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## Eighth Amendment--Pretrial Detention: What Will Become of the Innocent

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## EIGHTH AMENDMENT—PRETRIAL DETENTION: WHAT WILL BECOME OF THE INNOCENT?

United States v. Salerno, 107 S. Ct. 2095 (1987).

### I. INTRODUCTION

The Bail Reform Act of 1984<sup>1</sup> provides, *inter alia*, that certain defendants may be detained without bail pending trial when a judicial officer has held an adversarial hearing and determined, on the basis of clear and convincing evidence, that "no condition or combination of conditions [of bail] will reasonably assure . . . the safety of any other person and the community . . . ."<sup>2</sup> In *United States v. Salerno*,<sup>3</sup> the United States Supreme Court held that pretrial detention without bail on the grounds of dangerousness violates neither the fifth<sup>4</sup> nor eighth amendment<sup>5</sup> to the United States Constitution. This Note summarizes the opinions of the Court in *Salerno* and criticizes the majority's analysis and conclusions. This Note then discusses whether and at what point extended pretrial detention becomes punitive and therefore unconstitutional. This Note concludes that only by strictly limiting the length of detention can the Bail Reform Act be administered efficiently and fairly.

### II. FACTUAL BACKGROUND AND OPINIONS BELOW

Anthony Salerno and Vincent Cafaro were arrested on March 21, 1986, after being named defendants in a twenty-nine-count indictment which alleged their leadership participation in the Genovese Organized Crime Family of La Cosa Nostra.<sup>6</sup> At their arraignment, the government moved for the pretrial detention of Salerno and Cafaro without bail pursuant to the Bail Reform Act of

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<sup>1</sup> 18 U.S.C. §§ 3041-43, 3062, 3141-50, 3154, 3156, 3731, 3772, 4282 (1985).

<sup>2</sup> 18 U.S.C. § 3142(e) (1985).

<sup>3</sup> 107 S. Ct. 2095 (1987).

<sup>4</sup> The fifth amendment to the United States Constitution provides, in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

<sup>5</sup> The eighth amendment to the United States Constitution provides, in part: "Excessive bail shall not be required . . . ." U.S. CONST. amend. VIII.

<sup>6</sup> *United States v. Salerno*, 107 S. Ct. 2095, 2099 (1987).

1984.<sup>7</sup>

At the hearing on the government's motion for pretrial detention before the United States District Court for the Southern District of New York, the government proffered evidence that Salerno and Cafaro were leaders of the Genovese family and that they had engaged in and conspired to engage in various criminal activities.<sup>8</sup> The allegations of criminal activity included mail and wire fraud, extortion, and gambling offenses, as well as numerous racketeering activities, including conspiracy to commit murder.<sup>9</sup> The government's evidence consisted mainly of tape recordings gathered through court-ordered electronic surveillance of the defendants and their associates.<sup>10</sup> The recordings detailed the defendants' positions in the Genovese family, as well as their participation in various violent criminal conspiracies.<sup>11</sup> In addition, the government proffered the testimony of witnesses who would testify to Salerno's role in two murder conspiracies.<sup>12</sup> In resistance to the motion, Salerno offered character witnesses and a letter from his physician attesting to his poor health; Cafaro offered no evidence but argued that the wiretap conversations were no more than "tough talk."<sup>13</sup> Finding that no condition or combination of conditions would reasonably assure the safety of the community, the district judge ordered the defendants detained without bail pending trial.<sup>14</sup>

Salerno and Cafaro appealed the order of detention to the United States Court of Appeals for the Second Circuit, arguing both statutory<sup>15</sup> and constitutional grounds for reversal.<sup>16</sup> The court quickly rejected both of the defendants' statutory arguments and a

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* The opinion of the district court in *United States v. Salerno* is reported at 631 F. Supp. 1364 (S.D.N.Y. 1986).

<sup>15</sup> *United States v. Salerno*, 794 F.2d 64, 69-71 (2d Cir. 1986). The defendants argued, first, that the electronic surveillance evidence was wrongly admitted into evidence by the trial court in contravention of 18 U.S.C. § 2518(9) (1985) (requiring party against whom intercepted communications will be offered to be provided a copy of the documentation which authorized the interception not less than ten days before the proceeding); and second, that the evidence was insufficient to support a finding of dangerousness under 18 U.S.C. § 3142 (1985) (requiring government to prove facts in support of allegation of dangerousness by clear and convincing evidence).

<sup>16</sup> *Salerno*, 794 F.2d at 71. See *infra* notes 18-28 and accompanying text (analyzing the defendants' constitutional arguments).

jurisdictional challenge by the government.<sup>17</sup> Then, the court addressed the defendants' argument that insofar as it authorized incarceration based on dangerousness, pretrial detention under the Bail Reform Act was an unconstitutional deprivation of liberty without due process of law.<sup>18</sup> The government argued that although pretrial detention on the grounds of dangerousness could not be upheld as a punishment, it was constitutional as a regulatory measure to further the compelling government interest in public safety.<sup>19</sup> Over a dissent,<sup>20</sup> the second circuit held that even if limited pretrial detention was a regulatory measure imposed solely to protect the public from dangerous persons, such detention violated the due process clause of the fifth amendment.<sup>21</sup>

In reaching its conclusion, the court of appeals reasoned that the mere "lodging of [criminal] charges" against a person could not constitutionally enable the government to deprive that person of liberty.<sup>22</sup> The court observed that neither unindicted citizens nor convicted criminals who had served their sentences could be imprisoned in anticipation of future crimes.<sup>23</sup> In all three instances, the court concluded, preventive detention would violate "the constitutional imperative that incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes."<sup>24</sup> The court distinguished *Schall v. Martin*,<sup>25</sup> in which the United States Supreme Court upheld the brief detention of juvenile offenders as a regulatory measure, on the grounds that juveniles have a lesser interest in liberty than adults.<sup>26</sup> The court asserted that unlike the liberty of competent adults, the liberty of juveniles

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<sup>17</sup> *Salerno*, 794 F.2d at 68-69. The government argued that the defendants' notices of appeal were not timely filed.

<sup>18</sup> *Id.* at 71.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 75. (Feinberg, C.J., dissenting). Chief Judge Feinberg would have upheld the constitutionality of the Bail Reform Act's pretrial detention provisions where the detention was limited to periods too short to be considered punitive.

<sup>21</sup> *Id.* at 71. The majority of the court held the detention unconstitutional without regard to its duration. *Cf. id.* at 75. (Feinberg, C.J., dissenting) (pretrial detention unconstitutional only when unduly prolonged). All members of the court agreed that pretrial detention without bail is constitutional if the accused threatens to flee the jurisdiction or threatens to tamper with or intimidate witnesses or jurors. *Id.* at 71; *id.* at 76 (Feinberg, C.J., dissenting).

<sup>22</sup> *Id.* at 72-73.

<sup>23</sup> *Id.* at 73.

<sup>24</sup> *Id.* at 72 (quoting *United States v. Melendez-Carrion*, 790 F.2d 984, 1001 (2d Cir. 1986)).

<sup>25</sup> 467 U.S. 253 (1984).

<sup>26</sup> *Salerno*, 794 F.2d at 74.

may sometimes be "subordinated to the State's "'*parens patriae* interest in preserving and promoting the welfare of the child.'"<sup>27</sup> Finding pretrial detention on the grounds of dangerousness unconstitutional, the court of appeals remanded the matter to the district court for the setting of conditions of bail.<sup>28</sup>

### III. THE OPINIONS OF THE UNITED STATES SUPREME COURT

#### A. THE MAJORITY OPINION

The United States Supreme Court reversed the Court of Appeals for the Second Circuit and upheld the facial constitutionality of the pretrial detention provisions of the Bail Reform Act.<sup>29</sup> Chief Justice Rehnquist authored the majority opinion, in which Justices White, Blackmun, Powell, O'Connor, and Scalia joined.<sup>30</sup> Noting that a successful facial constitutional challenge to a legislative act requires that the challenger prove the act unconstitutional in every circumstance, the Chief Justice addressed the respondents' fifth and eighth amendment challenges to the Bail Reform Act in turn.<sup>31</sup>

Examining the Act in light of the due process clause of the fifth amendment,<sup>32</sup> the Court first considered the respondents' argument that pretrial detention constituted an impermissible punishment before trial.<sup>33</sup> Citing *Bell v. Wolfish*<sup>34</sup> for the proposition that not all detention is punishment, the Court applied a three-part test to determine whether the restriction on liberty authorized by the Act was punitive or regulatory. First, the Court looked to the legislative intent of the Act.<sup>35</sup> The Court determined that if Congress had intended to punish pretrial detainees, the Act would be unconstitutional.<sup>36</sup> Next, if no punitive intent was expressed by Congress, the Court would determine "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

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<sup>27</sup> *Id.* (quoting *Schall v. Martin*, 467 U.S. 253, 265 (1984)(quoting *Santowsky v. Kramer*, 455 U.S. 745, 766 (1982))).

<sup>28</sup> *Id.*

<sup>29</sup> *Salerno*, 107 S. Ct. at 2098.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 2100-01.

<sup>32</sup> "No person shall . . . be deprived of life, liberty, or property without due process of law . . ." U.S. CONST. amend. V.

<sup>33</sup> *Salerno*, 107 S. Ct. at 2101.

<sup>34</sup> 441 U.S. 520, 540 (1979)(holding that imposition of conditions necessary to maintain security of detention facility was not punishment as to persons detained pretrial on grounds of risk of flight).

<sup>35</sup> *Salerno*, 107 S. Ct. at 2101.

<sup>36</sup> *Id.*

purpose assigned [to it].'<sup>37</sup> If the restriction related to a permissible alternative purpose and was not excessive, and no punitive intent was shown, then the restriction authorized by the Act would be deemed regulatory.<sup>38</sup>

Applying this test, the Court concluded that no punitive congressional intent was shown and that pretrial detention constituted a permissible regulation which was not excessive in relation to the goal sought to be achieved.<sup>39</sup> In support of its conclusion, the Court cited the legislative history of the Bail Reform Act to determine congressional intent,<sup>40</sup> and compared the goals and procedures of the Act to those found permissible in *Schall v. Martin*<sup>41</sup> to determine whether the Act was a rational and not excessive means of achieving a permissible regulatory goal.<sup>42</sup> The Court affirmed its earlier opinion that protecting the community from dangerous persons is a legitimate regulatory goal and observed that the goals and procedures of the Act were comparable to those approved in *Schall*.<sup>43</sup> The Court found, therefore, that the pretrial detention provisions of the Bail Reform Act are regulatory in nature.<sup>44</sup>

Having established the regulatory nature of the Act, the Court continued its analysis by demonstrating that the government's interest in detaining certain individuals can sometimes outweigh the liberty interest of those individuals.<sup>45</sup> The Court pointed out that consistent with the Constitution, dangerous individuals have been detained in times of war<sup>46</sup> or insurrection;<sup>47</sup> pending deportation proceedings;<sup>48</sup> where the person is mentally unstable<sup>49</sup> or incompetent to stand trial;<sup>50</sup> where the person is a juvenile;<sup>51</sup> pending determination of probable cause to arrest;<sup>52</sup> and where an arrestee

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<sup>37</sup> *Id.* (quoting *Schall v. Martin*, 467 U.S. 253, 269 (1984)(quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963))).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (citing S. REP. No. 225, 98th Cong., 1st Sess. 8 (1983)("[P]retrial detention is not intended to promote the traditional aims of punishment such as retribution or deterrence . . .").

