COMMENT

PREVENTIVE DETENTION AND PRESUMING DANGEROUSNESS UNDER THE BAIL REFORM ACT OF 1984

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A calm dispassionate recognition of the rights of the accused . . . the unfailing faith that there is a treasure, if you can only find it in the heart of every man . . . are the symbols, which in the treatment of crime and the criminal mark and measure the stored up strength of a nation.

—Sir Winston Churchill

But till that time you'll here remain,
And bail we will not entertain . . . .

—W.S. Gilbert, Princess Ida

The Bail Reform Act of 1984¹ (“Bail Reform Act” or “Act”) has substantially revised the standards and procedures governing bail in the federal criminal justice system. The Act fundamentally changes the administration of bail in the federal criminal justice system by authorizing “preventive detention” upon a determination by a judge or magistrate that a defendant presents too great a danger to the community to be released prior to or during the trial.²

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² The term “preventive detention” is an expression commonly used to describe the pretrial detention authorized by the Bail Reform Act on a showing of the accused’s dangerousness. See, e.g., Mitchell, Bail Reform and the Constitutionality of Pretrial Detention, 55 Va. L. Rev. 1223, 1240 (1969).

Under the Bail Reform Act, a person is deemed dangerous if “no condition or combination of conditions [that can be placed on release] will reasonably assure . . .
The authorization of preventive detention for reasons of community safety marks a severe departure from the policy of prior federal law, which imposed bail solely for the purpose of assuring the appearance of the accused at judicial proceedings. This revision embodies in law a significant change in the national judgment of the proper accommodation of the rights of the criminally accused with the interest of all persons in being safe and secure in their lives and property.

The constitutionality of preventive detention has been hotly debated over the past two decades, but the Supreme Court has never explicitly decided the issue. This Comment will not attempt to review


See S. Rep. No. 225, supra note 2, at 3. Under The Bail Reform Act of 1984, the purposes of bail still include assuring the appearance of the accused at trial. Conditions can be imposed upon release to ensure that she appears for judicial proceedings. See 18 U.S.C.A. § 3142(c) (West 1985). If no conditions are found to be sufficient to ensure appearance at trial, the accused may be detained. See id. § 3142(d), (e). Prior law provided for the consideration of danger to the community only in capital cases. See Bail Reform Act of 1966, 18 U.S.C. § 3148 (1982), repealed by Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984).

In S. Rep. No. 225, supra note 2, the Judiciary Committee of the Senate stated:

The decision to provide for pretrial detention is in no way a derogation of the defendant’s interest in remaining at liberty prior to trial. However, not only the interests of the defendant, but also important societal interests are at issue in the pretrial release decision. Where there is a strong probability that a person will commit additional crimes if released, the need to protect the community becomes sufficiently compelling that detention, on balance, is appropriate.

Id. at 7.

This argument contrasts sharply with the view of the “public interest” expressed by Congress in 1966. The stated purpose of the Bail Reform Act of 1966 was “to assure that all persons . . . shall not be needlessly detained pending their appearance to answer charges . . . when detention serves neither the ends of justice nor the public interest.” 18 U.S.C. § 3141 (1982), repealed by Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984). Detention of a defendant prior to trial based on a prediction of future dangerous behavior apparently was considered not to serve the ends of justice or the public interest. It was not authorized by the 1966 Act.


See Bell v. Wolfish, 441 U.S. 520, 534 n.15 (1979) (reserving the question whether any governmental objectives besides guaranteeing an accused’s presence at trial may constitutionally justify pretrial detention). Other cases addressing the issue are
that debate or address the question whether a person can ever constitutionally be detained based on a prediction of dangerousness;8 rather, it will evaluate the procedures by which a person is determined to be dangerous under the Bail Reform Act.

Specifically, this Comment will address the constitutionality of the Bail Reform Act’s two presumptions of dangerousness. The Act states that under certain circumstances a presumption arises that no conditions placed on the release of the accused will reasonably assure the safety of the community.9 It then falls upon the accused to rebut the presumption of dangerousness in order to obtain her freedom before trial. If she cannot rebut the presumption, the judicial officer must order pretrial detention.10

Part I of the Comment discusses the two presumptions in the context of the overall procedural requirements of the Bail Reform Act. Part II describes the role of the burden of proof in the factfinding process and the effect of presumptions on the placement of that burden. As this general conceptual framework is outlined, Part II also gives content to the vague language in the statute and legislative history describing the operation of the presumptions in allocating the burden of proof in the dangerousness determination. Part III describes the due process standards for the use of presumptions in criminal prosecutions, and Part IV argues that the same procedural protections are constitutionally required in the pretrial detention hearing. Finally, Part V analyzes the constitutionality of the Bail Reform Act presumptions when measured by these standards. The Comment concludes that preventive detention resulting from a process in which the accused is presumed to be dan-

8 This Comment assumes that a prediction of dangerousness can, with proper procedural safeguards, be a basis for pretrial detention.

9 See 18 U.S.C.A. § 3142(e) (West 1985). Several courts of appeals have already confronted the question of the constitutionality of the presumptions. The First Circuit held that the presumption that an accused will flee is constitutional because it only shifts the burden of production and is supported by “substantial evidence.” See United States v. Jessup, 757 F.2d 378, 385-87 (1st Cir. 1985). Two circuits have expressly reserved the question. See United States v. Hazime, 762 F.2d 34, 37 (6th Cir. 1985); United States v. Williams, 753 F.2d 329, 333 (4th Cir. 1985).

gnerous and bears the burden of rebutting that presumption is a deprivation of liberty without due process of law, and thus violates the fifth amendment of the Constitution.\textsuperscript{11}

I. Procedures Under the Bail Reform Act

A. The Pretrial Detention Hearing

Under the Bail Reform Act, a judicial officer who is authorized to order an arrest\textsuperscript{12} may order that an arrested person be detained pending judicial proceedings.\textsuperscript{18} The person may be detained prior to trial if the judicial officer determines after a detention hearing that "no condition or combination of conditions [placed upon pretrial release] will reasonably assure the appearance of the person as required and the safety of any other person and the community . . . ."\textsuperscript{14}

A detention hearing must be held, upon the motion of the attorney for the government, in cases in which the defendant is charged with a crime of violence,\textsuperscript{15} an offense punishable by death or life imprisonment,\textsuperscript{16} a major drug trafficking offense,\textsuperscript{17} or any felony if the person has previously been convicted of two or more of the offenses described above.\textsuperscript{16} Additionally, a hearing must be held, upon the motion of the government or upon the court's own motion, in cases that involve a

\textsuperscript{11} "[No person shall] be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

\textsuperscript{12} A person may be ordered arrested and detained for any offense against the United States "by any justice or judge of the United States, or by any United States magistrate, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found . . . ." 18 U.S.C. § 3041 (1982).

\textsuperscript{13} See id. § 3141(a).

\textsuperscript{14} Id. § 3142(e). The conditions that may be placed on pretrial release in order to assure the appearance of the accused and the safety of the community are delineated in id. § 3142(c).

\textsuperscript{15} Id. § 3142(f)(1)(A).

\textsuperscript{16} Id. § 3142(f)(1)(B).


