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# Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives

Clara Kalhous and John Meringolo\*

Introduction: The Importance of Bail for a Criminal Defendant

There is no constitutional right to bail.<sup>1</sup> Yet, for an accused person facing criminal charges in the United States, particularly in the federal system, the denial of bail pending trial constructively precludes the effective exercise of those rights that are guaranteed by the United States Constitution and poses a challenge to attorneys and members of the judiciary, each of whom has sworn an oath to protect and defend those rights.

For a federal defendant facing criminal charges, the court's decision to grant or deny bail pending trial has an impact on every subsequent stage of the case. An incarcerated defendant is substantially less able to assist in his<sup>2</sup> own defense than one

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1. William Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 34 (1977).

2. For legibility and concision the male pronoun is used throughout.

whose freedom is unrestricted or only conditionally restricted by conditions of home confinement. Effectively cut off from communication with persons outside the detention facility, the incarcerated defendant is unable to arrange meetings with witnesses who could testify in his defense, to assist in the investigation of his case, or to provide his attorney with the facts to support a counter-narrative of the events leading to the criminal charge(s) against him.

Moreover, the restrictions and institutional regulations defense attorneys face when visiting clients at detention centers impede the attorneys' abilities to defend their clients and, by creating logistical barriers to client contact, impede the defense's ability to fully investigate the facts giving rise to the criminal indictment against the client. In a system where nine in ten federal criminal cases end in a conviction,<sup>3</sup> a denial of pretrial release makes it all the more likely that a defendant will plead guilty or that he will lose at trial. In addition, convicted defendants who were denied bail before trial are often sentenced to longer terms of incarceration than defendants who were granted pretrial release.<sup>4</sup>

Starting from the premise that the court's decision to grant or deny bail has a fundamental impact on the outcome of a criminal case, this Article analyzes the question of pretrial release on bail from the perspective of the defense attorney, with particular emphasis on the current law under the Bail Reform Act of 1984 (the "1984 Act"). Part I considers the history of bail in common law jurisdictions generally and the history of bail in the United States before 1984 in particular, with attention to the grounds on which pretrial release was granted. Part II examines the legislative history and enactment of the 1984 Act and the Act's effect on pretrial

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Bureau of Prison statistics indicate that 93.6 percent of federal inmates are male. FED. BUREAU OF PRISONS, Quick Facts About the Bureau of Prisons, <http://www.bop.gov/news/quick.jsp> (last updated Apr. 21, 2012). However, the arguments herein apply with equal force to the situation faced by female defendants.

3. Mark Motivans, U.S. DEPT OF JUSTICE, NCJ 234184, FEDERAL JUSTICE STATISTICS, 2009, at 2 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf>.

4. Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 339 n.33 (1990).

release decisions. Part III discusses the Bail Reform Act from defense attorneys' perspectives and provides an overview discussion of the recent decisions to release several high-profile defendants on bail on various stringent conditions and contrasts those cases with the denial of bail to defendants of lesser financial means facing similar charges. Part IV briefly considers the alternatives to pretrial detention, including home detention, electronic and GPS monitoring, and release on recognizance. Throughout, we have incorporated the views of prominent defense attorneys whose reflections on their experience defending clients who were denied pretrial release constitute an important critique of the current system and call into question the ability of the Bail Reform Act as applied by federal district courts to adequately protect the constitutional rights of the accused.

## I. The History of Bail

### A. *The Early English Laws*

Bail in the federal system "is rooted in the belief that a person who has not yet been convicted of a crime should ordinarily not spend any extended period of time in jail."<sup>5</sup> The current federal law in the United States, which is said to favor pretrial release,<sup>6</sup> originated in the Anglo-Saxon system in which, until the Assize of Clarendon in 1166, all crimes were bailable.<sup>7</sup>

Early Anglo-Saxon custom required an accused person to provide a suretor whose monetary pledge served to guarantee the appearance of the accused at trial as well as the payment of the pledged monies to the aggrieved party upon conviction.<sup>8</sup> If

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5. ROBERT W. KASTENMEIER, BAIL REFORM ACT OF 1984, H.R. REP. NO. 98-1121, at 16 (1984).

6. *United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception"). *But see* Motivans, *supra* note 3, at 2, 10 (at the end of the 2009 fiscal year, fifteen percent of federal inmates were pretrial detainees; seventy-seven percent of federal defendants in cases that terminated in 2009 had been detained pretrial at some point).

7. Duker, *supra* note 1, at 44.

8. *Id.* at 34-35. It has been noted that the early Anglo-Saxon bail process

the accused fled, the pledge was forfeited by the suretor.<sup>9</sup> Because the amount of the pledge was equal to the potential penalty upon conviction, the “system necessarily linked the amount of the pretrial pledge to the seriousness of the crime.”<sup>10</sup> In the eleventh century, the relationship between an accused individual and his suretor was converted into a community-based system in which all free men were required to maintain membership in a hundred and a tithing—local government units through which groups of men accepted responsibility for each others’ actions.<sup>11</sup>

Following the Norman Conquest in 1066, the increasing use of corporal punishment rather than monetary penalties and the “growing delays between accusation and trial” led to calls for reform.<sup>12</sup> Because crime was no longer punishable by a simple fine, the calculation of bail became more complicated.<sup>13</sup>

During the eleventh and twelfth centuries, a complex system of pretrial release on a series of summons, writs, and pledges arose but quickly became rife with abuse; additionally, the practice of the “hue and cry,” in which an accused felon was executed without trial as soon as he was captured, effectively eliminated the rights of the accused.<sup>14</sup> In response, the twenty-ninth chapter of the *Magna Carta*, signed in 1215, provided

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was “perhaps the last entirely rational application of bail. Since the amount of the pledge and the possible penalty were identical, the effect of a successful escape would have been a default judgment for the amount of the [pledged monies]. To the extent the accused left behind sufficient property to pay the [pledge], he would have had no incentive for flight. To the extent the surety bore the financial responsibility for payment, he had every incentive to ensure the appearance of the accused.” June Carbone, *Seeing through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 520 (1983) (footnote omitted).

9. Duker, *supra* note 1, at 37-38.

10. Carbone, *supra* note 8, at 520.

11. Duker, *supra* note 1, at 38-39. This practice was continued following the Norman Conquest. Under the Norman code, every free man was required to join a “frankpledge” at the age of twelve, a system in which the members provided surety for each other. *Id.* at 39. Failure to apprehend a member of one’s frankpledge following wrongdoing by that individual led to collective punishment of the group and provided a strong incentive for the maintenance of societal order. *Id.*

12. ROBERT W. KASTENMEIER, BAIL REFORM ACT OF 1984, H.R. REP. NO. 98-1121, at 17 (1984); Carbone, *supra* note 8, at 522.

13. Carbone, *supra* note 8, at 522.

14. Duker, *supra* note 1, at 40-43.

that “No Freeman shall be taken, or imprisoned, or be disseised<sup>15</sup> of his Freehold, or Liberties, or free Customs, or to be outlawed, or any otherwise destroyed, but by lawful Judgment of his Peers, or by the law of the Land.”<sup>16</sup>

Nearly simultaneously, at the Assize of Clarendon in 1166, the writ *de homine replegiando* was enacted. The writ “commanded the sheriff to release the individual detained unless he were held for particular reasons,” thereby establishing “the first written list of nonbailable offenses.”<sup>17</sup> The final clause of the writ, which allowed the sheriff to deny bail “for any . . . [wrong] for which according to English custom he is not replevisable,”<sup>18</sup> however, lent itself to abuse by the sheriffs.

In response, in 1275, the English Parliament adopted the Statute of Westminster, which classified all offenses for the first time as either bailable or nonbailable and mandated consideration of the nature of the offense, the probability of conviction, and factors including the defendant’s “attempted escape, bad repute, or comparable actions or characteristics which rendered the offense nonbailable.”<sup>19</sup>

Thus, by mandating consideration of the characteristics of the accused person and the likelihood of conviction, the Statute of Westminster required a preliminary consideration of the strength of the evidence against the accused as a proxy for the likelihood of flight.<sup>20</sup>

The Statute of Westminster remained the governing law (with emendations)<sup>21</sup> until the Petition of Right in 1628.<sup>22</sup> The

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15. *i.e.*, be wrongfully dispossessed of his freehold possession of property. See BLACK’S LAW DICTIONARY 211-12 (2d Pocket ed. 2001).

16. See Duker, *supra* note 1, at 43 (internal quotation marks omitted).

17. *Id.* at 44.

18. *Id.* at 45 (alteration in original) (internal quotation marks omitted); see also BLACK’S LAW DICTIONARY 602 (2d Pocket ed. 2001) (defining “personal replevin” as “[a]t common law, an action taken to replevy a person out of person or out of another’s custody.”).

19. Duker, *supra* note 1, at 45-46; Carbone, *supra* note 8, at 523; ROBERT W. KASTENMEIER, BAIL REFORM ACT OF 1984, H.R. REP. No. 98-1121, at 17 (1984).

20. Carbone, *supra* note 8, at 526-27.

21. H.R. REP. No. 98-1121, at 17.

22. See generally Duker, *supra* note 1, at 50-58 (discussing the intervening changes to the right to bail).

Petition was drafted in response to the decision in *Darnel's Case*,<sup>23</sup> in which the courts “upheld the right of the king to jail nobles who refused to lend him money, even though they had no legal obligation to do so.”<sup>24</sup> After intense parliamentary negotiations, the King agreed to sign the Petition, which “declared and enacted, That no Freeman may be taken or imprisoned or be disseised of his freehold or liberties, . . . but by lawful judgment of his peers, or by law of the land.”<sup>25</sup> The Petition of Right failed, however, to state a time limit within which an accused person must be released on bail.<sup>26</sup>

To eliminate this loophole, in 1677, the Petition of Right was amended by the Habeas Corpus Act of 1677, which provided that an accused person who was denied bail and brought a habeas corpus petition was entitled to have his petition heard within three days after the service of the petition and that:

[A]fter the Party shall be brought before them, the said Lord Chancellor or Lord Keeper, or Justice or Baron before whom the Prisoner shall be brought . . . , shall discharge the said prisoner from his Imprisonment, taking his or their Recognizance, with one or more Surety or Sureties, in any Sum according to their Discretion, having regard to the Quality of the Prisoner and Nature of the Offense, for his or their Appearance in the Court of the King's Bench . . . unless it shall appear . . . that the Party [is] . . . committed . . . for such Matter or Offenses for which by law the Prisoner is notailable.<sup>27</sup>

Thus, the right to bail was secured, but because the amount of bail was not constrained in any manner; the

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23. 3 How. St. Tr. 1 (1627 K.B.). See generally *id.* at 58-66 (discussion of facts and holding in *Darnel's Case*).

24. H.R. REP. No. 98-1121, at 17 (citing Duker, *supra* note 1, at 64).

25. *Id.* (internal quotation marks omitted).

26. See Duker, *supra* note 1, at 65-66.

27. *Id.* at 66 (alterations in original) (citation omitted).

“Discretion” of the person hearing the petition was effectively authorized to set prohibitively high bail.<sup>28</sup> This last loophole was corrected in 1689, with the Bill of Rights, which provided that, in criminal cases, “excessive bail ought not to be required.”<sup>29</sup>

At the dawn of American independence, the English common law approach to bail as outlined in the Statute of Westminster, the Petition of Right, the Habeas Corpus Act of 1679, and the Bill of Rights of 1689 provided the framework for the American laws.<sup>30</sup>

### B. *History of Bail Pending Trial in the U.S. from 1776 to 1966*

The colonists brought the English laws with them and “the early colonies applied [the Statute of Westminster] verbatim.”<sup>31</sup> Early revisions to the colonies’ bail laws, however, liberalized the requirements and the right to bail. For example, in 1641, Massachusetts passed a statute providing an “unequivocal right to bail for non-capital offenses.”<sup>32</sup> Similarly, in 1682, Pennsylvania adopted a constitutional provision “providing that ‘all Prisoners shall beailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great.’”<sup>33</sup> Pennsylvania’s formulation of the standard for bail—proof evident or presumption great—became the model for many states.<sup>34</sup>

Throughout this period, considerations of the evidence against the accused (i.e., the likelihood of conviction) and of the severity of the charged offense remained the most important factors in the courts’ bail decisions.<sup>35</sup> These factors were

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28. *Id.*

29. *Id.* (where “excessive” was not defined).

30. ROBERT W. KASTENMEIER, BAIL REFORM ACT OF 1984, H.R. REP. NO. 98-1121, at 18 (1984).

31. *Id.*; see also Carbone, *supra* note 8, at 529.

32. Carbone, *supra* note 8, at 530.

33. *Id.* at 531 (citing PA. CONST. art. XVI, § 28); Duker, *supra* note 1, at 80.

34. Carbone, *supra* note 8, at 532; H.R. REP. NO. 98-1121, at 19; see also Duker, *supra* note 1, at 80-82 (providing a detailed discussion of the individual colonies’ bail statutes).

35. Carbone, *supra* note 8, at 540-43.

effective proxies for the risk of flight—where conviction appeared more likely, the presumption that the accused would flee was stronger.

