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NOTE

The Constitutional Case for Clear and Convincing Evidence in Bail Hearings

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Abstract. Since 1987, the U.S. Supreme Court has emphasized that pretrial detention is the narrow exception to the general rule of pretrial release. The Bail Reform Act of 1984 (BRA) enshrines the presumption of release in federal law, permitting pretrial detention in two circumstances. First, a court may deny bail to anyone whose pretrial liberty would purportedly endanger the public. Second, a court can detain anyone who is not reasonably likely to appear in their proceedings as required. Although the BRA requires the government to prove dangerousness by clear and convincing evidence, it does not specify which evidentiary standard governs non-appearance risk. Federal courts have interpreted the BRA's silence as authorizing proof by a lower preponderance of the evidence standard. Consequently, thousands of accused individuals face pretrial detention annually based on the same standard of proof that applies in negligence cases.

This Note argues that the government is *constitutionally* obligated to prove the basis for pretrial detention by clear and convincing evidence, including for non-appearance risk. Most of the lower court decisions endorsing the preponderance standard came before the Supreme Court issued its landmark opinion in *United States v. Salerno*, which upheld the BRA against a constitutional attack. The Court's reasoning in *Salerno* suggested, though did not explicitly conclude, that clear and convincing evidence was necessary for a pretrial detention scheme to satisfy due process. To the extent *Salerno* left any ambiguity over the proper standard of proof in bail hearings, this Note looks to the Court's jurisprudence of fundamental liberties to fill it. *Salerno* invoked a long line of cases that, most famously in *Addington v. Texas*, have deemed clear and convincing evidence to be the minimal constitutionally permissible standard in government-initiated proceedings that place a fundamental liberty in jeopardy. This Note traces the *Addington* rationale's history and theoretical foundation, illustrating why bail hearings fall within its scope.

The safeguards surrounding detention orders have received scant scholarly attention, in large part because so much academic commentary has centered on cash bail. As cash bail

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comes under increasing scrutiny nationwide, scholars, activists, and practitioners must grapple with the other tools at courts' disposal that can stand in the way of accused individuals securing pretrial release. This Note attempts to energize the nascent scholarly conversation around detention orders as they become the next frontier in the struggle for a more humane and equitable pretrial process.

Table of Contents

Introduction

In the United States, the mass incarceration[1] of the presumptively innocent undergirds the mass incarceration of the convicted. Over 81% of the 547,000 people in local jails nationwide are awaiting the ultimate disposition of their cases.[2] The use of cash bail, which requires accused individuals[3] to put up sums of money in exchange for their liberty, has fueled the current crisis in pretrial detention.[4] Anyone who cannot afford their bail will remain incarcerated throughout the legal proceedings against them, which can last months[5] or even years.[6] Pretrial confinement disproportionately burdens people of color and low-wage earners, results in worse case outcomes for accused individuals, and adversely affects people's financial, employment, and housing stability.[7] Incarceration before conviction has become the "front door" to the criminal legal system's inhumanities and inequities.[8]

Advocates, scholars, and activists have long championed the elimination of money bail,[9] condemning the legal system for punishing poverty and wasting taxpayer dollars on incarcerating people who do not pose a credible risk of

1. *See* James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), https://perma.cc/P9HP-FLTT (defining "mass incarceration" as "shorthand for the fact that the U.S. incarcerates more people than any nation in the world").

2. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://perma.cc/6QHQ-L8LB.

3. To keep the humanity of the pretrial population at the fore, this Note uses "person-centered" language. *See generally* Erica Bryant, *Words Matter: Don't Call People Felons, Convicts, or Inmates*, VERA INST. OF JUST. (Mar. 31, 2021), https://perma.cc/U8CE-AQHB (describing the goals of person-centered language). Terms like "accused person" and "detained individual" appear in lieu of "defendant," "suspect," "detainee," and their variants. Because the criminal legal system burdens people of all gender identities, this Note adopts the singular "they." I have not altered quoted material to match my stylistic choices.

4. *See* BERNADETTE RABUY & DANIEL KOPF, PRISON POL'Y INITIATIVE, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME 1-2, 3 fig.4 (2016), https://perma.cc/RQ5K-9W8S.