\textsuperscript{18} 18 U.S.C.A. § 3142(f)(1)(D). This section also applies if the defendant has twice previously been convicted of state or local offenses that would have been offenses described in this paragraph "if a circumstance giving rise to Federal jurisdiction had existed . . . ." Id.
serious risk that the person will either flee,9 obstruct justice, "or attempt to threaten, injure, or intimidate, a prospective witness or juror."20 Because detention may be ordered only after a hearing, these requirements for invoking the detention hearing serve to limit the types of cases in which detention may be ordered prior to trial.

B. Due Process Protections at the Detention Hearing

A number of procedural requirements apply at the pretrial detention hearing that are intended to protect the right of the accused against deprivation of liberty without due process of law.21 The person has the right to be represented by counsel, and the right to have counsel appointed if she is financially unable to obtain representation.22 The accused may testify, present and cross-examine witnesses, and present information on the issue of dangerousness.23

Finally, the facts the judicial officer uses to support a finding "that no condition or combination of conditions will reasonably assure the safety of any other person and the community [must] be supported by clear and convincing evidence."24 In making this determination, the judicial officer is directed to take into account the nature and circumstances of the offense charged, the weight of the 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.25

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9 Id. § 3142(f)(2)(A).
10 Id. § 3142(f)(2)(B). In this subparagraph, the Bail Reform Act codifies existing case law authorizing detention for the purpose of preserving the integrity of the judicial system and protecting prospective witnesses and jurors. See, e.g., United States v. Wind, 527 F.2d 672, 675 (6th Cir. 1975); United States v. Gilbert, 425 F.2d 490, 491-92 (D.C. Cir. 1969); United States v. Freitas, 602 F. Supp. 1283, 1287 (N.D. Cal. 1985) (citing Gilbert and Wind to support the notion that bail may be denied when societal interests such as the protection of jurors or witnesses are at stake). In cases in which a detention hearing is held upon the motion of the court because the judicial officer perceives that these "serious risks" exist, it seems quite likely that the issue has been decided before the hearing is even held.

[While] pretrial detention is not per se unconstitutional ... a pretrial detention statute may nonetheless be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect.

Id.

23 See id. "The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing." Id.
24 Id.
25 Id. § 3142(g)(1)-(4).
C. The Presumptions of Dangerousness—Section 3142(e)

There are two rebuttable presumptions in the Bail Reform Act. The first presumption, that "no condition or combination of conditions will reasonably assure the safety of any other person and the community," arises in cases where the accused has been charged with, and has previously been convicted of, one of a number of specified offenses, and the previous offense was committed while on pretrial release. In addition, "not more than five years [may have] elapsed since the date of conviction, or release from imprisonment," for the previous offense.

The second rebuttable presumption, similar to the first, presumes "that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community." This presumption arises if the judicial officer finds there is probable cause to believe that the accused has committed a major drug trafficking offense or a felony with a firearm. Because these presumptions at the very least shift to the accused the burden of producing

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26 Id. § 3142(e).
27 See id. § 3142(e)(1). The offenses specified are:

(A) a crime of violence;
(B) an offense for which the maximum sentence is life imprisonment or death;
(D) any felony committed after the person had been convicted of two or more prior offenses described in subparagraphs (A) through (C) if a circumstance giving rise to Federal jurisdiction had existed . . . ."

29 Id. § 3142(e)(3).
30 Id. § 3142(e). This presumption is concerned with predicting appearance at trial as well as dangerousness. This Comment limits its focus to predictions of dangerousness only, although the discussion may be relevant to predicting flight risk as well.
evidence of nondangerousness, they have a severe impact on the hearing procedure.

II. PRESUMPTIONS AND THE BURDEN OF PROOF

Few legal terms have caused as much confusion as the terms "burden of proof" and "presumption." Yet Congress gave virtually no consideration and has provided no guidance as to the meaning or application of the presumptions in the Bail Reform Act. Given the high cost to the individual of a deprivation of liberty prior to an adjudication of guilt, it is imperative that the use of presumptions at the detention hearing not lead to unwarranted incarceration.

The presumptions of the Bail Reform Act affect the factfinding process by allocating the burden of proof. In order to appreciate how the presumptions of section 3142(e) affect the determination of whether a person is dangerous, it is necessary to understand how presumptions and the allocation of the burden of proof affect factfinding processes generally, as well as how the burden of proof is allocated under the Bail Reform Act in cases in which the presumptions do not arise.

A. The Burden of Proof

The term "burden of proof" includes two separate burdens. One

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33 See infra notes 71-89 and accompanying text.
34 See, e.g., E. Cleary, McCormick on Evidence § 344, at 965 (3d ed. 1984) ("One ventures the assertion that 'presumption' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof.'") [hereinafter cited as McCormick on Evidence]; Bohlen, The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof, 68 U. Pa. L. Rev. 307, 307-08 (1920) ("[T]here is no class of case more confused or confusing, more difficult to analyze or rationalise than those which deal with the effect of presumptions on the burden of proof."); Laughlin, In Support of the Thayer Theory of Presumptions, 52 Mich. L. Rev. 195, 196-207 (1953) (describing eight ways the term presumption has been used by the courts).
35 See infra notes 49-58 and accompanying text.
36 See infra notes 123-39 and accompanying text.
37 The law of burdens of proof and presumptions has developed as part of the law of evidence at trial, and a major concern has been the proper roles of the judge and jury. Obviously, the detention determination is not made pursuant to a trial. The judicial officer is both judge, making findings of law, and jury, making findings of fact. The rules of procedure established for trials, such as the rules governing admissibility of evidence, do not apply at the detention hearing. See 18 U.S.C.A. § 3142(f) (West 1985). Like a trial, however, the detention hearing functions as a procedural device for determining the existence of certain facts (for example, whether the accused is dangerous or likely to flee). Thus, the logical process of inference of the existence of one fact from proof of another operates in a pretrial hearing as in any fact-finding procedure. Moreover, trial judges, like the judicial officers in the pretrial hearing, often serve as both trier of fact and law. For these reasons, the operation of presumptions at trial should also be applicable at the detention hearing.
burden, commonly known as the "burden of production," is that of producing evidence of a particular fact in issue.\textsuperscript{38} To discharge this burden, the parties must "satisfy the judge that they have a quantity of evidence fit to be considered by the jury and to form a reasonable basis for the verdict."\textsuperscript{39}

The second burden, often referred to as the "burden of persuasion," is the burden of persuading the trier of fact that an alleged fact, upon which evidence has been introduced, is true.\textsuperscript{40} It is, in essence, an obligation to establish a sufficient degree of belief concerning the veracity of the fact in the mind of the factfinder.\textsuperscript{41} The party who has this obligation bears the risk that the finder of fact's belief will not be sufficiently high to induce her to act as the party wishes.\textsuperscript{42} The requisite degree of belief depends upon the nature of the action. In the familiar formulae, the standard in criminal cases is "beyond a reasonable doubt,"\textsuperscript{43} in some extraordinary civil controversies it is proof "by clear, strong and convincing evidence,"\textsuperscript{44} and in civil cases generally it is proof "by a preponderance of the evidence."\textsuperscript{45}

