Preventive Detention: Dangerous Until Proven Innocent

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PREVENTIVE DETENTION: DANGEROUS UNTIL PROVEN INNOCENT

Protecting the innocent, even at the expense of freeing the guilty, is a principle grounded in early American jurisprudence. This foundational tenet reflects the belief that wrongful detention threatens violence to civil order that is worse than the violence detention rightfully seeks to prevent. The fifth and fourteenth amendments to the United States Constitution uphold this principle by ensuring that no person will be deprived of liberty without "due process of law." The constitutional proscription against excessive bail and the guarantee of an early trial complement the right to due process.

These fundamental protections, however, have not forestalled the need for clear-cut legislation to define the terms by which a person may be detained prior to conviction. Positive law governing bail determinations does not answer the question of "how much" bail is necessary. Instead, the question is when may the court deny bail outright. General agreement exists that criminal charges for certain capital offenses, such as murder, may require outright denial of bail to prevent the accused's flight from the jurisdiction.

1. J. Kunen, How Can You Defend Those People? Foreword (1985) ("We find, in the rules laid down by the greatest English Judges, who have been the brightest of mankind, [that] we are to look upon it as more beneficial, that many guilty persons should escape unpunished, than one innocent person should suffer." (quoting 3 Legal Papers of John Adams 242 (L. Wroth & H. Zobel eds. 1965))).

2. Id.

3. The fifth amendment states: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V. The fourteenth amendment further provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

4. The eighth amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

5. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. Const. amend. VI.


7. See infra notes 102-14 and accompanying text.

8. See, e.g., Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 91 ("And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which
Furthermore, courts may deny bail when the accused threatens the safety of witnesses. Much less settled, however, is the propriety of detention not borne out of concern that the accused may forfeit his surety and flee, but rather that bond set at any amount will not protect the community from the threat of future harm that the accused’s release poses.

General public dissatisfaction with the bail-bond system in the District of Columbia spurred Congress, in 1970, to enact an amendment to the District of Columbia Code allowing detention without bond of defendants charged with certain “dangerous crimes” where “no condition or combination of conditions . . . will reasonably assure [the] safety of the community.” The District of Columbia statute, in turn, served as the eventual model for the Bail Reform Act of 1984 (Bail Reform Act), establishing the predetermination of dangerousness as a ground for detention at the federal level. In United States v. Salerno, the United States Supreme Court confirmed the constitutional soundness of the threat-to-the-community standard and supplied a much-needed “regulatory” response to the growing bail crisis.

Danger, as an element of the government’s decision to detain an individual, is not generally limited to the bail-bond system. In a companion deci-
sion to Salerno, the Supreme Court held in Hilton v. Braunskill, that Federal Rule of Appellate Procedure 23, sections (c) and (d), provide federal courts with the authority to stay the enlargement of a successful habeas corpus petition where the presumption of release is overcome by a showing of dangerousness to the public.

Unlike the standards for detention following bail proceedings, stay of habeas relief pending appeal relies on traditional standards governing the stay of civil judgments. Where the Bail Reform Act affords an adversarial hearing to allow the accused an opportunity to rebut the presumption that no conditions of release will ensure the safety of the community, rule 23(c) creates a presumption favoring the habeas petitioner's release. The prosecutor may overcome the presumption, however, if the traditional stay factors are shown.

This Comment will examine the competing doctrines of detention established by Salerno and Hilton and explore, more generally, judicial authority, within the confines of the fifth and fourteenth amendments, to predict dangerous behavior. Inherent inconsistencies exist between methods used to determine the dangerousness of successful habeas petitioners and those methods used to assess whether individuals should be incarcerated prior to trial. Whether the system of presumptions and challenges in either situation affords complete assurance that only the dangerous and guilty will be detained while the innocent go free, is, at best, highly debatable. It is fundamental, therefore, that our criminal justice system provide more clear-cut

21. FED. R. APP. P. 23(c) directs a court, justice, or judge to order release of a successful habeas petitioner pending review of the decision unless the deciding court or a higher court "shall otherwise order." FED. R. CRIM. P. 23(d) specifies that the initial release or custody order shall control review of the decision unless modification or an independent order is warranted for "special reasons." Cf. infra notes 164-65 and accompanying text.
22. Hilton, 107 S. Ct. at 2117-19 & n.4. Federal prisoners having cause to appeal their convictions on the ground of wrongful imprisonment may seek a writ of habeas corpus ordering their release. The prosecutor may rebut the presumption favoring enlargement of a successful habeas petitioner with a persuasive showing of dangerousness, without challenge by adversarial proceeding, to justify detention of the petitioner pending appeal. Cf. 18 U.S.C. § 3142(e) (a presumption favoring detention may be rebutted by the defendant during an adversarial hearing).
23. See infra notes 102-05 and accompanying text.
24. The standards governing the issuance of a stay of civil judgments are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Hilton, 107 S. Ct. at 2119; see also infra notes 161-63 and accompanying text.
25. See infra notes 102-05 and accompanying text.
26. See supra note 22 and accompanying text.
27. See supra note 24 and accompanying text.
determinants to be used to predict dangerous behavior. The likelihood that the dangerous but innocent might be detained also exists and raises the question of whether this result, albeit favorable to public safety even for a short period, is an acceptable refinement of our nation's desire to protect the innocent.

I. THE BOUNDS OF "CIVIL" PREVENTION

A. A Brief History of Preventive Detention

Historically, courts have applied preventive detention exclusively in civil proceedings. While the power to prosecute a criminal offense may result in civil detention prior to trial, it is the power to bring an individual into custody which forms the basis for detention. Determining what makes a person in custody "dangerous" enough to justify detention without trial involves the interplay of administrative necessity and predictive psychological judgments. In the past, Congress has frequently resorted to legislative enactment to authorize custody and detention of individuals who, because of their mental state or other factors, pose a threat to the community. For instance, while wholesale prevention based on racial ancestry has survived rigid judicial scrutiny, courts generally have upheld detention where such action is "necessary and proper" to the exercise of some specific federal

28. United States v. Salerno, 107 S. Ct. 2095, 2102 (1987) (reviewing the instances where courts have held that detention as a means of protecting community safety serves a compelling regulatory interest); see also Carlson v. Landon, 342 U.S. 524, 537-42 (1952) (administrative detention of communist aliens prior to deportation proceedings does not warrant judicial review where party doctrine advocating violent revolution threatens public safety).


30. Once in the custody and care of the United States, individuals accused of federal offenses but found mentally incompetent to stand trial remain subject to the purview of the federal courts to initiate commitment proceedings. See Greenwood v. United States, 350 U.S. 366, 375 (1956). While it is the prosecutor's duty to bring a case before the court, prolonged detention of individuals brought into custody requires a judicial determination of probable cause. See Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (prosecutor's information alone found insufficient to support detention beyond steps incident to warrantless arrest).

31. See infra text accompanying notes 228-31, 244-50.

32. See infra notes 102-14 and accompanying text.

33. At the outbreak of World War II, the Defense Department initiated a program of detention, curfew, and exclusion against persons of Japanese ancestry. See Hirabayashi v. United States, 320 U.S. 81 (1943) (unanimously upholding military authority to impose curfew restrictions on Japanese-Americans). While the United States Supreme Court never decided the constitutionality of detention under the relocation program, Ex parte Endo, 323 U.S. 283, 297 (1944) (invalidating detention of Japanese-Americans for lack of statutory authority), the Court upheld exclusion of such persons from military areas to prevent sabotage. See Korematsu v. United States, 323 U.S. 214, 219 (1944) (applying strict scrutiny test and upholding
authority.\textsuperscript{34}

In the midst of Cold War concern for domestic security against the threat of communism, Congress has found the authority within its plenary powers to detain communist aliens prior to deportation proceedings.\textsuperscript{35} The Supreme Court, in \textit{Carlson v. Landon},\textsuperscript{36} specifically rejected fifth and eighth amendment challenges to the United States Attorney General's authority to detain aliens without bond in such instances.\textsuperscript{37} Under the statutory scheme, hearsay evidence, without benefit of rebuttal through an adversarial hearing, sufficed to determine that an individual was an active alien Communist and hence detainable as a public menace.\textsuperscript{38} Because deportation is not a criminal proceeding, but rather a civil proceeding,\textsuperscript{39} the \textit{Carlson} majority found detention "necessarily" a part of the deportation procedure and therefore consistent with due process.\textsuperscript{40} The Court interpreted the delegation of discretionary authority to the Attorney General to act as judge and jailor as necessary in light of the steady, post-war influx of aliens into the country.\textsuperscript{41}

The \textit{Carlson} Court accepted a narrow view of the eighth amendment, finding that no absolute right to bail exists.\textsuperscript{42} Drawing from a now popular defendant's conviction for violating military order to exclude persons of Japanese ancestry from designated military area).

