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The Salerno Challenge to the Bail Reform Act of 1984

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THE *SALERNO* CHALLENGE TO THE BAIL REFORM ACT OF 1984

INTRODUCTION

The major innovation of the Bail Reform Act of 1984[1] was a provision allowing for pretrial detention on grounds of the accused's potential dangerousness.[2] The Act survived unscathed until May 2, 1986, when the Second Circuit held that pretrial detention on grounds of dangerousness was unconstitutional where such detention had lasted as long as eight months.[3] This qualification regarding length of detention was removed by the Second Circuit on July 3, 1986, just two months later in *United States v. Salerno*.[4] The court held that the due process clause prohibits pretrial preventive detention as a regulatory measure without regard to the duration of the detention.[5] That issue has recently been resolved by the Supreme Court of the United States and is the subject of this note.[6]

Part I analyzes the statistical assumptions that precipitated the Bail Reform Act of 1984, finds that substantial weight should be given to findings of fact by Congress, and concludes that there was sufficient basis for legislation which attempts to effectively redress pretrial recidivism. Part II discusses bail in terms of constitutional and statutory rights, finds that the Supreme Court has consistently viewed pretrial detention as a regulatory rather than a punitive sanc-

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1. Pub. L. No. 98-473, 98 Stat. 1976 (1984) (codified at 18 U.S.C. §§ 3141-50 (Supp. II 1984)).

2. 18 U.S.C. § 3142 (Supp. II 1984) (reproduced in Appendix). The Bail Reform Act of 1966 authorized pretrial detention on grounds of dangerousness only for those accused of capital offenses. Pub. L. No. 89-465, 80 Stat. 214, 215-16 (codified at 18 U.S.C. § 3148 (1982)).

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

4. 794 F.2d 64 (2d Cir. 1986), *rev'd*, 107 S. Ct. 2095 (1987).

5. *Id.* at 71.

6. For matters beyond the scope of this discussion, see United States v. Salerno, 107 S. Ct. 2095, 2106 (1987) (Marshall, J., dissenting) (issue of the Supreme Court's jurisdiction over an arguably moot controversy); United States v. Salerno, 631 F. Supp. 1364 (S.D.N.Y. 1986) (issues of fact resolved by the district court); Note, *Release Pending Appeal: A Narrow Definition of "Substantial Question" Under the Bail Reform Act of 1984*, 54 FORDHAM L. REV. 1081 (1986) (The Act requires a convicted defendant who has been sentenced to demonstrate that his appeal involves a "substantial question" of law or fact likely to result in reversal or an order for a new trial. Because Congress viewed conviction as presumptively correct, the author concludes that a strict standard of review should be applied in construing a "substantial question.").

tion, and concludes that pretrial detention on grounds of dangerousness to the community is not violative of the due process clause of the fifth amendment. Part III details the balancing test the Court has applied in affording procedural due process, highlights features of the Bail Reform Act of 1984 to show how it carefully incorporates safeguards to protect the accused, and concludes that there are no presently available viable alternatives to pretrial detention on grounds of dangerousness to the community.

I. PREDICTING PRETRIAL RECIDIVISM

The legislative history of the Bail Reform Act of 1984 reveals a deeply concerned, cautious, and critical approach to resolving "the alarming problem of crimes committed by persons on release."[7] Congress was disturbed by several statistical studies finding that one out of every six defendants on release was rearrested; one-third of those were rearrested more than once; and one-fourth of those released on surety bond in the District of Columbia were rearrested.[8] A Harvard study[9] disputed use of rearrest rates to measure pretrial crime because a substantial portion[10] of those arrested are not convicted. The use of rearrest rates, however, has been justified to compensate for

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7. S. REP. No. 225, 98th Cong., 1st Sess. 1, 3, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3185. Congress had considered the issue previously, when passing the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 642-49 (codified at D.C. CODE ANN. §§ 23-1321 to 1329 (1973)) (noting an alarming increase in street crime, statistical studies involving recidivism by those on pretrial release, recommendations by the President's Commission on Crime, and international practices); United States v. Edwards, 430 A.2d 1321, 1341 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982). For international practices, see Note, *Preventive Detention: A Comparison of European and United States Measures*, 4 N.Y.U.J. INT'L. L. & POL. 289, 290 (1971) ("In Europe, pretrial detention in some form is the rule rather than the exception.").

8. S. REP. No. 225, 98th Cong., 1st Sess. 6, 1984 U.S. CODE CONG. & ADMIN. NEWS 3189.

9. Comment, *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 289, 317-18 (1971). In his foreward to this article, Senator Ervin summarized conclusions reached by the National Bureau of Standards study of 1970: Pretrial crime was as low as 17% combining felonies and misdemeanors, but only 5% for serious felonies; there was no correlation between the type of crime in the first arrest and severity of the second offense; most bail recidivism did not occur in the immediate post-arrest period, but occurred with most frequency between 120-140 days; and there was no correlation between characteristics used to predict crime and what occurred. *Id.* at 294-95. The Harvard study of bail crime in Boston in 1968 found that the percentage of pretrial crime for serious offenses was as low as 5.2%, that prediction of pretrial recidivism was hazardous, and that detention was statistically related to race and socio-economic status. *Id.* at 369.

10. W. LAFAVE, MODERN CRIMINAL LAW 77, 81 (1978). About 40% of those persons arrested are released without the filing of charges and the figure is commonly 30% when considering only felonies.

those released on technicalities and for unreported, undetected, and unsolved crimes committed by defendants on pretrial release.[11] While empirical studies generally have concluded that predictions of behavior for those defendants released prior to trial are highly inaccurate,[12] "statistical assumptions are almost [invariably] open to plausible attack" and lead to "potentially endless, unresolvable, [useless] scholarly argument."[13] For example, one study revealed that being victimized by crime is a relatively rare experience,[14] while another revealed that "[e]very twenty-five minutes of each day, a person is murdered in the United States. Every seven minutes, a woman is raped. Every fifty-nine seconds, someone is robbed."[15] Reconciliation of such conflicting studies may lead to the cynical and commonplace observation that you can make statistics say anything you want.

The Supreme Court has already given ample guidance in dealing with predictions of crime and the deference to be accorded Congress as a fact-finding body. First, "there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions, and we have specifically rejected the contention, based on . . . sociological data . . . 'that it is impossible to predict future behavior . . . .' "[16] Second, the Court has also recognized that determinations which are "highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded

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11. *Id.* at 75.

12. Note, *The Loss of Innocence: Preventive Detention Under the Bail Reform Act of 1984*, 22 AM. CRIM. L. REV. 805, 812 (1985) [hereinafter Note, *The Loss of Innocence*]. *See generally* D. CHAPPEL & J. MONAHAN, VIOLENCE AND CRIMINAL JUSTICE 18-20 (1973) (predictions of future violence grossly overstated); D. GOTTFREDSON & M. GOTTFREDSON, DECISION-MAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION 123 (1980) (pretrial recidivism is typically under 5%); P. WICE, BAIL AND ITS REFORM: A NATIONAL SURVEY 26 (1973) (recidivist rate for those released on bail only 7%); Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1496 (1966).

13. United States v. Jessup, 757 F.2d 378, 386 (1st Cir. 1985).

14. UNITED STATES DEPT. OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES (1982), *cited in* A. KARMEN, CRIME VICTIMS 35 (1984).

