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PREVENTIVE PRETRIAL DETENTION AND THE FAILURE OF INTEREST-BALANCING APPROACHES TO DUE PROCESS

*Albert W. Alschuler**

We conclude that preventive detention under the [Family Court Act] serves a legitimate state objective . . .

— Schall v. Martin, 467 U.S.
253, 256-57 (1984).

[F]or the liberty of a man is highly valued in the law, and no man ought to be abridged of it, without some default in himself.

— A. HIGHMORE, A DIGEST OF
THE DOCTRINE OF BAIL viii
(1783).

INTRODUCTION

The statements above, separated by two centuries, address the problem of preventive detention from different jurisprudential perspectives. In *Schall v. Martin*, the Supreme Court upheld the preventive pretrial detention of juveniles accused of delinquent conduct. A central dispute between the majority and the dissenting Justices appeared to be whether a “very important” or only a “legitimate” governmental interest was necessary to justify this deprivation of liberty.

This article, echoing Highmore’s treatise of 1783, maintains that neither a legitimate nor a very important governmental interest can justify preventive detention in the absence of significant proof of past wrongdoing or an inability to control one’s behavior. Both the Supreme Court’s neglect of this issue and Congress’ similar neglect in the preventive detention provisions of the Federal Bail Reform Act of 1984 reveal the extent to which cost-benefit analysis has captured American law and threatened core concepts of individual dignity.

The article does not oppose all forms of preventive pretrial detention. To the contrary, it recognizes that the detention without bond of a person accused of crime can be consistent with Anglo-American

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legal tradition, with fundamental fairness, and with sound policy. The article maintains, however, that the Federal Bail Reform Act of 1984 is unconstitutional in failing to require adequate preliminary proof of guilt or convictability as a predicate for extended detention. The Act disregards concepts of individual freedom and responsibility that have dominated the law of pretrial detention from the time of Bracton.

After describing the 1984 Act, the article offers a historical retrospective on due process adjudication. It emphasizes the differences between "fundamental fairness" and "interest-balancing" approaches to the due process clause. Turning specifically to *Schall v. Martin*, it examines the two-tiered interest-balancing formula employed in that case, a formula declaring that intrusions upon "fundamental" personal interests are consistent with due process so long as they sufficiently advance "compelling" governmental interests — and that restrictions of "nonfundamental" individual interests are constitutional when they adequately further "legitimate" governmental interests. The article contends that this familiar framework is deeply flawed. In some contexts, it is too activist; in others, too restrained.¹

The article rejects several broad-gauged objections to all forms of preventive pretrial detention — their asserted dependency on an unattainable ability to predict human behavior, their asserted incompatibility with the historic goals of pretrial detention, and their asserted departure from the presumption of innocence. The article also maintains that no persuasive constitutional challenge can be mounted to the Bail Reform Act of 1984 (or, indeed, to substantially more intrusive preventive detention measures) under current interest-balancing due process formulas.

Although the history of pretrial restraint in England and America offers no condemnation of all preventive pretrial detention, this history does reveal an unwavering condemnation of detention without bond in the absence of strong preliminary proof of guilt. This opposition reflected a deep-seated belief that responsible adults should be deprived of their liberty only when they had abused it. The Federal Bail Reform Act contravenes this principle — a principle of liberty "so rooted

1. Interest balancing does have an appropriate role in some constitutional adjudication. For example, this article criticizes the Supreme Court's decision in *Gerstein v. Pugh*, 420 U.S. 103 (1975), for its failure adequately to "balanc[e] the need for [a search or seizure] against the invasion of personal rights that [this intrusion] entails." See text at notes 241-46 *infra*. The fourth amendment's prohibition of "unreasonable" seizures should be read to demand a stronger factual showing to justify extended pretrial detention than to justify arrest. In some contexts, interest balancing may be appropriate in due process adjudication as well. See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). This article contends, however, that the Supreme Court's current approach to the due process clause has tilted too far toward interest balancing and too far from historic concepts of individual freedom.

in the traditions and conscience of our people as to be ranked as fundamental."² For this reason, the Act violates the Constitution.

I. THE FEDERAL BAIL REFORM ACT OF 1984

In 1970, Congress authorized courts in the District of Columbia to detain some defendants without bond in order to protect the community from crime,³ but prosecutors rarely invoked the District of Columbia legislation.⁴ In federal courts outside the District, the right to bail in noncapital cases, established by the Federal Judiciary Act of 1789,⁵ persisted until 1984. The Bail Reform Act enacted that year⁶ currently authorizes detention without bond when a case involves a crime of violence (defined broadly to include misdemeanor assault, tipping over garbage cans, and possibly even shoplifting⁷), a crime pun-

2. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

3. D.C. CODE ANN. § 23-1322 (1981 & Supp. 1986); see *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982) (upholding the constitutionality of the statute by a divided vote). This legislation — one of the earliest legislative initiatives of the Nixon administration — was authored in part by Chief Justice Rehnquist, then Assistant Attorney General in charge of the Office of Legal Counsel. The authors of the Federal Bail Reform Act of 1984 borrowed many of the Act's procedural provisions from the District of Columbia legislation. See S. REP. NO. 225, 98th Cong., 1st Sess. 22 (1983).

To avoid an appearance of impropriety, Chief Justice Rehnquist might disqualify himself from participating in the decision of *United States v. Salerno*, No. 86-87 (*cert. granted*, 107 S. Ct. 397 (1986)), in which the Supreme Court may determine the constitutionality of the 1984 Act. Cf. *United States v. Nixon*, 418 U.S. 683 (1974) (Rehnquist, J., not participating); *Valid Doubts About Justice Rehnquist*, N.Y. Times, Sept. 11, 1986, at A26, col. 1 (criticism of Justice Rehnquist for failing to disqualify himself in *Laird v. Tatum*, 408 U.S. 1 (1972), despite apparent participation in executive branch deliberations on issues that the case presented).

A lawyer who has aided in drafting statutory language probably should not consider the constitutionality of that language in a judicial capacity (even when the language has been "laundered" a bit by its inclusion in new legislation). Similarly, a lawyer who has acted as an advocate may think it inadvisable to sit in judgment on issues that he once addressed as a partisan. Preventive detention was an important legislative priority of the Nixon administration, and the Assistant Attorney General in charge of the Office of Legal Counsel probably could not have viewed the issues posed by this legislation with detachment.

4. See H.R. REP. NO. 1419, 94th Cong., 2d Sess. 4 (1976) ("[F]rom date of enactment until [1976], pretrial detention was rarely requested (only about 60 times during the entire 5 year period)."); GEORGETOWN INST. OF CRIMINAL LAW AND PROCEDURE & VERA INST. OF JUSTICE, PREVENTIVE DETENTION IN THE DISTRICT OF COLUMBIA 69 (1972) (referring to the "virtual non-use of the preventive detention law"). Unlike the Federal Bail Reform Act of 1984, see text at notes 14-15 *infra*, the District of Columbia statute did not restrict the use of money bond to accomplish *sub rosa* preventive detention. Prosecutors may have found it easier to request bail in amounts that defendants could not supply than to invoke the statute's more complicated procedures.

5. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91.

6. 18 U.S.C. §§ 3141-3156 (Supp. II 1984).

7. See 18 U.S.C. § 3156(a)(4) (Supp. II 1984) (defining "crime of violence" to include "an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another"). The statute treats the use of force against property no differently from the use of force against a person; and if seizing a person is a crime of violence, perhaps larceny — seizing property — is a crime of violence as well. Courts may strain to avoid this jarring interpretation; but however narrowly they construe the statutory definition,

ishable by life imprisonment or death, a major drug offense, or a felony committed by a person previously convicted of two of the crimes listed above.⁸ It also authorizes detention without bond when a case involves "a serious risk that [the defendant] will flee" or that he will "obstruct . . . justice, or threaten, injure, or intimidate . . . a prospective witness or juror."⁹

Before ordering detention under the 1984 Act, a court must conduct a hearing at which the defendant "has the right to be represented by counsel, . . . to testify, to present witnesses on his own behalf, to cross-examine witnesses . . . , and to present information by proffer or otherwise."¹⁰ The Act provides that the rules of evidence shall not apply at the detention hearing.¹¹ Although it declares that "[t]he facts [used to support a detention order] shall be supported by clear and convincing evidence,"¹² it indicates the gravity of the risk that a defendant must pose to justify detention only by requiring a determination that no conditions of pretrial release will "reasonably" assure the safety of any other person and the community.¹³ When a prosecutor seeks detention on grounds of dangerousness, dangerousness is the only issue for the judge to resolve at the conclusion of the hearing.

This article will contend that, because the Bail Reform Act fails to require substantial preliminary proof of a defendant's guilt, it is unconstitutional. Nevertheless, before later sections of the article at-

the 1984 Act plainly uses the imposing term "crime of violence" to authorize the detention of defendants charged with minor offenses. When Congress permitted the denial of bail in noncapital cases, it apparently saw no reason to go half way.

In *United States v. Yeaple*, 605 F. Supp. 85 (M.D. Pa. 1985), the court ordered the preventive detention of a defendant charged with the possession of child pornography. The prosecutor had concluded that this possession was a "crime of violence," and the court indicated that the prosecutor's determination might not be subject to judicial review. It added that in any event "[p]ersons who create the demand for [pornographic] material by ordering or purchasing it indirectly cause minors to be drawn into this illegal activity, and bear some responsibility for the violence done to these minors, psychologically if not physically." 605 F. Supp. at 87. The court did not advert to the statutory definition, which requires the use or threatened use of physical force and apparently does not include the infliction of psychological harm.

8. 18 U.S.C. § 3142(f)(1) (Supp. II 1984).

9. 18 U.S.C. § 3142(f)(2) (Supp. II 1984).

10. 18 U.S.C. § 3142(f) (Supp. II 1984). Despite the Act's apparently unequivocal statement that defendants shall have the right to present witnesses, a United States Court of Appeals has held that trial judges may refuse to hear defense witnesses and may require defendants to proceed entirely by proffer. *United States v. Delker*, 757 F.2d 1390, 1395-96 (3d Cir. 1985).

11. 18 U.S.C. § 3142(f) (Supp. II 1984).

12. 18 U.S.C. § 3142(f) (Supp. II 1984).

13. 18 U.S.C. § 3142(e) (Supp. II 1984). Contrary to some descriptions of the statute, e.g., *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985); *Government's Petition for a Writ of Certiorari* at 4, *United States v. Salerno*, cert. granted, 107 S. Ct. 397 (1986) (No. 86-87), the Bail Reform Act does not require clear and convincing evidence of "dangerousness." See Comment, *Preventive Detention and Presuming Dangerousness Under the Bail Reform Act of 1984*, 134 U. PA. L. REV. 225, 234 (1985).

tempt to bury the statute, a word of praise seems appropriate. This enactment drafted by the Reagan administration includes a provision that every civil libertarian ought to cheer: "The judicial officer may not impose a financial condition that results in the pretrial detention of the person."¹⁴

Under this provision, no federal defendant may be imprisoned before trial because he is unable to post bond. The Act permits a judge to require financial security as a condition of release; but if a defendant proves unable to supply it, the judge must reconsider. After conducting a hearing, the judge may order the defendant's detention without bond; but if the evidence presented at the hearing fails to justify detention, the judge must release the defendant on conditions that do not require the posting of financial security.¹⁵

This scheme does not eliminate the advantage that the bail system affords the rich in the administration of criminal justice¹⁶ but does reduce it.¹⁷ This article will argue that when a responsible adult has done nothing wrong his apparent dangerousness is not an appropriate basis for detention. Dangerousness, however, is a more appropriate basis for detention than poverty. Under the federal statute, an organized crime figure who has repeatedly resorted to violence but who is able to post bail no longer will be allowed to go free while a defendant charged with writing a bad check is kept in custody because he is too poor to hire a surety. The Act moves the federal courts toward the pattern of pretrial release and detention found in European nations,¹⁸ a development that does not seem regrettable.

In some federal districts, prosecutors and judges appear to have disregarded the Act's prohibition of detention for failure to post

14. 18 U.S.C. § 3142(c) (Supp. II 1984).

15. Under provisions that the 1984 Act carried forward from the Bail Reform Act of 1966, a federal judge ordinarily may not require financial security as a condition of release unless a defendant seems unlikely to appear if released on nonfinancial conditions. *See* 18 U.S.C. § 3142(c)(2) (Supp. II 1984). When a judge requires financial security under this standard and the defendant is unable to supply it, the judge is very likely to order detention on the ground that release would create a "serious risk" of flight. Nevertheless, the bond requirement becomes unlawful when the defendant proves unable to satisfy it. Although the standard that the judge must apply after a detention hearing does not differ substantially from the standard applicable to his earlier decision to require a bond, the Act demands a sober second look.

16. As indicated, a defendant may find himself the subject of a detention hearing only because he cannot provide financial security.

17. *See* REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 58-82 (1963) [hereinafter ALLEN REPORT] (arguing for reform of the bail system to promote greater equality between the rich and the poor).

18. *See* Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 963 (1965) ("In some European countries, bail is either not authorized, as in Sweden, where it is 'considered to lead to inequality before the law,' or, although provided for by law, has fallen into disuse, as for example, in Norway, Denmark, West Germany.") (footnote omitted).

bond.¹⁹ Only in these districts, however, may the Act be largely a dead letter like its District of Columbia precursor.²⁰ A March 1986 issue of the *National Law Journal* reported differing claims concerning the frequency of detention hearings under the Act, but every claim suggested that use of the new procedures had become common. The Justice Department reported that, during the first sixteen months that detention without bond had been available, it had sought detention in 2853 cases. It also reported that judges had ordered detention in eighty percent of the cases in which the Department had requested it. The Administrative Office of the United States Courts offered a much higher figure — 4178 hearings during a five-month period in 1985. This figure indicated that judges might have conducted detention hearings in as many as twenty-five percent of all federal felony cases. The United States Marshals Service claimed that the 1984 Act had been “primarily responsible for a 32 percent increase in prisoner population . . . during the first year after its passage.”²¹

Congress may not have anticipated the extent to which its action would augment the number of defendants imprisoned without trial. When the Senate Judiciary Committee reported the proposed 1984 Act to the Senate, it declared:

[T]he Committee concluded that . . . there 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.²²

Among the disturbing aspects of the 1984 Act are some things that are not there. Unlike the 1970 preventive detention legislation for the District of Columbia, which in most cases limited the period of pre-trial incarceration to sixty days,²³ the 1984 Act imposes no limit on the length of pretrial detention. Its authors relied on a measure enacted after the District of Columbia statute, the Federal Speedy Trial

19. See Riley, *Preventive Detention Use Grows — But Is It Fair?*, Natl. L.J., Mar. 24, 1986, at 1, 32 (James I.K. Knapp, a Deputy Assistant Attorney General, reported that “as many as 7 percent to 8 percent of all federal felony defendants may still be detained on high bails . . . and that resistance to using the new detention procedures in places, like the Southern District of Florida, has led to disagreements between U.S. attorneys and the Justice Department in Washington.”).

20. For one possible explanation of the different effects of the two statutes, see note 4 *supra*.

21. Riley, *supra* note 19, at 32.

22. S. REP. NO. 225, 98th Cong., 1st Sess. 6-7 (1983). This indication of legislative purpose underlines the need for judicial clarification of the Act’s imprecise standard of dangerousness. See note 162 *infra*.

23. D.C. CODE ANN. § 23-1322(d) (1981) (limiting pretrial detention to 60 days but permitting a single extension of no more than 30 days for “good cause shown”).

Act of 1974,²⁴ to guard against prolonged imprisonment before trial.

The 1974 Act provides, but only as a starting point, that the trial of an incarcerated defendant must begin within ninety days of his detention.²⁵ Although Senator Thurmond, Senator Laxalt, and others who supported the 1984 Act described this ninety-day period as an "upper bound" or "worst case limit,"²⁶ they were in error.²⁷ The authors of the Speedy Trial Act recognized that the circumstances justifying delay cannot be reduced to a formula. After providing other, more specific exclusions from the ninety-day period, they created an all-purpose escape route. The Act authorizes judges to extend the ninety-day period on the basis of findings that "the ends of justice served by [granting continuances] outweigh the best interest of the public and the defendant in a speedy trial."²⁸ Statistics compiled by the Administrative Office of the United States Courts indicate that most federal criminal cases are not concluded within periods close to the base periods established by the Act.²⁹ Indeed, in a complex case, federal pretrial detention can easily last longer than a year.³⁰

24. 18 U.S.C. §§ 3161-3174 (1982).

25. 18 U.S.C. § 3164(b) (1982).

26. 130 CONG. REC. S941 (daily ed. Feb. 3, 1984) (statement of Sen. Thurmond); *id.* at S943 (statement of Sen. Laxalt); *id.* at S945 (statement of Sen. Grassley).

27. So was the Senate Judiciary Committee, which recognized that the 90-day period was "subject to certain periods of excludable delay" but nevertheless contended that it would "assure that a person is not detained pending trial for an extended period of time." S. REP. NO. 225, 98th Cong., 1st Sess. 22 n.63 (1983).

28. 18 U.S.C. § 3161(h)(8)(A) (1982).

29. Under the Speedy Trial Act, the base period for commencing a federal criminal trial is ordinarily 70 days from the filing of an indictment or information. 18 U.S.C. § 3161(c)(1) (1982). The Administrative Office does not compile figures on the median time from filing to the beginning of trial, but it does publish figures on the median time from filing to disposition. In fiscal 1985, this median period for all criminal cases — including a large number of traffic cases as well as cases resolved by dismissals and guilty pleas rather than trials — was 3.0 months. ADMIN. OFFICE OF THE U.S. COURTS, 1985 ANNUAL REPORT OF THE DIRECTOR 181-82 (also reporting without explanation figures for fiscal 1984 that differ greatly from those reported by the 1984 Annual Report — a circumstance that may suggest some lack of reliability of Administrative Office statistics).

30. In *United States v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986), the court noted that the defendants' preventive pretrial detention had lasted for more than eight months with no impending trial on the horizon. Although the defendants had been imprisoned since August 1985 — some in secure facilities in which they remained locked in their cells 23 hours a day — their lawyers estimated that their trial would not begin before mid-1987, almost two years after the detention had begun. The government's lawyers questioned this estimate but offered no estimate of their own. See also Bridges, *The Speedy Trial Act of 1974: Effects on Delays in Federal Criminal Litigation*, 73 J. CRIM. L. & CRIMINOLOGY 50, 69 (1982) (despite the Speedy Trial Act, approximately 10 percent of all federal criminal cases required more than 360 days of "processing time").

