reading *Medina* as a holding that history creates a rebuttable presumption that a challenged practice comports with due process, because "[a]ny less charitable reading of the Court's opinion would put it at odds with many of our criminal due process cases, in which we have required States to institute procedures that were neither required at common law nor explicitly commanded by the text of the Constitution").

84. *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-29 (2004) (O'Connor, J., plurality opinion) (emphasizing that the "ordinary mechanism that we use . . . for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law' . . . is the test that we articulated in *Mathews v. Eldridge*").

85. See *id.* at 575-76 (Scalia, J., dissenting) (arguing that *Mathews* "has no place" when the Constitution and common law prescribe the elements of process due, as in criminal cases).

86. See *id.* at 533 (O'Connor, J., plurality opinion) (holding that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker").

87. *Id.* at 556 (Scalia, J., dissenting).

88. See *id.* at 576 (emphasizing that the government must either "hand him over to the criminal authorities, whose detention for the purpose of prosecution will be lawful, or release him"); see also *id.* (arguing that Hamdi has a due process right to traditional common law criminal proceedings, including "an accusation, a hearing before an impartial tribunal, with proper jurisdiction, and a conviction and judgment" before punishment may be inflicted).

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due process rights fall on a continuum of greater and lesser deprivations, in which hearing rights come into play for any governmental deprivation that is not de minimis, but the extent of the hearing varies with the circumstances.⁸⁹ In criminal litigation, by contrast, the standard notice-and-hearing approach has made inroads into some parts of the criminal process outside of trial (most notably at sentencing), but it has not been consistently applied.⁹⁰ Most importantly, the criminal pretrial process remains largely exempt from the constitutional premise that adversary hearings should precede interim deprivations of liberty and property interests.⁹¹

The net result of the Court's criminal due process doctrines, as relevant here, is that the pretrial stages of a criminal proceeding are virtually unregulated constitutionally, even though serious deprivations may be involved, while the criminal trial itself is attended by extensive procedural protections, even though criminal trials are rarely held.⁹² For litigants who go to trial, the criminal model is highly protective.⁹³ But for those who do not, the criminal model is decidedly lacking in constitutional protections when compared with comparable stages of civil litigation. The specific principles of procedural due process that create these results are explored below, with a focus on the puzzling rules that govern due process in the pretrial stages of a criminal case.

89. See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.”); *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (noting that the formality of due process hearing procedures “can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings”).

90. See *infra* text accompanying notes 212-215 (applying notice-and-hearing rights in sentencing); *infra* notes 201-211 and accompanying text (applying notice-and-hearing rights to aspects of preventative detention hearing); see also *King v. Zimmerman*, 632 F. Supp. 271, 275 (E.D. Pa. 1986) (“[R]evocation of bail *sua sponte* without a hearing and without a statement of reasons constitutes an arbitrary denial of a state-created right in violation of the Fourteenth Amendment’s guarantee of procedural due process.”).

91. See *infra* Section II.B.

92. Statistics show that only a very small percentage of criminal defendants proceed to trial. See, e.g., Admin. Office of the U.S. Courts, *Judicial Facts & Figures tbl.5.5*, <http://www.uscourts.gov/judicialfactsfigures/Table505.pdf> (last visited Nov. 26, 2006) (showing that in 2005, 4.5% of defendants in federal criminal cases went to trial, while over 86% entered guilty pleas).

93. This explains why litigants like Hamdi seek to be criminally prosecuted, rather than subjected to the more minimalist civil detention procedures. The enemy combatant cases present the unusual circumstance in which the individuals are insisting on the right to be criminally prosecuted, while the government is insisting on civil procedures. See *Padilla v. Hanft*, 432 F.3d 582, 584-85 (4th Cir. 2005) (concerning a challenge brought by Jose Padilla, an alleged enemy combatant, who argued that due process required that he be criminally prosecuted or released). This reflects the other side of the criminal-civil split—civil due process may grant hearing rights at all stages of a civil case, but it can be unduly flexible in permitting civil hearing procedures that are remarkably minimal given the interests at stake. See, e.g., Carl Jones, *Padilla’s New Status: Indictment in Miami Against Alleged Terrorist a Sudden End to Years of Detention Without Charge*, *MIAMI DAILY BUS. REV.*, Nov. 23, 2005 (“With the stroke of a pen, President George Bush transformed alleged terrorist Jose Padilla from an enemy combatant with few legal rights to a criminal defendant protected by the Bill of Rights.”).

A. *Criminal Due Process at Trial*

It is true that at trial, a criminal defendant receives an impressive degree of “process” constitutionally required to adjudicate his guilt or innocence. Many of these rights are provided by the express terms of the Bill of Rights. The Sixth Amendment, for example, grants a criminal defendant the right to a speedy trial, the right to trial by jury, the right to assistance of counsel, the right to compulsory process, and the right to confront the government’s witnesses.⁹⁴ The Fifth Amendment grants a criminal defendant the right against compulsory self-incrimination, and protects the defendant against being placed in jeopardy twice for the same offense.⁹⁵ The Fourth Amendment (as judicially interpreted) bars the introduction at his criminal trial of evidence seized in violation of the defendant’s constitutional rights.⁹⁶

But due process itself also provides additional protections at trial, both substantive and procedural. Beyond the explicit guarantees of the Bill of Rights described above, the Supreme Court has found implicit in the constitutional guarantee of “due process of law” a number of additional “free-standing” rights that attach at a criminal trial.⁹⁷ Notwithstanding the Court’s rhetoric at times suggesting a limited role for freestanding due process,⁹⁸ the Supreme Court has taken a relatively expansive view of due process in the context of a criminal trial.⁹⁹ Beyond the specific rights spelled out in the Bill of Rights, for example, it is due process that grants the defendant such central protections as the right to an unbiased judge,¹⁰⁰ the right to a presumption of innocence,¹⁰¹ the right to have the government prove its case beyond a reasonable doubt,¹⁰² and the right

94. U.S. CONST. amend. VI; *see* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

95. U.S. CONST. amend. V.

96. *See* *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

97. “Free-standing” due process refers to constitutional requirements the Court has read into the Due Process Clause itself, aside from any specific provisions of the Bill of Rights that may also come into play. *See* *Israel*, *supra* note 12, at 305.

98. *See, e.g., Medina v. California*, 505 U.S. 437, 443 (1992) (“The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.”); *Dowling v. United States*, 493 U.S. 342, 352 (1990) (“Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.”).

99. *See* *Israel*, *supra* note 12, at 305 (noting the “steady stream of . . . Supreme Court rulings applying the independent content of due process to the state and federal criminal justice processes”).

100. *See* sources cited *supra* note 55.

101. *See* *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (“The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.”); *Coffin v. United States*, 156 U.S. 432, 453 (1895) (“The 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.”).

102. *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

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to obtain exculpatory evidence in the government's possession.¹⁰³ Due process also prevents a defendant from being tried when he is mentally incompetent,¹⁰⁴ and from being criminally punished without an adjudication of guilt.¹⁰⁵ While none of these rights is expressly spelled out in the Constitution, the Court has found each of them constitutionally required as part of the criminal process of conviction and punishment that is guaranteed by "due process."¹⁰⁶

Procedural due process has also made substantial inroads on the criminal sentencing process.¹⁰⁷ Criminal sentencing, which was traditionally lightly regulated on the premise that it was not directed at establishing the defendant's guilt or innocence but at rehabilitating the defendant,¹⁰⁸ is now subject to notice-and-hearing due process rules that require that the defendant be given notice and an opportunity for a meaningful hearing before the sentence is imposed.¹⁰⁹ 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. The judge's determination of the length of the sentence, or her choice between a prison term, home confinement, or probation, may affect the defendant's interests as keenly as the fact of conviction.¹¹⁰

In short, the criminal trial itself, extending through the sentencing process,

103. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . .").

104. *See Medina v. California*, 505 U.S. 437, 439 (1992) ("It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial."); *Drope v. Missouri*, 420 U.S. 162 (1975) (same); *Pate v. Robinson*, 383 U.S. 375 (1966) (same).

105. *See, e.g., United States v. Salerno*, 481 U.S. 739, 746 (1987) (stating that substantive due process bars "punishment before trial"); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167 (1963) (stating that "punishment cannot be imposed without a prior criminal trial and all its incidents"). *See generally* Israel, *supra* note 12, at 391-93 (detailing an impressive array of due process protections that come into play at a criminal trial).

106. The defendant also has certain due process hearing rights with respect to proceedings that occur in anticipation of trial, such as suppression hearings. *See generally* 1 CRIMINAL PROCEDURE, *supra* note 11, § 2.7(a) (discussing the protections extended by due process in pretrial hearings).

107. *See, e.g.,* Israel, *supra* note 12, at 393 (noting that at a criminal sentencing, "due process becomes the primary source of constitutional regulation").

108. *See Williams v. New York*, 337 U.S. 241, 246 (1949) (emphasizing the traditional rule that "[t]ribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations" but that sentencing judges have far wider discretion); *see also* *Specht v. Patterson*, 386 U.S. 605, 606 (1967) (noting that *Williams* espoused the traditional rule that due process does "not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he came to determine the sentence to be imposed").

109. *See, e.g., Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause.").

110. *See, e.g., Burns v. United States*, 501 U.S. 129, 148 (1991) (Souter, J., dissenting) (noting that a convicted defendant has a "lively concern" with an erroneous sentencing calculation, and that this concern gives rise to procedural due process rights). The Supreme Court has also applied due process to grant notice-and-hearing rights in parole and probation revocation proceedings, which are closely related to the criminal process but are deemed civil in nature. *See, e.g., Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (noting that "the revocation of parole is not part of a criminal prosecution").

is premised on a due process model with adversary testing and participatory rights. This model reflects the same basic notice-and-hearing values expressed in the Court's procedural due process rulings in civil and administrative settings. The same cannot be said, however, when the focus turns to the Supreme Court cases that govern the preliminary stages of the criminal process. Here, the Court's constitutional model permits a nonadversary, closed process that fails to provide for partisan testing of the government's charges and leaves little room for the defendant's meaningful participation. This occurs even though the defendant may have very significant liberty and property interests at stake.

B. *Criminal Due Process Before Trial*

In the preliminary stages of the criminal process, not surprisingly, very substantial deprivations of the accused person's protected interests can occur. Some harmful effects flow simply from being charged with a criminal offense.¹¹¹ But the burden of a criminal prosecution is rarely limited to an accusation alone. Other burdens frequently follow as part of the preliminary steps taken by the government to bring an alleged offender to justice. The accused is often arrested and, following arrest, subjected to a litany of bureaucratic procedures such as fingerprinting and photographing.¹¹² More seriously, an accused may be detained in prison pending trial.¹¹³ Based on the criminal charge, the government may also seek to seize the defendant's property, to limit his freedom to travel, to suspend his government employment, to bar him from government contracting, or to take other measures to protect governmental interests while the case is pending.¹¹⁴

111. See, e.g., *United States v. Lovasco*, 431 U.S. 783 (1977) (“[A] formal accusation may interfere with the defendant’s liberty, . . . 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.” (internal quotation marks omitted)); *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.”).

112. See, e.g., *County of Riverside v. McLaughlin*, 500 U.S. 44, 66 n.2 (1991) (Scalia, J., dissenting) (noting that an arrestee should not be subjected to such “indignities” as “cataloguing of his personal effects, fingerprinting, photographing, etc.,” without a judicial determination that probable cause supports the charges).

113. Defendants may be held in prison pending trial when detention is needed to assure that the accused “will stand trial and submit to sentence if found guilty,” *Stack v. Boyle*, 342 U.S. 1, 4 (1951), and for the additional purpose of preventing defendants from committing further crimes, *United States v. Salerno*, 481 U.S. 739, 748 (1987). As a practical matter, many defendants are also detained until trial because they cannot afford bail. Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 *CARDOZO L. REV.* 1947, 1950 (2005) (“[T]he vast majority of detainees languish in detention primarily because they are guilty of being too poor to meet bail.”).

114. See, e.g., *Albright v. Oliver*, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring) (“A person facing serious criminal charges is hardly freed from the state’s control upon his release from a police officer’s physical grip. He is required to appear in court at the state’s command. He is often subject . . . to the condition that he seek formal permission from the court (at significant expense) before exercising

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These are clearly the types of burdens that the Court would normally view as deprivations of “liberty” or “property” sufficient to invoke procedural due process protections. Physical deprivations of a person’s liberty are, of course, among the most serious types of governmental deprivations from a due process perspective.¹¹⁵ Similarly, the seizure of property and the suspension of government employment also clearly constitute the type of “property” interests protected in the Court’s due process cases.¹¹⁶ But beyond the clear case of physical seizures, the Court has made clear that the liberty protected by due process is not “merely freedom from bodily restraint.”¹¹⁷ Lesser restrictions—such as limitations on the freedom to travel or conditions attached to the defendant’s release on bond—are also constitutionally cognizable liberty deprivations. The deprivation of these interests would normally give rise to a right to notice and a hearing before an impartial decision-maker in the civil context.

This is not always so in the criminal context. While the defendant may have extensive due process hearing rights at a criminal trial and sentencing, the Court has frequently held that due process does not necessarily require extending comparable hearing rights to the defendant in the initial stages of a criminal case.¹¹⁸ Compared to the due process protections routinely afforded to

what would otherwise be his unquestioned right to travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense.”); *FDIC v. Mallen*, 486 U.S. 230 (1988) (concerning an FDIC suspension of an indicted bank president); *James A. Merritt & Sons v. Marsh*, 791 F.2d 328 (4th Cir. 1986) (holding that the Defense Department could suspend an indicted government contractor from competing for government contracts).

115. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (O’Connor, J., plurality opinion) (describing as “the most elemental of liberty interests . . . the interest in being free from physical detention by one’s own government”); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”); *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) (“While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment.”).

116. See, e.g., *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993) (holding that ownership of real property is a protected interest under due process); *Mallen*, 486 U.S. at 240 (holding that a continuing employment relationship with federal institution is a protected property interest); *Goss v. Lopez*, 419 U.S. 565, 573 (1975) (finding that an employee’s entitlement to continued government employment absent discharge for cause is a protected property interest).

117. *Bd. of Regents v. Roth*, 408 U.S. 564, 572 & n.11 (1972); see also, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that the term “liberty” in the Due Process Clause “is not confined to mere freedom from bodily restraint”).

118. See, e.g., *Baker v. McCollan*, 443 U.S. 137, 143 (1979) (emphasizing that “an adversary hearing is not required” to support the pretrial detention of a criminal defendant); *Ingraham*, 430 U.S. at 697-98 (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 nonadversary 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 CRIMINAL PROCEDURE, *supra* note 11, § 14.2(a) (noting that the Supreme

lesser interests in the civil context, this doctrine is striking. It is not an exaggeration to say that defendants constitutionally may be arrested, charged, prosecuted, and detained in prison pending trial with fewer meaningful review procedures—that is to say, procedures to test the legitimacy of the underlying charges—than due process would require in the preliminary stages of a private civil case seeking the return of household goods.¹¹⁹ The criminal system places enormous trust in the good faith of prosecutors, with relatively little judicial or public oversight except at trial.

Before dissecting the complex due process doctrines that set the procedural floor for criminal pretrial procedures, it is useful to answer a basic question: given that criminal defendants appear before the judge for various purposes before trial, in what sense can it be said that defendants do not enjoy pretrial due process hearing rights? To be clear, this Article does not suggest that a criminal defendant receives no “process” in the early stages of a criminal case. A typical defendant is processed within the criminal system through some combination of pretrial steps, which commonly include certain judicial hearings. Hearings may be held, for example, to issue an arrest warrant, to conduct post-arrest review after a warrantless arrest (a so-called *Gerstein* hearing),¹²⁰ to arraign the defendant, to set bail, to rule on a governmental motion for preventative detention, and so on.¹²¹ While judicial proceedings related to arrest are held *ex parte* (for evident and not-so-evident reasons),¹²² the preliminary steps in a criminal prosecution also typically include hearings before the court at which the defendant is present and may even have a right to counsel.¹²³ In this limited sense, the defendant receives some “adversary” process in the pretrial criminal process. Arraignment and bail, for example,

Court has stated in some cases that “due process provides no procedural protection” for the defendant’s interests in avoiding pretrial restraints).

119. Hence Justice Stewart’s observation mentioned above; *see supra* note 15. *Compare, e.g., Gerstein*, 420 U.S. at 120-25 (stating that a defendant may be arrested and detained pending trial based on a nonadversary proceeding), *with Fuentes v. Shevin*, 407 U.S. 67, 80-83 (1972) (holding that an adversary hearing is required before the government’s preliminary seizure of an oven and a stereo).

120. This hearing is named after *Gerstein*, 420 U.S. 103, discussed at length below.

121. *See generally* 1 CRIMINAL PROCEDURE, *supra* note 11, § 1.4 (describing the typical steps in a criminal prosecution).

