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Process and Prediction: A Return to a Fuzzy Model of Pre-trial Detention

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Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention

Jack F. Williams*

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* Associate Professor, Georgia State University College of Law. Thanks to Albert Alschuler, Bill Edmundson, Steve Friedland, Chuck Marvin, Steve Nickles, Ellen Podgor, and Eric Segall for their comments, and to Angela Ragsdale for help in preparing this Article. I dedicate this Article to the late Professor Elyce Zenoff, who first introduced me as her student to the slippery slope of dangerousness predictions.

INTRODUCTION

*Said a man ingenuously to one of his friends: "This morning we condemned three men to death. Two of them definitely deserved it."*¹

Let me tell of the strange travels of Defendant X.² Defendant X is a legal aid client arrested in New York in August 1991 and detained before trial based on future dangerousness. The Metropolitan Community Correctional Center in Manhattan (MCC-NY) initially detained him. The Marshall Service then moved him to the Federal Correctional Institution at Otisville. Because of overcrowded conditions at both sites, the government transported Defendant X to the county jail in Webb County, Texas, for five weeks. They then moved him to the Federal Correctional Institution in El Reno, Oklahoma, for a fortnight. On November 11, 1991, he returned to MCC-NY for his second court appearance.³

Defense attorneys recount troubling stories about being unable to see detained clients, like Defendant X, because of constant relocation from one correctional institution to another.⁴ Moreover, when attorney and client finally do meet, the client is often so exhausted from the constant relocations that the meetings are not productive. Numerous federal district judges have commented on this sorry state of affairs.⁵

Pretrial detention is politically popular because it symbolizes a government tough on crime.⁶ But this symbolism carries high costs. Pretrial detention hardens detainees and alienates them from a society that is increasingly receptive to historically unjustified restraints on liberty. Pretrial detention results in a detained defendant's inability to prepare and aid in his or her defense. Detention is expensive, costing United States taxpayers \$110.6 million to house 11,740 detainees per day.⁷ Yet individuals released on bail commit only about six percent of

1. DAVID S. SCHRAGER & ELIZABETH FROST, *THE QUOTABLE LAWYER* 261 (1986).

2. The true story of Defendant X is a typical saga of pretrial detainees. See Daniel B. Ryan, *The Federal Detention Crisis: Causes and Effects*, 57 *FED. PROBATION* 54, 54 (1993).

3. *Id.* at 55.

4. *Id.* at 55-56.

5. *Id.*

6. Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 *VA. L. REV.* 371, 373-74 (1970).

7. Ryan, *supra* note 2, at 55.

crimes.⁸ From an administrative perspective, pretrial detention is a nightmare.⁹ From a societal perspective, detention has fared no better. In the morass of hyperbole that surrounds the debate on detention and bail recidivism, Americans lose sight of the role our country has historically played as "a nation with moral authority in a troubled world."¹⁰

Detaining a presumptively innocent person on the basis of future dangerousness pits an individual's freedom against governmental interests. The compelling interest in preventing bail crime, however, is an insufficient justification for pretrial detention. A fundamental right is at stake: the presumptively innocent individual's right to be free of governmental restraint absent a prior adjudication.

The prevalence of pretrial detention is largely a function of our bivalent system of law,¹¹ a system comprising strings of ones and zeroes. Because of its inability to account for partial degrees of truth, necessary in a world of gray, a binary model requires a decision maker to round off the evidence and confine the case to total truth or no-truth to make a decision. In the end, easy detention cases look like hard ones and hard detention cases look like very hard ones.

This Article challenges the traditional notions of a bivalent jurisprudence, addressing its limitations through analysis of pretrial detention under the Bail Reform Act of 1984 ("the BRA").¹² The Article rejects the present detention model for its failure to account for the varying degrees of culpability, danger-

8. Tribe, *supra* note 6, at 371 & n.5. The 1992 arrest rate of federal defendants out on bail was three percent. Ryan, *supra* note 2, at 62.

9. Tribe, *supra* note 6, at 372-73.

10. William O. Douglas, *Vagrancy And Arrest on Suspicion*, 70 YALE L.J. 1, 14 (1960).

11. The prevalent models of legal interpretation (rules, categorization, standards, balancing) turn on strong distinctions between right and wrong and on the rule of the excluded middle. The binary model thus denies a legal universe of gradation. A binary model of the wonderfully complex texture of the law is a crude tool.

12. Pub. L. No. 98-473, 98 Stat. 1976-211 (codified as amended at 18 U.S.C. §§ 3141-3150 (1988 & Supp. II 1990)). By authorizing the use of pretrial detention, based in part on a court's assessment of a defendant's dangerousness, the BRA departed from the previous policy of federal bail law, which imposed bail to ensure the appearance of a defendant at trial or to protect the integrity of the judicial process. See Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214-217, *repealed by* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976-211 (codified as amended at 18 U.S.C. §§ 3141-3150 (1988 & Supp. II 1990)); see also *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951) (explaining that bail ensures the defendant's trial appearance).

ousness, and detainability. The pretrial detention model constructed in this Article instead rests on the axioms of a fuzzy universe.¹³ Fuzzy logic, which allows a decision maker to account for varying degrees of truth, provides a more graceful way in which to identify, analyze, resolve, and discuss the legal issues posed by pretrial detention. Fuzzy logic rejects the duality embodied in the bivalent model as a confining force; it recognizes that rules and categorization as well as standards and balancing are elements of the same set whose fuzziness turns on degrees of judicial discretion.

The foundation of fuzzy logic is fuzzy set theory. Unlike Aristotelian or formal logic, which recognizes statements as only true or false, fuzzy set theory recognizes partial membership in one or more sets at the same time.¹⁴ Fuzzy set theory abolishes the law of the excluded middle found in formal set theory. Whereas formal set theory insists that a variable be either in or out of the set, fuzzy set theory permits a variable to be in and out of the set simultaneously, usually by reducing the quality of a variable to a qualitative relation.¹⁵ Part I of this Article examines the statutory model of pretrial detention. It describes the history of the BRA and its initial incorporation of fuzzy variables. Part II addresses the metaphysical and constitutional issues posed by predictions of dangerousness, and the BRA's standard for pretrial detention. It examines the scientific literature that places dangerousness predictions at scantily better than chance. Part II also argues that the Supreme Court has so far avoided specific and empirical challenges to dangerousness predictions by recasting these challenges as normative attacks that are quickly dispatched.

Part III explains the importance of the metaphor employed in analyzing procedural due process issues. It argues that the perspective used to analyze the pretrial detention determination

13. See generally FUZZY SETS AND APPLICATIONS: SELECTED PAPERS BY L.A. ZADEH (R.R. Yager et al. eds., 1987) (providing the best tutorial on fuzzy sets); BART KOSKO, FUZZY THINKING: THE NEW SCIENCE OF FUZZY LOGIC (1993) (providing background information on fuzzy sets); Jack F. Williams, *Fallacies of Contemporary Fraudulent Transfer Models as Applied to Intercompany Guaranties: Fraudulent Transfer Law as a Fuzzy System*, 15 CARDOZO L. REV. 1403, 1448-69 (1994) (discussing fraudulent transfer law as a fuzzy system).

14. See generally VICTORIA A. KADER, U.S. DEP'T OF COMMERCE, FUZZY LOGIC: A KEY TECHNOLOGY FOR FUTURE COMPETITIVENESS (1991) (describing fuzzy set theory).

15. For example, the fuzzy set of blue swans admits any swan that is less than totally blue because blue becomes a matter of degree. The pale blue swan is, therefore, both in and out of the set.

affects the ultimate conclusion of what process is due. In constructing a fuzzy model, this Article shows the importance of the characterization of the dangerousness issue to the debate.¹⁶

Part III also explains the distinction in traditional due process jurisprudence between the intrinsic and process-sensitive theories.¹⁷ Part III then analyzes the distinction between categorizing and balancing competing interests. It argues that each approach requires the context of the other to make sense. It also argues that the choice between the two approaches turns on a strong right-wrong distinction inherent in a bivalent model of justice. The pretrial detention provisions that Congress drafted, however, rested on a sound fuzzy foundation. The detention scheme recognized different degrees of dangerousness by requiring a court to consider a list of conditions other than detention before it could impose detention.¹⁸ Part III shows that the Supreme Court, in altering the assessment of dangerousness and detention from fuzziness back to bivalence, has contravened congressional intent and sacrificed individual rights.¹⁹

Part IV presents a model that re-unites pretrial detention with its historical, moral, and ethical roots. It constructs a value-based model of due process deriving its axioms from fuzzy logic.²⁰ This model focuses the detention inquiry on the defendant's culpability, the precise danger posed by the defendant, and the conditions short of outright detention that may address the harm to the public posed by the pretrial release of the defend-

16. Authorities tend to frame the operative question in general, categorical terms, such as, whether the defendant is a member of a class that the legislature has identified as dangerous. The legislature, not the courts, is the ultimate arbiter of dangerousness. Additionally, this paradigmatic model focuses on dangerousness, not detention, thus collapsing the two distinctly different determinations into one. It limits the guilt of a defendant to a secondary role. In contrast, a model viewed through a fuzzy lens asks whether a particular defendant is dangerous, mandating more specific process.

17. The model of procedural due process defended in this Article, unlike the process-sensitive theories, recognizes that the deprivation process is a probabilistic endeavor. Tolerance for inaccuracy under the Due Process Clause depends on the weightiness of the individual's rights and governmental interests at stake.

18. 18 U.S.C. § 3142(c) (1988 & Supp. II 1990); see *infra* note 43 and accompanying text (identifying statutory conditions for release rather than detention).

19. For further documentation of what factors lead to a court's detention decision, see generally Jack F. Williams, *Classifying Pre-Trial Detention Decisions Under the Bail Reform Act of 1984: A Statistical Approach*, 30 AM. CRIM. L. REV. 255 (1993).

20. It rejects the duality embodied in the traditional rules/categorization and standards/balancing debate.

ant. All three of the model's decisional prongs are sufficiently dynamic to account for varying degrees of culpability, danger, and public harm.

The model proposed in Part IV contains five components. The first component limits offenses that trigger the application of pretrial detention, eschewing the vagaries of a "crime of violence" standard. The second component requires the government to seek detention at a defendant's first appearance before a court in the charging district.²¹ The third component contains strict time limits on the length of detention. The fourth component insists that detention must be part of a comprehensive bail package. Finally, the model increases the standard of proof to one of clear and convincing evidence, establishing substantively and symbolically the importance of that which is at stake in the detention process: the liberty of a presumptively innocent defendant and society's view of such people.

I. FEDERAL PRETRIAL DETENTION

Pretrial detention has deep roots in legal tradition.²² Athenian magistrates, sworn to release a citizen pending trial if the citizen could provide three sureties, denied bail to those persons charged with treason or embezzlement of public monies.²³ Blackstone noted that bail was improper for murder, treason, arson, escape from prison, and manslaughter if the accused was "clearly the slayer and not barely suspected to be so."²⁴ Historically, our government detained mentally unstable individuals²⁵

21. If the government fails to seek detention at the defendant's first appearance, it waives its right to seek detention.

22. For a thorough account of the origins of pretrial detention, see Alan M. Dershowitz, *The Origins Of Pretrial Confinement In Anglo-American Law—Part I: The English Experience*, 43 U. CIN. L. REV. 11-28 (1974); see also Alan M. Dershowitz, *The Law Of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL EDUC. 24, 26 (1970) [hereinafter Dershowitz, *Law of Dangerousness*] (discussing the history of preventive justice).

23. 4 WILLIAM BLACKSTONE, COMMENTARIES *297.

24. 4 *id.* at *298-*99. Many of the nonbailable offenses that Blackstone noted involved crimes of violence. The remaining nonbailable offenses focused on the weight of the evidence or the reasonable belief that the defendant posed a substantial risk of flight: "For what is there that a man may not be induced to forfeit, to save his own life?" 4 *id.*; see also 18 U.S.C. § 3142(g) (1988 & Supp. II 1990) (providing factors to consider when determining whether to impose pretrial detention under the BRA).

25. *E.g.*, *Addington v. Texas*, 441 U.S. 418, 425-27 (1979) (discussing the justifications for civil commitment).

and arrested juveniles²⁶ who posed a danger to society, dangerous defendants found incompetent to stand trial,²⁷ defendants charged with a capital crime,²⁸ defendants who had threatened jurors or witnesses,²⁹ and defendants who posed a significant risk of flight.³⁰

Consistent with this history, Congress enacted the BRA in 1984 to stem what it perceived as "the growing problem of crime committed by persons on release."³¹ Congress concluded that the need to protect society from "a small but identifiable group of particularly dangerous defendants" required pretrial detention.³² Critics of the 1966 Act,³³ the BRA's predecessor, argued that it failed to address the alarming rate of bail crime: "Federal bail laws must address the alarming problem of crimes committed by persons on release and must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released."³⁴

Bail law, as it related to detention based on dangerousness, reached the height of bivalence under the 1966 Act.³⁵ Under

26. *E.g.*, Schall v. Martin, 467 U.S. 253, 270 (1984) (holding that a juvenile may be detained after arrest to prevent pre-trial crime).

27. *E.g.*, Jackson v. Indiana, 406 U.S. 715, 731-39 (1972) (discussing commitment standards for mentally incompetent defendants).

28. Under the Bail Reform Act of 1966, judges were authorized to detain defendants charged with capital crimes pending trial and post-conviction defendants who posed either a danger to the community or a substantial risk of flight. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214-217, *repealed by* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976-211 (codified as amended at 18 U.S.C. §§ 3141-3150 (1988 & Supp. II 1990)); *see also* FED. R. CRIM. P. 46 (outlining the rules for releasing a defendant prior to trial).

29. *E.g.*, United States v. Wind, 527 F.2d 672, 675 (6th Cir. 1975) (holding that a judicial officer may consider evidence that the defendant threatened witnesses in setting terms for release).

30. *E.g.*, Bell v. Wolfish, 441 U.S. 520, 534 (1979) (stating that the government has a legitimate interest in ensuring that criminal defendants are available for trial); *see also* United States v. Abrahams, 575 F.2d 3, 8 (1st Cir.) (holding that a substantial risk of flight may justify denial of bail), *cert. denied*, 439 U.S. 821 (1978).

31. S. REP. NO. 225, 98th Cong., 2d Sess. 6 (1983), *reprinted in* 1984 U.S.C.C.A.N. at 3182, 3188-89; Ann M. Overbeck, Comment, *Detention for the Dangerous: The Bail Reform Act of 1984*, 55 U. CIN. L. REV. 153, 155 (1986).

32. S. REP. NO. 225, *supra* note 31, at 6-7, *reprinted in* 1984 U.S.C.C.A.N. at 3189.

33. *E.g.*, Steven R. Schlesinger, *Bail Reform: Protecting the Community and the Accused*, 9 HARV. J.L. & PUB. POL'Y 173, 177-78 (1986) (contending that the current bail system fails to achieve its stated goals).

34. S. REP. NO. 225, *supra* note 31, at 3, *reprinted in* 1984 U.S.C.C.A.N. at 3185.

35. *See supra* note 12 (discussing the 1966 Act).

that Act, if a court found that a defendant posed a danger to the community, it either had to release the defendant or set unlawfully high bail that the defendant would be unable to meet.³⁶ A court could not simply detain a defendant to ensure community safety.³⁷ The 1966 Act thus required courts to round off the evidence on community danger, surreptitiously forcing defendants into one category or the other. Congress specifically noted this dilemma during its debate on the BRA.³⁸ By authorizing pretrial detention, the BRA has functionally eliminated arbitrarily high bail (and concomitant dishonesty).

Under the BRA, a defendant must appear before a judicial officer³⁹ for arraignment without unnecessary delay.⁴⁰ At this initial appearance, a judicial officer must advise a defendant of his or her rights and must detain or conditionally release a defendant either on bail or personal recognizance.⁴¹ The BRA requires a judicial officer to order pretrial release on personal recognizance or unsecured bond unless the officer determines that release would not reasonably ensure a defendant's appearance or would endanger the safety of any other person or the community.⁴² Even if a judicial officer determines that release would result in flight or danger, the officer must order a defendant's conditional release if any conditions will adequately safeguard these security interests.⁴³ These conditions may include

36. Thomas E. Scott, *Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis*, 27 AM. CRIM. L. REV. 1, 7 (1989).

37. *Id.* at 4-7; see also *United States v. Melville*, 306 F. Supp. 124, 127 (S.D.N.Y. 1969) (discussing the judicial policy underlying the 1966 Act).

38. See S. REP. NO. 225, *supra* note 31, at 5, reprinted in 1984 U.S.C.C.A.N. at 3188 ("[I]t is intolerable that the law denies judges the tools to make honest and appropriate decisions regarding the release of such defendants.").

39. A "judicial officer" is broadly defined to include federal judges and "any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found." 18 U.S.C. § 3041 (1988 & Supp. IV 1992).

40. FED. R. CRIM. P. 5(a). A court determines "unnecessary delay" from the facts and circumstances of each case. *Williams v. United States*, 273 F.2d 781, 798 (9th Cir. 1959), cert. denied, 362 U.S. 951 (1960).

41. FED. R. CRIM. P. 5(b)-(c). The BRA provides for a hierarchy of 14 conditions that favor a defendant's release on personal recognizance. 18 U.S.C. § 3142(c) (1988 & Supp. II 1990).

42. 18 U.S.C. § 3142(b) (1988). Judicial officers must pursue one of four enumerated alternatives: release the defendant on personal recognizance or upon execution of an unsecured bond; release the defendant subject to increasingly restrictive conditions; temporarily detain the defendant; or order pretrial detention. 18 U.S.C. § 3142 (a)-(e) (1988 & Supp. II 1990); JOHN L. WEINBERG, FEDERAL BAIL AND DETENTION HANDBOOK 6-1 to 6-11 (1991).

43. A court can require the defendant to meet the following conditions:

drug testing, house arrest, or other similar alternatives short of pretrial detention.⁴⁴

II. THE METAPHYSICS OF DANGEROUSNESS PREDICTIONS

The bedrock of the BRA is a court's ability to predict a defendant's future dangerousness. The BRA's legislative history, however, recognizes that courts predict dangerousness poorly.⁴⁵

-
- (i) remain in the custody of a designated person, who agrees to [supervise him or her] . . . ;
 - (ii) maintain employment, or, if unemployed, actively seek employment;
 - (iii) maintain or commence an educational program;
 - (iv) abide by specified restrictions on personal associations, place of abode, or travel;
 - (v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;
 - (vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;
 - (vii) comply with a specified curfew;
 - (viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;
 - (ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance . . . without a prescription by a licensed medical practitioner;
 - (x) undergo available medical, psychological, or psychiatric treatment . . . ;
 - (xi) execute an agreement to forfeit upon failing to appear as required, such designated property . . . as is reasonably necessary to assure the appearance of the person as required . . . ;
 - (xii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and
 - (xiii) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

18 U.S.C. § 3142(c) (1988 & Supp. II 1990). Pretrial release of every defendant is also subject to the condition that the defendant refrain from committing any crime while on bond and meet all appearance requirements. *WEINBERG, supra* note 42, at 6-4.