15. *Id.*

16. Schall v. Martin, 467 U.S. 253, 278-79 (1984) (quoting Jurek v. Texas, 428 U.S. 262, 274-75 (1976)). The Court in *Jurek* recognized the difficulty of predicting future behavior, but considered it essential to a judge's decision to admit a defendant to bail. *Id.* The Court cites with approval *American Bar Association Project on Standards for Criminal Justice, Pretrial Release* § 5.1(a) (Approved Draft 1968). *Id.* at n.9. The American Bar Association had urged the Court to reverse the Second Circuit in *Salerno*. Amicus Curiae brief for Petitioner (December 8, 1986).

the capacity of Congress to amass the stuff of actual experience and cull conclusions from it."[17]

Predictions of future behavior will never be "error-free, but judges already make predictions of future behavior when they set bail, impose sentences, and approve parole."[18] If a variety of predictions are presently utilized in criminal law, then predicting dangerousness represents a refinement of tradition rather than a radical departure.[19] It has been argued that pretrial detention only occasionally or accidentally prevents the commission of a crime.[20] This theory is tenable where society is content to accept the recidivism rates established by Congress[21] as being negligible. Where, however, society is enraged by rampant crime and perceives the American system of justice as a "revolving door," the theory is unacceptable. While the likelihood that someone's house will burn down is small, it is so obviously irresponsible not to secure insurance for that possibility that banks will not give a mortgage without it. At some point society will justifiably err on the side of security and the law provides insurance or a hedge against risk.

The rationale for deploring pretrial detention based on dangerousness was tersely stated by the Second Circuit:

> Pretrial detention to prevent future crimes against society at large, however, is not justified by any concern for holding a trial on the charges for which a defendant has been arrested. It is simply a means of providing protection against the risk that society's laws will be broken. Even if the highest value is accorded to that objective, it is one

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17. United States v. Gainey, 380 U.S. 63, 67 (1965); *accord* Usery v. Turner Elkhorn Mining, 428 U.S. 1, 28 (1976).

18. Schlesinger, *Bail Reform: Protecting the Community and the Accused*, 9 HARV. J.L. & PUB. POL'Y 173, 198 (1986).

19. *Contra* United States v. Melendez-Carrion, 790 F.2d 984, 988 (2d Cir. 1986) (The Bail Reform Act of 1984 is the first comprehensive national legislation in our history providing for pretrial detention on grounds of dangerousness.).

20. *Schall*, 467 U.S. at 293 (Marshall, J., dissenting). Justice Marshall also cites eight professional sources supporting the proposition that dangerousness is unpredictable. *Id.* at 294 n.19. AMERICAN PSYCHIATRIC ASSOCIATION, CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL 27-28 (1974); Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1094-1101 (1976); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1974); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974); Schlesinger, *The Prediction of Dangerousness in Juveniles: A Replication*, 24 CRIME & DELINQ. 40, 47 (1978); Steadman & Cocozza, *Psychiatry, Dangerousness and the Repetitively Violent Offender*, 69 J. CRIM. L. & CRIMINOLOGY 226, 229-31 (1978); Wenk, Robison & Smith, *Can Violence Be Predicted?*, 18 CRIME & DELINQ. 393, 401 (1972); Comment, *supra* note 9.

21. *See supra* note 8 and accompanying text.

> that may not be achieved under our constitutional system by incarcerating those thought likely to commit crimes in the future.[22]

In the abstract, this argument is attractive because it exalts the Constitution and maintains respect for society's reservations regarding pretrial release. Yet, its analysis does not seem so piercing when applied to the prosaic reality of our crime-ridden, central cities. The heroin addict who has supported his habit by mugging defenseless old ladies incontrovertibly demonstrates a propensity for violent crime. If his rap sheet indicates that some of his numerous convictions were committed while on pretrial release, does the Constitution require that he be released upon arrest for similar charges because predicting future crime offends due process?

The Second Circuit also asserts that the constitutional flaw in pretrial preventive detention for repeat offenders is that "a person who has paid this penalty stands in a similar position, vis-a-vis the Bail Reform Act, to one who has not been charged with a crime."[23] Thus, the argument continues, an "anomaly" arises under the Act whereby those arrested without cause would be treated the same as those arrested with probable cause.[24] The concern is directed to the much regretted generalized deterrence on a mass scale that was used to intern Japanese during World War II,[25] but the analogy is inappropriate where only specific deterrence is sought for particularly dangerous felons:

> I see no anomaly. The Bail Reform Act applies only to persons indicted for serious offenses, not to unaccused citizens plucked from the population at large. Indictment basically alters the due process inquiry by establishing probable cause to believe that the accused has

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22. United States v. Salerno, 794 F.2d 64, 73 (2d Cir. 1986), *rev'd*, 107 S. Ct. 2095 (1987).

23. *Id.* Does the proposition that repeat offenders stand in the same position as first offenders survive recent statistics from Chicago showing that 70% of misdemeanor arrestees are repeat offenders? *See* Doulin v. City of Chicago, 662 F. Supp. 318 (N.D. Ill. 1986) (detention of misdemeanor arrestees for fingerprinting without probable cause is unreasonable seizure under the fourth amendment).

24. *Salerno*, 794 F.2d at 73. The "anomaly" as given is considerably more cumbersome:

> To uphold § 3142(e)'s provision for pretrial detention on the ground that defendants charged with violent criminal activities will continue "business as usual" would, therefore, create the anomaly that a person who has been charged with crimes but not yet convicted may be incarcerated on the ground that he will commit crimes in the future, whereas persons who have been neither charged with nor convicted of crimes, or have served their sentence of conviction on those charges, may not be incarcerated on the basis of such a prediction.

Id.

25. *Id.* at 74 (citing Korematsu v. United States, 323 U.S. 214 (1944)). Forty years later, the issue was hauntingly revived in Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984), *noted in* United States v. Melendez-Carrion, 790 F.2d 984, 1004 (2d Cir. 1986).

> committed specific acts constituting a serious crime. That legal finding gives the government a concrete basis, not available as to persons not accused, for predicting that the person will commit another crime before trial.[26]

Predicting pretrial recidivism has achieved conflicting results and much criticism, but when Congress has a reasonable basis for finding as a matter of fact that it does occur with disturbing regularity, the judiciary must accord substantial weight to such a finding. Where an indictment establishes probable cause to believe the accused has committed the serious crime charged, the specific deterrence sought through the pretrial detention of that individual is not analogous to a general internment of an entire race. Fear of random exploitation is thus unfounded in this context.

II. BAIL, PUNISHMENT, AND REGULATION

While the eighth amendment provides that "[e]xcessive bail shall not be required,"[27] this clause "says nothing about whether bail shall be available at all."[28] The history of bail indicates that it is neither a fundamental nor constitutional right.[29] It is primarily conferred by statutes and has a variety of restrictions, including, *inter alia*, arrest for a capital offense,[30] lack of assurance that the defendant will appear at trial (fear of flight),[31] and, now, that the accused is considered a danger to the community.[32] The eighth amendment also pro-

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26. *Salerno*, 794 F.2d at 77 (Feinberg, C.J., dissenting).

27. U.S. CONST. amend. VIII.

28. United States v. Salerno, 107 S. Ct. at 2104.

29. United States v. Edwards, 430 A.2d 1321, 1327-29 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982); *cf.* Carlson v. Landon, 342 U.S. 524, 545-46 (1952) (the bail clause was lifted from the English Bill of Rights Act which never contemplated a right to bail in all cases), *cited with approval in Salerno*, 107 S. Ct. at 2105. Speaking for the Court, Chief Justice Rehnquist concluded that, given the procedural safeguards within the Act, preventive detention without bail does not "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 107 S. Ct. at 2103 (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)); United States v. Perry, 788 F.2d 100, 111-12 (3d Cir. 1986). *See also infra* notes 30-31 and accompanying text.