There is a variety of reasons why the burden of proof may be allocated to one party or another. No single reason is determinative in any situation; rather, the allocation of the burdens "will depend upon the weight that is given to any one or more of several factors, including: (1) the natural tendency to place the burdens on the party desiring

\textsuperscript{38} See McCORMICK ON EVIDENCE, supra note 34, § 336, at 947.
\textsuperscript{39} 9 J. WIGMORE, EVIDENCE § 2487, at 293 (Chadbourn rev. 1981) (emphasis omitted). Regarding the "sufficiency" of the evidence to carry the burden of production, see F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.11, at 268-79 (2d ed. 1977) (discussing the sufficiency of the evidence to establish a proposition); McCORMICK ON EVIDENCE, supra note 34, § 338, at 953 ("The evidence must be such that a reasonable man could draw from it the inference of the existence of the particular fact to be proved . . . .").
\textsuperscript{40} See McCORMICK ON EVIDENCE, supra note 34, § 336, at 947.
\textsuperscript{41} See, e.g, CAL. EVID. CODE § 115 (West 1966) (defining burden of proof).
\textsuperscript{42} "A risk of non-persuasion naturally exists anytime one person attempts to persuade another to act or not to act. If the other does not change his course of action or nonaction, the person desiring change has, of course, failed." McCORMICK ON EVIDENCE, supra note 34, § 336, at 948 (footnote omitted).
\textsuperscript{43} See Id. § 339, at 956.
\textsuperscript{44} Id.
\textsuperscript{45} Id. One commentator suggests that these formulae are equivalent to statements that the trier of fact must find that the fact is almost certainly true, highly probably true, and probably true respectively. See McBaine, Burden of Proof: Degrees of Belief, 32 CALIF. L. REV. 242, 246-47 (1944). Of the traditional formulae, only the "beyond a reasonable doubt" standard explicitly goes directly to the state of mind of the trier of fact. The "preponderance" and "clear, strong and convincing" standards point to the evidence itself and thus are somewhat awkward vehicles for expressing the requisite state of mind of the trier of fact. See McCORMICK ON EVIDENCE, supra note 34, § 339, at 956-57.
change, (2) special policy considerations . . . ,\(^{46}\) (3) convenience, (4) fairness, and (5) the judicial estimate of the probabilities.\(^ {47}\)

Determining dangerousness under the Bail Reform Act is actually a two-step process.\(^{48}\) First, certain facts asserted to warrant a finding of dangerousness must be proved; that is, evidence supporting the existence of those facts must be produced and the judicial officer must thereby be persuaded that they are true. Second, proof of these facts must persuade the judicial officer that the accused is dangerous.

In its only statement regarding the burden of proof in the detention hearing, the Bail Reform Act states "[t]he facts the judicial officer uses to support a finding . . . that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence."\(^ {49}\) For example, if the defendant's history of criminal conduct is asserted to warrant detention, evidence of past criminal acts such as records of arrest and conviction must be produced.\(^ {50}\) This evidence must be clear and convincing, such that the judicial officer is persuaded that it is "highly probably true"\(^ {51}\) that the accused actually has a history of criminal conduct. Once the existence of such past criminal conduct is proved, it serves as evidence on the factual question whether the accused is dangerous. If such evidence is sufficiently persuasive, detention will be imposed.

The Bail Reform Act does not explicitly allocate the burdens of production and persuasion at either step, but the legislative history indicates that both burdens are on the prosecution at both steps. According to the House Judiciary Committee, "the burden of establishing that a defendant is dangerous [or] a flight risk is on the prosecution."\(^ {52}\) This

\(^{46}\) See, e.g., Speiser v. Randall, 357 U.S. 513, 525-26 (1958) (burden of proof beyond a reasonable doubt placed on prosecution in order to minimize conviction of innocent persons); see also In re Winship, 397 U.S. 358, 363-64 (1970) (noting the high stakes involved in a criminal prosecution due to the possibility of stigmatization and loss of liberty).

\(^{47}\) MCCORMICK ON EVIDENCE, supra note 34, § 337, at 952 (footnote omitted).

\(^{48}\) The dangerousness determination is a two-step process because it involves both backward-looking and forward-looking assessments. This distinguishes it from the usual trial of an issue of fact, in which the inquiry is exclusively into the past to determine what happened. In the detention hearing, the judicial officer must first determine what has happened in the past (the first step) and then from these facts determine the ultimate fact: what is going to happen in the future (the second step).


\(^{50}\) See S. Rep. No. 225, supra note 2, at 22. This is the Senate Judiciary Committee report on the version of the Act that was passed by the Senate on February 2, 1984. Regarding the burden of proof and the § 3142(e) presumptions, it is identical to the Bail Reform Act as enacted.

\(^{51}\) See McBain, supra note 45, at 254.

\(^{52}\) H.R. Rep. No. 1121, 98th Cong., 2d Sess. 27 (1984). Although the bill re-
is the sole statement in the reports on the issue of the burden of proof in the detention hearing, and it indicates that Congress generally intended that in this process the government bear the burden of producing evidence and persuading the judicial officer. Moreover, this is consistent with the placement of the burden in criminal trials, and the policy considerations that motivate that practice. Finally, the section 3142(e) presumptions, which in some cases shift to the defendant the burden of establishing that she is not dangerous, would be redundant and meaningless if the burden were not otherwise on the government.

The statute and legislative history are significantly less instructive, however, as to the degree to which the judicial officer must be persuaded that the accused is dangerous. As noted above, the statute states that the facts the judicial officer uses to support a finding of dangerousness must be supported by clear and convincing evidence. Thus, in the first step of the process, the judicial officer must be persuaded to the degree indicated by the "clear and convincing evidence" formula that the facts the government asserts to show dangerousness are true. The statute says nothing, however, regarding the degree of belief of dangerousness these facts, once proved, must produce in the mind of the judicial officer before the accused may be detained. The pertinent sections of the legislative history of all preventive detention statutes reported since 1981 similarly do not address the degree to which the judicial officer must be persuaded in this second step.

In sum, Congress has provided no indication of the degree to which the judicial officer must be convinced that the accused is dangerous, thus sanctioning judicial discretion in a situation that calls for a prophetic prediction of future behavior. Because the burden of persuasion is on the prosecution, the judicial officer must believe, at least to the degree indicated by the "preponderance of the evidence" formula, that the accused is dangerous. Thus the lowest of all evidentiary stan-

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dards, generally applicable only to civil cases, is the only check on judicial discretion.

B. Presumptions

The law regarding presumptions is among the most muddled of all areas of the law. Courts have used the term "presumption" to mean many different, unrelated things. Because the meaning of the term is ambiguous and the law on the subject is confused, it is particularly unfortunate that the Bail Reform Act is silent as to precisely how the section 3142(e) presumptions are intended to operate. This section will analyze the language of the statute and the legislative history in order to determine how the presumptions affect the process of assessing whether a defendant is dangerous.