122. Proceedings on an arrest warrant require secrecy, lest the defendant flee to avoid arrest. But even the post-arrest review required by the Fourth Amendment to allow the defendant’s continued detention may constitutionally be conducted as an *ex parte* proceeding, even though there is no longer any similar risk. *See generally* 1 CRIMINAL PROCEDURE, *supra* note 11, § 1.3(j) (noting that a *Gerstein* hearing “ordinarily is an *ex parte* determination, similar to that made in the issuance of an arrest warrant and relying on the same sources of information”).

123. It is clear that the defendant’s Sixth Amendment right to counsel extends beyond the trial itself, to every “critical stage” in a criminal prosecution. *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961). Depending on the particular criminal system, pretrial proceedings such as arraignment, bail hearings, and preliminary hearings may be “critical stages” to which the right to counsel attaches. *See, e.g., Coleman v. Alabama*, 399 U.S. 1, 10 (1970) (finding a Sixth Amendment right to counsel at the preliminary hearing); *Powell v. Alabama*, 287 U.S. 45, 58 (1932) (finding a Sixth Amendment right to counsel at arraignment).

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immediately come to mind as routine pretrial stages at which a defendant has the opportunity to appear before the court.¹²⁴

More to the point, however, these routine pretrial criminal hearings would not satisfy normal due process rules because they are not designed to test the issue that is most fundamental from a due process perspective—whether sufficient evidence of criminal wrongdoing exists to justify depriving the defendant of liberty and property interests pending trial.¹²⁵ Instead, these are more properly viewed as administrative steps designed to process the case and bring the defendant to trial.¹²⁶ Arraignment, for example, is simply an initial court appearance typically limited to such preliminary matters as informing the defendant of the charges and of his rights, determining whether counsel should be appointed, or determining how the defendant will plead.¹²⁷ Similarly, the focus at a bail hearing is narrow. The traditional bail inquiry concerns the risk that the defendant will not appear for trial, and seeks to set bail conditions to ensure the defendant's later appearance.¹²⁸ To the extent the judge at a bail hearing considers the evidence of the crime, it is simply to determine whether the evidence is so strong that the defendant is unlikely to appear for trial if released, not to make an assessment whether the government has presented sufficient evidence to justify restricting the defendant's liberty or property rights pending trial.¹²⁹

124. There is a long statutory tradition permitting criminal defendants to be released on bail, provided they do not present a risk of flight. *See, e.g.*, *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (“From the passage of the Judiciary Act of 1789 . . . to the present Federal Rules of Criminal Procedure . . . federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail.”); *see also* 18 U.S.C. § 3142 (2000).

125. As *Hamdi* makes clear, due process requires not simply a hearing but a meaningful adversary review of the “factual basis” for adverse government action. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

126. As will be discussed below, pretrial proceedings in criminal cases are not generally designed to review the merits of the government's criminal charges, but to determine how the defendant will plead, whether he is a flight risk, and so on.

127. *See* 1 CRIMINAL PROCEDURE, *supra* note 11, § 1.3(k) n.176 (using the term “arraignment” to “refer[] simply to calling a person before a court to be notified of criminal charges”). Arraignment is also used to refer to an appearance at which the defendant enters his initial plea to the charge. *Id.*; *see also id.* § 1.3(o) (after formal criminal charges, “the defendant is arraigned—i.e., he is brought before the trial court, informed of the charges against him, and asked to enter a plea of guilty, not guilty, or, as is permitted under some circumstances, *nolo contendere*”); *id.* § 1.3(k) (first appearance of defendant, also known as arraignment, “often is a quite brief proceeding”).

128. *See, e.g.*, 18 U.S.C. § 3142(b) (2000) (stating that bail should not be granted if the court finds that “release will not reasonably assure the appearance of the person” at subsequent proceedings); *cf.* 4 CRIMINAL PROCEDURE, *supra* note 11, § 12.1(b) (“The typical state statute declares that the objective of bail is to secure the defendant's attendance at the proceedings against him and to prevent his punishment before conviction.”). Since 1984, the federal bail statute has also permitted pretrial detention of a defendant not simply for the traditional goal of ensuring his appearance at trial but to prevent him from committing further crimes (“preventative detention”). *See* Bail Reform Act of 1984, 18 U.S.C. § 3142 (2000); *see generally* *United States v. Salerno*, 481 U.S. 739, 754-55 (1987) (upholding the federal preventative detention scheme).

129. State bail statutes commonly allow the court to consider, in setting bail, the government's assessment of the “strength of the case against the defendant, as communicated by the prosecutor or police.” 4 CRIMINAL PROCEDURE, *supra* note 11, § 12.1(b). The federal pretrial detention statute reads

Beyond arraignment and bail, there is a common pretrial procedure known as a preliminary hearing (or preliminary examination).¹³⁰ This is an adversary proceeding, established by statute, that on its face seems to contemplate pretrial judicial review of the sufficiency of the government's evidence.¹³¹ When a preliminary hearing is held, it is a judicial hearing at which the defendant is present and has procedural rights, designed to test whether the government's evidence displays probable cause to support the criminal charges—akin in function to a civil hearing on a motion seeking pretrial relief, if not quite as protective.¹³²

While preliminary hearings, if held, provide some opportunity for criminal defendants to test the government's evidence, because they are not constitutionally required, they are offered if at all as a matter of legislative grace.¹³³ Such hearings are infrequent in the federal criminal system,¹³⁴ and are selectively offered in state criminal systems.¹³⁵ The net result is that while the

similarly. *See* 18 U.S.C. § 3142(g) (2000) (allowing court to consider the “weight of the evidence against” the defendant). Such statutes, however, merely permit the weight of the evidence to be considered for the limited purpose of assessing the likelihood that the defendant will appear for trial—if the evidence is strong, there is a greater likelihood the defendant will flee. *See, e.g.,* United States v. Edson, 487 F.2d 370, 372 (1st Cir. 1973) (“Until a defendant has been convicted, the nature of the offense, as well as the evidence of guilt, is to be considered only in terms of the likelihood of his making himself unavailable for trial.”). Such laws do not grant the defendant a right to judicial review of the sufficiency of the government's evidence at the time of bail. Indeed, at a bail hearing, the government's assessment of the case is commonly submitted by proffer, rather than the introduction of evidence. *See, e.g.,* United States v. Abuhamra, 389 F.3d 309, 321 n.7 (2d Cir. 2004) (“Most [bail hearings] proceed on proffers.”).

130. *See* 1 CRIMINAL PROCEDURE, *supra* note 11, § 1.3(f) (“The preliminary hearing . . . provides screening in an adversary proceeding in which both sides are represented by counsel.”).

131. *See, e.g.,* 1 CRIMINAL PROCEDURE, *supra* note 11, § 1.3(f) (noting that in a preliminary hearing, the magistrate judge must “determine whether, on the evidence presented, there is probable cause to believe that defendant committed the crime charged”).

132. *See id.*; *see also infra* note 141. While the preliminary hearing is roughly akin in function to a civil pretrial hearing, preliminary hearing standards in criminal cases are typically *less* rigorous than their civil counterparts. The typical standard for a preliminary hearing simply requires proof of “probable cause to believe that an offense has been committed and that the arrested person has committed it.” *See, e.g.,* FED. R. CRIM. P. 4(a); 18 U.S.C. § 3060(a) (2000). By contrast, in a civil preliminary injunction hearing, the court must find that the party seeking relief is “likely to prevail on the merits.” *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Commentators have observed the anomaly of these standards, which permit adverse action against criminal defendants on *less* evidence than would be required to issue preliminary relief in a civil case. *See, e.g.,* Albert Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 519 (1986) (observing that a probable cause standard requires “less evidence than [federal courts] would require before issuing preliminary injunctions in civil cases”).

133. *See infra* Subsection II.B.1.

134. *See* 4 CRIMINAL PROCEDURE, *supra* note 11, § 14.2(b) (noting that over the federal system as a whole, “preliminary hearings are held in roughly 15-18% of the criminal prosecutions filed in district court”).

135. Preliminary examinations on the state level generally are made available to defendants charged by the prosecutor but not to those charged by the grand jury. Grand jury indictment may be used in state systems either for a set category of offenses, *see, e.g.,* R.I. CONST., art. I, § 7 (requiring a grand jury indictment for crimes punishable by death or life imprisonment), or at the prosecutor's discretion, *see, e.g.,* *Hawkins v. Superior Court*, 586 P.2d 916, 922 (Cal. 1978) (addressing a constitutional challenge to a state criminal system under which the prosecutor had “unfettered discretion to choose

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defendant is indeed “processed” through the criminal justice system, he has no constitutional right to the kind of process designed to ensure that there is a valid basis for the criminal charges on which he may be arrested, detained, and suspended from employment until he is ultimately tried. This is the due process “gap” addressed in this Article.

Below, the Article turns to the Supreme Court doctrines that create this seemingly anomalous result. While the protections that surround the criminal trial are familiar principles—such concepts as the presumption of innocence, the right to counsel, and the reasonable doubt standard—the procedural rules that govern the pretrial criminal process are more arcane. There are two key due process doctrines to understand: one doctrine establishes that there is no constitutional right to an adversary pretrial hearing to test the basis for criminal charges,¹³⁶ while the other grants preclusive legal effect to the grand jury’s indictment for pretrial purposes.¹³⁷ Together, these doctrines operate not only to deny criminal defendants due process hearing rights, but also to devalue those protections offered by statutory pretrial procedure schemes.

1. *Rejecting Due Process Rights in Pretrial Criminal Proceedings*

The due process rules that govern pretrial criminal proceedings stem from two seminal due process rulings issued over a half-century apart. The first is the Supreme Court’s 1913 decision in *Lem Woon v. Oregon*, in which the Court held that a defendant has no due process right to a preliminary hearing at the outset of a criminal case to test the validity of the government’s charges.¹³⁸ The second is its 1975 decision in *Gerstein v. Pugh*, in which the Court applied the same due process principle to pretrial detention, holding that a criminal defendant constitutionally may be held in prison before trial without any adversary hearing to test the validity of the charges on which he is detained.¹³⁹ Both cases remain important precedents.

At the time *Lem Woon* was decided, screening of criminal charges in state criminal systems was commonly provided by holding a preliminary hearing to review a prosecutor’s charges.¹⁴⁰ *Lem Woon* presented the question whether

which defendants will be charged by indictment rather than information”). See generally 4 CRIMINAL PROCEDURE, *supra* note 11, § 14.2(d) & n.48 (stating that in most state systems, indicted defendants are not entitled to preliminary hearings).

136. See *infra* Subsection II.B.1.

137. See *infra* Subsection II.B.2.

138. 229 U.S. 586 (1913).

139. 420 U.S. 103, 120-25 (1975).

140. See, e.g., *Hurtado v. California*, 110 U.S. 516, 538 (1884) (noting the existing state practice in criminal cases to proceed “by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant”). Preliminary hearings were also used in the federal system to review criminal charges following the defendant’s arrest and prior to the submission of his case to the grand jury. See 4 CRIMINAL PROCEDURE, *supra* note 11, § 14.2(b) (reasoning that because grand juries were not in constant session, the preliminary hearing served “to ensure that a person was not held in

such hearings were constitutionally required as a matter of due process. While the procedures for a preliminary hearing do not approach the formality of a criminal trial, at the same time, the procedure reflects the basic elements of the conventional due process model: the defendant receives notice, is entitled to participate, and receives a ruling from a neutral decision-maker based on the evidence presented.¹⁴¹ The preliminary hearing thus might be thought to inject an element of procedural due process in the initial stages of a criminal case.¹⁴² Despite the historic pedigree of the preliminary hearing,¹⁴³ the Supreme Court held in *Lem Woon* that due process does not require a preliminary hearing.¹⁴⁴

While the reasoning of *Lem Woon* is both sparse and questionable,¹⁴⁵ it might be defensible as a principle in a case in which no consequences flow from the criminal charges, other than to initiate a criminal prosecution. After

custody, or subjected to the continued burdens associated with release on bail, without a fairly prompt prosecutorial showing of probable cause”).

141. See generally 1 FEDERAL PRACTICE & PROCEDURE, *supra* note 9, § 85 (noting that while it is far less formal than a trial, a preliminary examination in its modern incarnation is a judicial proceeding attended by a number of trial-type procedural rights, such as the right to counsel, the right to call witnesses, the right to cross-examine the government’s witnesses, the right to a neutral decision maker, and the right to appeal); *id.* (noting that at the preliminary hearing, the magistrate stands between the parties “not as partisan, but as judge,” and that “[i]n subject and function, the hearing is judicial” (quoting *Wood v. United States*, 128 F.2d 265, 271 (D.C. Cir. 1942))).

142. Indeed, recognizing the value to the defendant of such adversary proceedings, the Supreme Court later held that when a state provides for an adversary preliminary hearing, the Sixth Amendment guarantees a right to counsel at that hearing. *Coleman v. Alabama*, 399 U.S. 1, 8-9 (1970).

143. See *Hurtado*, 110 U.S. at 538 (noting that the preliminary examination is an “ancient proceeding at common law”).

144. *Lem Woon v. Oregon*, 229 U.S. 586, 590 (1913).

145. In *Lem Woon*, the due process analysis consisted of a single paragraph, in which the Court reasoned that if due process does not require grand jury indictment, as it had earlier held in *Hurtado v. California*, “we are unable to see upon what theory” states may be required to provide preliminary examinations. *Id.* at 590. This rationale, however, is difficult to square with *Hurtado* itself. There the Court was willing to dispense with the screening function served by grand jury indictment precisely because the state had adopted a scheme that used preliminary hearings at which the magistrate judge “certif[ied] to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution.” *Hurtado*, 110 U.S. at 538. Providing for preliminary hearings in lieu of grand jury indictment, the *Hurtado* Court emphasized, “carefully considers and guards the substantial interest of the prisoner” and is thus a permissible method of initiating criminal charges. *Id.* at 538. As this makes clear, the *Hurtado* decision did not hold that there is *no* due process right to pretrial review of criminal charges, but rather that due process can be *satisfied* by providing for pretrial review through a preliminary hearing. This reading is confirmed in later Court decisions. See, e.g., *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430-31 (1994) (stating that the *Hurtado* Court allowed the state to dispense with the “safeguards of common-law procedure” because it provided an alternative procedure “with nearly the same protection as the abrogated common-law grand jury procedure”); see also *id.* at 436 (Scalia, J., concurring) (“The deprivation of property without observing (or providing a reasonable substitute for) an important traditional procedure for enforcing state-prescribed limits upon such deprivation violates the Due Process Clause.”). Commentators similarly interpret the *Hurtado* decision. See, e.g., Israel, *supra* note 12, at 345 (“In adopting [preliminary hearings], the legislature had obviously taken account of the interest of the individual in not being put through the burden of a trial where the state lacked a legitimate grounding for prosecution. It simply had used an alternative to grand jury review to protect that interest.”). Despite its questionable constitutional analysis, the *Lem Woon* decision has proved durable. See, e.g., *Albright v. Oliver*, 510 U.S. 266, 282 (1994) (Kennedy, J., concurring) (stating that the Constitution generally requires “no pretrial hearing on the sufficiency of the charges”).

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all, charges alone do not generally give rise to due process hearing rights, even though they may damage the defendant's reputation.¹⁴⁶ A litigant who faces government fraud charges in a civil case, for example, has no constitutional right to a pretrial hearing to challenge their factual basis unless the government seeks a pretrial order that would affect his property rights.¹⁴⁷ But in *Gerstein*, the Court extended the same principle to a case in which granting a preliminary hearing would have seemed reasonable—when the criminal charges were used not simply to initiate the case but also to justify detaining the defendant in prison for an extended period pending trial.¹⁴⁸

It was in *Gerstein*—decided in 1975, during the height of the Court's enthusiasm for procedural due process in civil contexts¹⁴⁹—that the Supreme Court expressly articulated a separate due process principle for pretrial criminal proceedings.¹⁵⁰ Leading up to *Gerstein*, the Court had issued a series of due process decisions applying notice-and-hearing principles not only in newer administrative settings¹⁵¹ but also to phases of civil cases historically treated as nonadversary proceedings.¹⁵² In *Gerstein*, however, the Court drew the line at extending such notice-and-hearing rights to pretrial proceedings in criminal cases. This ruling reflected a departure from the clear trend of the Court's

146. See, e.g., *Paul v. Davis*, 424 U.S. 693, 701 (1976) (rejecting the proposition that “reputation alone, apart from some more tangible interests such as employment, is either ‘liberty’ or ‘property’ by itself sufficient to invoke the procedural protection of the Due Process Clause”).

147. *Id.* On the other hand, one might reasonably argue that criminal charges are sufficiently grave in the obloquy and disruption they cause that such charges alone should give rise to “liberty” interests protected by due process. See, e.g., *Albright*, 510 U.S. at 296 (Souter, J., concurring) (arguing that “an official accusation of serious crime has a direct impact on a range of identified liberty interests” protected by due process); cf. FED. R. CIV. P. 9(b) (imposing a heightened pleading standard on civil fraud claims, which must be pled with “particularity”).