30. A "capital crime" is "[o]ne in or for which death penalty may, but need not necessarily, be imposed." BLACK'S LAW DICTIONARY 189 (5th ed. 1979). From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, federal law has provided for bail in non-capital offenses, but this traditional right is conditioned upon the accused's giving adequate assurance that he will stand trial. Stack v. Boyle, 342 U.S. 1, 4-5 (1951).

31. United States v. Abrahams, 575 F.2d 3, 8 (1st Cir.), *cert. denied*, 439 U.S. 821 (1978). "The right to bail is thus not absolute but decisionally recognized and statutorily approved as being generally available in noncapital cases subject to denial in exceptional cases and subject to the imposition of reasonable conditions of release." *Id.* (quoting United States v. Smith, 444 F.2d 61 (8th Cir. 1971)).

32. 18 U.S.C. § 3142(e) (1982).

hibits "cruel and unusual punishments."[33] Accordingly, the Supreme Court has stated that government "does not acquire the power to punish with which the eighth amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law."[34] While the Second Circuit readily agreed that there is no absolute right to bail, it concluded "the Framers of the eighth amendment did not . . . contemplate the denial of bail on grounds of dangerousness."[35] It seems dubious that withholding bail in capital cases was purely due to risk of flight, but even more problematical is applying the framers' concerns to modern problems.[36]

As Congress recognized in drafting the Bail Reform Act of 1984, the real issue arises not under the eighth amendment, but under the fifth amendment's due process clause: does pretrial detention for dangerousness permit punishment of a defendant prior to an adjudication of guilt?[37] Congress relied upon the Supreme Court's decision in *Bell v. Wolfish*[38] to conclude that pretrial detention "is a constitutionally permissible regulatory, rather than a penal, sanction."[39]

The Court in *Wolfish* agrees that liberty is a fundamental right, but this interest is accomodated at the initial decision to detain the accused upon a judicial determination of probable cause to believe that he is guilty as charged.[40] Thereafter, rights retained are subject

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33. U.S. CONST. amend. VIII.

34. Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977).

35. United States v. Melendez-Carrion, 790 F.2d 984, 997-98 (2d Cir. 1986).

36. Brown v. Board of Educ., 347 U.S. 483, 492-93 (1954). In analyzing an equal protection issue under the fourteenth amendment, the Supreme Court unanimously stated: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in light of its full development and its present place in American life throughout the Nation." *Id.* Similarly, the modern problems of international terrorism and drug smuggling are not rationally approached by reference to the framers. If this approach in *Brown* is adapted to the issue at hand, the message is that we must consider pretrial recidivism in light of its full development and present place in American life.

37. S. REP. No. 225, 98th Cong., 1st Sess. 8, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3190-91.

38. 441 U.S. 520 (1979). The gravamen of the complaint in *Wolfish* was the allegedly deplorable conditions in a detention center.

39. S. REP. No. 225, 98th Cong., 1st Sess. 8, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3191. Another way of expressing this dichotomy is that if preventive detention is not a criminal sanction then it is civil. *See* United States v. Perry, 788 F.2d 100, 112 (3d Cir. 1986).

40. *Wolfish*, 441 U.S. at 533-34; *accord* United States v. Delker, 757 F.2d 1390, 1397 (3d Cir. 1985); United States v. Jessup, 757 F.2d 378, 387 (1st Cir. 1985); United States v. Edwards, 430 A.2d 1321, 1335 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982); *see* Gerstein v. Pugh, 420 U.S. 103, 119-20 (1975) (The Court held that a judicial determination of probable cause is required before the accused can be detained, but the detention hearing does not require the full panoply of rights available at trial.); Schall v. Martin, 467 U.S. 253, 275 (1984) (Although *Gerstein* was decided on fourth amendment grounds, the Supreme

to restrictions and limitations.[41] A detainee's desire to be free from the disabilities of detention[42] "simply does not rise to the level of . . . fundamental liberty interests."[43] If no fundamental rights are at stake, it would seem that substantive due process[44] is not involved; but this requires a careful look at whether pretrial detention on grounds of dangerousness constitutes punishment.

Wolfish and *Schall* analyze whether a sanction is punitive or regulatory by the following factors:[45] whether it involves an affirmative disability or restraint; whether it promotes retribution or deterrence; whether the behavior involved is already a crime; whether an "alternative purpose" may be assignable to it; and whether it is excessive in relation to the alternative purpose assigned to it.[46] "Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face."[47]

Court has upheld its application in the fifth amendment due process context: "*Gerstein* arose under the fourth amendment, but the same concern with 'flexibility' and 'informality,' while yet ensuring adequate predetention procedures, is present in this context."); *see also* United States v. Salerno, 794 F.2d 64, 74 (2d Cir. 1986) (Second Circuit attempted to distinguish *Gerstein* as inapplicable to pretrial detention for dangerousness, where administrative steps incident to arrest become the basis for extending detention for weeks and months. Predictably, however, the Court did not retreat from its view, in both *Wolfish* and *Schall*, that *Gerstein* applies to fifth amendment due process concerns.), *rev'd*, 107 S. Ct. 2095 (1987). It is worthy of note that *Wolfish* and *Schall* were the only recent Supreme Court cases likely to affect *Salerno*, that both opinions were delivered by Mr. Justice Rehnquist (now Chief Justice), and both reversed Second Circuit judgments, at times caustically. In *Schall*, Rehnquist specifically stated: "We are unpersuaded by the Court of Appeals' rather cavalier equation of detentions that do not lead to continued confinement after an adjudication of guilt and 'wrongful' or 'punitive' pretrial detentions." 467 U.S. at 272. Thus, it comes as no surprise that Chief Justice Rehnquist has once again delivered the opinion for the Court in *Salerno*, reversing the Second Circuit.

41. *Wolfish*, 441 U.S. at 545.

42. *Id.* at 571-79 (Marshall, J., dissenting) (humiliating restrictions including body cavity searches); *see* S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE 666 (2d ed. 1984): "The consequences of incarceration include deprivation of contacts with friends and family, absence from employment and possibly loss of job, diminished ability to support family and to hire counsel, restrictions in the preparation of a defense, and stigmatizing effects on the prisoner's reputation and future employment prospects." *Id.*

43. *Wolfish*, 441 U.S. at 534.

44. *See infra* note 63 and accompanying text.

45. *Wolfish*, 441 U.S. at 537-40; Schall v. Martin, 467 U.S. 253, 269 (1984).

46. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

47. *Id.* at 169; *see* United States v. Salerno, 107 S. Ct. 2095, 2101 n.4 (1987). Even if the Bail Reform Act of 1984 is constitutional on its face, a concomitant consideration is whether it is constitutional as applied. Yet, the Supreme Court in *Salerno* left this issue unresolved, intimating "no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal." *Id.*

In *Trop v. Dulles*,[48] the defendant's conviction for desertion resulted not only in a jail term, but an automatic forfeiture of citizenship.[49] The Court struck down that section of the statute because its "alternative purpose," forfeiture of citizenship, served no other purpose than to inflict additional punishment, beyond the jail sentence already decreed.[50] The government's argument that the statute was regulatory rather than penal was unavailing.[51] By contrast, the express purpose of the Bail Reform Act of 1984 was to protect victims, prevent pretrial crime, and assure the appearance of the accused at trial.[52] The disability imposed, pretrial detention, accomplishes some legitimate governmental purpose[53] other than mere punishment. The test for "alternative purpose" is clearer in *Trop* than in *Mendoza-Martinez*:

> In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purpose of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.[54]

Additionally, "the severity of a sanction is not determinative of its character as 'punishment.' "[55]

