No. 86-87

In the

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTHONY SALERNO and VINCENT CAFARO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT, ANTHONY SALERNO

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for Respondent, Anthony Salerno.

Summary of Argument.

I. A basic principle of due process commands that an individual may not be punished prior to an adjudication of guilt. Section 3142 of the Bail Reform Act of 1984 enacts a manifestly punitive sanction utterly at odds with this fundamental tenet of due process. While the legislative history surrounding the act's passage takes great pains to articulate a nonpunitive regulatory rationale, the punitive substance and effect of § 3142 are unmistakable by whatever analysis is applied. The statute imposes an affirmative restraint, the total deprivation of liberty, along with all the myriad lesser freedoms which combine to form the whole, of a competent adult; the behavior to which the statute is applicable is already designated as a crime and punishable as such; the deprivation is premised upon

a finding of *scienter*; and most fundamentally, incapacitative incarceration has historically been regarded as punishment and promotes the traditional aims of punishment. It is aimed squarely at the person of the potential detainee rather than at the activity sought to be regulated. Preventive detention on the ground of future dangerousness is "regulatory" precisely in the same manner as is the substantive criminal law, and must be governed by the same principles, principles which absolutely prohibit punishment prior to an adjudication of guilt, such as that inflicted pursuant to 18 U.S.C. § 3142.

II. The sacred liberty of free men and women to be free from restraint is the most fundamental of rights; because of the necessarily sacrosanct nature of this most basic of human freedoms, the Due Process Clause of the Fifth Amendment prohibits the incarceration of competent adult citizens except through the mechanism of conviction for past criminal behavior. The fundamental nature of this freedom has been particularly stressed by this Court in the context of pretrial release, in decisions which reflect the premise rooted in nine centuries of Anglo-American history that the only legitimate function of pretrial incarceration is to assure that the accused can be prosecuted and, if convicted, sentenced. While pretrial detention to prevent flight or witness tampering bears a direct relationship to the preservation of the integrity of the criminal justice system, pretrial detention on the ground of anticipated future dangerousness is not only irrelevant for this purpose but in fact undermines the integrity of the process.

Incarceration of competent adults breaks new and constitutionally forbidden ground in two ways: its purpose is neither therapeutic nor necessary to the operation of the criminal justice system or to the exercise of any other power specifically conferred on the federal government by the Constitution, and persons subject to it suffer from no disability either of status or capacity that would distinguish them from other citizens. Deprivation of the full liberty interest of presumptively innocent competent adults is not, as the government suggests, merely an unexceptionable extrapolation from established

principles; rather, prior decisions of this Court upholding deprivations of liberty under the Due Process Clause all rest upon necessarily dispositive distinctions. While the government interest in protecting the community is undoubtedly an important one, when the naked exercise of governmental power, unsupplemented by any equally weighty but ameliorative state interest such as that inherent in the *parens patriae* power, runs squarely into the right of every competent adult to be free from restraint except upon conviction of crime, its reach is at an end.

III. That § 3142 violates the substantive component of the Due Process Clause becomes only more evident upon reference to the illusory nature of the procedural "protections" provided by the statute. The statutory standards by which the dangerousness of the individual is to be determined are vague and amorphous in the extreme, a defect only exacerbated by the lack of any notice to the defendant of the basis on which the government will contend that he is too "dangerous" to remain free. This vague standard, coupled with the inapplicability of the rules of evidence, the admissibility of hearsay, and the concomitant denial of confrontation rights all combine to destroy any protection which might be afforded by the statutorily prescribed clear and convincing evidence standard. Moreover, the statute effectively denies the defendant the opportunity to challenge the factual predicate of the charges which triggered the detention request. While the imposition of even the most stringent criminal safeguards could not validate detention on grounds of future dangerousness, their absence underscores the invalidity of preventive detention as a matter of substantive due process.

Argument.

The Bail Reform Act of 1984, by explicitly authorizing pretrial detention of persons arrested on criminal charges solely on the ground of their anticipated future "dangerousness" to

society embodies a significant and virtually unprecedented threat to the basic human rights of the adult citizenry of this nation. The government suggests that validation of preventive detention differs neither qualitatively nor quantitatively from many other incursions upon personal liberties which have historically been countenanced as necessary to further weighty governmental interests. What the government seeks to characterize as but a small and unexceptionable extrapolation from established principles is in fact nothing less than a complete break with all traditional notions of fundamental fairness and due process of law, based upon a total disregard for the lessons of history and immutable constitutional imperatives.

What is at issue here is not the right to bail, nor is it the "right" to commit crimes subject only to subsequent conviction and punishment; rather, what is at issue is the fundamental and inalienable right of every competent adult citizen of this country to liberty, to freedom from personal restraint, and to all the myriad liberty interests which flow therefrom, a right so central and so critical to our constitutional system that no governmental interest, whether "compelling" or "important" or merely "legitimate," may justify its deprivation on the ground of future dangerousness. To admit of a permissible balancing equation in this context would eradicate a heretofore sacrosanct line, a line which must remain inviolate.

The Due Process Clause of the Fifth Amendment commands that no competent adult citizen be imprisoned unless convicted of a criminal offense by proof beyond a reasonable doubt arrived at through judicial proceedings which fully comport with the constitutional requisites of a fair trial. Eliminate this line, and there remains no principled basis for the preservation of our historical freedoms. Let there be no mistake: this is no mere rational jurisprudential extension of past precedent as argued by the government; once this historic bulwark is breached, our very liberty is placed in jeopardy of further systematic encroachment until it is reduced to only an abstract concept which pales beside the legislative might.

I. PRETRIAL DETENTION SOLELY ON THE GROUND OF ANTICIPATED FUTURE DANGEROUSNESS IMPERMISSIBLY INFLICTS PUNISHMENT PRIOR TO AN ADJUDICATION OF GUILT.

"[U]nder the Due Process Clause a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. . . ." *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979). "Fundamental . . . in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial." *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937). *See Ingraham* v. *Wright*, 430 U.S. 651, 672-73 (1977). Detention of a competent adult to prevent future criminal behavior, in the context of a criminal prosecution for alleged past crime, imposes a manifestly punitive sanction utterly at odds with this fundamental and immutable tenet of due process.

While the extensive legislative history surrounding the passage of the statute takes great pains to articulate a nonpunitive, regulatory rationale,[1] "even a clear legislative classification of a statute as 'non-penal' [does] not alter the fundamental nature of a plainly penal statute." *Trop* v. *Dulles*, 356 U.S. 86, 95 (1958). It is not what Congress says about its actions which controls, but rather the purpose inherent in the statute's substantive impact, as distinguished from the form of its language.

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[1] *See, e.g.*, S. Rep. No. 98-225, 98th Cong., 1st Sess. (1983). However, perhaps the true measure of the punitive purpose of § 3142 may best be found not in the carefully crafted reports of legislative committees, prepared in undoubted contemplation of the need to safeguard the statute against inevitable challenge on this ground, *see United States* v. *Edwards*, 430 A.2d 1321 (D.C. App. 1981), *cert. denied*, 455 U.S. 1022 (1982), but rather in floor debate on the matter. *See* 130 Cong. Rec S938-S945 (daily ed. Feb. 3, 1984). The remarks of Sen. Mitchell responding to opposition to his proposed amendment to place a more finite limit on the potential duration of pretrial detention are particularly instructive: "[N]othing better illustrates the lack of understanding of what the American judicial process is about than the repeated references made that if you adopt this amendment, you are going to turn a guilty man loose, as the Senator said or Do you want to turn a lot of people loose who are guilty.'" *Id.* at S944 (Statement of Sen. Mitchell). *See also id.* at S941 (Statement of Sen. Thurmond).

See, e.g., Trop v. *Dulles*, 356 U.S. at 95;[2] *United States* v. *Lovett*, 328 U.S. 303, 313 (1946). Any conceptualization of the detention authorized by § 3142 as a valid nonpunitive regulatory measure cannot survive careful scrutiny of the statute in accordance with established principles. While determining the validity of an act of Congress is undoubtedly the "gravest and most delicate duty that this Court is called upon to perform," *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 159 (1963), it is a duty which must be fulfilled "with recognition of the transcendent status of our Constitution." *Id.*[3]

> The punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an act of Congress is penal or regulatory in character. . . . Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as 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

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[2] In *Trop*, the Court noted that while in form the statute in question, which provided for automatic loss of citizenship upon wartime court-martial under certain enumerated circumstances, appeared to be a regulation of nationality, "surely form cannot provide the answer to this inquiry. A statute providing that 'a person shall lose his liberty by committing bank robbery,' though in form a regulation of liberty, would nonetheless be penal. Nor would its penal affect be altered by labeling it a regulation of banks or by arguing that there is a rational connection between safeguarding banks and imprisoning bank robbers. The inquiry must be directed to substance." 356 U.S. at 95.

[3] The language of the statute itself contains many indicia of a punitive purpose. It is avowedly part of the criminal laws directed at prevention of crime, an inextricable part of a criminal prosecution aimed at the individual instituted by the federal government. Moreover, the statute inflicts an unspecified term of imprisonment, along with all the attendant stigma, a typically criminal punishment, on the basis of a criminal indictment charging past crime plus evidence intended to indicate a likelihood of future dangerousness, accompanied by an explicit legislative purpose of incapacitation, S. Rep. No. 98-225 at 10, a long recognized purpose of criminal sentencing, along with undeniable deterrence and retributive aspects.

> rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Kennedy v. *Mendoza-Martinez*, 372 U.S. at 168.

Analysis of these factors readily demonstrates the undeniable transcendence of the punitive substance over the regulatory form. As to the first of these factors, whether there is imposed an affirmative disability or restraint, there can admit of no conceivable doubt. Not only is the pretrial detainee deprived of his physical freedom but also of "all that makes life worth living," *Bridges* v. *Wixon*, 326 U.S. 135, 147 (1945); his employment is imperiled, his family relationships impaired, *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975), he is deprived of the freedom to be with family and friends and to form the other enduring attachments of normal life, *Morrissey* v. *Brewer*, 408 U.S. 471, 482 (1972), of the freedom of association, *Papachristou* v. *Jacksonville*, 405 U.S. 156 (1972), of the right to travel, *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), of the right to family integrity, *Moore* v. *East Cleveland*, 431 U.S. 494 (1977), and of his personal right to privacy and bodily integrity, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), in sum, of the right to enjoy most of those privileges "long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). *See generally Bell* v. *Wolfish*, 441 U.S. 520 (1979).

Certainly the behavior to which the statute applies is already a crime, *see Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 168, both as to the past behavior alleged to trigger the detention process and as to the future behavior sought to be prevented. Moreover, for similar reasons, the deprivation is premised upon a finding of *scienter*, both in terms of putative responsibility for the crime charged and in terms of an imputed intent to engage in future criminal conduct.

Moreover, and most fundamentally, incapacitative incarceration has historically been regarded as punishment and promotes the traditional aims of punishment.[4] "Isolation of the dangerous has always been considered an important function of the criminal law." *Powell* v. *Texas*, 392 U.S. 514, 539 (1968). "It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent — and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." *United States* v. *Brown*, 381 U.S. 437, 458 (1965). *Cf. Specht* v. *Patterson*, 386 U.S. 605, 608 (1967) (incarceration under Colorado sexually dangerous person statute is criminal punishment even though designed not so much as retribution as to keep individuals from inflicting future harm).

In *Schall* v. *Martin*, 467 U.S. 253 (1984), this Court concluded that a New York statute permitting pretrial detention of juveniles was regulatory rather than punitive in purpose, identifying a number of variables which combined to place the detention at issue therein somewhere on the regulatory end of the continuum. None of these ameliorating factors are present here. First, the Court stressed that the period of pretrial detention was strictly limited in time to a maximum possible duration of seventeen days. *Id.* at 270.[5] In stark contrast, the

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[4] The only cognizable exception to the universal equation of incarceration of competent adult citizens for more than the briefest duration as an incident to criminal processing, *cf. Gerstein* v. *Pugh*, 420 U.S. 103 (1975), with punishment is the power to detain for risk of flight. Such a power is essential to the very existence of the criminal justice system and has historical antecedents of such antiquity as to have become incorporated into the very definition of ordered liberty protected by the Due Process Clause; the derivative power to protect those same processes from crippling disruption through witness tampering and similar actions directed at preventing the free and unimpeded operation of the trial process rests upon the same rationale. *See* Section II *infra*.