148. Under the state procedures challenged in *Gerstein*, criminal defendants arrested without a warrant could be detained in prison for extended periods without judicial review of the factual basis for the criminal charges, so long as the prosecutor signed the criminal charges. See *Gerstein v. Pugh*, 420 U.S. 103, 106 (1975) (describing state criminal procedure under which “a person charged by information could be detained for a substantial period solely on the decision of a prosecutor”).

149. *Gerstein* was issued within five years after the Court's rulings that procedural due process requires notice and hearing in a wide variety of settings, extending to such varied governmental deprivations as the revocation of parole and probation, the pretrial seizure of household goods in a civil case, the suspension of public school students, the garnishment of bank accounts, and the termination of welfare benefits. See *infra* sources cited in notes 151 and 152.

150. *Gerstein*, 420 U.S. at 125 n.27.

151. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (applying procedural due process to require a pre-deprivation hearing for the suspension of a student from public school); *Bell v. Burson*, 402 U.S. 535, 541-42 (1971) (applying procedural due process to require a pre-deprivation hearing for the suspension of a driver's license); *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) (applying procedural due process to require a pre-deprivation hearing for the termination of welfare benefits).

152. See, e.g., *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606-07 (1975) (applying procedural due process to require a pre-deprivation hearing for the garnishment of bank account); *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973) (applying procedural due process to require preliminary and final hearings for probation revocation); *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972) (applying procedural due process to require a pre-deprivation hearing for a replevin order seizing household goods pending trial on repossession claims); *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972) (applying procedural due process to require preliminary and final hearings for parole revocation).

earlier due process decisions.

The *Gerstein* suspects were already safely in custody, and one could easily have concluded—as did the district court and the court of appeals¹⁵³—that providing for participation by the accused in a post-arrest probable cause hearing could enhance the accuracy of this screening, the goal of due process.¹⁵⁴ The Supreme Court did not agree. Rejecting its civil due process precedents as “inapposite and irrelevant,”¹⁵⁵ the Court held that the defendant’s protection in the pretrial process is limited to the Fourth Amendment requirement that a neutral judicial official find probable cause to support the criminal charges.¹⁵⁶ This judicial screening, it held, may be conducted without the presence of the accused.¹⁵⁷ It is this *ex parte* Fourth Amendment procedure, rather than the notice-and-hearing requirement of procedural due process, that provides the only process “due” to the defendant to support pretrial detention.¹⁵⁸

Under *Lem Woon* and *Gerstein*, a criminal defendant has no constitutional right to an adversary preliminary hearing to review the merit of criminal charges, even if he will suffer deprivations of liberty or property waiting for trial. Instead, he has only a limited Fourth Amendment right to judicial review in a hearing that may be closed to the defendant himself—a fundamental departure from the participatory model of due process in civil settings.¹⁵⁹ Equally important, this limited constitutional protection is undermined by another legal principle lurking in *Gerstein*’s footnotes: judicial review to screen the basis for the criminal charges need not be conducted at all when the grand jury has indicted.¹⁶⁰

153. See *Pugh v. Rainwater*, 483 F.2d 778, 787 (5th Cir. 1973), *aff’d in part and rev’d in part sub nom. Gerstein*, 420 U.S. 103 (applying the *Fuentes* line of decisions to conclude that due process requires an adversary preliminary hearing to review probable cause to detain criminal defendants).

154. See, e.g., *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (describing the “two central concerns of procedural due process” to prevent unjustified governmental deprivations and to promote participation in decision-making by affected individuals); *Fuentes*, 407 U.S. at 81 (“When a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented.”).

155. *Gerstein*, 420 U.S. at 125 n.27.

156. *Id.* at 126 (holding that that the Fourth Amendment requires a timely “judicial” determination of probable cause as a prerequisite to detention).

157. *Id.* at 120 (“Probable cause can be determined reliably without an adversary hearing.”).

158. *Id.* at 125 n.27 (“The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests has always been thought to define the ‘process that is due’ for seizures of person or property in criminal cases, including the detention of suspects pending trial.”).

159. See *supra* Part I.

160. In *Gerstein*, the Court revealed in dicta that its Fourth Amendment framework, requiring that a judge independently review criminal charges for probable cause, does not apply at all when the defendant has been charged by the grand jury rather than by the prosecutor. Instead, the grand jury’s indictment “conclusively determines the existence of probable cause.” *Gerstein*, 420 U.S. at 117 n.19.

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2. *Allowing Grand Jury Indictment To Displace Pretrial Judicial Review*

Grand jury indictment is, of course, one method of charging criminal offenses; the other is to allow the prosecutor to issue an “information,” criminal charges asserted by the prosecutor alone without the approval of panel of citizen grand jurors.¹⁶¹ Grand jury indictment is the predominant method of charging in the federal criminal system, in which it is constitutionally required for all serious offenses,¹⁶² while grand jury indictments are selectively used in the states, which are free to design their own charging systems.¹⁶³ When the grand jury is used, it reviews the prosecutor’s proposed criminal charges in a secret proceeding in which no rules of evidence apply and from which the defendant is entirely excluded.¹⁶⁴ The grand jury is, of course, the very antithesis of modern adversary hearing procedures.

The influence of grand jury doctrine in retarding the defendant’s procedural rights in the pretrial criminal process cannot be overstated. It is not simply that the defendant lacks procedural rights in the grand jury process (although this is certainly true). More than this, under governing doctrine, the mere fact that the grand jury has indicted is also used to deprive the defendant of procedural rights that would otherwise attach *outside* of the grand jury, both as a statutory and constitutional matter. This result flows from the constitutional principle, often traced to the Supreme Court’s 1932 decision in *Ex parte United States*,¹⁶⁵ that grand jury indictment is the legal equivalent of judicial review.¹⁶⁶ When

161. See 1 CRIMINAL PROCEDURE, *supra* note 11, § 1.3(n) (“Like the indictment, the information is a charging instrument which replaces the complaint, but it is issued by the prosecutor rather than the grand jury.”).

162. See U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .”).

163. See *Hurtado v. California*, 110 U.S. 516, 535-36 (1884) (holding that the Fifth Amendment requirement for jury indictment is not applicable to state criminal proceedings). As a result of *Hurtado*, grand jury indictment is required in the federal system only by virtue of the explicit grand jury clause in the Fifth Amendment, and not by due process. The states are free to dispense with grand jury indictment as a method of criminal accusation, and many states have done so, either in whole or in part. See generally SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 1:5 (2d ed. 2001) [hereinafter GRAND JURY LAW] (describing state grand jury reforms at the end of the nineteenth century). The typical state charging procedure uses prosecutorial information combined with preliminary hearings, but many states reserve grand jury indictment as an alternative charging method. See, e.g., *id.*; 1 CRIMINAL PROCEDURE, *supra* note 11, § 1.3(m) (“In a majority of the states, the prosecution is now allowed to proceed either by grand jury indictment or by information at its option.”).

164. See generally *Coleman v. Alabama*, 399 U.S. 1, 25 (1970) (Burger, C.J., dissenting) (contrasting adversary preliminary hearings with grand jury proceedings, in which counsel for the accused “cannot attend . . . even though witnesses, including the person eventually charged, may be interrogated in secret session”); *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 203 (1951) (Reed, J., concurring) (emphasizing that persons under grand jury investigation “have no right to notice by and hearing before a grand jury; only a right to defend the charge at trial”); GRAND JURY LAW, *supra* note 163, § 1:1.

165. 287 U.S. 241 (1932).

166. *Id.* at 250 (“[T]he finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer.”).

the grand jury indicts, the validity of the criminal charges is conclusively established for all pretrial purposes.¹⁶⁷

This far-reaching doctrine effectively forecloses any pretrial judicial review of the factual basis for the government's criminal charge (whether for purposes of arrest, detention, or otherwise) when the prosecutor obtains the grand jury's approval for criminal charges.¹⁶⁸ Following indictment, the judge has no discretion to deny an arrest warrant.¹⁶⁹ There is no probable cause hearing, there is no preliminary hearing, and the ground has been laid both for pretrial detention and government suspension.¹⁷⁰ This occurs because the issue of "probable cause"—which would otherwise require a judge's independent review—is foreclosed by the grand jury's decision to indict.¹⁷¹ This is a curious rule when one considers the grand jury's "process."¹⁷²

The grand jury's nonparticipatory process could not be farther from the notice-and-hearing model embodied in a conventional understanding of due process. Equally important, under normal rules about judicial qualifications (whether for due process or Fourth Amendment purposes), the grand jury is not a body that should qualify to make judicial judgments.¹⁷³ It is not simply that the grand jury engages in a one-sided proceeding dominated by the prosecutor (although this criticism is more than fair).¹⁷⁴ Equally important, within the legal

167. See, e.g., *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950) (stating that when a grand jury issues an indictment, this is a conclusive determination that there is "probable cause to believe [the defendant] is guilty," and "[a]s a result the defendant can be arrested and held for trial").

168. See generally Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 50-53 (2004) (noting that a grand jury indictment streamlines pretrial criminal procedures by providing a legally conclusive determination of probable cause that eliminates the need for further review procedures).

169. See *Ex parte United States*, 287 U.S. at 250 (holding that a grand jury's "indictment, fair upon its face . . . conclusively determines the existence of probable cause for the purpose of holding the accused to answer").

170. See Kuckes, *supra* note 168.

171. See *FDIC v. Mallen*, 486 U.S. 230, 241 (1988) (noting that a grand jury indictment establishes "probable cause to believe that appellee had committed a felony" and thus justifies the defendant's suspension from employment without a prior hearing); *Gerstein v. Pugh*, 420 U.S. 103, 117 n.19 (1975) (stating that a grand jury indictment "conclusively determines the existence of probable cause" for the purposes of arrest and detention); *Sciortino v. Zampano*, 385 F.2d 132, 133 (2d Cir. 1967) (noting that a grand jury indictment establishes probable cause and thus "eliminates the need for a preliminary examination," which would be an "empty ritual"). This substitution doctrine is particularly important in the federal system, in which most criminal cases proceed by indictment because of the Fifth Amendment requirement of grand jury indictment for all serious crimes. See U.S. CONST. amend. V. While state systems vary, many states also allow or require grand jury indictment for specified cases. See generally 4 CRIMINAL PROCEDURE, *supra* note 11, § 14.2(c) ("Eighteen states, as in the federal system, require prosecution by indictment (unless waived) for all felonies."); *id.* § 14.2(d) ("Almost two-thirds of the states permit felony prosecutions to be brought either information or indictment . . .").

172. The only rationale offered by the Court for allowing grand jury indictments to satisfy *Gerstein* requirements was the grand jury's "relationship to the courts and its historical role of protecting individuals from unjust prosecution." *Gerstein*, 420 U.S. at 117 n.19.

173. See, e.g., *id.* at 112 (noting that the Fourth Amendment requires a determination by a "neutral and detached magistrate" (citing *Johnson v. United States*, 333 U.S. 10, 13-14 (1948))).

174. See, e.g., Leonard B. Boudin, *The Federal Grand Jury*, 61 GEO. L.J. 1, 35 (1972) (stating that the grand jury is an "arm of the state, more powerful than ever before, serving the ends of the

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process the grand jury serves in an accusatory role as part of a law enforcement function.¹⁷⁵ If, like prosecutors, grand jurors charge and investigate crimes, they should be no more qualified than prosecutors to judge the merit of their own charges.¹⁷⁶ Yet the Court has held that there is no constitutional right to a judicial hearing, adversary or otherwise, to test the government's charges when the grand jury indicts.¹⁷⁷

Standing alone, the idea that grand jury indictment should suffice for issuing an arrest warrant (the narrow question in *Ex parte United States*) is not unreasonable. The government must be able to move swiftly to apprehend suspected wrongdoers and bring them to justice, and treating grand jury indictments as judicial furthers this purpose.¹⁷⁸ The problem arises, however, when this doctrine is combined with the general lack of due process protections in the criminal model. Arresting a defendant on the strength of a grand jury indictment would not matter if a criminal defendant retained ordinary due process rights thereafter (for example, to a post-arrest hearing to support his detention, his suspension from government employment, the freezing of his bank account, or other, nonphysical restrictions on his liberty). In such a regime, the defendant would get some meaningful opportunity for a hearing designed to ensure that the evidence justifies the considerable deprivations he will suffer during the criminal process. But the Supreme Court has made clear that preliminary hearings are not required.¹⁷⁹

Grand jury doctrine also has another effect in depressing the defendant's pretrial rights that is slightly more subtle. Whether in criminal or civil settings, of course, due process simply establishes the floor for permissible procedural protections; state and federal governments are free to adopt additional

prosecution"); William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973) ("Today, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury.").

175. See *Williams v. United States*, 504 U.S. 36, 51 (1992) (stating that the grand jury is an "accusatory" body); *Branzburg v. Hayes*, 408 U.S. 665, 687 (1972) (emphasizing the grand jury's "important role in fair and effective law enforcement").

176. See, e.g., Charles A. Thompson, *The Fourth Amendment Function of the Grand Jury*, 37 OHIO ST. L.J. 727, 743 (1976) (arguing that the grand jury's dependence on the prosecutor precludes it from making a neutral and detached judgment to satisfy the Fourth Amendment); *Gerstein*, 420 U.S. at 117 (holding that prosecutor's "responsibility to law enforcement is inconsistent with the constitutional role of neutral and detached magistrate").

177. See, e.g., *Kalina v. Fletcher*, 522 U.S. 118, 129 (1997) (holding that the Fourth Amendment probable cause requirement to support an arrest "may be satisfied by an indictment returned by a grand jury, but not by the mere filing of criminal charges in an unsworn information signed by the prosecutor").

178. Even under normal due process rules, the need for secrecy to effect the defendant's arrest would qualify as an exigent circumstance obviating the need for prior notice. See *infra* note 304.

179. See, e.g., *Gerstein*, 420 U.S. at 119 (noting that a "judicial hearing is not prerequisite to prosecution by information"); *Rivera v. Virgin Islands*, 375 F.2d 988, 990 (3d Cir. 1967) (noting that the provision of a preliminary hearing is "a mere procedural right which is not within the constitutional concept of due process"); cf. *Coleman v. Alabama*, 399 U.S. 1, 8 (1970) ("The preliminary hearing is not a required step in an Alabama prosecution.").

protections by statute. While the Supreme Court in *Lem Woon* declined to give the preliminary hearing constitutional status,¹⁸⁰ many systems (including the federal system) have adopted preliminary hearings as a matter of statute or rule.¹⁸¹ On paper, preliminary hearings look like reasonable due process hearings: the defendant is present, has a right to counsel and to call or cross-examine witnesses, and an independent judicial official reviews the sufficiency of the evidence to support the criminal charges.¹⁸²

The Catch-22 created by grand jury indictment is that indicted defendants do not get preliminary hearings.¹⁸³ Although this is not a necessary rule, it follows logically from the principle of grand jury equivalency. If one accepts the premise that the grand jury's indictment is equivalent to a judicial probable cause finding, there is no need to have a judge find probable cause if the grand jury has already made that determination. On this rationale, courts have concluded that statutory rights to a preliminary hearing, like Fourth Amendment rights, should evaporate once the grand jury indicts.¹⁸⁴

* * *

Some common themes emerge from the due process rules that set the constitutional floor for the screening mechanisms in the pretrial criminal process (arrest, accusation, preliminary hearing, and pretrial detention).¹⁸⁵ Little

180. See *Lem Woon v. Oregon*, 229 U.S. 586 (1913) (holding that preliminary hearings are not required by due process).

181. See FED. R. CRIM. P. 5.1 (describing preliminary hearing procedures); 1 CRIMINAL PROCEDURE, *supra* note 11, § 1.3(*l*) (“All but a few of our fifty-two jurisdictions grant the felony defendant a right to a preliminary hearing, to be held within a specified period . . .”).

182. See *generally* 1 CRIMINAL PROCEDURE, *supra* note 11, § 14.1 (stating that the preliminary hearing is an “open and adversary hearing” before a magistrate at which the prosecution must establish that there is sufficient evidence supporting its charge); *id.* § 14.4 (noting that at a preliminary hearing, the defendant has procedural rights typically including the right to counsel, the right to cross-examine the prosecution’s witnesses, and the right to call witnesses).

183. See 18 U.S.C. § 3060(e) (stating that no preliminary examination is held if a grand jury indictment is returned); *United States v. Simon*, 510 F. Supp. 232, 235 (E.D. Pa. 1981) (“Once a federal grand jury has indicted a defendant, probable cause is established, and the defendant is no longer entitled to a preliminary hearing.”); FED. R. CRIM. P. 5(c) (stating that the “preliminary examination shall not be held if the defendant is indicted”); 1 CRIMINAL PROCEDURE, *supra* note 11, § 1.3(*l*) (“In almost all jurisdictions, if the prosecutor obtains a grand jury indictment prior to the scheduled preliminary hearing, the preliminary hearing will not be held . . .”).

