Restoring the Presumption of Innocence

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The most commonly repeated adage in U.S. criminal justice is the presumption of innocence: defendants are deemed innocent until proven guilty. Historically, this presumption carried important meaning both before and during trial. However, in light of state and federal changes in pretrial practice, as well as Supreme Court precedent restricting the presumption's application to trial, the presumption of innocence no longer protects defendants before trial. These limitations on the presumption are fundamentally inconsistent with its constitutional roots. The results of the presumption's diminution are also troubling as the number of defendants held pretrial has steadily increased such that the majority of people in our nation's jails have not been convicted of any crime. Few contemporary legal scholars have focused on the dwindling pretrial presumption, let alone its constitutional implications. This Article fills the void by examining, historically, how the Due Process Clause provides the constitutional basis for the presumption of innocence and how that presumption secures at least one pretrial right: the right to release on bail, absent serious flight risk. This Article introduces three principles to ensure that the pretrial presumption of innocence remains true to its constitutional roots. Returning the presumption to its constitutional foundation and ensuring its application in ways that are consistent with that foundation will result in less confusion in the courts and a more consistent approach to pretrial decisions.

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I. INTRODUCTION

The presumption of innocence is one of the most familiar maxims in criminal law.[1] Historically, the presumption protected defendants from the time of charge to trial.[2] Grounded in the Due Process Clause, the presumption prohibited judges from predicting whether defendants were guilty. Preventing judges from deciding defendants' guilt pretrial ensured that defendants would remain at liberty before trial. At trial, the presumption solely applied to require prosecutors to prove guilt beyond a reasonable doubt.[3]

Despite the historical import of the presumption of innocence, changes in federal and state statutes have increased the opportunity for judges to predict

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[1] Coffin v. United States, 156 U.S. 432, 453 (1895); *see also* 1 CORPUS IURIS CIVILIS § 22.2.3, at 325 (Theodorus Mommsen et al. eds., 16th ed. 1954) [hereinafter CORPUS] ("The burden of proof rests on who asserts, not on who denies."); James Bradley Thayer, *The Presumption of Innocence in Criminal Cases*, 6 YALE L.J. 185, 188–89 (1897).

[2] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *300 ("Upon the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the justice . . . ; there to abide till delivered by due course of law. But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity: and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only[.]" (citations omitted)); 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2511, at 504 (2d ed. 1923) (the presumption of innocence "hovers over the prisoner as a guardian angel" from the moment of indictment until the verdict is determined); *see, e.g.*, People v. Riley, 33 N.E.2d 872, 875 (Ill. 1941) ("Any person indicted stands before the bar of justice clothed with a presumption of innocence and, as such, is tenderly regarded by the law. Every safeguard is thrown about him. The requirements of proof are many, and all moral, together with many technical, rules stand between him and any possible punishment.").

[3] *In re* Winship, 397 U.S. 358, 361–63 (1970).

guilt before trial. Furthermore, the Supreme Court has said that the presumption of innocence solely requires the prosecutor to show proof beyond a reasonable doubt.[4] The result is that the presumption of innocence now applies only at trial.

The practical results of the presumption's diminution are apparent and troubling.[5] The number of defendants held pretrial has steadily increased such that the majority of people in our nation's jails have not been convicted of any crime.[6] In the last fourteen years, the United States has gone from releasing 62% of defendants to only 40%,[7] without much complaint, discussion, or even acknowledgement by legal scholars.[8]

While several legal scholars commented on bail and detention during the 1970s and 1980s,[9] few contemporary legal scholars have analyzed the results of the changes in pretrial release standards and loss of the presumption of innocence.[10] And while some scholars have grieved the loss of the presumption

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[4] Bell v. Wolfish, 441 U.S. 520, 582 n.11 (1979).

[5] HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 160 (1968).

[6] Of the individuals in local jails, 62% have not been convicted of a crime and are being detained pretrial. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2007, at 5 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/jim07.pdf.

[7] *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 1 (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs04.pdf (describing federal release statistics as an example).

[8] *See, e.g.*, U.S. DEP'T OF JUSTICE, DETENTION NEEDS ASSESSMENT AND BASELINE REPORT: A COMPENDIUM OF FEDERAL DETENTION STATISTICS 3–4 (2001), *available at* http://www.justice.gov/ofdt/compendium_final.pdf.

[9] *See* Sam J. Erwin, Jr., *Foreword: Preventative Detention—A Step Backward for Criminal Justice*, 6 HARV. C.R.-C.L. L. REV. 291 (1971); John Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 1–2 (1985); Gerald H. Goldstein, *Pretrial Imprisonment*, 54 TEX. L. REV. 1169, 1170–71 (1976); Jeff Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 WIS. L. REV. 441, 442 (arguing that a probable guilt model should apply pretrial rather than probable cause); Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371 (1970). For a recent discussion of the Bail Reform Act of 1984 and the Excessive Bail Clause, see Samuel Wiseman, *Discrimination Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 FORDHAM URB. L.J. 121, 122–23 (2009).

[10] *But see* William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 404 (1995) (discussing the Supreme Court's connection of the presumption of innocence to the Fourteenth Amendment Due Process Clause in *Estelle v. Williams*, 425 U.S. 501 (1976) and *Taylor v. Kentucky*, 436 U.S. 478 (1978)); Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1, 4 (2005) (stating that the presumption of innocence is a "fundamental principle of due process" and that it should not be relevant to predicting the final outcome of a trial); Louis M. Natali, Jr. & Edward D. Ohlbaum, *Redrafting the Due Process Model: The Preventive Detention Blueprint*, 62 TEMP. L. REV. 1225, 1235–36 (1989) (discussing the evolving scope and purpose of the presumption of innocence); Chalmous G. Reemes, Note, United States v. Salerno*: The Validation of Preventative Detention and the Denial of a Presumed*

of innocence, no articles have both analyzed the effects of this loss and explained without reliance on normative arguments why we should reclaim it.[11] This Article attempts to contribute to this scholarship by examining how the Due Process Clause is the constitutional basis for the presumption of innocence and how that presumption secures the right against pretrial detention, absent serious flight risk.[12] After conducting a historical analysis of the Due Process Clause and the presumption of innocence, this Article provides some thoughts on how the original meaning of the presumption of innocence should apply in the modern world. This Article puts forth three principles by which the presumption of innocence and due process can apply consistently, while precluding improper judicial predictions of guilt.

This Article proceeds in four stages. Part II of this Article traces the history of the presumption of innocence and its constitutional basis, beginning at ancient texts and continuing through to the common law and finally U.S. cases, with a focus on pretrial rights and bail. This section also traces the common law history of the Due Process Clause and the presumption of innocence and demonstrates that pretrial liberty was preserved because bail was presumed for noncapital cases. Bail determinations served the purpose of ensuring that the defendant appeared at trial, not preventing additional crimes from being committed. And there were no decisions about guilt before trial as legal guilt was properly determined at trial. Part III also analyzes the history of the changes to bail in federal and state courts, from the 1960s to 1980s, which removed the presumption of bail in most cases, led to pretrial weighing of evidence and expanded the number of legitimate reasons to detain the accused. Part IV discusses the changes in interpretation of the Due Process Clause and the impacts of these changes on the pretrial presumption of innocence by considering the state murder exception in bail cases as an example. Part V introduces, for the first time, three constitutionally rooted principles to guide the application of the presumption of innocence pretrial. Because there has been a lack of consistent principles to apply the presumption of innocence, it has

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Constitutional Right to Bail, 41 ARK. L. REV. 697, 701 (1988) (noting briefly that the Due Process Clause and the presumption of innocence are linked in that they both require proof beyond a reasonable doubt to deprive someone of her individual liberty).

[11] *Compare* François Quintard-Morénas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. COMP. L. 107, 126 (2010), *with* Patrick G. Jackson, *The Impact of Pretrial Preventive Detention*, 12 JUST. SYS. J. 305, 332 (1987). *But see* Ronald J. Allen & Larry Laudan, *Deadly Dilemmas III: Some Kind Words for Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 781, 782–83 (2011) (arguing that preventive detention does not necessarily require indefinite detention or denial of the right to notice upon arrest nor the possibility of incarceration for a significant amount of time without due process).

[12] The other constitutional basis is the Sixth Amendment. The historical development of the Sixth Amendment and its ties to the presumption of innocence will be discussed in a follow-up article. For an interesting argument that the Equal Protection Clause should be the basis for criminal rights since due process has run its course, see Jeremy M. Miller, *The Potential for an Equal Protection Revolution*, 25 QUINNIPIAC L. REV. 287, 289 (2006).

diminished in meaning and been inconsistently applied by courts. This section discusses three principles with which to apply the presumption of innocence pretrial. First, pretrial restraints of liberty should be limited to where there is a proper basis. The proper basis for restricting a person's liberty includes ensuring a person's attendance at trial, protecting the judicial process from interference by defendant, and if defendant is detained, protecting the security of the facility. Second, the pretrial focus should not be on guilt-determination and punishment as the Due Process Clause requires a conviction of guilt by a jury in order to punish an individual. Third, the focus of pretrial protections for defendants should not be on obtaining the truth of a person's guilt or innocence, but should protect defendants' liberty until innocence or guilt can be proven at trial. Respecting these rights will honor the original influence of the Due Process Clause on bail rights—tempered by modern realities—and has the potential of creating a disciplined change in focus in pretrial practice.

II. HISTORICAL UNDERSTANDING OF THE PRESUMPTION OF INNOCENCE

In the early days of common law development, imprisonment was scarcely judicial and was often used arbitrarily by the English monarchs.[13] However, "[o]ne of the most celebrated clauses of [the] Magna Carta was that which guaranteed the king's subject immunity from imprisonment, or other punishment, save through the due process of the law."[14] In the centuries following the Magna Carta, due process and the presumption of innocence gained substance at common law; and, subsequent abuses by the monarch eventually led Parliament to take action to reinforce these common law principles.[15] These common law principles crossed the Atlantic with the colonists.[16] Historically, in the United States, the presumption of innocence and due process required a legal determination at trial to punish a defendant for a crime.[17] Due process demanded that a person maintain liberty and not be

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[13] ROBERT BARTLETT, ENGLAND UNDER THE NORMAN AND ANGEVIN KINGS: 1075–1225, at 186 (2000). For example, Henry kept his brother Robert and the rebel, Robert de Belleme, in captivity until their death "out of prudence rather than after judgment." *Id.*

[14] ALAN LLOYD, KING JOHN 302 (1973).

[15] Early in the seventeenth century, Parliament engaged in heated debate about the "fundamental laws and liberties of the Kingdom" when Charles I arbitrarily imprisoned five of his knights. *See* Sarah Willms, *The Five Knights' Case and Debates in the Parliament of 1628: Division and Suspicion Under King Charles I*, 7 CONSTRUCTING THE PAST 92, 93 (2006), *available at* http://digitalcommons.iwu.edu/cgi/viewcontent.cgi?article=1082&context=constructing. Parliament eventually passed the Habeus Corpus Act of 1679; however, "[i]t should be noticed that the law did not grant anything new; that it did not make habeas corpus, but merely made efficient a writ, which was recognized as already existing." A.H. Carpenter, *Habeas Corpus in the Colonies*, 8 AM. HIST. REV. 18, 19 (1902).

[16] Carpenter, *supra* note 15, at 18–19.

[17] Wilkerson v. Commonwealth, 76 S.W. 359, 361 (Ky. 1903) (holding that punishment without evidence of guilt should not occur and in this case the court should have instructed the jury to find the defendant not guilty). The concept of the presumption of innocence is not

imprisoned or punished without appropriate legal action.[18] In addition, the presumption of innocence, a fundamental principle of American criminal law, presumed bail for all noncapital cases.[19] Also, since the primary purpose of bail was to ensure a defendant's presence at trial, the presumption of innocence did not allow judges to detain defendants because they were likely to commit a crime while released, or to weigh the evidence against defendants before trial, in deciding whether they should be released.

A. *Bail Was Presumed for Noncapital Cases and Guilt Was Not Determined Pretrial*

Historically, the presumption of innocence and the due process principles included a presumption of bail for noncapital cases and guaranteed that guilt would not be determined before trial. The presumption of innocence came into effect when a defendant was arrested and charged. One of the most significant protections that accompanied the presumption of innocence was the constitutional right to pretrial release through bail.[20] While there was some discretion and bail was not always allowed for every alleged crime, it was

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a modern development, and is common to many ancient legal systems. *See* Coffin v. United States, 156 U.S. 432, 454 (1895) (tracing the presumption of innocence from Deuteronomy and ancient Greek and Roman law). The U.S. legal tradition traces its reliance on the presumption of innocence to the English common law. *See* Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 965–66 (1965) (recognizing that the importance of avoiding prison pretrial was central to the famous Magna Carta promise that "'no freeman shall be arrested, or detained in prison . . . unless . . . by the law of the land.'" (quoting 1 ZECHARIAH CHAFEE, JR., DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 251 (1963))).

[18] *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."); *see also* CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 104 (1930) ("It is commonly conceded that the purpose of the phrase 'by the law of the land,' which was later transformed into the more popular form 'due process of law,' was intended primarily to insist upon rules of procedure in the administration of criminal justice, namely, that judgment must precede execution, that a judgment must be delivered by the accused man's 'equals,' and that no free man could be punished except in accordance with the law of England . . . .").

[19] *Coffin*, 156 U.S. at 453–54. The overarching rationale for this presumption is based on the widely held belief "[t]hat it is better a hundred guilty persons should escape than one innocent person should suffer." *See* Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 175 (1997) (quoting Benjamin Franklin and detailing the many formulations of this principle in the American legal tradition).

[20] *See* Stack v. Boyle, 342 U.S. 1, 8 (1951) (explaining that a defendant is entitled to pretrial release until proven guilty as the spirit of bail is to "enable the[] [defendant] to stay out of jail until a trial has found them guilty"); *see also* Hunt v. Roth, 648 F.2d 1148, 1156 (1981) ("The protection against excessive bail has a direct nexus to the presumption of innocence, implicitly recognized within the [F]ourteenth [A]mendment.").

generally presumed for all accused due largely to the presumption of innocence.[21] English bail law presumed that defendants would be released and discussed the "bail decision" as though it were a decision of *how* to release the defendant, not *if* he would be released. To deny bail to a person who is later determined to be innocent was thought to be far worse than the smaller risk posed to the public by releasing the accused.[22] Some ancient English law banned pretrial detention in all criminal cases, even murder, due to the presumption of innocence.[23] However, by 1275 and for the next 500 years, there was an exception in bail law prohibiting bail in murder cases,[24] though those accused of murder were often released anyway.[25]

In the first federal statement on bail, the Judiciary Act guaranteed bail for all noncapital offenses. The 1789 Judiciary Act held that all noncapital crimes should be bailable, though capital crimes were bailable at the discretion of the judge who "exercise[d] their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law."[26]

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[21] State v. Mairs, 1 N.J.L. 335, 336 (1795) (explaining that "before trial . . . prisoners are to be presumed innocent of the crime laid to their charge, [and] . . . the court ought to admit them to bail"); *see* Shore v. State, 6 Mo. 640, 641 (1840) ("By the Constitution of this State, every offense is bailable, except capital offenses where the proof is evident or the presumption great."); *Ex parte* Tayloe, 5 Cow. 39 (N.Y. Sup. Ct. 1825) (holding that bail is only proper where it stands indifferent whether the party be guilty or innocent of the accusation against him, as it often does before his trial and in this country "a prisoner is, *prima facie*, entitled to bail"); *see also* Dickinson v. Kingsbury, 2 Day 1, 11 (Conn. 1805) ("The personal liberty of the subject is to be favored, as far as is practicable and safe, until conviction. Bail for his appearance at the Court, in which his guilt or innocence is to be tried, is, at once, the mode of favoring that liberty, and securing the appearance for trial."); State v. Connor, 2 S.C.L. (2 Bay) 34, 35 (1796) (decision relying on the pretrial presumption of innocence).

[22] THOMAS WONTNER, OLD BAILEY EXPERIENCE: CRIMINAL JURISPRUDENCE AND THE ACTUAL WORKING OF OUR PENAL CODE OF LAWS 263 (London, James Fraser 1833).

[23] *Id.*

[24] Statute of Westminster I, 1275, 3 Edw. 1, c. 15 (Eng.); 4 BLACKSTONE, *supra* note 2, at *298 ("By the ancient common law, before and since the conquest, all felonies were bailable, till murder was excepted by statute . . . ."); ELSA DE HAAS, ANTIQUITIES OF BAIL: ORIGIN AND HISTORICAL DEVELOPMENT IN CRIMINAL CASES TO THE YEAR 1275, at 59 (1940) (explaining that bail was not extended to homicide cases); *see also* 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 234 (London, MacMillan & Co. 1883) (noting that the Statute of Westminster constituted the law on bail for 550 years in England).

[25] 4 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 527 (1924).

[26] Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91. Though I do not challenge the constitutionality of the Judiciary Act, since it simply implemented the English common law approach to bail, one originalist argument that may be posed is that the Judiciary Act was passed by the First Congress, of which many members were involved in the Constitution's drafting and passage, suggesting that this approach is constitutional. However, the response to this would be *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803), which overturned a part of the Judiciary Act. Additionally, the Judiciary Act arguably opened the way for evaluating the circumstances of the offense charged and the weight of the evidence against

In the early nineteenth century, U.S. state and federal courts unanimously agreed that the Constitution entitled the accused to pretrial release except when the crime charged was a capital offense.[27] During the nineteenth century, there was also discussion of how denying bail violated the presumption of innocence. Bail was presumed in most cases.[28] In capital cases, courts reserved discretion to determine whether the accused should receive bail.[29] The rationale was that in capital cases the death penalty may be imposed and a defendant would have a serious incentive to flee before trial. For instance, a London treatise stated that a defendant could not be held without bail since "every man shall be presumed innocent of an offence till he be found guilty."[30] And in some criminal actions

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the defendant in making discretionary bail decisions, at least with capital offenses. As discussed in the second part of this section, early state case law takes a similar approach to that of the Judiciary Act.

[27] Note though that during this time a larger number of felonies were considered capital offenses. *See* THE OXFORD COMPANION TO AMERICAN LAW 305 (Kermit L. Hall et al. eds., 2002) (noting that many common law felonies were capital offenses but defendant could avoid the death penalty by pleading "benefit of clergy").

[28] Hudson v. Parker, 156 U.S. 277, 285 (1895) ("The statutes of the United States have been framed upon the theory that 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, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."); United States v. Barber, 140 U.S. 164, 167 (1891) ("But in criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial . . . . Presumptively they are innocent of the crime charged, and entitled to their constitutional privilege of being admitted to bail . . . ."); People v. Tinder, 19 Cal. 539, 542 (1862) ("In all other cases, [except for capital cases] the admission to bail is a right which the accused can claim, and which no Judge or Court can properly refuse."); People v. Van Horne, 8 Barb. 158, 167 (N.Y. Gen. Term 1850) ("Until his guilt is legally ascertained, there is no ground for punishment, and it would be cruel and unjust to inflict it." (citation omitted)).

