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Innocent Until Suspected Guilty

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INTRODUCTION

America is in the midst of an incarceration crisis. The United States locks up more of its citizens per capita than any other nation, with 698 out of 100,000 people confined at any given time.[1] 2.3 million Americans are currently living "in a cage."[2] The harm is even more pronounced among minorities; one in three black men will be locked up at some point in their lives.[3] The calls of civil rights activists to reform the U.S. criminal justice system have been growing stronger each year as mass incarceration persists.[4] But although the problem of mass incarceration may seem simple—too many people are imprisoned—the solution must be multi-faceted, because the laws and institutions that contribute to mass incarceration in the U.S. are numerous.[5] This Comment focuses on one of these laws: the federal presumption against bail for serious crimes.

Many incarcerated persons in the U.S. are not serving a prison sentence but are instead being held in custody while they await trial. Out of the 2.3 million incarcerated individuals, almost half a million are being held in jail without having been convicted of a crime.[6] In the federal system, pretrial detention rates are particularly alarming, with almost three out of four people charged with federal crimes being jailed before trial.[7] Even excluding immigration cases, where suspects are held in custody almost without exception, fifty-nine percent of federal defendants were detained pretrial in 2016.[8] For defendants charged with federal drug crimes, the percentage was eighty-four percent of all federal pretrial defendants.[9] Time in custody is not a short span, either. In 2016, the average length of

* Publications Editor, *University of Cincinnati Law Review*.

1. Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE (March 24, 2020).

2. MICHELLE ALEXANDER, THE NEW JIM CROW, TENTH ANNIVERSARY EDITION xxix (2020).

3. *Id*. at 11.

4. *See* Brennan Hoban, *The Need for Criminal Justice Reform*, THE BROOKINGS INSTITUTION (August 30, 2017), https://www.brookings.edu/blog/brookings-now/2017/08/30/the-need-for-criminal-justice-reform/ (collection of video presentations from a Brookings event on criminal justice reform).

5. ALEXANDER, *supra* note 2.

6. Sawyer, *supra* note 1.

7. Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, PROBATION AND PRETRIAL SERVICES OFFICE (September 2018).

8. Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, PROBATION AND PRETRIAL SERVICES OFFICE (September 2017). This was an increase of six percent from the number in 2006.

9. *Id*. This was an increase of eight percent from the number in 2006.

time that a pretrial defendant spent behind bars was 255 days.[10] Some jurisdictions averaged over 400 days.[11]

This Comment argues that the federal presumption against bail for serious crimes, codified at 18 U.S.C. § 3142(e)(3), is unconstitutional because it presumes guilt based first and foremost on the nature of charges not yet proven against the defendant. Part II examines the presumption of innocence in U.S. law and how that presumption applies to pretrial detention. Part II also discusses the origins and history of bail and the 1984 Bail Reform Act, which created the federal presumption against bail for serious crimes. Part III argues that 18 U.S.C. § 3142(e)(3), which codifies the presumption of detention for serious crimes, is unconstitutional. Part III first explains why the presumption of detention is facially inconsistent with the liberty safeguards built into other provisions of the Bail Reform Act. Part III then addresses why the presumption of detention assumes guilt by requiring a judge to assess a not-yet-convicted individual's dangerousness to the community. Finally, Part III discusses how the presumption of detention has been applied in a way that undermines Congress's original intentions.

II. BACKGROUND

Section A of this Part will begin by examining the origins of the presumption of innocence in U.S. law and how the presumption implicates a defendant's right to release before trial. Next, Section B will briefly examine the history of the bail process before the passage of the Bail Reform Act of 1984 ("1984 Amendments"). Finally, Section C will explain the changes under the 1984 Amendments, the U.S. Supreme Court's interpretation of the Amendments, and the current state of the right to pretrial release under federal law.

A. The Presumption of Innocence

Regarded as one of the bedrocks of free society, the presumption of innocence has defined the U.S. criminal justice system since its inception. The principle that one is innocent until proven guilty predates the founding of the nation. The 1895 Supreme Court case *Coffin v. United States* explored the history of the presumption of innocence, tracing it back to the Bible and to ancient Roman law.[12] Later, as U.S. criminal law

10. *Id.*

11. *Id*.

12. Coffin v. United States, 156 U.S. 432, 453-57 (1895) (referencing the Book of Deuteronomy, the Roman code during the times of Emperors Trajan and Julian, and three of the greatest English jurists: John Fortescue, Lord Hale, and Blackstone).

continued to develop through the 20th century, the presumption of innocence remained so fundamental that to infringe upon it amounted to a constitutional violation of due process.[13]

In *Coffin*, Justice White laid out the historical progression of the presumption of innocence.[14] He began by asserting that the "presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[15] Beginning with the Roman emperors, Justice White traced the presumption of innocence through English history.[16] He cited the great English jurist William Blackstone, who maintained that "the law holds that it is better that ten guilty persons escape than that one innocent suffer."[17] Justice White concluded with a quote from an 1817 English case that summed up why the law must include a presumption of innocence:

> I conceive that this presumption is to be found in every code of law which has reason, and religion, and humanity, for a foundation. It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman …. To overturn this, there must be legal evidence of guilt, carrying home a decree of conviction short only absolute certainty.[18]

Coffin thereby reaffirmed that the U.S. colonial legal system was heavily influenced by the principles of English law, and the presumption of innocence became just as fundamental to American criminal justice as it did in England.[19]

In 1970, the Supreme Court held in *In re Winship* that the standard of proof requiring guilt "beyond a reasonable doubt" must be proven for each element of a criminal case and explained that the presumption of innocence is a principle that could not be compromised.[20] In *Winship*, a twelve-year-old boy was found guilty of theft under a New York law that required only a "preponderance of the evidence" standard of proof in

13. In re Winship, 397 U.S. 358, 363 (1970).

14. *Coffin*, 156 U.S. at 453-57.