44. See *United States v. Traetz*, 807 F.2d 322, 326 (3rd Cir. 1986); see also *DEIRDRE GOLASH, THE BAIL REFORM ACT OF 1984*, at 1 (Federal Judicial Center 1987) (listing several alternatives to pretrial detention). In *United States v. Renzulli*, No. 87-258-7, 1987 U.S. Dist. LEXIS 8750, at *4 (E.D. Pa. Sept. 28, 1987), the court observed that "other similar alternatives" could include daily telephone reporting, the surrender of all firearms, 24-hour telephone monitoring, the wearing of beeper devices to restrict travel, and the surrender of passports.

45. See S. REP. No. 225, *supra* note 31, at 9, *reprinted in* U.S.C.C.A.N. at 3192 ("[W]hether future criminality can be predicted, an assumption implicit in permitting pretrial detention based on perceived defendant dangerousness, is one which neither the experience under the District of Columbia detention statute nor empirical analysis can conclusively answer.").

Experts have had little success in predicting future dangerousness, and courts appear to fare no better.⁴⁶ The criminal justice system, however, demands that courts predict future dangerousness.⁴⁷ "The concept [predictions of dangerousness] is so longstanding and such an integral part of our legal system that the Supreme Court . . . characterized the defendant's request to prohibit predictions of dangerousness in capital cases as 'somewhat like asking us to disinvent the wheel.'"⁴⁸

Dangerousness predictions are generally anamnestic, clinical, or statistical.⁴⁹ Anamnestic predictions reason that a person's past behavior can predict how that person will behave in future like circumstances.⁵⁰ Clinical predictions are an expert's intuitive judgments after some evaluation based on the expert's training, experience, and good judgment.⁵¹ Statistical or actuarial predictions are based on statistical evidence that a person possesses traits associated with a greater likelihood of future dangerousness.⁵² The consensus among experts is that clinical predictions of dangerousness, like court decisions, are inferior to statistical predictions.⁵³

46. Shari J. Cohen, Note, *Circumventing Due Process: A Judicial Response to Criminal Recidivism Under the Bail Reform Act*, 15 HASTINGS CONST. L.Q. 319, 330-33 (1988).

47. Dangerousness predictions are made for involuntary commitment, release on bail, sentence enhancement, imposition of the death penalty, and parole. See Elyce H. Zenoff, *Controlling The Dangers of Dangerousness: The ABA Standards and Beyond*, 53 GEO. WASH. L. REV. 562, 562 n.2 (1985).

48. *Id.* at 562-63 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983)).

49. Marc Miller & Norval Morris, *Predictions of Dangerousness: Ethical Concerns and Proposed Limits*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 393, 404-09 (1986); see also George E. Dix, *Clinical Evaluation of the "Dangerousness" of Normal Criminal Defendants*, 66 VA. L. REV. 523, 529 (1980) (clarifying distinctions between clinical and statistical analysis); Charles P. Ewing, Schall v. Martin: *Preventive Detention and Dangerousness Through The Looking Glass*, 34 BUFF. L. REV. 173, 181 (1985) (theorizing that predictions of future dangerousness proceed along either clinical or statistical lines of reasoning).

50. Miller & Morris, *supra* note 49, at 404-06.

51. *Id.* at 405.

52. *Id.* at 404-09.

53. To assess the accuracy of the two techniques, Professor Paul Meehl analyzed the accuracy of approximately 20 prediction studies in which both clinical and statistical methods were employed. PAUL E. MEEHL, *CLINICAL VERSUS STATISTICAL PREDICTIONS* 83-128 (1954). In all but one study, the "predictions made actuarially were either approximately equal or superior to those made by a clinician." *Id.* at 119; see also Arthur R. Angel et al., Comment, *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 300, 325 (1971) (noting that variables used to predict default do not predict recidivism).

Professor Barbara Underwood suggests that, unlike an actuarial or statistical prediction, a clinical approach to dangerousness predictions is not committed to a set of criteria or protocol before the decision is made. Barbara D.

A. SCIENTIFIC DEFICIENCIES IN PREDICTING DANGEROUSNESS

Courts and commentators have recognized the many scientific studies showing fundamental deficiencies in predictions of dangerousness. Professor Alan Stone asserts: "The concept of dangerousness is the stumbling block of all empirical science, but it is the key to the moral principles adopted recently by judges and legislative bodies critical of psychiatry. . . . [D]angerousness is an empty formula for legal decisions, inadequate for deciding concrete individual cases."⁵⁴

The detention of adults charged with serious crimes who pose a future danger to society is difficult to dispute. Both moral and utilitarian grounds may justify detention to protect society in these limited circumstances.⁵⁵ Nonetheless, what appears to be fair in the abstract may be oppressive in application:

Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1423 (1979). Consequently, Underwood observes that the clinical approach, unlike statistical predictions, allows the decision maker the freedom to respond to the individual at issue. *Id. Contra Williams, supra* note 19, at 288-89 (asserting that statistical predictions are sufficiently flexible to permit individualized determinations).

54. Alan A. Stone, *The New Legal Standard of Dangerousness: Fair in Theory, Unfair in Practice*, in DANGEROUSNESS: PROBABILITY AND PREDICTION, PSYCHIATRY AND PUBLIC POLICY 13, 18 (Christopher D. Webster et al. eds., 1985) [hereinafter DANGEROUSNESS]. A perusal of older studies supports Professor Stone's skepticism. For instance, a 1972 article by researchers at the Massachusetts Center for the Diagnosis and Treatment of Dangerous Persons reported on a 10-year study investigating 592 male offenders. Harry L. Kozol et al., *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQ. 371 (1972). Forty-nine offenders predicted to be dangerous based on clinical techniques were released. Of those released, 34.7% committed a post-release dangerous act. *Id.* at 390. The study observed a false positive rate of over 65%. *Id.* at 392. In the study, danger was defined as the potential for inflicting serious bodily harm, a definition more restrictive and focused than that under the BRA. *Id.* at 372.

In 1973, Maryland reported on its experience with the Patuxent Institution from 1955 to 1964. PATUXENT INST., MD. DEP'T OF PUB. SAFETY & CORRECTIONAL SERV., MARYLAND'S DEFECTIVE DELINQUENT STATUTE: A PROGRESS REPORT 2-3 (Jan. 9, 1973). The study reviewed 421 committed offenders, of whom 286 were released after treatment. One hundred individuals were granted conditional release; the remainder were released unconditionally. *Id.* The study reported a false positive rate of 61% among the class released on conditions. *Id.* The study reported a recidivism rate of 46% and a false positive rate of 54% among the class released unconditionally. *Id.*

55. See, e.g., *United States v. Salerno*, 481 U.S. 739, 755 (1987) (upholding pretrial detention intended to protect public safety). As Professor Elyce Zenoff has noted, pretrial detention meets Professor Francis A. Allen's morality-of-ends test. Zenoff, *supra* note 47, at 566. Allen's morality-of-ends focuses on the goals society pursues through legislation. *Id.*

But what about the morality of means? There is morality of ends and a morality of means. The morality of ends concerns itself with what goals are to be pursued through the utilization of state power. The morality of means is concerned with the propriety—the effectiveness and decency—of devices proposed to achieve social objectives.⁵⁶

The morality of means demands scrutiny of detention procedures. Criminal sanctions are not ends in themselves, but are means to accomplish important societal goals.⁵⁷

Unfortunately, people tend to focus on the ends with little consideration of the means used to achieve those ends.⁵⁸ Furthermore, many interpret questions about means as an attack on the importance of the underlying social goal.⁵⁹ This observation holds true in the detention context. After all, no one could take serious issue with minimizing bail recidivism. It is unfortunate that those who object to the manner of minimizing bail recidivism are often dismissed as “soft on crime.”⁶⁰

Empirical studies generally conclude that pretrial predictions of dangerousness are inaccurate.⁶¹ These studies show that a large number of nondangerous defendants are nevertheless detained as dangerous.⁶² This observation is expected because it is natural for a decision maker to concentrate on the tangible harm caused by the release of a dangerous defendant

56. Zenoff, *supra* note 47, at 566 (citation omitted).

57. Francis A. Allen, *The Morality of Means: Three Problems in Criminal Sanctions*, 42 U. PITT. L. REV. 737, 740 (1981).

58. *Id.*

59. *Id.*

60. Professor Allen makes another observation relevant to this discussion: “Much of the morality of means, of course, is given expression in constitutional doctrine; but too often American constitutionalism diverts thought about social policy from needed consideration of its rationality and decency.” *Id.* at 757. Thus, in our attempt to seek out and slay the myriad constitutional issues posed by pretrial detention under the BRA, we neglect a frank assessment of the rationality and decency of detention.

61. See, e.g., MICHAEL R. GOTTFREDSON & DON M. GOTTFREDSON, *DECISION-MAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION* 122-27 (1980) (listing factors that make predictions of pretrial releases unreliable).

62. See John Monahan, *The Prediction of Violence*, in *VIOLENCE AND CRIMINAL JUSTICE* 18-20 (Duncan Chappell & John Monahan eds., 1975); see also Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1496 (1966) (suggesting that preventive detention is ineffective and unnecessary). See generally Joseph J. Cocozza & Henry J. Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084 (1976) (finding that patients evaluated as dangerous by psychiatrists were not more dangerous than those evaluated as nondangerous); John Monahan, *Toward a Second Generation of Theory and Policy*, 141 AM. J. PSYCHIATRY 10 (1984) (concluding that dangerousness predictions are wrong about 95% of the time).

rather than the intangible harm caused by the detention of a nondangerous defendant.

Thus, a court's detention decisions are not error free. There are two inversely related types of errors a court can make in predicting dangerousness. Courts commit Type I errors, or false positives, when they reject a true null hypothesis.⁶³ For example, a court could detain a defendant who actually would not have committed a crime if released. Courts commit Type II errors, or false negatives, when they fail to reject a false null hypothesis.⁶⁴ A court commits a Type II error by ordering the release of a defendant who then commits a crime while on bail.

Type I and Type II errors are mutually exclusive; minimizing the probability of making a Type I error maximizes the probability of making a Type II error.⁶⁵ The converse holds true as well.⁶⁶ For example, a court could reduce the chance of making a Type I error (detention of a nondangerous defendant) by releasing everyone. In so doing, however, the court increases the chance of making a Type II error (releasing a dangerous defendant). Generally, a court chooses to risk making the type of error it perceives as fostering the less severe societal consequences. Consequently, a court will generally prefer a Type I error (detaining a nondangerous defendant) to a Type II error (releasing a dangerous defendant).⁶⁷

Although several older studies concluded that a decision maker can predict dangerousness within acceptable limits, these studies emphasized that the prediction was only as good as a decision maker's ability to adhere to some strict guidelines, which are generally unrealistic in the judicial process.⁶⁸ The ex-

63. DAVID W. BARNES & JOHN M. CONLEY, *STATISTICAL EVIDENCE IN LITIGATION* § 2.10.3, at 81 (1986).

64. *Id.*

65. JANET P. MOURSUND, *EVALUATION: AN INTRODUCTION TO RESEARCH DESIGN* 108-10 (1973).

66. *Id.*

67. *Cf.* JAMES P. LEVINE ET AL., *CRIMINAL JUSTICE: A PUBLIC POLICY APPROACH* 424-25 (1980) (reaching similar conclusions regarding dangerousness predictions of parole board).

68. Professor John Monahan has identified six indicators of future violent behavior: past violence, sex (90% of violent criminals are male), age (men between 15 and 20 account for 35% of all violent crimes), race (nonwhites account for a disproportionate share of those arrested), socioeconomic status (unemployed persons commit more violent crimes), and substance abuse. JOHN MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 71-77 (1981).

perts' predictions of future dangerousness are quite different from those predictions judges must make under the BRA.⁶⁹

Well before the enactment of the BRA, the "prediction of dangerous behavior ha[d] become a central topic in psychiatry."⁷⁰ One of the leading critics of dangerousness predictions in the judicial process is Professor Alan Stone.⁷¹ According to Stone, psychiatrists are unable "to predict violence, to prognosticate future behavior."⁷²

After reviewing a number of clinical and statistical studies on the prediction of dangerousness, one commentator concluded that the studies betray a false positive rate regularly in excess of fifty to sixty percent.⁷³ In these circumstances, the false positive rate measures the risk of an erroneous deprivation of liberty.⁷⁴ It thus "appears that the statistical predictions of criminal behavior in general, and violent behavior in particular, are much more likely to be wrong than right."⁷⁵

Acknowledging that predictions of dangerousness are difficult and unenviable,⁷⁶ Professor Park E. Dietz has nevertheless developed a prediction model that ranks predictors into three mutually exclusive broad groups.⁷⁷ First-rank predictors of dangerousness (the commission of intolerable crimes as defined by Dietz) have a greater than fifty percent probability of predicting

69. See, e.g., David Jett, Note, *The Loss of Innocence: Preventive Detention Under the Bail Reform Act of 1984*, 22 AM. CRIM. L. REV. 805, 813 (1985) (noting that "the conditions under which the various studies have been made are very different from those existing in pretrial detention").

70. See Christopher D. Webster et al., *Introduction*, in DANGEROUSNESS, *supra* note 54, at 1, 1; see also Park E. Dietz, *Hypothetical Criteria for the Prediction of Individual Criminality*, in DANGEROUSNESS, *supra* note 54, at 87, 89-90 (discussing the inability of clinicians to predict dangerous behavior).

71. For an influential critique of dangerousness predictions, see generally ALAN STONE, *MENTAL HEALTH AND THE LAW: A SYSTEM IN TRANSITION* (1975).

72. Stone, *supra* note 54, at 13 ("I found the published studies of prediction woefully inadequate, poorly conceived, wrongly interpreted, and well below any acceptable standard of scientific research or even solid clinical experience."); see also Robert J. Menzies et al., *Hitting the Forensic Sound Barrier: Predictions of Dangerousness in a Pretrial Psychiatric Clinic*, in DANGEROUSNESS, *supra* note 54, at 115, 117, 131 (contending that personal and statistical bias distorts the process of predicting dangerousness).

73. See Ewing, *supra* note 49, at 182-96.

74. *Id.* at 196-97.

75. *Id.* at 196.

76. Dietz, *supra* note 70, at 87. Professor Dietz offers his ranked predictive hypotheses with much caution and qualification. Although tentative, the hypotheses are a creative attempt to bring more objectivity and order to predictions of dangerousness.

77. *Id.* at 93.

dangerousness.⁷⁸ These predictors "are those believed to be so highly and specifically associated with the criterion variable (i.e., the commission of any intolerable crime) that the presence of a single predictor is sufficient for a positive prediction."⁷⁹ Second-rank predictors identify a probability of dangerousness of between ten and fifty percent.⁸⁰ Dietz noted that it would "be

78. *Id.*

79. *Id.* First-rank predictors include:

1. One murder with mutilation of the corpse
2. One murder with vampirism
3. One murder with cannibalism
4. One murder with antemortem sexual sadism
5. One contract murder
6. One sniper murder of a stranger
7. One abduction with torture of the victim
8. Three forcible rapes of strangers
9. One arson episode with sexual arousal
10. Two arson episodes for profit
11. One kidnapping for ransom
12. One bombing of an occupied building
13. Two bombings of motor vehicles
14. One forcible rape with torture of the victim
15. Two episodes in which a child under 12 was forcibly raped or tortured
16. One instance of insertion of the penis in a body orifice of an infant
17. Three batteries of an individual child under 12
18. Three batteries of a spouse within 1 year
19. Three or more felonious assaultive acts within 1 year with escalating degrees of violence
20. Two unprovoked attacks on strangers with a lethal weapon
21. Five violent offenses of any kind
22. Threats to kill another named person uttered three or more times, at least two of which included no display of anger, and extending over a period of at least 3 months
23. Preoccupation with a casual acquaintance or stranger lasting more than 3 months with at least one attempt at direct communication with the other person and at least one potentially injurious action directed at the other person, a surrogate for the other person, someone believed to be associated with the other person, or an effigy or symbol of the other person
24. A plan to commit an intolerable crime that the subject says he or she fully intends to carry out and a history of any violent felony
25. Delusional beliefs not acknowledged as delusional by the subject that, if true, would justify an intolerable crime and a history of any violent felony and a history of stopping medication against medical advice

Id. at 94.

80. *Id.* Second-rank predictors include:

1. One firearm offense within the preceding year
2. One forcible rape within the preceding year
3. One burglary with destruction of female clothing or bedding, killing of a pet, theft of fetish items, or writing on a wall or mirror
4. Sadistic sexual fantasies and a history of any violent felony
5. One attempted or completed arson

most accurate to predict all such persons [who triggered second-rank predictors] to be negative [i.e., not dangerous]."⁸¹ He also recognizes, however, that the dangerousness decision requires a sort of balancing between an individual and society, and that society may prefer detaining some nondangerous defendants to protect itself from dangerous ones.⁸² Dietz's third-rank predictors define populations with a dangerousness probability of less than ten percent.⁸³

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6. One attempted or completed abduction
 7. Any offense in which the victim was bound
 8. The purchase of a weapon with a threat or plan to harm someone
 9. One offense the initial intent of which was to acquire material goods but which came to involve unnecessary violence when something did not go according to plan
 10. One episode of brutality toward an unresisting victim during the commission of another offense
 11. Two batteries against anyone in the home within the past year
 12. Two batteries within a residential institution within the past year
 13. Use of a lethal weapon in the intentional destruction of an effigy or symbol of a family member or lover or such person's property within the past year
 14. Morbid jealousy with a history of any violent offense
 15. Alcoholism and any violent offense within the past year
 16. Alcoholism and a habit of carrying a lethal weapon
 17. One episode of unlawfully cutting another person with a knife
 18. One episode of unlawfully drugging or poisoning another person
 19. Keeping a diary describing past crimes
 20. Tape recording the victim's utterances in a previous offense
 21. A diagnosis of antisocial personality disorder with at least one arrest for a violent offense
 22. A diagnosis of paranoid schizophrenia with a history of at least two violent acts while psychotic and at least two episodes of stopping neuroleptic medication against medical advice
 23. A history of being abused during childhood coupled with an arrest for any violent offense
 24. Use of a lethal weapon at any time in the interest of preserving an ongoing, profitable, unlawful enterprise (e.g., pimping, prostitution, or drug dealing)
 25. Three violent offenses of any kind

Id. at 95.