[29] *See* Hight v. United States, 1 Morris 407, 409 (Iowa 1845) ("The ordinance of 1787 . . . declares that 'all persons[] [sh]all be bailable, unless for capital offenses where the proof shall be evident or the presumption great.' . . . This is no new provision, but is in express terms incorporated into the constitutions of at least one-half of the States of the Union, and is the rule of action in all the rest."); *see also* Street v. State, 43 Miss. 1, 10, 24–25 (1870) ("But in the United States the accused has a constitutional right to bail in all '*except* in capital cases' . . . Under the [B]ill of [R]ights, bail before conviction is a matter of right (and not of discretion) for all offenses, except those that are capital . . . ." (emphasis added)); *Ex parte* Bryant, 34 Ala. 270, 271 (1859) (holding that bail is a right for all noncapital cases and stating that if the defendant rebuts the evidence of the indictment in a noncapital case he can be bailed); *Ex parte* Wray, 30 Miss. 673, 674 (1856) ("The provision of the constitution is as follows: 'That all prisoners shall, before conviction, be bailable by sufficient securities, except for capital offenses, where the proof is evident or the presumption great.'"); State v. Summons, 19 Ohio 139, 140 (1850) ("The constitution of Ohio, in article 8, section 12, provides, 'That all persons shall be bailable by sufficient sureties *unless for capital offenses, where the proof is evident, or the presumption great*.'").

[30] JOSEPH CHITTY, A TREATISE ON THE GAME LAWS, AND ON FISHERIES 188 (London, W. Clarke & Sons 1812).

the defendant was not required to post bail due to the presumption of innocence.[31] In noncapital cases, bail was generally presumed for the accused.

Courts were generally not allowed to weigh evidence against a defendant, except in capital cases. Courts emphasized that guilt must be determined at trial, not before trial, because of the Due Process Clause and presumption of innocence.[32] And part and parcel of requiring a conviction at trial was a court's duty to make sure that it did not determine guilt until trial.[33] When bail was required, it often depended on defendant's financial circumstances, not a determination of guilt against him.[34] Further, accused persons maintained innocence until proven guilty with evidence at trial, so judges did not weigh evidence against defendants in determining bail.[35]

However, in 1944, Federal Rule of Criminal Procedure 46 provided that courts may take into account several factors in setting a bail amount to ensure the defendant's appearance at trial, including "the *weight of the evidence against him*."[36] Since Rule 46 restricted the consideration of these factors to their relevance regarding whether defendant would appear in court, this provision did not change the inquiry from that done previously under the Judiciary Act. Though, allowing courts to consider how much evidence exists against the defendant in all cases (beyond the Judiciary Act that allowed this consideration only for capital cases) opened the way for later, more expansive determinations of defendant's guilt before a jury trial. Historically, however, the presumption of innocence was rooted in the Due Process Clause, requiring release on bail for defendants charged with noncapital crimes and requiring that a determination of guilt not occur until trial.

B. *Purpose of Bail Was Return to Court, Not Preventing Additional Crimes*

Bail historically served the sole purpose of returning the defendant to court for trial, not preventing her from committing additional crimes.[37] Indeed,

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[31] FRANCIS J. TROUBAT & WILLIAM W. HALY, NOTES ON PRACTICE 42 (Philadelphia, Robert Desilver 1825).

[32] *See supra* notes 19–20.

[33] Powell v. Alabama, 287 U.S. 45, 69 (1932) ("[D]ue process of law require[s] charges and a reasonable opportunity to defend or explain."). Indeed, courts in the 1940s and 1950s expressed willingness to take the risk that some guilty would escape, in order to avoid convicting the innocent. *See* Reynolds v. United States, 238 F.2d 460, 463 (9th Cir. 1956).

[34] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 311 (Boston, Little, Brown & Co. 1868).

[35] Coffin v. United States, 156 U.S. 432, 452 (1895).

[36] Stack v. Boyle, 342 U.S. 1, 5 n.3 (1951) (emphasis added) (quoting FED. R. CRIM. P. 46(c) (1946)).

[37] *See* Hudson v. Parker, 156 U.S. 277, 285 (1895) (holding that the only reason for bail is to ensure that the defendant appear for trial); Barret v. Lewis, 1 Mart. (o.s.) 189, 192 (La. 1810) ("Bail is required in this territory for the purpose of securing the plaintiff from the

English judges set bail with only one purpose: to ensure the defendant's appearance in court.[38] Early state courts very rarely weighed the evidence against the defendant openly pretrial, mentioned concerns for safety of the community, or considered dangerousness of the defendant—even to dismiss them as improper justifications for denying bail.[39]

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flight of the defendant and for no other purpose. It is the same in England."); *see also* Hunt v. Roth, 648 F.2d 1148, 1163 (8th Cir. 1981) ("The federal courts have traditionally held . . . [that] the only relevant factor is the likelihood that the defendant will appear for trial."); *Ex parte* Verden, 237 S.W. 734, 737 (Mo. 1922) ("Confinement in jail prior to trial is not authorized because defendant may eventually be convicted of the charge by a jury, or as any part of his punishment, if guilty, but to assure his presence when the case is called for trial and during the progress thereof. The *only theory* on which bail can be denied in any capital case is that the proof is so strong as to indicate the probability that defendant will flee if he has the opportunity, rather than face the verdict of a jury." (emphasis added)); People v. Van Horne, 8 Barb. 158, 167 (N.Y. Gen. Term 1850) ("For as I have already stated, the object of imprisonment before trial is not the punishment of the delinquent, but merely to secure his appearance in court when his trial is to be had."); Hampton v. State, 42 Ohio St. 401, 404 (1884) ("The object of bail is to secure the appearance of the one arrested when his personal presence is needed; and, consistently with this, to allow to the accused proper freedom and opportunity to prepare his defense. The punishment should be after the sentence.").

[38] CHARLES W. BACON ET AL., THE AMERICAN PLAN OF GOVERNMENT 282 (1916) ("Magistrates now fix bail with the one idea of making sure of the prisoner's appearance in court when wanted."); *see* 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 299 (George E. Woodbine ed., Samuel E. Thorne trans., Harv. Univ. Press 1968) (1872). Under the original purpose of bail, someone charged with a more serious crime who had no money, ties outside of the jurisdiction, or even a passport would likely receive bail, while a person who had cash and no community ties, but was charged with a lesser crime, may not be granted a lower bail amount. *See, e.g.*, Ackies v. Purdy, 322 F. Supp. 38, 42 (S.D. Fla. 1970).

[39] Some courts considered additional factors for "flight risk" that went beyond what was traditionally allowed, including the nature of the crime and weight of evidence against the defendant. A 1912 California court noted that "[t]here might be instances under this statute where, for the safety of the individual or of society, it would be proper to deny bail." *In re* Henley, 121 P. 933, 935 (Cal. Dist. Ct. App. 1912). And in 1930, a New York court considered the nature of the offense and weight of evidence against the defendant in determining bail. People *ex rel.* Rothensies v. Searles, 243 N.Y.S. 15, 17 (App. Div. 1930) (denying reduction of bail where no proof was offered to show why bail was excessive); *see* People *ex rel.* Gonzalez v. Warden, 233 N.E.2d 265, 269 (N.Y. 1967) (affirming $1000 bail in part because the defendant was accused of a "vicious crime"); People *ex rel.* Lobell v. McDonnell, 71 N.E.2d 423, 425 (N.Y. 1947). Indeed, the *Rothensies* dissent objected to this analysis, pointing out that "rumor" of a prior conviction is not a basis for a judicial decision setting bail at an excessively high amount. *Rothensies*, 243 N.Y.S. at 19 (Hasbrouck, J., dissenting). Dissenting, Justice Hasbrouck connected the denial of bail with due process, stating that setting a high bail based on a "foundation of [a] rumor certainly is to deprive a person accused of crime of his liberty without due process of law." *Id.* The dissent tied a denial of bail to the oppressive acts of English kings and stated that denial of bail is "not an act of justice, it is an act of oppression" which is forbidden. *Id.* (citing 1 W. & M., c. 2 (1689) (Eng.) (English Bill of Rights of 1688); U.S. CONST. amend. VIII; N.Y. CONST. art. 1, § 5).

Before releasing a defendant, the defendant had to find a surety. The surety was a family member or friend that would ensure the defendant would appear at trial or pay a fine. Because the defendant, presumably, would not want to punish his sureties he would not flee, and because the sureties would not want to pay a fine, they would make sure the defendant appeared in court.[40] Sureties would lose their financial deposit only if the defendant did not appear for trial, not if the defendant committed an additional crime. The focus of a surety was only to return the defendant to court, not prevent him from committing further crimes. Bail was not denied based on justifications of public safety or dangerousness posed by these defendants, and was solely denied when the court was not assured that defendant would appear at trial.[41]

Under U.S. law, the purpose of bail was to ensure the appearance of defendant to "submit to a trial, and the judgment of the court" and not for preventing future crimes.[42] In *Stack v. Boyle*, the Court demonstrated that it was serious that bail was only to ensure the defendant's appearance at trial, and not to prevent her from committing crimes.[43] Four defendants were charged with federal violations as a result of alleged Communist activities.[44] The defendants' bail was set extremely high, and the government, without introducing any specific evidence, sought to have that bail upheld on the grounds of the offenses charged.[45] The Court rejected the government's contentions, stating that bail should not be set unusually high based solely on the indictment.[46] Furthermore, the Court pointed to the long history of admitting bail for noncapital crimes and, tying these rights to due process and the presumption of innocence, noted that denying a defendant bail hurts his "traditional right to freedom before conviction" in addition to the "presumption of innocence."[47] Accordingly, "the

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[40] *See* Statute of Westminster I, 1275, 3 Edw. 1, c. 15 (stating that defendants should be bailed "without giving ought of their Goods").

[41] 2 YEAR BOOKS OF THE REIGN OF KING EDWARD THE FIRST: YEARS XXI and XXII, at 56–57 (Alfred J. Horwood ed. & trans., London, Longman & Co. 1873) [hereinafter KING EDWARD] (citing a decision of the Court of Common Pleas of 1293); Quintard-Morénas, *supra* note 11, at 126 n.176.

[42] Taylor v. Tainter, 83 U.S. (16 Wall.) 366, 371–72 (1872) (observing that people released on bail were required to come back to court to ensure a fair trial); *Ex parte* Milburn, 34 U.S. (9 Pet.) 704, 710 (1835) (Bail "is not designed as satisfaction for the offen[s]e, 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 offen[s]e."); United States v. St. Clair, 42 F.2d 26, 28 (8th Cir. 1930) ("Bail is to procure release of a prisoner by securing his future attendance.").

[43] 342 U.S. 1, 9 (1951).

[44] *Id.* at 3.

[45] *Id.* at 3.

[46] *Id.* at 6.

[47] *Id.* at 4 (citations omitted).

fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."[48]

Faced with the threat of Communism, lower federal courts faithfully applied the *Stack* rule requiring that the accused not be detained to prevent them from committing crimes. In a case dealing with Communist Party leaders who were convicted of "conspiring to advocate and teach the violent overthrow of the United States," a Second Circuit judge was reluctant to detain them based on a prediction—even on appeal.[49] The judge rejected the idea that a person would be put in prison to protect society from "predicted but unconsummated offenses."[50]

Overall, the purpose of bail historically was to release people before trial. And the Court in *Stack* made it very clear that people should not be denied bail to prevent them from committing additional crimes.

C. *Accused Individuals Were Not Incarcerated or Punished*

Historically, defendants were punished only when convicted, according to principles of due process and the presumption of innocence.[51] And the presumption of innocence protected individuals from imprisonment unless there was confession in open court or proof of guilt beyond a reasonable doubt.[52] Under the common law, the presumption of innocence prevented a felony from

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[48] *Id.* at 5. *Stack* thus restricted the exercise of bail authority to the standards of Rule 46.

[49] Williamson v. United States, 184 F.2d 280, 280 (2d Cir. 1950).

[50] *Id.* at 282. Though, *Carlson v. Landon*, decided the same term as *Stack*, took a markedly different approach to the presumption of innocence. Carlson v. Landon, 342 U.S. 524 (1952). *Carlson* also involved alleged Communists, but the *Carlson* defendants were resident aliens as well. *Id.* at 526. The defendants wanted to be released on bail pending deportation hearings. *Id.* at 527. The Court emphasized that bail was not guaranteed in all cases, *id.* at 545–46, justifying its decision on the basis that "[d]eportation is not a criminal proceeding and has never been held to be punishment." *Id.* at 537. Though *Carlson* was a deportation case, and thus potentially an exception to normal bail rules, it is the first case where the court introduced the idea that denial of bail might be justified if it could be shown to have been done for nonpunitive purposes. *Id.* at 557 (Black, J., dissenting). Four justices dissented, claiming that the majority was really detaining these individuals on the basis of dangerousness and because they were allegedly Communists. *Id.* at 551. Thus, where *Stack* prevented the consideration of a defendant's dangerousness or digging into details of his crime for purposes of bail determinations, *Carlson* appeared at least to condone it.

[51] *See* Quintard-Morénas, *supra* note 11, at 112 n.35; *see also* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON Law 552 (Boston, Little, Brown & Co. 1898).

[52] COOLEY, *supra* note 34, at 311; *see also* People v. Van Horne, 8 Barb. 158, 167 (N.Y. Gen. Term 1850) ("If it could be ascertained to a moral certainty that the accused would appear and stand his trial, there would be no valid objection to admitting him to bail. For as I have already stated, the object of imprisonment before trial is not the punishment of the delinquent, but merely to secure his appearance in court when his trial is to be had.").

attaching until a defendant was convicted.[53] As long as it was certain that the defendant would appear in court for her trial, she was entitled to avoid any punishment until the judgment of the court.[54] There was even a disincentive to bring false charges, and a series of statutes enacted to interpret the Magna Carta included a provision that if false arrests were made, the accuser would be punished in the same way as the accused would have been.[55]

The maxim that a defendant was not punished before trial had significant meaning historically. For instance, a defendant was not prohibited from Communion after he was accused but before conviction,[56] and a priest accused of adultery continued with his duties.[57] Accused officials retained their rank until convicted,[58] showing how the presumption of innocence shielded the accused from punishment prior to an adjudication of guilt.[59] This maxim sometimes went as far as not allowing arrests to be made in public, because this would be a type of punishment before trial.[60] Likewise in England, comments in the media about a person's guilt were criticized when the individual had not yet been found guilty.[61]

Early on, the Supreme Court clearly stated that no imprisonment or punishment is allowed until trial.[62] In the 1930s, the Court established that guilty defendants "until convicted" were presumed innocent.[63] In the 1950s and 1960s, the Court continued to uphold due process rights, insisting that there should not be any imprisonment until after a finding of guilt.[64] Due process rights guaranteed that a defendant should not lose liberty until the government produced evidence to convince the factfinder of her guilt.[65] The Court explicitly

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[53] Liberty of Subject, 1354, 28 Edw. 3, c. 1 (Eng.); KING EDWARD, *supra* note 41, at 56–57 (citing a decision of the Court of Common Pleas of 1293); Quintard-Morénas, *supra* note 11, at 126 n.176.

[54] 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE, § 262, at 158 (Boston, Little, Brown & Co. 1872).

[55] RALPH V. TURNER, MAGNA CARTA: THROUGH THE AGES 123–24 (2003) (describing statutes interpreting Chapter 29 of the Magna Carta during the reign of King Edward III in England).

[56] Quintard-Morénas, *supra* note 11, at 114 n.61.

[57] *Id.* at 114 n.62.

[58] *Id.* at 113 n.49; 1 CORPUS, *supra* note 1, § 50.1.17.12, at 894.

[59] With serious crimes, some were detained before trial but not treated harshly, and the trial process was speedy so that the innocent could be discharged. Quintard-Morénas, *supra* note 11, at 113.

[60] *Id.* at 117, 126–30; *see* Bryan v. Comstock, 220 S.W. 475 (Ark. 1920) (noting that arrests in public were formerly deemed oppresive, and arrests on Sunday prohibited).

[61] Quintard-Morénas, *supra* note 11, at 128 (citing HENRY FIELDING, THE COVENT-GARDEN JOURNAL AND A PLAN OF THE UNIVERSAL REGISTER-OFFICE 85 (Bertrand A. Goldgard ed., Clarendon Press 1988) (1752)) (denouncing press that stated that a woman poisoned her father before she was found guilty).

[62] Hudson v. Parker, 156 U.S. 277, 285 (1895).

[63] Powell v. Alabama, 287 U.S. 45, 52 (1932).

[64] Speiser v. Randall, 357 U.S. 513, 526 (1958).

[65] *Id.*; *see* Tot v. United States, 319 U.S. 463, 466–67 (1943).

connected these rights to the Magna Carta and required courts to not impose punishment "without due process of law."[66]

The Supreme Court affirmed the principle that the U.S. tradition is that "one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt."[67] However, it also became common practice among courts to nominally recognize the pretrial presumption of innocence while in practice set bail so high that it could not be reached by the accused.[68] This practice also extended to state courts.[69] Overall, though, due to the presumption of innocence being rooted in due process principles, the courts generally waited until after trial to impose any punishment or to incarcerate the accused.

D. *Due Process Focused on Proving Legal Guilt at Trial*

Historically, due process rights emphasized proving guilt of defendants legally at trial and preserving innocence pretrial. In order to protect due process rights and the presumption of innocence, early on, judges insisted on a trial and a legal basis to convict.[70] *Coffin* focused on the presumption of innocence as a legal burden and specifically held that the presumption of innocence was *separate and distinct* from the equally fundamental principle that the prosecution bears the burden of proof beyond a reasonable doubt.[71] The

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[66] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963).

[67] Bandy v. United States, 81 S. Ct. 197, 197 (1960); *see also* United States v. Bentvena, 288 F.2d 442, 444 (2d Cir. 1961) ("Thus, until trial commences, enlargement on bail is the rule, upon adequate assurance that the accused will appear at trial.").

[68] Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1495 (1966) (noting that "courts have said that bail in an amount greater than the defendant can raise is not necessarily excessive; the accused is entitled only to the opportunity to make bail in a reasonable amount, not to such bail as he can provide").

[69] Commonwealth *ex rel.* Ford v. Hendrick, 257 A.2d 657, 660–61 (Pa. Super. Ct. 1969) (recognizing dangerousness as a permissible basis for detention without bail).

[70] In *McKinley's Case*, Lord Gillies discusses the presumption of innocence:

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

33 How. St. Tr. 275, 506 (1817); *see also* Coffin v. United States, 156 U.S. 432, 454 (1895). *Coffin* explains that the legal burden of proof is important because "'[i]n some cases presumptive evidence goes far to prove a person guilty, though there be no express proof of the fact to be committed by him.'" *Id.* at 456 (quoting 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 289 (Philadelphia, Robert H. Small 1847)). "This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn." *Id.* at 459.

[71] *Coffin*, 156 U.S. at 458–61 (emphasis added). *Coffin* emphasizes the Blackstone ratio that it is "better five guilty persons should escape unpunished, than one innocent person

Supreme Court initially made clear that the presumption of innocence was separate and distinct from the prosecutor's burden of proof, but later on, the two principles were merged into the prosecutor's burden at trial.[72] The separation of these two principles is critical for the presumption of innocence applying pretrial, and later cases ignored the presumption because they tied it to the prosecutor's burden.[73]

Nineteenth century courts noted that the proof required to find a person guilty required a high degree of certainty,[74] so much so that even if the individual was deemed guilty, in some cases the jury was still required to "presume his innocence" and find him innocent unless the burden of proof was met.[75] For instance, the government could have clear evidence that a defendant committed murder but the evidence, if it was obtained in violation of the defendant's right to counsel, would be inadmissible, thus leading the defendant to be acquitted. Legal scholars very much equated the presumption of innocence with a legal burden and were less concerned with whether the defendant actually committed the crime.[76]

The trial was the pinnacle of due process and where a defendant's right to innocence was protected. Judges focused so much on procedure and legal innocence that some even encouraged criminal defendants to go to trial and discouraged guilty pleas.[77] Eighteenth century judges sometimes asked defendants to retract guilty pleas and some wanted to abolish guilty pleas and substitute an examination of the defendant because it would "guard him against undue conviction, brought on upon him by his own imbecility and imprudence."[78] Blackstone also famously noted "all presumptive evidence of

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should die." *Id.* at 456 (quoting HALE, *supra* note 70, at 289). While there has been much talk about the Blackstone ratio in terms of putting a convict to death, the actual quote refers to innocent suffering as the outcome to be avoided. Cathy L. Bosworth, *Pretrial Detainment: The Fruitless Search for the Presumption of Innocence*, 47 OHIO ST. L.J. 277, 278 (1986).

