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COMMENT

PREVENTIVE DETENTION: A CONSTITUTIONAL BUT INEFFECTIVE MEANS OF FIGHTING PRETRIAL CRIME

I. INTRODUCTION

The Bail Reform Act of 1984¹ authorizes judicial officers to detain a defendant before trial if the officer determines that the defendant is likely to commit a crime while on release pending trial.² The United States Courts of Appeal and District Courts have consistently upheld the constitutionality of the Bail Reform Act (hereinafter "BRA") under the fifth and eighth amendments.³ Recently,

¹ Pub. L. No. 98-473, 98 Stat. 1976 (1984) (codified at 18 U.S.C. §§ 3041-3043, 3062, 3141-3150, 3154, 3156, 3731, 3772, 4282 (1985)).

² 18 U.S.C. § 3142(a)(4) ("Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial the person be . . . detained pursuant to the provisions of subsection (e)").

³ *United States v. Zannino*, 798 F.2d 544, 546 (1st Cir. 1986)(upholding the constitutionality of BRA in reliance on Chief Judge Feinberg's dissent in *United States v. Salerno*, 794 F.2d 64 (2d Cir. 1986)); *United States v. Portes*, 786 F.2d 758, 766 (7th Cir. 1986)("We join all other courts in the country which have either implicitly or explicitly held that the Bail Reform Act does not violate the fifth or eighth amendment."); *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986)("Nevertheless, Congress has provided a rational scheme for limiting the duration of federal pretrial detention and we decline to hold the Bail Reform Act unconstitutional for omitting the probable duration of pretrial incarceration."); *United States v. Perry*, 788 F.2d 100, 118 (3d Cir. 1986)("We hold that the second preventive detention provision in section 3142 (e) of the Bail Reform Act does not violate the eighth amendment, substantive due process, procedural due process, equal protection, or the sixth amendment."); *United States v. Kouyoumdjian*, 601 F. Supp. 1506, 1511 (C.D. Cal. 1985)("The Court . . . believes the Bail Reform Act of 1984 to be constitutional and adopts the reasoning set forth in greater detail in *United States v. Edwards*"); *United States v. Freitas*, 602 F. Supp. 1283, 1287 (N.D. Cal. 1985)("[T]his court agrees with the *Carlson* dictum that the excessive bail clause of the Eighth Amendment does not preclude Congress from enacting a law that provides for pretrial detention without bail in certain types of cases."); *United States v. Moore*, 607 F. Supp. 489, 492 (N.D. Cal. 1985) ("Having considered the parties' papers and oral arguments, the court finds that the [Bail Reform] Act can be construed so as to preserve its constitutionality."); *United States v. Rawls*, 620 F. Supp. 1358, 1360 (E.D. Pa. 1985). "[T]his court is of the opinion that the defendant's eighth

however, the United States Court of Appeals for the Second Circuit held that preventive detention violates the Due Process Clause of the fifth amendment.⁴

This Comment focuses on the opinions of the Second Circuit in *United States v. Melendez-Carrion*⁵ and *Salerno v. United States*⁶ to determine the constitutionality of BRA.⁷ First, after summarizing BRA, this Comment argues that preventive detention is constitutional under the fifth amendment because it passes each of the three factors of the Supreme Court's "legislative purpose" test.⁸ Second, this Comment argues that the opinions of Chief Judge Feinberg in *Melendez-Carrion*⁹ and *Salerno*¹⁰ provide a more thorough due pro-

amendment rights are not violated by sections 3142(e) and (f) of the Bail Reform Act of 1984.")

United States v. Acevedo-Ramos, 600 F. Supp. 501, 506 (D.P.R. 1984) ("The defendant argues that his pretrial detention without bail contravenes the Eighth Amendment's proscription against excessive bail We disagree The right to bail [is] . . . not an absolute constitutional right. The excessive bail clause of the Eighth Amendment was never intended to restrict what offenses could be deemed bailable."), *aff'd*, 755 F.2d 203 (1st Cir. 1985); *United States v. Payden*, 598 F. Supp. 1388, 1392 (S.D.N.Y. 1984) ("[U]nder the Supreme Court's decision in *Bell v. Wolfish* . . . the [Bail Reform] Act is a constitutionally permissible regulatory, rather than penal, sanction."); *United States v. Hazzard*, 598 F. Supp. 1442, 1449, 1450-52 (N.D. Ill. 1984) ("[T]his Court is satisfied that the Eighth Amendment did not prevent Congress from enacting the pretrial detention provision in the [Bail Reform] act." The court also held that BRA did not violate the fifth amendment's due process clause).

⁴ *United States v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986); *Salerno v. United States*, 794 F.2d 64 (2d Cir. 1986), *cert. granted, motion for expedited review granted*, 55 U.S.L.W. 3315 (U.S. Nov. 4, 1986)(No. 86-87).

⁵ 790 F.2d 984, 1005-09 (Feinberg, C.J., concurring)(2d Cir. 1986).

⁶ 794 F.2d 64, 75-79 (Feinberg, C.J., dissenting)(2d Cir. 1986).

⁷ This Comment focuses on the opinions of the Second Circuit because they consider the constitutionality of BRA under substantive due process. *Melendez*, 790 F.2d 984, 1000-03; *Salerno*, 794 F.2d 72-74. The Third and Seventh Circuits have focused more narrowly on procedural due process. *Melendez*, 790 F.2d at 1003-04 ("In *Portes*, the Seventh Circuit does not discuss the more fundamental question whether the substantive component of due process permits a person not convicted of a crime to be confined for any purpose not related to the conduct of an impending trial *Delker* [Third Circuit] also analyzed the issue solely as one of procedural due process."); See *Portes*, 786 F.2d 758, 767-68; *United States v. Delker*, 757 F.2d 1390, 1397-98 (3d Cir. 1985). The First Circuit has adopted without further elaboration the substantive due process reasoning developed by Chief Judge Feinberg of the Second Circuit. *Zannino*, 798 F.2d 544, 546 ("[W]e are in agreement with the dissenting opinion of Judge Feinberg in *Salerno* that this aspect of the Act does not violate substantive due process.").

⁸ *Schall v. Martin*, 467 U.S. 253 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979). Though the Court did not use the phrase "legislative purpose test," this Comment will use that phrase to describe the *Bell* Court's test given the emphasis placed on legislative intent by the Court. See *infra* notes 23-25 and accompanying text, and *infra* note 38 for evidence of the Court's reliance on legislative purpose in testing the constitutionality of pretrial detention.

⁹ 790 F.2d 984, 1005-09 (Feinberg, C.J., concurring)(2d Cir. 1986).

¹⁰ 794 F.2d 64, 75-79 (Feinberg, C.J., dissenting) (2d Cir. 1986).

cess analysis than the Supreme Court's "legislative purpose" test in his suggestion that the length of pretrial detention be added as a factor in the due process analysis. Finally, this Comment concludes that Congress should have chosen a less constitutionally suspect means of fighting crime on bail and proposes alternative legislation which would reduce pretrial crime more effectively.

II. THE BAIL REFORM ACT OF 1984

Prior to the Bail Reform Act of 1984, judicial officers could consider only the risk of flight of the accused in determining bail in non-capital cases.¹¹ Under BRA, a judicial officer, in addition to considering the risk of flight, is required to consider "the nature and seriousness of the danger to any person or the community that would be posed by the person's release."¹²

A judicial officer determines whether to detain the defendant at a detention hearing which is held upon a motion by the federal government following the defendant's arrest.¹³ At the hearing, the defendant "has the right to be represented by counsel" and is given the opportunity "to testify, to present witnesses on his own behalf, to cross-examine witnesses . . . and to present information by proffer or otherwise."¹⁴ To detain the defendant, the judicial officer must find "probable cause to believe that the person committed" an enumerated offense "for which a maximum term of imprisonment of ten years or more is prescribed."¹⁵ If a judicial officer makes such a finding, then a rebuttable presumption is triggered "that no condition or combination of conditions [of release] will reasonably assure the appearance of the person as required and the safety of the community."¹⁶

The defendant may be detained without bail if the judicial officer, based upon certain enumerated factors, finds "clear and convincing evidence" to support the presumption of dangerousness.¹⁷ The factors to be considered include "the nature . . . of the offense charged, including whether [it is] . . . a crime of violence or involves a narcotic drug," the weight of the government's evidence, and the "history and characteristics of the person," including his community

¹¹ Note, *The Loss of Innocence: Preventive Detention under the Bail Reform Act of 1984*, 22 AM. CRIM. L. REV. 806, 809-10 (1985) [hereinafter Note, *The Loss of Innocence*] (citing and construing 18 U.S.C. § 3146 (1966)(repealed 1984)).

¹² 18 U.S.C. § 3142 (g)(4).

¹³ 18 U.S.C. § 3142 (f).

¹⁴ *Id.*

¹⁵ 18 U.S.C. § 3142 (e).

¹⁶ *Id.*

¹⁷ 18 U.S.C. § 3142 (f).

ties and criminal history.¹⁸

III. THE SUPREME COURT'S LEGISLATIVE PURPOSE TEST

The Supreme Court has reserved the question of whether a court may detain adults prior to trial for reasons other than the risk of flight.¹⁹ In *Bell v. Wolfish*²⁰ the Court held that "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."²¹ The Court also recognized a "distinction between punitive measures that may not be constitutionally imposed prior to an adjudication of guilt and regulatory restraints that may."²²

To determine whether preventive detention constitutes unconstitutional punishment or permissible regulation, the *Bell* Court developed a three part "legislative purpose" test. The *Bell* Court examined seven criteria set forth in *Kennedy v. Mendoza-Martinez*²³ to aid its determination of whether the statute imposed punishment prior to adjudication or was permissibly regulatory. These criteria were:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.²⁴

The *Bell* Court narrowed these seven criteria into a three part test. The Court stated that "[1] absent a showing of an express intent to punish . . . [the] determination [of whether a statute imposed punishment or was regulatory] will turn on [2] whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and [3] whether [the detention] appears excessive in

¹⁸ 18 U.S.C. § 3142 (g).

¹⁹ *Bell*, 441 U.S. at 533-34 ("We are not concerned with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails."); *Schall*, 467 U.S. at 264 (clarifying that it was considering the constitutionality of preventive detention "in the context of the juvenile system").

²⁰ 441 U.S. 531 (1979)(Court upheld as constitutional the conditions under which pretrial detainees were held in a federal detention facility).

²¹ *Id.* at 535 (citations omitted).

²² *Id.* at 537 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)).

²³ 372 U.S. 144 (1963). The *Mendoza* Court used these criteria to determine that automatic forfeiture of citizenship provisions contained in the immigration laws constituted punishment which could not be applied to an alien without due process of law under the fifth amendment. *Mendoza*, 372 U.S. at 167-70, 186.

²⁴ *Bell*, 441 U.S. at 537-38 (quoting *Mendoza*, 372 U.S. at 168-69).

relation to the alternative purpose.'"²⁵

Five years after *Bell*, the Supreme Court upheld the constitutionality of preventive detention of juveniles in *Schall v. Martin*.²⁶ In *Schall*, the Court reviewed a New York statute which authorized family court judges to detain juveniles for a maximum period of seventeen days²⁷ if there is a serious risk that the defendant will commit a crime while out on bail.²⁸ In *Schall*, the Court was asked to determine whether preventive detention of juveniles was "compatible with the fundamental fairness' required by due process."²⁹

The *Schall* Court used the criteria established in *Bell* to uphold the statute on constitutional grounds.³⁰ First, the Court found that there was no indication that the statute "is used or [was] intended [to be used] as punishment."³¹ Second, the Court found that the statute served the alternative legitimate state objectives of protecting society and the juvenile defendant from the consequences of his or her future criminal acts.³² Third, the Court found that secure detention, while restrictive, was not excessive but was "consistent" with the state's regulatory objectives.³³

The *Schall* Court also noted that the procedural due process safeguards of the statute were sufficient, even though the statute gave the judge no guidance regarding what criteria³⁴ or kinds of evidence³⁵ he should consider in deciding whether to detain a juvenile. Further, in response to the petitioner's claim that it was impossible to predict future criminal behavior, the Court said:

[F]rom a legal point of view, there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgement forms an important element in many decisions, and we have specifically rejected the contention, based on the same sort of sociological data relied on 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."³⁶

Moreover, the *Schall* majority criticized the dissent for attempting

²⁵ *Bell*, 441 U.S. 538 (quoting *Mendoza*, 372 U.S. at 168-169).