\textsuperscript{34} \textit{Greenwood}, 350 U.S. at 375 (upholding legislative authority "auxiliary to incontestable national power"); \textit{see e.g., Carlson v. Landon}, 342 U.S. 524, 538 (1952) (detention "necessarily" a part of deportation).

\textsuperscript{35} \textit{Carlson}, 342 U.S. at 534, 538.

\textsuperscript{36} 342 U.S. 524 (1952).

\textsuperscript{37} \textit{Id.} at 542, 546. The district court in \textit{Carlson} detained the petitioners without bail under a congressional grant of authority to the United States Attorney General to deport all alien communists. Based on findings that communist teachings advocate violent overthrow of democratic nations, the Court ruled the Constitution vested the Executive with discretionary power to seek out and deport all Communist Party members. \textit{Id.} at 528-31. In affirming the constitutionality of the legislative scheme, the Supreme Court held that, where the legislative standard for deportation is "clear and definite" and the refusal of bail is not "arbitrary or capricious," the Executive's exercise of discretionary judgment to detain Communist Party members does not violate due process. \textit{Id.} at 543-47. Because the English Bill of Rights, the source of the bail provisions in the United States Constitution, accorded not an absolute right to bail but only a prohibition against excessive bail, congressional action to deny bail to certain classes of cases does not violate the eighth amendment. \textit{Id.} at 544-46; \textit{see also infra} note 43 and accompanying text.

\textsuperscript{38} \textit{Carlson}, 342 U.S. at 552-56 (Black, J., dissenting).

\textsuperscript{39} \textit{Id.} at 537.

\textsuperscript{40} \textit{Id.} at 538. Where temporary confinement necessary as an administrative step toward deportation involves hard labor or other "infamous punishments," however, due process requires the full protections of a jury trial. \textit{See} \textit{Wong Wing v. United States}, 163 U.S. 228, 238 (1896).

\textsuperscript{41} \textit{Carlson}, 342 U.S. at 543 n.39.

\textsuperscript{42} \textit{Id.} at 545-46.
reference to the English Bill of Rights Act of 1689, the majority determined that the framers intended only that bail not be excessive in cases where bail is otherwise appropriate. Contrary arguments recognize the logical inconsistency of allowing denial of bail but enforcing a proscription against excessive bail, when the result in either case is pretrial imprisonment. Detractors note, moreover, that reading the bail clause as a restraint on judicial excess contradicts accepted notions that the Bill of Rights intended to limit only the power of Congress.

During the same term as the Carlson decision, the Supreme Court, in Stack v. Boyle, considered the bail issue in the context of criminal proceedings. The Stack Court acknowledged that an unequivocal right to bail in noncapital offenses was necessary to the right to be free from “punishment” prior to trial. Freedom prior to conviction ensured the accused unrestrained preparation of a defense. In such a case, bail functions primarily to protect against failure to appear at trial.

Like Carlson, the Stack decision construed antisedition legislation designed to root out communist influences. Unlike the Internal Security

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43. 1 W. & M. 2, ch. 2, § 1(10). The Court in Carlson stated: The bail clause was lifted with slight changes from [the] English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.

44. Carlson, 342 U.S. at 544-46.

45. See id. at 556-58 (Black, J., dissenting) (“Under this contention, the Eighth Amendment is a limitation upon judges only, for while a judge cannot constitutionally fix excessive bail, Congress can direct that people be held in jail without any right to bail at all.”).


47. 342 U.S. 1 (1951).

48. Id. at 3.

49. Id. at 4.

50. Id.

51. Id. at 4-5.

52. The petitioners in Stack were charged with violating the Smith Act, ch. 439, 54 Stat. 670 (1940) (codified as amended at 18 U.S.C. § 2385 (1982)), which made conspiracy to under-
Act\textsuperscript{53} applied in \textit{Carlson}, the Smith Act\textsuperscript{54} in \textit{Stack} provided for criminal penalties and did not rely on a presumption of dangerousness incident to deportation as grounds for detention.\textsuperscript{55} The \textit{Stack} majority, in fact, expressly denounced treating an indictment as grounds for excessive bail, finding it disturbingly reminiscent of the totalitarian principles that the Smith Act sought to prevent.\textsuperscript{56} In \textit{Salerno}, this punitive/regulatory dichotomy became crucial to the bail issue because, in an administrative setting where detention did not carry the mantle of "punishment," surety was not necessary.\textsuperscript{57}

The moral dilemma peacetime detention raises in a democracy disappears when exigencies of civil insurrection or war make it necessary to detain an individual.\textsuperscript{58} A miner's strike in the 1900's resulting in domestic violence and subsequent detention of strikers by the Governor of Colorado, led the Supreme Court to address the due process complaint in \textit{Moyer v. Peabody}.\textsuperscript{59} The Supreme Court, taking judicial notice of the pliancy with which due process attaches in varying circumstances,\textsuperscript{60} upheld the power of the state to head off mob violence by whatever means necessary, including deadly force.\textsuperscript{61}

One of the oldest and most unrestrained grants of detention authority derives from the power granted by the fifth Congress to the executive branch to deal with the exigencies of war.\textsuperscript{62} Where citizens of hostile nations reside

\begin{footnotes}
\item[53] The Carlson petitioners were arrested and detained under the Internal Security Act of 1950, ch. 1024, 64 Stat. 987 (codified as amended in scattered sections of 18, 22, and 50 U.S.C.), which granted the Attorney General the authority to detain without bail, prior to deportation, any aliens found to be members of the Communist Party. 342 U.S. at 526-27 & n.4.
\item[54] ch. 439, 54 Stat. 670 (1940).
\item[55] \textit{Stack}, 342 U.S. at 5 (court must set bail to ensure defendants' appearance at trial where a final conviction carries a criminal penalty of five years imprisonment and a fine of up to $10,000); cf. 342 U.S. at 528 n.5 (continued custody pending final determination of deportation at the discretion of the Attorney General).
\item[56] 342 U.S. at 6.
\item[57] 107 S. Ct. 2095, 2101 (1987) (detention without bail not punishment where legislative intent evinces careful plan for "regulating" a pressing societal problem).
\item[58] \textit{See Moyer v. Peabody}, 212 U.S. 78, 83 (1909) (detention resulting from state governor's declaration that a state of insurrection exists is a conclusion of fact not subject to judicial review); \textit{see also} Ludecke v. Watkins, 335 U.S. 160, 161-62 (1948) (President has congressional mandate to direct the manner of restraint used against foreign nationals during times of war).
\item[59] 212 U.S. 78 (1909).
\item[60] Id. at 84 (due process of law varies with the circumstances and subject matter).
\item[61] Id. (supplement to Colorado Constitution empowering the governor to act to repel insurrection includes orders to kill where necessary).
\item[62] Enemy Alien Act of 1798, ch. 66, 1 Stat. 577.
\end{footnotes}
within the United States, the Enemy Alien Act of 1798 grants to the President unconditional authority to detain and deport such individuals. The Supreme Court decision in *Ludecke v. Watkins* affirmed this power where the Court held the government had lawfully detained a German national awaiting deportation during World War II.

In both *Moyer* and *Ludecke*, a statute empowered a government official to use preventive detention upon finding an individual dangerous. The Court presumed the United States official's decision lawful in both cases.