Chief Judge Feinberg dissented in *United States v. Salerno*, 794 F.2d 64 (2d Cir.), *cert. granted*, 107 S. Ct. 397 (1986), in which the Second Circuit held the 1984 Act unconstitutional. Judge Feinberg maintained, however, that preventive detention would become punitive and would violate the due process clause when it lasted too long. This analysis led him to join the Second Circuit's holding that the detention in *Melendez-Carrion* was invalid. The Seventh Cir-

As commentators have often noted, the burdens of pretrial imprisonment are not limited to losses of time and liberty. The jobs of detained defendants frequently disappear, and friendships and family relationships are disrupted.³¹ Indeed, families and friends sometimes lose interest and no longer visit or write. The physical conditions of confinement often are worse for untried defendants, frequently detained in local jails, than for convicted felons detained in penitentiaries.³² Work opportunities and educational programs usually are less available.³³ Coercion to engage in homosexual activities appears to be common as do other forms of brutalization, and suicide rates are high.³⁴ Moreover, incarceration affects a defendant's physical appearance and impedes his ability to consult lawyers, locate witnesses, and otherwise prepare a defense.³⁵ The available empirical studies of the effects of detention may not be conclusive, for perfect controls are unattainable. Nevertheless, these studies strongly suggest that pretrial incarceration makes both conviction and a severe sentence more likely.³⁶

One might imagine that, before imposing these burdens, a civilized

cuit and the Third Circuit have taken a view like Judge Feinberg's — sustaining the constitutionality of the Act but suggesting that lengthy preventive pretrial detention would violate the due process clause. See *United States v. Portes*, 786 F.2d 758, 768 (7th Cir. 1985); *United States v. Accetturo*, 783 F.2d 382, 387-88 (3d Cir. 1986); see also *United States v. Colombo*, 616 F. Supp. 780, 785 (E.D.N.Y.) (Weinstein, C.J.) ("A substantial . . . basis for my decision to confirm the Magistrate's decision to release the defendant is that the necessary delay in bringing the case to trial will require him to be incarcerated from 13 months to two years . . . Such a long period of preventive detention without a finding of guilt . . . is 'anathema to American ideals of due process.'"), *rev'd*, 777 F.2d 96 (2d Cir. 1985).

Judge Feinberg's argument that preventive detention would become punitive after the passage of time seems difficult to reconcile with the Supreme Court's motive-based definition of punishment. See notes 85-86 *infra* and accompanying text. His position also would create a difficult-to-administer system of pretrial detention. Unlike Judge Weinstein in *United States v. Colombo*, *supra*, Judge Feinberg would not order release when lengthy detention seemed likely at the outset. Instead, he would wait until this detention became "punitive" before declaring it unconstitutional. For this reason, the effective representation of a detained defendant apparently would require his lawyer to appear before a judge at periodic intervals to ask, "Now?" After an unspecified number of months during which the judge would reply, "Not yet," he would answer, "Yes, now." Judge Feinberg suggested that the moment of magic metamorphosis would vary from one case to the next. Just when the preventive tadpole would become a punitive bullfrog seems to be anyone's guess.

31. See R. GOLDFARB, RANSOM 41 (1965); D. FREED & P. WALD, BAIL IN THE UNITED STATES 43 (1964); STANDARDS RELATING TO PRETRIAL RELEASE 3 (Approved Draft 1968) [hereinafter ABA STANDARDS].

32. See ALLEN REPORT, *supra* note 17, at 73; R. GOLDFARB, *supra* note 31, at 41-43; D. FREED & P. WALD, *supra* note 31, at 44; ABA STANDARDS, *supra* note 31, at 2-3.

33. See R. GOLDFARB, *supra* note 31, at 43.

34. See R. GOLDFARB, JAILS: THE ULTIMATE GHETTO 6, 18-19, 105-12 (1975).

35. See ALLEN REPORT, *supra* note 17, at 74-76; R. GOLDFARB, *supra* note 31, at 40-43 (1965); D. FREED & P. WALD, *supra* note 31, at 45-46.

36. See ABA STANDARDS, *supra* note 31, at 3; D. FREED & P. WALD, *supra* note 31, at 46-48; Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-trial Parole*, 38 N.Y.U. L. REV. 67, 84-86 (1963); Konecni & Ebbesen, *External Validity of Research in Legal Psychology*, 3 L. & HUM. BEHAV. 39, 60 (1979); Rankin, *The Effect of Pretrial Deten-*

society would demand substantial preliminary evidence that a defendant had committed a crime. One might imagine as well that this society would afford the defendant at least an informal hearing on the issue. The United States, however, does not do so. The Bail Reform Act requires no finding of probable guilt or convictability as a prerequisite to detention. Indeed, in most federal cases, only an *ex parte*, in camera determination of probable cause by a grand jury (a body often dominated by a federal prosecutor³⁷) guards against preventive incarceration of the innocent.

In a system of preventive detention in which dangerousness alone could justify detention,³⁸ guilt would be merely evidence. Lacking independent moral significance, past wrongdoing would be merely one indicator of dangerousness among many. The Bail Reform Act appears to treat guilt in this fashion. It offers a lengthy list of "factors to be considered" in determining "whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community." On this list (treated no differently from "the history and characteristics of the person, including . . . his character, physical and mental condition") is "the weight of the evidence against the person."³⁹ The absence of a single statutory factor (like proof of past misconduct) apparently does not preclude detention.

Congress' failure to require prosecutors to offer preliminary proof of guilt at detention hearings was deliberate. The earlier preventive detention legislation for the District of Columbia had allowed detention only when, at the conclusion of an adversary hearing, a trial judge had found a "substantial probability" that the defendant had committed the offense charged. The District of Columbia Court of Appeals had construed this requirement to establish a standard "higher than probable cause" — one "equivalent to the standard required 'to secure a civil injunction.'"⁴⁰ In testimony before Congress, however, Justice Department lawyers noted "practical problems entailed in coming forward with additional evidence necessary to meet this standard."⁴¹

tion, 39 N.Y.U. L. REV. 641, 655 (1964). But see J. GOLDKAMP, TWO CLASSES OF ACCUSED 185-211 (1979).

37. See text at notes 214-15 *infra*.

38. See text at notes 106-20 *infra*.

39. 18 U.S.C. § 3142(g) (Supp. II 1984).

40. *United States v. Edwards*, 430 A.2d 1321, 1339 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982) (quoting H.R. REP. NO. 907, 91st Cong., 2d Sess. 182 (1970)).

41. *Bail Reform: Hearings on S. 440, S. 482, S. 1253, S. 1554 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 160 (1981) (statement of Deputy Associate Attorney General Jeffrey Harris); see also *id.* at 189-91; S. REP. NO. 225, 98th Cong., 1st Sess. 18 (1983).

These lawyers advocated legislation that would empower the federal courts to imprison untried defendants on the basis of less evidence than they would require before issuing preliminary injunctions in civil cases. The Senate Judiciary Committee was persuaded. Citing the Justice Department's objections, it declared: "For good reason the bill does not incorporate, as a precondition of pretrial detention, a finding that there is a 'substantial probability' that the defendant committed the offense for which he is charged."⁴²

42. S. REP. NO. 225, *supra* note 41, at 18. Especially in light of the fact that the 1984 Act declares the rules of evidence inapplicable to pretrial detention hearings, the Justice Department's objections to presenting preliminary proof of guilt appear insubstantial. In proceedings under the Act, the Department often has presented hearsay evidence of acts of violence that did not lead to prosecution, and prosecutors should be able to present at least as much evidence of the offenses that they have charged. Unless the Government in fact has filed charges without substantial evidentiary support, it should be able to offer a detailed hearsay description of its evidence (if not more); and a court should be able to hear and consider whatever evidence a defendant may offer in rebuttal at the early stage at which a detention hearing occurs. *See State v. Konigsberg*, 33 N.J. 367, 374-78, 164 A.2d 740, 744-46 (1960).

Indeed, in the absence of this requirement, the 1984 Act could be abused by prosecutors who believe that they know much more than they can prove. For example, a zealous prosecutor might be unable to establish the guilt of a reputed organized crime figure although organized crime "intelligence" suggests that this person has participated in numerous crimes. After persuading a grand jury to indict this person for a racketeering offense, the prosecutor might seek his detention and might present the hearsay testimony of law enforcement agents concerning the allegations that underworld informants have made about him in exchange for government favors. If the defendant then were acquitted after a period of detention grounded on this hearsay, the prosecutor might wait, file new charges, and begin the process again. In this way, the 1984 Act could become an important weapon in the war on organized crime, a device for incarcerating well-known "sleazes" whom it would be difficult or impossible to convict of crime.

I do not suggest that federal prosecutors have misused the statute in this fashion. The gamesmanship that influences organized crime prosecutions, however, is suggested by the caption that the United States Attorney's Office for the Southern District of New York provided for what may become a landmark case — the case in which the Supreme Court is likely to address the constitutionality of the 1984 Act. This sort of caption appears routine in "organized crime" prosecutions:

UNITED STATES OF AMERICA
v.
ANTHONY SALERNO, a/k/a "Fat Tony,"
VINCENT CAFARO, a/k/a "Fish,"
VINCENT DI NAPOLI, a/k/a "Vinnie,"
LOUIS DI NAPOLI, a/k/a "Louie,"
GIUSEPPE SABATO, a/k/a "Pepe,"
CARMINO DELLA CAVA, a/k/a "Carmino,"
THOMAS CAFARO, a/k/a "Tommy,"
JOHN TRONOLONE, a/k/a "Peanuts,"
MILTON ROCKMAN, a/k/a "Maishe,"
NICHOLAS AULETTA, a/k/a "Nick,"
EDWARD J. HALLORAN, a/k/a "Biff,"
ALVIN O. CHATTIN, a/k/a "Al,"
RICHARD COSTA, a/k/a "Richie,"
ALPHONSE MOSCA, a/k/a "Funzi," and
NEIL MIGLIORE, a/k/a "Neil," DEFENDANTS

United States v. Salerno, 631 F. Supp. 1364 (S.D.N.Y.), *revd.*, 794 F.2d 64 (2d Cir.), *cert. granted*, 107 S. Ct. 397 (1986). Perhaps the defendants' "aliases" were included in the caption solely to aid in identifying them, but prosecutors may have had less attractive reasons. If so, one

In 1985 and 1986, the United States Courts of Appeals for the Third Circuit and the Seventh Circuit sustained the 1984 Act's constitutionality,⁴³ but the Court of Appeals for the Second Circuit held the Act unconstitutional.⁴⁴ The Supreme Court has granted certiorari in the Second Circuit case and is likely to determine the Act's constitutionality during its current Term.⁴⁵

II. DETENTION AND DUE PROCESS

A. *Utilitarianism, Natural Justice, and Due Process of Law*

1. *A Short History of Due Process Adjudication*

Although the due process clauses of the fifth and fourteenth amendments are identical,⁴⁶ due process adjudication essentially began

wonders whether their tactics will prove effective with the Justices of the Supreme Court, including ANTONIN SCALIA, a/k/a "Nino," and BYRON WHITE, a/k/a "Whizzer."

43. See *United States v. Perry*, 788 F.2d 100 (3d Cir.), cert. denied, 107 S. Ct. 218 (1986); *United States v. Accetturo*, 783 F.2d 382 (3d Cir. 1986); *United States v. Portes*, 786 F.2d 758 (7th Cir. 1985). The Third Circuit upheld the 1984 Act only after construing it to save its constitutionality. For one thing, the court held that, to prevent the statute from violating the fifth amendment privilege against self-incrimination, a defendant must be afforded use immunity for testimony at a pretrial detention hearing. See *Perry*, 788 F.2d at 115-16. More importantly, the court noted that the Constitution affords the federal government no power to promote the general welfare, no power to enact general civil commitment statutes, and no power to detain a defendant simply on grounds of undifferentiated dangerousness. Only the danger that a defendant would commit a federal crime or otherwise interfere with a federally protected interest could support his pretrial detention; and despite the unqualified language of the statute, the court construed it to require proof of this sort of "federally cognizable" dangerousness. 788 F.2d at 109-11.

The Third Circuit's analysis suggests that the preventive detention that the Supreme Court currently is considering in *United States v. Salerno* may be unconstitutional. The district court concluded in *Salerno* that "the government has . . . demonstrated that Cafaro has directed violent acts and is ready, willing and able to direct violent acts in the future." *Salerno*, 631 F. Supp. at 1374. Similarly, it observed:

The government has proffered information showing that Salerno could order a murder merely by voicing his assent with the single word "hit." Although some of these murder conspiracies occurred between six and ten years ago, their seriousness and the ease with which they could be ordered weigh heavily in favor of finding that Salerno is a present danger to the community.

631 F. Supp. at 1371.

The court did not demonstrate that the violent acts attributed to Cafaro or the murder conspiracies attributed to Salerno could have been the subjects of federal prosecution. The protection of the community against murder and other violent crimes is ordinarily the province of the states. Why the pendency of a federal charge should itself confer a federal power to prevent a defendant's commission of state crimes is unclear.

44. *United States v. Salerno*, 794 F.2d 64 (2d Cir.), cert. granted, 107 S. Ct. 397 (1986). In an opinion by Judge Kearsce that drew extensively upon an earlier opinion by Judge Newman, the Second Circuit advanced an old-style, nonutilitarian interpretation of the due process clause like the one that this article will advance. The court, however, held all forms of preventive pretrial incarceration unconstitutional, a position that this article rejects.

45. *United States v. Salerno*, No. 86-87 (cert. granted, 107 S. Ct. 397 (1986)).

46. The Supreme Court has declared that the two clauses, although adopted in different historical contexts, have the same meaning. See *Hibben v. Smith*, 191 U.S. 310, 325 (1903); *Ingram v. Wright*, 430 U.S. 651, 672-73 (1977).

with the adoption of the fourteenth amendment.⁴⁷ The Supreme Court earlier had interpreted the phrase "due process of law" to refer to traditional English procedural law — "those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."⁴⁸ Imposing upon the states every detail of established English procedure, however, would have subverted basic principles of federalism without furthering the purposes of the fourteenth amendment. In 1884, in one of its earliest significant interpretations of the post-Civil War clause, the Court asserted a power to determine which portions of traditional law the provision embodied. In *Hurtado v. California*,⁴⁹ the Court spoke of "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."⁵⁰

The Court repeated this language in 1932 when it held in *Powell v. Alabama*⁵¹ that a trial court's denial of counsel to defendants in a capital case had contravened the "immutable principles of justice which inhere in the very idea of free government."⁵² The Court referred once

47. The Supreme Court commented on this phenomenon in 1877:

It is not a little remarkable, that while [the due process clause] has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law.

Davidson v. New Orleans, 96 U.S. 97, 103-04 (1877). Although the framers of the fourteenth amendment almost certainly did not intend to vary the meaning of the fifth amendment's due process clause, they may not have had much knowledge of the history of this clause or of its judicial interpretation. They may have regarded the open-ended language of the clause simply as a mandate for just and regularized procedure. In these circumstances, courts might have interpreted both the fifth and the fourteenth amendments' due process clauses in light of the fourteenth amendment's general objective of reconstructing the South and ensuring the just treatment of black (and other) Americans.

48. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855).

49. 110 U.S. 516 (1884).

50. 110 U.S. at 535.

51. 287 U.S. 45 (1932).

52. 287 U.S. at 71 (quoting *Holden v. Hardy*, 169 U.S. 366, 389 (1898)); see also 287 U.S. at 67 (attributing the earlier language about "fundamental principles of liberty and justice" to *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926), one of several cases repeating this language). *Powell's* interpretation of the due process clause was significantly more expansive than *Hurtado's*. *Hurtado*, without departing from the view that the due process clause referred to established English procedural law, had limited the scope of the clause to aspects of traditional law that courts regarded as "fundamental." In contrast, Justice Sutherland's opinion in *Powell* recognized that no departure from "the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence" had occurred in the case

more to the “fundamental principles . . . at the base of all our civil and political institutions” when it ruled in 1936 in *Brown v. Mississippi* that the use of brutally coerced confessions was “revolting to the sense of justice.”⁵³

For practical purposes, as Francis Allen has observed, the Court’s use of the due process clause to supervise state criminal procedure began during the decade that totalitarian regimes were emerging in western Europe.⁵⁴ European dictatorships, in Allen’s words, were using “the institutions of criminal justice as instrumentalities for the systematic destruction of political values upon which free societies rest”;⁵⁵ and although the Supreme Court had not reversed a state conviction on the authority of the due process clause until almost sixty years after the ratification of the fourteenth amendment,⁵⁶ the Court long had read the due process clause to embody these core values.

The view of due process advanced in *Hurtado v. California*, *Powell v. Alabama*, and *Brown v. Mississippi* had a “natural law” bent. It echoed Coke’s interpretation of the phrase “*per legem terrae*” of Magna Charta.⁵⁷ The Court’s view was tolerant of diversity and experimentation but insisted that law must adhere at its core to immutable principles of human dignity. The due process clause empowered the judiciary to articulate these principles and to treat legislation that offended them as unconstitutional. At the same time, decisions admonished against reliance on a purely personal intuition in the articu-

before the Court. 287 U.S. at 65. *Powell*, however, did not assert a judicial power to disregard traditional law in determining what principles of justice the due process clause embodied. Instead, the *Powell* opinion offered a detailed history of the right to counsel in England and America, concluding that American jurisdictions had consistently rejected the English common-law rule. 287 U.S. at 60-65. The opinion also noted that in a capital case “[t]he United States . . . and every state in the Union . . . make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him.” 287 U.S. at 73.

53. 297 U.S. 278, 286 (1936). As it had in *Powell*, the Court attributed the language about fundamental principles of liberty and justice to *Hebert v. Louisiana*.

54. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 522. Although many people know that Allen was dean of the University of Michigan Law School, few know that he also founded a prominent academic movement — the Aurora, Illinois, school of criminal justice. Three teachers of criminal law at American law schools (Allen himself, Phillip Johnson of the University of California at Berkeley, and I) learned most of what we needed to know about crime in the public schools of this small prairie metropolis. Allen is no longer dean at Michigan, but he will be capo of the Aurora school of criminal justice forever. Cf. *Ybarra v. Illinois*, 444 U.S. 85 (1979) (unconstitutional to frisk the patrons of an Aurora tavern before executing a warrant to search the tavern for narcotics — majority of the Supreme Court had never been to Aurora).

55. Allen, *supra* note 54, at 522.

56. See *Tumey v. Ohio*, 273 U.S. 510 (1927); see also *Moore v. Dempsey*, 261 U.S. 86 (1923) (ordering a hearing on a state prisoner’s claim that a mob-dominated trial had deprived him of due process of law).

57. See 1 E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *50-51; *Bonham’s Case*, 8 Coke 113b, 118a, 77 Eng. Rep. 646, 652 (K.B.).

lation of core values. Judges were to act primarily as armchair historians and sociologists. The issue was not only whether a challenged practice "shock[ed] the conscience"⁵⁸ but also whether it "offend[ed] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁵⁹

During the early decades of the twentieth century, the Supreme Court reviewed state substantive legislation more vigorously than it reviewed state procedural enactments.⁶⁰ Despite the fourteenth amendment's reference to "process," *Lochner v. New York*⁶¹ and other decisions invalidating state economic legislation departed from the restrained, tradition-based interpretation of the amendment articulated in *Hurtado* and other procedural decisions. The Court's "substantive due process" opinions declared that all substantive regulation must be justified as an exercise of something called the police power. Under this view, restrictions of liberty were not unconstitutional only when they were bad or very bad (conscience-shocking or incompatible with fundamental principles of liberty); they were unconstitutional unless they were good. The Court demanded affirmative justification for every restriction of liberty. What the Supreme Court called justification under the police power was no different from what it later would call a "rational relationship to a legitimate governmental interest."⁶² As the Court wrote in *Lochner*, "The act must have a . . . direct relation, as a means to an end, and the end itself must be appropriate and legitimate . . ."⁶³ The Court's departure from the restraint inherent in more tradition-based standards prompted Justice Holmes' dissent:

I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us.⁶⁴

58. *Rochin v. California*, 342 U.S. 165, 172 (1952).

59. *E.g.*, *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (citations omitted).