184. See, e.g., *United States v. Aranda-Hernandez*, 95 F.3d 977, 980 (10th Cir. 1996) (“The judicial determination of probable cause may be in the form of a preliminary examination or it may be in the form of an indictment; both are not required.”); *Sciortino v. Zampano*, 385 F.2d 132, 133 (2d Cir. 1967) (emphasizing that following a grand jury indictment, which establishes probable cause, a preliminary examination would be an “empty ritual”); *cf.* *People v. Franklin*, 398 N.E.2d 1071, 1074 (Ill. App. Ct. 1980) (concluding that both grand jury indictment and a preliminary examination “serve the function of determining probable cause and to require a repetition of this function by initiating post-indictment preliminary hearings would be an empty formality”).

185. See, e.g., 1 CRIMINAL PROCEDURE, *supra* note 11, § 1.4(f) (noting that “[t]he goal of minimizing the risk of erroneous accusations is advanced primarily through the various screening procedures of the criminal justice process,” including arrest, post-arrest review before the magistrate,

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constitutional value is placed on the participation of the citizen himself in decision-making, although his interests are directly at stake.¹⁸⁶ Apart from the Fifth Amendment right to grand jury indictment (which has no procedural content)¹⁸⁷ and the Fourth Amendment's "probable cause" requirement (which has very little),¹⁸⁸ the Due Process Clause does not grant a criminal defendant any independent right to adversary proceedings to test the factual basis for criminal charges in advance of trial,¹⁸⁹ even if those charges are used to justify such coercive pretrial measures as detaining the defendant in prison, seizing his property before trial, or limiting his right to travel.¹⁹⁰

This minimal constitutional floor has allowed the development of criminal pretrial statutes that grant statutory hearing rights to some defendants, withhold them from others, and generally fail to instill confidence that pretrial hearing procedures adequately guard against the risk of erroneous deprivations.¹⁹¹ State pretrial criminal systems can seem arbitrary. One defendant might be arrested and detained on the grand jury's secret probable cause review, while another accused of the same offense but charged by the prosecutor might have probable cause determined at a full adversary preliminary hearing before a judge.¹⁹² The

preliminary hearings, and grand jury review).

186. There are, of course, circumstances in criminal proceedings when providing notice to the accused will thwart the very purpose of the process (for example, when notice would allow the defendant to flee). But the Court has declined to provide for participatory rights even in circumstances when providing notice to the defendant would not threaten the integrity of the judicial process. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 127 (1975) (Stewart, J., concurring) ("[T]his case does not involve an initial arrest, but rather the continuing incarceration of a presumptively innocent person."); *Pugh v. Rainwater*, 483 F.2d 778, 784 (5th Cir. 1973), *aff'd in part and rev'd in part sub nom. Gerstein v. Pugh*, 420 U.S. 103 ("Where the State already has the defendant in custody it is not in jeopardy of losing him before a magistrate can rule on probable cause.").

187. The Supreme Court has consistently refused to read into the Fifth Amendment's grand jury indictment clause any particular procedural guarantees, adversary or otherwise. *See Williams v. United States*, 504 U.S. 36, 53 (1992) (rejecting a rule that would have required the prosecutor to present exculpatory evidence to the grand jury); *Costello v. United States*, 350 U.S. 359, 362 (1956) (refusing to impose hearsay rules on grand jury proceedings, as the grand jury's work has never been "hampered by rigid procedural or evidential rules").

188. *See Gerstein*, 420 U.S. at 120-22 (stating that the defendant has neither the right to adversary procedures nor the right to assistance of counsel for the court's Fourth Amendment probable cause review).

189. *See, e.g., Albright v. Oliver*, 510 U.S. 266, 282 (Kennedy, J., concurring) (noting that the Bill of Rights does not require a "pretrial hearing to weigh evidence according to a given standard," but simply requires "a grand jury indictment and a speedy trial where a petit jury can determine whether the charges are true").

190. *See, e.g., United States v. Contreras*, 776 F.2d 51, 54-55 (2d Cir. 1985) (reasoning that because an "indictment returned by a duly constituted and unbiased grand jury satisfies the Constitution as to the existence of probable cause that the defendant committed the crimes enumerated therein," the court will not require the government to present evidence that criminal conduct actually occurred).

191. *See, e.g., N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 608 (1975) (concluding, with respect to the temporary garnishment of commercial bank accounts, that the "probability of irreparable injury . . . is sufficiently great so that some procedures are necessary to guard against the risk of initial error").

192. *See, e.g., infra* note 200 (discussing *Hawkins v. Superior Court*, 586 P.2d 916 (Cal. 1978), *superseded by constitutional amendment*, CAL. CONST. art. I, § 14.1).

federal system, by contrast, is consistent but draconian. The adversary preliminary hearing that exists on paper is illusory because it is infrequently held; all serious cases proceed by indictment, which moots the defendant's statutory right to have his charges reviewed by a judge.¹⁹³ Clearly, due process doctrine in criminal cases is very different than the comparatively solicitous approach in civil cases, even though the stakes are higher.

Below, the Article explores some of the problematic consequences of allowing different procedural due process doctrines to govern civil and criminal cases.

III. THE PROBLEMATIC CONSEQUENCES OF COMPETING DOCTRINES OF CIVIL AND CRIMINAL DUE PROCESS

The differing procedural standards reflected in the Supreme Court's doctrines of civil and criminal due process create some problematic results. As hinted at above, the absence of due process regulation of pretrial criminal procedures permits radical differences in procedural protections for different defendants, based simply on the fortuity of the charging method. Within the criminal process, the divergent due process rules encourage irrational fact-finding procedures and lead to unexplained procedural differences between the pretrial and post-trial stages of a case. As between civil and criminal cases, the irrationalities can be even greater. Here, the due process rules seem to exhibit greater solicitude for the rights of convicted criminals than for the rights of presumptively innocent defendants, and to provide a higher level of protection for property rights in civil cases than for liberty interests in criminal prosecutions. In parallel proceedings, the lower procedural protections on the criminal side undermine the higher constitutional protections on the civil side. All of these anomalous results can be traced to the Court's failure to integrate its civil and criminal due process doctrines.

A. *Disparities Within the Criminal Process*

One evident problem tolerated by the criminal due process model is that different criminal defendants may enjoy radically different pretrial procedural rights, depending on the fortuity of the method the government used to charge them with crimes.¹⁹⁴ Because the pretrial aspects of a criminal case are not regulated by procedural due process, governments are free to offer or withhold

193. See sources cited *supra* note 134. Commentators have observed the common practice of federal prosecutors to "bypass" the preliminary hearing process by resorting to the nonadversary grand jury process before the hearing can be held. See 4 CRIMINAL PROCEDURE, *supra* note 11, § 14.2(b) (discussing "bypass" practices of federal prosecutors).

194. See, e.g., *Hawkins*, 586 P.2d at 917-18 (noting the contrast between the "impressive array of procedural rights" in a preliminary hearing and the "remarkable lack of even the most basic rights" in the grand jury process).

preliminary hearings across the board—or to give them to some defendants and not others—without running afoul of the Constitution.¹⁹⁵ To conserve their resources, both the federal and state governments reduce the number of preliminary hearings by denying such hearings to defendants who have had grand jury review (a practice which is constitutionally permissible).¹⁹⁶

All federal felonies must proceed by indictment, so federal criminal defendants rarely get preliminary hearings.¹⁹⁷ On the state level, by contrast, while preliminary hearings are widely available,¹⁹⁸ they are often selectively denied to defendants who are charged by grand jury indictment (but given to those who are charged by a prosecutor).¹⁹⁹ Not surprisingly, these arbitrary differences create perceptions of unfairness.²⁰⁰ Intuitively, it is hard to believe that the *ex parte* review by citizens in the grand jury can possibly provide an equal testing of the factual basis for criminal charges as an adversary hearing before a judge, conducted by defense counsel. Yet the criminal due process model treats these as legal equivalents.

Distinct but related disparities have resulted when the Court has confronted the challenge of reconciling new types of pretrial criminal proceedings with the traditional constitutional rules governing the pretrial process. Consider, for example, what happens when the federal government seeks a defendant's "preventative detention" before trial on grounds of danger to the community—a mechanism unknown in traditional criminal procedure.²⁰¹ When this scheme was adopted in the Bail Reform Act of 1984,²⁰² the Supreme Court faced the

195. *See, e.g.*, *United States v. Shober*, 489 F. Supp. 393, 401 (E.D. Pa. 1979) (holding that denying preliminary hearings to indicted defendants violates neither due process nor equal protection).

196. *See, e.g.*, *State v. Robinson*, 417 A.2d 953, 962 (Del. Super. Ct. 1980) (holding that using an "indictment-without-preliminary hearing procedure" furthers the State's interest in "obtaining a pretrial determination of probable cause without unnecessarily taxing the State's limited criminal justice administrative resources").

197. *See* sources cited *supra* note 134.

198. *See* 1 CRIMINAL PROCEDURE, *supra* note 11, § 1.4(c) ("Most states now use the adversary preliminary hearing either in addition to, or a substitute for, the nonadversary screening by the grand jury."); *see, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (noting that adversary preliminary hearings are the "procedure used in many States to determine whether the evidence justifies going to trial").

199. *See supra* note 135.

200. In one notable case, the California Supreme Court found a state-law equal protection violation based on the "considerable disparity in the procedural rights" afforded in the State's pretrial criminal process, depending on whether the defendant was charged by indictment or information. *See Hawkins v. Superior Court*, 586 P.2d 916, 922 (Cal. 1978) (declaring that the "denial of a postindictment preliminary hearing" deprived defendants of equal protection of the laws under the California Constitution), *superseded by constitutional amendment*, CAL. CONST. art. I, § 14.1. The *Hawkins* decision was later overturned by voter referendum.

201. Under traditional rules, a noncapital defendant's presumptive right to be released on bail could be overridden if the court found the defendant would not appear at trial if released, or would threaten the integrity of the trial by approaching witnesses. *See Stack v. Boyle*, 342 U.S. 1, 5-6 (1951). This scheme changed dramatically in federal cases when, in 1984, Congress passed the Bail Reform Act, authorizing the "preventative" detention of defendants charged with certain crimes, who might commit crimes while on bail. *See supra* note 128.

202. 18 U.S.C. § 3142 (2000).

due process problem how to reconcile this new form of detention with the traditionally nonadversary pretrial criminal process. In effect, the Act imported into the criminal context a type of detention for “dangerousness” that had previously characterized limited civil contexts, such as wartime, immigration, and involuntary commitment.²⁰³ In civil contexts, of course, such detention gives rise to traditional due process notice-and-hearing rights.²⁰⁴

To explain why the new federal detention scheme was procedurally fair, the Court in *United States v. Salerno* emphasized the extensive adversary protections extended to the defendant at the pretrial detention hearing to determine his “dangerousness.”²⁰⁵ At the same time, not one Justice suggested that due process required any adversary process with respect to the court’s determination that “probable cause” supported the charges, a separate statutory requirement for detention.²⁰⁶ The federal courts have repeatedly held, similarly, that the grand jury’s indictment conclusively establishes that probable cause supports the charges and forecloses an evidentiary inquiry into this statutory element.²⁰⁷

203. See, e.g., *Addington v. Texas*, 441 U.S. 418, 425-27 (1979) (discussing the civil detention of mentally unstable persons who present a danger to the public); *Carlson v. Landon*, 342 U.S. 524, 537-42 (1952) (discussing the civil detention of dangerous resident aliens pending deportation); *Ludecke v. Watkins*, 335 U.S. 160, 170-73 (1948) (discussing the civil detention of enemy aliens in time of war); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (discussing the civil detention of dangerous resident aliens pending deportation). The closest prior analogy to the constitutional questions posed by the Bail Reform Act was the Court’s prior decision in *Schall v. Martin*, upholding the propriety of a state law that provided for limited detention of juveniles during delinquency proceedings based on their propensity to commit further crimes if released during the proceedings. See 467 U.S. 253 (1984). Such delinquency proceedings are civil in nature. *Id.* at 257 n.4. The Court explicitly analogized to these civil counterparts in upholding the propriety of the detention provisions of the Bail Reform Act. See *United States v. Salerno*, 481 U.S. 739, 748-49 (1987).

204. See, e.g., *Addington*, 441 U.S. at 425 (“This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”).

205. See *Salerno*, 481 U.S. at 741 (emphasizing the “adversary hearing”); *id.* at 750 (emphasizing the “full-blown adversary hearing”); *id.* at 751 (emphasizing the “procedures . . . specifically designed to further the accuracy of [the dangerousness] determination”); *id.* at 755 (emphasizing that detention is imposed “after an adversary hearing”).

206. See 18 U.S.C. § 3142(e) (2000) (stating that a judicial officer must find “probable cause” to believe that defendant committed a predicate offense). The Justices apparently thought it beyond question that the grand jury indictment established this statutory element. See *Salerno*, 481 U.S. at 764 (Marshall, J., dissenting) (stating that “an indictment . . . establishes that there is probable cause to believe that an offense was committed, and that the defendant committed it”).

207. See, e.g., *United States v. Suppa*, 799 F.2d 115, 118-19 (3d Cir. 1986) (stating that for purposes of detention hearing as elsewhere, “an indictment by a grand jury conclusively demonstrates that probable cause exists to implicate a defendant in a crime”); *United States v. Dominguez*, 783 F.2d 702, 706 (7th Cir. 1986) (arguing that the court’s probable cause finding to support preventative detention “may be based solely on an indictment charging crimes”); *United States v. Contreras*, 776 F.2d 51, 54 (2d Cir. 1985) (“[W]e hold that a grand jury indictment cannot be undermined by an independent judicial determination finding no probable cause in the context of a detention hearing.”); *United States v. Hurtado*, 779 F.2d 1467, 1477 (11th Cir. 1985) (“It is so well settled as to be beyond cavil that the return of a true bill by a grand jury, resulting in indictment, conclusively demonstrates that probable cause exists implicating a citizen in a crime.”); *United States v. Hazime*, 762 F.2d 34, 37 (6th Cir. 1985) (affirming that “the indictment in this case . . . is sufficient to establish probable cause that Hazime

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The net result of *Salerno* is that the defendant gets an impressive degree of adversary protections for the traditionally civil predicate for preventative detention (that the defendant's detention is needed to protect community safety)²⁰⁸ but no adversary protections at all for the traditionally criminal predicate (that there is "probable cause" to believe the defendant committed the crimes charged).²⁰⁹ This ruling is particularly baffling, because under the statutory scheme the mere fact of criminal charges may create a presumption that detention should be ordered.²¹⁰ In *Salerno*, the Court announced a procedural compromise that acknowledges the relevance of conventional civil notice-and-hearing rules, yet applies the traditional deference to the grand jury's nonadversary hearing process despite the inconsistency of these doctrines.²¹¹

A final disparity within the criminal process relates to inconsistencies between the hearing rights extended at the pre- and post-trial stages of a criminal case. This due process gap was created when the Supreme Court extended notice-and-hearing rules to criminal sentencing, while continuing to take a cramped view of due process rights in the criminal pretrial process.

committed one or more of the charged offenses"). This understanding is also espoused by commentators—that probable cause is conclusively established by the grand jury's nonadversary indictment process and may not be reopened at the (otherwise) adversary bail hearing. *See, e.g.*, Alschuler, *supra* note 132, at 518 (noting that "in most federal cases, only an *ex parte*, in camera determination of probable cause by a grand jury (a body often dominated by a federal prosecutor) guards against preventative incarceration of the innocent"). *But see* *United States v. Cox*, 635 F. Supp. 1047, 1052 (D. Kan. 1986) ("When dealing with as fundamental a right as personal liberty—the right to remain free from detention until a judicial determination of guilt arrived at with all of the traditional safeguards of a criminal trial—a heavier standard for establishing probable cause is required.").

208. *See Salerno*, 481 U.S. at 751-52 (emphasizing that at a preventative detention hearing, detainees have a right to counsel, to testify in their own behalf, to present information by proffer or otherwise, and to cross-examine witnesses who appear at the hearing; that the government's burden of proof is clear and convincing evidence; that a judicial officer charged with determining whether detention is warranted is guided by statutory factors and must include written findings of fact and of reasons to support the detention; and that the law provides for immediate appellate review of the detention decision).

209. As noted earlier, there is no adversary hearing on probable cause because the grand jury's indictment conclusively establishes this statutory element. *See, e.g.*, Alschuler, *supra* note 132, at 559 ("Neither the [Bail Reform Act] nor any other federal law guarantees the defendant a hearing on whether he has done anything wrong.").