The quick decisions required of government authorities facing civil unrest, likened by the *Moyer* Court to those made by a captain of a ship at sea, require no clearer standard of proof than "good faith" judgment that the person detained stands in the way of a return to order. This standard sharply contrasts with the standard of proof required to involuntarily commit a person to a mental hospital. The Supreme Court in *Addington v. Texas* determined that, in such a case, due process demands "clear and convincing evidence." The *Addington* Court noted that while the choice of the proper standard of proof to apply in any judicial proceeding, civil or criminal, may be largely academic where the nuances are lost to a jury, the need for some workable threshold of proof increases as the interest at stake becomes more substantial. Civil commitment, like a criminal conviction where proof "beyond a reasonable doubt" is the standard, potentially involves a significant deprivation of liberty. *Addington* taught, however, that due process warrants a lesser standard of proof in proceedings to involuntarily commit the mentally ill because reliance on psychiatric diagnosis, not

63. *Id.*
64. *Id.; see also Ludecke v. Watkins, 335 U.S. 160, 161-62 (1948).*
65. 335 U.S. 160 (1948).
66. *Id.* at 162-63.
67. *See cases cited supra note 58.*
68. *Id.; see also Ludecke, 335 U.S. at 163-66 (executive power to deport during times of war is not reviewable); cf. id. at 184-87 (Douglas, J., dissenting) (contending deportation hearing required to comport with due process, but supporting the principle that the "needs of the hour may well require summary apprehension and detention of alien enemies" during wartime).*
70. *Id.* (governor not liable for "good faith" arrests made to prevent insurrection).
71. *See Addington v. Texas, 441 U.S. 418, 433 (1979) (rejecting as too subjective state application of beyond a reasonable doubt standard in cases of persons involuntarily committed to mental hospitals).*
73. *Id.* at 433.
74. *Id.* at 424-25.
75. *Id.* at 423-24.
76. *Id.*
77. *Id.* at 425.
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clear discernible facts, is at issue. The Court did not address the troubling
notion that the admittedly vague science of determining mental illness might result in wrongful detention, yet the Court evinced great concern that
an unrealistically high standard of proof would prevent the seriously ill from receiving psychiatric treatment.

In the federal criminal system, a range of statutory provisions allows for
civil commitment prior to trial or in anticipation of release from incarceration. The United States Code requires commitment until the accused is
mentally competent to stand trial. Commitment before release after incarcer-
cation requires a clear showing that the prisoner is dangerous. In addi-
tion, in Greenwood v. United States, the Supreme Court approved
application of the dangerousness test to a pretrial detainee, allowing his re-
lease only when he no longer was dangerous. The Court held that commit-
ment upon a finding that release would “endanger the officers, property, or
other interests of the United States” was “auxiliary to incontestable na-
tional power” and thus clearly within congressional authority granted by
the necessary and proper clause.

Greenwood did not specifically address how long detention may last where
a straightforward application of the federal commitment procedures results
in a virtual life sentence for a defendant with a poor mental prognosis. The
potential for interminable commitment did arise some fourteen years later
when the Supreme Court considered a similar Indiana commitment proce-

78. Id. at 429-30. In addition to the difficulty in attempting to apply psychiatric testi-
mony to the beyond a reasonable doubt standard, the Addington Court maintained that civil
commitment is not punitive and placed such cases on the regulatory side of the punitive/
regulatory dichotomy. Id. at 428.
80. Id. at 430.
ascertaining mental incompetency of defendants at the time of trial. Id. §§ 4244-4245. Section
4246 empowers the court to commit those persons found mentally incompetent under §§ 4244
and 4245 to the custody of the Attorney General until the accused become competent. Id.
§ 4246. Section 4246 also provides that where, under § 4247, such individuals are prisoners
about to be released upon expiration of their prison sentence, § 4248 shall apply to require
commitment until they become sane or cease to be dangers to “the officers, the property, or
(1956); 18 U.S.C. § 4246.
82. 18 U.S.C. § 4246.
83. Id. §§ 4247-4248.
84. 350 U.S. 366 (1956).
85. Id. at 374.
86. Id. at 375.
87. Id.
88. Id.
89. Id. at 375-76.
In Jackson v. Indiana, the Supreme Court sought an outer boundary to commitment for lack of competency to stand trial where the effect was virtually permanent. The Court adopted the "rule of reasonableness" that had percolated in the lower courts since Greenwood's adoption. The rule, created to meet the guarantees of due process, requires holding of the defendant only for a reasonable time before continued incompetency required release or a more stringent commitment procedure. The operation of the rule, however, specifically excluded defendants found "dangerous" under the Indiana statute.

B. Pretrial Detention: 1984 Bail Reform Act Withstands Facial Challenge

1. Requirements of the Bail Reform Act

Bail reform refocused the search for a definition of "dangerous behavior." By the time Congress considered the Bail Reform Act, it was evident that, out of the range of circumstances where dangerous behavior results in preventive detention, a few ground rules must be followed. First, as Jackson demonstrates, deprivation of liberty is not in violation of substantive due process where a showing of dangerous behavior exists. Second, to survive a federalism challenge, the guidelines for detention must be "necessary and proper" to some specific federal authority. Third, as Stack explains, the bail clause treats those detention proceedings that are penal in nature as

91. The petitioner in Jackson was a mentally defective deaf mute with virtually no communication skills. Id. at 717. Because Indiana's standard for competency required commitment of the defendant until such time as he was mentally and physically capable of understanding the proceedings and assisting in his defense, the commitment had the effect of a life sentence. Id. at 718-19.
92. Id. at 732-34.
93. Id. at 734. In addition to his due process challenge, the petitioner in Jackson successfully charged that alternative commitment proceedings available to feeble-minded persons providing a more stringent standard of proof and a more relaxed release requirement violated his rights under the equal protection clause of the fourteenth amendment. Id. at 723-30.
94. Id. at 733.
95. Unlike the alien status of foreign nationals detained prior to deportation proceedings or the parens patriae rationale which distinguishes detention of juveniles and the mentally ill, the Bail Reform Act involves incapacitation of dangerous, but mentally competent adults charged with serious crimes, a distinction which brings the punitive/regulatory distinction into sharp focus. See United States v. Melendez-Carrion, 790 F.2d 984, 999-1000 (2d Cir. 1986) (eight persons alleged to be members of the "Los Macheteros" terrorist organization arrested on armed robbery charges and detained under 18 U.S.C. § 3142(e)).
96. See United States v. Salerno, 107 S. Ct. 2095, 2102 (1987) (courts have repeatedly upheld the regulatory interest of government in community safety at the expense of personal liberty in a variety of circumstances).
98. Id. at 110 (quoting Greenwood v. United States, 350 U.S. 366, 375 (1956)).
unconstitutional "punishment" without bail or trial. Civil proceedings, on the other hand, escape such constitutional infirmity, especially where a suitable standard of proof, such as the "clear and convincing evidence" standard of Addington, applies.

As codified, the Bail Reform Act establishes a threat-to-community standard for detention. Sections 3124(e) and (f) determine the existence of such a threat through application of detailed guidelines which may give rise to a rebuttable presumption that the accused is dangerous. The presumption arises upon two separate findings by the court. First, if the court determines at a detention hearing that there is probable cause to believe the accused has committed any one of several specified felonies, a rebuttable presumption exists that "no condition or combination of conditions will reasonably assure . . . the safety of the community." Second, the same rebuttable presumption will arise upon a motion by the government's attorney in a case charging the accused with certain specified crimes, where the court

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99. 342 U.S. 1, 4-6 (1951) (bail denied defendants accused of a noncapital offense hampers preparation of defense and results in "infliction of punishment prior to conviction"); cf. Salerno, 107 S. Ct. at 2104 (rejecting proposition that Stack "categorically prohibits" regulation of pretrial release where other "compelling interests" are involved).


101. Id. at 433.


If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial.

103. Id. § 3142(e).

104. The statute requires that the judicial officer first find:

That there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act, the Controlled Substances Import and Export Act, section 1 of the Act of September 15, 1980, or an offense under section 924(c) of title 18 of the United States Code.