60. See Kadish, *Methodology and Criteria in Due Process Adjudication — A Survey and Criticism*, 66 YALE L.J. 319, 325 (1957).

61. 198 U.S. 45 (1905).

62. *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973).

63. 198 U.S. at 57.

64. 198 U.S. at 76. Holmes' tradition-based dissent may appear ironic in view of his contribution to a largely ahistorical utilitarian jurisprudence, but it was consistent with his view that courts ought rarely interfere with the utilitarian tinkering and power-brokering of legislatures.

2. Current Approaches to the Due Process Clause

The fourteenth amendment's protection of life, liberty, and property echoed the language of the Declaration of Independence, but the twentieth century has seen a decline in the faith in natural justice that sparked the Declaration.⁶⁵ In fourteenth amendment adjudication, interest balancing and the "incorporation" of Bill of Rights safeguards have largely supplanted the Supreme Court's "fundamental fairness" interpretation of the due process clause. In *Duncan v. Louisiana*,⁶⁶ the Court recognized that its incorporation of Bill of Rights provisions had reflected the partial abandonment of an earlier search for transcendent principles of ordered liberty.⁶⁷ Moreover, in cases in which Bill of Rights provisions are inapplicable, the Court has adopted an open-ended utilitarian approach to "procedural" due process, one that affords only limited deference to procedures approved by the legislative and executive branches of government:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁶⁸

Although "substantive" due process adjudication entered a dormant phase in 1937,⁶⁹ this branch of fourteenth amendment litigation reemerged in 1965. The decision in *Griswold v. Connecticut*,⁷⁰ however, did not resurrect the "police power" or "legitimate governmental

65. For descriptions of the original faith, see B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 55-93, 175-98 (1967); Corwin, *The "Higher Law" Background of American Constitutional Law* (pts. 1 & 2), 42 HARV. L. REV. 149, 365 (1928-29); see also Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56 (1931). For a brief examination of where the loss of this faith has led, see Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436 (1987).

66. 391 U.S. 145 (1968).

67. [R]ecent cases applying provisions of the first eight Amendments to the States represent a new approach to the "incorporation" debate. . . . Of each of these determinations that a constitutional provision originally written to bind the Federal Government should bind the States as well it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States. 391 U.S. at 149 n.14. For the view that "selective incorporation" has yielded an overproceduralized criminal justice system that subverts through plea bargaining the most basic of due process rights, the right to be heard, see Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 995-1011 (1983).

68. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

69. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

70. 381 U.S. 479 (1965).

interest" analysis of *Lochner*. Courts can apply "fundamental fairness" and "interest-balancing" interpretations to "substantive" and "procedural" due process issues interchangeably;⁷¹ and *Griswold* attempted, perhaps inartfully, to ground the right to marital privacy upon legal tradition (penumbras, formed by emanations of various constitutional guarantees) and upon natural law:

We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.⁷²

In 1973, however, the Court articulated a concept of substantive due process more reminiscent of *Lochner*. It declared that a governmental restriction of liberty would be unconstitutional unless this restriction advanced a "legitimate" governmental interest. Indeed, the Court went beyond *Lochner* by declaring that a "legitimate" objective was not always good enough. The Court wrote in *Roe v. Wade*: "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'"⁷³ The Court concluded that its invalidation of

71. Although the fourteenth amendment speaks only of "process," efforts to confine the due process clause to procedural issues are likely to yield incongruous results. That a police officer may not adjudicate guilt and send a person to prison on the basis of personal intuition is a procedural protection of limited value if a state may make it a substantive crime to "give offense to a police officer." Moreover, a due process clause confined entirely to procedural matters would afford no protection against restrictions of the right to speak and other "substantive" freedoms generally regarded as essential to ordered liberty.

72. 381 U.S. at 486.

73. 410 U.S. 113, 155 (1973). The cases that the Supreme Court cited in support of its two-tiered interest analysis under the due process clause had not arisen under that clause. Most were equal protection decisions in which the Court had said that the government must justify its imposition of burdens or conferral of benefits on some people and not others. The principal focus of these decisions had been on means rather than ends: In light of the government's apparent objectives, did it have a legitimate or, occasionally, a compelling reason for treating people differently? When the Court found an equal protection violation, the government could remedy it either by extending benefits to a previously disadvantaged group or by withholding benefits from a previously advantaged group; it was not wholly disabled from pursuing its objectives. See *Orr v. Orr*, 440 U.S. 268, 272 (1979); *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). *Roe*, by contrast, focused primarily on ends, not means. The due process clause empowered the judiciary to reassess the affirmative justification for every deprivation of liberty.

By importing the two-tiered interest analysis of equal protection decisions into the due process clause, *Roe* established an essentially utilitarian framework for evaluating due process claims. Nevertheless, the *Roe* opinion ultimately offered an odd blend of utilitarian and non-utilitarian thinking. The requirement that a restriction of liberty be justified by a "legitimate" or "compelling" governmental interest tilted toward utilitarianism. The legitimate reason for a challenged action apparently could not be that the majority favored it, that the action had been sanctioned by history, or that the action was supported by deeply felt religious sentiment. Nevertheless, the abortion issue, more clearly than most others, is not susceptible to a purely utilitarian

state legislation prohibiting abortion was "consistent with the relative weights of the respective interests involved."⁷⁴

In the years since *Roe*, the Supreme Court has not always employed the two-tiered interest analysis that it employed in that case. As Robert Nagel has observed, today's "formulaic Constitution" appears to reflect the Court's bureaucratic effort to control future decisions.⁷⁵ Nevertheless, the Court commonly has added new formulas without abandoning old ones, and the proliferation of formulas, far from confining discretion, typically has had the opposite effect. The Court has been able to select some formulas from an ever-expanding smorgasbord while silently disregarding others.

Most recently, when the Supreme Court upheld a state's prohibition of homosexual conduct in *Bowers v. Hardwick*,⁷⁶ it invoked pre-*Roe* formulations. Fundamental liberties, the Court said, could be regarded as those "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed."⁷⁷ Alternatively, they could be regarded as freedoms "deeply rooted in this Nation's history and tradition."⁷⁸ The Court said that "neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy" and added that it was not "inclined to take a more expansive view of [its] authority to discover new fundamental rights imbedded in the Due Process Clause."⁷⁹ The Court responded to the claim that "there must be a rational basis for the law" by declaring that "majority sentiments about the morality of homosexuality" were sufficient.⁸⁰ It distinguished *Roe* only with the factual observation that *Bowers* did not involve "abortion" or the decision "whether or not to beget or bear a child."⁸¹

Old due process standards never die. Nevertheless, utilitarian for-

resolution. The Supreme Court ultimately drew a mystic line — fetal viability — and declared that the governmental interest in protecting potential life became compelling once this strange, scholastic line had been passed.

74. 410 U.S. at 165.

75. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 178 (1985).

76. 106 S. Ct. 2841 (1986).

77. 106 S. Ct. at 2844 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

78. 106 S. Ct. at 2844 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

79. 106 S. Ct. at 2844, 2846.

80. 106 S. Ct. at 2846.

81. 106 S. Ct. at 2843, 2844. Two Justices who joined the majority opinion in *Bowers*, Justice Powell and Chief Justice Burger, had joined the majority opinion in *Roe*. But see *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169, 2192 (1986) (Burger, C.J., dissenting) ("The soundness of our holdings must be tested by the decisions that purport to follow them. If *Danforth* and today's holding really mean what they seem to say, I agree we should reexamine *Roe*").

mulations dominated the Supreme Court's analysis when, in 1984, it first considered the constitutionality of preventive detention legislation.

B. *The Decision in Schall v. Martin*

The plaintiffs in *Schall v. Martin*⁸² sought a declaratory judgment that a New York statute permitting the detention of juveniles accused of delinquency violated the due process clause. This statute authorized a juvenile's detention for no longer than seventeen days⁸³ if there appeared "a serious risk that [the juvenile might, before an adjudicative hearing,] commit an act which if committed by an adult would constitute a crime."⁸⁴

The Constitution establishes a number of prerequisites to the imposition of criminal punishment, but detention imposed solely for protective, preventative, or paternalistic purposes is regarded as civil rather than criminal in character.⁸⁵ Involuntary detention qualifies as punishment under the Constitution only when its imposition reflects a retributive or deterrent purpose or an attribution of blame.⁸⁶ The principal argument of the plaintiffs in *Schall* was that the New York statute was " 'unconstitutional as to all juveniles' because [it was] administered in such a way that 'the detention period serves as punishment imposed without proof of guilt established according to the requisite constitutional standard.' "⁸⁷ Although the Supreme Court rejected this argument,⁸⁸ it recognized that the restraint authorized by

82. 467 U.S. 253 (1984).

83. Although the Second Circuit had indicated that the period of detention might occasionally be somewhat longer, see *Martin v. Strasburg*, 689 F.2d 365, 367 n.5 (2d Cir. 1982), *revd. sub nom. Schall v. Martin*, 467 U.S. 253 (1984), both the majority and dissenting Justices in *Schall* assumed that it could not. See 467 U.S. at 270 (majority opinion); 467 U.S. at 282 (Marshall, J., dissenting).

84. N.Y. FAM. CT. ACT § 320.5(3)(b) (McKinney 1983).

85. See, e.g., *Allen v. Illinois*, 106 S. Ct. 2988, 2991-92 (1986).

86. Cf. Hart, *The Aims of the Criminal Law*, LAW & CONTEMP. PROBS., Winter 1958, at 401, 404 ("What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition."). The Supreme Court has never articulated the touchstone of criminal punishment in language as simple as Hart's, but its rulings appear to express about the same principle. See *Allen v. Illinois*, 106 S. Ct. 2988, 2991-92 (1986); *Bell v. Wolfish*, 441 U.S. 520, 537-40 (1979); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). But see *United States v. Brown*, 381 U.S. 437, 458 (1965). Of course the due process clause may require procedures for the imposition of some noncriminal restraints that resemble those required for the imposition of criminal punishment. Compare *In re Gault*, 387 U.S. 1 (1967), with *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

87. *Schall*, 467 U.S. at 256 (quoting *Martin v. Strasburg*, 689 F.2d 365, 373-74 (2d Cir. 1982), *revd. sub nom. Schall v. Martin*, 467 U.S. 253 (1984)).

88. The plaintiffs had offered evidence that many juveniles detained prior to adjudicative hearings were not detained after these hearings had been concluded. Because a person who had appeared too dangerous to release 17 days before a hearing was likely to have appeared too

the statute required justification:

Two separate inquiries are necessary to [determine whether the statute is compatible with the "fundamental fairness" required by due process]. First, does preventive detention under the New York statute serve a legitimate state objective? And, second, are the procedural safeguards contained in the [Family Court Act] adequate to authorize the pretrial detention of at least some juveniles charged with crimes?⁸⁹

Three dissenting Justices maintained that more than a "legitimate" state objective was necessary to justify pretrial incarceration, but the majority did not consider whether freedom from imprisonment is a "fundamental" interest. It failed to explain why it had selected the lower of *Roe's* two tiers. The majority implied, however, that use of a more demanding standard would not have affected its analysis: "The 'legitimate and compelling state interest' in protecting the community

dangerous to release following a finding of delinquency at this hearing, the plaintiffs suggested that much detention in New York had not rested on bona fide findings of dangerousness. Justice Rehnquist's majority opinion responded that "the final disposition of a case is 'largely irrelevant' to the legality of a pretrial detention." 467 U.S. at 273. The opinion argued that the release of a juvenile following an adjudication of delinquency could not establish the reason for his earlier incarceration. A number of circumstances, including the emergence of new evidence, might have explained the apparent judicial turnabout.

A remarkable aspect of the *Schall* litigation, however, was that the trial judge, court of appeals judges, Supreme Court Justices, and even the defendants' lawyers failed to question the plaintiffs' claim that widespread abuse of the New York statute would, if proven, have warranted the relief that the plaintiffs sought, a declaration of the statute's invalidity. No one suggested that the plaintiffs' survey of the administration of preventive detention in practice (together with the heated discussion that it engendered) was itself "largely irrelevant" to the issues that the case presented.

If all statutes that had been frequently abused were unconstitutional, however, one wonders how many statutes would survive. Indeed, if preventive detention statutes were unconstitutional because they had been used in an unconstitutional way, traditional bail statutes undoubtedly would fall as well. Empirical studies have suggested that abusive judges sometimes set high bail for the purpose of imposing punishment prior to trial, see Note, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693, 705 (1958); Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1038-41 (1954), and a judge willing to use the New York preventive detention statute for unconstitutional purposes probably would be willing to misuse traditional bail law as well. The consequence of the empiricist jurisprudence urged and apparently accepted in *Schall* might be that all criminal defendants would be released on recognizance, however strong the probability that they would flee before trial.

Lawyers and judges have come to view American courts as so little different from legislatures that whether it was appropriate for the judiciary to act as an investigative commission was an unasked question. No one doubted that courts were empowered to examine much more than the facts of litigated cases and the terms of challenged statutes. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976).

A pattern of unconstitutional abuse sometimes justifies injunctive relief against executive officers — but not against judges, who are immune from suit. See *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872). The plaintiffs in *Schall* brought an essentially injunctive action and may have sought to avoid the immunity of New York's judges by purporting to challenge the statute that the judges had allegedly abused. The statute, however, did not authorize the abuse. Even if judicial immunity were to be abrogated, an appropriate injunction would be difficult to frame. It would forbid only the illegitimate use of bail and preventive detention statutes, not all use.

89. 467 U.S. at 263-64 (citations omitted).

from crime cannot be doubted."⁹⁰

The Court recognized that "[t]he juvenile's countervailing interest in freedom from institutional restraints . . . is undoubtedly substantial,"⁹¹ but it concluded that "the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's '*parens patriae* interest in preserving and promoting the welfare of the child.'"⁹² In the language of 1984 (the year of Orwell's prophesy), preventive detention statutes no longer deprived people of "liberty"; instead, they implicated "liberty interests."⁹³

Justice Marshall, joined in dissent by Justice Brennan and Justice Stevens, concluded that a tier somewhat below the "compelling governmental interest" tier but well above the "legitimate governmental interest" tier was the appropriate shelf for *Schall*. The "very important governmental interest" tier seemed neither too hard nor too soft:

It is manifest that [the New York statute] impinges upon fundamental rights. If the "liberty" protected by the Due Process Clause means anything, it means freedom from physical restraint. Only a very important governmental interest can justify deprivation of liberty in this basic sense.⁹⁴

90. 467 U.S. at 264.

91. 467 U.S. at 265.

92. 467 U.S. at 265.

93. In an earlier era, judges who bothered to voice the truism that imprisonment deprives people of their liberty might not have hesitated to say so directly, using the word liberty as a noun (which the dictionary says it is). In the bowdlerized legal language of the 1980s, however, rather than declare that imprisonment deprives people of their liberty, even a distinguished judge is likely to write, "Pretrial detention implicates a liberty interest . . ." *United States v. Delker*, 757 F.2d 1390, 1397 (3d Cir. 1985) (Adams, J.).

The use of the word "liberty" as an adjective modifying "interest" is not objectionable primarily because it is inelegant; more importantly, this treatment of liberty as an "interest" transforms it into a bargaining chip. A quick phrase sets the stage for a utilitarian trade. Indeed, in our utilitarian legal world, it may not be long before judges declare that "capital punishment implicates a life interest." LEXIS indicates that the phrase "liberty interest" has appeared in majority or dissenting opinions in 85 Supreme Court cases and that the same phrase has appeared in more than 1000 United States Court of Appeals opinions. The first appearance of the phrase in a court of appeals opinion came during the same year that it first appeared in a Supreme Court opinion, 1972. The annual total of court of appeals cases in which this solecism appeared increased rapidly thereafter. In 1973, the phrase appeared in 3 cases; in 1976, in 33 cases; in 1979, in 58 cases; in 1982, in 80 cases; and in 1985, in 167 cases. LEXIS searches conducted by James Fleissner, J.D., University of Chicago (Genfed library, US and USAPP files) (Sept. 1986).

94. 467 U.S. at 288 (Marshall, J., dissenting) (citations omitted). At another point in his opinion, Justice Marshall said that the New York statute could be justified "only by a weighty public interest." 467 U.S. at 291. He elaborated on the appropriate constitutional standard in a footnote:

This standard might be refined in one of two ways. First, it might be argued that because [the New York statute] impinges upon "[l]iberty from bodily restraint," which has long been "recognized as the core of the liberty protected by the Due Process Clause," the provision can pass constitutional muster only if it promotes a "compelling" governmental interest. Alternatively, it might be argued that the comparatively brief period of incarceration permissible under the provision warrants a slight lowering of the constitutional bar. . . . [I]t

In the end, however, the dissenting opinion did not doubt what the majority opinion had said cannot be doubted — that the government's interest in preventing crime is both legitimate and compelling. The opinion concluded: "[E]ven if the purposes identified by the majority are conceded to be compelling, they are not sufficiently promoted by detention pursuant to [the New York statute] to justify the concomitant impairment of the juveniles' liberty interests."⁹⁵ This article will examine Justice Marshall's analysis of what legal jargon sometimes calls "the means-end fit" after exploring some general implications of interest balancing.

C. *The Implications of Schall*

When the framers of the fourteenth amendment spoke of liberty, they referred to freedom from imprisonment much more clearly than they did to reproductive freedom, the ability to engage in interstate travel, or the right to vote.⁹⁶ Moreover, constitutional history aside, imprisonment seems, short of death, the most serious deprivation of liberty that governments commonly inflict. When Justice Marshall maintained that freedom from imprisonment qualifies as a "fundamental" interest if any does, he voiced common sense.

Criminal codes, however, contain innumerable statutes that authorize what Justice Marshall called "deprivation[s] of liberty in this basic sense." The Justice's interpretation of the due process clause would empower courts to consider whether each of these statutes advanced a "very important" governmental interest. After assessing the

might be held that an important — but not quite "compelling" — objective is necessary . . .

In the present context, there is no need to choose between these doctrinal options . . .
467 U.S. at 291 n.15 (citations omitted).

Elsewhere in his opinion, Justice Marshall implied that the Court might engage in open-ended balancing that would make any tier-specification unnecessary. He rephrased the first of the majority's questions (whether the New York preventive detention statute advanced a legitimate state objective) as whether "the provision promotes legitimate governmental objectives *important enough* to justify the abridgment of the detained juveniles' liberty interests." 467 U.S. at 283 (emphasis added). He also wrote, "To comport with 'fundamental fairness,' [the statute] must advance goals commensurate with the burdens it imposes on constitutionally protected interests." 467 U.S. at 288. Cf. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (arguing for "a spectrum of standards . . . comprehend[ing] variations in the degree of care with which the Court will scrutinize particular classifications").

95. 467 U.S. at 293.

96. See E. CORWIN, *LIBERTY AGAINST GOVERNMENT* 90-115, 140-42 (1948); Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 439-42 (1926); Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect, "Life, Liberty, and Property,"* 4 HARV. L. REV. 365, 368-69, 382 (1891). Although the Supreme Court declined in *Schall* to classify the freedom from institutional confinement as "fundamental," it earlier had accorded that special status to the other freedoms mentioned in the text. See *Roe v. Wade*, 410 U.S. 113, 155 (1973) (reproductive freedom); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (interstate travel); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (the right to vote).

reasons for prohibiting marihuana possession, heroin possession, incest, adultery, polygamy, prostitution, gambling, price-fixing, public drunkenness, and dozens of other activities, the courts would invalidate all prohibitions that failed this demanding test.

