1990

Pretrial Detention and Punishment

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> In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.
>
> Chief Justice Rehnquist[1]

> When I use a word . . . it means just what I choose it to mean — neither more nor less.
>
> Lewis Carroll in *Through the Looking Glass and What Alice Found There*[2]

Raymond Buckey, a defendant in the nationally publicized McMartin Preschool molestation case,[3] was detained for almost four years without bail.[4] Authorities held his co-defendant and mother, Peggy McMartin Buckey, for two years without bail.[5]

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† We would like to thank the following for advice on earlier drafts of this Article: Morgan Cloud, Daniel Freed, Melvin Gutterman, Randy Hertz, Graham Hughes, Howard Hunter, Andrew Kull, Howard Miller, Norval Morris, Edmund Novotny, Abraham Ordover, Ronald Wright and Franklin Zimring.

1. United States v. Salerno, 481 U.S. 739, 755 (1987) (Rehnquist, C.J., with White, Blackmun, Powell, O'Connor, and Scalia, JJ.).

2. THE COMPLETE ILLUSTRATED WORKS OF LEWIS CARROLL 136 (E. Guiliano ed. 1982). Carroll's character, Humpty Dumpty, unknowingly foreshadowed modern use of the term "punishment."

3. The case originally filled headlines as the biggest school child molestation case in history. Interviews of McMartin students — so unbelievable that prosecutors wanted to keep tapes of the interviews out of evidence, while defense attorneys hoped to get them in — suggested that hundreds of students had been molested by seven teachers. L.A. Times, Aug. 9, part II, at 1, col. 4. The children made repeated claims about rape, sodomy, druggings, satanic rituals, killing of small animals, and explicit picture-taking, but local and federal authorities uncovered no photographs or other physical evidence of these charges despite extensive investigations. Lacayo, *Hollywood Tapes and Testimony*, TIME, Dec. 15, 1986, at 64.

4. N.Y. Times, Jan. 19, 1990, at A18, col. 5.

5. *A History of the Molestation Charges*, N.Y. Times, Jan. 19, 1990, at A18, col. 5.

Authorities detained Raymond Buckey on the molestation charges despite his community ties and solid background, despite the absence of any prior record, and despite the Los Angeles District Attorney's dismissal of the case against five of seven original defendants after two years because the evidence against those five defendants was "incredibly weak."[6]

Authorities held Buckey through an eighteen-month preliminary hearing — the longest in California's history[7] — despite the judge's dismissal of 80 of the 170 counts against Buckey.[8] They held him without bail past the beginning of trial in July 1987 — four years after the state first filed charges.[9]

After all that time, in December 1987 the trial judge finally set bail at three million dollars.[10] Buckey's friends and lawyers tried to raise the six million dollars in equity required under California law, but failed.[11] Exactly one year later, in December 1988, the court reduced the bail figure to one and one half million dollars, and Buckey's lawyers pledged property worth

6. *D.A. Won't Try 5 in McMartin Case*, L.A. Times, Jan. 18, 1986, part I, at 1, col. 5 [hereinafter *D.A. Won't Try 5*]. The story noted that authorities were holding Buckey without bail, and holding his mother on $500,000 bail. *Id.* The judge set bail for two of the defendants (against whom the charges were later dismissed) at $400,000, and for one of the defendants at $750,000. *Id.* at 24. The Los Angeles Times editorial board commented in the lead editorial several days later that "[e]ither guilty people are being let off or innocent people have been unjustly and irreparably harmed." *See also* L.A. Times, Jan. 24, 1986, part I, at 4, col. 1; *McMartin Flaw: Gaps in Evidence*, L.A. Times, Jan. 27, 1986, part I, at 4, col. 1 (noting the lack of a single photograph despite testimony by the children that pictures had been taken).

7. *D.A. Won't Try 5*, *supra* note 6, at 25. A full set of appeals on the question of whether the children could testify by television led to delays in the preliminary hearing. *High Court Enters McMartin Case: Decision on Children's Testimony by TV to Be Reviewed*, L.A. Times, July 20, 1985, part I, at 20, col. 1.

8. *145 More Counts Dropped in McMartin Abuse Case*, L.A. Times, June 13, 1985, part II, at 1, col. 3. The judge had already dismissed 64 counts against three other defendants a few days earlier. *Judge Drops 64 Charges Against McMartin Figures*, L.A. Times, June 12, 1985, part I, at 1, col. 1.

9. *McMartin Trial to Begin, 4 Years After First Arrest*, L.A. Times, July 13, 1987, part I, at 1, col. 5; *Raymond Buckey to Testify in McMartin Preschool Molestation Trial, Lawyer Says*, L.A. Times, July 27, 1987, part I, at 19, col. 4. The trial took longer than expected. *Child Sex-Abuse Issues Still Stymie Courts*, Christian Science Monitor, April 24, 1989, part I, at 1, col. 1; Cox, *Trial by Ordeal*, NAT'L L. J., June 26, 1989, at 1.

10. *Judge Halves Bail To $1.5 Million For Raymond Buckey*, L.A. Times, Dec. 7, 1988, part II, at 3, col. 5.

11. *Id.*

three million dollars to bail him out[12] — almost five years after he was first detained.[13] The judge noted that Buckey "has already completed the equivalent of a 10-year state prison term."[14] In addition to bail, the judge ordered seven conditions of release, including a twenty-four hour guard.[15]

Press coverage and commentary for the first two years hardly mentioned Buckey's detention and never questioned its validity. Only after dismissal of charges against five of the original defendants did the *Los Angeles Times* remind readers that Buckey was detained.[16] The article neglected to mention, however, that he had been detained for almost two years at that point.[17] The article mentioned, but did not emphasize, the absence of bail.[18]

Almost three years after the case started, the *Los Angeles Times*, in an editorial entitled *McMartin Debacle*,[19] expressed concern that a former prosecutor had said publicly that he believed the McMartin defendants were innocent.[20] The editors neglected to mention Buckey's detention, still without bail.[21]

In January 1990, the jury acquitted Buckey and his mother of fifty-two counts of molestation[22] and were unable to reach a verdict on the remaining thirteen counts.[23] The news articles

12. *$3 Million in Property Raised for Buckey's Bail*, L.A. Times, Feb. 2, 1989, part I, at 3, col. 2.

13. *Buckey Freed on $1.5 Million Bail After 5 Years in Jail*, L.A. Times, Feb. 16, 1989, part I, at 3, col. 5.

14. *Judge May Release McMartin Defendant*, L.A. Times, Feb. 10, 1990, part II, at 2, col. 1.

15. *Judge Places Severe Restrictions Covering Release for Buckey*, L.A. Times, Feb. 11, 1989, part II, at 1, col. 4.

16. *D.A. Won't Try 5*, *supra* note 6, at 1.

17. *Id.*

18. *Id.* The paper did, however, run front page articles during the preliminary hearing with titles like *Children's Abuse Reports Reliable, Most Believe.* L.A. Times, Aug. 26, 1985, part I, at 1, col. 1. Another article noted a $450,000 federal research grant to UCLA researchers to trace the psychological and behavioral development of the child victims in the McMartin case. *UCLA to Study Development of Victims of Alleged Abuse*, L.A. Times, Sept. 20, 1985, part II, at 1, col. 4. Press coverage of this sort led defense attorneys to ask for a change of venue — rarely necessary from populous Los Angeles County. *McMartin Attorneys Seek Relocation of Trial*, L.A. Times, Feb. 23, 1987, part I, at 16, col. 1.

19. L.A. Times, Dec. 3, 1986, part II, at 4, col. 1.

20. *Ex-McMartin Prosecutor Refuses to Answer Most Questions at Hearing*, L.A. Times, Jan. 10, 1987, part I, at 26, col. 1.

21. *See supra* note 19, at 4.

22. *McMartin Verdict: Not Guilty*, L.A. Times, Jan. 19, 1990, part I, at 1, col. 5.

23. *Id.*

announcing the verdict ignored or simply misstated the history of Buckey's detention. Three days after the verdict, the *Los Angeles Times* ran a long, self-critical investigative story exploring allegations that the paper's coverage was biased in favor of the prosecution.[24] The paper failed even in this focused context to mention the absence of coverage or editorial comment on Buckey's prolonged detention, thus proving, perhaps, the issue of bias at stake in the story.[25] Even more astounding, the *New York Times* stated on its front page that Buckey had "spent five years in jail before he could raise the $1.5 million bond."[26]

A barrage of media pressure led to Buckey's retrial on eight counts. Again the jury failed to find Buckey guilty.[27]

Buckey's undoubtedly sensational case[28] nonetheless serves as an example of how far the law and the public view have come in accepting detention. Buckey's case serves also as a paradigm of detention used to satisfy a community's demand for

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24. *Times McMartin Coverage was Biased, Critics Charge*, L.A. Times, Jan. 22, 1990, part I, at 1, col. 5.

25. *Id.*

26. *2 Acquitted of Child Molestation in Nation's Longest Criminal Trial*, N.Y. Times, Jan. 19, 1990, at A1, col. 2. While the article did not correct its error, it did include a separate time chart noting that detention had originally been without bail. *Id.* at A18. The paper printed another article on the case, however, focusing on, among other things, the panic surrounding the case which, on the first page, again stated that Buckey "spent five years in jail before raising bail." *Collapse of a Child Abuse Case: So Much Agony for so Little*, N.Y. Times, Jan. 24, 1990, at A1, col. 1.

27. *Buckey Trial Deadlocks; Mistrial is Declared*, L.A. Times, July 28, 1990, at A1, col. 2. After seven years and two trials, the D.A. announced he would not seek a third trial. *Id.*

28. Buckey's case is sensational but not unique in pointing to the degree of acceptance of detention. In a more recent California case, prosecutors charged a woman with two counts of burglary after she "barricaded herself . . . armed with 500 rounds of ammunition" in the home of an actress. The judge denied bail, finding that the woman "posed a danger *to the community*." *Gless Fan Reportedly Planned Assault, Suicide*, L.A. Times, Apr. 4, 1990, at B2, col. 1 (emphasis added). The Los Angeles Times reported the story in a small blurb on the second page of the "local news" section. *Id.* In a federal case in December 1988, a magistrate refused to release on bail a 25-year-old suspected computer hacker where there was evidence that he entered a National Security Agency computer and planted a false story on a financial news wire. *Suspected Computer Hacker is Denied Bail*, L.A. Times, Dec. 24, 1988, part II, at 1, col. 5. The magistrate concluded that there were no "conditions the court could set up . . . [where] the defendant would be anything other than a danger to the community." *Id.* These cases show the extraodinarily low level at which state and federal judges find sufficient threat to detain. They are extreme only in the sense that they show how judges have become extremely willing to detain.

vengeance. In the context of pretrial detention, society has yet to resolve the conflict between an individual's right to trial and presumption of innocence on the one hand, and the ever-increasing fear of crime and ever-slowing court systems on the other. Following decades of detention and bail reform efforts, the nation's criminal justice systems are in troubled times.[29]

The troubled state of detention and bail practice is the result of several interrelated factors. First and foremost, pretrial detention is one of several intractable problems of the criminal justice system.[30] Detention decisions occur at a critical balance point between government power and individual rights.[31] Each detention decision exposes deep conflicts between a deliberate system of justice and the pressure to respond immediately to threats to the social order.[32] Detention practices also affect other critical practices and rights: plea bargaining, sentencing, punishment, and the right to representation and to a speedy, public trial.[33] Detention practice is one direct measure of a society's view of the proper purposes and limits of criminal law.[34]

Second, public, political, and scholarly perceptions of the purposes of detention have significantly changed since the last major bail and detention reform movement in the 1960s. Then, reformers sought to change bail practice so that judges would use methods other than posting cash or a bond to assure presence at trial.[35] An important goal was to apply detention

29. *See infra* notes 44-47.

30. *See* Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 2-6 (1985).

31. *See* Alschuler, *Preventive Detention and the Failure of Interest Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 520-27 (1986).

32. *See* Goldkamp, *supra* note 30, at 6.

33. *See, e.g.*, Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 WIS. L. REV. 441, 456-57. The power of plea bargaining in the pretrial process where the defendant is detained is extraordinary; only 1% to 10% of all defendants ever make it to the trial stage. A first offender detainee is more likely to be convicted and severely sentenced than a recidivist with more than ten prior arrests who was released before trial. *Id.*

34. *See* Goldkamp, *supra* note 30, at 2 (contrasting the recent reform movement shaped primarily out of concern for protecting the public from potentially dangerous defendants with the goals of the 1960s that focused on the elimination of inappropriate detention).

35. *See* W. THOMAS, BAIL REFORM IN AMERICA 254 (1976) (surety bail serves no useful function in the criminal system). The role of bail bondsman has disappeared as an issue as the bond industry has disappeared from many urban areas. *See, e.g.*, M. SVIRIDOFF, BAIL BONDS AND CASH ALTERNATIVES 26-34 (Vera Institute of Justice, 1986). In 1987 one of the few bondsman in the

equally to the poor and to the wealthy.[36] Now, prosecutors and legislators unabashedly seek to use pretrial detention to reduce crime and protect society.[37] The language of "reform" today claims to be more "honest"[38] about this use of detention.

The pretrial detention system in the District of Columbia was the first expressly based upon the threat of criminality before trial and sparked debate in the early 1970s over detention practice.[39] This debate led to the unsatisfactory accommodation between the individual and the state reflected in the Federal Bail Reform Act of 1984,[40] the Supreme Court's 1987 decision in *United States v. Salerno*,[41] and the increasingly extreme detention practices in many states.

This Article argues that the debate over detention has lost sight of the fundamental values that necessarily define detention policy in this country and elsewhere.[42] Its goal is to offer a

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borough of Brooklyn in New York City had the sign in front of his window — "Ba*l *onds" — missing two key letters.

36. The seminal work that pulled together all of the early bail reform work of the 1960s and set the tone for the remainder of the decade is D. FREED & P. WALD, BAIL IN THE UNITED STATES: 1964 (1964). *See also* W. THOMAS, *supra* note 35, at 249-50 (general discussion of bail reform).

37. *See supra* notes 3-28 and accompanying text.

38. S. REP. NO. 225, 98th Cong., 2d Sess. 5, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3188.

39. That system was strongly supported by then Attorney General John Mitchell. *See* Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1231-42 (1969) (detention of people deemed dangerous to the community was constitutionally permissible); Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 373, 407 (1970) (pretrial detention does not enhance community safety and violates the principle that accusation of a crime should not subject a person to imprisonment). The court in United States v. Edwards, 430 A.2d 1321, 1332, 1341 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982), upheld the District of Columbia system against constitutional attack. *See* Comment, *Preventive Detention and* United States v. Edwards: *Burdening the Innocent*, 32 AM. U.L. REV. 191, 195 (1982). The District of Columbia periodically serves as more than host to federal lawmakers: It serves as a laboratory for federal lawmaking. This pattern was repeated by the former "Drug Czar" of the Bush Administration, William Bennett, who chose to make the District the showpiece and cornerstone of the national war on drugs. *Bennett Unveils Plan to Combat Washington Drug Crisis; Expanded U.S. Role Includes New Prisons, Additional Prosecutors*, Wash. Post, April 11, 1989, at A1, col. 1.

40. Federal Bail Reform Act of 1984, Pub. L. No. 98-473, § 203(a), 98 Stat. 1976 (1984) (codified at 18 U.S.C. §§ 3141-3156 (1988)). Congress also endorsed the use of predictions of future dangerousness in detention determinations. 18 U.S.C. § 3142(g)(3) (1988) (allowing use of detained person's characteristics and past history to determine if there are any conditions of release that will "reasonably assure" the safety of the community).

41. 481 U.S. 739, 749-51 (1987).

42. Detention and trial policies have become a focus of international

theoretical framework enabling comparison of future detention decisions with present and past practice and highlighting the effects of particular detention policies on a range of societal values, principles, and procedures. An extensive literature exists on the Federal Bail Reform Act of 1984,[43] *Salerno*,[44] on preventive detention in general,[45] and on detention in specific contexts, such as the detention of juveniles in *Schall v. Martin*[46] and the detention of aliens.[47] This Article builds on the existing literature by focusing on several key aspects that remain inadequately examined.[48]

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human rights accords. The United States does not always measure up to these emerging international standards. *See infra* notes 302-04 and accompanying text.

43. *See, e.g.*, Note, *The Loss of Innocence: Preventive Detention Under the Bail Reform Act of 1984*, 22 AMER. CRIM. L. REV. 707 (1985); Note, *When Preventive Detention is (Still) Unconstitutional: The Invalidity of the Presumption in the 1984 Federal Bail Statute*, 61 S. CAL. L. REV. 1091 (1988); Note, *Detention For the Dangerous: The Bail Reform Act of 1984*, 55 U. CIN. L. REV. 153 (1986); Comment, *Preventive Detention and Presuming Dangerousness Under the Bail Reform Act of 1984*, 134 U. PA. L. REV. 225 (1985); Note, *Pretrial Preventive Detention Under the Bail Reform Act of 1984*, 63 WASH. U.L.Q. 523 (1985).

44. *See, e.g.*, Alschuler, *supra* note 31; Comment, United States v. Salerno: *"A Loaded Weapon Ready for the Hand,"* 54 BROOKLYN L. REV. 171 (1988) [hereinafter Comment, *"A Loaded Weapon"*]; Note, *Crime and "Regulation"*: United States v. Salerno, 48 LA. L. REV. 743 (1988); Note, United States v. Salerno: *Pretrial Detention Seen Through the Looking Glass*, 66 N.C.L. REV. 616 (1988); Note, United States v. Salerno: *Destruction of the Presumption of Innocence?*, 32 ST. LOUIS U.L.J. 573 (1987); Comment, *The Trial of Pretrial Dangerousness: Preventive Detention After* United States v. Salerno, 75 VA. L. REV. 639 (1989).

45. *See, e.g.*, Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517 (1983); Goldkamp, *supra* note 30; Thomas, *The Poisoned Fruit of Pretrial Detention*, 61 N.Y.U. L. REV. 413 (1986); Note, *Preventive Detention: Dangerous Until Proven Innocent*, 38 CATH. U.L. REV. 271 (1988); Note, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 YALE L.J. 320 (1987) [hereinafter Note, *Limiting*].

46. 467 U.S. 253 (1984); *see, e.g.*, Comment, *The Constitutionality of Juvenile Preventive Detention:* Schall v. Martin *— Who Is Preventive Detention Protecting?*, 20 NEW ENG. L. REV. 341 (1984-85); Comment, *The Supreme Court and Pretrial Detention of Juveniles: A Principled Solution to a Due Process Dilemma*, 132 U. PA. L. REV. 95 (1983); Note, *Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the Parens Patriae Doctrine*, 95 YALE L.J. 174 (1985).

47. *See, e.g.*, Levy, *Strangers to the Constitution: Detention in the Asylum Context*, 44 U. PITT. L. REV. 297 (1983); Note, *The Indefinite Detention of Excluded Aliens: Statutory and Constitutional Justifications and Limitations*, 82 MICH. L. REV. 61 (1983).

48. This Article does not offer a comprehensive analysis of the Bail Re-

Part I explores the most recent twists in the detention debate: the procedural novelty of the Federal Bail Reform Act of 1984 and the analytic novelty of *Salerno*, in which the Court relied on the use of detention without trial at a variety of points throughout the criminal justice, civil justice, and mental health systems,[49] including the juvenile detention case of *Schall*.[50] Part I argues that the essential notion of punishment is overlooked in the detention debate, and it considers the need for a constitutional conception of punishment to replace the Supreme Court's assertion that detention on the basis of predicted criminality is not punishment.[51] Part I then considers the theoretical and practical problems with the latest magic formula in the detention debate — the use of predictions of future dangerousness to determine who should be detained before trial.[52]

Part II departs from current issues and identifies a series of trade-offs that any criminal justice system must make in setting rules for detention.[53] Part II tries to identify essential decisions distinguishing one detention system from another and to explore the current practices in the United States within this framework.[54]

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form Act of 1984. It points out the Act's key substantive and procedural framework and compares the Act to its predecessor statute in the District of Columbia. Nor does this Article explore the constitutional issues involving bail in great depth. It does, however, explain the need for a definition of punishment given the Court's analysis in *Salerno*. This Article addresses *Schall* only to the extent necessary to understand its relationship to adult detention. It deals with predictions of dangerousness only to the extent necessary to understand their use for detention. It addresses the right to a speedy trial, the Speedy Trial Act, the notion of the presumption of innocence, and the right to counsel only to the extent they are relevant to detention policy.

49. *See infra* text accompanying notes 55-135.

50. 467 U.S. 253 (1984).

51. Readers familiar with the literature on detention might bypass the discussion of the Bail Reform Act, *Schall*, *Salerno*, and the constitutionality of preventive detention and begin with Part I, Section D on the meaning of punishment. *See infra* text accompanying notes 156-218.

52. Writers often argue from the premise that use of predictions of dangerousness is never acceptable. We do not believe this is a tenable position. *See infra* notes 219-95 and accompanying text.

53. *See infra* text accompanying notes 328-80, 405-13. Again, readers steeped in the relevant case law and literature might focus on Part II. A. 3, which evaluates studies of the amount of crime before trial, and Part II. B. 3, which suggests non-traditional ways of restricting detention decisions by increasing what we call the prosecutorial "burden of detention."

54. *See infra* text accompanying notes 204-468.

I. PRETRIAL DETENTION IN THE 1980s

The most prominent and widely discussed changes in detention law and practice have taken place at the federal level and in the District of Columbia.[55] The procedural revolution initiated by the Warren Court in the 1960s may be one explanation for the increased reliance on detention to prevent crime. The perception,[56] if not the reality,[57] is that the key procedural devices created by the Court's rulings — including suppression in state criminal proceedings of evidence seized in violation of the fourth and fourteenth amendments,[58] suppression of statements obtained in violation of *Miranda v. Arizona*,[59] and suppression of certain identifications unless the state could meet the heightened burden of proof demonstrating reliability of the identification[60] — have created a system in which final disposition of criminal cases depends more on the conduct of the police than on the conduct of the accused. This view holds that reliance on the exclusionary rules at trial to protect individual liberty has increasingly permitted guilty individuals to avoid

55. One recent example is the proposal in the District of Columbia to eliminate pretrial release for everyone arrested on drug charges. This proposal was in response to the crack wars and radically increased homicide rate. *D.C. Raises Drug, Gun Sentences; Council Action Will Simplify Pretrial Detention*, Wash. Post, March 8, 1989, at A1, col. 1. (council proposal to classify possession of illegal drugs with intent to distribute as a "dangerous crime" for which suspects can be held in preventive detention until trial).

56. Bindinotto, *Crime and Consequences: The Criminal Justice System*, 39 THE FREEMAN 294 (1989); J. GRANO, POLICE INTERROGATION AND CONFESSIONS: A REBUTTAL TO MISCONCEIVED OBJECTIONS 12 (Occasional Paper, N.Y.U. Center For Research in Crime and Justice, 1987); Kannar, *Liberals and Crime*, THE NEW REPUBLIC, December 19, 1988, at 19; Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L.J. 573, 583 (1971); Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 TEX. L. REV. 736, 737-38 (1972).

57. AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE IN CRISIS 5, 11-34 (1988) ("[c]onstitutional restrictions, such as the exclusionary rule and Miranda, do not significantly handicap police and prosecutors" from obtaining convictions for serious crimes); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1036-38 (1984); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 742-46 (1970); Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & CRIMINOLOGY 343, 366-67 (1980); Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1051-53 (1987).

58. Mapp v. Ohio, 367 U.S. 643 (1961), *overruled by* United States v. Leon, 468 U.S. 897 (1984).

59. 384 U.S. 436 (1966).

60. Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).

conviction.[61]

For legislators and judges who think that the guilty go free at trials for reasons other than the strength of the evidence, detention upon arrest may appear to be a just counterweight. If judges dismiss some cases before or at trial because of police violations, no punishment will be possible unless the accused is punished upon arrest. Courts that dislike the procedural rules of the Warren Court are likely to tolerate punishment of the "guilty" somewhere in the process, even if punishment comes before trial. In short, the meaning of the criminal trial has changed over the past thirty years.[62]

Another explanation for increased use of detention points to the bail reforms of the 1960s. To the extent that those reforms succeeded in decreasing the use of money bail, they would prevent the sub-rosa detention of some defendants.[63] The release of these defendants may have encouraged legislators to find an express ground for detention.[64]

By the end of 1984, thirty-four states had express statutory provisions justifying detention based on a defendant's alleged dangerousness.[65] Unlike the federal Constitution, many state

61. *Cf.* Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 230-31 (1983) (Warren Court due process revolution changed balance of power between prosecution and defense and encouraged negotiated settlements).

62. Bolstering the view that criminal trials have changed is the fact that they occur less frequently. *Compare* Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 938 (1983) (although commonly estimated that 90% of all criminal convictions in America are by guilty plea, one 1979 study reported that guilty pleas accounted for 85% of convictions in cases commenced by felony arrests but for only 53% of dispositions of filed cases) *with* Galanter, *The Life and Times of the Big Six: Or the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 946-47 (explaining change in civil caseload).

63. W. THOMAS, *supra* note 35, at 223.

64. *Id.* ("[c]ommission of crimes by persons on pretrial release became a major issue" after the Bail Reform Act of 1966); L. SHERWOOD-FABRE, AN EXPERIMENT IN BAIL REFORM: EVALUATING PRETRIAL RELEASE SERVICE AGENCIES IN FEDERAL DISTRICT COURTS 35-36, 39-40, 371 (Ph.D. Dissertation, Indiana University, 1984).