15. *Id*. at 453.

16. *Id*. at 454.

17. *Id.* at 456.

18. *Id*. (quoting McKinley's Case (1817), 33 St. Tr. 275, 506).

19. *See* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L. J. 723 (2011) (Professor Baradaran explains the operation of the presumption of innocence in English law with regard to bail: "While there was some discretion and bail was not always allowed for every alleged crime, it was generally presumed for all accused due largely to the presumption of innocence. English bail law presumed that defendants would be released and discussed the 'bail decision' as though it were a decision of how to release the defendant, not if he would be released. To deny bail to a person who is later determined to be innocent was thought to be far worse than the smaller risk posed to the public by releasing the accused." Baradaran then goes on to discuss how the British principles translated into U.S. law and specifically applied to the right to bail.).

20. In re Winship, 397 U.S. 358 (1970).

juvenile cases.[21] "Preponderance of the evidence" only requires it to be more likely than not that the defendant is guilty, while "beyond a reasonable doubt" is the highest burden of proof in the legal system.[22] In finding that the use of the lower standard of proof violated the boy's constitutional due process rights, the Court reasoned that "[t]he reasonable-doubt standard […] provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle."[23] To violate this principle, the Court concluded, would impose "a disadvantage amounting to a lack of fundamental fairness."[24] The Court in *Winship* therefore viewed the presumption of innocence as so foundational and important, that to violate it would violate constitutional due process.[25]

The Court has also stated that the presumption of innocence is a driving force behind the right to bail before trial. In 1951, the Court addressed bail and pretrial detention in *Stack v. Boyle*, where twelve members of the Communist party were charged with conspiring to overthrow the government.[26] Bail was set at $50,000 for each individual.[27] The defendants challenged this bail as excessive under the Eighth Amendment, presenting evidence that they were unable to pay such a high sum.[28] The Court agreed that the bail was excessive and equated the presumption of innocence with the right to freedom before trial, writing that "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[29] The Court further explained that pretrial release "permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction."[30] Not only did the Court view the right to bail as a fundamental safeguard of liberty, it also recognized the key role that pretrial release had played in securing other due process rights that are guaranteed to criminal defendants.[31]

Legal scholars have recognized that the presumption of innocence is

21. *Id.* at 360.

22. State v. King, 2014-Ohio-4189, p.11 (Ohio Ct. App., 2014) ("[A]t trial, the State must prove guilt beyond a reasonable doubt, the highest burden in our system of criminal jurisprudence.").

23. Winship, 397 U.S. at 363.

24. *Id*.

25. *Id*. at 364 ("Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." (quoting Speiser v. Randall, 357 U.S. 513, at 525-26)).

26. Stephen M. Scott, *Criminal Constitutional Law—Any Means to an End: Bail, the Constitution, and the Liberty Interest*, 27 WILLIAM MITCHELL L. REV. 2, Article 47 (2000).

27. Stack v. Boyle, 342 U.S. 1, 3 (1951).

28. *Id*.

29. *Id.* at 4.

30. *Id.*

31. *Id.*

now considered a constitutional right under the Fifth and Fourteenth Amendment Due Process Clauses. According to Professor Rinat Kitai, "[t]he presumption of innocence was recognized in the second half of the eighteenth-century as a basic constitutional right granted to every person."[32] Professor Shima Baradaran connects due process with the presumption of innocence and the right to bail, writing that "the presumption of innocence was rooted in the Due Process Clause, requiring release on bail for defendants charged with noncapital crimes and requiring that a determination of guilt not occur until trial."[33] The link between the presumption of innocence and the right to bail is historically rooted and well-established.

The presumption of innocence does not, however, entitle every person charged with a crime to wander wherever he likes.[34] In order to function, the justice system sometimes requires the detention of individuals who have not yet been convicted of a crime, and the Supreme Court has justified pretrial detention as a procedural necessity that does not require any adjudication of a person's guilt or innocence.[35] In 1979, the Court held in *Bell v. Wolfish* that the presumption of innocence did not mean that a defendant awaiting trial must always be treated identically to a person who has not been charged.[36] *Bell* involved a class action case filed by detainees at a New York prison, who alleged that the presumption of innocence was violated by the poor conditions in which they were being housed while awaiting trial.[37]

The Court in *Bell* said that the presumption of innocence had "no application to determine the rights of a pretrial detainee during confinement" because there was no dispute over whether the government had the right to detain the individuals in the first place.[38] The Court reasoned that the presumption of innocence did not apply to the specific conditions of confinement when both sides acknowledged that the confinement itself was permissible.[39] In dispensing with the defendants' argument, the Court explained that its holding was "not concerned with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails."[40] Thus, the Court differentiated

32. Rinat Kitai, *Presuming Innocence,* 55 OKLA. L. REV. 257, 263 (2002).

33. Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L. J. 723 (2011).

34. Bell v. Wolfish, 441 U.S. 520 (1979).

35. *Id*. at 536 ("A person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a 'judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest.'" (quoting Gerstein v. Pugh, 420 U.S. 103 (1975))).

36. *Id*.

37. *Id*. at 524-27.

38. *Id*. at 533-34.

39. *Id*. at 534.