The Supreme Court's failure to classify freedom from imprisonment as a fundamental interest denied an obvious truth, but it withheld the broad power that Justice Marshall would have afforded the judiciary. The majority's approach to the due process clause empowered courts to reassess only the "legitimacy" of the interests supporting criminal statutes. In *Bowers v. Hardwick*,⁹⁷ however, the Supreme Court seemed to doubt that it should have even this power to second-guess state and federal legislatures. If *Bowers* was correctly decided — indeed, if the Supreme Court should stop anywhere short of the position advocated by Justice Marshall — the process of two-tiered interest balancing must be deeply flawed. A straightforward application of the Court's two-tiered formula would lead to Justice Marshall's position.

Unlike the Court's current interest-balancing interpretations, "fundamental fairness" views of the due process clause do not invite courts to invalidate all criminal statutes that fail to advance "legitimate" or "compelling" governmental interests. These interpretations reflect a sense of judicial restraint lacking in more utilitarian formulations. At the same time, these interpretations also embody a different concept of appropriate judicial activism; they do not fade away whenever a "legitimate" or "compelling" governmental interest appears. These interpretations insist that some indignities cannot be excused by the fact that they advance strong interests. Treating each individual as an "end in himself,"⁹⁸ they assert that people sometimes have more than interests; they have rights.

*Rochin v. California*⁹⁹ illustrates this difference in approach. In *Rochin*, three deputy sheriffs broke into a bedroom without probable cause; discovered a partially dressed narcotics suspect and his wife; noticed two capsules on a nightstand and asked, "Whose stuff is this?"; then, when the suspect placed the capsules in his mouth, "jumped upon" him and struggled to recover the capsules; and finally took the suspect to a hospital where, at their direction, a doctor forced a tube into the suspect's stomach, poured down an emetic solution to

97. 106 S. Ct. 2841 (1986). *Bowers* is described in text at notes 76-81 *supra*.

98. See I. KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS, in THE MORAL LAW 96 (H. Paton trans. 1967).

99. 342 U.S. 165 (1952).

induce vomiting, and recovered the capsules. The capsules led to the suspect's conviction of morphine possession.

In his opinion for the Supreme Court in 1952, Justice Frankfurter noted that "[s]tates in their prosecutions [must] respect certain decencies of civilized conduct."¹⁰⁰ He described the due process clause as "a summarized constitutional guarantee of respect for those personal immunities which . . . are 'implicit in the concept of ordered liberty.'"¹⁰¹ Calling the sheriffs' behavior "conduct that shocks the conscience,"¹⁰² the Court reversed the suspect's conviction.

If the Supreme Court were to analyze *Rochin* under the due process clause today, it might proceed in a different way.¹⁰³ The Court might note that the sheriffs' brutality had implicated a "liberty interest," probably a "fundamental" liberty interest; then it might insist that all acts of police brutality must be justified by "compelling" governmental interests.¹⁰⁴ Presumably the Court would not deny, however, that the state's interest in the enforcement of its narcotics laws is compelling, nor would it deny that the methods employed in *Rochin* had advanced this interest in a direct and substantial way (satisfying the constitutional requirement of an appropriate "means-end fit"¹⁰⁵). If the Court took its two-tiered, interest-balancing formula seriously, it would affirm the suspect's conviction. The Court's current view of the due process clause, if seriously intended, would invalidate all penal statutes that failed to advance important interests while upholding all police brutality that did further important interests. This view seems at once too activist and too restrained.

D. *Balancing and Detention: Of Predicates and Predictions*

Predictions of future misconduct frequently influence decisions about whether and how long to imprison people. They inform the imposition of sentence (including the choice between prison and probation), the grant or denial of bail pending appeal, the decision

100. 342 U.S. at 173.

101. 342 U.S. at 169 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

102. 342 U.S. at 172.

103. Because the Supreme Court has now "incorporated" the fourth amendment's prohibition of unreasonable searches and seizures within the due process clause, it probably would not invoke its general due process standards in a case like *Rochin*. It would instead analyze the case as though the fourth amendment were directly applicable. See *Winston v. Lee*, 470 U.S. 753 (1985).

104. Cf. *Winston*, 470 U.S. at 762 ("Weighed against these individual interests [described as 'the life or health of the suspect' and his 'dignitary interests in personal privacy and bodily integrity,' 467 U.S. at 761] is the community's interest in fairly and accurately determining guilt or innocence.").

105. See text at notes 121-28 *infra*.

whether to release on parole, and many other choices within the criminal justice system.¹⁰⁶ In addition, various forms of civil commitment rest in part on official assessments of dangerousness.

Almost invariably, however, preventive detention requires something more — some additional predicate for a deprivation of liberty, some perceived moral requisite to making the official prediction. This “something more” is sometimes a status, one that suggests a person’s inability to control the danger that he poses. Civil commitment statutes typically authorize the detention, not of everyone thought dangerous to himself or others, but of people who appear “mentally ill” and dangerous or who are thought dangerous because they have a communicable disease.¹⁰⁷ Within the criminal justice system, however, the predicate is rarely a status. It is instead an act,¹⁰⁸ one that bespeaks culpability and that itself is believed to justify an exercise of state power. In assessing measures of preventive detention, it is appropriate to consider both the strength of the asserted predicate for prediction and the strength of the prediction itself.

The preventive pretrial detention authorized by the Federal Bail Reform Act of 1984 and by recent state enactments¹⁰⁹ lacks the predicate for prediction that our criminal justice system most frequently requires, proof of voluntary wrongdoing beyond a reasonable doubt. For this reason, some opponents of preventive detention have contended that the incarceration only of people charged with crime is irrational; this detention rests on a principle that would authorize the imprisonment of everyone thought dangerous.¹¹⁰ This objection seems unsound. A charge of past misconduct, coupled with a determination of probable cause,¹¹¹ provides a predicate for prediction. This predi-

106. For lists of situations in which criminal justice officials make predictions of future behavior, see J. MONAHAN, *PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES* 22-23 (1981); Morris & Miller, *Predictions of Dangerousness*, 6 *CRIME & JUSTICE: AN ANNUAL REVIEW OF RESEARCH* 1, 4 n.2, 7-10 (M. Tonry & N. Morris eds. 1985).

107. See, e.g., ILL. REV. STAT. ch. 91 1/2 para. 1-119 (1985) (authorizing involuntary confinement when a person is “mentally ill and . . . because of his illness is reasonably expected to inflict serious physical harm upon himself or another in the near future”); ILL. REV. STAT. ch. 111 1/2 para. 22 (1985) (affording the Department of Public Health “supreme authority in matters of quarantine”); *People ex rel. Barmore v. Robertson*, 302 Ill. 422, 433-34, 134 N.E. 815, 819-20 (1922) (interpreting the latter statute to authorize the involuntary confinement of people with communicable diseases).

108. Cf. *Robinson v. California*, 370 U.S. 660 (1962) (holding criminalization of the status of being a narcotics addict unconstitutional).

109. E.g., 18 U.S.C. §§ 3141-3156 (Supp. II 1984); CALIF. CONST. art. I, § 12(b); COLO. CONST. art. II, § 19; TEXAS CONST. art. I, § 11a.

110. See, e.g., Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 405 (1970).

111. See *Gerstein v. Pugh*, 420 U.S. 103 (1975) (described in text at notes 207-10 *infra*).

cate may be slight. It may in fact be constitutionally inadequate.¹¹² Nevertheless, even this limited predicate differentiates current schemes of pretrial detention from "pure" preventive detention schemes — schemes grounded solely on official judgments of dangerousness that look to the future without regard for the past.¹¹³

The assessment of a "pure" preventive detention scheme may, however, provide a foundation for analyzing the less restrictive enactments of Congress and state legislatures. Imagine that psychologists at Menninger University have developed a written test, the Menninger Multiphasic Dangerousness Inventory or MMDI. The test asks subjects to record the extent of their agreement or disagreement with statements like: "My mother is insecure," "My father obtained a better-paying job at least once during my childhood," "I prefer western movies to situation comedies," "I sometimes wet my bed as a child," and "I am fascinated by fire."¹¹⁴ After pretesting and refining the MMDI, the psychologists have administered it to a large random sample of the population. Careful follow-up studies have revealed that, although only 0.7 percent of the population scored 140 points or higher on the test, 69.2 percent of the subjects with these high scores were convicted of serious crimes within the next two years.

Impressed by this evidence, a state legislature has required everyone to take the MMDI. It has provided for the administrative detention in secure but nonpunitive facilities of people who score 140 points or higher. Prior to detention, these people are to be afforded hearings with full procedural safeguards on the single determinative issue — whether they failed the test. They are to be detained only until they reduce their scores to an acceptable level. The principal constitutional issue posed by this scheme of "pure" (or predicate-less) preventive detention is one of substantive rather than procedural due process,¹¹⁵

112. See text at notes 177-253 *infra*.

113. In *United States v. Salerno*, 794 F.2d 64 (2d Cir.), *cert. granted*, 107 S. Ct. 397 (1986), the United States Court of Appeals for the Second Circuit maintained that the pretrial detention authorized by the Federal Bail Reform Act of 1984 cannot be distinguished from detention solely on grounds of dangerousness. This argument provides one of the few points of disagreement between the opinion in *Salerno* and this article.

114. Agreement with propositions like these may in fact indicate dangerous propensities. See J. MONAHAN, *supra* note 106, at 69-71; Yesavage, Werner, Becker & Mills, *Short-Term Civil Commitment and the Violent Patient*, 139 AM. J. PSYCHIATRY 1145, 1149 (1982) ("[A] number of BPRS scales [Brief Psychiatric Rating Scales] were significantly associated with inpatient violent behavior. For example, total BPRS scores and scale scores for grandiosity, excitement, unusual thought content, anxiety, and conceptual disorganization were significantly correlated with total ward behavior scores.").

115. The effort to characterize due process questions as either "substantive" or "procedural" sometimes seems artificial. By characterizing the MMDI as a "procedure" for determining dangerousness, one might contend that its use raises procedural rather than substantive issues. By

and analysis of this issue requires further examination of the Supreme Court's decision in *Schall v. Martin*.

Schall considered only the preventive detention of juveniles, and the Court indicated that the detention of adults would pose different issues. After noting that a juvenile's "interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial," the majority said: "But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody."¹¹⁶

This statement provoked a strident response of the sort that has become increasingly common in Supreme Court opinions. Justice Marshall wrote in dissent that the majority's "characterization of preventive detention as merely a transfer of custody from a parent or guardian to the State is difficult to take seriously."¹¹⁷ The majority, however, had not characterized preventive detention merely as a transfer of custody from a parent to the state. To the contrary, it had recognized that a juvenile's interest in freedom from institutional restraints is substantial. The Justices in the majority apparently did think it relevant, however, that juveniles have less freedom than adults. Without affording them hearings, the state effectively deprives children of liberty when it detains them in schools for most of the day. Moreover, when juveniles run away, the state sends them home. Although full-time institutional confinement restricts juveniles as much as adults, the deprivation of liberty may be somewhat less for juveniles because juveniles have somewhat less liberty to begin with.

Much more importantly, there are reasons for the state's assertion of special power over juveniles. The majority noted in *Schall* that "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves."¹¹⁸ In schemes of preventive pretrial detention for adult criminal defendants, the only predicate for detention other than a prediction of future misconduct is the act that has led to the filing of a criminal charge — an act not yet established by proof beyond a reasonable doubt or even by a preponderance of the evidence. In schemes of pretrial detention for juveniles, by contrast, the predicate is both an act and a status, a status that suggests an incomplete ability to control assertedly dangerous behavior. An arrest for delinquency offers at least some reason to suspect, in the majority's words, that "parental

the same token, one might characterize a seemingly substantive drunk driving provision as establishing a procedure for identifying and isolating those drivers who are likely to have accidents.

116. 467 U.S. at 265.

117. 467 U.S. at 289.

118. 467 U.S. at 265.

control [may have] falter[ed].”¹¹⁹ When a preliminary inquiry offers additional reason for concern, the state may respond to the perceived parental failure in the short run while it considers how best to respond to it in the long run.

In judging the constitutionality of the pretrial detention of adults, a court might distinguish *Schall* on the ground that the detention of juveniles presents different issues. For the court then to treat *Schall* as irrelevant, however, would be disingenuous. *Schall*’s significance as a precedent lies primarily in the framework of analysis that the Supreme Court employed, and this framework appears to make immaterial every difference between the detention of juveniles and the detention of adults.

Indeed, the Court’s two-tiered framework seems to mandate the conclusion not only that every scheme of adult pretrial detention enacted by state and federal legislatures is constitutional but that detention simply on the basis of test scores would be constitutional as well. This framework omits any consideration of the moral predicate traditionally required for detention. The Court’s formula looks to the “liberty interest” lost when a person is imprisoned and to the “governmental interest” advanced by this imprisonment. The absence of past misconduct or of an inability to control one’s behavior does not seem to matter at all.

The “liberty interest” of adults may be stronger than the “liberty interest” of juveniles. Under the Supreme Court’s two-tiered formula, however, a compelling governmental interest triumphs over every liberty interest. The governmental interest supporting existing schemes of adult preventive detention — and supporting schemes that would detain people who have failed psychological tests — is no different from the governmental interest that supported the scheme of detention in *Schall*: “The ‘legitimate and compelling state interest’ in protecting the community from crime cannot be doubted.”¹²⁰ The detention of adults can advance this interest as much as the detention of juveniles, and so may detention on the basis of test scores. If taken seriously, current modes of legal analysis end the battle over the preventive detention of adults before a shot has been fired. Indeed, they deliver overwhelming armaments to those who would uphold “pure” schemes of preventive detention on the basis of psychological tests.

119. 467 U.S. at 265.

120. 467 U.S. at 264.

III. THE JUSTICE AND LEGITIMACY OF SOME FORMS OF PREVENTIVE PRETRIAL DETENTION

A. *A Prediction and the Means-End Fit: Of False Positives and False Science*

Under the Supreme Court's decisions, the fact that a challenged governmental action advances a compelling interest is not always decisive. The Court sometimes considers how much the challenged action advances this governmental interest. In one context it has said, "If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present."¹²¹ Descriptions of the required "means-end fit" have varied enormously, however, both because the issue has arisen in different contexts¹²² and because the Court typically has resolved it in a quick word or phrase. The Court sometimes has said only that a challenged governmental action must not be "wholly irrelevant to the achievement of the State's objective"¹²³ or that it must not "achieve[] its purpose in a patently arbitrary or irrational way."¹²⁴ On other occasions, the Court has said that the challenged action must "directly advance[] the governmental interest asserted,"¹²⁵ "must be substantially related to the achievement of [its] objectives,"¹²⁶ or must have "a fair and substantial relation to the object of the legislation."¹²⁷ On still other occasions, the Court has said that the challenged action must be "'necessary . . . to the accomplishment' of its purpose."¹²⁸

In his dissent in *Schall*, Justice Marshall invoked the "means-end" branch of the Supreme Court's two-tiered, interest-balancing, due process formula. He protested that preventive detention was not preventive enough to achieve a suitable means-ends match:

Both of the courts below concluded that only occasionally and accidentally does pretrial detention of a juvenile under [the New York statute] prevent the commission of a crime. . . . Family Court judges are incapable of determining which of the juveniles who appear before them

121. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

122. "Heightened" judicial scrutiny apparently requires a tighter "means-end fit" than "mid-level" review; and "mid-level" review requires a tighter "fit" than "ordinary" review. Although it is difficult to say, the Supreme Court also may have created different standards for "commercial" speech, "symbolic" speech, and speech limited as to "time, place, and manner."

123. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

124. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 177 (1980).

125. *Central Hudson Gas & Elec. v. Public Serv. Commn.*, 447 U.S. 557, 566 (1980).

126. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

127. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

128. *In re Griffiths*, 413 U.S. 717, 722 (1973) (quoting *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964)); see *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

would commit offenses before their trials if left at large and which would not. . . . On the basis of evidence adduced at trial, supplemented by a thorough review of the secondary literature, the District Court found that "no diagnostic tools have as yet been devised which enable even the most highly trained criminologists to predict reliably which juveniles will engage in violent crime." The evidence supportive of this finding is overwhelming.¹²⁹

The majority responded:

Our cases indicate . . . that from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions, and we have specifically rejected the contention, based on the same sort of sociological data relied upon by appellees and the District Court, "that it is impossible to predict future behavior and that the question is so vague as to be meaningless."¹³⁰

Justice Marshall's observation that all of the cases upon which the majority relied involved defendants already convicted of crime¹³¹ did not answer the majority's contention. The Supreme Court had indeed, "from a legal point of view," rejected the proposition upon which Justice Marshall relied, the asserted impossibility of predicting criminal behavior.

This proposition, however, has been widely accepted elsewhere. John Monahan has written, "Rarely have research data been as quickly or nearly universally accepted by the academic and professional communities as those supporting the proposition that mental health professionals are highly inaccurate at predicting violent behavior."¹³² Monahan has summarized the social science research by saying:

[T]he "best" clinical research currently in existence indicates that psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several-year period among institutionalized populations that had both committed violence in the past . . . and who were diagnosed as mentally ill.¹³³

129. *Schall*, 467 U.S. at 293-94 (quoting *United States ex rel. Martin v. Strasburg*, 513 F. Supp. 691, 708 (S.D.N.Y. 1981), *aff'd*, 689 F.2d 365 (2d Cir. 1982), *rev'd. sub nom. Schall v. Martin*, 467 U.S. 253 (1984)). Justice Marshall argued in addition that the limited information available to a New York judge at the time of a detention hearing aggravated the difficulty of accurate prediction. 467 U.S. at 294.

130. 467 U.S. at 278-79 (quoting *Jurek v. Texas*, 428 U.S. 262, 274 (1976) (plurality opinion)).

131. 467 U.S. at 294 n.20.

132. J. MONAHAN, *supra* note 106, at 27.

133. *Id.* at 77 (emphasis omitted); see also B. ENNIS & R. EMERY, *THE RIGHTS OF MENTAL PATIENTS* 20 (1978) ("[I]t now seems beyond dispute that mental health professionals have no expertise in predicting future dangerous behavior, either to self or others. In fact, predictions of dangerous behavior are wrong about 95 percent of the time.") (emphasis in original); Monahan, *The Prediction of Violent Behavior: Toward a Second Generation of Theory and Policy*, 141 AM.

Although the academic research has focused primarily on predictions by mental health professionals, there is little reason to believe that judges can predict what psychologists and psychiatrists cannot.

Justice Blackmun and two other Justices who joined his dissenting opinion in *Barefoot v. Estelle*¹³⁴ accepted this pessimistic view of the social science findings. The issue in *Barefoot* was whether the Constitution allows the introduction of psychiatric predictions of violence at capital sentencing hearings, and Justice Blackmun wrote, "The Court holds that psychiatric testimony about a defendant's future dangerousness is admissible, despite the fact that such testimony is wrong two times out of three."¹³⁵ Justice Blackmun's statement, however, was inaccurate or misleading in six significant respects. Contrary to the "nearly universal" view of academic and professional communities, the available evidence does not support the claim that predictions of future criminality are inherently or even usually inaccurate. A fair assessment of current predictive capacities offers no basis for condemning all forms of preventive pretrial detention. Moreover, the Supreme Court's two-tiered formula yields no other credible objections to preventive incarceration. Stronger objections to this detention (at least in the form authorized by the Federal Bail Reform Act of 1984) lie elsewhere.