In the early twentieth century, however, courts began to additionally consider the defendant's criminal record when setting the amount of bail.<sup>36</sup> In 1946, the Federal Rules of Criminal Procedure formalized this practice by adopting a provision requiring consideration of the defendant's criminal record.<sup>37</sup> Thus, consideration of the character and criminal record of the defendant, the likelihood of conviction, and the severity of the offense, determined whether he was to be released on bail and if so, in what amount.<sup>38</sup>

In contrast to many state constitutions, the Constitution of the United States does not guarantee the right to bail.<sup>39</sup> The Eighth Amendment provides only that "Excessive bail shall not be required."<sup>40</sup> Although not constitutionally guaranteed, bail protects the interests of the public and the interests of the defendant "if the government can be assured of [the defendant's] presence" in court.<sup>41</sup> The mandate that "a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment"<sup>42</sup> reinforces the presumption of innocence.<sup>43</sup>

The right to bail in non-capital cases is preserved in the Judiciary Act of 1789, however, which provides that:

[U]pon all arrests in criminal cases, bail shall be admitted, except where the punishment may be

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36. *Id.* at 546.

37. *Id.*

38. *Id.* at 547-48. The courts retained substantial discretion in the decision to grant or deny bail based on the character of the defendant and his criminal record. *See Duker, supra* note 1, at 69.

39. Carbone, *supra* note 8, at 533.

40. U.S. CONST. amend. VIII.

41. *United States v. Barber*, 140 U.S. 164, 167 (1891).

42. *Hudson v. Parker*, 156 U.S. 277, 285 (1895).

43. Duker, *supra* note 1, at 68 ("This traditional theory, corollary to the notion of presumption of innocence, theoretically permits the accused to aid his counsel in the preparation of a defense.").

death, in which cases it shall not be admitted but by the Supreme or a circuit court, or by a justice of the Supreme Court, or a judge of the district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of evidence, and the usages of law.<sup>44</sup>

Whether or not this language actually guarantees the right to bail is still debated.<sup>45</sup> In *Stack v. Boyle*,<sup>46</sup> the Supreme Court wrote:

[The] traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.<sup>47</sup>

Later in that same term, however, the Court also wrote in dicta that:

The [Eighth Amendment's] bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases in which it is proper to

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44. Federal Judiciary Act of 1789, § 33, ch. 20, 1 Stat. 73, 92 (1789).

45. ROBERT W. KASTENMEIER, BAIL REFORM ACT OF 1984, H.R. REP. NO. 98-1121, at 19 (1984); *see also* United States v. Edwards, 430 A.2d 1321, 1326 (D.C. 1981) ("The history of the Eighth Amendment . . . is generally unilluminating and falls short of supporting, let alone compelling, the conclusion that a right to bail must be found by implication.").

46. 342 U.S. 1 (1951).

47. *Id.* at 4 (citation omitted). The question before the Court concerned whether bail set at fifty thousand dollars for defendants accused of violating the Smith Act, 54 Stat. 670 (1940) (codified as amended in scattered sections of 18 U.S.C.), was "excessive." The Court held that "[b]ail set at a figure higher than an amount reasonably calculated to fulfill [the] purpose [of assuring appearance at trial] is 'excessive' under the Eighth Amendment." *Stack*, 342 U.S. at 5; *see also* H.R. REP. NO. 98-1121, at 20.

grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must beailable.<sup>48</sup>

If bail is granted, however, the Eighth Amendment's guarantee that bail shall not be "excessive" applies. Despite the longstanding prohibition on imposing excessive bail, the question of what was excessive was not always understood to refer to the monetary amount of bond imposed.<sup>49</sup> In the colonial period, the financial circumstances of the accused were not considered when bail was set.<sup>50</sup> Indeed, the state courts considered that the imposition of bail calculated according to the accused's ability to pay would be unjust.<sup>51</sup>

In 1835, the District Court of the District of Columbia redefined the concept of "excessive" bail, holding that:

[T]o require larger bail than the prisoner could give would be to require excessive bail and to deny bail in a case clearlyailable by law. . . . [T]he discretion of the magistrate in taking bail in a criminal case, is to be guided by the compound consideration of the ability of the prisoner to give bail, and the atrocity of the offence.<sup>52</sup>

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48. *Carlson v. Landon*, 342 U.S. 524, 545-46 (1952). The Court limited its holding to deportation cases but found that aliens being deported could be held without bail. *Id.*; see also *Edwards*, 430 A.2d at 1330 ("Lower courts have relied, alternatively, on the dicta of both *Carlson* and *Stack* to find or deny a constitutional right to bail, but without any convincing resolution.").

49. See *Carbone*, *supra* note 8, at 548-49.

50. *Id.* at 548.

51. *Id.* at 549 (quoting *People v. Goodwin*, 18 Johns. 187 (N.Y. Sup. Ct. 1820)).

52. *Carbone*, *supra* note 8, at 549 (citing *United States v. Lawrence*, 26

Still, before the Bail Reform Act of 1966 (the “1966 Act”), the gravity of the charged offense was the most important consideration for the court and the defendant’s financial circumstances were considered “only within limits dictated by the seriousness of the offense.”<sup>53</sup>

### C. *The Bail Reform Act of 1966*

During the decade preceding the enactment of the 1966 Act, studies by Caleb Foote<sup>54</sup> and others<sup>55</sup> demonstrated that courts were rarely influenced by the defendant’s financial resources in setting the amount of bail and that many defendants remained in pretrial detention because they were unable to post bond.<sup>56</sup> In response, the Manhattan Bail Project at the Vera Institute of Justice<sup>57</sup> attempted to create an alternative mechanism for determining which defendants should be detained before trial, working from the premise that the risk of flight was the sole rationale for a denial of bail.<sup>58</sup> The Manhattan Bail Project’s analysis of individual defendants’ ties to the community successfully halved the number of individuals released on their own recognizance (i.e., with no monetary bond) who subsequently failed to appear for trial.<sup>59</sup>

In response, Congress passed the 1966 Act, which “codified a presumption in favor of pretrial release, prescribed non-monetary conditions of release as an alternative to bail bonds, and added ‘community ties’ as a new element to be weighed in setting the conditions of release.”<sup>60</sup> Under the 1966 Act, all defendants other than those facing a potential capital sentence were entitled to be released on their own recognizance unless

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F. Cas. 887, 888 (C.C.D.D.C. 1835) (No. 15,577).

53. Carbone, *supra* note 8, at 552.

54. See CALEB C. FOOTE, STUDIES ON BAIL 190 (1966).

55. See Carbone, *supra* note 8, at 552 nn.178-79.

56. *Id.* at 552.

57. See VERA INST. OF JUSTICE, PROGRAMS IN CRIMINAL JUSTICE: VERA INSTITUTE OF JUSTICE TEN-YEAR REPORT, 1961-1972 (1972).

58. Carbone, *supra* note 8, at 552-53.

59. *Id.* at 553.

60. *Id.* (citing Bail Reform Act of 1966, Pub. L. No. 89-465, § 3146(b), 80 Stat. 214 (current version at 18 U.S.C. § 3146(b) (2006)).

the court determined that the release “[would] not reasonably assure” the defendant’s presence at trial.<sup>61</sup> If the court found that release on recognizance would not assure the defendant’s appearance as required, the 1966 Act provided a series of conditions that could be imposed, including:

[P]lacing the person in the custody of a designated person or organization which agrees to the supervision; restrictions on travel, association and/or residence; execution of a bail bond with a sufficient number of solvent sureties; and finally the imposition of any other condition deemed reasonably to assure appearance as required, including a condition requiring that the person return to custody after specified hours.<sup>62</sup>

In making the determination of what conditions were reasonably necessary to assure the defendant’s appearance as required, courts employed the Manhattan Bail Project’s criteria, as well as the more “traditional” criteria of the weight of evidence against the accused and his criminal history.<sup>63</sup> Thus, until 1984, the “gravity of the offense” established the contours of the decision to grant or deny bail and provided a framework for a determination of the amount of bail that

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61. ROBERT W. KASTENMEIER, BAIL REFORM ACT OF 1984, H.R. REP. NO. 98-1121, at 21 (1984). This and similar citations in this section refer to the Bail Reform Act of 1966. The referenced provisions of the U.S. Code have been amended by the Bail Reform Act of 1984. Defendants facing capital charges were eligible for release on the same conditions “unless the judicial officer has reason to believe that no such condition(s) will reasonably assure that a particular defendant will not flee or pose a danger to any other person or to the community.” *Id.* at 21-22.

62. *Id.* at 21 (internal quotation marks omitted). In 1982, the 1966 Act was amended by the Victim and Witness Protection Act of 1982, which added the possibility of pretrial release on the condition that a defendant did not violate federal obstruction of justice statutes. *Id.* at 22.

63. *Id.* at 21. These “traditional” criteria included, “the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused’s family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.” *Id.*

courts considered reasonable.<sup>64</sup>

D. *The District of Columbia Court Reform and Criminal Procedure Act of 1970*

Under the United States Constitution,<sup>65</sup> Congress has legislative jurisdiction over the District of Columbia. In the 1960s, following the enactment of the federal 1966 Act, Congress reworked the District of Columbia Code, authorizing preventive pretrial detention in noncapital cases on grounds either that the accused was likely to pose a danger to the community or a risk of flight for the first time.<sup>66</sup> Pretrial detention was authorized for individuals charged with:

[C]ertain defined dangerous crimes who could be a threat to the safety of the community; (2) those charged with a crime of violence who have been convicted of such a crime within the immediate preceding ten year period, or those who were on bail or other release pending completion of a sentence; and (3) those charged with any offense who, for the purpose of obstructing or attempting to obstruct justice, threaten, injure, intimidate or attempt to threaten injure or intimidate any prospective witness or juror.<sup>67</sup>

The law also provided for a detention hearing procedure at which the judicial officer was instructed to release the individual on bail unless the officer found by clear and convincing evidence that he fell into one of the enumerated categories; that “there [was] no condition or combination of conditions or release which [would] reasonably assure the safety of any other persons or the community,” taking various factors into consideration; and “with the exception of those in the third category, *supra*, that there [was] a substantial

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64. Carbone, *supra* note 8, at 541.

65. U.S. CONST. art. I, § 8, cl. 17.

66. H.R. REP. NO. 98-1121, at 22.

67. *Id.*

probability that the accused committed the offense for which he [was] present before the judicial officer.”<sup>68</sup>

The Code’s preventive detention measure was challenged, but ultimately upheld by the United States Court of Appeals for the District of Columbia, which reasoned that the provision was regulatory, not punitive, because it “was not intended to promote either of the ‘traditional aims of punishment retribution and deterrence.’”<sup>69</sup> The preventive detention provision and other sections of the District of Columbia Code, regarding the admissibility of evidence at the detention hearing and the representation by counsel, formed the background against which Congress deliberated when reforming the 1966 Act.

## II. The Bail Reform Act of 1984

Following the enactment of the 1966 Act, it became clear that the risk of flight alone was an inadequate ground on which to base the bail decision. Moreover, when Congress was debating enactment of the 1984 reforms, Representative Kastenmeier noted in his report to the House Judiciary Committee that, since passage of the 1966 Act, the judiciary had adopted a *de facto* consideration of dangerousness “by denominating defendants as flight risks and setting a high bail. . . . One study estimate[d] that about two-thirds of those eligible for detention under the Senate bail bill [that became the 1984 Act] [were] already detained.”<sup>70</sup> Thus, federal courts were taking matters into their own hands, effectively denying bail in cases where they deemed defendants to be dangerous by setting inordinately high bail, albeit on stated grounds of risk of flight.

In the spring of 1982, President Reagan began pressing for congressional action on a number of anticrime proposals including bail reform. He urged Congress to “set an example for the States by establishing a modern, effective criminal justice

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68. *Id.*

69. *United States v. Edwards*, 430 A.2d 1321, 1332-33 (D.C. 1981) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)).

70. H.R. REP. NO. 98-1121, at 10-11.

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system,” by passing proposed legislation that would include “reform of our bail laws so that a judge, after a hearing with full due process protections, can prevent a dangerous defendant from returning to the streets to prey once again on innocent citizens. It would permit a judge to set reasonable conditions for pretrial release and to lock up any defendant who is rearrested while out on bail.”<sup>71</sup>

A. *President Reagan’s Anticrime Proposals*

Congressional work on the law that would become the 1984 Act began when President Reagan’s Attorney General’s task force on crime and the Senate Judiciary Committee developed an omnibus anticrime bill and sent it to Congress for consideration in 1982.<sup>72</sup> Thereafter, however, the proposals were not immediately taken up, and, on February 18, 1984, President Reagan addressed the nation, urging Congress to act.<sup>73</sup> In his address, the President argued that “too many of our friends and loved ones live in fear of crime. . . . For too many years, the scales of criminal justice were tilted toward protecting rights of criminals. . . . The liberal approach of coddling criminals didn’t work and never will.”<sup>74</sup> Describing the bail reforms, the President said:

It’s hard to imagine the present system being any worse. Except in capital cases, Federal courts cannot consider the danger a defendant may pose to others if released. The judge can only consider whether it’s likely the defendant will appear for trial if granted bail. Recently, a man charged with armed robbery and suspected

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71. President Ronald Reagan, Statement on Proposed Anticrime Legislation (May 26, 1982), available at <http://www.reagan.utexas.edu/archives/speeches/1982/52682b.htm>.