210. Simply charging the defendant with certain crimes gives rise to a statutory presumption that there is no set of conditions that will assure the safety of the public. *See* 18 U.S.C. § 3142(e) (2000) (providing that "[s]ubject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe" that the person committed any of the federal offenses specified in the Act, which include most serious drug crimes). Whether the defendant committed the offense at all is also critical because regulatory detention based purely on dangerousness is unconstitutional. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) ("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment.").

211. *See* Alschuler, *supra* note 132, at 517-18 ("One would imagine that, before imposing [the burdens of pretrial detention], a civilized society would demand substantial preliminary evidence that a defendant had committed a crime. One might imagine as well that this society would afford the defendant at least an informal hearing on the issue. The United States, however, does not do so.").

Modern determinate sentencing laws, such as the federal Sentencing Reform Act of 1984, depart from traditional sentencing practices by creating specific legislative and administrative standards to guide judicial sentencing decisions.²¹² These reforms and their predecessors created pressure for due process protections because of the evident parallel to administrative entitlements, an area in which the Supreme Court has recognized extensive procedural due process rights.²¹³ The Court has resolved such issues, in part, by applying notice-and-hearing rights in sentencing.²¹⁴ At the same time, the Court has continued to restrict due process hearing rights in pretrial proceedings.

Under these divergent due process doctrines, a convicted felon is entitled to notice and hearing when, for example, the Court at sentencing is considering increasing a requested prison sentence by several months.²¹⁵ Yet a presumptively innocent criminal defendant has no comparable constitutional right to an adversary hearing on the merit of the criminal charges before the government may detain him in prison, potentially for lengthy periods, awaiting his criminal trial.²¹⁶ While the presumptive availability of bail might seem to temper the risk that defendants will be held for lengthy periods without meaningful adversary process, the data suggests that this confidence may be misplaced.²¹⁷

As these disparities reflect, rather than integrating its due process approaches, the Court simply applies *both* the civil notice-and-hearing model of due process (exemplified by *Mathews*) and the leaner criminal due process model (exemplified by *Gerstein*) without acknowledging or reconciling the contradiction between the two models.

212. See, e.g., *Burns v. United States*, 501 U.S. 129, 132 (1991) (stating that the Sentencing Reform Act “revolutionized the manner in which district courts sentence persons convicted of federal crimes” by adopting specific guidelines to govern the sentencing process). *But see* *United States v. Booker* 543 U.S. 220, 233-34 (2005) (striking down the mandatory application of the Federal Sentencing Guidelines).

213. See, e.g., *Burns*, 501 U.S. at 147 (O’Connor, J., concurring) (emphasizing that under the Sentencing Reform Act, a defendant “enjoys an expectation subject to due process protection” that he will be sentenced in accordance with the terms of the statute).

214. See sources cited *supra* note 109.

215. See *Burns*, 501 U.S. at 138 (holding that a district court must provide notice to defendant that it is considering an upward departure from an applicable Guidelines sentencing range).

216. See *supra* Subsection II.B.1.

217. See, e.g., *United States v. Edwards*, 430 A.2d 1321, 1355 n.5 (D.C. 1981) (Ferren, J., concurring in part and dissenting in part) (“The right to bail, of course, is often illusory . . . [E]ven when not constitutionally excessive, bail in fact may be set too high for the accused to afford.”). Professor Manns has written at length on the problem of pretrial detention:

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

Manns, *supra* note 113, at 1950.

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B. *Disparities Between Criminal and Civil Cases*

The Supreme Court's schizophrenic due process approach does not simply distort the criminal process, as explored above, but also creates irrational disparities between criminal and civil cases. The problem, of course, is that the deprivations threatened by a civil case may resemble those in a criminal case. Civil litigation, no less than criminal prosecutions, may present governmental demands for pretrial measures such as asset freezes, cease and desist orders, and even pretrial detention. Comparing the due process rules between civil and criminal cases gives rise to the fair criticism that the pretrial protections in a criminal case, in which the defendant's liberty may be at stake, are less than the pretrial protections that attach to lesser deprivations in civil settings.²¹⁸

Comparing civil and criminal rules on pretrial detention, for example, a convicted defendant is constitutionally entitled to greater procedural protection in civil proceedings that follow his successful conviction than in his underlying criminal case. In *Morrissey v. Brewer*, applying the standard notice-and-hearing due process model, the Court concluded that when the government seeks to revoke a convicted defendant's parole—a proceeding that is civil in nature—the defendant is constitutionally entitled to a hearing immediately following his arrest to review the factual basis to justify recommitting him to prison pending a fuller hearing.²¹⁹ The Court explained that this initial inquiry “should be seen as in the nature of a ‘preliminary hearing’ to determine whether there is probable cause or reasonable grounds” to support the government's charges.²²⁰

This ruling creates an ironic juxtaposition. A parole violator—that is, a defendant who has been proven guilty—has a constitutional right to a “preliminary hearing” on the question whether he violated the terms of his criminal sentence. Yet due process does not extend the same right to a preliminary hearing to the defendant—who is presumptively innocent—before conviction.²²¹ It is hard to understand why the same principles of accuracy and fairness that compel the Court to recognize the value of a preliminary adversary hearing in a parole revocation case would not compel the same procedure in a criminal case.²²²

218. See, e.g., Alschuler, *supra* note 132, at 567 (“To imprison defendants on the basis of substantially less evidence than would be required to justify interim relief in a civil case . . . is unconscionable.”).

219. 408 U.S. 471, 485-88 (1972). Indeed, the Supreme Court subsequently held that a right to counsel may also attach in certain parole revocation cases. See *Gagnon v. Scarpelli*, 411 U.S. 778, 786-87 (1973) (recognizing that “the effectiveness of the rights guaranteed by *Morrissey* may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess”).

220. *Morrissey*, 408 U.S. at 485 (“[D]ue process would seem to require some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are still available.”).

221. See *supra* Subsection II.B.1.

222. See, e.g., *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979) (“The function of legal process, as that concept is embodied in the Constitution, and in the realm of

These disparities become even more striking when one considers the difference between the lack of pretrial protections in criminal litigation affecting liberty interests and the solicitous procedural rules in civil litigation involving property rights. Civil litigation cases involving the temporary seizure of private property, like *Fuentes v. Shevin*²²³ or *United States v. James Daniel Good Real Property*,²²⁴ again highlight the contradiction between these two models of due process. Following the defendant's conviction on drug charges in *James Daniel Good Real Property*, the government initiated a civil proceeding seeking forfeiture of the defendant's house allegedly used in his drug crimes. As an initial step in the civil litigation, the government obtained a seizure order in an *ex parte* proceeding. Invoking the civil due process cases, the defendant complained that this procedure violated his due process right to notice and a hearing before the pretrial seizure of his property. The Supreme Court agreed.²²⁵ Rejecting the restrictive criminal due process approach, which would have required no adversary process to justify the seizure order, the Court instead applied traditional notice-and-hearing principles.²²⁶

Consider the result of this ruling: at his criminal trial the defendant, who is presumed innocent, can himself be detained pending trial on the strength of an *ex parte* determination of probable cause—made without his participation based on evidence unknown to him. Yet in the civil trial that follows, the now-convicted criminal can insist on a right to know and refute the evidence supporting the temporary seizure of property allegedly used in his crimes. The irony was not lost on Chief Justice Rehnquist, who decried it “paradoxical indeed” to allow *ex parte* procedures to suffice for purposes of holding a criminal defendant pending trial, but not for holding his property in a collateral civil proceeding that follows.²²⁷

Perhaps the high-water mark of the civil-criminal split, however, is

factfinding, is to minimize the risk of erroneous decisions.”).

223. 407 U.S. 67, 96 (1972).

224. 510 U.S. 43 (1993).

225. *See id.* at 53 (“The right to prior notice and a hearing is central to the Constitution’s command of due process.”); *id.* at 62 (“Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.”).

226. *Id.* at 50-54 (rejecting the analogy to *Gerstein* and applying the due process model of *Mathews*).

227. *See id.* at 67-68 (Rehnquist, C.J., dissenting) (“It is paradoxical indeed to hold that a criminal defendant can be temporarily deprived of liberty on the basis of an *ex parte* probable-cause determination, yet [a civil defendant] cannot be temporarily deprived of property on the same basis.”). Chief Justice Rehnquist argued similarly in a substantive due process case that “it would be odd to conclude that the Government may not restrain property, such as the home and apartment in respondent’s possession, based on a finding of probable cause, when we have held that . . . the Government may restrain *persons* where there is a finding of probable cause to believe that the accused has committed a serious offense.” *United States v. Monsanto*, 491 U.S. 600, 615-16 (1989) (finding no due process bar to pretrial orders seizing a defendant’s assets allegedly used in a crime, even if the defendant needs the assets to pay for his defense).

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exhibited in the early due process decisions in *Fuentes* and *Gerstein*. In *Fuentes*, the Supreme Court held that a civil defendant may not be temporarily deprived of the continued possession of a partially paid oven and stereo system, valued at \$500, without prior notice and an opportunity for a judicial hearing.²²⁸ Yet the Supreme Court, just three years later, rejected attempts by the lower courts to impose comparable notice-and-hearing rights in criminal cases. In *Gerstein*, the Court held that no adversary procedures are constitutionally required to justify the pretrial detention of the criminal defendant, potentially for significant periods.²²⁹ It is no wonder that Justice Stewart, writing separately in *Gerstein*, objected to the majority's premise that "the Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of garnishing a commercial bank account, . . . the custody of a refrigerator, . . . the temporary suspension of a public school student, . . . or the suspension of a driver's license."²³⁰

Finally, criminal due process doctrines also have a pernicious effect insofar as they spill over to undermine due process protections in civil as well as criminal cases. Under the grand jury equivalency doctrine, for example, the defendant's indictment may be used to truncate normal hearing procedures not only in his criminal prosecution, but also in related civil proceedings. Under normal due process rules, loss of a government entitlement (such as government employment, or eligibility for government contract awards) gives rise to the due process right to notice and a hearing, even with respect to interim steps such as suspension.²³¹ But when suspension is sought on the ground that a government employee or government contractor has been indicted, the same due process rules do not apply.²³² Instead, the grand jury's

228. See *Fuentes*, 407 U.S. at 96 ("We hold that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor.").

229. See *Gerstein v. Pugh*, 420 U.S. 103, 123 (1975) ("conclud[ing] that the Constitution does not require an adversary determination of probable cause" to support the defendant's pretrial detention).

230. *Id.* at 127 (Stewart, J., concurring) (citations omitted); see also, e.g., *Pugh v. Rainwater*, 483 F.2d 778, 787 (5th Cir. 1973) ("Incarceration of an untried defendant for up to a month without any scrutiny by a judicial officer of the basis for this incarceration is far more odious to a sense of justice than the temporary deprivation of property without a hearing. Yet the Supreme Court has repeatedly held that such deprivations of property are impermissible."), *aff'd in part and rev'd in part sub nom. Gerstein*, 420 U.S. 103. In *Fuentes*, the Court recognized the slippery-slope problem of expanding pretrial rights in civil cases without threatening the traditionally ex parte nature of criminal pretrial proceedings. See *Fuentes*, 407 U.S. at 93 n.30 ("[O]ur decision today in no way implies that there must be an opportunity for an adversary hearing before a search warrant is issued.").

231. See, e.g., *Gilbert v. Homar*, 520 U.S. 924, 928-29 (1997) (noting that the Court has held that "public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process"); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985) (holding that a public employee dismissable only for cause was entitled under procedural due process to a pre-termination hearing as an "initial check against mistaken decisions," with a more extensive hearing to follow).

232. See, e.g., *Debarment and Suspension Procedures*, 48 C.F.R. ch. 2, app. H-102 (2001) ("In a suspension action based upon an indictment, . . . there will be no fact-[finding] proceeding concerning

indictment conclusively establishes that there are reasonable grounds for suspension. Even though a defendant targeted for suspension would ordinarily be entitled by due process to test the facts in a judicial hearing,²³³ the grand jury's secret indictment process suffices. The theory, as expressed by the Supreme Court in *FDIC v. Mallen*, is that grand jury charges provide "substantial assurance that the deprivation is not baseless or unwarranted."²³⁴

The logic of cases like *Mallen* is not hard to understand. If one accepts the premise that adversary rights should not attach in the early stages of a criminal case, applying a comparable rule in related civil settings makes sense. This is *Gerstein's* race to the bottom. If grand jury indictment is sufficient, standing alone, to provide a reliable factual basis for detaining a defendant in prison, it is hard to see why grand jury indictment should not also be enough to suspend his government employment, a lesser deprivation of rights. To grant adversary review of the factual basis for criminal charges here would give an indicted defendant *greater* rights in subsidiary civil suspension proceedings than in the underlying criminal case.

On the other hand, if one examines the criminal due process model with a critical eye, its logic is far from clear. The suspension cases highlight once again the divergence between the standard notice-and-hearing model of due process, which assumes that disclosure and participation by the party affected is the most reliable means of fact-finding, and the criminal due process model, which grants virtually exclusive power over fact-finding to a partisan government prosecutor at the outset of a criminal case. The disconnect between these due process doctrines is both problematic and influential.

In short, surveying the landscape of constitutional rulings on criminal pretrial rights raises some basic questions. Why was the Supreme Court ready to announce that a defendant has no due process right to pretrial screening of a prosecutor's criminal charges when it is willing to recognize comparable protections both for civil parties and agency litigants? More broadly, why should the doctrines of procedural due process operate so differently in criminal and civil cases? Below, the Article considers the rationales the Court has offered to justify its distinctive model of criminal due process.

the matters alleged in the indictment.”).

233. See, e.g., *FDIC v. Mallen*, 486 U.S. 230, 244 (1988) (holding that an indicted defendant may be suspended from government employment without a hearing because grand jury indictment demonstrates that probable cause exists and therefore the “suspension is not arbitrary”); *James A. Merritt & Sons v. Marsh*, 791 F.2d 328, 330-31 (1986) (holding that an indicted contractor may be immediately suspended from further contract awards without a hearing because the grand jury’s “decision to issue an indictment is made by a deliberative public body acting as an arm of the judiciary operation under constitutional and other legal constraints” and thus has sufficient “indicia of reliability”).

234. *Mallen*, 486 U.S. at 240, 244 (holding that grand jury indictment eliminates the right to a pre-suspension hearing because, in light of the grand jury’s action, there is presumed to be “little likelihood the deprivation is without basis”); see also *Los Angeles v. David*, 538 U.S. 715, 718 (2003).

IV. TOWARD AN INTEGRATED APPROACH TO PROCEDURAL DUE PROCESS

So far, the Article has demonstrated that procedural due process is applied differently in civil and criminal cases and has suggested that this disparity creates some jarring results. The possibility remains, however, that there are valid differences between criminal and civil litigation that justify applying due process differently. Before concluding that procedural due process rules should reflect an integrated whole, it is important to consider the reasons offered by the Court to justify adopting distinct civil and criminal due process models. To do so, it is useful to consider the reasons offered by the Supreme Court in *Gerstein*, when it decided that the due process rules developed in its civil precedents should not govern the criminal pretrial process.

A. *Judging the Rationales for Distinguishing Civil and Criminal Due Process*

In *Gerstein*, the Supreme Court offered three related but distinct justifications for rejecting conventional civil due process rules. *First*, the Court suggested that the *ex parte* procedures embodied in the Fourth Amendment, rather than the adversary proceedings contemplated by due process, provide all the process due in pretrial criminal proceedings (a rationale this Article will refer to as the “displacement” theory).²³⁵ *Second*, the Court reasoned that minimal adversary protections in the pretrial stages of a criminal case are sufficient because they are balanced by extensive procedural protections at a criminal trial (referred to below as the “trial rights” theory).²³⁶ And *third*, the Court argued that the criminal process is “wholly different” from civil proceedings and should primarily reflect historic traditions, rather than a flexible test for structural fairness developed in the context of agency adjudication (referred to below as the “criminal process” theory).²³⁷ Many of the same rationales appear in later iterations of the same basic debate, in cases like *Medina* and *Hamdi*, about whether due process rules should be different in criminal cases.²³⁸ Each rationale is considered in turn below.

235. See *Gerstein*, 420 U.S. at 125 n.27 (“The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests has always been thought to define the ‘process that is due’ for seizures of person or property in criminal cases, including the detention of suspects pending trial.”).

236. See *id.* (“[T]he Fourth Amendment probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct.”).

237. See *id.* (“Here we deal with the complex procedures of a criminal case and a threshold right guaranteed by the Fourth Amendment. The historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-created benefits.”).