First, no study has suggested that "psychiatric testimony about a defendant's future dangerousness . . . is wrong two times out of three." In predicting whether a flipped quarter will come up "heads," a random guess may prove accurate half the time; and if one can anticipate that an event will occur more frequently than not or less frequently than not, one can improve this fifty percent average by automatically predicting it or failing to predict it in every case. To be wrong substantially more than half the time in a series of yes-or-no predictions is to be very wrong, and no study has claimed that even mental health professionals are so bad.

The literature of prediction distinguishes between "positive" predictions — judgments that an event will occur — and "negative" predictions — judgments that the event will not occur. This literature speaks of "true positives" (predictions of the event's occurrence that later are vindicated), "false positives" (predictions of the event's oc-

J. PSYCHIATRY 10, 10 (1984) ("Even in the best of circumstances — with lengthy multidisciplinary evaluations of persons who had already manifested their violent proclivities on several occasions — psychiatrists and psychologists seemed to be wrong at least twice as often as they were right when they predicted violence."); Morris & Miller, *supra* note 106, at 3.

134. 463 U.S. 880 (1983).

135. 463 U.S. at 916 (Blackmun, J., dissenting).

currence that later appear false), "true negatives" (predictions of the event's nonoccurrence that later are verified), and "false negatives" (predictions of the event's nonoccurrence that later appear incorrect).¹³⁶

Contrary to Justice Blackmun's apparent suggestion, the claim that the predictions of mental health professionals are wrong two-thirds of the time speaks only of their positive predictions. In one influential study, for example, only 34.7 percent of the patients classified as dangerous by mental health professionals but released by a court committed serious assaults within five years.¹³⁷ In this study as in every other, however, the professionals' negative predictions, judged by the same measure, were overwhelmingly accurate. Ninety-two percent of the patients released by the court with the professionals' approval were not arrested for serious assaults within the study period.¹³⁸ The professionals therefore were not wrong two-thirds of the time; they were correct eighty-six percent of the time.¹³⁹

In assessing schemes of preventive detention, focusing exclusively on positive predictions may be appropriate. The ratio of "true positives" to "false positives" is more important than the overall rate of predictive success. Only a "true positive" prediction can prevent a crime; only a "false positive" prediction can lead to incarceration that in fact serves no incapacitative purpose. Nevertheless, Justice Blackmun was in error in *Barefoot* when he characterized the predictions of mental health professionals as "less accurate than the flip of a coin."¹⁴⁰

Second, even the ratio of true positive predictions to false positive predictions commonly has exceeded one in three. Indeed, because the overall recidivism rate of people convicted of crime is approximately

136. See J. MONAHAN, *supra* note 106, at 47-49.

137. Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQ. 371, 390 (1972).

138. *Id.*

139. See *id.* at 389-90 (31 of 386 patients classified as nondangerous were arrested for serious assaults within the study period and were therefore viewed as "false negatives"; 32 of 49 patients classified as dangerous but released by the court were not arrested for serious assaults within the study period and were therefore viewed as "false positives"; the overall error rate accordingly was 63 of 435 cases or 14 percent). Moreover, the assertion that the professionals were correct 86 percent of the time omits 226 cases in which they might have been correct — those in which judges accepted the professionals' assessments of dangerousness and ordered hospitalization so that no experimental evaluation could occur. See *id.* at 378; text at notes 151-52 *infra*.

It seems worth noting as a postscript to this observation that 14 of the 49 released patients whom the authors had classified as dangerous would not have been so classified under criteria that the authors later developed; the exclusion of these patients probably would have yielded a ratio of true to false positives greater than fifty percent. See Kozol, Boucher & Garofalo, *Dangerousness*, 19 CRIME & DELINQ. 554, 554-55 (1973) (letter to the editor in reply to Monahan).

140. 463 U.S. at 931 (Blackmun, J., dissenting) (quoting Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 737 (1974)).

one in three,¹⁴¹ positive predictions based only on the single variable of past conviction would achieve what most commentators appear to regard as the highest degree of accuracy attainable by current methods. Prior imprisonment for a felony, moreover, is a significantly better predictor of future criminality than prior conviction. Treating penitentiary imprisonment, by itself, as a predictor of recidivism¹⁴² apparently would improve the ratio of true to false positives to fifty percent or more. Sixty percent of a sample of 539 inmates released from Illinois penitentiaries were arrested for new crimes within twenty-nine months of their release;¹⁴³ and although rearrest rates were higher for offenders who had committed crimes against property than for violent offenders,¹⁴⁴ half of the violent offenders in the sample were arrested for new crimes within the study period.¹⁴⁵ More than three-quarters of the youngest group of released inmates and more than three-quarters of the inmates who had been incarcerated on three prior occasions were arrested.¹⁴⁶ In short, when future arrest is the variable to be predicted, isolating some groups whose actuarial "base expectancy rate" greatly exceeds one in three does not seem difficult. Indeed, even when subsequent conviction (rather than arrest) is the dependent variable, some identifiable groups of violent, repeat offenders appear to have "base expectancy rates" of fifty percent or more.¹⁴⁷ A number of

141. See C. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 373 (1978); D. GLASER, *THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM* 13-35 (1964).

142. I refer to recidivism measured by arrest rather than conviction. See note 155 *infra*.

143. See ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY, *RESEARCH BULLETIN* No. 3: *THE IMPACT OF PRIOR CRIMINAL HISTORY ON RECIDIVISM IN ILLINOIS* 1, 4 (1986) [hereinafter *RECIDIVISM IN ILLINOIS*].

144. Recidivism rates generally are somewhat lower for violent than for nonviolent offenders. See BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPARTMENT OF JUSTICE, *SPECIAL REPORT: EXAMINING RECIDIVISM* 4, table 6 (1985).

145. *RECIDIVISM IN ILLINOIS*, *supra* note 143, at 7.

146. *Id.* at 1, 2.

147. Three different British samples demonstrated "that one variable alone — having three or more previous convictions for violence — identified groups of offenders of whom more than [fifty percent] were subsequently reconvicted of violence." J. FLOUD & W. YOUNG, *DANGEROUSNESS AND CRIMINAL JUSTICE* 184 (1981). In each of the British studies, there was reason to believe that the fifty percent figure was conservative. One of these studies followed the criminal careers of 264 people who had been initially convicted of violent offenses in 1947. By 1958, 55 percent of the people who had been convicted of a fourth violent offense also had been convicted of a fifth. At the time of the study's cut-off date, some people might have been convicted of their fourth offenses so recently that they simply had not had adequate opportunities to commit further crime. Many, in fact, might have been in prison. Each of the other studies followed their subjects for five or six years after they had been convicted of violent offenses a third or fourth time. The studies reported the commission of additional violent crimes (measured by conviction, not arrest) by 52 percent and 54 percent of the subjects. Presumably some of these subjects also had been incarcerated during most or all of the follow-up period. They, too, might have been substantially disabled from joining the ranks of "true positives." See *id.* (describing N. WALKER, W. HAMMOND & D. STEER, *THE VIOLENT OFFENDER — REALITY OR ILLUSION?* (Oxford University Penal Research Unit Occasional Paper No. 1, 1970) (reporting the results of two

studies of clinical ("nonactuarial") predictions similarly have yielded substantially better than one-to-three ratios of true to false positives.¹⁴⁸

Third, virtually all of the studies that yielded low ratios of true to false positives (and most other studies as well) grew out of two situations — those in which courts rejected the recommendations of mental health professionals and ordered the release of people whom these professionals had classified as dangerous¹⁴⁹ and those in which courts ordered the transfer of people from institutions for the "criminally insane" (where they apparently had been confined because psychologists had regarded them as dangerous¹⁵⁰) to other mental facilities.¹⁵¹ In the first situation, arrest for a violent crime within a specified period was treated as the measure of accuracy of a professional judgment of dangerousness; in the second, the commission of assaults in the "non-criminal" hospitals tested whether the earlier judgments of dangerousness had been correct.

The recommendations of mental health professionals that judges reject, however, are likely to be less well grounded than those that they accept. The professional recommendations that yielded low ratios of true to false positives were those that initially had seemed most dubious. Certainly if all of the people whom the professionals had classified as dangerous had been released, their ratio of true to false

studies); G. PHILLPOTTS & L. LANCUCKI, PREVIOUS CONVICTIONS, SENTENCE AND RECONVICTION: A STATISTICAL STUDY OF A SAMPLE OF 5000 OFFENDERS CONVICTED IN JANUARY 1971 (Home Office Research Study No. 53, 1979)).

148. See Dept. of Public Safety & Correctional Services, State of Maryland, Maryland's Defective Delinquency Statute — A Progress Report (1978) (unpublished) [hereinafter Maryland Report] (summarized in J. MONAHAN, *supra* note 106, at 73-74) (46 percent of the patients released unconditionally against staff advice committed new offenses — not necessarily violent offenses — within three years; 39 percent of those released to outpatient treatment against staff advice committed new offenses; and 7 percent of those released to outpatient treatment with staff approval committed new offenses); Steadman, *A New Look at Recidivism Among Patuxent Inmates*, 5 BULL. AM. ACAD. PSYCHIATRY & L. 200, 209 (1977) (41 percent of the patients released against staff advice apparently committed violent offenses within three years while 31 percent of those released with staff approval did so); Hodges, *Crime Prevention by the Indeterminate Sentence Law*, 128 AM. J. PSYCHIATRY 291, 293 (1971) (81 percent of the convicted sex offenders who, contrary to staff advice, were not confined committed new crimes within three years; 71 percent of those initially confined but later released against staff recommendations committed new crimes; and 37 percent of those released with staff approval committed new crimes).

149. *E.g.*, Maryland Report, *supra* note 148; Cohen, Groth & Siegal, *The Clinical Prediction of Dangerousness*, 24 CRIME & DELINQ. 28 (1978); Steadman, *supra* note 148; Kozol, Boucher & Garofalo, *supra* note 137; Hodges, *supra* note 148.

150. See Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1093-94 (1976) (recognizing that the authors' earlier study had inferred psychiatric judgments of dangerousness from the fact that patients had been confined in hospitals for the criminally insane; no direct evidence of these psychiatric judgments — or of how long ago they had been made — was available).

151. See H. STEADMAN & J. COCOZZA, CAREERS OF THE CRIMINALLY INSANE (1974); T. THORNBERRY & J. JACOBY, THE CRIMINALLY INSANE: A COMMUNITY FOLLOW-UP OF MENTALLY ILL OFFENDERS (1979).

positives might have been much higher.¹⁵² Similarly, the failure of mental patients to commit assaults while they remained in custody (presumably with attendants at the elbow much of the time) provides weak evidence that they had been erroneously classified as dangerous.¹⁵³

Fourth, none of the studies involved predictions of the behavior of people recently convicted of capital murder (the relevant population in *Barefoot*) or of people recently arrested for serious crimes (the people generally subject to preventive pretrial detention under current state and federal enactments). It might be substantially easier to attain a high ratio of true to false positives with these high-risk groups than with people whom judges had released to the community and with transferred mental patients who had been confined for an average of fifteen years and whose average age was fifty-two.¹⁵⁴ The most clearly dangerous people are rarely the subjects of empirical study. When these people appear recently to have manifested their dangerousness in serious criminal conduct, courts do not often release them. Nevertheless, the ability to identify these people was at issue in *Barefoot* and is at issue in evaluating current schemes of preventive pretrial detention.

Fifth, although an arrest for a violent crime may validate a mental health professional's judgment of dangerousness,¹⁵⁵ the failure to arrest for a violent crime does not falsify this judgment. Many crimes go undetected, and the number of false positives cannot be known. To assume that the professionals' predictions were correct more frequently than subsequent arrests proved them correct would be inappropriate. Nevertheless, to characterize the unverified predictions as "wrong," as Justice Blackmun did in *Barefoot*, would be equally inap-

152. See Litwack, *The Prediction of Violence*, CLINICAL PSYCHOLOGIST, Fall 1985, at 87, 87-88. Moreover, if a low ratio of true to false positives among released patients indicates the inability of professionals to make accurate predictions, it also indicates the judges' predictive success. All of the cases that were false positives for the professionals appear to have been true negatives for the judges.

153. Some of the transferred patients ultimately were released to the community where, within two and one-half years, only eight percent were convicted of new offenses. See Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-1970*, 129 AM. J. PSYCHIATRY 304, 307-08 (1972). Presumably, however, these patients — a small minority of all the transferred patients — had been released only because they no longer were considered sufficiently dangerous to confine. But cf. H. STEADMAN & J. COCOZZA, *supra* note 151, at 117-18, 125 (concluding, oddly, that release decisions were not based on "past and present dangerousness" while reporting that they were based on psychiatric "improvement").

154. See *id.* at 78. To infer an inability to predict the future criminality of capital murderers from studies of aging mental patients is like inferring an odds-maker's inability to predict a New York Giants victory over the Slippery Rock eleven from his low rate of success in predicting the team's victories over the Denver Broncos.

155. Arrest may be a better factual indicator of guilt than conviction in an overburdened legal system that affords prosecutors broad discretion to decline, divert, and bargain. Obviously, however, arrest remains a fallible indicator.

propriate. All of the studies established only the professionals' minimum rate of success.¹⁵⁶

The sixth reason why the empirical studies fail to establish either the impossibility of predicting criminal conduct or the failure of past efforts is the most significant. An anecdote recounted by John Monahan indicates a defect of all of these studies:

[At a judicial sentencing conference] I gave my stock speech about the probability of violence never being higher than 1-in-3 in the research. A judge raised his hand and said that he recently had a case of a murderer with a large number of prior violent offenses who, when asked if he had anything to say before sentence was imposed, stated "if I get out, the first thing I am going to do is murder the prosecutor, the second thing I am going to do is murder you, Your Honor, the third thing I am going to do is murder every witness who testified against me and the fourth thing I am going to do is murder each member of the jury." The judge asked if I thought that this person's probability of violence was no greater than 1-in-3. I called for a coffee break.¹⁵⁷

Although predicting the weather is a difficult task, almost anyone can do it when a funnel cloud is headed in his direction.¹⁵⁸ Norval Morris and Marc Miller, after accepting the common judgment that future violence cannot be predicted with greater than one-in-three accuracy, recognized that the cases of "a few very rare individuals" of-

156. For speculation about how many of the professionals' unverified predictions were likely to have been false, see J. MONAHAN, *supra* note 106, at 81-85.

My objection to the common academic disparagement of the predictions of mental health professionals should not be read as claiming that the professionals have special predictive powers. None of the studies have examined whether professionals are more successful at predicting behavior than lay people, and the judgment of the American Psychiatric Association is that psychiatrists have no special ability to predict violent behavior. See *Barefoot*, 463 U.S. at 899-902 (describing an amicus brief filed by the APA); AMERICAN PSYCHIATRIC ASSOCIATION, CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL 30 (1974); American Psychological Association, *Report of the Task Force on the Role of Psychology in the Criminal Justice System*, 33 AM. PSYCHOLOGIST 1099, 1110 (1978).

Similarly, the discussion in the text should not be read as endorsing the Supreme Court's affirmation of the death sentence in *Barefoot*. One of the psychiatrists who testified in *Barefoot* was Dr. James Grigson, Dallas' infamous "Dr. Death." Although Dr. Grigson had never examined Barefoot and although the only act of violence of which Barefoot had been convicted was the one for which he was to be sentenced, Dr. Grigson testified on the basis of hypothetical questions that the likelihood that Barefoot would commit future crimes of violence was "one hundred percent and absolute." Judging "sociopathic personality disorder" on a scale of one to ten, Dr. Grigson rated Barefoot "above ten." *Barefoot*, 463 U.S. at 919 (Blackmun, J., dissenting). A death sentence that may have rested in part on Dr. Grigson's testimony seems as inconsistent with due process as one grounded on a prophesy of future violence by Jeanne Dixon.

157. Letter from John Monahan to Norval Morris (Feb. 27, 1984), *quoted in* Morris & Miller, *supra* note 106, at 17 n.14.

158. See Litwack, *supra* note 152, at 87 ("There is no research that contradicts the common sense notion that when an individual has clearly exhibited a recent history of repeated violence, it is reasonable to assume that that individual is likely to act violently again in the foreseeable future unless there has been a significant change in the attitudes or circumstances that have repeatedly led to violence in the recent past.").

fered exceptions to this generalization.¹⁵⁹ These funnel clouds, however, should not merely be acknowledged and forgotten.¹⁶⁰

For one thing, funnel clouds may be substantially more frequent in the criminal justice system than they are on the Texas panhandle. The records of cases that have arisen under the preventive detention provisions of the Federal Bail Reform Act of 1984 often have presented abundant evidence of defendants' firm commitment to crime as a way of life. In many of these cases, continuing criminality seemed close to certain if the defendants were to be released.¹⁶¹ Moreover, however rare these cases may be, they mark one end of a spectrum. On this spectrum, cases in which predictions of future criminality can be made with near certainty are followed by those in which these predictions can be made with substantial confidence, then by those in which continuing violence seems more likely than not, then by those in which future violence seems only a significant possibility.

At any point along this spectrum, one may draw a line marking "dangerousness." Under the Federal Bail Reform Act, for example, judges must determine when the release of a defendant will not "reasonably" assure the safety of any other person and the community.¹⁶² To suggest that, wherever the line is drawn, the ratio of true positive to false positive predictions cannot be higher than one-in-three simply defies belief.

159. See Morris & Miller, *supra* note 106, at 17.

160. A study of recidivism in Illinois offered the following case history:

"Jack" began his officially-recorded adult criminal career at the age of 17 with an arrest for burglary. Two and one-half years later he was arrested for unlawful use of a weapon, and two years after that, at the age of 22, he was arrested for theft. Following this arrest, barely a year elapsed before Jack was arrested again — this time for murder and armed robbery. Between the time he was arrested and incarcerated on the murder charge, Jack was arrested four more times — twice for attempted murder and once each for armed robbery and attempted armed robbery. Just 16 months after completing his sentence for murder, Jack was arrested for armed robbery, kidnapping, and armed violence.

RECIDIVISM IN ILLINOIS, *supra* note 143, at 2 (emphasis omitted). "Jack's" case should not be disregarded on the ground that it is atypical; unusual cases, like routine cases, must be decided. Some authority in the criminal justice system must determine whether, if "Jack" is able to post bond, he ought to be released pending trial.

161. E.g., *United States v. Salerno*, 631 F. Supp. 1364 (S.D.N.Y.), *vacated*, 794 F.2d 64 (2d Cir.), *cert. granted*, 107 S. Ct. 397 (1986); *United States v. Rawls*, 620 F. Supp. 1358 (E.D. Pa. 1985); *United States v. Daniels*, 622 F. Supp. 178 (N.D. Ill. 1985), *aff'd*, 783 F.2d 92 (7th Cir. 1986); *United States v. Buck*, 609 F. Supp. 713 (S.D.N.Y. 1985).

162. 18 U.S.C. § 3142(c) (Supp. II 1984). The "reasonable assurance" language is subject to a variety of interpretations. For federal courts to specify the degree of confidence necessary to support a prediction of future criminality with more precision than the statute does itself would seem feasible, appropriate, and desirable. For example, the appropriate standard might be a "manifest danger of serious criminal conduct during the pretrial period," or a "grave risk of serious criminal conduct," or a "clear and present danger of serious criminal conduct." The legislative history of the Bail Reform Act appears to indicate a purpose to limit pretrial confinement more narrowly than federal prosecutors and judges have limited it in practice. See *United States v. Orta*, 760 F.2d 887, 890-92 (8th Cir. 1985); text at note 22 *supra*.