A presumption is a mechanism that deems one fact, the "fact presumed," to be true when the truth of another fact, the "fact proved," is established. Under the Bail Reform Act, the fact that no conditions of release will reasonably assure the safety of the community is deemed to be true when the "fact" of one of the enumerated current charges plus prior conviction, or the "fact" of the current charge alone, is established.

Except in the case of a "conclusive" or "irrebuttable" presumption, the party against whom a presumption operates can introduce

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59 See supra note 34.
60 Professor Laughlin, who has described eight ways "presumption" has been used, observed:

In checking source material relative to various of the presumptions referred to, it soon becomes evident that the word has been so promiscuously used as to be devoid of much of its utility. The language of the law is permeated by "magic words," . . . which are used as substitutes for exact analyses. The word "presumption" is rapidly becoming such a word.

Laughlin, supra note 34, at 195-96 (1953) (footnotes omitted).

61 Basic elements of the law of presumptions and the theories of their proper role in the fact-finding process are discussed in this section, but a general overview is not within the scope of this Comment. There will be no attempt here, therefore, to set forth every sense in which the term has been used. General issues regarding presumptions will be addressed only as they are relevant to understanding the presumptions of the Bail Reform Act.

62 See Ashford & Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale L.J. 165, 165 (1969). More generally, a presumption has been defined as "a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts." McCormick on Evidence, supra note 34, § 342, at 965.

63 18 U.S.C.A. §§ 3142(e)(1)-(3), 3142(f) (West 1985) (the "fact proved" that gives rise to the first presumption).
64 Id. § 3142(e) (the "fact proved" that gives rise to the second presumption).
65 A "conclusive" or "irrebuttable" presumption is actually not a presumption at all. If one fact is conclusively presumed from proof of another fact, then the party
evidence that contradicts the existence of the fact presumed. If such evidence is sufficient to render the presumption inoperative, the presumption is said to have been overcome or rebutted.66 The Bail Reform Act explicitly states that the presumptions of dangerousness are rebuttable.67 Nonetheless, exactly what the accused must do to overcome the presumption is left unanswered by the statute.

At the beginning of the dangerousness determination process, the burden of producing evidence and persuading the judicial officer is on the prosecution.68 To presume that the defendant is dangerous affects the burden of proof in one of three ways. At a minimum, presumptions satisfy the party's burden of producing evidence. Such a "permissive presumption"69 allows, but does not require, the finder of fact to infer the fact presumed from the fact proved. It does not, however, shift either the burden of production or the burden of persuasion to the party against whom it operates.70 Thus, if the section 3142(e) presumptions are purely permissive, the judicial officer is permitted, but not required, to find an accused dangerous on the basis of the current charge alone, and the accused is under no obligation to introduce evidence to the contrary to avoid detention.

Although the Supreme Court has used the term "presumption" to refer to such permissive inferences,71 most commentators have used the term to describe a standardized practice that satisfies a party's burden of producing evidence on the issue, and requires the adversary to produce credible evidence with regard to the presumed fact.72 In some cases, the burden of persuasion is shifted to the adversary as well.73

against whom the presumption operates is precluded from showing evidence that the fact presumed does not exist. In reality, this is a rule of substantive law, because the existence of the fact presumed is immaterial. See J. WIGMORE, supra note 39, § 2492, at 307-08. In a commonly cited example, if it is proven that a child is under seven years old, the courts have stated that it is conclusively presumed that she did not commit a felony. This is not a presumption at all, but a rule of law that someone under the age of seven cannot be convicted of a felony. See, e.g, 1 E. MORGAN, BASIC PROBLEMS OF EVIDENCE 31 (1961).

66 See Ashford & Risinger, supra note 62, at 165.
68 See supra notes 52-54 and accompanying text.
70 See id.; see also Barnes v. United States, 412 U.S. 837, 840 n.3 (1973) (permissive presumption described in jury instructions).
72 See MCCORMICK ON EVIDENCE, supra note 34, § 342, at 965.
73 See id. The development of the two major theoretical positions discussed in the text are attributable, respectively, to the work of James Bradley Thayer and Edmund Morris Morgan. They have come to be referred to simply as "the Thayer approach" and "the Morgan approach." See, e.g, Ashford & Risinger, supra note 62, at 169. Thayer's and Morgan's views are put forth in their influential treatises on evidence. See J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 313-52 (1898); 1 E. MOR-
The Court has defined these as two types of “mandatory presumptions.”

Under the first of these two approaches, the effect of the section 3142(e) presumptions would be to shift to the accused the burden of producing some evidence that there are conditions of release that would reasonably assure the safety of the community. The burden of persuading the judicial officer that there are no such conditions would remain on the prosecution, and the presumption involved would have no further effect. Under the second approach, the section 3142(e) presumption would also shift to the accused the burden of persuading the judicial officer that there are conditions that would assure the safety of the community.

To understand the effect of the section 3142(e) presumptions on the determination of dangerousness, it is crucial to determine which of the three above-described interpretations Congress intended. The only statements in the legislative history of the Bail Reform Act regarding the effect of the section 3142(e) presumptions are made in reference to the first presumption, which mandates that dangerousness be presumed upon the facts of the current charge and a previous conviction for an offense committed while on pretrial release. Referring to these “basic facts,” the Senate Judiciary Committee report states “it is appropriate in such circumstances that the burden shift to the defendant to establish a basis for concluding that there are conditions of release sufficient to assure that he will not engage in dangerous criminal activity pending his trial.” According to the report, “[s]uch a history of pretrial criminality is, absent mitigating information, a rational basis for concluding that a defendant poses a significant threat to community

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GAN, supra note 65, at 31-44.


75 The practical result under this theory in civil actions is that the parties relying on the presumption can survive a motion for a directed verdict at the end of their own case. The presumption thereafter disappears. See MCCORMICK ON EVIDENCE, supra note 34, § 344, at 973-74; J. THAYER, supra note 73, at 336.

76 Those who have argued in favor of this latter approach stress that the requirements for dissipating any presumption should depend on the reasons for which it is created. They point out that although courts may profess to be applying the former rule, they are often influenced by such considerations and apply the latter. See 1 E. MORGAN, supra note 65, at 34-37.


78 S. REP. No. 225, supra note 2, at 19 (emphasis added). This statement is recited verbatim in the Senate Judiciary Committee reports of every other bail reform bill reported since 1981 that contained the presumptions. See S. REP. No. 147, supra note 58, at 46; S. REP. No. 317, supra note 58, at 50.

79 The use of the term “rational basis” appears to be a direct reference to the test the Court has developed for assessing the constitutionality of mandatory presumptions used in criminal prosecutions. See infra notes 103-105 and accompanying text.
These statements indicate that the section 3142(e) presumptions are mandatory presumptions. They do more than merely permit the judicial officer to find an accused dangerous upon proof of the specified facts. Rather, the presumptions place upon the accused at least the burden of producing evidence on the question.