<sup>41</sup> 467 U.S. 253 (1984)(upholding brief detention of juveniles).

<sup>42</sup> *Salerno*, 107 S. Ct. at 2101-02.

<sup>43</sup> *Id.* at 2101.

<sup>44</sup> *Id.* at 2102.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (citing *Ludecke v. Watkins*, 335 U.S. 160 (1948)).

<sup>47</sup> *Id.* (citing *Moyer v. Peabody*, 212 U.S. 78 (1909)).

<sup>48</sup> *Id.* (citing *Carlson v. Landon*, 342 U.S. 524 (1952)).

<sup>49</sup> *Id.* (citing *Addington v. Texas*, 441 U.S. 418 (1979)).

<sup>50</sup> *Id.* (citing *Jackson v. Indiana*, 406 U.S. 715 (1972)).

<sup>51</sup> *Id.* (citing *Schall v. Martin*, 467 U.S. 253 (1984)).

<sup>52</sup> *Id.* (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975)).

threatens to flee the jurisdiction or jeopardize the trial process by threatening witnesses.<sup>53</sup> The Court stated that it would evaluate the pretrial detention provisions of the Bail Reform Act in "precisely the same manner that [it had] evaluated the laws in the cases discussed above."<sup>54</sup> Thus, the Court determined to weigh the governmental interest sought to be advanced, in light of the procedures used, against the liberty interests of the individuals detained.<sup>55</sup>

Describing the government's interest in crime prevention as "legitimate and compelling,"<sup>56</sup> the Court reasoned that the interest in preventing crimes by adult arrestees could be no less compelling than the interest in juvenile crime prevention approved in *Schall*.<sup>57</sup> Because the Bail Reform Act detained only persons accused of specified serious crimes and only after an adversarial hearing, allowing this detention would be less radical than allowing the detention in *Schall*.<sup>58</sup> Chief Justice Rehnquist noted Congress' finding that the persons who would be affected by pretrial detention are extraordinary risks to the community after arrest.<sup>59</sup> The Court concluded that the state's interest in minimizing the risk of pretrial crime, tempered by the procedural safeguards afforded by the Act, outweighs the liberty interest of those individuals who would be detained under the Act.<sup>60</sup> The Court held that the Act, therefore, did not violate the due process clause of the fifth amendment.<sup>61</sup>

Next, the Court considered the respondents' argument that pretrial detention under the Bail Reform Act violates the excessive bail clause of the eighth amendment.<sup>62</sup> The respondents relied on *Stack v. Boyle*,<sup>63</sup> in which the Court held that twelve persons accused

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<sup>53</sup> *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 2102-03.

<sup>56</sup> *Id.* at 2102 (citing *De Veau v. Braisted*, 363 U.S. 144, 155 (1960)).

<sup>57</sup> *Id.* at 2103 (citing *Schall v. Martin*, 467 U.S. 253 (1984)).

<sup>58</sup> *Id.* The *Salerno* Court explained that the statute upheld in *Schall* allowed detention of any juvenile arrested on any charge after a showing of possible dangerousness, whereas the Bail Reform Act focused on a more specific group of individuals who are accused of a specific group of offenses.

<sup>59</sup> *Salerno*, 107 S. Ct. at 2103 (citing S. REP. NO. 225, 98th Cong., 1st Sess. 6-7 (1983) (noting study indicating that approximately one out of every six defendants is rearrested during pretrial period. Lazar Institute, *Pretrial Release: An Evaluation of Defendant Outcomes and Program Impact* 48 (Washington, D.C., August 1981))).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* The Court held that the Act, on its face, comported with both substantive and procedural due process.

<sup>62</sup> *Id.* at 2104. The eighth amendment to the United States Constitution provides, in part: "Excessive bail shall not be required . . ." U.S. CONST. amend. VIII.

<sup>63</sup> 342 U.S. 1 (1951).

of violating the Smith Act<sup>64</sup> were entitled to a bail hearing at which reasonable bail must be set. The respondents argued that under *Stack*, the eighth amendment guaranteed them the right to bail set at an amount no higher than calculated to ensure their presence at trial.<sup>65</sup> Because pretrial detention without bail was, effectively, infinite bail set without regard to the risk of flight, the respondents contended that pretrial detention must be excessive bail which is prohibited by the eighth amendment.<sup>66</sup> This argument was grounded on the proposition that the sole purpose of bail is to maintain the viability of the trial process.<sup>67</sup> Consistent with this purpose, the respondents argued that bail could be refused only if the defendant threatens to flee the jurisdiction or otherwise impede the trial process by threatening witnesses or jurors.<sup>68</sup>

Characterizing the *dicta* in *Stack* as "far too slender a reed on which to rest this argument,"<sup>69</sup> the majority agreed that the primary purpose of bail is to protect the trial process by ensuring the defendant's appearance at a fair trial.<sup>70</sup> The Court, however, rejected "the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release."<sup>71</sup> The Court found, first, that the excessive bail clause in itself does not guarantee that any bail shall be available;<sup>72</sup> second, that the right to bail clearly is not absolute;<sup>73</sup> and third, that the *Stack* court was faced with a differ-

<sup>64</sup> 18 U.S.C. § 2385 (1985). The Smith Act of 1940 makes it a criminal offense to advocate the overthrow of the government of the United States.

<sup>65</sup> *Salerno*, 107 S. Ct. at 2104. In its discussion, the *Stack* Court wrote:

From the passage of the Federal Judiciary Act of 1789 . . . federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning. . . . Bail set at a figure higher than an amount reasonably calculated to [assure the defendant's presence at trial] . . . is "excessive" under the Eighth Amendment.

*Stack*, 342 U.S. at 4-5 (emphasis in original)(citations omitted).

<sup>66</sup> *Salerno*, 107 S. Ct. at 2104.

<sup>67</sup> *Id.* See, e.g., Tribe, *An Ounce Of Detention: Preventive Justice In The World Of John Mitchell*, 56 U. VA. L. REV. 371, 376-78 (1970)(arguing that because common law prescribed death as punishment for even non-violent criminals, accused persons had great incentive to flee; traditional denial of bail in capital cases, therefore, must be understood as a means of preventing the defendant's flight and not as a means of preventing other crimes).

<sup>68</sup> *Salerno*, 107 S. Ct. at 2104.

<sup>69</sup> *Id.* See *supra* note 65 (quoting *Stack dicta*).

<sup>70</sup> *Salerno*, 107 S. Ct. at 2104.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*



ent question than that presented in this case.<sup>74</sup> The Court cited *Carlson v. Landon*<sup>75</sup> as more on point.<sup>76</sup> In *Carlson*, the Court held that resident aliens who were thought to be communists could be detained without bail pending a determination of deportability.<sup>77</sup> Assuming without deciding that Congress is limited in its power to defineailable offenses, the *Salerno* Court held that the Bail Reform Act is constitutional because pretrial detention is not excessive in relation to the government interest in protecting the community.<sup>78</sup> The Bail Reform Act, therefore, does not on its face violate the excessive bail clause of the eighth amendment or the due process clause of the fifth amendment.

#### B. JUSTICE MARSHALL'S DISSENT

Justice Marshall wrote a four-part dissenting opinion in which Justice Brennan joined.<sup>79</sup> The dissent struck out at the majority opinion as "consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state."<sup>80</sup>

In Part I, the dissent argued that this case should be dismissed for lack of a "live case or controversy" as required by Article III of the Constitution.<sup>81</sup> Salerno had been sentenced to 100 years imprisonment on charges unrelated to the charges in this prosecution prior to the oral argument of this case before the Court.<sup>82</sup> The dissent concluded that Salerno's case was moot, therefore, and outside the jurisdiction of the Court.<sup>83</sup> Similarly, Cafaro had been released

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<sup>74</sup> *Id.* (construing *Stack v. Boyle*, 342 U.S. 1 (1951)). The *Salerno* Court characterized the question in *Stack* as being whether bail set at an amount greater than necessary to ensure the defendants' presence at trial was permissible where the statute under which the defendants were arrested specifically allowed bail.

<sup>75</sup> 342 U.S. 524 (1952).

<sup>76</sup> *Salerno*, 107 S. Ct. at 2104.

<sup>77</sup> *Carlson*, 342 U.S. at 544. The defendants in *Carlson* were accused of advocating the overthrow of the government in violation of the Internal Security Act of 1950, 18 U.S.C. § 793 (1985), by virtue of their membership in the Communist Party of the United States.

<sup>78</sup> *Salerno*, 107 S. Ct. at 2105. The Court said that the only arguable substantive limitation on Congress's power to regulate bail is that the scheme not be excessive in relation to its goal. *Id.*

<sup>79</sup> *Id.* at 2105 (Marshall, J., dissenting).

<sup>80</sup> *Id.* at 2106 (Marshall, J., dissenting).

<sup>81</sup> *Id.* at 2107 (Marshall, J., dissenting)(quoting *Burke v. Barnes*, 107 S. Ct. 734, 736 (1987)). Article III of the United States Constitution provides, in part: "The judicial power shall extend . . . to *Controversies* to which the United States shall be a party . . ." U.S. CONST. art. III, § 2 (emphasis added).

<sup>82</sup> Salerno was sentenced to 100 years imprisonment on January 13, 1987. *Salerno*, 107 S. Ct. at 2106 (Marshall, J., dissenting). This case was argued January 21, 1987. *Id.* at 2095.