65. *See* Goldkamp, *supra* note 30, at 15; B. GOTTLIEB, PUBLIC DANGER AS A FACTOR IN PRETRIAL RELEASE: A COMPARATIVE ANALYSIS OF STATE LAWS 1 (National Institute of Justice Research Report, July 1985); B. GOTTLIEB & P. ROSEN, PUBLIC DANGER AS A FACTOR IN PRETRIAL RELEASE — DIGEST OF STATE LAWS 96 (1985). Some of the states follow the District of Columbia practice and evaluate defendants for detention based on a combination of the current charge and other factors. Most allow a discretionary decision based on the use of physical violence in the commission of an alleged felony, while a few rely solely on the current charge. *See* B. GOTTLIEB, *supra*, at 3; Note, *Pre-*

constitutions originally included provisions mandating a right to bail.[66] In the face of demands for detention, however, a number of states have amended their constitutions to allow detention[67] and some state courts have read these rights to be less than absolute.[68] In recent litigation addressing the state constitutional limits on detention, the appellate decisions have often been cursory, and the cases have sometimes not even reached the highest state court.[69] Finally, as the *Buckey* case suggests, the state level is where some of the most egregious detention abuses occur without much critical comment,[70] and state and

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ventive Detention: Illinois Takes a Tentative Step Towards a Safer Community, 21 J. MARSHALL L. REV. 389, 390 n.10 (1988).

66. In 1963, Freed and Wald reported that 39 states guaranteed a right to bail before conviction in non-capital cases. *See supra* note 36, at 2. In 1979, one court tallied 36 states with a constitutional bail guarantee. *In re* Humphrey, 601 P.2d 103, 105, 108 app. I (Okla. Crim. App. 1979).

67. *See* Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is there a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 38 (1989) (10 states have added preventive detention amendments to their state constitution). In 1982, California amended its constitutional provision, which formerly provided for denial of bail only in capital crimes, to allow detention for "[f]elony offenses involving acts of violence on another person when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others." CAL. CONST. art. I, § 12, subd. (b) (West Supp. 1990).

68. *See, e.g.*, State v. Wassillie, 606 P.2d 1279, 1283 (Alaska 1980) (bail clause in state constitution "does not afford a right to post-conviction [and presentencing] bail"); L.O.W. v. District Court, 623 P.2d 1253, 1258 n.8 (Colo. 1981) (en banc) (constitutional right to bail providing that "[a]ll persons shall be bailable" does not apply to juveniles); People *ex rel.* Hemmingway v. Elrod, 60 Ill. 2d 74, 79, 322 N.E.2d 837, 840 (1975) (constitutional right to bail qualified by inherent authority of the courts to manage proceedings); Mello v. Superior Court, 117 R.I. 578, 585, 370 A.2d 1262, 1265 (1977) (where defendant violates a condition related to risk of nonappearance or criminal activity, trial court authorized to revoke release). *Cf.* State v. Cassius, 21 Ariz. App. 78, 83, 515 P.2d 903, 908 (1973) (bail guarantee not absolute in that it allows bail to be conditioned upon variety of factors), *vacated*, 110 Ariz. 485, 520 P.2d 1109, *cert. granted*, 419 U.S. 824 (1974), *cert. dismissed*, 420 U.S. 514 (1975). *Contra* Shabazz v. State, 440 So. 2d 1200, 1202 (Ala. Crim. App. 1983) (rejecting trend towards qualifications on absolute constitutional right to bail); Van Atta v. Scott, 27 Cal. 3d 424, 439, 613 P.2d 210, 217, 166 Cal. Rptr. 149, 156 (1980) (placing burden on prosecution in opposing "own recognizance" release).

69. For example, the California courts have allowed detention under the new provision with only cursory review. *See, e.g., In re* Nordin, 143 Cal. App. 3d 538, 543-46, 192 Cal. Rptr. 38, 41-43 (1983).

70. States are often more politically homogeneous than the country as a whole, and state courts and media respond more quickly to local political pressures. Note, *City Government in The State Courts*, 78 HARV. L. REV. 1596, 1598-99 (1965). In urban jurisdictions, the criminal justice systems are often overburdened. McConville & Mirsky, *Criminal Defense of the Poor in New*

local detention practices have come to mold and define the operation and limits of the criminal justice system.[71]

A. THE FEDERAL BAIL REFORM ACT OF 1984

The Bail Reform Act of 1984 makes protection of the public the pivotal factor in determining whether to release or detain federal defendants. The Act provides that defendants should be released "unless . . . such release will not reasonably assure the appearance of the person . . . or will endanger the safety of any other person or the community."[72]

Congress originated the express use of predictions of dangerousness as the basis of detention in its 1970 statute governing bail practice in the District of Columbia.[73] However, the District of Columbia Act gives the defendant many important protections in return. The District of Columbia Act requires the prosecutor to present evidence that there is a "substantial probability" that the defendant committed the crime of which he is charged;[74] limits detention to persons charged with a "dangerous crime"[75] or a "crime of violence";[76] allows the de-

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York City, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 652 (1986-87). The reality of such courts has become so overwhelming that they may be easier to describe in fiction than in careful, scholarly terms. *See, e.g.*, T. WOLFE, BONFIRE OF THE VANITIES 116-36 (1987). These factors allow new, unfavorable practices to evolve and yet be overlooked.

71. For example, pretrial detainees, rather than convicted defendants, often push the prison and jail capacity beyond legal limits. Up to 50% of jail inmates in this country are unconvicted. BUREAU OF JUSTICE STATISTICS, UNITED STATES DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1989, at 574 (1990) [hereinafter SOURCEBOOK].

72. 18 U.S.C. § 3142(b) (1988).

73. D.C. CODE ANN. §§ 23-1321-1332 (1989); *Hearings Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 91st Cong., 2d Sess. 1-677 (1970) (hearings on preventive detention).

74. D.C. CODE ANN. § 23-1322 (b)(2)(C) (1989).

75. D.C. CODE ANN. § 23-1322(a)(1) (1989). D.C. CODE ANN. § 23-1331(3) defines a "dangerous crime" as follows:

> (A) taking or attempting to take property from another by force or threat of force, (B) unlawfully entering or attempting to enter any premises adapted for overnight accommodation of persons or for carrying on business with the intent to commit an offense therein, (C) arson or attempted arson of any premises adaptable for overnight accommodation of persons or for carrying on business, (D) forcible rape, or assault with intent to commit forcible rape, or (E) unlawful sale or distribution of a narcotic or depressant or stimulant drug (as defined by any Act of Congress) if the offense is punishable by imprisonment for more than one year.

76. D.C. CODE ANN. § 23-1322(a)(2) (1989). Section 1331(4) defines "crime of violence" as:

> murder, forcible rape, carnal knowledge of a female under the age of

fendant to testify and present witnesses;[77] places strict limitations on the period of detention;[78] allows the defendant to appeal an order of detention;[79] and places the case of a detained defendant on an expedited trial calendar.[80] All these measures place a substantially increased burden on the prosecution to make an affirmative case for detention and, if successful, to be ready for trial promptly. The District of Columbia Act provisions also require a high burden of proof — clear and convincing evidence — that the defendant poses a threat to the community.[81]

Although supposedly modeled on the District of Columbia provisions,[82] the Federal Bail Reform Act of 1984 provides only some of these protections. Evidence of other crimes may be presented by hearsay, which is not subject to cross-examination.[83] Defendants do not receive advance notice that prosecutors will seek detention based on past criminal behavior; therefore, defendants may not be able to adequately respond to the government's request for detention. Whenever the government offers the information about the defendant through an Assistant United States Attorney and a proffer of evidence, the Act does not require an opportunity for confrontation of any kind.[84]

The class of defendants subject to detention under the Fed-

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sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnaping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses as defined by any Act of Congress or any State law, if the offense is punishable by imprisonment for more than one year.

77. D.C. CODE ANN. § 23-1322(c)(4) (1989).

78. The statute provides for a 60 day limit, D.C. CODE ANN. § 23-1322(d)(2)(A), but that period can be extended to 90 days upon the filing of an additional petition showing "good cause." D.C. CODE ANN. § 23-1322(d)(4) (1989).

79. D.C. CODE ANN. § 23-1322(c)(7) (1989).

80. D.C. CODE ANN. § 23-1322(d)(1) (1989).

81. D.C. CODE ANN. § 23-1322(b)(2)(A) (1989).

82. S. REP. NO. 225, 98th Cong., 2d Sess. 22, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3205.

83. "The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearings." 18 U.S.C. § 3142(f) (1988). *See, e.g.*, United States v. Acevedo-Ramos, 755 F.2d 203, 208 (1st Cir. 1985).

84. *See, e.g.*, United States v. Delker, 757 F.2d 1390, 1396 (3d Cir. 1985) ("discretion lies with the district court to accept evidence by live testimony or proffer").

eral Bail Reform Act based on the community's safety is broader[85] than under the District of Columbia Act.[86] The federal government can seek detention for *any felony* committed after conviction of two or more federal crimes of violence or after "two or more State or local offenses that would have been offenses" described as crimes of violence "if in circumstances giving rise to Federal jurisdiction had existed."[87] The Federal Bail Reform Act creates a rebuttable presumption in favor of detention whenever the defendant has a prior conviction involving a "crime of violence" offense *and* the defendant was arrested while on conditional release "pending trial for a Federal, State, or local offense" *and* not more than five years has elapsed since the date of conviction or the release from imprisonment on the prior conviction.[88]

With telling candor, Congress expressly rejected the District of Columbia Act's requirement of evidence of a substantial probability of the accused's guilt because this additional burden was one of the "principal reasons" that the District of Columbia prosecutors had made such limited use of the local detention provisions over their first fourteen years.[89] Less easily stated but of great importance, the Federal Bail Reform Act allows a final determination of dangerousness on what are essentially intuitive and untestable judgments largely removed from the proof of particular acts.[90] The Act also fails to place any limits, beyond those of the Speedy Trial Act,[91] on the length of deten-

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85. In the Bail Reform Act a crime of violence is defined as:

> (A) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; or
>
> (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 3156(a)(4) (1988).

86. D.C. CODE ANN. § 23-1331(4) (1989).

87. 18 U.S.C. § 3142(f)(1)(D) (1988).

88. 18 U.S.C. § 3142(3)(e) (1988). The rebuttable presumption provisions of the Bail Reform Act of 1984, while still fairly broad, come much closer to identifying the particular concerns of threat from those on condition release, and the provisions do so in a way that does not vest as much unwarranted discretion in the decision-maker. *See infra* notes 466-68 and accompanying text.

89. S. REP. NO. 225, 98th Cong., 2d Sess. 18, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3201.

90. Alschuler, *supra* note 31, at 513 ("When a prosecutor seeks detention on grounds of dangerousness, dangerousness is the only issue for the judge to resolve at the conclusion of the hearing.").

91. 18 U.S.C. §§ 3161-3174 (1988).

tion, or any additional burden on the government to proceed quickly to trial.

In the end, the "carefully limited exception"[92] enacted in the Federal Bail Reform Act and upheld in *Salerno* is not much more than a miniature hearing with limited procedural protections to determine if any conditions of pretrial release can reasonably assure the safety of the community. Based upon a finding that no conditions would be adequate and probable cause to believe the accused is guilty of the current offense, a federal defendant may be detained until trial, limited only by the flexible bounds of the Federal Speedy Trial Act[93] and the distant bounds of the speedy trial clause.[94]

B. FROM *SCHALL* TO *SALERNO*

Twice in the 1980s, the Supreme Court has addressed the constitutional limits on the use of detention to prevent arrested persons from committing crimes before trial. The first challenge came in the case of *Schall v. Martin*.[95] At the time the Court decided *Schall*, Congress had not yet enacted the Bail Reform Act of 1984. Additionally, *Schall* involved juvenile detention — always an exceptional part of criminal justice.[96] Despite both of these facts, the *Salerno* Court used the *Schall* opinion upholding juvenile detention as a stepping-stone to uphold adult detention — a key issue of liberty for all citizens. On close examination, this turns out to be a false step.

1. *Schall v. Martin*

For most of this century, preventive detention has been virtually the universal practice in the juvenile justice system.[97] Since the creation of the first juvenile justice system, lawmakers in nearly all jurisdictions have explicitly authorized courts to detain juveniles arrested for suspected crime whenever the court believed the juvenile might commit a new crime if released.[98]

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92. United States v. Salerno, 481 U.S. 739, 747 (1987).
93. 18 U.S.C. §§ 3161-3174 (1988).
94. U.S. CONST. amend. VI.
95. 467 U.S. 253 (1984).
96. *See supra* note 46.
97. *See, e.g.*, D. FREED & P. WALD, *supra* note 36, at 93-109 (describing juvenile detention practice up to 1963); Guggenheim, *Paternalism, Prevention, and Punishment: Pretrial Detention of Juveniles*, 52 N.Y.U. L. REV. 1064, 1066-67 (1977) (discussing current juvenile detention pratice).
98. D. FREED & P. WALD, *supra* note 36, at 93-109.

The Court in *Schall* voted six to three to uphold New York's juvenile preventive detention scheme.[99] The Court first considered whether detaining accused delinquents to prevent crime during the pretrial period served a legitimate state interest.[100] In answering that question affirmatively, the Court emphasized both the state's special *parens patriae* interest in helping children and a juvenile's limited liberty interest.[101] The Court said New York's purported purpose in detaining juveniles is "to protect *the child* and society from the potential consequences of his criminal acts."[102] The Court held that

> [s]ociety has a legitimate interest in protecting a juvenile from the consequences of his criminal activity — both from potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child,[103]

or as the New York Court of Appeals had said: " 'protecting the juvenile from his own folly.' "[104]

The relative ease with which the Court upheld preventive detention in *Schall* clearly spurred preventive detention for

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99. 467 U.S. at 254, 281.

100. *Id.* at 263-64.

101. *Id.* at 265.

102. *Id.* at 264 (citing People *ex rel.* Wayburn v. Schupf, 39 N.Y.2d 682, 689-90, 350 N.E.2d 906, 910 (1976)) (emphasis added).

103. 467 U.S. at 266. The Court has emphasized on previous occasions that children are especially vulnerable to influence by others and lack the experience and judgment necessary to avoid making poor choices. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 115 (1982); Bellotti v. Baird, 443 U.S. 622, 635 (1979).

104. 467 U.S. at 265 (quoting People *ex rel.* Wayburn v. Schupf, 39 N.Y.2d 682, 688-89, 350 N.E.2d 906, 909 (1976)). The Court quoted at length from the New York Court of Appeals' decision in *Wayburn*. *Id.* at 265-66 n.15. The New York court, however, went to great pains to distinguish juveniles from adults in upholding a statutory scheme that would be intolerable as applied to adults.

> For the same reasons that our society does not hold juveniles to an adult standard of responsibility for their conduct, our society may also conclude that there is a greater likelihood that a juvenile charged with delinquency, if released, will commit another criminal act than that an adult charged with crime will do so. To the extent that self-restraint may be expected to constrain adults, it may not be expected to operative with equal force as to juveniles. Because of the possibility of juvenile delinquency treatment and the absence of second-offender sentencing, there will not be the deterrent for the juvenile which confronts the adult. Perhaps more significant is the fact that in consequence of lack of experience and comprehension the juvenile does not view the commission of what are criminal acts in the same perspective as an adult.

Id. at 265-66 n.15 (quoting People *ex rel.* Wayburn v. Schupf, 39 N.Y.2d 682, 687-88, 350 N.E.2d 906, 908-09 (1976)).

adults. At the same time, the differences between the liberty interests of juveniles and adults kept alive the hope of preventive detention opponents that the decision in *Schall* would be limited to persons who, as the Court noted in an earlier case, "often lack . . . experience, perspective, and judgment."[105] At the very least, opponents of detention thought it unlikely that the Court would justify jailing adults on the ground that their own safety was enhanced by being in jail.

2. *United States v. Salerno*

The hopes of those who opposed increased adult detention were defeated in *United States v. Salerno*.[106] The same justices as in *Schall* voted six to three to uphold the Bail Reform Act provisions enabling federal courts to detain suspected criminals to protect the community from danger.[107]

From one perspective, the decision was narrow. *Salerno* involved a facial challenge, and therefore the Court could declare the statute unconstitutional only if there was no conceivable set of circumstances under which the statute would be valid.[108] Using this extremely narrow basis to decide facial attacks, the Court would likely prefer instead to wait and declare unconstitutional any particular detention order in which the defendant could show that the state's interest in community protection failed to outweigh his or her interest in liberty.[109] Yet the fa-

105. Bellotti v. Baird, 443 U.S. 622, 635 (1979).

106. United States v. Salerno, 481 U.S. 739 (1987), *rev'g* 794 F.2d 64 (2d Cir. 1986).

107. 481 U.S. at 740.

108. *Id.* at 740-45.

109. In *Salerno* the Court upheld the constitutionality of federal pretrial detention against an attack on grounds of substantive due process. *Id.* at 746-51. One can make a distinct and equally powerful claim to unconstitutionality under the procedural wing of the due process clause. This claim has two parts: first, that it is impossible to establish and challenge predictions in the pretrial context, *see infra* notes 219-95 and accompanying text; and second, that if pretrial detention based upon predictions is allowed, courts should require far more substantial procedures than those provided by the federal detention provisions.

Even if better procedures were introduced to govern the detention decision, research suggests that detention and bail decisions in the past have been governed by the recommendation of prosecutors. *See* Ebbesen & Konecni, *Decisionmaking and Information Integration in the Courts: The Setting of Bail*, 32 J. PERSONALITY & SOC. PSYCHOLOGY 805, 819-20 (1975). The greater power given to prosecutors under current federal law, 18 U.S.C. § 3142(e) (1988), is suspect for this reason also. This research emphasizes the importance of detention rules based upon consistent, particularized, and provable factors. Ebbesen & Konecni, *supra*, at 819.

cial challenge was exactly the way to raise the basic question asked in *Salerno*: whether presumptively innocent persons may be jailed solely to prevent them from committing future crimes without an additional showing that the detainees are mentally ill or otherwise beyond the control of the criminal justice system.[110]

Critical to understanding the decision and its central flaw is that both the government and the Court readily conceded the challengers' most basic point: preventive detention would be unconstitutional if a court imposed it as punishment.[111] No responsible public official has tried to frame or justify preventive detention as a punitive measure.[112] The Court upheld the law by accepting the government's contention that preventive detention was not punishment, but rather was merely a regulatory restriction on a person's liberty imposed to protect the community from danger.[113]

The Court stated that "[a]s an initial matter, the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment."[114] On one level, the truth of that proposition is obvious; if all forms of detention were punishment, detention to assure presence at trial would be impermissible. Indeed, the Court could have gone even further to support its position by observing that detention to protect the community from danger does not inexorably involve punishment. For example, the state in exercising its police power may quarantine individuals afflicted with communicable diseases for the sole purpose of protecting the community from danger.[115] The Court avoided, however, the underlying problem of identifying circumstances that make detention punishment.

The Court seemed impressed by the government's concession that pretrial punishment would not be permissible. Simi-

110. 481 U.S. at 747.

111. 481 U.S. at 746-47.

112. The argument that authorities should use detention as a form of summary punishment does appear in print, in some cases supported by respected academics. *See, e.g.*, Nagel, *The No-Bail Solution*, NEW REPUBLIC, April 24, 1989, at 13 (suggesting reform of the bail laws to deny serious offenders, including "drug dealers," routine pretrial release).

113. 481 U.S. at 747.

114. *Id.* at 746-47 (citing Bell v. Wolfish, 441 U.S. 520, 537 (1979)).

115. *See* Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905); *cf.* Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 275 (1940) (a state legislature may select a class of individuals, based on members likelihood to pose a danger to the community, and place members under appropriate control).

larly, the Court was clearly taken with Congress's statement that it authorized preventive detention to help solve the pressing societal problem of crime;[116] preventive detention was thus merely a regulatory weapon for the "War on Crime." Echoing Congress,[117] the Court noted repeatedly the need to respond to this "alarming,"[118] "pressing,"[119] "compelling,"[120] and "particularly acute" problem.[121]

The Court in *Salerno* used a highly deferential two-part test to evaluate the constitutionality of preventive detention. First, the Court looked to legislative intent.[122] Finding the intent to be regulatory, the Court asked whether one can rationally assign a regulatory purpose to preventive detention.[123] With only a citation to *Schall*, the Court announced that "preventing danger to the community is a legitimate regulatory goal."[124] Second, the Court asked whether detention is excessive considering Congress's regulatory purpose. The Court held that detention is not excessive to its regulatory purpose because the Bail Reform Act of 1984 allows imposition of preventive detention only when the accused is arrested for serious offenses, and because the detention has at least theoretical temporal limits in the provisions of the Speedy Trial Act.[125]

The Court's wholesale reliance on *Schall* to support the rule that detaining suspected criminals to prevent crime serves a regulatory, nonpunitive interest expands the rationale of *Schall* beyond its context. The Court in *Schall* was answering questions about the criminal justice system in the narrow context of the juvenile justice system. Under the Court's jurisprudence, juveniles are presumptively unformed beings — frequently immature and thus unlikely to be constrained by the normal deterrent effect of law or to conform their behavior to the dictates of the penal law.[126] These differences both explain

116. 481 U.S. at 742.

117. *See* S. REP. NO. 225, 98th Cong., 1st Sess. 3 ("alarming problem"), 6 ("growing problem"), *reprinted in* 1984 U.S. CODE CONG. &. ADMIN. NEWS 3185, 3188.

118. 481 U.S. at 742 (citing S. REP. NO. 225, 98th Cong., 1st Sess. 3, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3185).

119. *Id.* at 747 (citing S. REP. NO. 225, 98th Cong., 1st Sess. 4-7, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3186-89).

120. *See id.* at 749 (citing DeVeau v. Braisted, 363 U.S. 144, 155 (1960)).

121. *Id.* at 750.

122. *Id.* at 747.

123. *Id.*

124. 481 U.S. at 747.

125. *Id.*

126. Schall v. Martin, 467 U.S. 253, 265-66 (1984).

and justify the juvenile justice system, which operates without the full constraint of the due process clause precisely because the state's purpose is to help wayward youth.[127] Because young people are less mature than adults, they deserve a different set of rules in the operation of a justice system.[128]

Thus, the rule of *Schall* cannot by itself explain whether preventive detention of adults is lawful. In the criminal justice system, the Court has never said adults can be jailed for their own safety. *Schall* is no more relevant to the lawfulness of preventive detention for presumptively fit adults than is the lawfulness of involuntary commitment laws for dangerous, mentally ill adults (who are detained when courts find they are dangerous to themselves or others).[129] Yet, the Court in *Salerno* relied exclusively on *Schall* in finding the regulatory purpose of preventive detention to be valid.[130]

At the same time, *Salerno* suggests that the difference in liberty interests between adults and juveniles might affect whether legislation labeled "regulation" is actually regulatory or punitive. In *Schall*, the Court noted that "juveniles, unlike adults, are always in some form of custody."[131] In *Salerno*, the Court noted that the unfettered liberty interests of adults mandate a carefully tailored scheme.[132] As the *Salerno* Court itself observed, *Schall* upheld a preventive detention scheme permitting authorities to detain any juvenile, accused of any crime.[133] The *Salerno* Court noted approvingly that the Bail Reform Act was considerably more focused.[134] Thus, the Court in *Salerno* recognized at least one critical difference between the juvenile and adult systems. Preventive detention for juveniles is facially constitutional even when the statute's reach is unlimited.[135] A statute authorizing preventive detention for adults might be facially unconstitutional, however, if it failed to limit its reach to persons arrested for serious offenses.

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127. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 543-50 (1970).

128. *Id.* at 551-52 (White, J., concurring).

129. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 426 (1979).

130. 481 U.S. at 747 (citing *Schall*, 467 U.S. at 269).

131. *Schall*, 467 U.S. at 265.

132. *See* 481 U.S. at 750-51.

133. *Id.* at 750.

134. *Id.*

135. The language in *Salerno* suggests that the only precondition to juvenile detention is that authorities must arrest and formally charge the detainee with the commission of a crime. *Id.*

C. THE CONSTITUTIONALITY OF PREVENTIVE DETENTION

Salerno involved two constitutional issues: whether pretrial detention under the Bail Reform Act of 1984 violates the eighth amendment, and whether it violates the due process clauses of the fifth and fourteenth amendments.[136] Succinctly stated, preventive detention poses one core constitutional question: whether the Constitution permits jailing presumptively innocent persons to prevent them from committing future crimes without any showing that the jailed persons are mentally imbalanced.

1. Eighth Amendment

The eighth amendment is the only part of the Constitution that expressly addresses pretrial liberty. By its terms, the amendment proscribes only "excessive bail."[137] The eighth amendment does not definitively prohibit detention in order to prevent crime.[138] Indeed, nothing in the text of the amendment speaks to the justifiable grounds for detention. Although many argue that the prohibition against excessive bail implies a right to bail,[139] that argument does not directly address the constitutionality of preventive detention. The question of whether a right to bail exists is analytically unrelated to the purposes for which a judge may set bail. Even assuming that an accused is entitled to release on non-excessive bail in all cases (except capital cases), a judge is not prohibited by the eighth amendment from setting non-excessive bail for the purpose of crime prevention.[140]

Thus, the eighth amendment is concerned with the *condi-*

136. Each individual detention decision can raise a variety of additional constitutional claims based not only on the law in general, but also on its operation in a particular case. For example, even under a constitutional detention system a suspect may be denied due process through the exclusion of relevant evidence of appearance or danger or past acts.

137. U.S. CONST. amend. VIII.

138. Commentators have taken a variety of positions on whether the eighth amendment provides a general right to bail. *See, e.g.*, United States v. Edwards, 430 A.2d 1321, 1325-31 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982); Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 329, 331 n.17 (1982).

139. *See* Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 969-71, 989, 1125-26 (1965); Tribe, *supra* note 39, at 399.

140. *See* Note, *supra* note 138, at 330 (eighth amendment command that excessive bail shall not be required has traditionally been interpreted to prohibit a magistrate from setting bail higher than that necessary to assure defendant's presence at trial). *See, e.g.*, Stack v. Boyle, 342 U.S. 1, 4-5 (1951); United States v. Bobrow, 468 F.2d 124, 127 n.16 (D.C. Cir. 1972).

tions that a court may impose. Nothing in the amendment or its history speaks directly to the *basis* for determining upon whom to impose conditions. Preventive detention is not special because the conditions for detention may include the withholding of bail; rather, the special concern with preventive detention is whether a court may detain (or set non-excessive bail) for the *reason* of crime prevention.[141]

The history of bail under the eighth amendment surely includes some sub-rosa use of bail to detain individuals because of their perceived dangerousness, although the extent of such use may be overstated by those who assume it was widespread.[142] The traditional denial of bail to capital defendants was not generally based upon a fear of dangerousness, but rather upon a strong and logical presumption of flight.[143] At the time of the ratification of the amendment, magistrates could deny bail to a class of detainees if the class was thought to pose a risk of flight.[144] Accordingly, the eighth amendment is a weak peg on which to anchor the claim that a court may not deprive persons of their pretrial liberty based solely upon the threat they may pose to society.