²⁶ 267 U.S. 253, 281 (1984).

²⁷ *Id.* at 270.

²⁸ *Id.* at 255 n.1 (citing N.Y. [Family Court Act (29A)] § 320.5 (McKinney 1983)).

²⁹ *Id.* at 263.

³⁰ *Id.* at 269.

³¹ *Id.*

³² *Id.* at 265-66.

³³ *Id.* at 271.

³⁴ *Id.* at 279.

³⁵ *Id.* at 302 (Marshall, J., dissenting).

³⁶ *Id.* at 278-79 (quoting *Jurek v. Texas*, 428 U.S. 262, 274 (1976)(other footnotes omitted)).

to invade the legislature's role by redrafting the statute because in their opinion it constituted poor social policy.³⁷

The dissents in *Bell* and *Schall* ably noted the deficiencies of the legislative purpose test, which relies heavily on a determination of legislative intent. Justice Marshall, dissenting in *Bell*, emphasized that due process demands a consideration of the potential punitive effect of restraints on the detainee.³⁸ Justice Marshall asserted that the majority's test was incapable of determining the effect of detention on detainees because the test did not consider whether detention constitutes an affirmative disability or whether it historically has been regarded as a punishment as required by *Mendoza*.³⁹ In addition, because of the "overwhelming" evidence that even "highly trained criminologists" cannot accurately predict criminal behavior, Justice Marshall reasoned that the New York statute did not meet its purpose of preventing crime.⁴⁰ Because the statute did not advance the asserted alternative governmental purpose of preventing crime, Justice Marshall concluded that it was constitutionally "invalid *in toto*" under the majority's test.⁴¹

IV. THE CONSTITUTIONALITY OF BRA UNDER THE SUPREME COURT'S LEGISLATIVE PURPOSE TEST

The legislative purpose test is comprised of three factors. The first factor is whether Congress expressed an intention to punish pretrial detainees. The second factor is whether Congress expressed an alternative intention to regulate the future behavior of the detainee. The third factor is whether preventive detention is excessive in relation to Congress's alternative intention to regulate the future behavior of detainees.

A. FACTORS ONE AND TWO: WHETHER CONGRESS EXPRESSED AN INTENT TO PUNISH OR TO REGULATE PRETRIAL DETAINEES

Factors one and two of the *Bell* test will be considered together. To determine Congress's intent in enacting BRA, an examination of the legislative history of BRA is essential. This examination begins

³⁷ *Id.* at 281.

³⁸ *Bell*, 441 U.S. at 567 (Marshall, J., dissenting) ("[T]he Due Process Clause focuses on the nature of the deprivations, not on the persons inflicting them. If this concern is to be vindicated, it is the effect of conditions of confinement, not the intent behind them, that must be the focal point of the constitutional analysis.").

³⁹ *Id.* at 565.

⁴⁰ *Schall*, 467 U.S. at 293-94 (Marshall, J., dissenting).

⁴¹ *Id.* at 292-93.

with an analysis of Congress' preventive detention statute for the District of Columbia which was enacted in 1970.

After failing to enact an adult preventive detention statute for the federal system, the Nixon administration secured the passage of a preventive detention statute for the District of Columbia in 1970.⁴² In *United States v. Edwards*,⁴³ Edwards and other defendants unsuccessfully challenged the statute on fifth amendment grounds. The defendants argued that preventive detention was "inevitably . . . punishment" prior to an adjudication of guilt.⁴⁴ The *Edwards* court recognized that *Bell* narrowed the *Mendoza* criteria by "emphasizing governmental purpose as particularly significant in determining whether the challenged conditions imposed on pretrial detainees were penal or regulatory."⁴⁵ The *Edwards* court concluded, based upon the legislative history of the D.C. statute, that Congress' aim was to "protect the safety of the community" and not to punish the defendant.⁴⁶ The court reasoned that the purpose of pretrial detention was to "incapacitate the detainee from committing future crimes," not to promote the "traditional aims of punishment—retribution and deterrence."⁴⁷

In *United States v. Portes*,⁴⁸ the court found that Congress expressly relied on the *Edwards* analysis to distinguish preventive detention from punishment when drafting BRA.⁴⁹ The *Portes* court examined the Senate Judiciary Committee's report on BRA to reach this conclusion.⁵⁰ The Judiciary Committee report concluded:

With respect to the Due Process issue, the [*Edwards*] court concluded, correctly in the view of the Committee, that pretrial detention is not intended to promote the traditional aims of punishment such as retri-

⁴² See Ervin, *Preventive Detention: A Species of Lydford Law*, 52 GEO. WASH. L. REV. 113, 116 (1983). The District of Columbia preventive detention statute is codified at D.C. CODE ANN. § 23-1321-32 (1983).

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

⁴⁴ *Id.* at 1331.

⁴⁵ *Id.* at 1332.

⁴⁶ *Id.* at 1332-33 (construing H.R. REP. NO. 91-907, 91st Cong., 2d Sess. 184 (1970)).

⁴⁷ *Id.* at 1333 (quoting in part *Mendoza*, 372 U.S. at 168). *But see* Note, *The Loss of Innocence*, *supra* note 11, at 817 (BRA, like other criminal law measures, seeks to deter the accused); Comment, *Preventive Detention and United States v. Edwards: Burdening the Innocent*, 32 AM. U.L. REV. 191, 204 (1982) [hereinafter Comment, *Burdening the Innocent*] (Preventive detention "can have as much of a deterrent effect as any criminal sanction."); Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 U. VA. L. REV. 371, 379 n.30 (1970).

⁴⁸ 786 F.2d 758 (7th Cir. 1986). The court in *Portes* held that BRA does not violate either the eighth or the fifth amendment to the Constitution. *Id.* at 766-68.

⁴⁹ *Id.* at 767 (construing *Edwards*, 430 A.2d at 1332-33; S. REP. NO. 225, 98th Cong., 1st Sess. 8 (1983)) [hereinafter S. REP. 225]; *Accord* *United States v. Acevedo-Ramos*, 600 F. Supp. 501, 505 (D.P.R. 1984), *aff'd*, 755 F.2d 203 (1st Cir. 1985).

⁵⁰ *Portes*, 786 F.2d at 767 (construing S. REP. NO. 225, *supra* note 49, at 8).

bution or deterrence, but rather that it is designed "to curtail reasonably predictable conduct, not to punish for prior acts," and thus, under the Supreme Court's decision in *Bell v. Wolfish*, is a constitutionally permissible regulatory, rather than a penal, sanction.

Based on its own constitutional analysis and its review of the *Edwards* decision, the Committee is satisfied that pretrial detention is not *per se* unconstitutional.⁵¹

The Judiciary Committee further emphasized its prospective, regulatory purpose in recommending the pretrial detention statute for Senate approval. The Committee noted that

[T]here is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons. It is with respect to this limited group that the courts must be given the power to deny release pending trial.⁵²

Courts, moreover, have noted that the language of BRA itself suggests a regulatory rather than a punitive intent.⁵³ Indeed, BRA provides that detainees, where possible, are to be confined separately from prisoners serving sentences or awaiting appeal.⁵⁴ BRA provides further that preventive detention is to be used sparingly, only when stringent release conditions will not assure community safety.⁵⁵ Finally, an arrestee may be detained before trial for only a limited time period under the provisions of the Speedy Trial Act which Congress applied to BRA.⁵⁶

Courts have consistently followed the clearly expressed regulatory intention of Congress in construing BRA.⁵⁷ They have found that Congress did not intend to punish arrestees, but only to regulate their future behavior.⁵⁸ The Second Circuit, although it struck

⁵¹ S. REP. No. 225, *supra* note 49, at 8 (footnotes omitted).

⁵² *Id.* at 6-7.

⁵³ *United States v. Freitas*, 602 F. Supp. 1283, 1291 (N.D. Cal. 1985) (holding that preventive detention under BRA "is regulatory not punitive"); *United States v. Hazzard*, 598 F. Supp. 1442, 1451 (N.D. Ill. 1984) (holding that Congress in enacting BRA did not intend to punish detainees, but to protect the community against crimes detainees would commit if released).

⁵⁴ *Freitas*, 602 F. Supp. at 1291 (citing 18 U.S.C. § 3142 (i)(2) (1985)); *Hazzard*, 598 F. Supp. at 1451 (citing 18 U.S.C. § 3142 (i)(2)).

⁵⁵ *Freitas*, 602 F. Supp. at 1291 (citing 18 U.S.C. § 3142 (e)).

⁵⁶ *Id.* (citing 18 U.S.C. § 3161 (c)(1)). *But see infra* notes 199-212 and accompanying text for a discussion of the difficulties of limiting the length of pretrial detention under BRA in multi-count, multi-defendant cases.

⁵⁷ *See infra* notes 58-59 and accompanying text.

⁵⁸ *Portes*, 786 F.2d at 767 (drawing on *Edwards*, the court noted that "pre-trial detention was intended to protect the safety of the community, not to promote retribution or deterrence."); *Melendez-Carrion*, 790 F.2d at 1000 ("We are willing to assume that section 3142 (c) was enacted by Congress primarily as a regulatory measure."); *Kouyoumdjian*, 601 F. Supp. at 1511 ("There is no indication that the Act seeks to promote such recog-

down BRA as unconstitutional, was "willing to assume" that BRA "was enacted by Congress primarily as a regulatory measure and that its constitutionality should be determined accordingly."⁵⁹

Therefore, preventive detention under BRA meets the first two factors of the Supreme Court's legislative purpose test. First, Congress did not express an intent to punish detainees. Second, Congress expressed an intention to regulate the future conduct of detainees in order to ensure the safety of the community.

B. FACTOR THREE: WHETHER PREVENTIVE DETENTION IS EXCESSIVE IN RELATION TO ITS PURPOSE OF FIGHTING PRETRIAL CRIME

Whether preventive detention is excessive in relation to the purpose of fighting pretrial crime poses difficult constitutional questions and will be considered in two parts. First, this Comment considers whether preventive detention is excessive *per se* because it is so inconsistent with our constitutional system of criminal justice as to "shock the conscience."⁶⁰ Second, this Comment considers whether the particular form of preventive detention provided by BRA is excessive in relation to the purpose of fighting pretrial crime because defendants may be detained who would not have committed crimes while out on bail.

1. Does Preventive Detention per se Violate our Constitutional Traditions?

a. The Argument Against Preventive Detention

The Second Circuit held in *United States v. Melendez-Carrion*⁶¹

nized goals of punishment as retribution, deterrence or rehabilitation. The procedural protections encompassed by the 1984 Act . . . accommodat[e] . . . the government's interest in preventing flight before trial and protecting the safety of the community."); *Freitas*, 602 F. Supp. at 1291 ("[T]he Court concludes that pretrial detention under the new Bail Act is regulatory rather than punitive."); *Rawls*, 620 F. Supp. at 1360 ("The Congressional history of the Bail Reform Act of 1984 makes it abundantly clear that pretrial detention is intended to protect the safety of the community and is not designed to punish a defendant for prior bad acts."); *Acevedo-Ramos*, 600 F. Supp. at 505 ("The legislative history of the Bail Reform Act of 1984 indicates an intent to protect the community against persons likely to endanger it, and not as an intent to punish."), *aff'd*, 755 F.2d 203 (1st Cir. 1985); *Payden*, 598 F. Supp. at 1392 ("The Act is not intended to promote the traditional aims of punishment such as retribution or deterrence, but rather . . . to curtail reasonably predictable conduct.'").

⁵⁹ *Melendez-Carrion*, 790 F.2d at 1000.