[72] *Coffin*, 156 U.S. at 458–61. *But cf. In re* Winship, 397 U.S. 358, 361–63 (1970).

[73] *See, e.g.*, *Winship*, 397 U.S. at 361–63.

[74] R. v. White, (1865) 176 Eng. Rep. 611 (N.P.) 612 n.(a) (Eng.).

[75] United States v. Doyle, 130 F.3d 523, 539 (2d Cir. 1997) ("Unless and until the Government meets its burden of proof beyond a reasonable doubt, the presumption of innocence remains with the accused regardless of the fact that he has been charged with the crime, regardless of what is said about him at trial, regardless of whether the jurors believe that he is likely guilty, *regardless of whether he is actually guilty*. The presumption attaches to those who are actually innocent and to those who are actually guilty alike throughout all stages of the trial and deliberations unless and until that burden is met.").

[76] Thayer, *supra* note 1, at 199.

[77] Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 7–8 (1979); *see also* HALE, *supra* note 70, at 225 (discussing situations where the court will advise a defendant to go to trial and refuse to record his confession).

[78] Alschuler, *supra* note 77, at 8 (quoting 3 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 127 (London, Hunt & Clarke 1827)) (internal quotations marks omitted) (discussing Blackstone, who noted that judges were "very backward in receiving and recording [a guilty plea] . . . and generally advise[d] the prisoner to retract it" (quoting 4 BLACKSTONE, *supra* note 2, at *329 (first alteration in original))). In the Stephen Wright trial

felony should be admitted cautiously," emphasizing that evidence should be found indirectly by a jury rather than admitted.[79]

However, over time, the focus on the presumption of innocence became proving legal guilt at trial, not pretrial. And the presumption of innocence became synonymous with the prosecutor's burden to prove an individual guilty beyond a reasonable doubt.[80] Thus, the maxim of "innocent until proven guilty" signified that jurors convict only when there was enough proof that the crime was committed.[81] It lost its greater meaning that the defendant was protected against any inferences or findings of guilt before trial. This change opened the way for judges to make legal examinations of defendants' guilt pretrial, where previously due process principles would not have allowed this.

In order to fully understand the change in the pretrial role of the presumption of innocence in guaranteeing pretrial release without judicial predictions, the next section provides a historical review of relevant U.S. cases that changed these original principles.

III. CHANGES TO THE PRESUMPTION OF INNOCENCE AND DUE PROCESS

Changes in state and federal laws between the 1960s and 1980s demonstrate a shift in the meaning of due process and the presumption of innocence pretrial. Until the 1950s, judges presumed bail for all noncapital defendants and were only permitted to deny bail where there was a risk of flight.[82] However, from the late 1960s on, courts considered various factors, including the weight of the evidence against an individual and how her release would impact the safety of the community.[83] These changes in statutory laws attempting to "reform" bail

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in 1743, where Wright tried to plead guilty to robbery to avoid trial in hopes that the death sentence would not be imposed, the court said that it would not take note of favorable circumstances until he agreed to trial. *Id.* at 9.

[79] 4 BLACKSTONE, *supra* note 2, at *352; *see also* People v. Lohman, 2 Barb. 450, 451 (N.Y. Gen. Term 1848) ("All offenders are entitled *before* trial, to be bailed; but an exception has been made by statute, in cases of homicide. In all cases it rests in the discretion of the judge. The question for him to settle is, whether bail will secure the appearance of the prisoner.").

[80] *See* Taylor v. Kentucky, 436 U.S. 478, 484 (1978); *see also* Bell v. Wolfish, 441 U.S. 520, 533 (1979) ("The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials . . . [and] has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.").

[81] Laufer, *supra* note 10 at 332.

[82] *See, e.g.*, *Lohman*, 2 Barb. at 451 ("All offenders are entitled *before* trial, to be bailed; but an exception has been made by statute, in cases of homicide. In all cases it rests in the discretion of the judge. The question for him to settle is, whether bail will secure the appearance of the prisoner.").

[83] *See, e.g.*, 18 U.S.C. § 3142(f) (2006); FLA. STAT. ANN. § 907.041(4)(a) (West 2011); S.D. CODIFIED LAWS § 23A-43-2 (2004); United States v. Ploof, 851 F.2d 7, 11 (1st Cir. 1988) (holding that preventive detention is authorized under 18 USC § 3142(f) only if one of the conditions listed in that section are met); State v. Olson, 152 N.W.2d 176, 178 (S.D. 1967) ("The granting of bail to a large extent is governed by the facts and circumstances of

from the 1960s to the 1980s opened the door to increased detention by allowing judges to make predictions about defendants' guilt and future proclivity to commit crime.[84] As a result, bail is no longer presumed in most cases and judges are given a greater ability to consider additional factors in determining whether to release a person on bail.[85] The pretrial bail decision became *whether* to release a person on bail rather than *how* to release the person on bail.

Early U.S. cases assert the importance of the right to bail and the presumption of innocence, a few connecting it with due process rights. The next section discusses the importance of the presumption of innocence and due process in the evolution of U.S. bail rights.[86]

A. *1966 Act Allows Weighing of Evidence*

In the 1960s, Congress unintentionally opened the way for predictions of future guilt and pretrial weighing of evidence in the bail decision. The 1966 Federal Bail Reform Act strongly favored pretrial release,[87] in line with historical notions that bail should be presumed for all noncapital defendants.[88] Congress found that many judges were setting high bail amounts that defendants could not meet, denying them real access to bail.[89] The 1966 Act maintained that people only be denied bail if they would not appear for trial.[90]

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each particular case."); Watkins v. Lamberti, No. 4D11-894, 2011 WL 1084968, at *1 (Fla. Dist. Ct. App. Mar. 25, 2011) (holding that the lower court did not abuse its discretion in denying bail "after consideration of the factors set forth in Florida Rule of Criminal Procedure 3.131").

[84] *See, e.g.*, 18 U.S.C. § 3142(e); *Bell*, 441 U.S. at 533 ("The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials . . . . [I]t has no application to the determination of the rights of a pretrial detainee during confinement before his trial has even begun."); *see also supra* notes 71–73 and accompanying text.

[85] *See supra* notes 83–84 and accompanying text.

[86] *See* United States v. Scoblick, 124 F. Supp. 881, 889 (M.D. Pa. 1954); Carr v. State, 4 So. 2d 887, 888 (Miss. 1941) ("[Y]et there is no such sanctity in this assumption of innocence which renders it immune to actual proof of guilt, or prolongs its life beyond that moment when the reason and judgment of the jury accept the guilt of the defendant as proven.").

[87] *See* Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214; H.R. REP. NO. 89-1541, at 5, 8–9 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2293, 2299 (noting that this Act will greatly increase pretrial release and reduce reliance on money bail and stating that "it is the poor man, lacking sufficient funds, who remains incarcerated prior to trial"); *id.* at 5 ("The purpose of [the Act] is to revise existing bail procedures in the courts of the United States including the courts of the District of Columbia in order to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.").

[88] *See supra* note 82 and accompanying text.

[89] *See supra* note 87 and accompanying text.

[90] Thus, the Act provided that persons charged with noncapital crimes were required to be released before trial unless the judge "determine[d] . . . that such a release [would] not

The Bail Reform Act expanded the factors that judges could consider in releasing an individual on bail. The Act did not take into account the perceived "dangerousness" of the defendant,[91] but expanded the reasons judges could legitimately deny bail. In addition, the 1966 Act allowed judges to consider the "weight of the evidence against the person" in deciding whether to release them.[92] In such cases, the Act empowered judges to take several steps to restrict defendants' release, including denying release.[93] However, and importantly, the Act did preserve the presumption that all noncapital defendants should be released on bail.[94]

While the 1966 Act placed some limits on the ability of courts to release defendants pretrial, overall federal defendants were released in greater numbers after the Act and the presumption of release pretrial remained.[95] While the Act favored release and, by some estimates, increased the release rate of federal defendants by as much as 40%,[96] it inadvertently paved the way for limits on defendants' release rights. In defending the 1966 Act, the Department of Justice made it clear that the presumption of innocence would have no application

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reasonably assure the appearance of the accused as required" due to flight. H.R. REP. NO. 89-1541, at 5–6.

[91] *See* United States v. Leathers, 412 F.2d 169, 171 (D.C. Cir. 1969) ("The structure of the Act and its legislative history make it clear that in noncapital cases pretrial detention cannot be premised upon an assessment of danger to the public should the accused be released."); H.R. REP. NO. 89-1541, at 5–6 ("This legislation does not deal with the problem of the preventive detention of the accused . . . . It must be remembered that under American criminal jurisprudence pretrial bail may not be used as a device to protect society from the possible commission of additional crimes by the accused.").

[92] 18 U.S.C. § 3142(g)(2) (2006). In making decisions as to whether a defendant's appearance could be reasonably assured, judges could also consider "character, physical and mental condition, family ties, employment, financial resources, [the] length of [the defendant's] residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history and, record concerning appearance[s] at court proceedings[.]" *Id.* § 3142(g)(3)(A).

[93] *Id.* § 3142(a)–(e); *see also* United States v. Abrahams, 575 F.2d 3, 8 (1st Cir. 1978) ("The right to bail is thus not absolute but recognized and statutorily approved as being generally available in noncapital cases subject to denial in *exceptional cases* . . . ." (emphasis added)).

[94] 18 U.S.C. § 3142(j); *see Abrahams*, 575 F.2d at 8 ("The right to bail is thus not absolute but recognized and statutorily approved as being generally available in noncapital cases subject to denial in *exceptional cases* . . . ." (emphasis added)).

[95] Gavino v. McMahon, 499 F.2d 1191, 1195 (2d Cir. 1974). Courts interpreting the Act recognized its limitations on the power of judges to order detention. The Second Circuit noted that "[a]lthough the trial judge is accorded discretionary power during trial to revoke bail where such drastic relief is essential . . . such power . . . *does not extend to revocation of bail before trial*." *Id.* (emphasis added).

[96] The 1966 Federal Bail Reform Act had a significant impact on the release rate of federal defendants, which increased by as much as 40%. *See* WAYNE H. THOMAS, BAIL REFORM IN AMERICA 27 (1976).

pretrial as it was purely a rule of "evidence."[97] With a declining emphasis on the presumption of innocence and courts now possessing more discretion in pretrial decisions, the 1966 Act paved the way for courts to consider additional factors, besides flight risk, in deciding whether to release someone on bail. Given this increased discretion, the 1966 Act also led to public scrutiny of violent crimes by people released pretrial.[98] This scrutiny led to some jurisdictions enacting laws that permitted judges to consider the dangerousness of the defendant, even though the 1966 Act expressly prohibited such considerations.[99]

While the immediate result of the 1966 Bail Reform Act was that more defendants were released, the long-term impact was a rationale that allowed for increased detention. The Act led to a further expansion of discretion for judges to weigh evidence against defendants before trial—violating due process principles historically requiring this legal determination to occur only at trial.[100] Judges were also granted more discretion in predicting which defendants were likely to commit additional crimes—violating historic presumption of innocence principles—requiring that bail only be refused for flight risk.[101]

Following the 1966 Act, courts continued to connect the principles of due process with the presumption of innocence—explicitly and implicitly.[102] Indeed, the Court explicitly wedded the presumption of innocence to the Due Process Clause.[103] *In re Winship* stated that to give "concrete substance" to the presumption of innocence, the Due Process Clause required the prosecutor to

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[97] *See* Brown v. United States, 410 F.2d 212, 216 (5th Cir. 1969) (relying on the Department's analysis of the Act to conclude "there is no conflict between Rule 46(f) and the Bail Reform Act").

[98] *See* S. REP. NO. 98-225, at 6 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3189 (quoting a study in D.C. that reported 13% rearrest rates for felony defendants and among some groups of defendants 25% rearrest rates (surety bond), and concluding that the "disturbing" recidivism rates "require[] the law to recognize that the danger a defendant may pose to others should receive at least as much consideration in the pretrial release determination as the likelihood that he will not appear for trial").

[99] Bail Reform Act of 1966, Pub. L. No. 89-465, § 3146, 80 Stat. 214. The first states to consider dangerousness as a factor in making pretrial release determinations were Alaska (1967), Delaware (1967), Maryland (1969), South Carolina (1969), and Vermont (1967). *See* Mary A. Toborg & John P. Bellassai, *Attempts to Predict Pretrial Violence: Research Findings and Legislative Responses*, *in* THE PREDICTION OF CRIMINAL VIOLENCE 101, 107 n.24 (Fernand N. Dutile & Cleon H. Foust eds., 1987).

[100] *See supra* note 70 and accompanying text.

[101] United States v. Motamedi, 767 F.2d 1403, 1406 (9th Cir. 1985).

[102] The Supreme Court made clear that due process required "that no man should lose liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." *In re* Winship, 397 U.S. 358, 364 (1970) (quoting Speiser v. Randall, 357 U.S. 513, 525–26 (1959)).

[103] Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence, though not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.").

persuade the jury beyond a reasonable doubt.[104] While connecting the Due Process Clause to the presumption of innocence, the Court failed to recognize that due process principles were critical in guaranteeing bail rights. The Court emphasized that defendants should be released and that liberty should be preserved before trial.[105] This was a historic departure from precedent tying both due process and the presumption of innocence with pretrial rights.

The failure to recognize the importance of due process and the presumption of innocence pretrial allowed the Court to equate these principles with the prosecutor's burden of proof. Following this change in tide,[106] the Court in *Taylor v. Kentucky* decided that *Coffin* was in error when it stated that the principles of the presumption of innocence and the prosecution bearing the burden of proof beyond a reasonable doubt were separate and distinct.[107] *Taylor* asserted that though guilt should be determined at trial, the presumption of innocence was just one way to express this right to a jury.[108] In equating the presumption of innocence with the prosecutor's burden of proof, the Court emphasized the import of the presumption of innocence and due process *at trial*, rather than pretrial and also robbed it of its initial import in guaranteeing bail.[109]

With changes in constitutional protections pretrial, courts recalibrated the level of rights they granted pretrial detainees. Clearly, detainees should not be treated like convicts, but courts still had to determine what restrictions could be made on their liberty in accord with due process and the presumption of innocence while in detention. Generally, in order to justify a restriction of pretrial defendants' rights, courts required a compelling necessity for prison safety.[110] They emphasized that pretrial defendants should be entitled to the

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[104] *Winship*, 397 U.S. at 363. The Court later echoed the link between the presumption and due process by pointing out that "[t]he right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." *Estelle*, 425 U.S. at 503.

[105] *Winship*, 397 U.S. at 367. The Court expressly affirmed that the state cannot punish without due process, and more specifically held that the accused maintain "freedom from bodily restraint" that is protected except in accordance with due process of law. Ingraham v. Wright, 430 U.S. 651, 673–74 (1977). The Court was clear in several cases that an adjudication was required to satisfy the demands of due process and to deny this basic fundamental right of freedom from bodily restraint and punishment. *See also* Rochin v. California, 342 U.S. 165, 172–73 (1952).

[106] Another indication of the change in tide occurred in 1970 when Congress passed a District of Columbia act that was a precursor to a similar national bail reform that went into effect in 1984. The D.C. act allowed detention before trial based on safety to the community and other factors for serious crimes. After enactment of the D.C. statute, twelve additional states enacted laws patterned after it. Toborg & Bellassai, *supra* note 99, at 107 nn.25–26.

[107] Taylor v. Kentucky, 436 U.S. 478, 483–84 (1978).

[108] *Id.* at 485.

[109] *Id.*

[110] Bosworth, *supra* note 71, at 279; Detainees of the Brooklyn House v. Malcolm, 520 F.2d 392, 397 (2d Cir. 1975) (applying the compelling necessity test in a case concerning inhumane and unsanitary living conditions in New York detention centers). Indeed, administrative inconvenience and economic constraints are not compelling necessities for limiting detainees' rights. *See* Marcera v. Chinlund, 595 F.2d 1231, 1237 (2d Cir. 1979).

presumption of innocence as they "have not been convicted and sentenced to jail."[111] Other courts, however, reasoned that pretrial defendants' guilt was "probable" and deferred more to prison officials.[112]

These cases paved the way for *Bell v. Wolfish*,[113] which casts a doubt on the principle that pretrial detention should be a rare exception due to the presumption of innocence, which applies from arrest throughout the trial to ban restraints on liberty.[114] *Bell* dealt with a constitutional challenge to conditions at a temporary detention center that required pretrial detainees to share a room, prohibited them from receiving certain books or packages, and subjected them to mandatory body-cavity searches following outsider visits.[115]

In *Bell*, the Supreme Court upheld the pretrial confinement conditions as constitutional while discounting the application of the presumption of innocence. The Court echoed *Taylor* in holding that the presumption of innocence is a "doctrine that allocates the burden of proof in criminal trials."[116] Though it plays "an important role in our criminal justice system," the Court said it "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."[117] While *Bell* did deal a drastic blow to the presumption of innocence, its holding was clearly limited to defendants *detained* pretrial.[118] *Bell* did not close the door to the presumption of innocence or due process rights ever applying pretrial, but simply stated that they did not apply during pretrial *confinement*.[119] *Bell* also made clear that restrictions on a defendant's pretrial liberty are not only limited to those aimed at ensuring their presence at trial.[120] Some liberty limits can be imposed to maintain security at a pretrial detention facility.[121] The exception *Bell* made for preserving liberty while in confinement is one that historically was not required because there was not a big window of time between arrest and trial.

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[111] Inmates of Milwaukee Cnty. Jail v. Petersen, 353 F. Supp. 1157, 1159–60 (E.D. Wis. 1973).

[112] Jones v. Diamond, 594 F.2d 997, 1003–04 (5th Cir. 1979). The court here found that the jail in question, while having questionable medical care, physical facilities' overcrowding, and more, was not unfit for human habitation. *Id.* at 997.

[113] 441 U.S. 520 (1979).

[114] *See* Lester, *supra* note 10, at 10.

[115] *Bell*, 441 U.S. at 530.

[116] *Id.* at 533.

[117] *Id.*

[118] *Id.* at 560–61.

[119] *Id.* at 533, 537. To further explain, the Court said that "the Due Process Clause protects a detainee from certain conditions and restrictions of pretrial detainment," demonstrating that the Due Process Clause still applies in a real way to protect defendants before trial. *Id.* at 533, 535–40.

[120] *Id.* at 539–40.