[5] The Court further noted that this brief time span was directly related to the limited purpose of providing the youth with a controlled environment and separating him from improper influences pending the speedy disposition of the case. *Schall* v. *Martin*, 467 U.S. at 266.

detention imposed under § 3142 is subject only to whatever time constraints may be supplied by the Speedy Trial Act, 18 U.S.C. §§ 3161, 3164, protection which in practice has proven largely illusory in light of the myriad exclusions encompassed within § 3161(h), particularly the open-ended exclusion in the interests of justice permitted by § 3161(h)(8)(B)(ii), resulting not in a sharply limited confinement but rather in a virtually indeterminate one.[6]

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[6]The lack of any finite time limits on the potential duration of detention also distinguishes § 3142 from the statute at issue in *United States* v. *Edwards*, 430 A.2d 1321 (D.C. App. 1981). Any protestations contained in the legislative history regarding the adequacy of the Speedy Trial Act to impose reasonable limitations on the length of time a detainee might remain incarcerated must be entirely discounted. Simple reference to cases decided under the Speedy Trial Act upholding extraordinarily lengthy intervals between indictment and trial because of validly excludable delay quickly demolishes any reliance on the Speedy Trial Act to function as the necessary safeguard. *See, e.g., Henderson* v. *United States*, ___ U.S. ___, 106 S.Ct. 1871 (1986) (in excess of two years from arraignment of last co-defendant to trial); *United States* v. *Novak*, 715 F.2d 810 (3d Cir. 1983), *cert. denied*, 465 U.S. 1030 (1984) (228 day delay upheld under Speedy Trial Act). Since legislative reference to applicable legal standards is elsewhere readily evident in the legislative history, the conclusion is inescapable that Congress recognized the indeterminate nature of the commitment and chose to incorporate it into the Bail Reform Act. Indeed, a conclusion that the failure to ameliorate the potential for extraordinarily prolonged detention was deliberate is inescapable when reference is had to congressional debates relating to and ultimately rejecting the imposition of more finite and/or stringent time limits, *see, e.g.*, 130 Cong. Rec. at S938-S945, a clear manifestation of punitive intent. Experience under the Bail Reform Act amply bears out the potential for lengthy and relatively open-ended detention. Recent statistics show that 307 defendants were detained in custody in excess of 151 days during the period from July 1, 1984, through June 30, 1985. *United States* v. *Accetturo*, 783 F.2d 382, 395 (3d Cir. 1986) (Sloviter, J., dissenting) (upholding detention of a minimum of six months; district court had excluded seven month period of time as validly excludable delay under Speedy Trial Act). *See, e.g., United States* v. *Claudio*, No. 86-1437 (2d Cir. Nov. 20, 1986) (fourteen months' detention already, and trial still eight months away); *United States* v. *Portes*, 786 F.2d 758 (7th Cir. 1985) (eight months); *United States* v. *LoFranco*, 620 F.Supp. 1324 (N.D.N.Y. 1985), *appeal dismissed sub nom. United States* v. *Cheeseman*, 783 F.2d 38 (2d Cir. 1986) (five and one-half months' detention and trial still four months away); *United States* v. *Theron*, 782 F.2d 1510 (10th Cir. 1986) (four months detention, no fixed trial date); *United States* v. *Hall*, No. 85-CR-87 (N.D.N.Y. 1985) (six

Second, the Court found significant the quality of detention imposed, noting that confinement was for the most part in nonsecure halfway houses; where secure detention was deemed necessary, confinement was in a secure juvenile facility in which children lived in dormitories assigned on the basis of age, size, and behavior, wore street clothing, and participated in educational, recreational, and counseling sessions. *Id.* at 271. In striking contradistinction to these relatively benign incidents of confinement, adult pretrial detainees are held in jail or prison facilities, most often in administrative segregation, confined to their cells twenty-three hours per day. *See United States* v. *Melendez-Carrion*, 790 F.2d 984, 999 (2d Cir. 1986). *See also Bell* v. *Wolfish*, 441 U.S. 520 (1979). The conditions of confinement are, at best, identical to those in-

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months detention); *United States* v. *Zannino*, 798 F.2d 544 (1st Cir. 1986) (sixteen months with no fixed trial date). *See also* Bridges, The Speedy Trial Act of 1974: Effects on Delays in Federal Criminal Litigation; 73 J. Crim. L. & Crim. 50, 69 (1982) (approximately 10% of all federal criminal cases require more than 360 days processing time). This latter statistic, given the increasing complexity of many federal indictments, such as the one in this case, is undoubtedly conservative in terms of present reality.

Opponents of additional limitations upon the possible length of pretrial detention sought to justify their opposition on the grounds that such restrictions would be unduly burdensome for the government in that complex cases could not be prepared for trial within such short confines, which would result in unwarranted dismissals of indictments, *see* 130 Cong. Rec. at S941. However, such purported concerns are unconvincing in light of the almost plenary control exercised by prosecutors over the timing of the return of indictments, the amount of preindictment preparation, and the timing of arrests pursuant thereto, *see, e.g., United States* v. *Claudio, supra*, subject only to very limited constitutional and statutory constraints. The last ditch attempt to impose more rigid time controls was a modest proposal indeed, providing only that the time limit of the Speedy Trial Act be reduced from 90 to 60 days in cases involving detained defendants, subject to all the exclusions of the Speedy Trial Act, *see* 130 Cong. Rec. at S939, a compromise which would have more than adequately safeguarded any governmental interest in adequate time for pretrial preparation. Rather, Congress elected to shift the burden of delay to the detained defendant, permitting him to escape prolonged pretrial confinement only by insisting on an early trial at the grievous sacrifice of adequate consultation with counsel and pretrial preparation of the defense, a request which if made may nonetheless be thwarted by the government or even by undetained codefendants through the mechanism of the Speedy Trial Act.

flicted as punishment upon persons who have been convicted and sentenced and, all too often, are far more onerous.[7]

Third, the Court in *Schall* relied upon three interrelated attributes of the New York scheme which are entirely inapplicable here: that the statute required the court to consider the best interests of the juvenile in all proceedings, including detention hearings, that the statute had been authoritatively construed as regulatory by the state's highest court, and that detention of juveniles has long been permitted nationwide. *Id.* at 266-68. No such solicitude for the interests of potential detainees is found in the adult context, nor is pretrial detention of competent adults other than completely antithetical to the historical fabric of our nation.[8]

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[7] Ironically, the segregation of pretrial detainees from sentenced prisoners has generally led to harsher rather than more benign conditions of confinement. At best, detainees are subjected to the same humiliating and oppressive restrictions and intrusions as are sentenced prisoners, justified by the reasonable needs of the institution to maintain security and discipline, *see Bell* v. *Wolfish*, *supra*. However, in all too many instances detainees suffer far harsher conditions, being confined in administrative segregation cells for 23 hours per day with significantly curtailed access to the outside world, whether via telephone or personal visits, and the concomitant severe interference with access to counsel and the opportunity to participate in preparation of the defense, *see Stack* v. *Boyle*, 342 U.S. 1, 4 (1951), all without prior adjudication of guilt. And because they have not been convicted of a crime, detainees do not have "inflicted" upon them any rehabilitative programs or work assignments, often the only available activities which stand between an incarcerated person and endless mind-numbing boredom. *Cf. McGinnis* v. *Royster*, 410 U.S. 263, 273 (1973) ("it would hardly be appropriate for the state to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence").

[8] Further rendering inapposite the analysis of *Schall*, the Court therein engaged in a bipartite analysis of the punitive versus regulatory conundrum, first considering whether juvenile preventive detention *per se* was a valid regulatory measure and holding that it was, a conclusion which necessarily imports a finding of nonpunitive purpose. Section II, *infra*. *See Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 186 n.43. Noting, however, that "the mere invocation of a legitimate purpose will not justify *particular restrictions and conditions of confinement* amounting to punishment," *id.* at 269 (emphasis added), the Court then embarked upon the second component of the regulatory-punitive determination; having concluded that the general nature of the legislative scheme was regulatory rather than punitive in *purpose*, based upon

Far from the brief and relatively benign confinement at issue in *Schall*, the incarceration which results from a detention order under § 3142 has all the incidents of what has historically been categorized as "infamous punishment." *See, e.g., Ex parte Wilson*, 114 U.S. 417, 423 (1885); *Mackin* v. *United States*, 117 U.S. 348, 352 (1886); *Wong Wing* v. *United States*, 163 U.S. 228, 237 (1896). *Cf. United States* v. *Waddell*, 112 U.S. 76 (1884). Not only does § 3142 consign persons to incarceration to prevent future crime, historically viewed as a

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numerous considerations applicable to juveniles and not to adults, the Court then turned to consideration of whether the detention scheme was punitive in *effect*, with reference to the conditions of confinement imposed. It was only in this latter context that the Court applied a rational basis analysis, embodied in the last two of the *Mendoza-Martinez* factors: whether the particular condition of confinement is inflicted for purposes of punishment or rather is but an incident of some other legitimate government purpose. *Id.* at 269. In *Bell* v. *Wolfish*, 441 U.S. 520 (1979), the Court had subjected the *conditions* of confinement of adult pretrial detainees to similar scrutiny, *id.* at 537-39 & n.20; the propriety of the detention *per se* was not an issue, the parties having conceded the validity of detention on the basis of risk of flight. *Id.* at 533-34 & n.15.

Similarly, in *Allen* v. *Illinois*, ___ U.S. ___, 106 S.Ct. 2988 (1986), the Court examined the incidents of commitment as a sexually dangerous person, noting particularly that the state had established a system which provided treatment for those committed and offered release after "the briefest time" in confinement, concluding accordingly that the conditions of confinement themselves did not constitute punishment such as to render the proceedings criminal for purposes of the fifth amendment privilege against self-incrimination, but indicating that the conclusion might well be different if the petitioner demonstrated that no treatment was provided or that persons committed under the statute were confined under basically the same conditions as regular prisoners. As in *Bell* v. *Wolfish*, *supra*, the legitimacy of the confinement *per se* of the dangerously mentally ill was not at issue, this power to confine being a long established incident of the police and *parens patriae* powers of the state, *see* Section II, *infra*. The more relaxed scrutiny afforded conditions attendant upon valid confinement simply bears no relationship to the propriety of detention *per se*. In the former context, the detainee has already been deprived of his most fundamental rights, and the question is limited to what the state may impose upon him in furtherance of the purposes for which confinement was ordered and in recognition of the necessities of the institutional confinement; in the latter context arises the incomparably more significant determination of *when* such fundamental deprivations may be imposed in the first instance, an inquiry mandating the most careful and stringent scrutiny.

paradigm of punishment, but it also bears unmistakable retributive and deterrent aspects, retribution for the past crime charged and the perceived intent to commit future crime and deterrence by expanding the reach of the criminal law to punish crime before it occurs, until now thought to be a grotesque anomaly unknown in civilized societies outside the circle of readers of Lewis Carroll.[9]

Moreover, not only does preventive detention carry all the hallmarks of traditional punitive incarceration, except for its putative rehabilitative aspects, it also shares many of the indicia which have historically been held to characterize punishment of different types. "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact." *Cummings* v. *Missouri*, 4 Wall 277, 320 (1866). See *United States* v. *Lovett*, 328 U.S. at 316. While preventive detention looks generally to anticipated future conduct, its invocation is triggered by past conduct, the alleged criminal behavior which underlies the allegations in the indictment, and, in turn, the same past behavior is used to justify an expectation of future criminality, for the concatenation of which incarceration is imposed. "The theory upon which our political institutions rest is, that all men have certain inalienable rights — that among these are life, liberty, and the pursuit of happiness. . . . Any deprivation of any of these rights for past conduct is punishment, and can be in no otherwise defined." *Id.* at 321. *See Ex parte Garland*, 4 Wall 333, 377 (1866).