The simpler approach is to avoid historical analysis and take the amendment at its word: In circumstances in which bail is set, it may not be "excessive."[145] Even if one goes further and implies from the language that a judge must set bail in all cases in which detention is a possibility, the central question of this Article — which factors the court may consider in setting bail — is still beyond the reach of the amendment.[146]

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141. *See supra* notes 3-46 and accompanying text.

142. Judicial recognition of such a basis for detention is quite modern. *See, e.g.,* Hunt v. Roth, 648 F.2d 1148, 1163 (8th Cir. 1981) (citing several cases in which courts have indicated that danger to the community may be considered when setting bail), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982) (per curiam); Nail v. Slayton, 353 F. Supp. 1013, 1019 (W.D. Va. 1972) ("A trial judge may deny bail if he feels that the release of the accused will endanger the community.").

143. Berg, *The Bail Reform Act of 1984*, 34 EMORY L.J. 685, 687 (1985).

144. *See* Note, *supra* note 138, at 331. For the most comprehensive treatment of the early history of bail, see E. DE HASS, THE ANTIQUITIES OF BAIL (1940).

145. U.S. CONST. amend. VIII.

146. The argument that the eighth amendment prohibits a court from detaining an individual without bail is unsatisfactory. First, from the passage of the Judiciary Act of 1789 the courts, in granting of bail in capital cases, have been allowed discretionary power in the consideration of applications for bail pending an appeal. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 76 (1977). Second, the eighth amendment does not address those in-

This Article focuses, therefore, on the constitutional propriety of detention without further consideration of the eighth amendment.[147] Its concern is not whether a judge must usually set bail when he or she wants to detain an accused, but rather, whether the Constitution limits the judge in first choosing to detain. The amendments most relevant to this inquiry (and the amendments that the Court considered in *Salerno*) are the fifth and fourteenth amendments, which protect individuals from deprivations of liberty without due process of law.

2. Due Process of Law

The rule that the state may not punish an offender without a complete trial and due process of law is the most basic constitutional principle relating to criminal law.[148] Determining when state action is punishment is not an easy task. At a minimum, such a determination involves consideration of both the purpose of the detention and its effect.

Preventive detention contains a vital attribute of punishment; namely, it serves a traditional purpose of punishment after trial — incapacitation.[149] The state's goal of crime prevention through incapacitation is central to the criminal justice system. The effect of preventive detention is identical to that of punishment after conviction: deprivation of physical liberty by placement in a locked cell.[150]

Indeed, the most striking feature of preventive detention is its capacity to swallow up the whole of the criminal justice system.[151] If the state's interest in preventing future crime is suf-

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stances in which detention without bail is permissible, and those instances in which it is not. U.S. CONST. amend. VIII.

147. It is worth noting that the prohibition against excessive bail appears along with the excessive fines and cruel and unusual punishment clauses. This shows that the framers recognized the close ties between bail and punishment. U.S. CONST. amend. VIII. *See infra* notes 416-66 and accompanying text.

148. Bell v. Wolfish, 441 U.S. 520, 535-46 (1979). *See generally* Alschuler, *supra* note 31, at 532-33 (preventive detention is unjustified unless substantial evidence exists of past wrongdoing or inability to control one's behavior).

149. *See* 18 U.S.C. § 3553(a)(2)(C) (1988); United States v. Brown, 381 U.S. 437, 458 (1965).

150. For these reasons, defendants are entitled in *all* jurisdictions to credit toward their final sentence for time served in pre-trial confinement. *See, e.g.*, D.C. CODE ANN. § 23-1322(e) (1989). *See also* text at *infra* note 412 (federal law).

151. In England's recent past, repeat or dangerous offenders received "extended detention": a period of detention under less-punitive conditions following the term of normal "punishment." Authorities detained the offender after the normal term based on what he or she might do if released. *See* J. HALL &

ficient to deprive presumptively innocent persons of their liberty, the state could incarcerate any person — whether not yet convicted, not yet arrested, or even previously acquitted — based on a showing that the person poses a danger to the health, safety, or morals of the community. In *United States v. Melendez-Carrion*, Judge Newman noted that "[i]t cannot seriously be maintained that under our Constitution the Government could jail people not accused of any crime simply because they were thought likely to commit crimes in the future."[152] Yet he observed also that "such a police state would undoubtedly be a rational means of advancing the compelling state interest in public safety."[153]

These observations do not prove that preventive detention is punishment. Furthermore, we do not suggest that all forms of state-authorized loss of physical liberty imposed to prevent harm to others are punishment. Once state action appears to be punishment, however, a heavy burden must shift to those wishing to justify that action on other grounds. That inquiry should take place not only in the case of preventive detention used to protect the public from future crime, but also in the context of other state-imposed deprivations of liberty. This Article next explores detention in a variety of contexts in order to develop a definition of punishment that aids in sorting valid instances of detention from detention improperly used as punishment.

D. THE MEANING OF PUNISHMENT

In *Salerno*, the Supreme Court used accepted instances of state-imposed detention to bolster its conclusion that not all detention is punishment.[154] This section considers these and other illustrations of state-imposed losses of liberty in order to identify the constitutional meaning of punishment. This inquiry should be *central* to determining the constitutionality of preventive detention. From this perspective, the Court's treatment of the issue was woefully inadequate.

G. WILLIAMS, THE ENGLISH PENAL SYSTEM IN TRANSITION 12 n.5 & 214-16 (1970) (detention was allowed under the Criminal Justice Act of 1948, § 21, until its abolition in 1967).

152. United States v. Melendez-Carrion, 790 F.2d 984, 1000 (2d Cir. 1986).

153. *Id.*

154. United States v. Salerno, 481 U.S. 739, 748-49 (1987).

1. *Salerno*'s Benign Detention

A perspective emerging first in *Schall* and repeated in *Salerno* suggests that not all detention before trial is punishment — that some forms of pretrial detention are benign or even helpful to the person detained. Writing for the Court in *Schall*, Justice Rehnquist suggested that the detention of juveniles was for their benefit — they were clothed in street attire, well-fed, and subject to education — and therefore seemed less punitive.[155] This perspective applies equally well to detention for adults. Thus, *Schall* establishes the conceptual foundation for viewing certain types of pretrial detention as not being punishment at all.

The principle that certain kinds of detention are not punitive is unremarkable. The notion that preventive detention before trial and a finding of criminal guilt constitutes one of these nonpunitive kinds of detention, however, is remarkable. Yet, the *Salerno* Court reached the later determination with astounding casualness. In making the determination, the Court used an unsatisfactory standard, deciding the issue simply by accepting at face value the purpose expressly stated in the legislative history and labeling that purpose as "regulatory."[156] In the Court's words: "Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].' "[157] It is not surprising that Congress's stated purpose of protecting the community from danger satisfied this standard.

2. Failed Analogies to Other Instances of Detention

The basic, substantive challenge to any preventive detention statute is that the state may not jail presumptively innocent persons to prevent future crimes because jailing them for that reason constitutes punishment before trial.[158] The Court in *Salerno* failed to respond satisfactorily to this basic claim. Although conceding a " 'general rule' of due process that the government may not detain a person prior to a judgment of

155. Schall v. Martin, 467 U.S. 253, 265-68 (1984).
156. *Salerno*, 481 U.S. at 746-51.
157. *Id.* at 747 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).
158. *Id.* at 748.

guilt in a criminal trial,"[159] the Court found a sufficient number of "exceptions" to this rule to conclude that the statute did not offend values "implicit in the concept of ordered liberty."[160]

The exceptions that the Court listed in *Salerno*, however, all fall short of providing support for the power to jail competent adults before they have been convicted of wrongdoing in order to prevent crime. The "exceptions" listed in *Salerno* include the power to detain:

1) dangerous individuals in times of war or emergency;
2) dangerous resident aliens pending deportation hearings;
3) persons found dangerously mentally ill in civil proceedings;
4) persons found dangerously mentally ill in criminal proceedings;
5) presumptively incompetent juveniles accused of crime, pending trial;
6) persons arrested for crime pending their prompt appearance before a magistrate; and
7) persons arrested for a crime when a court finds the person presents a risk of flight or a danger to witnesses.[161]

The Court's list is not comprehensive; additional examples of state-authorized deprivations of liberty include:

8) wartime or peacetime draft;[162]
9) compulsory education laws;[163] and
10) quarantine.[164]

A careful analysis of these so-called exceptions to the rule that the state may not deprive an individual of liberty prior to conviction demonstrates that they do not support the rule of law announced in *Salerno*. Simply stated, only three of the examples listed above — detention in time of war or emergency, detention of dangerous aliens pending deportation, and confinement to prevent harm to witnesses — involve a finding by a court or government official that the detainees must be deprived of liberty in order to prevent them from engaging in acts for which they would be criminally responsible. For many additional reasons, however, the examples do not benefit those who rely on them to support preventive detention before trial.

159. 481 U.S. at 749.

160. Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

161. *Salerno*, 481 U.S. at 748-49.

162. Holmes v. United States, 387 F.2d 781, 784-85 (7th Cir.), *cert. denied*, 391 U.S. 936 (1968) (compulsory civilian service during peacetime did not violate constitutional guarantee against involuntary servitude).

163. Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163, 1180 n.87 (1984); Choper, *Consequences of Supreme Court Decisions Upholding Individual Rights*, 83 MICH. L. REV. 1, 179 (1984).

164. People *ex rel.* Barmore v. Robertson, 302 Ill. 422, 427, 134 N.E. 815, 817 (1922) (quarantine regulations sustained on the law of necessity).

Persons found dangerously mentally ill in either civil or criminal proceedings, presumptively incompetent juvenile delinquents, and persons afflicted with a communicable disease all possess a common trait which the ordinary accused adult criminal lacks: Each of these persons is presumptively not responsible for his or her future acts. Their detention is thus not punishment for two reasons. First, the Anglo-American system of criminal law is based on assumptions about the autonomy of individuals and choice of action.[165] These assumptions define a just legal order as one in which the state prominently publishes a penal law and its penalties and then intervenes whenever individuals break the law.[166] These assumptions and the resulting legal order are inapplicable to persons not criminally responsible for their behavior.[167] For example, no law can prevent a person who possesses a highly communicable disease from being a danger to others.[168] Detention and quarantine can

165. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 22-45 (1968).

> Criminal punishment as an attempt to secure desired behaviour . . . defers action till harm has been done; its primary operation consists simply in announcing certain standards of behaviour and attaching penalties for deviation, making it less eligible, and then leaving individuals to choose. This is a method of social control which maximizes individual freedom within the coercive framework of law in a number of different ways . . . .

Id. at 23.

166. This legal order does *not* assume that such a system will prevent crime. It assumes that some will break the law — that the promised penalties will fail to deter. Instead of preventing crime, these assumptions justify punishment imposed only upon those who do violate the rules.

167. *See* Robinson v. California, 370 U.S. 660, 666-67 (1962) (imprisonment for addiction to narcotics violates cruel and unusual punishment clause because it inflicts punishment for a status); *see also* Powell v. Texas, 392 U.S. 514, 532 (1968) (distinguished from *Robinson* on the ground that one who is convicted of being drunk in public is not punished for his status as an alcoholic but rather for an act in which he engaged).

168. *Cf.* S. BUTLER, EREWHON 95, 96-100 (1872).

> Prisoner at the bar, you have been accused of the great crime of labouring under pulmonary consumption, and after an impartial trial before a jury of your countrymen, you have been found guilty. . . . You were convicted of aggravated bronchitis last year: and I find that though you are now only twenty-three years old, you have been imprisoned on no less than fourteen occasions for illnesses of a more or less hateful character . . . . You may say that it is not your fault. The answer is ready enough at hand, and it amounts to this — that if you had been born of healthy and well-to-do parents, and been well taken care of when you were a child, you would never have offended against the laws of your country, nor found yourself in your present disgraceful position. If you tell me that you had no hand in your parentage and education, and that it is therefore unjust to lay these things to your charge, I answer that whether your being in a consumption is your fault or no, it is a fault in you, and it is my duty to see that

protect the community, but the simple creation of a law that makes it a crime to infect others with a communicable disease is meaningless. Similarly, dangerously mentally ill persons and, according to the Court in *Schall*, accused juvenile delinquents are not responsible for their acts because the state cannot prevent crime by waiting until such persons break the law; the ordinary restraint of law is unavailing. Second, detention of persons in these categories carries no moral statement about the individual. The state is not branding them as "criminal"; instead, the state is identifying them only as "unreasonably dangerous."

The Court's reliance on the practice of detaining persons arrested for crimes pending their prompt appearance before a magistrate is also misplaced. Detention pending a first appearance before a magistrate is an appropriate exercise of state power necessary to continue the processing of a criminal case and to shift its locus from the police station to the courthouse.[169] The deprivation of liberty involved to this point is severely restricted in duration.[170]

Once before the magistrate, detention to assure presence at trial is also an appropriate exercise of power, at least when coupled with a finding that no less restrictive means exist to assure the accused's presence. Because the state may punish criminals after it convicts them, it possesses the lesser authority to assure that accused criminals will be available for trial and possible punishment. The state may properly — consistent with complete respect for the presumption of innocence — detain arrestees to guarantee the integrity of the fact-finding process, without any finding, express or implied, that the accused is ready, willing, and able to break the law other than not appearing in the near future.[171]

Although wartime and peacetime drafts and compulsory education laws involve to varying degrees a deprivation of liberty, they share a common trait that eliminates their punitive purpose: They are imposed universally on persons subject to

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> against such faults as this the commonwealth shall be protected. You may say that it is your misfortune to be criminal; I answer that it is your crime to be unfortunate.

Id.

169. *See* Baker v. McCollan, 443 U.S. 137, 143-45 (1979).

170. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 125 (1975); Llaguno v. Mingey, 763 F.2d 1560, 1568 (7th Cir. 1985) (police officers held liable for holding arrestee in jail for 42 hours without probable cause determination); Bernard v. City of Palo Alto, 699 F.2d 1023, 1025 (9th Cir. 1983).

171. Tribe, *supra* note 39, at 404-06.

the law. Because all young men are subjected to a draft or registration and because all children are subject to compulsory education laws, the government is not focusing on individual behavior or responsibility. Without such a focus, punishment does not exist. In enacting the draft or education laws, the legislature simply makes a judgment that society is best served by the law, not that the subject class deserves to be punished or deprived of their liberty.

The only examples upon which the Court relies that directly implicate the authority to detain preventively are jailing suspected persons in time of war or emergency,[172] detaining dangerous resident aliens pending deportation hearings, and detention to protect witnesses. Jailing suspected persons in time of war or emergency, however, is hardly a helpful precedent when applied to all adults accused of crime under federal law. The Constitution explicitly authorizes suspension of the writ of habeas corpus in emergencies,[173] acknowledging that on limited occasions United States law tolerates the existence of a police state.[174] The Court's reliance on this principle in *Salerno* to permit jailing upon arrest in nonemergencies is, to say the least, stretching the point. This precedent is perhaps better understood as the Court labeling the crime problem as so severe as to constitute an ongoing emergency.[175]

Similarly, the power to detain dangerous resident aliens during deportation proceedings is a very limited power authorized precisely because aliens possess less than the full breadth of constitutional protection.[176] In *Carlson v. Landon*,[177] the Supreme Court upheld this power, emphasizing that "[t]he

172. IV CICERO, PRO MILONE ii (Loeb Classical Library 1929) ("law stands mute in the midst of arms").

173. U.S. CONST. art. I, § 9, cl. 2.

174. The use of the police power, or the failure to use it, has marked some of the great debates in American history. *See* Korematsu v. United States, 323 U.S. 214 (1944). President Lincoln's failure to properly suspend the writ has been a continuing source of commentary and reflection. Halpert, *The Suspension of the Writ of Habeas Corpus by President Lincoln*, 2 AM. J. LEGAL HIST. 95 (1958).

175. *See* United States v. Salerno, 481 U.S. 739, 747 (1987) (describing crime as a "pressing societal problem").

176. The power to detain aliens has been at the center of both legal and policy debates surrounding the treatment of the Mariel boatlift Cuban detainees. *See, e.g., Cuban Prisoner Riots Followed Seven Years of U.S. Ambivalence: Despite an Intial Welcoming, Many Aliens are Detained Even After Prison Terms*, Wall St. J., Dec. 1, 1987, at 1, col. 1.

177. 342 U.S. 524 (1952). The Court relied upon this case in *Salerno*, 481 U.S. at 748, 753-54.

power to expel aliens, being essentially a power of the political branches of government . . . may be exercised entirely through executive officers."[178] Thus, detention of resident aliens also involves a type of suspension of constitutional rights.

The power to detain an accused based upon a finding that the person would pose a threat to witnesses if released is the only "exception" the Court lists that even loosely implicates the power to detain to prevent future crimes. The narrowly focused justification for the detention, however, distinguishes it from the law upheld in *Salerno*. Protecting witnesses is a textbook illustration of a valid exercise of the state's regulatory power to ensure a fair trial. The exercise of all reasonable means to protect witnesses from threats, intimidation, and physical harm is a necessary corollary to the power to conduct a trial. A trial court has "broad powers to ensure the orderly and expeditious progress of a trial."[179] Protection of witnesses is a separate, valid interest of the state, not to prevent crime in any direct way (though of course that is a side effect), but to ensure the state's ability to bring the defendant to a fair trial.[180] Upon a proper showing that release of the accused would endanger the validity of the trial process, a court may detain him or her without bail. Such detention does not constitute punishment. Even if such detention were viewed as punishment, it is a narrow exception and extremely modest support for the shotgun approach of detention to prevent nonspecific crime.

Having failed to identify the distinguishing elements of these examples, the Court had an easy time stepping over what theretofore had been a sacrosanct line prohibiting punishment before trial (except in emergencies). The Court slipped past that line because it failed to analyze with any degree of care the examples upon which it relied. Had the Court undertaken this analysis, it would have understood the unprecedented nature of the power to punish upon arrest that it upheld in *Salerno*.

3. Exploring the Meaning of Punishment

In addition to misusing its list of "exceptions," the Court in *Salerno* failed to explore in any serious manner the meaning of

178. 342 U.S. at 537. The *Carlson* Court ruled that Congress may establish procedures, pursuant to the Subversive Activities Control Act, for the "detention and deportation of certain noncitizens, including members of the Communist Party . . . [who] may so comport [themselves] as to aid in carrying out the objectives of the world communist movement." *Id.* at 544.

179. Bitter v. United States, 389 U.S. 15, 16 (1967).

180. *See* Carbo v. United States, 82 S. Ct. 662, 668 (1962).

punishment. Such exploration would not have been unprecedented.[181] Courts have often been faced with the necessity of determining whether a particular act of the government should be considered "punishment" for purposes of the eighth amendment or the due process clause.[182] The Supreme Court has taken a variety of approaches in defining punishment, but *Salerno* is one of the first cases in which the definition of punishment was *necessary* to the opinion. Yet the Court refused to acknowledge the prior law on the question or to treat it with the care it deserves.

Courts take one of three alternative approaches to the definition of punishment for constitutional purposes. Some cases focus on the punisher's intent;[183] some on the effects suffered by the punished individual;[184] and others on the legitimacy of the grounds for the exercise of the punisher's power.[185] The Court in *Salerno* relied on one version of the first of these ap-

181. *See* Comment, *Toward a Constitutional Definition of Punishment*, 80 COLUM. L. REV. 1667, 1668 (1980).

182. The Supreme Court has occasionally considered the meaning of punishment under other constitutional clauses. *See, e.g.*, United States v. Brown, 381 U.S. 437, 447, 456-58 (1965) (provision prohibiting service as officer or employee of a union if they are a member of the Communist Party "inflicts 'punishment' within the meaning of the Bill of Attainder Clause"); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 287, 320-21 (1867) (striking down loyalty test oath under ex-post facto clause). In *Cummings*, the Court noted:

> The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator or guardian, may also, and often has been, imposed as punishment.

Id. at 320. The newest arena for consideration of the constitutional meaning of punishment involves civil fines, in which the Court held last term that excessive civil judgments in the form of punitive damages are not governed by the excessive fines clause of the eighth amendment. *See* Browning-Ferris Ind. v. Kelko Disposal, 109 S. Ct. 2909, 2911 (1989) (leaving open the question of whether the due process clause might limit civil fines).

183. *See, e.g.*, United States v. Lovett, 328 U.S. 303, 323-27 (1946) (Frankfurter, J., concurring).

184. *See, e.g*, Lieggi v. I.N.S., 389 F. Supp. 12 (N.D. Ill. 1975), *rev'd mem.*, 529 F.2d 530 (7th Cir. 1976).

185. *See, e.g*, Galvan v. Press, 347 U.S. 522, 529-32 (1954). *See generally* Navasky, *Deportation as Punishment*, 27 U. KAN. CITY L. REV. 213, 215 (1959) (evaluates and applies constitutional definitions of punishment formulated by the Supreme Court and case law); Comment, *supra* note 181, at 1677-78 (deportation is punishment and to state otherwise creates a legal fiction which is not in keeping with constitutional safeguards required by a democratic society).

proaches, a perspective that looks both at the punisher's intent and the rational relation of the detention to legitimate government purposes.[186] In doing so, the Court denigrated the notion of individual rights that the due process clause is intended to protect, and provided an unconvincing characterization of both the effect of detention before trial and the magnitude of the government's interest.

Seven years before *Salerno*, the Court examined the constitutional dimensions of punishment in *Bell v. Wolfish*.[187] That case concerned the constitutionality of conditions of confinement before trial. *Wolfish* did not raise any question concerning the legitimacy of the grounds for detention; the only question regarded the conditions in which the detainees were held.[188] The Court found that absent an express intent to punish, the conditions to which the state subjects detainees need only be reasonably related to a legitimate, nonpunitive government objective.[189] The dissent argued that the primary factor in determining whether the state was punishing the detainees should be the effect of the detention.[190]

Weaknesses in both the majority and dissenting positions suggest why the Court must look beyond legislative intent or simple effect alone. Of course, intent or effect can settle the issue in some instances; if the legislature expressly states its desire to punish, or if the effect is so severe,[191] or both, then the conclusion that the state is punishing the individual would be difficult to rebut. However, most cases are more difficult precisely because a court can interpret the intent to be either punitive or not.

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186. 481 U.S. at 747; *cf.* Trop v. Dulles, 356 U.S. 86, 94-95 (1958) (noting problems with rational relation test).

187. 441 U.S. 520 (1979).

188. *Id.* at 523.

189. *Id.* at 538-39.

190. *Id.* at 568-70.

191. If the pretrial phase involved forcing the defendant to break large stones with a small hammer or imposing a capital sentence rather than detention, the Court would presumably look beyond intent alone. Yet under the Court's logic in *Salerno*, it could conclude that banishment instituted to reduce jail populations is regulatory rather than punitive, and therefore, authorities could banish a defendant after a preliminary showing that the jails were overcrowded. *See* United States v. Salerno, 481 U.S. 739, 747 (1981). The effects of long-term pretrial detention may be sufficiently severe to cross the line and become punishment based on duration alone. *See supra* notes 3-38 and accompanying text; *see also* United States v. Frisone, 795 F.2d 1, 2 (2d Cir. 1986) (pretrial detention after 12 months solely on ground of dangerousness to community is unconstitutional).

Defining punishment simply on the basis of its effect is unhelpful.[192] It is overbroad because it labels as punitive a wide range of situations where deprivations are permissable and non-punitive. The complete concept of punishment should offer relatively clear constitutional bulwark against the politics of particular moments. Its definition must capture more than just one judge's perception of the effect upon the individual deprived of liberty.

If, on the other hand, legislative intent is the sole determinant of punishment, legislatures could circumvent rights expressly protecting the individual from government authority — such as protection from cruel and unusual punishment and from the deprivation of life, liberty, or property without due process — by obfuscating the real purpose of punitive legislation:[193] truly a case of the fox guarding the chicken coop. Allowing intent alone to govern leads to a tenuous and, in the end, empty conception of liberty.[194]

Nonetheless, intent — perhaps better described as purpose — is an important factor in determining punishment. This Article has considered a wide variety of instances in both civil and criminal law in which courts view detention as not being punishment.[195] In each instance, the basis for this conclusion is a finding of a purpose supported unambiguously by independent, established grounds for the government's exercise of its power to detain.

At least three kinds of government intent lean towards a finding of punishment: retribution, deterrence, and incapacitation.[196] In addition, the focus of the government's decision — whether it is about an individual or a broad group — is a crucial

192. H.L.A. Hart has noted that discussions of the concept of punishment tend to involve "some persistent drive towards an over-simplification of multiple issues which require separate consideration." H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 3 (1968). This Article is not an effort to find a universal rule for punishment, but rather to suggest a working definition that applies to the range of situations of detention by the government to determine which situations should be considered punishment for purposes of constitutional analysis, and which should not.

193. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 33 (1968). The Court's ready acceptance in *Salerno* of the questionable statements of congressional intent behind the Bail Reform Act of 1984 suggests that this danger is far from hypothetical. *See* United States v. Salerno, 481 U.S. 739, 747 (1987).

194. *Cf.* Hughes v. Washington, 389 U.S. 290, 298 (1976) (Stewart, J., concurring) ("the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*") (emphasis in original).

195. *See supra* notes 156-80 and accompanying text.

196. *See* Alschuler, *supra* note 31, at 527.

factor in determining the government's actual intent.[197] Punishment is a concept focused almost exclusively on the individual or on discrete groups.[198]

Some kinds of effects can also cross a constitutional line and become punishment. The more severe and extended the deprivation of rights recognized under the Constitution or laws, the more the deprivation will take on the character of punishment, and the stronger the government's justification should be.