105. Id.

106. The statute requires a case involving:

(A) a crime of violence;

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

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act, the Controlled Substances Import and Export Act, or section 1 of the Act of September 15, 1980; or

(D) any felony committed after the person had been convicted of two or more prior offenses described in subparagraphs (A) through (C), or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) if a circumstance giving rise to Federal jurisdiction had existed . . . .
finds at a detention hearing that he has a prior conviction for one of those crimes, and he committed it while on release pending trial.\textsuperscript{107}

The accused, once afforded counsel,\textsuperscript{108} is given the opportunity to rebut the presumption through testimony, presentation of witnesses, cross-examination, and proffer of information.\textsuperscript{109} The judicial officer must consider: (1) the nature of the offense charged, including whether the offense is a crime involving a narcotic drug; (2) the weight of the evidence presented; (3) the personal characteristics of the accused, including, inter alia, his physical and mental condition, past conduct, and ties to the community; and (4) the seriousness of the danger such person would pose if released.\textsuperscript{110} If, after balancing all the factors, the court issues written findings\textsuperscript{111} that the accused, "by clear and convincing evidence,"\textsuperscript{112} has been shown to pose a threat to the safety of the community, the court orders his detention until trial.\textsuperscript{113} The detainee may, however, make expedited appeal of the detention order.\textsuperscript{114}

2. United States v. Salerno

In \textit{United States v. Salerno},\textsuperscript{115} the Supreme Court upheld the pretrial detention of two alleged organized crime figures on the grounds that the Bail Reform Act satisfies the bail and due process clauses of the fifth, eighth, and

\textsuperscript{107} \textit{Id.} \textsection 3142(f) (citations omitted).

\textsuperscript{108} \textit{Id.} \textsection 3142(f).

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} 18 U.S.C. \textsection 3142(g). Judicial consideration of the accused's physical condition and past history of drug abuse in determining whether to detain on community safety grounds could conceivably result in the preventive detention of persons infected with the Acquired Immune Deficiency Syndrome (AIDS), known to plague intravenous drug users among others. At least one Reagan administration official has suggested that AIDS-carrying prisoners, once convicted, should be isolated and those who threaten to willfully spread the infection should be detained indefinitely. \textit{Bennett's Far-Flung Opinions Make Him Subject of Debate}, Wash. Post, Aug. 3, 1987, at A6, col. 3.

\textsuperscript{111} 18 U.S.C. \textsection 3142(i).

\textsuperscript{112} \textit{Id.} \textsection 3142(f).

\textsuperscript{113} \textit{Id.} \textsection 3142(a)(4).

\textsuperscript{114} \textit{Id.} \textsection 3145(b).

\textsuperscript{115} 107 S. Ct. 2095 (1987).
fourteenth amendments. During evidentiary proceedings, the district court ordered detention of the respondents, alleged leaders of the Genovese crime family of La Cosa Nostra, following the proffer of government surveillance evidence indicating that both men participated in conspiracies to protect the organization's activities in illegal gambling, loansharking, and the control of labor unions. The government also asserted the willingness of two witnesses to expose respondents' plans to commit further violence by murdering two targeted individuals. The court detained both respondents under the Bail Reform Act, whereupon the respondents appealed, contending that their restraint imposed unconstitutional punishment prior to trial. The United States Court of Appeals for the Second Circuit reversed the decision, finding merit in their constitutional attack. On petition by the government, the Supreme Court reversed the Second Circuit, finding the Bail Reform Act to be facially valid.

Delivering the opinion of the Court, Chief Justice Rehnquist disclaimed any express congressional intent to punish dangerous defendants in contravention of the due process protections of the fifth and fourteenth amendments. Nor, by application of the test set forth in the majority opinion,

116. *Id.* at 2098-100.
117. United States v. Salerno, 631 F. Supp. 1364, 1366, 1375 (S.D.N.Y. 1986). The indictment charged that defendant Anthony Salerno was the "Boss" of the Genovese family and that Vincent Cafaro was a "Capo," or Captain, of the organization. *Id.* at 1366.
118. *Id.* at 1366-67 (the government arrested the defendants, along with 13 others, and in an 88-page indictment charged them with mail and wire fraud, extortion, gambling, conspiracy to murder, and violation of the Racketeer Influenced and Corrupt Organizations Act (RICO)).
119. *Id.* at 1367-68 (James "Jimmy the Weasel" Fratianno and Angelo Lonardo, two formerly active members of La Cosa Nostra, agreed to testify concerning orders by the defendant Salerno and others to "contract" for the murders of two named individuals).
120. *Id.* at 1375.
121. United States v. Salerno, 794 F.2d 64, 66-67 (2d Cir. 1986).
122. *Id.* at 71-75.
123. *Id.* at 74-75.
124. United States v. Salerno, 107 S. Ct. 2095, 2098 (1987) (in a six-to-three decision). The United States Court of Appeals for the Second Circuit, relying on its decision in United States v. Melendez-Carrion, 790 F.2d 984 (2d Cir. 1986), held in *Salerno* that insofar as the Bail Reform Act mandates pretrial detention on danger-to-the-community grounds as a means of preventing future crime, it violates due process. The circuit court specifically recognized as valid, however, detention orders based solely on the risk that the defendant would flee the jurisdiction. *Salerno*, 794 F.2d at 71-72. The Supreme Court's reversal of the Second Circuit in *Salerno* does not disturb the validity of pretrial detention based on risk of flight. 107 S. Ct. at 2104-05.
126. *Id.* at 2101 (stating that the legislative history of the Bail Reform Act "clearly indicates" that Congress did not enact a pretrial detention provision to punish dangerous persons); see also S. REP. NO. 225, 98th Cong., 2d Sess. 8, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3190.
was there any excessive “alternative purpose” to which the detention statute rationally could be assigned.\textsuperscript{127} Relying on the congressional intent to create a pretrial detention statute that relieved a “pressing societal problem,”\textsuperscript{128} the majority concluded that the Bail Reform Act is “regulatory” and not “punitive” in nature.\textsuperscript{129} Even though Congress codified the preventive detention provision in the title of the United States Code pertaining to crimes,\textsuperscript{130} this regulatory interpretation is consistent with past observations that preventive detention is distinctly civil and not criminal.\textsuperscript{131} The Chief Justice wrote that Congress may subordinate the due process rights of pretrial detainees in “precisely” the same manner as in those instances where the government, through civil actions, has established a compelling need to detain dangerous aliens, juveniles, and the mentally unstable.\textsuperscript{132} The government’s “legitimate and compelling” interest in deterring crime,\textsuperscript{133} combined with the various “special circumstances” in the past that have warranted detention before trial,\textsuperscript{134} combine to support the Court’s conclusion that the Bail Reform Act does not violate substantive due process.\textsuperscript{135}

\textit{Salerno} dispensed with the facial challenge to procedural due process by holding that the Bail Reform Act satisfies the standard the Court established in \textit{Schall v. Martin}\textsuperscript{136} for detention of juveniles. Where a statutory procedure for detention is “‘adequate to authorize the pretrial detention of at least some [persons] charged with crimes,’”\textsuperscript{137} it is facially valid “whether or not [it] might be insufficient in some particular circumstances.”\textsuperscript{138} In so stating, the Court maintained, as it did in \textit{Jurek v. Texas},\textsuperscript{139} that “‘there is nothing inherently unattainable about a prediction of future criminal conduct.’”\textsuperscript{140}

The majority rejected the respondents’ reliance on \textit{Stack} as support for a

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\item \textsuperscript{127} \textit{Salerno}, 107 S. Ct. at 2101 (quoting \textit{Schall} v. \textit{Martin}, 467 U.S. 253, 269 (1984)).
\item \textsuperscript{128} \textit{Id.}; see also S. REP. No. 225, 98th Cong., 2d Sess. 4-7 \textit{reprinted in} 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3186.
\item \textsuperscript{129} \textit{Salerno}, 107 S. Ct. at 2101.
\item \textsuperscript{130} United States v. Perry, 788 F.2d 100, 109 (3d Cir. 1986).
\item \textsuperscript{131} See supra notes 28, 29, 40 and accompanying text.
\item \textsuperscript{132} \textit{Salerno}, 107 S. Ct. 2102.
\item \textsuperscript{133} \textit{Id.}
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{Id.} at 2104.
\item \textsuperscript{136} 467 U.S. 253, 264 (1984) (upholding New York statute permitting preventive detention of accused juvenile delinquents on findings that, if released, they would likely commit acts which would be criminal if committed by an adult).
\item \textsuperscript{137} \textit{Salerno}, 107 S. Ct. at 2103 (quoting \textit{Schall}, 467 U.S. at 264).
\item \textsuperscript{138} \textit{Id.}
\item \textsuperscript{139} 428 U.S. 262, 274 (1976) (predicting dangerous behavior, although difficult, is an essential element of the criminal justice system).
\item \textsuperscript{140} \textit{Salerno}, 107 S. Ct. at 2103 (quoting \textit{Schall}, 467 U.S. at 278).
\end{itemize}
finding that the Bail Reform Act violated the "excessive" bail restriction in the Eighth Amendment.\textsuperscript{141} Quoting the Court's decision in \textit{Carlson}, the majority followed the narrow view that the bail clause, with minor changes, is the progeny of the English Bill of Rights which does not accord an unconditional right to bail.\textsuperscript{142} The Court refused to resolve countervailing arguments that bail limitations apply to Congress, holding only that they apply to the judiciary.\textsuperscript{143}