40. *Id*. at 533-34.

between decisions that require an adjudication of guilt or innocence, where the presumption of innocence may come into play, and mere procedural decisions, such as detention conditions, where it does not.[41]

The presumption of innocence affects many parts of the trial process. It requires that a person cannot be punished without being convicted in a court of law[42] and it imposes the burden of proof on the government in criminal trials.[43] Overall, the presumption of innocence is interwoven throughout the U.S. criminal justice system so thoroughly that it reaches into virtually every corner of the law—including bail and pretrial release.[44] Although the Court has not extended criminal defendants the right to unconditional release before trial, it has emphatically stated that the presumption of innocence and due process protect the rights of individuals to not be found guilty before evidence is presented at trial.[45]

B. Traditional Role of Bail in the United States

The Eighth Amendment provides that "excessive bail shall not be required."[46] Bail in the U.S. has traditionally been a tool used by courts to ensure that criminal defendants appeared for future court appointments and trial. Before the Bail Reform Acts passed in 1966 and 1984, cash bail was the norm. This Section explores the evolution of bail in U.S. criminal justice processes and the Bail Reform Act of 1984's major changes to those processes, culminating in the system we have today.

1. Defining Bail

A person charged with a crime is entitled to pretrial release, either on the basis of his promise to return for trial or on bail.[47] If released on bail,

41. *Id*. at 537 ("Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. … Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility.").

42. *Id*. at 535.

43. *Id*. at 532.

44. Stack v. Boyle 342 U.S. 1, 4 (1951).

45. *See* Taylor v. Kentucky, 436 U.S. 478, 485-86, (1978) ("This Court has declared that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. […] While use of the particular phrase "presumption of innocence" -- or any other form of words -- may not be constitutionally mandated, the Due Process Clause of the Fourteenth Amendment must be held to safeguard 'against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.'").

46. U.S. Const. am. VIII.

47. *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing,* 131 HARV. L. REV. 1125 (Feb. 9, 2018).

the individual pays a sum of money to the court as a security that is returned only when the individual come backs and stands trial.[48] The bail system goes back to the very beginning of the American criminal justice system, and it was traditionally meant to ensure that the individual charged returned to court for his trial.[49] "The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty."[50] For the majority of U.S. history, the question of bail was not whether the defendant deserved to be locked up but rather whether he was likely to return for trial, fulfilling his end of the bargain struck between himself and the court.[51]

It should be noted that the terms "bail" and "bond" generally refer to the money paid to a court in exchange for pretrial release.[52] Bail refers to a financial deposit paid to the court to secure the defendant's release.[53] The court returns the bail money to the defendant when he comes to stand trial, and if he misses any of his hearings, the court has the right to keep the bail money.[54] Bond, on the other hand, specifically describes a promise by a third party to the court on behalf of a defendant who cannot afford his bail.[55] In short, bail is the price set by the court in exchange for release, and bond is the promise of a third party to pay a criminal defendant's bail. In literature discussing pretrial release, both terms may be used, as the particular payment scheme is not typically relevant.

2. Right to Bail Before 1984

Before 1966, U.S. law required that anyone charged with a non-capital crime must be admitted to bail.[56] Although this right to bail had been in place since the Judiciary Act of 1789, the ability to post bail was limited by a defendant's financial resources.[57] Thus, indigent defendants often were unable to secure release.[58] Before 1966, the pretrial process was a "dismal picture of a system which trades freedom for money," marked by

48. *Id.*

49. *Id.*

50. Stack v. Boyle 342 U.S. 1 (1951).

51. Bail Reform, *supra* note 47.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Stack v. Boyle, 342 U.S. 1 (1951) ("From the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure 46, federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail.").

57. Austin, *supra* note 8.

58. *Id*.

a "pattern of pretrial detention."[59]

Congress passed the Bail Reform Act of 1966 (the "1966 Act") to reduce some of the disparities between defendants with differing financial abilities.[60] The 1966 Act's purpose was "to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest."[61] The 1966 Act not only replaced most financial bonds with non-monetary release conditions, it also explicitly provided that the only permissible consideration for setting bail was ensuring the defendant's return to court.[62] Essentially, the 1966 Act shifted the focus of bail from finance to a defendant's character. Most importantly, the 1966 Act created a presumption of release without payment, meaning that the starting point for every criminal defendant would be release on his own recognizance rather than upon payment of bail.[63]

After the 1966 Act's overhaul of the federal bail system, all fifty states quickly updated their codified bail practices to match the federal scheme.[64] These changes resulted in a notable drop in pretrial detention numbers. In the twenty years after passage of the 1966 Act, the portion of the jail population in custody awaiting trial fell from sixty percent to roughly thirty-five percent.[65]

3. The War on Drugs

Although the goal of the 1966 Act was to reduce pretrial detention rates, especially among defendants with limited resources, concerns quickly developed that the new system was too lenient.[66] Particularly, critics worried that judicial officers were not permitted under the statute to consider a defendant's likelihood of committing additional crimes upon

59. Patricia M. Wald and Daniel J. Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 AM. BAR ASS'N J. 10, 940-45 (1966).

60. Austin, *supra* note 8.

61. 18 U.S.C. § 4141-51, *repealed by* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 202-03, 98 Stat. 1837, 1976 (1984).

62. 18 U.S.C. § 4141-51 (repealed).

63. Wald, *supra* note 59.

64. Sam Walker, *LBJ Signs Bail Reform Act; Affirms Rights of Criminal Suspects*, TODAY IN CIVIL LIBERTIES HISTORY (2013), http://todayinclh.com/?event=lbj-signs-bail-reform-act-affirms-rights-of-criminal-suspects.