From these few clues, however, it is extremely difficult to determine whether Congress intended that the presumptions in the Bail Reform Act shift to the accused both the burden of production and persuasion, or only the burden of production.\(^81\) It is not clear whether "establish a basis for concluding" means "establish credible evidence"—in which case the prosecution would still bear the burden of persuasion to the degree indicated by the clear and convincing evidence standard—or "persuade the judicial officer to conclude"—in which case the defendant would bear the burden of persuasion to some unspecified degree.\(^82\) In *United States v. Jessup*\(^83\) the First Circuit determined that the presumptions shift the burden of production but not the burden of persuasion.\(^84\) The reasons for which the presumptions exist, however, indicate that the better interpretation is that Congress intended the burden of persuasion to shift to the defendant.

The Bail Reform Act is premised on the notion that judges can identify those few defendants who are dangerous,\(^85\) that in most cases the accused is not dangerous, and that the determination should be

\(^80\) S. REP. No. 225, *supra* note 2, at 19; see also S. REP. No. 147, *supra* note 58, at 45 (same statement); S. REP. No. 317, *supra* note 58, at 49 (same statement). The introductory discussion of the presumptions, however, states that both presumptions arise under "sets of circumstances under which a strong probability arises that no form of conditional release will be adequate" to insure the safety of the community. S. REP. No. 225, *supra* note 2, at 19. Moreover, in its discussion of the set of instances under which the second presumption arises, the Committee made no distinction with reference to the accused's burden. *See id.* at 19-20. For these reasons, it is reasonable to infer that the two presumptions shift the burden to the accused in the same way.

\(^81\) It may be irrelevant whether the section 3142(e) presumptions shift both components of the burden of proof to the accused, or only the burden of production. The Supreme Court has indicated that, in a criminal trial, both types are "mandatory" presumptions and are to be judged by the same standard. *See County Court v. Allen*, 442 U.S. 140, 157 & n.16 (1979). There is at least one commentator, however, who has suggested that the distinction between these two types of "mandatory" presumption might be important with regard to the tests for their constitutional validity. *See McCormick on Evidence, supra* note 34, § 346, at 988.

\(^82\) The question of the degree to which the accused would then have to persuade the judicial officer is an even greater riddle.

\(^83\) 757 F.2d 378 (1st Cir. 1985).


\(^85\) *See, e.g.*, S. REP. No. 225, *supra* note 2, at 6-7.
made on a case by case basis. Thus, in the general run of cases, Congress determined that the probability that the defendant is dangerous is low, and that the government must introduce evidence and persuade the judicial officer otherwise. In those instances that give rise to the presumptions, however, Congress determined that just the opposite is true. In those circumstances, Congress stated, there is a "strong probability" that the person is dangerous. Therefore, Congress established that in those specified circumstances, the status quo should reflect the probability for dangerousness and the accused should be detained. The burden of persuading the judicial officer to disturb the status quo is to be borne by the accused. It appears, then, that Congress intended that the presumptions not disappear upon the introduction of evidence by the accused, but that they shift to the accused the burden of persuading the judicial officer that there are conditions of release that will reasonably assure the safety of the community.

III. DUE PROCESS LIMITATIONS ON THE USE OF PRESUMPTIONS

The due process requirements of the fifth and fourteenth amendments of the Constitution place limitations on the use of presumptions that operate against criminal defendants. Since the early part of this century, the Supreme Court has attempted to prescribe standards for testing the validity of presumptive language. This effort culminated in the 1979 decisions of County Court v. Allen and Sandstrom v. Montana. In Allen and Sandstrom the Court determined that the proper test to be employed in evaluating the constitutionality of presumptions depends upon the type of presumption in question.

In Allen, the Court laid out the constitutional standards for evalu-
ating permissive presumptions and those mandatory presumptions that shift at least the burden of production. According to the Court, "in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." Because permissive presumptions leave the trier of fact free to credit or reject the inference and do not shift the burden of proof, they affect the factfinder's responsibility only if, "under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." Only in that situation, stated the Court, is there a risk that the use of the permissible inference has caused the presumably rational factfinder to make an erroneous factual determination.

In contrast, the Court stated that a mandatory presumption affects the placement of the burden of proof by telling the trier of fact that she must find the presumed fact upon proof of the basic fact, at least until the defendant "has come forward with some evidence to rebut the presumed connection between the two facts." This presumption effectively removes factfinding responsibility from the trier of fact. Because a mandatory presumption has a more significant effect on the factfinding process, the Court stated that when the validity of a mandatory presumption is at issue, existence of evidence sufficient to support a conviction is irrelevant.

To the extent that the trier of fact is forced to abide by the presumption, and may not reject it based on an independent evaluation of the particular facts presented by the State, the

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94 In Allen, four persons were convicted of possession of illegal handguns under New York state law. See 442 U.S. at 144. The evidence showed that two illegal handguns were found in an open handbag in the front of the car occupied by the defendants belonging to one of the defendants. See id. at 143. A New York statute provided that, with certain exceptions, the presence of a firearm in an automobile was presumptive evidence of its possession by all persons occupying the vehicle. See id. at 142 (citing N.Y. PENAL LAW § 265.15(3) (McKinney 1967)). The trial judge instructed the jury in language that first suggested that the presumption stated only a "permissive inference" and then suggested that it shifted the burden of production. Id. at 161. In a federal habeas corpus proceeding, the Court of Appeals for the Second Circuit held that the presumption shifted the burden of proof to the defendant and was "unconstitutional on its face." Id. at 143. The Supreme Court reversed, stating that the presumption was only permissive because it did not shift either the burden of production or persuasion to the defendant. See id. at 160-63.

95 Id. at 156.
96 Id. at 157.
97 Id.
98 Id.
99 Id. at 159-60.
analysis of the presumption’s constitutional validity, is logically divorced from those facts and based on the presumption’s accuracy in the run of cases.\(^{100}\)

*Allen*, therefore, requires that mandatory presumptions be analyzed on their face to determine whether they are constitutional. Constitutionality depends on the adequacy of the connection between the facts that give rise to the presumption and the fact that is presumed.\(^{101}\) The Court has defined the standard that the connection must meet in a series of cases, beginning with *Tot v. United States*.\(^{102}\)

In *Tot* the Court determined that there must be a “rational connection” between the basic fact and the presumed fact:

Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. . . . [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.\(^{103}\)

It was not clear from *Tot*, however, whether determining that a connection was rational was a question of relevancy or sufficiency of the connection between the facts proved and the fact presumed.\(^{104}\) If it was a question of relevancy, a presumption would be valid if the proved fact tended to prove the presumed fact. But if it was a question of sufficiency, a presumption would be valid only if the existence of the proved fact made it more likely than not that the presumed fact was true.\(^{105}\)

The Court made it clear in *Leary v. United States*\(^{106}\) that the test was one of sufficiency. Reviewing *Tot* and the subsequent cases in

\(^{100}\) *Id.* at 159 (citation omitted).

\(^{101}\) See *id.* at 156.

\(^{102}\) 319 U.S. 463 (1943). *Tot* involved the validity of a presumption stating that possession of a firearm by a person who has been convicted of a crime of violence was presumptive evidence that the firearm was shipped or transported in interstate commerce. *Id.* at 464. The Court, finding that there was no rational basis for concluding from possession of the firearm that the acquisition must have been through interstate commerce, held that the presumption violated the defendant’s right to due process. *Id.* at 468.

\(^{103}\) *Id.* at 467-68 (citations omitted).