72. See President Ronald Reagan, Remarks to Reporters Announcing Proposed Criminal Justice Reform Legislation (Sept. 13, 1982), available at <http://www.reagan.utexas.edu/archives/speeches/1982/91382b.htm>.

73. See President Ronald Reagan, Radio Address to the Nation on Proposed Crime Legislation (Feb. 18, 1984), available at <http://www.reagan.utexas.edu/archives/speeches/1984/21884a.htm>.

74. *Id.*

of four others was given a low bond and quickly released. Four days later he and a companion robbed a bank, and in the course of the robbery a policeman was shot. This kind of outrage happens again and again, and it must be stopped. So, we want to permit judges to deny bail and lock up defendants who the government has shown pose a grave danger to their communities.<sup>75</sup>

The President's inflammatory example, which implied that an arrest could be a proxy for guilt, reflected the deep dissatisfaction with the 1966 Act's reliance on risk of flight and preyed on increasing fears of criminal activity within American communities.<sup>76</sup>

#### B. *Congressional Debates and Legislative Enactment*

Based on experience with the 1966 Act and in reaction to the public's perception that crime was increasing across America, Congress's overwhelming rationale for the 1984 Act was the desire to increase judicial discretion to detain individuals based on a perceived danger to the community.<sup>77</sup> As

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75. *Id.*

76. In a speech on the floor of the House in August 1984, Representative Lungren admonished his colleagues for having ignored the President's anticrime proposals for fifty-one weeks, and cited a report in USA TODAY that sixty-two percent of readers described themselves as "very worried" about crime, while only fifty-two percent described themselves as "very worried" about nuclear war. 130 CONG. REC. H23,592-93 (daily ed. Aug. 9, 1984) (statement of Rep. Lungren). Similarly, Representative Hoyer cited statistics from a U.S. Department of Justice report from September 1983 that in 1982, "there was one murder every [twenty-five] minutes, one rape every [seven] minutes, one robbery every [fifty-nine] seconds, and one burglary every [nine] seconds." 130 CONG. REC. H10,807 (daily ed. Oct. 2, 1984) (statement of Rep. Hoyer).

77. S. REP. NO. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185, 1983 WL 25404, at \*3:

Many of the changes in the Bail Reform Act incorporated in this bill reflect the Committee's determination that federal bail laws must address the alarming problem of crimes committed by persons on release and must give the courts

Representative Kastenmeier wrote:

In 1966, the Congress made an explicit decision *not* to permit the courts to assess directly whether the defendant was dangerous. . . . Since 1966, there has been continued pressure for the use of pretrial detention based on predictions of dangerousness. During this [fifteen]-year period, some additional evidence has emerged which may help resolve the issues outlined above. The pressure for preventive detention has produced changes in the bail laws in a number of states and passage of a bail reform bill by the Senate.<sup>78</sup>

The Senate Committee on the Judiciary agreed, reporting that “[c]onsiderable criticism has been leveled at the Bail Reform Act [of 1966] in the years since its enactment because of its failure to recognize the problem of crimes committed by those on pretrial release.”<sup>79</sup>

During the period leading to the enactment of the 1984 Act, the House Committee on the Judiciary held three days of hearings on bail reform, seeking to establish through expert testimony from the Judicial Conference of the United States, the Pretrial Resource Center, the Reagan Administration, the American Bar Association, the American Civil Liberties Union, and academic experts, the “nature and extent of pretrial crime in the Federal criminal justice system,” and which of the proposed legislative measures would be most effective, least costly (both financially and humanly), and would pose the fewest constitutional problems.<sup>80</sup>

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adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.

*Id.*

78. ROBERT W. KASTENMEIER, BAIL REFORM ACT OF 1984, H.R. REP. NO. 98-1121, at 10 (1984) (footnotes omitted).

79. S. REP. NO. 98-225, at 5.

80. H.R. REP. NO. 98-1121, at 9.

In his written report to the House Judiciary Committee summarizing the hearings, Representative Kastenmeier characterized the “question of whether dangerousness should be a sufficient justification for pretrial detention” as “the single most difficult bail issue.”<sup>81</sup> He presciently noted, *inter alia*, that opponents of preventive pretrial detention found that “predictive pretrial detention should be minimized because of the negative impact detention has on trial outcome and sentence (all other things being equal, detainees are more likely to be convicted and, once convicted, receive longer sentences).”<sup>82</sup>

When the legislation containing the 1984 Act came to the House floor for debate, Representative Kastenmeier spoke against the bail reform provisions as written, saying, “Title I of this bill radically changes bail practices in this country by authorizing preventive detention. While I recognize that fear of crime and the public concern about crimes committed on pretrial release motivate these provisions, these changes are ill-founded and possibly unconstitutional.”<sup>83</sup> Specifically, he argued that the bill “may violate the eighth amendment right to bail. Second, the bill may violate the due process requirements of the fifth amendment.”<sup>84</sup>

Representative Kastenmeier’s view gained support from Representative Rodino, who agreed that allowing pretrial detention based on predictions of dangerousness went “too far,”<sup>85</sup> and from Representative Conyers, who said that, “[w]hen we authorize preventive detention in an unconstitutional way to permit the Federal courts to lock up a person without a finding of guilt based on the judge’s guess about the person’s future behavior, I think we have a constitutional problem.”<sup>86</sup> Nonetheless, the House passed the measure, which Representative Sawyer called “one tremendous

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81. *Id.* at 11.

82. 130 CONG. REC. H10,811 (daily ed. Oct. 2, 1984) (statement of Rep. Robert Kastenmeier).

83. *Id.*

84. *Id.* at n.1.

85. 130 CONG. REC. H10,810 (daily ed. Oct. 2, 1984) (statement of Rep. Peter Rodino).

86. 130 CONG. REC. H10,813 (daily ed. Oct. 2, 1984) (statement of Rep. John Conyers).

crime bill . . . [and] the biggest crime bill ever passed in history.”<sup>87</sup>

In the Senate, the rhetoric was much more favorable. The Senate Committee on the Judiciary’s report noted the “deep public concern, which the Committee shares, about the growing problem of crimes committed by persons on release.”<sup>88</sup> The Committee cited a report that one out of every six defendants released pretrial was rearrested during the pretrial period, and one third of those were rearrested more than once.<sup>89</sup> Thus, the Committee wrote:

[T]here is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons. It is with respect to this limited group of offenders that the courts must be given the power to deny release pending trial.<sup>90</sup>

On October 4, 1984, the Senate adopted the Thurmond Amendment No. 7043, which included a number of major amendments to federal criminal law including “bail and sentencing reform, forfeiture of drug assets, improvements in the insanity defense, increased drug penalties, surplus Federal property improvements, labor racketeering provisions, prison construction assistance, missing children provisions, Federal assistance to state crime victim compensation programs, and trademark counterfeiting, credit card fraud, armed career criminals and terrorism provisions.”<sup>91</sup> In his remarks, Senator Thurmond noted that:

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87. 130 CONG. REC. H11,981 (daily ed. Oct. 10, 1984) (statement of Rep. Thomas Sawyer); 130 CONG. REC. H11,981 (daily ed. Oct. 10, 1984) (statement of Rep. Neal Smith).

88. S. REP. NO. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3188, 1983 WL 25404, at \*6.

89. *Id.*

90. *Id.* at 6-7.

91. H.R.J. Res. 648, 98th Cong. (1984) (enacted).

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[T]he crime problem is a high priority for the American people and, thus, should receive prompt and effective attention on the part of their elective representatives. The crime package that we are offering today is a result of many years of hard work and dedication on the part of Members of Congress and individuals in the executive branch. Let me emphasize to my colleagues on both sides of the Capitol dome-this is a bipartisan effort that cuts across liberal and conservative lines.”<sup>92</sup>

In concurrence, Senator Biden called the bill a bipartisan effort, and noted that earlier versions of the Comprehensive Crime Control Act of 1984 had been passed by overwhelming majorities in both the House and the Senate, stating that “[t]he enactment of this crime legislation should not be a partisan issue. Crime is not a Democratic issue or a Republican issue.”<sup>93</sup> Senator Laxalt praised the legislation, saying:

The reforms made by this legislation are well-considered responses to a serious crime problem in our Nation. When this package is signed into law, criminals who are found to be dangerous will no longer be free on bail to walk to streets and commit other crimes . . . . [S]uffice it to say that all of the reforms are essential to reshape our Federal criminal justice system. These changes will go a long way toward making this system one which is truly just.”<sup>94</sup>

Senator Kennedy called the bail reform provisions of the Act, “historic . . . far reaching, and . . . urgently needed.” He continued:

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92. 130 CONG. REC. S13,062 (daily ed. Oct. 4, 1984) (statement of Sen. Strom Thurmond).

93. 130 CONG. REC. S13,063 (daily ed. Oct. 4, 1984) (statement of Sen. Joseph Biden).

94. 130 CONG. REC. S13,078 (daily ed. Oct. 4, 1984) (statement of Sen. Paul Laxalt).

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The most important provision is the change that at last permits judges to take into account the potential dangerousness of defendants in deciding whether they should be released on bail. No longer will judges be faced with the Hobson's choice of granting bail to a demonstrably dangerous defendant, or subverting the law with a baseless finding that the defendant is likely to flee. No longer will any judge feel compelled by a foolish law to release a dangerous defendant into a community to rape or rob or mug or kill again.

There are also important companion changes in the existing law on money bail. The act prohibits the use of money bail as a means to assure a defendant's appearance at trial, and limits the amount of bail to the defendant's ability to pay. No longer will rich defendants be released because they can afford to post their bail, while the poor remain in jail.

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In sum, this legislation embodies a unique national consensus that more can be done and must be done to combat crime in our society. The bill we offer today is a giant step forward for the safety of our communities, for the preservation of our freedoms, and for every law enforcement officer, every criminal justice official, and every citizen in America.<sup>95</sup>

Senator Leahy noted that, "[o]ur bail laws, both Federal and State, have failed to give adequate consideration to how much danger is posed to the community by particular bail conditions. This bill allows a judge to evaluate a danger to the

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95. 130 CONG. REC. S13,079 (daily ed. Oct. 4, 1984) (statement of Sen. Edward Kennedy).

community. It is a change that is long overdue.”<sup>96</sup> He cautioned, however, that “the strengthening of our Federal bail law implies a strong duty to ensure a speedy trial. . . . Judges should embrace the bail standards in this bill, but should use their considerable powers to see to it that those who are denied bail because of danger to the society are promptly tried. . . . Curbs on bail are curbs on the personal liberty of the accused. The need for bail is deeply rooted in the presumption of innocence.”<sup>97</sup>

Despite evidence that the proportion of federal defendants released on bail and rearrested for subsequent criminal activity was very low,<sup>98</sup> Congress’s stated rationale—to protect the public—was adopted and accepted by the Supreme Court in the first case to challenge the constitutionality of the 1984 Act’s preventive detention provisions.<sup>99</sup>

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96. 130 CONG. REC. S13,088 (daily ed. Oct. 4, 1984) (statement of Sen. Patrick Leahy).

97. *Id.*

98. ROBERT W. KASTENMEIER, BAIL REFORM ACT OF 1984, H.R. REP. 98-1121, at 11 (1984) (“At the Federal level, in 10 demonstration districts [using expanded pretrial supervision], the pretrial arrest rate for releasees was reduced to 4.7% and *only 2.4% are charged with a new felony*”).

An early study done by the Harvard Civil Rights and Civil Liberties Law review found that if the criteria of the D.C. preventive detention statute were applied in Boston, for every correct prediction (i.e. an incarceration of the person would have prevented the offense) seven persons would have been incorrectly jailed, thus, tripling the detention population. Two more recent studies (one national and one of the District of Columbia) indicate that using the best available predictive device would result in at least as many incorrect predictions as correct ones. Moreover, the national study found that a 16% reduction in pretrial crime would result in an increase of 30% in the detention population. The most recent study using Federal data found that 93% eligible for detention would, if released, not commit a new offense. Thus, finding the dangerous 7% is a formidable task.

*Id.* at n.11.

99. *See* United States v. Salerno, 481 U.S. 739, 742 (1987).

C. *Pretrial Detention for Dangerousness or Risk of Flight Under the 1984 Act*

Pursuant to the 1984 Act,<sup>100</sup> the court “shall order the pretrial release of [a defendant] on personal recognizance, or upon execution of an unsecured appearance bond . . . unless the [court] determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.”<sup>101</sup>

If the court determines that release on personal recognizance or unsecured bond poses a risk of nonappearance or of danger to the community, the court “shall order the pretrial release of the person . . . subject to the least restrictive . . . condition, or combination of conditions, that . . . will reasonably assure the appearance of the person as required and the safety of any other person and the community . . .”<sup>102</sup>

Only if the court finds after a hearing that “no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community” shall the court detain the defendant pending trial.<sup>103</sup> A finding that no conditions will reasonably assure “the safety of any other person and the community” must be supported by clear and convincing

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100. 18 U.S.C. § 3142 (2006).