[121] *Bell*, 447 U.S. at 540. The government needs to manage detention facilities beyond ensuring that defendants show up at trial, including concerns for preventing weapons or drugs from reaching detainees. *Id.*

Bell also held that due process only requires that pretrial detainees be free from "punishment,"[122] rather than from a restraint of liberty—even though historically it has required both. This decision represented an unnecessary, though major, shift in the Court's jurisprudence involving the presumption of innocence.[123] In determining whether certain restrictive confinement practices of a federal prison violated pretrial detainee's rights, the Court said that "punishment" does not exist if it is "reasonably related to a legitimate governmental objective."[124] Although *Bell* dealt with the conditions of detention and not detention itself, the logic of the case seemed to indicate that such detention was constitutional and not considered punishment, provided it could be construed as a "regulatory restraint."[125] To determine if the presumption of innocence or due process was violated the Court could have considered whether any of the conditions allows judges to determine guilt of certain defendants or disadvantage them at trial.[126]

The ruling in *Bell* changed several things. *Bell v. Wolfish* set the stage for expanding pretrial detention based on other factors by holding that pretrial detention is not punishment if related to a legitimate governmental objective.[127]

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[122] *Id.* at 536–37.

[123] *See id.* at 533 ("The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial."). *Compare* Herrera v. Collins, 506 U.S. 390, 398 (1993) ("A person when first charged with a crime is entitled to a presumption of innocence . . . ."), *with* Hudson v. Parker, 156 U.S. 277, 285 (1895) ("The statutes as to bail upon arrest and before trial provide that 'bail may be admitted' upon all arrests in capital cases, and 'shall be admitted' upon all arrests in other criminal cases . . . ." (quoting 1 REV. STAT. §§ 1014–1016 (1875))).

[124] *Bell*, 441 U.S. at 539.

[125] *Id.* at 537. *Bell* thus echoed the detention justifications presented in the immigration context in *Carlson*. *See supra* note 50 and accompanying text. The Supreme Court examined these conditions and determined that not being allowed books or food from outside of the institution does not constitute punishment. *Bell*, 441 U.S. at 560–61.

[126] As demonstrated in Part V, none of these conditions seems to do so and each is more closely related to maintaining the security of the people in the facility rather than inferring the guilt of certain defendants. If there was a condition, for instance, limited visits for pretrial detainees, this would disadvantage a defendant in preparing for trial and would violate the presumption of innocence.

[127] *Bell*, 441 U.S. at 539. The Court in *Bell* also separated the doctrines of presumption of innocence and the compelling necessity test, rejecting the latter in favor of a reasonableness standard, given the special circumstances of pretrial detention. *Id.* at 532; *see* Anthony B. Quinn, Case Note, Bell v. Wolfish*, 99 S. Ct. 1861 (1979)*, 1979 BYU L. REV. 1022, 1027–33. *Bell* has been upheld. *See* Block v. Rutherford, 468 U.S. 576, 589 (1984) (holding that *Rutherford*'s attempt to depart from *Wolfish* was not acceptable and that prison officials must be given a great deal of deference in order to maintain prison security). *But see id.* at 600 (Marshall, J., dissenting) (arguing that because people who are convicted and incarcerated retain their constitutional rights, pretrial detainees, who are presumptively innocent persons, are certainly entitled to the same rights).

The Court recognizes that due process does not allow punishment,[128] but fails to recognize that due process and the presumption of innocence historically required liberty—or release on bail. This reasoning, which was unnecessary to uphold the detention conditions in *Bell*, opens the way for pretrial detainees to be treated like convicts.[129]

With shifts in federal bail law in *Bell* and the 1966 Act, a few states changed their laws to allow consideration of factors other than flight risk in noncapital cases.[130] Initially, bail was determined by considering the flight risk of the individual, but a few courts in the 1960s began to analyze evidence to determine whether a defendant was guilty before trial.[131]

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[128] *Bell*, 441 U.S. at 535.

[129] *See infra* Part V.

[130] In the 1960s, Iowa statutorily added factors to consider in the bail decision to "assure appearance" including: "the nature and circumstances of the offense charged, the defendant's family ties, employment, financial resources, character and mental condition, [and] the length of his residence in the community." State v. Fenton, 170 N.W.2d 678, 679–80 (Iowa 1969) (quoting 1967 Iowa Acts 805) (denying bail on a rape charge). Also, in Pennsylvania, the court allowed consideration of several factors to ensure the defendant's appearance in court. Commonwealth *ex rel.* Hartage v. Hendrick, 268 A.2d 451, 452 n.1 (Pa. 1970) (considering: "(1) The nature and circumstances of the offense and the stage of the prosecution then existing; (2) The age, residence, employment, financial standing and family status of the defendant; (3) Defendant's character, reputation and previous criminal history; and (4) Defendant's mental condition." (quoting PA. R. CRIM. P. 4005(a) (1970)) (current version at PA. R. CRIM. P. 523(a) (West 2011))). While these factors took a step beyond flight risk, neither statute allowed the judge to predict guilt or dangerousness or allowed any weighing of evidence as would occur at a trial. *Fenton*, 170 N.W.2d at 680; *Hartage*, 268 A.2d at 452, n.1.

[131] In 1969, a Pennsylvania court determined that prediction of future crimes was appropriate pretrial where there was a "predictable threat to the community." Commonwealth *ex rel.* Ford v. Hendrick, 257 A.2d 657, 662 (Pa. Super. Ct. 1969). In another case, a New York court held that revoking bail was permissible considering the nature of the offenses (possession of explosions, extortion, and coercion), the defendant's past criminal record, and the unexplained drowning of a witness. People *ex rel.* Calascione v. Ramsden, 246 N.Y.S.2d 84, 90 (App. Div. 1963) (noting that another witness's shop was also blasted). In another case, People *ex rel.* Klein v. Krueger, 255 N.E.2d 552, 555–56 (N.Y. 1969), the court considered safety to witnesses as a valid consideration though not enough alone. In 1970, a court went even further in *People v. Melville*, holding that a defendant charged with bombing six occupied buildings was a danger to the community. 308 N.Y.S.2d 671, 673, 680 (Crim. Ct. 1970). *But see* Martin v. State, 517 P.2d 1389, 1397 (Alaska 1974) (holding that the 1966 Bail Reform Act does not allow detention without bail and that a law allowing detention without the right to bail would be "unconstitutional unless a constitutional amendment were adopted"). In 1976, forty states still had constitutional guarantees to bail dating from early colonial days, though since that time, some states have amended their constitutions to allow pretrial detention. Donald B. Verilli, Jr., *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 353 (1982).

B. *1984 Act Restricts Pretrial Liberty Based on Community Safety*

The trend of decreasing pretrial rights continued though the 1980s with an increase in pretrial judicial predictions and little acknowledgement of the presumption of innocence. In two separate appeals, the D.C. Court of Appeals affirmed the constitutionality of a D.C. law that allowed detention based on predictions of future bad conduct.[132] Interestingly, in upholding the constitutionality of the Act, the court said the statute was intended to prevent "reasonably predictable conduct, not to punish for prior acts."[133] The D.C. Court implied that it was appropriate for judges to predict future conduct for detainees, though it was not appropriate to punish for prior acts without trial.[134] Both of these actions have historically been prohibited by judges pretrial.

Courts also started to ignore due process protections requiring a conviction by a jury in order to detain a defendant. For instance, the D.C. Circuit determined that if there was "competent evidence" presented to a judge, even without the protections of trial, a defendant's liberty could be denied without violating her due process rights.[135] Thus, the court allowed reliance on "competent evidence" to detain someone, whereas previously, a conviction after a jury verdict was required.[136]

Restricting accuseds' rights based on "community safety" and without a determination of guilt are themes that soon extended to the Supreme Court. In 1984, *Schall v. Martin* involved a challenge to the constitutionality of New York's juvenile pretrial detention scheme allowing detention when there was a serious risk that a juvenile might commit a crime.[137] The Supreme Court upheld the scheme under the Due Process Clause,[138] based on concerns for community

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[132] De Veau v. United States, 454 A.2d 1308, 1313–14 (D.C. 1982) (holding there is no constitutional right to bail); United States v. Edwards, 430 A.2d 1321, 1326, 1331 (D.C. 1981) (same).

[133] *Edwards*, 430 A.2d at 1332.

[134] *Id.* The court emphasized that the Act did not go beyond what was reasonable to "protect the safety of the community" pending trial. *Id.* at 1332–33 (requiring that detention be no longer than sixty days, after which the defendant must either receive bail or go to trial, and allowing a judge to end the detention whenever a "'subsequent event has eliminated the basis for such detention'" (quoting D.C. CODE § 23-1322(d)(2)(B) (1973))).

[135] Campbell v. McGruder, 580 F.2d 521, 529, 568 (D.C. Cir. 1978). In a case defending the D.C. Code, at least one court required a low bar of proof to rebut the presumption of innocence. Instead of requiring a determination of guilt by a jury, the court argued that "the presumption of innocence is an active factor weighing on whether [the defendant] should be released or not, once that presumption is rebutted by competent evidence and it is determined that [the defendant] must be confined, the effect of the presumption is largely in repose until the time of trial." *See id.* at 568.

[136] *Id.* at 568.

[137] 467 U.S. 253, 255–56 (1984).

[138] *Id.* at 256–57. While the majority did not consider the presumption of innocence, the dissent discussed the serious issues inherent with denying liberty interests to presumptively innocent defendants. *See id.* at 281–309 (Marshall, J., dissenting).

safety from crime.[139] The Court held that restrictive conditions placed on juveniles satisfied a "regulatory" purpose, posing no violation to due process.[140] This was one of the first pretrial detention cases where the Court directly decided that a government objective—other than ensuring a defendant's presence at trial—allowed confinement.[141] In upholding detention designed to protect the community from future crimes, *Schall* paved the way for the justification of pretrial detention on a larger scale. What is more, *Schall* directly violated historical mandates of bail under the Due Process Clause, which were solely that the defendant return to court, not to prevent future crimes.

Within months of the Court's decision in *Schall*, an emboldened Congress passed the Bail Reform Act of 1984.[142] The 1966 Act was considered too liberal in releasing defendants,[143] and the 1984 Act was enacted to deal with what the public perceived as the high number of crimes committed pretrial.[144] The 1984 Act contained much of the language of the 1966 Act, which provided that a defendant should be released if her presence at trial could be reasonably guaranteed.[145]

The 1984 Act was a significant departure from the longstanding tradition that allowed pretrial detention only to assure appearance of the accused at

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[139] *Id.* at 264 (majority opinion).

[140] *Id.* at 269–71.

[141] *Id.* at 264. *But see* Kansas v. Hendricks, 521 U.S. 346, 358 (1997) (setting forth procedures for indefinite civil confinement of prisoners, convicted of sex offenses, who are deemed dangerous due to mental abnormality). In *Schall*, the Court explained that the state has a "'legitimate and compelling state interest'" in protecting society from crime. *Schall* 467 U.S. at 264 (quoting De Veau v. Braisted, 363 U.S. 144, 155 (1960)). Although this may be weighed against the juvenile's liberty interest, which is also substantial, this "interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody." *Id.* at 265.

[142] 18 U.S.C. §§ 3141–3150 (1988). Though the D.C. Code had procedural safeguards that dissuaded prosecutors from using it very often, *see* Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 346–47 (1990), these were absent from the mirror Bail Reform Act of 1984. *Id.* at 347.

[143] S. REP. NO. 98-225, at 5 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3187, 3188 ("'Increasingly, the [1966 Bail Reform] Act has come under criticism as too liberally allowing release and as providing too little flexibility to judges in making appropriate release decisions regarding defendants who pose serious risks of flight or danger to the community.' . . . If a court believes that a defendant poses such a danger, it faces a dilemma—either it can release the defendant prior to trial despite these fears, or it can find a reason, such as risk of flight, to detain the defendant (usually by imposing high money bond). In the Committee's view, it is intolerable that the law denies judges the tools to make honest and appropriate decisions regarding the release of such defendants." (quoting U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME: FINAL REPORT (1981))).

[144] *Id.* at 6 (noting that the Bail Reform Act fails to recognize the crimes committed by those on pretrial release and that both the President and Chief Justice have urged amendment of federal bail laws to deal with this problem).

[145] *Id.* at 5.

trial.[146] First, judges making bail decisions could, for the first time, take into account the danger to the community posed by the defendant's release.[147] The Act thus made the prediction of the "dangerousness" inquiry that it had condoned in previous cases for capital crimes explicit, now expanding it to other crimes of violence and drug offenses.[148] Second, courts could continue to consider the weight of the evidence against a defendant in determining release.[149]

The first controversial change soon developed a split among the circuits regarding whether the 1984 Act met the demands of the Due Process Clause in allowing considerations of dangerousness and detention based on a prediction of future crimes.[150] Most circuits upheld the Act against challenges but the

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[146] *See, e.g.*, 1 THE COLONIAL LAWS OF NEW YORK 114 (Albany, James B. Lyon 1894) ("THAT In all Cases whatsoever Bayle by sufficient Suretyes Shall be allowed and taken unlesse for treason or felony plainly and specially Expressed and menconed in the Warrant of Committment provided Alwayes that nothing herein contained shall Extend to discharge out of prison upon bayle any person taken in Execucon for debts or otherwise legally sentenced by the Judgment of any of the Courts of Record within the province."); *see* Bandy v. United States, 81 S. Ct. 197, 197 (1960); United States v. Bentvena, 288 F.2d 442, 444 (2d Cir. 1961).

[147] 18 U.S.C. § 3142(g)(4) (2006).

[148] Section 3142(f) provides certain categories that subject a person to detention: those charged with "a crime of violence; an offense for which the maximum sentence is life imprisonment or death"; drug offenses which carry a maximum sentence greater than ten years; repeat felony offenders; or if the defendant poses a "serious risk" of flight, obstructs justice, *see* United States v. Ploof, 851 F.2d 7, 11 (1st Cir. 1988), or "threaten[s], injure[s], or intimidate[s]" a witness or juror, *see* United States v. Leon, 766 F.2d 77, 80–81 (2d Cir. 1985). 18 U.S.C. § 3142(f).

[149] 18 U.S.C. § 3142(g)(2). Under the 1984 Act, courts could consider the "weight of evidence against the person; the history and characteristics of the person . . . [and] the nature and seriousness of the danger to any person or the community that would be posed by the person's release." *Id.* § 3142(g). A magistrate holds a hearing to determine if the defendant is charged with a capital crime, a crime of violence or a drug offense. *Id.* § 3142(f). Then a presumption of dangerousness is created and the magistrate must determine by "clear and convincing evidence" that "no condition or combination of conditions will reasonably assure the safety . . . [and] the appearance of [the defendant]." *Id.* § 3142(e)–(f).

[150] *Compare* United States v. Simpkins, 826 F.2d 94, 95 (D.C. Cir. 1987) (holding that the 1984 Act does not violate the Due Process Clause), United States v. Rodriguez, 803 F.2d 1102, 1103 (11th Cir. 1986) ("We agree with the Seventh and Third Circuits that allowing pretrial detention because of potential dangerousness of the accused is constitutional."), United States v. Zannino, 798 F.2d 544, 547, 549 (1st Cir. 1986) (reversing the decision to release a defendant indicted with multiple counts of racketeering, loan sharking, gambling, predicate acts of two murders, and four conspiracies to commit murder because the evidence "appears strong," his charges "are of the gravest order," and if he were convicted of all he would face 130 years of prison), United States v. Perry, 788 F.2d 100, 114 (3d Cir. 1986) (holding that due process was not violated by preventative detention if "procedural safeguards" are put into place, such as those in trial), *and* United States v. Accettoruo, 783 F.2d 382, 388 (3d Cir. 1986) (holding that due process was a "flexible," case-by-case concept and arbitrary lines should not be drawn regarding when "defendants adjudged to be flight risks or dangers to the community should be released pending trial"), *with* United

Second Circuit held that detention based on dangerousness alone violates the Due Process Clause.[151] The Second Circuit emphasized that while releasing an accused person "thought to be dangerous" is risky, this risk was constitutionally mandated.[152] It did not support using incarceration to "protect society" from future crimes the government fears they may commit. And thus, the Second Circuit would have upheld the principle that the Due Process Clause does not permit detention of those who are not convicted of a crime.

The Supreme Court resolved this split among the circuits, upholding the constitutionality of the Bail Reform Act of 1984 in *United States v. Salerno*.[153] By the time *Salerno* was decided, the recognized purposes of bail had evolved from ensuring the defendant's presence at trial to more explicit public safety justifications that neglected pretrial due process.[154] The Court also mentioned that a defendant may be detained if he presents a danger to a witness,[155] and the government has a compelling interest in preventing dangerousness generally.[156]

States v. Melendez-Carrion, 790 F.2d 984, 988, 1003 (2d Cir. 1986) (holding that it is unconstitutional to base pretrial detention on dangerousness alone).

[151] *Melendez-Carrion*, 790 F.2d at 988, 1003–04 (noting that detention to prevent future crime "can constitutionally occur only after conviction"). The court also notes that the Eighth Amendment and "the history of bail suggest[] that dangerousness is not a permissible ground for pretrial detention," and that even if there was not an absolute right to bail in all cases, it was primarily denied on the basis of flight risk. *Id.* at 997. The decision explained, "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*." *Id.* at 1001 (emphases added). Furthermore, "all guarantees of liberty entail risks, and under our Constitution those guarantees may not be abolished whenever government prefers that a risk not be taken." *Id.* at 1003. Chief Justice Feinberg, in his concurrence, distinguished *Schall*, noting that the decision was limited because the maximum detention possible was seventeen days and was for the juvenile's own protection and allowed the court to pursue the best interests of the child. *Id.* at 1006–08 (Feinberg, C.J., concurring). Under the Bail Reform Act, the detention may be much longer, it involves competent adults, and the state does not consider the best interests of the detainees. *Id.* at 1008.

[152] *Id.* at 1002–03 (majority opinion).

[153] United States v. Salerno, 481 U.S. 739, 748 (1987) ("Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons.").

[154] Following *Bell*, the *Salerno* Court held that "preventing danger to the community is a legitimate regulatory goal." *Id.* at 747. The Court also noted that there are other situations in which it has held that public safety trumps individual liberty interests: detaining alien enemies in time of war, detaining individuals in time of insurrection, detaining resident aliens prior to deportation, detaining mentally unstable individuals, and detaining dangerous defendants who are incompetent to stand trial. *Id.* at 748–49.

[155] *Id.* at 749.

[156] *Id.* Marshall wrote a scathing dissent, arguing that the Bail Reform Act specifically states that it does not modify or limit the presumption of innocence, citing 18 U.S.C. § 3142(j): "The majority's untenable conclusion that the present Act is constitutional arises from a specious denial of the role of the . . . Due Process Clause in protecting the invaluable guarantee afforded by the presumption of innocence." *Salerno*, 481 U.S. at 762–63

Salerno determined that pretrial detention, as it relates to the Bail Reform Act, does not constitute punishment and therefore does not violate the Due Process Clause.[157] The *Salerno* decision did not even mention the presumption of innocence.[158] And thus, without much discussion, the *Salerno* Court neglected the application of pretrial due process and the presumption of innocence, upholding the 1984 Act.

Over time, states increasingly changed their positions to reflect the federal one.[159] Some states still hold true to the common law principle that defendants have an absolute right to bail for noncapital crimes.[160] And some states resisted

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(Marshall, J., dissenting). He went on to distinguish the presumption of innocence from the burden of the prosecutor to prove guilt beyond a reasonable doubt and said that both are "implicit in the concept of ordered liberty," established under the Due Process Clause. *Id.* at 763 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[157] *Salerno*, 481 U.S. at 747.