81. *Id.* at 94.

82. *Id.* at 94-95.

83. *Id.* at 95. Third-rank predictors include:

1. Has a juvenile record
2. Has a felony record
3. Is male
4. Age is 16 to 24
5. Is black
6. Is poor
7. Father is absent from family of origin
8. Has a tattoo
9. Possesses a cheap handgun
10. Has a gun collection
11. Has a preference for bondage and domination pornography

Dietz identifies the predictors not to predict dangerousness, but to test predictions of dangerousness. His predictors are identified here to contrast them with the factors a court must consider at a detention hearing. While Dietz lists some seventy-five factors based on his extensive experience, the BRA lists eleven.⁸⁴ The BRA factors include:

1. Weight of evidence
2. Obstruction of justice
3. Crime of violence or drugs
4. Bail or probation crimes
5. Drug or alcohol history
6. Employment status
7. Character, physical or mental condition
8. Court appearance record
9. Lack of family or community ties
10. Criminal history

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12. Reads detective magazines
 13. Reads mercenary and terrorist magazines
 14. Owns child pornography
 15. Collects Nazi memorabilia
 16. Has sought out work with the wounded in an accident department or ambulance service
 17. Has sought out work with the dead in a morgue or funeral home
 18. Has sought out flesh-incising work in a butcher shop, slaughter house, or operating theater
 19. Has worked as a private security guard or auxiliary police officer
 20. Has worked as a volunteer fireman
 21. Has been a paid employee in a police, fire, or correctional department in association with any personality disorder or sexual deviation
 22. Has been or is associated with an extremist political organization
 23. Is preoccupied with inner fantasies to the detriment of social functioning
 24. Has a first-degree relative with a criminal record
 25. Has a history of threatening and filing lawsuits that have never succeeded

Id. at 96.

84. Dietz makes one further observation of note:

Perhaps one day the clinical prediction of intolerable crime will be a task for the as yet unrecognized specialty of clinical criminology. In the meantime, a body of variously informed clinicians, most of whom have only minimal knowledge of crime, will remain empowered and expected by the courts and the public to make professional judgments about matters beyond their competence. Some, of course, seek to acquire expertise about "dangerousness" (although rarely about crime). Many others, unfortunately, are content to accept the false assumption by the courts and public that they are, indeed, experts in the prediction of criminal conduct. The confidence man's work is not legitimized by the abundance of eager victims. To predict criminal behavior without knowledge of crime is a psycholegal confidence game.

Id. at 99 (footnotes omitted). After contrasting Dietz's lists of predictive factors with the BRA's list, one is persuaded that predicting criminal behavior without knowledge of *behavior* is also a psycholegal confidence game.

11. Statutory presumptions of dangerousness (bail recidivism or drug-and-firearm).⁸⁵

These eleven factors have an interesting lineage. Factors one through nine are from the 1966 Act, which denied bail only to ensure the appearance of a defendant at trial.⁸⁶ Thus, the reliability of these factors as predictors of dangerousness is questionable. Moreover, there is little empirical support for the nine factors as accurate and reliable predictors of dangerousness. The tenth factor is from the District of Columbia's pretrial detention statute and involves a defendant's criminal history.⁸⁷ The eleventh factor is the presumption of dangerousness that arises under the BRA in certain delineated circumstances and is lacking empirical support.⁸⁸

The empirical support for the BRA is vital, given some experts' guarded optimism over the predictability of dangerousness.⁸⁹ In arguing that statistical studies show improved prediction over clinical studies,⁹⁰ Professors Deidre Klassen and William O'Connor identified factors to include in any predictive effort. These factors include past violence, youth, lower socioeconomic status, race, low IQ, criminal history, personality disorders, alcoholism, drug abuse, mental disorders, marital status, and unemployment.⁹¹

Based on the identified factors, Klassen and O'Connor analyzed data generated from 239 adult males at risk for violent behavior.⁹² The sample consisted of patients at a community mental health center, whom researchers observed three and six months after their release.⁹³ Klassen and O'Connor were able to assess correctly patients' dangerousness 85.3% of the time.⁹⁴ Fifty-nine percent of those predicted to be violent were violent, while 94% of those predicted to be nonviolent were nonviolent.⁹⁵ Based on these results, the authors concluded that violence pre-

85. 18 U.S.C. § 3142(e)-(g) (1988 & Supp. II 1990).

86. See Angel et al., *supra* note 53, at 325.

87. *Id.*

88. 18 U.S.C. § 3142(e)-(f) (1988 & Supp. II 1990).

89. *E.g.*, Deidre Klassen & William A. O'Connor, *A Prospective Study of Predictors of Violence in Adult Male Mental Health Admissions*, 12 LAW & HUM. BEHAV. 143, 144-45 (1988) (discussing the success of clinical and statistical studies in predicting dangerousness).

90. *Id.* at 144 (noting that "[c]linical predictions of dangerousness rarely exceed the accuracy obtainable by chance").

91. *Id.* at 145-47.

92. *Id.* at 147-48.

93. *Id.* at 149-50.

94. *Id.* at 152-53.

95. *Id.*

diction is improving, but that false positive rates should generate "considerable caution"⁹⁶ in predictions.⁹⁷

In 1994, Robert Menzies authored a continuing study of 162 accused persons evaluated for dangerousness at the Metropolitan Toronto Forensic Service (METFORS).⁹⁸ Using clinical and actuarial techniques, experts and laypersons attempted to predict the dangerousness of the accused persons.⁹⁹ Predictions that the accused persons were dangerous were more wrong than right.¹⁰⁰ Calling the empirical results "equivocal," the authors urged caution in the use of dangerousness predictions in both judicial and clinical contexts.¹⁰¹

The METFORS study is noteworthy because it addressed the dangerousness issue in "probabilistic and contextual language."¹⁰² The study provides the first systematic look at the multivalent or fuzzy nature of dangerous predictions:

Whereas we maintained that any wholesale rejection of the concept [of dangerousness predictions] was premature, it was still apparent that any progress toward resolution of the dangerousness debate would require a fundamental reframing of theory, policy, and practice in both judicial and clinical quarters. Of cardinal importance would be the recognition that danger [and] violence . . . are not discrete or insulated entities amenable to narrow scientific calibration—rather, they are complex, multidimensional, and discursively charged phenomena¹⁰³

In summary, studies on predicting dangerousness have shown that experts are accurate in predictions of future dangerousness about one-third of the time¹⁰⁴ and that experts overpredict dangerousness, yielding a false positive rate of sixty

96. *Id.* at 156; see also Deidre Klassen & William A. O'Connor, *Assessing the Risk of Violence in Released Mental Patients: A Cross-Validation Study*, 1 PSYCHOL. ASSESSMENT: J. CONSULTING & CLINICAL PSYCHOL. 75, 80 (1989) (noting that recent statistical predictions demonstrate violence is not as unpredictable as previously believed).

97. John Monahan & Saleem A. Shah, *Dangerousness and Commitment of the Mentally Disordered in the United States*, 15 SCHIZOPHRENIA BULL. 541, 550 (1989). After observing that courts are more comfortable than experts with predictions of dangerousness, Monahan and Shah, like other experts, conclude that "[t]here is guarded optimism in the field that it may be possible to improve the validity of clinical predictions of violence." *Id.* at 550.

98. Robert J. Menzies, *The Dimensions of Dangerousness Revisited: Assessing Forensic Predictions About Violence*, 18 LAW & HUM. BEHAV. 1 (1994).

99. *Id.* at 1-16.

100. *Id.* at 25.

101. *Id.* at 24-26.

102. *Id.* at 24.

103. *Id.*

104. See JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES 77 (1981); Menzies, *supra* note 98, at 1.

percent.¹⁰⁵ Thus, a number of nondangerous defendants are detained without a prior adjudication of guilt. Furthermore, experts are better predictors of nondangerous defendants than dangerous ones.¹⁰⁶ Finally, a fatalistic thread running through the literature concludes that prediction despite its serious deficiencies "has always been a part of life and has always been a part of law."¹⁰⁷ Prediction, alas, is an undeniable part of detention.

B. LEGAL DEFICIENCIES IN PREDICTING DANGEROUSNESS

Defendants have attacked pretrial detention schemes by claiming that the test for detention is unconstitutionally vague.¹⁰⁸ They cite legions of scientific authority for the proposition that it is virtually impossible to predict future dangerousness within acceptable levels of confidence.¹⁰⁹ According to this argument, if the standard for pretrial detention fails to specify relevant factors on which a court should rely in making predictions of dangerousness, the standard is intrinsically arbitrary, regardless of the protection the BRA affords.¹¹⁰

In *United States v. Edwards*,¹¹¹ the District of Columbia Court of Appeals rejected a defendant's overbreadth¹¹² argument aimed at the District of Columbia pretrial detention statute. The court confined the doctrine to statutes that swept too broadly and thus impinged on constitutionally protected conduct.¹¹³ Because pretrial detention under the District of Columbia statute (the forerunner to the BRA) applied only to regulated

105. TERENCE P. THORNBERRY & JOSEPH E. JACOBY, *THE CRIMINALLY INSANE: A COMMUNITY FOLLOW-UP OF MENTALLY ILL OFFENDERS* 178-79 (1979); Menzies et al., *supra* note 72, at 131.

106. Klassen & O'Connor, *supra* note 89, at 152-53.

107. MONAHAN, *supra* note 104, at 26. For an entertaining debate on dangerousness predictions in the guise of a closing argument at a mock trial, see Virginia J. McFarlane, *Clinical Predictors on Trial: A Case for Their Defense*, in *DANGEROUSNESS*, *supra* note 54, at 209, 210-25.

108. See *United States v. Payden*, 598 F. Supp. 1388, 1391 (S.D.N.Y. 1984), *rev'd*, 759 F.2d 202 (2d Cir. 1985).

109. See *Barefoot v. Estelle*, 463 U.S. 880, 920-21 (Blackmun, J., dissenting).

110. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169-70 (1972).

111. 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).

112. The overbreadth doctrine requires the invalidation of a statute if it is fairly capable of being applied to punish people for constitutionally protected speech or conduct. *Thomhill v. Alabama*, 310 U.S. 88, 97-98 (1940).

113. *Edwards*, 430 A.2d at 1341-42.

conduct, the court held that the overbreadth doctrine had no application to the detention statute.¹¹⁴

In *United States v. Payden*,¹¹⁵ a federal district court in New York addressed whether the BRA was "void for vagueness" because it did not define dangerousness. The defendant contended that the statute failed to give adequate notice of the conduct that would lead to pretrial detention.¹¹⁶ The court disagreed, finding that the detention factors were sufficiently specific to limit a court's discretion.¹¹⁷ In justifying its conclusion, the court observed that void for vagueness rests "on the principle that a person should be free to plan his or her behavior based upon laws which are clear enough to afford one a reasonable opportunity to know what is permitted and what is proscribed."¹¹⁸ The court also noted that a statute is not tested in the abstract; rather, it is examined in light of the facts of each case.¹¹⁹

In reviewing the detention provisions, the *Payden* court found that the statute provided ample notice of the proscribed conduct.¹²⁰ The statute states that a detention hearing will be conducted upon motion of the government in a case that involves, among others, "an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act."¹²¹ The court observed that the prosecutor had charged the defendant with three counts under the Controlled Substances Act, all of which carry at least a ten year maximum period of imprisonment.¹²² Thus, the court reasoned, the statute clearly set forth those offenses that will give rise to a detention hearing.¹²³

The *Payden* court also rejected the defendant's vagueness claim, noting that courts usually apply the "void for vagueness" doctrine when a statute does not give notice of the prohibited

114. *Id.* at 1342.

115. 598 F. Supp. 1388, 1391 (S.D.N.Y. 1984), *rev'd*, 759 F.2d 202 (2d Cir. 1985).

116. *Id.* at 1395.

117. *Id.* at 1396.

118. *Id.* at 1395 (citing *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 855 (2d Cir. 1984)).

119. *Id.* (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7 (1982)).

120. *Id.* at 1395.

121. 18 U.S.C. § 3142(f)(1)(C) (1988 & Supp II 1990).

122. *Payden*, 598 F. Supp. at 1395.

123. *Id.* at 1395-96.

behavior.¹²⁴ The court concluded that “[t]he new bail statute does not prohibit conduct, rather it establishes a framework for a judge to detain an individual based on a prediction of possible future conduct.”¹²⁵ Finally, in a terse statement to the defendant’s contention that the statute did not define the “danger” to which it applied, the court stated: “While the statute does not define the danger, it specifies a number of factors to be considered by the court in ordering detention.”¹²⁶

The limitation fashioned in *Edwards* and *Payden* on the overbreadth doctrine is unconvincing, especially because the BRA fails to define danger to the community.¹²⁷ Danger to the community does not mean only physical danger. Congress also meant to include non-physical danger, such as operating a continuing criminal enterprise.¹²⁸ It is, then, fair to ask what the limits are to this expansive concept of danger to the community. May a defendant, for example, be detained for political reasons if it can be shown that such activity might harm the community?¹²⁹ One court, grappling with the BRA’s protean concept of dangerousness, concluded that the BRA regulates danger to the community posed by engaging in future criminal conduct violative of federal criminal statutes.¹³⁰ The court based this conclusion on congressional inability to enact laws to promote the general welfare.¹³¹

The term “dangerous” is imprecise because it could include *any* unacceptable activity. The accurate prediction of danger-

124. *Id.* at 1396.

125. *Id.*

126. *Id.*

127. 18 U.S.C. § 3142(e)-(g) (1988 & Supp. II 1990).

128. S. REP. NO. 225, *supra* note 31, at 12, 13, 19-20, *reprinted in* 1984 U.S.C.C.A.N. at 3195, 3196, 3202-03. Examples of the protean standard of dangerousness include *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986) (examining defendant’s use of false identification); *United States v. Coleman*, 777 F.2d 888, 892-94 (3d Cir. 1985) (examining defendant’s murder threats); *United States v. Daniels*, 772 F.2d 382, 383 (7th Cir. 1985) (examining defendant’s history of threats); *United States v. Leon*, 766 F.2d 77, 78-82 (2d Cir. 1985) (examining defendant’s threats to arresting officer and two witnesses); *United States v. Acevedo-Ramos*, 755 F.2d 203, 208-09 (1st Cir. 1985) (examining defendant’s history of violent crime); *United States v. Simon*, 760 F. Supp. 495, 497 (D.V.I. 1990) (examining defendant’s attempt to tamper with jury); *United States v. Yeaple*, 605 F. Supp. 85, 87 (M.D. Pa. 1985) (examining defendant’s receipt of child pornography in the mail).

129. See Andrew Von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFF. L. REV. 717, 745-48 (1972).

130. *United States v. Perry*, 788 F.2d 100 (3d Cir.), *cert. denied*, 479 U.S. 864 (1986).

131. *Id.* at 109.

ousness, however, requires a narrow focus.¹³² The BRA fails to focus the task of predicting dangerousness.

The Supreme Court has rejected similar arguments regarding dangerousness predictions in other contexts. In *Korematsu v. United States*,¹³³ the Court upheld an executive order to detain Japanese Americans on the West Coast in detention camps. Although the Court conceded that the executive order necessarily caused many American citizens loyal to the United States to be detained,¹³⁴ the Court nevertheless recognized the government's "overwhelming" concern for national security.¹³⁵ The Court struck the balance in favor of the government, noting "[n]othing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety" could justify race-based detention.¹³⁶

The Supreme Court has also upheld dangerousness determinations as part of Texas's death penalty scheme in two cases relevant to this Article. In *Jurek v. Texas*,¹³⁷ the jury's consideration of a defendant's dangerousness determined whether the state imposed the death sentence. The defendant argued that "it [was] impossible to predict future behavior and that the [dangerousness] question [upon which imposition of the death penalty rested] is so vague as to be meaningless."¹³⁸ The Court upheld the Texas death penalty statute against this constitutional challenge, concluding that predictions of dangerousness are "essential element[s] in many of the decisions rendered throughout our criminal justice system."¹³⁹

132. George E. Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 *TEX. L. REV.* 1343, 1344 n.1, 1345 (1977).

133. 323 U.S. 214, 219 (1944).

134. *Id.* at 218-19.

135. *Id.* at 218.

136. *Id.* *Korematsu* dramatically underscores the dangers to individual rights inherent in a strict application of a balancing test. For compelling discussions of how courts have used balancing tests to cut back the rights of individuals, see Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733, 776-77 (1964); Jeffrey Blum et al., Comment, *Cases that Shock the Conscience: Reflections on Criticism of the Burger Court*, 15 *HARV. C.R.-C.L. L. REV.* 713, 729-31 (1980).

137. 428 U.S. 262, 267-68 (1976).

138. *Id.* at 274.

139. *Id.* at 275. The *Jurek* Court further observed:

It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, [because] prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system . . . the task that a Texas jury must perform is

Furthermore, the *Jurek* plurality held that the dangerousness question was valid in determining whether to impose the death sentence.¹⁴⁰ The plurality appeared convinced because "all possible relevant information about the individual defendant" was presented to the jury.¹⁴¹ The plurality thus found that a trier of fact's dangerousness determination may have procedural validity despite its lack of moral or empirical justification.¹⁴²

Similarly, in *Barefoot v. Estelle*,¹⁴³ the second Texas death penalty case relevant to this Article, the Court held admissible expert predictions of dangerousness in capital cases, even though the experts made their predictions based on a hypothetical question, not on an examination of the defendant. One expert testified that he could "give a medical opinion within reasonable psychiatric certainty as to the psychological or psychiatric makeup of an individual"¹⁴⁴ and that "there was a one hundred percent and absolute chance that Barefoot would commit future acts of violence."¹⁴⁵ Another expert echoed this prediction when he answered the prosecutor's hypothetical question.¹⁴⁶ Neither expert actually examined the defendant.¹⁴⁷ Nevertheless, the Court upheld the constitutionality of the Texas death penalty statute, apparently persuaded that the sentencing authority reached its decision in good faith after hearing all the relevant evidence. In fact, the record showed that expert predictions of dangerousness were more often wrong than

thus basically no different from the task performed countless times each day throughout the American system of criminal justice.

Id. at 274-75. In support of its conclusion, the Court cited to the use of dangerousness predictions in the context of bail, sentencing, and parole decisions. *Id.* at 275.

140. *Id.* at 276.