101. *Id.* § 3142(b).

102. *Id.* § 3142(c)(1)(B). The specific conditions, which are enumerated in 18 U.S.C. § 3142(c)(1)(B)(i)-(xiv), include release to custody of a designated person who will assure the defendant's appearance; that the defendant maintain or seek employment; maintain or seek education; abide by specific restrictions on personal associations, place of abode, or travel; avoid all contact with alleged victims and potential witnesses; report regularly to pretrial services; comply with an imposed curfew; refrain from possession of a firearm, destructive device, or other dangerous weapon; refrain from excessive use of alcohol or any use of narcotic drugs without a prescription; undergo medical, psychological, or psychiatric treatment as mandated; agree to forfeiture of property or money for failure to appear as required; execute a bail bond with sufficient sureties to reasonably assure the court of appearance; return to custody for specified hours following release for employment, education, or other limited purposes; and 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.”

103. *Id.* § 3142(e)(1).

evidence.<sup>104</sup> A finding that the defendant poses a risk of flight must be supported by a preponderance of the evidence.<sup>105</sup> The burden of proof rests with the government.

If a defendant is accused of

(A) a crime of violence, [sex trafficking of children], or [an act of terrorism transcending national boundaries] . . . for which a maximum term of imprisonment of 10 years or more is prescribed; (B) an offense for which the maximum sentence is life imprisonment or death; (C) a[] [controlled substances] offense for which a maximum term of imprisonment of ten years or more is prescribed . . .[.]<sup>106</sup>

or if the defendant is accused of any felony and has previously been convicted of two or more such offenses in federal or state courts,<sup>107</sup> or if the case involves “any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device . . . or any other dangerous weapon . . . [.]”<sup>108</sup> a rebuttable presumption arises that “no condition or combination of conditions will reasonably assure the safety of any other person and the community.”<sup>109</sup>

In deciding “whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community[.]” the 1984 Act instructs the court to consider:

(1) [T]he nature and circumstances of the offense charged, including whether the offense is a crime of violence . . . or involves a . . . firearm, explosive, or destructive device; (2) the weight of the evidence against the person; (3) the history

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104. *Id.* § 3142(f)(2)(B).

105. *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985).

106. 18 U.S.C. §3142(f)(1)(A)-(C) (citations omitted).

107. *Id.* § 3142(f)(1)(D).

108. *Id.* § 3142(f)(1)(E).

109. *Id.* § 3142(e)(2).

and characteristics of the person . . . ; and . . . (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.<sup>110</sup>

Because the 1984 Act favors pretrial release, "it is only a limited group of offenders who should be denied bail pending trial."<sup>111</sup>

D. *The Supreme Court's Constitutional Analysis of the 1984 Act*

In 1987, the Supreme Court considered the preventive detention provisions of the 1984 Act and found them constitutional in *United States v. Salerno*.<sup>112</sup> Anthony Salerno and Vincent Cafaro were charged in a twenty-nine-count indictment that alleged, inter alia, thirty-five acts of racketeering activity including conspiracy to commit murder. Salerno was alleged to be the "boss" of the Genovese crime family, and Cafaro was alleged to be a "captain" in the same family.<sup>113</sup> The government moved for detention, proffering evidence obtained through wiretaps and offering the testimony of two of its trial witnesses.<sup>114</sup> In return, Salerno offered testimony from character witnesses and medical evidence in the form of a letter from his doctor. Both Salerno and Cafaro challenged the reliability of the government's evidence and the credibility of the witnesses.<sup>115</sup>

The District Court for the Southern District of New York granted the government's detention motion, concluding that the 1984 Act's requirements had been met and that "the Government had established by clear and convincing evidence that no condition or combination of conditions of release would

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110. *Id.* § 3142(g).

111. *United States v. Sabhnani*, 493 F.3d 63, 75 (2d Cir. 2007) (internal quotation marks omitted) (citing *United States v. Shakur*, 817 F.2d 189, 195 (2d Cir. 1987)).

112. 481 U.S. 739 (1987).

113. *Id.* at 743.

114. *Id.*

115. *Id.*

ensure the safety of the community or any person”<sup>116</sup> because:

The activities of a criminal organization such as the Genovese Family do not cease with the arrest of its principals and their release on even the most stringent of bail conditions. . . . When business as usual involves threats, beatings, and murder, the present danger such people pose in the community is self-evident.<sup>117</sup>

The defendants appealed the detention order, and the United States Court of Appeals for the Second Circuit agreed that, “to the extent that the Bail Reform Act permits pretrial detention on the ground that the arrestee is likely to commit future crimes, it is unconstitutional on its face.”<sup>118</sup> The Second Circuit reasoned that “our criminal law system holds persons accountable for past actions, not anticipated future actions [.]” and that “the Government could not, consistent with due process, detain persons who had not been accused of any crime merely because they were thought to present a danger to the community.”<sup>119</sup>

The Supreme Court reversed the Second Circuit in a six-to-three decision and found the 1984 Act’s preventive detention provisions constitutional.<sup>120</sup> Chief Justice Rehnquist’s opinion for the Court began by noting that the 1984 Act had been enacted in response to “the alarming problem of crimes committed by persons on release.”<sup>121</sup> On that basis, the Court held that the 1984 Act did not violate the Due Process Clause either substantively or procedurally.<sup>122</sup> The Court characterized the preventive detention provision as “regulatory in nature” and found that it did “not constitute punishment

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116. *Id.* at 743-44.

117. *Id.* at 744 (citing *United States v. Salerno*, 631 F. Supp. 1364, 1375 (S.D.N.Y. 1986)).

118. *Id.* (referencing *United States v. Salerno*, 794 F.2d 64 (2d Cir. 1986)).

119. *Id.* at 744-45.

120. *Id.* at 740.

121. *Id.* at 742 (quoting S. REP. NO. 98-225, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185, 1983 WL 25404, at \*3).

122. *Id.* at 746-52.

before trial in violation of the Due Process Clause.”<sup>123</sup> Praising Congress’s “careful delineation of the circumstances under which detention will be permitted,” the Court wrote, “When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat.”<sup>124</sup>

The Court also found that the 1984 Act did not violate the Eighth Amendment’s Excessive Bail Clause.<sup>125</sup> Referencing its earlier decisions in *Stack v. Boyle*<sup>126</sup> and *Carlson v. Landon*,<sup>127</sup> the Court held that, “when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.”<sup>128</sup>

Thus, since the Court’s holding in *Salerno*, federal district courts are authorized to order the pretrial detention of defendants based on a perceived risk of flight, or a danger to the community. The following sections of this Article examine how the 1984 Act’s detention provisions affect the ability of criminal defense attorneys to defend their clients and how pretrial detention imperils defendants’ exercise of their constitutional rights.

### III. The 1984 Act in Practice—Defense Attorneys’ Perspectives

The 1984 Act’s authorization of preventive pretrial detention has had a profound impact on the ability of defense attorneys to defend their clients and on the defendants’ abilities to exercise their constitutional rights.

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123. *Id.* at 748.

124. *Id.* at 751.

125. *Id.* at 752-55.

126. 342 U.S. 1 (1951).

127. 342 U.S. 524 (1952).

128. *Salerno*, 481 U.S. at 754-55.

A. *The Detention Hearing*

Under the 1984 Act, after a defendant is arrested, a detention hearing is held at which the court attempts to determine the “risk of flight” or “danger to the community” posed by the defendant. After the detention hearing, a defendant is either released on bail or remanded for the pretrial period.<sup>129</sup> The detention hearing is held at the defendant’s first appearance before the court<sup>130</sup>—usually in front of a magistrate judge—unless either party seeks a continuance.

The 1984 Act favors pretrial release.<sup>131</sup> Nonetheless, the issue of detention has become closely litigated, especially in cases where a defendant has a prior criminal record or substantial ties to a foreign country. In addition, because of the increasing number of narcotics cases, a growing number of defendants fall within the rebuttable presumption of the 1984 Act,<sup>132</sup> so that even first time offenders often struggle to gain pretrial release.

The detention hearing can provide an insight into the government’s case and present a strategic opportunity as well. Andrew Weinstein<sup>133</sup> explains:

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129. See, e.g., Krista Ward & Todd R. Wright, *Pretrial Detention Based Solely on Community Danger: A Practical Dilemma*, 1999 FED. CTS. L. REV. 2, I.2 (1999) (calling into question whether a detention hearing based on danger to the community alone is authorized by the 1984 Act).

130. See 18 U.S.C. § 3142(e)-(f) (2006).

131. 18 U.S.C. § 3142(a); see *United States v. Sabhnani*, 493 F.3d 63, 75 (2d Cir. 2007) (finding that even if the government establishes, by a preponderance of the evidence, that the defendant presents a flight risk, the government must also demonstrate, by a preponderance of the evidence, that no conditions could be imposed on the defendant that would reasonably assure his attendance in court. The operative standard is “reasonable assurances” not conditions that guarantee attendance); see also *United States v. Tomero*, 169 F. App’x 639, 641 (2d Cir. 2006).

132. 18 U.S.C. § 3142(f)(1).

133. Mr. Weinstein received a B.A. from the University of Michigan in 1987 and graduated, magna cum laude, from Cardozo School of Law in 1990. Following his graduation from Cardozo, Mr. Weinstein served as a law clerk to the Hon. Charles H. Tenney, United States District Judge for the Southern District of New York. Between 1991 and 1998, Mr. Weinstein was associated with LaRossa, Mitchell, and Ross, a boutique criminal defense firm in New York City where he participated in many high-profile criminal trials. Mr. Weinstein is the founder of The Weinstein Law Firm PLLC in New York City

In one case I was involved in, the prosecution sought an order of detention based upon an extensive proffer that relied, in part, upon evidence obtained derivatively from certain Title III intercepted communications. The defense maintained, successfully, that in light of the information contained within the government's proffer, 18 U.S.C. § 2518(9) required that the government turn over to the defense the court orders and accompanying applications for the underlying T III intercepted communications. The government had apparently not considered the disclosure provisions of § 2518(9) and there were tactical reasons why the government did not want to disclose these documents to the defense. Ultimately, the government had to turn over the orders and affidavits and they proved to contain significant helpful information, including the identification of potential witnesses, that was critically important and valuable in connection with the preparation of the defense. Absent, the vigorous litigation which took place at the detention hearing stage, these orders and applications likely would have never been obtained by the defense, particularly given the government's position that they did not intend to introduce any of the resulting recordings at trial.<sup>134</sup>

### 1. Risk of Flight and the Law of Return

Historically, the risk of flight revolved around the likelihood that a defendant would not appear as required at subsequent court proceedings, including trial. As set forth in Section I, above, early bail laws sought to enlist suretors or

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where he continues to represent individual and corporate clients in a wide array of criminal investigations and in all stages of complex criminal and civil litigation in federal and New York state courts.

134. Letter from Andrew Weinstein to authors (Jan. 31, 2012) (on file with authors).

require monetary bonds to guarantee a defendant's appearance.<sup>135</sup> Following the Vera Institute of Justice's Manhattan Bail Project, the defendant's community ties became increasingly important to the bail determination. Today, defense attorneys attempt to assess the nature and quality of a defendant's ties to the community, including the number of family members in the local area, a defendant's work situation, and, conversely, any ties that the defendant or his family have to any other state or foreign jurisdiction, in order to demonstrate to the court that a defendant can be relied upon to appear as required. Martin Geduldig<sup>136</sup> notes that, "The most common reason for a defendant to be denied bail is the crime charged—homicide, drugs. Another very common reason is the country of origin of a defendant—whether he is a citizen or not. A naturalized citizen with contacts abroad is viewed with skepticism."<sup>137</sup>

Recently, the government has advanced the proposition that individual defendants with ties to Israel present an additional risk of flight given Israel's Law of Return,<sup>138</sup> which provides that every Jew has the right to come to Israel and to claim Israeli citizenship. Although Israel allows extradition to the United States,<sup>139</sup> the argument is nonetheless often made that a defendant who is Jewish presents a *prima facie* risk of flight. As has been argued, if this means that anyone to whom the Law of Return applies is an increased flight risk, then "every Jew" would have to be viewed for bail purposes as a greater risk of flight than a non-Jew. "That means at least

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135. See *United States v. Friedman*, 837 F.2d 48, 49-50 (2d Cir. 1988) (finding that simply being charged with a crime, conviction of which carries a potential sentence of incarceration, does not create a presumption of a risk of flight for the purposes of the 1984 Act).

136. Mr. Geduldig is a Georgetown University Law Center graduate and a former counsel to the New York State Senate Committee on Crime and Correction. He is currently the Chairman of the Nassau County Bar Association Committee on Criminal Procedure and Committee on Federal Courts and is listed as one of the top ten criminal defense lawyers in Long Island, New York.