Traditionally, "[i]n determining whether legislation bases a disqualification on the happening of a certain past event im-

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[9] "The appeal of preventive imprisonment is as old as it is seductive. Witness this classic exchange in Lewis Carroll's Through the Looking Glass. The Queen observes that the King's Messenger is 'in prison now, being punished; and the trial doesn't even begin till next Wednesday; and of course the crime comes last of all.' Perplexed, Alice asks, 'Suppose he never commits the crime?' 'That would be all the better, wouldn't it?' the Queen replies." Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va. L. Rev. 371, 374-75 (1970), *quoting* L. Carroll, Through the Looking Glass 88 (Harper & Bros. ed. 1902) (hereinafter referred to as Tribe).

poses a punishment, the Court has sought to discern the objects on which the enactment in question was focused. Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. The contrary is the case where the statute in question is evidently aimed at the person or class of persons disqualified." *Flemming* v. *Nestor*, 363 U.S. 603, 613-14 (1960). The essential inquiry is, therefore, whether the statute intends to reach the person or the activity regulated. *See, e.g., Cummings* v. *Missouri*, 4 Wall at 320; *United States* v. *Lovett*, 328 U.S. at 315; *Trop* v. *Dulles*, 356 U.S. at 95-96.

In the context of preventive detention, the status or activity from which the individual is barred is, of course, personal liberty, under the guise of a community safety regulation. The actual focus of the legislation, apparent on its face, is upon the person of the criminal defendant and not upon the activity regulated. Where the "person" is that of a competent adult citizen, the only permissible manner of reaching that person for purposes of crime prevention is through conviction of guilt of a specifically charged federal substantive criminal offense beyond a reasonable doubt through a criminal trial with the full panoply of due process safeguards.[10]

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[10] Where substantial deprivations have been upheld as incidents of a valid regulatory scheme, the nexus between the activity regulated and the activity deprived has been one of essential congruence. For example, in the exercise of their power to regulate the franchise, states may deprive convicted felons of the right to vote, *Richardson* v. *Ramirez*, 418 U.S. 24 (1974). Similarly, in the regulation of the license to practice medicine, a state in prescribing qualifications may disqualify persons with felony convictions, *Hawker* v. *New York*, 170 U.S. 189 (1898), and may similarly prescribe qualifications for government employment generally, *Garner* v. *Board of Public Works*, 341 U.S. 716 (1951); *DeVeau* v. *Braisted*, 363 U.S. 144 (1960). *Compare United States* v. *Brown*, 381 U.S. 437 (1965), *with American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950).

Unless we are prepared to say that the government may "regulate" the circumstances under which competent adult citizens may enjoy their freedom from physical restraint, the requisite correlation is simply absent. Congress may not regulate liberty *per se*, nor may it do by indirection what it may not

Preventive detention on the ground of predicted future criminal behavior is "regulatory" in precisely the same manner as is the substantive criminal law, and must be governed by the same principles, principles which absolutely prohibit punishment prior to an adjudication of guilt, such as that inflicted pursuant to 18 U.S.C. § 3142.

II. Incarceration of Competent Adult Citizens for the Purpose of Preventing Future Crimes, Even if Arguably Regulatory Rather than Punitive, Violates the Due Process Clause of the Fifth Amendment.

The sacred liberty of free men and women to be free from restraint is the most fundamental of rights, a right which "lie[s] at the base of all our civil and political institutions," *Hurtado* v. *California*, 110 U.S. 516, 535 (1884), "deeply rooted in this nation's history and tradition," *Moore* v. *East Cleveland*, 431 U.S. 494, 503 (1977); it is "the matrix, the indispensable condition, of nearly every other form of freedom," *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937). *See Ingraham* v. *Wright*, 430 U.S. 651, 672-73 (1977); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 186; *Board of Regents* v. *Roth*, 408 U.S. 564, 571 (1972); *Williams* v. *Fears*, 179 U.S. 270 (1900).

Because of the necessarily sacrosanct nature of this most basic of human freedoms, the Due Process Clause of the Fifth Amendment impenetrably circumscribes the power of the federal government to encroach upon the freedom from physical restraint of competent adult citizens except through the mechanism of conviction for past criminal behavior:

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do directly, *see Cummings* v. *Missouri*, 4 Wall at 325, by incarceration of persons charged with crime based upon anticipated future crime as an "incident" of regulatory public safety legislation. Certainly the government has a weighty interest in protecting the community from crime, but "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law." *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

> [T]he total deprivation of liberty as a means of preventing future crime exceeds the substantive limitations of the Due Process Clause. This means of promoting public safety would be beyond the constitutional pale. The system of criminal justice contemplated by the Due Process Clause — indeed, by all of the criminal justice guarantees of the Bill of Rights — 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.

United States v. *Salerno*, 794 F.2d 64, 72 (2d Cir. 1986), *quoting United States* v. *Melendez-Carrion*, 790 F.2d 984, 1001 (2d Cir. 1986).

While liberty and property "interests" may properly be arranged along a continuum determined by the perceived importance of the right at stake and the countervailing governmental interest, at the end of that continuum stands a wall erected by the Due Process Clause which no governmental interest — rational, important, compelling or otherwise — may surmount. Yet it is this very constitutional wall, the bulwark of all our cherished freedoms, long enshrined in our history and traditions, *see Poe* v. *Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting), which the government terms "unappealing" (Brief for Petitioner at 25) and "hard to understand" (Brief for Petitioner at 21).

The concern for liberty of the person was enshrined in our Constitution even before the passage of the Bill of Rights, in Article I, Section 9, the habeas corpus clause, "the great object

of which is the liberation of those who may be imprisoned without sufficient cause." *Ex parte Watkins*, 3 Pet. 193, 208 (1830). *See also Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866). The habeas corpus clause was given a body of content by the Bill of Rights, particularly the interrelated protections of the constitutional right of freedom from imprisonment erected by the Fourth, Fifth, Sixth, and Eighth Amendments, the substantive contents of which all coalesce to produce that liberty which may not be deprived without due process of law.

The Sixth Amendment in particular emphasizes the fundamental nature of the right to freedom from restraint by sharply curtailing the circumstances under which it may be denied "in all criminal prosecutions," circumstances which include, under the Due Process Clause, a requirement that guilt be found only on proof of past crime beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970), a standard of proof which "provides concrete substance for the presumption of innocence — that bedrock 'axiomatic and elementary' principle whose enforcement lies at the foundation of the administration of our criminal law." *Id.* at 363. In the particular context of pretrial status during the pendency of a criminal prosecution, this Court has many times underscored the fundamental nature of this freedom.[11]

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

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[11] Respondent does not contend herein that the Eighth Amendment confers an absolute right to bail but rather that it does, as set forth *infra*, circumscribe the power of Congress to restrict access to bail for purposes other than those so long recognized as essential to the operation of the judicial system as to have become already implicit in the concept of liberty. Thus, based upon the Eighth Amendment and its historical antecedents, it cannot really be said that detention to prevent flight is in fact "regulatory" in nature; it is not a restriction overlaid upon our traditional conceptions of liberty but rather one which is inherent therein by virtue of nine centuries of historic fact.

Stack v. *Boyle*, 342 U.S. 1, 4 (1951).[12] Justice Jackson in concurrence, joined by Justice Frankfurter, elaborated upon the fundamental nature of the right at stake:

> The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.

Id. at 7. *See Schilb* v. *Kuebel*, 404 U.S. 357, 365 (1971). The views of the Court expressed in *Stack* v. *Boyle* are a simple and eloquent reiteration of the Court's pronouncements on the matter of bail from the early days of the republic.

> Bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon.

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[12] While this Court has indicated that the presumption of innocence has no bearing upon the *conditions* of confinement of pretrial detainees validly held because of risk of flight, *Bell* v. *Wolfish*, 441 U.S. at 533, the presumption is one of the several facets of the constitutional protection against imprisonment which demand that pretrial detention be strictly limited to those circumstances in which it is essential to preserve the functioning of our criminal justice system. "The burdens of pretrial detention are substantial ones to impose on a presumptively innocent man, even when there is probable cause to believe he has committed a crime." *Baker* v. *McCollan*, 443 U.S. 137, 153 (1979) (Stevens, J., dissenting). The presumption of innocence referred to in *Stack* v. *Boyle* must be viewed as representing a commitment to the proposition that a man accused of crime is entitled to freedom and respect as an innocent member of society; only those deprivations necessary to assure the progress of the proceedings pending against him, which deprivations do not rest upon an assumption of guilt, may be squared with this "basic postulate of dignity and equality." Tribe, *supra* n. 9, at 404.

> It is not disguised as a satisfaction of the offense, when it is forfeited and paid; but as a means of compelling the party to submit to the trial and punishment, which the law ordains for his offense.

Ex parte Milburn, 34 U.S. 704, 710 (1835). *See also United States* v. *Motlow*, 10 F.2d 657, 659 (7th Cir. 1926) (Butler, J., as Circuit Justice) ("The Eighth Amendment . . . implies, and therefore safeguards, the right to give bail at least before trial. The purpose is to prevent the practical denial of bail by fixing the amount so unreasonably high that it cannot be given. The provision forbidding excessive bail would be futile if magistrates were left free to deny bail"); *United States* v. *Ryder*, 110 U.S. 729, 736 (1884) ("the object of bail in criminal cases is to secure the appearance of the principal before the Court for the purpose of public justice"); *Hudson* v. *Parker*, 156 U.S. 277, 285 (1895) ("a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment"); *Carbo* v. *United States*, 82 S.Ct. 662, 667 (1962) (Douglas, J., as Circuit Justice) ("Denial of bail should not be used as an indirect way of making a man shoulder a sentence for unproved crimes"); *Williamson* v. *United States*, 184 F.2d 280, 282 (2d Cir. 1950) (Jackson, J., as Circuit Justice) ("[it is] difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated and yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it. . . .").[13]

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[13] *Carlson* v. *Landon*, 342 U.S. 524 (1952), decided by a sharply divided court later the same term as *Stack* v. *Boyle*, does not detract from the content previously assigned to the Eighth Amendment. In *Carlson*, the Court rejected by a 5-4 vote the argument that the Eighth Amendment granted alien Communists arrested on deportation warrants the same constitutional right to bail afforded citizens charged with crime. The Court's statement in *dictum* that the Eighth Amendment merely protects against excessive bail in cases in which

The entirety of the bail jurisprudence of this Court reflects the antecedents of the Eighth Amendment deeply rooted in Anglo-American history, which has rested for nine centuries on the premise that the only legitimate function of pretrial incarceration was to provide assurance that the accused could be prosecuted and if convicted, sentenced. Tribe, *supra* n.9 at 402. While the historical record may not support the proposition that there is an absolute right to bail, to derive from that modest concession to the essential demands of the judicial system a sweeping legislative power to restrict access to bail for reasons unrelated to those demands is to utterly misread the teachings of history and to reduce the Eighth Amendment "below the level of a pious admonition." *Carlson* v. *Landon*, 342 U.S. 524, 542 (1952) (Black, J., dissenting). Whatever conclusion one may reach regarding the evolution of bail in England,[14] "our Bill of Rights was written and adopted to guar-

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bail may be granted and does not prevent Congress from defining classes of cases in which bail may be denied can only be read in the context in which it was made, an area to which the Court expressed some doubt that the Eighth Amendment was even applicable, deportation being a civil and not criminal proceeding. Moreover, the federal government has plenary power to regulate aliens, their admission to this country and the conditions under which they may remain. *See, e.g., Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953); *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896). Furthermore, bail was not denied entirely but was discretionary with the Attorney General and subject to judicial review. And most importantly, the court in referring to "classes" of cases in which Congress could restrict access to bail, clearly had reference to classes other than the class of criminal cases, in which class the only permissible curtailment was that for capital cases. As discussed further, *infra*, the exception for capital offenses has a firmly established historical basis, and nothing in this Court's opinion may be read to contemplate further encroachments on the right to bail in criminal cases as a class, notwithstanding Congress' power to restrict access to bail in deportation cases as a class.