<sup>83</sup> *Id.* at 2106 (Marshall, J., dissenting).

on a \$1,000,000 personal recognizance bond in exchange for his assistance as a cooperating witness even before the petition for certiorari was granted in this case.<sup>84</sup> Notwithstanding a contrary order of the district court entered in what the dissent characterized as a "vain attempt" to keep the controversy alive,<sup>85</sup> the dissent concluded that the government did not need a pretrial detention order to incarcerate Salerno and had already voluntarily released Cafaro on a bond.<sup>86</sup> Thus, the dissent concluded that both cases should have been dismissed for want of a "live case or controversy."<sup>87</sup>

In Part II of his dissent, Justice Marshall criticized the majority's division of the respondents' "unitary argument" involving the fifth and eighth amendments into two distinct halves.<sup>88</sup> In Justice Marshall's opinion, the division of the argument into separate analyses of the fifth and eighth amendment issues enabled the majority to attack the parts of the respondents' argument without facing the whole.<sup>89</sup> In so doing, the majority avoided the pith of the issue—whether the fifth and eighth amendments together prescribe any substantive limit on the power of Congress to regulate pretrial release.<sup>90</sup>

Justice Marshall continued his criticism of the majority's "false dichotomy" by pointing out the logical inadequacy of the Court's due process argument.<sup>91</sup> The dissent argued that a finding that pretrial detention is a reasonable means of protecting the community from dangerous persons does not support the conclusion that pretrial detention is regulatory, as opposed to punitive, or constitutional, even if regulatory.<sup>92</sup> To illustrate the untenability of the majority's position, Justice Marshall extended the majority's logic to a hypothetical case.<sup>93</sup> In the hypothetical, Congress finds that much violent crime is committed by unemployed persons, and that much violent crime is committed at night.<sup>94</sup> In response, Congress declares that after a judicial proceeding, anyone who is found to be

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<sup>84</sup> *Id.* at 2106-07 (Marshall, J., dissenting). Cafaro was released October 9, 1986. *Id.* at 2106 (Marshall, J., dissenting). The Solicitor General's petition for certiorari was not granted until November 3, 1986. *United States v. Salerno*, 107 S. Ct. 397 (1986).

<sup>85</sup> *Salerno*, 107 S. Ct. at 2106 n.1 (Marshall, J., dissenting).

<sup>86</sup> *Id.* at 2107 (Marshall, J., dissenting).

<sup>87</sup> *Id.* (Marshall, J., dissenting).

<sup>88</sup> *Id.* (Marshall, J., dissenting).

<sup>89</sup> *Id.* (Marshall, J., dissenting).

<sup>90</sup> *Id.* at 2109 (Marshall, J., dissenting).

<sup>91</sup> *Id.* at 2107 (Marshall, J., dissenting).

<sup>92</sup> *Id.* at 2108 (Marshall, J., dissenting).

<sup>93</sup> *Id.* (Marshall, J., dissenting).

<sup>94</sup> *Id.* (Marshall, J., dissenting).

unemployed may be subjected to a dusk-to-dawn curfew.<sup>95</sup> Because the curfew is not intended as punishment and is a rational response to the legitimate regulatory goal of fighting crime, Justice Marshall concluded that the majority's due process analysis would validate the curfew.<sup>96</sup> The dissent characterized such a conclusion as "absurd," and warned that under the majority's analysis the government could reclothe any punitive scheme in regulatory justifications and thereby make it constitutional.<sup>97</sup> Protesting that the due process clause protects substantive rights other than the right to be free from punishment,<sup>98</sup> the dissent dismissed the majority's due process argument as "an exercise in obfuscation."<sup>99</sup>

Turning to the eighth amendment issues, the dissent rejected the "sophistry" embedded in the majority's conclusion that although the eighth amendment prohibits the setting of excessive bail, it does not prohibit the setting of no bail whatsoever.<sup>100</sup> In either case, the effect is the same—continued incarceration for the defendant.<sup>101</sup> The dissent criticized the majority's implicit suggestion that the excessive bail clause applies to the judiciary but not to the legislature, and argued that the eighth amendment applies equally to Congress and to the courts.<sup>102</sup> Justice Marshall reasoned that because a judge cannot legally circumvent the Constitution's prohibition of excessive bail simply by refusing bail, neither can Congress.<sup>103</sup>

In Part III of his dissent, Justice Marshall set forth his view of the proper, limited place for pretrial detention in our constitutional system. First, the dissent noted the many cases that have recognized the presumption of innocence as an "axiomatic and elementary" principle inherent in the due process clause of the fifth amendment.<sup>104</sup> In the dissent's view, the presumption of innocence is a substantive limit on the legislature's power to regulate pretrial release.<sup>105</sup> Justice Marshall pointed out the irony that the language of

<sup>95</sup> *Id.* (Marshall, J., dissenting).

<sup>96</sup> *Id.* (Marshall, J., dissenting).

<sup>97</sup> *Id.* (Marshall, J., dissenting).

<sup>98</sup> *Id.* at 2109-10 (Marshall, J., dissenting). In Justice Marshall's view, the due process clause also protects the individual's substantive right to be presumed innocent of crime until proven guilty beyond a reasonable doubt.

<sup>99</sup> *Id.* at 2108 (Marshall, J., dissenting).

<sup>100</sup> *Id.* (Marshall, J., dissenting).

<sup>101</sup> *Id.* (Marshall, J., dissenting).

<sup>102</sup> *Id.* at 2109 (Marshall, J., dissenting).

<sup>103</sup> *Id.* (Marshall, J., dissenting).

<sup>104</sup> *Id.* (Marshall, J., dissenting)(quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

<sup>105</sup> *Id.* (Marshall, J., dissenting).

the Bail Reform Act affirms the presumption of innocence while the majority opinion abolishes it in practice.<sup>106</sup> To demonstrate how the majority's approval of the Act abolishes the presumption of innocence, Justice Marshall hypothesized a defendant who, despite a pretrial finding of dangerousness, had been acquitted at trial.<sup>107</sup> The government, of course, could not detain such a person after the trial on the grounds of dangerousness, because that would entail imprisonment for crimes not proven beyond a reasonable doubt.<sup>108</sup> Reasoning that the presumption of innocence means that "the defendant is as innocent on the day before his trial as he is on the morning after his acquittal,"<sup>109</sup> Justice Marshall concluded that pretrial preventive detention cannot be constitutional unless the constitutionally-rooted presumption of innocence is disregarded. "Under this statute," Justice Marshall wrote,

[a]n untried indictment somehow acts to permit a detention, based on other charges, which after an acquittal would be unconstitutional. The conclusion is inescapable that the indictment has been turned into evidence, if not that the defendant is guilty of the crime charged, then that left to his own devices he will soon be guilty of something else. "If it suffices to accuse, what will become of the innocent?"<sup>110</sup>

Turning again to the eighth amendment excessive bail clause, the dissent acknowledged that pretrial detention without bail is constitutional in the traditional cases.<sup>111</sup> The dissent, therefore, approved of pretrial detention without bail to ensure the defendant's initial appearance before a magistrate or to prevent the defendant from undermining the trial process by fleeing the jurisdiction or by threatening witnesses or jurors.<sup>112</sup> In Justice Marshall's view, however, these exceptional deprivations of liberty are acceptable only as means necessary to protect the trial process.<sup>113</sup> Because pretrial detention authorized by the Bail Reform Act has no relation to the

<sup>106</sup> *Id.* (Marshall, J., dissenting). Subsection 3142(j) of the Bail Reform Act provides that "[n]othing in this section shall be construed as modifying or limiting the presumption of innocence." 18 U.S.C. § 3142(j) (1985).

<sup>107</sup> *Salerno*, 107 S. Ct. at 2110 (Marshall, J., dissenting).

<sup>108</sup> *Id.* (Marshall, J., dissenting).

<sup>109</sup> *Id.* (Marshall, J., dissenting).

<sup>110</sup> *Id.* (Marshall, J., dissenting)(quoting *Coffin v. United States*, 156 U.S. 432, 455 (1895)(quoting Ammianus Marcellinus, *Rerum Gesterum Libri Qui Supersunt*, L. XVIII, c. 1, A.D. 359)).

<sup>111</sup> *Id.* (Marshall, J., dissenting). See also *supra* notes 46-53 and accompanying text (listing circumstances under which denial of bail is traditionally approved).

<sup>112</sup> 107 S. Ct. at 2110-11 (Marshall, J., dissenting).

<sup>113</sup> *Id.* at 2111 (Marshall, J., dissenting). Justice Marshall also noted that the majority offered no authority "for the proposition that bail has traditionally been denied *prospectively*, upon speculation that witnesses would be tampered with." *Id.* at n.7 (Marshall, J., dissenting)(emphasis in original).

governments's interest in protecting that process, Justice Marshall concluded that the interests served by such detention cannot properly be considered in the Court's excessive bail clause analysis.<sup>114</sup>

Finally, Part IV of the dissent criticized the government's self-serving abuse of the Bail Reform Act embodied in the release of Cafaro as a cooperating witness. Cafaro had been detained at the government's request and had been characterized, before he agreed to cooperate, as too dangerous to be released.<sup>115</sup> Justice Marshall submitted that this "peculiar" turn of events served as an "eloquent demonstration of the coercive power of authority to imprison upon prediction, [and] of the dangers which the almost inevitable abuses pose to the cherished liberties of a free society."<sup>116</sup> Admitting that the preservation of liberty is often a difficult<sup>117</sup> and costly task,<sup>118</sup> Justice Marshall concluded by noting that the Constitution can shelter society from unchecked government power only if society has "the courage, and the self-restraint, to protect [itself]" by steadfastly maintaining the liberties of even those persons who are believed to be guilty.<sup>119</sup>

### C. JUSTICE STEVENS' DISSENT

In a three-paragraph dissent, Justice Stevens agreed with Justice Marshall that pretrial detention under the Bail Reform Act is unconstitutional.<sup>120</sup> In addition to agreeing that the case should be dismissed for want of a live case or controversy,<sup>121</sup> Justice Stevens also agreed that pretrial detention on the basis of future dangerousness is inconsistent with the presumption of innocence protected by the fifth amendment and is violative of the excessive bail clause of the eighth amendment.<sup>122</sup> Justice Stevens, however, reserved judgment on the broader question of whether preventive detention for

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<sup>114</sup> *Id.* at 2111 (Marshall, J., dissenting).

<sup>115</sup> *Id.* (Marshall, J., dissenting).

<sup>116</sup> *Id.* (Marshall, J., dissenting).

<sup>117</sup> *Id.* (Marshall, J., dissenting). Justice Marshall noted that the protection of liberty is made more difficult because "the safeguards of liberty [must] frequently [be] forged in controversies involving not very nice people." (quoting *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting)). *Rabinowitz* was subsequently overruled by *Chimel v. California*, 395 U.S. 752, 768 (1969).

<sup>118</sup> 107 S. Ct. at 2112 (Marshall, J., dissenting). Justice Marshall's reference to the social costs of pretrial liberty for defendants like Salerno and Cafaro apparently refers to the risk that such defendants may, in fact, commit crimes that would have been prevented by pretrial detention.

<sup>119</sup> *Id.* (Marshall, J., dissenting).

<sup>120</sup> *Id.* at 2112 (Stevens, J., dissenting).

<sup>121</sup> *Id.* at 2113 (Stevens, J., dissenting).