137. Letter from Martin Geduldig to authors (Feb. 15, 2012) (on file with authors).

138. The Law of Return, 5710-1950, SH No. 51 p. 189 (Isr.), available at <http://www.knesset.gov.il/laws/special/eng/return.htm>.

139. *United States v. Samet*, 11 F. App'x 21, 22 (2d Cir. 2001).

5,300,000 Americans would be viewed as heightened bail risks simply because they are Jew[ish].”<sup>140</sup> “[This] logic would [ ] extend even to a Jew[ish] American whose family lived in this country since the first Jews arrived on the shores of New Amsterdam in 1654.”<sup>141</sup> From a defense perspective, this reading of the 1984 Act’s “risk of flight” provision is clearly nonsensical.

Moreover, Israel and the United States have signed extradition treaties<sup>142</sup> providing that each country must extradite its own nationals at the request of the other.<sup>143</sup> In 2005, the Justice Department advised the Senate that from 1999 to 2005, “the United States has extradited a total of 20 fugitives from Israel, of whom 15 were Israeli nationals (including dual United States-Israeli nationals).”<sup>144</sup>

For example, in 2002, Michael Akva, an Israeli citizen, was extradited by Israel to the United States on securities fraud and insider trading charges. In 2000, Sharon Haroush, an Israeli citizen, was extradited by Israel to the United

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140. Memorandum of Law in Support of Sholom Rubashkin's Motion for Reconsideration of His Pre-trial Detention at 6 *United States v. Rubashkin*, 718 F. Supp. 2d 953 (N.D. Iowa 2010) (No. 08-1324), 2008 WL 6458257 [hereinafter Rubashkin's Motion]; see Mordecai Plaut, *The Real State of American Jewry*, HAARETZ (Nov. 12, 2003), <http://www.haaretz.com/news/the-real-state-of-american-jewry-1.105442>.

141. Rubashkin's Motion, *supra* note 140, at 13.

142. Convention on Extradition Between the Government of the State of Israel and the Government of the United States of America, U.S.-Isr., Dec. 10, 1962, 14 U.S.T. 1707.

143. *Id.* at art. IV (“[a] requested Party shall not decline to extradite a person sought because such person is a national of the requested Party.”).

144. *Pending Treaties: Congressional Testimony Before Committee on Senate Foreign Relations*, at 7 (Nov. 15, 2005) (statement of Mary E. Warlow, Director, Office of Int'l Affairs, Criminal Div., Dep't of Justice, S. Comm. on Foreign Relations) [hereinafter *Warlow Statement*]; see Rubashkin's Motion, *supra* note 140, at 17 n.20 (“A limited exception [now] applies to persons who were Israelis at the time of the offense. Such persons are still to be extradited from Israel to the United States, but only on the condition that they be returned to Israel to serve their sentences”). This condition of returning Israelis to Israel to serve their sentence was part of the pre-existing procedure that the Justice Department found to be workable. *Warlow Statement*, *supra* note 144; see also Extradition Law, 5714-1954, 8 LSI 144 (1953-1954)(Isr.).

States on fraud and theft charges.<sup>145</sup> [In 1977], Chaim Berger, an American citizen from New York . . . was indicted in the Southern District of New York for defrauding the government of many millions of dollars. He fled to Israel where he had never lived previously, and claimed citizenship under the Law of Return. He was extradited back to the United States, pled guilty and was sentenced to six years' imprisonment.<sup>146</sup> In 2006, the Attorney General of the United States publicly praised Israel for its extradition to the United States of an Israeli who was a suspected [organized crime] boss on drug charges . . . . [D]espite the history of successful extraditions, the Administration sought and obtained Senate ratification for a protocol amending the treaty to "significantly streamline[] the process of requesting extradition." [T]he amended treaty now allows the use of hearsay; streamline[s] the procedures for 'provisional arrest;' expands the list of extraditable offenses, providing that any crime that constitutes an offense in both countries and is punishable by imprisonment of one year or more is extraditable; [and] requires that only one offense need be extraditable—as long as there is one extraditable offense in the United States' extradition request, Israel can extradite on non-extraditable offenses as well.<sup>147</sup>

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145. Rubashkin's Motion, *supra* note 140, at 15 (citing SEC Obtains Default Judgments Ordering Two Defendants to Pay \$7.6 Million For Insider Trading, U.S. Sec. and Exch. Comm'n Litigation Release No. 18193 (June 18, 2003), available at <http://www.sec.gov/litigation/litreleases/lr18193.htm>).

146. *Id.* at 15 n.14 (citing Randal C. Archibald, *Israeli Court Allows Return of Man Indicted in Fraud*, N.Y. TIMES, Aug. 7, 2001, <http://www.nytimes.com/2001/08/07/nyregion/israeli-court-allows-return-of-man-indicted-in-fraud.html>; United States v. Berger, 22 F. Supp. 2d 145 (S.D.N.Y. 2002)); see United States v. Berger, No. 97-Cr-00410-BSJ (S.D.N.Y. May 23, 2002) (No. 167, Filed Judgment as to Defendant Chaim Berger).

147. *Id.* at 15-16 (citing *U.S. Attorney General Praises Israel for Fight Against Terror, International Crime*, HAARETZ, June 27, 2006, <http://www.haaretz.com/news/u-s-attorney-general-praises-israel-for-fight->

Not surprisingly, after the new Protocol was signed, extraditions from Israel increased . . . . For example, in September 2010 the United States Attorney's Office for the Southern District of New York announced that Israel had arrested nine Israelis in a lottery telemarketing fraud scheme. According to the government's press release, "[t]his case involves the largest number of Israeli citizens ever to be provisionally arrested by Israel in anticipation of extradition."<sup>148</sup>

Due to "the effectiveness of the treaty, the Law of Return does not create an opportunity for successful flight from prosecution."<sup>149</sup> And it therefore creates no motive to flee. Should a defendant flee nonetheless, "to accelerate the extradition procedure, some courts have required as a condition of bail that defendants with strong ties to Israel (including citizenship) execute irrevocable waivers of extradition."<sup>150</sup>

In the Authors' experience, defendants with ties to foreign countries including Israel may be granted bail if they are able to post a high bond. For example, in *United States v. Shereshevsky*,<sup>151</sup> Judge Lynch granted bail to a convicted felon charged in an alleged two hundred and fifty million dollar securities fraud action where the defendant had substantial

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against-terror-1.191465; *Warlow Statement*, *supra* note 144, at 6-7; Israel Extradition Treaty, U.S.-Isr., Dec. 10, 1962, art. II, IX, XI, 14 U.S.T. 1707).

148. *Id.* at 17 (citing Press Release, U.S. Attorney S. Dist. of N.Y., Isr.-Based Defendants Indicted and Arrested in Lottery Telemarketing Fraud Targeting U.S. Citizens (Sept. 26, 2008), *available at* <http://www.usdoj.gov/usao/nys/pressreleases/September08/mayoetalarrestindictmentpr.pdf>).

149. *Id.* at 18.

150. *Id.* (citing *United States v. Shimon*, No. 06-Cr-0210, 2006 U.S. Dist. LEXIS 52979 (D. Nev. July 27, 2006) (Israeli citizen released upon condition of executing extradition waiver); *United States v. Karni*, 298 F. Supp. 2d 129, 133 (D.D.C. 2004) (same); *United States v. Cohen*, No. 00-Cr-00100 (S.D. Fla. May 5, 2000); Order Requiring Written Waiver of Extradition, *United States v. Cohen*, No. 00-Cr-00100 (S.D. Fla. May 5, 2000), ECF No. 35; Order Denying Request for Pretrial Detention, *United States v. Cohen*, No. 02-MJ-02592 (S.D. Fla. May 3, 2002), ECF No. 16; Detention Hearing, *United States v. Freund*, No. 99-Cr-00561 (S.D.N.Y. May 10, 1999), ECF No. 22).

151. No. 94-Cr-248 (CSH), 2003 WL 21497629 (S.D.N.Y. June 25, 2003).

international ties and business operations in Israel and Africa. Some of the countries in Africa had no extradition treaties with the United States. Letters written by rabbis and members of the Orthodox Jewish community and incorporated into counsel's memorandum in favor of bail evidenced his "substantial . . . family and community ties,"<sup>152</sup> and Mr. Shereshevsky was granted bail. Mr. Shereshevsky's bail was set at a ten million dollar personal recognizance bond cosigned by ten financially responsible people, at least five of whom were not related to him through blood or marriage, one million dollars in property not owned by Mr. Shereshevsky, secured by five thousand dollars cash from each cosigner, and home confinement with electronic monitoring.<sup>153</sup>

In *United States v. Ezagui*,<sup>154</sup> Magistrate Judge Go granted bail even though Mr. Ezagui had been arrested at John F. Kennedy Airport with a one-way ticket to South America, and was a citizen of Israel where his wife and children resided. His bail consisted of a three million dollar bond cosigned by his brother and one additionally financially responsible surety, secured by three properties owned by his brother and his brother's shares in a corporation, and home detention with electronic monitoring.<sup>155</sup> While on bail, Mr. Ezagui's son was injured during service with the Israeli army, and the court granted him permission to visit his son in Israel. He spent approximately two weeks there and returned without incident, adhering to the court's restrictions.

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152. Memorandum in Support of Pretrial Release, *United States v. Shereshevsky*, No. 94-Cr-248 (CSH), 2003 WL 21497629 (S.D.N.Y. June 25, 2003) (available through ECF, original on file with the authors).

153. Mr. Shereshevsky later was unable to meet the conditions, and argued that the bail should be reduced. Shereshevsky relied on *United States v. Penaranda*, No. 00-Cr-1251(RWS), 2001 WL 125621, at \*2 (S.D.N.Y. Feb. 13, 2001) ("[W]here a defendant cannot meet the financial conditions of his bail, then the court should consider where that particular financial condition is a necessary part of the bail conditions to provide reasonable assurance of the defendant's appearance, and set forth written findings of fact and legal conclusions regarding that issue").

154. 08-MJ-00530 (E.D.N.Y. July 28, 2008).

155. John Marzulli & William Sherman, *Brooklyn Developer Eliyahu Ezagui Indicted in \$18M Mortgage Fraud*, N.Y. DAILY NEWS, Apr. 2, 2009, [http://articles.nydailynews.com/2009-04-02/local/17920261\\_1\\_mortgage-fraud-indictment-buyers](http://articles.nydailynews.com/2009-04-02/local/17920261_1_mortgage-fraud-indictment-buyers).

## 2. Danger to the Community

Since the enactment of the 1984 Act, a defendant's perceived danger to the community has become a frequently contested basis for pretrial detention. Although not defined in the 1984 Act, "danger" is understood to mean "the likelihood that the accused will engage in criminal activity, including non-violent criminal activity, if released."<sup>156</sup> As Andrew Weinstein notes:

Putting aside those crimes with presumptions in favor of detention, the seriousness of the crime a defendant is charged with, whether it is a crime of violence, how much prison time the defendant is facing upon conviction, whether the defendant is alleged to be part of a criminal organization (such as in a RICO or CCE prosecution), and if so, what his or her position is within such organization, are all factors that typically play into a court's decision whether to release a defendant on bail.

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Typically, the defendant's prior history plays a significant role in advancing arguments in favor of bail pending trial. Regardless of the prosecution's arguments in favor of detention and/or the nature of the crime charged, the defendant's prior history is usually a good source of information to refute such arguments. For example, if the defendant has no prior criminal history, one could argue that as a factor weighing heavily in favor of release on bail. Conversely, if the defendant has an extensive and long-

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156. Michael Harwin, Note, *Detaining for Danger Under the Bail Reform Act of 1984: Paradoxes of Procedure and Proof*, 35 ARIZ. L. REV. 1091, 1091 (1993).

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standing criminal history, that too could be a factor that one can argue should weigh heavily in favor of release. For example, if the defendant's history is replete with prior arrests and convictions, but no criminal activity while the defendant was out on bail in any other case and no prior instance of bail jumping, one could take the long criminal history of his or her client and turn it into a positive by arguing that the Court need not speculate as to whether the defendant would commit crimes and/or come back to court if released on bail (like the Court would with someone without any criminal history) since, despite the defendant's long and extensive criminal history, he/she has never once been charged with committing a crime while on release or with failing to come to court when required.<sup>157</sup>

Martin Geduldig agrees that:

A defendant's prior arrest for a serious crime can be a major obstacle in getting reasonable bail. Prior arrests for relatively minor crimes do not present a great obstacle. An extended period without any arrests and a fairly consistent work record during that time is extremely helpful. I had a case involving a [thirty-eight]-year-old defendant who had been convicted as a [sixteen] year old of attempted murder. He served a [ten] year sentence. During the [fifteen] years he was released, he had one drug arrest but the new judge could not get [past] the [twenty] year old attempted murder conviction and set a very high bail.<sup>158</sup>

As already noted, certain charges carry with them a

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157. Letter from Andrew Weinstein to authors, *supra* note 134.