141. *Id.* Texas juries were not instructed on what to do with mitigating evidence adduced at the sentencing stage of a capital murder trial. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (holding the Texas death penalty procedure as practiced unconstitutional).

142. See *Stone*, *supra* note 54, at 21. *Stone* observed:

All the authoritative scientific statements on clinical and statistical predictions of violence . . . say that it cannot be done with any appreciable precision. Yet the Supreme Court with sanguine assurance says that it is done every day. It is rather like the man who is asked if he believes in baptism. He answers, "Believe in it? Hell, I've seen it done!"

Id. at 20-21.

143. 463 U.S. 880, 903-06 (1983).

144. *Id.* at 918 (Blackmun, J., dissenting) (emphasis deleted).

145. *Id.* at 919 (Blackmun, J., dissenting) (emphasis deleted).

146. *Id.* at 918-19 (Blackmun, J., dissenting).

147. *Id.* at 884.

right.¹⁴⁸ The Court, however, characterized attacks on prediction reliability as arguments to the weight of the evidence rather than its admissibility.¹⁴⁹

The Supreme Court has also considered dangerousness determinations in non-capital offense cases. For instance, in *Addington v. Texas*,¹⁵⁰ the Supreme Court addressed the standard of proof required in adult civil commitment proceedings. The Court held that adult civil commitment proceedings do not require proof beyond a reasonable doubt,¹⁵¹ the standard traditionally reserved for criminal prosecutions.¹⁵² At the same time, however, the Court rejected the preponderance of the evidence standard embodied in the Texas statute out of concern that an adult may be committed for nothing more than idiosyncratic behavior.¹⁵³ The Court noted that because commitment necessarily results in the loss of liberty, the risk of error should decidedly favor the individual over society.¹⁵⁴

Rejecting the most and least exacting standards of proof, the *Addington* Court embraced the clear and convincing evidence standard.¹⁵⁵ In embracing the clear and convincing evidence standard, the Court made several troubling observations regarding proof, certainty, and dangerousness: "Given the lack of certainty and the fallibility of psychiatric diagnosis there is a serious question as to whether a state could ever prove beyond a

148. *Id.* at 920 (Blackmun, J., dissenting) (noting that expert predictions as to dangerousness are accurate about one-third of the time).

149. *Id.* at 898-99.

150. 441 U.S. 418, 419-20 (1979).

151. *See In re Winship*, 397 U.S. 358, 368 (1970).

152. 441 U.S. at 431.

153. *Id.* at 427.

154. *Id.* Consequently, the mere preponderance standard was insufficient. *Id.* In the traditional adult civil commitment proceeding, two issues are of utmost importance: the threat posed by the defendant to himself or others and mental disease. *See generally* *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992) (discussing adult civil commitment).

155. 441 U.S. at 431-32. This standard is generally placed between the preponderance standard and the reasonable doubt standard. *Id.* In support of its conclusion, the Court observed:

It may be true that an erroneous commitment is sometimes as undesirable as an erroneous conviction . . . [I]t is not true that the release of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty. One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma. . . . It cannot be said, therefore, that it is much better for a mentally ill person to "go free" than for a mentally normal person to be committed.

Id. at 428-29 (citations omitted).

reasonable doubt that an individual is both mentally ill and likely to be dangerous."¹⁵⁶

Addington is inconsistent with prior and subsequent case law. In *Jurek v. Texas*¹⁵⁷ and *Barefoot v. Estelle*,¹⁵⁸ the Court had no difficulty permitting predictions of future dangerousness (even those based on facts incorporated in a hypothetical question) as long as the jury received all relevant evidence. Texas prosecutors in a death penalty case must prove beyond a reasonable doubt not only that the defendant committed capital murder, but also, among other things, that "the defendant would commit criminal acts of violence that would constitute a continuing threat to society."¹⁵⁹ Requiring Texas to prove both guilt and dangerousness beyond a reasonable doubt in *Jurek* and *Barefoot* is no more difficult than proving mental illness and dangerousness beyond a reasonable doubt in *Addington*. "The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach"¹⁶⁰ in both types of dangerousness predictions:¹⁶¹

The Court must be wrong. The decision in *Addington* may well be supported by other considerations, but it is not justified by the impossibility of proving risk beyond a reasonable doubt. That an individual is likely to be dangerous *can* be proved at any level required, provided "likely to be dangerous" is given careful construction. If that phrase is defined as "belonging to a group with a risk of dangerous behavior unacceptable in relation to its gravity, if the harm occurs, balanced against the reduction of individual freedom involved in its avoidance," then the existence of a threat of future harm can be proved at the same levels as many other facts. It is a fact in the same sense that a broken bone is a fact. By contrast, if the phrase "likely to be dangerous" is defined as requiring proof on a balance of probability that *this* patient will injure himself or others, or that he is more likely to do so than not, then it cannot be proved at any level of confidence, since it is very rarely so. In the latter perspective, in practice, it can never be proved, since at present our best predictive capacities fall far below the requisite level of proof.¹⁶²

156. *Id.* at 429.

157. 428 U.S. 262, 274-76 (1976).

158. 463 U.S. 880, 896-905 (1983).

159. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (West Supp. 1994).

160. *Addington*, 441 U.S. at 430.

161. For a discussion of diagnostic uncertainty in the context of civil commitment, see Barry A. Martin, *Criteria for Civil Commitment: Medicolegal Impasse, in DANGEROUSNESS, supra* note 54, at 161, 167 ("Unfortunately, with respect to both the diagnosis of mental order and the prediction of dangerousness psychiatrists are hard pressed to meet even the civil standard of proof, let alone the intermediate standard.")

162. Marc Miller & Norval Morris, *Predictions of Dangerousness: An Argument for Limited Use*, 3 VIOLENCE & VICTIMS 263, 278 (1988).

The Supreme Court addressed the dangerousness issue in a slightly different context in *Jones v. United States*.¹⁶³ The trial court in *Jones* found the defendant not guilty by reason of insanity of shoplifting.¹⁶⁴ After the government confined him for a period longer than the maximum sentence if he had been convicted, Jones sought release.¹⁶⁵ He argued that once the commitment period exceeded the maximum sentence of the crime charged, the government either had to release him or commit him under civil commitment procedures.¹⁶⁶ The finding that he was insane at the time of the offense, Jones argued, was not sufficiently probative of dangerousness to justify continued confinement.¹⁶⁷

The Court rejected Jones's contentions, holding that the law presumes mental disability and dangerousness to continue indefinitely and that this presumption finds its genesis in the criminal act to which Jones had pled not guilty by reason of insanity.¹⁶⁸ The Court embraced a broad definition of dangerousness that included any person who committed a crime.¹⁶⁹ The Court essentially concluded that Jones was a future danger to society because he had stolen a jacket from a department store.¹⁷⁰ It was irrelevant to the Court that the crime was non-violent; only Jones's plea, the court's finding of insanity, and the concomitant presumption of continuing dangerousness were relevant.

The presumption of continued dangerousness crafted in *Jones* has captivated commentators.¹⁷¹ In criticizing the opinion, Professor Elyce Zenoff challenged the Court's presumption of dangerousness: "The majority seemed untroubled by the complete lack of scientific support for its assumption that repetition of either nonviolent or violent crimes can be predicted from the

163. 463 U.S. 354 (1983).

164. *Id.* at 360. The prosecution did not challenge Jones's insanity plea, and the court entered judgment on a stipulation. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 364-66, 369-70.

169. *Id.* at 364-65 ("We do not agree . . . that the requisite dangerousness is not established by proof that a person committed a non-violent crime against property.")

170. See Zenoff, *supra* note 47, at 572.

171. See, e.g., Miller & Morris, *supra* note 162, at 279 (criticizing the presumption of continuing dangerousness); Zenoff, *supra* note 47, at 572-74 (discussing the tension between the presumption in *Jones* and prior case law).

combination of mental illness and a single nonviolent crime."¹⁷² Other commentators echo those concerns:

The presumptions of continuing mental illness and dangerousness were found by the majority, even though Jones had committed attempted petty larceny of a jacket—an offense that, in “common sense” terms, could hardly be termed violent. The willingness of the majority to presume dangerousness on the basis of the plea of insanity, especially in the absence of any supporting evidence of the defendant’s dangerousness, is groundless—in short, *Jones* is a miscarriage of justice.¹⁷³

In *Schall v. Martin*,¹⁷⁴ the Supreme Court addressed the constitutionality of a New York law that authorized the pretrial detention of juveniles if a serious risk existed that the juvenile would commit a crime before trial.¹⁷⁵ The statute did not define the term “serious” or prescribe the standard of proof.¹⁷⁶ Furthermore, it contained no guidelines or factors for predicting dangerousness.¹⁷⁷ Seizing these ambiguities, the defendants argued that it was virtually impossible to accurately predict future criminality and that the decision to detain was intrinsically arbitrary.¹⁷⁸

Relying on *Jurek v. Texas*,¹⁷⁹ the Court dismissed the defendants’ arguments, stating “we have specifically rejected the contention . . . ‘that it is impossible to predict future behavior and that the question is so vague as to be meaningless.’”¹⁸⁰ Furthermore, the Court held that the New York statute served the legitimate state interest “of protecting . . . society from the hazards of pre-trial crime”¹⁸¹ and did not violate a defendant’s due process rights.

The Court’s analysis in *Schall* is deficient in several respects. Most notably, the Court failed to appreciate how the

172. Zenoff, *supra* note 47, at 572.

173. Miller & Morris, *supra* note 162, at 279.

174. 467 U.S. 253 (1984).

175. Under New York law, a court could order pretrial detention of a juvenile before a finding of probable cause if a court determined that “there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime.” N.Y. FAM. Ct. Act § 320.5(3)(b) (McKinney 1983). For an in-depth discussion of *Schall* and the challenged New York statute, see Ewing, *supra* note 49, at 175.

176. 467 U.S. at 283 (Marshall, J., dissenting).

177. *Id.* at 278; see also Ewing, *supra* note 49, at 177 (noting that “[o]nly the foolhardy would deny” that errors will not be committed).

178. 467 U.S. at 278.

179. 428 U.S. 262 (1976).

180. 467 U.S. at 278-79 (quoting *Jurek v. Texas*, 428 U.S. 262, 274 (1976)).

181. 467 U.S. at 274. The Court found protecting the juvenile from the consequences of committing a crime is a legitimate state objective as well. *Id.*

dangerousness prediction is made under the New York statute. Under that statute, a court makes the detention decision based on the nature of the offense charged, a cursory review of background information and criminal history, and the testimony of a juvenile probation officer.¹⁸² Little or no proof exists that these factors are accurate and reliable predictors of juvenile dangerousness.¹⁸³

More troubling was the Court's treatment of the actual evidence introduced in *Schall*. The defendant introduced expert evidence that prediction of future dangerousness under the New York detention scheme was not appreciably better than chance.¹⁸⁴ The district court endorsed the expert witness's view that prognosis of dangerousness under the statute was "wholly unpredictable."¹⁸⁵ The Court did not conclude that this finding was clearly erroneous.¹⁸⁶ Consequently, the Court upheld a detention scheme that was no better than chance in predicting dangerousness.¹⁸⁷

Finally, in *United States v. Salerno*,¹⁸⁸ the Court dismissed, in a manner harkening back to *Barefoot*, the contention that the procedures embodied in the BRA were inaccurate predictors. The Court focused on dangerousness through a normative, rather than empirical, lens and, relying on *Schall*, stated that "there is nothing inherently unattainable about a prediction of future criminal conduct."¹⁸⁹ The pitfall of relying on *Schall* is obvious: *Schall* itself relies on authorities where the dangerous-

182. *Id.* at 283-84 (Marshall, J., dissenting); Zenoff, *supra* note 47, at 594 n.188.

183. Zenoff, *supra* note 47, at 594.

184. 467 U.S. at 293-94 (Marshall, J., dissenting).

185. *Id.* at 294 (Marshall, J., dissenting).

186. In fact, the Court casually dismissed the district court's findings of fact on dangerousness predictions, an approach criticized by Justice Marshall in dissent. *Id.* at 294 n.20 (Marshall, J., dissenting).

187. In *Schall*, the distinction between detention by decision and detention by chance is one of process. Ostensibly, the former decision is made after careful deliberation, and the latter simply by chance. From the perspective of a detained juvenile, however, it does not matter that the court carefully deliberates before rendering a decision whose probability of accuracy is slightly better than casting dice or flipping a coin.

188. 481 U.S. 739 (1987).

189. *Id.* at 751 (quoting *Schall*, 467 U.S. at 278).

ness prediction occurred after conviction,¹⁹⁰ when a defendant's right to liberty is at low tide.¹⁹¹

The Supreme Court has so far avoided assessing the accuracy of dangerousness determinations by conveniently recasting arguments as raising legal and not empirical questions or, as in *Schall*, by ignoring the evidence presented. Although determining what factors are appropriate in predicting dangerousness is, in the first instance, a legislative question, whether chosen factors pass constitutional muster is traditionally a judicial question. Perhaps the Court consistently diverts its attention from appraising the empirical evidence regarding dangerousness because a forthright appraisal of dangerousness would often doom the statutory scheme.¹⁹² Meanwhile, by ignoring the empirical question, the Court has yet to decide the level of confidence in the dangerousness prediction process necessary to pass constitutional muster. Thus, the Court has failed to scrutinize predictive practice, a part of the warp and woof of American criminal law. The defendant who challenges a dangerousness prediction as unconstitutional meets the Court's refrain that "there is nothing inherently unattainable about a prediction of future criminal conduct."¹⁹³

III. PRETRIAL DETENTION AS A FUZZY SYSTEM

A. *MATHEWS*, METAPHORS, AND PERSPECTIVE

Framing the dangerousness issue is fundamental to the type of procedural due process analysis that a court will apply.¹⁹⁴ The paradigmatic model of detention frames the debate in categorical terms. It asks whether a defendant is a member of a class that Congress has identified as dangerous, not whether a particular defendant is dangerous. By framing the inquiry in such categorical, legislative terms, courts can skirt

190. Professor Ewing depicts *Schall* as a pragmatic policy judgment. Ewing, *supra* note 49, at 207.

191. The Court relied on precedents involving dangerousness predictions in the context of the death penalty, parole release and revocation, and sentencing dangerous defendants. See Ewing, *supra* note 49, at 207.

192. See, e.g., *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983) (noting that an acceptance of the view that dangerousness predictions are unreliable "would immediately call into question those other contexts in which predictions of future behavior are constantly made"); see also David J. Rabinowitz, Note, *Preventive Detention and United States v. Edwards: Burdening The Innocent*, 32 AM. U. L. REV. 191, 201 (1982) (summarizing the research on the accuracy of judicial predictions of dangerousness).

193. *Salerno*, 481 U.S. at 751.

194. See *Miller & Morris*, *supra* note 162, at 278-79.

the rigid due process requirements embodied in cases like *Goldberg v. Kelly*¹⁹⁵ and *Londoner v. Denver*¹⁹⁶ and opt for the less rigid requirements found in cases like *Mathews v. Eldridge*¹⁹⁷ and *Bi-Metallic Investment Co. v. State Board of Equalization*.¹⁹⁸ Under the *Mathews* and *Bi-Metallic* line of cases, when the class at issue is general or when expert testimony helps determine an individual's membership in the class *vel non*, the process due an aggrieved individual is substantially lessened.¹⁹⁹ While *Goldberg* and *Londoner* would put the government to individual proof of a defendant's dangerousness and need for detention, *Mathews* and *Bi-Metallic* question an individual's interest in the deprivation process.

The contemporary procedural due process paradigm recognizes a tension between what commentators have dubbed the intrinsic value theory and the instrumentality or process-sensitive theory.²⁰⁰ The intrinsic value theory recognizes the dignity of the individual, and demands that the individual receive appropriate notice and a right to be heard before the government deprives the individual of life, liberty, or property.²⁰¹ The essence of the intrinsic value theory is an individual's participation in the deprivation process and a decision maker's explanation of that deprivation decision.²⁰² The intrinsic value theory emphasizes fairness and individual dignity.²⁰³

195. 397 U.S. 254 (1970) (holding that a pre-termination evidentiary hearing is necessary to provide welfare recipients with procedural due process).

196. 210 U.S. 373 (1908) (holding that due process can require that taxpayers be afforded a hearing).

197. 424 U.S. 319 (1976) (holding that an evidentiary hearing is not required prior to the termination of social security disability payments).

198. 239 U.S. 441 (1915) (holding that where a rule applies to more than a few people, due process does not require that each person have a direct voice in its adoption).

199. See *Barefoot v. Estelle*, 463 U.S. 880, 903-04 (1983).

200. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 666-67 (2d ed. 1988).

201. See generally Frank Michelman, *Formal and Associational Aims in Procedural Due Process*, in *DUE PROCESS: XVIII NOMOS* 126-27 (J. Roland Pennock & John W. Chapman eds., 1977) (contending that due process vindicates the values of participation and revelation).

202. See, e.g., *Joint Anti-Fascist Refugee Comm'n v. McGrath*, 341 U.S. 123 at 171-72 (1951) (Frankfurter, J., concurring) ("No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.").

203. *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970); TRIBE, *supra* note 200, at 666-67; see also Richard Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 117-25 (1978) (defining due process values in terms of the impact on the dignity of those individuals affected by government action).

In contrast, the instrumentality or process-sensitive theory views procedural due process as a mechanism to ensure the accuracy of applying general substantive rules to the individual.²⁰⁴ The process-sensitive theory does not recognize the utility of participation of the individual per se; rather, it latches onto participation of the individual as a means to ensure accuracy.²⁰⁵ The quest for accuracy in the decisional process thus becomes the essence of procedural due process.²⁰⁶ Accuracy becomes a thing in itself.

The Supreme Court appears to embrace the supremacy of the process-sensitive theory of procedural due process, weighing procedural safeguards primarily in terms of their contribution to accuracy.²⁰⁷ This view elevates accuracy above the individual's ability to participate in the deprivation process. Consequently, under the process-sensitive theory, a court could deny pre-deprivation hearings as long as it conducts a post-deprivation hearing.²⁰⁸

The present dichotomized procedural due process paradigm is seriously misleading. In theory, and more importantly in application, the two models of procedural due process are not divisible. Accuracy in the deprivation decision, the touchstone of the process-sensitive theory, is one of several values that the intrinsic value theory embodies.

Although heralded as the darling of the process-sensitive theory, the Court's pronouncement in *Mathews v. Eldridge*²⁰⁹ rests on a firm intrinsic value theory foundation. In *Mathews*, the Court upheld the Social Security Administration's procedures for terminating social security benefits without an evidentiary hearing.²¹⁰ In its famous "balancing" test, the *Mathews* Court required consideration of the following interests:

[F]irst, the private interest that will be affected by the official action;
second, the risk of an erroneous deprivation of such interest through

204. TRIBE, *supra* note 200, at 666-67.

205. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972) ("[T]he essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property.").