⁶⁰ For an explanation of the development of the phrase "shocks the conscience" in the due process inquiry, see *Rochin v. California* 342 U.S. 165, 172 (1952) ("Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents . . . is conduct that shocks the conscience."). *Rochin* was referred to by the *Schall* Court in determining whether BRA was consistent with due process. See *Schall*, 467 U.S. at 268-69 n.18.

⁶¹ 790 F.2d 984 (2d Cir. 1986).

and *Salerno v. United States*⁶² that preventive detention is inconsistent with the traditions of our constitutional system of criminal justice because "detention to prevent the commission of domestic crime can constitutionally occur only after conviction."⁶³ The Second Circuit in *Melendez* and *Salerno* stated that preventive detention cannot be upheld simply because it is a "rational means" to promote public safety.⁶⁴ The court asserted that under a "rational means" test, the federal government could also imprison people not accused of any crime but who were deemed likely to commit future crimes.⁶⁵

The court in *Melendez* and *Salerno* reasoned that an indictment or prior criminal record, both factors to be considered under BRA, does not enhance the government's case for detention.⁶⁶ Detaining individuals under BRA on the basis of a prior arrest offends procedural due process because individuals are punished for prior conduct without the protections of the fifth and sixth amendments.⁶⁷ The Supreme Court's reasoning in *Jackson v. Indiana*,⁶⁸ that "pending criminal charges [do not] provide a greater justification for different treatment than conviction and sentence,"⁶⁹ supports the Second Circuit's argument. In addition, the *Salerno* court reasoned that defendants traditionally have been detained prior to trial only to prevent the flight of the accused, thereby protecting the integrity of the judicial process.⁷⁰

Commentary regarding preventive detention supports the Second Circuit's argument that preventive detention on the basis of dangerousness violates our constitutional traditions.⁷¹ Commentators have noted that BRA marks the first time that bail may be denied for non-capital offenses on the basis of dangerousness,⁷² a statutory change that "marks a severe departure from the policy of

⁶² 794 F.2d 64 (2d Cir. 1986).

⁶³ *Melendez*, 790 F.2d at 1004.

⁶⁴ *Salerno*, 794 F.2d at 72 (quoting *Melendez*, 790 F.2d at 1001).

⁶⁵ *Salerno*, 794 F.2d. at 72.

⁶⁶ *Id.*

⁶⁷ *Id.* The court also noted that a person who has "paid the penalty for his previous crimes" cannot be "further incarcerated to protect the public." *Id.* at 73. Chief Judge Feinberg noted, however, that double jeopardy considerations protect the interests of ex-convicts. See *Id.* at 77 n.1 (Feinberg, C.J., dissenting).

⁶⁸ 406 U.S. 715 (1972). See *infra* note 69 for further information about *Jackson v. Indiana*.

⁶⁹ *Id.* at 729. See also Note, *The Loss of Innocence*, *supra* note 11, at 822. *Jackson* dealt, however, with an equal protection claim in the context of civil commitment, and not with due process in the context of criminal procedure. *Id.*

⁷⁰ *Salerno*, 794 F.2d at 73-74.

⁷¹ See *infra* notes 72-74 and accompanying text.

⁷² Note, *The Loss of Innocence*, *supra* note 11, at 809-10. See *infra* notes 73-74 and accompanying text.

prior federal law" which allowed detention only to prevent the accused from fleeing the court's jurisdiction.⁷³ Indeed, Senator Ervin argued that the District of Columbia preventive detention statute "pervert[s] the historic and legitimate purpose of bail—to assure the appearance of the accused at trial."⁷⁴

After holding that detention based on an indictment or prior criminal record violates our constitutional traditions, the Second Circuit asserted that prophylactic measures in the pretrial period are inconsistent with the fifth amendment's guarantee of due process.⁷⁵ The court stated:

The system of criminal justice contemplated by the Due Process Clause . . . is a system of announcing in statutes of adequate clarity what conduct is prohibited and then invoking the penalties of the law against those who have committed crimes. The liberty protected under that system is premised on the accountability of free men and women for what they have done, not for what they may do. The Due Process Clause reflects the constitutional imperative that incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes.⁷⁶

There is also commentary supporting the Second Circuit's opposition to prophylactic measures. For example, Professor Tribe has opposed preventive detention on the basis of dangerousness. He has distinguished it from civil commitment of the mentally unstable because a mentally disturbed individual cannot control his impulses.⁷⁷ Tribe reasoned, therefore, that detaining an individual "capable of conforming to society's demands" is a peculiarly "offensive anticipatory condemnation" that is inconsistent with constitutional traditions.⁷⁸

Finally, the court in *Melendez* concluded that preventive detention under BRA is analogous to the detention of adults of Japanese ancestry during World War II.⁷⁹ The court reasoned that the concern regarding the possibility that Japanese-Americans were engaging in espionage during World War II, which triggered *Korematsu v. United States*,⁸⁰ represented the "rare, possibly unique, circum-

⁷³ Comment, *Preventive Detention and Presuming Dangerousness Under the Bail Reform Act of 1984*, 134 U. PA. L. REV. 225, 226 (1985).

⁷⁴ Ervin, *supra* note 42, at 114 n.9; See Tribe, *supra* note 47 at 401-42.

⁷⁵ Salerno, 794 F.2d at 72 (quoting *Melendez*, 790 F.2d at 1001).

⁷⁶ Salerno, 794 F.2d at 72 (emphasis in original).

⁷⁷ Tribe, *supra* note 47, at 378-79.

⁷⁸ Tribe, *supra* note 47, at 379-80.

⁷⁹ *Melendez*, 790 F.2d at 1004.

⁸⁰ 323 U.S. 214 (1944).

stance" in which detention comports with due process.⁸¹ The *Melendez* court concluded, however, that the prevention of domestic crime does not justify preventive detention.⁸² The harsh tone of the Second Circuit's analogy of preventive detention under BRA to the detention in *Korematsu* was echoed by Senator Ervin.⁸³ Senator Ervin characterized preventive detention as "a blueprint for a police state" and a "[g]estapo-like" tactic.⁸⁴

Thus, the Second Circuit in *Melendez* and *Salerno* advanced a forceful argument that preventive detention per se violates our constitutional traditions of fundamental fairness.

b. The Argument in Favor of Pretrial Detention

Chief Judge Feinberg's concurring opinion in *Melendez* and his dissenting opinion in *Salerno* provide a more well-reasoned constitutional analysis demonstrating why preventive detention does not per se violate our constitutional traditions of fundamental fairness under the due process clause of the fifth amendment.

Chief Judge Feinberg conceded that placing a person in jail "simply because he is thought to be dangerous is not part of our tradition of liberty."⁸⁵ He added, however, that the constitutionality of detention under BRA was not as easy to resolve as the majority suggested.⁸⁶ Therefore, he rephrased the constitutional inquiry as:

[W]hether a defendant already indicted for a serious crime can be denied bail in the pretrial period because there is clear and convincing evidence that the defendant will otherwise commit another crime while on release.⁸⁷

Chief Judge Feinberg skillfully pointed out that preventive measures of confinement are an integral part of our criminal justice system.⁸⁸ He illustrated this point by noting that judges regularly and legitimately depend upon predictions of future criminality in determining the length of prison sentences and in granting bail after conviction.⁸⁹ Thus, he concluded that "[t]here is nothing inherently shocking to the conscience in using a prediction of future criminality

⁸¹ *Melendez*, 790 F.2d at 1004. The court, however, did question the continuing validity of *Korematsu*. *Id.* (construing *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984)).

⁸² *Melendez*, 790 F.2d at 1004.

⁸³ Ervin, *supra* note 42, at 115, 116 n.15.

⁸⁴ *Id.*

⁸⁵ *Salerno*, 794 F.2d at 77 (Feinberg, C.J., dissenting).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 76 (Feinberg, C.J., dissenting).

⁸⁹ *Id.*

to justify confinement.”⁹⁰

Moreover, in the pretrial context, Chief Judge Feinberg stated that the Supreme Court in *Gernstein v. Pugh*⁹¹ approved detention after arrest and before arraignment not only because detention would prevent flight, but also because it would tend to “bar commission of future crimes.”⁹² Chief Judge Feinberg aptly concluded that “[i]f the police may detain an arrestee for a short time to prevent danger to the community pending a finding of probable cause, Congress may direct judges to do the same after an indictment and pending trial.”⁹³

Three additional arguments which support Judge Feinberg’s position that preventive detention in the pretrial period is not inconsistent with our constitutional traditions can be gleaned from the legislative history of BRA⁹⁴ and commentary regarding preventive detention.⁹⁵

First, the Senate reasoned that by enacting BRA, Congress merely exercised its traditional power to define which federal offenses are bailable.⁹⁶ The Senate Judiciary Committee argued that Congress, like the British Parliament before it, has always retained the right to define which offenses are bailable.⁹⁷ While inconsistent Supreme Court *dicta* exists regarding whether Congress has the power to deny bail for certain offenses,⁹⁸ the Judiciary Committee chose instead to rely on *Carlson v. Landon*⁹⁹ which stated that the Constitution

[H]as not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. This [sic] in criminal cases,

⁹⁰ *Id.*

⁹¹ *Gernstein v. Pugh*, 420 U.S. 103, 111-19 (1975)(fourth amendment requires a judicial determination of probable cause prior to extended detention after arrest).

⁹² *Salerno*, 794 F.2d at 76 (Feinberg, C.J., dissenting) (construing *Gernstein*, 420 U.S. at 114).

⁹³ *Salerno*, 794 F.2d at 76-77 (Feinberg, C.J., dissenting).

⁹⁴ See *infra* notes 97-110 and accompanying text.

⁹⁵ See *infra* notes 113-15 and accompanying text.

⁹⁶ See *infra* notes 97-110 and accompanying text.

⁹⁷ S. REP. No. 147, 98th Cong., 1st Sess. 3-11 (1983) [hereinafter S. REP. No. 147].

⁹⁸ *Stack v. Boyle*, 342 U.S. 1, 4 (1951)(“From the passage of the Judiciary Act of 1789 . . . to the present . . . federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail.”). However, the author of *Stack*, Chief Justice Vinson, joined the majority opinion of Justice Reed in *Carlson v. Landon*, 342 U.S. 524 (1952). See S. REP. No. 147, *supra* note 97, at 11. *Stack*, furthermore, upheld the right of Congress to deny bail because of the risk of flight despite the statutory traditions it discussed. *Stack*, 342 U.S. at 5. See S. REP. No. 147, *supra* note 97, at 10-11. *Stack*, moreover, framed its discussion of bail in terms of Congress’ action to provide for that right in both the Judiciary Act of 1789 and the Federal Rules of Civil Procedure. *Stack*, 342 U.S. at 4.

⁹⁹ 342 U.S. 524 (1952).

bail is not compulsory where the punishment may be death. Indeed, the very language of the [Eighth] Amendment fails to say that all arrests must be bailable.¹⁰⁰

Congress, moreover, has exercised its power to define bailable offenses in order to provide "official restraint prior to final judgment of conviction."¹⁰¹ For example, since 1789 Congress has required judicial officers to deny bail to arrestees charged with capital crimes.¹⁰² Further, the courts have upheld Congress' power to deny bail in order to prevent the flight of the accused from the jurisdiction by denying bail before trial,¹⁰³ to prevent witness harassment and jury tampering by denying bail during trial,¹⁰⁴ and to assure community safety by denying bail pending appeal.¹⁰⁵

In addition, Congress reasoned that the exercise of its power to define bailable offenses in an effort to prevent future crime is consistent with legislative and judicial tradition.¹⁰⁶ The Senate Judiciary Committee noted that considerations of community safety animated the early surety system of bail in England and the United States.¹⁰⁷ The early surety system required that an individual "with the capacity to control or influence" the arrestee's behavior "accept responsi-

¹⁰⁰ S. REP. No. 147, *supra* note 97, at 11 (quoting *Carlson*, 342 U.S. at 545). The eighth amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. Discussion of whether the eighth amendment creates a constitutional right of bail is beyond the scope of this Comment. For interesting discussions of the eighth amendment issue, see Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 77-92 (1977) (bail is a constitutional right); Foote, *The Coming Constitutional Crisis in Bail*, U. PA. L. REV. 457, 971-89 (1965) (bail is a constitutional right); Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1225-31 (1969) (bail is not a constitutional right); Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 377-79, 397, 400-02 (1970) (bail is a constitutional right).