158. Letter from Martin Geduldig to authors, *supra* note 137.

rebuttable presumption of dangerousness—crimes of violence, the use or possession of a firearm in connection with a crime of violence, a capital offense, or a drug offense where a sentence of ten years or more is mandated under Title 21 of the United States Code.<sup>159</sup> In addition, defendants charged with a crime of violence, a capital offense, or a narcotics felony with a minimum ten-year penalty who were “previously convicted of or released from prison for a similar offense not more than five years before the judicial finding”<sup>160</sup> are presumed dangerous.

In presumption cases, the presumption shifts the burden of production to the defendant, but the government retains the burden of persuasion.<sup>161</sup> Nevertheless, even if the defendant “successfully rebuts the presumption, the fact that it was triggered may still be considered in release or detention determinations.”<sup>162</sup>

Since the enactment of the 1984 Act, there has been a dramatic increase in the number of defendants denied pretrial release, especially in narcotics cases.<sup>163</sup> In its report, the Senate Committee on the Judiciary explained that “dangerousness” was to be construed broadly, and emphasized that “the risk that a defendant will continue to engage in drug trafficking constitutes a danger to the ‘safety of any other person or the community.’”<sup>164</sup> Further, “[p]ersons charged with major drug felonies are often in the business of importing or distributing dangerous drugs, and thus because of the nature of the criminal activity with which they are charged, they pose a

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159. See 18 U.S.C. § 3142(f)(1) (2006); see also Christopher A. Andreoff, *A Primer on Federal Criminal Procedure*, 72 MICH. B.J. 60, 61 (1993).

160. Harwin, *supra* note 156, at 1110.

161. Andreoff, *supra* note 159, at 61.

162. *Id.*; see Harwin, *supra* note 156 at 1111-17 (describing cases where the presumption, even though rebutted, provided the court with a basis for detention).

163. Harwin, *supra* note 156, at 1122 n.32 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-88-6, CRIMINAL BAIL: HOW BAIL REFORM IS WORKING IN SELECTED DISTRICT COURTS 17, 20 (1987); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-90-7, IMPACT OF BAIL REFORM IN SELECTED DISTRICT COURTS 17-18 (1989); Sen. Edward M. Kennedy, *Forward to Symposium, Crime Control Act of 1984*, 22 AM. CRIM. L. REV., at vi, viii n.4 (1985); see Thomas E. Scott, *Pretrial Detention under the Bail Reform Act of 1984: An Empirical Analysis*, 27 AM. CRIM. L. REV. 1, 22 (1989)).

164. S. REP. NO. 98-225 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3196, 1983 WL 25404, at \*12-13.

significant risk of pretrial recidivism.”<sup>165</sup>

Despite Congress’s intention that the drug presumption should apply to “major” drug traffickers,<sup>166</sup> the presumption’s reliance on the prospective sentence faced by a defendant combined with the fact that many low-level drug defendants are charged as part of conspiracies in which the total quantity of drugs is large, leads to the pretrial detention of numerous non-dangerous defendants. Occasionally, these pretrial detention orders are successfully challenged,<sup>167</sup> but in the authors’ experience, in many cases defendants choose not to appeal a detention order, assuming that they will be convicted and relying on the fact that the time they spend in custody will ultimately be credited toward their sentence.

Courts have also begun to consider that “danger” may include the possibility of economic harm. Thus, in *United States v. Dekhkanov*,<sup>168</sup> Judge Bianco denied pretrial release to Mr. Dekhkanov, a twenty-five-year-old first-time offender who was charged with conspiracy to commit mail fraud, access device fraud, and aggravated identity theft with a loss total of five hundred thousand dollars, despite his offer to post a four million dollar bond secured by numerous properties and suretors. The court found that the possibility that, if released, Mr. Dekhkanov could continue the charged scheme, which allegedly involved accessing information from credit cards, posed a danger to the community.

Similarly, in high profile cases such as *United States v. Madoff*,<sup>169</sup> Judge Kaplan granted release on extremely stringent conditions, including Mr. Madoff’s hiring a security company to provide twenty-four-hour surveillance of his residence. The Judge concluded that, although economic harm might be a proper consideration with respect to detention,

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165. *Id.* at 20.

166. *Id.*

167. *See, e.g.*, *United States v. Cox*, 635 F. Supp. 1047 (D. Kan. 1986) (The denial of pretrial release was overturned where no evidence established that no set of conditions would reasonably assure the safety of the community. The district court’s opinion noted that an indictment that triggers the presumption is insufficient to establish by clear and convincing evidence that the defendant is a danger to the community).

168. 2:11-Cr-00581 (JFB) (E.D.N.Y. 2011).

169. 586 F. Supp. 2d 240 (S.D.N.Y. 2009).

there was no substantial risk that Mr. Madoff would continue to pose an economic danger to the community given the change in his circumstances.

Bobbi Sternheim<sup>170</sup> offers an example of a case in which bail was denied in a presumption case, yet the defendant was ultimately sentenced to time served:

I represented a man who was arrested because his coat was hung in a closet above which a locked box contained a firearm. He was charged with a narcotics conspiracy involving a [ten]-year mandatory minimum sentence and a 924(c) weapons offense mandating a consecutive [five]-year sentence. My client, in need of a place to stay after having had a fight with his roommate, paid the lessee of the apartment a weekly fee to sleep in the apartment. My client had no keys to the apartment. The lessee, a target of the investigation, was the subject of a search warrant. My client was sitting outside the building smoking a cigarette when agents came to execute the warrant. My client—who was not involved in any discovery, which included electronic and visual surveillance—answered questions by the agents concerning the apartment and informed the agents that he was staying in the apartment but had not been given keys by the lessee. He was arrested after

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issuance of the warrant when he identified his coat after agents recovered a gun in the locked box on a shelf above the coat. The indictment charged more than [ten] defendants; all but my client were Hispanic. My client was a white Jew.

Bail was denied due to the nature of the charges, the presumptions in the Bail Reform Act relating to mandatory minimum sentencing and because my client has a prior felony having pled guilty to possession of a bad check in Florida, making him a “felon in possession” of a firearm. The government opposed bail during my bail application before the magistrate judge and when I renewed my application before the district court judge.

My client maintained his innocence throughout. The AUSA rejected his innocence proffer as well as my submission in support of a deferred prosecution. As trial approached, I renewed [m]y request for a deferred prosecution. Ultimately, the AUSA offered a plea to a misprision of felony. My client accepted the plea, lest he risk a conviction at trial and a mandatory sentence of [fifteen] years. The length of his pretrial detention exceeded the guideline sentence for the misprision charge and the client received a sentence of time served.

After sentencing, the district judge asked, “How did I miss this one?” To which I replied that had the court heeded the argument of seasoned and reputable defense counsel this never would have happened.<sup>171</sup>

Where the rebuttable presumption does not operate,

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171. Letter from Bobbi Sternheim to authors (Feb. 15, 2012) (on file with authors).

defendants are significantly more likely to be granted pretrial release. Indeed, even arguably “dangerous” defendants facing charges including murder, attempted murder, murder conspiracy, gun possession, extortion, and kidnapping, have regularly received bail in the Southern and Eastern Districts of New York.<sup>172</sup> In *United States v. Sabhnani*,<sup>173</sup> for example, the Second Circuit vacated the district court’s order of pretrial detention, despite the violent nature of the charges—forced labor and harboring illegal aliens—holding that, “it is only a limited

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172. See, e.g., *United States v. Modica*, 09-Cr-1243 (LAK) (S.D.N.Y. 2009) (Mr. Modica, an alleged soldier in the Gambino Crime Family, was charged with, inter alia, racketeering conspiracy, racketeering, illegal gambling, extortion, and assault in aid of racketeering. Mr. Modica was alleged to have committed five of the eighteen racketeering acts alleged in the multi-defendant indictment including murder, jury tampering, and obstruction of justice, yet he was released on bail. Michael Scotto, one of Mr. Modica's co-defendants, was granted bail with a three million dollar bond. Mr. Scotto was charged with, inter alia, racketeering conspiracy, racketeering, extortion conspiracy, and sex trafficking of a minor); *United States v. Persico*, 376 F. App'x 155 (2d Cir. 2010) (Mr. Persico, an alleged associate in the Colombo crime family, the son of the official boss, and brother of the acting boss, was indicted him on charges of extortion and murder conspiracy, was released on a five million dollar bond); *United States v. Gigante*, 85 F.3d 83, 84 (2d Cir. 1996) (alleged “boss” of “Genovese organized crime family”); *United States v. Spero*, 99-Cr-520 (E.D.N.Y. 1999) (alleged Consigliere of Bonanno Crime Family, charged with murder and other violence); *United States v. Bellomo*, 96-Cr-430 (S.D.N.Y. 1996) (alleged Genovese Acting Underboss Mickey Generoso, charged with murder conspiracy); *United States v. Fama*, 95-Cr.-840 (S.D.N.Y. 1995) (reputed soldier charged with heroin distribution, kidnapping and murder); *United States v. Gregory Scarpa, Jr.*, 94-Cr-1119 (E.D.N.Y. 1994) (accused participant in bloody Colombo Family war); *United States v. Orena*, 93-Cr-1366 (E.D.N.Y. 1993) (reputed soldier and boss’ son, charged with murder conspiracy and weapons possession); *United States v. Failla*, 93-Cr-294 (E.D.N.Y. 1993) (multiple high-ranking members of Gambino Family accused, among other charges, of killing a government witness); *United States v. Conti*, 93-Cr-053 (E.D.N.Y. 1993) (organized crime defendant charged with murder and murder conspiracy); *United States v. Russo*, 92-Cr-529 (S.D.N.Y. 1992) (alleged mafia captain charged with murder and other violent crimes); *United States v. Persico*, 92-Cr-351 (E.D.N.Y. 1992) (alleged mafia captain charged with murder conspiracy in connection with internal Colombo war); *United States v. Rosenfeld*, 90-Cr-755 (S.D.N.Y. 1990) (defendant released on bail despite charges of threatening one cooperator with a gun and killing another); cf., e.g., *United States v. Fiumara*, 02-Cr-317 (D.N.J. 2002) (reputed head of Genovese Family’s New Jersey faction, whose parole was revoked for four alleged murders).

173. 493 F.3d 63 (2d Cir. 2007).

group of offenders who should be denied bail pending trial.”<sup>174</sup>

Similarly, in *United States v. Khashoggi*,<sup>175</sup> the district court released Mr. Khashoggi, a wealthy Saudi Arabian businessman facing mail fraud charges, reasoning in part that the absence of a presumption “militat[ed] in favor of pretrial release.”<sup>176</sup> And, in *United States v. Patriarca*,<sup>177</sup> the district court released the alleged former head of the Patriarca crime family on conditions of house arrest with electronic monitoring, reasoning that conditions existed to assure the court of his appearance and of the safety of the community.

In *United States v. Rubashkin*,<sup>178</sup> Mr. Rubashkin was charged in a 163-count Indictment alleging a massive bank fraud, money laundering, mail fraud, wire fraud, harboring undocumented aliens, false statements, and violations of the Packers and Stockyards Act. Despite the breadth and the magnitude of the charges, Mr. Rubashkin was granted bail on a ten million dollar bond.

### 3. Moral Suasion

In deciding what level of bond to set, courts often look to the persons who offer themselves as suretors for the defendant, seeking to establish that the proposed bond will have sufficient moral suasion over the defendant that he will not violate the terms of his release. Where family members offer to post their property as collateral or to co-sign a bond, a bail argument gains persuasive force because the defense attorney is able to demonstrate that individuals close to the defendant believe that the defendant will not flee or endanger the community.

In *United States v. Dina Wein-Reis*,<sup>179</sup> the defendant was charged in the Southern District of Indiana with one count of

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174. *Id.* 75 (quoting *United States v. Shakur*, 817 F.2d 189, 195 (2d Cir. 1987)(internal quotation marks omitted)).

175. 717 F. Supp. 1048 (S.D.N.Y. 1989).

176. *Id.* at 1051.

177. 776 F. Supp. 593 (D. Mass. 1991).

178. 718 F. Supp. 2d 953 (N.D. Iowa 2010).

179. *United States v. Wein-Reis*, No. 08-MJ-02362 (UA) (S.D.N.Y. Oct. 28, 2008).

conspiracy to commit wire fraud and six counts of wire fraud. She was arrested at her home in New York. Ms. Wein-Reis was denied bail at a hearing in front of the presiding magistrate judge in the Southern District of New York and was scheduled to be extradited to Indiana on Wednesday, November 5, 2008.