[14] Numerous commentators have traced the history of bail in England. *E.g.*, Tribe, *supra* n.9 at 400-02; Hickey, Preventive Detention and The Crime of Being Dangerous, 58 Geo. L. Rev. 287 (1969) (hereinafter referred to as Hickey); Foote, The Coming Constitutional Crisis in Bail, 113 U. Pa. L. Rev. 959 (1965); Duker, The Right to Bail: A Historical Inquiry, 42 Alb. L. Rev. 33 (1977); Meyer, Constitutionality of Pretrial Detention, 60 Geo. L.J. 1139 (1972). In addition, several judicial decisions have painstakingly analyzed the

antee Americans greater freedom than had been enjoyed by their ancestors who had been driven from Europe by persecution." *Id.* at 557.[15] In this country, the Judiciary Act of 1789, adopted at the same time as the Eighth Amendment, established a right of bail in all except capital cases, leaving release on bail in those cases to the discretion of the federal judiciary. This formulation essentially followed, and was in turn followed by, state constitutional provisions, beginning with the Pennsylvania Frame of Government, adopted in 1682, which provided "[t]hat all prisoners shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident or the presumption great." By 1960 forty states had adopted essentially the same clause. Identical language was incorporated in the Northwest Territory Ordinance of 1787, art. II, 1 Stat. 13. *State* v. *Konigsberg,* 164 A.2d at 742.

There is, accordingly, a historical basis for restricting bail in capital cases but not otherwise, and the historical record convincingly demonstrates that the basis for this exception was not the imputed dangerousness of the capital defendant but rather the perception that a well-nigh uncontrollable urge to flee might well understandably seize one in danger of the ultimate penalty; to that end the judiciary was instructed to look to the strength of the proof to determine how strongly the jeopardy of conviction might be felt by the accused. *See, e.g., United States* v. *Melendez-Carrion,* 790 F.2d at 997;

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historical background. *E.g., Hunt* v. *Roth,* 648 F.2d 1148 (8th Cir. 1981), *vacated as moot,* 455 U.S. 478 (1982) (*per curiam*); *Faheem-El* v. *Klincar,* 620 F.Supp. 1308 (N.D. Ill. 1985); *United States* v. *Edwards,* 430 A.2d 1321 (D.C. App. 1981); *State* v. *Konigsberg,* 33 N.J. 367, 164 A.2d 740 (1960).

[15] James Madison remarked in proposing the Bill of Rights to Congress:

> In the declaration of rights which that country [England] has established, the truth is, they have gone no further than to raise a barrier against the power of the Crown; the power to legislate is left altogether indefinite. . . . But although it may not be thought necessary to provide limits for the legislative power in that country, yet a different opinion prevails in the United States. The people of many states have thought it necessary to raise barriers against power in all forms and departments of government.

1 Annals of Cong. 18, 46-50 (Gales & Seaton ed. 1789-1791), *quoted in United States* v. *Edwards,* 430 A.2d at 1367 (Mack, J., dissenting).

Hunt v. *Roth*, 648 F.2d at 1160; *State* v. *Konigsberg*, 164 A.2d at 743; 4 W. Blackstone, Commentaries on the Laws of England 293-94 (4th ed. 1770); Tribe, *supra* n.9 at 377.

The entire history of bail in this country reflects a "profound judgment about the way in which law should be enforced and justice administered," *In re Winship*, 397 U.S. at 361, mandating that access to bail be denied only when there is a significant risk that the judicial process itself will be thwarted, characteristically through the flight of the defendant, and later extended to encompass threats to the integrity of its processes through witness tampering and the like. *E.g.*, *Carbo* v. *United States*, 82 S.Ct. 662 (1962) (Douglas, J., as Circuit Justice); *Fernandez* v. *United States*, 81 S.Ct. 642 (1961) (Harlan, J., as Circuit Justice). The government's characterization of detention as "ancillary" to the criminal case, rendering it reasonable for Congress to impose upon courts the obligation to detain criminal defendants believed to pose a danger to the community completely misperceives the historic function of bail to preserve the liberty of the individual while ensuring the continued integrity of the judicial system. Conditional release pending trial, which may itself impose substantial and onerous restrictions on personal liberty, *see Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975), except where essential for the criminal justice system to perform its designated function, strikes the only balance permissible in this context. While the power to detain based upon risk of flight or threat to the integrity of the judicial process may be essential to the continued validity of a system which depends entirely for the achievement of its purposes upon its ability to carry out its adjudicatory and dispositional mandates upon the presence of the accused and the uncoerced testimony of witnesses, pretrial detention on grounds of dangerousness to the community is irrelevant for these purposes.[16]

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[16] As the legislative history of § 3142 explains, the statutory reference to danger to any specific individual in the community refers simply to the established power to detain if the defendant poses a danger to witnesses or others involved in the judicial process, whereas danger to the community encompasses future criminal behavior detrimental to society as a whole. S. Rep. No. 98-225

Accordingly, *Bell* v. *Wolfish*, 441 U.S. 520 (1979), in which the only ground for detention asserted was that of risk of flight, *id.* at 534 and n.15, has no bearing upon the validity of pretrial detention on the ground of future dangerousness. Neither does *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), in any way suggest the permissibility of such detention. *Gerstein* held no more than that pretrial restraint of liberty, whether through restrictive release conditions or as a result of inability or failure to post the required bond, must be premised at a minimum upon a finding of probable cause. *Gerstein* does not sanction pretrial detention, but rather comprehends a restriction upon liberty closely related to the rationale underlying detention where a risk of flight appears, that is, restraint for so long as is necessary for the criminal justice system to attach to the person and compel submission to its processes. 420 U.S. at 114, 120. Probable cause does not justify or empower pretrial detention; it is simply a prerequisite for the institution or the continuation of the process, a necessary but not sufficient predicate for restraint, which may include detention where necessary to permit an adjudication of guilt or innocence.[17]

> Pretrial detention to prevent future crimes against society at large, however, is not justified by any concern for

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at 12. The arguments presented herein are addressed only to detention based upon danger to the community as a whole, there being no evidence that respondent posed any danger to witnesses or to the judicial process. *United States* v. *Salerno*, 794 F.2d at 71.

[17] *Gerstein* must also be read in light of *Stack* v. *Boyle*, 342 U.S. 1 (1951), which articulates the permissible limits of pretrial detention; *Gerstein* provides an additional measure of protection by prohibiting even detention as a flight risk absent probable cause as to the commission of the offense charged. Moreover, while *Gerstein* intimates that Fourth Amendment standards define the necessary due process balance governing seizures of persons pending trial, even for the purposes of extended restraints, 420 U.S. at 125 n.27, the role of the Due Process Clause itself in imposing its own substantive limits cannot be doubted. *See, e.g., Schall* v. *Martin*, 467 U.S. 253 (1984); *Bell* v. *Wolfish*, 441 U.S. 520 (1979). Nothing in *Gerstein* purports to determine the substantive limitations on the available grounds for pretrial detention imposed by the Due Process Clause.

> holding a trial on the charges for which a defendant has been arrested. It is simply a means of providing protection against the risk that society's laws will be broken. Even if the highest value is accorded to that objective, it is one that may not be achieved under our constitutional system by incarcerating those thought likely to commit crimes in the future. Detention of a person lawfully arrested for past criminal conduct is unconstitutional not because preventing crime is less important than preventing a defendant's flight, but because this means of preventing crime conflicts with fundamental principles of our constitutional system of criminal justice, while detention to prevent flight serves the principles of that system by guaranteeing that the defendant will stand trial and, if convicted, face punishment.

United States v. *Salerno*, 794 F.2d at 73, *quoting United States* v. *Melendez-Carrion*, 790 F.2d at 1002.

Rather, our constitutionally based criminal justice system demands that incarceration for purposes of crime prevention be achieved only through conviction for past crime, with all the attendant safeguards required to ensure, insofar as it is humanly possible, that no innocent person be condemned. *See In re Winship*, 397 U.S. at 364. The insistence upon past conduct as the only constitutionally acceptable predicate for preventive incarceration is manifest in the basic principle of our criminal law that

> [p]unishment for status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense. . . . This is a situation universally sought to be avoided in our criminal law; the fundamental requirement that some action be proved is solidly established even for offenses most heavily based on propensity, such as attempt, conspiracy, and recidivist crimes.

Powell v. *Texas*, 392 U.S. 514, 543 (Black, J., concurring). For this reason, this Court has consistently rejected state attempts to extend the reach of their criminal laws to punish on the basis of status unconnected to criminal behavior that is within the state's competence to prosecute, *Robinson* v. *California*, 370 U.S. 660, 667 (1962), or on the basis of behavior, unexceptionable in itself, but perceived as a potential precursor of criminal behavior, *Thompson* v. *Louisville*, 362 U.S. 199 (1960), or on the basis of ill-defined associational behavior sought to be justified as a crime prevention measure, *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939). *Cf. Stanley* v. *Georgia*, 394 U.S. at 557.

Similarly, predictions of future behavior of competent adult citizens have until the enactment of the Bail Reform Act of 1984 been a permissible basis for judicial and/or administrative decisionmaking which impacts upon the freedom of the individual only after an adjudication of guilt, for example, in sentencing determinations, *Barefoot* v. *Estelle*, 463 U.S. 880, 896 (1983); *Jurek* v. *Texas*, 428 U.S. 262, 274-75 (1976), in determining whether to grant parole, *Greenholtz* v. *Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7 (1979), or whether parole or probation having once been granted should be revoked, *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 (1973); *Morrissey* v. *Brewer*, 408 U.S. 471, 483 (1972).

> That finding [conviction of crime] justifies imposing extensive restrictions on the individual's liberty. Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts. *Given the previous conviction* and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial. . . .

Morrissey v. *Brewer*, 408 U.S. at 483 (emphasis added).

Any constitutionally cognizable governmental interest in deterrence through incapacitation of competent adults on the basis of future behavior is thus born only of criminal conviction: "the conviction, with all its procedural safeguards, has extinguished that liberty right. . . . '[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.'" *Greenholtz* v. *Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. at 7.[18]

The government suggests that the Bail Reform Act of 1984 is simply an unexceptionable manifestation of the government's recognized power to curtail freedom as a nonpunitive regulatory measure to protect substantial governmental interests. However, recourse to the examples cited by the government of this Court's validation of such measures quickly demonstrates the essential fallacy of this contention; none of these cases, with the possible exception of the World War II Japanese internment cases, authorize or approve the pretrial detention of competent adult citizens on the grounds of anticipated future dangerousness, either explicitly or implicitly. These cases, by virtue of dispositive distinctions arising from the source of the government power asserted or the less than complete competence of the individual affected, simply fall on the other side of the constitutional barrier and cannot be read to contemplate its breach.

Initially, the question must be addressed whether the restraint of liberty imposed falls within the power, the constitutional competence, of Congress to regulate at all, *Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 186 n.43, whether the regulatory scheme which demands it arises "from an affirmative power possessed by Congress under the Constitution." *Id.* at 211

[18] Underscoring the vital significance of an adjudication of guilt in the balance of individual interests against those of the government are numerous noncriminal cases of this Court which turn on either the added boost given to the strength of the government's interest by the fact of conviction or, conversely, upon the greater interests of the individual in its absence. *See, e.g., Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 159; *DeVeau* v. *Braisted*, 363 U.S. at 160; *Richardson* v. *Ramirez*, 418 U.S. 24 (1974); *Hawker* v. *New York*, 170 U.S. 189 (1898). *Cf. Baxstrom* v. *Herold*, 383 U.S. 107 (1966).