The dissent by Justice Marshall, joined by Justice Brennan, disputes the majority's conclusion that preventive detention is not a punitive, and thereby, excessive measure for ensuring community safety.\textsuperscript{144} By analogy, the dissent compared the ease of enforcing a regulatory preventive detention statute to the "absurdity" of a hypothetical law which authorizes the regulatory nighttime curfew of all jobless persons upon a finding by Congress that most crime is committed at night by the unemployed.\textsuperscript{145}

Substantive due process should not depend on any such magical redefinition.\textsuperscript{146} Noting that under the statute an indictment is necessary before detention may occur, the Court found that, in effect, the indictment becomes evidence of dangerousness.\textsuperscript{147} This can lead to an illogical result should a person, detained as dangerous following indictment, be found not guilty. He must be set free or the detention exacts punishment without evidence beyond a reasonable doubt.\textsuperscript{148}

The ease with which courts can manipulate the bail process to serve purposes independent of, and in some cases, contrary to, the issue of the individual's danger to the community is illustrated by the dissent's reference to the facts of the case at bar.\textsuperscript{149} Prior to his pretrial detention on grounds of dangerousness, the government had consented to Salerno's release from an earlier conviction sentencing him to 100 years incarceration.\textsuperscript{150} The release, subject to federal bail laws, required "clear and convincing" proof that Salerno was not a threat to the community, raising the inference that government prosecutors were intent on using the respondent as a test case before

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the Court.\footnote{Id.} In the case of respondent Cafaro, the government consented to his release ostensibly for health reasons, but in reality to permit him to serve as a government informant.\footnote{Id. at 2111.} Justice Marshall stated that "[t]here could be no more eloquent demonstration of the coercive power of authority to imprison upon prediction, or of dangers which the almost inevitable abuses pose to the cherished liberties of a free society."\footnote{Id. at 2109 (quoting 18 U.S.C. § 3142(j) (Supp. III 1985)).} The real essence of preventive detention, in the dissent's view, lies in the Bail Reform Act's statutory disclaimer that "'[n]othing in this section shall be construed as modifying or limiting the presumption of innocence.'"\footnote{Id. at 2112 (Stevens, J., dissenting).}

Justice Stevens, writing alone, dissented from the majority's conclusion that preventive detention on the ground of an individual's danger to the community is constitutional, but reserved judgment for instances where certain violence or times of crises may warrant brief detention.\footnote{Id. at 2112 (Stevens, J., dissenting).} Sharing in Justice Marshall's reproach of the use of indictment as evidence of dangerousness, he asserted that indictment should carry no weight in determining the need for detention.\footnote{Id. at 2102.}

The \textit{Salerno} decision adds to an established body of law supporting preventive detention prior to trial.\footnote{See supra text accompanying notes 90-93.} Under subsection 3141(e), a valid prediction of dangerous behavior warrants pretrial detention, as in \textit{Jackson},\footnote{See id. at 2102.} without violating substantive due process guarantees.\footnote{The possibility that substantive due process violations may occur if the detention is excessive was expressly excluded from the Court's consideration in \textit{Salerno}. 107 S. Ct. at 2101. Unlike the "rule of reasonableness" established in \textit{Jackson v. Indiana}, 406 U.S. 715, 732-34 (1972), the outer limits of detention under the Bail Reform Act are governed by the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1982 & Supp. III 1985), limiting to 90 days the pretrial detention of persons designated as being of high risk. 18 U.S.C. § 3164(b); see also \textit{Jackson}, 406 U.S. at 732-34; \textit{cf.} United States v. Melendez-Carrion, 790 F.2d 984, 996 (2d Cir. 1986) (referring to the Senate debate about inserting an absolute 90-day limit to pretrial detention into the Bail Reform Act).} Moreover, the Bail Reform Act withstands the federalism challenge because detention is "necessary and proper" to the specific power of Congress to enact and enforce laws
governing serious criminal offenses. Finally, a criminal pretrial detention statute avoids, through the Court's acceptance of the "regulatory" label, the heavier procedural protections where punishment results.

C. Post-Conviction Detention: Threat-to-Community Standard Found Valid for Federal Courts

1. Federal Rule of Appellate Procedure 23

In contrast to the rich background of pretrial preventive detention, very little interpretation has accompanied federal post-conviction authority to stay release of successful habeas corpus petitioners on the ground that they are dangerous to the community. Federal Rule of Appellate Procedure 23 governs the stay of habeas release. Section (c) of Rule 23 presumptively favors release, unless the court shall "otherwise order." Section (d) of Rule 23 instructs appellate courts to respect an initial custody or enlargement order unless modification or a new order is warranted for "special reasons shown." Typically, a district court will allow a two- to three-month period before letting the writ issue in order to allow the state time to retry the defendant. Aside from such common practices, however, little au-

160. United States v. Perry, 788 F.2d 100, 111 (3d Cir.) (power of Congress to proscribe the crimes specified in the Bail Reform Act gives rise to auxiliary authority to detain in order to prevent their occurrence), cert. denied, 107 S. Ct. 218 (1986).

161. Salerno, 107 S. Ct. at 2104 (procedural safeguards provided by the Bail Reform Act, combined with the "legitimate and compelling regulatory purpose" it serves, meet procedural due process requirements).

162. Carter v. Rafferty, 781 F.2d 993, 994-95 (3d Cir. 1986) (noting, for example, that "there is little explanation in the case law of what sort of 'special reason' must be demonstrated to a reviewing court in making an order 'respecting custody, enlargement or surety [of a habeas corpus petitioner]' ").


164. Section (c) of Rule 23 reads in full:

Release of Prisoner Pending Review of Decision Ordering Release. Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon the prisoner's recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

FED. R. APP. P. 23(c).

165. Section (d) of Rule 23 reads in full:

Modification of Initial Order Respecting Custody. An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall govern review in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made.

FED. R. APP. P. 23(d).

166. Carter, 781 F.2d at 994 n.1.
 authoritative precedent exists to interpret the rules. Former Supreme Court Rule 49, the precursor to rule 23(c), made release of prisoners prevailing on the merits of a habeas petition mandatory. Courts, without further guidance, have relied on the ancestral development of rule 23(c) to heavily favor release.

Deciding what "special reasons" may stay habeas relief has raised concerns for fundamental principles of comity and federal intrusion into matters of traditional state concern. Beyond a federal court's responsibility to determine whether a constitutional infirmity at trial exists to warrant habeas relief, the bounds of the federal courts' authority to tailor release seemed to extend no further than ensuring that the petitioner did not flee federal jurisdiction. Purely preventive detention in order to avoid harm to the community was considered to be outside the purview of federal court authority.

2. Hilton v. Braunskill

In Hilton v. Braunskill, the Supreme Court extended federal court authority to stay release of prevailing habeas corpus petitioners solely on threat-to-the-community grounds. In so doing, the Hilton majority expressly rejected the notion that principles of comity limited federal exercise of stay authority. Decided on the same day as Salerno, the Hilton decision, relying on the broad discretion granted to federal courts to decide habeas matters, held that similarly broad discretion should govern the

167. United States ex rel. Taylor v. Redman, 500 F. Supp. 453, 459 (D. Del. 1980) (noting the absence of case law to guide courts in determining what factors should govern decisions to release individuals pending appeal); see also supra note 162.
168. Carter, 781 F.2d at 997.
170. Carter, 781 F.2d at 996 (treating "dangerousness" as a reason for detention as an exclusively state concern unless it otherwise related to federal court functions). But see infra note 175 and accompanying text.
171. Carter, 781 F.2d at 995. Carter recognized federal court authority to stay release of a prevailing habeas petitioner if the state raised a valid concern that the petitioner, once enlarged, would flee federal jurisdiction. Id.; see also Hilton v. Braunskill, 107 S. Ct. 2113, 2118 (1987) (upholding federal stay authority to ensure later service of process).
172. Carter, 781 F.2d at 996.
174. Id. at 2120.
175. Id. at 2117-18 (overruling Carter, holding that exercise of federal stay powers on grounds of dangerousness is not an intrusion on exclusive state authority).
176. Id. at 2113 (Hilton and Salerno were decided on May 26, 1987); United States v. Salerno, 107 S. Ct. 2095 (1987).
177. 107 S. Ct. at 2118.
stay of habeas relief. The Court considered this approach a practical extension of the accepted practice of delaying enlargement to allow the state time to appeal the federal order.