5. *See, e.g.*, United States v. Torres, 995 F.3d 695, 699, 708-09 (9th Cir. 2021) (rejecting a claim that twenty-one months of pretrial detention violated due process).

6. *See, e.g.*, United States v. Nero, 854 F. App'x 14, 17-18 (6th Cir. 2021) (upholding an approximately four-year term of pretrial confinement against a constitutional challenge).

7. *See infra* Part II.

8. RAM SUBRAMANIAN, RUTH DELANEY, STEPHEN ROBERTS, NANCY FISHMAN & PEGGY MCGARRY, VERA INST. OF JUST., INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 2, 4-5 (2015) (capitalization altered), https://perma.cc/DY9V-YFR5.

9. *See* Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 723-30 (2018) (chronicling the first "wave" of bail reform in the mid-twentieth century). This Note uses the terms "cash bail" and "money bail" interchangeably. *See also Bail Reform*, ACLU, https://perma.cc/677J-J4F8 (archived Oct. 29, 2022) (using both terms).

danger or non-appearance in court.[10] State governments have started heeding their calls. Recent legislation has curtailed judges' ability to impose financial conditions on release.[11] Many jurisdictions have implemented risk-assessment tools that purportedly make pretrial-detention determinations more reliable, consistent, and fair.[12] Enthusiasm for ending wealth-based detention continues to predominate in national discussions of the criminal legal system.[13] "Bail reform" has become synonymous with ensuring that anyone deemed eligible for pretrial release does not remain in custody because of their inability to pay.[14]

The energy behind the movement to abolish money bail has generated scholarly interest in a different constituency: people denied pretrial release altogether. Every year, thousands of individuals nationwide—including 10% of everyone confined pretrial[15] and 70% of cases heard in federal court[16]—receive no opportunity to make bail. People detained by judicial decree represent a relatively small subsection of the pretrial population,[17] though by no means one unworthy of public concern. As a future without cash bail beckons, detention orders are ripe to one day overtake unaffordable bail amounts as the primary instrument of pretrial confinement. In the interim, scholars have

10. *See, e.g.*, SUBRAMANIAN ET AL., *supra* note 8, at 11 ("While jails still serve their historical purpose of detaining those . . . who are either a danger to public safety or a flight risk, they have come to hold many who are neither."); *see also id.* at 12-14 (emphasizing the costs of pretrial detention).

11. Lea Hunter, *What You Need to Know About Ending Cash Bail: What's Wrong with Cash Bail and How to Fix It*, CTR. FOR AM. PROGRESS, https://perma.cc/M2WA-7NBV (last updated Apr. 23, 2020).

12. Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, VOX (Oct. 17, 2018, 7:30 AM EDT), https://perma.cc/Q8J4-N476. For a critique of these tools, see Part II.C below.

13. *See, e.g.*, Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 839 (observing that a movement for bail reform has emerged because "our nationwide money bail crisis has reached a 'tipping point'" (quoting Lisa Foster, Dir., Off. for Access to Just., Remarks at ABA's 11th Annual Summit on Public Defense (Feb. 6, 2016), https://perma.cc/Z4UX-R85Z)); DATA FOR PROGRESS & JUST. COLLABORATIVE, THE END MONEY BAIL ACT 3 (2019), https://perma.cc/56S5-75QW (using poll results to show that "twice as many want to see the end of money bail as support it").

14. *See, e.g.*, Jessica Brand & Jessica Pishko, *Bail Reform: Explained*, APPEAL (June 14, 2018), https://perma.cc/SN3F-V8R8 (describing "legislation to eliminate or reduce the use of cash bail" as the "future of bail reform" (capitalization altered)).

15. BRIAN A. REAVES, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ NO. 24377, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009-STATISTICAL TABLES at 15 (2013), https://perma.cc/U2B7-AVYK.

16. Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643, 1652 (2020) (noting that the detention rate in federal court "has exceeded 70 percent" while acknowledging that "the federal system is only a small sliver of the criminal legal system as a whole").