65. *Id.*

66. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 719 (2017) ("In the 1970s and 1980s, concerns about rising rates of pretrial crime led to a second wave of reform, this time directed at identifying and managing defendants who posed a threat to public safety.").

his return to the community pretrial.[67] The Office of the Attorney General created a Task Force on Violent Crime to address these concerns, which recommended several changes to the bail system to keep those deemed to "present a danger" locked up before trial.[68]

The concerns raised about the leniency of the bail system coincided with the advent of the infamous "war on drugs."[69] The Controlled Substances Act was passed in 1970.[70] In 1971, President Nixon famously declared drug abuse to be "public enemy number one," and the Drug Enforcement Agency was created three years later.[71] The government's focus on "cracking down" on drug use grew stronger under the Reagan administration, particularly with the passage of the Anti-Drug Abuse Act of 1986, which established mandatory minimums for a number of drug offenses.[72] The war on drugs is considered a primary factor in the expansion of incarceration among the U.S. population.[73] According to Michelle Alexander, "[t]he impact of the drug war has been astounding. In less than thirty years, the U.S. penal population exploded from around 300,000 to more than 2 million, with drug convictions accounting for the majority of the increase."[74]

Additionally, the federal criminal system is much more heavily inundated with drug crimes than state systems.[75] Today, although individuals convicted of drug crimes make up only about fifteen percent of state prisoners, they comprise about forty-five percent of federal prisoners.[76] In a world where eighty four percent of federal defendants charged with drug crimes are held in pretrial detention, the effect of the increase in drug arrests and charges was magnified.[77]

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67. Austin, *supra* note 8.

68. *Id.* The recommendations from the Task Force included considering dangerousness to particular persons or the community when considering whether to admit an individual to bail, as well as denying bail to those previously convicted of a serious crime while on pretrial release.

69. National Public Radio, *Timeline: America's War on Drugs*, NPR.ORG (2007), https://www.npr.org/templates/story/story.php?storyId=9252490.

70. JOANNA R. LAMPE, CONG. RSCH. SERV., R45948, THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 117TH CONGRESS (Feb. 5, 2021).

71. National Public Radio, *supra* note 69.

72. Deborah J. Vagins and Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, AMERICAN CIVIL LIBERTIES UNION (2006).

73. ALEXANDER, *supra* note 2 ("As I see it, the War on Drugs – more than any other government program or political initiative – gave rise to mass incarceration […]The declaration and escalation of the War on Drugs marked a moment in our past when a group of people defined by race and class was viewed and treated as the 'enemy.' A literal war was declared on a highly vulnerable population, leading to a wave of punitiveness that permeated every aspect of our criminal justice system and redefined the scope of fundamental constitutional rights." *Id.* at xxviii).

74. *Id.* at 7.

75. Sawyer, *supra* note 1.

76. *Id.*

77. *See* Part I, page 2 *supra*.

C. The Right to Bail After 1984

1. The Bail Reform Act of 1984

Congress felt pressure from both the public and the executive branch to combat drugs and ensure community safety.[78] It responded by passing the 1984 Amendments to the Bail Reform Act ("1984 Amendments").[79] The 1984 Amendments made two important and fundamental changes to federal bail procedures. First, in addition to judicial officers being directed to ensure defendants' appearances at trial, the 1984 Amendments also mandated that they should consider the "safety of the community" if defendants were to be released.[80] Second, the amendments authorized pretrial detention without bail for individuals charged with certain serious, non-capital crimes.[81] This stood in contrast to nearly two centuries of federal law that had consistently required that non-capital defendants be admitted to bail.[82]

Under the 1984 Amendments, persons facing federal charges must be released before trial on their own recognizance, unless the judge "determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."[83] If a judge determines that a defendant's pretrial release is insufficient to assure his appearance, the judge may order release with one or more conditions attached.[84] Sometimes the court will release a defendant into the custody of a family member who assumes responsibility for his behavior and return to trial.[85] In other cases, the defendant awaiting trial is restricted in his activities or permissive range of travel.[86] Conditional release may also be accomplished through use of a bail bond, under which the defendant's financial obligation is expected to assure his return to court.[87] However, the court might determine that no set of conditions or restrictions is enough to ensure that a person will return to court for trial, and then the person is kept in custody until the

78. Austin, *supra* note 8 ("[A] 1984 Senate report stated, 'Considerable criticism has been leveled at the Bail Reform Act [of 1966] in the years since its enactment because of its failure to recognize the problem of crimes committed by those on Pretrial release. In just the past year, both the President and the Chief Justice have urged amendment of federal bail laws to address this deficiency.'" (quoting Senate Report No. 98-225, at 3)).

79. *Id.*

80. 18 U.S.C. § 3142.

81. 18 U.S.C. § 3142(e).

82. *See* n.56, page 9 *supra*.

83. 18 U.S.C. § 3142(b).

84. 18 U.S.C. § 3142(c).

85. *Id.*

86. *Id.*

87. *Id.*

trial can take place.[88]

The 1984 Amendments not only authorized a judge to deny bail based on a determination that a defendant might be a danger to his community, but it created a statutory presumption against bail for persons charged with various serious crimes.[89] This presumption is codified in 18 U.S.C. § 3142(e)(3), which states that "it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed…" one of approximately twelve different crimes.[90] Those crimes include felony drug offenses, firearm offenses, and threats of terrorism, all of which carry sentences of at least ten years.[91] If the judge determines that there is probable cause to believe that the defendant committed the crime with which he is charged, that determination triggers the presumption against bail.[92] Probable cause, the same standard of proof that must be met for police to arrest and charge an individual, is a relatively low standard, below "clear and convincing evidence" and "beyond a reasonable doubt."[93] Thus, if a defendant is properly charged with any of the serious crimes subject to the presumption against bail, he will also meet the criteria for detention before trial.

The 1984 Amendments contains some statutory safeguards regarding the presumption against bail's intended application. Despite the presumption of detention, the statute requires that each defendant have the opportunity to appear at a pretrial release hearing before a judge, and the facts the judge considers must be supported by clear and convincing evidence.[94] At this "adversarial" hearing, the defendant has the opportunity to prove that he should be released before trial.[95] In theory, prosecutors can also choose whether to request pretrial detention; however, federal prosecutors pursued detention in more than seventy-five percent of federal cases in 2019.[96]

Surprisingly, evidence suggests that releasing defendants on bond to await trial would neither significantly increase rates of recidivism nor

88. 18 U.S.C. § 3142(e).