Ms. Wein-Reis's attorney, John Meringolo, immediately appealed the bail denial and Judge Shira Scheindlin, the presiding Part I Judge, specially opened the federal courthouse in the Southern District of New York on Tuesday, November 4, 2008—Election Day—in order to hear counsel's bail arguments, demonstrating the fundamental importance of ensuring that a defendant's application for bail be heard expeditiously.<sup>180</sup>

At the bail hearing, the government argued that Ms. Wein-Reis should be detained because she was a risk of flight with property in Israel and the means to flee. Ms. Reis had a home in Israel, conducted business there, and even visited frequently. After an extensive argument and presentation of a substantial bail package, Judge Scheindlin granted bail on a ten million dollar bond secured by approximately 2.5 million dollars in property. The bail package was strengthened by Ms. Wein-Reis's brother's, Hershel Wein, offer to post his home and his annual salary—1.3 million dollars—as collateral. As reported by the *Daily News*, Judge Scheindlin confirmed with Mr. Wein that he had “[o]ne hundred percent”<sup>181</sup> confidence that Ms. Wein-Reis would not violate the terms of her release. In retrospect, Judge Scheindlin's decision was correct. Ms. Wein-Reis did not flee and complied with all bail conditions imposed.

#### 4. Appellate Review of Bail Denials

“To eliminate unnecessary detention, the court must

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180. See Thomas Zambito, *Yes, Judge, My Sister is Worth \$10M*, N.Y. DAILY NEWS, Nov. 5, 2008, <http://www.nydailynews.com/news/crime/yes-judge-sister-worth-10m-article-1.336351>.

181. *Id.*

supervise the detention within the district of any defendants awaiting trial . . . .”<sup>182</sup> “The judicial officer may at any time amend the order to impose additional or different conditions of release.”<sup>183</sup> In addition, a defendant who is denied bail by a magistrate judge may appeal that denial to the district judge.<sup>184</sup> The district court may “independently review the magistrate’s order and conduct any necessary evidentiary hearings or receive additional affidavits.”<sup>185</sup>

As with other matters, a defendant who is denied bail by the district court may appeal to the circuit. The 1984 Act does not provide a standard for appellate review of bail determinations.<sup>186</sup> However, the Second Circuit reviews a denial of bail for clear error, that is, the denial will be upheld “unless ‘on the entire evidence we are left with the definite and firm conviction that a mistake has been committed.’”<sup>187</sup>

In *United States v. Trucchio*,<sup>188</sup> the Second Circuit overturned the district court and granted bail to Mr. Trucchio, an alleged captain in the Gambino crime family who was charged with racketeering, distribution of marijuana, cocaine, marijuana, and ecstasy trafficking, assault in aid of racketeering, illegal gambling, and loansharking. Mr. Trucchio proposed a three million dollar bail package secured by real property—homes in which he and members of his extended family lived, and which counsel argued provided significant moral suasion.<sup>189</sup> The government opposed bail, arguing that the drug trafficking charges and the resulting presumption as well as the significant sentencing exposure made Mr. Trucchio

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182. FED. R. CRIM. P. 46(h)(1).

183. 18 U.S.C. § 3142(c)(3) (2006).

184. 18 U.S.C. § 3145 (2006).

185. Michael Edmund O’Neill, Note, *A Two-Pronged Standard of Appellate Review for Pretrial Bail Determinations*, 99 YALE L.J. 885, 891 (1990).

186. *See id.* at 895.

187. *United States v. Persico*, 376 F. App’x 155, 157 (2010) (quoting *United States v. Sabhnani*, 493 F.3d 63, 75 (2d Cir. 2007)) (citation omitted).

188. *United States v. Trucchio*, No. 11-Cr-12 (RMB) (S.D.N.Y. Jan. 5, 2011). The district court revoked Trucchio’s bail following his plea of guilty.

189. Alphonse Trucchio’s Motion and Supporting Memorandum for Release on Bail Pending Trial at 17-18, *United States v. Trucchio*, No. 11-Cr-12 (RMB) (S.D.N.Y. Apr. 20, 2011), ECF No. 147.

a risk of flight and a danger to the community.<sup>190</sup>

Judge Berman denied Trucchio's motion for bail, and an expedited appeal was taken.<sup>191</sup> Three months later, the Second Circuit reversed the district's denial, and granted bail.<sup>192</sup> Mr. Trucchio was released on a slightly modified version of the three million dollar bond that he originally proposed.

### B. *The Effect of a Denial of Bail*

Despite the procedural protections in the 1984 Act, many defense attorneys, including the Authors and others interviewed for this Article, find that the preventive pretrial detention provisions and the broad judicial discretion to detain a defendant based on the perceived "risk of flight" or "danger to the community" have a significant and detrimental impact on every stage of the case.<sup>193</sup>

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190. Government's Motion for Detention-Defendant Alphonse Trucchio at 12, *United States v. Trucchio*, No. 11-Cr-12 (RMB) (S.D.N.Y. Apr. 29, 2011), ECF No. 154.

191. Docket Minute Entry, *United States v. Trucchio*, No. 11-Cr-12 (RMB) (S.D.N.Y. June 7, 2011); Order, *United States v. Trucchio*, No. 11-Cr-12 (RMB) (S.D.N.Y. June 27, 2011), ECF No. 191; Notice of Appeal, *United States v. Trucchio*, No. 11-Cr-12 (RMB) (S.D.N.Y. June 21, 2011), ECF No. 192.

192. Docket Minute Entry, *United States v. Trucchio*, No. 11-Cr-12 (RMB) (S.D.N.Y. Sept. 12, 2011); Agreement to Forfeit Property (other than real property) to Obtain a Defendant's Release, *United States v. Trucchio*, No. 11-Cr-12 (RMB) (S.D.N.Y. Sept. 12, 2011), ECF No. 244.

193. See Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1, 12-13 (2005):

The difference between being released prior to trial and being incarcerated often is the difference between an acquittal and a conviction. No matter how quickly a case is fast-tracked through the system, a detained defendant will suffer some material harm. The defendant will be displaced from work and familial duties, as well as suffer the stigma of being a prisoner. But most important, a freed defendant is able to better defend himself against the government. A freed defendant can better assist his attorney in gathering evidence and securing witnesses so that the government's burden to convict remains high. Pretrial detention severely limits a defendant's ability to defend himself simply because his ability to contact the world is necessarily restricted. The setting of bail, although "often . . . done in haste [and at

## 1. Constitutional Concerns

The Sixth Amendment of the United States Constitution guarantees a defendant the right to assist in his own defense.<sup>194</sup> However, when a defendant is denied bail, his ability to assist his attorney is severely limited. Despite all efforts to provide copies of pretrial discovery to detained clients, inefficient mail delivery, and a lack of adequate electronic equipment such as computers on which to listen to recordings, make it impossible for a client to fully examine all of the evidence produced by the government. In addition, an attorney going over the same discovery alone is at a disadvantage because the person best equipped to explain its significance to him—the client—is effectively inaccessible. Thus, the barriers between an attorney and his incarcerated client infringe on the client's ability to exercise his constitutional right to assist in his own defense.<sup>195</sup>

In addition, the presumption of innocence is endangered by pretrial incarceration of a defendant. Martin Geduldig explains that:

The courts always try to keep a defendant's bail status from the jury. For those defendants who fail to make bail and are incarcerated this effort is never successful. Those defendants released on bail will be seen in the halls of the court-house, or in local restaurants during the lunch break. A

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times] fixed without . . . full inquiry and much consideration," is one of the most crucial steps in the administration of criminal justice. Bail should be fixed only after careful deliberation by a neutral party. Any shortcuts in this procedure are a direct assault on individual liberty and should always be guarded against.

*Id.* (alterations in original) (citations omitted).

194. U.S. CONST. amend. VI.

195. Courts have also considered the likely length of the period of pretrial detention in assessing whether pretrial release is warranted. *See, e.g.,* United States v. Orena, 986 F.2d 628, 630-31 (2d Cir. 1993) (collecting cases); United States v. Frisone, 795 F.2d 1, 1 (2d Cir. 1986) (per curiam); United States v. Gallo, 653 F. Supp. 320, 336-39 (E.D.N.Y. 1986); United States v. Scarpa, 815 F. Supp. 88, 91 (E.D.N.Y. 1993).

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jury's perception of a defendant is altered by the fact of a defendant's release.<sup>196</sup>

## 2. Practical Considerations

Andrew Weinstein explains how his ability to defend a client is changed when bail is denied:

The ability to defend a client who is detained pending trial is significantly hampered, which is one of the many reasons that detention hearings are typically vigorously litigated. As noted above, access to a detained defendant is limited and generally speaking, detained defendants often suffer from diminished morale. For what would otherwise be a one hour meeting in the attorney's office, counsel for a detained client will often need to block out the better part of an entire day for travel time to the prison, waiting to be processed and allowed in, waiting for the client to come down to the attorney visiting area, waiting for "counts" to clear, meeting with the client, and travel time back to the attorney's office once the meeting has concluded.

Having a detained client also makes listening to large quantities of tape recordings *together* impractical. Electronic equipment in the prisons is out of date, in limited supply, and there are significant restrictions that the BOP places on inmates using such equipment. Similar complications exist when dealing with large "paper" cases. Often times, cases have tens or hundreds of boxes of discovery and relevant documents that need to be reviewed. An organized system is easy to arrange for such review in an attorney's office. The same cannot take place in a prison setting.

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196. Letter from Martin Geduldig to authors, *supra* note 137.

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Perhaps most important is the inability to confer with the client during overnight recesses when on trial. The reality is that preparation time during overnight breaks is a precious commodity. When a client is on bail, they can return to the attorney's office and work into the evening with the attorney, review documents and evidence together with the attorney, discuss strategy for the following day, etc. When a client is detained, an attorney often has to make a difficult decision: Go visit the client in jail and forego many hours of valuable prep time in the office or spend the time in the office preparing for the following day and forego extensive and potentially valuable input from the client. The prejudice suffered by a detained client in terms of trial preparation is very difficult to quantify; yet anyone who has tried a case with a client who has been denied bail would attest to the simple proposition that a detained client is at a significant tactical disadvantage simply as a result of being detained.<sup>197</sup>

Martin Geduldig agrees that:

A defendant in jail is not available to readily reach out to prospective defense witnesses with whom he has a relationship. Telephone conversations with a jailed defendant are very circumscribed because of a legitimate fear that those conversations are being recorded. This leads to the need for more frequent jail visits, which result in substantial periods of wasted time traveling to and from jails and waiting for a client to be brought to the interview room.<sup>198</sup>

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197. Letter from Andrew Weinstein to authors, *supra* note 134.

198. Letter from Martin Geduldig to authors, *supra* note 137.

James Harkins<sup>199</sup> comments that:

It is much more difficult to work with an incarcerated defendant because, as an investigator, you often need access to information that the client could easily provide if he were released, such as phone numbers or contact information for potential witnesses. Every step of the process is prolonged and complicated in an investigation for an incarcerated defendant.<sup>200</sup>

In addition, an incarcerated defendant is substantially more likely to agree to a plea of guilty because the time spent in pretrial detention is credited toward the eventual sentence imposed. Therefore, rather than spending a year or more in pretrial detention and taking the case to trial, especially when the chance of winning a federal criminal case is less than two percent, an incarcerated defendant has every incentive to plead guilty and obtain a credit for the time served as well as the customary reduction under the Sentencing Guidelines for acceptance of responsibility.<sup>201</sup>

### 3. *United States v. Rea*,<sup>202</sup> A Personal Example

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199. James Harkins currently owns and operates a boutique private investigator service company in New York City. Mr. Harkins is a former decorated NYPD police officer. He won countless awards during his twenty years on the force, including Police Officer of the Month, United States Department of Justice Recognition Award, and Recognition Awards from the Federal Bureau of Investigation, Recognition Awards from the DEA and Exceptional and Meritorious Police Duty on sixty-one occasions. Since retiring from the Police Department, Mr. Harkins' company has handled many high profile federal criminal cases around the United States.

200. Telephone Interview with James Harkins, Private Investigator (Feb. 28, 2012).

201. *See also* Miller & Guggenheim, *supra* note 4, at 420 (noting that a detained defendant's ability to assist counsel is reduced).

202. No. 10-Cr-767 (JBW) (E.D.N.Y. Oct. 6, 2010).

In 2010, Mr. Rea was arrested at his home in Henderson, Nevada, near Las Vegas, and charged in the Eastern District of New York with RICO conspiracy as a member of La Cosa Nostra, and racketeering acts including illegal gambling, the murder of Gerard Pappa (in July 1980), conspiracy to commit extortion of the International Brotherhood of Teamsters Local 807, and conspiracy to murder John Doe #1 in 1992.<sup>203</sup>

Mr. Rea was extradited to New York, where counsel argued vigorously for bail, citing Mr. Rea's extremely ill health and the fact that the murder charge was thirty years old.<sup>204</sup> Mr. Rea suffered from diabetes and numerous complications including diabetic neuropathy for which he was taking prescription morphine, a drug that the Bureau of Prisons did not allow him to continue taking while incarcerated. As a result, Mr. Rea suffered from extreme pain during the few weeks of his pretrial incarceration. In addition he had recently undergone laparoscopic surgery and required a special diet. Moreover, he was a caregiver to his two minor non-biological grandchildren, whose mother was unable to provide for them. Considering all of these factors, as well as the significant bail package proposed—three million dollars secured by property—Magistrate Joan Azrack agreed that Mr. Rea should be released on bond.<sup>205</sup>

Thereafter, discovery provided by the government and counsel's investigation demonstrated that the charges against Mr. Rea were unsubstantiated by the evidence. Just two months later, on January 3, 2011, the government advised counsel that it was dropping the murder charge.<sup>206</sup> After

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203. See John Marzulli, *Reputed Bonanno Crime Soldier Armando Rea Charged in 1980 Slay of Mafia Hitman*, N.Y. DAILY NEWS, Oct. 15, 2010, [http://articles.nydailynews.com/2010-10-15/news/29440390\\_1\\_pappa-gravano-genovese-mobster-gerard](http://articles.nydailynews.com/2010-10-15/news/29440390_1_pappa-gravano-genovese-mobster-gerard); Jerry Capeci, *Bonanno Wiseguy Nabbed In 30-Year-Old Mob Rubout*, HUFFINGTON POST (Oct. 21, 2010, 11:30 AM), [http://www.huffingtonpost.com/jerry-capeci/post\\_1126\\_b\\_773196.html](http://www.huffingtonpost.com/jerry-capeci/post_1126_b_773196.html).