Preventive detention might constitute punishment under a straightforward analysis of intent and effect. The intent behind the new pretrial detention practices seems to mirror the purposes of detention after conviction. The express goal of the new federal pretrial detention is to prevent defendants from committing serious crimes during the period before trial.[199] This goal is one of incapacitation. Pretrial detention is no less punitive simply because retribution does not appear to be its purpose.[200] The Court held in *Wolfish* that detention may not be imposed as *punishment* unless there has been an adjudication of guilt.[201] Repeating the long-held view that punishment for a criminal act can only come after a finding of guilt, however, does not make the identical intent or effect of the detention decision any less punitive.

Analysis of the effect of pretrial detention also bolsters the view that preventive detention is punitive. Imprisonment is the

197. The constitutional prohibition against bills of attainder, punitive legislation focused on one person or a small, identifiable group, reflect a similar concern. U.S. CONST. art. I, § 9, cl. 3.

198. This is also the core insight behind the ex-post facto clause. U.S. CONST. art. I, § 9, cl. 3.

199. *See supra* note 72 and accompanying text.

200. Former Los Angeles Police Chief Ed Davis's famous comment about highjackers — "Give 'em due process and hang 'em at the airport" — suggests that preliminary (pretrial) judgments can embody pure retribution. Martinez, *To Live and Die in L.A.*, L.A. Times, Sept. 8, 1990, at B2, col. 6. A retributive strain lurks behind the desire to detain upon arrest. The often-expressed feeling of injustice when an accused is released on bail and the victim is dead or injured is based on a desire to see "justice" done immediately. The notion that the accused deserves the maximum punishment possible (often expressed as a desire that "they throw the book at him") carries with it the conclusion that authorities should jail the accused upon arrest. The detention in the McMartin Preschool molestation case certainly had retributive undertones. Because lawmakers do not identify retribution as the government purpose behind the new detention, this Article does not follow the easier route of arguing that preventive detention is all the more punitive because it serves a retributive purpose in some cases.

201. 441 U.S. 520, 535 (1979).

modern norm of punishment. The conditions of detention are as bad or worse than imprisonment after conviction not only in terms of physical surroundings,[202] but also in terms of the impact on the individual.[203] The facilities and nature of detention are rarely benign from any perspective. Pretrial detainees are sometimes held in the same facilities used for those convicted of crimes. When authorities use local jails for detention, the circumstances of detention may be more unpleasant than detention in prison after conviction.[204]

In other contexts the punitive nature of pretrial detention is unquestioned: Federal law requires that convicted federal offenders receive credit for periods of detention;[205] and federal courts have required credit for detained federal defendants in a variety of different circumstances regardless of the grounds for detention.[206] Federal courts have required medical and psychiatric treatment of pretrial detainees using the same standards applied to convicted prisoners.[207]

The failure of federal courts to identify preventive detention as punishment suggests that the elements of punishment available in current case law — purpose and effect — inadequately delineate acceptable and unacceptable instances of punishment. If a constitutional definition of punishment is to protect against what is certainly among the most severe deprivations of liberty that modern, civilized governments impose on

202. *See* P. WICE, FREEDOM FOR SALE 81-96 (1974). Anecdotal evidence suggests that much of Wice's critique of detention facilities remains relevant for many, but not all, jurisdictions.

203. Detention before trial imposes substantial burdens on the individual, inhibiting the possibility of a fair trial. *See infra* notes 451-54 and accompanying text.

204. *Cf.* Meachum v. Fano, 427 U.S. 215, 224 (1976) (convicted prisoner has been "constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system").

205. 18 U.S.C. § 3568 (1988).

206. *See, e.g.*, Vickers v. Haynes, 539 F.2d 1005, 1006 (4th Cir. 1976) (credit for pretrial detention for non-bailable offense); Faye v. Gray, 541 F.2d 665, 668 (7th Cir. 1975) (credit for pretrial detention of indigent defendant even where total of pretrial and sentence does not exceed the maximum); Hook v. Arizona, 496 F.2d 1172, 1174 (9th Cir. 1974) (pretrial detention period must be credited to maximum term).

207. *See, e.g.*, Hamm v. DeKalb County, 774 F.2d 1567 (11th Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986). The Supreme Court has held that the due process rights of a pretrial detainee are "at least as great" as the eighth amendment rights inmates possess after sentencing. City of Revere v. Massachusetts Hospital, 463 U.S. 239, 244 (1983). The argument that detention is for nonpunitive purposes might be somewhat easier to accept if the treatment for detainees were in fact considerably better than that of convicted offenders.

their citizens, it must have more structure than the Court offers in *Salerno* or in the *Wolfish* majority and dissenting opinions.

4. A Proposed Definition: When Detention is Punishment

A definition of punishment should take account of the intent and power of the punisher and the effect on the individual being punished.[208] The following definition is based on the proposition that the state may impose punishment only after trial and a finding of guilt.[209] Building on the work of H.L.A. Hart,[210] we suggest a principled definition of state-imposed punishment for constitutional purposes including four criteria.

To be constitutional a deprivation must:

(1) involve a restraint on liberty or property otherwise enjoyed by a free citizen;
(2) *not* be justified by a clear, substantial, nonpunitive purpose;
(3) be imposed by the authorized and legitimate legal authority; and
(4) be imposed based on a final adjudication finding a violation of a law, or specific anticipated violation of a law, with *scienter*.

If a deprivation fits all of these criteria, it is constitutional pun-

208. *See* Thaler, *supra* note 33, at 450-51.

209. Bell v. Wolfish, 441 U.S. 520, 535 (1979). Defining when punishment is constitutional and when deprivations of liberty are not punishment is far preferrable to defining punishment as mere effect and then explaining the difference between "acceptable" and "unacceptable" punishment. The former approach focuses on the justifications for deprivations of liberty not constituting "punishment." As noted in the discussion of *Salerno*, *see supra* text accompanying notes 159-65, a number of important deprivations of liberty do not involve punishment.

210. H.L.A. HART, *supra* note 192, at 4-13. Hart offers his definition of punishment as a prelude to showing the importance of separating what he calls "Definition," "General Justifying Aim," and "Distribution." *Id.* He relies on the definition to show the complexity of and variation in justifications for particular punishments. *Id.* at 4-13. The collection of essays, of which his definition is merely an introductory part, are part of his explanation of the role of *mens rea* in the criminal law and of the notion of responsibility more generally. We seek different results from our definition; accordingly, we have changed Hart's definition substantially, adding elements of responsibility and judgment he sought to justify. Our definition of punishment is narrower; it seeks not only to describe punishment but to limit it, in a constitutional sense, to circumstances fitting within the principle that the state may impose punishment only after conviction. Thus, using Hart's terminology, we include an element of "distribution." This element of distribution — who can be punished (and the secondary question of how much, which we do not address) — turns on the notion of penalties imposed not only for "an offence against legal rules," *id.* at 5, but also for an offense with a positive mental state (with *scienter*). We add to Hart's definition, as well, the element of anticipated, specific violation of law, though we acknowledge that this falls within the spirit and purpose of much of Hart's discussion.

ishment. If a deprivation fits the first and third criteria but *is* justified by a clear, substantial, nonpunitive purpose, then it does not constitute punishment but may be acceptable detention. If a deprivation is not justified by such a nonpunitive purpose, and it appears to be based on a violation of law but without that finding following a trial, then courts should disallow it as unconstitutional punishment.

This definition includes elements of effect and intent and provides a coherent rule for identifying punishment. The definition turns on a combination of the effect of a deprivation, the lack of a substantial nonpunitive rationale, and on what the Court has consistently recognized as the core notion of legitimate punishment: the state's imposition of the deprivation based upon conviction for a knowing violation of a criminal law.[211] The state must articulate its "purpose" to satisfy the second element. In the absence of a substantial, nonpunitive purpose, whenever the state deprives an individual — presumptively able to control his or her behavior — of liberty or property in response to the individual's lawbreaking or expected lawbreaking, the state is punishing the individual in a constitutional sense.

This definition is consistent with the other instances of nonpunitive detention examined in this Article.[212] In each instance, a substantial, nonpunitive purpose is evident. Thus, wartime and peacetime drafts and compulsory education raise no problem because the overriding nonpunitive element is clear.[213]

Detention of accused defendants based on the threat they pose to witnesses is less clear under the definition. In one sense, such detention looks like punishment under the suggested definition because the state acts on the finding that the defendant is likely to commit another criminal act with criminal intent. This situation involves, however, a second, independent purpose: the state's legitimate regulatory power to conduct a fair trial on the original charge. Without this power, particularly violent and threatening defendants could create a cycle of lawbreaking that would prevent the proper imposition of punishment.[214]

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211. United States v. Salerno, 481 U.S. 739, 748 (1987).

212. *See supra* notes 159-65 and accompanying text.

213. *See supra* notes 161-64 and accompanying text.

214. Although the power to conduct a fair trial is an established, independent justification for detention, standards of particularity and proof must restrict the power. *See infra* notes 305-13 and accompanying text.

In other instances, a substantial, nonpunitive purpose is evident, *and* the detention is not based to any major extent on a finding of past or future criminal conduct with mens rea. The state detains juveniles and persons found dangerously mentally ill because of their presumptive inability to make choices about their actions. Under the proposed definition, their reasonable detention is not punishment because of the lack of *scienter*. Similarly, brief detention for processing at arrest is not justified by a conclusion that the defendant has committed a criminal act, with or without *scienter*. Instead, the state imposes such detention (within proper limits) to ensure its ability to determine whether the individual has committed a criminal act with the requisite mental state, and therefore, whether punishment is justified.[215]

Detention to prevent flight is also justified under the proposed definition for two reasons. As with protection of witnesses and brief detention for processing at arrest, the state has a sufficient nonpunitive purpose in the need to conduct a trial. Because this rationale must be balanced against the obvious punitive effect, its power to justify detention is more limited than in the other cases. Because detention based on a finding that the defendant will flee is based on a finding of a specific anticipated violation of the law, there must be specificity in the factual basis for detention and procedural protections, such as a higher burden of proof, to acknowledge and limit the punitive character of the detention.

Finally, the remaining categories exist in an extra-constitutional realm. Wartime and emergency detention do not permit normal adjudication of guilt or innocence.[216] Detention of dangerous resident aliens is permissible because of their special status apart from United States citizens.[217] Detention operates in these cases only by explicit suspension of the Constitution; therefore, the proposed definition is inapplicable.

The proposed definition requires a positive, substantial purpose to remove detention from the category of punishment. However, the state cannot preventively detain a competent adult without making an implicit moral statement about the individual; the detention order implies a magistrate's brand of

215. This rationale supports the minimum detention necessary to assure orderly trial and requires that authorities implement detention to minimize the necessary burden upon the defendant's trial and personal rights.

216. *See* PERSONAL JUSTICE DENIED, REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 3-8 (1983).

217. Korematsu v. United States, 323 U.S. 214, 223-24 (1944).

"criminal" or "putative criminal." Whenever a court concludes that an individual is likely to commit crimes in the future and therefore orders jailing, the court's finding is equivalent to guilt after trial — that the individual possesses the requisite mens rea to justify being jailed. In these cases, the state proffers no purpose other than punishment. In striking down the juvenile detention law subsequently upheld by the Supreme Court, the district court in *Schall* stated this point with great force:

> If incarceration under the statute were based exclusively on a founded suspicion that the juvenile had committed crimes, no one would doubt that this constituted punishment. To hold that it is not 'punishment' when based on a vague suspicion that the juvenile may commit future crimes would render the applicability of the due process clause in inverse proportion to the arbitrariness of governmental decision-making.[218]

In ordering preventive detention, a magistrate rules necessarily that the accused is ready, willing, and able to break the law in the near future, concluding, therefore, that the individual should be jailed. Humpty Dumpty notwithstanding, that's punishment.

E. THE SCIENCE OF PREDICTIONS

> Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted.
>
> Justice Jackson, sitting as a Circuit Justice
> in *Williamson v. United States*[219]

Proponents of increased preventive detention under the Bail Reform Act might choose not to dispute our understanding of the meaning of punishment. For them, the purpose of pretrial detention is the "regulatory" goal of avoiding additional crime before trial. The Court in *Salerno* validated this perspective when it found that "there is nothing inherently unattaina-

218. United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 716 (S.D.N.Y. 1981), *aff'd sub nom.* Martin v. Strasburg, 689 F.2d 365 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 467 U.S. 253 (1984).

219. 184 F.2d 280, 282-03 (2d Cir. 1950). The defendant had been convicted of Smith Act violations for conspiring to advocate and teach the violent overthrow of the United States. *Id.* at 280. He challenged the denial of bail on appeal. *Id.* at 281. Although bail on appeal raises different questions, *see* United States v. Miranda, 442 F. Supp. 786, 789-92 (S.D. Fla. 1977), Justice Jackson's argument in *Williamson* applies with even more force to detention before trial.

ble about a prediction of future criminal conduct."[220]

Bail reform advocates in the 1960s planted, perhaps inadvertently, the seeds for the use of predictions of dangerousness to justify detention. In successfully attacking reliance on money bail and bondsmen, the reformers recognized that "[r]econciling the ancient right of an accused to bail with the vital need of the community for safety is a major task."[221] They went on to suggest that "[u]nder a more rational system, explicit criteria might be formulated for detaining the individual whose past record and present psychology strongly suggest that he represents too substantial a danger to be let loose pending trial."[222] Lawmakers later took the hint about detention, but ignored the language about the right to bail.[223]

The mistaken belief that courts can identify individuals who are likely to commit additional crimes before trial is criti-

220. United States v. Salerno, 481 U.S. 739, 751 (1987) (quoting Schall v. Martin, 467 U.S. 253, 278 (1984)).

221. D. FREED & P. WALD, *supra* note 36, at 55.

222. *Id.* at 84.

223. The reformers warned that a detention policy would run counter to the presumption of innocence and that "[c]areful and intensive analysis would be required to assess the effects of such a policy on defendants and the trial process." *Id.* at 84-85. While one can view the shift towards increased pretrial detention as running counter to the reforms of the 1960s, one can also view the shift as a functional response to the elimination of opportunities for sub-rosa detention — detention now requires publicly stated grounds and application of rules to offenders regardless of economic status. The legislative history of the Bail Reform Act of 1984 cites a 1981 Attorney General's Task Force suggesting that the 1984 Act sought to correct the liberal release decisions resulting from the 1966 Act's focus on economic fairness:

> The primary purpose of the [1966] Act was to deemphasize the use of money bonds in the Federal courts, a practice which was perceived as resulting in disproportionate and unnecessary pretrial incarceration of poor defendants, and to provide a range of alternative forms of release. These goals of the Act — cutting back on the excessive use of money bonds and providing for flexibility in setting conditions of release appropriate to the characteristics of individual defendants — are ones which are worthy of support. However, 15 years of experience with the Act have demonstrated that, in some respects, it does not provide for appropriate release decisions. Increasingly, the Act has come under criticism as too liberally allowing release and as providing too little flexibility to judges in making appropriate release decisions regarding defendants who pose serious risks of flight or danger to the community.

S. REP. NO. 225, 98th Cong., 2d Sess. 5 (quoting ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 50-51 (1981)), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3187-88. This Article certainly does not advocate return to a system where detention is a de facto but unacknowledged part of the process. Instead, it tries to identify acceptable goals for and necessary limits on express detention rules.

cal to the current expansion of pretrial detention. This belief goes beyond the assumption that many suspects are criminous by nature or profession. Rather, the belief rests on an expectation that experts, whether psychologists or statisticians, can identify particular dangerous individuals from a class of suspects. We are confident that the use of predictions of dangerousness will eventually be viewed as anachronistic to a sensible bail and detention process — much like the current view of bail bondsmen.[224]

To understand the problems with the use of predictions of dangerousness at the pretrial stage, one must first examine the increasing use of predictions of dangerousness at other points in the criminal justice system. This analysis reveals that: (1) the kind of predictions used for detention under the Bail Reform Act and similar state provisions are not "scientific predictions" that can be tested and challenged;[225] (2) even scientific predictions of dangerousness have a limited (though expanding) place in other parts of the criminal justice system;[226] (3) the justification for using scientific predictions at sentencing or for early release does not apply to detention decisions;[227] (4) the accuracy of predictions is in fact lower than policymakers assume and is unlikely to improve significantly;[228] and (5) there are insurmountable practical barriers other than just the low predictive capacity to using predictions for detention decisions.[229] These arguments lead to the conclusion that detention based on the use of predictions of dangerousness is punishment:[230] Such detention is not justified by "a clear, substantial non-punitive purpose;"[231] it involves a great restraint on liberty; it is imposed by the government; and it is imposed based on "a finding of specific anticipated violation of a law with *scienter*."[232]

Few people in the United States would support detention

224. Freed and Wald quoted a United Nations study finding that "the United States and the Philippines are the only countries to allot a significant role to professional bail bondsmen in their systems of criminal justice." D. FREED & P. WALD, *supra* note 36, at 22. The criticism of bondsmen, the use of alternative forms of money bail, and the development of alternatives to bail have led to the virtual disappearance of bondsmen from many major cities. *See, e.g.*, M. SVIRIDOFF, *supra* note 35, at 3-8.

225. *See supra* notes 239-49 and accompanying text.

226. *See supra* notes 250-65 and accompanying text.

227. *See supra* notes 260-65 and accompanying text.

228. *See supra* notes 266-90 and accompanying text.

229. *Id.*

230. *See supra* notes 210-18 and accompanying text.

231. *See supra* note 210 and accompanying text.

232. *Id.*

without any stated justification. There are many situations where detention or imprisonment of individuals might have superficial appeal to some — such as detention of black teenage underclass males[233] or imprisonment of antinuclear or antiwar protesters parading during a Presidential address — but most people in this country would summarily reject such detention. Supporters of pretrial detention do not argue that authorities should *arrest* and detain persons expected to commit future crimes. Thus, detention is unjustified in the absence of arrest even if the prediction of a violent criminal act is at a level of accuracy — say three out of four — far above current acheiveable levels.[234]

Even proponents of detention based on dangerousness agree that the arrest and charge *combined* with the prediction — not the arrest and charge alone — justify the detention.[235] For all but the most violent crimes, they would reject the assertion that the state could constitutionally detain all those arrested and charged on the basis of the arrest and charge alone. Detention based on a prediction relies on two assumptions: that the suspect is guilty of the crime charged[236] (because without this assumption the state could not detain the defendant without suspending the Constitution), and that the prediction characterizes adequately the kind and degree of threat justifying detention. Proponents do not explain, however, why or how a prediction of dangerousness or criminality[237] justifies

233. Black teenage underclass males are mentioned because of the statistically high rate of criminality among this group. *See* 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 90 (1983). In certain urban areas in the United States, criminologists claim to be able to make powerful assessments of the likelihood of criminality (not necessarily violent criminality) based on knowledge of date of birth, sex, and address. *See* Alschuler, *supra* note 31, at 547.

234. *See infra* note 288 and accompanying text; *see also* Gottfredson, *Prediction: An Overview of Selected Methodological Issues*, in PREDICTION AND CLASSIFICATION CRIMINAL JUSTICE DECISION MAKING 33-38 (1987) [hereinafter PREDICTION AND CLASSIFICATION].

235. *See* Mitchell, *supra* note 39, at 1235-39.

236. Another way of viewing detention on the basis of prediction is that the fact of arrest, combined with the defendant's prior record, poses a sufficient threat. Because federal law imposes detention on individuals rather than on a class, some additional element must exist — in this case relegated to the total discretion of the judge and prosecutor. A decision to detain all of a class of defendants based on the combination of arrest and record would raise different questions. These are addressed in another part of this Article. *See infra* text accompanying notes 242-47.

237. Although the two are often merged, predictions of future violence differ from predictions of future criminality. Discussions with prosecutors using the federal detention provisions suggest, unfortunately, that prosecutors and

treating a person as if he or she is guilty before a court makes a formal determination of guilt.

1. Nonscientific Predictions Under the Federal Bail Reform Act of 1984

In debates on the Bail Reform Act of 1984, Congress avoided most of the difficult issues raised by the use of predictions of future criminality. The legislative history suggests that "neither the experience under the District of Columbia detention statute nor empirical analysis" settles the issue of whether anyone can predict future dangerousness.[238] The legislative history concluded, however, that "certain combinations of offense and offender characteristics . . . have been shown in studies to have a strong positive relationship to predicting the probability that a defendant will commit a new offense while on release," and that "judges can . . . make such predictions with an acceptable level of accuracy."[239]

Even these few bare statements show an unresolved conflict. Assume for the moment that "studies" have in fact shown "a strong positive relation" between "certain combinations of offense and offender characteristics" and pretrial criminality. Congress still does not justify giving judges *discretion* in mak-

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judges assume dangerousness and criminality are synonymous. Criminality is a broad, unstructured concept. It includes both nonviolent and violent offenses against property and persons. The type of predicted criminality is one of the major sources for the wide difference in predictive studies used to bolster or question detention practices. *See infra* notes 268-70 and accompanying text. For the purposes of this Article, several generalizations are important: (1) nonviolent property offenses may be predicted at much higher levels than violent offenses, or than violence generally, but such relatively minor behavior, even if proven, is a weak foundation on which to build a justification for detention to "protect the community"; (2) the "dark figures" (unreported and unproven allegations) of property and less violent offenses are much higher than for violent offenses, and the inclination to presume guilt is stronger; (3) property and less violent offenses can be handled more quickly in the criminal justice system and do not raise the same perceived need for detention before final adjudication. SOURCEBOOK, *supra* note 71, at 518, 534. We do not mean by these points to denigrate the unwelcome impact of any crime, and we recognize that some property and less violent offenses, such as home burglary, raise greater detention concerns. *See* Miller & Morris, *Predictions of Dangerousness: Ethical Concerns and Proposed Limits*, 2 NOTRE DAME J. L., ETHICS & PUB. POL'Y 393, 402-03 (1986). As an analytical matter, however, discussion of detention must focus on the real and perceived threats of the kind of violent crimes against persons that are reported in the papers, repeated in legislatures, and that drive the calls for "reform."

238. S. REP. NO. 225, 98th Cong., 2d Sess. 9, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3192.

239. *Id.*

ing the detention decision. Congress does not explain why judges have the ability to "make . . . predictions with an acceptable level of accuracy." Nor does Congress specify what constitutes an acceptable level of accuracy.

These gaps in the rationale behind predictions of dangerousness imply that Congress did not fully comprehend the difference between "scientific" and "clinical" predictions. One can also infer that Congress did not want to set a specific level of required accuracy[240] because any reasonable level of accuracy is unobtainable given present and plausible-future abilities to predict violent crime.[241]

The recent literature on the use of predictions of dangerousness suggests that several kinds of predictions exist.[242] The most accurate predictions — and the type that can be most easily tested, verified, and challenged — are based on statistical or actuarial methods applied to largely objective criteria such as age, criminal record, employment, and education.[243] Experts increasingly accept statistical predictions of dangerousness as a tool to assist decisionmaking throughout the criminal justice system — in part because of their scientific aura, but also be-

240. The Bail Reform Act of 1984 allows the government to move for detention in any case involving a crime of violence, or a federal drug offense carrying a penalty of ten years or more, or any felony following convictions on two or more offenses of these types, or an offense carrying a penalty of life imprisonment or death, or two or more comparable state or local offenses, or a combination of such offenses. 18 U.S.C. § 3142(f) (1988). Functional standards would require Congress to be more specific. For example, Congress should address whether a prediction that the defendant will commit an offense much less serious than the charged offense, perhaps something as minor as driving without a license, should be a sufficient prediction of "dangerousness" to justify detention. The same unaddressed question — the legitimacy of refering to crimes generally, rather than to specific criminal behavior — helps to explain the statistics claiming a high degree of pretrial crime — the basis for the Bail Reform Act of 1984. *See infra* notes 374-78 and accompanying text.

241. Tonry, *Prediction and Classification: Legal and Ethical Issues*, in PREDICTION AND CLASSIFICATION, *supra* note 234, at 393-94. One of the authors of this Article wrote as an afterword to an article published in 1984 that the Bail Reform Act of 1984's pretrial prevention provisions, "although loosely structured, . . . [are] a step toward the honest administration of pretrial detention." Morris & Miller, *Predictions of Dangerousness*, in 6 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 49 (1985). That judgment was meant to praise Congress's willingness to acknowledge the express use of predictions. It was a hasty judgment and is hereby rejected for the reasons explained in this Article.

242. *See* Miller & Morris, *supra* note 237, at 403-06; Tonry, *supra* note 241, at 395.

243. Miller & Morris, *supra* note 237, at 405, 425, 434-36; Gottfredson, *supra* note 234, at 36-37.

cause they can improve or assist with many of the difficult decisions in the system which judges now make poorly.[244] Studies indicate that the use of statistical predictions can improve on decisionmakers' highly inaccurate intuitive assessments — at least for certain decisions, including bail decisions.[245]

"Clinical" predictions — predictions of an expert with claimed ability to identify a characteristic through special insight — tend to be less accurate than statistical predictions.[246] Equally important for purposes of a detention decision, such predictions are not easily challenged because they rely on the expertise and insights of one individual. A clinical prediction can be "tested" by the past success of the expert making the prediction, but this does not guarantee that the prediction is equally accurate when applied to a new case. The very nature of clinical predictions suggests they are largely immune to legal review.

The imprecise standards governing predictions under the Federal Bail Reform Act of 1984 give detention decisions the character of clinical decisions.[247] A judge's finding that a defendant "will endanger the safety of any other person or the community"[248] cannot be called a scientific determination. Yet the Act empowers a judge to reach this conclusion whenever a case involves a broadly defined "crime of violence" or "any felony" coupled with certain prior convictions — without any additional finding beyond probable cause for the charged offense and without the protection of the rules of evidence.[249]

Fundamental problems would remain even if the Bail Reform Act did require that predictions of dangerousness be based on provable, objective factors and have an actuarial basis. The government should not use predictions to justify state action that could not otherwise be justified. Judges should only use

244. *See infra* notes 250-65 and accompanying text.