[158] *Id.* at 739–55. *Bell* had made clear only that the presumption of innocence and due process did not limit conditions placed on pretrial defendants *in confinement*; it did not clearly establish that due process did not apply to limit *predictions* made by judges about defendants pretrial. Bell v. Wolfish, 441 U.S. 520, 533 (1979). And there was still cause to believe that Congress thought the presumption of innocence still applied to bail since the 1984 Act specifically mentioned that nothing in the Act was intended to modify or limit the presumption of innocence. 18 U.S.C. § 3142(j) (2006). Arguably, if the presumption of innocence did not apply pretrial at all, it would nOt be necessary for a bail statute to even mention it.

[159] Where California courts once disapproved of considering public safety in determining bail, in 1987 the California legislature amended its penal code to make public safety the primary factor for the court to consider in setting bail. Gray v. Superior Court, 23 Cal. Rptr. 3d 50, 58 (Ct. App. 2005). In 2000, a Louisiana court emphasized that the purpose of bail was not "to protect the public" from harms the defendant may cause while released, but to ensure her appearance at trial. Harper v. Layrisson, 764 So. 2d 1061, 1065–66 (La. Ct. App. 2000); *see also* Nicholas v. Cochran, 673 So. 2d 882, 883 (Fla. Dist. Ct. App. 1996) ("The purpose of bail is to ensure the appearance of the criminal defendant at subsequent proceedings and to *protect the community* against unreasonable danger from the criminal defendant." (emphasis added)).

[160] *Ex parte* Colbert, 805 So. 2d 687, 688 (Ala. 2000) (internal citations omitted). As far as release on bail, twenty-seven states retain statutes, constitutional provisions, or criminal rules that define capital offenses generally as being non-bailable. *See* ALA. CODE § 15-13-3 (LexisNexis Supp. 2010); ALASKA STAT. § 12.30.020 (repealed 2010); ARIZ. REV. STAT. § 13-3961 (LexisNexis Supp. 2010); ARK. CODE ANN. § 16-91-110 (2011); CAL. PENAL CODE § 1270.5 (West 2004); COLO. REV. STAT. § 16-4-101 (2011); CONN. CONST. art. I, § 8; DEL. CODE ANN. tit. 11, § 2103(a) (2007); FLA. STAT. ANN. § 907.041(4)(a) (West Supp. 2011); IDAHO CODE ANN. § 19-2903 (2011); 725 ILL. COMP. STAT. 5/110-4 (West 2011); IND. CODE ANN. § 35-33-8-2 (West 2004); MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 29(2); NEB. CONST. art. I, § 9; NEV. REV. STAT. ANN. § 178.484(1) (LexisNexis Supp. 2011); N.M. CONST. art. II, § 13; OKLA. STAT. ANN. tit. 22, § 1101(C) (West Supp. 2011); 42 PA. CONS. STAT. ANN. § 5701 (West Supp. 2011); S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 8; TENN. CONST. art. I, § 15; TEX. CONST. art. I, § 11; UTAH CODE ANN. § 77-20-1 (LexisNexis 2008); VT. STAT. ANN. tit. 13, § 7553 (2009); VA. CODE ANN. § 19.2-120(B)–(D) (2011); WASH. SUPER. CT. CRIM. R. 3.2(a) (West Supp. 2011). Additionally, twenty-one jurisdictions define other specific crimes as being nonbailable. *See* ARIZ. REV. STAT. § 13-3961

reducing bail rights because of due process concerns.[161] As new laws narrowed the scope of the presumption of innocence, courts expanded the factors used to justify pretrial detention, which now include: (1) the weight of the evidence against the defendant,[162] (2) protection of the court's own processes, and (3) community safety.[163]

(LexisNexis Supp. 2010); ARK. CODE ANN. § 16-91-110 (2011); CAL. CONST. art. I, § 12; COLO. REV. STAT. § 16-4-101 (Supp. 2011); CONN. GEN. STAT. ANN. § 54-64a(b)(1) (West Supp. 2011); FLA. STAT. ANN. § 907.041(4)(a) (West Supp. 2011); IDAHO CODE ANN. § 19-4516 (2011); 725 ILL. COMP. STAT. ANN. 5/110-4 (West Supp. 2011); IND. CODE ANN. § 35-33-8-3.5 (West Supp. 2011); MD. CODE ANN., CRIM. PROC. § 5-202 (LexisNexis 2010); MICH. COMP. LAWS ANN. § 765.5 (West 2000); NEB. CONST. art. I, § 9; NEV. REV. STAT. ANN. § 178.484(1)–(5) (LexisNexis 2011); N.M. CONST. art. II, § 13; OKLA. STAT. ANN. tit. 22, § 1101(C) (West 2011); R.I. CONST. art. I, § 9; S.C. CONST. art. I, § 15; UTAH CODE ANN. § 77-20-1 (LexisNexis 2008); VT. STAT. ANN. tit. 13, § 7553 (2009); VA. CODE ANN. § 19.2-120(C)–(E) (Supp. 2011); WASH. SUPER. CT. CRIM. R 3.2(a) (West 2011). California defines capital crimes as being non-bailable either where "the facts are evident or the presumption great," or for specific felonies. CAL. CONST. art. I, § 12; *cf.* Henley v. Taylor, 918 S.W.2d 713, 714 (Ark. 1996); State v. Hill, 444 S.E.2d 255, 257 (S.C. 1994) (noting that a rebuttable presumption arises in capital cases that the defendant is not entitled to bail and the defendant has a burden of production in showing he is not a danger to the community); *In re* Steigler, 250 A.2d 379, 382 (Del. 1969) (holding that the state must bear the burden to demonstrate the "proof is positive or the presumption great"). Moreover, three jurisdictions have defined sexual assault as non-bailable. *See* ARIZ. CONST. art. I, § 22; CAL. CONST. art. I, § 12; NEB. CONST. art. I, § 9. In Arizona, there are only five categories of crimes that are non-bailable: capital offenses, sexual assault, sexual conduct with a minor under fifteen, molestation of child under fifteen, and serious felonies where "there is probable cause to believe that the person has entered or remained in the United States illegally." ARIZ. REV. STAT. ANN. § 13-3961 (LexisNexis Supp. 2010).

[161] For instance, in 1993 a Massachusetts court struck down amendments to its bail scheme that went beyond the Federal Bail Reform Act, holding that they "infringe on the individual interest in freedom from detention" and core due process rights, punish a broader swath of crimes, and permit "unbridled discretion" by not imposing a burden of clear and convincing evidence. Aime v. Commonwealth, 611 N.E.2d 204, 210, 213–14 (Mass. 1993). The state legislature responded by passing new provisions with more procedural protections, which were upheld. MASS. GEN. LAWS ch. 276, § 58A (Supp. 2011), *upheld in* Mendoza v. Commonwealth, 673 N.E.2d 22, 25 (Mass. 1996)).

[162] Today, some states consider the nature of the crime. *See, e.g.*, Tyler v. United States, 705 A.2d 270, 272 (D.C. 1997); State v. LeDoux, No. A08-0260, 2008 Minn. App. Unpub. LEXIS 1532, at *2, *8 (Minn. Ct. App. May 5, 2008) (holding that bail amounts of $50,000 on child-pornography charges and $200,000 on a first-degree criminal sexual-conduct charge with a nine-year-old girl were not excessive because these were "serious offenses"). Some states also consider the weight of the evidence. *See, e.g.*, Yording v. Walker, 683 P.2d 788, 791 (Colo. 1984); Blackwell v. Sessums, 284 So. 2d 38, 39 (Miss. 1973) (affirming bail denial where the evidence conflicted on whether the proof was evident that defendant was guilty based on the evidence). Many states consider the defendant's past conduct. *See, e.g.*, State v. Dodson, 556 S.W.2d 938, 944–45 (Mo. Ct. App. 1977) (past conduct of defendant indicated he would be harmful to community where defendant committed murder while on release for another murder charge). *But see* State *ex rel*. Ghiz v. Johnson, 183 S.E.2d 703, 706 (W. Va. 1971) (reversing denial of bail because among other reasons, trial judge did not consider defendant's lack of prior criminal history). Further, many states consider the risk to

C. *New Bail Standards Allow Pretrial Decisions About Guilt*

As intended, the 1984 Bail Reform Act was effective in increasing pretrial detention.[164] While the 1984 Act standard was arguably high, once the floodgates had been opened for judges to predict what a defendant would do on release, bail as a presumption for all became a relic of the past. And more offensive to due process principles than the permission courts have been granted

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other persons, community, or property in determining whether to release an individual. *See, e.g.*, Gilbert v. State, 540 P.2d 485, 486 (Alaska 1975) (holding that the judge may consider "danger to the community" in setting bail); *In re* Weiner, 38 Cal. Rptr. 2d 172, 174 (Ct. App. 1995) ("The court in setting, reducing, or denying bail must primarily consider the public safety."); Wheeler v. State, 864 A.2d 1058, 1066 (Md. Ct. Spec. App. 2003) (holding that detention of a defendant without bail was appropriate where there was clear and convincing evidence that he posed a danger to his neighbors). And finally, at least one circuit considers dangerousness of the defendant specifically. *See, e.g.*, United States v. Kisling, 334 F.3d 734, 735 n.3 (8th Cir. 2003) (discussing government's burden to prove risk of harm caused by defendant).

[163] 18 U.S.C. § 3142(f) (2006); *see* Hunt v. Roth, 648 F.2d 1148, 1163–64 (8th Cir. 1981) (citing multiple cases for each main factor). For discussion of the fifty states' consideration of other factors besides flight risk, see *supra* note 162. There are often additional subfactors aimed at predicting which defendants are most likely to flee, interfere with the court's processes or endanger the community. *See* United States v. Holmes, 438 F. Supp. 2d 1340, 1343 (S.D. Fla. 2005) (citing Congress, which stated that these "additional factors for the most part go to the issue of community safety, an issue which may not be considered in the pretrial release decision under the . . . [1966 Bail Reform Act]").

[164] The 1984 Act increased the number of federal prisoners by 32% in 1985. *See* Howard Kurtz, *Detention Law Further Crowds Prisons*, WASH. POST, Jan. 9, 1986, at A4 (as of 1986, the federal prison system was 42% overcapacity). Some have argued that the Act's effect on the crime rate was ambiguous, however. *See, e.g.*, Guggenheim, *supra* note 142, at 383–88. I analyze this issue in a forthcoming article. *See also* United States v. Daniels, 772 F.2d 382, 383 (7th Cir. 1985) ("The new bail statute increases the number of people confined pending trial and pending appeal."). As the Court upheld the Bail Reform Act, many courts began to weigh in on how to apply the Act and who should bear the burden to prove detention. One of the most widely cited cases, still followed today, is *United States v. Jessup*, 757 F.2d 378 (1st Cir. 1985). The First Circuit, as well as other district courts, found that once a presumption of detention is created by a charge against a defendant, the burden of production shifts to the defendant to prove that he can safely be released. *Id.* at 382, 386. If the defendant produces evidence and satisfies his burden, the magistrate will "keep the presumption in mind in making a decision" but still must find by clear and convincing evidence to assure appearance of defendant or protect the community. *Id.* at 379, 382, 386; *see, e.g.*, United States v. Gossett, No. IP 05-82-CR-07 M/F, 2005 U.S. Dist. LEXIS 14938, at *11–12 (S.D. Ind. July 19, 2005) (holding that defendant did not rebut the presumption of dangerousness and that she could be detained because there was a strong probability she would be convicted of drug trafficking, and because she fled a prior court proceeding); United States v. Jointer, No. IP 04-0396M-01, 2005 U.S. Dist. LEXIS 11839, at *12–14 (S.D. Ind. May 17, 2005) (holding that the defendant accused of the drug offense could be detained because he did not rebut the presumption that he was a danger to the community and the evidence showed he had an active and integral role in the drug trafficking conspiracy, and there was a strong probability of conviction).

to determine which defendants are dangerous, is the license courts have to weigh the evidence against defendants to determine whether they should be released.

United States v. Freitas shows how the Bail Reform Act allows a judge to weigh the evidence against a defendant in determining whether she should be released.[165] It demonstrates that the nature of the Act's inquiry allows the judge to conduct an abbreviated mini-trial to determine whether the defendant is guilty and whether she is likely to commit a crime while on release. Here, the defendant was charged with manufacturing methamphetamine. The court determined that if there was probable cause to believe the defendant had committed a serious drug offense like the one with which defendant was charged,[166] then "a rebuttable presumption" arises such that no condition could assure that the defendant would appear in court or that he would not pose a threat to the community.[167] The court found probable cause, as the agents found the defendant sleeping next to the components of a meth lab.[168] Thus, the rebuttable presumption arose. The defendant then satisfied his burden of production to rebut this presumption by showing that he had faithfully appeared in court in the past.[169] However, the court held that even though the defendant rebutted the presumption, he should still be detained because "[t]he weight of the evidence against the accused is substantial."[170] The court found that because the evidence indicates that the "defendant is deeply involved in illegal drug activity," he should not be released, as Congress intended to reduce danger to the community in pretrial release.[171]

The *Freitas* court essentially found that the defendant was guilty of drug manufacturing, rather than considering whether he would appear in court. There was no mention of evidence suggesting that he would not appear in court for

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[165] 602 F. Supp. 1283, 1294–95 (N.D. Cal. 1985).

[166] A rebuttable presumption does not "arise[] merely by the fact of indictment," and "[a]lthough the indictment may be considered, there must be an independent factual basis establishing probable cause that the offense charged was committed." United States v. Cox, 635 F. Supp. 1047, 1052 (D. Kan. 1986) (explaining the use of the rebuttable presumption because, with as "fundamental a right as personal liberty—the right to remain free from detention" should come with "all of the traditional safeguards of a criminal trial—a heavier standard for establishing probable cause is required").

[167] *Freitas*, 602 F. Supp. at 1286.

[168] *Id.* at 1294. There was also evidence of equipment used in making meth found in storage lockers used and rented by the defendant, police investigating the residence due to chemical odors, and prior to the search, agents receiving reports that the defendant was involved in meth manufacturing. *Id.*

[169] *Id.* The court noted that the defendant's mother offered to let him live with her and act as custodian to satisfy that he would not commit any additional crimes. *Id.*

[170] *Id.* Thus, the court found that none of the release conditions seemed to ensure he would appear and cease illegal activity. *Id.*

[171] *Id.* at 1295. Further, the court noted he had a lengthy criminal history and was on release from a rape charge. *Id.*

trial.[172] *Freitas* demonstrates that all the evidence presented pretrial goes to the merits of the case, which is determined at a brief detention hearing where probable cause is the standard, not guilty beyond a reasonable doubt. Thus, the defendant quickly gives up her right to due process before a deprivation of liberty. And often, because of the realities of modern criminal practice, this detention hearing is the closest thing to a trial that a defendant will receive because she will likely strike a plea bargain while in pretrial detention. Thus, with one mini-trial, the defendant loses all opportunities to gain access to the umbrella of constitutional protections she receives at trial,[173] including the presumption of innocence.

With the assistance of bail reform legislation from the 1960s through the 1980s, courts have lost sight of the original purpose of bail: to assure that a defendant appears at trial. This legislation has also opened the way for judges to weigh defendants' guilt in determining whether to release them and focus on the danger posed by the individual upon release, eviscerating the traditional influence of the presumption of innocence before trial.

IV. DUE PROCESS CHANGES LIMIT PRETRIAL RIGHTS

Due to a lack of firm constitutional rooting and an increasing focus on predicting before trial whether the defendant is guilty, the pretrial rights of defendants have diminished. While the Supreme Court has claimed that the presumption of innocence is constitutionally rooted, its specific roots have rarely been discussed. Thus, the presumption of innocence has been the first and most explicit loss for pretrial defendants, as the Supreme Court has specifically held that pretrial defendants do not have the right to be presumed innocent and that their detention in various contexts does not violate the Constitution.[174] And the focus of the presumption of innocence has become an emphasis on *trial* rights like proving defendants guilty beyond a reasonable doubt.[175] In addition,

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[172] *See generally id.* And the fact that the court rejected the defendant's argument that his mother would act as his "surety" to vouch for him not committing any additional crimes demonstrates how far we have come from historic expectations of sureties, which was simply that they would bring the defendant to court. *Id.* at 1295.

[173] In addition to the presumption of innocence, these include the right to confront witnesses against him, the right against self-incrimination, and the right to a jury trial. Boykin v. Alabama, 395 U.S. 238, 243 (1969) (discussing the constitutional protections a criminal defendant waives when entering a guilty plea, including the "privilege against compulsory self-incrimination," the right to trial by jury, and "the right to confront one's accusers"); *see* Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 18–22 (2006).

[174] United States v. Salerno, 481 U.S. 739, 748–49 (1987) (holding that pretrial detention under the Bail Reform Act of 1984 does not violate the Constitution); *see also* Schall v. Martin, 467 U.S. 253, 278 (1984) (finding that "there is nothing inherently unattainable about a prediction of future criminal conduct").

[175] *In re* Winship, 397 U.S. 358, 361–63 (1970).

the Court has held that pretrial detention does not violate due process.[176] And the focus of due process has become procedural protections that focus on preventing defendants from being found guilty if police or prosecutors misstep, rather than focusing on protecting individuals from deprivation of liberty before they have been found guilty.[177]

Historically, due process encompassed the fundamental rights to liberty and a fair trial and, importantly, the idea that people are presumed innocent until proven otherwise.[178] Over time, due process was separated from the presumption of innocence. As society gained increased trust in police and the state, real protections for defendants in the early stages after arrest and bail were lost.[179] Due process came to represent freedoms for those the police had already found guilty and society believed to be so. And due process was lost during a fundamental time for a defendant: pretrial. These changes were particularly apparent and troubling changes occurred, ironically, in the heyday of criminal defendants' rights: the 1960s.[180] The first part of this section discusses the changing view of due process which led to its divorce from the presumption of innocence and its lack of importance pretrial. The second part of this section discusses how the lack of understanding of the shared roots of these principles has led to inconsistencies and a lack of protection of defendants' pretrial rights.

A. *Divorce of Due Process and the Presumption of Innocence*

To clearly understand the historic development of due process law and the presumption of innocence in U.S. bail law, an understanding of prevailing views at the time when these changes occurred is appropriate. During this fundamental time of change in criminal procedure law, Herbert Packer, in one

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[176] *Salerno*, 481 U.S. at 748–49.

[177] *See* Kuckes, *supra* note 173, at 21–22.

[178] *See* United States v. Agurs, 427 U.S. 97, 107 (1976) (protecting the right to a fair trial under the Due Process Clause of the Fifth Amendment); Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."); Lisenba v. California, 314 U.S. 219, 236 (1941) (protecting the right to a fair trial under the Due Process Clause of the Fourteenth Amendment).

[179] The initial distrust of police may have been caused by the memory of the British Rule, *see* SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 63–65 (1980), but many argue that early American police were not competent and were often driven by political forces, therefore engendering mistrust. *See* WILLIAM J. BOPP & DONALD O. SCHULTZ, A SHORT HISTORY OF AMERICAN LAW ENFORCEMENT 41 (1972); DAVID R. JOHNSON, AMERICAN LAW ENFORCEMENT: A HISTORY 10–11 (1981); ROBERT C. WADMAN & WILLIAM THOMAS ALLISON, TO PROTECT AND TO SERVE: A HISTORY OF POLICE IN AMERICA 13, 16–17 (2004).