206. See TRIBE, *supra* note 200, at 667.

207. See *Mathews v. Eldridge*, 424 U.S. 319, 344-45 (1976). See generally Jenny Mashaw, *The Supreme Court's Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976) (criticizing the Supreme Court's emphasis on questions of technique rather than questions of value).

208. TRIBE, *supra* note 200, at 673.

209. 424 U.S. 319 (1976).

210. *Id.* at 349.

the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²¹¹

Thus, although accuracy may be the primary factor in the *Mathews* calculus, the Court's balancing test reveals that the term has no meaning standing alone.²¹² Accuracy cannot be a thing in itself. The Court has stressed that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation,"²¹³ because the answer to what process is due turns on the individual's and the government's interests.²¹⁴ A process-sensitive approach to procedural due process cannot define what accuracy is sufficient. A court can fairly answer the question of accuracy only by resort to the interests at stake.

The paradigmatic due process model conceals the need to look outside the norm of accuracy for the substantive rights at stake to give the goal of accuracy content and context. Once a court isolates these external values, the principles and utility of a process-sensitive model become secondary.²¹⁵ Professor Laurence Tribe argues that "[t]he process theme by itself determines almost nothing unless its presuppositions are specified, and its

211. *Id.* at 335. Appended to this calculus is the presumption that "substantial weight must be given to the good faith judgment of the [agency] charged by Congress with the administration of social welfare programs." *Id.* at 349.

212. The Court also noted the interdependence of substantive and procedural factors, observing that "[s]ignificantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited." *Id.* at 348.

213. *Cafeteria & Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886, 895 (1961).

214. Confidence is directly related to the accuracy in the decisional process. There are several ways by which accuracy may be measured. One method looks at the number of successes and failures identified. See Underwood, *supra* note 53, at 1410 n.4. Another method measures the total percentage of correct predictions. *Id.* It is thus necessary when assessing accuracy to identify the method by which the concept is to be measured.

215. Professor Tribe persuasively shows that

[e]ven the Constitution's most procedural prescriptions cannot be adequately understood, much less applied, in the absence of a developed theory of fundamental rights that are secured to persons against the state—a theory whose derivation demands precisely the kinds of controversial substantive choices that the process proponents are so anxious to leave to the electorate and its representatives.

Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1067 (1980).

content supplemented, by a full theory of substantive rights and values—the very sort of theory the process-perfecters are at such pains to avoid.”²¹⁶ He identifies numerous “superficially procedural” provisions of the Constitution “such as the rights to counsel, confrontation, *bail*, and jury trial” that draw their essence from some substantive value or norm.²¹⁷ According to Tribe, these rights “function, often at some cost to the efficiency and accuracy of fact-finding, to prevent the government from treating individuals in the criminal process as though they were objects.”²¹⁸ Individual rights may thus trump a model’s goal of accuracy.

Employing a value-based model of due process assessing the individual’s and the government’s respective interests provides insight into the accuracy determination.²¹⁹ The value-based model recognizes that accuracy is an important goal, but one set by reference to the conflicting substantive rights at stake, and not one set in the abstract. It also recognizes that accuracy is important, but not *all* important.

Applying the value-enhanced *Mathews* model to pretrial detention, the individual rights affected by pretrial detention are a defendant’s freedom from incarceration before being found guilty and from being labeled “dangerous” by the government. The individual interests also include retention of employment (which will surely be lost if detained on the basis of dangerousness), the ability to prepare a defense (which may be inhibited by pretrial incarceration), freedom from conditions of incarceration often more severe than those for convicted individuals, and protection from higher conviction rates for those detained at the time of trial.²²⁰ These interests are “collectively” fundamental.

216. *Id.* at 1064.

217. *Id.* at 1069-70 (emphasis added).

218. *Id.* (citations omitted).

219. The greater the individual right, the greater the need for confidence in the decision. This basic tenet is the cornerstone of the three customary burdens of proof generally recognized in American jurisprudence. The “reasonable doubt” standard is reserved for crimes, the intermediate “clear and convincing evidence” standard applies to quasi-criminal, stigmatizing allegations, and the least-exacting “preponderance of the evidence” standard is reserved for most civil disputes. *Addington v. Texas*, 441 U.S. 418, 423-24 (1979); see also RICHARD EGGLESTON, *EVIDENCE, PROOF, AND PROBABILITY* 114-40 (2d ed. 1983) (analyzing the various standards of proof). In the detention context, one must also concede that the greater the confidence in the prediction of dangerousness, the greater the government’s concern for community safety.

220. Rabinowitz, *supra* note 192, at 211.

The governmental interests implicated by pretrial detention include protecting specific individuals or the community in general from future crime while the defendant is free on bail awaiting trial, protecting the public fisc against the cost of two full-blown trials, and reducing the cost of housing defendants and easing overcrowding by ensuring accuracy in the detention decision.²²¹ The government's combined interests are compelling. Presently, a court resolves a constitutional conflict pitting fundamental individual rights against compelling government interest, in large part, according to the tool it uses to address the conflict: categorization or balancing.

B. THE TOPOLOGY OF CATEGORIZATION AND BALANCING

1. The Tradition in Classifications

Professor Kathleen Sullivan has skillfully discussed the inherent differences between categorization and balancing, the two techniques used in constitutional theory to constrain judicial discretion.²²² Both categorization and balancing tests are tools of political and legal discretion.²²³ According to Sullivan, categorization requires a decision maker to classify and label cases.²²⁴ Litigation then seeks to determine which category controls. Categorization becomes outcome determinative. "Once the relevant right and mode of infringement have been described, the outcome follows, without any explicit judicial balancing of the claimed right against the government's justification for the infringement."²²⁵ In contrast, balancing requires a decision maker to weigh competing rights and interests.²²⁶ Balancing is not outcome determinative, because the outcome "depends on the relative strength of a multitude of factors."²²⁷

One familiar with Professor Sullivan's work may recognize that the debate between categorization and balancing is remi-

221. *Id.* at 212.

222. Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992).

223. Balancing tests are one of five rhetorical techniques used by courts. See, e.g., Blum et al., *supra* note 136, at 715 (noting that court techniques include balancing tests, evasion of precedent, viewing facts as dichotomies, privatization of governmental disputes, and idiosyncratic rule extension). All five techniques allow a court to manipulate legal doctrine in accordance with its own biases while paying lip-service to objectivity and fidelity to past precedents. *Id.* at 727.

224. Sullivan, *supra* note 222, at 293.

225. *Id.*

226. *Id.* at 293-94.

227. *Id.* at 294.

niscent of a similar debate between rules and standards.²²⁸ In fact, a rule is a form of categorization, and a standard a form of balancing. The debate between rules and standards may thus provide insight into the categorization and balancing debate in the detention context.²²⁹

Although the dichotomy between rules and standards has long been a part of the law,²³⁰ Professor Duncan Kennedy has recently popularized the tension between the two norms used to qualify formal realizability.²³¹ Kennedy has shown a modest inter-connectedness of form and substance in private law adjudication. He argues that the two choices for the form of law, rules and standards, each envision a different picture of the substantive content of law.²³² "In picking a form through which to achieve some goal, we are almost always making a statement that is independent or at least distinguishable from the statement we make in choosing the goal itself."²³³ Kennedy further identifies certain values modestly associated with the form of law. With individualism goes rules, with altruism goes standards.²³⁴ He perceives the tension between individualism and altruism as an "unresolvable conflict."²³⁵

228. See generally Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (discussing the 1991 Supreme Court term).

229. The role and significance of rules and standards has aroused substantial interest among legal scholars. See, e.g., ANDREW ALTMAN, *CRITICAL LEGAL STUDIES* 104-48 (1990) (arguing that claims of inconsistency between liberal theory of law and liberal theory of politics are unpersuasive); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 15-63 (1987) (characterizing the relationship between norm and substance as aesthetic); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE* 104 (1991) (contending that "ruleness" encompasses more than specificity); Louis Kaplow, *Rules v. Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (analyzing rules and standards from a cost-benefit perspective); Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989) (arguing that the rule-of-law ideal must be reinterpreted); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 592-93 (1988) (discussing various perspectives on the dichotomy between rules and standards); Sullivan, *supra* note 228, at 26 (casting the the Supreme Court debate between liberals and conservatives in terms of rules and standards).

230. See John P. Goebel, *Rule and Standards: A Critique of Two Critical Theorists*, 31 DUQ. L. REV. 51, 52-66 (1992).

231. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976).

232. "[T]he pro-rules and pro-standards positions are more than an invitation to positivist investigation of reality. They are also an invitation to choose between sets of values and visions of the universe." *Id.* at 1712.

233. *Id.* at 1710.

234. Kennedy, *supra* note 231, at 1710.

235. *Id.* at 1713.

Much of the rules/standards debate ultimately turns on how much discretion a superior authority wishes to leave to a decision maker.²³⁶ The superior authority can attempt to limit the discretion of a decision maker by fixing rules or requiring categorization. Rules, like categorization, become outcome determinative. Both promote consistency, predictability, and judicial restraint in decision making.²³⁷ By design, both confine a decision maker to the role of sifting through the facts, a task generally devoid of subjective value choices.²³⁸ Rules and categorization also provide fair notice of what is expected of the citizen.²³⁹

Sullivan offers contemporary equal protection analysis as an example of categorization. "[T]he two-tier system was meant to enshrine penitence for the sins of the *Lochner* era by making deferential rationality review the norm and strict scrutiny the emergency exception where 'fundamental rights' or 'suspect classes' were threatened."²⁴⁰ If the minimal rationality standard is applied, the government is supposed to win. If the strict scrutiny standard is applied, the government almost always loses. The sport is in the classification, not in the analysis.

In contrast, standards, like balancing, are indeterminate.²⁴¹ They are contextual determinations that, according to Sullivan, embody the "pragmatic spirit of the common law judge."²⁴² Standards and balancing allow and encourage wide-ranging discretion (legal, political, and otherwise) on the part of a decision maker to decide concrete cases. Standards and balancing are arguably fairer than rules and categorization, because they promote substantive justice and equality.²⁴³ Because a balancing approach is not committed to a fixed protocol, the decision maker is free to minimize the risk of error from the

236. A strong theme underlying the advance of rules over standards, and vice-versa, is the mistrust inherent in the relationship between a superior authority and the decision maker. "If the legislature trusted judges to execute its intent, rules would only be a nuisance and a waste of time. No law would be needed if judges could be completely trusted, just as infinite law would be needed if judges were completely untrustworthy." David G. Carlson, *Contradiction and Critical Legal Studies*, 10 CARDOZO L. REV. 1833, 1839 (1989).

237. See Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 400 (1985); Sullivan, *supra* note 228, at 62, 65.

238. Kennedy, *supra* note 231, at 1770 (noting that "rules are defined as directives whose predicates are always facts and never values").

239. ALTMAN, *supra* note 229, at 107.

240. Sullivan, *supra* note 222, at 296.

241. *Id.* at 294.

242. Sullivan, *supra* note 228, at 27.

243. *Id.* at 66-67.

over- and under-inclusiveness endemic in a rule or category.²⁴⁴ Endowing a decision maker with wide-ranging discretion, however, injects another type of error into the decisionmaking process; namely, error from bias and incompetence.²⁴⁵ Moreover, standards and balancing may provide less notice to citizens.²⁴⁶

Formal logic incorrectly suggests a clear dichotomy between categorization and balancing. Sullivan, in contrast, masterfully portrays the *blend* of categorization and balancing in the context of gender classification and affirmative action programs. She observes that the intermediate scrutiny that courts employ in these areas is essentially balancing.²⁴⁷ Although a court employs the language of categorization in gender-based classification and affirmative action reviews, it performs a balancing function. Likewise, although a court may use the language of balancing, oftentimes the actual analysis looks more like categorization. This categorization disguised as balancing is the result in the Supreme Court's detention cases.

Two Supreme Court detention cases, *Schall v. Martin*²⁴⁸ and *United States v. Salerno*,²⁴⁹ illustrate the application of balancing tests that take on the air of categorization. In both cases, the Court categorized pretrial detention as regulatory action, not punishment, nudging the balancing metaphor into a pro-government slide. In fact, these so-called balancing cases are only disguised uses of categorization. *Schall* characterized the government's interests in preventing juveniles from committing future crimes while their cases await adjudication and in protecting juveniles from the consequences of their own unlawful acts as at least legitimate if not important.²⁵⁰ The Court, which took great pains to detail the government's interest, merely stated the important interest of the juvenile from restraint before an adjudication of culpability, and then discounted that interest by observing that juveniles are not accustomed to unfettered restraint because parental rights and schools traditionally

244. ALTMAN, *supra* note 229, at 107-08.

245. SCHAUER, *supra* note 229, at 149-55; Sullivan, *supra* note 228, at 58-59; *see also* ALTMAN, *supra* note 229, at 107-08 (discussing the virtues and vices of standards).

246. ALTMAN, *supra* note 229, at 108.

247. Sullivan, *supra* note 222, at 300-01.

248. 467 U.S. 253 (1984).

249. 481 U.S. 739 (1987).

250. *Schall*, 467 U.S. at 274.

limit their liberty.²⁵¹ The Court carefully insisted that it assessed regulation of juveniles, not punishment.²⁵²

The *Salerno* Court masterfully used *Schall*²⁵³ to uphold the constitutionality of the BRA.²⁵⁴ The Court noted that “[c]rime prevention is no less compelling when the suspects are adults.”²⁵⁵ Again, the Court exhaustively considered treatment of the government’s interests²⁵⁶ while only begrudgingly recognizing an adult individual’s interest to be free from governmental restraint.²⁵⁷ Rhetorically, to mask the basis of the decision, the losing interest ought to receive more time than the winning one. In *Salerno*, this rhetoric is not the case. By truncating the discussion of an individual’s interest, the Court masked political debate by depicting a self-evident resolution to the debate.²⁵⁸ By its sheer devotion to the governmental interest in sculpting its opinion, the Court makes a convincing one-sided case for its conclusion at the expense of a deeper discussion of the issues.²⁵⁹

Furthermore, the Court dismissed Salerno’s claim that pre-trial detention constituted punishment before a prior adjudication of guilt.²⁶⁰ The Court observed that punishment for a crime requires conviction; thus, if the BRA’s pre-trial detention provisions constituted punishment, detention would be unconstitutional. Nonetheless, the Court categorized pre-trial detention as

251. *Id.* at 265.

252. *Id.* at 271.

253. Professor Albert Alschuler, by studying earlier Supreme Court cases, successfully predicted the Court’s decision to uphold detention under the BRA. Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest—Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 536 (1986). Alschuler’s prediction rested on the Court’s relatively recent captivation with balancing heuristics. He observed that the Court’s approach is “tilted too far toward interest balancing and too far from historic conceptions of individual freedom.” *Id.* at 511 n.1. For an interesting article exploring methods historically used by the courts in addressing competing interests, see generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

254. Professor Mashaw has observed that the court’s reliance on precedents is the institutional defense against illegitimacy in a political democracy. Mashaw, *supra* note 207, at 54.

255. *Salerno*, 481 U.S. at 749-50.

256. The Court devoted 37 lines in the official opinion to developing the government’s interests. *Id.* at 749-50.

257. *Id.* at 750. The Court devoted less than five lines to a discussion of the individual’s interest to be free from governmental restraint. *Id.*

258. See Blum et al., *supra* note 136, at 750. Furthermore, by treating a point as self-evident, the Court can escape exposure of the political basis of its opinion. *Id.*

259. *Id.* at 727.

260. *Salerno*, 481 U.S. at 746.

regulation and not punishment, which requires that a defendant receive due process.²⁶¹

Schall and *Salerno* employed a misleading balancing metaphor. The metaphor incorrectly suggests that a court has carefully considered and weighed all relevant interests in reaching an objective decision, employing a test like the carpenter's rule.²⁶² *Schall*, *Salerno*, and to an extent *Mathews*, are transparent; in each case the Court's approach to weighing the individual's interest was incomplete.²⁶³ Its balancing test dwarfs "soft" variables, discounting any possible synergy among the interests weighed.²⁶⁴

Among the individual rights conspicuously absent from the Court's balance in *Salerno* were freedom of association, freedom from the loss of the defendant's employment and the capacity to support a family, freedom from a tarnished reputation, freedom from an increased probability of conviction, and freedom from hampering an individual's defense.²⁶⁵ The Court also ignored the "soft" variables of an individual's interest against the injustice of punishment without an adjudication of guilt, which cannot help but impair confidence in society, and society's interest in preventing this alienation.²⁶⁶

Moreover, it is fair to say that *Salerno* may have overstated the government's interest in preventing bail crime. Studies

261. *Id.*; see also Donald W. Price, Note, *Crime and "Regulation"*: United State v. Salerno, 48 LA. L. REV. 743, 747-53 (1988) (examining the categorization technique applied in *Salerno*). For other cases where the Court has employed a similar categorization technique, see generally Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (addressing loss of citizenship); United States v. Lovett, 328 U.S. 303 (1946) (addressing bills of attainder); Wong Wing v. United States, 163 U.S. 228 (1896) (addressing the deportation of aliens).

262. *Salerno*, 481 U.S. at 729.

263. For a variant of this observation, see Mashaw, *supra* note 207, at 38-39.

264. *Id.* at 48. Professor Mashaw concludes that the utilitarian calculus used in *Mathews* tends to ignore complexities and ambiguities. *Id.* The problem, as captured by Mashaw, is that the balancing test in *Mathews* asks unanswerable questions. *Id.* Other commentators note:

Completely missing from the balance [in *Mathews*] was society's interest in *having* additional procedures, e.g., providing a source of information to the general public on how their government is operating and treating citizens; providing a check on powerful government bureaucracies; creating an incentive for governments to be careful, accurate, and respectful of people they deal with.

Blum et al., *supra* note 136, at 729 n.143.