245. *See* Gottfredson, *supra* note 234, at 36-37; Miller, *Legal and Ethical Limits on the Use of Predictions of Dangerousness in the Criminal Law*, in THE PREDICTION OF CRIMINAL VIOLENCE 35, 42 (1986) [hereinafter CRIMINAL VIOLENCE]; *see also* Gottfredson, Gottfredson & Conly, *Stakes and Risk: Incapacitative Intent in Sentencing Decisions*, 7 BEHAV. SCI. & L. 91, 103-04 (1989) (study found that most guidelines could be enhanced by the inclusion of empirically based measures).

246. *See* Farrington & Tarling, *Criminological Prediction: An Introduction*, in PREDICTION IN CRIMINOLOGY (1985); J. FLOUD & W. YOUNG, DANGEROUSNESS AND CRIMINAL JUSTICE 27 (1981).

247. *See supra* notes 85-91 and accompanying text.

248. *See supra* note 72 and accompanying text.

249. *See supra* notes 87-88 and accompanying text.

prediction to distribute punishment or guide decision-making within otherwise justified ranges. Pretrial detention on the basis of predictions fails because without the prediction and an assumption of guilt, the detention is invalid. To elaborate on this point, the next section explores the use of predictions for decisions not involving detention.

2. Detention Compared to Other Uses of Predictions

Acceptance of predictions of dangerousness is increasing in a number of contexts, particularly in the context of sentencing.[250] Experts agree that virtually every sentencing decision involves prediction; in the words of Justice John Paul Stevens: "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."[251]

In recent years the Supreme Court has shown broad support for the use of predictions of dangerousness in even extreme circumstances. In *Barefoot v. Estelle*,[252] the Court upheld the use of clinical predictions of dangerousness in deciding whether to sentence the defendant to death.[253] In *Jones v. United States*,[254] the Court upheld a sentence based on the future dangerousness of an individual who pleaded not guilty by reason of insanity, even though the term might extend beyond the possible criminal sentence and beyond the otherwise applicable period of civil commitment.[255]

Both *Barefoot* and *Jones* indicate the Court's broad acceptance of the use of predictions of dangerousness in making fundamental decisions about individual liberty. Both may be criticized for upholding improper uses of predictions.[256] But

250. *See* Petersilia & Turner, *Guideline-based Justice: Prediction and Racial Minorities*, in PREDICTIONS AND CLASSIFICATION, *supra* note 234, at 155-60; Miller & Morris, *Predictions of Dangerousness: An Argument for Limited Use*, 3 VIOLENCE & VICTIMS 263 (1988) (citing articles).

251. Jurek v. Texas, 428 U.S. 262, 275 (1976).

252. 463 U.S. 880 (1983).

253. Texas law allows a capital sentence under a finding that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CRIM. PROC. CODE ANN. § 37.071(b)(2) (Vernon 1981). The Court upheld the Texas statute and the sentence under it, which was based upon psychiatric testimony supported only by the expertise of the doctors. *Barefoot*, 463 U.S. at 905, 906.

254. 463 U.S. 354 (1983).

255. *Id.* at 370.

256. Miller & Morris, *supra* note 250, at 270.

the use of predictions of dangerousness to justify pretrial detention is a significant step beyond these decisions.

The Court in *Salerno* relied upon the general acceptance of the use of predictions in other areas to justify their use in detention decisions.[257] The Court wrongly assumed that all *uses* of predictions are the same,[258] when in fact this was precisely the issue before the Court. In allowing certain clinical evaluations into evidence, the *Barefoot* Court did not hold that all uses of predictions are acceptable. In addition, the Court assumed that all *predictions* are the same.[259] The Court erred in both respects.

The use of predictions of dangerousness for detention is different from most other uses of predictions in the criminal justice system.[260] Predictions have spread throughout the system without careful consideration of the proper boundaries for this tool. The use of relative predictions of dangerousness[261] to distribute punishment within previously accepted ranges of punishment must be distinguished from the use of predictions to justify new, unprecedented actions. The first kind of prediction is a "customary" use of predictions, while the second is an "exceptional" or "extraordinary" use.[262]

The heart of the distinction between customary and exceptional uses lies in the justification for the state action in question. When the use is customary, the state could have acted without predictions. The state "customarily" uses predictions to distribute loss of liberty across a spectrum justified by the preexisting relationship between the individual and the state —

257. United States v. Salerno, 481 U.S. 739, 748 (1987).

258. *Id.* at 751-52. *See generally* Miller & Morris, *supra* note 242, at 422-31 (discussing the Supreme Court's treatment of predictions of dangerousness).

259. *Barefoot*, 463 U.S. 880, 896 (1983).

260. Alschuler, *supra* note 31, at 532-33; Miller & Morris, *supra* note 250, at 263, 265.

261. A relative prediction of dangerousness is a prediction of the dangerousness of a member or part of a group based on the base rate for the group. Relative predictions of dangerousness can hide more precise predictions of future dangerousness. For example, a prediction at an absolute group rate that might appear low (say one in four of a violent act over two years) may in fact show a member or part of a group (such as those accused of aggravated assault) that is many times more likely to be violent than other members of the group.

262. *See* Miller & Morris, *supra* note 237, at 432; Miller, *supra* note 245, at 37-38; *see also* Gottfredson, *Prediction and Classification in Criminal Justice Decision Making*, in PREDICTION AND CLASSIFICATION, *supra* note 234, at 2-3 (discussing types of predictions).

whether as a suspect, a defendant, or a convicted criminal.[263] If predictions improve on the identical but untutored judgments made before the use of predictions, justice may be increased. An error in applying the prediction violates no fundamental principle of justice (unless the prediction is arbitrary) because the punishment or other state action was justified without the prediction. When a range of punishment is already authorized for a class of individuals, a judge's use of predictions only fine-tunes the decision made within the authorized range.

The lack of predictive ability matters more when the prediction itself serves as the justification for the punishment than when judges use predictions to distribute punishment in otherwise accepted ranges. Whenever the state tries to justify exceptional actions that could not be taken without a prediction, the prediction carries the entire weight of the state action. This fact places a tremendous burden on the levels of certainty and proof necessary to support the validity of the prediction.

The Supreme Court accepted the exceptional uses of predictions in *Barefoot* and *Jones*, but that should not justify another exceptional use for preventive detention. The state had convicted the defendant in *Barefoot* of murder[264] and the defendant in *Jones* had pleaded not guilty by reason of insanity.[265] Whenever judges use predictions to modify sentences, the predictions affect the detention or punishment of the individual only after the state at least has established the grounds for punishment — that is, obtained a conviction.

A corollary to the distinction between customary and extraordinary use of predictions is that given a separate justification for pretrial detention (not *preventive* detention), the state might use scientific predictions to distribute detention among the class of suspects detained under that justification. Thus, for example, if the state could detain all suspects accused and charged with murder under accepted principles — because such defendants are most likely to flee or to interfere with the trial process — then the state could use predictions of dangerousness to determine which suspects to release pending trial, which to release on other terms (for example, bail or special conditions of release), and which not to release at all. Although such uses of predictions for pretrial detention determinations would raise the difficult practical and evidentiary problems discussed in

263. *See supra* notes 250-65 and accompanying text.
264. *Barefoot*, 463 U.S. at 883.
265. *Jones*, 463 U.S. at 360.

this Article, they would not raise the deeper problem of trumping basic liberty interests. Any misapplication would be in favor of liberty; any error would be within a loss of liberty otherwise allowed.

3. Practical Problems With Predictions

The practical and evidentiary barriers to the use of predictions of dangerousness as a basis for detention are substantial. Even the best controlled prospective prediction studies[266] have success rates that raise serious questions about Congress's conclusions regarding the ability to predict dangerousness. And despite the limited success of controlled studies, the *reality* of discretionary judicial predictions based on expert testimony is far worse still.[267]

As noted by the Supreme Court,[268] no study has predicted future violent behavior for any group of individuals over a reasonable length of time at greater than one positive or accurate prediction for every two negative or inaccurate predictions.[269] Professor Alschuler argues that these predictive studies understate criminologists' and psychologists' ability to predict violence.[270] Among other points, he notes that the rate of recidivism (measured by rearrest) is higher for some groups than the level of violence claimed by these studies.[271] This observation confuses the level of subsequent criminal acts with violence. Indeed, most of Alschuler's points do not apply to predictions of violence in the pretrial context because he changes one or two of the critical variables in prediction: either

266. A prospective study is one which tests a hypothesis on data collected in the future rather than using past data to define or test a model. *See* Gottfredson, *supra* note 234, at 24-38.

267. *See generally* Toborg & Bellassai, *Attempts to Predict Pretrial Violence: Research Findings and Legislative Responses*, in CRIMINAL VIOLENCE *supra* note 245, at 116-17 (summarizing research studies on the prediction of pretrial violence); Jackson, *The Impact of Pretrial Preventive Detention*, 12 JUST. SYS. J. 305 (1987) (examining pretrial detention policies in various jurisdictions and concluding that most policies have minimal effects on pretrial crime).

268. Barefoot v. Estelle, 463 U.S. 880, 900 n.7 (1983) (citing J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 47-49 (1981)).

269. Predictions of a future event which come true are known as "true positive" predictions. Affirmative predictions that do not come true are known as "false positives." Predictions that an event will not occur which are correct are called "true negatives," while predictions of nonoccurrence that do in the end occur are called "false negatives." *See* Tonry, *supra* note 241, at 393-97.

270. Alschuler, *supra* note 31, at 539-48.

271. *Id.* at 544-48.

the time period of the prediction or the seriousness of the predicted act.[272] Additionally, Alschuler does not address the question of whether any expert can predict who among a large group will actually commit the acts.

However moderate the success of predictions in controlled settings,[273] they prove far less accurate in actual pretrial settings. Since the District of Columbia detention provisions took effect in 1970, researchers have conducted only a handful of studies to determine the accuracy of predictions in practice.[274] Low overall rates of pretrial crime (even measured by rearrest) present a difficult challenge in predicting who these offenders will be.[275] Compared to the one in three predictive level for violent behavior attained by the most accurate controlled predictive studies, efforts to predict pretrial crime in actual practice have essentially failed.[276] Conducting a proper blind test of an operative pretrial detention system is difficult politically because it would involve releasing some individuals who would otherwise be detained. Few communities or politicians would accept scientific experimentation involving the release of "dangerous" individuals (despite the fact that authorities would release them without the "dangerous" label). Because the state detains those predicted to commit serious crimes, studies cannot determine what their actual behavior would have been

272. *Id.*

273. The difficulty of obtaining even moderately successful predictions suggests another overwhelming practical problem: the cost of producing scientific predictions — especially given the short time frame for such decisions — might overwhelm the criminal justice system. In other words, even if experts could better predict future dangerousness, it might simply not be worth it.

274. *See* Fagan & Guggenheim, Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment (predictions of juvenile criminality) (unpublished study, relevant excerpts on file with the *Minnesota Law Review*) [hereinafter Fagan & Guggenheim study]; Toborg & Bellassai, *supra* note 267, at 103-07 (reviewing recent research on predictions of pretrial criminality); Jackson, *supra* note 267, at 307-08.

275. The question of the amount of pretrial crime is distinct from the question of how well judges or experts can predict who will commit pretrial crime. In theory (though not in fact) overall levels of pretrial crime can be very low, yet experts can identify precisely who will commit that crime. Similarly, pretrial crime can be at moderate levels, yet experts can be unable to predict who among a class of defendants will commit that crime. *See* Fagan & Guggenheim study, *supra* note 274.

276. Toborg & Bellassai, *supra* note 267, at 116 ("At present, predictions of future criminality cannot be made with a high degree of reliability for individual defendants. Nevertheless, groups of defendants much more likely to commit crime-on-bail than other groups of defendants can be relatively accurately identified.").

upon release. In light of this dilemma, the best analytical tool available to test the validity of the detention is measurement of the rates of crime by those actually released and by those for whom prosecutors requested but the court denied detention.

One important exception to this dilemma is a recent study in which the researchers tested the accuracy of predictions of dangerousness of accused juvenile delinquents.[277] A federal district court issued a continuing writ of habeas corpus for all juveniles preventively detained in New York City.[278] During the three years in which the writ was effective, New York Family Court judges identified over seventy accused delinquents who would ordinarily be jailed pending trial because they posed a high risk of committing a crime if released.[279] Due to the district court order, the state did not actually detain any of these juveniles.[280]

The study indicated that the great majority of juveniles did not require detention to prevent crime before trial and that, had they been detained, most would have needlessly lost their liberty.[281] The study analyzed the rearrest rates of juveniles by dividing their offenses into two categories: violent, felony offenses,[282] and *any* crime, regardless of its seriousness.[283] In addition, several time periods were used to determine when the juveniles were rearrested.[284] Under the New York scheme, all delinquency trials, even for those not detained, were to be completed within 90 days after arrest.[285] Thus, the study focused on rearrest rates within 90 days.

Of the juveniles predicted to commit a crime, 18.7% were

277. Fagan & Guggenheim study, *supra* note 274.

278. The district court issued the order in United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 717 (S.D.N.Y. 1981), after it declared the statutory provision authorizing preventive detention unconstitutional. The Supreme Court eventually vacated and overturned the order in Schall v. Martin, 467 U.S. 253, 281 (1984).

279. Since enactment of the New York Family Court Act in 1962, judges could detain accused delinquents upon arrest whenever the judge found there was a "serious risk" that the juvenile, if released, would commit a crime before the next court date. N.Y. FAM. CT. ACT. § 320.5 (McKinney 1983).

280. Fagan & Guggenheim study, *supra* note 274.

281. *Id.*

282. Violent felony offenses were defined as all charges of assault, robbery, sex-related crimes, kidnapping, homicide, and manslaughter for which the maximum penalty is imprisonment for greater than one year. *Id.*

283. *Id.*

284. *Id.*

285. N.Y. FAM. CT. ACT § 340.1 (McKinney 1983).

rearrested for a violent felony crime within 90 days.[286] Thus, eight out of ten juveniles who would have been detained would not have been rearrested for a violent offense within the total time of their pretrial confinement. Of the juveniles predicted to commit a crime, 40.5% were rearrested for any crime within 90 days.[287] Thus even for this very broad category, nearly six out of ten juveniles would have been detained for false reasons.[288]

The high level of false positives demonstrates that the ability to predict future crimes — and especially violent crimes — is so poor that such predictions will be wrong in the vast majority of cases. Therefore, judges should not use them as an independent justification for major deprivations of liberty such as detention.

The study raises another important point. It found that fifty-seven percent of the juveniles ordered to be detained on dangerousness grounds were never convicted of any of the charges brought against them.[289] In these cases the juveniles were both falsely accused and preventively detained to prevent them from committing future crimes.

The use of predictions of dangerousness in the current law

286. Fagan & Guggenheim study, *supra* note 274.

287. Two points must be kept in mind about studies of rearrest. First, arrest does not equal conviction. Second, arrest for crimes that do not pose a threat to personal safety should not be used to justify detention.

288. Finally, more than two years after a judge found the juveniles to be so dangerous that they required detention, 27.5% were never rearrested for a violent offense and 17.5% were never rearrested for *any* crime. In other words, had the judges confined all of the juveniles for two years (eight times longer than the maximum time within which their case had to be tried), more than 27 out of 100 would not have been rearrested for a violent offense and more than 17 would never have been rearrested at all. Fagan & Guggenheim study, *supra* note 274.

289. The study found that of those ordered to be detained 42.9% were convicted of some crime (though many were convicted of less serious crimes than charged), 40.5% of the cases were withdrawn or dismissed outright, and an additional 16.6% of the cases were adjourned in contemplation of dismissal and dismissed after six months. Fagan & Guggenheim study, *supra* note 274. Of course, it is impossible to know what the outcomes of the cases would have been had the juveniles actually been jailed as the judges wanted. But it is unlikely that the outcomes would have been similar. Rather, as studies have consistently shown, when the accused is detained before trial, the strong probability is that the case will result in conviction. *See, e.g.*, Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole*, 38 N.Y.U. L. REV. 67, 84-86 (1963); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641, 642 (1964). We know of no other study in which case outcomes of detainees were examined where the conviction rate was under 50%.

of federal pretrial detention goes far beyond any careful or limited application of current predictive abilities. Under the procedures and standards enacted by Congress and upheld by the Supreme Court, the use of predictions is little different than if Congress had directed the federal courts to rely on a fortune teller's predictions. If the court closely questioned the fortune teller and the fortune teller asserted great confidence in his or her conclusions, the court would be encouraged to rely on the conclusion in deciding to jail the defendant.

Independent of whether experts can predict who will commit crimes before trial, this Article must still address two questions, one of theory and another of practice. The theoretical question is whether the threat of crime should *ever* be the basis for detention. Predictions of dangerousness might be a more plausible basis for detention if they were very reliable. If one could identify those very likely to commit a pretrial, violent criminal act, even powerful theoretical arguments against reliance on predictions would wilt in the face of the substantial threat such defendants would pose. This rationale extends, however, beyond the period between arrest and trial. Detention on the basis of ironclad predictions of dangerousness would be justifiable even without arrest or criminal charge. The detention would take on the character of civil detention — done not to punish, but to protect both the individual and society. Accordingly, the defendant should be entitled to the separate substantive and procedural standards and separate incarcerative settings involved in involuntary civil commitment. Thus, even the extreme case of ultrareliable predictions does not change our view about detention based upon the charge and before trial unless society is willing to extend this rationale to authorize detention before any charge.

A key rhetorical turning point in the debate over preventive detention is just how much pretrial crime happens. An important distinction exists between studies of the accuracy of predictions of short-term criminality or violence and studies measuring the amount of crime that those released before trial actually commit. Much of the debate over detention based on additional crimes before trial has centered on the evidence about the frequency of such crimes.[290] This debate occurs because a high level of pretrial crime might justify detention even without an ability to predict which particular defendants will commit the crimes. This Article deals with this separate issue

290. *See infra* Part II. A. 3.

in Part II,[291] where it evaluates whether current detention standards are adequate to deal with crime before trial. If society is comfortable with pretrial detention based on threat of crime, it must consider whether the current level of predictive accuracy is sufficient to detain. For example, assume that those released before trial will commit some substantial level of violent crime — say ten percent. The question remains whether decisionmakers can identify that group from among the total population of accused individuals — in social science terms, a question of the number of true and false positives.[292]

If the United States criminal justice system still rejects immediate punishment because of the possibility that an individual may be innocent — if it operates under the maxim that failing to convict nine guilty persons is preferable to punishing one who is innocent — then it cannot abide a system that justifies detention based on a finding that is never more accurate that one in three and is almost always much less accurate than that.[293] Because predictions of dangerousness — even in the careful, scientific world that does not exist at detention hearings within hours of arrest — will be wrong most of the time,[294] they should never provide an independent justification for depriving an individual of liberty.[295]

II. SHIFTING THE BURDEN: THE PROCEDURES GOVERNING DETENTION

The recurring nature of the debate over pretrial detention suggests the need for a framework to compare policies in different eras and across jurisdictions. The use of predictions — highlighting the absence of a concept of punishment — is only the current turning point in the ongoing debate over detention.

If one central idea can define a system of detention, it would be the relative burdens placed on the government and on

291. *Id.*

292. *See supra* note 269.

293. Barefoot v. Estelle, 463 U.S. 880 (1983). In *Barefoot*, the Supreme Court accepted the proposition that "the 'best' clinical research currently in existence indicates that psychiatrists and psychologists are accurate in no more that one out of three predictions of violent behavior over a several-year period among institutionalized populations that had both committed violence in the past . . . and who were diagnosed as mentally ill." *Id.* at 900 (citing J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 47-49 (1981)).

294. *Id.*

295. Short-term predictions of severe harm, such as predictions justifying short-term civil commitment or detention after a suicide attempt, provide closely circumscribed exceptions.

the individual before and during detention. "Burden" is used to mean the sum of procedural and other "costs" that both the individual and the government incur as the government seeks, obtains, and maintains pretrial detention. Within this broader notion — which we refer to as the "burden of detention" — fits the important and more familiar evidentiary burden of proof applied to particular facts at a detention hearing.[296]

At one end of a spectrum of relative burdens would be systems that give the government enormous power to detain individuals on a wide array of grounds or even without public justification, for long periods of time and without procedural protection or review. Indeed, this may sound like some totalitarian regimes around the world.[297] At the other end of the spectrum would be governments forbidden to detain without a criminal conviction, reinforced by a criminal process replete with substantive and procedural protections.

The following four elements go far towards distinguishing various detention systems:

(1) the grounds which justify detention;
(2) the procedures required for detention, including time limits and mandatory review;
(3) independent values, such as a speedy trial and the right to counsel, that limit the impact of detention;
(4) alternatives to detention used to achieve the same ends.

This list does not suggest a necessary "right" answer for all systems. These elements are choices or tradeoffs.[298] They are meant primarily to clarify the underlying concerns in the debate over detention. Applying these principles to current United States practices reveals, however, that lawmakers are making choices that seem to violate independent principles and norms of the United States' own legal culture.

A. GROUNDS FOR DETENTION

The grounds that justify detention set the tone for each

296. *See infra* notes 384-93 and accompanying text.

297. The release of people held in detention and changes in detention rules may be among the first signs of political change in some repressive regimes. Conversely, increased detention, like that reported in China after Tienamin Square, *China Annouces Release of 573 Detainees*, Wash. Post, Jan. 19, 1990, at A13, col. 3 (10,000 detained at time of protest), suggests rejection of principles of open and democratic government.

298. Judge Stephen Breyer's superb article explaining the kind of compromises made in establishing a federal sentencing guidelines system serves as a model for this approach. *See* Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

system. Grounds for detention may include those familiar (if not fully established) in American law, such as appearance at trial, protection of witnesses, and prevention of pretrial crime.[299] The possible grounds for detention extend well beyond those traditionally recognized in the United States. Other countries currently use detention for social control: to quash debate and to punish without trial.[300] In the most extreme instances, the decision to detain serves as a determination of guilt.

Detention to prevent pretrial crime assumes not only that a criminal trial system exists, but also that time elapses between arrest and trial. Thus, selection of purposes for detention reflects the structure and purpose of the entire criminal justice system. It reflects also the substantive definition of particular crimes. Where independent requirements of a free and willing act or protection of speech do not limit the definition of crimes, the government can easily use detention for political control rather than crime control.

If countries such as South Africa, Chile, or Cuba offered "dangerousness" or "threat of breaking the criminal laws before trial" as factors for detention, citizens in the United States would likely doubt both the honesty of the justification and the ability of the government to determine such a factor.[301] American citizens would assume that the government was merely creating a smokescreen for political or class oppression. They would "know" how difficult (perhaps impossible) it is to determine who is likely to break a law in the future especially when the laws in question restrict acts that Americans consider deserving of protection, like political speech.

To suggest that the practice of detention in each country reflects its history, culture, and government is not to suggest that unbridled use of detention in other countries is legitimate.[302] This discussion simply notes that many countries al-

299. *See supra* notes 158-75 and accompanying text.

300. *See supra* note 297.

301. Such a claim by a country with untrustworthy government motives sounds much like the Soviet use of psychiatric facilities and "civil" commitment to control dissidents, at least in the pre-Gorbachev Soviet Union.

302. A number of notable international human rights documents address detention. They may have substantial implications for law in the United States. The International Covenant on Civil and Political Rights, arts. 9-10, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 368, 371-72 (1967) [hereinafter International Covenant], and the European and American Convention on Human Rights each contain specific provisions on how long governments may detain individuals before

low detention for reasons and for periods that would be considered unacceptable in this country.[303] Thus, in developing a system of detention in the United States, lawmakers must build upon our own legal and historical framework.[304]

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trial. American Convention on Human Rights, O.A.S. T. S. No. 36, at 1, O.A.S. Doc. OEA/ser. L/V/II.23, doc. 21, rev. 6 (1979), *reprinted in* 9 I.L.M. 673, 677-78 (1970) [hereinafter American Convention]; European Convention on Human Rights, *done* Nov. 4, 1950, art. 5, Europ. T. S. No. 5, 213 U.N.T.S. 221 [hereinafter European Convention]. Many of these international materials are increasingly emphasizing the importance of a public criminal trial.

303. For example, Israel has imposed detention policies in the West Bank and Gaza (the "occupied territories") that allow summary detention for extended periods without formal charges and without a right to trial. *See, e.g., Israel Imprisons Three Palestinian Leaders without Trial*, Wash. Post, Nov. 14, 1990, at A25, col. 1; *Rights Group Says the Israelis Detained 5,000*, N.Y. Times, June 1, 1989, at A11, col. 1.

304. This Article does not address in detail moral and legal arguments that detention generally, or detention on the basis of future threat, violates basic principles of humanity transcending particular political systems and particular times. Such arguments appear commonly, however, in the international human rights materials. Every international human rights agreement since World War II states that individuals have a right to be free of arbitrary detention or imprisonment. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, reporters' note 6 (1986); *see also* Universal Declaration of Human Rights, arts. 3, 9, G.A. Res. 217A, 3 U.N. GAOR (pt. 1) at 71, U.N. Doc. A/810 (1948). Article 3 states "[e]veryone has the right to life, liberty, and the security of the person," and Article 9 states, "[n]o one shall be subject to arbitrary arrest, detention or exile." International Covenant, *supra* note 302, at art. 9, para. 1. ("Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention."); American Convention, *supra* note 302, at art. 7, para. 1, 3. Paragraph one states "[e]very person has the right to personal liberty and security." Paragraph three states, "[n]o one shall be subject to arbitrary arrest or imprisonment." *See also* European Convention, *supra* note 302, at art. 5, para. 1 ("Everyone has the right to libery and security of person"); African Charter on Human and Peoples' Rights, art. 6, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1981), *reprinted in* 21 I.L.M. 59, 60 (1982). Legal scholars also have broadly recognized the unacceptability of arbitrary detention. *See, e.g.*, L. OPPENHEIM, 1 INTERNATIONAL LAW 687-89 (1955); L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 82-83 (1973); L. HENKIN, THE RIGHTS OF MAN TODAY 89-101 (1978).