[180] In the 1960s, arguably, rights before arrest increased substantially. *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968) (limiting the ability of police to investigate with stop-and-frisks); Katz v. United States, 389 U.S. 347, 353 (1967) (limiting police electronic surveillance); Rogers v. Richmond, 365 U.S. 534, 540 (1961) (regulating the admissibility of confessions obtained by coercion).

of the most influential pieces of criminal justice scholarship, set out two models describing the purpose of criminal procedure.[181] These competing models were the crime control and due process models.[182] The way scholars viewed criminal procedure during this critical time period when the 1966 and 1984 Bail Reform Acts and other key changes occurred is critical to understanding how we view due process today.[183]

According to Packer, there were two ways to view criminal rights. The crime control model viewed the role of criminal procedure as reducing crime and protecting the public.[184] It assumed that police have screened out those who are innocent, so that those who are in the system after arrest are presumed guilty.[185] In contrast, the due process model viewed criminal procedure as focused on protecting individual freedom.[186] This model viewed criminal procedure as an "obstacle course" of legal protections for inmates.[187] While Packer argued that the presumption of innocence "occupies an important position in the Due Process Model," it treated the presumption of innocence as an unrealistic command "to the authorities to ignore the presumption of guilt in their treatment of the suspect," even though in most cases the suspect is guilty.[188]

Thus, Packer's due process model provides a new meaning to the presumption of innocence—one that advantages a defendant in acquittal, rather

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[181] Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 5–6 (1964) [hereinafter Packer, *Two Models*]; *see* PACKER, *supra* note 5, at 153. In addition, the due process model stressed the fact that mistakes can be made in the fact-collection process and all doubts must be resolved before conviction. Packer, *Two Models*, *supra*, at 14; *see also* Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671, 672 (1999) (noting that "[f]or thirty-five years now, the major models have been Packer's due process and crime control models").

[182] Packer, *Two Models*, *supra* note 181, at 6.

[183] Of course, since Packer's contribution, many have criticized the two models. *See* ANDREW ASHWORTH & MIKE REDMAYNE, THE CRIMINAL PROCESS 39 (3d ed. 2005) (neglecting any discussion of victims' rights); A.E. BOTTOMS & J.D. MCCLEAN, DEFENDANTS IN THE CRIMINAL PROCESS 226–39 (1976) (neglecting the role of resource management); Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 576 (1973) (arguing that the models are not actually models but "two clashing inner tendencies: the tendency toward efficiency and the tendency toward protecting the rights of the defendant"); Doreen J. McBarnet, *False Dichotomies in Criminal Justice Research*, *in* CRIMINAL JUSTICE: SELECTED READINGS 23, 31 (John Baldwin & A. Keith Bottomley eds., 1978) (arguing that there is not much of a difference between due process and crime control in practice).

[184] Packer, *Two Models*, *supra* note 181, at 9–10.

[185] *Id.* at 11.

[186] *Id.* at 16.

[187] *Id.* at 13.

[188] *Id.* at 12. These values are largely protected with a focus on "legal guilt" so that a person is held guilty "if and only if these factual determinations are made in procedurally regular fashion." *Id.* at 16. This reliance on procedures that have nothing to do with actual guilt reflects the expansions of criminal defendants' rights during the 1960s.

than protects her liberty. The due process model will allow those who would be found guilty to be released based on "technicalities" in evidence collection. All of the major "due process" rights defendants gained during the 1960s—including reduced police rights to search and seize, *Miranda* protections, and most importantly, the expansion of the exclusionary rule that allowed suppression of evidence improperly gathered even if it proved a defendant guilty—demonstrate the importance of technical advantages.[189] During this time, due process was viewed as protecting against technicalities and providing advantages to the guilty, rather than protecting liberty and a premature determination of guilt.

Generally speaking, the two models of criminal procedure demonstrate the modern views of the presumption of innocence and due process.[190] The presumption of innocence applies at trial with the other "due process" protections that allow defendants to get off on technicalities, because the perception is that the defendant is probably guilty anyway. Due process no longer protects a defendant's autonomy in a meaningful way because even under the "defendant's rights" model, the defendant is assumed guilty and all efforts are to prevent the prosecutor from being able to prove her legally so. Neither model emphasizes meaningful pretrial rights, like allowing a defendant to speak during a grand jury before she is indicted, allowing an adversarial probable cause hearing in determining arrest, allowing the defendant bail before trial to prepare her defense, a full right to all exculpatory evidence that the prosecutor possesses, and most importantly, for this Article, delaying a determination of a defendant's guilt until trial.[191] Neither model is focused on

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[189] During the 1960s, defendants' rights expanded in many key ways. The Fifth Amendment was interpreted to encompass an active warning to all individuals in custody and under interrogation by the police of their right to silence and to an attorney. Miranda v. Arizona, 384 U.S. 436, 444 (1966). All evidence that police gathered through search and seizure in violation of the Fourth Amendment would now be excluded in state and federal trials of defendants. Mapp v. Ohio, 367 U.S. 643, 655 (1961). And police needed warrants more regularly to enter people's homes, cars, and places of business. Payton v. New York, 445 U.S. 573, 576 (1980) (homes); Elkins v. United States, 364 U.S. 206, 211–12 (1960) (citing Gambino v. United States, 275 U.S. 310, 316 (1927)) (cars).

[190] Several scholars have adapted the two models or added to them to apply modern changes. Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 209–28 (1983); William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 848–56 (1988).

[191] For an example of further limitations of pretrial rights, compare *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that due process prevents prosecutors from suppressing evidence both favorable and material to defendants' guilt or punishment), with *Strickler v. Greene*, 527 U.S. 263, 286 (1999) (limiting the right of defendants to receive exculpatory evidence where they do not demonstrate prejudice), and *United States v. Ruiz*, 536 U.S. 622, 633 (2002) (limiting exculpatory evidence required to release for plea agreements).

important pretrial rights that protect a defendant's liberty or waiting until trial to determine a defendant's guilt.[192]

From the 1960s on, the determination of guilt by a judge pretrial, before the chance for a fair trial, was not generally found to violate due process. The courts that even noticed the conflict usually dealt with this issue by stating that the presumption of innocence applied only at trial, and not before.[193] This and other confusion about how to apply due process and the presumption of innocence has led to inconsistent results pretrial.

B. *Improper Understanding of Due Process Allows for Violations*

Historically, the Due Process Clause prohibited restraints on a person's liberty without a proper determination of guilt. Early on, this determination of guilt meant a jury trial. Additionally, due process required that an arrest and indictment were not advertised and a person's name was not sullied until a proper determination was made against her. Bail rights in the United States were generally protected historically, but as discussed in the previous section, there was a shift from the 1960s onward where due process meant something entirely different. The Due Process Clause came to encompass judicial process advantages given to an accused person who was deemed guilty after being arrested. While the Due Process Clause clearly applies pretrial,[194] it no longer protects against an improper invasion of personal liberty of a person detained before trial.[195] Instead, the Fourth Amendment often takes the place of the Due Process Clause.[196]

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[192] At least one scholar has disagreed that the presumption of innocence should be viewed as a strictly legal doctrine, and argued that jurors should evaluate whether a defendant is factually guilty rather than guilty under the law. Laufer, *supra* note 10, at 329.

[193] Blunt v. United States, 322 A.2d 579, 584 (D.C. 1974) ("The presumption of innocence, however, has never been applied to situations other than the trial itself. To apply it to the pretrial bond situation would make any detention for inability to meet conditions of release unconstitutional.").

[194] City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983); Tyler v. United States, 705 A.2d 270, 274–75 (D.C. 1997) (applying the Due Process Clause pretrial).

[195] Feeley v. Sampson, 570 F.2d 364, 376–77 (1st Cir. 1978).

[196] For instance, in a recent example of deprivation of pretrial defendants' rights, courts have allowed searches and evidence to be collected from pretrial defendants where previously prohibited. These decisions have expanded the principles in *Bell v. Wolfish*, 441 U.S. 520, 520–21 (1979), allowing further restrictions on defendants' rights after arrest and before determination of guilt at trial. After *Bell*, ten federal courts of appeals held that the Fourth Amendment did not allow an arrestee charged with a minor offense to be strip-searched in the absence of reasonable suspicion that he is concealing a weapon or other contraband. *See, e.g.*, Florence v. Bd. of Chosen Freeholders of Burlington, 621 F.3d 296, 299 (3d Cir. 2010), *cert granted*, 131 S. Ct. 1816 (2011). It is important to note that the courts did not rely on the presumption of innocence or due process to examine pretrial restraints after *Bell*. Courts focused on the more robust protections of the Fourth Amendment. However, in the last few years three en banc panels of courts of appeals, including the Eleventh Circuit, *see* Powell v. Barrett, 541 F.3d 1298, 1314 (11th Cir. 2008),

In an instance demonstrating the pretrial replacement of the Due Process Clause with the Fourth Amendment, the Ninth Circuit recently held that amendments to the Bail Reform Act that call for warrantless extraction of DNA samples from people accused of felonies do not violate the Fourth Amendment.[197] The defendant did not rely on due process or the presumption of innocence successfully, but rather the Fourth Amendment prohibition of unreasonable searches and seizures.[198] The court held that where the sample is collected after the judge has found probable cause to support the charges against the defendant, the government's interest in determining the defendant's identity outweighs her privacy interest.[199] Without a textual basis for the presumption of innocence, courts are left without guidance in determining when restrictions of pretrial defendants' rights are proper and when they go too far. Pretrial defendants' rights cannot be rooted in the Fourth Amendment alone, as historically, the Due Process Clause has provided independent pretrial protections to liberty and the right to a trial before a determination of guilt. And most importantly, with guiding principles, the Due Process Clause can be applied more consistently. Part V introduces three principles that can be consistently applied to guard rights under the Due Process Clause and the presumption of innocence.

Before discussing the principles that can enhance and provide consistency to pretrial defendants' rights, the next section provides examples of how, without guiding principles pretrial, defendants' rights cannot be applied consistently. Indeed, there are three justifications modern courts generally rely on for denying bail: (1) determining guilt by weighing evidence pretrial; (2) interference with the criminal process or witness tampering; and (3) predicting whether the defendant will be a danger to the community. The next section discusses all of these justifications to see how courts have applied them inconsistently to obtain different results due to a disconnect between the presumption of innocence and the Due Process Clause.

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the Ninth Circuit, *see* Bull v. San Francisco, 595 F.3d 964, 975 (9th Cir. 2010), and the Third Circuit, *see Florence*, 621 F.3d at 299, 308, reversed these earlier Fourth Amendment decisions. *See also id.* (holding that strip search policies forcing arrestees to submit to visual observation of naked bodies before taking supervised shower when arrested for non-indictable offenses is permitted). These courts reasoned that *Bell* did not distinguish between the reasons a person is detained, but what is really important is that the individuals are detained in a correctional facility, and thus lose rights. After these recent decisions, defendants charged with minor offenses can now be strip-searched without a violation of the Fourth Amendment or due process.

[197] United States v. Pool, 621 F.3d 1213, 1214 (9th Cir. 2010).

[198] *Id.* at 1216. This constitutes a reversal of a 2009 Ninth Circuit decision that warrantless extraction of DNA from a pretrial detainee suspected of a crime other than the one for which he was being held very clearly violated the Fourth Amendment. Friedman v. Boucher, 580 F.3d 847, 851 (9th Cir. 2009).

[199] *Pool*, 621 F.3d at 1228.

1. *Weighing of Evidence Pretrial*

Many states allow weighing of the evidence before trial in capital cases, though this rationale has also expanded to noncapital cases. In many states, bail and pretrial detention practice has followed a pattern similar to the federal evolution of bail law. Like the federal government, many states allowed a bail exception for capital cases where there was significant evidence.[200] While flight risk was considered in determining whether most defendants should be released on bail for lesser crimes, for murder, in many states, courts considered other factors because there was a larger risk that the defendant may flee.[201]

Early cases indicate that American courts looked at the weight of evidence against a defendant, but only for capital cases. In fact, some courts went as far as stating that an indictment for a capital offense carried a heavy presumption of guilt until trial.[202] This rationale was also accepted by the Supreme Court until 1951.[203] Up until that time, pretrial detention for the purpose of protecting society from a potentially dangerous defendant was not valid in American courts.[204]

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[200] One court expanded this concept noting the permissibility of detaining a defendant without bail if he has "dangerously wound[ed] another," on the theory that the alleged victim might die and the defendant would be charged with capital murder. Commonwealth v. Trask, 15 Mass. (1 Tyng) 277, 277 (1818); *see also Ex parte* Andrews, 19 Ala. 582, 586 (1851) (allowing detention "in the event that a capital felony will shortly be consummated"). Note as well that during this time capital offenses included most felonies. *See* Furman v. Georgia, 408 U.S. 238, 333–42 (1972) (discussing the historic development of capital punishment in the United States).

[201] The rationale was that in murder cases a defendant has a greater incentive to flee, so courts can consider additional factors in determining whether the defendant will flee. The rationale for granting courts limited discretion in the case of capital offenses was that the accused posed a much greater flight risk when there was substantial evidence against him. In short, an accused facing death would rather forfeit his property by failing to appear at trial if it meant preserving his life. *See, e.g.*, State v. Zarinsky, 380 A.2d 685, 687 (N.J. 1977) ("The underlying motive for denying bail in capital cases was to secure the accused's presence at the trial. In a choice between hazarding his life before a jury and forfeiting his or his sureties' property, the framers of the many State Constitutions felt that an accused would probably prefer the latter. But when life was not at stake and consequently the strong flight-urge was not present, the framers obviously regarded the right to bail as imperatively present."); *Ex parte* Tayloe, 5 Cow. 39, 55 (N.Y. Sup. Ct. 1825) (Sutherland, J., concurring) ("If capital, bail should not in general be allowed, because no pecuniary consideration can weigh against life; and where guilt is clear, and a rigorous and disgraceful imprisonment may follow for a great length of time, the presumption is strong that the accused will not appear.").

[202] *See, e.g.*, Hunt v. Roth, 648 F.2d 1148, 1156 n.12 (8th Cir. 1981) (nonbailable offenses include homicide).

[203] *See* Stack v. Boyle, 342 U.S. 1, 4 (1951) ("[F]ederal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail.").

[204] *See* Note, *supra* note 68, at 1489 ("In theory, the sole danger at which bail is aimed is the possibility of flight; present law does not authorize detention of offenders on the ground that they may, if released on bail, commit further crimes or interfere with witnesses and

However, states have diverged greatly over time on what factors are permissible to consider when making decisions on release. Consistent with federal law, most states initially categorized noncapital offenses as bailable and capital offenses as nonbailable. And courts held that bail before conviction is a matter of right, not discretion, for all offenses but capital offenses.[205] Many state constitutions also included provisions allowing detention for capital cases where there was enough "proof" against the defendant.[206] States have differed on how to apply this requirement of "proof," with some placing the burden on the government[207] and others placing the burden on the defendant to rebut the presumption.[208]

In a few early cases, judges determined a defendant's guilt in deciding to release her under this capital murder exception. However, in examining the "proof" against the defendant, a few courts have been careful to acknowledge

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evidence."); *see also* United States v. Leathers, 412 F.2d 169, 171 (1969) (per curiam) ("The structure of the [1966 Bail Reform] Act and its legislative history make it clear that in noncapital cases pretrial detention cannot be premised upon an assessment of danger to the public should the accused be released.").

[205] Street v. State, 43 Miss. 1, 6 (1870) (capital offenses "where the 'proof is evident, or presumption great'" are not guaranteed release on bail (quoting *Ex parte* Wray, 30 Miss. 673, 673 (1856))).

[206] ARIZ. CONST. art. II, § 22 (capital offense not bailable where proof is evident or presumption great); CAL. CONST. art. I, § 12 (same); COLO. CONST. art. II, § 19 (same); FLA. CONST. art. I, § 14 (same).

[207] Some states required that the burden of showing that the proof was great be placed on the government. Texas initially found that the burden should be on the accused in capital cases. *Ex parte* Smith, 5 S.W. 99, 100 (Tex. Ct. App. 1887). Later, Texas decided that the burden should instead be on the government in capital cases to prove that "proof is eviden[t] that the prisoner is guilty." By contrast, the prisoner is entitled to bail in noncapital crimes. *Ex parte* Newman, 41 S.W. 628, 629 (Tex. Ct. App. 1897). In a much later New Jersey case, a court held similarly that other than in cases where the defendant is accused of a capital crime and the proof is evident and the presumption great, the burden of proof should be on the government, as this "conforms with the pervasive presumption of innocence attending all criminal charges." State v. Konigsberg, 164 A.2d 740, 744 (N.J. 1960). The court further explained that since the rule is generally that the accused should have a right to bail, then "[t]he burden should rest on the party relying on the exception." *Id.*; *see also* People v. Purcell, 758 N.E.2d 895, 898 (Ill. App. Ct. 2001) (putting the burden of proof on the accused for pretrial release violates the presumption of innocence).

[208] For example, in Iowa, a court held broadly that the burden of proof should be on the government. Ford v. Dilley, 174 Iowa 243, 255 (1916). While in Oklahoma, a court noted that the "settled rule" in Oklahoma is that for capital offenses the burden of proof is on the defendant to show he is entitled to bail, and if he cannot allege sufficient facts to create a reasonable doubt of his guilt, he will not be admitted to bail. *Ex parte* Burton, 21 Okla. Crim. 92, 94–95 (Crim. App. 1922) (holding where the defendant refused to testify that he could not be admitted to bail because he did not prove guilt was not evident); *see also Ex parte* Dodds, 21 Okla. Crim. 54, 54 (Crim. App. 1922) (holding a defendant charged with murder was entitled to bail where there was a direct conflict between defense and state evidence); *Ex parte* Lacy, 20 Okla. Crim. 440, 442 (Crim. App. 1922) (noting that "[t]he filing of an information . . . is prima facie evidence that the proof of guilt is evident and the presumption thereof great").

the Due Process Clause and made sure it was not determining guilt or innocence.[209] But other courts have come dangerously close to violating due process and the presumption of innocence in determining guilt of capital defendants before trial. For instance, a New York case applying the state capital crime exception stated that if the evidence indicated that there is no reasonable doubt of the guilt of the defendant, he should not receive bail.[210] The invocation of the "reasonable doubt" standard before trial and without a jury contradicts historical notions that a determination of guilt only comes after a jury trial.[211]

What is more, the weighing of evidence and determination of guilt before trial expanded to a few courts in *noncapital* cases. The courts there actually held that if the judge determines that a defendant is guilty, without a large doubt, the defendant should not be released on bail.[212] These courts failed to discuss potential due process or presumption of innocence concerns with weighing the evidence against the defendant before trial.

2. *Interference with Criminal Process*

Some courts refuse to deny bail for defendants even where they have threatened witnesses,[213] denying it only it if the defendant is considered "dangerous."[214] These two factors are wholly different and should be analyzed

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[209] For there to be enough proof, the court required that evidence must be "cogent and persuasive" and that a "'fair likelihood' of conviction" must be demonstrated. State v. Engel, 99 N.J. 453, 459–60 (1985) (quoting State v. Konigsberg, 164 A.2d 740, 745 (N.J. 1960)). The Vermont Constitution also allowed "the denial of bail for offenses punishable by life imprisonment where the evidence of guilt [was] great." State v. Passino, 577 A.2d 281, 284 (Vt. 1990); *see* VT. CONST. ch. II, § 40 (1995); State v. Duff, 563 A.2d 258, 261 (Vt. 1989). In interpreting this provision, a Vermont court noted that "[t]his exception to the right to bail responds to concerns about the risk of flight and the dangerousness of persons charged with very serious offenses." *Passino*, 577 A.2d at 284–85.

[210] *Ex parte* Tayloe, 5 Cow. 39, 51 (N.Y. Sup. Ct. 1825). Similar to New York, the New Jersey Constitution provides that all persons are entitled to bail, except for those with capital offenses, when "the proof is evident or presumption [is] great." N.J. CONST. art. I, ¶ 11.