In fact, none of the empirical studies indicated the level of confidence at which the predictions that they purportedly tested were made. Some studies hinted that this level might have been low. One noted a "strong psychiatric conservatism" in deciding whether to release patients to the community.¹⁶³ Another defined dangerousness simply as "a potential for inflicting serious bodily harm."¹⁶⁴ Indeed, in virtually all of the studies, mental health professionals were left at large to set their own standards of dangerousness.

A psychologist asked to determine whether a person is dangerous and to recommend whether he should be released may conclude that the odds are one in three that this person would, if released, commit a violent crime. A one-in-three risk of violence is likely to seem substantial. The psychologist may therefore classify the person as dangerous and recommend against release. He may draw similar conclusions in many other cases. A judge, however, may set a higher threshold and reject the psychologist's recommendations.

Several years later, a social scientist may conduct a study and discover that only one in three of the people whom the psychologist had classified as dangerous had committed a violent crime following his release. Were this researcher to accept the fallacy that has infected most studies of prediction, he would treat the psychologist's judgments of dangerousness as though they had been firm predictions that every person viewed as dangerous would be arrested for a violent crime within the study period. The social scientist would treat all cases in which assertedly dangerous people had not been arrested as "false positives." Then he would cite the one-in-three ratio of "true" to "false" positives as proof that the psychologist could not accurately predict violent behavior. The one-in-three ratio, however, would have been the ratio that the psychologist had anticipated. Far from demonstrating his inability to predict violent behavior, the empirical study would have vindicated his judgment.

None of the studies commonly cited as demonstrating the inability of mental health professionals to predict violent behavior indicates that these professionals failed to predict violence with the degree of accuracy that they sought to attain. Similarly, the studies do not suggest any inability to employ a higher level of confidence and thereby improve the professionals' "batting averages."

To be sure, firm predictions of future violence probably cannot be made in large numbers of cases. Any policy of preventive detention

163. H. STEADMAN & J. COCOZZA, *supra* note 151, at 33.

164. Kozol, Boucher & Garofalo, *supra* note 137, at 372.

likely to reduce the amount of crime substantially would be likely to require the detention of many people who would not commit crimes if released. This circumstance provides moral and economic reasons for rejecting widespread detention, but it offers no reason for rejecting detention when predictions of future violence can be made with confidence. Reducing violence a small amount is better than not reducing it at all. Perhaps, in practice, overzealous judges would fail to limit detention to sufficiently clear cases, but the objection that a power to detain would be expanded and misused is different from the objection that judges cannot accurately predict human behavior.

No empirical study either supports or refutes this hypothesis, but I believe that I could go a dozen blocks from my office at the University of Chicago Law School, talk for a time with some young men standing on street corners, and ultimately identify a few whom I could predict with substantial confidence would commit serious crimes. If my belief is correct, perhaps these people should be imprisoned today — before they hit a helpless old man on the head and take his wallet or rob a dozen people and finally are caught. Cost-benefit analysis unrestrained by respect for individual rights could justify much preventive imprisonment (including imprisonment based partly on racial and ethnic characteristics if these characteristics, joined with others, proved sufficiently predictive¹⁶⁵).

Recognizing that my claim of predictive power is doubtful, however, I will not rely on it. I will instead invoke a less questionable power, one that I share with other law teachers — the power to advance the march of science with a wave of my hand. At my request, psychologists at Menninger University have improved their written instruments to the point that these tests now identify future violent offenders with ninety-seven percent accuracy.¹⁶⁶ Preventive detention based solely on test scores implicates a substantial “liberty interest”; but it advances a compelling governmental interest and — thanks to the good work of the team at Menninger — does so with an extremely tight means-end fit. Whether the majority or the dissenting opinion in *Schall v. Martin* offered the better standard, my constitutional analysis is complete. Both my proposal to call in the police vans after inter-

165. Crime rates vary greatly among racial and ethnic groups, see, e.g., 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 90, table 2-2 (A. Blumstein, J. Cohen, S. Martin & M. Tonry eds. 1983), and although the prospect of imprisoning someone partly for being the wrong color is conscience-shocking, *Schall* has taught us that the prevention of crime is a “compelling” governmental interest. See 467 U.S. at 264.

166. I have deliberately set the tests’ accuracy at less than 100 percent. A perfect predictive power would call into question the assumption of free will that I believe underlies our legal system’s rejection of “pure” schemes of preventive detention. See text at notes 176-206 *infra*.

viewing unemployed youths and my proposal for detention on the basis of test scores leave out nothing of constitutional significance, at least nothing of significance under interest-balancing standards.

B. *Other Broad Objections to Preventive Pretrial Detention*

Courts and commentators have opposed preventive pretrial detention on grounds other than the asserted impossibility of predicting human behavior. Some have maintained that the only historic function of detention before trial was to prevent flight, not to protect the community from crime.¹⁶⁷ Indeed, in *Stack v. Boyle*, the Supreme Court declared that “[b]ail set at a figure higher than an amount reasonably calculated to [assure the presence of the accused at trial] is ‘excessive’ under the Eighth Amendment.”¹⁶⁸ Nevertheless, the Supreme Court appears to have fashioned this limitation on the purposes of pretrial detention without any historic basis. The historical record is all but silent on the issue. The available evidence offers no support for the common perception that pretrial detention in England and America lacked protective goals; indeed, a few sources indicate that this common perception is erroneous.

For the most part, early commentators on the law of bail failed to address the issue. Although they insisted that the function of pretrial confinement was “custody” rather than “punishment,”¹⁶⁹ they neither asserted nor denied that a purpose of this custody was to safeguard the community. In deciding whether to admit a defendant to bail, early justices of the peace considered the seriousness of the alleged offense and the strength of the preliminary evidence,¹⁷⁰ but the statutory criteria that governed their decisions do not reveal whether crime prevention was one goal of the system of pretrial restraints. The seriousness of the crime and the strength of the evidence might have mattered only because defendants threatened with severe punishment and likely to be convicted would be tempted to flee; but these considerations also might have mattered because people feared the presence in the community of defendants who, after a preliminary examination, seemed

167. See, e.g., *United States v. Melendez-Carrion*, 790 F.2d 984, 997-98 (2d Cir. 1986) (Newman, J.); *State v. Konigsberg*, 33 N.J. 367, 373, 164 A.2d 740, 743 (1960); Tribe, *supra* note 110, at 376-78; Hickey, *Preventive Detention and the Crime of Being Dangerous*, 58 GEO. L.J. 287, 287-89 (1969).

168. 342 U.S. 1, 5 (1951).

169. See, e.g., 2 H. BRACTON, *DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE* 345 (S. Thorne trans. 1968); 4 W. BLACKSTONE, *COMMENTARIES* *297, *300 (adding that “in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, nor subjected to other hardships than such as are absolutely requisite for the purpose of confinement only”).

170. See text at notes 190-95 *infra*.

guilty of serious crime.¹⁷¹

Our forebears may indeed have regarded both justifications as persuasive; they may have seen no reason to choose between them or even to discuss the issue. Modern commentators who claim that the only legitimate function of detention before trial is the assurance of a defendant's appearance apparently would release on bond or recognizance even a frequently repeated offender arrested with a pistol and stolen cash moments after shooting and seriously wounding his victim — so long as this defendant had never missed a court appearance, had strong family and community ties, and had given no indication that he was likely to flee. To attribute this risk-taking to past generations, however, requires evidence that none of the commentators has presented. At most, the commentators have pointed to a murky historical record and have cast the burden of disproof on others. As the commentators have observed, the available evidence does not clearly establish that pretrial detention had goals other than insuring the appearance of defendants at trial. Equally, however, this evidence does not establish that community protection was unimportant. Indeed, although the historical record is sparse, a few sources appeared to recognize that safeguarding the community from crime was an appropriate function of pretrial restraint.

Laurence Tribe, one of many scholars who have argued that the only goal of pretrial detention was to insure appearance at trial, offered a piece of typically negative evidence: "The most comprehensive compilation of statutory and case law on the English bail system in the late eighteenth century nowhere suggests that fear of danger to the community before trial motivated the distinctions typically made between bailable and non-bailable offenses."¹⁷² Tribe apparently did not read closely enough. The source to which he referred, Highmore's *Digest of the Doctrine of Bail*, noted that, in criminal but not civil

171. The issues considered by early justices of the peace included whether the defendant was a thief "openly defamed and known," whether he had been "taken with the manour," whether he had been charged on "light suspicion," and the like. See text at notes 192-93 *infra*. They did not include the sorts of considerations listed by the Federal Bail Reform Act of 1984 — the defendant's "physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, . . . history relating to drug or alcohol abuse, . . . and record concerning appearance at court proceedings." See 18 U.S.C. § 3142(g)(3)(A) (Supp. II 1984). An early justice of the peace might have been astonished by the suggestion that his preliminary examination should address not only the defendant's apparent guilt but also every other circumstance that might bear on the likelihood of his appearance at trial. If a defendant plainly had committed a serious crime, that was enough to justify his confinement. Perhaps the likelihood of flight was strong enough when a defendant seemed guilty of a serious crime (and weak enough in other cases) that further inquiry would have been superfluous, but protective goals offer at least as plausible an explanation of the shape of the early English law of bail.

172. Tribe, *supra* note 110, at 400-01.

cases, English law had departed from the rule that had allowed bail universally. Highmore maintained that Parliament had departed from the common-law rule so "that the safety of the people should be preserved against the lawless depredations of atrocious offenders."¹⁷³ Moreover, the Massachusetts Body of Liberties of 1641 provided:

No man's person shall be restrained or imprisoned by any authority whatsoever, before the law hath sentenced him thereto, if he can put in sufficient security, bail, or maineprize for *his appearance and good behavior* in the meantime, unless it be in crimes capital and contempts in open court and in such cases where some express act of [the legislature] doth allow it.¹⁷⁴

When bail would not insure a defendant's good behavior as well as his appearance, the Massachusetts colonists apparently considered detention appropriate.

This limited evidence may not establish that community protection was a recognized goal of pretrial detention, but people who contend that our ancestors did not object to allowing murderers and highwaymen to roam among them should bear the burden of demonstrating this claim. If historical inquiry does not establish the illegitimacy of preventive pretrial detention, the current generation need not be bashful about resolving this issue for itself.

Some commentators also have objected to preventive pretrial detention on the ground that every defendant must be presumed innocent until a judge or jury has found him guilty.¹⁷⁵ When innumerable witnesses have seen a defendant rob and shoot his victim, however, the presumption of innocence does not require a denial of the evidence of one's senses. The presumption is not a command to treat even the most obviously guilty defendant as innocent for all purposes until his guilt has formally been adjudicated. Instead, as the Supreme Court has recognized, the presumption is a rule of trial procedure; it requires a finder of fact to acquit a defendant when the government has failed

173. A. HIGHMORE, A DIGEST OF THE DOCTRINE OF BAIL vii (1783). This treatise added: [F]ormerly bail was a general favour, granted to the subject in most cases; till it was found that increasing corruption growing more and more prevalent, and keeping pace with a rapid swell of population, and influx of inhabitants from other countries, it became necessary to institute some restrictions thereto; of which murder was the first — and surely no one can complain of this as an unjust innovation upon the generous liberality of our ancient law.

Id.

174. MASSACHUSETTS BODY OF LIBERTIES § 18 (1641), reprinted in THE COLONIAL LAWS OF MASSACHUSETTS 37 (W. Whitmore ed. 1889) (emphasis added; spelling and punctuation modernized).

175. See, e.g., Tribe, *supra* note 110, at 404-05; Miller, *Preventive Detention — A Guide to the Eradication of Individual Rights*, 16 HOW. L.J. 1, 15-17 (1970); cf. Stack v. Boyle, 342 U.S. 1, 4 (1951) ("Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.").

to establish his guilt beyond a reasonable doubt.¹⁷⁶

IV. THE UNCONSTITUTIONALITY OF THE FEDERAL BAIL REFORM ACT OF 1984

A. *Things Passed By: Anglo-American History and the Freedom of the Human Will*

Sweeping constitutional objections to all forms of preventive pretrial incarceration seem unconvincing, and objections grounded on interest-balancing approaches to the due process clause seem especially strained and artificial. Protecting the community from crime plainly qualifies as a "compelling" governmental interest; and in some cases at least, predictions of future criminality can be made with sufficient confidence to establish a suitable "means-end match."

Something that interest balancing leaves out, however, is a sense of history. The interests to be balanced are all here and now. In this respect, "utilitarian" views of the due process clause differ greatly from the "natural law" views that they have largely supplanted.

Anglo-American history offers no condemnation of all preventive pretrial detention. From the very beginning, however, our law has resisted detention that lacks a predicate in past misconduct or a person's inability to control his apparent dangerousness. Our ancestors manifested this resistance partly in their law of crimes. In 1883, Sir James Fitzjames Stephen wrote, "Sinful thoughts and dispositions of mind . . . were never punished in this country [even] by ecclesiastical criminal proceedings."¹⁷⁷ Blackstone's familiar declaration that "to make a complete crime . . . there must be both a will and an act"¹⁷⁸ expressed a fundamental principle, the refusal to punish or detain for dangerous propensities alone.¹⁷⁹ Indeed, only one clear departure from this central principle — one unmistakable instance of "pure" preventive detention — comes to mind from nine centuries of Anglo-American history. During World War II, Americans rationalized the incarceration of citizens of Japanese ancestry as an emergency war-time measure.¹⁸⁰ Despite the perceived threat to the nation's security,

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

177. 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 78 (1883).

178. 4 W. BLACKSTONE, COMMENTARIES *21.

179. One statutory form of treason — compassing or imagining the death of the king — may have been an exception, but Blackstone reported that this compassing could not be punished until it had been "demonstrated by some open or overt act." Noting that Dionysius had reportedly executed a subject for dreaming of his death, Blackstone declared, "[S]uch is not the temper of the English law." *Id.* at *79.

180. In *Korematsu v. United States*, 323 U.S. 214 (1944), the Supreme Court upheld the exclusion of Japanese-Americans from west coast "military areas" but failed to consider the

many Americans later came to view this action as a dark, shameful, and aberrational moment in their history.¹⁸¹

An insistence on proof of past misconduct shaped the common law's rules of detention as well as its definitions of crime.¹⁸² During

constitutionality of their confinement in "assembly centers" and "relocation centers." Although the Court recognized that the "exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions," 323 U.S. at 220, it argued that the challenged exclusion bore "a definite and close relationship to the prevention of espionage and sabotage." 323 U.S. at 218. Three dissenting Justices would have considered and condemned the preventive incarceration as "a clear violation of Constitutional rights." 323 U.S. at 225 (Roberts, J., dissenting). Justice Murphy argued that "under our system of law individual guilt is the sole basis for deprivation of rights" and that "[t]o give constitutional sanction to [the inference drawn by the military authorities] is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual." 323 U.S. at 240 (Murphy, J., dissenting).

181. See COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1982); M. WEGLYN, YEARS OF INFAMY (1976).

Although the incarceration of Japanese-Americans during World War II may provide the only example of "pure" preventive detention in our history, the predicate of voluntary wrongdoing supporting imprisonment for vagrancy and other crimes of status was weak. Moreover, the use of peace bonds subjected some assertedly dangerous people to a measure of preventive control. See Note, *Peace and Behavior Bonds — Summary Punishment for Uncommitted Offenses*, 52 VA. L. REV. 914 (1966). As these examples suggest, the Anglo-American opposition to "predicate-less" preventive confinement has wavered. When compared to the willingness of governments elsewhere to imprison likely troublemakers, however, nearly a millenium of English and American restraint remains truly remarkable.

182. The discussion that follows emphasizes the rules governing the denial of bail rather than those governing detention following the admission of defendants to bail. It does so for two reasons. First, this branch of doctrine is the relevant branch in evaluating the Federal Bail Reform Act of 1984. Whether rightly or wrongly, Anglo-American law long has treated detention without bond as more restrictive of liberty than detention with the (sometimes merely formal) option of posting bond. The Federal Bail Reform Act forbids detention because a defendant is unable to post bond and authorizes the detention of dangerous defendants without bond. See text at notes 7-9 *supra*. It creates its regime of detention in the absence of safeguards that our history has demanded for centuries. Second, the early law governing the denial of bail provides a better indicator of how our legal system regarded pretrial imprisonment than the law governing the detention of defendants who fail to post bond.

The English law of bail developed at a time when admitting a defendant to bail seems almost invariably to have led to his release. Indeed, for centuries, commentators spoke of the decision to admit a defendant to bail as though it were a decision to release him. Before releasing an untried defendant, a sheriff or justice of the peace required surety for his appearance. This requirement ordinarily was satisfied, however, when the defendant's family or friends pledged that he would appear. Bracton noted that strangers to the community and others who lacked friends could not gain pretrial release under this system of "pledges," but Bracton did not list people who lacked economic resources in the same category. "If the [accused] is a stranger and unknown, coming from afar, as a traveller, or if because of a lack of friends he cannot find pledges, let his pledge be the gaol, which is assigned for his custody and not for his punishment." 2 H. BRACON, *supra* note 169, at 345. The Statute of Westminster I, 3 Edw., ch. 15 (1275), declared that defendants were to be bailed "without giving ought of their goods."

The early surety system apparently rested on a series of related propositions. Because the sureties had assumed their obligations voluntarily, it would be appropriate to punish them financially if the defendant absconded. Because the defendant would not wish to bring this punishment on his sureties, he would hesitate to flee. And because the sureties would be concerned to avoid punishment, they would take effective steps to assure the defendant's appearance. The financial sanctions inflicted on sureties when defendants absconded were typically heavy, and the early surety system apparently achieved its objectives successfully. See generally E. DE HAAS, ANTIQUITIES OF BAIL: ORIGIN AND HISTORICAL DEVELOPMENT IN CRIMINAL CASES TO THE

the earliest days of the common law, when admitting a defendant to bail almost invariably meant his release,¹⁸³ sheriffs had discretion to admit any criminal defendant to bail.¹⁸⁴ Abuse of this power, however, both by "let[ting] out by replevin such as were not replevisable" and by "[keeping] in prison such as were replevisable,"¹⁸⁵ led to a series of statutory restrictions. By the time of Bracton's treatise in the mid-thirteenth century, murder had become, for the sheriffs,¹⁸⁶ a non-bailable offense.¹⁸⁷ In 1275, the Statute of Westminster I provided lists of situations in which sheriffs were required to release on bail and situations in which they were forbidden to do so.¹⁸⁸ Stephen observed, "This statute was for 550 years the main foundation of the law of

YEAR 1275 (1940); 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 584-90 (2d ed. 1968).

As an incident of this surety system, some defendants who had been admitted to bail were imprisoned, but their cases seemed aberrational. The authorities, moreover, appeared to view the detention of these defendants as more de facto than de jure. Their detention was an unavoidable incident of the useful practice of requiring surety for a released defendant's appearance. English authorities treated the law governing the admission of defendants to bail as, for all practical purposes, the law of pretrial restraint.