17. *See id.* at 1652.

called on courts to end wealth-based detention by treating unaffordable bail amounts as the legal equivalent of detention orders.[18] Courts have started adopting this position, vowing to apply the constitutional protections associated with detention orders to grants of pretrial release subject to financial conditions.[19] As more courts follow suit, it is becoming increasingly clear that the law of detention orders has a bearing not only on the thousands of people detained outright—but also on the hundreds of thousands of people subject to wealth-based detention.

Yet the constitutional limitations on detention orders are unclear and underdeveloped.[20] As Sandra Mayson explains, the question of what "constraints the federal Constitution and state constitutions place on pretrial detention . . . is the subject of ongoing debate."[21] "Without a clear constitutional standard in place," Jenny Carroll adds, "the process of pretrial detention systems can vary widely."[22] Of the jurisdictions with statutory regimes regulating detention orders, most require the government to prove the basis for detention by clear and convincing evidence in an adversarial hearing.[23] Others only expect the government to satisfy the lower preponderance of the evidence standard.[24] Many jurisdictions do not prescribe specific procedures and safeguards surrounding pretrial detention.[25] Because courts have not issued clear guidance, "there is no guarantee that existing statutes comply with constitutional standards."[26] Mayson calls clarifying the constitutional restrictions on detention "the central challenge now facing the bail-reform movement."[27]

18. *E.g.*, *id.* at 1654-60 (arguing that the same legal standards should apply to detention orders and unaffordable bail amounts); Application for Leave to File Brief Amici Curiae and Proposed Brief of Amici Curiae National Law Professors of Criminal, Procedural, and Constitutional Law in Support of Respondent at 16-17, 28-30, *In re* Humphrey on H.C., 417 P.3d 769 (Cal. 2018) (mem.), https://perma.cc/G3A9-JN9J; *see also* Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1107 (2019) ("The question thus remains open whether outside the federal context, courts should consider *any* unaffordable bail to be a de facto order of pretrial detention.").

19. *See* Mayson, *supra* note 16, at 1658-59.

20. For an overview of the constitutional law of bail, see SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 28-36, 108-28 (2018).

21. Mayson, *supra* note 16, at 1677.

22. Jenny E. Carroll, *The Due Process of Bail*, 55 WAKE FOREST L. REV. 757, 765 (2020).

23. Mayson, *supra* note 16, at 1676-77.

24. *Id.* at 1679. Several of these jurisdictions do not even require judges to put in writing their reasoning for issuing detention orders. *Id.*

25. Carroll, *supra* note 22, at 765.

26. Mayson, *supra* note 16, at 1677.

27. *Id.* at 1679.

Taking up Mayson's mandate, this Note argues that the government cannot constitutionally confine an accused individual pretrial except upon a showing of clear and convincing evidence. Detention based on any lower standard violates due process. The Supreme Court came close to endorsing this view in *United States v. Salerno*, which held that the federal Bail Reform Act of 1984 (BRA) did not violate the Fifth Amendment.[28] The question before the Court was whether detention based on dangerousness amounted to an unconstitutional deprivation of liberty.[29] The Court noted that the BRA permitted pretrial detention only in "narrow circumstances": when a prosecutor has clear and convincing evidence "the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community."[30] The BRA's clear and convincing evidence requirement for dangerousness, combined with other procedural safeguards, adequately protected individual liberty such that it withstood a constitutional attack.

Salerno left two questions unanswered. First, though the Court held that the safeguards under the BRA were *sufficient* to comply with the Fifth Amendment, lower courts diverge on whether those procedural protections are *necessary* to survive a constitutional challenge.[31] Second, *Salerno* only addressed detention based on dangerousness, but the BRA also provides for pretrial confinement if "no condition . . . will reasonably assure the appearance of the person as required."[32] The BRA requires that the government prove dangerousness with clear and convincing evidence, but it does not mention the legal standard governing non-appearance.[33] When *Salerno* reached the Supreme Court, most circuit courts had already interpreted the BRA's silence as permitting a lower preponderance of the evidence standard for appearance-based detention.[34] *Salerno* did not explicitly settle whether the legal standard for pretrial detention could ever dip below clear and convincing evidence and, if so, whether there was any compelling reason to justify a downward departure to secure an accused person's appearance.[35]

This Note explains why the clear and convincing standard is constitutionally necessary regardless of how the government presents the grounds for detention. *Salerno* invoked a long line of cases that, most famously

28. 481 U.S. 739, 751-52 (1987).