While there is a division of opinion in the commentary regarding the status of the right to bail, courts have held that "the overwhelming weight of authority indicates that the Eighth Amendment is addressed only to the amount of bail set for a bailable offense, but creates no right to bail for an offense made non-bailable by statute." *Acevedo-Ramos*, 600 F. Supp. at 507, *cert. denied*, 439 U.S. 821 (1978) (citing *United States v. Abrahams*, 575 F.2d 3, 5 (1st Cir. 1978)); *Atkins v. Michigan*, 644 F.2d 543, 549 (6th Cir. 1981), *cert. denied*, 452 U.S. 964 (1981); *United States v. Beaman*, 631 F.2d 85, 86 (6th Cir. 1980); *United States v. Miller*, 589 F.2d 1117, 1135 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979)). *Accord Edwards*, 430 A.2d at 1325-31.

¹⁰¹ Mitchell, *supra* note 100, at 1232 (arguing in favor of the constitutionality of preventive detention).

¹⁰² Mitchell, *supra* note 100, at 1232.

¹⁰³ See *Stack*, 342 U.S. at 5.

¹⁰⁴ Mitchell, *supra* note 100, at 1233 (construing and quoting *Fernandez v. United States*, 81 S. Ct. 642, 644 (Harlan, Circuit Justice) (1961)).

¹⁰⁵ Mitchell, *supra* note 100, at 1232 (citing *Carbo v. United States*, 82 S. Ct. 662 (Douglas, Circuit Justice) (1962)).

¹⁰⁶ See *infra* notes 107-10 and accompanying text.

¹⁰⁷ S. REP. No. 147, *supra* note 97, at 18.

bility for his good conduct.”¹⁰⁸ The Committee stated that with the decline of the surety system, Congress considered community safety by making the most atrocious offenses, which were also capital offenses, non-bailable.¹⁰⁹ The Committee concluded that when the number of non-capital offenses increased and the Bail Reform Act of 1966 prohibited consideration of dangerousness, judges continued to gauge the dangerousness of the defendant *sub rosa* by setting high bail for serious felonies.¹¹⁰ The Senate Committee argued strongly, therefore, that preventive detention is compatible with constitutional traditions because Congress has consistently exercised, with court approval, its power to define bailable offenses.

A second argument, supporting Chief Judge Feinberg and responding to the *Melendez* and *Salerno* attack on the use of prophylactic measures, can be derived from the majority opinion in *Schall*. Justice Rehnquist noted that preventive measures “[form] an important element in many decisions” within the criminal justice system.¹¹¹ These decisions include judicial evaluation of a death sentence imposed by a jury, grants of parole, revocation of parole, and the imposition of an increased sentence under the “dangerous special offender” statute.¹¹²

Commentators also support this view. While Professor Tribe argued that pretrial detention contravenes our constitutional traditions, he conceded that “the desire to prevent future offenses obviously informs much of our law.”¹¹³ In construing the Model Penal Code, for example, Professor Tribe found a preventive purpose in the substantive definitions of numerous crimes.¹¹⁴ He also invoked Blackstone’s observation that “[i]f we consider all . . . punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes than to expiate the past.”¹¹⁵

Third, as the *Schall* Court noted in the juvenile context, preventive detention does not so readily “shock the conscience” if it is already widely used by the states.¹¹⁶ The *Schall* Court reasoned that the fact that every state and the District of Columbia permit preven-

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 19-20.

¹¹⁰ *Id.* at 20-21.

¹¹¹ *Schall*, 467 U.S. at 278-79, n.30.

¹¹² *Id.* The “dangerous special offender” statute is codified at 18 U.S.C. § 3757 (1986).

¹¹³ Tribe, *supra* note 47, at 380 (footnote omitted).

¹¹⁴ *Id.* at 380 n.31 (construing MODEL PENAL CODE art. V, comment 24 (Tent. Draft No. 10 (1960))).

¹¹⁵ *Id.* at 380 n.31 (quoting 4 W. BLACKSTONE, COMMENTARIES *251-52).

¹¹⁶ *Schall*, 467 U.S. at 268.

tive detention of juveniles should be given some weight in the due process analysis of the New York juvenile detention law.¹¹⁷ While adult preventive detention is not as pervasive as juvenile detention, a comparative study of state law prepared for Congress found that twenty-three states and the District of Columbia currently authorize adult preventive detention.¹¹⁸ Thus, as Justice Rehnquist noted in *Schall*,

The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."¹¹⁹

Therefore, Chief Judge Feinberg made a better reasoned argument regarding the constitutionality of BRA than the majority, which asserted that preventive detention per se violates our constitutional traditions. Chief Judge Feinberg's argument is better reasoned because of Congress's traditional power to define bailable offenses, the importance of prophylactic measures during the pretrial period, and the practice of the states.

2. *Is the Preventive Detention Authorized by BRA Excessive in Relation to the Purpose of Fighting Pretrial Crime?*

Having established that preventive detention under BRA does not *per se* violate due process, the remaining question under the Supreme Court's legislative purpose test is whether the particular form of preventive detention authorized by BRA is excessive in relation to Congress' regulatory purpose. While only Chief Judge Feinberg has addressed the question of whether preventive detention is excessive because of the difficulties in predicting pretrial criminality in the Second Circuit,¹²⁰ other courts in their due process analyses, including the Supreme Court, have considered this problem.¹²¹

¹¹⁷ *Id.*

¹¹⁸ H.R. REP. NO. 1121, 98th Cong., 2d Sess. 62, 76 (1984) [hereinafter H.R. REP. NO. 1121] (quoting *Public Danger as a Factor in Pretrial Release: The Pretrial Processing of "Dangerous" Defendants: A Comparative Analysis of State Laws*) (Arizona, Arkansas, California, Colorado, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Nebraska, Nevada, New Mexico, New York, North Carolina, Rhode Island, South Dakota, Texas, Utah, Virginia, Washington and Wisconsin).

¹¹⁹ *Schall*, 467 U.S. at 268 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *Leland v. Oregon*, 343 U.S. 790, 798 (1952)).

¹²⁰ *Salerno*, 794 F.2d at 76 (Feinberg, C.J., dissenting).

¹²¹ *Schall*, 467 U.S. at 278 ("[A]ppellees claim, and the District Court agreed, that it is virtually impossible to predict future criminal conduct with any degree of accuracy."); *Acevedo-Ramos*, 600 F. Supp. at 506 ("The statutory provisions [of BRA] that rely on future conduct are not speculative nor vague . . . [T]here is nothing inherently unattainable about a prediction of future criminal conduct."); *United States v. Edwards*,

Commentators have also addressed this issue.

a. The Argument Against Pretrial Detention.

Members of the Supreme Court, the District of Columbia Court of Appeals, and commentators have argued that preventive detention is excessive in relation to the goal of fighting pretrial crime because of the difficulties of predicting who will commit crime while out on bail.¹²² Justice Marshall in his dissent in *Schall* noted that "no diagnostic tools" exist that would enable even "the most highly trained criminologists" to reliably predict future criminal behavior.¹²³ In *Edwards*, Judge Mack of the District of Columbia Court of Appeals concurred with Justice Marshall's view.¹²⁴ Judge Mack referred to a study by the American Psychiatric Association which concluded that even psychiatrists cannot accurately predict criminal behavior.¹²⁵ He also noted a study published by the *Harvard Journal of Civil Rights and Civil Liberties* which concluded that in order to prevent the commission of certain select offenses, authorities would have to detain eight non-recidivists for every recidivist successfully detained.¹²⁶

Professor Ewing, commenting on this issue, argued that the accuracy of crime prediction is higher than the Harvard study would suggest, but still characterized the risk of error as unacceptable.¹²⁷ He reviewed the potential for clinical predictions of criminal behavior and concluded that the rate of false positives ranges from 54%

430 A.2d 1321, 1356 (D.C. 1981)(Ferren, J., concurring in part and dissenting in part)("In my view, the [District of Columbia preventive detention] statute cannot survive constitutional scrutiny unless it contains . . . additional safeguards which . . . will make the risk of error acceptably low.").

¹²² *Schall*, 467 U.S. at 293 (Marshall, J., dissenting); *Edwards*, 430 A.2d at 1369 (Ferren, J., concurring in part and dissenting in part).

¹²³ *Schall*, 467 U.S. at 293 (Marshall, J., dissenting)

¹²⁴ *Edwards*, 430 A.2d at 1369-70 (Mack, J., dissenting).

¹²⁵ *Edwards*, 430 A.2d at 1370 (construing American Psychiatric Association, *Task Force Report on the Clinical Aspects of Violent Individuals* 28 (1974)).

¹²⁶ *Edwards*, 430 A.2d at 1370 n.16 (construing *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 289 (1971)). The Harvard Study applied the criteria Congress developed in the District of Columbia preventive detention statute which are in part similar to the criteria in the present BRA. *Edwards*, 430 A.2d at 1370 n.16.

¹²⁷ For Ewing's evidence that preventive detention would erroneously detain arrestees 40% to 50% of the time, see *infra* note 128 and accompanying text. In comparison, the Harvard Study found that the system would erroneously detain arrestees 88% of the time. See *supra* note 126 and accompanying text. Despite his suggestion of greater accuracy, Professor Ewing does not favor preventive detention because "predictions of criminal behavior in general . . . are much more likely to be wrong than right." Ewing, *Schall v. Martin: Preventive Detention and Dangerousness Through the Looking Glass*, 34 BUFFALO L. REV. 173, 196 (1985).

to 65%.¹²⁸ He also noted that these studies assumed that the person predicting criminal behavior was a trained clinician or social scientist who relied on "sophisticated multivariate analysis," not a judge who is more likely to err by relying on other factors.¹²⁹ Indeed, judges may often err on the side of detention because they will thereby make "fewer demonstrable mistakes" and because it will be difficult for them to distinguish between arrestees with similar criminal records and present indictments.¹³⁰

Justice Marshall also reasoned in *Schall* that even if judges could predict criminal behavior more accurately, the New York juvenile detention statute¹³¹ still violates due process because of the lack of procedural safeguards for arrestees.¹³² First, Justice Marshall noted that the New York statute gives family court judges no guidance about what kinds of evidence to consider in their decision to detain a juvenile, such as "the nature of a juvenile's criminal record or the severity of the crime for which he was arrested."¹³³ Second, the statute does not establish a standard of proof prescribing how likely it must be that the arrestee will commit a crime on bail.¹³⁴ While Justice Marshall did not suggest an appropriate standard of proof, he referred to *Addington v. Texas*¹³⁵ where the Court held that "clear and convincing proof [was] constitutionally required to justify civil commitment to a mental hospital."¹³⁶ Justice Marshall concluded that the lack of guidance regarding evidence and standards of proof "creates an excessive risk that juveniles will be detained erroneously."¹³⁷

Even with the proper procedural safeguards, however, preventive detention might still yield a high false positive rate.¹³⁸ Studies compiled by Professor Ewing have shown that limiting detention to serious or violent crimes would result in a false positive rate "in the 50 to 60 percent range."¹³⁹ Requiring a showing of probable cause would produce false positive rates in approximately the same

¹²⁸ Ewing, *supra* note 127, at 181-83. False positives are persons detained who would not have committed crimes if released from custody. Ewing, *supra* note 127, at 181-83.

¹²⁹ Ewing, *supra* note 127, at 199.

¹³⁰ Tribe, *supra* note 47, at 382.

¹³¹ N.Y. [Family Court Act (26A)] § 320.5 (McKinney (1983)).

¹³² *Schall*, 467 U.S. at 302 (Marshall, J., dissenting).