238. See *supra* notes 79-83 and accompanying text.

1. *The “Displacement” Theory of Criminal Due Process*

One rationale that underlies the criminal due process model is the idea that procedural due process requirements should be displaced by other, more explicit constitutional guarantees. The Court’s decision in *Gerstein* provides a direct statement of this premise. Because the Fourth Amendment was “tailored explicitly for the criminal justice system,” the Court explained, the nonadversary proceedings contemplated by that Amendment limit and define “the process that is due” for pretrial seizures in criminal cases.²³⁹ Under this rationale, because the Fourth Amendment provides a right to specific (nonadversary) pretrial procedures in criminal cases, this displaces any claim that the defendant has a right to (adversary) pretrial procedures under the Due Process Clause. In subsequent cases, some members of the Court seized on this aspect of *Gerstein* to argue for a broad mandate for minimizing criminal due process rights, primarily in the area of substantive due process.²⁴⁰

This reasoning has been justifiably criticized. As an analytical matter, the fact that a defendant has Fourth Amendment rights with respect to pretrial criminal procedures fails to explain why other constitutional rights do not attach. There is no logical reason why a defendant should not enjoy more than one constitutional right in the same stage of a criminal case. Consider, for example, a defendant who is arrested on a valid warrant but who has been selected for prosecution based purely on racial hostility. Even if Fourth Amendment requirements are satisfied by the judge’s issuance of a warrant, this would not deprive the defendant of an equal protection claim based on the prosecutor’s unlawful racial targeting.²⁴¹ The same logic is true of Fourth Amendment and due process rights. A defendant could, without any internal contradiction, possess both a Fourth Amendment right to a judicial determination of probable cause with respect to his arrest, and a due process right to an adversary proceeding with respect to cognizable deprivations of his liberty or property in the course of the criminal case. Simply because a defendant has a constitutional right to one process in connection with his

239. See *Gerstein*, 420 U.S. at 125 n.27.

240. These Justices argue that “explicit” constitutional guarantees governing the criminal process should not be supplemented through the “generalized notion of substantive due process.” See *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (Rehnquist, C.J.) (stating that because the Fourth Amendment expressly addresses pretrial deprivations of liberty, substantive due process provides no separate right to be free from criminal prosecution without probable cause); *Graham v. Connor*, 490 U.S. 386, 395 (1989) (Rehnquist, C.J.) (reasoning that because the Fourth Amendment provides an “explicit textual source of constitutional protection” against unreasonable seizures of the person, that Amendment, rather than substantive due process, must guide the analysis of excessive force claims during arrest). As Justice Scalia has expressed this view, substantive due process “cannot be used to impose additional requirements upon such of the states’ criminal processes as are already addressed (and left without such requirements) by the Bill of Rights.” *Albright*, 510 U.S. at 276 (Scalia, J., concurring).

241. See, e.g., *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (stating that while a prosecutor enjoys broad charging discretion, the decision of whether to prosecute may not be based on “an unjustifiable standard such as race, religion, or other arbitrary classification”).

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“seizure” does not suggest he should have no constitutional right to additional process in connection with deprivations of his “liberty” or “property.” It seems logical that some wrongs can “affect more than a single right and, accordingly, can implicate more than one of the Constitution’s commands.”²⁴²

What is striking about the Court’s willingness to entertain, and indeed rely on, some variation of a “displacement” theory in *Gerstein* is that the Court has easily rejected this rationale in other cases.²⁴³ In *James Daniel Good Real Property*, for example, the Court had little difficulty rejecting the government’s argument that the Fourth Amendment displaces due process when it held that adversary procedures must be afforded in the pretrial stages of a civil forfeiture case, even though Fourth Amendment requirements may have been satisfied.²⁴⁴ The Court does not generally subscribe to a “displacement” theory of constitutional criminal procedure. It has suggested in several cases, as in *Gerstein*, that due process has “limited operation” in criminal cases beyond the “specific guarantees enumerated in the Bill of Rights.”²⁴⁵ But the Court has in fact continued to recognize rights implicit in the generalized concept of “due process of law.”²⁴⁶ In a criminal trial, for example, the Court has created an entire body of “free-standing” due process rights, even though a criminal trial is heavily regulated by specific provisions of the Bill of Rights (indeed, the Sixth Amendment is devoted to the criminal trial).²⁴⁷

In short, while “explicit” Fourth Amendment rights govern the defendant’s arrest and seizure, this rationale fails to provide a compelling justification for dispensing with due process protections that would otherwise attach to cognizable deprivations of liberty and property during the litigation of a criminal case.

242. *Soldal v. Cook County*, 506 U.S. 56, 70 (1992); *see also Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (stating that the “full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution”).

243. *See, e.g., Israel*, *supra* note 12, at 405 (“The response of the *Gerstein* majority, however, has largely been forgotten.”).

244. 510 U.S. 43, 49 (1993) (“We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another.”); *see also Albright*, 510 U.S. at 286 (Souter, J., concurring) (“The Court has previously rejected the proposition that the Constitution’s application to a general subject (like prosecution) is necessarily exhausted by protection under particular textual guarantees addressing specific events within that subject (like search and seizure), on a theory that one specific constitutional provision can pre-empt a broad field as against another more general one.”).

245. *Dowling v. United States*, 493 U.S. 342, 352 (1990); *see, e.g., Medina v. California*, 505 U.S. 437, 443 (1992) (“The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansions of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance the Constitution strikes between liberty and order.”).

246. *See generally* 1 CRIMINAL PROCEDURE, *supra* note 11, § 2.7(b) (noting the “continuous growth in due process regulation”); *Israel*, *supra* note 12, at 398 (“[T]he Court appears to have ‘retired’ its description of free-standing due process as having only ‘limited operation’ . . .”).

247. *See supra* text accompanying notes 94-103.

2. *The “Trial Rights” Theory of Criminal Due Process*

Another justification used by the Supreme Court to rationalize the lack of preliminary procedural protections in the criminal due process model is the observation that extensive protections are afforded at the criminal trial itself. This rationale played a role, for example, in the *Gerstein* Court’s willingness to dispense with adversary hearing procedures. When a court initially reviews the government’s charges for probable cause, the Court explained, adversary protections are unnecessary because this is “only the first stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct.”²⁴⁸

This “trial rights” rationale is related to but distinct from the “displacement” theory outlined above. The displacement theory, as applied in *Gerstein*, posits that there are explicit Fourth Amendment procedures that govern pretrial criminal procedures, and that these specific procedures should displace generalized due process hearing requirements that would otherwise come into play.²⁴⁹ The “trial rights” theory, by contrast, attacks the premise that interim or temporary deprivations in criminal cases should give rise to separate due process hearing rights. It posits, in essence, that if sufficient protections are afforded at the ultimate trial, it should be possible to limit or eliminate procedural protections in advance of trial. The tendency to view the guilt or innocence phase of a criminal case as the “real event” in a criminal prosecution is a theme that runs through the Court’s criminal procedure rulings more generally,²⁵⁰ despite its questionable premise.²⁵¹

It is undeniable that a criminal defendant enjoys extensive protections at a

248. *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975) (emphasis omitted). Professor Israel, for example, has speculated that the key to the Court’s ruling in *Lem Woon*, holding that a preliminary hearing is not required by due process, “was that the defendant would receive a fair hearing in the adjudication of his guilt.” See Israel, *supra* note 12, at 377.

249. See *supra* Subsection IV.A.1.

250. See, e.g., *Albright v. Oliver*, 510 U.S. 266, 283 (1994) (Kennedy, J., concurring) (recognizing that due process requirements in the pretrial process would not help ensure “fundamental fairness in the determination of guilt at trial”); *Baker v. McCollan*, 443 U.S. 137, 146 (1979) (“The ultimate determination of such claims of innocence is placed in the hands of the judge and jury.”); *Costello v. United States*, 350 U.S. 359, 364 (1956) (stating that at the “trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict,” and that applying evidentiary rules to grand jury proceedings would “add nothing to the assurance of a fair trial”).

251. The Court has increasingly recognized that pretrial proceedings play an important role in criminal cases. See, e.g., *Ash v. United States*, 413 U.S. 300, 310 (1973) (“[E]xtension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself.”); *United States v. Wade*, 388 U.S. 218, 224 (1967) (“[T]oday’s law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused’s fate and reduce the trial itself to a mere formality.”). Indeed, this has been the premise on which the Court has been willing to extend the Sixth Amendment right to counsel beyond the trial itself to any proceeding that is a “critical stage” in a criminal prosecution, which may include such pretrial proceedings as bail hearings, arraignment, and preliminary hearings. See *supra* note 123.

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criminal trial. The criminal trial, should it occur, is attended by numerous procedural rights, collectively understood as part of “due process” (in the broader systemic sense used by Justice Scalia, rather than the specific constitutional phrase).²⁵² But any superficial appeal of the “trial rights” theory of criminal due process is belied by two problems, one practical and one conceptual. As a practical matter, of course, the premise that any errors in the pretrial process will be remedied by review at the criminal trial is counterfactual in view of the simple fact that most criminal cases don’t go to trial.²⁵³ Whatever due process protections might otherwise come into play at trial, these benefits will not be enjoyed by the vast majority of defendants. Nor could the criminal justice system possibly function if a greater proportion of defendants insisted on exercising their trial rights.²⁵⁴ The efficient operation of criminal justice is heavily dependent on encouraging a large proportion of defendants to forgo their trial rights and plead guilty. To build due process rules on the premise that rights in the pretrial process can be minimal because a criminal defendant will enjoy extensive rights at trial is thus an illusory, and even pernicious, doctrine.²⁵⁵

Beyond this practical observation, there is a conceptual flaw with a “trial rights” justification. It is simply not the case that affording due process rights at

252. See *supra* text accompanying notes 94-103.

253. See *supra* note 92.

254. A pithy but apt statement of this principle is found in Professor Lloyd Weinreb’s observation that our system “can offer a trial to all only if few accept the offer.” LLOYD WEINREB, *DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES* 82 (1977). See, e.g., Arenella, *supra* note 21, at 468 (“[T]he modern adversarial jury trial is far too expensive, complex and time-consuming to be used as the system’s routine method for dispute resolution.”); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 408 (1992) (“In the past few decades, criminal jury trials have become so lengthy and complex that we cannot, or will not, provide them to the vast majority of defendants.”).

255. Professor Peter Arenella, for example, has argued that the minimal protections in the pretrial process, combined with the high rate of guilty pleas, suggests the need for reforms to the pretrial process. See Arenella, *supra* note 21, at 469 (“[I]t no longer makes sense to rely primarily on the trial to safeguard essential accusatorial principles when pretrial screening devices like the preliminary hearing and the grand jury perform the only independent adjudication of the defendant’s guilt before conviction in most cases.”). His insightful article focuses on reforms that would improve pretrial procedures to screen out not only cases in which the defendant is factually innocent (the function served by the current “probable cause” standard) but also cases in which defendants have valid legal objections would preclude conviction at trial (the “legally innocent”). *Id.* at 469-70. Professor Arenella is not so much concerned with the question of adversary protection in the pretrial process (the focus of the procedural due process doctrines addressed in this Article) as he is with bringing to the pretrial process “accusatorial” values such as those expressed in the reasonable doubt standard. In the federal system, he would be satisfied, for example, with reforms to strengthen the grand jury’s ability to make a preliminary ex parte review, without requiring an adversary proceeding. *Id.* at 475. Professor Arenella “assumes” with detailed analysis that the Constitution would require “the preliminary determination of guilt during the pretrial process [to] provide *some* protection of the accusatorial values that the trial was designed to vindicate.” *Id.* at 469. This Article focuses on the distinct constitutional question of the adversary values inherent in procedural process, and the Court’s analysis of procedural due process principles in the pretrial criminal context and elsewhere. As a result, the conclusions reached in this Article are quite different from those of Professor Arenella, particularly with respect to the troubling problem of undue deference to the grand jury’s role in the criminal process.

trial will remedy deprivations that occur before trial. Correcting errors in pretrial procedures is not a function of the criminal trial. Consider, for example, a defendant who is improperly detained before trial on baseless charges.²⁵⁶ His acquittal at trial will neither cure the loss of liberty he has already suffered, nor provide him with compensation for his wrongful detention.²⁵⁷ Acquittal simply prevents his future imprisonment on the same wrongful charges. It is precisely because of the risk of such erroneous deprivations—and the difficulty of remedying such errors after the fact—that the Supreme Court in the civil context established a default rule that notice and hearing must *precede* rather than follow governmental deprivations of liberty or property.²⁵⁸ There is no reason to believe that the government is inherently more reliable when it makes allegations of criminal wrongdoing than, for example, when it seeks the civil forfeiture of property.²⁵⁹

In short, the rationale that strong trial protections will balance weak pretrial protections must also be discounted as a flawed justification for rejecting ordinary due process protections in the pretrial stages of a criminal case.

256. See, e.g., *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972) (“[O]bviously the disadvantages for the accused who cannot obtain his [pretrial] release are . . . serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.”).

257. See, e.g., *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 (1993) (“[T]he availability of a postseizure hearing may be no recompense for losses caused by erroneous seizure”); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (“[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.”); cf. *Albright v. Oliver*, 510 U.S. 266 (1994) (stating that a citizen arrested and detained in prison without probable cause to support the charges suffers no compensable due process violation).

258. See, e.g., *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991) (stating that a post-deprivation hearing will “not cure the temporary deprivation that an earlier hearing might have prevented”); *Ingraham v. Wright*, 430 U.S. 651, 696 (1977) (White, J., dissenting) (“[T]he case for advance procedural safeguards (such as a magistrate’s determination of probable cause) is more compelling when the Government finally inflicts an injury that cannot be repaired in a subsequent judicial proceeding . . .”).

259. See *James Daniel Good Real Prop.*, 510 U.S. at 53 (noting that a preseizure hearing in a civil forfeiture case serves to “minimize substantively unfair or mistaken deprivation of property”). Chief Justice Rehnquist argued that the *Fuentes* line of civil cases is more properly interpreted as a response to the risks created by “potential bias of the self-interested private party seeking attachment,” and that adversary procedures should not be necessary when the government is seeking a pretrial remedy. *James Daniel Good Real Prop.*, 510 U.S. at 71 (Rehnquist, C.J., concurring in part and dissenting in part). This is hard to square, however, with the Court’s recognition elsewhere that a government prosecutor, like a private litigant, acts in the zealous capacity of a party within the criminal process. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 449-53 (1971) (stating that a prosecutor’s responsibility for law enforcement is inconsistent with a disinterested role). While government officials are not “self-interested” in the same way a party might be, this does not mean that they are unbiased, as the Court has used that term, or that there is no risk that government lawyers may be overzealous in their enforcement efforts.

3. *The “Criminal Process” Theory of Criminal Due Process*

The final justification offered by the Court to rationalize a unique model of criminal due process is straightforward but simplistic: criminal cases are different. Returning again to *Gerstein*, this theme finds clear expression in explaining the criminal due process model. The historical basis of criminal prosecution makes criminal cases “quite different from the relatively recent application of variable due process in debtor-creditor disputes and termination of government-created benefits.”²⁶⁰ In this view, civil notice-and-hearing procedures are simply “inapposite and irrelevant” in the “wholly different context” of the criminal justice system.²⁶¹ Clearly, the intuitive sense that criminal cases are just “different” in some due process respect is deeply felt—it later reappears in the debate, in cases like *Medina*, over whether the *Mathews* test is applicable in criminal cases.²⁶²

The question, however, is *how* criminal procedure is different—what it is about the criminal process that calls for distinguishing criminal pretrial rules from normal due process principles.²⁶³ It is true that criminal prosecutions

260. *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975) (adding that the Fourth Amendment’s balance between individual and public interests “has always been thought to define the ‘process that is due’ for seizures of person or property in criminal cases”).

261. *Id.*; see also, e.g., *James Daniel Good Real Prop.*, 510 U.S. at 50 (reasoning that criminal due process rules differ from those in civil cases because “the arrest or detention of a suspect occurs as part of the regular criminal process, where other safeguards ordinarily ensure compliance with due process”).

262. See *supra* note 79.

263. In considering this question, I have limited consideration to the Court’s express rationales for its decision in *Gerstein* flatly distinguishing between criminal and civil cases. It is, of course, also possible that pragmatic considerations not expressed also influenced the Court. 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 pretrial 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 pretrial detention hearing would “serve as a discovery tool” and undermine the “carefully limited” discovery rules provided in criminal cases). Other practical considerations may have simply included concerns about the potential cost of imposing additional procedural rights in the criminal process. See, e.g., *Gerstein*, 420 U.S. at 122 n.23 (“Criminal justice is already overburdened by the volume of cases and the complexities of our system.”). Professor Carol Steiker has speculated that the *Gerstein* majority was motivated by precisely such concerns:

The imposition of yet another expensive and time-consuming protection—the adversary hearing rejected in *Gerstein*—would have imposed a cost far beyond the civil due process hearings that the Court had approved for the repossession of refrigerators and the suspension of public school students to which Justice Stewart referred in his sharply worded concurrence. The criminal justice system was simply much bigger and more continuously in operation than any civil setting, and in addition, it required the free provision of lawyers to participate in any adversary hearing that might be required. Thus, there were tremendously strong pressures to decide *Gerstein* the way it came out in 1975.