265. See Sam J. Ervin, Jr., *Preventive Detention: A Species of Lyford Law*, 52 GEO. WASH. L. REV. 113, 122 (1983).

266. Caleb Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125, 1137 (1965).

show that bail crime represents a small component of the total crime rate.²⁶⁷ Consequently, the government may not be able to prove in many instances the compelling nature of its interest if actually put to the task.²⁶⁸ Furthermore, because of the superficial nature of its balancing inquiry, the Court failed to provide due consideration to alternative measures the government may take to further its interest while at the same time accommodating an individual's fundamental rights.²⁶⁹ A true balancing approach would account for these alternative measures.²⁷⁰

2. A Fuzzy Alternative in Classifications

A metaphysical assumption implicit in the traditional categorization/balancing debate is that a correct resolution to a given dispute exists and a superior authority has already decided it.²⁷¹ Because the debate frames the relationship in terms of accurate communication between superior authority and decision maker, implicit in the debate is a belief that the legal universe is completely filled.²⁷² Courts, the decision makers, cannot be trusted, and so the superior authority, the legislature, searches for an equilibrium between, on the one hand, over- and under-inclusiveness and, on the other, the risk that judges will sneak in their own ethical preferences in lieu of the all-encom-

267. See, e.g., Ryan, *supra* note 2, at 60 (noting that the 1992 re-arrest rate for federal defendants was three percent); see also *supra* note 8 and accompanying text (noting that bail crime represents about six percent of total crime).

268. Errors in detection and in failure to report bail crime would result in an artificially low recidivism rate. George E. Dix, *Expert Prediction Testimony in Capital Sentencing: Evidentiary and Constitutional Considerations*, 19 AM. CRIM. L. REV. 1, 18 (1981). This observation should be discounted, however, until we learn more about the extent of measurement error.

269. For example, expedited trials, more courts and prosecutors, restrictive release conditions, forfeiture of right to bail for bail crime, and stricter sentences for pretrial offenses are just a smattering of less intrusive measures to accomplish the government's goal of reducing bail crime. See Angel et al., *supra* note 53, at 359-68.

270. Although there is nothing inherently wrong with balancing tests, Blum et al., *supra* note 136, at 746, it is far from the only model by which to analyze competing interests. Professor Mashaw articulates several value-sensitive models, relying on dignity, equality, and tradition. Mashaw, *supra* note 207, at 46-57. For a thorough discussion on other traditional models by which competing interests were gauged by the Court, see Aleinikoff, *supra* note 253, at 943.

271. Professor Frederick Schauer forcefully depicts a model of rules that turns on a strong right/wrong distinction. SCHAUER, *supra* note 229, at 135, 149-55.

272. Arthur Jacobson, *Hegel's Legal Plenum*, 10 CARDOZO L. REV. 877, 880-83 (1989); see also Carlson, *supra* note 236, at 1838-39 (describing Duncan Kennedy's assumption that legislative intent is omnipresent).

passing intent of the superior authority.²⁷³ Under this view, law is a brooding omnipresence in the sky. There is always a right answer.

Fuzzy logic rejects the notion of a filled legal universe. It coheres with post-modern philosophy, according to which a speaker never fills the universe with omnipresence.²⁷⁴ Both post-modern philosophy and fuzzy set theory deny the law of the excluded middle as a confining force.²⁷⁵ This denial implies that any given set (or qualitative concept, for that matter) contains things that are thought to be excluded. Every set covertly contains its opposite; the set of A includes not-A. Every concept is thus in a state of contradiction. Furthermore, what the qualitative judgment "set of A" must admit, whether expressly or covertly, is anti-quality. The opposite of the asserted quality of A is negativity, or quantity. Thus, qualitative judgments fail; they let in negativity, universality, quantity, and degree.

Fuzzy set theory, therefore, contradicts the traditional categorization/balancing dichotomy, which rests strongly on the law of the excluded middle. Traditional analysis distinguishes the use of categorization and balancing on the basis of a strong right-wrong distinction. Categorization gets it "wrong" because words betray the superior authority's intent leading to over- and under-inclusiveness. Balancing, however, permits "wrong" results because a judge does not or will not commune with the prelinguistic reality of the superior authority, which has already decided who should win every contest.

The categorization/balancing debate further masks a deeper schism in the law. Like language, the law is a system of thought

273. Schauer acknowledges a foundation of mistrust between the superior authority and the decision maker. SCHAUER, *supra* note 229, at 158-62.

274. See Carlson, *supra* note 236, at 1838-39.

275. At the heart of the difference between formal and fuzzy logic is what is known as the rule of the excluded middle. A basic principle of standard or bivalent sets is that an object cannot belong to both a set and its complement set or, for that matter, to neither of the sets. The number seven belongs to the set of prime integers, or it does not. The number seven cannot exist in both sets. The rule of the excluded middle preserves the structure of Aristotelian logic; it avoids the paradox that an object is and is not a member of the set at the same. See Bart Kosko & Satoru Isaka, *Fuzzy Logic*, *Sci. Am.*, July 1993, at 76, 76. Fuzzy set theory rejects the rule of the excluded middle as a formal confining force. Generally, objects only partially belong to a fuzzy set. A container can be 10% empty and 90% full, or 100% empty and 0% full, or 0% empty and 100% full. Thus, the rule of the excluded middle, that an object is 100% in one set and 100% not in another set, is merely a special case in fuzzy logic.

and of communication.²⁷⁶ Categorization (like rules) communicates outcomes to judges, litigants, and society in a clear manner.²⁷⁷ Categorization, however, does not advance a debate over issues, nor does the technique allow the law to grow through new cases and observations. After all, what is categorization (or a clear rule) but ultimately the death of thought? Balancing (like standards) furthers the law's system of thought by exposing to judges, litigants, and society the rationale of outcomes. Although balancing furthers the debate over issues and allows the law to grow with new cases, it often fails as a good communicator of outcomes.

All of the law is classification. The struggle is to find acceptable classification techniques.²⁷⁸ Categorization and balancing are two classification techniques. Although their use may be inherently political,²⁷⁹ the commentators miss a deeper message. That message concerns what system of the law, communication or thought or both, is to be embraced.²⁸⁰ Justice Antonin Scalia responds to this fundamental dilemma by embracing the law as a system of communication.²⁸¹ In Justice Scalia's world, the judge is a communicator. Others respond by embracing the law as a system of thought.²⁸² In their world, the judge is a teacher.

In fuzzy systems, categorization and balancing *co-exist* as classification techniques to address legal principles.²⁸³ Use of

276. See generally NOAM CHOMSKY, *LANGUAGE AND MIND* (1972) (exploring the intersection of linguistics, philosophy, and psychology). I, of course, do not mean that the law is *only* a system of thought and communication, but that these systems are of more interest to me in this context.

277. In a nutshell, this is the jurisprudence of Justice Scalia. See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (discussing the dichotomy between "general rule of law" and "personal discretion to do justice"); Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 GEO. WASH. L. REV. (forthcoming 1994) (analyzing Scalia's methodology).

278. ALTMAN, *supra* note 229, at 104-07.

279. See, e.g., Kennedy, *supra* note 231, at 1751-66 (describing the influence of politics on judges when deciding on standards based on the purposes of the community); Sullivan, *supra* note 228, at 95-112 (discussing the extensive role of politics in judicial conflicts over rules and standards).

280. To be sure, the degree of formal realizability of legal norms is modestly connected to a substantive ethical view, and I believe this to be the message of Duncan Kennedy and Andrew Altman. Lurking deeper, however, is the notion that the degree of formal realizability is logically connected to the substantive role of the law and the law decider.

281. Segall, *supra* note 277 (Manuscript at 9-14, on file with author).

282. I would place Duncan Kennedy, and, to a lesser extent, Kathleen Sullivan in this "category."

283. Kosko, *supra* note 13, at 167.

each technique turns on how much the superior authority and the decision maker know about the case before them. Categorization allows small patches of judicial discretion, while balancing allows large patches of judicial discretion.

When a legislature or a court knows more about a problem, categorization may be appropriate. Categorization, for example, is appropriate for easy cases.²⁸⁴ In a continuous system, this technique tends to establish more precision as a result of increased knowledge about cases.²⁸⁵ By no means is this increase in knowledge limited to precedent; custom, habit, and sense are all tutors. Categorical systems, however, tend to lose their fuzziness, and along the way, their common-sense meaning. As courts acquire more knowledge, the number of categories may grow exponentially and the systems may thus become unwieldy and difficult to apply. Like any mathematical model, fuzzy logic falls victim to the "curse of dimensionality."²⁸⁶ The system becomes increasingly precise, but less useful.²⁸⁷

Balancing is more appropriate when a court knows less about a case. Balancing requires the court to analyze and weigh the competing rights and interests. This balancing is typically explicit in a court's written decision where "[c]andor and demystification are independent goods."²⁸⁸ Spelling out the reasons for a decision fosters debate, which in turn leads to both negative and positive feedback. A superior authority and a decision maker may then use this new data to refine future classifications.²⁸⁹ The system of thought is not only continuous and organic, but also adaptive. Ultimately, the law's system of thought will gradually give way to a system of communication with the birth of rules borne of standards.

As Professor Sullivan has observed, classifications may be driven by politics and by conceptions of the judicial role.²⁹⁰ According to the political perspective, contextual political considerations are generally the only explanation for a particular

284. See generally Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985) (examining how "easy cases" may provide guiding principles for understanding cases involving more theoretical issues).

285. Kosko, *supra* note 13, at 167.

286. Kosko & Isaka, *supra* note 275, at 81. This curse leads fuzzy systems to become more complex and difficult to apply because of the massive increase in small-patch rules. *Id.*

287. *Id.*

288. Sullivan, *supra* note 222, at 309.

289. Williams, *supra* note 19, at 315.

290. Sullivan, *supra* note 228, at 92.

classification technique.²⁹¹ After discounting the political claim, Sullivan suggests that perhaps the choice among classification techniques may turn on a decision maker's conceptions of the judicial role.²⁹² The fuzzy model offers a third perspective that is closely related to that offered by Sullivan. Perhaps the choice between categorization or balancing turns on different conceptions of the system of law—communication or thought—held by a superior authority or decision maker. Thus, Sullivan's perspective on the debate is the consequence of the classification of the systems of law.

Legal classification relies on a scale of discretion conventionally identified by reference to classification (rules) and balancing (standards). The degree of discretion employed turns on how much we know and want to know about a case, the need for debate, the need for fair notice, and general principles of efficiency. These notions are in a state of contradiction. In detention cases, the Supreme Court has applied a superficial balancing test that discounts an individual's rights and overstate's the government's interest. The Court has essentially embraced categorization as its classification technique in the detention area. The Court has done so at the very time it, Congress, and society would most benefit from reasoned debate.

C. A RETREAT FROM A FUZZY MODEL OF DETENTION: POST-SALERNO FORMALIST INTERPRETATIONS OF DETENTION

In *United States v. Salerno*,²⁹³ the Supreme Court upheld the constitutionality of pretrial detention under the BRA. The Court held that BRA detention neither deprived defendants of their due process rights nor imposed excessive bail in violation of the Eighth Amendment.²⁹⁴ Characterizing BRA detention as regulatory, the *Salerno* Court concluded that Congress intended to regulate bail crime and not to punish defendants.²⁹⁵

Authorities had arrested Anthony Salerno and Vincent Cafaro on charges of mail and wire fraud, extortion, gambling, and violations of the Racketeer Influenced and Corruption Organizations Act.²⁹⁶ The government moved for pretrial detention,

291. SCHAUER, *supra* note 229, at 230.

292. Sullivan, *supra* note 228, at 95, 112. Sullivan shows that Justice Scalia favors rules at the "interpretive and operative" levels, while Justices Kennedy, O'Connor, and Souter favor standards. *Id.* at 113.

293. 481 U.S. 739 (1987).

294. *Id.* at 741, 755.

295. *Id.* at 748.

296. *Id.* at 743.

arguing that both defendants were dangerous and that no condition of release would ensure community safety.²⁹⁷ The government presented evidence that portrayed Salerno as the "boss" of the Genovese crime family of La Costra Nostra, and Cafaro as one of his "captains."²⁹⁸ The federal district court ordered the defendants detained without bail.²⁹⁹ The defendants appealed, contending that pretrial detention under the BRA violated their Fifth Amendment right to substantive due process and their Eighth Amendment right to bail.³⁰⁰

The Second Circuit agreed with the defendants' substantive due process argument, holding that pretrial detention under the BRA was unconstitutional.³⁰¹ In reaching this conclusion, the Second Circuit stressed the fundamental purpose of the criminal justice system: to punish for past acts based on some form of culpability of the defendant and thereby to minimize the risks of future criminality.³⁰² Punishment for anticipated future acts, the court stated, absent the limited exception to protect the judicial process, has no place in the American criminal justice system.³⁰³ The court noted that liberty "is premised on the accountability of free men and women for what they have done, not for what they may do."³⁰⁴ The court thus denied that the government has the constitutional power to curtail an individual's freedom simply to protect society, acknowledging that every guarantee of liberty entails risk.³⁰⁵

In reversing the Second Circuit, the Supreme Court observed that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."³⁰⁶ The Court then held that detention based on future dangerousness as delineated in the BRA fell "within that carefully limited exception."³⁰⁷

297. *Id.*

298. *Id.*

299. *Id.* at 743-44. For a thorough discussion of the facts in *Salerno*, see Marian E. Lupo, Comment, *United States v. Salerno: A Loaded Weapon Ready For The Hand*, 54 BROOK. L. REV. 171, 177-85 (1988).

300. 481 U.S. at 744.

301. *United States v. Salerno*, 794 F.2d 64, 71 (2d Cir. 1986), *rev'd*, 481 U.S. 739 (1987). The Second Circuit did not reach the Eighth Amendment issue.

302. *Id.* at 73.

303. *Id.* at 71-73.

304. *Id.* at 72 (quoting *United States v. Melendez-Carrion*, 790 F.2d 984, 1000-01 (2d Cir.), *cert. dismissed*, 499 U.S. 978 (1986)).

305. *Id.* at 74.

306. 481 U.S. at 755.

307. *Id.*

The Supreme Court also concluded that the BRA did not violate the Eighth Amendment. Although the Eighth Amendment clearly prohibits excessive bail, the Court noted that it "says nothing about whether bail shall be available at all."³⁰⁸ The Excessive Bail Clause requires only that the court's conditions to release or detain are not "'excessive' in light of the perceived evil."³⁰⁹ The Court agreed that a primary purpose of bail is to safeguard a court's role of adjudicating the guilt or innocence of defendants by, for example, preventing the defendant from fleeing or intimidating witnesses. The Court, however, also found that the Eighth Amendment does not prevent the government from addressing "the alarming problem of crimes committed by persons on release."³¹⁰

Justice Thurgood Marshall's dissent observed that the majority rendered the Excessive Bail Clause a nullity by interpreting it to apply only to cases in which bail is set, but not to cases in which bail is entirely denied.³¹¹ The dissent cogently argued that no real distinction existed between the effects of excessive bail and denial of bail; in both cases the court detains the defendant.³¹² If the Eighth Amendment protects against excessive bail, it must also protect against detention that results from a refusal to set bail. Furthermore, accepting the majority's balancing test for resolving Excessive Bail Clause issues, the dissent asserted that the "compelling" governmental interest in regulating bail crime under the BRA through the detention of presumptively innocent adults was itself an unconstitutional interest.³¹³ Therefore, because the governmental interest depicted in the BRA was unconstitutional, any judicial balancing test must favor of the individual.³¹⁴

The *Salerno* Court also addressed the claim that pretrial detention under the BRA is essentially a prior adjudication of guilt of a presumptively innocent adult defendant, without the full panoply of constitutional protections. The Court quickly dismissed the defendants' argument that detention violated sub-

308. *Id.* at 752.

309. *Id.* at 754.

310. *Id.* at 742 (quoting S. REP. NO. 225, *supra* note 31, at 3, reprinted in 1984 U.S.C.C.A.N. at 3185).

311. *Id.* at 760-61 (Marshall, J., dissenting). Justice Brennan joined Marshall's dissent. Justice Stevens filed his own dissent. *Id.* at 767 (Stevens, J., dissenting).

312. *Id.* at 760-61 (Marshall, J., dissenting).

313. *Id.* at 762 (Marshall, J., dissenting).

314. *Id.* at 762-63 (Marshall, J., dissenting).

stantive due process by concluding that detention was regulatory rather than penal.³¹⁵ The Court concluded that "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment."³¹⁶ After reviewing the legislative history, the Court concluded that Congress intended to regulate bail crime rather than punish defendants for their past behavior.³¹⁷ The Court concluded that the BRA served the legitimate regulatory goal of reducing danger to the community.³¹⁸

Moreover, the circumstances under which a court could order pretrial detention were sufficiently limited such that the BRA was not excessive. To support its conclusion, the Court stated that the BRA limits a court's discretion to impose pretrial detention to "crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, [and] certain repeat offenders."³¹⁹ Based on the lack of congressional intent to punish, coupled with the fact that detention clearly was not excessive in all circumstances, the *Salerno* Court concluded that pretrial detention was regulatory and not punitive.³²⁰

After deciding that pretrial detention was regulatory, the Court balanced the government's interest in preventing bail crime against the defendants' liberty interest.³²¹ The Court concluded that the government's interest in preventing bail crime was compelling.³²² Furthermore, the Court observed that it had "repeatedly held that the Government's regulatory interest in

315. *Id.* at 747.

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

317. *Id.* at 747. Absent an express congressional intent to punish, the determination whether a restriction is punitive turns on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purposes assigned to it." *Id.* (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

318. *Id.* at 747-48.

319. *Id.* at 751-52. The Court described other benefits available to a defendant. It noted that the defendant was entitled to a prompt adversarial hearing; that the length of detention was limited; that the decision to detain was made by a neutral authority; that the court must consult eleven factors contained in the BRA in considering detention; that the defendant has the right to counsel and other important rights at the hearing; that the court must support its detention decision by clear and convincing evidence and must reduce its order to written form; that appellate review of a detention order is expedited; and that the detainees were to be housed separately, if possible, from others serving or waiting to serve sentences. *Id.*

320. *Id.* at 748-52.

321. *Id.* at 749-52.

322. *Id.* at 749 (citing *Schall v. Martin*, 467 U.S. 253, 269 (1984)).

community safety can, in appropriate circumstances, outweigh an individual's liberty interest."³²³ Relying on the congressional finding that certain defendants were likely to commit dangerous acts after their arrest, the Court concluded that the BRA narrowly focused on this particular problem presented by certain classes of defendants.³²⁴

Additionally, because the BRA requires the government to show probable cause that the defendant committed the alleged crime and to present clear and convincing evidence that no release conditions could adequately protect the community, courts could not apply the BRA arbitrarily to all persons suspected of having committed a serious crime.³²⁵ Under these limited circumstances, a defendant's liberty interest does not outweigh the government's heightened interest in preventing crime.³²⁶ The Court noted:

We do not minimize the importance and fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society. . . . Under these circumstances, we cannot categorically state that pretrial detention "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."³²⁷

The dissent asserted that the majority misinterpreted the punitive/regulatory distinction founded in substantive due process jurisprudence and, in the process, reduced the presumption of innocence to a rule of evidence at trial, converting the return of an indictment into a relevant piece of evidence at a detention hearing.³²⁸ According to the dissent, to look solely to congressional intent to determine whether a statute is punitive allows Congress to recharacterize any punishment as regulatory and thus evade strict due process scrutiny.³²⁹

Surprisingly absent from *Salerno* is a consideration of the importance of the *detention* decision. The Court's complete focus on the defendant's dangerousness has unfortunately led subsequent courts to concentrate on whether a defendant poses a danger instead of whether the court could reasonably mollify that danger by release conditions.