¹³³ *Id.* at 302-03.

¹³⁴ *Id.* at 303.

¹³⁵ 441 U.S. 418 (1979).

¹³⁶ *Schall*, 467 U.S. at 303 n.32.

¹³⁷ *Id.* at 303.

¹³⁸ See *infra* notes 139-42 and accompanying text.

¹³⁹ Ewing, *supra* note 127, at 200-01.

range.¹⁴⁰ Requiring a court to consider a series of factors such as criminal history, prior multiple adjudications, and the present charge of an "aggressive crime" would still "prove incorrect almost 50% of the time."¹⁴¹ Indeed, the rate of false positives may be very difficult to reduce because "[c]riminal behavior, particularly violent criminal behavior, is relatively rare It is generally agreed that any predictions of rare behavior are bound to include a substantial percentage of false positives."¹⁴²

Thus, Justice Marshall, Judge Mack, and Professor Ewing have persuasively argued that preventive detention is an inaccurate method of fighting pretrial crime.

b. The Argument in Favor of Pretrial Detention

Despite the inaccuracies of preventive detention as demonstrated by sociological data, preventive detention under BRA is constitutionally acceptable for two reasons. First, preventive detention under BRA is not excessive because it bears a "rational relationship" to Congress's goal of preventing pretrial crime.¹⁴³ Second, Congress has provided far better procedural safeguards in BRA than were present in the New York juvenile detention statute.¹⁴⁴

(i) *The Rational Relationship Test*

The courts in *United States v. Hazzard*¹⁴⁵ and *United States v. Moore*¹⁴⁶ developed a standard to determine whether a preventive detention measure is "rationally related" to Congress' goal of reducing pretrial crime.¹⁴⁷ In each case, the court analyzed BRA in terms of the equal protection component of the fifth amendment's due process clause and upheld the categories of presumptively dangerous persons established in BRA.¹⁴⁸

The *Moore* court concluded that since bail is not a fundamental or constitutional right in all cases, the due process challenge should be evaluated "under a rational basis' test."¹⁴⁹ Under such a test, a court must consider "whether it is conceivable that the classification

¹⁴⁰ *Id.* at 201.

¹⁴¹ *Id.* at 205.

¹⁴² *Id.*

¹⁴³ See *infra* notes 155-70 and accompanying text.

¹⁴⁴ See *infra* notes 175-89 and accompanying text.

¹⁴⁵ 598 F. Supp. 1442 (N.D. Ill. 1984).

¹⁴⁶ 607 F. Supp. 489 (N.D. Cal. 1985).

¹⁴⁷ *Moore*, 607 F. Supp. at 494-95; *Hazzard*, 598 F. Supp. at 1452-53.

¹⁴⁸ *Id.*

¹⁴⁹ *Moore*, 607 F. Supp. at 494. See *supra* notes 99-100 regarding the constitutional status of the right to be admitted to bail.

bears a rational relationship to an end of government not prohibited by the Constitution."¹⁵⁰ The *Hazzard* court added that the equal protection component of the fifth amendment's due process clause "does not require that Congress . . . choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that Congress's action be rationally based" ¹⁵¹ The *Moore* court added that "[t]he court may not substitute its judgment for that of Congress' so long as there is some reasonable basis for the classification."¹⁵²

To determine whether Congress had a rational basis for believing that the classifications under BRA would further its goal of preventing pretrial crime, a brief re-examination of what triggers detention under the statute is necessary. Under BRA, a finding of probable cause that the defendant committed an offense carrying at least a ten-year sentence, or an offense involving narcotics, violence, or a firearm triggers a rebuttable presumption that no conditions of release will assure community safety.¹⁵³ To determine whether the defendant has rebutted this presumption of dangerousness, the court considers, *inter alia*, the defendant's history of drug abuse, his criminal history, and whether the offense involved a firearm.¹⁵⁴

Congress had a rational basis for believing that individuals falling into these classifications were likely to commit crimes while on bail. First, the *Moore* court concluded that drug offenders could constitutionally be detained because Congress "articulated a reasonable basis" for detaining certain drug offenders.¹⁵⁵ The court noted that the legislative history of BRA "contains a lengthy discourse on the reasons Congress believed drug offenders constituted danger to the community."¹⁵⁶ The Senate Judiciary committee reported that

drug trafficking is carried on to an unusual degree by persons engaged in continuing patterns of criminal activity. Persons charged with major drug felonies are often in the business of importing or distributing dangerous drugs, and thus, because of the nature of the criminal activity with which they are charged, they pose a significant risk of pretrial recidivism.¹⁵⁷

¹⁵⁰ *Id.* (quoting J. NOWACK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 591 (2d ed. 1983)).

¹⁵¹ *Hazzard*, 598 F. Supp. at 1452. (quoting *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970)).

¹⁵² *Moore*, 607 F. Supp. at 494-95.

¹⁵³ 18 U.S.C. § 3142 (f)(1) (1985).

¹⁵⁴ 18 U.S.C. § 3142 (f)(2).

¹⁵⁵ *Moore*, 607 F. Supp. at 495.

¹⁵⁶ *Id.*

¹⁵⁷ S. Rep. No. 225, *supra* note 49, at 20. See also *Bail Reform, 1981: Hearings on S. 440, S. 482, S. 1253, S. 1554 Before the Subcommittee on the Constitution of the Senate Judiciary*

Second, the Senate had evidence that arrestees with prior criminal records were more likely to be re-arrested while out on bail than other arrestees. The Senate based its conclusion upon a Justice Department study,¹⁵⁸ the testimony of one Senator noting that 36% of repeat offenders arrested were on some form of bail for previous crimes,¹⁵⁹ and the testimony of the National District Attorney's Association showing that 34% of the repeat offenders released in a test project committed crimes while on bail.¹⁶⁰ On the basis of these findings, the Senate Judiciary Committee concluded that

a history of pretrial criminality is, absent mitigating information, a rational basis for concluding that a defendant poses a significant threat to community safety and that he cannot be trusted to conform to the requirements of the law while on release.¹⁶¹

Professor Ewing has also in his writings noted that "the single most potent predictor of future crime is past crime, particularly violent crime."¹⁶²

Third, Congress relied on studies showing a high pretrial recidivism rate for those who committed crimes with firearms. For example, the Judiciary Committee reviewed one study which concluded that 34.6% of those arrested for armed robbery were subsequently indicted for another felony while on bail, and that of those indicted, the average recidivist committed 1.7 crimes while on release.¹⁶³

In addition, there are two more general reasons which support Congress's choice of preventive detention as a means of fighting pretrial crime. First, Congress found that general rates of pretrial recidivism, as well as recidivism rates for selected crimes, were very high and on the increase.¹⁶⁴ For example, the Senate Judiciary Committee noted that one-third of all those arrested in the District of Columbia were on some form of conditional release and that one out of five was on some form of pretrial release.¹⁶⁵ The Committee also relied on a study showing that in the District of Columbia 28%

Comm., 97th Cong., 1st Sess. 56-60. [hereinafter *Senate Hearings*] (statement and testimony of Sen. Chiles)(Congress considered testimony of a Senator from a state with a high number of drug arrests in coming to its conclusion that drug offenders are likely to pose dangers to the community).

¹⁵⁸ S. REP. NO. 147, *supra* note 97, at 27 (citing NAT'L INST. OF L. ENFORCEMENT AND CRIM. JUST. L. ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, *Instead of Jail: Pre and Post-Trial Alternatives to Jail Incarceration* (1977)).

¹⁵⁹ S. Rep. No. 157, *supra* note 97, at 79 (statement of Sen. Kassebaum).

¹⁶⁰ *Id.* at 105 (testimony of James Anders, National Association of District Attorneys).

¹⁶¹ S. Rep. No. 147, *supra* note 97, at 45-46.

¹⁶² Ewing, *supra* note 127, at 199-200.

¹⁶³ S. Rep. No. 147, *supra* note 97, at 24.

¹⁶⁴ See *infra* notes 165-70 and accompanying text.

¹⁶⁵ S. Rep. No. 147, *supra* note 97, at 27.

of the murders, 19% of the rapes, 31% of the robberies, 32% of the burglaries, and 11% of the assaults were committed by persons on some form of conditional release.¹⁶⁶ In all, the study found that slightly over one-fourth of all felonies were committed by persons on pretrial release.¹⁶⁷ Other studies reviewed by the Committee placed the general recidivism rate as high as 63%¹⁶⁸ and the specific recidivism rate for certain arrestees, such as those arrested for auto theft, at 65%.¹⁶⁹ The Committee also cited a study which concluded that pretrial crime was increasing in 52% of the seventy-two cities and towns surveyed.¹⁷⁰

Second, and perhaps most importantly, the prediction that an arrestee will commit a crime while out on bail may well be as accurate, if not more accurate, than other predictions of future criminality made in the criminal justice system. Professor Monohan has argued that preventive detention predictions are reasonably accurate in comparison to other predictions made by criminologists and are more accurate than false positive statistics would suggest:

[A]fter years of carefully examining these studies [of pretrial recidivism predictions] in light of other criminological research, Monohan has concluded that these studies "provide *reasonably accurate estimates . . . of violence.*" Monohan's conclusion is based in large measure upon other criminological data which "support the argument that the one third of the individuals who are predicted as violent and are arrested for a violent crime are in fact the same people who commit most of the unreported crime and unsolved criminal acts It is not that the false positives are really true positives in disguise but rather that the true positives are truer (i.e., more violent) than we had imagined."¹⁷¹

Former Attorney General Mitchell agreed with Professor Monohan. He argued that there are certain "dangerous federal crimes" including "robbery, burglary, arson, rape, sex crimes, and unlawful drug sales" which

usually result from a continuing motivation of pecuniary profit or sexual gratification, which involve planning, deliberation and the purposeful selection of a victim Moreover . . . these dangerous crimes frequently involve cooperation with other criminals on a continuing basis. The nature of these offenses, the fact that the arrest rate for such crimes is typically 15 percent and the long experience of law

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Ewing, *supra* note 127, at 186 (quoting and construing Monohan, *The Prediction of Violent Behavior: Developments in Psychology and Law*, in *PSYCHOLOGY AND THE LAW* 147, 159 (1983)(emphasis original).

enforcement officers with such offenders, compels the conclusion that a person charged with commission of one of these crimes is rarely apprehended on his first criminal venture.¹⁷²

Thus, Congress had a "rational basis" for believing that BRA would promote the goal of reducing pretrial crime. The data Congress reviewed supports the argument that certain classes of defendants are more likely to commit crime while out on bail than others and demonstrates that Congress tailored BRA to detain only these arrestees. Furthermore, Monohan's and Mitchell's findings regarding the relative accuracy of preventive detention counter the competing sociological data which suggests that preventive detention is excessive in relation to Congress' purpose. The evidence presented by Monohan and Mitchell shows that in comparison to other predictive efforts in criminology, pretrial detention predictions are reasonably accurate, particularly in light of their propensity to detect and detain previously undetected repeat offenders. Therefore, preventive detention arguably is not excessive in relation to the goal of reducing pretrial crime.

Unlike the New York juvenile detention statute which Justice Marshall criticized in *Schall*, BRA provides guidance to judges as to what factors to consider in detaining adults. In fact, BRA requires a judge to examine the arrestee's prior criminal record and the severity of his present offense, considerations which were suggested by Justice Marshall in *Schall*.¹⁷³ The legislative history, moreover, provides a rational basis for believing that these factors, as well as the others enumerated in BRA, should form the basis of detention decisions.

(ii) *Procedural Safeguards Under BRA*

The remaining question is whether BRA meets Justice Marshall's second objection that preventive detention lacks the procedural safeguards necessary to reduce the risk of erroneous deprivations of liberty.¹⁷⁴ The procedures required by BRA do meet the Supreme Court's procedural due process standards and are responsive to Justice Marshall's criticism of the New York juvenile detention statute in *Schall*.