The respondent in this case was convicted in New Jersey state court and sentenced to nine and one half years in prison for sexual assault and unlawful possession of a knife. Contending that state court refusal to admit testimony from an alibi witness violated his sixth amendment right to call witnesses in his defense, respondent appealed, thereafter exhausting the remedies available in state court. The federal district court on petition granted Braunskill a writ of habeas corpus, finding merit in his constitutional claim. State prosecutors, relying exclusively on the apparent danger Braunskill's release posed to the community, argued for a stay of the order granting his release. The district court ruling, subsequently affirmed on appeal to the United States Court of Appeals for the Third Circuit, held that stay of the writ could be granted only upon risk of flight. Relying on the Third Circuit decision in Carter v. Raffety, the district court maintained that consideration of the accused's danger to the community as a factor determining the release of a state prisoner was not within the purview of federal courts.

In vacating the district court order, the Supreme Court determined that the Carter decision took too limited a view of rule 23, citing to federal court ability to condition habeas relief “as law and justice require.” Against the historical backdrop that once made release mandatory by creation of the

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178. Id.
179. Id.
180. Braunskill v. Hilton, 629 F. Supp. 511, 513 (D.N.J. 1986) vacated, 107 S. Ct. 2113 (1987). The court found that the defendant Braunskill, armed with a knife, sexually assaulted a 69-year-old woman in the lobby of an apartment building. Id. The defendant, who was arrested after the victim made a photographic identification, maintained that he was elsewhere at the time the crime was committed. Id. at 514. A motion by defense counsel seeking introduction of alibi testimony was denied by the trial court upon the state's objection that the motion was untimely. Id. at 513-16.
181. Id. at 517. The sixth amendment provides that “the accused shall enjoy the right... to have compulsory process for obtaining witnesses in his favor... .” U.S. CONST. amend. VI.
183. Id. at 525-26.
185. Id.
186. 781 F.2d 993 (3d Cir. 1986) (stay of release denied in the case of Rubin “Hurricane” Carter where the sole concern governing the state's application for a stay was the defendant's dangerous sociopathic tendencies).
187. Hilton, 107 S. Ct. at 2117; see 781 F.2d at 997 (interpreting Rule 23(d) to be consistent with federalism and comity concerns).
189. Id. at 2118 (quoting 28 U.S.C. § 2243 (1982)).
Supreme Court's own rules of procedure, the majority emphasized that federal courts even then retained discretion to condition release pending further state action. Consistent with this more permissive interpretation of the modern rule 23, the majority commended its own practice of applying traditional factors governing the stay of a civil judgment. The presumptions created by rule 23 favoring the petitioner's release may be overcome by information introduced by the state. If, upon application by the state, the court determines that the information brought forth convincingly demonstrates that the petitioner poses a threat to the community, enlargement will be denied. The habeas petitioner's interest in release, always substantial by the majority's view, will be greatest when the civil factors are weakest. Conversely, a strong showing by the state that it can muster a sound case on the merits will minimize the preference for release. Consideration of an individual's danger to the community through the use of these civil factors is not an intrusion on matters of traditional state concern, according to Justice Rehnquist, who attributes whatever strain exists on federal-state relations to federal habeas jurisdiction itself and not to federal discretion in exercising that authority.

In support of its opinion that preventive detention is not repugnant to substantive due process, the Hilton majority reiterated its holding in Salerno. Further, the majority stated, habeas petitioners, unlike the prearrest detainees in Salerno, are to be treated less favorably because habeas petitioners, but for the constitutional infirmity at trial, have been found guilty beyond a reasonable doubt. In such cases, the due process provisions of the Constitution do not prohibit consideration of the threat the accused may pose to the community.

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190. See supra note 166 and accompanying text.
192. Id. at 2118-19. The Hilton Court noted that four factors govern the stay of civil judgments under federal rules applicable both to district courts and courts of appeals:
   (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.
193. Id. at 2119.
194. Id.
195. Id.
196. Id. at 2119-20.
197. Id. at 2120.
198. Id.
199. Id.
200. Id.
The dissent in Hilton found the majority's construction of rule 23 contrary to the very principles of "law and justice" the majority sought to invoke on behalf of its expanded view of habeas corpus jurisdiction. According to the dissent's view, acceptance of federal authority to make dangerous behavior a criteria for stay of habeas relief confuses the state's interest as an adversary in the litigation with the traditional respect afforded state decisions. Moreover, the convention of conditioning writs of release on further action by the state, rather than supporting federal court efforts to review the issue of a habeas petitioner's violent propensities, more convincingly demonstrates a healthy federal respect of state court authority to decide such matters.

Taken from the reach of state laws, otherwise successful federal habeas corpus petitioners may be detained as dangerous, like those detained prior to trial under the Bail Reform Act, but in a manner which the dissent found to be devoid of the same statutory safeguards afforded the defendants in Salerno. Adjudication of guilt, but for the constitutional failures at trial, does not minimize the need for safeguarding erroneous deprivation of liberty as the majority suggests. Such a choice of logic "trivializes" the constitutional violation. No grounds for continued punishment remain where the decision to imprison an individual has been adjudged null and void.

II. REFINEMENTS TO PREVENTIVE DETENTION: TAKING THE GUESSWORK OUT OF DECIDING WHO IS DANGEROUS

The Court's sine qua non treatment of guilt in Hilton casts post-conviction detention in sharp contrast to the "numerous procedural safeguards" afforded the pretrial detainees in Salerno. Under the Bail Reform Act, a person is detained prior to trial only after failing, in a full adversarial hearing, to rebut a presumption of dangerousness created by satisfying a detailed statutory standard of past behavior. In contrast, a petitioner who has gained federal habeas release only after exhausting his state appeals, may be denied the presumption of release by an unchallenged showing that he or she is dangerous. There is no required finding of past conduct evidencing

201. Id. at 2124 (Marshall, J., dissenting).
202. Id. at 2121-22.
203. Id. at 2122.
204. See infra notes 208-15 and accompanying text.
205. See infra text accompanying notes 220-21.
207. Id.
209. See supra notes 102-14 and accompanying text.
210. See supra notes 164-65, 192, and accompanying text.
threatening behavior.\textsuperscript{211} Nor is a "clear and convincing" standard of proof demanded.\textsuperscript{212} Detention decisions in either case rest on common ground in the respect that there exists a clear ability to try the defendant in the future.\textsuperscript{213} A state showing that it is able to successfully retry a habeas petitioner, however, standing alone, suffices to rebut the presumption of release.\textsuperscript{214} Prosecution efforts to seek detention under the federal bail enactment face a tougher challenge.\textsuperscript{215}

State comity considerations do not normally arise in the context of pretrial preventive detention because the federal crimes which invite "regulatory" treatment do not exist under habeas relief from state convictions.\textsuperscript{216} Court decisions prior to \textit{Hilton} have recognized that the Bail Reform Act does not apply to enlargement of habeas petitioners.\textsuperscript{217} There is concern, moreover, with eliminating the confusing use of bail terms to describe surety requirements of conditional habeas writs.\textsuperscript{218} Courts previously have been led, nevertheless, to consider application of bail standards to cases involving habeas corpus.\textsuperscript{219} Those opposed to the idea point out that the federal authority to deny bail is auxiliary to specified power to protect federal property and personnel.\textsuperscript{220} This "necessary and proper" connection is absent where the individuals involved are in state, not federal, custody.\textsuperscript{221} The \textit{Hilton} majority did not discuss what, if any, greater federal purpose authorizes denial of habeas relief. The Court chose instead to describe the detention measure in terms of a common sense extension of prior federal practice to briefly stay