(Stewart, J., dissenting). *See United States* v. *Perry*, 788 F.2d 100, 109-11 (3d Cir.), *cert. denied*, 107 S.Ct. 218 (1986) ("Congress may concern itself with 'the safety of the community' only to the extent that other grants of specific power so permit").

The paradigmatic example of regulation of liberty in the exercise of a specifically articulated constitutional power are the war powers cases. *E.g.*, *Ludecke* v. *Watkins*, 335 U.S. 160 (1948); *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943). *Cf. Moyer* v. *Peabody*, 212 U.S. 78 (1909).[19] In both *Korematsu* and *Hirabayashi*, the government asserted an imminent danger of armed invasion of the west coast of this country by the Japanese; the reach of their holdings is sharply circumscribed by "the crisis of war and of threatened invasion," *Hirabayashi* v. *United States*, 320 U.S. at 101.[20] In *Moyer*, the Court held the governor of Colorado immune from liability in damages for a two-and-one-half month detention of the plaintiff during a declared "state of insurrection" because inflicted in good faith reliance upon authorization derived from the state constitution. While the continuing precedential value of *Moyer* is seriously to be doubted, it did not in any event hold that such

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[19] Noteworthy, however, is the fact that even though legislative action pursuant to the war powers clause has necessarily been afforded the highest degree of deference in times of war or armed hostility, even invocation of this most indisputable area of congressional competence has not sufficed to save all action sought to be justified by its operation. *See, e.g., Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963); *Trop* v. *Dulles*, 356 U.S. 86 (1958).

[20] Moreover, subsequent exploration of the validity of the government's claims suggest that this nation would have done well to heed the admonitions of Mr. Justice Murphy, dissenting in *Korematsu*, that "under our system of law individual guilt is the sole basis for deprivation of rights. . . . To give constitutional sanction to [the inference drawn by military authorities] is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual. . . ." *Id.* at 240. "*Korematsu* remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees." *Korematsu* v. *United States*, 584 F.Supp. 1406, 1420 (N.D. Cal. 1984). These cautions are as important in the context of the "war" on crime as in all other types of war hysteria.

detention was affirmatively permissible under the Due Process Clause. These and other cases cited by the government in support of its contention that this Court has "repeatedly" sanctioned the regulatory detention of competent adults, *e.g.*, *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), Brief for Petitioner at 23-24, a highly exaggerated claim in any event, exemplify the worst of our nation's history, periods during which the constitutional vision upon which this nation was founded was sacrificed to the exigencies of the moment, against which we would be ill-advised to measure the depth and breadth of our constitutional freedoms.

While the internment in *Ludecke* was premised upon the exercise of the war powers clause, Ludecke was also an alien, a status which falls within another undoubted area of congressional regulatory competence, the power to exclude or expel aliens being a "fundamental sovereign attribute." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). "Detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid," *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896); *see Ekiu* v. *United States*, 142 U.S. 651 (1892), an exercise of congressional power under the necessary and proper clause markedly analogous to detention to prevent flight from the operation of the criminal processes. *Cf. Carlson* v. *Landon*, 342 U.S. 524 (1952).[21]

Commitment of persons found incompetent to stand trial stands on similar footing, as a valid exercise of the necessary and proper clause. "The petitioner came legally into the custody of the United States. The power that put him into such custody — the power to prosecute for federal offenses — is not exhausted. Its assertion in the form of the pending indictment persists." *Greenwood* v. *United States*, 350 U.S. 366, 375 (1956). While it is "clear that the government's substantive power to commit on the particular findings made in that case

[21] Even in this area of indisputable regulatory competence, this Court has insisted upon stringent procedural protections which reflect the severity of the proposed deprivation. *See, e.g., Woodby* v. *Immigration & Naturalization Service*, 385 U.S. 276 (1966); *Bridges* v. *Wixon*, 326 U.S. 135 (1945).

was the sole question there decided," *Jackson* v. *Indiana*, 406 U.S. 715, 726 (1972), what *Greenwood* teaches is that Congress may not authorize commitment simply to protect the general welfare of the community at large. As with detention to prevent flight or witness tampering, commitment until competent to stand trial is necessary and proper to the administration of justice in the federal courts, but only for so long as is necessary to determine whether there is a substantial probability that the defendant will attain the capacity to be tried in the foreseeable future; if not, he must either be committed pursuant to the ordinary civil commitment statutes, with their far greater procedural safeguards, or released. *See Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972). In short, detention on the ground of incompetence to stand trial retains its justification as a necessary and proper adjunct of the federal power to prosecute for federal offenses only so long as it appears that such prosecution is possible of consummation.

While detentions such as those considered in cases such as *Greenwood*, *Bell* v. *Wolfish*, *Gerstein* v. *Pugh*, and *Carbo*, may properly be viewed as necessary and proper to the indisputable federal power to prosecute for federal offenses, detention on the ground of potential future criminal behavior bears no such relationship to that power. The power to prosecute does not encompass the power to prevent unless and until the prosecutorial process culminates in an adjudication of guilt.[22]

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[22] The analysis of *United States* v. *Perry*, 788 F.2d 100, 109-11 (3d Cir. 1986), although ultimately reaching a manifestly erroneous conclusion, is nonetheless instructive. The Court noted that the Constitution affords the federal government no power to promote the general welfare, no power to enact general civil commitment statutes, and no power to detain a defendant simply on grounds of undifferentiated dangerousness, but concluded that upon a showing of danger that the defendant would commit one of the federal offenses enumerated in § 3142(e), the detention power arose as "auxiliary" to the power to proscribe these offenses such that the federal government could resort to civil commitment to prevent their occurrence. While *Perry*'s general federalism analysis accurately articulates the sensitive and complex issues involved in determining the legislative competence of a government of limited powers, its ultimate conclusion that the power to commit is a necessary auxiliary of the power to proscribe would sweep within its ambit persons not charged, nor

The remaining instances of permissible regulatory detention have their foundation in the incapacity of the individual to control his behavior to ensure that it remains within the bounds decreed by law. *See, e.g., Allen* v. *Illinois*, ___ U.S. ___, 106 S.Ct. 2988, 2994 (1986); *Jones* v. *United States*, 463 U.S. 354, 361 (1983); *Addington* v. *Texas*, 441 U.S. 418, 426 (1979); *O'Connor* v. *Donaldson*, 422 U.S. 563, 575-76 (1975); *Specht* v. *Patterson*, 386 U.S. 605, 608 (1967).[23] "There

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even chargeable, with criminal offenses but found likely to commit one of the designated dangerous offenses in the future.

> It cannot seriously be maintained that under our constitution the Government could jail people not accused of any crime simply because they were thought likely to commit crimes in the future. Yet such a police state approach would undoubtedly be a rational means of advancing the compelling state interest in public safety. In a constitutional system where liberty is protected both substantively and procedurally by the limitations of the Due Process Clause, a total deprivation of liberty cannot validly be accomplished whenever doing so is a rational means of regulating to promote even a substantial governmental interest.

United States v. *Salerno*, 794 F.2d at 72, *quoting United States* v. *Melendez-Carrion*, 790 F.2d at 1001.

In this case, the District Court's determination of future dangerousness rested upon findings that Salerno would, if released, "continue business as usual. When business as usual involves threats, beatings, and murder, the present danger such people pose in the community is self-evident." *United States* v. *Salerno*, 794 F.2d at 67-68. As to Salerno specifically, the District Court found that "[t]he government proffered information showing that Salerno could order a murder merely by voicing his assent with the single word 'hit.' Although some of these murder conspiracies occurred between six and ten years ago, their seriousness and the ease with which they could be ordered weigh heavily in favor of finding that Salerno is a present danger to the community." *Id.* at 67. There was, however, no demonstration in this case that the future crimes the likelihood of commission of which was imputed to Salerno or Cafaro could have been the subject of *federal* prosecution and, indeed, protection of the community against murder and other violent crime is ordinarily the province of the states. A serious question arises as to the basis upon which a prosecution for a federal offense confers a federal power to prevent the future commission of *state* crimes. *Cf. United States* v. *Himler*, 797 F.2d 156, 160 (3d Cir. 1986).

[23] As to the significance of the individual power of control, *compare United States* v. *Brown*, 381 U.S. 437 (1965) (impermissible to criminalize holding of union membership by person who had at any time in past five years been member of Communist Party), *with American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950) (individuals had power to exclude themselves from the class impacted by the legislation by resignation from Community Party).

Also predicated upon an inability to control rationale are those police/public health power cases dealing with quarantine to protect against dangerous communicable diseases. *E.g., Compagnie Francaise de Navigation a Vapeur* v.

is a striking difference between the involuntary confinement of an individual who is considered dangerous for reasons beyond his control and the involuntary confinement of one who is thought to be capable of conforming his conduct to the requirements of the law but is suspected of being unwilling to do so." Tribe, *supra* note 9, at 379. Moreover, one who suffers from debilitating mental illness and is in need of treatment "is neither wholly at liberty or free of stigma," *Addington* v. *Texas*, 441 U.S. at 426; while the liberty interest of such persons remains substantial, it nonetheless lacks the transcendent force of that of the fully competent adult.

Critical too to the power of civil commitment (including that for sexually dangerous persons and those found not guilty by reason of insanity) is the conjunction of the state's *parens patriae* power with its police power. *See, e.g., Allen* v. *Illinois*, ___ U.S. at ___, 106 S.Ct. at 2994; *Addington* v. *Texas*, 441 U.S. at 426; *O'Connor* v. *Donaldson*, 422 U.S. at 573; *Jones* v. *United States*, 463 U.S. at 368. The person sought to be committed must be shown to be *both* mentally ill *and* dangerous. Just as commitment may not be predicated solely on the *parens patriae* power, *e.g., O'Connor* v. *Donaldson*, 422 U.S. at 576 ("[s]tate cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends"), neither is it permissible solely as an exercise of the police power. *See, e.g., Robinson* v. *California*, 370 U.S. 660, 666 (1962) (criminalization of status as narcotics addict without even purporting to provide treatment); *Allen* v. *Illinois*, ___ U.S. at ___, 106 S.Ct. at 2994 (might regard sexually dangerous commitment as criminal

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Louisiana State Board of Health, 186 U.S. 380 (1902); *Morgan's Steamship Co.* v. *Louisiana Board of Health*, 118 U.S. 455 (1886). *See also Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905) (mandatory smallpox vaccination). In *Jacobson*, the Court viewed the intrusion as set forth in the statute as one of relatively minor proportions, *unless* it could be shown that the individual in question was not a suitable candidate for inoculation by reason of danger to his health which could be caused thereby, at which point the permissible reach of the police power is at its end, *id.* at 37, 39. *Cf. Winston* v. *Lee*, 470 U.S. 753 (1985).

rather than civil proceeding if petitioner able to show no treatment being provided).

Both the control rationale and the necessary duality of purpose underlay this Court's decision in *Schall* v. *Martin*, 467 U.S. 253 (1984). Beginning from the premise that juveniles "*unlike adults*, are always *in some form of custody*," *id.* at 265 (emphasis added), the Court noted that "children by definition are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the state must play its part as *parens patriae*." *Id.* Just as a breakdown in the internal individual control mechanism may justify civil commitment, so too may a failure of the external parental control system warrant state intervention in the life of a juvenile. Moreover, this Court explicitly framed the question for determination as "whether, in the context of the juvenile system, the *combined interest* in protecting both the community and the juvenile himself from the consequences of future criminal conduct is sufficient to justify [pretrial] detention" (emphasis added).[24] *See Ingraham* v. *Wright*, 430 U.S. 651, 652 (1977) (state may impose reasonable corporal punishment in public schools as necessary to the proper education of the child *and* the maintenance of group discipline).