89. 18 U.S.C. § 3142(e)(3).

90. *Id.*

91. *Id.*

92. United States v. Salerno, 481 U.S. 739, 750 (1987).

93. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 271 (1986).

94. 18 U.S.C.S. § 3142(f).

95. *Id ("*At the hearing, the person has the right to be represented by counsel, and … shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise.").

96. Alison Siegler & Kate Harris, *How Did the 'Worst of the Worst' Become 3 out of 4?* N.Y. TIMES (Feb. 24, 2021).

failures to later appear in court. Less than one percent of federal defendants released on bond in 2019 failed to appear for trial, and less than two percent were arrested again while out on bond.[97] A study conducted by the Prison Policy Initiative from 2017 to 2020 found that, after examining pretrial policy reforms in thirteen jurisdictions across four states, "the results were the same: Releasing people pretrial did not negatively impact public safety."[98]

Furthermore, there is substantial evidence suggesting that pretrial detention actually increases an individual's likelihood of reoffending.[99] According to the Probation and Pretrial Services Office: "Every day that a defendant remains in custody, he or she may lose employment, which in turn may lead to a loss of housing. These financial pressures may create a loss of community ties, and ultimately push a defendant towards relapse and/or new criminal activity."[100]

2. The Court's Analysis of the 1984 Amendments

In *United States v. Salerno*, the Supreme Court addressed the constitutionality of the 1984 Amendments—specifically, the pretrial detention provisions.[101] In *Salerno*, two defendants charged with multiple counts of racketeering argued that their pretrial detention violated due process prohibitions on excessive bail.[102] The Second Circuit agreed with the defendants and ruled that § 3142(e) violated due process and was unconstitutional on its face.[103]

The Supreme Court, in a majority opinion by Chief Justice Rehnquist, reversed that decision and upheld the constitutionality of the 1984 Amendments.[104] Although the Chief Justice stated that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception," he went on to justify detention prior to conviction as laid out in the 1984 Amendments.[105] The Court first concluded that pretrial detention under the 1984 Amendments was not a

97. Alison Siegler & Erica Zunkel, *Rethinking Federal Bail Advocacy to Change the Culture of Detention*, NAT'L ASS'N OF CRIM. DEF. LAWYERS (July 2020).

98. Tiana Herring, *Releasing People Pretrial Doesn't Harm Public Safety,* PRISON POLICY INITIATIVE (Nov. 17, 2020).

99. Heaton, *supra* note 66 ("Furthermore, those detained pretrial are more likely to commit future crimes, which suggests that detention may have a criminogenic effect.").

100. Austin, *supra* note 8.

101. United States v. Salerno, 481 U.S. 739 (1987).

102. *Id.* at 746.

103. *Id.* at 741.

104. *Id.* at 755.

105. *Id*.

punitive measure but a mere regulatory necessity.[106] This was significant because the Court had previously established in *Bell v. Wolfish* that defendants may not be punished before trial.[107] After deciding that "preventing danger to the community is a legitimate regulatory goal" and therefore permissible for a judge to consider as part of the bail determination, the Court described situations in which courts had found that the government could permissibly hold a person in custody before trial.[108] These included times of war, illegal aliens awaiting deportation, mentally unstable individuals, and flight risks.[109]

The Court ultimately held that the 1984 Amendments did not violate due process, primarily because the Act contained "extensive safeguards" in the detention hearing that would ensure only those individuals who present "a demonstrable danger to the community" would be incarcerated.[110] Specifically, the Court found that safeguards such as the "full-blown adversary hearing" in the presence of a "neutral decisionmaker," the guidance to the judge of "statutorily enumerated factors" to consider when making his decision, and the defendant's right to counsel, all combined to provide sufficient procedural protections to make the 1984 Amendments constitutional.[111] Although the Court acknowledged that circumstances may exist in which the 1984 Amendments would operate unconstitutionally, it was not a sufficient threat to render the challenged provisions facially unconstitutional.[112]

Justice Stevens's dissent in *Salerno* was brief, but he succinctly summed up his beliefs regarding the fundamental constitutional flaw in the 1984 Act, which was that "a pending indictment may not be given any weight in evaluating an individual's risk to the community or the need for immediate detention."[113] Essentially, Justice Stevens argued that a person cannot be found dangerous to the community based on a crime for which he is presumptively innocent.[114] Instead of a statutory presumption against bail, Justice Stevens favored a case-by-case neutral analysis, because "[i]f the evidence of imminent danger is strong enough to warrant

106. *Id.* at 747 ("The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem.").

107. Bell v. Wolfish, 441 U.S. 520, 535 (1979) ("In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee.").

108. *Salerno*, 481 U.S. at 748-49.

109. *Id*.

110. *Id*. at 750

111. *Id.* at 750-52.

112. *Id.* at 745.

113. *Id.* at 768 (Stevens, J., dissenting).