Detention is arbitrary under customary international law if "it is not pursuant to law *or* if it is incompatible with the principles of justice or with the dignity of the human person." RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, comment h (1986) (quoting *Statement of U.S. Delegation*, 13 U.N. GAOR C.3 (863d mtg.) at 137, U.N. Doc. A/C.3/SR.863 (1958)). In other words, "[d]etention is arbitrary if it is unlawful or unjust." *Id.* § 702, reporters' note 6.

The United States has recently reaffirmed the idea that the principles of the U.N. Charter embodied in the Universal Declaration of Human Rights constitute basic principles of international law and that there is "a corresponding duty on the part of every state to respect and observe them." Memorial of the United States (*United States. v. Iran*), 1982 I.C.J. Pleadings (United States

1. Traditional Grounds for Detention in the United States

The government has used pretrial detention to protect the orderly process of determining guilt or innocence.[305] Society widely accepts detention based on a careful determination that the defendant is likely to flee or otherwise not appear for trial.[306] Charges of homicide or other extremely severe offenses may raise a presumption that the accused will not appear for trial.[307] In addition, detention may be justified if the state can show that the defendant will threaten or harm witnesses or will otherwise interfere with the collection of evidence.[308]

Not surprisingly, the same lower federal courts that have questioned detention on the basis of dangerousness have upheld the federal provisions permitting pretrial detention on these

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Diplomatic and Consular Staff in Tehran) 182 (May 24, 1980); *see also* Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980) (discussing the universal renunciation of torture). The Supreme Court long ago recognized that customary international law is sometimes applicable in courts of the United States. The Paquete Habana, 175 U.S. 677, 700 (1900). At least one federal court has relied upon customary international law in finding a right to be free from arbitrary detention. Fernandez v. Wilkinson, 505 F. Supp. 787, 797 (D. Kan. 1980), *aff'd*, Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

This Article has argued that detention practice in this country is unprincipled, that it ignores fundamental principles of the United States legal system, and that reliance on predictions of criminality in particular cannot be justified at present levels of knowledge, if ever. The perspective of the international human rights material may allow a more dispassionate critique of United States detention practice than is possible within the current political climate regarding criminal justice issues. If nothing else, the international materials drive home the point that U.S. citizens would consider detention accepted in the United States to be unprincipled and unjust in other countries.

305. These traditional grounds for detention are, of course, retained under the Bail Reform Act. 18 U.S.C. § 3142(f)(2)(A) & (B) (1988).

306. *See, e.g.*, United States v. Perez-Franco, 839 F.2d 867, 869-70 (1st Cir. 1988); United States v. Portes, 786 F.2d 758, 764-65 (7th Cir. 1985); United States v. Gotay, 609 F. Supp. 156, 158-59 (S.D.N.Y. 1985); United States v. Melville, 309 F. Supp. 824, 826-27 (S.D.N.Y. 1970); AMERICAN BAR ASSOCIATION STANDARDS RELATING TO PRETRIAL RELEASE § 5.1 (1968).

307. Detention without bail is dramatically higher in practice for murder than for other crimes and generally higher for violent crimes than for non-violent crimes. *See* SOURCEBOOK, *supra* note 71, at 524. On the capital offense exception to bail, see Thaler, *supra* note 33, at 444-46. On refusal of bail based on severity of crime, see, *e.g.*, Stinnett v. United States, 387 F.2d 238, 240 (D.C. Cir. 1967); United States v. Soto Rivera, 581 F. Supp. 561, 564 (D.P.R. 1984); United States v. Meinster, 481 F. Supp. 1117, 1123 (S.D. Fla. 1979).

308. *See, e.g.*, United States v. Catala Fronfrias, 612 F. Supp. 999, 1000-01 (D.P.R. 1985); United States v. Halloran, 327 F. Supp. 337, 339-41 (C.D. Cal. 1971).

more traditional grounds.[309] Federal courts have repeatedly upheld detention on the grounds that the defendant is likely to obstruct justice by, for example, threatening or harming witnesses.[310] Of course, this justification can hide less accepted purposes. The justification of threat should be restricted, therefore, by standards of particularity and proof.[311]

Under the definition of constitutional punishment suggested in Part I,[312] detention based on the traditional grounds is *not* punishment because a clear, substantial, nonpunitive purpose — protecting the orderly process of law — justifies it. A number of important elements are included in the traditional justification for detention: First, the grounds for detention concern the protection of the legal process; second, these instances are limited exceptions to the presumption in favor of pretrial liberty; and third, the bail system provides a range of options other than a simple two-choice decision to detain or not to detain. To the extent that judges have used bail to detain individuals and prevent crimes before trial rather than to ensure appearance at trial, the bail system has served as a substitute for a system of pretrial detention.[313]

309. *See* United States v. Melendez-Carrion, 790 F.2d 984, 995-1004 (2d Cir. 1986).

310. *See, e.g.*, United States v. Gotti, 794 F.2d 773, 779 (2d Cir. 1986). Federal courts have found an inherent power in trial courts to deny bail to achieve the orderly administration of justice. United States v. Provenzano, 578 F. Supp. 119, 120 (E.D. La. 1983), *aff'd*, 747 F.2d 1462 (5th Cir. 1984); United States v. Kirk, 534 F.2d 1262, 1280-81 (8th Cir. 1976), *cert. denied*, 433 U.S. 907 (1977).

311. Courts have held that the standard of proof for risk of flight is a preponderance of the evidence and the standard for danger to the community is clear and convincing evidence. United States v. Motamedi, 767 F.2d 1403, 1406-07 (9th Cir. 1985); United States v. Payne, 660 F. Supp. 288, 291-92 (E.D. Mo. 1987). Regardless of the standard of proof, the trial court must carefully assess a claim that detention is necessary to protect the safety of witnesses. United States v. Gallo, 653 F. Supp. 320, 332-34 (E.D.N.Y. 1986). In *Gallo* the court assumed that a threat to witnesses had been made and then discounted the danger because it found "several prominent circumstances which make it in the defendants' best interests to ensure the witness' presence at trial." *Id.* at 332. The court noted that the witness had already testified before the grand jury, which indicted the defendants, and at a previous bail hearing. The court had informed the defendants that "if [the witness] is unavailable for trial and it can reasonably be concluded that his absence resulted from the activities of the defendants or their associates," the court will admit the prior statements at trial. *Id.*

312. *See supra* text accompanying notes 208-11.

313. Acknowledging that judges sometimes set bail at improper levels for purposes of community protection does not justify detention without bail. The eighth amendment expressly demands that in cases in which bail is set, it must be set at a reasonable level. U.S. CONST. amend. VIII. Thus, the framers ad-

One can reasonably fear the detention of accused but untried individuals. This fear is similar (perhaps identical) to the framers' fear that improper detention and bail practice could lead to abusive government infringement of the liberties of its citizens.[314] One can easily envision police and prosecutors in an overburdened urban setting who might find ready use for a broader detention power, even (if not especially) in cases in which they had no intention or expectation of eventual conviction.

2. Concern About Crimes Before Trial

The concern that defendants will commit crimes before trial is at the heart of the trend towards increased pretrial detention. In a world of long delays before trial[315] and case resolution by bargaining rather than trial,[316] the concern that defendants may commit additional criminal acts before trial is certainly legitimate. Society is rightly concerned about those who have a record of several recent convictions for serious charges.

Without any expansion of the traditional grounds for detention, however, the legal system already has the tools to respond to the majority of those who pose the greatest threat. Offenders charged with a serious offense while serving a term of probation or parole are detainable pending the determination of the validity of the later charge.[317] This detention — punishment under the definition suggested in Part II[318] — is based upon the prior determination of guilt. The state may lawfully detain the individual without reliance on predictions of future behavior by commencing parole or probation revocation proceedings upon a showing of something close to probable cause.[319] Ample authority exists for detention based on rearrest pending final determination that the parolee or probationer violated a condition of liberty by committing another

dressed the fear that bail would be used for improper purposes or set so high as to achieve improper ends. *Id.*

314. Comment, *supra* note 39, at 198-200.

315. SOURCEBOOK, *supra* note 71, at 518.

316. Note, *The Prosecutor's Duty to Disclose to Defendants Pleading Guilty*, 99 HARV. L. REV. 1004, 1009-10 (1986).

317. *See* AMERICAN BAR ASSOCATION STANDARDS RELATING TO PRETRIAL RELEASE §§ 5.5-5.9 (1968).

318. *See supra* text accompanying notes 208-10.

319. *See* FED. R. CRIM. P. 32.1(a)(1); Note, *Due Process and Probation Revocation: The Written Statement Requirement*, 56 FORDHAM L. REV. 759, 760 (1988).

crime.[320]

Ample authority also exists for detention of defendants charged with extremely violent crimes.[321] Practice firmly anchored in history permits detention for crimes of extreme violence — in particular murder — even for a first offense.[322]

Congress enacted the 1984 Bail Reform Act provisions without considering the alternatives to preventive detention.[323] Before enacting sweeping legislation radically altering basic principles in the criminal justice system, Congress should have at least explored the currently available alternative methods of protecting society from repeated criminality. The underutilization of parole and probation revocation[324] suggests that the support for expansive preventive detention was born more of political considerations than actual need. Whether or not Congress identified accurately the threat of pretrial crime, the threat to the community from crimes of prior offenders can be substantially met within current principles and procedures.

Current principles fail to encompass only one class of criminal defendants: those suspects rearrested before trial whom a judge had previously released on recognizance, bail, or release conditions pending trial. Not all such suspects threaten the community. The crime for which police have rearrested the defendant must be serious — involving violence or the threat of violence — in order to constitute a government interest sufficient to challenge the presumption of liberty before trial.[325]

The fear of crime moves from a rational but abstract plane

320. United States v. Bazzano, 712 F.2d 826, 837 (3rd Cir. 1982), *cert. denied*, Mollica v. United States, 465 U.S. 1078 (1984).

321. *See, e.g.*, United States v. Gatto, 750 F. Supp. 664, 672-76 (D.N.J. 1990). Some sub-rosa detention to prevent crime may overstate the degree to which crime prevention is a concern independent of the trial process concerns. Those charged with more serious crimes might present a greater threat to the community's safety. Yet those charged with more serious crimes are also those most likely to be detained on the ground that they will flee because, facing severe punishment, they have the most to lose by appearing for trial and risking conviction. The detention of those accused of murder can be explained much more easily by a presumption that they will flee than by a fear that they might commit further murders — a relatively rare and extreme act.

322. Comment, *supra* note 39, at 193, 200. The presumption of flight should, of course, be rebuttable.

323. *See* S. REP. NO. 225, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182.

324. Note, *Limiting*, *supra* note 45, at 330-51.

325. Project: *Thirteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1982-1983: II. Preliminary Proceedings*, 72 GEO. L.J. 365, 426 (1983).

to a functional and concrete point whenever a defendant, released pending trial for a violent felony, is rearrested for a subsequent serious act before the trial is completed. This limited category poses a substantial challenge. Two choices are available. The first is to prohibit detention of these individuals simply because authorities have not yet convicted them. The second is to permit detention — subject to certain procedural safeguards — on the theory that they have violated a condition of their release pending trial on the prior arrest. If this second approach is taken, the safeguards should include a high standard of proof of guilt on the new charge.[326] In addition, the court should notify the defendant of the proposed detention hearing, thus providing time to respond and the opportunity to call witnesses as well as the opportunity to cross-examine the government's witnesses. The higher burden of proof and the requirement that the subsequent charge pose a real threat of violence would protect the defendant against unwarranted charges.

The power to detain in these circumstances is directly related to the state's ability to try the defendant on the original charge. The defendant's failure to avoid arrest for a second serious charge during the period in which the government is collecting evidence to prove the original act arguably justifies detention because the defendant failed to act in accordance with the condition of good behavior during release.[327] If the

326. For example, Arizona's constitutional bail provision reads:

> All persons charged with crime shall be bailable by sufficient sureties, except for:
>
> 1. Capital offenses when the proof is evident or the presumption great.
>
> 2. Felony offenses, committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge.
>
> 3. Felony offenses if the person charged poses a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community and if the proof is evident or the presumption great as to the present charge.

ARIZ. CONST. art. 2, § 22.

327. Separate justifications exist for short-term detention, both within and outside of the criminal process. Within the criminal process, temporary detention is associated with arrest based upon probable cause. Outside the criminal system, detention powers are associated with a system of short-term involuntary civil commitment, detention after a suicide attempt, or brief detention of a minor based on the request of family members. This Article does not address these short-term detention scenarios and justifications.

state dismisses the prior pending case, however, the state should release the accused in the remaining case.

Much of the public debate over pretrial detention has turned on claims about the amount of crime committed before trial by those already accused of crime. This debate does not focus on the theory or grounds for detention, on past practice, or on the operation of the criminal justice system. Instead, it is a battle to shape public perception of the degree of threat posed by pretrial crime. The level of pretrial crime asserted varies within a huge range depending on the speaker's viewpoint. The following section explores how people can possibly make the vast array of claims about pretrial crime rates and considers whether one can draw a more consistent, sensible picture of the actual extent of pretrial crime.

3. Determining the Amount of Crime Before Trial

A recent National Institute of Justice film states that accused defendants on pretrial release commit one fifth of all crimes.[328] Both former Chief Justice Burger[329] and President Reagan[330] told the American Bar Association that released suspects commit vastly too much crime before trial. In enacting the Federal Bail Reform Act of 1984, Congress emphasized the need to "address the alarming problem of crimes committed by persons on release."[331] The key Senate report on the Bail Reform Act cites a study showing that "one out of every six defendants in the sample studied were rearrested during the pretrial period."[332] In another cited study in the District of Columbia, "thirteen percent of all felony defendants released

328. *Out On Bail* (National Institue of Justice Film 1986). In the film *Out On Bail*, program commentators and experts show how to manipulate statistics about crime on release. Some talked of "crime on release" without explaining the source of the figure; others talked of "rearrests." Professor James Q. Wilson stated that one in six released defendants "commit crimes on bail," of which one in five are arrested. *See* M. SORIN, OUT ON BAIL STUDY GUIDE (1986). No one tried to make sense of all the numbers tossed around. Earlier studies had shown even higher levels of pretrial crime — up to 35% of released defendants. *See* P. WICE, *supra* note 202, at 74.

329. Address of Chief Justice Burger to the American Bar Association, Feb. 8, 1981, *cited in* S. REP. NO. 225, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3187.

330. Address of President Reagan to the International Association of Chiefs of Police, September 28, 1981, *cited in* S. REP. NO. 225, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3187.

331. S. REP. NO. 225, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3185.

332. *Id.*

were rearrested,"[333] and police rearrested those posing the most serious bail risks at "the alarming rate of twenty-five percent."[334] Given such studies, there is little wonder at the wide call for increased pretrial detention.

Other studies, including a recent study of rearrests of those released under the Bail Reform Act, show that defendants released before trial commit crime at rates ranging from a fraction of one percent to a few percentage points.[335] Given this second set of studies, there is much wonder that detention is allowed at all.

These two claims — of a tide of criminality on the one hand and of negligible criminality on the other — are both common in the public debate over pretrial detention. Reconciling both claims presents a substantial challenge.

One possibility is that one group of studies is simply wrong — based either on methodological error or fraud — and the other right.[336] Another possibility is that the studies use different definitions of pretrial crime. A third possibility is that the studies are actually fairly consistent, but politicians manipulate the data or misinterpret it for political advantage.

To facilitate discussion of these possibilities, this Article focuses on just four studies: the two studies on pretrial crime upon which Congress relied in the legislative history to the Bail Reform Act of 1984, showing rearrest rates of 13% and 25% respectively;[337] a study of detention decisions under the Bail Re-

333. *Id.* at 9, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3189.

334. *Id.*

335. *See, e.g.*, GENERAL ACCOUNTING OFFICE, CRIMINAL BAIL: HOW BAIL REFORM IS WORKING IN SELECTED DISTRICT COURTS 39-40 (1987) [hereinafter GAO STUDY]; Jackson, *supra* note 267, at 312-15.

336. This Article does not explore the methodological framework of the wide range of studies on pretrial crime, nonappearance, or the factors judges actually consider in setting bail. *See, e.g.*, Landes, *The Bail System: An Economic Approach*, 2 J. LEGAL STUD. 79 (1973) (suggesting economic model in examining actual bail decisions); Landes, *Legality and Reality: Some Evidence on Criminal Procedure*, 3 J. LEGAL STUD. 287 (1974); J. ROTH & P. WICE, PRETRIAL RELEASE AND MISCONDUCT IN THE DISTRICT OF COLUMBIA III-4 to III-16 (PROMIS Research Project Publication 16, Institute for Law and Social Research, 1978) (discussing studies). Instead, it identifies the kinds of factors that make the bottom line in various studies look so different. This Article focuses more on the way studies are used — the rhetoric of pretrial crime — than on the methodology or accuracy of any particular study or on the conclusions about what judges actually do consider in setting bail.

337. M. TOBORG, PRETRIAL RELEASE: A NATIONAL EVALUATION OF PRACTICES AND OUTCOMES 3 (1981); J. ROTH & P. WICE, *supra* note 336, at II-45 to II-51.

form Act of 1984, suggesting rearrest rates of less than 1%;[338] and a pre-Act study of rearrest in the federal district courts, suggesting a rearrest rate of around 3%.[339]

First, the rate of crime before trial (or of its surrogate in these studies, rearrest) depends to a large extent on how quickly the trial occurs after the defendant is released. If trials on serious charges took place within two weeks, the rate of rearrest would be extremely low; on the other hand, if the state never tried those charged, the rearrest rate would be similar to the "recidivism" rate.[340]

The period from arrest to trial is not, however, what most clearly distinguishes the studies of pretrial crime. The clearest distinction in aggregate terms is whether researchers conducted the study in the federal courts or in state and local courts. Studies in federal courts show rearrest rates for federal felony defendants ranging from less than 2%[341] up to 4.7%.[342] Two studies serve as examples: the 1984 Sherwood-Fabre study (which found a rearrest rate of around 3%)[343] and the 1987 General Accounting Office study comparing pretrial crime before and after the Bail Reform Act of 1984.[344]

Sherwood-Fabre examined the behavior of released federal defendants in ten districts.[345] Although the study refers to defendants who "commit" a misdemeanor or felony, the study in fact correlated release under various conditions only with rearrest.[346] The study found that authorities rearrested between 1.7% and 3.2% (depending on the type of condition of release)

338. GAO STUDY, *supra* note 335, at 39-40.

339. L. SHERWOOD-FABRE, *supra* note 64, at 173-94. The studies used as examples in this Article, however, have become a central part of the current literature and debate. They involve the same distinguishing factors as the other, older studies.

340. Recidivism is an odd term that seems fairly simple and yet is in fact quite complex. Because researchers typically measure rearrest as a substitute for "pretrial crime," recidivism here means the rate of rearrest over a long period of time, whether for the same crime or a different, more or less serious crime. *See infra* notes 367-75 and accompanying text.

341. GAO STUDY, *supra* note 335, at 37-41.

342. *See Hearings on Pretrial Detention Act of 1983 H.R. 3491 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 139 (1983). The data are from the Pretrial Services Data System of the Administrative Office of the United States Courts.

343. L. SHERWOOD-FABRE, *supra* note 64, at 174.

344. GAO STUDY, *supra* note 335, at 13. The study analyzed a sample of cases involving criminal defendants charged with a felony. *Id.*

345. L. SHERWOOD-FABRE, *supra* note 64, at 78.

346. *Id.* at 410, 420.

of defendants for misdemeanors and between 1.2% and 3.9% for felonies.[347] In sum, the study found that less than 6% of the defendants whom judges would have predicted to be dangerous under the District of Columbia Act and the then-proposed Federal Bail Reform Act standards "ever committed any type of bail violation."[348]

The level of pretrial crime that the Sherwood-Fabre study suggested for a group of federal defendants is, of course, much lower than the numbers Congress relied upon in the same year in passing the Bail Reform Act of 1984. Moreover, Sherwood-Fabre did not evaluate whether the state was able to later convict the rearrested defendants of the crime for which authorities rearrested them. A post-Bail Reform Act study not only confirms the suspicion that Congress was playing with the numbers, but makes the point even more clearly and forcefully than the Sherwood-Fabre study.

A General Accounting Office study in 1987 compared pre-Bail Reform Act cases (of defendants released on bail in the first six months of 1984) with early Bail Reform Act cases (of defendants released on bail in the first six months of 1986). It analyzed a random sample of several thousand federal defendants released on bail in four federal judicial districts.[349] This study showed rearrest on a felony *or misdemeanor* at 1.8% under pre-Bail Reform Act law and 0.8% under the Bail Reform Act.[350] The study emphasized that "[n]o comprehensive, reliable statistics exist on the extent to which federal defendants released on bail . . . are arrested for committing additional crimes while on bail."[351]

The GAO felt the need to explain the discrepancy between these statistics and those the Senate Judiciary Committee cited in the legislative history of the Bail Reform Act of 1984 that suggested rates "of crime on bail as somewhere between 7 to 20 percent."[352] The GAO noted that the studies upon which Con-

347. *Id.* at 309-21.

348. *Id.* at 446. The study found that the various factors used in the District of Columbia statute and the then-proposed federal statute could accurately predict little if any of the pretrial crime. Thus, use of these predictions would lead to an enormous number of "false positives." *Id.*

349. The four districts were the Northern District of Indiana, the District of Arizona, the Southern District of Florida and the Eastern District of New York. GAO STUDY, *supra* note 335, at 12.

350. *Id.* at 36.

351. *Id.*

352. *Id.* (citing S. REP. NO. 317, 97th Cong., 2nd Sess. 34 (1982); S. REP. NO. 147, 98th Cong., 1st Sess. 30 (1983)).

gress relied upon "included defendants from local jurisdictions as well as federal defendants from the District of Columbia."[353]

State and local rearrest rates, including those in the District of Columbia, tend to be higher than federal rearrest rates. Congress relied upon one study in the District of Columbia which showed a pretrial rearrest rate on serious charges of seven percent.[354] A study in Philadelphia — from about the same time as the District of Columbia study — showed a pretrial rearrest rate on serious charges of about six percent of those released after arraignment.[355]

Analysis of the two studies Congress relied upon reveals additional information. The Roth & Wice study examined a group of defendants in the District of Columbia in 1974.[356] The study concluded that "[a]mong felony defendants on pretrial release during 1974, 13 percent were rearrested before disposition of their cases; among alleged misdemeanants, the estimated rate was 7 percent."[357] The study noted that felony defendants released on cash bond were "by far the least dependable" and that authorities rearrested twenty-five percent of them.[358] The long, detailed Roth & Wice study does not distinguish the crimes for which authorities rearrested the released defendants. Thus, the rearrest figures seem to be for any felony or misdemeanor.[359]

The study referred to in the Senate Report[360] as the "Lazar Institute" study evaluated bail statistics from a number of jurisdictions, including Washington, D.C.[361] The study showed aggregate rearrest rates of sixteen percent, although the figures

353. *Id.*

354. M. TOBORG, PRETRIAL RISK ASSESSMENT IN THE DISTRICT OF COLUMBIA: THE EFFECTS OF CHANGED PROCEDURES 4 (1984) (prepared for the District of Columbia Pretrial Services Agency).

355. Goldkamp, *Questioning the Practice of Pretrial Detention: Some Empirical Evidence from Philadelphia*, 74 J. CRIM. L. & CRIMINOLOGY 1556, 1567 (1983).

356. J. ROTH & P. WICE, *supra* note 336, at iv.

357. *Id.* at II-48 (footnotes omitted).

358. *Id.*

359. The study appears to count any arrest in the pretrial period. *Id.*

360. The results of the study are more readily available in a National Institute of Justice publication than in the source cited in the legislative history. *See* M. TOBORG, *supra* note 337, at 3.

361. The eight jurisdictions were Baltimore, Maryland; Baltimore County, Maryland; Washington, D.C.; Dade County, Florida; Louisville, Kentucky; Pima County, Arizona; Santa Cruz County, California; Santa Clara County, California. *Id.*

varied considerably by jurisdiction.[362] About half of all pretrial arrests in the study led to a conviction.[363] Although the study noted the importance of assessing the type of charges on rearrest and suggested that the rearrest charges tended to be less serious than the original charges, it did not provide detailed data regarding rearrest charges.[364] Congress mentions little of the relevant detail — such as the fact that these were not federal defendants — in the legislative history of the Bail Reform Act.

Rearrest rates for federal felony defendants probably are lower because, to paraphrase Lester Maddox, they are a better class of defendant.[365] Unlike state offenses, which run the gamut from trivial to the most severe and which include most common street crimes, federal crimes generally require more organization, money, and sophistication.[366]

Given the difference between federal and state rearrest rates, Congress understandably — though not justifiably — chose to refer only to studies of state and local jurisdictions in justifying its increase in *federal* pretrial preventive detention. The studies of federal felony defendants simply did not provide a dramatic basis for shifting the burden of detention from the government trying to detain and convict to the defendant.

The analysis of these studies reveals three common problems with efforts to describe the extent of pretrial crime: (1) the studies examine rearrests although the real issue is the extent of pretrial crime; (2) the studies examine aggregate data on rearrests rather than distinguishing subsequent crime by original charge; and (3) the studies fail to examine the type of alleged offenses for which authorities rearrest defendants.

The studies of pretrial "crime" in fact tend to study some-

362. *Id.* at 20-21. The rates varied from 7.5% in the city of Baltimore to 22.2% in Dade County, Florida. *Id.*

363. *Id.* The jurisdictions convicted 7.8% of released defendants of a crime committed during the pretrial period. *Id.* at 21.

364. *Id.* at 20-21, 70, 73-74.

365. Lester Maddox, the former governor of Georgia, suggested that to improve the prison system "we need a better class of prisoners." *A Better Class of Prisoner*, Wash. Post, Oct. 30, 1984, at A19, col. 1.