The pretrial detention of competent adults breaks new, and constitutionally forbidden, ground in two ways: its purpose is neither therapeutic nor necessary to the operation of the criminal justice system, and persons subject to it suffer from no disability either of status or capacity that would distinguish them from other citizens. *See* Hickey, *supra* note 14, at 295. The full liberty interest of competent adults, that core value at the heart of all freedom, is so unquestionably indispensable to the perpetuation of our constitutional system that it neces-

[24] Thus, in answering in part the question left open in *Bell* v. *Wolfish*, 441 U.S. at 534 n.15, whether any governmental objective other than ensuring the presence of the defendant at trial may constitutionally justify pretrial detention, the Court repeatedly stressed the conjunction of the state's *parens patriae* power with its police power to protect the community. Nothing in the opinion intimates that such detention could be sustained in the exercise of the police power alone.

sarily transcends all invocations of governmental power to limit it on the basis that the individual manifests certain characteristics deemed to be inimical to the public interest.[25] While the government interest in protecting the community articulated in *Schall* remains the same in the context of adults, and it is undoubtedly a weighty and important one, when the naked police power, unsupplemented by equally weighty but ameliorative state interests such as those inherent in the *parens patriae* power, runs squarely into the right of every competent adult to be free from restraint except upon conviction of crime, accompanied by the attendant panoply of due process and Sixth Amendment safeguards, its reach is at an end, for it has entered a territory where the weight of the governmental interest, no matter how strong, is no longer controlling. Rather, it is a fundamental tenet of our constitutional system that the incarceration of a citizen, presumably capable of responding to the law's commands, solely in order to prevent future crimes, is anathema unless predicated upon criminal conviction.

III. The Procedures Whereby Pretrial Detention on the Ground of Future Dangerousness May Be Ordered under Section 3142 Are Incompatible with the Fundamental Fairness Required by Substantive Due Process And Fail to Protect Against an Erroneous Deprivation of Liberty.[26]

While, as the government asserts, Congress considered issues relating to bail reform and pretrial detention for many years

[25] As Judge Newman observed in *United States* v. *Melendez-Carrion*, 790 F.2d at 1004: "In only one instance in the constitutional jurisprudence of this country has the Supreme Court upheld the preventive detention of competent adults, prior to conviction of any crime. In *Korematsu* v. *United States* . . . the Court approved the compulsory relocation and related detention of Americans of Japanese descent during World War II to prevent them from committing acts deemed inimical to the Nation's security, indeed its survival. If *Korematsu* is valid today, a proposition seriously to be questioned . . . . it illustrates the rare, possibly unique, circumstance in which preventive detention of a competent adult in a time of national emergency comports with the requirements of due process despite the total deprivation of liberty safeguarded by the Fifth Amendment."

[26] Petitioner addresses the procedural defects of the statute only because the government has sought to sustain the validity of the Bail Reform Act by ref-

prior to arriving at the formulation ultimately adopted, those years of study reflect less a careful concern for the rights of the individuals affected than a calculated concern to appear to be so doing. Nowhere is the reality of this essential disregard for the fundamental liberty right of all competent adults more evident than in the largely illusory procedural "protections" set forth in § 3142, in phrases which recite the appropriate language on the one hand while on the other hand rob them of any meaning or practical effect.

The extraordinary vagueness of the applicable standard, whether any condition or combination of conditions will reasonably assure "the safety of any other person and the community," 18 U.S.C. § 3142(e), fails to provide either adequate notice to the defendant of what he must defend against or adequate guidance to the judicial officer as to what precisely he must find. The legislative history counsels that the act is intended to apply only to "a small but identifiable group of particularly dangerous defendants,"[27] S. Rep. No. 98-225 at 6-7, "demonstrably dangerous defendants," S. Rep. No. 97-317,

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erence to what it contends are carefully crafted and extensive procedural safeguards and because the procedural structure of the act underscores its fundamental incompatibility with basic principles of substantive due process and fundamental fairness. Because this particular case presents no procedurally based challenges to the act's constitutionality, this discussion is limited to the most glaring of the act's procedural shortcomings and is not intended as a catalogue of its failings.

[27] In light of the actual experience under the operation of the Bail Reform Act, one must question whether prosecutors and courts are ignoring the expressed assessment of Congress that detention is intended to reach only a small class of defendants or rather are responding affirmatively to what is perceived as the "real" intent of Congress. While the experience under the District of Columbia statute at issue in *Edwards* indicates that it was in fact sparingly employed, being invoked only approximately 60 times in the first five years of its existence, H.R.Rep. No. 1419, 94th Cong., 2d Sess. 4 (1976), the few available statistics regarding use of the Bail Reform Act indicate vast overutilization. Justice Department figures show that in the first ten months after the effective date of the Act, 2853 detention hearings were held, resulting in 1114 detentions on the basis of flight, 881 on the basis of dangerousness, and 705 on the basis of both. Figures reported to the Administrative Office of the U.S. Courts by United States Magistrates for a five month period in 1985 showed the holding of 4178 detention hearings, a figure which when annualized would suggest an annual rate equivalent to nearly 25% of all federal felony prosecutions. Riley, *Preventive Detention Use Grows — But Is It Fair?* 8 National Law Journal 1, 32 (March 24, 1986) (hereinafter referred to as Riley).

97th Cong., 2d Sess. 38 (1982), "a reasonably identifiable group of defendants who would pose a serious risk to the safety of others if released," due to a "strong possibility" that the defendant will commit additional crimes if released. S. Rep. No. 98-225 at 7, 10. The Senate Committee expressed its intention that the concept of dangerousness "be given a broader construction than merely harm involving physical violence," emphasizing also that continued drug trafficking would fall within the rubric of dangerousness to the community.

Imprecise as this language may be, the statute itself contains even less guidance. Detention may be invoked where a defendant is charged with a crime of violence, a crime for which the maximum penalty is life imprisonment or death, a controlled substances offense for which a maximum penalty of ten years or more is prescribed, or a felony committed after two prior convictions, 18 U.S.C. § 3142(f)(1)(A)-(D). The term "crime of violence" means "an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another" or "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 3156(a)(4)(A), (B). However, while a charge of such a crime of violence suffices to permit a detention request, the legislative history indicates that the dangerousness which will authorize a detention order is not limited by even this relatively open-ended definition, and § 3142(g) instructs the judicial officer to consider "the nature and seriousness of the danger to any person or the community that would be posed by the person's release" without providing any guidance as to the nature of the danger sought to be avoided, either as to its qualitative or quantitative features.[28]

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[28] The grotesque distortions possible under such amorphous standards are exemplified by a pair of cases from the Middle District of Pennsylvania. In *United States* v. *Yeaple*, 605 F.Supp. 85 (M.D. Pa. 1985), the Court concluded that the federal offence of receiving material the production of which required a minor to engage in sexually explicit conduct was a crime of violence within the act because persons who create a demand for such materials by purchasing them indirectly cause minors to be drawn into this activity and bear some respon-

Section 3142 entrusts the liberty of free men to judicial officers who must necessarily "guess at [the statute's] meaning and differ as to its application . . . ." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). Statutes which work a deprivation of liberty must provide fair notice of the standards which will be utilized in making the deprivation decision and must provide criteria sufficiently clear to preclude arbitrary or discriminatory enforcement.[29] *See Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972); *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). Section 3142 provides suffi-

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sibility for the violence done to them, "psychologically if not physically." *Id.* at 87. On this basis and the fact that the defendant had himself at some time in the past photographed minors engaging in sex, the defendant was ordered detained as a danger to the community. The National Law Journal reports that Mr. Yeaple was detained for three months, pled guilty and was immediately released on bail pending sentencing, and was subsequently placed on probation. Riley, *supra* note 27, at 33. Similarly, in *United States* v. *Cocco*, 604 F.Supp. 1060 (M.D.Pa. 1985), the court applied a dictionary definition of "violence" as "injury by or as if by distortion, infringement, or profanation" to conclude that the same statute was a crime of violence, corrupting of minds and morals, resulting in an order detaining a defendant described as a good father and husband, a successful and respected businessman with a good reputation in the community, and a substantial property owner with no prior criminal record. The same National Law Journal article reports a successful attempt to detain on a theory of "economic violence" in a credit card fraud case. Riley, *supra* note 27, at 33.

[29] That the statute also provides no curb upon prosecutorial arbitrariness is exemplified by the history which preceded the detention in this case. Respondent Salerno was indicted in February, 1985, for RICO conspiracy and substantive offenses, together with twenty-two other counts of extortion from businesses which affect interstate commerce, extortionate interference with labor unions, and loansharking. Alleged as part of the means of furthering the conspiracy were six murders and one conspiracy to murder, notwithstanding which the government agreed to Mr. Salerno's release on a $2 million secured bond with only the standard conditions. Nonetheless, in March, 1986, upon Salerno's arraignment on the indictment on which he is now held, which alleges bidrigging in the concrete construction industry, an extortionate transaction in the food manufacturing and distribution industry, exercise of control over unions, operation of an illegal gambling business, loansharking, and two conspiracies to murder, the government moved to detain the defendant pursuant to 18 U.S.C. § 3142(f)(1)(A), on the ground that he posed a danger to the community, notwithstanding the absence of any new information obtained since February, 1985, or of any indication of criminal wrongdoing by Salerno since that date. See Defendant Salerno's Supplemental Appendix in Support of His Motion for Conditions of Release, Vol. I(D) (Transcript of hearings before Walker, J.) (hereinafter referred to as Bail Appendix).

cient clarity neither "to guide the judge in its application" nor "the lawyer in defending one charged with its violation," *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 (1952); it is an essentially empty standard, its content to be supplied on an *ad hoc* basis by the decisionmaker, who is free to decide how much dangerousness of what sort is too much to be averted through the imposition of stringent release conditions, and what particular aspects of community safety merit the draconian protection of the detention sanction.[30]

While the defendant does in most cases have notice of the charged past offense asserted to trigger the detention request, the statute fails to provide for any form of notice as to the future behavior on which detention is sought to be predicated. Notice of the adjudicatory basis upon which the government proposes to inflict a deprivation of liberty is an essential component of due process, the foundation upon which other procedural protections build and without which they are merely a cruel illusion. *See, e.g., Morrissey* v. *Brewer*, 408 U.S. 471 (1972) (notice of alleged violations essential to process due before revocation of conditional parole liberty); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (probation revocation); *Wolff*

[30] Detention may be ordered only upon a finding that *no* conditions of release will reasonably assure the safety of the community, 18 U.S.C. § 3142(e). The range of available release conditions is set forth in § 3142(c)(1),(2)(A)-(N); that subsection includes a residuary clause allowing the decisionmaker to impose *any* other condition that he finds to be reasonably necessary to assure the safety of the community. As an example of just how restrictive those release conditions may be, Salerno here offered, in addition to secured bail in the amount of $2 million, to report personally to pretrial services whenever required and, in any event, to report telephonically before noon on a daily basis; to confine himself to his home in Rhinebeck, New York, with the exception of court appearances, consultation with his lawyer or his physician, and medically necessary walking in the vicinity of his home, notifying probation in advance of each meeting with physician or lawyer of his purpose and destination and telephoning again on his return; to submit himself to random visitation by probation; to have a pen register on all telephones at his residence; and to refrain from any association with named coconspirators as well as codefendants, except in the presence of his attorneys for purposes of defense preparation. See Bail Appendix, Vol. I(D) at 80-84; Vol. II(A) at 70.

While imposition of onerous and restrictive release conditions solely upon the ground of anticipated future dangerousness is not itself free from constitutional difficulty, the issue is not presented herein. Wherever the constitutional line may fall, the qualitative and quantitative leap from release on conditions to detention places the latter beyond the constitutional pale.

v. *McDonnell*, 418 U.S. 539 (1974) (loss of prison good time); *Goss* v. *Lopez*, 419 U.S. 565 (1975) (school suspension); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits).[31] Refutation of the proposition that one will, if given the opportunity to do so, intentionally make the morally culpable choice to commit a particular crime is, at best, an amorphous undertaking but when the breadth of the "charge" encompasses potentially the entire spectrum of conduct which might be found to jeopardize the safety of the community, the opportunity to be heard becomes virtually meaningless.