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\item \textsuperscript{211} Justice Rehnquist, writing for the \textit{Hilton} majority, emphasized the need to tailor stay judgments to the circumstances of each case and the inability to reduce the general standards for staying civil judgments to "a set of rigid rules." 107 S. Ct. at 2119; \textit{see also supra} note 192 and accompanying text.
\item \textsuperscript{212} \textit{Hilton} suggests only that the presumption favoring enlargement may be overcome if the stay factors "tip the balance against it." 107 S. Ct at 2119.
\item \textsuperscript{213} \textit{See United States ex rel. Taylor v. Redman}, 500 F. Supp. 453, 459 (D. Del. 1980) (denying stay of habeas relief pending trial on other charges arising out of the same events on ground that it violated the double jeopardy clause).
\item \textsuperscript{214} Walberg v. Israel, 776 F.2d 134, 136 (7th Cir. 1985) (showing that likelihood exists that error at trial is curable is sufficient to rebut rule 23(c) presumption).
\item \textsuperscript{215} The adversarial hearing provided under 18 U.S.C. § 3142(e) (Supp. III 1985) requires only that the defendant meet the burden of producing evidence tending to show an absence of dangerous behavior in the past; the burden of persuasion then rests with the United States to show clear and convincing evidence to the contrary. \textit{United States v. Perry}, 788 F.2d 100, 107 n.4, 114-15 (3d Cir.), \textit{cert. denied}, 107 S. Ct. 218 (1986).
\item \textsuperscript{216} 18 U.S.C. § 3142(e) requires a threshold determination of probable cause that the accused committed a specified federal offense. \textit{See supra} note 104 and accompanying text.
\item \textsuperscript{217} \textit{United States ex rel. Thomas v. New Jersey}, 472 F.2d 735, 741 (3d Cir. 1973).
\item \textsuperscript{218} \textit{Id.}.
\item \textsuperscript{219} Carter v. Rafferty, 781 F.2d 993, 997 n.5 (3d Cir. 1986).
\item \textsuperscript{220} \textit{Id.; see also Greenwood v. United States}, 350 U.S. 366, 375 (1956).
\item \textsuperscript{221} Carter, 781 F.2d at 997 n.5.
\end{itemize}
enlargement pending retrial by the state.\textsuperscript{222}

Despite the divergent procedural safeguards in both cases, preventive detention prior to trial and following conviction are pointedly characterized as civil, not criminal proceedings.\textsuperscript{223} Such a portrayal has been critical to the maintenance of the wider body of commitment proceedings.\textsuperscript{224} Hilton relies on the traditional civil label attached to habeas corpus.\textsuperscript{225} Salerno, by contrast, adopts civil overtones by reference to the regulatory imperative of resolving the bail crisis and the lack of intent by Congress to treat detention as punishment.\textsuperscript{226} Other “civil” detentions have addressed the dangerous propensities of the mentally ill by reference to legitimate state interest under parens patriae authority.\textsuperscript{227} Still other detention actions have avoided the higher procedural requirements of criminal proceedings by treating them as “necessarily” a part of settled federal authority to deport undesirable aliens.\textsuperscript{228} The civil distinction in each case makes it possible to detain without delay individuals who are clearly dangerous.\textsuperscript{229} Thus, an insane skyjacker may be detained where his release would almost certainly result in further violence.\textsuperscript{230} Or, a defendant in possession of a sawed-off shotgun would be detained, rather than set free, after mailing a bomb to a police station where he was formally charged.\textsuperscript{231}

The civil-criminal distinction has been described by one authority as a “labeling game,” the rules of the game requiring the “players”—the state on the one hand and the “defendant, patient, juvenile ward, [or] deportee” on the other—to convince the court that the proceedings should be either criminal or civil.\textsuperscript{232} For support, the players might rely on the intent of statutory enactment or, more simply, the location of the relevant laws outside the

\textsuperscript{223} See supra notes 18, 28-29, 57, 192, and accompanying text.
\textsuperscript{224} Id.
\textsuperscript{225} 107 S. Ct. at 2118-19.
\textsuperscript{227} See Addington v. Texas, 441 U.S. 418, 426 (1979); see also Shah, Some Interactions of Law and Mental Health in the Handling of Social Deviance, 23 Cath. U.L. Rev. 674, 675 (1974).
\textsuperscript{228} See supra text accompanying notes 39-40.
\textsuperscript{229} See infra text accompanying notes 230-31.
\textsuperscript{230} Salerno, 107 S. Ct. at 2112 n.1 (Stevens, J., dissenting) (quoting United States v. Greene, 497 F.2d 1068, 1088 (7th Cir. 1974) (Stevens, J., dissenting)).
\textsuperscript{231} 2 W. LaFave & J. Israel, supra note 46, § 12.3, at 139 & n.63 (citing In re Underwood, 9 Cal. 3d 345, 508 P.2d 721, 107 Cal. Rptr. 401 (1973)).
\textsuperscript{232} Dershowitz, Preventive Confinement: A Suggested Framework for Constitutional Analysis, 51 Tex. L. Rev. 1277, 1295-96 (1973) (Professor Dershowitz attributes use of the “civil” label to avoidance by courts of responsibility for supervising procedural safeguards to predictive determinations of dangerous behavior.)
criminal code.\textsuperscript{233} Such a labeling game distinction underlines the concern for avoiding overzealous detention. The detainees in \textit{Carlson}, for example, included one homemaker and a waiter who sold some $50,000 in United States war bonds, both labelled as dangerous to the country's safety and welfare and detained under the “civil” authority of the Executive to deport members of the communist movement.\textsuperscript{234}

Whether the substantive criteria for civil detention results in preventing obvious harm to the public or in overzealous protection, judicial ability to predict dangerous behavior lies at the root of the issue.\textsuperscript{235} The ease with which the \textit{Salerno} majority glosses over concern for accurate prediction of future criminal behavior is not supported by other authorities which generally discount a court's ability to make consistent psychiatric predictions.\textsuperscript{236} \textit{Jurek v. Texas},\textsuperscript{237} the leading case supporting the ability of courts to predict dangerousness, has received critical attention.\textsuperscript{238} The Texas capital punishment procedure found constitutional in \textit{Jurek} hinges on a jury's ability to accurately respond to the “probability”\textsuperscript{239} that a defendant found guilty of murder would pose a “continuing threat to society.”\textsuperscript{240} The \textit{Jurek} jury standard, criticized as “hopelessly vague,”\textsuperscript{241} has been negatively compared to the phrase “substantial history of serious assaultive criminal convictions”\textsuperscript{242} which the Supreme Court treated as unconstitutional, during the same term as \textit{Jurek}.\textsuperscript{243}

Nonetheless, lay predictions of dangerous behavior have been considered to be more competent than the results of legal pressure to force empirical

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\item \textsuperscript{233} See id. at 1296-97.
\item \textsuperscript{234} 342 U.S. 524, 549-50 (1952) (Black, J., dissenting).
\item \textsuperscript{235} See Dershowitz, supra note 232, at 1288-93.
\item \textsuperscript{236} The \textit{Salerno} opinion addressed the issue of judicial ability to predict dangerous behavior in a single statement. \textit{Salerno}, 107 S. Ct. 2095, 2103 (1987) (quoting \textit{Jurek v. Texas}, 428 U.S. 262, 274 (1976)).
\item \textsuperscript{237} 428 U.S. 262 (1976).
\item \textsuperscript{239} 428 U.S. at 269.
\item \textsuperscript{240} Under TEX. CODE CRIM. PROC. ANN. art. 37.071 (Supp. 1975-1976), a death sentence may be imposed if the jury responds affirmatively to three questions, the second of which reads: “(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” \textit{Jurek}, 428 U.S. at 269. The other two jury questions require consideration of nothing further than what already should have been decided upon a finding of guilt by the jury prior to the sentencing procedure. See Black, supra note 238, at 3-4.
\item \textsuperscript{241} See Black, supra note 238, at 5.
\item \textsuperscript{242} Id. (citing Gregg v. Georgia, 428 U.S. 153, 202 (1976)).
\item \textsuperscript{243} Id. (both cases were decided by the Supreme Court on July 2, 1976).
\end{itemize}
predictions of dangerousness out of the psychiatric profession. The reason given is that dangerous behavior is not as likely to be a “trait disorder” as it is to be “situational and interactional.” Dangerous behavior, therefore, may be a rare event and hard to measure in terms of future predictability. The violent rage of a person who is highly provoked is less predictable than the frequent dangerous behavior of others under normal conditions. Consequently, a pattern of over-prediction of dangerous behavior has developed, even by clinicians not relying on empirical predictors. Research indicates that for every one person accurately found to be dangerous and preventively detained, five to ninety-nine or more individuals are wrongfully detained by inaccurate predictions of dangerousness. While limitations on judicial resources may cause such results, the evidence of abusive detention is factually inopposite to American notions that innocence must be protected even at the expense of freeing the guilty.