<sup>122</sup> *Id.* at 2112 (Stevens, J., dissenting).

reasons other than those approved by Justice Marshall can ever be constitutional.<sup>123</sup>

#### IV. DISCUSSION

In *United States v. Salerno*,<sup>124</sup> the Supreme Court affirmed the constitutionality of a statute which violates the fifth amendment by imposing punishment without an adjudication of guilt. In approving the Bail Reform Act, the Court abandoned common sense, strained precedent, and ignored the great weight of sociological data that dooms the fair and effective use of pretrial detention. Likewise, the Court's eighth amendment analysis insufficiently weighed the traditional role of bail in American criminal law and contradicted the common sense import of the excessive bail clause. Essentially, the decision unjustly sacrificed the individual's right to be presumed innocent to the government's interest in pretrial detention.

##### A. THE PUNITIVE EFFECT OF PRETRIAL DETENTION

In concluding that pretrial detention under the Bail Reform Act is not punitive, the Court defied the common sense understanding of what it means to be punished. Common sense counsels that imprisonment for an extended period of time is punishment.<sup>125</sup> Although "regulatory"<sup>126</sup> is an innocuous label for depriving presumptively innocent citizens of their liberty, an innocuous label is no consolation for the person swept into the nation's penal system without the benefit of a trial.<sup>127</sup>

It is well established that punishment without adjudication of guilt beyond a reasonable doubt violates the due process clause of

<sup>123</sup> *Id.* (Stevens, J., dissenting).

<sup>124</sup> 107 S. Ct. 2095.

<sup>125</sup> *United States v. Edwards*, 430 A.2d 1321, 1368 (D.C. 1981)(Mack, J., dissenting), *cert. denied*, 455 U.S. 1022 (1982).

<sup>126</sup> The *Salerno* Court held that imprisonment imposed for the regulatory purpose of protecting the community does not violate the fifth amendment. *Salerno*, 107 S. Ct. at 2101-02.

<sup>127</sup> Although the Act provides that the defendant should be detained separately from convicted criminals where possible, it is doubtful whether that goal can be achieved. Note, *The Loss of Innocence: Preventive Detention Under The Bail Reform Act of 1984*, 22 AM. CRIM. L. REV. 805, 818 (1985)(nonexistence of separate facilities or overcrowding of facilities is likely to frustrate separation of prisoners and detainees)[hereinafter Note, *The Loss of Innocence*]; Note, *Preventive Detention and United States v. Edwards: Burdening the Innocent*, 32 AM. U.L. REV. 191, 205 n.101 (1982)(virtually impossible to achieve separation of detainees from convicts)[hereinafter Note, *Burdening the Innocent*].

the fifth amendment.<sup>128</sup> Although the government may temporarily detain a person without an adjudication of guilt for a legitimate regulatory purpose,<sup>129</sup> neither legislative intent nor description of the detention as regulatory will validate the detention if its effect or similarity to traditional punishment make the sanction punitive.<sup>130</sup> A fair reading of precedent confirms that the pretrial detention authorized by the Bail Reform Act is punitive and therefore unconstitutional.

In *Kennedy v. Mendoza-Martinez*,<sup>131</sup> the Supreme Court announced a comprehensive test for distinguishing regulatory from punitive sanctions. In that case, the Court struck down a statutory scheme which automatically divested an American of citizenship for remaining outside the United States in order to avoid wartime military service.<sup>132</sup> The Court held that depriving a person of citizenship is punishment.<sup>133</sup> Because this punishment was imposed without trial, the statutory scheme was unconstitutional.<sup>134</sup> The *Mendoza-Martinez* Court reviewed the cases in which the Court had distinguished punitive from regulatory sanctions and summarized them in a multi-factor test.<sup>135</sup> The Court announced that if Congress did not express a punitive intent in prescribing the sanction, then the distinction turns on:

[W]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .<sup>136</sup>

According to this test, if no punitive congressional intent is mani-

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<sup>128</sup> *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979); *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977); *In re Winship*, 397 U.S. 358, 364 (1970).

<sup>129</sup> *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975)(upholding detention for limited time necessary for administrative steps incident to arrest); *United States v. Melendez-Carrion*, 790 F.2d 984, 1002 (2d Cir. 1986)(holding that “[p]retrial detention to avoid undue risk of flight or jeopardy to the trial process is not prohibited by a constitutional scheme that relies on the trial process to determine guilt and enforce the criminal law.”).

<sup>130</sup> *In re Gault*, 387 U.S. 1, 27 (1967); *Trop v. Dulles*, 356 U.S. 86, 94-95 (1958); *United States v. Lovett*, 328 U.S. 303, 315 (1946).

<sup>131</sup> 372 U.S. 144 (1963).

<sup>132</sup> *Id.* at 167.

<sup>133</sup> *Id.* at 165.

<sup>134</sup> *Id.* at 167.

<sup>135</sup> *Id.* at 168-69.

<sup>136</sup> *Id.* (citations omitted)(emphasis in original).

fest, each factor in the test is to be weighed.<sup>137</sup> The test shows that the *Mendoza-Martinez* Court prescribed an objective review of the operation of a sanction and its effect on the defendant.<sup>138</sup> This analysis goes beyond a mere search for a rational connection between the sanction and its end. The perspective of the defendant must be considered as well. If a "regulatory" sanction is so similar to punishment as to appear indistinguishable in its effect to the objective observer, the sanction should be considered punitive regardless of its regulatory purpose.<sup>139</sup>

Accepting *arguendo* that Congress did not intend for pretrial detention under the Bail Reform Act to be punitive,<sup>140</sup> the sanction fails the *Mendoza-Martinez* test on almost every point.<sup>141</sup> First, the total deprivation of liberty authorized by the Act is obviously an affirmative disability or restraint. Second, imprisonment has historically been regarded as an "infamous punishment."<sup>142</sup> Third, because pretrial detention is based on a finding of future dangerousness or an expectation of violent criminal activity,<sup>143</sup> the sanction "comes into play" only upon a finding of scienter. Fourth, the operation of the statute promotes the traditional aims of punishment: retribution, by putting the defendant in a position where his rights are forfeited only because of a judgment triggered by his past conduct;<sup>144</sup> deterrence, by incapacitating the defendant himself and

<sup>137</sup> *Id.* at 169. Although convinced that deprivation of citizenship was punitive under the test announced, the Court did not apply the full test because punitive congressional intent made the full analysis unnecessary. *Id.*

<sup>138</sup> See *Bell v. Wolfish*, 441 U.S. 520, 564-67 (1979)(Marshall, J., dissenting); Note, *The Loss of Innocence*, *supra* note 127, at 816-19; Note, *Burdening the Innocent*, *supra* note 127, at 203-05.

<sup>139</sup> See *Trop v. Dulles*, 356 U.S. 86, 94-95 (1958)(determination of whether law is penal cannot depend on congressional label or intent, but requires disinterested consideration of substance); *Bell v. Wolfish*, 441 U.S. at 564-65 (Marshall, J., dissenting)(determination of whether law is penal requires consideration of impact of sanction on detainee).

<sup>140</sup> See *supra* note 40 (quoting legislative history of the Bail Reform Act).

<sup>141</sup> Note, *The Loss of Innocence*, *supra* note 127, at 816-19; Note, *Burdening The Innocent*, *supra* note 127, at 202-07. See also *supra* notes 131-39 and accompanying text (analyzing *Mendoza-Martinez* test).

<sup>142</sup> *Bell v. Wolfish*, 441 U.S. at 569 (Marshall, J., dissenting)(quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

<sup>143</sup> "If . . . the judicial officer finds that no condition or combination of conditions [of bail] will reasonably assure . . . the safety of any other person and the community, he shall order the detention of the person prior to trial." 18 U.S.C. § 3142(e) (1985); cf. Note, *Burdening the Innocent*, *supra* note 127, at 204-05 (noting that crimes delineated in District of Columbia pretrial detention statute include element of scienter).

<sup>144</sup> *Amicus Curiae* Brief of The American Civil Liberties Union, New York Civil Liberties Union, and the ACLU Foundation of Southern California in Support of Respondents at 12-13, *United States v. Salerno*, 107 S. Ct. 2095 (1987)(No. 86-87).



by creating a threat of similar detention for other offenders.<sup>145</sup> Indeed, the threat of extended imprisonment before trial is surely a more effective deterrent than other punitive sanctions like fines and probation. Fifth, the feared future endangerment of the community and the past act which triggered the sanction are already crimes. Finally, even assuming that pretrial detention is rationally connected to the prevention of crime, the means used to achieve that goal are excessive in light of the persuasive evidence that judges are likely to be poor predictors of criminal activity.<sup>146</sup> Under the *Mendoza-Martinez* criteria, therefore, the effect of pretrial detention is punitive.

In *Salerno*, the Court did not apply the comprehensive analysis required by *Mendoza-Martinez*. Instead, the Court relied on an abbreviated restatement of the test found in *Bell v. Wolfish*.<sup>147</sup> In *Wolfish*, the Court examined the conditions under which pretrial detainees were held at a federal facility in New York.<sup>148</sup> Because the plaintiffs were being held without bail under the traditional exception for those who threaten to flee the court's jurisdiction, the *Wolfish* Court was not faced with the question presented in *Salerno*.<sup>149</sup> The *Wolfish* Court held that reasonable prison restrictions necessary to maintain order and security at the facility were not punitive.<sup>150</sup> In the majority opinion, Justice Rehnquist quoted the full text of the *Mendoza-Martinez* test but then restated the test as being simply "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] . . . ."<sup>151</sup> Justice Rehnquist supported his drastic restatement of the test with neither precedent nor logic. In fact, he did not even acknowledge the change.

The switch from the comprehensive, objective analysis of *Mendoza-Martinez* to the diluted rational relation test espoused in *Wolfish*

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<sup>145</sup> *Id.*

<sup>146</sup> *United States v. Edwards*, 430 A.2d 1321, 1369-70 (D.C. 1981)(Mack, J., dissenting)(listing authorities questioning ability to predict dangerous criminal behavior in discussion of District of Columbia detention statute), *cert. denied*, 455 U.S. 1022 (1982); *See also infra* notes 167-173 and accompanying text (discussing impossibility of accurate predictions of dangerousness).

<sup>147</sup> 441 U.S. 520 (1979).

<sup>148</sup> *Id.* at 523.

<sup>149</sup> *Id.* at 534 n.15 ("The only justification for pretrial detention asserted by the Government is to ensure the detainee's presence at trial. . . . We, therefore, have no occasion to consider whether any other governmental objectives may constitutionally justify pretrial detention.").

<sup>150</sup> *Id.* at 540.