323. *Id.* at 748. For an interesting discussion of the authorities relied on by the Court, see Price, *supra* note 261, at 750-52.

324. 481 U.S. at 750-51.

325. *Id.* at 751.

326. *Id.* at 750-51.

327. *Id.* at 751 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

328. *Id.* at 763-66 (Marshall, J., dissenting).

329. *Id.* at 759-60 (Marshall, J., dissenting).

Salerno paved the way for the expanded use of pretrial detention by focusing almost exclusively on the government's interest in preventing bail crime. The Court ignored the BRA's insistence on a careful consideration of release conditions short of outright detention.³³⁰ *Salerno* has, therefore, induced a bivalent drift in subsequent cases. Post-*Salerno* courts have concentrated on the danger a defendant poses to society, with outright detention usually close on the heels of a dangerousness determination.³³¹ These opinions generally lack any meaningful analysis of whether release conditions short of detention would reasonably ensure public safety.³³² The courts' failure to do so forces a decision maker to round off the evidence to either detention or no-detention. This binary approach is inconsistent with the multivalent nature of detention under the BRA. Furthermore, the categorical model employed by the courts to assess detention effectively kills thought on predictions of dangerousness and on detention alternatives.

The anti-fuzzy nature of *Salerno* can be gauged empirically. In an earlier article, I reported the results from empirical research on the question of what detention factors courts emphasized in reaching their detention decisions.³³³ The statistical techniques offer an enlightening glimpse at what drives the courts' detention decisions. The statistical study identified four decisional lines where detention was almost always ordered by the court and one line of cases where it was almost always denied.³³⁴ I detail the study because it shows that courts are employing a categorical model that is easily predicted.

One line of cases identified by the study turns on the relationship between the drug offender presumption and the defendant's unemployment. Detention was ordered ninety-five percent of the time when these two factors were present.³³⁵ Because the presumption of dangerousness alone is insufficient to support

330. See *supra* notes 41-44 and accompanying text (identifying statutory conditions for release and alternatives to detention).

331. See, e.g., *United States v. Simpkins*, 826 F.2d 94, 96-97 (D.C. Cir. 1987) (discussing the defendant's criminal activity).

332. See, e.g., *United States v. Gerard*, 664 F. Supp. 203, 206 (E.D. Pa. 1987) (stating that there is a rebuttable presumption against consideration of conditional release); see also John B. Howard, Jr., Note, *The Trial of Pretrial Dangerousness: Preventive Detention After United States v. Salerno*, 75 VA. L. REV. 639, 672-75 (1989) (analyzing *Simpkins* and *Gerard* in light of *Salerno*).

333. *Williams*, *supra* note 19, at 255.

334. *Id.* at 309-14.

335. *Id.* at 311-12.

detention,³³⁶ it is reasonable to conclude that the relationship between the presumption and a defendant's employment status is significant to the detention order. One possible reason that unemployment is a significant predictor of detention is that a presumed dangerous defendant charged with a serious narcotics offense with no obvious lawful means of livelihood is more likely to commit future crimes. This presumption harkens back to the vagrancy statutes that the Supreme Court concluded ran afoul of the Due Process Clause.³³⁷

A second line of cases turns on the reputed organized crime reputation of, and weight of evidence against, a defendant. If these two detention factors were present, a court always ordered pretrial detention.³³⁸ This decisional branch is also troubling in that a court orders detention based on a defendant's character, physical condition, or mental condition. Most of the defendants who fit this combination are alleged members of organized crime.³³⁹ It is this alleged status of a defendant, coupled with the weight of the evidence, that results in detention. Dangerousness is apparently presumed from the defendant's character. The problem with this approach is that both the character factor under the BRA, and the types of "character," such as being a member of organized crime, are vague.³⁴⁰

A third line of cases turns on the drug offender presumption and a prior history of committing crime while on bail. Courts ordered detention ninety-five percent of the time when these two detention factors were present.³⁴¹

A fourth line of cases involves a defendant's prior misconduct. Courts *always* ordered detention when the defendant had obstructed justice in the past by intimidating witnesses or jurors.³⁴²

A fifth line of cases generally resulted in courts denying detention. Courts deny detention eighty-six percent of the time if the defendant has not engaged in the obstruction of justice, has

336. *Id.* at 293.

337. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972); *see also Douglas, supra* note 10, at 11 (noting that little evidence supports the proposition that a person with no visible means of livelihood is likely to commit a crime).

338. *Williams, supra* note 19, at 312-14.

339. *Id.* at 312.

340. *Id.* at 309-14; *see also Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (holding that statute making it a crime to be a "gangster" violates the Due Process Clause).

341. *Williams, supra* note 19, at 310.

342. *Id.*

not triggered a presumption of dangerousness, and is of good character.³⁴³

Finally, the empirical study demonstrated that the BRA has a disproportionate impact on Hispanic defendants.³⁴⁴ Thirty-five of the seventy-nine defendants in the sample were Hispanic.³⁴⁵ The findings confirmed a government study that found the likelihood of Hispanics being detained without bail had increased from 2.7% before the BRA to 33.2% after the BRA.³⁴⁶ This fact is striking when compared to the likelihood of detention for non-Hispanics, which increased from 1.6% before the BRA to 14.1% after the BRA.³⁴⁷

These empirical results are troubling. They suggest the possibility of abuse, derived from the incoherence in the present detention model.³⁴⁸ The abuse may come as a result of the unfocused task of predicting danger and detention; or it may result from the courts' lack of perspective in assessing detention, caused in large part by *Salerno*. Of particular importance to this Article is that the statistical model can accurately predict the outcome of about 80% of all detention hearings over 95% of the time. The statistical results suggest that the courts are focused only on a defendant's dangerousness and are inattentive to alternatives short of outright detention. Thus, although authorities are still in the early stages of predicting dangerousness, hard cases become easy as courts truncate debate by formulation of if/then categories.³⁴⁹ In the end, society loses because creative attempts to condition pretrial release are not being considered.³⁵⁰

IV. BACK TO THE FUTURE: A RETURN TO FUZZINESS

Commentators have demonstrated a moral and historical justification for detention.³⁵¹ The problem with detention under the BRA, however, is not necessarily its moral or historical

343. *Id.* at 314.

344. *Id.* at 293.

345. *Id.* at 293 n.214.

346. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SPECIAL REPORT, PRETRIAL RELEASE AND DETENTION: THE BAIL REFORM ACT OF 1984, at 4 (Frank D. Balog ed., 1988).

347. *Id.*

348. See generally Williams, *supra* note 19, at 314-36 (analyzing the statistics created by the research).

349. *Id.* at 310.

350. See 18 U.S.C. § 3142(c) (1988 & Supp. II 1990).

351. See, e.g., Dershowitz, *Law of Dangerousness*, *supra* note 22, at 26 (discussing Blackstone's affirmance of "preventive justice"); Miller & Morris, *supra*

roots; the problem is the paradigmatic detention model itself and judicial interpretation of that model. The paradigmatic model is unfocused, untested, and unfair.

The paradigmatic model of how courts evaluate and determine detention is needlessly crude. It lacks sufficient sensitivity to account for the gradations of an individual's and the government's interests. Individual interests are not equal, and freedom from restraint is a right of varying degrees. Upon a greater showing of guilt or a history of violent behavior, possibly while on bail, the right weakens. Correspondingly, the moral and ethical predicate for detention solidifies. Likewise, the government's interest is not the same in every case. If the government is concerned with protecting an individual or society from imminent physical harm, that interest is greater than its interest in protecting society from a defendant who may continue shoplifting while awaiting trial. Society must remain vigilant that pre-trial detention provides an extraordinary remedy to reduce the threat of imminent physical harm.

The model of detention this Article proposes recognizes the varying degrees of rights and interests held by individuals and the government. It also embraces a model of due process set forth in the *Goldberg* and *Londoner* line of cases.³⁵² The proposed model puts the government to individual proof of a presumptively innocent defendant's culpability, dangerousness, and detention qualifications. It recognizes the defendant's autonomy and entitlement to dignity from the government. By recognizing the right of a competent, sane adult to be free from incarceration absent a prior adjudication of guilt, the model also minimizes the probability of an erroneous decision infringing this right.

Furthermore, the proposed model accommodates the government's interest in protecting society from the most egregious cases of bail crime: violent offenses for which clear and convincing evidence of the underlying offense exists. The model thus rests on a foundation embedded in blameworthiness, with sufficient procedural safeguards to ensure that those detained are not only dangerous to the community, but are also guilty of the charged crime. Consequently, the proposed detention model is founded on the moral and historical roots of pretrial detention.

note 162, at 265-67 (offering three principles for the just invocation of dangerousness predictions).

352. See *supra* notes 195-198 and accompanying text (discussing *Goldberg* and *Londoner*).

A. PROCEDURAL PROTECTIONS

The BRA attempts to limit the application of its pretrial detention provisions by delineating specific offenses that trigger a detention hearing.³⁵³ Unfortunately, one of the specific offenses, a "crime of violence," is too broad to meaningfully limit the application of a detention model.³⁵⁴ A more balanced model should identify with reasonable specificity the offenses that trigger detention. This identification could be by type (for example, crimes involving *physical* violence) or by offense (for example, kidnapping). In either case, a more meaningful limitation to the application of a detention statute is necessary.³⁵⁵

Furthermore, the BRA presently contains a requirement that the government seek detention, if at all, upon a defendant's first appearance.³⁵⁶ Nonetheless, the Supreme Court has suggested that the government's failure to meet the first appearance requirement is subject to harmless-error analysis.³⁵⁷ The Court's holding effectively removes any teeth from the requirement.

The first appearance requirement is an important safeguard in the detention process.³⁵⁸ Aside from minimizing the time under which a defendant is held in violation of the Due Process Clause, the first appearance requirement protects a defendant from a vindictive government official or from threats of detention used as leverage in plea negotiations. Absent newly discovered evidence, a defendant is as dangerous at the first appearance as at some future date. A more balanced detention model should therefore require the government, absent cause, to seek detention at a defendant's first appearance in the charging district.³⁵⁹

353. 18 U.S.C. § 3142(f) (1988 & Supp. II 1990).

354. Alschuler, *supra* note 253, at 512 n.7, 567 n.252; Thomas E. Scott, *Pretrial Detention Under The Bail Reform Act of 1984: An Empirical Analysis*, 27 AM. CRIM. L. REV. 1, 33-34 (1989); *see also* 18 U.S.C. § 3156(a)(1) (1988 & Supp. II 1990) (defining a "crime of violence").

355. John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 16 (1985); *see also* Scott, *supra* note 354, at 33-34 (urging Congress to readdress the broad categories of detainable offenses).

356. 18 U.S.C. § 3142(f) (1988 & Supp. II 1990).

357. *United States v. Montalvo-Murillo*, 495 U.S. 711, 716-22 (1990).

358. *Id.* at 722-30 (Stevens, J., dissenting).

359. *See, e.g., United States v. Melendez-Carrion*, 790 F.2d 984, 1005-09 (2d Cir.), *cert. dismissed*, 479 U.S. 978 (1986) (noting that the detention hearing should normally be deferred until defendant reaches the charging district).

The proposed model should also limit the length of the detention period. The BRA does not contain a specific length of detention.³⁶⁰ At some point, detention becomes punitive.³⁶¹ Fixing that exact point through the interstitial growth of case law is absurd. In other words, balancing is an inappropriate technique for setting a maximum detention length. Rather, a detention model must contain a provision that clearly limits the duration of detention. This time period can be fixed or it can contain a provision allowing the court to extend detention for cause shown. Silence, however, is not appropriate.³⁶²

Detention under the BRA is an ineffective and unfair means to minimize bail recidivism. The BRA is too one-sided. A more balanced model should recognize that detention alone provides minimal successes at great costs. Regardless of the model used, nondangerous defendants will sometimes be detained while dangerous ones are set free. Both errors are serious concerns. Consequently, detention alone is a futile weapon in this struggle.

Detention must be part of a comprehensive bail package. This package should include several factors: expedited trials, additional courts and prosecutors, a hierarchy of restrictive release conditions, bail forfeiture if charged with a bail crime, and stricter sentences for those who are convicted of crimes committed while on bail.³⁶³ Furthermore, detainees should be housed separately from convicts, and in conditions at least as good as, if not better than, those convicted of crimes. Moreover, detainees should have free access to their lawyers. Anything short of a comprehensive response provides a weak return on a substantial social investment: the incarceration of defendants without prior adjudication of guilt.

B. BURDENS OF PROOF

A fundamental issue is what burden of proof the Constitution requires for pretrial detention. The Supreme Court has held that the "reasonable doubt standard" does not apply to the

360. Unlike the BRA, the District of Columbia detention model contains an express time limit of 120 days for detention. D.C. CODE ANN. § 23-1322(h) (1994).

361. *Melendez-Carrion*, 790 F.2d at 1005-09 (Timbers, J., concurring).

362. Because of excludable time, the Speedy Trial Act, 18 U.S.C. § 3161 (1988 & Supp. V 1993), does not provide a satisfactory limit on the length of detention. Scott, *supra* note 354, at 39-43.

363. See, e.g., Angel et al., *supra* note 53, at 359-68 (analyzing the alternatives to preventive detention).

detention of a defendant pending trial.³⁶⁴ The District of Columbia pretrial detention statute, for example, requires a showing of substantial probability of guilt,³⁶⁵ as do the overwhelming number of state statutes that provide for pretrial detention.³⁶⁶ *United States v. Edwards*,³⁶⁷ however, strongly suggested that probable cause is a constitutionally permissible standard for pretrial detention.

Probable cause generally means the existence of "facts and circumstances 'sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense.'"³⁶⁸ Historically, courts used the probable cause standard when significant restraints on liberty were imposed.³⁶⁹ Relying on these cases, courts have concluded that the probable cause standard in the BRA is constitutionally permissible.³⁷⁰ This reasoning rests on the Supreme Court's conclusion in *Gerstein v. Pugh*³⁷¹ that a determination of probable cause must be present for an extended restraint of liberty following arrest and on the Court's embrace of *Gerstein* in upholding the New York juvenile pretrial detention statute challenged in *Schall v. Martin*.³⁷²

The BRA contemplates three decisions in the detention process and embodies several standards of proof. The BRA first requires a judicial officer to find that there is probable cause to believe a defendant committed a crime triggering the application of the pretrial detention provisions of the BRA.³⁷³ This decision is referred to as the culpability determination. A court almost always extricates itself from the role of predicting guilt by simply relying on the grand jury's indictment.³⁷⁴ The second decision, known as the dangerousness determination, requires a

364. See *Bell v. Wolfish*, 441 U.S. 520, 533 (1979).

365. D.C. CODE ANN. § 23-1322 (1994).

366. See generally Goldkamp, *supra* note 355, at 33-38 (discussing various state procedural safeguards).

367. 430 A.2d 1321, 1339 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).

368. *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

369. See, e.g., *Gerstein*, 420 U.S. at 119-21 (addressing detention after arrest on criminal violations); *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973) (addressing probation violations); *Morrissey v. Brewer*, 408 U.S. 471, 485-89 (1972) (addressing parole violations).

370. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

371. 420 U.S. 103, 124-25 (1975).

372. 467 U.S. 253, 277 (1983).

373. 18 U.S.C. § 3142(e) (1988 & Supp. II 1990).

374. Although the language is unequivocal and unambiguous, all the appellate courts addressing the issue have concluded that the return of an indict-

judicial officer to find, presumably by a preponderance of the evidence, that a defendant poses a danger to the community or to a particular person.³⁷⁵ The third function is the detention determination. It requires a judicial officer to find by clear and convincing evidence that no release conditions can reasonably assure community safety.³⁷⁶ A more balanced detention model should specifically identify the three predictive tasks a court must accomplish in the detention process, and should expressly state the relevant standards of proof.

1. Culpability Determination

In the culpability determination, the BRA does not require a finding of convictability as a prerequisite to detention. "Indeed, in most federal cases, only an *ex parte*, *in camera* determination of probable cause by a grand jury . . . guards against preventive incarceration of the innocent."³⁷⁷ In federal criminal proceedings, the determination of probable cause usually is made by a grand jury. The grand jury proceedings are *in camera*, the rules of evidence do not apply, and a defendant has no right to appear or submit evidence.³⁷⁸ Furthermore, the government does not even have the duty to disclose to the grand jury evidence of an exculpatory nature.³⁷⁹

The culpability determination requires a judicial officer to find probable cause that a defendant committed the offense charged. The judicial officer is to make this determination after a detention hearing.³⁸⁰ Despite unambiguous language in § 3142(e) requiring a judge to hold a hearing to determine a defendant's culpability, every appellate court addressing the issue has concluded that an indictment establishes the probable cause

ment by the grand jury satisfies this requirement. *See infra* note 381 and accompanying text (discussing the grand jury).

375. 18 U.S.C. § 3142(g) (1988 & Supp. II 1990). Contrary to some descriptions of the BRA, *see United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985), the statute does not require clear and convincing evidence of dangerousness. Alschuler, *supra* note 253, at 513.

376. 18 U.S.C. § 3142(e)-(f) (1988 & Supp. II 1990).

377. Alschuler, *supra* note 253, at 518.

378. FED. R. CRIM. P. 5-7; *see also Costello v. United States*, 350 U.S. 359, 361-64 (1956) (holding that indictments do not violate the Fifth Amendment).

379. *United States v. Williams*, 112 S. Ct. 1735, 1745 (1992).

380. 18 U.S.C. § 3142(e) (1988 & Supp. II 1990) ("If, after a hearing . . . the judicial officer finds no condition or combination of conditions will reasonable assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.").

finding that section contemplates.³⁸¹ Without disclosing its new role, the grand jury thus plays an integral role in the detention process.