204. Defendant Armando Rea's Memorandum of Law in Support of Omnibus Discovery Motion, United States v. Rea, No. 10-Cr-767 (JBW) (E.D.N.Y. Nov. 7, 2010), ECF No. 5; Calendar: Magistrate's Proceeding, United States v. Rea, No. 10-Cr-767 (JBW) (E.D.N.Y. Nov. 8, 2010), ECF No. 9.

205. Calendar: Magistrate's Proceeding, *supra* note 204.

206. Superseding Indictment, United States v. Rea, No. 10-Cr-767 (JBW) (E.D.N.Y. Jan. 3, 2011), ECF No. 44.

significant pretrial arguments and after jury selection, the Honorable Jack B. Weinstein suppressed numerous tape recordings and agreed to reopen a hearing as to whether Mr. Rea's pre- and post-arrest statements should be suppressed because he was denied his right to counsel when arrested in Nevada. On the morning of his scheduled trial, February 15, 2011, Mr. Rea was offered and accepted a plea to a single count of conspiracy to commit extortion.<sup>207</sup> On May 23, 2011, Judge Weinstein sentenced Mr. Rea, who had originally faced a sentence of life in prison, to five years of probation.<sup>208</sup>

In the Authors' opinion, the fact that Mr. Rea was released on bail and the resulting ability of counsel to meet with him often, to review the evidence, and to avail themselves of his assistance in gathering evidence to disprove the government's original narrative, was essential to the outcome of the case.<sup>209</sup>

#### 4. The Effect of Affluence—Recent High Profile Defendants on Bail

Recently, the Southern and Eastern Districts of New York have released several high profile defendants on bail subject, in some cases, to provisions so extreme that they amounted to the creation of private detention facilities in the defendants' homes. For instance, in the cases of Bernard Madoff<sup>210</sup> and Marc Dreier,<sup>211</sup> the court released the defendants to their own homes, but required them, in addition to other stringent release conditions, to hire twenty-four-hour security personnel to

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207. Waiver of Indictment, *United States v. Rea*, No. 10-Cr-767 (JBW) (E.D.N.Y. Feb. 15, 2011), ECF No. 92; Superseding Information, *United States v. Rea*, No. 10-Cr-767 (JBW) (E.D.N.Y. Feb. 15, 2011), ECF No. 93; Criminal Cause for Pleading or Repleading, *United States v. Rea*, No. 10-Cr-767 (JBW) (E.D.N.Y. Feb. 15, 2011), ECF No. 94.

208. Criminal Cause for Sentencing, *United States v. Rea*, No. 10-Cr-767 (JBW) (E.D.N.Y. May 23, 2011), ECF No. 100.

209. Had Mr. Rea remained incarcerated during the pretrial period, it is likely that counsel would have spent numerous hours on auxiliary matters, such as letters to the Bureau of Prisons regarding Mr. Rea's health. Consequently, continued pretrial incarceration would have had a negative impact on Mr. Rea's ability to defend himself and adequately exercise his constitutional rights.

210. *United States v. Madoff*, 586 F. Supp. 2d 240 (S.D.N.Y. 2009).

211. *United States v. Dreier*, 596 F. Supp. 2d 831 (S.D.N.Y. 2009).

monitor them. As Jonathan Zweig has noted, such detention orders, which are only available to very wealthy defendants, may be unconstitutional in their own right.<sup>212</sup> In contrast, defendants of lesser means who face similar charges have a much more difficult bail argument to make, and are likely to be denied pretrial release.<sup>213</sup> The unequal treatment afforded to some wealthy defendants calls into question the constitutionality of the courts' decisions to release those individuals, despite those decisions' compliance with the 1984 Act's mandate that a defendant be released on "personal recognizance," or on the "least restrictive . . . condition, or combination of conditions, that [the] judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community."<sup>214</sup>

a. *Bernard Madoff*

In Mr. Madoff's case, the government and the defense agreed on an initial set of bail conditions that were made possible by Mr. Madoff's wealth.<sup>215</sup> These conditions included the following: a ten million dollar personal recognizance bond secured by properties and suretors; the filing of confessions of judgment with respect to four properties; twenty-four-hours-per-day electronic monitoring at Mr. Madoff's home, with release only for court appearances; the surrender of passports belonging to Mr. Madoff and his wife; and the condition that Mr. Madoff employ, "at his wife's expense, a security firm acceptable to the Government, to provide" twenty-four-hour monitoring of Mr. Madoff's apartment building and doors, with communication devices providing a direct link to the FBI and additional guards as requested to "prevent harm or flight."<sup>216</sup>

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212. Jonathan Zweig, Note, *Extraordinary Conditions of Release Under the Bail Reform Act*, 47 HARV. J. ON LEGIS. 555, 574-76, 582 (2010).

213. See, e.g., *United States v. Dekhkanov*, No. 11-Cr-581 (E.D.N.Y. Aug. 17, 2011).

214. 18 U.S.C. § 3142(a)-(c) (2006), held unconstitutional by *United States v. Karper*, No. 11-Cr-103 (TJM/RFT), 2011 WL 7451512 (N.D.N.Y. Aug. 10, 2011).

215. *Madoff*, 586 F. Supp. 2d at 244.

216. *Id.* at 244-45.

These conditions were later amended to include restrictions on the transfer of any property, and requirements that Mr. Madoff compile an inventory, to be checked once every two weeks, of all valuable portable items in his home.<sup>217</sup>

In releasing Mr. Madoff to bail, the court wrote:

The issue at this stage of the criminal proceedings is not whether Madoff has been charged in perhaps the largest Ponzi scheme ever, nor whether Madoff's alleged actions should result in his widespread disapprobation by the public, nor even what is appropriate punishment after conviction. The legal issue before the Court is whether the Government has carried its burden of demonstrating that no condition or combination of conditions can be set that will reasonably assure Madoff's appearance and protect the community from danger.<sup>218</sup>

The court then found that the government had not met that burden, and that the conditions were sufficient to meet the requirements of the 1984 Act.

b. *Marc Dreier*

In Mr. Dreier's case, the court found that the government had proven that the defendant would pose a risk of flight if released without conditions.<sup>219</sup> However, Judge Rakoff found that Dreier's proposed bail package was sufficient to minimize the flight risk.<sup>220</sup> The package included the following: a ten million dollar personal recognizance bond co-signed by the defendant's son and mother; no computer access; surrender of travel documents; screening and searching of all visitors (who were to be pre-approved); strict Pretrial Services supervision; cooperation with a receiver to identify and preserve all assets;

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217. *Id.* at 243-44.

218. *Id.* at 246 (citing 18 U.S.C. § 3142(e) (2006)).

219. *United States v. Dreier*, 596 F. Supp. 2d 831, 833 (S.D.N.Y. 2009).

220. *Id.*

and “home detention, 24/7, in his East Side apartment, secured not only by electronic monitoring but by on-premises armed security guards, supplied by a company acceptable to the Government but paid for by the defendant’s relatives.”<sup>221</sup>

The court found it to be “a serious flaw in our system” that wealthy defendants are able to obtain release because of their ability to pay for private monitoring; however, such flaws are “not a reason to deny a constitutional right to someone who, for whatever reason, can provide reasonable assurances against flight.”<sup>222</sup>

c. *Robert Allen Stanford*

In contrast to Mr. Madoff and Mr. Dreier, Mr. Stanford was denied bail numerous times.<sup>223</sup> Mr. Stanford was charged with twenty-one counts including, inter alia, wire fraud, mail fraud, conspiracy to commit securities fraud, money laundering, and obstructing an SEC investigation.<sup>224</sup> The magistrate and district judges hearing Mr. Stanford’s case found that he presented a serious risk of flight and denied pretrial release. Mr. Stanford is a citizen of the United States and of Antigua and Barbuda who had lived primarily outside of the United States for the fifteen years prior to the filing of an SEC proceeding against him. He had numerous foreign bank accounts, and traveled extensively internationally.<sup>225</sup>

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221. *Id.* Nonetheless, the court imposed additional conditions on Mr. Drier, including the following requirements: “express[] consent in writing to the use, by the armed security guards, of ‘temporary preventive detention and the use of reasonable force’ to thwart any attempt to flee;” payment of three months’ worth of costs for the security guards into an escrow account; removal of all electronic communication devices, other than a single land-line telephone, and anything that “might serve as a weapon;” maintenance of a land-line phone; payment of electronic monitoring costs; and denial of all visitors who had not obtained “the express prior written permission of the Pre-Trial Services officer, given only after consultation with the U.S. Attorney’s Office.” *Id.* at 834.

222. *Id.* at 833.

223. *United States v. Stanford*, 367 F. App’x 507 (5th Cir. 2010); *United States v. Stanford*, 341 F. App’x 979 (5th Cir. 2009); *United States v. Stanford*, 630 F. Supp. 2d 751 (S.D. Tex. 2009).

224. *Stanford*, 367 F. App’x at 507.

225. *Stanford*, 630 F. Supp. 2d at 752-54.

Stanford challenged his detention on constitutional grounds, arguing that the detention was “excessively prolonged, and therefore punitive, in relation to Congress’s regulatory goal.”<sup>226</sup> Given that a trial date had been set,<sup>227</sup> that Mr. Sanford had previously sought extensions of that trial date based on the complexity of the case, and that the government had not tactically delayed the trial date, the court rejected Stanford’s argument that pretrial release was appropriate.<sup>228</sup> The Fifth Circuit upheld the district court’s denial of Stanford’s pretrial release, and the United States Supreme Court denied certiorari.<sup>229</sup>

#### IV. Alternatives to Pretrial Incarceration

When the court finds that pretrial detention is not warranted, the 1984 Act provides several options for release, from the most lenient—release on personal recognizance—to the more stringent imposition of a series of conditions intended to ensure that the defendant will not flee or pose a danger to the community. The options most often granted include release on recognizance, the imposition of a curfew (possibly with electronic or GPS monitoring), and home detention. In addition, whether the defendant is released on his own recognizance or on a more restricted basis, courts almost always impose standard conditions of release, such as monitoring by Pretrial Services, drug testing, and travel restrictions. These conditions, while onerous in their own right, are far preferable to detention, and a defendant who is granted pretrial release, even on stringent conditions, is in a far better position to fight his case and exercise his constitutional rights.

#### Conclusion

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226. *United States v. Stanford*, 722 F. Supp. 2d 803, 806, 808 (S.D. Tex. 2010) (internal brackets omitted) (citing *United States v. Salerno*, 481 U.S. 739, 747 (1987)).

227. The total pretrial incarceration was approximately nineteen months. *Id.*

228. *Id.* at 807-11.

229. *Stanford v. United States*, 131 S. Ct. 1028 (2011); *United States v. Stanford*, 394 F. App’x 72 (5th Cir. 2010).

The denial of pretrial release has a profound impact on every stage of a defendant's case, including the ultimate outcome. Incarcerated defendants are hampered in their ability to assist in their own defense, and are more likely to plead guilty and to be sentenced to longer terms of incarceration. In providing for preventive pretrial detention based on "dangerousness," as well as the traditional ground of "risk of flight," the 1984 Act shifted the playing field for defense attorneys and their clients away from the pursuit of justice and toward the expedient resolution of cases.

Moreover, because more defendants are now increasingly likely to be denied pretrial release, the government's bargaining position is enhanced in plea negotiations, where incarcerated defendants are promised time off in exchange for their cooperation or plea of guilty. Incarcerated pretrial defendants, who understand that the time that they are serving can only benefit them if they plead guilty, are less likely to exercise their right to trial, and more likely to resolve the case without full exercise of the constitutional protections to which they are entitled.

As the defense attorneys cited in this Article have explained, and in the Authors' experience, not only is the denial of bail on grounds of dangerousness a significant impediment to the thorough investigation and defense to which every defendant is entitled, it also calls into question the ability of the 1984 Act to protect the rights of the defendants affected by its provisions. Although the goals of the 1984 Act were understandable at the time of enactment, the time has come for a reappraisal of the federal bail system and of the practical effect of the 1984 Act at all stages of criminal prosecution.