Compounding the vagueness of the statutory standard and the absence of any notice to defendant reasonably calculated to define the issues for hearing is the statutory exemption of these proceedings from the applicability of the rules of evidence, which has unanimously been interpreted to permit the

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[31] While the indictment may embody sufficient information to frame the issues for trial of the offenses charged, any notice it provides as to the asserted basis for detention is purely incidental. The nature and circumstances of the offense charged is only one factor among many to be considered in the detention calculus under 18 U.S.C. § 3142(g). While in some cases, the government will indeed contend that the future dangerousness feared is a continuation or repetition of the past behavior alleged in the indictment, this is no assistance to the defendant in preparing to oppose detention if he does not know that this is the basis for the government's contention. In a multi-count indictment, defendant knows neither which offense is relied upon as the triggering offense nor which charged offense — if any — the government will contend is likely to continue or be repeated absent detention. Moreover, the asserted future dangerousness may be of an entirely different nature than that which inheres in the offenses charged in the indictment. This is especially true in light of the statutory authorization for the use of hearsay in that it permits the detention request to be predicated on the indicted offense and the asserted dangerousness to be based upon a wide range of informant information regarding entirely unrelated and unproven past behaviors. In this case, for example, the most fact-specific allegations contained in the government's proffer, the Nardi-Green murders, which were particularly stressed by the government as a basis for detention have never been the basis of a criminal charge against Salerno. See Bail Appendix at A, B, D. Indeed, the act itself does not even require that the future dangerous behavior in fact involve the commission of crime. Without advance notice of at least the general category of dangerous conduct in which it is feared the defendant will engage, the defendant is significantly handicapped in preparing to refute the government's claim, whether through the proposal of release conditions specifically tailored to meet and negate the likelihood that the safety of the community would be threatened in the manner feared or through the presentation of affirmative evidence directed to the issue or through effective cross-examination of government witnesses.

government to meet its burden of proof in part or in full through hearsay. *See, e.g., United States* v. *Acevedo-Ramos*, 755 F.2d 203, 207 (1st Cir. 1985); *United States* v. *Hurtado*, 779 F.2d 1467, 1479-80 (11th Cir. 1985); *United States* v. *Winsor*, 785 F.2d 755, 756 (9th Cir. 1986); *United States* v. *Perry*, 788 F.2d 100, 106 (3d Cir. 1986); *United States* v. *Portes*, 786 F.2d 758, 764 (7th Cir. 1985). Characteristically, such hearsay involves the recitation by a government agent of information furnished by informants who are themselves heavily involved in criminal activity and whose interests thus lie in encouraging a favorable regard by the government or a recitation by one government agent recounting the investigatory procedures and observations of another, the reason for whose absence is neither questioned nor considered. At least one court has interpreted the act as relieving the government of the need to present *any* live witnesses whatsoever, allowing it to proceed entirely by proffer, *United States* v. *Martir*, 782 F.2d 1142, 1146 (2d Cir. 1986), which procedure was followed in this case, even though the act by its express terms only permits the defendant to proceed by proffer,[32] *see United States* v. *Suppa*, 799 F.2d 115, 118 (3d Cir. 1986). Thus while § 3142(f) confers the right to cross-examine those witnesses who do appear at the hearing, that protection is rendered largely nugatory by the concomitantly established authorization for the government to structure its presentation in such a manner as to insulate the declarant from cross-examination, thereby delivering up to the

[32] At least one Court, on the other hand, has ignored the clear language of § 3142(f) that "[t]he person shall be afforded an opportunity . . . to present witnesses on his own behalf . . .", holding that the judicial officer, in the exercise of his discretion over the conduct of the hearing, may refuse to hear witnesses for the defendant and insist that counsel proceed by proffer. *United States* v. *Delker*, 757 F.2d 1390, 1396 (3d Cir. 1985).

Section 3142(f) also grants the defendant an opportunity to testify, an empty concession in light of Congress' rejection of a proposal to confer immunity upon a defendant's detention hearing testimony, one which poses the choice between the risk of self-incrimination and lengthy and onerous detention. *See United States* v. *Perry*, 788 F.2d 100, 115 (3d Cir. 1986). The right to proceed by proffer must accordingly be preserved for the defendant.

government the power to determine what, if any, confrontation shall be afforded the defendant.[33]

Confrontation has long been regarded as a fundamental component of the process due whenever a substantial and irremediable deprivation is at stake. *See, e.g., Specht* v. *Patterson*, 386 U.S. 605 (1967) (indeterminate sexually dangerous person commitment); *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270 (1940) (same); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) (parole revocation); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (probation revocation); *In re Gault*, 387 U.S. 1 (1967) (juvenile proceedings); *Jenkins* v. *McKeithen*, 395 U.S. 411 (1969) (commission investigation); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits); *Greene* v. *McElroy*, 360 U.S. 474 (1959) (loss of security clearance); *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963) (bar admission). *Cf. Bridges* v. *Wixon*, 326 U.S. 135 (1945) (deportation).[34] This Court's discussion in *Greene* v. *McElroy*, *supra* at 496, is particularly pertinent:

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[33] Several courts have expressed some disquiet with this imbalance. The First Circuit in *United States* v. *Acevedo-Ramos*, 755 F.2d 203, 207 (1st Cir. 1985), recognized the difficulties inherent in reconciling the statutory right of cross-examination with the admissibility of hearsay; while acknowledging the strength of the arguments against use of hearsay in detention hearings, however, it chose rather to limit the hearsay on which the judicial officer might rely to investigatory descriptions of evidence, and similar hearsay, where the judicial officer reasonably concludes that the evidence, in the particular circumstances of the hearing, is reliable. To give greater effect to the right of cross-examination, the Court also empowered the judicial officer to insist upon the production of the underlying evidence or evidentiary source where its accuracy is in question. While recognizing its importance, the Third Circuit declined to address the hearsay/confrontation issue in *United States* v. *Perry*, 788 F.2d 100, 115 (3d Cir. 1986), because Perry had been afforded an opportunity to subpoena the agents whose extrajudicial declarations were reported but had failed to use it. *See also United States* v. *Accetturo*, 783 F.2d 382, 389 (3d Cir. 1986) (congressional authorization of hearsay does not represent determination that it is always appropriate). *But see United States* v. *Delker*, 757 F.2d 1390 (3d Cir. 1985) (permissible for judicial officer to refuse to allow defendant to subpoena hearsay declarants).

[34] While this Court concluded in *Gerstein* v. *Pugh*, 420 U.S. 103, 121 (1975), that confrontation and cross-examination were unnecessary to the initial probable cause determination required before a person could be held for further proceedings, its reasoning underscores the need for confrontation in the context of pretrial detention hearings:

> The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends upon fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty, or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirement of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which pro-

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the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable doubt *or even a preponderance standard* demands and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt . . . . This is not to say that confrontation and cross-examination might not enhance the reliability of probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards assigned for trial must also be employed *in making the Fourth Amendment determination of probable cause* (emphasis added).

The consequences of a *Gerstein* probable cause finding are merely that the criminal process will continue through all the subsequent stages to its conclusion; that an incidental consequence of a probable cause determination may be the detention of the defendant on the ground that there is reasonable apprehension that he will not submit to the continuation of the process, a decision reached in a separate proceeding directed to qualitatively different issues, does not justify reading *Gerstein* as authorizing pretrial detention based upon a finding of probable cause, and, indeed, this Court was scrupulously careful to indicate that such was *not* its meaning. *See id.* at 114, 120. Moreover, the imposition of detention requires findings of fact by clear and convincing evidence, a much "fine[r] resolution of conflicting evidence" than even the preponderance standard which this Court found far more demanding than the Fourth Amendment probable cause standard. Finally, and most critically, we are not here concerned with a preliminary determination of Fourth Amendment probable cause but rather with the complete and total deprivation for months if not years of the liberty *per se* of a presumptively innocent person, a deprivation demanding of the highest level of procedural protection. *Cf. Morrissey* v. *Brewer*, 408 U.S. 471 (1972) (probable cause insufficient basis for parole revocation, involving *conditional* liberty of person as to whom presumption of innocence extinguished by conviction).

> vides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny . . . .

Section 3142, while paying lip-service to the general requirement of confrontation and cross-examination, confers a right to so little of either as to be essentially meaningless as a mechanism of adversarial testing, a void which the defendant is powerless to fill in light of the statutory failure to provide for compulsory process.

An additional obstacle in the way of full exploration of the validity of the asserted factual bases for a finding of dangerousness is the conclusiveness accorded the indictment as a finding of probable cause sufficient to warrant further inquiry into the need for detention at the behest of the government, *see, e.g.*, *United States* v. *Hurtado*, 779 F.2d at 1477; *United States* v. *Contreras*, 776 F.2d 51, 54 (2d Cir. 1985); *United States* v. *Suppa*, 799 F.2d at 119; *United States* v. *Perry*, 788 F.2d at 112, an inquiry which is bootstrapped into its own answer by the triggering of the statutory presumptions where applicable. *See* 18 U.S.C. § 3142(e).[35] Missing in the process is any opportunity for the defendant to challenge the factual predicate for a finding of probable cause, perhaps the most important factor in preventing the pretrial detention of an innocent per-

[35] While this case did not involve application of the statutory presumptions of dangerousness, it is difficult to reconcile presumptive preventive detention with any notion of fundamental fairness or substantive due process, even if accorded the ameliorative construction of such cases as *United States* v. *Jessup*, 757 F.2d 378 (1st Cir. 1985). Treating the presumptions as a factor to be considered along with the § 3142(g) factors, to be given whatever weight the judicial officer deems appropriate, incorporates into the decisionmaking an improper general focus unrelated to the characteristics of the individual; i.e. that Congress has determined that persons possessing certain designated attributes should, in general, be deprived of their personal liberty pending trial. Moreover, given Congress' repeated protestations that the persons to whom detention should be applicable are readily and demonstrably identifiable, *e.g.*, S. Rep. No. 98-225 at 6-7, the artificial boost provided by the presumptions should be unnecessary to the process.

son; and, to the extent that the posited future dangerousness involves the anticipated continuation of the past conduct charged in the indictment, depriving him of the opportunity to refute the objective manifestation of the basis asserted.[36]

The extraordinary vagueness of the statutory standard, the acceptability of hearsay or even proffer as the basis for a detention order, and the concomitant limitation upon the right of confrontation and cross-examination all combine to rob of any meaning the statutory requirement of proof by clear and convincing evidence. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' . . . The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington* v. *Texas*, 441 U.S. 418, 423 (1979). Where, as here, proceedings employ imprecise substantive standards in a format which places the determination at the mercy of the subjective values of the judicial officer by granting the discretion to underweigh factors favorable to the defendant and to overweigh factors favorable to the government, the risk of error is magnified from the outset. *See Santosky* v. *Kramer*, 455 U.S. 745, 758 (1982). Further exacerbating the risk of error is the relaxation and even abandonment of the rules of evidence. *See Bridges* v. *Wixon*, 326 U.S. 135, 153-54 (1945) ("the more liberal the practice in admitting testimony, the more imperative the obligation to

[36] The Ninth Circuit, in fact, considers the weight of the evidence the least important of the § 3142(g) factors. *E.g.*, *United States* v. *Motamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985). Significantly, the rationale underpinning this minimization of the scrutiny afforded the very offense charged which precipitated the detention request arises from an uneasy recognition that the greater the focus on the past offense charged, the more the statute assumes punitive rather than regulatory proportions. On the other hand, the Eleventh Circuit has acknowledged the unfairness inherent in an absolute preclusion, intimating that while the indictment may trigger both the hearing and the statutory presumptions, the analysis for purposes of the § 3142(g) weight of the evidence factor may necessarily be broader, including the right to cross-examine the government witnesses whose testimony led to the evidentiary finding of probable cause, *United States* v. *Hurtado*, 779 F.2d 1467, 1479-80 (11th Cir. 1985).

preserve the essential rules of evidence by which rights are asserted or defended"). The conjunction of the amorphous adjudicatory standards with the absence of evidentiary standards sends a message to the factfinder in direct opposition to that which is theoretically to be derived from the superimposition of an enhanced burden of proof, such that the clear and convincing standard does little or nothing to reduce the potential for an erroneous deprivation of liberty.