114. *Id.*

emergency detention, it should support that preventive measure regardless of whether the person has been charged, convicted, or acquitted of some other offense."[115]

The scope of the government's ability to detain not-yet-convicted individuals resurfaced in 2003 in the context of immigration.[116] In *Demore v. Hyung Joon Kim*, the Court considered the constitutionality of the detention of a South Korean immigrant who was convicted of petty theft and thereby subject to deportation under a federal statute.[117] Kim argued that his detention prior to a deportation hearing violated his due process rights because the government had not proven that he was a flight risk or a danger to the community.[118] The majority rejected Kim's argument, primarily because "Congress may make rules as to aliens that would be unacceptable if applied to citizens."[119] Justice Souter, however, saw things differently. In his dissent, Justice Souter insisted that because Kim was a lawful permanent resident, he should have the same due process rights as a U.S. citizen.[120]

After establishing that "the only reasonable starting point is the traditional doctrine concerning the Government's physical confinement of individuals," Justice Souter went on to lay out the due process rights afforded to U.S. citizens in the context of pretrial detention.[121] Reviewing the Court's jurisprudence on the subject, he began with the foundational assumption that freedom from incarceration is "essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution."[122] He then referred to the 1984 Amendments' pretrial detention of criminal defendants without bail, explaining that the Act was only constitutional because of the "full-blown adversary hearing" and because the statute "applied only to defendants suspected of 'the most serious of crimes.'"[123] Justice Souter concluded by distilling the "traditional doctrine" into a simple rule: "Due process calls for an individual determination before someone is locked away."[124]

In short, the Supreme Court has affirmed that the government may, under certain circumstances, lock up individuals who are awaiting trial. Additionally, the Court has tacitly endorsed the 1984 Amendments, which included the presumption against bail for serious crimes. In both

115. *Id.*
116. Demore v. Hyung Joon Kim, 538 U.S. 510 (2003).
117. *Id*. at 513.
118. *Id.* at 514.
119. *Id.* at 522.
120. *Id.* at 547 (Souter, J., concurring in part and dissenting in part).
121. *Id*. at 547-48.
122. *Id*. at 549.
123. *Id.* at 550.
124. *Id*. at 551.

Salerno and *Demore*, the Court accorded great weight to the built-in procedural safeguards that, in its view, prevented the pretrial detention provisions of the 1984 Amendments from "selecting a class of people for confinement on a categorical basis and denying members of that class any chance to dispute the necessity of putting them away."[125] The statutorily mandated individual hearing, heightened burden of proof, and limited categories of those eligible for detention all served to render constitutional what otherwise would be an affront to due process.

III. DISCUSSION

The federal presumption against bail for criminal defendants charged with serious crimes is unconstitutional because it conditions a person's liberty on the nature of charges of which he is presumed innocent.[126] The late twentieth and early twenty-first centuries have ushered America into a crisis of over-incarceration of its own citizens, and defendants being held in custody prior to trial make up over twenty percent of those incarcerated.[127] The harms caused by excessive pretrial detention, particularly of those charged with non-violent offenses such as drug crimes, can be mitigated through the efforts of conscientious prosecutors and judges.[128] The ultimate solution, however, must involve a restructuring of the law itself. Either § 3142(e)(3) must be repealed by Congress or ruled unconstitutional by the Court.

In 2021, bipartisan bills were introduced in both the Senate and the House with the title "Smarter Pretrial Detention for Drug Charges Act."[129] The bills, if enacted, would remove drug offenses from the list of crimes that trigger the presumption against bail.[130] The introduction of these bills could indicate increasing congressional recognition of the harms caused by expansive pretrial detention. Three months prior to the Senate bill's introduction, members of the United States House of Representatives introduced a sweeping bail reform bill that would, among other things, have eliminated the presumption against bail.[131] Even though the bail reform bill failed to get out of committee, its short life evinces the growing awareness of the need to fundamentally restructure pretrial detention procedures. The U.S. Congress is a slow-acting body, however,

125. *Id*. at 551-52.

126. 18 U.S.C. § 3142(e)(3).

127. *See* Part I, page 1 *supra*.

128. Siegler & Harris, *supra* note 96. Siegler and Harris explain how prosecutors can choose not to request pretrial detention for every permissible defendant in order to minimize pretrial detention.

129. Smarter Pretrial Detention for Drug Charges Act of 2021, S. 309, 117th Cong (2021); Smarter Pretrial Detention for Drug Charges Act of 2021, H.R. 5722, 117th Cong (2021).

130. *Id.*

131. Federal Bail Reform Act of 2020, H.R. 9065, 116th Cong (2020).

and a more direct approach would be for the Court to declare § 3142(e)(3) unconstitutional.

This Part discusses three reasons why the Court should hold that the federal presumption against bail for serious crimes is unconstitutional. First, Part A addresses how the presumption is facially incompatible with the procedural safeguards built into the rest of the Bail Reform Act. Section B explains why judging danger to the community on the basis of the charges against a criminal defendant violates the presumption of innocence. Finally, Section C argues that the presumption against bail has not been applied in line with the Court's ruling in *Salerno*.

A. The 1984 Amendments is Internally Inconsistent

The text of § 3142(e)(3) states that "it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed" one of a number of serious crimes.[132] The presumption is triggered when the defendant is charged with a serious crime, which requires only a showing of probable cause.[133] In the context of the mandatory adversary hearing, however, the statute states that the facts by which a judge supports a finding that an individual will be dangerous to the community upon release must be supported by "clear and convincing evidence."[134] Not only is clear and convincing evidence a different evidentiary standard than probable cause, but requiring it also makes it difficult to know how the presumption under § (e)(3) is meant to be applied. If in practice, on a case-by-case basis, a federal judge truly determined the flight risk of each defendant, and the State had the burden in each instance to prove its case by clear and convincing evidence, then the presumption against release would be unnecessary.

The adversary hearing and the evidentiary standard it utilizes were key safeguards that the Court relied on in *Salerno*.[135] But if these protections were actually effective, there would be no need for the presumption against release to exist at all. The practical effect would be what Justice Stevens advocated in his *Salerno* dissent, that if the evidence warranting a person's immediate and unconditional incarceration was so strong, then it would carry that burden on its own, regardless of what particular crime the prosecution was advancing.[136]

132. 18 U.S.C. § 3142(e)(3).