[211] *Ex parte Tayloe*, 5 Cow. at 51.

[212] In an 1848 New York case where the defendant had already been convicted of a misdemeanor for performing an abortion, the court said, "[o]n a question of bail before indictment, the magistrate may inquire as to the guilt of the prisoner." People v. Lohman, 2 Barb. 450, 454 (N.Y. App. Div. 1848).

[213] *See, e.g.*, United States v. Bigelow, 544 F.2d 904, 907–08 (6th Cir. 1976); Mastrian v. Hedman, 326 F.2d 708, 712 (8th Cir. 1964) (per curiam) ("[A] state court may in a particular situation make denial or postponement of the general right to bail where this rationally appears to be necessary to prevent a threat or likelihood of interference with the processes of investigation or the orderliness of trial[.]"); Nail v. Slayton, 353 F. Supp. 1013, 1019–20 (W.D. Va. 1972) (denying bail based partially on a death threat to a witness); Lynch v. United States, 557 A.2d 580, 581–82 (D.C. 1989) (requiring the standard of clear and convincing evidence that defendant threatened a prospective witness).

[214] Jones v. United States, 347 A.2d 399, 400–01 (D.C. 1975).

separately.[215] As to the first factor, there is little evidence historically that bail was intended to deter pretrial crime. Denying bail due to predicted dangerousness may have violated historic rights to due process and the presumption of innocence, but it has the blessing of the Supreme Court. However, interference with the criminal process is a different matter. Though this has not been as explicit a cause for denying bail, it is not an affront to due process to deny bail in order to protect the criminal process.[216] When an accused has threatened witnesses, the judge should consider this in denying bail. The presumption of innocence requires no improper inferences before a determination of guilt, but under its proper meaning, it should not tolerate interference with judicial processes. Due to the constitutional connection of the presumption with the Due Process Clause, the presumption's purpose is to preserve innocence until a fair trial.[217] A proper trial can fairly decide guilt, and the presumption should not act as a barrier that provides a defendant with an opportunity to destroy evidence before trial. Allowing a defendant to threaten witnesses or interfere with the criminal process unfairly advantages a defendant and does not protect the presumption of innocence. It would be an improper understanding of due process to allow a defendant to threaten witnesses while on release and prohibit a judge from considering such interference in denying release. This confusion, as well as the confusion illustrated in the determination of pretrial dangerousness below, shows why a principled understanding of what due process should and should not permit is necessary.

3. *Predicting Danger to the Community*

Recent courts examining due process and bail rights have allowed judges to determine whether a defendant poses a danger to the community. The examination of whether a defendant poses a danger in deciding bail violates original notions of the presumption of innocence. In 1982, the Hawaii Supreme Court outright struck down a "proof is great" statute. The court held that a statute that denied bail when the *offense is serious*, the proof is evident and

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[215] State v. Pray, 346 A.2d 227, 229–30 (Vt. 1975); *In re* Underwood, 508 P.2d 721, 724 (Cal. 1973).

[216] There is a legitimate argument that the value of the common law pretrial examination of witnesses was a critical component of the due process right, starting at least in the 16th Century. *See* 1 & 2 Phil. & M., c. 13 (1554) (Eng.); 2 & 3 Phil. & M., c. 10 (1555) (Eng.); 1 STEPHEN, *supra* note 24, at 326 (discussing demands by defendants to have the "accusers" brought against him). In some cases, these demands were refused, *see* Raleigh's Case, 2 How. St. Tr. 1, 15–16, 24 (1603), but the witnesses' testimony was obviously deemed critical for trial as the pretrial examination of witnesses did not satisfy the demands of due process. *See* JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 21–34 (1974).

[217] State v. Parker, 757 N.W.2d 7, 14 (Neb. 2008) (noting that "[o]ne of the essential safeguards of a fair trial is the benefit of the presumption of innocence" and due process); State v. Graves, 668 N.W.2d 860, 876–77 (Iowa 2003) (holding that due process is violated when it is not complied with throughout trial and "guilt or innocence" is not "determined solely on the basis of the evidence introduced at trial").

presumption great, was unconstitutional.[218] Prior to 1980, the Hawaii statute recited simply, like many other statutes, that "all persons charged with criminal offenses shall be bailable by sufficient sureties, unless for offenses punishable by *imprisonment for life not subject to parole*, when the proof is evident or the presumption great."[219] "The statute was augmented in 1980 to limit the availability of bail"[220] when the offense was a serious crime or felony and there was "a clear danger to society."[221] The court struck down the 1980 provision because it violated the Due Process Clause by presuming dangerousness "from the fact that [the defendant] had been charged with a serious crime" and for not leaving the judge enough discretion to consider releasing the defendant based on the likelihood that the defendant would commit crimes pending trial.[222] In other words, the court disapproved of the statute for determining that individuals would not receive bail due to "presumed dangerousness" without consideration of other factors, rather than because it allowed judicial weighing of evidence pretrial.[223]

This Hawaii decision demonstrates the change in judicial attitude about pretrial judicial predictions. In the 1950s and 1960s, courts challenged the foreign concept of allowing judges to predict whether an individual is likely to commit additional crimes. However, this Hawaii court, in 1982, did not find fault with a judge determining the likelihood of the accused committing additional crimes while on release. The court here just wanted the defendants to have an ability to rebut the presumption that they are dangerous, and relies more on this procedural protection than a more fundamental due process concern that the judge not be permitted to presume a defendant's future guilt. This Hawaii case is an excellent example of the changes in interpretation of the Due Process Clause when it comes to bail and the greater focus on procedural obstacles that prevent a defendant from being found guilty rather than actually requiring a trial before making presumptions of guilt.[224]

In 2010, the New Hampshire Supreme Court upheld a similar statute holding that due process is not violated when the court considers flight risk or

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[218] Huihui v. Shimoda, 64 Haw. 527, 540 (1982).

[219] *Id.* at 540 (emphasis added).

[220] *Id.*

[221] *Id.*

[222] *Id.* at 543.

[223] *Id.*

[224] Before this decision and the Bail Reform Act, when there was more of a controversy about judges considering factors other than flight risk in determining whether to release on bail, other statutes like the Hawaii one were challenged and upheld, allowing courts to weigh the evidence of the alleged crime before allowing release on bail. In many courts, however, defendants are still detained based on the gravity of the offense and weight of the evidence, particularly for previous capital crimes, like murder. *See, e.g.*, People v. Anderson, 6 Cal. 3d 628, 657 n.45 (1972). *But see* Commonwealth v. Truesdale, 296 A.2d 829, 832 (Pa. 1972) (releasing defendant accused of murder on bail because the Constitution mandated bail in noncapital cases and Pennsylvania had abolished the death penalty).

dangerousness.[225] The court argued that "from the beginning of the bail system, an exception to the rule favoring bail was made for persons accused of serious crimes that focused the inquiry solely on the evidence of the defendant's guilt."[226] Nonetheless, the court said that the concepts of dangerousness and flight risk are implicit in the statutory reference to "proof is evident,", so those factors will not be completely ignored.[227] The court further held that before denying bail the burden of "reasonable doubt" is not used and that the "clear and convincing evidence" burden is sufficient.[228] The court said that requiring proof beyond a reasonable doubt for detention, in essence, puts the cart before the horse and makes the state prove before trial what it will have to prove at trial.[229]

The arguments in this recent New Hampshire case show the tensions inherent in today's pretrial detention decision. On the one hand, we allow judges to consider a defendant's guilt and weigh the evidence to determine whether she will go to prison or be released, but on the other hand we do not require the due process protections that usually accompany this decision, including a jury trial or proof beyond a reasonable doubt. Instead, pretrial we are satisfied with evidence of a defendants' guilt of probable cause and clear and convincing evidence. On top of that, considering that most defendants plead guilty and that being detained during the plea bargain puts them at a disadvantage,[230] this lower burden and ability of a judge to determine such facts seem even more significant. While historically in capital cases courts were allowed to weigh evidence, it was only allowed as a factor to determine flight risk, not to detain a defendant if she was likely to be found guilty. And predictions of future dangerousness were banned due to the presumption of innocence and due process. These cases demonstrate how uncontroversial future predictions and considering dangerousness have become. Using the three principles discussed in Part V, it becomes clear that only two of these justifications should allow denial of bail: interference with criminal processes, and in some instances, danger to the community.

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[225] State v. Furgal, 13 A.3d 272, 279 (N.H. 2010).

[226] *Id.*

[227] The New Hampshire Supreme Court conflates the judge's weighing of "proof" and considering dangerousness, stating that these factors have always gone together. *Id.*

[228] *Id.* at 280–81.

[229] *Id.* at 280 (rejecting the requirement of proof beyond a reasonable doubt because that is the degree of proof reserved for trial, not bail).

[230] *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 933 (2007); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2492–93 (2004) (recognizing that pretrial detention leads to "quick plea bargains in small cases, even if the defendant would probably win acquittal at an eventual trial").

V. PRINCIPLES OF PRETRIAL DUE PROCESS

Courts and scholars disagree as to how or if the presumption of innocence should apply pretrial. Some courts have continued to use the presumption pretrial, and others have refused to apply it.[231] Other courts have forgotten that the presumption historically protected bail rights in most cases and focus heavily on community safety in determining bail.[232] Some scholars believe it should prohibit punishment and others say it should prohibit treating the accused like a convicted person.[233] As far as investigation of the accused, scholars have noted that the presumption should not prohibit the State from taking steps that assume guilt and that are necessary to investigate the circumstances of the incident and conduct the trial.[234] In these discussions, often scholars point to normative reasons why the state should preserve the presumption of innocence.[235] Normative reasons for protecting the presumption of innocence exist, but are not the most concrete way to protect a right that is often easy to neglect when prosecutors and courts are faced with concerns about public safety.[236] Other scholars have noted that the key in stopping the violation

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[231] *Compare* People v. Purcell, 758 N.E.2d 895, 902 (Ill. App. Ct. 2001) (refusing to apply *Bell* because it "was not concerned with bail proceedings" and instead choosing to apply *Stack* to hold that the presumption of innocence does "attach to bail proceedings"), *with Ex parte* Elliott, 950 S.W.2d 714, 717 (Tex. Crim. App. 1997) (per curiam) (stating that "the presumption of innocence is a doctrine that allocates the burden of proof in criminal trials and does not apply to a determination of the rights of a pretrial detainee").

[232] *See, e.g.*, United States v. Kisling, 334 F.3d 734, 735 n.3 (8th Cir. 2003) (stating that "counter-intuitively" the burden is higher for the government to prove risk of harm than risk of flight in determining bail and failing to recognize the historical presumption in favor of bail).

[233] Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 287 (2002); Miller & Guggenheim, *supra* note 142, at 342 (considering "the need for a constitutional conception of punishment to replace the Supreme Court's assertion that detention on the basis of predicted criminality is not punishment").

[234] Kitai, *supra* note 233, at 292.

[235] *Id.* at 295 (noting that judges should "refrain from passing judgement . . . for preventing the moral harm resulting from the breach of this commitment"); Ndiva Kofele-Kale, *Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes*, 40 INT'L LAW. 909, 923–24 (2006); John M. Tyson, *Presumed Guilty Until Proven Innocent: Using Results of Statistical or Econometric Studies as Evidence*, 10 ST. THOMAS L. REV. 387, 390–92 (1998); Alexander G.P. Goldenberg, Note, *Interested, but Presumed Innocent: Rethinking Instructions on the Credibility of Testifying Defendants*, 62 N.Y.U. ANN. SURV. AM. L. 745, 747–49 (2007).

[236] Practically speaking, scholars have promoted protections that would allow pretrial detainees to have the presumption of innocence while detained pretrial:

> [P]retrial detainees have to be held as far away as possible from sentenced prisoners; detainees have a right not to be compelled to work, but rather to work at will[.] . . . [D]etainees have a right to wear their own clothes, . . . [and] [d]etainees should have a right to almost unlimited contact with the outside world through visits

of the presumption of innocence (and allowing preventative detention) is defining punishment appropriately.[237] Without a clear understanding of the purpose of the presumption of innocence, it cannot be applied properly pretrial.

Clearer guidelines, preferably rooted in constitutional text, may be more effective in defining the purpose of the presumption of innocence where a slippery slope may lead to reduced rights. Scholars in recent years have not articulated principles that will help protect the rights of defendants *pretrial*, while allowing a fair trial that society and crime victims deserve. And thus, the focus of the presumption of innocence has become an emphasis on *trial* rights like proving defendants guilty beyond a reasonable doubt. The focus of due process has also shifted to encompass procedural protections that block a defendant from being found guilty if the police or prosecutors did not act carefully, rather than protecting individuals from any deprivations of liberty until a proper determination of guilt at trial. In recent years, due process has been more heavily focused on procedures that help a defendant avoid punishment, like the exclusionary rule, rights to *Miranda*, and rights to confrontation. While these rights are critical in increasing police professionalism, there has been a missing emphasis on legal innocence and pretrial liberty—which historically represented the pinnacle of pretrial due process. As such, we now allow judges to predict factually whether someone is guilty without any procedural or legal protections that accompany a defendant at trial, as these are considered "technicalities." This is significant since over 90% of defendants never go to trial and thus never receive the protection of due process or the presumption of innocence.[238]

Because there has been no focus on the constitutional basis for the presumption of innocence, there have been inconsistent distinctions made regarding when detention is and is not appropriate pretrial. However, when the presumption of innocence is tied to due process protections that prohibit a deprivation of liberty until a determination of guilt, there is a constitutional basis that allows for more consistent determinations of what deprivations of liberty are and are not allowed. Obviously, there must be some deprivation of liberty allowed pretrial—and in turn some infringements on a defendant's presumed innocence. Without any deprivation of liberty, arrest would never be allowed until trial. Some deprivation of liberty is allowed, but the question

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> and telephones. . . . Rights should be restricted only upon an individualized suspicion and not as a general policy of controlling discipline.

Rinat Kitai-Sangero, *Conditions of Confinement—The Duty to Grant the Greatest Possible Liberty for Pretrial Detainees*, 43 CRIM. L. BULL. 250, 271–72 (2007) (footnotes omitted).

[237] This definition may be based on the punisher's intent, the effect of the punishment, or the legitimacy of the grounds on which the punitive power is exercised. Miller & Guggenheim, *supra* note 142, at 365; *see* Bell v. Wolfish, 441 U.S. 520, 538–39 (1979); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 321–22 (1869).

[238] *See* PLEA-BARGAINING 77 (William F. McDonald & James A. Cramer eds., 1980) (observing that the role of the judiciary has changed dramatically over time since up to 90% of convictions result from guilty pleas in the negotiation process).

remains for how long and for what reasons it is justified. Whether we are justified in detaining an individual because he will flee before trial or because he may commit an additional crime are both reasonable and rational purposes for detaining a defendant pretrial as far as society is concerned, but which of them is in accord with a defendant's due process rights? Which purpose is consistent with the modern reality that many defendants are recidivists? And which comports with society's increased expectation of protection from crime? The following three principles, derived from earlier historical analysis, help answer these questions.

A. *Pretrial Restraints of Liberty*

First, defendants should maintain pretrial liberty before trial unless there is a proper basis.[239] The proper basis for restricting a person's liberty includes ensuring a person's attendance at trial, safeguarding the judicial process from interference by a defendant, and protecting the security of the facility if a defendant is detained (which should be a rare occurrence)—while interfering as little as possible with a defendant's trial preparation. As the historical analysis demonstrates, the presumption of innocence deems a defendant innocent until the judicial process has been concluded and it has been found otherwise.[240] Thus, a defendant can be held in detention in extreme cases where the government has proven that there is a substantial risk of a defendant threatening or stopping witnesses from testifying at trial.[241] And a defendant can be held because there is a substantial risk, due to the defendant's out-of-state or country connections, that she will flee the jurisdiction before her guilt is determined at trial. Though, arguably, the problem of flight risk is a much smaller issue in today's world of ankle bracelets, passport freezes, and other GPS tracking devices.

Under this principle, an arrest would be justified upon probable cause because the arrest signifies a temporary removal of an individual from society for the purpose of determining whether she is guilty or innocent of the crime with which she has been charged. If the presumption of innocence was taken more seriously upon arrest, the government would take more precautions to

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[239] For a recent example of an application of the presumption of innocence to bail, see *United States v. Madoff*, 586 F. Supp. 2d 240, 252–53 (S.D.N.Y. 2009) (granting bail and stating that the risk of economic danger to the community was not enough to overturn the presumption of release pretrial).

[240] Hudson v. Parker, 156 U.S. 277, 285 (1895) ("The statutes of the United States have been framed upon the theory that 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 . . . ."); Zydok v. Butterfield, 187 F.2d 802, 804 (6th Cir. 1951) (stating that bail shall not be denied as punishment).

[241] This later point is like the forfeiture-by-wrongdoing doctrine under the law of evidence since defendants lose the rights to bail if they interfere with witnesses who plan to testify against them. *See* Giles v. California, 554 U.S. 353, 359 (2008).

ensure that a person's reputation is not tarnished by the arrest and to make clear that the defendant is not presumed guilty until found so by a court of law. For instance, a defendant would not be arrested in public and announcements of the arrest would not be made public until trial.[242] To counterbalance the public nature of an arrest, however, a defendant's arrest and the *Gerstein* hearing that follows should come with adversarial protections that would be provided at trial. A defendant should have the requisite due process protections before being deprived of liberty more permanently. The arrest is a critical part of the pretrial process, as now a trial is unlikely and there are fewer stages that a defendant undergoes before pleading guilty.

A defendant's liberty should be less severely affected while detained pretrial, so that the presumption of innocence is protected as much as possible. If all three of these principles are respected, instances of detention will be rare,[243] and when a defendant is detained for proper reasons, limits can be placed upon her while in detention. While currently the Due Process Clause protects pretrial detainees from "punishment," the real focus should be best allowing them to prepare for trial—with minimal limits placed on defendants' liberty to secure the detention facility. For instance, some limits on the items defendants can receive through the mail, invasive searches of people entering or of residents after contact with individuals outside, or sharing a room with another detainee are not necessarily violations of the presumption of innocence.[244] The Supreme Court, in upholding the foregoing conditions,

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[242] Here, however, the presumption of innocence conflicts with the First Amendment rights of reporters and victims, allowing society to hear the defendant's story before it is presented more fairly in the adversarial setting of trial.

[243] Another reason why detention should be rare is that private losses for defendants are great when being held pretrial. The injuries to those detained include: the social stigma of incarceration, *see* GARY T. TROTTER, THE LAW OF BAIL IN CANADA 37 (2d ed. 1999); Michael J. Eason, *Eighth Amendment—Pretrial Detention: What Will Become of the Innocent?*, 78 J. CRIM. L. & CRIMINOLOGY 1048, 1065 (1988); Sam J. Ervin, Jr., *Preventive Detention, A Species of Lydford Law*, 52 GEO. WASH. L. REV. 113, 122–23 (1983); David J. Rabinowitz, *Preventive Detention and* United States v. Edwards*: Burdening the Innocent*, 32 AM. U. L. REV. 191, 211–12 (1982); Robert S. Natalini, Comment, *Preventive Detention and Presuming Dangerousness Under the Bail Reform Act of 1984*, 134 U. PA. L. REV. 225, 246 (1985), the physical and emotional injuries that may come from detention, alienation from family and society, *see* Allen D. Applbaum, Note, *As Time Goes By: Pretrial Incarceration Under the Bail Reform Act of 1984 and the Speedy Trial Act of 1974*, 8 CARDOZO L. REV. 1055, 1082 (1987), and the loss of work options, loss of future employment, and exposure to convicted criminals, *see* MARTIN L. FRIEDLAND, DETENTION BEFORE TRIAL 104–05 (1965). Another injury is that the lack of public defenders and denial of bail together may deny those detained their due process rights. *See* Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able to Participate in Plea Discussions*, 48 AM. CRIM. L. REV. (forthcoming 2011).