\(^{104}\) See MCCORMICK ON EVIDENCE, *supra* note 34, § 347, at 993.

\(^{105}\) *Id.*

which presumptions were challenged,\textsuperscript{107} the Court held that a criminal statutory presumption is unconstitutional "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."\textsuperscript{108}

In \textit{Sandstrom v. Montana},\textsuperscript{109} moreover, the Supreme Court indicated that the validity of mandatory presumptions that shift the burden of persuasion to the defendant may be tested by a more stringent standard and, in fact, may be unconstitutional under all circumstances. In \textit{Sandstrom}, the defendant was charged with "deliberate homicide," in that he "purposely or knowingly" caused the death of the victim.\textsuperscript{110} The defendant had previously confessed to the slaying,\textsuperscript{111} so the only issue was the question of intent. The trial judge instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts."\textsuperscript{112} The jury found the defendant guilty and sentenced him to one hundred years in prison.\textsuperscript{113}

The Supreme Court reversed the conviction in a unanimous decision.\textsuperscript{114} The Court determined that a reasonable jury could well have interpreted the presumption as either conclusive,\textsuperscript{115} or "as a direction to find intent upon proof of the defendant’s voluntary actions (and their ‘ordinary’ consequences), unless the defendant proved the contrary by some quantum of proof which may have been considerably greater than ‘some’ evidence—thus effectively shifting the burden of persuasion on the element of intent."\textsuperscript{116} The Court held that under either interpretation the defendant would have been deprived of his right to due process of law, and therefore, the instruction was unconstitutional.\textsuperscript{117}

The Court reasoned that if the jury had interpreted the instruction as shifting the burden of persuasion, it could have concluded that upon proof of the slaying and of additional facts not themselves sufficient to establish the element of intent, the burden was shifted to the defendant

\textsuperscript{107} See United States v. Romano, 382 U.S. 136, 143-44 (1965) (presumption of possession, custody, or control from proof of presence at illegal still held invalid); United States v. Gainey, 380 U.S. 63, 67-68 (1965) (presumption of “carrying on” the business of distiller from proof of presence at illegal still held valid).

\textsuperscript{108} \textit{Leary}, 395 U.S. at 36 (emphasis added).

\textsuperscript{109} 442 U.S. 510 (1979).

\textsuperscript{110} \textit{Id.} at 512 (quoting \textit{MONT. CODE ANN.} § 45-5-102 (1978)).

\textsuperscript{111} \textit{Sandstrom}, 442 U.S. at 512.

\textsuperscript{112} \textit{Id.} at 513.

\textsuperscript{113} \textit{Id.}

\textsuperscript{114} See \textit{id.} at 511.

\textsuperscript{115} \textit{Id.} at 517. The Court stated that a conclusive presumption could be interpreted "not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption." \textit{Id.}

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Id.} at 524.
to prove that he lacked the requisite intent.\textsuperscript{118} Such a presumption would be constitutionally deficient because the "'State must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the defendant by means of such a presumption.'\textsuperscript{119}

The Court's analysis in \textit{Sandstrom} leaves unanswered the question of whether a presumption may ever be used to assign the burden of persuasion to the defendant.\textsuperscript{120} It is clear, at least, that the burden of persuasion may not be shifted unless a rational finder of fact could find the presumed fact beyond a reasonable doubt from the facts proved.\textsuperscript{121} This requirement ensures that use of the presumption, if it is in fact the basis for the finding of the element in question, does not relieve the prosecution of its burden of proof, nor withdraw from the finder of fact the function of determining whether the prosecution has carried its burden.\textsuperscript{122}

In summary, statutory presumptions that merely state permissible inferences are to be evaluated on the record of the case, and are valid unless, under all the facts of the case, there is no rational way the finder of fact could make the connection permitted by the inference. Presumptions that shift the burden of production are evaluated on their face and are valid if the existence of the proved fact makes it more likely than not that the presumed fact is true. Conclusive presumptions and presumptions that shift the burden of persuasion are also evaluated on their face, and are only valid if the finder of fact could rationally find the presumed fact beyond a reasonable doubt from proof of the basic fact.

IV. RELEVANCY OF DUE PROCESS STANDARDS TO BAIL REFORM ACT PRESUMPTIONS

The Supreme Court has developed due process standards for the use of presumptions that operate against criminal defendants in the context of trials. A pretrial detention hearing, however, is not a crimi-
nal trial. It is therefore necessary to determine whether the same proce-
dural standards that apply to the use of presumptions at a trial should
apply to the use of the section 3142(e) presumptions at a pretrial
hearing.\textsuperscript{123}

The importance of what is at stake for the criminally accused was
recognized over a century ago in \textit{Miles v United States}.\textsuperscript{124} In \textit{Miles}, the
Court approved the trial judge’s instructions that

\begin{quote}
[a] juror in a criminal case ought not to condemn . . . un-
less he be so convinced by the evidence, no matter what the
class of evidence, of the defendant’s guilt, that a prudent man
would feel safe to act upon that conviction in matters of the
highest concern and importance to his own dearest personal
interests.\textsuperscript{125}
\end{quote}

More recently, the Court was asked to determine whether proof
beyond a reasonable doubt was among the essentials of due process and
fair treatment required at the adjudicatory stage when a juvenile is
charged with an act that would constitute a crime if committed by an
adult.\textsuperscript{126} The Court held that such proof is required\textsuperscript{127} because “[t]he
accused during a criminal prosecution has at stake interests of immense
importance, both because of the possibility that he may lose his liberty
upon conviction and because of the certainty that he would be stig-
mated by the conviction.”\textsuperscript{128}

Although these cases involved criminal trials and the burden of
proof required for conviction, the accused has the same interests in
maintaining her freedom before trial and in avoiding the stigmatization
of being labeled dangerous.

Detention prior to trial is a severe restriction of the accused’s lib-
erty. Beyond the obvious deprivation of liberty that occurs anytime the
state incarcerates an individual, there are several factors operating in

\textsuperscript{123} In \textit{United States v. Jessup}, 757 F.2d 378 (1st Cir. 1985), the First Circuit
held that the standards for the use of presumptions at trial do not apply at the pretrial
detention hearing. \textit{See id.} at 386-87. Thus, instead of using the “more likely than not”
standard of \textit{Leary v. United States}, 395 U.S. 6, 36 (1969), they considered only
whether the presumption was supported by “substantial” information. \textit{See Jessup,} 757
F.2d at 387.

The \textit{Jessup} decision is fundamentally flawed by its failure to recognize the severe
restriction of liberty occasioned by a decision to detain prior to trial. Because the inter-
ests of defendants in this context are so similar to their interests at trial, the same
standards should apply.

\textsuperscript{124} 103 U.S. 304 (1880).
\textsuperscript{125} \textit{Id.} at 309.
\textsuperscript{127} \textit{Id.} at 368.
\textsuperscript{128} \textit{Id.} at 363.
the pretrial detention situation that make the deprivation of liberty particularly severe. First, pretrial imprisonment is often imposed under conditions that are as harsh, if not harsher, than those imposed upon convicted prisoners. Although the Supreme Court has held that conditions of pretrial detention that most would consider severe do not necessarily violate the right to due process of law, the nature of the conditions is relevant to the question of the degree to which liberty is infringed.