<sup>151</sup> *Id.* at 538.

and applied in *Salerno* is more than a mere modification or narrowing of the original test. As restated, the test fails to consider the effect of the sanction upon the prisoner; rather, any sanction "reasonably related" to a legitimate government objective will be affirmed.<sup>152</sup> Justice Marshall recognized the danger of this in his *Wolfish* dissent,<sup>153</sup> and demonstrated its unacceptability in his dusk-to-dawn curfew hypothetical in *Salerno*.<sup>154</sup> A majority of the *Salerno* Court agreed, however, that there should be no check on the legislature's power to "regulate" pretrial release beyond the *de minimus* rational relation requirement discussed in *Wolfish*.<sup>155</sup> Applying this analysis, the *Salerno* Court did not inquire into the nature of detention and its harsh effect on the detainee.

Had the Court applied the *Mendoza-Martinez* criteria in *Salerno*, it would have concluded that pretrial detention on the grounds of dangerousness is punishment. The effects of pretrial detention on the accused are devastating. The untried defendant is deprived of liberty, the right to free association, the right to travel,<sup>156</sup> and the right to privacy.<sup>157</sup> He will probably lose his job,<sup>158</sup> and his family will be disrupted.<sup>159</sup> He will probably be jailed under conditions of confinement as bad or worse than those under which convicted

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<sup>152</sup> *Id.* at 539 ("Thus, if a particular condition or restriction . . . is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'").

<sup>153</sup> *Id.* at 565 (Marshall, J., dissenting) ("By this process of elimination [of several *Mendoza-Martinez* factors], the Court contracts a broad standard, sensitive to the deprivations imposed on detainees, into one that seeks merely to sanitize official motives and prohibit irrational behavior. As thus reformulated, the test lacks any real content.").

<sup>154</sup> 107 S. Ct. 2095, 2108 (Marshall, J., dissenting); see *supra* notes 93-99 and accompanying text (discussing Justice Marshall's hypothetical).

<sup>155</sup> The danger of allowing the government to justify preventive detention simply because it advances a legitimate government interest was recognized long ago. As Justice Jackson wrote:

The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes . . . . [I]f we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.

*Korematsu v. United States*, 323 U.S. 214, 246 (1944)(Jackson, J., dissenting).

<sup>156</sup> *United States v. Edwards*, 430 A.2d 1321, 1368 (D.C. 1981)(Mack, J., dissenting), *cert. denied*, 455 U.S. 1022 (1982).

<sup>157</sup> *Bell v. Wolfish*, 441 U.S. 520 (1979)(upholding conditions of detention whereby detainees were confined two to a cell, prohibited from receiving books and packages, forced to remain outside their cells during routine "shake-down" searches, and subjected to body-cavity searches).

<sup>158</sup> *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 289, 353 (1971)[hereinafter *Harvard Study*].

<sup>159</sup> *Edwards*, 430 A.2d at 1368 (Mack, J., dissenting).

felons are imprisoned.<sup>160</sup> Pretrial detention may affect the defendant's appearance and demeanor and will hamper him in preparing a defense.<sup>161</sup> Consequently, both conviction and a severe sentence are more likely for the pretrial detainee.<sup>162</sup> Even if he is acquitted, pretrial detention stigmatizes the individual and may make it difficult to reestablish employment and personal relationships after release.<sup>163</sup> Compared to the effect of other punitive sanctions such as fines and probation, the effect of pretrial detention is far more punitive.

Because the Court ignored the effect of pretrial detention on the defendant and concentrated its analysis on the connection between preventive detention and crime prevention, much of the *Salem* decision is premised on the trial judge's ability to predict future criminal behavior. If trial judges are unable to predict dangerous behavior, pretrial detention may not be rationally related to the goal of reducing pretrial crime because many persons who are, in fact, likely to commit crimes will not be detained. Likewise, the sanction might be excessive in relation to that goal because many accused persons who are not dangerous will be detained.<sup>164</sup> Moreover, the scheme might be ineffective for reasons not necessarily related to the predictive success of judges. These factors would then make it more likely that pretrial detention is punitive.<sup>165</sup> Despite the importance of these factors in distinguishing punitive from regulatory

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<sup>160</sup> Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 517 (1986).

<sup>161</sup> *Barker v. Wingo*, 407 U.S. 514, 533 (1972); *Harvard Study*, *supra* note 158, at 347-51.

<sup>162</sup> *Harvard Study*, *supra* note 158, at 347-51.

<sup>163</sup> *Campbell v. McGruder*, 580 F.2d 521, 530 (D.C. Cir. 1978); von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717, 743 (1972); *Harvard Study*, *supra* note 158, at 351-54; *cf.* *Wisconsin v. Costantineau*, 400 U.S. 433, 437 (1970) (considering stigma associated with state action against defendant as a factor in striking down temperance statute).

<sup>164</sup> Persons who are predicted to be dangerous but who in fact would not commit a crime if released are called "false positives" in the research literature. "True positives" are those persons who are correctly predicted to be dangerous. Similarly, "false negatives" are persons who are predicted to be nondangerous but who in fact will commit a crime if released, while "true negatives" are correctly predicted to be nondangerous. In considering the constitutionality of pretrial detention, focusing on the incidence of false positive predictions is appropriate because only positive predictions result in detention, thereby incurring a risk of erroneously depriving a person of the constitutional right to liberty with no gain in crime prevention. Alschuler, *supra* note 160, at 540.

<sup>165</sup> Both the *Mendoza-Martinez* test and the diluted *Wolfish* test of whether a scheme is regulatory require that the sanction be rationally related to achievement of its goal. Likewise, both tests require that the sanction not be excessive in achieving that goal. *See supra* notes 136, 147-51 and accompanying text (discussing *Mendoza-Martinez* and *Wolfish* tests).

sanctions, the *Salerno* Court dismissed any concerns of erroneous prediction by simply asserting that "there is nothing inherently unattainable about a prediction of future criminal conduct."<sup>166</sup>

The great weight of sociological data belies the Court's confidence in the ability of trial judges to predict future criminal behavior.<sup>167</sup> One scholar, for example, recently surveyed the empirical research literature regarding predictions of dangerousness.<sup>168</sup> He concluded that "statistical predictions of criminal behavior in general, and violent criminal behavior in particular, are much more likely to be wrong than right."<sup>169</sup> Similarly, after years of study, another scholar concluded that the clinical and criminological research as a whole is "reasonably accurate" and supports the conclusion that only one in three predictions of violent criminal behavior is correct.<sup>170</sup> Even commentators who support some form of pretrial detention agree that the risk of erroneous detention under the Bail Reform Act is uncomfortably high.<sup>171</sup> The general consensus is that

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<sup>166</sup> *Salerno*, 107 S. Ct. at 2103 (quoting *Schall v. Martin*, 467 U.S. 253, 278 (1984)).

<sup>167</sup> See, e.g., Ewing, *Schall v. Martin: Preventive Detention and Dangerousness Through the Looking Glass*, 34 BUFFALO L. REV. 173 (1985) (surveying research literature on predicting violent and criminal behavior and concluding that predictions of violence are more often wrong than right); Monahan, *The Prediction of Violent Behavior: Developments in Psychology and the Law*, in PSYCHOLOGY AND THE LAW 147, 159 (1983) (concluding that current prediction studies are reasonably accurate and that most crimes committed by persons on release are committed by a small proportion of those persons); J. MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES 77 (1981) (no more than one in three clinical predictions of violent behavior are accurate); American Psychological Association, *Report of the Task Force on the Role of Psychology in the Criminal Justice System*, 1978 AM. PSYCHOLOGIST 1110 (1978) ("[T]he validity of psychological predictions of dangerous behavior . . . is extremely poor, so poor that one could oppose their use on the strictly empirical grounds that psychologists are not professionally competent to make such judgments."); *Harvard Study*, *supra* note 158, at 315 (concluding that in order to prevent half the crimes committed by persons on release in sample group, ratio of nondangerous to dangerous detainees would be nearly five-to-one).

<sup>168</sup> Ewing, *supra* note 167.

<sup>169</sup> *Id.* at 196. Ewing also concluded that "no more than one out of three clinical predictions of dangerousness proves to be accurate." *Id.* at 185-86.

<sup>170</sup> Professor Monahan concluded that:

[T]he one-third of the individuals who are predicted as violent and are arrested for a violent crime are in fact the same people who commit most of the unreported and unsolved violent acts. *It is not that the false positives are really true positives in disguise but rather that the true positives are "truer" (i.e., more violent) than we imagined.*

Monahan, *The Prediction of Violent Behavior: Developments in Psychology and Law*, in PSYCHOLOGY AND THE LAW 147, 159 (1983) (emphasis added).

<sup>171</sup> Alschuler, *supra* note 160, at 537-48 (arguing that the prediction of future dangerousness is likely to be more accurate than the studies suggest because of methodological and interpretive errors in the studies and because persons covered by the Bail Reform Act are a high-risk group. Alschuler conceded, however, that "firm predictions of future violence probably cannot be made in large numbers of cases. Any policy of preventive detention likely to reduce the amount of crime substantially would be likely to require the detention of many people who would not commit crimes if released." *Id.* at 546-47);

not even trained professionals can predict dangerous behavior well enough to assure that most of the persons detained are in fact dangerous.<sup>172</sup> Untrained in psychology, judges will almost certainly do no better than professional psychologists.<sup>173</sup>

Moreover, pretrial detention may be an ineffective response to pretrial crime.<sup>174</sup> First, the use of pretrial detention for some arrestees will probably result in longer delays in bringing other arrestees to trial.<sup>175</sup> As these delays lengthen, arrestees who have been released prior to trial will be more likely to commit crimes while out on bail.<sup>176</sup> Second, there is evidence that pretrial detention may increase recidivist tendencies in detainees.<sup>177</sup> This result would be particularly ironic in the case of the pretrial detainee who is eventually acquitted of the alleged crime which triggered his detention, but who is now "hardened, embittered, and more likely to recidivate once released."<sup>178</sup> The empirical questions of whether pretrial detention will increase the level of pretrial crime and whether acquitted detainees will become hardened criminals await an answer, but the uncertainty itself lends strength to the argument that pretrial detention is not a rational response to the problem of crimes committed by persons on pretrial release.<sup>179</sup> If pretrial de-

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Comment, *Preventive Detention: A Constitutional But Ineffective Means of Fighting Pretrial Crime*, 77 J. CRIM. L. & CRIMINOLOGY 439, 471 (1986) ("Even with the most favorable procedural due process protections, the false positive rate never falls below fifty percent.") (citations omitted) [hereinafter Comment, *Fighting Pretrial Crime*].

<sup>172</sup> Schall v. Martin, 467 U.S. 256, 293 (Marshall, J., dissenting); Monahan, *supra* note 170 at 152.

<sup>173</sup> There are, of course, cases in which almost anyone could predict violent behavior. For example, an articulated threat to commit murder made by an experienced criminal should not be ignored. Alschuler, *supra* note 160, at 544-45. Such a case, however, is no justification for detention of the usual defendant.

<sup>174</sup> Comment, *Fighting Pretrial Crime*, *supra* note 171, at 471-72.