29. *Id.* at 744.

30. *Id.* at 750.

31. Funk, *supra* note 18, at 1107; Carroll, *supra* note 22, at 785.

32. 18 U.S.C. § 3142(e)(1).

33. 18 U.S.C. § 3142(f).

34. *See infra* Part I.B.

35. *See infra* Part I.C.

in *Addington v. Texas*,[36] require a showing of clear and convincing evidence before someone can be deprived of a fundamental liberty.[37] Appearance-based detention jeopardizes the same liberty interest as preventive detention; the value of freedom from confinement in no way depends on how the government frames its argument. Accused individuals and their advocates have therefore urged the adoption of the clear and convincing standard in pretrial proceedings,[38] with courts responding favorably.[39] While scholars have acknowledged the existence of a constitutional case for clear and convincing evidence,[40] none have meaningfully examined its history and theoretical foundation, traced its development in other areas of law, probed its policy implications, or illustrated its suitability to pretrial detention orders.[41] This Note endeavors to fill that void.

The argument proceeds in four parts. Part I charts the history of federal statutes governing bail hearings, recounts the heretofore untold story of how the circuit courts came to adopt the preponderance standard for non-appearance risk, and illustrates that the courts' rationales for doing so rested on statutory interpretation instead of constitutional analysis. Part II explores how the statutory framework has played out in practice, demonstrating that courts' fears of people intentionally evading the law have led to the widespread punishment of indigence and honest mistakes. Courts' failure to protect accused individuals from unnecessary and racially biased detention thereby indicates the need for more robust procedural safeguards. Part III details how adjusting the standard of proof can mitigate the impressionistic and prejudiced thinking that has pervaded the pretrial process. Part IV then argues that courts are constitutionally obligated to protect accused people from detention unless

36. 441 U.S. 418, 441-43 (1979).

37. *See infra* Part IV.A.

38. *See, e.g.*, Memorandum in Support of Plaintiffs' Motions for a Temporary Restraining Order and Class-Wide Preliminary Injunction at 2-3, Torres v. Collins, No. 20-cv-00026 (E.D. Tenn. Nov. 30, 2020), ECF No. 26.

39. *See infra* Part IV.C.

40. *E.g.*, Alison Siegler & Erica Zunkel, *Rethinking Federal Bail Advocacy to Change the Culture of Detention*, CHAMPION, July 2020, at 46, 59 nn.102-03.

41. The closest a work of scholarship has come is Jaden M. Lessnick, Comment, *Pretrial Detention by a Preponderance: The Constitutional and Interpretive Shortcomings of the Flight-Risk Standard*, 89 U. CHI. L. REV. 1245 (2022). Lessnick applies the three-part balancing test set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to the 1984 Act. *Id.* at 1256-57. The *Addington* rationale figures heavily, if briefly, into his analysis of the first *Mathews* factor. *See id.* at 1258-59. Lessnick also focuses on the 1984 Act's legislative history and the canon of constitutional avoidance. *See id.* at 1272-74. This Note, by contrast, focuses on *Addington* itself—its history, theoretical foundation, and application in the lower courts—and understands the rationale as more significant than a factor to be balanced under the *Mathews* framework. *See infra* Part IV.D. Still, because of the two pieces' different approaches to a similar research question, they can productively be read together.

the government has presented clear and convincing evidence of dangerousness or non-appearance risk. Scholars have paid scant attention to the origins of what this Note calls the "*Addington* rationale," which describes the Supreme Court's repeated recourse to the clear and convincing evidence requirement when the government attempts to deprive someone of a fundamental liberty.[42] Delving into that rationale's history will help demonstrate why bail hearings fall within its scope.