Reports on the conditions under which persons are detained prior to trial commonly include descriptions of foul smelling air, over-crowding, annoying levels of noise, and sexual perversion. In many cases, those accused of crime for the first time are not segregated from convicted prisoners. There are rarely any rehabilitative programs or planned recreational activities. The days are filled with endless monotony. Reports that have described the conditions under which pretrial detainees are commonly confined clearly indicate that the infringement upon the liberty of an unconvicted person is significant.

Second, there is a high positive correlation between pretrial detention and the severity of any subsequent sentence. This correlation has been shown to exist in virtually every study over the past 50 years, and has been found again in the most recently completed government study of pretrial release. The accused is greatly restricted in aiding in her own defense and is often detained at a location so distant as to prevent consultation with counsel, thereby further handicapping the preparation of a defense. Finally, prosecutors say that the prospect of

132 See P. Wice, supra note 131, at 88-89.
133 See id. at 91.
134 See J. Goldkamp, Two Classes of Accused: A Study of Bail and Detention in American Justice 185 (1979); see also Rankin, The Effect of Pretrial Detention, 39 N.Y.U. L. Rev. 641, 642-43 (1964) (representative study); Note, supra note 129, at 1053-54 (same).
135 See U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRETRIAL RELEASE AND MISCONDUCT 5 (1985) (special report) [hereinafter cited as BJS Study]. Although causation cannot be inferred reliably from correlative data, see, e.g., J. Goldkamp, supra note 134, at 186, this recent study used statistical techniques that reduced the confounding influence of other possible factors. The interpretation made was “that detainees receive harsher sentences because of their pretrial detention.” BJS Study, supra, at 5 n.13.
136 See P. Wice, supra note 131, at 92-93.
pretrial detention is one of the primary forces encouraging defendants to enter premature guilty pleas.\textsuperscript{137}

In addition to severely restricting an accused's liberty, the state will stigmatize the pretrial detainee by branding her as too dangerous to be in the community. This stigma can affect present and future employment, as well as relationships with family and the community at large.\textsuperscript{138} This negative effect on an accused's reputation may be irreparable even if the person is ultimately acquitted at trial.\textsuperscript{139}

In summary, the concerns that lead to the protection of the accused from the operation of irrational presumptions at trial are also implicated at a detention hearing. The interests of unconvicted defendants in maintaining their liberty and avoiding the stigma of being branded too "dangerous" to be in the community are at stake at the detention hearing as well as at a trial. For these reasons, the due process limitations upon the use of presumptions in criminal trials must operate at the detention hearing to protect the accused from unwarranted detention prior to trial.

V. TESTING THE CONSTITUTIONALITY OF THE PRESUMPTIONS OF DANGEROUSNESS

Having determined that the due process clause of the fifth amendment places affirmative limits on the use of presumptions in criminal

\textsuperscript{137} See id. at 91.

\textsuperscript{138} In United States v. Motamedi, 767 F.2d 1403 (9th Cir. 1985), Judge Boochever stated:

"Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."

"... Society has no mechanism to recompense an individual for income lost or damages to a career due to pretrial confinement. Nor do we compensate the individual and his family for their mental suffering and loss of reputation due to pretrial incarceration."

\textit{Id.} at 1414 (Boochever, J., concurring in part and dissenting in part) (quoting Gerstein v. Pugh, 420 U.S. 103, 114 (1975); see also Hirsch, Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons, 21 BUFFALO L. REV. 717, 743 (1972) ("[L]abeling someone a potential criminal would have much the same stigmatizing effect as labeling him a past offender.") (footnote omitted); Comment, Preventive Detention and United States v. Edwards: Burdening the Innocent, 32 AM. U.L. REV. 191, 211 (1982) ("[E]ven if the accused is found not guilty of the charged offense, the label of 'dangerous potential criminal' can be a stigma to the accused and can adversely affect his opportunity for future employment.") (footnote omitted).

\textsuperscript{139} See United States v. Motamedi, 767 F.2d 1403, 1414 (9th Cir. 1985) (Boochever, J., concurring in part and dissenting in part) ("[T]he injuries consequent upon pretrial confinement may not be reparable upon a subsequent acquittal."); Campbell v. McGruder, 580 F.2d 521, 530 n.15 (D.C. Cir. 1978) ("Even without the stigma of conviction, however, pretrial detention may permanently damage the detainee's reputation.").
prosecutions, and that those limits apply in the pretrial detention hearing, the presumptions of the Bail Reform Act must be analyzed according to the standards developed to ensure that the accused's right to due process of law is not violated.

The section 3142(e) presumptions, which, at minimum, shift to the accused the burden of production of evidence on the issue of dangerousness, are constitutional only if the facts that give rise to the presumption of dangerousness make it more likely than not that the person is actually dangerous. Thus, the question is whether a person charged with the crimes specified by the Act and with a specified criminal history is more likely than not a person as to whom no conditions of release will reasonably assure the safety of the community.

In the necessarily empirical analysis of the connection between the fact proved and the fact presumed, the Court has on several occasions stated that Congress's determination must weigh heavily. The Court reiterated this deference to Congress's determination in *Leary v. United States*. In *Leary*, however, the Court examined the legislative history of the statute and found it inconclusive as to the strength of the connection between the presumed and basic fact. The Court therefore conducted an extensive review of the relevant literature and found the connection insufficient to meet the more likely than not standard. This insufficiency, the Court stated, was not "overcome by paying, as we do, the utmost deference to the congressional determination that this presumption was warranted."

As was the case in *Leary*, there is little in the hearings and reports

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140 See supra notes 52-58 and accompanying text.
143 See, e.g., *United States v. Gainey*, 380 U.S. 63, 67 (1965). In *Gainey* the Court held that there was a rational connection between a defendant's unexplained presence at an illegal still, and the crime of operating the still. The Court stated that "[t]he process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." *Id.* at 67.
144 395 U.S. 6, 36 (1969) ("[I]n the judicial assessment the congressional determination favoring the particular presumption must, of course, weigh heavily.")
145 See *id.* at 39-46.
146 See *id.* at 47-52.
147 See *id.* at 52.
148 *Id.* at 53. Although the Court recently held that from a legal standpoint there is nothing inherently unattainable about judges predicting future criminal conduct, it did not imply that this was an area of specialized judicial competence. *See Schall v. Martin*, 104 S. Ct. 2403, 2417-18 (1984). For a discussion suggesting that very few have the competence to make the dangerousness determination, see Slobogin, Dangerousness and Expertise, 133 U. Pa. L. Rev. 97, 127-30 (1984).
on the Bail Reform Act indicating that presuming dangerousness from the facts specified in the statute is anything more than mere speculation. The Report of the Senate Judiciary Committee on the version of the Bail Reform Act that passed the Senate in February 1984\textsuperscript{149} merely asserts that upon proof of the specified facts a strong probability arises that no form of conditional release will be adequate, but does not substantiate these assertions beyond calling them a "rational basis" for concluding that the defendant poses a threat to the community.\textsuperscript{160} Regarding the second presumption, the report cites both dangerousness and bail jumping as highly probable upon a showing of probable cause of the specified charges.\textsuperscript{153} Again, the report makes broad assertions, and labels them "obvious considerations," yet presents no substantiation except a reference to the testimony of one Senator.\textsuperscript{165} This testimony also contains no empirical support regarding the dangerousness presumptions.\textsuperscript{185} In fact, the Senate Judiciary Committee reports of every bail reform bill since 1981 containing the presumptions use virtually identical language and similarly, contain no empirical evidence of any connection between the specified facts proved and the presumed fact of dangerousness.\textsuperscript{184} An inquiry into the sufficiency of the connection between the facts upon which the section 3142(e) presumptions are based and the presumed fact of dangerousness must therefore go beyond the legislative history of the Bail Reform Act.