Carol S. Steiker, *Solving Some Due Process Puzzles: A Response to Jerold Israel*, 45 ST. LOUIS U. L.J. 445, 451 (2001).

differ from civil litigation in the extent to which they are regulated by explicit provisions of the Bill of Rights (many Fourth, Fifth, and Sixth Amendment protections are specific to criminal cases), as well as in the protectiveness of trial procedures (the reasonable doubt standard and the presumption of innocence come to mind). But these issues have already been dispatched above as inadequate justifications for refusing to constitutionally regulate the pretrial criminal process. There must be some other respect in which criminal cases are “different” to justify this divergent approach.

The implication of cases like *Gerstein* is that criminal cases are different because criminal procedure is grounded in a long historic tradition, unlike modern civil procedures such as administrative complaints or consumer rights litigation.²⁶⁴ Yet the common law procedures struck down in some of the Court’s civil due process precedents have had equally impressive historic pedigrees as those in criminal cases. The civil replevin procedures the Court struck down in *Fuentes*, for example, had ancient roots in the common law, and had been used without question for many years.²⁶⁵ To say that criminal procedure doctrines have historic roots does not adequately distinguish them from many civil judicial procedures that the Court has analyzed under a conventional due process approach.

Giving determinative weight to historic practice in assessing due process protections in the criminal pretrial process would be problematic for several reasons. To begin with, the historic institution that traditionally dominated the initiation of criminal proceedings—grand jury indictment—is the very antithesis of modern due process rules. As a secret, nonadversary body that issues unreviewable determinations, the grand jury is an institution contrary to the basic due process premise that “fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.”²⁶⁶ While grand jury

264. See *Gerstein*, 420 U.S. at 125 n.27 (noting the “relatively recent application of variable due process in debtor-creditor disputes and termination of government-created benefits”). This is echoed in Justice Scalia’s *Hamdi* opinion. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting) (noting that due process requires “those common-law procedures traditionally deemed necessary”).

265. See *Fuentes v. Shevin*, 407 U.S. 67, 78-79 (1972) (noting that the prejudgment replevin statutes struck down by the Court, authorizing the seizure of property before a final judgment, are derived from an “ancient possessory action” and descend “from the common-law replevin action of six centuries ago”); see also, e.g., *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (invalidating traditional quasi in rem jurisdiction and observing that “traditional notions of fair play and substantial justice” can be violated as much “by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage”); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 340 (1969) (holding unconstitutional a long-standing practice of garnishing wages because “[t]he fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms”); 1 CRIMINAL PROCEDURE, *supra* note 11, § 2.7(b) (noting “the Court’s application of the *Mathews* analysis to aspects of civil process that also have deep roots in our common law heritage”); Israel, *supra* note 12, at 361 (discussing criminal due process cases that have struck down procedural practices sanctioned by “settled usage”).

266. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring); see also *Goss v. Lopez*, 419 U.S. 565, 580 (1975) (“Secrecy is not congenial to truth-

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indictment may satisfy constitutional requirements as a method of *accusation* (which is the focus of the Fifth Amendment's grand jury clause), it scarcely satisfies such requirements as a method of *adjudication* (which is the focus of procedural due process).²⁶⁷

Equally important, perhaps in recognition of such problems, the Supreme Court long ago abandoned a purely historic interpretation of due process in criminal pretrial proceedings when it held that the States are free to dispense with grand jury indictment and to develop alternative means of protecting the same "substantial rights."²⁶⁸ It is hard to say, in light of this ruling, that history has been the defining factor in assessing pretrial due process rights in criminal cases when in *Hurtado*, the Court expressly disavowed limiting the requirements of due process in criminal cases based on the vagaries of historic practice.²⁶⁹ If anything, the return to a historic emphasis in some of the Court's criminal due process cases suggests an attempt to revive some older strands in the Court's due process case law.²⁷⁰

The "criminal process" rationale is problematic, in the end, because it treats criminal litigation as a unique and different type of adjudicatory proceeding, distinct from all other types of adjudication. This suggests a distinction that is indefensible in theory and disturbing in practice. Criminal litigation involves valid public safety concerns generally not presented by civil litigation, and it may legitimately be designed to implement law enforcement goals specific to the criminal setting, such as the desire to prevent further crimes and to convict

seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." (quoting *McGrath*, 341 U.S. at 171-72 (Frankfurter, J., concurring))). While a grand jury indictment is ostensibly simply a criminal accusation, *Gerstein* allows an indictment to stand in for a judicial probable-cause determination to support arrest and detention. See *Gerstein*, 420 U.S. at 117 n.19. When so used, indictment goes beyond a mere accusation and becomes "decisive of rights," at least in the pretrial context.

267. See Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1300-09 (2006) (arguing that the grand jury plays an accusatory role, not an adjudicatory role, in criminal litigation).

268. *Hurtado v. California*, 110 U.S. 516, 532 (1884) (noting that due process guarantees "not particular forms of procedure, but the very substance of individual rights to life, liberty, and property"); cf. 1 CRIMINAL PROCEDURE, *supra* note 11, § 2.7(b) ("*Hurtado* found consistent with due process the filing of felony charges by information even though the common law traditionally required that such charges be presented by a grand jury's indictment.").

269. See, e.g., 1 CRIMINAL PROCEDURE, *supra* note 11, § 2.7(b) ("In *Hurtado v. California*, the Court's first major interpretation of due process under the Fourteenth Amendment, the Court majority rejected . . . a strict, 'frozen-in-history' reading [of a prior due process precedent]."); Israel, *supra* note 12, at 346 ("*Hurtado* is often described as the launching pad for the flexible, evolving concept of due process that later came to dominate the application of due process in both its procedural and substantive context.").

270. See Israel, *supra* note 12, at 387 (describing increased emphases on historic practice as "major reformulations of due process doctrine as applied to criminal procedure" by the Court in recent decades). In any event, a true historic approach might well result in the conclusion that a preliminary hearing is required by due process, given the historic antecedents of this institution. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting) (describing common law tradition as "committal by a magistrate followed by indictment and trial" (emphasis added)).

those who have committed crimes. From a due process perspective, however, these are not goals that our system ordinarily pursues at the cost of expediency. Even in the context of an alleged “enemy combatant” in the War on Terror, due process rules begin from the premise that procedural protections should be designed to protect a person who is “erroneously detained.”²⁷¹

Criminal litigation generally involves greater stakes, it is true, and thus is accompanied by more extensive procedural protections during the trial phase.²⁷² But this is a difference of degree, and not of kind. Criminal litigation, like civil and administrative litigation, are all methods of adjudicating rights built on the same basic model of adversary justice.²⁷³ The question remains *why* criminal cases are so fundamentally different that criminal (but not civil) defendants should be subjected to deprivations of liberty and property interests pending trial, on the strength of an accusation and without an opportunity to test the factual basis for the charges. This is a question that neither *Medina* nor *Gerstein* convincingly answers.

In short, enforcing a sharp dividing line between civil and criminal due process rules is untenable because there is not a comparably sharp dividing line between criminal and civil cases. This is readily demonstrated by the due process problems presented by cases like *Mallen* (in which the government pursued parallel civil and criminal proceedings)²⁷⁴ and *James Daniel Good Real Property* (in which the government brought a civil forfeiture case following a criminal prosecution).²⁷⁵ It is bound to become apparent, in such cases, when the constitutional hearing rights granted in one setting diverge sharply from those extended in the other, despite the evident similarity. Unless the two due process doctrines are integrated, these differences will inevitably create pressure either to raise the due process standard in criminal cases (as Justice Stewart urged),²⁷⁶ or to lower the due process standard in civil cases (as

271. See *Hamdi*, 542 U.S. at 530 (O’Connor, J., plurality opinion) (“[A]t this stage in the *Mathews* calculus, we consider the interest of the *erroneously* detained individual.”); *id.* (noting that the weight of Hamdi’s significant interest in avoiding detention is “not offset by the circumstances of war or the accusation of treasonous behavior”); *cf.* *Schlup v. Delo*, 513 U.S. 298, 325 (1995) (“The maxim of the law is . . . that it is better that ninety-nine . . . offenders should escape, than that one innocent man should be condemned.” (citation omitted)).

272. See, e.g., *Bell v. Burson*, 402 U.S. 535, 540 (1971) (“[P]rocedures adequate to determine a welfare claim may not suffice to try a felony charge.”).

273. See, e.g., *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (stating that due process in criminal prosecution requires at a minimum “notice of the charge and an adequate opportunity to be heard in defense of it”); *Frank v. Magnum*, 237 U.S. 309, 326 (1915) (stating that due process is satisfied when a criminal prosecution “includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure”).

274. See *FDIC v. Mallen*, 486 U.S. 230 (1988) (applying due process in proceedings to suspend a bank president from government employment following his indictment on criminal charges).

275. See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993) (applying due process in civil forfeiture proceedings initiated following criminal conviction).

276. See *supra* text accompanying note 15.

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then-Justice Rehnquist argued).²⁷⁷

In sum, the Supreme Court has failed to provide a compelling justification for adopting a criminal due process model that rejects any adversary protections in the pretrial stages of a case. It has failed to explain why procedural due process could not be applied rationally and sensitively to require appropriate notice-and-hearing procedures to accompany pretrial deprivations of liberty or property in a criminal case, just as they do in a civil case, or an agency adjudication. Some final questions remain. What would integration of civil and criminal due process look like? How would we go about applying standard procedural due process rules to the pretrial phase of a criminal case? The Article turns to these challenging questions below.

B. *Integrating the Doctrines of Civil and Criminal Due Process*

Sketching out a comprehensive, integrated framework of procedural due process theory is a daunting task. Without suggesting that the author has the hubris to undertake such an enterprise, it is possible to venture some observations about how integrating due process rules might affect the criminal pretrial process.

Justice Scalia's due process model in *Hamdi* was a relatively literal historic model. It treated "due process" as a package of traditional rights associated with criminal prosecution, which are largely but not entirely spelled out in the Bill of Rights.²⁷⁸ His model echoed Justice Black's view that there is a strict due process divide between "civil lawsuits" and "government prosecutions for crime." Justice Black argued that the very elevation of criminal prosecutions as deserving of special protections in the Bill of Rights suggests, conversely, that civil trials should not be "hampered or handicapped by the strict and rigid due process rules" the Constitution applies to protect criminal defendants.²⁷⁹ Justice

277. See *supra* note 227 and accompanying text; cf. *Schall v. Martin*, 467 U.S. 253, 275 (1984) (Rehnquist, J.) (stating that in approving a scheme for civil pretrial detention of juvenile delinquents dangerous to the community, the law "provides far more predetention protections for juveniles than we found to be constitutionally required for a probable-cause determination for adults in *Gerstein*"); *Hewitt v. Helms*, 459 U.S. 460, 476 (1983) (Rehnquist, J.) (using the *Gerstein* decision as a guide to hold that due process simply requires an "informal, nonadversary evidentiary review" with respect to the prison's decision to confine an inmate to administrative segregation during an investigation into misconduct charges against him).

278. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting) ("The Due Process Clause in effect affirms the right of trial according to the process and proceedings of the common law." (internal quotations and citation omitted)).

279. *Boddie v. Connecticut*, 401 U.S. 371, 390 (1971) (Black, J., dissenting) (arguing that due process rules requiring equal access to the judicial process for indigent criminal defendants should not be extended to the "quite different field of civil cases"). Like Justice Scalia, Justice Black believed that "due process" in criminal cases is defined as trial in accordance with the specific package of rights specified in the Constitution. See, e.g., *North Carolina v. Pearce*, 395 U.S. 711, 744 (1969) (Black, J., dissenting) ("A due process criminal trial means a trial in a court, with an independent judge lawfully selected, a jury, a defendant's lawyer if the defendant wants one, a court with power to issue compulsory process for witnesses, and with all the other guarantees provided by the Constitution and valid laws

O'Connor, on the other hand, rejected the idea that there is any special model of due process in criminal cases. She argued that the same flexible notice-and-hearing balancing test (embodied in *Mathews*) provides a general framework for deciding all procedural due process challenges, whatever the legal context.²⁸⁰

There is, on the face of it, a large analytic “gap” between the civil and criminal due process doctrines advanced in *Hamdi*. One doctrine defines procedural due process as a pure balancing test with no reference to tradition,²⁸¹ while the other defines procedural due process entirely in terms of traditional common law procedures.²⁸² One doctrine posits that the same due process test applies whatever the setting, while the other posits that due process rules in criminal cases are distinct and different. Perhaps most disturbing, however, is the odd distance between their positions on what procedural due process actually requires. This Article has focused thus far on the criminal model’s unique approach to pretrial procedure, which trades off minimal protections before trial for extensive procedural protections at the trial itself. But *Hamdi* itself actually concerned the opposite side of the equation—the flexible civil due process model. *Hamdi* may have the unquestioned right to notice and a hearing under civil due process rules, but in Justice O’Connor’s view at least, that hearing may be conducted before a military tribunal based on hearsay, with a presumption that the government is correct.²⁸³

A cursory administrative hearing within a hostile executive branch agency obviously falls far short of the due process protections that *Hamdi* would be afforded in a full-fledged criminal trial before a federal judge with life tenure.²⁸⁴ There is, by comparison, much less distance between the harms *Hamdi* may suffer in each case. If successfully convicted of treason at a

passed pursuant to it.”).

280. See *Hamdi*, 542 U.S. at 529 (O’Connor, J., plurality opinion) (noting that *Mathews* dictates the “process due in any given instance” when the government deprives a person of protected interests); *cf.*, e.g., *Burns v. United States*, 501 U.S. 129, 148 (1991) (Souter, J., dissenting) (observing that the *Mathews* analysis has “been used as a general approach for determining the procedures required by due process whenever erroneous governmental action would infringe an individual’s protected interest”); *Parham v. J.R.*, 442 U.S. 584, 599 (1979) (stating that *Mathews* provides “a general approach for testing challenged state procedures under a due process claim”).

281. On its face, the *Mathews* test does not suggest any consideration of traditional procedural protections. See *supra* note 47 (reciting the three-part *Mathews* test).

282. See *Hamdi*, 542 U.S. at 556 (Scalia, J., dissenting) (arguing that due process in criminal cases consists of “those common-law procedures traditionally deemed necessary before depriving a person of life, liberty or property”).

283. See *Hamdi*, 542 U.S. at 534 (O’Connor, J., plurality opinion) (explaining that “the Constitution would not be offended by a presumption in favor of the Government’s evidence”); *id.* at 538 (suggesting that the hearing could be held before an appropriately constituted military tribunal); *id.* at 533-34 (emphasizing that “[h]earsay . . . may need to be accepted”).

284. See *supra* note 93 (discussing the odd juxtaposition in enemy combatant cases, in which enemy combatants seek to be criminally prosecuted, and government prosecutors seek to proceed civilly).

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criminal trial, Hamdi would likely suffer lengthy detention in a federal prison, or even death.²⁸⁵ But if successfully classified as an “enemy combatant” at an administrative hearing, Hamdi will likely suffer indefinite detention in a military prison.²⁸⁶ While these “sentences” are not identical in length or purpose, to the extent they both result in his physical detention, they may be quite similar from Hamdi’s perspective.²⁸⁷ Given the logical similarity of the interests at stake, it is hard to understand how the degree of “process” required could diverge to such a degree based simply on whether the case is viewed as civil or criminal. As this reflects, the Supreme Court’s divergent due process rules create problems not only on the criminal side, but also on the civil side of the equation.

Integrating civil and criminal due process doctrines may be possible, however, by considering what both due process approaches epitomized in *Hamdi* are missing. *First*, both approaches mask the overarching principle that guides the application of procedural due process, whether in a criminal or civil setting. The core meaning of procedural due process is clear: when protected interests are affected, due process requires notice and a meaningful opportunity to be heard. While this principle has come to be applied in a wide variety of modern settings, it is not a new doctrine.²⁸⁸ It reflects a noncontroversial

285. See 18 U.S.C. § 2381 (2000) (authorizing the death penalty or a prison sentence of not less than five years as the punishment for treason).

286. Justice O’Connor acknowledged the “substantial prospect of perpetual detention” for the rest of Hamdi’s life if the “war on terror” is broadly construed, *Hamdi*, 542 U.S. at 520 (O’Connor, J., plurality opinion), though she sought to limit his detention by suggesting that Hamdi can only be held so long as American troops are engaged in active combat in Afghanistan, *id.* at 521.

287. Justice Marshall objected, on precisely this pragmatic ground, to the Court’s attempt to distinguish between permissible regulatory detention and impermissible punitive detention in a case raising a substantive due process challenge to conditions of pretrial detention. See *Bell v. Wolfish*, 441 U.S. 520, 569 (1979) (Marshall, J., dissenting) (“[I]n terms of the nature of the imposition and the impact on detainees, pretrial incarceration . . . is essentially indistinguishable from punishment.”). He argued that characterizing different types of detention as punitive or regulatory is an “empty semantic exercise” when the conditions of detention are virtually the same. *Id.* at 569 n.7.