High money bond ultimately resulted in the frequent detention even of defendants who had been admitted to bail, but when the extensive use of money bond began is unclear. The English Bill of Rights of 1689, the source of the provision of the United States Constitution that "[e]xcessive bail shall not be required," complained that during the reign of James II judges had set high bail "to elude the benefit of lawes made for the liberty of the subjects." The Bill of Rights, 1 W. & M., sess. 2, ch. 2 (1689); see U.S. CONST. amend. VIII. Both the English Bill of Rights and the American apparently sought to ensure that decisions to admit defendants to bail would, once again, lead to release in all but exceptional cases. Nevertheless, the requirement that money bond be posted prior to release and the development of a commercial market in bail bonds made the later surety system a caricature of its ancestor. In recent decades, almost every American jurisdiction has moved away from this system to some degree by deemphasizing the use of monetary bond.

183. See note 182 *supra*; E. DE HAAS, *supra* note 182, at 51-57.

184. See 4 W. BLACKSTONE, *COMMENTARIES* *298 ("By the ancient common law, before and since the conquest, all felonies were bailable, till murder was excepted by statute.").

185. Statute of Westminster I, 3 Edw., ch. 15 (1275). This statutory language suggests that by 1275 there were already categories of "replevisable" and "not replevisable" defendants; but immediately after this language, the statute declared, "[B]efore this time it was not determined which persons were replevisable, and which not [except for defendants charged with murder and a few other defendants]." The statute proceeded to remedy this defect by specifying which defendants were to be bailed and which detained. See text at notes 192-93 *infra*.

186. See text at note 190 *infra*.

187. See 2 H. BRACTON, *supra* note 169, at 349 ("In every *injuria* and trespass against the king's peace to which the word 'felony' is added, the appellee or person accused is usually released by pledges, except in the case of homicide . . ."). The unavailability of bail in homicide cases apparently led to temporary detention without bond in some assault cases as well:

[T]he wound must . . . be viewed, and if it is a dangerous one and the appellee [the accused] is present let him be arrested at once and kept in custody until it is clear whether the wounded man can recover or not. If he cannot and dies, let the appellee be kept in prison; if he recovers, let the appellee be attached by four or more pledges, according as the wound is serious or slight; if it is mayhem, by many pledges, that there may be good security; if the wound is slight, two pledges are sufficient.

Id. at 345.

188. Statute of Westminster I, 3 Edw., ch. 15 (1275) (described in greater detail in text at notes 192-93 *infra*).

bail.”¹⁸⁹

Westminster I and the multitude of statutes that shaped the later English law of bail limited the discretion only of sheriffs and, later, of justices of the peace. High court judges retained an unquestioned power to release on sufficient surety any defendant, even one charged with murder or treason.¹⁹⁰

Decisions to admit defendants to bail or commit them to prison came to be made primarily by justices of the peace, and the law governing their decisions grew tangled and complex. Nevertheless, two general themes ran through this law. In the main, the justices were to order detention only when defendants were charged with very serious offenses and only when evidence of their guilt was clear. The justices were to conduct preliminary examinations of witnesses and defendants before granting or denying bail, and they were to record the evidence taken at these examinations so that judges of gaol delivery could review the propriety of their decisions.¹⁹¹

Bracton's treatise declared that, apart from murder cases (in which release was not allowed), “no one who can provide pledges is to be thrust into prison unless it is evident that he has perpetrated . . . a serious crime.” Bracton added that sheriffs should consider not only “the nature and gravity of the crime” but also the accused's “distinguished rank and great wealth or his integrity or official position.”¹⁹² Without departing from Bracton's principle, the Statute of Westminster I attempted to give it greater specificity. The statute established a right to bail when an accused had been charged with any crime “for which one ought not to lose life nor member.” It also created a right to bail when a defendant had been charged with a serious crime on “light suspicion.” At the same time, the statute forbade bail to “thieves openly defamed and known” and “such as be taken with the

189. 1 J. STEPHEN, *supra* note 177, at 234.

190. See, e.g., *id.* at 243; 2 M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 129 (1736). But cf. *Carlson v. Landon*, 342 U.S. 524, 545 (1952) (apparently endorsing the misconception that English law treated some offenses as nonbailable altogether and declaring, “The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country”).

191. See J. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE* 5-15 (1974) (discussing the first Marian statute, An Act appointing an Order to Justices of the Peace for the Bailment of Prisoners, 1 & 2 Phil. & M., ch. 13 (1554-1555)). Langbein demonstrated that justices of the peace initially had no power to discharge defendants following their preliminary examinations and, further, that evidence gathered at their examinations was to be used neither in securing indictments nor at trial. The sole function of the early preliminary examination was to inform the decision to release or detain defendants — then to permit review of this decision by judges of gaol delivery. Although a judge's review came too late to correct an erroneous decision to release or detain, it could lead to punishment of the erring (or corrupt) justice of the peace.

192. 2 H. BRACTON, *supra* note 169, at 349-50.

manour" (caught red-handed). Similarly, it forbade bail to people who had formally confessed to felonies ("provers" and people who had "abjured the realm") and to defendants "not of good name" who had been implicated by admitted co-felons.¹⁹³

Throughout the centuries that followed, discussions of pretrial detention emphasized the importance of preliminary proof of guilt. Bacon wrote, "In felony, bail may be admitted, where the fact is not notorious and the person not of evil fame."¹⁹⁴ Highmore declared, "[B]ail is regularly to be allowed in such cases wherein it seems doubtful whether the person accused be guilty or not."¹⁹⁵

Some American colonies duplicated the patchwork English law of bail,¹⁹⁶ but the Massachusetts Body of Liberties in 1641 reformed and greatly simplified this law, reducing it to a single sentence.¹⁹⁷ So did the Pennsylvania Frame of Government in 1682, the model for most subsequent enactments. The Pennsylvania formulation remained the basic provision of the American law of bail for three hundred years and is still the law of most states: "[A]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident, or the presumption great."¹⁹⁸

This language entered federal law before the ratification of the Constitution. The Confederation Congress included the Pennsylvania formulation in its Ordinance for the Government of the Northwest

193. Statute of Westminster I, 3 Edw., ch. 15 (1275).

194. 7 THE WORKS OF FRANCIS BACON 740 (J. Spedding, R. Ellis & D. Heath eds. 1870). Coke's treatise on bail, first published in 1635, suggested liberality in the award of bail:

[A] man indicted or appealed of manslaughter may be bailed.

A man indicted or appealed of rape, he may be bailed

A man indicted for burglary may be bailed

A man indicted or appealed of robbery may be bailed.

. . . .

A man indicted for putting out of eyes, cutting out of tongues, may be bailed.

E. COKE, A TREATISE OF BAIL AND MAINPRIZE 21-22, in THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (10th ed. 1703) (spelling modernized). Still, there were limits to this liberality:

If a man commit felony, and be taken in the manner, he ought not to be bailed.

. . . .

If a man be indicted of manslaughter, robbery, rape, burglary, felony, or any other offense whereof he is bailable; yet if he be an infamous and a notorious thief, and so openly and commonly esteemed and taken, bail may be denied him.

Id. at 21.

195. A. HIGHMORE, *supra* note 173, at 152 (emphasis omitted).

196. See Foote, *supra* note 18, at 974 & n.75.

197. MASSACHUSETTS BODY OF LIBERTIES § 18, *reprinted in* THE COLONIAL LAWS OF MASSACHUSETTS, *supra* note 174, at 37. The language of this provision appears in the text at note 174 *supra*.

198. PENNSYLVANIA FRAME OF GOVERNMENT art. XI (1682), *reprinted in* 5 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 3052, 3061 (1909).

Territories in 1787.¹⁹⁹ In the Judiciary Act of 1789, enacted one day before the submission of the Bill of Rights to the states, the First Congress used different language but again recognized a right to bail in all noncapital cases. In determining whether to set bail in capital cases, the Act authorized judges to "exercise their discretion," admonishing them to consider "the nature and circumstances of the offense, and of the evidence, and the usages of law."²⁰⁰

Ultimately the constitutions of forty states adopted the Pennsylvania formulation.²⁰¹ Moreover, most states that have recently amended their constitutions to permit detention without bond in noncapital cases have departed from this format only slightly. Although these states have listed other serious offenses along with capital offenses as crimes that may justify a denial of bail, they have retained a right to bail for less serious offenses. Moreover, they have permitted the denial of bail to defendants charged with capital and other serious crimes only when the proof is "evident" or the "presumption great."²⁰²

Both the English and the American law of pretrial detention took shape before imprisonment became a common penal sanction, at a time when capital offenses included all very serious crimes. The denial of bail to some defendants charged with noncapital offenses (now that the word capital no longer offers a shorthand description of all very serious offenses) does not seem to mark a major departure from historical principles.²⁰³

As this paper has suggested, sensible people usually do not allow murderers and highwaymen to roam among them.²⁰⁴ When people who appear to have committed very serious crimes cannot be tried immediately, self-protection can be reconciled with the principle that dangerousness is not a sufficient predicate for imprisonment in only one way. Before confining untried defendants, a judge must conclude

199. Northwest Ordinance of 1787, art. II, 1 Stat. 51, 52 n.a.

200. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91.

201. See *State v. Konigsberg*, 33 N.J. 367, 371, 164 A.2d 740, 742 (1960).

202. See, e.g., ARIZ. CONST. art. II, § 22; CAL. CONST. art. I, § 12; COLO. CONST. art. II, § 19; ILL. CONST. art. I, § 9; MICH. CONST. art. I, § 15; NEB. CONST. art. I, § 9; UTAH CONST. art. I, § 8.

203. *Accord Mitchell, Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1225-31 (1969). *Contra Miller, supra* note 175, at 15-16; Borman, *The Selling of Preventive Detention* 1970, 65 NW. U. L. REV. 879, 901-03 (1971).

204. Our forebears apparently did not do so when preliminary proof of guilt was clear, whatever their reasons for pretrial detention may have been. During the lengthy period when the most serious crimes were punishable by death, the denial of pretrial release usually was unequivocal; later this denial was commonly veiled in bail requirements that defendants could not meet. See ABA STANDARDS, *supra* note 31, at 6; Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1038-43 (1954).

on the basis of substantial preliminary proof that they are indeed murderers and highwaymen.

A society committed to the proposition that only deliberate wrongdoing justifies imprisonment may permit even defendants charged with capital crimes to remain at large when the proof is not "evident" or the "presumption great." It may recognize that "bail is regularly to be allowed [when] it seems doubtful whether the person accused be guilty or not." Such a society may willingly tolerate greater risks than cost-benefit analysis would support. When the proof does appear "evident," however, pretrial confinement no longer rests on dangerousness alone. It rests on the conclusion — based on imperfect evidence that is also the best available — that a defendant has abused his freedom by committing a serious crime. From the time of Bracton and the Statute of Westminster I and (even more clearly) from the time of the Pennsylvania Frame of Government in 1682 and the Northwest Ordinance of 1787, these sentiments have guided the Anglo-American law of pretrial restraint.

Interest-balancing approaches to the due process clause not only leave out this history; they also leave out a central tenet of western culture that this history has expressed — a belief in the freedom of the human will. The traditional Anglo-American refusal to imprison until proof of past offending was "evident" revealed a conviction that individual responsibility could be justified only by commensurate opportunity. That every person was entitled to his liberty until he abused it was an unquestioned principle through the centuries.

As Herbert Morris has observed, human beings have regarded themselves as capable of creating, among other things, themselves. Morris has noted "the inestimable value to each of us of having the responses of others to us determined over a wide range of our lives by what we choose rather than what they choose. A person has a right to institutions that respect his choices."²⁰⁵

In at least a few cases, predictions of future wrongdoing can be made with confidence, and detention based on these predictions may further the "greater good." Nevertheless, even funnel clouds sometimes turn around, and human beings sometimes defy predictions. They turn around as well. Schemes of preventive detention that lack a predicate in past misconduct deny people the chance to turn around — the opportunity to choose. From the beginning, our history has treated this opportunity as an essential attribute of human dignity and as more than an interest to be weighed on a utilitarian scale. With

205. Morris, *Persons and Punishment*, 52 *MONIST* 475, 486 (1968).

only occasional aberrations, this history has condemned the incarceration of responsible adults until, in Blackstone's words, they have "abuse[d] . . . that free-will which God has given to man."²⁰⁶

B. *Does Gerstein v. Pugh Remedy the Failure of the Federal Bail Reform Act to Require Proof of Past Misconduct?*

A constitutional decision of the Supreme Court provides a partial corrective for the Federal Bail Reform Act's failure to demand preliminary proof of guilt. In *Gerstein v. Pugh*,²⁰⁷ the Court held that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."²⁰⁸

The Supreme Court was unanimous in this holding, but it divided five to four on other issues that the majority opinion addressed. The *Gerstein* majority, in statements that the four concurring Justices characterized as dicta, declared that the required judicial determination of probable cause could be made ex parte and, further, that "[t]he standard [for imposing an extended pretrial restraint of liberty] is the same as that for arrest."²⁰⁹ In the majority's view, either the return of a grand jury indictment or the issuance of a warrant prior to arrest would satisfy the fourth amendment's requirements.²¹⁰ Under *Gerstein*, a judge need not afford a defendant a hearing before imprisoning him and need find no greater likelihood of guilt than would be necessary to justify his arrest.

Most federal defendants receive no greater protection against unfounded charges than *Gerstein* affords. The Federal Rules of Criminal Procedure provide adversary preliminary hearings only to defendants who are not indicted before or shortly after their arrests.²¹¹ In large federal districts in which grand juries are regularly in session, preliminary hearings are rare. Magistrates in the Southern District of New York, for example, conduct only about twenty-five of these hearings each year.²¹² Nationally, a reasonable guess is that only one federal defendant in nine obtains a preliminary hearing.²¹³

206. 4 W. BLACKSTONE, COMMENTARIES *27.

207. 420 U.S. 103 (1975).

208. 420 U.S. at 114.

209. 420 U.S. at 120.

210. See 420 U.S. at 116 n.18, 117 n.19.

211. See FED. R. CRIM. P. 5(c).

212. See, e.g., ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 29, at 512.

213. This guess is based on the fact that during fiscal 1985 federal magistrates conducted 44,379 initial appearances in criminal cases but only 4922 preliminary hearings. See *id.*

In the federal courts, the determination of probable cause usually is made by a grand jury. Grand jury proceedings are in camera; the rules of evidence do not apply; and the defendant has no right to appear or submit evidence.²¹⁴ The only lawyer authorized to appear before the grand jury is the federal prosecutor, and a grand jury rarely fails to follow this official's recommendation to indict. The well-worn imagery may be exaggerated, but most observers regard grand juries as "rubber stamps" for prosecutors' offices.²¹⁵

In most cases, only the grand jury's determination of probable cause prevents the Federal Bail Reform Act from operating as a "pure" scheme of preventive detention. The 1984 Act affords a defendant an adversary hearing on the issue of dangerousness. It guarantees him a right to counsel, a right to cross-examination, the assurance that adverse factual findings must be supported by clear and convincing evidence, and other safeguards.²¹⁶ Neither the 1984 Act nor any other federal law guarantees the defendant a hearing on whether he has done anything wrong. The fourth amendment standard of probable cause, as the Supreme Court has interpreted it, demands only a "fair probability" of guilt or a "substantial basis" for believing a defendant guilty.²¹⁷ In short, under the 1984 Act, the principle that proof of voluntary wrongdoing is necessary to deprive responsible adults of their liberty is respected only nominally. Even as supplemented by *Gerstein*, the Act authorizes imprisonment grounded almost entirely on a prediction of future misconduct.

"Substantive" due process forbids some forms of involuntary, nonpunitive confinement. In *Jackson v. Indiana*, the Supreme Court ruled that "Indiana's indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment's guarantee of due process."²¹⁸ In *O'Connor v. Donaldson*, the Court noted that a state is forbidden to "incarcerate all who are physically unattractive or socially eccentric."²¹⁹ It held that "[a] finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him

214. See FED. R. CRIM. P. 6; *Costello v. United States*, 350 U.S. 359, 361-63 (1956).

215. See, e.g., *Hawkins v. Superior Court*, 22 Cal. 3d 584, 589-90, 586 P.2d 916, 919, 150 Cal. Rptr. 435, 438 (1978); M. FRANKEL & G. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 21-28 (1977). I once shared a podium with Richard Sprague, then the First Assistant District Attorney in Philadelphia. He summarized the role of the grand jury this way: "When we decide that we want an indictment, we say, 'Let's get an indictment.' It never occurs to us that we may not be able to get one."

216. See note 10 *supra* and accompanying text.

217. See text at notes 236-37 *infra*.

218. 406 U.S. 715, 731 (1972).

219. 422 U.S. 563, 575 (1975).

indefinitely in simple custodial confinement.”²²⁰ Both of these due process rulings were unanimous.

“Substantive” due process similarly should preclude preventive confinement that lacks a predicate in past misconduct or an inability to control one’s behavior. “Pure” preventive detention contravenes a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”²²¹ When the predicate for preventive confinement is voluntary wrongdoing, moreover, “procedural” due process should require a demonstration of this wrongdoing by more than a finding of probable cause in an *ex parte* proceeding.

The burdens that pretrial detention imposes on a defendant do not vary with the objectives that the detention is thought to serve. The government’s restriction of a defendant’s “liberty interest” is unaffected by whether its goal is to punish him, prevent his commission of crime, or assure his appearance at trial. From an interest-balancing perspective that sees due process as “a flexible concept which requires different procedural protections for different degrees of intrusion on life, liberty or property interests,”²²² *Gerstein* may appear to hold that an *ex parte* judicial determination of probable cause constitutes “the process that is due” before imprisoning a defendant under the 1984 Act.

This “functional” interpretation of *Gerstein*, however, would be plainly erroneous. Although incarceration to punish a defendant may impose the same burdens as incarceration to assure his appearance at trial, *Gerstein* did not hold that pretrial incarceration to achieve punitive goals could be justified by an *ex parte* determination of probable cause. The Supreme Court did not abandon the principle that the only legitimate basis for criminal punishment under the Constitution is a finding of guilt beyond a reasonable doubt.²²³ Similarly, *Gerstein* did not hold that defendants could be imprisoned to protect the community from crime simply because judges had found probable cause for their arrests. At the time that *Gerstein* was decided, the Supreme Court had indicated that the only purpose of pretrial restraint was to insure a defendant’s appearance.²²⁴ *Gerstein* held no more than that

220. 422 U.S. at 575.

221. See *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

222. *United States v. Portes*, 786 F.2d 758, 767 (7th Cir. 1985); accord *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (quoted in text at note 68 *supra*).

223. See *In re Winship*, 397 U.S. 358 (1970); cf. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (“[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”).

224. See *Stack v. Boyle*, 342 U.S. 1, 5 (1951). Federal statutory law expressed the same principle, see Federal Bail Reform Act of 1966, Pub. L. No. 89-465, § 3(a), 80 Stat. 214, 214-15

probable cause provides an adequate predicate for detention when this detention is necessary to permit an adjudication of guilt or innocence to occur.

In some criminal cases, danger to the community may justify pre-trial detention to achieve protective goals. This interim incarceration may be "legitimate"; it may not require the same factual predicate that the Constitution requires for sanctions designed to stigmatize. Nevertheless, interim relief designed to incapacitate, to achieve one goal of criminal punishment, should be granted only on the basis of a substantial showing that it will appear justified following a final adjudication. *Gerstein v. Pugh* did not address this "mixed" issue of substantive and procedural due process, an issue that is critical in judging the constitutionality of the 1984 Act.