The Supreme Court set out the procedural due process standards for preventive detention in *Schall*.¹⁷⁵ The Court reasoned in

¹⁷² Mitchell, *supra* note 100, at 1236 (footnote omitted).

¹⁷³ *Schall*, 407 U.S. at 302-03 (Marshall, J., dissenting).

¹⁷⁴ *Id.* at 303.

¹⁷⁵ *Id.* at 274-75 (majority opinion)(citing *Gernstein v. Pugh*, 420 U.S. 103, 114 (1975)).

Schall that "a judicial determination of probable cause" is required before the state may restrain an individual's liberty for an extended period of time.¹⁷⁶ Justice Rehnquist stated, however, that "a specific timetable" is not required and that the accused is not entitled to "the full panoply of adversary safeguards" including cross-examination, the rights of counsel and confrontation, and compulsory process of the witnesses.¹⁷⁷ The *Schall* Court noted the desirability of "flexibility and informality while . . . ensuring adequate . . . safeguards" in pretrial detention procedures.¹⁷⁸

BRA meets and exceeds the procedural standards enunciated in *Schall*. As the Seventh Circuit noted in *United States v. Portes*,¹⁷⁹ under BRA the court must hold the detention hearing immediately upon the defendant's initial appearance, continuances are strictly limited to five days, and the defendant has the right to be represented by counsel, to call witnesses, to testify himself, and to cross-examine other witnesses.¹⁸⁰ Thus, the *Portes* court joined a number of other courts in holding that "these procedures adequately protect the liberty interest" of the accused.¹⁸¹ In addition, BRA requires that a judge state in writing his reasons for detention,¹⁸² that he support these reasons with "clear and convincing evidence,"¹⁸³ and that the courts of appeal conduct an expedited review of all detention orders.¹⁸⁴

BRA's procedural standards also respond to Justice Marshall's criticisms of the New York juvenile detention statute. Under BRA, the standard of proof of "clear and convincing evidence" governs a judge's determination of detention. The Supreme Court used the same clear and convincing evidence standard in *Addington v. Texas*,¹⁸⁵ a case which Justice Marshall referred to in his critique of the New York statute in *Schall*.¹⁸⁶

Thus, in comparison to the New York juvenile detention statute upheld in *Schall*, which provided no guidance to a judge regarding the criteria or kinds of evidence to consider in detaining a juvenile

¹⁷⁶ *Id.* at 274-75.

¹⁷⁷ *Id.* at 275.

¹⁷⁸ *Id.*

¹⁷⁹ 786 F.2d 758 (7th Cir. 1986).

¹⁸⁰ *Id.* at 767 (construing 18 U.S.C. § 3142 (f)).

¹⁸¹ *Id.* at 767-68; *Accord Delker*, 757 F.2d at 1397; *Jessup*, 757 F.2d at 385; *Freitas*, 602 F. Supp. at 1292; *Hazzard*, 598 F. Supp. at 1453-54.

¹⁸² 18 U.S.C. § 3142 (i).

¹⁸³ 18 U.S.C. § 3142 (f).

¹⁸⁴ 18 U.S.C. § 3145.

¹⁸⁵ 441 U.S. 418 (1979).

¹⁸⁶ *Schall*, 467 U.S. at 303 n.32 (Marshall, J., dissenting).

arrestee,¹⁸⁷ the procedural safeguards in BRA do not create "an excessive risk that [persons] . . . will be detained erroneously." ¹⁸⁸ In fact, BRA "minimizes the risk of erroneous deprivations of liberty through extensive procedural provisions."¹⁸⁹

C. SUMMARY.

Therefore, despite the strong arguments that preventive detention is inaccurate in predicting criminal behavior and is excessive in relation to its purpose, BRA meets the Supreme Court's three part legislative purpose test enunciated in *Bell* and *Schall*. First, Congress did not intend to punish arrestees in BRA. Second, Congress sought only to detain arrestees in order to regulate their future conduct.¹⁹⁰ Third, Congress' regulation is not excessive in relation to its purpose. Preventive confinement prior to a final determination of guilt does not violate our constitutional traditions.¹⁹¹ In addition, Congress has reasonably tailored BRA so that only those arrestees who are most likely to commit crimes on bail will be detained.¹⁹² Congress also provided procedural safeguards in BRA to minimize the risk of erroneous deprivations of liberty.¹⁹³ Indeed, in his analysis of *Schall*, Professor Ewing concluded that the Supreme Court would uphold preventive detention for adults.¹⁹⁴

The constitutionality of BRA should not, however, be determined on the basis of the legislative purpose test alone for two reasons. First, the legislative purpose test does not enable courts to mitigate the harsh effect of excessive detention caused by the difficulties of predicting pretrial criminal behavior. Despite Congress' thorough consideration of which criteria to use to identify which defendants to detain and Professor Monohan's observations concerning the relative reliability of predictions of criminal behavior,¹⁹⁵ judges will still be likely to detain large numbers of arrestees erroneously.¹⁹⁶ Sociological data suggests, moreover, that procedural safeguards will not significantly reduce the number of erroneous de-

¹⁸⁷ See *supra* notes 34-35 and accompanying text.

¹⁸⁸ *Schall*, 467 U.S. at 303 n.32 (paraphrasing Justice Marshall).

¹⁸⁹ Note, *Pretrial Preventive Detention Under the Bail Reform Act of 1984*, 63 WASH. U.L.Q. 523, 543 (1985)(arguing that BRA is constitutional under the due process clause of the fifth amendment)(footnotes omitted).

¹⁹⁰ See *supra* notes 42-59 and accompanying text.

¹⁹¹ See *supra* notes 96-119 and accompanying text.

¹⁹² See *supra* notes 154-63 and accompanying text.

¹⁹³ See *supra* notes 174-89 and accompanying text.

¹⁹⁴ Ewing, *supra* note 127, at 216-19.

¹⁹⁵ See *supra* notes 155-70 and accompanying text.

¹⁹⁶ See *supra* notes 129-30 and accompanying text.

tentions.¹⁹⁷ Second, the present legislative purpose test, as Justice Marshall noted in *Bell*, does not consider the potential punitive effect of pretrial detention on arrestees.¹⁹⁸

V. A FOURTH FACTOR: THE LENGTH OF PRETRIAL DETENTION

Chief Judge Feinberg's opinions in *Melendez* and *Salerno* more thoroughly analyzed the due process issue than did the Supreme Court in *Schall* in his suggestion that the length of pretrial detention should also be considered. Considering the length of pretrial detention would allow courts to better monitor whether preventive detention has become excessive in relation to its regulatory purpose in a particular case. While consideration of the length of pretrial detention is not aimed at increasing the accuracy of predictions of pretrial recidivism, adding this fourth consideration to the due process analysis would allow judges to mitigate the harsh effects of the false positive problem by ensuring that arrestees are detained for only short periods of time whenever possible. Consideration of the length of pretrial detention would also enable courts to gauge the potential punitive effect of detention on arrestees.

The Second Circuit in *United States v. Columbo*¹⁹⁹ determined that "Congress relied upon the Speedy Trial Act . . . to limit the length of pretrial incarceration" under BRA.²⁰⁰ The *Columbo* court noted that the Senate Judiciary Committee rejected attempts by Senators to impose a sixty day ceiling on all detentions as provided in the District of Columbia detention statute.²⁰¹ The *Columbo* court relied on the following portion of the Committee's report:

18 U.S.C. § 3161 [of the Speedy Trial Act] specifically requires that priority be given to a case in which a defendant is detained, and also requires that his trial must, in any event, occur within 90 days These current limitations are sufficient to assure that a person is not detained pending trial for an extended period of time.²⁰²

The *Columbo* court concluded, nonetheless, that BRA in practice, particularly in complex cases, "might not work perfectly well to protect against lengthy incarceration."²⁰³

¹⁹⁷ See *supra* notes 139-42 and accompanying text.

¹⁹⁸ See *supra* note 38 and accompanying text.

¹⁹⁹ 777 F.2d 96 (2d Cir. 1985).

²⁰⁰ *Id.* at 100. Congress did not impose a limitation on the length of pretrial detention in BRA itself. Instead, Congress provided that the provisions of the Speedy Trial Act would apply to ensure that all detainees came to trial within 90 days. *Id.* See *supra* note 56 and accompanying text.

²⁰¹ *Columbo*, 777 F.2d at 100.

²⁰² *Id.* (quoting S. REP. No. 225, *supra* note 49, at 22 n.63 (1984)).

²⁰³ *Id.* at 101. The court in *Columbo*, however, was faced with the issue of whether a

Recent cases have demonstrated that BRA has resulted in very lengthy pretrial detention, particularly in multi-count, multi-defendant cases.²⁰⁴ Two examples illustrate the problem of lengthy detention. In *United States v. Melendez-Carrion*,²⁰⁵ two defendants were indicted with fifteen others for bank robbery.²⁰⁶ The government maintained in *Melendez* that the number of defendants and the large amount of time necessary to transcribe hundreds of tapes made of intercepted conversations in Spanish would delay trial until mid-1987, causing the arrestees to be detained for a total of two to three years.²⁰⁷ The court ruled that the preventive detention of eight months which had already occurred was unconstitutional.²⁰⁸

In *United States v. Zannino*,²⁰⁹ the defendant, Ilario Zannino, was indicted with six co-defendants in a multi-count indictment which charged him with loansharking, gambling, and racketeering violations, predicate acts of two murders, and four counts of conspiracy to murder.²¹⁰ Though the defendant had already been detained for sixteen months and had suffered a cardiac arrest two months after he was detained, the First Circuit ruled that further detention was permissible.²¹¹

While a detention of sixteen months is rare, detention exceeding the ninety day provision of BRA is not. Recent statistics show that "307 defendants were detained in custody 151 days and over" prior to the disposition of the charges pending against them.²¹²

Chief Judge Feinberg argued persuasively against the constitutionality of such extended detention in *Melendez*. Chief Judge Feinberg asserted, drawing on a factor of the *Kennedy v. Mendoza-Martinez*²¹³ test which was omitted by the Supreme Court in *Schall*, that "incarceration for periods as long as eight months has histori-

district court judge could order the detainee released under BRA "based on the speculative anticipated length of his pretrial incarceration." *Id.* The court held that such a speculative release was an abuse of the district court's discretion. *Id.*

²⁰⁴ See *Columbo*, 777 F.2d at 101 (speculating that multi-count, multi-defendant cases might yield lengthy pretrial incarcerations under BRA).

²⁰⁵ 790 F.2d 984 (2d Cir. 1986).

²⁰⁶ *Id.* at 988.

²⁰⁷ *Id.* at 1006 (Feinberg, C.J., concurring).

²⁰⁸ *Id.* at 1000.

²⁰⁹ 798 F.2d 544 (1st Cir. 1986). The court in *Zannino* adopted without further elaboration the substantive due process reasoning expressed by Chief Judge Feinberg of the Second Circuit. *Id.* at 546.

²¹⁰ *Id.* at 545.

²¹¹ *Id.* at 547-9. See *infra* notes 242-46 and accompanying text for the basis of the court's decision to continue detention of Zannino.

²¹² *Accetturo*, 783 F.2d at 395 (Sloviter, J., dissenting in part).