III. INNOCENCE PROTECTED: CLOSING THE DISTANCE BETWEEN CIVIL ORDER AND PREDICTIVE ACCURACY

What follows from the Supreme Court’s approval of preventive detention in Salerno and Hilton is a construct of constitutional behavior which cuts a rough distinction between the right to liberty of two classes of “dangerous” persons. What remains, in either case, is a persistent doubt that the systems devised are detaining only the dangerous. Yet, the design of preventive detention, as the long history of civil commitment shows, is clearly not to protect everyone from the hazards of erroneous restraint of liberty. The premium is public safety. Preventive detention may afford a margin of error as long as jailing the nondangerous is a by-product of meeting the “sufficiently weighty” needs of protecting society. This does not discount

244. See Stone, supra note 236, at 22.
245. Id. at 17.
247. See id. at 87-88.
248. See Shah, supra note 227, at 705.
249. See id. at 706.
250. See Stone, supra note 238, at 18.
252. See supra text accompanying notes 244-50.
253. See supra text accompanying note 249.
254. See supra text accompanying notes 126-35.
255. Salerno, 107 S. Ct. at 2103.
the possibility that a detention scheme may supply both constitutional validity and better predictive accuracy. Critical examination of preventive detention supports legislative efforts to clarify the legal definition of “dangerous” behavior.256 The Bail Reform Act upheld in Salerno, by its very specific terms, provides a solid example of such a definition.257

In contrast, Hilton’s refusal to reduce procedures governing the stay of habeas relief “to a set of rigid rules”258 illustrates an interest in flexibility at the possible expense of a clear definition. The likely result of more “over-predictions” in the case of habeas petitioners is saved only by the majority’s debatable logic that many habeas petitioners would still rightfully remain lodged in prison “but for” the constitutional infirmity at their trial.259

Supreme Court acceptance of the two detention schemes, however, does not erase the possibility for state action to improve the predictive accuracy of preventive detention.260 Pretrial detention may easily become retrial detention through careful modeling of state bail laws.261 Upon rearrest, a state prisoner prevailing on the merits of a federal habeas petition may be detained, but this time by the state, following a well-defined detention procedure.262 At present, twenty-three states have pretrial detention statutes.263 It has been noted, however, that most of them allow for detention only when the crime committed occurred when the accused was out on bail.264 State enactment of pretrial detention laws modeled after the Bail Reform Act would result in detention where the person has been accused of a specific crime and has a past recorded incidence of criminal activity following release from incarceration.265

States, unlike the federal government, are not governments of limited powers and have the additional power to legislate for the “general welfare” beyond the reach of their spending authority.266 The result of not having to legislate detention as “necessary and proper” to some specific grant of power could actually produce more refined means for predicting dangerous behav-

256. See Schwitzgebel, supra note 246, at 92.
257. See supra notes 102-14 and accompanying text.
259. See supra text accompanying notes 199-200, 205-07.
260. The National Association of Attorneys General suggests that the Salerno decision will induce state legislatures to model their detention statutes after the Bail Reform Act. Stewart, Pretrial Detentions Upheld, 73 A.B.A. J. 54, 58 (Aug. 1987).
261. See id.
263. See Stewart, supra note 260, at 58.
264. Id.
265. See supra notes 102-14 and accompanying text.
ior.  Federal judges, once satisfied that there is a suitable state alternative to a stay of federal habeas corpus authority, may exercise their "broad discretion" in such matters and release the petitioner to state authorities for subsequent state proceedings. Such a result avoids the state comity issue altogether. While Hilton holds that stays of habeas relief are not an inappropriate federal intrusion on state matters, the decision does not mandate full exercise of federal court authority to prevent state action. Ironically, the respondent in Hilton would be a free man in the absence of federal intercession because New Jersey, the state which convicted him, does not provide for preventive pretrial detention.

Future efforts to fine tune preventive detention may be enhanced by tougher state measures requiring jail sentences rather than giving straight probation. One recent study shows that twenty-six percent of persons convicted of major felonies were released without serving time in jail. For drug traffickers, one of the criminal target areas of the federal bail enactment, more than half of those convicted in state courts received probation, nearly half of those probated never served a day in prison for their crimes. Prison overcrowding has been held partly to blame. The rate of violent crime, however, is reported to be on the decline, a trend attributed to the aging of the baby boom generation. To fill the void, determinate jail sentencing procedures, which place greater emphasis on incarceration for convictions, may alleviate the burden recidivism places on deciding

267. Because states have more latitude to legislate for the general welfare, state pretrial detention statutes may be less constrained to consider indicators of dangerous behavior other than indictment for specified offenses; at the same time, such ability may lead to abuses. See Stewart, supra note 260, at 58 (suggesting that bail reform might be revisited by the Supreme Court if abuses develop).
268. See supra text accompanying note 262.
269. See supra notes 170-71, 175, and accompanying text.
270. Hilton holds only that federal courts are not restrained by state comity concerns in exercising their authority under rule 23(c) and (d) to stay habeas relief upon a showing of dangerousness. See supra note 175 and accompanying text.
271. See supra text accompanying note 262.
272. Bureau of Justice Statistics, United States Department of Justice, NCJ-105743 Sentencing Outcomes in 28 Felony Courts 1985 5 (July 1987) (the fact that jail and not prison is the correctional institution selected for those felons actually incarcerated becomes more significant in light of the fact that convicted felons are usually perceived as state, not local, reponsibilities).
273. See supra note 104.
274. See Bureau of Justice Statistics, supra note 272, at 5.
275. See id. at 18.
276. Wash. Post, Oct. 5, 1987, at A6, col. 1 (In 1986, 34.1 million crimes were estimated to have occurred, a decline from 1985 of 750,000 and a drop of 7 million from 1981. The decline is attributed to a reduction of persons in the crime prone 15 to 24 age bracket.).
277. See Bureau of Justice Statistics, supra note 272, at 18.
which persons accused of crimes, but as yet untried, may be dangerous and worthy of preventive pretrial detention.

IV. CONCLUSION

Preventive detention gives rise to uncomfortable choices which must be faced when deciding who must be detained to protect community safety. Salerno and Hilton hold that community safety takes a "legitimate and compelling" place in the body of law restraining personal liberty for the greater good. The result, almost by necessity, is that innocent people will be detained at the expense of attempts to cure a larger social evil. Future abuses which may arise from the standards set forth under the Bail Reform Act may cause the Supreme Court to reconsider the "necessity" of regulatory intervention to allay society's discomfort with freeing potentially dangerous individuals prior to trial. State legislatures, at the same time, undoubtedly will be closely following the progress of federal bail reform with an eye toward revising their own bail enactments to more accurately predict and detain individuals who threaten their communities. Victorious federal habeas corpus petitioners, as a result, may garner the benefits of state legislative action. In the meantime, the likelihood remains that federal courts will be motivated to stay the release of prisoners who prevail on their habeas appeal upon a showing by the state as an adversary party that the prisoner is dangerous. The danger may, however, be nothing more than the state's inattention to the need for more care in constructing its own bail laws.

Available alternatives to preventive detention, such as determinant sentencing, show promise in minimizing reliance on the difficult nature of predicting "dangerous" behavior. Initiatives by state legislatures to mandate determinant sentencing procedures will help minimize the number of high-risk individuals who may reenter the jailhouse door through a system of prevention, perhaps only to be set back out on the street again.

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