133. Rowland, *supra* note 7.

134. 18 U.S.C. 3142(f).

135. *See* Part II(c)(2), page 15 *supra.*

136. United States v. Salerno, 481 U.S. 739, 768 (1987) (Stevens, J., dissenting).

B. The Presumption Against Bail Violates the Presumption of Innocence

1. The Presumption of Danger to the Community is a Presumption of Unproven Guilt

Historically, the foremost consideration of the bail system has been the right to liberty.[137] Before a person is convicted of a crime, he is free to go where he wishes, and bail was only required to ensure a return to the court for trial. When the Court decided *Stack v. Boyle* in 1951, a judge's bail determination was based on one variable: risk of the defendant's flight.[138] "Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."[139] Even after the 1966 Act, judges setting a defendant's bail would only consider what amount was necessary to secure the defendant's return for trial.[140] The 1984 Amendments, however, added a new consideration to the bail decision—safety of the community if the defendant were to be released.[141] Now, instead of only considering the risk of flight, judges were considering the likelihood that the person would commit crimes in the future, then granting or denying liberty based on their speculations about these future crimes.[142]

Although the two concepts may seem intimately related, judging a person's danger to the community based on the severity of the charges against him necessarily requires a judgment of that person's guilt or innocence, which the flight risk analysis does not. In *Bell v. Wolfish*, the Court recognized the distinction between detaining a person based on a judgment of guilt and detaining based on procedural necessity.[143] Detention to ensure the defendant returns for trial falls into the procedural category. A person might not come back for trial, even if he is innocent, for any number of reasons. Fear of an unjust conviction could keep an

137. Austin, *supra* note 8.

138. Stack v. Boyle, 342 U.S. 1, 5 (1951).

139. *Id.*

140. *See supra*, Part II(B)(2).

141. 18 U.S.C. § 3142(e)(1) ("If … the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.").

142. Rowland, *supra* note 7 ("The statutory provisions allowing for detention on grounds of danger to the community and the presumption of detention in certain cases had a direct impact on pretrial release rates. … By 2000, when the tough on crime approach was in full swing, the conviction rate had climbed 11 percentage points, imprisonment was part of the sentence for 9 out of 10 those convicted, and the average prison term imposed increased by 5 months (AO); defendants had to serve at least 85 percent of their time regardless of their behavior while an inmate, and regardless of the risk they presented for recidivism.").

143. See Part II(A), page 7 *supra*.

innocent person from returning for trial. Defendants might fail to appear for personal reasons, the inability to find childcare, or fear of losing a job.[144] A defendant may also simply forget to come back for his trial.[145] These can all factor into a judge's decision to detain a certain defendant pretrial without any judgment of guilt.

Danger to the community, however, requires a fundamentally different analysis. In order to assess dangerousness, a judge must decide if a person is *likely to commit future crimes*—in other words, if he is fundamentally a guilty person—and the judge must decide this at a hearing for which the defendant has had barely any chance to prepare.[146] This goes beyond any sort of fact-based analysis that would occur at trial and instead requires a judge to make a subjective assessment of the defendant's character. It essentially requires the judge to decide if the defendant is going to be guilty of committing dangerous crimes in the future, under unforeseen circumstances, at an unknown time.[147] At the most basic level, this is an incredibly difficult question for a judge to answer.

Because this assessment is so speculative, the judge making this determination should only consider established facts and proven guilt when deciding whether to lock a person up based on dangerousness. However, the presumption against bail instead starts the defendant off in a position of guilt based solely on the crime with which he is charged.[148] The presumption is triggered merely by a showing of probable cause, which is the same standard required to charge a person with a crime in the first place.[149]

2. Detention Based on Unproven Guilt Violates the Presumption of Innocence

The fundamental flaw of 18 U.S.C. § 3142(e)(3), however, is not

144. Lauryn P. Gouldin, *Defining Flight Risk*, 85. U. CHI. L. REV. 677, 742 (2018).

145. *Id.*

146. Under 18 U.S.C. § 3142(f), the bail hearing must be held no more than five business days after the defendant's initial appearance before the court. Often, the only evidence that the defendant knows the prosecutor will bring to the bail hearing is the pretrial services report. Therefore, a defendant essentially has to respond to the government's evidence without any chance to prepare.

147. United States v. Salerno, 481 U.S. 739, 766 (1987) (Marshall, J., dissenting) ("Imprisonment to protect society from predicted but unconsummated offenses is . . . unprecedented in this country and . . . fraught with danger of excesses and injustice." (quoting Williamson v. United States, 95 L. Ed. 1379, 1382 (1950))).

148. Rowland, *supra* note 7 (explaining how the presumption "flips" the burden of proof from the prosecutor to the defendant, who must then demonstrate that he is *not* a danger to the community in order to be released on bail).

149. Bell v. Wolfish, 441 U.S. 520, 536 (1979) ("A person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a 'judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest.'" (quoting Gerstein v. Pugh, 420 U.S. 103 (1975))).

simply that it includes danger to the community as a factor when evaluating a person's right to liberty. Instead, the problem is that this danger is determined, at least in part, by the charges a prosecutor *chooses* to bring against the defendant.[150] Danger to the community is not inherently an unconstitutional reason for detention.[151] In fact, preventing a person from committing future crimes is one of the fundamental justifications of punishment that underly the institution of incarceration.[152] However, an assessment of danger to the community cannot be based on the nature of a pending charge, of which the defendant is presumptively innocent.[153] As Justice White wrote in *Coffin*: "[i]n some cases presumptive evidence goes far to prove a person guilty, though there be no express proof of the fact to be committed by him, but then it must be very warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die."[154] A person's subsequent conviction does not justify his pretrial detention.