While it is clear that the sanction of pretrial detention imposes disabilities and promotes specific deterrence, it is also clear that it serves the alternative purpose of assuring the defendant's presence at trial. *Trop's* message is that the alternative purpose is sufficient to uphold the statute.[56] In *United States v. Edwards*,[57] the court justifies the alternative purpose of detention on grounds of dangerousness by finding the preservation of the judicial process to be a "forward-looking" concept, rather than the retrospective vantage point of penal judgment.[58] *Wolfish* left open the question of "whether any other

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48. 356 U.S. 86 (1958).
49. *Id.* at 97.
50. *Id.*
51. *Id.* at 98.
52. S. REP. No. 225, 98th Cong., 1st Sess. 5-6, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3187-88 (discussing the need for preventive detention to safeguard the community, reduce pretrial crime, and assure the appearance of those accused of crime at trial).
53. *See infra* notes 54-58 and accompanying text.
54. *Trop*, 356 U.S. at 96.
55. Fleming v. Nestor, 363 U.S. 603, 616 n.9 (1960).
56. *Trop*, 356 U.S. at 96-97.
57. 430 A.2d 1321 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982).
58. United States v. Edwards, 430 A.2d 1331, 1332 (D.C. 1981).

government objectives [aside from assuring the detainee's presence at trial] may constitutionally justify pretrial detention."[59] The Second Circuit argues that "*Wolfish* was concerned only with the conditions of confinement, not the justification for the confinement itself."[60] Yet *Schall* upheld pretrial detention for juveniles on grounds of dangerousness and its analysis is not so dependent on the *parens patriae* interest that it would not apply to adults.[61] *Schall* sees the issue in terms of the fundamental fairness required by due process and concludes that a statute will pass constitutional muster if it serves a legitimate state objective and has adequate procedural safeguards.[62] It becomes clear that the Court views the issue as one of procedural due process, rather than substantive due process, and that the latter interest fades upon a finding of probable cause, as previously noted.[63]

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59. Bell v. Wolfish, 441 U.S. 520, 534 n.15 (1979).

60. United States v. Melendez-Carrion, 790 F.2d 984, 1001 n.4 (2d Cir. 1986).

61. Schall v. Martin, 467 U.S. 253, 264-65 (1984) ("The harm suffered by the victim of a crime is not dependent upon the age of the perpetrator."); *see also Melendez-Carrion*, 790 F.2d at 998-99 (The court argued that (1) the New York juveniles were detained for a maximum of seventeen days while delays possible under the Speedy Trial Act extended incarceration for adults for many months; (2) the juveniles were placed in "non-secure halfway houses without locks, bars or security officers" while dramatically different conditions exist in detention centers for adults; (3) juveniles are accustomed to custody; and (4) "pretrial preventive detention has never been part of the general American approach to criminal justice."); United States v. Salerno, 794 F.2d 64, 76 (2d Cir. 1986) (Feinberg, C.J., dissenting) (While a majority of the Second Circuit panel in *Salerno* agreed with the view expressed in *Melendez-Carrion*, the dissent was more persuasive: "the societal interest identified as 'compelling' by the Court only two years ago in *Schall* does not vary in strength with the age of the person to be detained. If anything, the need to shield the community from the hazards of pretrial crimes committed by adults is more compelling . . . ."), *rev'd*, 107 S. Ct. 2095 (1987); N.Y. FAM. CT. ACT § 320.5(3)(b) (McKinney 1983) (The court may order detention for a juvenile if "there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime." This parallel to § 3142 of the Bail Reform Act of 1984 is so striking that the Second Circuit goes to great lengths to distinguish *Schall* as strictly limited to juveniles.); Note, *Pretrial Preventive Detention Under the Bail Reform Act of 1984*, 63 WASH. U.L.Q. 523, 536 n.75, 76 (1985) (not dependent on *parens patriae* interest).

62. *Schall*, 467 U.S. at 256-57, 263-64; *Melendez-Carrion*, 790 F.2d at 1011 (Timbers, J., dissenting); *see also Wolfish*, 441 U.S. at 539 ("[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' "); DeVeau v. Braisted, 363 U.S. 144, 155 (1960) (the government has a right to "vindicate a legitimate and compelling state interest"), *cited with approval in Salerno*, 107 S. Ct. at 2102; United States v. Edwards, 430 A.2d 1321, 1331 (D.C. 1981) (en banc) (concluding that pretrial detention is regulatory rather than penal), *cert. denied*, 455 U.S. 1022 (1982).

63. *See supra* note 40 and accompanying text; *see also Wolfish*, 441 U.S. at 532 (When considering the proper standard of review under due process, the Court held that a "compelling-necessity standard," advanced by the Second Circuit, was inapplicable.); Note, *The Loss of Innocence*, *supra* note 12, at 814.

It seems only realistic for the procedures incident to arrest, detention, and trial to assume a regulatory nature. The administration of justice is unavoidably and inescapably bureaucratic. Considering the volume of criminals processed through the system,[64] with the limited resources afforded,[65] some injustice is bound to slip through the cracks. Thus it becomes increasingly important to maintain a sensitivity to the liberty interest, safeguard it through the regulatory morass, and be wary of bright lines drawn between regulation and punishment.[66] When they are closely housed in the same facility, the visible distinction between the plight of detainees and convicts becomes blurry. During the period between arrest and trial, detention and incarceration may look alike, but if loss of liberty were only possible following a guilty verdict, there would be little chance of assurance that dangerous criminals would stand trial.

The detainee's subjective perception, equating detention with punishment, cannot be the test for due process.[67] Nor may he assert that he is entitled to a presumption of innocence:

The error of the Second Circuit in *Wolfish*, and in *Salerno*, was analysis under substantive due process, which typically proceeds as follows:

> The initial question in any substantive due process examination is whether individual rights are limited by governmental action. If the court finds that a fundamental right is affected it will exercise strict scrutiny to determine if a rational relationship exists between the action taken by the government and the achievement of a legitimate government interest. This strict scrutiny requires that a court determine whether the statute 'advances' a compelling governmental interest and, if so, whether a less restrictive means will promote the government interest.

Id.; United States v. Melendez-Carrion, 790 F.2d 984, 1000-01 (2d Cir. 1986) (The Second Circuit adopted this higher standard: "In a constitutional system where liberty is protected both substantively and procedurally by the Due Process Clause, a total deprivation of liberty cannot validly be accomplished whenever doing so is a rational means of regulating to promote even a substantial government interest.").

64. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 176 (106th ed. 1986). In 1984, there were 8,891,000 arrestees and 11,882,000 crimes.

65. *Id.* Total full-time police and correction officers in 1983 were 902,868.

66. *Wolfish*, 441 U.S. at 564 (Marshall, J., dissenting) (The distinction between regulation and punishment has been criticized as being irrelevant: "I believe the proper inquiry . . . is not whether a particular restraint can be labeled 'punishment.' Rather, as with other due process challenges, the inquiry should be whether the governmental interests served by any given restriction outweigh the individual deprivations suffered."). Yet, pretrial preventive detention withstands this scrutiny as well, since the government's interest (safety of a community threatened by one accused of particular extremely serious offenses) outweighs the deprivation caused by temporary loss of freedom. *Id.; see, e.g.*, United States v. Salerno, 631 F. Supp. 1364, 1367 (S.D.N.Y. 1986) (In the case *sub judice*, Salerno was accused, *inter alia*, of two murder conspiracies while running a large, organized, crime family. Specifically, he ordered a "hit" (contract for murder) on a loanshark.).