<sup>175</sup> *Id.* (citing H.R. REP. NO. 1121, 98th Cong., 2d Sess. 60 (1984) (views of Representative Kastenmeier, Chairman of the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice)).

<sup>176</sup> *Id.* at 472 (citing *Bail Reform Act 1981-82: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 204-05 (1983) (testimony of Ira Glasser, American Civil Liberties Union)).

<sup>177</sup> *Id.* (citing *Harvard Study*, *supra* note 158, at 351-53).

<sup>178</sup> *Harvard Study*, *supra* note 158, at 352.

<sup>179</sup> In fact, more promising means of reducing the incidence of pretrial crime have been identified. See, e.g., Comment, *Fighting Pretrial Crime*, *supra* note 171, at 473-75 (concluding that increased pretrial supervision of accused persons, speedier trials, more restrictive conditions of release, and bail revocation for crimes committed during pretrial release would be more effective means of fighting pretrial crime than the Bail Reform Act); *Harvard Study*, *supra* note 158, at 359-68 (concluding that expedited trials, restrictive conditions of release, forfeiture of right to bail for pretrial crime, and stricter sentences for pretrial offenders would be more effective means of fighting pretrial crime than preventive detention).

tion is not rationally related to the purpose assigned to it, the inference that the sanction is punitive grows.<sup>180</sup>

Furthermore, the incentive imparted to judges faced with a motion for pretrial detention may be to err on the side of detention and thereby make fewer verifiable errors.<sup>181</sup> If a judge rejects the motion and the defendant commits a crime, the judge will appear to have erred. Conversely, there will be no way to check the reliability of a prediction of dangerousness because an incarcerated person cannot prove the prediction wrong.<sup>182</sup> As one scholar explained:

[T]he [preventive detention] system will appear to be malfunctioning only when it releases persons who prove to be worse risks than anticipated. The pretrial misconduct of these persons will seem to validate, and will indeed augment, the fear and insecurity that the system is calculated to appease. But when the system detains persons who could safely have been released, its errors will be invisible. Since no detained defendant will commit a public offense, each decision to detain fulfills the prophecy that is thought to warrant it, while any decision to release may be refuted by the results.

The inevitable consequence is a continuing pressure to broaden the system in order to reach ever more potential detainees. Indeed, this pressure will be generated by the same fears that made preventive detention seem attractive in the first place.<sup>183</sup>

The evidence that pretrial detention will be both excessive and ineffective in combatting crime by persons on release supports the conclusion that pretrial detention on the grounds of future dangerousness is an impermissible punishment without trial. Some persons who are dangerous will probably not be identified, and thereby will be free to commit more crimes while on release. Many persons who are not dangerous will be misidentified, and thereby will be subjected to the hardship and indignity normally reserved for convicted criminals after trial.<sup>184</sup> Significantly, some people held without bail did not commit the crime which triggered their detention.<sup>185</sup> They will have been punished despite their

<sup>180</sup> Under both the *Wolfish* and *Mendoza-Martinez* analyses, this flaw in the Bail Reform Act's pretrial detention scheme weighs in favor of a finding of punitive effect.

<sup>181</sup> Tribe, *supra* note 67, at 382.

<sup>182</sup> S. Rep. No. 225, 98th Cong., 1st Sess. 9 (1983).

<sup>183</sup> Tribe, *supra* note 67, at 375. This pressure to expand the reach of the pretrial detention scheme is probably even more acute on Congress. As one commentator observed, pretrial detention "represented a 'no lose' situation for the legislators who supported it: constituents are satisfied that their representatives are tough on crime and citizens whose liberties are most affected by the [Bail Reform] Act are not in a position to command congressional attention." Note, *The Loss of Innocence*, *supra* note 127, at 814.

<sup>184</sup> See *supra* notes 167-73 (assessing risk of misidentification).

<sup>185</sup> Twenty-two percent of the persons detained under the Bail Reform Act did not commit the underlying offense. *Bail Reform Act 1981-82: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th

innocence.<sup>186</sup>

In light of the high risk of erroneously depriving nondangerous and even innocent persons of their liberty, the grave punitive effect of pretrial detention makes that sanction unacceptable under the due process clause. Liberty is a fundamental right.<sup>187</sup> Had the Court exercised the heightened scrutiny necessary to validate a scheme depriving a citizen of liberty,<sup>188</sup> the Court would not have approved the Bail Reform Act.

#### B. THE EIGHTH AMENDMENT UNDERMINED

The Court's eighth amendment analysis in *Salerno* insufficiently weighed the traditional role of bail in American criminal law<sup>189</sup> and contradicted the common sense import of the excessive bail clause. Although the Constitution neither expressly grants an absolute right to bail in all cases nor expressly prohibits the consideration of dangerousness in bail decisions,<sup>190</sup> there are good reasons to believe that preventive detention as authorized by the Bail Reform Act violates the eighth amendment.

First, there are strong intuitive arguments that the excessive

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Cong., 1st & 2d Sess. 86 (1983)(testimony of Guy Willets, Administrative Office of the U.S. Courts).

<sup>186</sup> The likelihood that some persons detained under a system of pretrial detention are neither dangerous nor guilty did not chill the *Salerno* majority, which balanced the interests of the individual against the interests of the state and came down on the side of "law and order." The same problem, however, has disturbed many commentators. *See, e.g.,* von Hirsch, *supra* note 163, at 740. Professor von Hirsch observed that:

Proponents of preventive confinement must argue in terms of "balancing" the individual's interest in not being mistakenly confined against society's need for protection from the actually dangerous person . . . . [T]hat *cost-benefit thinking is wholly inappropriate here*. If a system of preventive incarceration is known systematically to generate mistaken confinements, then it is unacceptable in absolute terms because it violates the obligation of society to do *individual* justice. Such a system cannot be justified by arguing that its aggregate social benefits exceed the aggregate amount of injustice done to mistakenly confined individuals.

(emphasis in original).

<sup>187</sup> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V; *United States v. Edwards*, 430 A.2d 1321, 1369 (D.C. 1981)(Mack, J., dissenting)("One cannot question that the right to liberty is a fundamental right."), *cert. denied*, 455 U.S. 1022 (1982).

<sup>188</sup> When the government seeks to limit a fundamental right, it must prove that the means chosen is necessary for, and not merely related to, the effectuation of a compelling state interest. *United States v. Edwards*, 430 A.2d at 1369 (Mack, J., dissenting)(citations omitted).

<sup>189</sup> The federal jurisdiction protected a defendant's right to bail in noncapital cases until the passage of the Bail Reform Act of 1984. The right was clearly established by the Federal Judiciary Act of 1789, if not by the Constitution. Alschuler, *supra* note 160, at 512.

<sup>190</sup> The eighth amendment simply provides, in part, that, "Excessive bail shall not be required . . . ." U.S. CONST. amend. VIII.

bail clause grants a constitutional right to bail in noncapital cases. Until very recently, the eighth amendment was widely read as granting such a right.<sup>191</sup> Although the English right to bail was more circumscribed,<sup>192</sup> arguments that the American right to bail is similarly circumscribed are not persuasive because Congress is more limited in its control over individual rights than is the English Parliament.<sup>193</sup> Moreover, the excessive bail clause is meaningless unless it is read to prohibit judicial and legislative intrusions on the traditional right to bail.<sup>194</sup> Without a constitutional guarantee of bail in all but the traditional exceptions, the government will be able to circumvent the clause merely by defining certain offenses as non-bailable.<sup>195</sup> The framers of the Bill of Rights would not have approved such an insidious usurpation of individual liberty.<sup>196</sup>

Second, the Act authorizes extended pretrial detention triggered by no more than a finding of probable cause to believe that

<sup>191</sup> *Stack v. Boyle*, 342 U.S. 1 (1951); *United States v. Motlow*, 10 F.2d 657, 659 (7th Cir. 1926)(Butler, Circuit Justice); H.R. REP. NO. 1541, 89th Cong., 2nd Sess. 6 (1966); Foote, *The Coming Constitutional Crisis in Bail (Pt. II)*, 113 U. PA. L. REV. 1125, 1180 (1965); but see Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33 (1977).

<sup>192</sup> In the English theory of civil liberties, Parliament itself was the ultimate source of individual rights. As English law developed, only persons accused of offenses which Parliament had determined to be bailable were granted a right to bail. Foote, *The Coming Constitutional Crisis in Bail (Pt. I)*, 113 U. PA. L. REV. 959, 968-69 (1965).

<sup>193</sup> "The Eighth Amendment is in the American Bill of Rights of 1789, not the English Bill of Rights of 1689. . . . [O]ur Bill of Rights was written and adopted to guarantee Americans greater freedom than had been enjoyed by their ancestors who had been driven from Europe by persecution." *Carlson v. Landon*, 342 U.S. 524, 557 (1952)(Black, J., dissenting)(citing *Bridges v. California*, 314 U.S. 252, 264-65 (1941)). In dissent, Judge Mack recently highlighted the differences between the American and English theories of government. He wrote:

[T]he majority, with its emphasis on Parliament, does not make allowances for the differences between the English system of absolute Parliamentary control over individual rights and the basic American system of a government of limited and defined powers delegated by the people and circumscribed by individual liberties . . . . [I]t seems somehow ludicrous to me to suggest that the Eighth Amendment was drafted with the idea of isolating Congress from its restraints.

*United States v. Edwards*, 430 A.2d 1321, 1367 (D.C. 1981)(Mack, J., dissenting)(citing Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960)), cert. denied, 455 U.S. 1022 (1982).

<sup>194</sup> The exceptional cases cited by the *Salerno* majority do not support the Court's decision to balance the interests of society against the interests of the individual in every case in which the legislature prescribes detention. Rather, those cases can be read as narrow categories of situations in which detention without bail has been tolerated, i.e., when the defendant is incompetent or otherwise unable to act responsibly, when the government exercises extraordinary powers to protect the national security, and when detention is necessary to protect the trial process.

<sup>195</sup> *Salerno*, 107 S.Ct. at 2108-09 (Marshall, J., dissenting).

<sup>196</sup> *United States v. Edwards*, 430 A.2d at 1365 (Mack, J., dissenting)("Surely the framers of our Bill of Rights did not intend to fashion illusory protection—leaving open the possibility that a subsequent act of a legislature could empty a *critical* provision of the federal Constitution of all content.")(emphasis in original).



the defendant committed a crime.<sup>197</sup> Indeed, even the absence of probable cause might not be fatal to a detention motion because the weight of the evidence is only one factor in determining the defendant's dangerousness.<sup>198</sup> Although this minimal suspicion of guilt may distinguish the Bail Reform Act from a pure preventive detention scheme, probable cause is an unacceptably low standard of proof by which to deny a presumptively innocent person the right to bail.<sup>199</sup> Professor Alschuler has pointed out that even though bail may have been denied to dangerous arrestees at common law, that denial was predicated on substantial preliminary proof of the defendant's guilt.<sup>200</sup> In Professor Alschuler's view, an absolute prohibition of pretrial detention for dangerousness would contradict centuries of Anglo-American jurisprudence.<sup>201</sup> Similarly, however, the Anglo-American tradition allows detention for dangerousness only when there is a demonstrated high probability that the defendant will be convicted of the predicate offense.<sup>202</sup> Thus, preventive detention of defendants on less than substantial proof of guilt of the predicate offense violates the traditional interpretation of the role of bail in Anglo-American law.<sup>203</sup> Assuming *arguendo* that there is no constitutional right to bail, the Bail Reform Act is nevertheless unconstitutional because it is triggered by no more than a finding of probable cause.