[244] Courts have guaranteed pretrial detainees reasonable medical care, *see* State *ex rel.* Riley v. Rudloff, 575 S.E.2d 377, 387–88 (W. Va. 2002), recreation, *see* Wickham v. Fisher, 629 P.2d 896, 901 (Utah 1981), and critical rights like the right to documents necessary for

unnecessarily cast a shadow on the significance of the presumption of innocence pretrial. The Court could have indicated that some limits are permitted pretrial and others are not depending on whether they restrict a defendant's ability to prepare for trial or restrain her liberty without a proper basis.[245] Given that the crux of the presumption of innocence is due process and preserving a defendant's ability to prepare for a trial that determines her guilt, none of the *Bell* conditions would have violated the defendant's rights to the presumption of innocence. Restrictions that may violate the presumption of innocence for pretrial detainees would be limits on the types and number of visitors they could receive at a facility, restrictions in sharing documents that may relate to witness preparation, and special prohibitions on making calls, receiving confidential mail, and using library or computer facilities that would help them prepare for trial.[246]

B. *Pretrial Weighing of Evidence and Predicting Crime*

Second, judges should not be able to weigh evidence against defendants to determine whether they are guilty before trial. Though judges, in rare circumstances, may be permitted to consider the potential for future crimes on pretrial release when a defendant is a recidivist and has a serious record of prior convictions. Historically, judges were not permitted to look at the facts and circumstances of the crime a defendant allegedly committed in order to determine whether to release him on bail. Bail was a presumed right for most defendants, as it allowed defendants to prepare for trial and because they were presumed innocent at this point and could not be deprived of their liberty without the due process protections. The only exception to this rule was in

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communication with individuals regarding litigation, *see* Tyler v. Whitehead, 583 S.W.2d 240, 243 (Mo. Ct. App. 1979) (per curiam).

[245] Stack v. Boyle, 342 U.S. 1, 4 (1951) ("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."); *see also* Hampton v. State, 42 Ohio St. 401, 404 (1884) ("The object of bail is to secure the appearance of the one arrested when his personal presence is needed; and, consistently with this, to allow to the accused proper freedom and opportunity to prepare his defense. The punishment should be after the sentence."). Indeed, in line with the 1966 Act, another reason defendants are presumptively released pretrial is to avoid negative financial consequences to themselves and their families. *See* United States v. Barber, 140 U.S. 164, 167 (1891) (For "the interest of the public as well as the accused" the defendant should not be detained before trial "if the government can be assured of his presence at that time" because defendants are often poor and to require them to pay bail would mean that they would remain in jail and "their families would be deprived, in many instances, of their assistance and support.").

[246] *See, e.g.*, Block v. Rutherford, 468 U.S. 576, 589 (1984) (discussing "shakedown[s]" or searches of prison cells); Bell v. Wolfish, 441 U.S. 520, 553–54 (1979) (receipt of packages); Duran v. Elrod, 542 F.2d 998, 1000 (7th Cir. 1976) (visitation); People v. Jenkins, 997 P.2d 1044, 1114–15 (Cal. 2000) (access to legal materials in detention); Lawler v. State, 453 P.2d 333, 335 (Okla. Crim. App. 1969) (access to counsel in detention).

capital cases under the common law, and in most of the U.S. states from early on, judges were permitted to consider the weight of the evidence against the defendant before determining whether to release her before trial. The justification for this was that because the defendant was charged with a capital crime, the incentive to flee the jurisdiction to avoid trial and potentially death was too great. Those charged with serious crimes were never detained pretrial based on the concern that the accused would commit further crimes or based on weighing of evidence against them. However, this minor loophole that allowed judges to consider other factors besides flight risk was expanded. First, in the late 1940s, the Supreme Court allowed additional factors such as the weight of the evidence against the defendant and nature and circumstances of the crime to be considered in determining whether the defendant would appear for trial. Later, in the 1960s, these factors became important for determining whether a defendant could be released pretrial. And finally, in the 1980s, these factors, in addition to future dangerousness of a defendant, were added to allow a judge to fully weigh the evidence of guilt and predict whether a defendant would commit a crime on bail.

Today, it is a widespread practice for courts to predict whether a defendant is guilty of the crime charged. The courts can properly weigh the evidence against the defendant in a mini-trial before the actual trial (and significantly, without many of the protections that accompany a defendant at trial) and determine whether the defendant should be detained. If the defendant is more likely to have committed the crime based on the evidence presented, he is detained. If the weight of the evidence is in the defendant's favor, he may be released.[247]

Further, judges can detain an individual based on concerns for safety of the community and the dangerousness of the defendant.[248] If the judge determines, based on the defendant's criminal history, the evidence against him of this particular crime, or other information before the court that the defendant is likely to pose a danger to society that no bail conditions can prevent, the defendant can be detained. And even more commonly than that, the judge can set higher bail amounts for an individual he deems dangerous or one charged with a more serious crime, based purely on those determinations, rather than on the defendant's ability to flee and avoid judgment. Where historically judges were limited to predicting whether the defendant would appear at trial, now they

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[247] In federal court, the burden of persuasion is clear and convincing evidence for community safety, *see* United States v. Ciccone, 312 F.3d 535, 543 (2d Cir. 2002), and preponderance of the evidence that accused is a flight risk, *see* United States v. Cisneros, 328 F.3d 610, 616 (10th Cir. 2003), though clear and convincing evidence has been required for both, *see* Kleinbart v. United States, 604 A.2d 861, 871 (D.C. 1992).

[248] For a criticism of future dangerousness assessments, see Joseph E. Kennedy, *The Danger of Dangerousness as a Basis for Incarceration*, *in* CRIMINAL LAW CONVERSATIONS 83, 83 (Paul H. Robinson et al. eds., 2009) ("[F]uture dangerousness is too dangerous as a sole basis for incarceration because it appeals too directly to our deepest, strongest, and potentially most violent instinct—self-preservation.").

can predict substantively based on various factors whether a defendant will commit a crime while released. In this determination, the judge is given broader powers than he has at trial.[249]

While predicting whether a defendant will commit crimes while on release squarely violates historical due process notions, it may be reasonable for courts to make such assessments in a modern world where many defendants are recidivists. But should judges be permitted to infer any guilt with respect to pending indictments for defendants with previous convictions? Obviously judges are not permitted to consider pending indictments or evidence on the current charge under due process principles, but what about previous convictions? Does the presumption of innocence persist when the defendant has been convicted of a crime? The answer to this question, according to modern case law, is clear.[250] On the one hand, the presumption of innocence is relinquished after a trial that determines a defendant's guilt. Similarly, when a defendant pleads guilty the presumption of innocence no longer applies. But what should courts infer if the defendant is subsequently charged with a crime that he has been convicted of several times in the past? The presumption of innocence does not require courts to cast a blind eye when it comes to determining defendants' rights and making decisions that affect the safety of the community. But historically, judges have only been permitted to take notice of information relating to defendants' previous convictions in determining whether the defendant is a flight risk.[251] Thus, judges should not "weigh" any of the evidence alleged against defendants before trial, though with recidivist defendants, judges may consider prior convictions in assessing whether they pose a danger to the community.

C. *Pretrial Focus on Legal Innocence*

Third, the focus of pretrial protections for a defendant should not be on obtaining the truth of a person's guilt or innocence, but should protect a defendant's liberty until innocence or guilt can be proven at trial. This is what the marriage between the Due Process Clause and the presumption of innocence

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[249] As such, this decision is likely to also violate the Sixth Amendment. This will be discussed more fully in a follow-up article.

[250] Herrera v. Collins, 506 U.S. 390, 399 (1993) ("Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears."); State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973) ("A verdict against the defendant removes the presumption of innocence and raises a presumption of guilt upon appeal.").

[251] United States v. Melendez-Carrion, 790 F.2d 984, 1001 (2d Cir. 1986) ("Just as the Due Process Clause would prohibit incarcerating a person not even accused of a crime in order to prevent his future crimes, it would equally bar preventive detention of a person who has been convicted of past crimes and has served his sentence. The Clause must accord similar protection to a person not convicted but only accused of a crime."). Also, due to the presumption of innocence, previous arrests generally should not be considered against a defendant nor should allegations that have not been proven in court.

has historically required. Due process has required a focus on proving legal guilt and without this emphasis pretrial, the presumption of innocence is left weak. Thus, a change in focus on legal innocence in the pretrial stages would help restore the constitutional link between the Due Process Clause and the presumption of innocence.

However, there is currently a lack of focus on legal guilt pretrial.[252] During all of the important pretrial stages, including arrest,[253] the grand jury hearing,[254] a pretrial detention hearing, a preliminary hearing,[255] and during plea negotiations,[256] there is no focus on the defendant's right to be presumed innocent.[257] This right only attaches after the defendant has worked her way through the system to trial, the last stage, which only about 5% of defendants ever reach.[258] Thus, the presumption of innocence—typically requiring a focus on proving legal guilt and requiring liberty—is not able to have an impact. The presumption of innocence is most important at the most earliest stages of accusation, when it is not yet a foregone conclusion that the defendant is guilty, yet it applies only at the final stage: trial.

In early England, the presumption of innocence was a factual and legal presumption. Due to the link with due process, a person accused of a crime was protected from punishment until facts established that she had committed the crime.[259] In some instances, the presumption so protected the innocent that people who falsely accused an individual were put to death or faced the

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[252] As discussed above, judges are permitted to weigh the evidence against a defendant in determining whether to release her. This "weighing" of the evidence robs the jury of its role—proscribed by the Due Process Clause—to determine legal guilt at trial.

[253] Gerstein v. Pugh, 420 U.S. 103, 123–25 (1975) (failing to rely on the presumption of innocence in requiring that probable cause be established before or promptly after an arrest).

[254] GEORGE J. EDWARDS, JR., THE GRAND JURY 37 (1906) ("Primarily the object of the grand jury is not to protect the innocent . . . but is to accuse those persons, who, upon the evidence submitted by the prosecutor, if uncontradicted, would cause the grand jurors to believe the defendant guilty of the offence charged.").

[255] JOHN N. FERDICO ET AL., CRIMINAL PROCEDURE FOR THE CRIMINAL JUSTICE PROFESSIONAL 805 (10th ed. 2009) (noting that the purpose of a preliminary hearing is to determine "whether a crime was committed; whether the crime occurred within the territorial jurisdiction of the court; and whether there is probable cause to believe that the defendant committed the crime").

[256] F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 232 (2002) (discussing whether plea bargaining preserves the presumption of innocence or not).

[257] Una Ni Raifeartaigh, *Reconciling Bail Law with the Presumption of Innocence*, 17 OXFORD J. LEGAL STUD. 1, 19 (1997) (discussing the different views in the U.S. and other common law jurisdictions on whether the presumption of innocence applies pretrial).

[258] JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE 1016 (4th ed. 2010) (citing 2004 statistics that 96.4% of federal convictions were resolved without trial and that 95% of state felony convictions were resolved by guilty plea).

[259] Quintard-Morénas, *supra* note 11, at 111 n.25 (noting that under Roman law the burden of proof rested on the accuser).

punishment that they alleged another person to have committed.[260] But during this time, if a person confessed in open court or the judge determined that there was sufficient proof of guilt before trial, in some cases, the individual would lose her right to the presumption of innocence. There was a great desire to disincentivize individuals from falsely accusing others because of the experience of English kings who imprisoned political enemies under false charges.[261] The early colonies inherited this mistrust of the government from their experience with British kings, but, over time American case law demonstrates a larger trust of the government police force and a broader concern for public order and safety.[262]

Through the 1960s, the Due Process Clause was tied closely with the emphasis on proper legal procedures that dominated the criminal justice system. In the 1960s, scholars documented this focus on procedural advantages and explained that most people in the criminal justice system were guilty, so the only way to prevent their punishment was to find that a legal procedure was not followed properly to try to prevent a defendant from being found guilty. This focus on legal innocence, rather than factual innocence, did not apply pretrial, however.

Pretrial, judges rely on factual guilt and are allowed to predict and infer guilt based on unproven evidence against the defendant. Judges "weigh" the evidence against defendants to determine whether to release them before trial. While the focus of due process has shifted to legal innocence throughout the criminal justice system, in the pretrial context, the focus is factual innocence.[263]

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[260] *See* HUGH CHISHOLM, 27 THE ENCYCLOPAEDIA BRITANNICA 73 (1898) (explaining that under Roman law individuals were put to death when they falsely accused others). However, some early cases employed methods that today would violate due process in order to determine if someone was guilty. For instance, before the thirteenth century, in some states the burden was reversed and the accused actually had to prove innocence. It was extremely difficult to prove innocence as a matter of fact. In ancient Rome, some people were tortured, and if they did not confess, they were considered innocent. In other early cases, the public relied on revelations from God to distinguish the innocent from the person who was the murderer or robber. William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 331–32 (1995).

[261] S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 406–08 (2d ed. 1981) (discussing the requirement that the accuser bring the evidence against the accused).

[262] *See supra* Part III; *see also* Mervin F. White & Ben A. Menke, *On Assessing the Mood of the Public Toward the Police: Some Conceptual Issues*, 10 J. CRIM. JUST. 211, 223 (1982) (noting that the proportions of citizens who reported a positive police image when presented general questions ranged from 75% to 80%); Catherine Gallagher et al., *The Public Image of Police: Final Report to the International Association of Chiefs of Police* (2001), http://www.theiacp.org/PoliceServices/ExecutiveServices/ProfessionalAssistance/ThePublicImageofthePolice/tabid/198/Default.aspx#ft1 (reviewing studies on public confidence in police and concluding that "[p]olice in America enjoy relatively high levels of satisfaction, support, confidence, and esteem from the public").

[263] There is one important exception to this statement. Several scholars have argued convincingly that with the rise of the innocence movement, the focus has shifted from innocence to factual or actual innocence. *See, e.g.*, Susan A. Bandes, *Protecting the Innocent*

Once that factual determination is made by the judge, the defendant's fate is often sealed, as detention often leads to less bargaining power and a custodial sentence.[264]

The third principle helps courts determine whether strip searches or other violations of privacy are appropriate for defendants being detained pretrial.[265] Historically these searches were not permitted, but recently three circuits have allowed strip searches of pretrial detainees. Strip searches that occur when a person is detained temporarily do not restrain a defendant's liberty; though they do infringe on a defendant's privacy rights, on the whole they do not violate the first principle. In addition, strip searches do not violate the second principle because they do not allow judges to predict or infer guilt of the defendant based on the crime she has allegedly committed. Strip searches, while embarrassing and distasteful when occurring for all defendants placed in a correctional

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as the Primary Value of the Criminal Justice System, 7 OHIO ST. J. CRIM. L. 413, 434 (2009) (describing proposals to provide additional resources for defense where the likelihood of factual innocence is high and noting that such arrangements risk supporting the public view that "lawyers should not defend 'those people'" unless they did not commit the crime); Emily Hughes, *Innocence Unmodified*, 89 N.C. L. Rev. 1083, 1090 (2011) (arguing that juxtaposing "actual innocence against legal innocence dilutes what innocence means").

[264] *See, e.g.*, VERA INST. OF JUSTICE, PROGRAMS IN CRIMINAL JUSTICE REFORM, TEN-YEAR REPORT 1961–1971, at 19 (1972) ("[T]he detainee is more apt to be convicted than if he were free on bail."); Charles E. Ares et al., *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. REV. 67, 69 (1963); Stuart S. Nagel, *Policy Evaluation and Criminal Justice*, 50 BROOK. L. REV. 53, 61 (1983); Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641, 641 (1964); *see also* Bellamy v. Judges & Justices, 342 N.Y.S.2d 137, 142 n.2 (App. Div. 1973) (citing a study of 857 criminal cases that showed that people who were not released on bail were far more often convicted, and far more often given a prison term even accounting for the merits of the cases, or any other factors).

[265] This third principle also illuminates one of the recent questions courts have faced regarding whether it is proper to take DNA samples from defendants regarding crimes charged. The Ninth Circuit has held that taking such samples does not violate the Fourth Amendment. *See supra* note 196 and accompanying text. This type of intrusion into defendants' rights does not violate a defendant's due process or presumption of innocence rights. Gathering of DNA evidence works either to exonerate or prove the guilt of a pretrial detainee at trial. This evidence may be gathered in the pretrial period in order to promote the gathering of evidence so that the jury can eventually determine legal innocence. DNA evidence goes toward proving factual guilt and innocence, which is relevant at trial. In that pursuit it actually resolves some of the problems that have historically existed with proving factual guilt. Before DNA evidence and other sophisticated scientific methods, a defendant was faced solely with conflicting witness accounts or other circumstantial evidence. New methods may allow further progress towards improving factual evidence at trial and the making of evidence-based decisions, where previously evidence was just not reliable enough to fairly determine a defendant's guilt.

facility, do not favor some defendants over others, deprive liberty, or allow judges to make trial-appropriate determinations about defendants before trial.[266]

The Supreme Court in *Bell* allowed restrictions for pretrial confinement, but arguably went too far in limiting the application of the presumption of innocence and due process pretrial. Perhaps the Court thought that there was no way to allow preventative detention while consistently applying the presumption of innocence and went too far in limiting rights to avoid this problem. Though by applying these three principles, the Court could have upheld the presumption of innocence and still allowed some uniform pretrial security prohibitions. Though, because *Bell* was limited to pretrial confinement and *Salerno* did not discuss the presumption of innocence, there is still room for courts to reclaim defendants' due process and presumption of innocence rights pretrial with these three principles.

VI. CONCLUSION

In our modern system of U.S. criminal justice, we proclaim that all are innocent until proven guilty at trial but we allow judges to predict which ones are guilty long before trial. We have adopted practices allowing predictions of guilt and weighing of evidence against defendants before trial since defendants' rights have lacked steady constitutional rooting. Without consistent principles to apply due process principles and the presumption of innocence before trial, these rights have been watered down and applied inconsistently. Three principles emanating from the presumption of innocence and Due Process Clause may help protect pretrial rights in a consistent and disciplined manner. First, pretrial restraints of liberty should be limited to where there is a proper basis. The proper basis for restricting a person's liberty includes ensuring a person's attendance at trial, protecting the judicial process from interference by the defendant, and if the defendant is detained, protecting the security of the facility. Second, the pretrial focus should not be on guilt-determination and punishment as the Due Process Clause requires a conviction of guilt by a jury in order to punish an individual. Though judges, in rare circumstances, may be permitted to consider the potential for future crimes on pretrial release when a defendant is a recidivist and has a serious record of prior convictions. Third, the focus of pretrial protections for defendants should not be on obtaining the truth of a person's guilt or innocence, but should protect defendants' liberty until innocence or guilt can be proven at trial. Respecting these rights will honor the original influence of the Due Process Clause on bail rights—tempered by modern realities—and allow a disciplined change in focus in pretrial practice.

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[266] *Compare* Stanley v. Henson, 337 F.3d 961, 967–68 (7th Cir. 2003) (allowing pretrial strip search with battery misdemeanor charges), *with* Masters v. Crouch, 872 F.2d 1248, 1255 (6th Cir. 1989) (denying a pretrial strip search for a minor offense).