²¹³ 372 U.S. 144, 168 (1963). See *supra* note 23 for a discussion of *Mendoza*.

cally been regarded as punishment.’”²¹⁴ He stated “[s]ince none of the traditionally regulatory’ reasons for jailing a person without trial, such as the defendant’s propensity to flee or to tamper with witnesses, justify confinement in such a case [for eight months], such lengthy detention would historically be seen as a punishment.”²¹⁵ Chief Judge Feinberg also reasoned that incarceration may be “rendered so harsh by its length that it . . . degenerates into punishment.”²¹⁶ He stated that “[e]nforced separation from family, friends, and the community by confinement in an institutional setting for many months is clearly punitive under our traditions.”²¹⁷

Other courts have also recognized that lengthy pretrial detention exceeding the ninety day provision in BRA raises serious due process questions under the fifth amendment.²¹⁸ As Chief Judge Feinberg has noted, “[e]very other appellate court that has examined the lawfulness of this practice under the Bail Reform Act has indicated that pretrial detention to prevent future crimes may be invalid if unduly prolonged.”²¹⁹ Indeed, the Tenth Circuit in *United States v. Theron*²²⁰ concluded that detention for four months was too lengthy and thus unconstitutional.²²¹ The District Court for the Northern District of California in *United States v. Freitas*²²² upheld BRA as constitutional while emphasizing that detention under BRA is strictly limited in time.²²³ Similarly, the Supreme Court in *Schall* noted, with regard to the New York juvenile detention law, that “[t]here is no indication in the statute itself that preventive detention is used . . . as a punishment. First of all, the detention is strictly limited in time.”²²⁴

Moreover, Congress did not intend that detention would normally exceed the ninety day limit provided in BRA. Several Senators even attempted to limit all detention under BRA to sixty days as is the limit under the District of Columbia preventive detention stat-

²¹⁴ *Melendez*, 790 F.2d at 1008 (Feinberg, C.J., concurring)(citing *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

²¹⁵ *Id.*

²¹⁶ *Id.* at 1008. (Feinberg, C.J., concurring).

²¹⁷ *Id.*

²¹⁸ See *infra* notes 219-21 and accompanying text.

²¹⁹ *Salerno*, 794 F.2d 64, 78 (Feinberg, C.J., dissenting)(citing *Portes*, 786 F.2d at 768 n.14). *Accetturo*, 783 F.2d at 388; *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986); *Edwards*, 430 A.2d at 1333.

²²⁰ 782 F.2d 1510, 1516 (10th Cir. 1986).

²²¹ *Id.* at 1516.

²²² 602 F. Supp. 1283 (N.D. Cal. 1985).

²²³ *Id.* at 1291.

²²⁴ *Schall*, 467 U.S. at 269.

ute.²²⁵ Three members of the Judiciary Committee, in persuading the Senate not to adopt a sixty day ceiling, argued that the ninety day limit would not be exceeded. The Committee Chairman, Senator Thurmond, emphasized that "the 90 days [provision] is the worst case limit," while Senator Laxalt referred to it as the "upper bound."²²⁶ Senator Grassley concurred, arguing that under the BRA as written "no defendant will be detained indefinitely while the processes of justice grind to a halt."²²⁷

Chief Judge Feinberg concluded that the problem of lengthy detention is best resolved on a case-by-case analysis by the courts.²²⁸ The courts, according to Chief Judge Feinberg, must strive to determine whether preventive detention has become punitive in its effect because of its length.²²⁹

Considerable opposition exists within the Second Circuit to Chief Judge Feinberg's view. First, in his *Melendez* dissent, Judge Timbers reasoned that while the liberty restraint imposed on the arrestee by detention increases with time, "[c]ongressional intent and the importance of preventing reasonably predictable future criminal conduct do not change with the passage of time."²³⁰ Judge Timbers' criticism of Chief Judge Feinberg's consideration of the length of pretrial detention emphasizes the need for a fourth criterion in the constitutional test. Indeed, the three factor *Bell* test applied by Judge Timbers in *Melendez* cannot take into account the potential punitive effect of detention extending beyond what BRA's sponsor called the "worst case limit" of ninety days.²³¹ Second, Judge Newman in *Melendez* would declare pretrial detention unconstitutional in all cases.²³² However, his approach is too extreme because it would prohibit even brief detentions of particularly dangerous defendants such as Zannino.²³³

Scrutinizing the length of detention on a case-by-case basis is advantageous when compared to both Judge Timbers' and Judge Newman's approach because of its flexibility. A case-by-case analy-

²²⁵ *Melendez*, 790 F.2d at 996 (Feinberg, C.J., concurring).

²²⁶ *Id.* (quoting 130 CONG. REC. S941, 943 (daily ed. Feb. 3, 1984)(statements of Senators Thurmond and Laxalt)).

²²⁷ *Id.* (quoting 130 CONG. REC. S945 (daily ed. Feb. 3, 1984)(statement of Senator Grassley)).

²²⁸ *Salerno*, 794 F.2d at 78-9 (Feinberg, C.J., dissenting).

²²⁹ *Id.*

²³⁰ *Melendez*, 792 F.2d at 1014 (Timbers, J., dissenting)(footnote omitted).

²³¹ *See Bell*, 441 U.S. at 567 (Marshall, J., dissenting).

²³² *Melendez*, 790 F.2d at 1005 (Feinberg, C.J., concurring)("Judge Newman's opinion . . . would bar the pretrial detention for even a brief period of time of a competent adult criminal defendant on the basis of danger to the community.").

²³³ *See Melendez*, 790 F.2d at 1005 (Feinberg, C.J., concurring).

sis would enable the government to detain briefly particularly dangerous defendants, yet still allow judicial review of the potential punitive effect of pretrial detention. Three appellate courts have declined to draw "bright lines" as to when persons detained on the basis of dangerousness should be released.²³⁴ As the Third Circuit explained in *United States v. Accetturo*²³⁵

Because due process is a flexible concept, arbitrary lines should not be drawn regarding precisely when defendants adjudged to be flight risks or dangers to the community should be released pending trial. Instead, we believe that due process judgments should be made on the facts of individual cases.²³⁶

Moreover, while Congress did not want detentions to run for long periods of time, not even the proponents of a sixty day limit on detention desired an absolute ceiling on the length of detention in all cases.²³⁷

Many authorities have suggested that the length of pretrial detention factor of the due process test be applied using the following criteria: the length of the detention which has already occurred, the complexity of the federal government's case against the detainee, and whether one side has added to the complexity of the case needlessly or delayed the case without good cause.²³⁸ In addition, the *Accetturo* and *Zannino* courts suggested that courts consider the seriousness of the pending charges, the strength of the proof that the defendant will pose a danger to the community, and the strength of the government's evidence on the underlying charges.²³⁹

Both *Melendez* and *Zannino* provide good illustrations of how the length of pretrial detention could be incorporated as a fourth factor in the due process analysis. In *Melendez*, Judge Feinberg apparently found no additional evidence relating to either the length of detention or whether one side had contributed needlessly to the complexity of the case because he concluded that the defendants "face continued incarceration *solely* on the basis of their anticipated propensity to commit future crimes."²⁴⁰ The "anticipated propensity" to commit crime on bail, without more, was insufficient to merit con-

²³⁴ *Id.* at 1008 (Feinberg, C.J., concurring); *Accetturo*, 783 F.2d at 388; *Theron*, 782 F.2d at 1516.

²³⁵ 783 F.2d 382 (3d Cir. 1986).

²³⁶ *Id.* at 388.

²³⁷ *Melendez*, 790 F.2d at 996 (citing 130 CONG. REC. S941, 945)(statements of Senators Specter and Mitchell); S. REP. NO. 225, *supra* note 49, at 22 n.63).

²³⁸ See *Salerno*, 794 F.2d at 79; *Accetturo*, 783 F.2d at 388; *Zannino*, 798 F.2d at 547.

²³⁹ *Zannino*, 798 F.2d at 547 (quoting *Accetturo*, 783 F.2d at 388).

²⁴⁰ See *Melendez*, 790 F.2d at 1009 (Feinberg, C.J., concurring)(emphasis added).

tinued detention in *Melendez*.²⁴¹

In *Zannino*, the court adduced evidence to justify an extended detention. First, the court assessed the seriousness of the charges against the defendant and found that they were of the "gravest order," involving predicate acts of two murders and carrying a maximum 130 year prison sentence.²⁴² Second, the court assessed the strength of the government's allegation that the defendant posed a threat of danger to the community if released. The court concluded that the defendant had the potential to play "a continuing leadership role in mob activities" to which he had "devoted his life" despite his health condition.²⁴³ Third, the court found that the trial had been delayed at Zannino's insistence and that the government had "steadfastly pressed for trial throughout the period of Zannino's detention."²⁴⁴ On the basis of these findings, the court concluded that while 16 months of detention may well prove to be excessive in most cases, continuing detention given these circumstances did not violate due process.²⁴⁵ The court emphasized that a rigid limitation on the length of pretrial detention would eviscerate the government's regulatory purpose in BRA:

[C]ourts often would be forced by the duration of detention alone to release a palpably dangerous defendant, or a defendant palpably likely to flee or intimidate witnesses Such a result would virtually scuttle the important governmental purposes promoted by the Bail Reform Act's pretrial detention provisions.²⁴⁶

Chief Judge Feinberg's opinions in *Melendez* and *Salerno* thus agree for the adoption of an additional element of the due process test: the length of pretrial detention. There are many advantages to the approach which Chief Judge Feinberg suggests. A case-by-case analysis enables the government to legitimately pursue its goals by detaining particularly dangerous defendants for the statutory period of ninety days, while also enabling courts to gauge the potential punitive effect of pretrial detention on arrestees.²⁴⁷

The development of the length of pretrial detention as a fourth

²⁴¹ *Id.*

²⁴² *Zannino*, 798 F.2d at 547.

²⁴³ *Id.*

²⁴⁴ *Id.* at 548.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ One disadvantage of a case-by-case approach to the due process analysis is potential inconsistency of application among the circuits. However, due process is amenable to such variations because of its flexible response to different fact situations. *Freitas*, 602 F. Supp. at 1291 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)) ("It is well established that due process is flexible and calls for such procedural protections as the particular situation demands.'").

factor in the due process analysis is advantageous for three other reasons related to the separation of powers between the branches of the federal government. First, a more active judicial role in policing the potential punitive effect of detention will become very important “[b]ecause the defendants whose liberties are most affected are those who are unlikely to command public sympathy or attention [and therefore] it is unlikely there will be action from Congress” to improve BRA.²⁴⁸ Second, if the courts adopt a “policing” role, they can force the federal government either to accelerate its trial preparation prior to indictment or be foreclosed from using pretrial detention.²⁴⁹ Third, it is important that lower federal courts take on the policing role which the fourth factor provides because the Supreme Court will not allow them to strike down preventive detention statutes on the grounds that sociological data show that they constitute poor public policy.²⁵⁰ The *Schall* court noted, “we have specifically rejected the contention, based on the same sort of sociological data relied on by appellees and the district court, that it is impossible to predict future behavior and [we feel] . . . that the question is so vague as to be meaningless.”²⁵¹ The *Schall* Court also said, in response to the dissent:

The dissent would apparently have us strike down New York’s preventive detention statute on two grounds: first, because the preventive detention of juveniles constitutes poor public policy . . . and, second, because the statute could have been better drafted to improve the quality of the decision making process But it is worth recalling that we are neither a legislature charged with formulating public policy nor an American Bar Association committee charged with drafting a model statute. The question before us today is solely whether the preventive detention system chosen by the State of New York . . . comports with constitutional standards.²⁵²

Therefore, adding the length of pretrial detention as a fourth factor to the due process test would greatly improve the quality of the constitutional analysis of preventive detention. Given the reluctance of the Supreme Court to allow lower courts to invalidate preventive detention on the basis of sociological data, a four factor test comprised of the three *Bell* factors and the length of pretrial detention would provide a more thorough constitutional analysis of cases involving preventive detention under BRA. The most significant advantage of considering the length of pretrial detention is that it

²⁴⁸ *Accetturo*, 783 F.2d at 395-96 (Sloviter, J., dissenting).

²⁴⁹ *Salerno*, 794 F.2d at 79 n.2 (Feinberg, C.J., dissenting).

²⁵⁰ *Schall*, 467 U.S. at 278-79.

²⁵¹ *Id.*

²⁵² *Id.* at 281.

would enable courts to mitigate the harsh effects of the false positive problem and to gauge the potential punitive effect of pretrial detention.

While adding the length of pretrial detention to the due process analysis will help mitigate the problems of preventive detention, there is evidence in the legislative history of BRA that less constitutionally suspect, yet more effective means to fight crime on bail are available.²⁵³ The next segment of this Comment suggests that while there is a rational relationship between certain categories of arrestees and the goals of BRA, the use of pretrial services, speedier trials, and detention upon commission of a crime while out on bail provide more effective, yet less constitutionally suspect means of fighting pretrial crime.