### C. THE PRESUMPTION OF INNOCENCE IGNORED

The *Salerno* majority's refusal to recognize the presumption of innocence as a fundamental tenet coloring the whole of the criminal

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<sup>197</sup> Under the Act, the judicial officer presiding at the detention hearing is charged only to determine whether there is "clear and convincing evidence" of the facts used to support the government's allegation of dangerousness. 18 U.S.C. § 3142(f) (1985). Although the judicial officer is to consider the weight of the evidence in determining whether safe conditions of release exist, substantial proof of the defendant's guilt of the underlying offense is not required. 18 U.S.C. § 3142(g) (1985).

<sup>198</sup> Alschuler, *supra* note 160, at 518.

<sup>199</sup> *Id.* at 533-34.

<sup>200</sup> *Id.* at 551-58. *Cf.* D.C. CODE ANN. § 23-1322(b)(2)(C) (1987), which provides that "No person . . . shall be ordered detained unless the judicial officer finds that . . . there is a substantial probability that the person committed the offense for which he is present before the judicial officer." The "substantial probability" standard is higher than probable cause and has been interpreted to be equal to "the standard required 'to secure a civil injunction—likelihood of success on the merits.'" *United States v. Edwards*, 430 A.2d at 1339 (quoting H.R. REP. No. 907, 91st Cong., 2d Sess. 182 (1970)).

<sup>201</sup> Alschuler, *supra* note 160, at 548-58.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

justice system is unacceptable.<sup>204</sup> This refusal traces back to *Bell v. Wolfish*,<sup>205</sup> in which the plaintiffs sought to enjoin certain rules and practices followed at the federal facility where they were being detained prior to trial.<sup>206</sup> The gist of the plaintiffs' argument was that pretrial detainees could not be subjected to conditions of confinement identical to those under which convicted criminals were imprisoned.<sup>207</sup> The plaintiffs relied partly on the proposition that because of the presumption of innocence, detainees must be treated as innocent persons.<sup>208</sup> The Court rejected that proposition, flatly stating that the presumption of innocence "allocates the burden of proof in criminal trials . . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial."<sup>209</sup> Maintaining this position, the *Salerno* majority did not address the presumption of innocence in passing on the constitutionality of pretrial detention.

Although the presumption of innocence is undoubtedly reflected in the burden of proof rules in criminal trials, allowing the government to avoid the presumption during the period preceding trial unfairly deprives the defendant of a critical constitutional protection.<sup>210</sup> Recognizing this, Justice Stevens articulated a more reasonable interpretation of the presumption of innocence in his *Wolfish* dissent.<sup>211</sup> Justice Stevens wrote that the presumption "shield[s] a person awaiting trial from potentially oppressive governmental actions"<sup>212</sup> by presuming "both that he is innocent of prior criminal conduct and that he has no present intention to commit any offense."<sup>213</sup> Because this view of the presumption protects a defendant even before trial, it is the view shared by the dissenting Justices in *Salerno*.

The trivialized version of the presumption of innocence adopted by the *Salerno* majority is contrary to the traditional interpretation of the presumption. In 1895, the Court, in *Coffin v. United*

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<sup>204</sup> *Salerno*, 107 S. Ct. at 2109 (Marshall, J., dissenting)("[T]he very pith and purpose of this statute is an abhorrent limitation of the presumption of innocence.")

<sup>205</sup> 441 U.S. 520 (1979).

<sup>206</sup> *Id.* at 523.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 532.

<sup>209</sup> *Id.* at 534.

<sup>210</sup> The presumption of innocence is "constitutionally rooted." *Cool v. United States*, 409 U.S. 100, 104 (1972).

<sup>211</sup> 441 U.S. 520, 580 (1979)(Stevens, J., dissenting). Justice Brennan joined this dissent. *Id.* Justice Marshall dissented in a separate opinion. *Id.* at 563 (Marshall, J., dissenting).

<sup>212</sup> *Id.* at 583 n.11 (Stevens, J., dissenting).

<sup>213</sup> *Id.* (Stevens, J., dissenting).

*States*, observed that the presumption was “the undoubted law, axiomatic and elementary . . . [lying] at the foundation of the administration of our criminal law,”<sup>214</sup> and apparently not confined to the courtroom. Similarly, in 1951, the Court recognized that the denial of reasonable bail implicated the presumption.<sup>215</sup> The Court warned 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.”<sup>216</sup> In 1973, the defendant was still clothed with the presumption of innocence during pretrial detention.<sup>217</sup> In 1978, the United States Court of Appeals for the District of Columbia was of the opinion that to consider the presumption irrelevant to pretrial detention was “profoundly to misconstrue it.”<sup>218</sup> The same year, the Supreme Court repeated the sweeping language of *Coffin*.<sup>219</sup> In 1979, however, the Court solemnly announced that the presumption of innocence “allocates the burden of proof in criminal trials . . . . But it has no application to a determination of the rights of a pretrial detainee . . . .”<sup>220</sup> Justice Stevens, in dissent, was astounded: “I cannot believe the Court means what it seems to be saying.”<sup>221</sup> Thus, the Supreme Court’s refusal to recognize the presumption of innocence as more than a procedural tool ignores a long line of broader interpretations. The *Salerno* majority should have considered the presumption of innocence in its analysis of the Bail Reform Act. Had it done so, the Court would have concluded that the presumption of innocence is a substantive, constitutional limitation on the power of the legislature to regulate pretrial release.<sup>222</sup> Because preventive detention conflicts with this constitutional limitation, the Bail Reform Act should have been struck down.

As the states begin to follow the lead of the federal government in expanding preventive detention, many more persons will be deprived of their liberty for significant lengths of time under the guise of dangerousness.<sup>223</sup> For those persons, the obvious retreat is to challenge the Bail Reform Act “as applied.” The remainder of this Note analyzes an “as applied” question which was not before the

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<sup>214</sup> 156 U.S. 432, 453 (1895).

<sup>215</sup> *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

<sup>216</sup> *Id.*

<sup>217</sup> *McGinnis v. Royster*, 410 U.S. 263, 273 (1973).

<sup>218</sup> *Campbell v. McGruder*, 580 F.2d 521, 529 (D.C. Cir. 1978).

<sup>219</sup> *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978).

<sup>220</sup> *Bell v. Wolfish*, 441 U.S. 520, 534 (1979).

<sup>221</sup> *Id.* at 583 n.11 (Stevens, J., dissenting).

<sup>222</sup> *Salerno*, 107 S. Ct. at 2109 (Marshall, J., dissenting).

<sup>223</sup> See *infra* notes 229-42 (noting length of detentions under the Bail Reform Act).

Court in *Salerno*: given the facial constitutionality of pretrial detention, when will extended detention become punitive and therefore unconstitutional?

#### D. TOO MUCH OF A GOOD THING?

Many federal courts have conceded that extended pretrial detention without bail might "degenerate into punishment" and thereby become unconstitutional.<sup>224</sup> The *Salerno* Court did not address the question of when extended pretrial detention becomes punitive, acknowledging only that it might become so.<sup>225</sup> Congress, too, was concerned with the length of detention that might befall an untried defendant under the Bail Reform Act.<sup>226</sup> The legislative history of the Act reveals that Congress relied heavily on the provisions of the Speedy Trial Act<sup>227</sup> to ensure that no defendant would be held for an unacceptable length of time without possibility of bail.<sup>228</sup> Therefore, both Congress and the lower courts have acknowledged that the hardships suffered by the pretrial detainee increase with the duration of the detention.

Neither the widespread disapproval of excessive pretrial detention nor the Speedy Trial Act has prevented very lengthy detention in some cases. One recent study of the Speedy Trial Act concluded that "processing time" in ten percent of all federal criminal cases exceeds 360 days.<sup>229</sup> The Supreme Court has approved delays of up to two full years between arraignment of the last codefendant and trial.<sup>230</sup> In cases under the Bail Reform Act, 307 defendants were detained without bail 151 days or longer before their dismissal, plea

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<sup>224</sup> *United States v. Melendez-Carrion*, 790 F.2d 984, 1007 (2d Cir. 1986)(Feinberg, C.J., concurring); *United States v. Zannino*, 798 F.2d 544, 547 (1st Cir. 1986); *United States v. Acceturo*, 783 F.2d 382, 388 (3d Cir. 1986); *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986); *United States v. Portes*, 786 F.2d 758, 768 (7th Cir. 1985); *United States v. Colombo*, 777 F.2d 96, 100 (2d Cir. 1985).

<sup>225</sup> *Salerno*, 107 S. Ct. at 2101 n.4.

<sup>226</sup> *United States v. Colombo*, 777 F.2d 96, 100 (2d Cir. 1985)(citing S. REP. NO. 225, 98th Cong., 1st Sess. 22 n.63 (1983)).

<sup>227</sup> 18 U.S.C. § 3164(b) (1985). The Speedy Trial Act provides that the trial of any person who is being held in detention solely because he is awaiting trial "shall commence not later than ninety days following the beginning of such continuous detention . . ." The ninety-day limit is subject to certain periods of excludable delay enumerated in 18 U.S.C. § 3161(h) (1985).

<sup>228</sup> *United States v. Colombo*, 777 F.2d 96, 100 (2d Cir. 1985).

<sup>229</sup> Bridges, *The Speedy Trial Act of 1974: Effects on Delays in Federal Criminal Litigation*, 73 J. CRIM. L. & CRIMINOLOGY 50, 69 (1982). "Processing time" is the time between the defendant's first official court notice and final disposition, including time through sentencing. *Id.* at 68 n.62.

<sup>230</sup> *Henderson v. United States*, 106 S. Ct. 1871 (1986).

of guilty, or trial during the year ending June 30, 1985.<sup>231</sup> The United States Court of Appeals for the First Circuit approved pretrial detention without bail for over sixteen months in *United States v. Zannino*.<sup>232</sup> Clearly, detention of untried defendants for these prolonged periods far exceeds the expectation or intention of Congress that detention under the Bail Reform Act would last for ninety days in a "worst case" scenario.<sup>233</sup>

In addressing the problem of long pretrial detention, the lower courts have essentially been performing a case-by-case analysis.<sup>234</sup> Factors considered in the analysis have included the length of detention already suffered, the complexity and seriousness of the case, whether one side has needlessly added to the complexity or length of the case without good cause, and the strength of the evidence of the defendant's guilt or dangerousness.<sup>235</sup> As a result of this case-by-case analysis, courts have determined that pretrial detention became punitive after five months,<sup>236</sup> six months,<sup>237</sup> eight months,<sup>238</sup> and fourteen months.<sup>239</sup> On the other hand, detentions of three and one-half months,<sup>240</sup> seven months,<sup>241</sup> and sixteen months<sup>242</sup> have been approved.