67. United States v. Lovett, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring) ("The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of

> The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions. . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.[68]

The detainee's constitutional consolation for his incapacitation[69] is that detention is only imposed as a last resort, where "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 . . . ."[70]

Since bail is not a fundamental right, challenges to the Bail Reform Act of 1984 based on substantive due process are inapplicable.[71] The liberty interest is properly accommodated by an indictment establishing probable cause to believe the accused is guilty as charged.[72] The sanction of pretrial detention on grounds of dangerousness is primarily a regulatory measure intended to incapacitate rather than punish the accused.

III. PROCEDURAL SAFEGUARDS

The Supreme Court employs a balancing test to determine wheth-

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what otherwise would be enjoyed. But there may be reasons other than punishment for such deprivation."); *see also Wolfish*, 441 U.S. at 538 n.19.

68. *Wolfish*, 441 U.S. at 533; *see also Salerno*, 107 S. Ct. at 2109 (Marshall, J., dissenting) (Marshall's dissent in *Salerno* hinges on this very issue: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.") (quoting Coffin v. United States, 156 U.S. 432, 453, 458-59 (1895)). A careful look at *Coffin* reveals, however, that the presumption of innocence is only discussed in the context of the accused "when brought to trial upon a criminal charge," not in the context of pretrial detention. *Coffin*, 156 U.S. at 458-59; *see, e.g.*, Palko v. Connecticut, 302 U.S. 319, 327 (1937) (cited by Mr. Justice Marshall in support of applying the presumption of innocence to pretrial detention).

69. United States v. Melendez-Carrion, 790 F.2d 984, 999 (2d Cir. 1986) (The Second Circuit argues that incapacitation "achieves one of the classic purposes of punishment."). While there are appreciable similarities between incapacitation and punishment, there are also differences. Incapacitation of an assailant is justifiable self defense. It precedes the determination of whether punishment is appropriate. From the posture of Congress in drafting provisions of the Bail Reform Act of 1984, it is clear that incapacitation through regulation, not punishment, was intended. S. REP. NO. 225, 98th Cong., 1st Sess. 1, 3, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3192-93. The Committee concluded "that pretrial detention is a necessary and constitutional mechanism for incapacitating pending trial, a reasonably identifiable group of defendants who would pose a serious risk to the safety of others if released." *Id.*

70. 18 U.S.C. § 3142(e) (Supp. 1984).

71. *See supra* notes 29-31 and accompanying text.

72. *See supra* notes 26, 40-43 and accompanying text.

er detention procedures satisfy procedural due process:

> Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[73]

While the private interest affected in pretrial detention is loss of liberty and its attending disabilities, the Court in *Salerno* would have justly concluded that the procedural safeguards afforded by the Bail Reform Act of 1984 were more than adequate to prevent an erroneous deprivation of liberty; the "government's"[74] interest in protecting the public by preventing crime could not be more fundamental and compelling (even though a legitimate interest would suffice); and there are no reasonable[75] alternatives presently available that would not create an unmanageable burden for government.

Of the three propositions above, the second is readily supported by the principle that the primary purpose of government is to protect and safeguard the people it serves.

With respect to the first proposition, pretrial release is still the general rule of the Bail Reform Act of 1984.[76] Section 3142(a) authorizes the judicial officer[77] to release on personal recognizance, re-

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73. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see also* Schall v. Martin, 467 U.S. 253, 264 (1984) (discussing the inquiries necessary to ascertain the fairness of preventive detention of juveniles); Note, *The Loss of Innocence*, *supra* note 12, at 825; Note, *supra* note 61, at 541; *cf.* United States v. Jessup, 757 F.2d 378, 385 (1st Cir. 1985); Serr, *The Federal Bail Reform Act of 1984: The First Wave of Case Law*, 39 ARK. L. REV. 169, 214-15 (1985).

74. When "government" is at odds with an "individual," the Bill of Rights signals our conscience to protect the individual. When law enforcement is identified with "government," that word takes on a harsh sound, which to some sensibilities has totalitarian overtones. A semantic middle ground for softening the term "government" is calling it "the people." We can all identify with being people, while we are more apt to alienate ourselves from "government." The final step in removing any remaining impersonal, cold, machine-like qualities from "government" is to call it the "community." *See* Bail Reform Act of 1984, 18 U.S.C. § 3142(e) (Supp. II 1984) (the drafters of the Bail Reform Act of 1984 speak in terms of the accused's posing a danger "to any other person and the community.").

75. To require the government's burden to be any "feasible" alternative would likely be unreasonable. *Cf.* American Textile Mfr. Inst. v. Donovan, 452 U.S. 490, 512 (1981); Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 639 (1980).

76. Serr, *supra* note 73.

77. 18 U.S.C. at § 3156(a)(1) (Judicial Officer is defined as "unless otherwise indicated, any person or court authorized pursuant to § 3041 of this title, or the Federal Rules of Criminal Procedure, to detain or release a person before trial or sentencing or pending appeal in a court of the United States and any Judge or the Superior Court of the District of Columbia.").

lease on condition(s), or order detention. Under § 3142(e), detention is only appropriate where "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 . . . ." When conditions are imposed, they must be the "least restrictive" alternatives listed in § 3142(c)(2). The fact that the accused is charged with a crime which allows a presumption of his dangerousness (§ 3142[f][1][A-C]) does not preclude the judicial officer from granting release on conditions.[78]

The next to last sentence of § 3142(c) states that a "judicial officer may not impose a financial condition that results in the pretrial detention of the person." This reflects weak drafting, since it is obvious that imposing bail may result in detention where the defendant cannot afford to pay. However, it appears within the context of conditions of release, among which bail is already listed, thereby indicating some other purpose. Congressional intent was to prevent the formerly widespread *sub rosa* use of setting high bail as a way of assuring the defendant's incarceration.[79] Other than the new authority to detain on grounds of dangerousness, the removal of judicial temptation to impose defacto detention via high bail represents the second major achievement of the Act. It hardly seems a coincidence that these two features operate as a trade-off, so that there would have been little incentive for the latter without the availability of the former. By this latter provision vitiating defacto detention, Congress took a giant step in answering criticism of a financially-based bail system that is said to discriminate against the poor and, by implication, against minorities.[80]

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78. S. REP. No. 225, 98th Cong., 1st Sess. 21, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3204, *construed in* United States v. Knight, 636 F. Supp. 1462 (S.D. Fla. 1986).

79. S. REP. No. 225, 98th Cong., 1st Sess. 16, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3199, *construed in* United States v. Jessup, 757 F.2d 378, 388-89 (1st Cir. 1985); Serr, *supra* note 73, at 200-02; *see also* United States v. Salerno, 107 S. Ct. 2095, 2108 (1987) (Marshall, J., dissenting) (purporting that the result achieved by setting excessive bail is indistinguishable from the result achieved by the denial of bail altogether).

80. Bell v. Wolfish, 441 U.S. 520, 563 n.1 (1979) (Marshall, J., dissenting); P. WICE, FREEDOM FOR SALE 61 (1974) ("Our courts have permitted a system of justice which allows one's pretrial freedom to be put up for sale and those defendants unable to pay the price must suffer the dire consequences."), *quoted in* Schlesinger, *supra* note 18, at 176; Lay & Hunt, *The Bail Reform Act of 1984: A Discussion*, 11 WM. MITCHELL L. REV. 929, 931 (1985). It is also widely noted that placing the power to grant bail in a bail bondsman effectively overrules the judge's discretion. *See* Lay & Hunt, *supra*, at 931; Schlesinger, *supra* note 18, at 179.