VI. A LEGISLATIVE PROPOSAL

Congress' effort to limit detention to dangerous offenders having high pretrial recidivism rates eliminates only some of the criticisms of preventive detention. Even with the most favorable procedural due process protections, the false positive rate never falls below fifty percent.²⁵⁴ Moreover, Congress knew about the false positive problem. Representative Kastenmeier referred explicitly to the studies relating to the false positive problem and concluded that BRA "makes it likely that the courts will lock up far too many to ensure that they have detained the dangerous few."²⁵⁵

Congress also knew that preventive detention might actually exacerbate the problem of pretrial crime.²⁵⁶ Representative Kastenmeier pointed out that preventive detention hearings are elaborate and time consuming.²⁵⁷ The more detention hearings that are held, the longer the delays will be in holding trials for the larger number of arrestees who have been released prior to trial.²⁵⁸

²⁵³ See *infra* notes 264-79 and accompanying text.

²⁵⁴ See *supra* notes 138-42 and accompanying text.

²⁵⁵ H.R. Rep. No. 1121, *supra* note 118, at 59, 60 (additional views of Representative Kastenmeier, Chairman of the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice). Moreover, during the hearings on BRA, the Administrative Office of the United States Courts informed Congress that by using the present charge and prior criminal record as factors in detaining arrestees, 22% of those detained have not even committed the underlying offense. *Bail Reform Act 1981-2: Hearings Before The Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st and 2d Sess. 86 [hereinafter *House Hearings*](Testimony of Guy Willets, Administrative Office of the U.S. Courts).

²⁵⁶ See *infra* notes 257-62 and accompanying text.

²⁵⁷ H.R. Rep. No. 1121, *supra* note 118, at 60 (additional views of Representative Kastenmeier).

²⁵⁸ *Id.*

The longer the delays between arrest and trial for those released, the greater the probability that they will commit crime on bail.²⁵⁹ Preventive detention also creates added expenses as a result of the need to build and maintain additional prison facilities.²⁶⁰ Finally, pretrial detention may actually increase the recidivist tendencies of detainees once they are released.²⁶¹ As one study presented to Congress found:

In many respects, persons detained in jail prior to trial are subjected to even worse conditions with less chance for rehabilitation The indelible impact of this incarceration, the exposure to those whose way of life is crime and to persons who have lost all hope and are resigned to failure, leave many defendants hardened, embittered, and more likely to recidivate once released, than they were before incarceration.²⁶²

Professor Tribe has argued that the greatest weakness of preventive detention is Congress' inability to monitor the success and accuracy of such a program. Pressures to detain more arrestees will grow as a result. Tribe persuasively summarized the argument by stating:

Once the government has instituted a system of imprisonment openly calculated to prevent crimes committed by persons awaiting trial, the system will appear to be malfunctioning only when it releases persons who prove to be worse risks than anticipated. The pretrial misconduct of these persons will seem to validate, and will indeed augment, the fear and insecurity that the system is calculated to appease. But when the system detains persons who could safely have been released, its errors will be invisible. Since no detained defendant will commit a public offense, each decision to detain fulfills the prophesy that is thought to warrant it, while any decision to release may be refuted by its results.

The inevitable consequence is a continuing pressure to broaden the system in order to reach ever more potential detainees. Indeed, this pressure will be generated by the same fears which made preventive detention seem attractive in the first place.²⁶³

Congress had evidence of the pitfalls of preventive detention when it enacted BRA. In addition, it had evidence of far more effective means of reducing pretrial crime including pretrial services, speedier trials, and detention upon the commission of a crime while out on bail.

²⁵⁹ *House Hearings*, *supra* note 255, at 204-05 (testimony of Ira Glasser, American Civil Liberties Union).

²⁶⁰ *Id.* at 204.

²⁶¹ *Id.* at 205 (quoting Angel, *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. at 352-53 (footnotes omitted)).

²⁶² *Id.*

²⁶³ Tribe, *supra* note 47, at 375.

A. PRETRIAL SERVICES

Pretrial service officers collect and verify information regarding arrestees, recommend release conditions, modify and review these recommendations as necessary, supervise persons on release, and inform the court of any violations of the release conditions.²⁶⁴ Pretrial services greatly reduce the incidence of crime on bail.²⁶⁵ A five year federal pilot project in ten demonstration districts found that though 90% of the arrestees were released, pretrial crime was cut in half.²⁶⁶ Pretrial services succeed because for the first time, court officials have verified information on which to make release decisions.²⁶⁷ Senator Biden has noted that pretrial services, though costly, will result in a savings to the community in terms of reductions in crime on bail, unnecessary detentions, and fugitive rates.²⁶⁸ Thus, in comparison to preventive detention, pretrial services reduce pretrial crime more efficiently.²⁶⁹

B. SPEEDIER TRIALS

Studies published by the *Harvard Journal of Civil Rights and Civil Liberties* and the Commerce Department have shown that the longer a person classified as dangerous is on release, the greater the probability that he will be re-arrested for another crime.²⁷⁰ One commenator has asserted that if the Speedy Trial Act is fully implemented, pretrial crime would be reduced by 50%.²⁷¹

These empirical findings comport with judicial experience.²⁷² Judge George L. Hart noted that if trials could be held "within 6 weeks to two months of the arrest," there would be no need to amend the previous Bail Reform Act.²⁷³ Judge Harold Greene

²⁶⁴ *Senate Hearings, supra* note 157, at 365-66 (statement of Senator Biden).

²⁶⁵ *See infra* note 266 and accompanying text.

²⁶⁶ *House Hearings, supra* note 255, at 85-86 (testimony of Guy Willets, Administrative Office of the United States Courts).

²⁶⁷ *Id.* at 86.

²⁶⁸ *Senate Hearings, supra* note 157, at 367 (statement of Senator Biden).

²⁶⁹ *Compare supra* notes 256-62 and accompanying text, regarding the expenses created by preventive detention, *with supra* note 268 and accompanying text, regarding the savings to the community by using pretrial services.

²⁷⁰ *House Hearings, supra* note 255, at 206 (testimony of Ira Glasser, A.C.L.U.) (citing Angel, *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. at 317, 360; Locke, *Compilation and Use of Criminal Court Data in Relation to Pre-Trial Release of Defendants: Pilot Study*, Washington, D.C., National Bureau of Standards, U.S. DEP'T OF COM. 165 (1970)).

²⁷¹ *Id.* at 207 (testimony of Ira Glasser, A.C.L.U.) (citing Duke, *Bail Reform for the Eighties: A Reply to Senator Kennedy*, 49 FORDHAM L. REV., 40, 46 n.40 (1980)).

²⁷² *See infra* notes 273-75 and accompanying text.

²⁷³ *House Hearings, supra* note 255, at 207 (testimony of Ira Glasser, A.C.L.U.) (quoting *Amendments to the Bail Reform Act of 1966, Hearings before the Subcomm. on Constitutional Rights*

agreed, noting that if trials were held quickly the problem of crime on bail would be greatly diminished because "many crimes are committed in the first 45 to 60 days" after arrest.²⁷⁴ Judge Green also noted that "the mere fact that a speedy trial is available would be a much greater deterrent to crime than what we have now, when it takes a year to a year and a half to have a criminal case tried in the district court."²⁷⁵

C. CONSIDERATION OF DANGEROUSNESS AND LIMITED DETENTION

Judges should be permitted to consider the dangerousness of the defendant in setting the conditions of release and in allowing pretrial detention when the defendant commits a crime while out on bail. Allowing a judge to consider the dangerousness of the defendant given his prior record is a prerequisite to effective pretrial services. Consideration of the dangerousness of the defendant would allow judges to devise effective release conditions and to revoke bail if necessary to reduce the likelihood of further criminality before trial.²⁷⁶ Similarly, Congress also noted the need to allow judges to consider the dangerousness of defendants in making release decisions.²⁷⁷

In addition, the commission of a crime while out on bail should trigger pretrial detention. Pretrial detention would thus be based on a present manifestation of dangerousness, not a prediction of future dangerousness. This approach would avoid the false positive problem because reliance would not be placed on future predictions of criminality. Detention triggered by crime on bail, moreover, would give strength to the conditions of release by requiring a swift judicial reprisal for any breach of the release conditions.²⁷⁸ These swift judicial reprisals would also act as a visible deterrent to crime on bail.²⁷⁹

Finally, if an arrestee commits a crime on release, the federal

of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 10-11 (1969)[hereinafter *Amendment Hearings*](Testimony of Judge George L. Hart).

²⁷⁴ *Amendment Hearings*, *supra* note 273, at 10-11 (quoting *Amendment Hearings*, *supra* note 255, at 41 (testimony of Judge Harold Greene)).

²⁷⁵ *Id.*

²⁷⁶ Such a proposal has the support of the Criminal Law Committee of the Judicial Conference of the United States. *House Hearings*, *supra* note 255, at 84 (statement of Judge Gerald Tjoflat, Criminal Law Committee, Judicial Conference of the United States).

²⁷⁷ S. Rep. No. 147, *supra* note 97, at 1-2 (1983).

²⁷⁸ *Id.*

²⁷⁹ *See Id.* at 136-39. This type of proposal is supported by the Committee on Criminal Justice Standards of the American Bar Association, *Id.*, and also has some Congressional support. H.R. REP. NO. 1121, *supra* note 118, at 25 (similar proposal, made by

government should be required to submit clear and convincing evidence of the underlying charge and to meet all other BRA requirements. The requirements would include demonstrating a history of alcohol or drug abuse and a previous criminal record. By making it more difficult to secure detention, this high standard of review would help ensure that police agencies do not re-arrest individuals simply because they wish to incarcerate them.

In summary, pretrial services, speedier trials, and detention triggered by crime on bail have proven effective in reducing pretrial crime,²⁸⁰ whereas preventive detention may be inaccurate in predicting who will commit crime while out on bail.²⁸¹ Each element in the proposal imposes fewer physical restraints on the arrestee prior to trial than incarceration, thereby raising fewer constitutional problems. Similarly, when detention does occur, it would be based upon a present manifestation of dangerousness, not a potentially unreliable general prediction. In addition, the three elements of this proposal have the support of various groups with special expertise in criminal law.²⁸² Thus, pretrial services, speedier trials, and detention triggered by crime on bail would constitute a more effective, and less constitutionally suspect means of fighting pretrial crime than preventive detention under BRA. Unlike preventive detention under BRA, this three element proposal would effectively reduce pretrial crime without reliance on inaccurate and constitutionally suspect predictions of future criminality.

VII. CONCLUSION

Congress changed federal bail policy in the Bail Reform Act of 1984 by enabling judicial officers to detain an arrestee because he is likely to commit a crime while out on bail. While the Bail Reform Act fulfills the requirements of the due process clause of the fifth amendment under the *Bell* Court's three-part legislative purpose test, BRA poses difficult constitutional questions given the problem of accurately predicting who will commit crime on bail.

Chief Judge Feinberg's opinions in *Melendez* and *Salerno* provide a more thorough due process inquiry by suggesting that the length of pretrial detention be an added consideration. Considering the length of pretrial detention as a fourth factor in the due process analysis will mitigate the harsh effects of inaccurate preventive de-

Representative Kastenmeier, defeated in the House Judiciary Committee by a vote of 13 to 18).

²⁸⁰ See *supra* notes 265-79 and accompanying text.

²⁸¹ See *supra* notes 254-55 and accompanying text.

²⁸² See *supra* notes 276-79 and accompanying text.

tention and enable judges to gauge the potential punitive effects of preventive detention under BRA.

Despite the present potential for an enhanced constitutional analysis provided by the consideration of the length of pretrial detention, the ultimate remedy for the problems posed by preventive detention is legislation which uses less constitutionally suspect, yet more effective means to fight pretrial crime. Using pretrial services, speedier trials, and detention based on crime while out on bail will raise fewer constitutional problems than preventive detention while preventing more crime on bail.

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