The second presumption under section 3142(e) arises on a showing of probable cause of the current crime charged in certain cases involving drug trafficking or a felony committed with a firearm. Studies of pretrial misconduct have shown clearly that there is no significant relationship between the current crime charged and the defendant's proclivity for engaging in pretrial criminal behavior.\textsuperscript{185} A study con-

\textsuperscript{149} S. 1762, 98th Cong., 2d Sess. (1984). Regarding the presumptions, this bill was identical to the Bail Reform Act as enacted.
\textsuperscript{150} See S. Rep. No. 225, supra note 2, at 19.
\textsuperscript{151} See id. For a description of the offenses that trigger the presumption, see supra notes 31-32.
\textsuperscript{152} See S. Rep. No. 225, supra note 2, at 20 & n.58.
\textsuperscript{153} Bail Reform: Hearings on S. 440, S. 482, S. 1253 & S. 1554 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 56-60 (1981) (testimony of Senator Lawton Chiles). Senator Chiles did present a study dealing with the likelihood that defendants charged with drug offenses will fail to appear. The study concludes that "[t]he failure to appear rate for 'drug defendants' was 17% in [the United States Southern District of Florida]." Id. at 64 app.
\textsuperscript{154} See S. Rep. No. 147, supra note 58, at 45-47 (1983); S. Rep. No. 317, supra note 58, at 49-50 (1982). The bill favorably reported to the House of Representatives by the House Judiciary Committee, only eleven days before the Bail Reform Act was passed, did not even contain the presumptions. See H.R. Rep. No. 1121, supra note 52, at 3 (report on H.R. 5865).
\textsuperscript{155} See P. WICE, supra note 131, at 78-80. But cf. id. at 80 ("This limited survey,
ducted at the Harvard Law School found that "the initial charge, often considered one of the most important factors in setting bail, proves to be little better than a random indicator of recidivism."\(^{166}\) Defendants charged with armed offenses recidivated in only 12.5\% of the cases studied.\(^{167}\) Moreover, persons charged with drug offenses recidivated in only 8.8\% of the cases studied.\(^{168}\) A study by the National Bureau of Standards found that less than 30\% of persons charged with crimes involving dangerous drugs recidivated on pretrial release.\(^{169}\) In summary, from proof of the facts that give rise to the second presumption of section 3142(e) one cannot claim that it will be more likely than not that the presumed fact of dangerousness is true.

The strength of the connection between the facts upon which the first presumption of section 3142(e) arises\(^{160}\) and the presumed fact of dangerousness is significantly more difficult to assess. Despite intuitive appeal, the absence of evidence in the legislative history suggests that the existence of a connection is, at best, speculative.

Moreover, there is evidence that indicates that the connection does not meet the more likely than not standard. Recall that this first presumption arises on proof both of specified current charges and a prior record of specified types of misconduct while on pretrial release.\(^{163}\) A recent study by the Bureau of Justice Statistics found that although a prior criminal record is positively correlated with pretrial misconduct,\(^{164}\) the connection was not sufficient to meet the more likely than not standard.\(^{165}\) The Harvard study found that the correlation between a history of violent crimes in the past ten years and misconduct on

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\(^{166}\) Preventive Detention: An Empirical Analysis, 6 Harv. C.R.-C.L. L. Rev. 300, 311 (1971); see also id. at 382, 392 (relevant statistical tables).

\(^{167}\) See id. at 383.

\(^{168}\) See id. at 382. This recidivism rate by drug offenders was less than that of a number of offenders who do not raise the section 3142(e) presumptions, including those who commit rape (10.3\%), robbery (11.7\%), aggravated assault (17.1\%), and arson (10\%). This comparison is not made to suggest that the statute is underinclusive, but rather to suggest that Congress did not carefully identify the proper indicia of the likelihood of pretrial misconduct.


\(^{160}\) See supra notes 26-29 and accompanying text.


\(^{162}\) See BJS Study, supra note 135, at 4.

\(^{163}\) Thirty-five percent of all defendants with "serious records," and 20\% of those with "less serious records," were arrested for a new crime or failed to appear for a court date during a 120-day bail period. See id.
release was only 0.14.\textsuperscript{164} While these figures do not represent a complete analysis of the factors upon which the first presumption of section 3142(e) arises, they indicate that there is no constitutionally sufficient connection between the facts that give rise to the presumption and the ultimate fact of dangerousness.\textsuperscript{165}

It thus appears that without carefully scrutinizing the available information on the subject, Congress created two presumptions in the Bail Reform Act that simply are not supported by the available data. In the words of the Court in \textit{Leary}, "it [is] no more than speculation"\textsuperscript{166} to say, upon a showing of the facts specified in the Bail Reform Act, that a person is likely to pose a danger to the community if released prior to trial.

\textbf{CONCLUSION}

The Bail Reform Act of 1984 has fundamentally changed the administration of bail in the federal criminal justice system by allowing for pretrial detention of accused persons who are deemed too dangerous to be released. The presumptions of section 3142(e) of the Bail Reform Act impinge on the determination of dangerousness by shifting to the accused at least the burden of production, and quite possibly shifting the burden of persuasion as well. The Constitution places affirmative limits on the use of presumptive devices that shift the burden of proof in this way. The standards developed for assessing whether the use of presumptions violate the accused's right to due process of law clearly show that the use of these presumptions is unconstitutional.

The presumptions of the Bail Reform Act require the accused to prove the existence of a fact that, in effect, cannot be proved. If persons who have not been convicted of the crime charged are to suffer the severe deprivation of liberty and stigmatization caused by detention prior to trial, then the Constitution requires that this deprivation be based on a reasoned and thorough investigation of the factors involved, rather than on the unsubstantiated beliefs of a well-intentioned legislature.

\textsuperscript{164} See \textit{Preventive Detention: An Empirical Analysis}, \textit{supra} note 156, at 392. For "dangerous crimes" the correlation was 0.22. See id. A perfect correlation is 1.0, 0.0 indicates that there is no relationship, and -1.0 indicates a perfect inverse relationship.

\textsuperscript{165} In United States v. Jessup, 757 F.2d 378 (1st Cir. 1985), the court presented some evidence on the risk of flight of defendants accused of drug offenses, see id. at 395-98 app., but did not present any evidence dealing with dangerousness.

\textsuperscript{166} 395 U.S. at 52.