288. See, e.g., *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (“The fundamental requisite of due process of law is the opportunity to be heard.”); *Simon v. Craft*, 182 U.S. 427, 436 (1901) (“The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things, and not by mere form.”); *Louisville & Nashville R.R. v. Schmidt*, 177 U.S. 230, 236 (1900) (explaining that due process is satisfied when “the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend”); *Hovey v. Elliott*, 167 U.S. 409, 417 (1897) (stating that “due process of law signifies a right to be heard in one’s defence”); *Iowa Cent. Ry. v. Iowa*, 160 U.S. 389, 393 (1896) (emphasizing that due process requires that the method of procedure adopted “gives reasonable notice, and affords fair opportunity to be heard before the issues are decided”); *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876) (“Wherever one is assailed in his person or his property, there he may defend”); *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863) (“Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence.” (citations omitted)); *Nations v. Johnson*, 65 U.S. (24 How.) 195, 203 (1860) (stating the common principle that “no man shall be condemned in his person or property without notice, and an opportunity to make his defence”); *Boswell’s Lessee v. Otis*, 50 U.S. (How. 9) 336, 350 (1850) (“No principle is more vital to the administration of justice, than that no man shall be condemned in his person or

constitutional premise that underlies both the *Mathews* decision²⁸⁹ and older due process decisions.²⁹⁰

Second, and equally important, inherent in the notion that the hearing must be meaningful is the idea that the contours of the hearing should be “appropriate to the nature of the case”—an implicit principle of constitutional proportionality.²⁹¹ This suggests that the degree of process that is constitutionally “due” should bear some consistent relationship across criminal and civil lines. This does not mean that every detention must be preceded by a full criminal trial.²⁹² It would make little sense to import the entire, highly developed apparatus of criminal procedure into every setting in which a deprivation of liberty is at stake.²⁹³ There is, and properly should be, a distinction between a “criminal prosecution,” in which certain explicit rights granted by the Fifth and Sixth Amendments attach, and something that is not a criminal prosecution.²⁹⁴ In noncriminal settings (as in pretrial criminal settings), depending on the issues at stake, due process may or may not require the same panoply of rights explicitly granted in criminal trials.²⁹⁵ But there should be some informed calculation about the types of procedural protections

property without notice, and an opportunity to make his defence.”).

289. *The Mathews* Court, for example, began its analysis with the oft-quoted expression by Justice Frankfurter that the “right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society.” *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

290. *See, e.g., Hovey*, 167 U.S. at 417 (interpreting Justice Story’s *Commentaries on the Constitution of the United States* to mean that “due process of law signifies a right to be heard in one’s defense”).

291. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (“Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”).

292. *See, e.g., Gardner v. Florida*, 430 U.S. 349, 358 n.9 (1977) (“The fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights.”).

293. Leaving aside the limited applicability of many Fifth and Sixth Amendment rights, there are explicit constitutional rights that are not today considered essential elements of due process—a prime example being the Fifth Amendment right to grand jury indictment. *See Adamson v. California*, 332 U.S. 46, 62-63 (1947) (Frankfurter, J., concurring) (rejecting the suggestion that it would be “inconsistent with a truly free society” to allow prosecutions without an indictment, or to try petty civil cases without the paraphernalia of a common law jury). Justice Scalia himself has acknowledged that his interpretation of due process “does not say that every practice sanctioned by history is constitutional.” *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 38 (1991) (Scalia, J., concurring).

294. *See Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (“Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply.”).

295. *Compare Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (extending the right to confront and cross-examine witnesses to fact-finding processes in welfare benefits termination proceedings), *and Greene v. McElroy*, 360 U.S. 474, 496-97 (1959) (explaining that the same rights of confrontation and cross-examination that “find expression in the Sixth Amendment” may be applicable not only in criminal cases but also in administrative settings), *with Wolff v. McDonnell*, 418 U.S. 539, 567 (1974) (emphasizing, in a prison discipline case, that the rights of confrontation and cross-examination are not rights universally applicable to all hearings).

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the courts have found important in comparable settings.²⁹⁶

It may be difficult, once one leaves the narrow confines of traditional judicial procedures, to determine the specific process appropriate to implement the mandate of procedural due process, but this does not render procedural due process either permanently fixed or infinitely malleable. Procedural due process simply cannot be as determinate and rigid as Justice Scalia's historic model suggests, if it is to be a living constitutional doctrine.²⁹⁷ On the other hand, neither can due process be as fluid and flexible as Justice O'Connor's narrow focus on "balancing" the stakes in individual cases tends to suggest, at least not without creating glaring procedural disparities.

Both approaches would benefit from the simple recognition that implicit in the notice-and-hearing model of procedural due process that underlies both doctrines must be some sense of constitutional proportionality across different types of adjudication. What is "appropriate" simply cannot be determined in a vacuum that ignores comparable types of litigation. Detaining an individual, whether in a criminal or civil setting, should require a greater degree of process than freezing property rights, even if civil detention does not require the full process of a criminal trial.²⁹⁸

This Article suggests a simple middle ground to understanding and applying procedural due process. First of all, cognizable deprivations should generally be preceded by a notice and hearing process. Adversary protections should extend when government actions threaten the deprivation of protected liberty or property interests, whether the setting is a criminal or a civil case. Second, and equally important, comparable deprivations should generally require a comparable degree of process. Without a compelling rationale to explain the difference, for example, there should not exist a wide gap between the due process procedures that govern a criminal pretrial detention proceeding

296. See, e.g., *McNeil v. Patuxent Inst.*, 407 U.S. 245, 249 (1972) (emphasizing that when a civil commitment is "permanent in its practical effect, it require[s] safeguards commensurate with a long-term commitment"); *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 177 (1951) (Douglas, J., concurring) (stating that if notice is required for "even the most minor claim asserted against a defendant" in civil cases, the court should require no less when it comes to an administrative determination that "may well destroy the group" that is so labeled); Friendly, *supra* note 8, at 1298 (suggesting that while it may be impossible to apply a "universal scale of seriousness" to reconcile the body of procedural due process rulings, at the same time, the cases suggest "gradations" in the gravity of the interests at stake).

297. No less eminent a jurist than Justice Frankfurter suggested, for example, that while some of the express rights granted in the first eight Amendments "are enduring reflections of experience with human nature," others are better viewed as the "restricted views of Eighteenth-Century England regarding the best methods for the ascertainment of facts." *Adamson v. California*, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring); see also *Malinski v. New York*, 324 U.S. 401, 414-15 (1945) (Frankfurter, J., concurring) (same). It cannot be that all of those rights are part of a "frozen" conception of procedural due process. See generally Redish & Marshall, *supra* note 3, at 469 (emphasizing that the Supreme Court's "frozen-in-history" approach to procedural due process "did not last long").

298. See *supra* notes 228-230 and accompanying text (discussing the divergence between the protections afforded to civil property seizures under *Fuentes* and those extended to pretrial detention in criminal cases under *Gerstein*).

and those that govern a civil pretrial detention proceeding, if the duration and conditions of confinement will be comparable.²⁹⁹ The mere label of “criminal” or “civil” should not be determinative of due process rights that attach when the individual is threatened with virtually the same harm in either instance.³⁰⁰

Having derived at least a basic framework for an “integrated” due process model,³⁰¹ it is useful to return to our original focus: how procedural due process should operate in pretrial criminal settings under the insights derived above. To begin with, it is important to be clear on what would *not* change. Integrating due process rules would not require transforming the grand jury into an adversary process.³⁰² Due process comes into play in proceedings that adjudicate rights, not in proceedings that merely investigate or accuse.³⁰³ Under normal due process principles, a party can develop its charges without implicating due process notice-and-hearing requirements, and the criminal process should be no different.³⁰⁴ The grand jury’s accusation need not be an adversary process.³⁰⁵ Applying conventional due process hearing principles is not a backdoor way to get the “camel’s nose” under the tent of grand jury proceedings.

What would change, however, is that the mere fact of grand jury indictment could not be used to justify issuing orders restricting the defendant’s liberty or property rights pending trial, or to foreclose the court from considering, at a pretrial hearing, whether the government’s charges are supported by the evidence.³⁰⁶ Instead, under an integrated due process approach, to support the

299. See *supra* notes 219-222 and accompanying text (discussing the divergence between the due process approaches to pretrial detention in *Gerstein* and *Morrissey*).

300. Cf. *In re Gault*, 387 U.S. 1, 50 (1967) (noting that whether juvenile commitment is deemed civil or criminal, it is “incarceration against one’s will” and a deprivation of one’s liberty).

301. The question remains, of course, whether the *Mathews* three-part balancing test should or should not be the general test for procedural due process. While full discussion of this question is beyond its scope, this Article simply suggests that the debate may be fruitfully redirected by considering those aspects of procedural due process underlying *Mathews* that are not controversial: the core principle that hearings should precede governmental deprivations and the implicit premise that hearing procedures should be proportional.

302. See, e.g., *In re Oliver*, 333 U.S. 257, 264-65 (1948) (“Grand juries investigate . . . They do not try and they do not convict. They render no judgment.”).

303. See *Hannah v. Larche*, 363 U.S. 420, 442 (1960) (holding that an administrative agency charged with investigating rather than adjudicating need not provide notice-and-hearing rights, on the grounds that “since the [agency] does not adjudicate, it need not be bound by adjudicatory procedures”).

304. Nor would defendants have adversary rights in connection with the issuance of arrest or search warrants. Due process rules, quite sensibly, recognize an exception for “exigent circumstances” when providing prior notice would threaten the integrity of the judicial process, or cause a party to flee or destroy evidence. See *Fuentes v. Shevin*, 407 U.S. 67, 94 n.30 (1972) (noting that due process does not require “an adversary hearing before a search warrant is issued”); see also *supra* note 61 and accompanying text.

305. See, e.g., *In re Oliver*, 333 U.S. 257, 265 (1948) (holding that the grand jury is constitutionally permitted to work in secrecy because an indictment “cannot be used as evidence against the person indicted,” nor may the defendant “be fined or sentenced to jail until he has been tried and convicted after having been afforded the procedural safeguards required by due process of law”).

306. See *supra* Subsection II.B.2 (discussing legally preclusive effect of grand jury indictment in

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defendant's pretrial imprisonment, or his suspension from government employment, or restrictions on his right to travel or work, or seizure of his assets, there should be an adversary hearing appropriate to the circumstances, and the contours of that hearing should at least roughly approximate what would be constitutionally required for an analogous proceeding in a civil case. When exigent circumstances are not present (for example, when the defendant is already in custody), such adversary procedures should precede, rather than follow, the deprivation at issue. The grand jury's doors need not be opened to the defendant, but neither should the grand jury's one-sided accusatory process substitute for adversary procedures normally required as a constitutional matter to deprive the defendant of his liberty or property.³⁰⁷

In essence, an integrated approach would recognize that as a matter of due process, at least when the government seeks some restriction on the defendant's rights during a criminal prosecution, the defendant should have a constitutional right to some appropriate preliminary hearing (not merely a provisional statutory entitlement to a preliminary hearing, as under existing law).³⁰⁸ In such a hearing, the proper focus should be on allowing the defendant to see and challenge the government's evidence to show a factual basis for its allegations of criminal wrongdoing.³⁰⁹ An integrated, rational theory of due process would not be satisfied by providing an adversary pretrial hearing but insisting that grand jury indictment conclusively establishes probable cause for the criminal charges (as in *Salerno*).³¹⁰ Nor would it be satisfied by providing for independent judicial review of the government's evidence but excluding the defendant from participation in that process (as in *Gerstein*).³¹¹ On the other hand, the provisional and interim nature of the process would suggest that due process should permit some level of proof that simply demands reasonable, rather than absolute, certainty about whether the facts will ultimately be proved as the government asserts—just as the standard at a pretrial civil hearing may

pretrial process).

307. See, e.g., *In re Oliver*, 333 U.S. at 265 (reasoning that when a grand jury conducts a contempt proceeding, it must be measured “not by the limitations applicable to grand jury proceedings, but by the constitutional standards applicable to court proceedings in which an accused may be sentenced to fine or imprisonment or both”).

308. See *supra* notes 194-200 and accompanying text (discussing the problems created by the statutory nature of the defendant's entitlement to a preliminary hearing).

309. In a civil case, for example, it would not suffice to provide a hearing to consider whether granting preliminary injunctive relief would harm the defendant, but to exclude from consideration the central question whether the plaintiff was likely to prevail at the ultimate trial. See, e.g., *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002) (“The sine qua non of this four-part inquiry [for granting a preliminary injunction] is likelihood of success on the merits.”); cf. *Bell v. Burson*, 402 U.S. 535, 541-42 (1971) (emphasizing that “[i]t is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision” does not meet the standard of a meaningful hearing required by due process).

310. See *United States v. Salerno*, 481 U.S. 739 (1987).

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

be lower than the standard that will apply at trial.³¹²

This integrated due process approach would affect the federal system the most because it relies so heavily on grand jury indictments in lieu of meaningful adversary hearings.³¹³ Under current rules, for example, the government can obtain an indicted defendant's detention from now until the end of his criminal trial without making an evidentiary showing to the court to support the validity of the government's charges.³¹⁴ Under an integrated due process approach, preliminary hearings—or proceedings akin to them—would be required in many more federal cases than at present. On the state level, an integrated approach would have a less significant impact because preliminary hearings are already routinely used.³¹⁵ It could, however, potentially open up to constitutional scrutiny the sufficiency of particular procedures used at such hearings.³¹⁶

In sum, criminal pretrial proceedings need not be as extensive as a criminal trial, nor must they follow the same evidentiary rules. What such procedures should do, however, is grant the right to meaningful testing of the basis for the government's criminal charges, to minimize the risk of mistaken or baseless deprivations. The current constitutional framework fails even this limited test.

CONCLUSION

The complex body of Supreme Court rulings with respect to pretrial criminal procedures, spanning over a century, tell a curious history. It is not readily apparent, for example, why the Court so curtly abandoned the due process premise expressed in *Hurtado*—which stated that the essence of due process is meaningful review of the basis for criminal charges, whatever the form of that review³¹⁷—in favor of its flat premise in *Lem Woon* that there is no

312. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 485-89 (stating that in a preliminary civil detention hearing, the court simply inquires “whether there is probable cause or reasonable ground” to believe the government will prevail).

313. See *supra* note 134 (discussing the small proportion of federal criminal defendants who receive preliminary hearings).

314. The existence of probable cause to support the government's charges is presumed from the grand jury's indictment. See *Gerstein*, 420 U.S. at 117 n.19.

315. See *supra* note 181.

316. As noted earlier, Professor Arenella has argued that a “probable cause” standard is unduly permissive and that pretrial screening of criminal charges should be conducted under some standard that relates to the accusatorial burdens that will be placed on the government at trial. See Arenella, *supra* note 21, at 469-70 (arguing that pretrial criminal procedures should screen not only for factual innocence but also for “legal innocence”). The current “probable cause” standard generally used in preliminary hearings is a minimal threshold that simply screens for evidence of guilt, not likelihood of success at trial.

317. See 110 U.S. 516, 538 (1884) (holding that due process is satisfied because providing a preliminary hearing in lieu of grand jury review “carefully considers and guards the substantial interest of the prisoner”).

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due process right to preliminary review of the basis for criminal charges.³¹⁸ Nor is it clear why the Court, during the very time it was recognizing the modern implications of the notice-and-hearing model for both administrative and civil litigation, should have drawn such a clear line in *Gerstein* precluding adversarial rights in the pretrial criminal process.³¹⁹ These are curious rulings that lead to highly anomalous results in terms of perceived and actual inequities in the processing of criminal cases.

This Article has argued that the Court's decisions create a problematic distinction between a civil model of due process, as advocated by Justice O'Connor, and a criminal model of due process, as advocated by Justice Scalia. It has suggested that the explanations advanced by the Court to justify different treatment of procedural due process in civil and criminal cases fail to provide a convincing rationale. To escape this analytical conundrum, this Article proposes a simple doctrinal premise: when governmental actions threaten individual interests to a comparable degree, this should raise comparable concerns about accuracy, and should thus require a comparable degree of process. Tradition should not be enough to insulate procedural practices that deprive a criminal defendant of rights deemed substantial in comparable civil settings.³²⁰ As Justice Stewart aptly observed, if a refrigerator cannot constitutionally be seized without meaningful adversary procedures, then meaningful procedures should also be required to detain a human being.³²¹

318. See 229 U.S. 586, 590 (1913) (stating that the Court is "unable to see upon what theory" due process should require a preliminary hearing).

319. See *supra* note 149 and accompanying text.

320. To use a phrase attributed to de Toqueville, particularly favored by Justice Frankfurter, to suggest that a criminal procedure is traditional and thus equivalent to the fair hearing guaranteed by due process is to "confound the familiar with the necessary." *Adamson v. California*, 332 U.S. 46, 63 (1946) (Frankfurter, J., concurring).

321. See *supra* text accompanying note 15.