366. This distinction is probably less pronounced than it was ten years ago due to the increasing use of federal prosecutorial and prison resources for fairly minor drug possession and distribution crimes. Currently around 50% of federal cases are drug cases compared to 23% in 1980. *Compare* UNITED STATES SENTENCING COMMSSION, 1989 ANNUAL REPORT 39-40 (1990) *with* SOURCEBOOK, *supra* note 71, at 479.

thing different: rearrest.[367] The disadvantage of using arrest as a marker for crime is that the police officer's decision to arrest is far removed from any determination of guilt or innocence. In the Roth & Wice study, for example, the courts subsequently convicted only forty percent of those rearrested while on pretrial release of the crime for which police rearrested them.[368] On the other hand, one may argue that "real" crime rates are much higher than reflected by defendants whom police happen to rearrest.[369] The advantage of using the number of arrests is that it is a relatively clear, easily determined measure. Rather than either using some kind of multiplier of arrests to determine "real" crime or using convictions on the subsequent offense as a measure of whether the defendant committed a crime while on pretrial release, researchers and policymakers have settled on arrest as the best alternative — avoiding the interpretation either of the other approaches would require.

Most of the studies of rearrest before trial take as a base all persons charged with a felony in the jurisdiction under study.[370] Yet few systems allow detention for any felony,[371] and felonies often include a wide range of behavior posing varying degrees of threat to individuals. Whether looking at all defendants accused of a felony generates a higher or lower aggregate rearrest rate is unclear. What is clear is that the studies of pretrial "crime" have moved far from the concerns that stimulate the increased use of detention.

The most substantial problem with studies of pretrial rearrests before trial is that they include in the rearrest statistics crimes that do not reflect the policy reasons behind preventive detention.[372] Some of the studies look only at felony rearrests while others look at arrests for either a felony or misde-

367. Some studies acknowledge this distinction. *See, e.g.*, M. TOBORG, *supra* note 337, at 21 (distinguishing data on rearrest from data on convictions on those arrests).

368. J. ROTH & P. WICE, *supra* note 336, at vi, II-48 to II-51.

369. *See, e.g.*, Serrano, *The Thin Blue Line: Police Blame Explosion in Crime Population for Drop in Service*, L.A. Times, Feb. 12, 1989, part II, at 1, col. 1, (San Diego Co. ed.).

370. *See, e.g.*, Note, *Limiting*, *supra* note 45, at 337 n.94; Comment, *supra* note 39, at 201.

371. Comment, *A Loaded Weapon*, *supra* note 44, at 172.

372. *See, e.g.*, Jackson, *supra* note 267, at 305; Note, *Releasing Inmates from State and County Correctional Institutions: The Propriety of Federal Court Release Orders*, 64 TEXAS L. REV. 1165, 1181-82 (1986) (rearrest rates are not an exact means of measuring danger to society but may be the best data available).

meanor[373] — indeed this difference may explain some of the variation in the studies — but most studies do not limit the relevant category to rearrests on serious or violent felonies.

The 1981 Lazar Institute study Congress relied upon did distinguish, to some extent, the types of charges for which police rearrested defendants.[374] The study concluded that rearrest charges tend to be less serious.[375]

The GAO study of federal bail practice in selected federal districts under the Bail Reform Act of 1984 made this point more clearly. As noted previously, the study showed a pretrial rearrest rate of 1.8% before the new law and 0.8% after.[376] Among this small group of federal felony defendants rearrested in the sample districts, most of the subsequent charges involved lesser crimes than the original felony charges. A majority of the rearrests (fifty-six percent) were for misdemeanors; the most frequent charge was illegal operation of a motor vehicle (such as driving with a suspended license or driving while intoxicated).[377]

Studies *must* take account of the seriousness of the offense for which police rearrest a pretrial defendant in order to determine whether defendants pose a level of threat that justifies detention. An overview of detention studies, including studies of state and local detention, concluded that "serious pretrial crime is relatively infrequent."[378] The result, especially in the federal system, suggests an extremely low level of serious pretrial crime.

Thus, the studies of pretrial crime, as a group, fail to justify the policies underlying the call for pretrial detention. The time has come to ask whether any study can identify a sufficiently high rate of violent or threatening crime before trial for any group — based either on the charged offense or, more likely, on

373. *See, e.g.*, J. ROTH & P. WICE, *supra* note 336, at II-48; GAO STUDY, *supra* note 335, at 13.

374. M. TOBORG, *supra* note 337, at 21.

375. *Id.* at 22. Despite a reference to data in the appendix, the study did not clearly analyze the charges on which authorities rearrested the defendants before trial. Instead, the appendix presented the data by original charge (to show the total number rearrested) and by the number convicted of the crime for which authorities rearrested them. *See id.* at 69-74 (Appendix A).

376. GAO STUDY, *supra* note 335, at 39-40. Government researchers could not even credit the new law with the insignificant, actual drop (one percent) in rearrests. They did postulate however that the new law could have been a contributing factor. *Id.*

377. *Id.* at 40.

378. Jackson, *supra* note 267, at 332.

a combination of the charged offense, past record, and other characteristics. Until a study determines the level of serious threat from pretrial crime, policymakers cannot have a balanced discussion of whether a detention policy should exist for any category of individuals or of the extent to which judicial discretion should play a role in identifying those individuals.

Because the studies reveal that the base rates of rearrest on serious charges are very low in the federal system, the justification for a high rate of detention is missing. These studies suggest that detention, at least in the federal system, misses its mark most of the time. An unacceptably high rate of false positives disserves both detainees and society. If the probability that detention is preventing crime is extremely low, the detention is plainly nothing more than punishment for past behavior.

The pretrial studies, particularly the recent GAO study of the federal courts, suggest that policymakers have vastly overstated the threat from pretrial detainees.[379] They suggest also that the policy response is one-dimensional, unimaginative, and unnecessarily restrictive of individual liberty. If someone can determine factors indicating higher levels of dangerousness or criminality, proper conditions of release and other lesser intrusions on liberty may meet much of the concern. Such an approach is more consonant with the established system of justice and with respect for the liberty interests of citizens.[380]

B. THE BURDEN OF DETENTION

The second key element for distinguishing detention systems concerns the procedures that guide the detention decision. Inadequate procedures for determining whether the state has proved the factual basis of grounds for detention can overwhelm even carefully prescribed grounds for detention. On the one hand, a system can enable a magistrate to make an ex parte detention judgment that is not explained or subject to review. On the other, a system can require a full hearing or trial on whether the state has satisfied the grounds for detention. As noted at the beginning of Part II of this Article, however, the "burden of detention" encompasses notions of procedure far be-

379. One could argue that the state studies demonstrate a greater threat from state defendants, and therefore, detention is justified in the states. The studies of state pretrial crime, however, fail to bolster the case for detention. Those studies still do not examine how soon defendants are rearrested, the charges for which they are rearrested, and whether the arrest data are acceptable measures of pretrial crime.

380. *See supra* notes 171-85 and accompanying text.

yond the evidentiary standards required to justify or attack the detention decision.

Procedures related to the broad notion of "burden of detention" can attach at various stages of the detention process. Procedures related to detention include those governing police investigation as well as the procedures for initial and subsequent detention hearings. Although procedures alone cannot make an inappropriate determination appropriate, procedures protect important substantive rights.[381] In the context of pretrial detention, procedures provide the tools to insure a sound judgment.[382]

This Section has three short parts. Part 1 discusses the specific procedural requirements of an initial detention hearing, including the narrower issue of burdens of persuasion and proof. It emphasizes the importance of the procedural differences between the District of Columbia Act and the Federal Bail Reform Act of 1984. Part 2 considers some evidence of the inability of current federal detention procedures to generate consistent or principled decisions. Part 3 returns to the broader notion of "burden of detention" and explores ways to generate better detention decisions other than by manipulating the burden of proof at initial detention hearings.

1. The Procedures Governing Detention Hearings

Both the District of Columbia Act and the Federal Bail Reform Act provide that an arrested defendant has a right to counsel.[383] Indeed, a scheme denying assistance of counsel at the detention stage should not survive sixth amendment chal-

381. The protection of substantive rights in the real world turns on the fulcrum of procedure. The early history of bail reform in England is essentially a history of procedure, from the Statute of Westminster in 1275, listing bailable offenses, to the 1688 Bill of Rights, prohibiting excessive bail. *See* D. FREED & P. WALD, *supra* note 36, at 1.

382. In Hunt v. Roth, 648 F.2d 1148, 1164 (8th Cir.), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478, 480 (1982) (per curiam), the Eighth Circuit struck down a detention scheme because it failed to provide procedures guaranteeing a reasonable determination of an individual's dangerous propensities. The development of proper procedures could limit the ill effects of the current federal law's unbounded judicial discretion.

383. The D.C. Act provides that for pretrial detention hearings, "the person shall be entitled to representation by counsel and shall be entitled to present information by proffer or otherwise to testify, and to present witnesses in his own behalf." D.C. CODE ANN. § 23-1322(c)(4) (1989). The Federal Bail Reform Act provides that at pretrial detention hearings the defendant "has the right to be represented by counsel, and if financially unable to obtain adequate representation, to have counsel appointed." 18 U.S.C. § 3142(f) (1988).

lenge.[384] This illustrates the importance of the procedures related to detention determinations. Unless adequate standards govern the detention decision itself, however, counsel's role may be reduced to accompanying his or her client to jail.

This Article has previously noted the critical differences between the detention procedure of the District of Columbia Act and those of the Federal Bail Reform Act.[385] For example, the District of Columbia Act requires that the government prove that the accused is a threat to the community by clear and convincing evidence.[386] Because of this burden of proof and the other more specific requirements of the District of Columbia Act, prosecutors did not extensively use the Act's provisions during the first fifteen years of its existence.[387] Although no case challenging the District of Columbia Act ever reached the Supreme Court, the District of Columbia Court of Appeals relied heavily on these specific procedural protections, including limitations on the period of detention, in upholding the constitutionality of the Act.[388]

The addition of similar procedures — requiring the government to show a "substantial probability" that the defendant committed the crime that it charges, limiting the list of charges for which the government can seek detention, placing a limit

384. Although the Court held in Gerstein v. Pugh, 420 U.S. 103, 122 (1975), that a defendant is not constitutionally entitled to counsel for a probable cause hearing, the detention resulting from such a hearing is short-term and regulatory in nature. The Court has not yet decided whether a defendant has a right to counsel at a hearing regarding preventive detention or bail. The sixth amendment case law suggests, however, that such a hearing involves the "adversarial process," and therefore, a defendant is entitled to counsel. *See* Kirby v. Illinois, 406 U.S. 682, 688 (1972) (plurality); *cf.* United States v. Marion, 404 U.S. 307, 320 (1971) (sixth amendment right to a speedy trial begins when accused is arrested); United States v. Wade, 388 U.S. 218, 235 (1967) (counsel's absence during line up in which defendant was identified violated sixth amendment). Detention of an individual with a presumptive right to liberty is, of course, distinguishable from even long-term administrative detention of an incarcerated prisoner. *See, e.g.,* United States v. Gouveia, 467 U.S. 180, 192 (1984).

385. *See supra* text accompanying notes 82-90.

386. *See supra* note 81.

387. *See* N. BASES & W. MCDONALD, PREVENTIVE DETENTION IN THE DISTRICT OF COLUMBIA: THE FIRST TEN MONTHS, 69-73 (1972) (preventive detention law invoked against only 20 of 6,000 felony defendants due in part to prosecutorial reluctance to become involved in lengthy and evidence-divulging preventive detention hearing and the requirement of an expedited trial). The preventive detention was requested only once by prosecutors in 1974. J. ROTH & P. WICE, *supra* note 336, at I-33. In 1977, prosecutors requested preventive detention in only 40 cases out of a possible 1,500. *Id.*

388. United States v. Edwards, 430 A.2d 1321, 1333-37 (D.C. 1981).

(other than the Speedy Trial Act) on the period of detention, and requiring a higher standard of proof on the critical issue of threat to the community — would ameliorate defects in the Federal Bail Reform Act of 1984 in two respects. First, such procedures should reduce the number of unnecessary detentions, in the same way that these procedures limited detentions in the District of Columbia.[389] Second, careful procedures highlight the difficulty of proving threat to the community and the lack of an alternative to detention, thereby protecting the principles of liberty. In comparison, the Federal Bail Reform Act's findings of probable cause[390] and dangerousness seem inadequate to protect individual liberty.[391]

The federal government should employ other procedures to help generate balanced detention decisions. Faithful adherence to procedural due process would require that federal prosecutors present evidence similar to that presented at trial and that the statute or the courts specify the kinds of evidence required to find dangerousness. Prosecutors should produce the witnesses it offers to support a finding of dangerousness, and the court should give the defendant the opportunity to cross-examine them. The evidence necessary to justify detention should include specific acts of violence, and the court should find specifically that all other conditions of release will fail to serve the purposes of detention.

To further the goals of the speedy trial clause, the government should enforce strict limitations on the period of detention, thus placing a burden on the prosecution to proceed quickly to trial. Furthermore, due process calls for elimination of the provision in the Federal Bail Reform Act that allows prosecutors to present evidence of other crimes by hearsay, not subject to cross-examination.[392] Congress should also eliminate the provision that allows the government to offer information through an Assistant United States Attorney by a proffer of evidence[393] without opportunity for confrontation.

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389. Zimring & Hawkins, *Dangerousness and Criminal Justice*, 85 MICH. L. REV. 481, 506 (1986); P. WICE, *supra* note 202, at 2-5.

390. Gerstein v. Pugh, 420 U.S. 103, 117-19 (1971).

391. *See* Alschuler, *supra* note 31, at 558-65 (discussing Act's failure to adequately address substantive due process problems).

392. 18 U.S.C. § 3142(f)(2) (1988).

393. 18 U.S.C. § 3142(f)(2)(a) & (b) (1988). Despite this provision, courts have held that discretion lies with the district court to accept evidence by live testimony or proffer. *See, e.g.,* United States v. Delker, 757 F.2d 1390, 1396 (3d Cir. 1985).

2. Inconsistent Decisionmaking Under the Federal Bail Reform Act of 1984

One would expect vague detention standards to generate inconsistent detention decisions. The initial evidence about actual detention practice in various federal districts under the Bail Reform Act indicates substantial inconsistency in detention decisions.[394]

One government study showed an increase in the total percentage of defendants detained from twenty-six percent under the prior law to thirty-one percent of all federal defendants arrested since the Federal Bail Reform Act of 1984 became effective.[395] Thus, the detention of federal defendants increased almost twenty percent. Of those detained, authorities held about half for failure to pay money bail and the other half under the new detention provisions.[396] The study compared districts in Indiana, Arizona, Florida, and New York.[397] The total percentage of defendants detained increased in three districts, but decreased in one.[398]

In addition, the percentage of defendants detained for failure to pay money bail — one-hundred percent of those detained under prior law — decreased by widely varying amounts in the four districts.[399] Under the Bail Reform Act, the government did not detain any defendants for failure to pay money bail in the Northern District of Indiana, but the percentage of those detained for failure to pay money bail dropped by only sixteen percent — from one-hundred percent to eighty-four percent of all defendants detained — in the Southern District of Florida.[400]

The Bail Reform Act prohibits the government from using a financial condition to justify pretrial detention.[401] The detention of defendants on the forbidden basis of inability to pay their money bail is, however, still evident in some of the test districts. In two of these districts — the Northern District of

394. GAO STUDY, *supra* note 335, at 18-23.
395. *Id.* at 18.
396. *Id.* at 27, figure 2.2.
397. The districts were the Northern District of Indiana, the District of Arizona, the Southern District of Florida, and the Eastern District of New York. *Id.* at 2.
398. *Id.* at 18, 20, table 2.6.
399. *Id.* at 23.
400. *Id.*
401. 18 U.S.C. § 3142(c)(2) (1988). *See* United States v. Holloway, 781 F.2d 124, 126 (8th Cir. 1986).

Indiana and the Eastern District of New York — instances of detention for failure to pay bail decreased sharply,[402] but in the other two districts — the District of Arizona and the Southern District of Florida — a *higher percentage* of defendants for whom money bail was set were unable to meet it.[403] These figures suggest that some judges may still be using money bail to seek sub-rosa detention in some instances.

The most important lesson from these figures, however, is the extreme inconsistency in bail practice among the four districts studied. This inconsistency suggests the failure of the 1984 Act to guide detention practice in a principled manner. Given the prohibition on the use of money bail to detain, the 1984 Act certainly reads as providing greater equality in the detention decision, and some districts have obviously achieved that goal. Similarly, the Act's presumption for conditions of release over detention reads as restricting prior detention practice, despite the expansion of the possible grounds for detention. Congress's failure — in rejecting many of the key procedures in the District of Columbia Act model — to provide adequate procedures for detention, however, has apparently allowed federal judges and magistrates to be governed less by law and more by their discretion and the recommendations of prosecutors.[404]

3. Shifting the Burden of Detention

Methods *other* than changing the procedures at the detention hearing may exist to produce principled detention practice. This Article refers to such procedural changes as shifting the burden of detention to distinguish them from the burdens of proof and persuasion that attach to particular facts at the detention hearing.[405]

Scholars have evaluated judicial release and bail decisions and considered ways to increase the level of release through judicial rules or training.[406] Less well considered is how to en-

402. Defendants detained for failure to pay decreased from 32% of those offered money bail to 0% in the Northern District of Indiana and from 70% to 3% in the Eastern District of New York. GAO STUDY, *supra* note 335, at 25, 26, table 2.6.

403. Defendants detained for failure to pay money bail increased from 27% of those offered money bail to 33% in the District of Arizona and from 44% to 48% in the Southern District of Florida. *Id.* at 26, table 2.3.

404. Ebbesen & Konecni, *supra* note 109, at 819-20.

405. *See supra* Part II.

406. *See* Nagel, *Discretion in the Criminal Justice System: Analyzing,*

courage prosecutorial behavior not to seek unnecessary detention. Under the current federal system and many state systems, obtaining detention has relatively few costs for the government.[407] Thus, the government has little incentive to move quickly toward trial once it obtains a detention order. In fact, the incentives may run in the opposite direction because the time spent in detention may encourage defendants to plead guilty.[408]

One cost levied against the government involves the kind of evidence and level of proof required to justify detention. Those systems that require the proof of particular, specified dangerous acts or offenses at a higher level than mere probable cause increase the government's burden. Accordingly, the use of detention is limited to the more serious cases. Another cost to the government is the requirement that prosecutors promptly provide information about the case to the defendant, disclosing prosecution strategy and shortening the time to trial. These costs, however, fall on the government as an abstract entity, and do not place a particular "burden of detention" on the individual prosecutor requesting detention.

Commentators have not explored other ways of making the government responsible for unnecessary detention. As an example, the government might pay a fixed amount per day to detained defendants whom the court subsequently acquits or against whom the state dismisses all charges.[409] Writers have proposed that the government compensate those convicted and sentenced who serve time and are subsequently absolved of

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Channeling, Reducing, and Controlling It, 31 EMORY L.J. 603, 611-12 & n.11 (1982).

407. Freed and Wald specified four "rights" of every detained defendant: (1) prompt and adequate bail review; (2) detention facilities separate from the general prison population; (3) a speedy trial; and if convicted, (4) credit for time served before sentence. D. FREED & P. WALD, *supra* note 36, at 86-90. While the last condition is now mandated by federal law, *see supra* note 205, the other conditions remain essentially unfulfilled.

408. Studies suggest that time in detention has a tendency to promote guilty pleas. *See* Thaler, *supra* note 33, at 555-59.

409. The remedy of false imprisonment does not apply to cases in which the judge imposes detention for a charge, but the court thereafter acquits the defendant or the state dismisses the charge. Even if such a remedy existed, false imprisonment generally requires proof of extraordinary violations and motives. *See* Strong v. City of Milwaukee, 38 Wis. 2d 564, 568, 157 N.W.2d 619, 621-22 (1968); Annotation, *Delay in Taking Before Magistrate or Denial of Opportunity to Give Bail as Supporting Action for False Imprisonment*, 98 A.L.R. 2D 966, 970-71 (1960).

guilt through some extraordinary circumstance.[410] If this principle makes sense for innocent individuals improperly punished after trial, it should be extended to the much greater number of people whom the state charges, detains, but later finds not guilty. Laying aside the practical implications, the concept is clear enough: Detention will cost the government money if it is not justified subsequently by a conviction on a charge that originally justifed the detention.

Another way to increase the burden of detention would be to pay detainees an amount sufficient to hire a private attorney. The theory supporting such a provision would be that the guarantee of private counsel would balance the burden that detention places on trial and representation rights.[411] Political support for this idea would undoubtedly be hard to obtain, but the point of this discussion is not political feasibility. Rather, the point is the idea of making the government feel the burden of detention in proportion to the burden felt by the detained defendant in each case.

A detained defendant has a continuing interest in liberty. This interest increases over time because extended detention interferes with a fair trial and with the defendant's ability to deal with family and employment. One obvious limitation on detention would be a sharp time limit. The defendant could be guaranteed a right to trial within very short time periods — perhaps fourteen to thirty days — even for serious offenses. If the state desires longer periods of detention, Congress might create a detention system that recognizes the ongoing liberty interest and increasing burden of detention through mandating frequent rehearings with new burdens of detention on the government. For example, a detained defendant might, as a matter of right, receive a hearing on his or her detention status before a magistrate every two weeks. At each hearing the presumption could be for release unless the government could continue to prove the adequacy of the grounds for detention. The federal scheme might require the government to move from a standard requiring a preponderance of the evidence, to one demanding clear and convincing evidence of the defendant's continuing threat to the community. The government might also have to show reasonable progress towards trial at each hearing or identify delay attributable solely to the defendant. Finally, at the initial hearing and at subsequent hearings, the court

410. *See, e.g., Day of Reckoning*, N.Y. Times, Jan. 19, 1986, at D9, col. 3.
411. *See infra* notes 451-54 and accompanying text.

might adopt a provision like that in the Federal Bail Reform Act of 1984,[412] and require the government to show that no conditions of release or less punitive detention would satisfy the purposes of detention.[413]

These suggestions may not be practical. They may cause too many other problems at other points in the system. They may be too expensive or politically unfeasible. They suggest, however, ways in which the grave burden that detention imposes on the individual could be reflected in the burden the government bears for each detention decision. Rules such as these would place a burden on the government to match the burden placed on the individual and, therefore, might lead to a more careful and balanced set of detention decisions under any stated purpose of detention.

C. INDEPENDENT VALUES

A third element distinguishing detention systems is the role of independent values — such as a presumption of innocence[414] and rights to trial, speedy trial, and representation — that necessarily limit the impact of detention. A detention system without these principles is very different from a system in which some or all are present. When they are both present and strong — propositions that are arguably true in this country — detention must remain what Chief Justice Rehnquist called it in *Salerno*: an exception.[415]

1. Presumption of Innocence

The time may have already passed when the presumption

412. Federal law provides that defendants shall be released on personal recognizance or on an unsecured bond. 18 U.S.C. § 1342(a)(1) & (b) (1988). If the two preceding alternatives are believed to be inadequate, the defendant can be released subject to release conditions, 18 U.S.C. § 1342(c) (1988), unless "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 1342(e) (1988).

413. *See* Note, *Limiting*, *supra* note 45, at 335-37.

414. The presumption of innocence is intimately related to the rights to a speedy trial and to counsel. Cobb v. Aytch, 643 F.2d 946, 958 n.7 (3d Cir. 1980) (en banc) (the right to counsel and speedy trial clauses, when read together with the bail clause of the eighth amendment creates a federally protected interest in reducing pretrial incarceration and minimizing interference with a pretrial detainee's liberty). Together, these rights protect the fact-finding process and, thereby, the legitimacy of the entire criminal process.

415. *See supra* note 1.

of innocence has become the presumption of guilt.[416] Many people assume that virtually all accused defendants are guilty and believe, therefore, that punishment should begin immediately upon arrest and indictment.[417] Police and prosecutors, as well as the public, often voice the suspicion that if the police arrest someone, he or she must be guilty — if not of the crime charged, then of some other offense.[418] Former Attorney General Edwin Meese, a career prosecutor, has expressed publicly the view that suspects are usually guilty or else police would not arrest them.[419] Under this view, the conviction validates the prior punishment, and if the court subsequently finds the individual not guilty, he or she must have escaped conviction on a technicality. If the state detains the accused before trial and later dismisses the charges, some people shrug and say that the state legitimately punished the accused for past crimes committed by the accused but for which the police had not arrested him or her or been unable to convict.

The United States Supreme Court has recognized that the presumption of innocence is "constitutionally rooted,"[420] that it is "axiomatic and elementary, and that its enforcement lies at the foundation of the administration of our criminal law."[421] Courts generally view the presumption as growing from the possibility of mistaken arrest or prosecution.[422] The presump-

416. *See* Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 137 (1989); Thaler, *supra* note 33, at 442; H. PACKER, *supra* note 193, at 160-62.

417. Ordover, *supra* note 416, at 148; Project, *The District of Columbia Court of Appeals: A Survey of Recent Case Law, Prosecutorial Misconduct: Grounds for Reversal?*, 32 HOW. L.J. 163, 170 (1989).

418. Project, *supra* note 417, at 408 n.86.

419. *See* Ripston, *So Much for the Hallowed Presumption of Innocence*, L.A. Daily Journal, Dec. 11, 1985, at 4, col. 4. In a recent interview, reporters asked Meese whether criminal suspects, who are presumed innocent, should be informed of their rights. *Id.* His reply: "Suspects who are innocent of crime should. But the thing is, you don't have many suspects who are innocent of a crime. That's contradictory. If a person is innocent of a crime, he is not a suspect." *Id.* When Attorney General Meese faced an accusation of violating ethical and legal rules, his lawyer took a vigorous, contrary position, blasting the press and public for following "[t]he current fashion" by "assum[ing] that anyone indicted is guilty." Lewis, *Meese Deserves Justice, not Abuse*, N.Y. Times, Feb. 15, 1988, at 21, col. 2. Meese's lawyer wrote: "There was a time, not too long ago, when you could be considered a criminal only after you had been charged in an indictment, a jury returned a verdict and a court of appeals upheld the fairness of the proceeding." *Id.*

420. Cool v. United States, 409 U.S. 100, 104 (1972) (per curiam).

421. Coffin v. United States, 156 U.S. 432, 453 (1895).

422. *See* Campell v. McGruder, 580 F.2d 521, 529 n.14 (D.C. Cir. 1978). To focus only on the innocent is to misunderstand the purpose of the presumption

tion is a requirement that the state presume a criminal defendant to be innocent until it proves guilt beyond a reasonable doubt; the state cannot punish a defendant until it meets this standard of proof.