Section 3142(e) unequivocally requires a judicial officer to find, after a hearing, probable cause to believe that the defendant committed the crime charged. At least three reasons support this assertion. First, the statute itself requires the judicial officer to make the finding. Congress did not state that the courts could abdicate this responsibility. It is a safe assumption that Congress knew the grand jury's role in the federal criminal process. By specifically providing that a judicial officer make the culpability finding after a hearing, Congress necessarily excluded the grand jury from the detention process.³⁸²

Fuzzy logic provides a second argument. Probable cause is a fuzzy concept. What an audience held captive by the prosecution may conclude constitutes probable cause may be something quite different than what a court concludes is probable cause at a detention hearing. Although the Constitution tolerates the fuzziness of the probable cause standard, this may not be the case when a defendant who has not been found guilty suffers prolonged incarceration. Furthermore, a grand jury's probable cause determination is made absent rigorous counterfactual evidence, cross-examination, or challenges to credibility.³⁸³ Again, the Constitution may tolerate flexibility in the probable cause determination that leads to an indictment, but not in the case of pretrial detention.³⁸⁴

381. See *United States v. Stricklin*, 932 F.2d 1353, 1354-55 (10th Cir. 1991); *United States v. Trospen*, 809 F.2d 1107, 1110 (5th Cir. 1987); *United States v. Vargas*, 804 F.2d 157, 163 (1st Cir. 1986); *United States v. Suppa*, 799 F.2d 115, 118-19 (3d Cir. 1986); *United States v. Dominguez*, 783 F.2d 702, 706 n.7 (7th Cir. 1986); *United States v. Hurtado*, 779 F.2d 1467, 1478-79 (11th Cir. 1985); *United States v. Contreras*, 776 F.2d 51, 54 (2d Cir. 1985); *United States v. Hazime*, 762 F.2d 34, 37 (6th Cir. 1985).

382. If the statute were silent as to who makes the probable cause finding, then the arguments accepted by the eight circuits would have force. See *supra* note 381 (listing the eight decisions holding that an indictment establishes sufficient probable cause for detention). As presently drafted, however, to conclude that the grand jury indictment constitutes the probable cause finding required under § 3142(e) is to assert that Congress did not say what it meant.

383. See, e.g., *Williams*, 112 S. Ct. at 1744-54 (holding that a prosecutor has no duty to disclose known exculpatory evidence to the grand jury).

384. A more troubling question is whether the prosecutor must disclose to the grand jury the government's intent to rely on the indictment to seek detention of the defendant. Arguably, the grand jury should be made aware of the new role it plays in the detention process. Nonetheless, in light of the limited powers a federal court has over the grand jury, *Bank of Nova Scotia v. United*

A third argument requiring a judicial hearing recognizes that the probable cause determination serves a secondary role in the detention process. It triggers the presumptions of dangerousness under § 3142(e). The BRA describes two sets of circumstances under which a rebuttable presumption arises that no form of conditional release is adequate to protect the community.³⁸⁵ The first rebuttable presumption arises when the defendant has a history of pretrial criminality (the "previous-violator" presumption).³⁸⁶ Congress believed the first rebuttable presumption strongly suggested that a defendant would resort to violence while out on bail, because the defendant had actually done so in the past. As such, this predictor covers precisely the type of conduct the BRA is designed to prevent. The second rebuttable presumption arises when a defendant is charged with a drug offense punishable by at least ten years³⁸⁷ or with the use of a firearm in the commission of a crime of violence or a drug trafficking crime.³⁸⁸ It arises from the charged crime, rather than a record of recidivism, and may be referred to as the "drug-and-firearm-offender" presumption.

Both presumptions are important factors in the detention decision because they do not "burst" when rebutted. Generally, the presumptions, once triggered, shift only the burden of pro-

States, 487 U.S. 250, 254-57 (1988), the present Supreme Court would probably reject an attempt by the courts to force the prosecutor to make the disclosure.

385. See 18 U.S.C. § 3142(g) (1988 & Supp. II 1990).

386. Section 3142(e) provides that if a defendant is charged with one of the serious offenses described in subsection (f)(1), a rebuttable presumption arises if the judicial officer finds that:

- (1) the defendant has been convicted of another (f)(1) offense (or a state equivalent);
- (2) the offense was committed while the defendant was on pretrial release; and,
- (3) the period between the offense presently charged and the date of the conviction or release from prison (whichever is later) is no more than five years.

18 U.S.C. 3142(e) (1988 & Supp. II 1990).

387. 21 U.S.C. §§ 841, 952(a), 953(a), 955, 959 (1988). For drug charges to trigger the drug-and-firearm-offender presumption, the defendant must be charged with at least one offense that carries a 10-year maximum sentence. GOLASH, *supra* note 44, at 15. The government cannot aggregate *all* the charges to meet this requirement. *United States v. Hinote*, 789 F.2d 1490, 1491 (11th Cir. 1986); see also WEINBERG, *supra* note 42, at 7-25 (discussing complex pretrial detention cases). Moreover, it is the statutory maximum penalty and not the recommended sentence under the sentencing guidelines that triggers the presumption. *Hinote*, 789 F.2d at 1491.

388. 18 U.S.C. § 924(c) (1988).

duction, not the burden of persuasion.³⁸⁹ Several courts have held that the presumption alone can result in the defendant's detention.³⁹⁰ Consequently, the judicial officer's role in determining probable cause is an important procedural safeguard that minimizes the risk of an unnecessary confinement.³⁹¹

The Fourth Amendment standard of probable cause, as interpreted by the Supreme Court in *Gerstein v. Pugh*,³⁹² demands only a fair probability of guilt or a substantial basis for believing a defendant guilty.³⁹³ Although *Gerstein* applied only to temporary restraints of liberty incident to arrest, Congress incorporated the decision's probable cause standard into the BRA.

Gerstein determined what kind of probable cause is required when the government seeks limited detention.³⁹⁴ The Court outlined procedures that it deemed necessary for "limited post-arrest detention."³⁹⁵ One commentator thus observed, "*Gerstein's* probable cause finding may be a necessary prerequisite to detaining an individual on the basis of dangerousness, but it is not, in and of itself, constitutionally sufficient."³⁹⁶ A *Gerstein* probable cause hearing and the BRA detention hearing are analogous (each hearing determines when a court may detain an

389. See, e.g., *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (stating that the presumptions of detention do not shift the burden of persuasion to the defendant); *United States v. Martin*, 782 F.2d 1141, 1144 (2d Cir. 1986) (holding that the government retains the burden of persuasion). Even where there is probable cause to believe that a defendant appearing at a detention hearing on other charges may also have committed a firearm violation, the drug-and-firearm-offender presumption cannot arise if the defendant has not yet been charged with the firearm offense by a "valid complaint or indictment." *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985).

390. E.g., *United States v. Aiello*, 598 F. Supp. 740, 744 (S.D.N.Y. 1984) (holding that the government meets its burden if the defendant fails to rebut an established presumption). But see *United States v. Moore*, 607 F. Supp. 489, 497 (N.D. Cal. 1985) (finding "several problems" with *Aiello*).

391. *United States v. Cox*, 635 F. Supp. 1047, 1051 (D. Kan. 1986).

392. 420 U.S. 103 (1975).

393. *Id.* at 120.

394. *Id.* at 105; see also Alschuler, *supra* note 253, at 559 (discussing the Court's reasoning in *Gerstein*). In *Gerstein*, the Court did not hold that the defendants could be imprisoned to protect the community from crime simply because judges had found probable cause for their arrest. The Supreme Court had indicated almost a quarter of a century before *Gerstein* that the sole purpose of pretrial detention is to ensure a defendant's appearance. See *Stack v. Boyle*, 342 U.S. 1, 5 (1951). Federal statutory law expressed the same principle. See Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214-217, *repealed by* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976-211 (codified as amended at 18 U.S.C. §§ 3141-3150 (1988 & Supp. II 1990)).

395. *United States v. Salerno*, 481 U.S. 739, 752 (1987).

396. Cohen, *supra* note 46, at 329.

individual before trial), but they are incongruent. The former restraint on liberty is traditionally of short duration, while the latter may result in an extended restraint of liberty, branding the individual as dangerous even if later found not guilty.

Professor Alschuler convincingly maintains that the BRA fails to require adequate preliminary proof of guilt or convictability as a predicate for extended detention.³⁹⁷ He argues that a finding of substantial probability that the defendant committed the charged offense should precede imposition of pretrial detention.³⁹⁸ Consequently, because the BRA fails to require substantial preliminary proof of a defendant's guilt, Professor Alschuler contends that it is unconstitutional.³⁹⁹

He also draws a striking analogy between pretrial detention and preliminary injunctive relief employed in the civil context. Like the civil preliminary injunction, pretrial detention affords the government interim relief in a criminal case.⁴⁰⁰ In seeking a preliminary injunction, the proponent must show, among other things, a substantial likelihood of success on the merits.⁴⁰¹ No similar requirement under the BRA protects the defendant. An anomaly thus results: a criminal defendant, whose liberty hangs in the balance, receives less protection than parties to civil litigation, who may be disputing something so relatively minor as the ownership of property.⁴⁰²

397. Alschuler, *supra* note 253, at 511.

398. *Id.* at 560. Professor Alschuler contends that detention should be permitted only on the basis of a substantial showing that it will appear justified following a final adjudication; that is, that the defendant is guilty of the crime charged. Alschuler thus believes that

the constitutional standard for detention without bond should be no different from the standard for denying bail that has been part of our nation's jurisprudence from the beginning. This detention should be permissible only when "the *proof is evident or the presumption great.*" In more familiar, modernized language, this standard requires "clear and convincing evidence" of guilt or convictability as a prerequisite to detention.

Id. at 566 (emphasis added).

399. *Id.* at 557 ("A society committed to the proposition that only deliberate wrongdoing justifies imprisonment may permit even defendants charged with capital crimes to remain at large when the proof is not evident or the presumption great.").

400. *Id.* at 566.

401. See John Leubsdorf, *The Standard of Preliminary Injunctions*, 91 HARV. L. REV. 525, 526 (1978).

402. Justice Stewart observed in his *Gerstein* concurrence that "the Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of garnishing a commercial bank account." *Gerstein v. Pugh*, 420 U.S. 103, 127 (1975) (Stewart, J., concurring) (citations omitted).

Although the BRA declares that a court shall take the weight of the evidence into account,⁴⁰³ the BRA does not indicate what weight the court shall give it. A court might afford substantial weight to this consideration, refusing to order detention unless the preliminary evidence clearly and convincingly indicates guilt. Nonetheless, Professor Alschuler asserts that "Congress' rejection of a requirement of preliminary proof of guilt reveals that it did not intend this construction; and treating one factor to be considered differently from all others would require a strained reading of the statute."⁴⁰⁴

Professor Alschuler's contention is not persuasive. The detention factors are dynamic; there is no indication that a court must give the factors equal weight. To the contrary, Congress has identified one detention factor, community ties, as bearing little relevance to the dangerousness determination.⁴⁰⁵ Furthermore, some factors may emerge through experience as reliable predictors of detention, while others will demonstrate little correlation.⁴⁰⁶

As to the culpability determination, the standard of proof should thus be increased so that the government must prove guilt of the offense charged by clear and convincing evidence. This more exacting standard removes the grand jury from the detention process, provides the moral predicate for curtailing one's liberty, aligns detention under the federal law with that of almost all state detention models,⁴⁰⁷ and minimizes the effect (but not the likelihood) of a Type I error (detaining a nondangerous defendant).⁴⁰⁸

2. Dangerousness Determination

A court's second prediction is the dangerousness determination. A host of problems accompany this component of the BRA. Many authorities overlook the third prediction and thereby overemphasize the dangerousness determination.⁴⁰⁹ Moreover, many authorities mistakenly believe that the government must

403. 18 U.S.C. § 3142(g) (1988 & Supp. II 1990).

404. Alschuler, *supra* note 253, at 567 n.252.

405. S. REP. No. 225, *supra* note 31, at 24, reprinted in 1984 U.S.C.C.A.N. at 3207.

406. See Williams, *supra* note 19, at 306-16.

407. See Goldkamp, *supra* note 355, at 7 n.26.

408. See *supra* note 63 and accompanying text (explaining Type I errors).

409. See, e.g., *United States v. Perry*, 788 F.2d 100, 113 (3d Cir.) (discussing how dangerousness justifies deprivation of liberty), cert. denied, 479 U.S. 864 (1986).

show by clear and convincing evidence that a defendant is dangerous.⁴¹⁰ Additionally, because of the conflicting standards of proof and collapsed predictive tasks of the dangerousness determination, troubling permutations may arise. For example, a presumptively innocent defendant indicted by the grand jury, found more likely than not to be dangerous, may be detained. This result affords less protection to an innocent adult than constitutionally required for mentally ill adults subject to involuntary commitment.⁴¹¹ Furthermore, a court may misplace its focus on the dangerousness issue and not on the ultimate issue of detention under the BRA: whether any release conditions would reasonably ensure community safety. Post-*Salerno* courts utterly fail to recognize that a finding of danger by any quantum of proof is insufficient to support detention under the BRA.⁴¹²

The American Bar Association has rejected pretrial detention of "the dangerous defendant" on the ground that "[t]oo little is now known of the true need for preventive detention and of the predictive techniques required to operate the system with tolerable accuracy."⁴¹³ The ABA has, however, embraced dangerousness predictions to enhance sentences.⁴¹⁴ The apparent inconsistency in the ABA's approach exists because one use involves a prediction after an individual has been found guilty beyond a reasonable doubt; the other prediction involves a presumptively innocent person accused of committing a crime. In both cases, society curtails liberty. When a person is found guilty, society confines with a clear conscience. But before an adjudication of guilt, when society confines, it does so with less than good conscience.⁴¹⁵

The fundamental flaw of the dangerousness determination under the BRA is that it is unguided and unfocused. Danger should be specifically defined. The BRA fails to define it. Danger should be defined as the potential for inflicting serious bodily

410. See, e.g., *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985) (stating a standard for clear and convincing evidence).

411. See, e.g., MINN. STAT. § 253B.09 (1992) (requiring clear and convincing evidence for involuntary commitment to mental hospitals).

412. See *supra* note 331 and accompanying text (describing post-*Salerno* overemphasis on dangerousness).

413. AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO PRETRIAL RELEASE § 5.5, at 69 (1968).

414. Franklin Zimring & Gordon Hawkins, *Dangerousness and Criminal Justice*, 85 MICH. L. REV. 481, 496 (1986).

415. *Id.* at 508.

harm.⁴¹⁶ It should focus on risks to person and not to property. An argument that all crime is serious, though accurate, is meaningless. Even if all crime is serious, some crimes are more serious than others. The government must not cast too wide a net. Thus, a protean concept of danger must be rejected. Moreover, the government should need to prove dangerousness by clear and convincing evidence. The Court's justification for this standard in *Addington* applies equally well in this context.⁴¹⁷

Furthermore, more research is necessary to identify and verify predictors of dangerousness. The BRA factors are suspect at best, and wholly insufficient at worst. Professor Dietz has attempted to identify a number of factors.⁴¹⁸ His list, and the lists of others, should be empirically tested to provide more guidance to courts and to channel their discretion. Moreover, inter-judge and intra-judge comparisons of predictions should be made and studied.⁴¹⁹ Finally, any presumptions of dangerousness should be discarded, especially those lacking empirical support.

3. Detention Determination

The BRA provides that a court shall detain a defendant if it concludes by clear and convincing evidence that no release conditions would reasonably assure community safety. The primary focus is not on safety or dangerousness, but on whether there are sufficient release conditions to assure community safety. The BRA lists a number of alternate release conditions.⁴²⁰ Case law has added drug testing, house arrest, daily telephone reporting, and surrender of firearms to the list.⁴²¹

The proposed model highlights the detention prediction as an important, but often overlooked, determination. It retains most of the BRA provisions but clearly requires that the focus of a court must ultimately rest on reasonable release conditions. Danger alone should not end the inquiry. Danger alone should not be congruous with detention.

416. *But cf.* Ewing, *supra* note 49, at 200-06 (doubting the existence of any effective measure for potential dangerous behavior).

417. *See supra* notes 150-156 and accompanying text (discussing the standard of proof adopted in *Addington*).

418. *See supra* notes 76-84 and accompanying text (discussing Dietz's study).

419. *See Williams, supra* note 19, at 315-16.

420. *See* 18 U.S.C. § 3142(c) (1988 & Supp. II 1990); *see also supra* note 43 and accompanying text (detailing statutory alternatives).

421. *See supra* note 44 and accompanying text (listing judicial additions to alternate release conditions).

CONCLUSION

Court predictions of dangerousness are problematic. Nevertheless, as Professor Alschuler observed, predicting the weather is a difficult task, but "almost anyone can do it when a funnel cloud is headed in his direction."⁴²² Similarly, the role of dangerousness predictions in the criminal justice process is so systemic that it will remain a part of the warp and woof of the judicial role. What is most troubling about the dangerousness issue, however, is the lack of judicial candor in both reviewing the legislative factors that support detention and in recognizing the ability to predict dangerousness in the first instance. Issues awaiting a frank judicial assessment include reliability and accuracy of the legislative factors in predicting dangerousness and the possibility that a defendant's character or employment is no better a predictor of dangerousness than flipping a coin. Any progress in resolving these difficult issues will require approaching these problems in a manner that fundamentally modifies theory, policy, and practice.

A defendant with a history of violent behavior is a likely candidate to engage in continuing criminality. Nonetheless, under the BRA, a federal court may not detain a person based on future dangerousness without a showing of some likelihood of guilt. The question then becomes how much confidence one must have in the culpability determination to support a detention policy. It is a dismal but inevitable fact that the criminal justice system will detain innocent and nondangerous individuals. Courts utilize three criteria that comprise the detention process (the culpability, danger, and detention decisions) in a sea of uncertainty. The BRA provides that only probable cause is necessary to detain a presumptively innocent defendant before trial; the courts appear to agree. Professor Alschuler convincingly counters that when a responsible adult has done nothing wrong, the adult's apparent dangerousness is not an appropriate basis for detention. The proposed model requires at least a showing of clear and convincing evidence of guilt before detention.⁴²³ This view is consistent with detention history and almost all state pretrial detention schemes.⁴²⁴

The idea of law as inherently dichotomous is a deeply entrenched one. Formal logic has dominated our conception of what an ideal legal system should be. The law's artificial matrix

422. See Alschuler, *supra* note 253, at 544.

423. *Id.* at 511.

424. See Goldkamp, *supra* note 355, at 72.

of black and white, while offering the power of precision, leads to a loss of important information. The paradigmatic detention model as recast by the Supreme Court in *Salerno* is unfaithful to the purpose and focus of the BRA. Its focus on danger and not detention skews decisions in favor of outright detention as opposed to release on conditions. The fuzzy model proposed in this Article recognizes a reality of partial truths. It accounts for the varying shades of gray encountered throughout the criminal justice system. It recognizes that the culpability, danger, and detention determinations are all fuzzy, all matters of degree.