The case-by-case method has resulted in gross inconsistencies among the federal circuit courts.<sup>243</sup> Although the requirements of due process are flexible and vary with the situation,<sup>244</sup> it is fundamentally unfair for accused persons in one circuit to be "regulated" longer than similarly accused persons in other circuits. This is particularly true when the determination of when the detention becomes punitive turns on subjective evaluations of the "seriousness"

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<sup>231</sup> Annual Report of the Director of the Administrative Office of the U.S. Courts, Table D-13 of Appendix 1, Detailed Statistical Tables (1985).

<sup>232</sup> 798 F.2d 544 (1st Cir. 1986).

<sup>233</sup> 130 CONG. REC. S941 (daily ed. Feb. 3, 1984)(remarks of Senator Thurmond).

<sup>234</sup> *United States v. Zannino*, 798 F.2d 544 (1st Cir. 1986); *United States v. Acceturo*, 783 F.2d 382 (3d Cir. 1986); *United States v. Theron*, 782 F.2d 1510 (10th Cir. 1986). See also Comment, *Fighting Pretrial Crime*, *supra* note 171, at 464-71 (arguing in favor of case-by-case determination of when regulatory detention becomes punitive).

<sup>235</sup> *United States v. Acceturo*, 783 F.2d 382, 388 (3d Cir. 1986).

<sup>236</sup> *United States v. Theron*, 782 F.2d 382 (10th Cir. 1986).

<sup>237</sup> *United States v. LoFranco*, 620 F. Supp. 1324 (N.D.N.Y. 1985).

<sup>238</sup> *United States v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986).

<sup>239</sup> *United States v. Gonzales-Claudio*, 806 F.2d 334 (2d Cir. 1986).

<sup>240</sup> *United States v. Acceturo*, 783 F.2d 382 (3d Cir. 1986).

<sup>241</sup> *United States v. Colombo*, 777 F.2d 96 (2d Cir. 1985).

<sup>242</sup> *United States v. Zannino*, 798 F.2d 544 (1st Cir. 1986).

<sup>243</sup> See *supra* notes 236-42 and accompanying text (illustrating gross inconsistencies between circuits).

<sup>244</sup> *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972).

of the case or the "strength" of the evidence.<sup>245</sup> It is likely that the determinations made under such an analysis will vary not only among circuits, but also among trial judges within the same circuit.

Furthermore, the case-by-case analysis necessarily requires a considerable amount of judicial attention. Because there is considerable incentive for the detained person to make motions for release regularly during the period of detention, and because pretrial detention is being used quite frequently,<sup>246</sup> motions for release will become very common.<sup>247</sup> As judges spend more time examining these motions, they will have less time to conduct trials.<sup>248</sup> The case-by-case analysis, therefore, may compound the problem of crimes committed by persons on pretrial release by lengthening the delay between arrest and trial for defendants who were not detained.<sup>249</sup>

Finally, most of the factors relied on in the case-by-case analysis bear little relation to whether the effect of detention on the defendant has become punitive. Although the length of detention already served is certainly relevant, neither the seriousness and complexity of the case nor the strength of the evidence of guilt or dangerousness is relevant in determining the effect of pretrial detention on the accused. Similarly, the reasons why the case is so long or complex are irrelevant to this determination.<sup>250</sup> As these factors enter into the decision to allow extended pretrial incarceration, the suspicion grows that harsher treatment exists for defendants whose alleged conduct the judge considers more culpable than others. The defendant would be singled out on the basis of the kind of person the judge suspects he is, rather than for any proven criminal act. In-

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<sup>245</sup> See *supra* note 235 and accompanying text (discussing factors relied upon in case-by-case analysis).

<sup>246</sup> See Alschuler, *supra* note 160, at 515 (considering reports that judges may be holding detention hearings in as many as 25% of all federal felony cases).

<sup>247</sup> *Id.* at 517 n.30:

[T]he effective representation of a detained defendant apparently would require his lawyer to appear before a judge at periodic intervals to ask, "Now?" After an unspecified number of months during which the judge would reply, "Not yet," he would answer, "Yes, now." . . . [T]he moment of magic metamorphosis would vary from one case to the next.

<sup>248</sup> See *supra* notes 175-76 and accompanying text (trial postponement contributes to incidence of crimes by persons on release).

<sup>249</sup> *Id.*

<sup>250</sup> It should be noted that the threat of a judgment that he was "needlessly adding to the length or complexity of the case" might chill the defendant in making a defense. Considering this factor to the detriment of the defendant seems close to punishing him for what might be construed as "annoying" the judge. *Cf.* United States v. Mendoza, 663 F. Supp. 1043 (D.N.J. 1987) (noting "chilling effect" of excluding delays caused by defendant's pretrial motions in determining compliance with Speedy Trial Act).

deed, a legitimate case-by-case analysis of the punitive effect of detention necessarily requires consideration of the personal characteristics and circumstances of each detainee. For example, it is easy to imagine a situation in which the effect of detention on A would be more harsh than the effect of detention on B, even though B had been detained much longer than A. Assuming A and B were accused of similar offenses, would it then be fair to release A on bail before B? The difficulties presented by a case-by-case determination of when pretrial detention becomes punitive warrant the adoption of a bright-line time limit.<sup>251</sup> Adopting a bright-line rule in all federal courts would improve the current case-by-case analysis in several ways.<sup>252</sup>

First, an outer limit on the length of pretrial detention for dangerousness would mitigate the harsh effect of detention on the accused.<sup>253</sup> Moreover, a bright-line rule is more fair than a case-by-case approach. A bright-line rule will subject all defendants to the same maximum pretrial detention. The subjective moral judgments which contribute to inconsistencies under the case-by-case analysis will no longer be a factor.<sup>254</sup>

Second, imposing a firm time limit will force the government to seek the drastic measure of detention without bail only when it has substantially prepared its case for trial before indictment.<sup>255</sup> This might curtail the use of detention without bail to some extent because the prosecution would move for detention less often. The result of this curtailment, however, will achieve what Congress intended—that pretrial detention without bail be reserved for a “small but identifiable group” of particularly dangerous

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<sup>251</sup> The need for a bright-line limit was suggested in *United States v. Acceturo*, 783 F.2d 382, 392 (3d Cir. 1986) (Sloviter, J., dissenting). Judge Sloviter argued for a bright-line limit which could be extended only after a full adversarial hearing with more stringent procedural requirements than are required to impose the initial detention. If trial had not begun when the initial period of detention lapsed, the defendant would ordinarily be released on bail but the charges would not be dropped. *Id.* In the absence of legislative action, such a rule could be prescribed by the judiciary exercising its supervisory power over criminal procedure and evidence. *Id.*

<sup>252</sup> *Contra* Comment, *Fighting Pretrial Crime*, *supra* note 171, at 464-71 (arguing in favor of case-by-case analysis of when pretrial detention becomes punitive).

<sup>253</sup> *See supra* notes 156-63 and accompanying text (illustrating harsh effect of detention on accused).

<sup>254</sup> *See supra* notes 234-42 and accompanying text (considering factors which lead to inconsistencies). To the extent that some defendants who are detained prior to trial may not be held for the full time limit, some disparity in treatment will remain. Limiting the maximum detention, however, will assure that no defendant will be subjected to a grossly disproportionate amount of detention.

<sup>255</sup> *Cf.* Comment, *Fighting Pretrial Crime*, *supra* note 171, at 470 (arguing that case-by-case analysis would have similar effect).

defendants.<sup>256</sup>

Third, a firm limit on the length of detention satisfies Congress's intention that no defendant be detained for an unreasonably long period of time. In persuading their colleagues to adopt the pretrial detention statute, several senators testified that ninety days was the longest detention the statute authorized.<sup>257</sup> Although Congress chose not to place an ultimate cap on the length of detention under the Act, a ninety-day limit is more reasonable than the very lengthy terms that have resulted from reliance on the Speedy Trial Act.<sup>258</sup>

Finally, a time limit would require less judicial supervision than the case-by-case analysis.<sup>259</sup> The rule would be self-executing. As a result, fewer trials involving non-detained defendants will be delayed while the trial judge entertains the regular motions of those defendants whose temporary detention is stretching into punishment.<sup>260</sup> A self-executing rule would enable the judge to spend more time on trials, thereby reducing the incidence of crimes committed by persons on pretrial release.<sup>261</sup>

## V. CONCLUSION

In *United States v. Salerno*,<sup>262</sup> the Supreme Court approved a pretrial detention scheme which allows the government to imprison presumptively innocent persons for long periods of time without benefit of trial for the alleged offenses which trigger their detention. Moreover, the Bail Reform Act, as interpreted, does not adequately recognize that detention is more onerous the longer it is sustained. In order to assure that untried defendants are not detained for long periods of time "while the processes of justice grind to a halt,"<sup>263</sup> a bright-line rule should be adopted to limit the harsh effects of de-

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<sup>256</sup> S. Rep. No. 225, 98th Cong., 1st Sess. 6 (1983).

<sup>257</sup> Senator Grassley stated that "[n]o evidence has been presented . . . that the 90 day Speedy Trial Act limit has not worked perfectly well to protect against lengthy incarceration." 130 CONG. REC. S945 (daily ed. Feb. 3, 1984). Senator Thurmond and Senator Laxalt foresaw the ninety-day limit of the Speedy Trial Act as the "worst case limit" and "upper bound" of detention, respectively. *Id.* at S941 (Sen. Thurmond); *id.* at S943 (Sen. Laxalt).

<sup>258</sup> See *supra* notes 231-32 and accompanying text (noting lengthy pretrial detentions).

<sup>259</sup> See *supra* notes 246-47 and accompanying text (noting extensive judicial supervision required by case-by-case analysis).

<sup>260</sup> See *supra* note 247 and accompanying text (discussing incentive for detainees to make frequent motions for release under case-by-case analysis).

<sup>261</sup> See *supra* notes 248-49 and accompanying text (lengthy delays contribute to pretrial crime).

<sup>262</sup> 107 S. Ct. 2095 (1987).

<sup>263</sup> 130 CONG. REC. S945 (daily ed. Feb. 3, 1984)(statement of Sen. Grassley).



tention on the accused. Only a bright-line rule will ensure that all accused persons are treated fairly and equally by the criminal justice system.

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