This principle "has a status in our criminal law of primordial origin."[423] Its history can be traced from Deuteronomy through Roman law, English common law, and the common law of the United States.[424] The presumption is meaningless, however, unless it imposes real limits on a government seeking to treat suspects like convicted criminals.[425] In other words, it must do more than just provide certain protections on the path to final judgment at trial, or else the state can simply treat the innocent as guilty and avoid the trouble of trial altogether.[426]

The presumption of innocence appears most often in cases involving evidentiary rules at trial, jury instructions on the burden of proof, or substantive limits on the treatment of defendants at trial such as forbidding the defendant's appearance in court in a prison uniform or shackled.[427] The common ele-

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of innocence. The state should have the same burdens when prosecuting a "clearly" guilty defendant as when prosecuting a close case. A steady and terrifying stream of stories about innocent individuals convicted of serious crimes (and in some cases sentenced to death) illustrates the complexity involved in recreating and judging uncertain events. The criminal system can eliminate false convictions only if it presumes *all* defendants are innocent.

423. State v. Ingenito, 87 N.J. 204, 213, 432 A.2d 912, 917 (1981) (jury instructions on meaning of presumption required).

424. *Coffin*, 156 U.S. at 453. The presumption of innocence is so "fundamental" that its reach can be overstated and used for some rather florid, unanchored legal prose. *See, e.g.*, State v. Holmes, 338 N.W.2d 104, 107 (S.D. 1983) (Henderson, J., dissenting) (presumptions of guilt were and are found in fascist and tyrannical cultures led by Adolf Hitler, Joseph Stalin, Ho Chi Minh, and Ayatollah Khomeini). This observation is not meant to offend but rather, to note the tendency of such general and fundamental principles, especially those with hazy but ancient historical anchors, to become the focus of rather broad and, in the end, unconvincing arguments.

425. Justice Jackson observed in Stack v. Boyle, 342 U.S. 1, 4 (1951), that "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."

426. If society views the presumption of innocence as only an ideal that it maintains despite the "reality" of guilty defendants, the presumption reverses from one designed to protect individuals to one that justifies processes which decrease the possibility of innocence and inevitably leads to a finding of guilt. Such a societal view leads to acceptance of wholesale plea bargaining or inadequate representation.

427. *See, e.g.*, State v. Tolley, 290 N.C. 349, 365-66, 226 S.E.2d 353, 366-67 (1976) (citing an extensive list of cases that hold that defendant is entitled to appear at trial free of bonds and shackles); *see also* Bell v. Wolfish, 441 U.S. 520, 531-41 (1976) (detailing the various issues that arise during pretrial detention).

ments in these cases include the idea that the state should not treat or label the accused as guilty and, beyond that, the idea that the jury or judge should understand that the state carries a heavy burden of proof in all cases.

One court's view that seems to capture much of the substantive bite of the presumption is that "courts must be alert to factors that may undermine the fairness of the fact-finding process."[428] Applying this idea aids in identifying the threat pretrial detention poses to the presumption of innocence.

Detention undermines the fairness of the criminal process in numerous ways. The state's assumption of guilt inherent in detaining before trial becomes a self-fulfilling prophecy. Those detained are more likely to plead guilty, to be convicted if tried, and to receive a prison sentence.[429] Conversely, those released are less likely to plead guilty.[430] In New York's lower criminal courts, defendants detained before trial or plea will likely meet their defense counsel only briefly before their first hearing in court, and at later stages in the process, they often must deal with different legal aid or appointed attorneys.[431]

To the extent that detention carries heavy "indicia of guilt" or otherwise interferes with the possibility of conducting a full defense, it may be analogous to the principles underlying the case law prohibiting indicia of guilt at trial. The Constitution forbids the state from clothing, handling, or portraying a defendant as if he or she is guilty.[432] These concerns must extend beyond the physical bounds of the courtroom if the presumption of innocence is not to be reduced to formalism.

Fidelity to the presumption of innocence should result in as little curtailment of liberty before trial as possible. This curtailment appropriately includes limited detention at a precinct for processing. It extends through a prompt appearance before a magistrate. Detention may be extended through trial to pro-

428. Estelle v. Williams, 425 U.S. 501, 503 (1976).

429. Evidence of these effects originated in the early 1960s. *See* McGinnis v. Royster, 410 U.S. 263, 281-83 (1973) (Douglas, J., dissenting); VERA INSTITUTE OF JUSTICE, PROGRAMS IN CRIMINAL JUSTICE REFORM; TEN-YEAR REPORT 1961-1971 31 (1972); Ares, Rankin & Sturz, *supra* note 289, at 84-86; Rankin, *supra* note 289, at 643. More recent evidence confirms that pretrial detention continues to carry a burden far beyond the period of detention itself. *See, e.g,* J. ROTH & P. WICE, *supra* note 336, at IV-23 to IV-26; L. SHERWOOD-FABRE, *supra* note 64, at 5-7.

430. Nagel, *Policy Evaluation and Criminal Justice*, 50 BROOKLYN L. REV. 53, 67 (1983).

431. McConville & Mirsky, *supra* note 70, at 751-60.

432. *See supra* note 153.

tect the integrity of the trial process, including the assurance of the suspect's appearance at trial. The standards required of government — standards of probable cause for arrest,[433] probable cause for detention pending trial,[434] and the numerous standards imposed on the trial process, including the fundamental provision of counsel to those charged with serious crime who cannot afford counsel[435] — protect individuals from each of these substantial incursions on liberty.

Society is always tempted to cut back on the protection that these principles afford — especially the protections emanating from principles that lack an express basis in the Constitution. The protections that the presumption of innocence affords are particularly tenuous. The accused often have criminal records, the evidence of guilt may seem strong in a particular case, and the accused frequently have different backgrounds and lifestyles than those arresting, prosecuting, and judging them. Additionally, the state often finds that the suspect is in fact guilty of some offense.

2. Right to Trial

In the context of limiting federal collateral review proceedings, the Supreme Court emphasized the central importance of the trial in the determination of guilt.[436] Yet the willingness to resort to pretrial detention on the grounds of expected future crimes indicates a general lessening of the belief in the trial as the key process for determining guilt. Because prosecutors and defendants at both state and federal levels dispose of the vast majority of crimes by plea, very few trials occur, and the role of the trial as a symbol has correspondingly diminished.[437]

Recognizing this fact, lawmakers have extended some of the procedural protections provided at trial to the pretrial process. Judicial decisions and legislative acts recognize the critical

433. *See, e.g.*, Hayes v. Florida, 470 U.S. 811, 816 (1985); Illinois v. Gates, 462 U.S. 213, 217 (1983); Dunaway v. New York, 442 U.S. 200, 212 (1979).

434. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103 (1975); Coleman v. Alabama, 399 U.S. 749 (1962); *see also* 18 U.S.C. § 3060 (1988); FED. R. CRIM. P. 5(c).

435. *See, e.g.*, Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

436. Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

437. The percentage of cases resolved by pleas is around 90% in the federal system, UNITED STATES SENTENCING COMMISSION 1989 ANNUAL REPORT 35 (1990), and even higher in some state systems. SOURCEBOOK, *supra* note 71, at 510 (89% of *felony* offenses settled by pleas nationwide in 1986). In New York City, well over 90% of cases are resolved by pleas. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1206 n.84 (1975).

and often determinative value of events that occur at arrest, in the police station, and in lockup.[438] The increase in detention and the corresponding derogation of the value of liberty before trial run directly counter to the broader understanding that justice does indeed turn on the treatment and respect shown the individual before a trial begins. Importantly, pretrial detention conflicts not only with the criminal trial process, but also with a proceduralized quick disposition process. The ability to meet with lawyers and collect evidence is even more important in the short and pressured time span of a plea-centered system.

The trends toward the disparagement of the criminal trial and toward providing trial-like protections to non-trial settings are partially consistent. Disparagement of the criminal trial may reflect a belief that the trial itself is not so important; the overwhelming use of plea bargaining in many systems encourages this view. Accordingly, extending trial-like paradigms to pretrial procedures is an effort to retain important trial concepts.

The disparagement of the criminal trial and the increase in pretrial procedures can work, however, to transfer real protections into paper shields. Lack of time, intense pressures, and uncertainty inherently limit the pretrial process. An increase in procedural protections may not relieve these limitations. Instant justice is an oxymoron; justice involves some degree of research, examination, presentation, thought, and principled, public resolution. A pretrial trial fits none of these requirements.

3. Speedy Trial

Some people view the provision of a speedy trial as the turning point of the detention debate.[439] The inability to provide the quick, fair trial mandated by the Bill of Rights is undoubtedly one of the greatest failures of America's modern criminal justice system. Some argue that the concern with pretrial detention is in reality a concern with the inability to provide a speedy trial and conclude that if the state in fact provided a speedy trial, the concern with detention would

438. Thaler, *supra* note 33, at 479-80 (*e.g.*, extension of right to counsel earlier in process, including lineups).

439. People who see the delay in trials as the core detention problem argue that if trials were in fact provided quickly, detention would be less of a concern, and conversely, slowing, failing court systems have unduly exacerbated the detention problem. Godbold, *Speedy Trial — Major Surgery for a National Ill*, 24 ALA. L. REV. 265, 288-89 (1972).

largely disappear.[440] Closer examination reveals quite the opposite: a bitter tension between speedy trial and detention works to deprive defendants of more rights than they would lose in the absence of speedy trials or the presence of detention alone.

Detention pending a quick trial could lead to enormous pressures to forgo rights and create real, substantial impediments to conducting a minimally adequate defense. Speedy trials could generate even less well-founded pleas because detention impairs the ability to prepare for trial.[441] Detainees, therefore, may need more time to prepare for trial than individuals who are on release. Although properly enforced speedy trial requirements should penalize the government whenever it is not proceeding diligently toward trial, the detainee must be able to waive his or her right to a speedy trial upon a showing of need for more preparation.

The foregoing discussion does not denigrate the importance of speedy trials. The constitutional guarantee of a speedy trial should impose some limit on pretrial detention.[442] Jurisdictions should adopt time limitations stricter for those detained than for defendants at liberty.[443] In the federal system, the limits of the Speedy Trial Act[444] do little to diminish the impact of pre-

440. We do not suggest that we are opponents of speedy trial rights. In fact, we think debate over detention can invigorate speedy trial jurisprudence. Those concerned that the new jurisprudence of pretrial detention further erodes the fundamental principles of criminal law that protect citizens' basic freedoms might focus not only on detention reform, but also on providing truly speedy trials to all defendants. Isolation of elements of the criminal justice system, such as detention, ignores the other important elements. Reform must take account of all elements of complex criminal justice systems.

We also reject cynicism about the ability to provide speedier trials. Powerful evidence suggests that trials of even serious offenses could in fact occur at a radically faster pace then they do at present. Vera Institute of Justice studies show that felony trials in New York could go to trial in weeks if police properly applied their resources. VERA INSTITUTE OF JUSTICE, *supra* note 429, at 137-41.

441. *See, e.g.*, Perry v. Mitchell, 253 Ga. 593, 322 S.E.2d 273 (1984) (delay hurts detained defendants).

442. *See* Strunk v. United States, 412 U.S. 434, 436-37 (1973); Barker v. Wingo, 407 U.S. 514, 522 (1972); Beavers v. Haubert, 198 U.S. 77, 87 (1905) (the right to a speedy trial "depends upon circumstances").

443. *See* AMERICAN BAR ASSOCIATION STANDARDS RELATING TO PRETRIAL RELEASE § 5.10 (1986). About half of the states with detention provisions for "dangerous" defendants provide additional speedy trial guarantees as part of the detention law, while the other half apply only the general speedy trial provisions. B. GOTTLIEB, *supra* note 65, at 15.

444. 18 U.S.C. §§ 3161-3174 (1988).

trial detention.[445] A number of states also have speedy trial provisions, but many state defendants still spend substantial amounts of time in jail before trial, even for relatively minor offenses.[446]

The movement toward increased detention has opened up new possibilities for constitutional claims under the speedy trial clause. The length of detention raises due process concerns separate from the grounds for detention.[447] The Court's new reliance in *Salerno*[448] on the Speedy Trial Act's "stringent time limitations" on the length of pretrial detention[449] may lead to a new and proper jurisprudence of speedy trials. In the past, speedy trial challenges had to demonstrate government violation of the constitutional boundaries of the right to trial, but now they need only address the right not to be detained before trial. Thus, pretrial detainees have a new and powerful reason to argue that the language of the fifth amendment guarantees them a truly speedy trial — even more stringent than the limits of the Speedy Trial Act.[450]

4. Right to Representation

The higher conviction rates for those detained reflect in part a detained defendant's reduced ability to assist counsel in trial preparation.[451] Having the assistance of counsel must mean more than the mere presence of an attorney in a hearing or at trial. A defendant can do many things in preparing a defense that an attorney — especially an overwhelmed public defender — simply will not be able to do. Examples include searching for witnesses and collecting evidence.

In upholding federal laws governing seizure of assets, the Supreme Court recently rejected the notion that the sixth amendment includes the right of defendants to choose which

445. *See* Alschuler, *supra* note 31, at 516.

446. SOURCEBOOK, *supra* note 71, at 525.

447. Chief Judge Feinberg concurring in *Melendez-Carrion* argued that detention for eight months based on a finding of dangerousness violated due process. United States v. Melendez-Carrion, 790 F.2d 984, 1009 (2d Cir. 1986).

448. *See supra* notes 106-26 and accompanying text.

449. 18 U.S.C. § 3161 (1988).

450. *But see* United States v. Montalyo-Murillo, 110 S. Ct. 2072 (1990) (failure to follow the time requirements of 18 U.S.C. § 3142(f) to conduct a judicial hearing to determine whether any condition or combination of release conditions will reasonably assure the defendant's appearance at trial or the public's safety does not require the detainee's release).

451. *See supra* note 431; *see also* Van Atta v. Scott, 27 Cal. 3d 424, 435, 613 P.2d 210, 215, 166 Cal. Rptr. 149, 154 (1980).

attorney they want.[452] This holding should make the state even more hesitant to needlessly detain defendants. In a world in which criminal defendants *must* use overburdened government counsel, preventing them (through detention) from meeting with the attorney and from working on their own defense seems particularly unfair. The inability to interact meaningfully with counsel impedes the notion of a substantial right to counsel. Many defendants choose instead to exercise their right to present their own defense.[453] This phenomenon is particularly apparent in the urban criminal court setting.[454]

D. ALTERNATIVES TO DETENTION

The state may use various forms of release, various forms of detention, or combinations of the two to obtain the objectives of detention.[455] "Detention," however, connotes imprisonment. Even assuming the goal of detention is to avoid pretrial crime, the government has an array of means to keep an eye on a defendant without placing him or her in the distinctly punitive setting of jail.[456] Widely accepted alternatives include home detention,[457] detention in a community facility,[458] and supervised

452. Caplin & Drysdale v. United States, 109 S. Ct. 2646, 2652 (1989).

453. Faretta v. California, 422 U.S. 806, 834-36 (1975).

454. In Atlanta, for example, defendants — charged with crimes ranging from violation of city ordinances to state felonies — are not asked until the first hearing whether they want an attorney. The vast majority do not appear at the first hearing with an attorney and then often reject public counsel — even in the face of the judge's persistent advice to the contrary — because accepting counsel means returning to detention, even if only for a day. The power of detention is evident as defendant after defendant, although charged with serious offenses, insists on representing himself at the preliminary hearing.

Professor Marc Miller, a co-author of this Article, has made the preceding observations of the Atlanta Municipal Court system while head of the Atlanta Muncipal Court Project.

455. This area most directly raises questions about money bail. Money bail is, of course, the traditional way of guaranteeing appearance at trial. The question for purposes of this Section, however, would be whether money bail can serve the other purposes of detention.

456. *See* Note, *Limiting*, *supra* note 45, at 323-27.

457. *See generally* P. HOFER & B. MEIERHOEFER, HOME CONFINEMENT 14 (Federal Judicial Center 1987); *see also* United States v. Traitz, 807 F.2d 322, 325 (3d Cir. 1986) (approving restrictive "home incarceration" under Bail Reform Act on basis of dangerousness). In a widespread development in both state and federal jurisdictions, authorities are using various forms of home confinement with electronic monitoring to keep track of a defendant's whereabouts and behavior. *See* P. HOFER & B. MEIERHOEFER, *supra*, at 36-40. These highly intrusive programs raise their own substantial questions of deprivation of liberty, but used for short periods within proper guidelines, they are vastly

release.[459] A broad incarcerative detention policy inherently limits experimentation because the government is not motivated to find alternative ways to achieve the same ends.

The notion of alternatives other than detention in jail focuses once again on the central question of who bears the burden of detention: the government or the individual. If the government had a sharply reduced power to detain, it would undoubtedly find other ways to protect society.[460] For example, in the *Buckey* case,[461] the government could have found alternative ways to protect the public generally, and young children in particular, from the defendant. Prosecutors could have moved to prohibit the defendant from working in any school or other environment where children are present. The court could have prohibited Buckey from being around children at all times, enforcing this order by requiring him to spend evening and weekend hours at home or in a community detention facility.[462]

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preferable to jail, enabling the defendant to receive counsel, prepare a case, and maintain a substantial degree of family and work support. Such programs often make sense in terms of public policy because the cost of short-term incarceration is so high, and in jurisdictions with no available jail space, these options are in particular cases far preferable to court orders of release resulting from court-ordered limits on detention. Other ideas — including supervision tied to drug or alcohol treatment, less-supervised release, and daily drug testing — may provide a range of ways in which the court can respond to the particular concerns that would have motivated a decision to detain in the absence of such options.

458. *See* Harland & Harris, *Developing and Implementing Alternatives to Incarceration: A Problem of Planned Change in Criminal Justice*, 1984 U. ILL. L. REV. 319, 321.

459. VERA INSTITUTE OF JUSTICE, *supra* note 429, at 140.

460. Michael E. Smith, director of the Vera Institute of Justice, has made the same point regarding prisons. In the absence of prisons, society would likely develop many alternative ways to punish, incapacitate, deter, and reform offenders.

461. *See supra* notes 3-28 and accompanying text.

462. In fact, when the court released Buckey — on $1.5 million bail five years after his arrest — the court imposed severe conditions of release. *Judge Places Severe Restrictions Covering Release For Buckey*, L.A. Times, Feb. 11, 1989, part II, at 1, col. 4. The conditions were as follows: Buckey could not contact any of the victims in the case or their families; he could not leave the state without the court's permission; he had to relinquish his passport; he could not have any verbal or physical contact with any person under age 14 who was not a blood relative or accompanied by a parent; Buckey could not enter the cities of Manhattan Beach, Redondo Beach, or Hermosa Beach without the court's permission; he could not consume any alcohol; and authorities must keep him *under 24-hour guard*. *Id.* These conditions would certainly have been equally effective five years earlier, and they are equally effective regardless of whether they are backed by $1.5 million bail.

In some cases, a court identifies a "threat to the community" as the basis for the detention of a defendant charged with a nonviolent crime. These cases are particularly disturbing and expose the punitive nature of the detention because alternative forms of protection are so readily available. For example, in 1988 a federal magistrate in California refused to release on bail a twenty-five year old suspected computer hacker who allegedly entered a National Security Agency computer and planted a false story on a financial news wire.[463] The magistrate concluded that no "conditions the court could set up" could ensure that "the defendant would be anything other than a danger to the community."[464] The defense attorney suggested home detention and the removal of all computers with the disconnection of all phone lines. The magistrate responded, without further explanation, that "the defendant could commit major crimes no matter where he is."[465]

These cases are not extreme in at least one sense. Judges at detention hearings commonly ignore the fact that detention is the most severe limitation on individual liberty — barring capital punishment — that society accepts. Pretrial conditions are neither polar questions — in or out — nor three-way decisions with traditional money bail as the third alternative. Rather, the court may set a variety of conditions that raise considerably less substantial constitutional concerns than detention.[466] Criminal justice systems across the country are beginning to recognize a range of incapacitative alternatives[467]

463. *Suspected Computer Hacker is Denied Bail*, L.A. Times, Dec. 24, 1988, part II, at 1, col. 5. The defendant allegedly obtained the telephone billing information of the NSA and several of its employees. *Id.* The U.S. Attorney made no allegations, however, that the defendant had access to classified data.

464. *Id.*

465. *Id.* at 6.

466. Some alternatives raise other constitutional concerns. *Compare* Abell, *Pretrial Drug Testing — Expanding Rights and Protecting Public Safety*, 57 GEO. WASH. L. REV. 943, 948-56 (1989) (dismissing constitutional concerns), *with* Rosen & Goldkamp, *The Constitutionality of Drug Testing at the Bail Stage*, 80 J. CRIM. L. & CRIMINOLOGY, 114, 175 (1989) (finding constitutional problems).

467. Some states and localities have begun to implement pretrial control alternatives. Experiments conducted by the Vera Institute of Justice in New York led to the first great reform of the federal bail system in the early 1960s, culminating in the Federal Bail Reform Act of 1966. Clarke, *Pretrial Release: Concepts, Issues, and Strategies for Improvement*, in 3 RESEARCH IN CORRECTIONS 1 (1988). The Vera Institute of Justice is now experimenting with the use of supervised release settings for defendants who would otherwise likely be detained. *See generally* VERA INSTITUTE OF JUSTICE, PRELIMINARY REPORT ON THE ESTABLISHMENT OF THE NASSAU BAIL BOND AGENCY 13-14 (1989) (dis-

that are both less expensive than jail,[468] and more protective of individual liberty.

Due process of law requires an increased use of such alternatives. Conditions of release — even quite restrictive conditions — pose a lesser threat to individual liberty than detention in secure state facilities. The differences in the ability of the defendant to work, maintain a family life, and prepare for the defense of criminal charges are substantial.

The Bail Reform Act of 1984 contains a presumption in favor of release on whatever conditions will guarantee appearance at trial and protection of the community. This presumption needs currently unavailable standards and programs to enforce it, but the idea behind the presumption is proper. As bail practice continues to expand and become more sophisticated, the greater availability of non-incarcerative alternatives may substantially lessen the government's desire to detain defendants in prison. Keeping suspects out of jail also sustains a meaningful notion of the presumption of innocence before trial.

CONCLUSION

Pretrial detention has a place in dealing with those accused of serious crime, but lawmakers must keep it within proper limits. All legal systems recognize some level of detention; thus, the question is not whether one is for or against detention, but rather where and how one draws the line.

In our view, the current trend in this country is extremely dangerous and threatening to fundamental liberties. The preventive detention provisions in the Federal Bail Reform Act of

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cussing criteria for supervised release). In this study, the court releases defendants to the control and supervision of trained staff. Defendants begin their release in a supervised residential setting, and then may return home if they satisfy the requirements of the supervising program. Not only does this allow for release in cases where detention would have occurred as a matter of course, it also provides the opportunity for the court to receive information on the defendant in a less artificial (and certainly a more positive) setting than jail. Moreover, authorities can use the pretrial period to help the defendant begin to deal with drug and alcohol (as well as employment and housing) problems, preventing subsequent infringement on the punitive powers of the court at the time of trial and sentencing. *See, e.g.*, Freed, *The Only Agreement on Crime: No Easy Answers*, L.A. Times, Dec. 22, 1990, at A1, col. 5. The city of San Joaquin Valley allows some felons to serve their sentences at home rather than at jail.

468. *See, e.g.*, Reed, *No Easy Escape From Jail Dilemma*, L.A. Times, July 2, 1990, at B1, col. 2 (Ventura Co. ed.) (listing less expensive alternatives to jail, such as furlough, work release, and drug treatment programs).

1984 and in many state acts are predicated on inaccurate assumptions that tend to substantially overstate the amount of pretrial crime sufficiently serious to justify detention. These laws are based on assumptions that overstate the ability to identify those who pose a threat. The inadequacy of the procedures governing detention determinations compounds these errors.

Salerno largely settled the broad federal constitutional issues concerning preventive detention. Because the Supreme Court has determined that it will not limit the use of pretrial preventive detention, Congress must correct the errors in the Bail Reform Act. Similarly, the responsibility shifts to state courts and legislatures operating under their own constitutions to develop sensible detention policies.

In recent years, federal authorities have emphasized the traditional primacy of the states in designing and operating the great bulk of the criminal justice system in this country. The states are meeting the challenge with novel bail, detention, alternative sentencing, drug treatment, and intervention programs. Pretrial detention presents a significant opportunity for state and local legislatures to reject a flawed federal model and develop principled, functional systems which themselves can serve as models.

The fact that the new federal practice has passed constitutional challenge on its face neither makes it more legitimate as a matter of principle, nor shields the federal law against attack in particular cases. The current federal situation — like the situation in states — is not immune to reform. Though not ideal, the framework of detention can remain if the government employs proper standards and procedures. The effect of the laws in such a world, however, would likely be much different.

The treatment of suspects before trial is one of the great tests of a society's respect for individual liberty. A government that presumes guilt will use detention to punish the suspect immediately, and pay the cost in false convictions and destabilization of the liberty interest that all members of society enjoy. A society that insists on a presumption of innocence and lives up to that commitment will detain individuals only when their release will circumvent the very process of ordered liberty.

This Article has considered and rejected the modern trend toward increased detention based on inaccurate, unprovable predictions of dangerousness. This trend is a subterfuge to undermine the presumption of innocence. Regardless of the total

number of detained individuals, lawmakers must find standards and processes that operate to identify the *particular* individuals whom the state should detain. Predictions of dangerousness fail this requirement.

Something is needed to replace the misuse of predictions, lack of basic procedures, and mischaracterization of detention. This Article offers a theory of detention that accommodates fundamental constitutional and jurisprudential principles, the traditional grounds for detention, and the notion that the state should detain certain highly criminous offenders whom it arrests for serious offenses during a period of bail or release pending trial on serious charges. If carefully developed, detention on these grounds will provide society with sufficient protection against those who continue to commit serious crimes before trial.