Before the accused may be detained, he is entitled to an immediate hearing upon his initial appearance before a judicial officer.[81] Continuance motions are generally limited to five days for the defendant and three days for the government.[82] Informality permits admission of hearsay evidence: "rules concerning admissibility of evidence in criminal trials do not apply . . . at the hearing."[83] However, facts used to show that the defendant must be detained because of dangerousness must be "clear and convincing."[84] Congress gives the example of prior arrest and conviction records.[85] It was not intended that the government have to prove the accused's dangerousness with a high degree of certainty, but rather that the facts used establish a sound evidentiary basis.[86] Moreover, there is no statutory language mandating a higher standard for proving dangerousness

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81. 18 U.S.C. § 3142(f). *See generally* J. CARR, 1986 CRIMINAL PROCEDURE HANDBOOK 296-98 (timing of hearing).

82. 18 U.S.C. § 3142(f).

83. *Id.*

84. *Id.; see* United States v. Chimurenga, 760 F.2d 400, 405 (2d Cir. 1985) (clear and convincing standard means something more than a preponderance of evidence, but something less than beyond a reasonable doubt).

85. S. REP. No. 225, 98th Cong., 1st Sess. 19, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3202; *see* United States v. Salerno, 107 S. Ct. 2095, 2110 (1987) (Marshall, J., dissenting). Mr. Justice Marshall strongly objected to the use of prior arrest and conviction records as a means of determining that a defendant is dangerous:

> Under this statute an untried indictment somehow acts to permit a detention, based on other charges, which after an acquittal would be unconstitutional. The conclusion is inescapable that the indictment has been turned into evidence, if not that the defendant is guilty of the crime charged, then that left to his own devices he will soon be guilty of something else.

Id.

86. Serr, *supra* note 73, at 188-90 (distinction is between a standard of proof and the nature of proof). Serr disagrees with the Second Circuit in *Chimurenga*, 760 F.2d at 405, that the government must prove dangerousness by clear and convincing evidence. He argues further that "if a defendant is more likely than not to pose a danger to the community . . . the safety of the community certainly cannot be reasonably assured." Serr, *supra* note 73, at 190. Therefore, "[r]equiring more than a preponderance of evidence to support a conclusion of 'dangerousness' clearly does not effectuate Congressional intent." *Id.; see* United States v. Gotti, 794 F.2d 773, 777 (2d Cir. 1986) (Second Circuit has reaffirmed its view); *Chimurenga*, 760 F.2d at 402. The dubious value of the clear and convincing standard of proof imposed upon the government by the Second Circuit becomes clear as we read the facts upon which Coltrane Chimurenga was released on conditions:

> The government alleged that Chimurenga was the leader of a successor group to . . . the "Family." The "Family" was responsible for an armed robbery in Nanuet, New York, which resulted in the death of an armored truck guard and two police officers. The government's proof included: taped conversations in which Chimurenga instructed his co-defendants on how to kill armored truck guards, if necessary; tapes in which he advised others to cut emotional ties and flee rather than face imprisonment; an arsenal of weapons, ammunition, explosives, and bulletproof vests; physical surveillance evidence linking defendant to a series of planned violent crimes . . . .

than for proving probable flight: "surely the government interest in preventing disruption of the judicial system by the non-appearance of a criminal defendant is not greater than the interest in preventing the harm caused by crime."[87]

The offenses listed in § 3142(f)(1) include "a crime of violence,"[88] capital offenses, and felonious drug dealing. Any of these triggers "a rebuttable presumption . . . that no condition or combination of conditions will reasonably assure the appearance of the person . . . and the safety of . . . the community" in § 3142(e). Drug dealers are targeted because the imposition of bail has proven useless in bringing them to trial.[89] Yet, an equal protection challenge (for a class of

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Id. at 401. Another contributing factor in the decision to release Chimurenga was the Second Circuit's adoption of a clearly erroneous standard of review for appeals from district court detention decisions. *See* United States v. Portes, 786 F.2d 758, 762 (7th Cir. 1986) (Second and Fourth Circuits apply the clearly erroneous standard of appellate review, the First and Fifth Circuits apply a "supported by the proceedings below" standard, and the Third, Sixth, Eighth, Ninth and Eleventh Circuits require an independent review of the entire record).

87. United States v. Hazzard, 598 F. Supp. 1442, 1451 (N.D. Ill. 1984); *cf.* S. REP. No. 225, 98th Cong., 1st Sess. 6, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3189 ("[T]he danger a defendant may pose to others should receive at least as much consideration in the pretrial release determination as the likelihood that he will not appear for trial."). *See generally* Taylor, *Supreme Court Hears Arguments Issue of Preventive Detention*, N.Y. Times, Jan. 22, 1987, at B17, col. 1 (quoting Rehnquist, C.J.) (During oral argument in *United States v. Salerno* on January 21, 1987, Chief Justice Rehnquist framed the issue in a question: "Why is the sanctity of the judicial system so much greater than the sanctity of the life of someone not involved in the judicial system?") (cited in Note, *As Time Goes By: Pretrial Incarceration Under the Bail Reform Act of 1984 and the Speedy Trial Act of 1974*, 8 CARDOZO L. REV. 1055, 1072 n.86 (1987)).

88. 18 U.S.C. § 3156(a)(4):

> The term "crime of violence" means—
> (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.

Id. Detaining on grounds of dangerousness for a crime of violence represents another reform under the Act, since detention was previously available on these grounds only for capital crimes. Serr, *supra* note 73, at 181 (It has been argued that the definition of a crime of violence is too broad, so that courts will "bend over backwards" to justify detention.); *see also supra* note 2. Yet refusing to draw a bright line between capital crimes and other violent felonies seems only sensible. The sadistic slasher whose victim survives has not committed a capital crime, but he hardly seems to deserve preferential treatment over the professional executioner whose victim dies instantly.

89. S. REP. No. 225, 98th Cong., 1st Sess. 23-24, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 3206-07. "Among such defendants, forfeiture of bond is simply a cost of doing business, and it appears that there is a growing practice of reserving a portion of crime income to cover this cost of avoiding prosecution." *Id.* Along the same lines, Congress granted the judicial officer discretion to question the source of a defendant's collateral. 18 U.S.C. § 3142(i). Risk of flight is not the only consideration: "The Committee also emphasizes that the risk that a defendant will continue to engage in drug trafficking constitutes a danger to the

drug smugglers) is readily disposed of: bail is neither a fundamental nor constitutional right; the classification bears a rational relation to a legitimate government purpose, and the court may not substitute its judgment for that of Congress' so long as there is a reasonable basis for the classification (obvious from the legislative history).[90]

There is wide agreement that the rebuttable presumptions of § 3142(e) impose only a burden of production on the defendant; the burden of persuasion remains with the government.[91] The defendant may then attempt to demonstrate that he should be released on condition(s) set forth in § 3142(c), but he must await trial "to rebut the finding of probable cause."[92] Section 3142(e) provides that "if the judicial officer finds that there is probable cause," the rebuttable presumptions are triggered. While it may be argued that the plain meaning of the statute directs the judicial officer to make an independent determination of probable cause,[93] a practical approach favors judicial achievement of this finding by reference to the grand jury indictment.[94] "[T]he government has an obvious interest in not conducting a full-blown criminal proceeding twice and the defendant's interest seems better served by expeditious handling."[95] An additional safeguard is that the judicial officer must include written findings of fact and detailed reasons for detaining the suspect.[96]

'safety of any other person or the community.'" S. REP. No. 225, 98th Cong., 1st Sess. 13, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 3196; *see also* United States v. Jessup, 757 F.2d 378, 395-98 (1st Cir. 1985) (by 1981, drug trafficking in Florida alone was a ten billion dollar business).

90. *See* United States v. Moore, 607 F. Supp. 489, 494-95 (N.D. Cal. 1985) (also includes discussion of mandatory and permissive presumptions in criminal statutes).