Three developments subsequent to *Gerstein*, moreover, should prompt a reconsideration of that decision even as it applies to defendants who pose a risk of flight if released.²²⁵ These developments are the enactment of the Bail Reform Act itself, the Supreme Court's reevaluation of the probable cause necessary to justify an arrest, and the Court's recognition that probable cause for arrest provides insufficient justification under the fourth amendment for deprivations of liberty more serious than arrest.

1. *Gerstein and the Bail Reform Act*

In the federal courts, the 1984 Act substituted an extensive regime of detention without bond for one in which detention without bond had been limited to capital cases. From a "functional" perspective, just as detention for punitive purposes may seem little different from detention for nonpunitive purposes, detaining a defendant without bond may seem little different from detaining him because he has been unable to post bond. A defendant who cannot post bond derives no comfort from the fact that a judge has afforded him the option of doing so.

Gerstein, however, was grounded on a historical rather than a functional analysis, and Anglo-American history has treated pretrial detention without bond as a more severe restriction of liberty than

(repealed 1984), and so did some state judicial decisions. See, e.g., *State v. Konigsberg*, 33 N.J. 367, 372-73, 164 A.2d 740, 743 (1960); see also Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 67-69 (1977).

225. Perhaps this argument should not be phrased in terms of a need to reconsider *Gerstein*; it might be cast instead in terms of the inapplicability of *Gerstein* to circumstances different from those that existed at the time of the Supreme Court's decision. However the argument should be characterized, the legal world has changed since *Gerstein*, and the justifications offered for that ruling no longer fit the circumstances.

detention for failure to post bond.²²⁶ At the time of the *Gerstein* decision, when most pretrial detention did follow the admission of defendants to bail, the Supreme Court may have been justified in disregarding the historic rules governing the denial of bail.²²⁷ These rules, however, make clear that history offers no warrant for the regime of imprisonment created by the Federal Bail Reform Act.

The *Gerstein* majority emphasized the historical basis of its decision when it responded to the more "functional" view of pretrial detention asserted by the concurring Justices. These Justices thought it incongruous that the Court had afforded "less procedural protection to an imprisoned human being" than its due process decisions had required "to test the propriety of garnishing a commercial bank account, the custody of a refrigerator, the temporary suspension of a public school student, or the suspension of a driver's license."²²⁸

Without denying this functional incongruity, the majority replied:

The historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the "process that is due" for seizures of person or property in criminal cases, including the detention of suspects pending trial.²²⁹

The historical analysis of *Gerstein* plainly does not extend to the sort of detention authorized by the Federal Bail Reform Act. The fourth amendment's requirement of probable cause has not defined the "process that is due" for the detention of suspects without bond. To the contrary, for three hundred years before the Bail Reform Act, American courts had permitted the denial of bail only when the proof

226. See note 182 *supra*.

227. See M. TOBORG, PRETRIAL RELEASE: A NATIONAL EVALUATION OF PRACTICES AND OUTCOMES 7 (National Evaluation Program Phase II Report Series B No. 2, 1981) ("Only a very small percentage of [detained] defendants were detained outright, with no possibility of release provided to them."). One of the plaintiffs in *Gerstein* had been denied bail, see 420 U.S. at 105, but the Court mentioned this fact only in passing without considering its historical or constitutional significance.

228. 420 U.S. at 127 (Stewart, J., concurring) (citing *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Goss v. Lopez*, 419 U.S. 565 (1975); *Bell v. Burson*, 402 U.S. 535 (1971)).

229. 420 U.S. at 125 n.27. The majority also noted that "the Fourth Amendment probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct." 420 U.S. at 125 (emphasis in original). That a defendant will be afforded the benefits of "an elaborate system, unique in jurisprudence" after his pretrial incarceration has ended, however, has little bearing on the justice of the incarceration itself. Cf. L. CARROLL, THROUGH THE LOOKING GLASS 88 (Harper & Bros. ed. 1902) (The king's messenger is "in prison now, being punished; and the trial doesn't even begin till next Wednesday; and of course the crime comes last of all.").

was "evident" or the "presumption great."²³⁰ Indeed, a substantial majority of American courts adhere to this rule today. Moreover, until the Bail Reform Act, English and American courts consistently afforded defendants the opportunity to answer the charges against them before detaining them without bond.²³¹

The Bail Reform Act of 1984 seems in fact to have restored much of the older law of bail, omitting only its principal safeguard. Under this Act, a federal judge determines whether a defendant will be detained or released without masking this decision or turning it largely on wealth. The Act's return to the basic outline of the law of pretrial restraint during the Middle Ages and the Renaissance seems desirable. Only Congress' failure to insist on clear evidence of guilt as a prerequisite to detention marks a departure from the historic pattern. Unlike the law of pretrial restraint that had endured from the thirteenth century, the 1984 Act imprisons without possibility of bail defendants whose past wrongdoing has not been demonstrated by substantial preliminary proof.

2. Gerstein and the Reevaluation of Probable Cause

Gerstein v. Pugh declared, "The standard for arrest is probable cause, defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.'"²³² Following *Gerstein*, however, in *Illinois v. Gates*,²³³ the Supreme Court overruled a series of decisions that had attempted to refine the probable cause concept. Noting that decisions to search or arrest must be made in an "informal, often hurried context," the Court concluded that these decisions must rest on the "nontechnical, common-sense judgments of laymen applying a standard less demanding than those used in more formal legal proceed-

230. See text at note 198 *supra*. Some American courts held that the return of an indictment created a presumption that the proof was evident and cast the burden of rebutting this presumption on the defendant. Even these courts, however, afforded the defendant a hearing on the issue. Most courts, moreover, rejected this narrow view of the historic requirement. They required prosecutors to present clear evidence of guilt as a prerequisite to detention without bond. See, e.g., *State v. Konigsberg*, 33 N.J. 367, 373-77, 164 A.2d 740, 743-45 (1960).

231. From a modern perspective, the early preliminary examination that determined whether a defendant would be admitted to bail does not seem a model of adversary procedure. A justice of the peace examined the witnesses against the defendant in his absence, then interrogated the defendant himself. The defendant received no aid from counsel and no *Miranda* warnings, and the "inquisitorial" character of the proceedings ultimately led to protest and reform. See 1 J. STEPHEN, *supra* note 177, at 216-21. Even under what now may seem the crude procedures of a brutal age, however, a judge heard a defendant's side of the story before deciding whether to imprison him before trial without bond.

232. 420 U.S. at 111 (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

233. 462 U.S. 213 (1983).

ings.”²³⁴ The Court added that “probable cause is a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules.”²³⁵ Under *Gates*, probable cause to search requires only “a fair probability that contraband or evidence of a crime will be found in a particular place.”²³⁶ The Court observed: “[S]o long as the magistrate had a ‘substantial basis for . . . conclud[ing]’ that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more.”²³⁷

Gates focused on the evidence necessary to justify a search. Transposing its standards to the probable cause needed for arrest, one federal court of appeals has concluded that the fourth amendment’s requirement “is less than a rule of more-likely-than-not, but how much less depends on the circumstances.”²³⁸ At least in some cases, this view seems appropriate. The *Restatement (Second) of Torts* provides a classic illustration: A police officer discovers two people examining a corpse, and each accuses the other of murder. The *Restatement* concludes that the officer is “privileged to arrest either or both.”²³⁹ The propriety of arresting and detaining both suspects for a time so that law enforcement officers can investigate further does not suggest the legitimacy of holding both suspects for trial and detaining them for an extended period.

As I have argued elsewhere, *Gates* sensibly abandoned the undue refinement of earlier probable cause decisions. In the context of the issue that the Supreme Court addressed, the case marked an appropriate return to first principles.²⁴⁰ *Gates*, however, did not consider the constitutional issues posed by lengthy pretrial detention. The Court’s observations concerning the need to rely on the hurried judgments of lay people do not apply to judicial decisions to impose extended restraints on liberty prior to trial. The issues addressed by *Gates* had little in common with the issues addressed by *Gerstein*, and the combi-

234. 462 U.S. at 235-36.

235. 462 U.S. at 232.

236. 462 U.S. at 238.

237. 462 U.S. at 236.

238. *Gramenos v. Jewel Cos.*, 797 F.2d 432, 438 (7th Cir. 1986) (Easterbrook, J.). *But see* Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 245-47 (1984) (arguing that “[o]n some occasions, a greater than fifty percent probability that a search will be successful may not . . . justify it” while in other situations “a smaller than one percent chance” may be enough).

239. RESTATEMENT (SECOND) OF TORTS § 119 comment j, illustration (1965).

240. *See* Alschuler, *supra* note 238, at 245-56 & n.98; Alschuler, “Close Enough for Government Work”: The Exclusionary Rule After *Leon*, 1984 SUP. CT. REV. 309, 325; *see also* Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REF. 465 (1984).

nation of the two decisions yields outcomes that neither decision justified. The view of probable cause that the Supreme Court articulated in *Gates* accordingly should lead to a reevaluation of *Gerstein*'s declaration that "[t]he standard [for imposing an extended pretrial restraint of liberty] is the same as that for arrest."²⁴¹

3. *Detention and Other Intrusions More Serious than Arrest*

Before *Gerstein*, the Supreme Court had recognized that probable cause is not a universal solvent for fourth amendment issues. The Court had said in *Terry v. Ohio* that when a law enforcement officer could "point to specific and articulable facts which . . . reasonably warrant [the] intrusion,"²⁴² he could stop and detain a suspect briefly without probable cause. After *Gerstein*, the Court upheld a suspect's detention for twenty minutes in the absence of probable cause and observed: "[O]ur cases impose no rigid time limitation on *Terry* stops. . . . [W]e have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes."²⁴³ Were the Court to permit intrusions slightly less serious than arrest without probable cause and then to insist on no more than probable cause for intrusions much more serious than arrest, its rulings would not reflect a principled "balancing of the need for [a search or seizure] against the invasion of personal rights that [this intrusion] entails."²⁴⁴ The Court's sliding scale instead would slide in only one direction — toward upholding restrictions of liberty.

Decisions subsequent to *Gerstein* have made clear that the Court does not take this unprincipled view. In *Winston v. Lee*,²⁴⁵ the Court held that involuntary surgery to recover a bullet from a suspect required stronger justification than was provided by a showing of probable cause. Similarly, *Tennessee v. Garner*²⁴⁶ held that a police officer's use of deadly force to effect a felony arrest violated the fourth amendment although this use of force was both necessary to prevent escape and supported by probable cause. *Winston* and *Garner* demonstrated that *Terry*'s coin does have two sides. They also cast *Gerstein* as an anomaly in the Supreme Court's fourth amendment jurisprudence — a glitch in the sliding scale. These recent cases and other

241. 420 U.S. at 120 (1974).

242. 392 U.S. 1, 21 (1968).

243. *United States v. Sharpe*, 470 U.S. 675, 685 (1985).

244. *See Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

245. 470 U.S. 753 (1985).

246. 471 U.S. 1 (1985).

developments since *Gerstein* have undercut the basis for that ruling as applied to detention under the 1984 Act. Neither a functional nor a historical analysis can support detention without bond simply on a showing of probable cause.

Indeed, the constitutional standard for detention without bond should be no different from the standard for denying bail that has been part of our nation's jurisprudence from the beginning. This detention should be permissible only when "the proof is evident or the presumption great." In more familiar, modernized language, this standard requires "clear and convincing evidence" of guilt or convictability²⁴⁷ as a prerequisite to detention.

C. *An Analogy: Preventive Detention and Preliminary Injunctive Relief in Civil Cases*

In arguing for preventive detention legislation for the District of Columbia, Attorney General John Mitchell wrote, "A finding of probable guilt of the offense charged is critical"²⁴⁸ Mitchell observed that the standard incorporated in the legislation then proposed by the Justice Department — a substantial probability that the defendant committed the offense with which he is charged — "is perhaps best compared to the civil test for the issuance of a preliminary injunction."²⁴⁹ Mitchell's comparison seems instructive. Preventive pretrial detention affords the government interim relief in a criminal case. A party who seeks interim relief in a civil case, however, must establish both that he will suffer irreparable injury in the absence of this relief and that he probably will prevail on the merits.²⁵⁰ Requiring proof of danger to the community before granting pretrial relief in a criminal case may seem analogous to requiring proof of irreparable injury. The 1984 Act, however, omits any analogue of the civil requirement of proof of probable success on the merits. Although the Senate Judiciary Committee considered the issue, it concluded that comply-

247. Although clear and convincing evidence of factual guilt would satisfy the due process clause, the better legislative standard would focus on convictability — the probability of the government's eventual success on the merits. To permit the detention of "factually guilty" defendants whose guilt cannot be demonstrated under evidentiary rules would undercut the policies those rules serve. Casting the requirement in terms of factual guilt might indeed invite deliberate abuse when prosecutors could not establish guilt in accordance with legal requirements. See note 42 *supra*. Focusing on convictability would not require the application of evidentiary rules at the detention hearing itself; it would be enough for the government to demonstrate informally that it possessed sufficient admissible evidence to make conviction a strong probability.

248. Mitchell, *supra* note 203, at 1238.

249. *Id.*

250. See 11 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2948 (1973); Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 526 (1978).

ing with this standard would be too burdensome.²⁵¹

One might be troubled by Mitchell's analogy; treating an extended deprivation of liberty in the same manner as the issuance of a civil injunction apparently values liberty too little. To imprison defendants on the basis of substantially less evidence than would be required to justify interim relief in a civil case, however, is unconscionable.²⁵²

251. See text at notes 40-42 *supra*.

252. Perhaps courts could construe the Bail Reform Act in a way that would avoid its apparent constitutional defect. The Act authorizes preventive detention when a case "involves" a crime of violence or another specified offense. 18 U.S.C. §§ 3141-3146 (Supp. II 1984) (described more fully in text at notes 7-9 *supra*). Courts and commentators have assumed that a case involves a crime of violence whenever the defendant is charged with a crime of violence, see, e.g., Serr, *The Federal Bail Reform Act of 1984: The First Wave of Case Law*, 39 ARK. L. REV. 169, 172 (1985), but "involves" is a verb for the 1980s. To say that a case "involves" a crime of violence is to say that the case has something to do with a crime of violence. Just what the case must have to do with a crime of violence before courts may order pretrial detention is an issue for these courts to resolve. Judges might in fact conclude that a case does not "involve" a crime of violence unless clear and convincing evidence suggests that a defendant has committed a crime of violence.

Congress did not intend this construction of its statute. As noted, the Senate Judiciary Committee rejected a requirement that prosecutors establish a "substantial probability" of guilt as a prerequisite to imprisonment. See text at notes 40-42 *supra*. So long as Congress' language bears the suggested construction, however, the objection based on congressional intent might not be decisive. Congress might prefer a limiting construction of the statute to a declaration that the statute is unconstitutional.

The suggested construction, however, might not save the 1984 Act. The Act authorizes imprisonment without bond not only when a case "involves" a crime of violence or other specified offense but also when the case "involves" a risk that the defendant will flee, intimidate a prospective witness or juror, or obstruct justice. 18 U.S.C. § 3142(f) (Supp. II 1984). In these situations, the statutory language looks to the future rather than the past; importing a requirement of proof of past misconduct into this language seems impossible. Requiring a stronger factual basis for preventive detention than for detention designed to insure that a fair trial can occur may be justified, see text at notes 222-25 *supra*, but this article has suggested that the Constitution demands a substantial predicate in past misconduct for this second form of detention as well. See text at notes 225-47 *supra*. Construing the Act to establish two classes of detained defendants — one detained after adversary hearings at which prosecutors have offered clear and convincing evidence of guilt and one detained only on the basis of *ex parte* determinations of probable cause — would have a tenuous basis both in the language of the statute and in constitutional analysis.

The Bail Reform Act also provides:

The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning [among other things] . . . the weight of the evidence against the person.

18 U.S.C. § 3142(g) (Supp. II 1984). Although the Act declares that a judge or magistrate shall take this evidence into account, it does not indicate what weight he shall give it. A court might hold that a judge or magistrate should afford substantial weight to this consideration, refusing to order detention unless the preliminary evidence clearly indicates guilt. Again, however, Congress' rejection of a requirement of preliminary proof of guilt reveals that it did not intend this construction; and treating one "factor to be considered" differently from all others would require a strained reading of the statute.

Although courts might construe the Bail Reform Act to save its constitutionality, this construction would require mighty judicial tugging. Congress could remedy the Act's constitutional defect without significant difficulty; and reluctant though courts should be to declare a major piece of federal legislation unconstitutional, they probably should hold the 1984 Act invalid. Alternatively, the Supreme Court might limit or overrule *Gerstein v. Pugh*, hold that the fourth amendment requires clear and convincing evidence of guilt as a prerequisite to extended pretrial detention without bond, and declare the Bail Reform Act constitutional when read in conjunc-

CONCLUSION

The failure of the Federal Bail Reform Act of 1984 to demand proof of wrongdoing as a prerequisite to detention and its failure to afford hearings on this issue are incompatible with the law governing the award of interim relief in civil cases, with fourth amendment decisions concerning intrusions more serious than arrest, with due process decisions governing the restraint of property, with Anglo-American tradition, with the current practice of most states, with the freedom that our culture customarily has afforded individuals to govern their lives, and with "fundamental fairness." The interest-balancing approach to due process that characterized both the majority and the dissenting opinions in *Schall v. Martin* leaped over most of these concerns.

Hundreds or thousands of federal defendants are currently imprisoned without bond although no judicial officer has found more than probable cause to believe them guilty of any wrongdoing. The requirement of probable cause nominally demands a "substantial basis" for the belief that a person has committed an offense. The claim that any impartial authority has found even a "substantial basis," however, depends on the fiction that grand juries exercise independent judgment. Most of today's detained defendants have not been afforded hearings on the issue of probable cause, and most will be detained for months before trial.

These defendants are imprisoned in a nation that for centuries demanded that the proof be "evident" or the "presumption great" before denying bail even to defendants charged with capital crimes. Today's widespread imprisonment without trial occurs in a nation that once had heard whatever evidence defendants wished to present on guilt or innocence before determining whether to deny them bail. The incarceration of defendants under the Bail Reform Act rests on a proposition that denies individual opportunity and affords little place to the freedom of the human will. This detention works an injustice that only a formulaic interest-balancing — one that sees freedom as subordinate to "compelling governmental interests" and misses most of what matters in human experience — could begin to obscure. This detention violates "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."²⁵³

tion with this fourth amendment requirement. Such a ruling, however, would require the Court to address a number of constitutional objections to the 1984 Act that this article has not considered.

253. See *Hurtado v. California*, 110 U.S. 516, 535 (1884); *Powell v. Alabama*, 287 U.S. 45, 67 (1932); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

Requiring substantial preliminary proof of guilt as a prerequisite to detention might not result in the release of many defendants currently detained under the 1984 Act. Federal prosecutors do not ordinarily file charges in the absence of evidence to support them, and they might be able to justify most current detention under the appropriate constitutional standard. Nevertheless, whether a person is detained is not all that matters. Why this person is detained matters as well. The Federal Bail Reform Act takes at least a small step toward the preventive detention practices of those European dictators who Francis Allen suggested might have sparked the Supreme Court's initial use of the due process clause to control American criminal procedure. These dictators of the 1930s were not reluctant to subordinate human rights to compelling governmental interests.