Further diluting the possibility that the clear and convincing standard will fulfill the function ascribed to it is the curious statutory distinction between the facts upon which the finding of dangerousness is based and the finding itself; Section 3142(f) provides that "[t]he facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety . . . of the community shall be supported by clear and convincing evidence"; § 3142(e) is silent as to the degree of relationship which these facts must bear to the ultimate finding that "no condition or combination of conditions will *reasonably* assure . . . the safety of . . . the community" (emphasis added), a formulation which suggests a lower evidentiary threshold. Section 3142 does not by its terms require that *future* dangerousness be found to a clear and convincing level of certainty but only the underlying historical facts which are said to give rise to the conclusion.[37]

In addition, there is no requirement that the judicial officer find by clear and convincing evidence that the defendant committed the offense asserted to trigger the applicability of § 3142(f), the weight of the evidence against the defendant being merely one factor among many, to be accorded whatever significance the judicial officer deems appropriate under the

[37] The incongruity of allowing a clear and convincing standard to be met by hearsay or proffer is underscored by the fact that rights so substantial as to demand the protection of an enhanced burden of proof have generally been thought also to demand the protections afforded by the rules of evidence. *See, e.g., Santosky* v. *Kramer*, 455 U.S. 745 (1982) (termination of parental rights); *Addington* v. *Texas*, 441 U.S. 418 (1979) (civil commitment).

circumstances.[38] This Court has frequently noted the requirement that deprivation of liberty be grounded in past misconduct as well as future dangerousness. *See, e.g., Jones* v. *United States,* 463 U.S. 354, 361, 364 n.12 (1983); *Specht* v. *Patterson,* 386 U.S. 605, 608 (1967); *Minnesota ex rel. Pearson* v. *Probate Court,* 309 U.S. 270, 274 (1940); *Allen* v. *Illinois,* ___ U.S. ___, 106 S.Ct. 2988, 2993 (1986). *Cf. Addington* v. *Texas,* 441 U.S. 418, 429 (1979) (requiring clear and convincing evidence of mental illness *and* dangerousness). *But see Jackson* v. *Indiana,* 406 U.S. 715, 728 (1972) (no affirmative proof accused had committed criminal act; pending charges did not supply such proof in context of civil commitment statute).[39] The more attenuated the relationship between the imposition of pretrial detention and the past conduct which gave rise to its invocation, the more nearly the Bail Reform Act approximates a pure preventive detention scheme.

Finally, the deprivation at issue here is indistinguishable in terms of the consequences to the individual and the attendant stigmatization from that imposed by the criminal sentencing process; indeed, it is far more onerous than criminal sanctions such as fine, probation, or very brief periods of incarceration which must nonetheless be supported by a finding of guilt beyond a reasonable doubt:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake an interest of immense importance both because of the

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[38] The statute at issue in *United States* v. *Edwards,* 430 A.2d 1321 (D.C. App. 1981), required that the government demonstrate a "substantial probability" that the defendant had committed the offense charged. The omission of any such requirement from the Bail Reform Act was deliberate. *See* S. Rep. No. 98-225 at 18.

[39] The Court held in *Jackson* that the pendency of criminal charges could not justify commitment on different terms or by different procedures than those required for regular civil commitment once the justification for commitment as incompetent to stand trial had ended, 406 U.S. at 738, following *Baxstrom* v. *Herold,* 383 U.S. 107, 111 (1966), which had struck down a distinction for purposes of civil commitment between persons nearing the end of their criminal sentences and all other persons.

> possibility he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt . . . . There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value — as a criminal defendant his liberty — this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder . . . of his guilt beyond a reasonable doubt.

In re Winship, 397 U.S. at 363-64. *No* less is required in the pretrial detention context for the ultimate conclusion that the defendant is so dangerous that he must be stripped of his liberty prior to an adjudication of guilt.[40]

The procedures provided in § 3142 demonstrate not a careful balancing of individual rights against governmental interests but rather a constitutionally impermissible weighting of the scales in favor of detention. The established analytical framework for determining the parameters of the procedural protections required by the Due Process Clause was set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), and requires that the Court consider:

[40] While this Court held in *Addington* v. *Texas*, 441 U.S. 418, 429 (1979), that the constitution required the application of no less than a clear and convincing standard of proof to civil commitment cases, the liberty at stake therein was of one who was, by virtue of his mental illness, neither wholly at liberty nor free of stigma. Furthermore, the issue to be adjudicated was whether or not the individual was deprived by his illness of the ability to control his behavior such that he thereby posed a danger to himself or the community. In contrast, the Bail Reform Act is not cast in terms of a strict either-or proposition; the question is not whether the defendant is "dangerous" but rather whether he is *so* "dangerous" that even the most restrictive conditions of release, which may be tantamount to house arrest under watchful government surveillance, will not suffice. Moreover, the impact of an erroneous initial determination in a civil commitment case is somewhat ameliorated by liberal provision for the patient to obtain release if he is no longer dangerous, *see, e.g., Jackson* v. *Indiana*, 406 U.S. 715 (1972); the pretrial detainee once incarcerated is in for the duration, subject only to limited appellate review.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The individual interest at stake is of the highest and most fundamental and requires no further elaboration to demonstrate the necessity of the most stringent of procedural protections. "Given the grave invasion of the most fundamental of all personal liberties that occurs when preventive detention is ordered and the high risk of an erroneous judgment as to the highly speculative determination of future dangerousness, the procedural due process mode of analysis suggested by *Mathews* seems to require that the procedural safeguards should approach those used in the far less speculative enterprise of determining guilt of past misconduct." *United States* v. *Perry*, 788 F.2d at 114.

The government interest at stake presumably does not extend to the detention of individuals who would not if released engage in criminal behavior. *See, e.g., Santosky* v. *Kramer*, 455 U.S. at 764; *Addington* v. *Texas*, 441 U.S. at 426. Moreover, the expressed congressional certainty that it was dealing only with a small group of readily identifiable individuals would suggest that procedures more scrupulous of individual rights would not greatly undermine the act's avowed purpose.[41] The funda-

[41] The government's assertion that the procedural protections afforded under § 3142 are *ipso facto* adequate because greater than those accorded juveniles under the statutory scheme at issue in *Schall* v. *Martin*, *supra*, is not only not necessarily true but also ignores the vastly greater liberty at stake in the case of presumptively innocent competent adults and the far more severe deprivation involved, a difference between seventeen days and months if not a year or more. The degree of potential deprivation and its possible length are also significant factors to be considered. *Mathews* v. *Eldridge*, 424 U.S. at 341.

An additional purported justification for the casualness of the procedures sometimes advanced by the government is the requirement of § 3142(f) that the detention hearing be held immediately upon the defendant's first appearance

mental importance of the individual rights affected demands that any risk of error be borne by society rather than by the potential detainee. *Compare In re Winship*, 397 U.S. at 363-64, *with Addington* v. *Texas*, 441 U.S. at 428-29.

While this Court has indicated that there is "nothing inherently unattainable about a prediction of future criminal conduct," *Schall* v. *Martin*, 467 U.S. at 278, it is nonetheless an undertaking fraught with uncertainty, *see Barefoot* v. *Estelle*, 463 U.S. 880, 916 (1983) (Blackmun, J., dissenting), requiring full adversarial testing to "sort out the reliable from the unreliable evidence," *Barefoot* v. *Estelle*, 463 U.S. at 901. *See also Jurek* v. *Texas*, 428 U.S. 262 (1976). The government contends that the defendant is under the statute "entitled to a full adversary hearing on the detention question," Brief for Petitioner at 37; in light of the foregoing discussion, such a suggestion is preposterous. What is true, however, is that the fundamental fairness mandated by the Due Process Clause would require, at a minimum, a readily ascertainable adjudicatory standard, notice to the defendant of the grounds on which the government asserts he poses an unacceptable risk of danger to the community, an opportunity to contest the factual predicate underlying the crimes charged, the application of the rules of evidence, full rights of confrontation, cross-examination and compulsory process, and proof of future dangerousness beyond a reasonable doubt, predicated upon a finding by clear and convincing evidence that the accused committed the offenses charged.

This is not, of course, to suggest that a preventive detention statute incorporating these procedural protections would pass constitutional muster.

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before a judicial officer, subject to the possibility of a three day continuance at the request of the government or up to five days, or more if good cause is shown, at the request of the defendant. However, in the vast majority of cases indictment precedes arrest, such that it is within the power of the government to effect the arrest after it has largely marshalled its evidence and is ready to litigate a detention request. In most of the remaining cases, for example, where the defendant is arrested "at the scene," the arrest will have been preceded by surveillance and information gathering regarding the persons involved, such that persons with first hand knowledge will generally be available to testify.

> Even if a statute provided that a person could be incarcerated for dangerousness only after a jury had been persuaded that his dangerousness had been established beyond a reasonable doubt at a trial surrounded with all of the procedural guarantees applicable to determinations of guilt, the statute could not be upheld, no matter how brief the period of detention. It would be constitutionally infirm, not for lack of procedural due process, but because the total deprivation of liberty as a means of preventing future crime exceeds the substantive limitations of the Due Process Clause.

United States v. *Salerno*, 794 F.2d at 72, *quoting United States* v. *Melendez-Carrion*, 790 F.2d at 1001. Rather, the absence of such protections, indeed, of most of the protections generally deemed essential to the prevention of erroneous deprivations of fundamental liberties, compels the conclusion that the Bail Reform Act of 1984 legislates a deprivation of liberty wholly outside the bounds of the substantive limitations imposed by the Due Process Clause.

The government is not, however, left without recourse in pursuit of its interest in the prevention of future crime. The Bail Reform Act and other provisions of the Comprehensive Crime Control Act of 1984 provide the government with significantly enhanced powers to deal with new crimes committed by defendants while on pretrial release. *E.g.*, 18 U.S.C. § 3062 (authorizing arrest without warrant of person who agent has probable cause to believe has violated certain release conditions in his presence); 18 U.S.C. § 3147 (authorizing imposition of additional penalty of up to ten years consecutive to penalty for offense where crime committed while on release); 18 U.S.C. § 3148 (authorization for issuance of arrest warrant for violation of release condition; violation of release condition punishable as contempt). The availability of these procedures strikes the only regulatory balance possible in this context; through these processes the government is empowered to act when the defendant violates a release condition to which he has agreed to submit himself and which might reasonably be

viewed as a precursor to future crime, for example, association with known confederates or presence at a known locus of criminal activity, which have been forbidden to him by the conditions of his release.[42] Through the mechanism of imposition of sanctions for violation of a release condition, including incarceration for contempt, the defendant may be deprived of his liberty, not on the impermissible basis that he is believed to present an unacceptable risk of future dangerousness to the community but rather on the basis that he has elected, of his own free will, to flaunt the explicit terms of a known requirement. While such deference to basic human dignity and the right of self-determination may not perfectly serve the government's interest, where that interest conflicts with the fundamental right to liberty, the higher values embodied in the Due Process Clause must necessarily take precedence.

Conclusion.

The judgment of the Second Circuit Court of Appeals must be affirmed.

Respectfully submitted,

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[42] Such violations as these are among those for which federal agents are authorized under 18 U.S.C. § 3062 to arrest without a warrant if committed in the presence of the officer. Accordingly, if there is real reason to fear that the defendant will commit a serious crime while on pretrial release, the structuring of release conditions specifically tailored to minimize the possibility of its occurrence accompanied by surveillance to monitor the defendant's compliance with those conditions will permit the government to intervene in the event of a material breach without awaiting the actual happening of the feared event.