91. United States v. Hurtado, 779 F.2d 1467, 1479 (11th Cir. 1985); United States v. Chimurenga, 760 F.2d 400, 405 (2d Cir. 1985); United States v. Jessup, 757 F.2d 378, 383 (1st Cir. 1985) (also noting that any proffer produced by the defendant does not operate as a "bursting bubble" against the government's presumption, but rather leads to a "middle ground" where the judicial officer must still weigh which side has the preponderance of evidence).

92. *Hurtado*, 779 F.2d at 1479.

93. *Hurtado*, 779 F.2d at 1483 (Clark, J., dissenting).

94. *Id.* at 1477-79; United States v. Contreras, 776 F.2d 51 (2d Cir. 1985) (judicial officer need not hold an evidentiary hearing to determine whether probable cause exists where a grand jury has already established it); United States v. Hazime, 762 F.2d 34 (6th Cir. 1985) (indictment alone sufficient to establish probable cause for purposes of triggering the rebuttable presumptions which come into play at the detention hearing), *noted in* Serr, *supra* note 73, at 174.

95. United States v. Edwards, 430 A.2d 1321, 1337 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982); *see also* United States v. Delker, 757 F.2d 1390, 1393-94 (3d Cir. 1985) (district court may hold an evidentiary hearing to review the magistrate's decision).

96. 18 U.S.C. § 3142(i)(1); *see* United States v. Hurtado, 779 F.2d 1467, 1480 (11th Cir. 1985) (where the trial court relied solely upon findings and recommendations of a magistrate

While no list of procedural safeguards is likely to console suspects deprived of their liberty (without a determination of guilt beyond a reasonable doubt),[97] fundamental fairness required by procedural due process was never meant to be a one-way street. "Particularly where the atrocity of the offense is great, the concerns for detention surpass the interests in release."[98]

In *United States v. Melendez-Carrion*,[99] the decision leading to the Second Circuit's opinion in *Salerno* was divided. Judge Newman, speaking for the court, would have held, as the Second Circuit did in *Salerno* that detention on grounds of dangerousness "for any length of time as a regulatory measure" violates due process.[100] Judge Feinberg, concurring, refused to go so far, effectively limiting the holding in the case to lengthy detentions: "I believe that lengthy delay can transform what might otherwise be a valid regulatory measure into one that is punitive regardless of Congress' stated intentions."[101] This position has at least three problems: (1) At what precise time should due process considerations attach?[102] (2) Does potential length of pretrial detention now constitute a viable factor to be raised at the initial bail hearing?[103] (3) If Congress relied upon the Speedy Trial Act to limit the period of pretrial detention,[104] does that, too, have constitutional problems?[105]

If construction of a statute is possible without serious constitutional doubts, courts should adopt that construction.[106] Judge Feinberg's concern raises the issue that the Speedy Trial Act may be deficient in the context of pretrial detention on grounds of dangerousness, on its face where complex litigation involving numerous defendants on numerous charges allows for "ends-of-justice" continu-

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without undertaking any independent review of factual findings or matters of law, as required under this subsection, there was reversible error).

97. S. SALTZBURG, *supra* note 42, at 665-66.

98. Jordan, *Focus on the 1984 Bail Reform Act: Pretrial Detention Permitted*, 9 BLACK L.J. 280, 292 (1986).

99. 790 F.2d 984 (2d Cir. 1986).

100. *Id.* at 1000.

101. *Id.* at 1007; *see supra* note 47 and accompanying text.

102. Abramovsky & Chikofsky, *Second Circuit's Hard Look at Preventive Detention*, N.Y.L.J., May 27, 1986, at 1, col. 4.

103. *Id.*

104. United States v. Colombo, 777 F.2d 96, 100 (2d Cir. 1985); Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (codified as amended at 18 U.S.C. § 3161-74 (1982 & Supp. III 1985)); S. REP. NO. 225, 98th Cong., 1st Sess. 22, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3205 n.63.

105. *See* Note, *supra* note 73.

106. Califano v. Yamasaki, 442 U.S. 682, 693 (1979) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

ances granted to the government,[107] and also as applied where judicial officers leisurely set dates for submission of pretrial motions that lie far in the future.[108] While the point is undoubtedly well taken, resolution of the problem, if at all, points to higher authority. However, it is clear that Congress has chosen the Speedy Trial Act, not the preventive detention provisions of the Bail Reform Act of 1984, to regulate the length of pretrial delays.[109] If construction of the Speedy Trial Act leads to the conclusion that it is constitutional, preventive detention cannot fail for permissive delays.

To summarize, whether procedural safeguards are adequate to prevent an erroneous deprivation of liberty under the Bail Reform Act of 1984, consider that:

> First, the person must be charged with a crime, and not just any crime, but a serious crime as specified in the statute. Second, the government must persuade a judicial officer by clear and convincing evidence that the defendant is a danger to the community. Third, the government must also persuade the judicial officer . . . that no condition of release will deter the defendant from committing a crime while at liberty. Fourth, the detention is meant to be of limited duration—until it can be determined whether the defendant is guilty of

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107. *See* United States v. Theron, 782 F.2d 1510 (10th Cir. 1986); United States v. Leon, 614 F. Supp. 156 (W.D.N.Y. 1985); *see also* United States v. Gonzales Claudio, 306 F.2d 334, 335, 341 (2d Cir. 1986) (Judge Newman dealt with this issue at length. The defendants had already been detained some fourteen months and it would be an additional twelve months before their trial would end. The case was complicated by eighteen other defendants, a large volume of evidence collected by the Government (much of which required translation into English), and more than 400 motions filed by defense counsel. Of course, defendants may not litigate pretrial matters to the ultimate degree and then claim that the length of their pretrial detention violates due process. The remaining inquiry is, then, how much responsibility the Government bears for the duration of detention. Since Congress contemplated that trial would begin within ninety days of detention, that point of reference provides guidance on the constitutional limit of pretrial detention. Unfortunately, this does not resolve the issue, which presently remains subject to judicial discretion.). One commentator has suggested a sixty day maximum period of pretrial detention. Note, *supra* note 87, at 1090. In view of congressional recognition of continuances bases on "ends of justice" in complex litigation, it would seem more appropriate to order some form of release after it was shown by defense counsel that the Government was responsible for unnecessarily delaying the pretrial litigation for at least sixty days. The Cardozo Note recognizes that an inflexible sixty-day maximum period of pretrial detention would be expensive (adding manpower to the court system) and risky (releasing presumably dangerous persons), perhaps sealing the fate of such a proposal. *Id.* at 1093-94 n.175. Moreover, if *Barker v. Wingo*, 407 U.S. 514 (1972), is any guide, Congress will be no more disposed to fix maximum times than the Court. *Cf.* United States v. Salerno, 107 S. Ct. 2095, 2100 (1987) (since this issue goes to the constitutionality of the statute as applied, it was not ripe for consideration in *Salerno*, which construed the constitutionality of the Bail Reform Act of 1984 on its face).

108. United States v. Salerno, 794 F.2d 64, 79 n.2 (2d Cir. 1986) (Feinberg, C.J., dissenting), *rev'd*, 107 S. Ct. 2095 (1987).