It is unconstitutional for a judge to decide guilt or innocence without a trial and before the defendant has had the opportunity to prepare a defense. Unfortunately, the majority opinion in *Salerno* did not find a problem with a judge assessing the potential dangerousness of criminal defendants before trial.[155] Chief Justice Rehnquist defended it by saying that "[t]he procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination."[156] By making that assertion in defense of the pretrial detention statute, however, the Court failed to address the crux of the issue. Regardless of whether the judge's determination is accurate as to a defendant's dangerousness, the defendant's constitutional rights were

150. Rowland, *supra* note 7 ("Prosecutors are responsible for timely and just charging decisions, and for seeking detention when needed to protect individuals and the community and ensure the return of defendants for future proceedings.")

151. United States v. Salerno, 481 U.S. 739, 748 (1987) ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." The court goes on to list a number of examples when community safety was held to be a constitutional reason for detention, including wartime, insurrection, mentally unstable persons).

152. Shira Scheindlin, former U.S. District Judge for the Southern District of New York, *The Hardest Thing About Being a Judge? What Courts Say About Sentencing.* CONNECTICUT LAW TRIBUNE (2020) ("Every first-year law student learns that sentencing has four goals: retribution, incapacitation, deterrence and rehabilitation.").

153. Brinegar v. United States, 338 U.S. 160, 174 (1949) ("Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.").

154. Coffin v. United States 156 U.S. 432, 456 (1895).

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

156. *Id.*

violated because the judge made the decision unilaterally under a statute directing him to assume that dangerousness based on crimes of which the defendant had not been convicted. Because finding a person dangerous to the community requires a finding of guilty character, a person charged with one of these serious federal crimes, who is presumed to be dangerous to the community based solely on a charge, is also presumed to be guilty.

C. The Presumption Against Bail Is Wrongly Applied

In each case where the Supreme Court has considered the scope of the government's right to detain criminal defendants pretrial, the Court accorded great weight to the "extensive" safeguards that, in its view, counterbalanced the effect of the presumption against bail.[157] In *Salerno*, the Court listed the mandatory adversary hearing, the neutral judge, the right to counsel, and the predetermined factors to be considered by the judge when deciding whether to award pretrial release.[158] All of these protections, in the Court's opinion, would prevent the presumption of detention from getting out of hand. Justice Souter's dissent in *Demore* reiterated that pretrial detention should be used in a limited and individually tailored manner.[159] He contended that it would be unconstitutional to single out "a class of people for confinement on a categorical basis."[160] Unfortunately, things have not turned out the way the Court hoped that they would.

Under the 1984 Amendments to the Bail Reform Act, Congress intended that pretrial detention be reserved for "the worst of the worst" criminal defendants.[161] Given this, the fact that more than three-fourths of federal defendants are subject to pretrial detention should be a red flag that our system is not functioning as it was originally intended. Alison Siegler has chronicled how prosecutors and courts have shifted from the original intention of the presumption against bail: "the [Bail Reform Act] only authorizes pretrial jailing under very limited circumstances. But many of the players have forgotten the statutory rules, and in some cases, judges and prosecutors are jailing people for reasons not authorized by those rules."[162]

In 1987, these questions of presuming innocence and guilt with regard to release on bond appeared to be largely intellectual exercises—not many federal defendants were jailed pretrial. But today, the justice system is

157. *See* Part II(C)(2), page 16 *supra*.

158. *Salerno*, 481 U.S. at 750.

159. Demore v. Hyung Joon Kim, 538 U.S. 510, 551-52 (2003).

160. *Id*.

161. Austin, *supra* note 8.

162. Siegler & Zunkel, *supra* note 97.

feeling the strain of an over-populated prison system and reaping the rewards of the failed war on drugs. Although it may be only a small portion of the mammoth-sized problem of mass incarceration, federal pretrial detention rates have slowly risen to alarming levels since the 1984 Amendments was passed.[163] The shift has been gradual, but over the past forty years, the rate has increased from nineteen percent in 1985 to seventy-five percent in 2019.[164] The system is now at a point where "in practice it deprives nearly every person awaiting trial in a federal drug case of their liberty," even though Congress's original intent was to lock up only the 'worst of the worst' offenders awaiting trial."[165]

IV. CONCLUSION

The *Salerno* opinion referred to the "alarming problem of crimes committed by persons on release" that prompted Congress to pass the 1984 Amendments in the first place.[166] After living with the 1984 Amendments for almost 40 years, however, we have learned that the problem might not be as alarming as the Court feared. Even with data showing that less than two percent of defendants commit crimes on pretrial release,[167] judges are strongly motivated not to release defendants who have even an inkling of potential to commit future crimes and very little motivation to err on the side of pretrial release. Magistrate judges, many of whom handle a large number of federal bond hearings,[168] must consider running for reappointment and are unlikely to want an improperly released defendant on their record.[169] Although these concerns may be understandable, they must give way to the constitutional rights of criminal defendants. Until a defendant is afforded due process and given the opportunity to have his case tried before a jury, he must be regarded as innocent until proven guilty. The federal presumption of detention takes away that right by assuming dangerousness based on the mere fact that a defendant was charged with a serious crime. Such a defendant is no longer innocent until proven guilty; he is innocent until suspected guilty.

163. *Id.*

164. *Id*.

165. Siegler & Harris, *supra* note 96.

166. United States v. Salerno, 481 U.S. 739, 742 (1987).

167. *See* Part II(C)(1), page 15 *supra*.

168. Magistrate judges conducted 49,936 bail hearings in the 12-month period ending September 2013. *See* Phillip M. Pro, United States Magistrate Judges: Present but Unaccounted For, 16 Nev. L.J. 783, 790 (2016).

169. *Id*.