109. United States v. Accetturo, 783 F.2d 382, 387 (3rd Cir. 1986).

> the crime charged. So the constitutional issue . . . is not simply whether an individual can be confined because he is dangerous. It is whether a defendant already indicted for a serious crime can be denied bail in the pretrial period because there is clear and convincing evidence that the defendant will otherwise commit another crime while on release.[110]

In sum, it is these procedural safeguards which led the Supreme Court in *Salerno* to hold that, "as against a facial attack mounted by these respondents, the Act fully comports with constitutional requirements."[111]

Perhaps the final due process consideration is the possibility of alternatives available to the government and the burdens they would impose. In *Salerno*, the Second Circuit proposes surveillance: "Even the risk of some serious crime . . . must, under our Constitution, be guarded against by surveillance of the suspect and prompt trial on any pending charges, and not by incarceration . . . ."[112] The idea of surveillance as a cure for pretrial recidivism is fraught with irony. The 1984 Act needs no Orwellian big brother to implement it. Does due process require hidden cameras and microphones, round-the-clock stake-outs, and future victims? "Congress could reasonably restrict its efforts to increase community safety . . . on the ground that a broader effort would be very intrusive, inefficient, and expensive."[113]

Release on recognizance (ROR) programs seek the elimination of bail ("freedom for sale"), leaving a choice between release and detention. These programs depend upon close agency monitoring within the community to achieve lower recidivism rates.[114] Release on recognizance is progressive and has laudable goals, but requires such extensive funding and regulation that its potential is limited by the fragility of our economy — which is why it failed in the early 1970's.[115] Moreover, when considering that the Bail Reform Act of 1984 is directed towards serious felonies, especially drug trafficking, ROR would not seem to address the Congressional concerns which led to enactment. Expanding the court system to provide for speedier

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110. *Salerno*, 794 F.2d at 77 (Feinberg, C.J., dissenting).

111. *Salerno*, 107 S. Ct. at 2098. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.* at 2100.

112. *Salerno*, 794 F.2d at 74.

113. United States v. Hazzard, 598 F. Supp. 1442, 1453 (N.D. Ill. 1984).

114. Schlesinger, *supra* note 18, at 180-94.

115. Lay & Hurd, *supra* note 80, at 932-33.

trials seems a more direct solution than establishing an agency to manage release programs.

At present there are no available viable alternatives to preventive detention. This regulatory measure is only activated when "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. . . ."[116] It is clear that Congress expressly intended it as a last resort.

CONCLUSION

The Supreme Court has found that judicial predictions of criminal behavior are necessary and available in several contexts. It has also deferred to Congress in establishing matters of fact. Since there is no fundamental or constitutional right to bail,[117] the remaining issue is procedural due process. The provisions of § 3142 seek to assure that serious felons will stand trial.[118] The intent of Congress was not to punish the accused,[119] and the Act has a variety of procedural safeguards to accommodate the liberty interest.[120] Suspects in capital crimes or those who pose a risk of flight are denied bail. "If the government is justified in preventing flight, the same level of concern is evident in protecting the community from danger."[121]

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116. 18 U.S.C. § 3142(e).

117. *See supra* notes 26, 40-44 and accompanying text.

118. *See supra* notes 88-89 and accompanying text.

119. *See supra* note 39 and accompanying text.

120. *See supra* section III.

121. Jordan, *supra* note 98, at 295. The popularity of this concern for protecting the community from predictably dangerous detainees creates the likelihood that most states will enact similar statutes, now that the Supreme Court has favorably resolved the constitutionality of preventive detention under the Bail Reform Act of 1984. NAT'L L.J., June 8, 1987, at 5, col. 1.

APPENDIX § 3142. Release or detention of a defendant pending trial

(a) **In general.**—Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

(1) released on his personal recognizance or upon execution of an unsecured appearance bond, pursuant to the provisions of subsection (b);

(2) released on a condition or combination of conditions pursuant to the provisions of subsection (c);

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion pursuant to the provisions of subsection (d); or

(4) detained pursuant to the provisions of subsection (e).

(b) **Release on personal recognizance or unsecured appearance bond.**—The judicial officer shall order the pretrial release of the person on his personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of his release, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c) **Release on conditions.**—If the judicial officer determines that the release described in subsection (b) will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, he shall order the pretrial release of the person—

(1) subject to the condition that the person not commit a Federal, State, or local crime during the period of release; and

(2) subject to the least restrictive further condition, or combination of conditions, that he determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

(A) remain in the custody of a designated person, who agrees to supervise him and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(B) maintain employment, or, if unemployed, actively seek employment;

(C) maintain or commence an educational program;

(D) abide by specified restrictions on his personal associations, place of abode, or travel;

(E) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(F) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(G) comply with a specified curfew;

(H) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(I) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(J) undergo available medical or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(K) execute an agreement to forfeit upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court such indicia of ownership of the property or such percentage of the money as the judicial officer may specify;

(L) execute a bail bond with solvent sureties in such amount as is reasonably necessary to assure the appearance of the person as required;

(M) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(N) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

The judicial officer may not impose a financial condition that results in the pretrial detention of the person. The judicial officer may at any time amend his order to impose additional or different conditions of release.

(d) **Temporary detention to permit revocation of conditional release, deportation, or exclusion.**—If the judicial officer determines that—

(1) the person—

(A) is, and was at the time the offense was committed, on—

(i) release pending trial for a felony under Federal, State, or local law;

(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii) probation or parole for any offense under Federal, State, or local law; or

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 110(a)(20)); and

(2) the person may flee or pose a danger to any other person or the community;

he shall order the detention of the person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take the person into custody during that period, the person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B), the person has the burden of proving to the court that he is a citizen of the United States or is lawfully admitted for permanent residence.

(e) **Detention.**—If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that 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, he shall order the detention of the person prior to trial. In a case described in (f)(1), a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if the judge finds that—

(1) the person has been convicted of a Federal offense that is described in subsection (f)(1), or of a State or local offense that would have been an offense described in subsection (f)(1) if a circumstance giving rise to Federal jurisdiction had existed;

(2) the offense described in paragraph (1) was committed while the person was on release pending trial for a Federal, State, or local offense; and

(3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1), whichever is later.

Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Im-

port and Export Act (21 U.S.C. 951 et seq.), section 1 of the Act of September 15, 1980 (21 U.S.C. 955a), or an offense under section 924(c) of title 18 of the United States Code.

(f) Detention hearing.—The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) will reasonably assure the appearance of the person as required and the safety of any other person and the community in a case—

(1) upon motion of the attorney for the Government, that involves—

(A) a crime of violence;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); or

(D) any felony committed after the person had been convicted of two or more prior offenses described in subparagraphs (A) through (C), or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) if a circumstance giving rise to Federal jurisdiction had existed; or

(2) Upon motion of the attorney for the Government or upon the judicial officer's own motion, that involves—

(A) a serious risk that the person will flee;

(B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days. During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the Government or on his own motion, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether he is an addict. At the hearing, the person has the right to be represented by counsel, and, if he is financially unable to obtain adequate representation, to have counsel appointed for him. The person shall be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine

witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing.

(g) **Factors to be considered.**—The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
(2) the weight of the evidence against the person;
(3) the history and characteristics of the person, including—
(A) his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
(B) whether, at the time of the current offense or arrest, he was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(2)(K) or (c)(2)(L), the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

(h) **Contents of release order.**—In a release order issued pursuant to the provisions of subsection (b) or (c), the judicial officer shall—

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and
(2) advise the person of—
(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(C) the provisions of sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim, or an informant), and 1513 (retaliating against a witness, victim, or an informant).

(i) **Contents of detention order.**—In a detention order issued pursuant to the provisions of subsection (e), the judicial officer shall—

(1) include written findings of fact and a written statement of the reasons for the detention;

(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

(3) direct that the person be afforded reasonable opportunity for private consultation with his counsel; and

(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

(j) **Presumption of innocence.**—Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

18 U.S.C. §§ 3141-50 (Supp. II 1984).