I. The Statutory Basis for the Preponderance Standard

This Note takes federal law as its starting point, though the constitutional standards for pretrial detention are also applicable to the states.[43] This Part recounts how the preponderance standard's use in bail hearings originated from fears of rising crime rates and ambiguous draftsmanship of a federal law that courts rushed to clarify. Most of the circuit courts handed down their interpretations of the BRA shortly before the Supreme Court issued its landmark ruling in *Salerno*. Had the chronology been reversed, accused individuals and their advocates would almost certainly have brought constitutional arguments for applying clear and convincing evidence to non-appearance risk. Instead, because the circuit courts were not presented with constitutional claims, they defaulted to statutory analysis.

A. Pretrial Detention in the Federal Courts

After making an arrest, the government has forty-eight hours to bring an accused person before a magistrate judge,[44] who determines the individual's eligibility for pretrial release.[45] The judge can release someone on their own recognizance, trusting them to appear for their court dates; release them with restrictions imposed on their liberty, including monetary conditions like bail; or detain them outright.[46] At this initial hearing, the accused person benefits from a presumption of pretrial release.[47] Some jurisdictions enumerate

42. *See infra* Part IV.

43. *See* U.S. CONST. art. VI, § 2.

44. County of Riverside v. McLaughlin, 500 U.S. 44, 56-57 (1991); *see also* Powell v. Nevada, 511 U.S. 79, 80 (1994) (noting that, under *McLaughlin*, holding an accused person for longer than forty-eight hours will violate the Fourth Amendment "absent extraordinary circumstances").

45. *See Initial Hearing / Arraignment*, U.S. DEP'T OF JUST., https://perma.cc/MD42-XBDY (archived Nov. 12, 2022).

46. Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 476-77 (2016).

47. *E.g.*, 18 U.S.C. § 3142(b).

offenses for which courts must either deny bail[48] or impose a rebuttable presumption of detention.[49] In all other cases, the government carries the burden of showing why detention is necessary.[50]

Today, the BRA of 1984 (the 1984 Act)[51] governs pretrial proceedings in federal court.[52] The BRA permits pretrial detention in two circumstances: First, if releasing the accused person would present a safety risk, and second, if confinement is needed to secure the individual's appearance.[53] Courts refer to these two criteria as "dangerousness" and "risk of flight," respectively.[54] The latter is also referred to as "risk of non-appearance."[55] A judge must grant pretrial release unless the government can demonstrate that "no condition . . . will reasonably assure the appearance of the person as required and the safety of any other person and the community."[56] If the government cannot establish dangerousness or non-appearance risk, the presumption of release carries the day.[57]

The 1984 Act departed from over a century of legal history when it explicitly authorized judges to detain someone for safety reasons. The first federal pretrial regime, enacted under the Judiciary Act of 1789, guaranteed bail in all noncapital cases.[58] The severity of the alleged crime and the strength of the incriminating evidence were the primary determinants of whether an arrested individual would receive pretrial release.[59] These factors supposedly stood in for non-appearance risk: The greater the possible penalty, and the

48. *E.g.*, CAL. CONST. art. 1, § 12 (amended 1982, 1994); COLO. CONST. art. 2, § 19 (amended 1995).

49. *E.g.*, 18 U.S.C. § 3142(e)(2).

50. Willie Santana, *Whose Burden Is It Anyway? Bail Hearings Post-*Torres v. Collins, TENN. BAR J., Sept./Oct. 2021, at 42, 42-44.

51. 18 U.S.C. §§ 3141-3156.

52. U.S. Dep't of Just., Crim. Res. Manual § 26 (2020), https://perma.cc/CJJ9-X65W.

53. 18 U.S.C. § 3142(e)(1). The BRA also permits a third type of pretrial detention in cases involving "a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror." 18 U.S.C. § 3142(f)(2)(B).

54. *See* United States v. Salerno, 481 U.S. 739, 749 (1987).

55. *See* United States v. Santos-Flores, 794 F.3d 1088, 1091 (9th Cir. 2015).

56. 18 U.S.C. § 3142(e)(1).

57. *See id.*

58. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (repealed 1966) ("And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death.").

59. Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives*, 32 PACE L. REV. 800, 806 (2012).

more compelling the government's evidence, the more incentive an accused person had to abscond.[60]

The first wave of bail reform took hold in the mid-twentieth century, culminating in the 1984 Act's predecessor, the BRA of 1966 (the 1966 Act).[61] The 1966 Act enshrined two principles in law: "(1) that a person's financial status should not be a reason for denying pretrial release; and (2) that danger of non-appearance at trial should be the only criterion considered when bail is assessed."[62] The momentum behind bail reform reflected the rising tide of wealth-based detention nationwide and a growing concern that judges did not ascertain people's ability to pay before fixing bail amounts.[63] The 1966 Act introduced a presumption of release on one's own recognizance or on an unsecured money bond, which does not require people to put up any cash before leaving custody.[64]

The 1966 Act provided for appearance-based detention only.[65] Congress intentionally excluded considerations of dangerousness from the bail calculus, noting that "[t]his legislation does not deal with the problem of the preventive detention of the accused because of the possibility that [pretrial release] might endanger the public."[66] Congress decided that "pretrial bail may not be used as a device to protect society from the possible commission of additional crimes by the accused."[67]

Despite Congress's intentions, safety concerns were already permeating bail determinations. Over the twentieth century, public opinion soured on accused and incarcerated individuals as the trope of the "repeated offender" began to loom large in American political discourse.[68] Judges responded by placing greater emphasis on an accused person's criminal record during bail hearings.[69] And state judges in particular evaluated the arrested person's "character," including their "'prior standing in the community,' 'respect for

60. *Id.* at 807.

61. *See generally* Van Brunt & Bowman, *supra* note 9 (chronicling the "waves" of bail reform).

62. Warren L. Miller, *The Bail Reform Act of 1966: Need for Reform in 1969*, 19 CATH. U. L. REV. 24, 24 (1969).

63. Van Brunt & Bowman, *supra* note 9, at 723.

64. CHARLES DOYLE, CONG. RSCH. SERV., R40221, BAIL: AN OVERVIEW OF FEDERAL CRIMINAL LAW 3 & n.24 (2017) (quoting *Unsecured Bail Bond*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

65. Bail Reform Act of 1966, Pub. L. No. 89-465, § 3146(a), 80 Stat. 214 (repealed 1984).

66. H.R. REP. No. 89-1541, at 5 (1966).

67. *Id.* at 6.

68. June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 546 (1983); Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 741 (2011).

69. *See* Baradaran, *supra* note 68, at 738-41.

law,' . . . 'station in life,' [and] general reputation."[70] The 1966 Act authorized judges to consider someone's criminal record, but only as one of several factors, and only to assess the accused person's non-appearance risk.[71] What emerged was a "de facto consideration of dangerousness": Judges could "effectively deny[] bail in cases where they deemed defendants to be dangerous by setting inordinately high bail, albeit on stated grounds of risk of flight."[72]

The 1984 Act endowed informal judicial practice with the authority of federal law. The Act turned dangerousness into an independent ground for pretrial detention, but only for individuals accused of certain serious crimes.[73] The impetus for reform came as fears of crime nationwide and calls for law and order were reaching fever pitch.[74] The pretrial process had come under heightened scrutiny as the public became increasingly concerned that accused individuals would abuse their pretrial liberty by harming others.[75] Today, the government can therefore center its argument for pretrial detention on either dangerousness or non-appearance risk. Convincing a court on either front is sufficient under the 1984 Act to sustain a detention order.

The 1984 Act also broke new ground in another, less publicized way by introducing formal legal evidentiary standards into federal bail legislation.[76] Neither the Judiciary Act of 1789 nor the 1966 Act had included a standard of proof for bail hearings.[77] The latter had listed the factors judges should consider when assessing an accused individual's case but not what standard of persuasion should govern their analysis.[78] In the 1984 Act, Congress specified that prosecutors had to present clear and convincing evidence if they sought detention based on dangerousness.[79] The provision was partly a concession to

70. Carbone, *supra* note 68, at 547.

71. *See* Bail Reform Act of 1966, Pub. L. No. 89-465, § 3146, 80 Stat. 214 (repealed 1984).

72. *See* Kalhous & Meringolo, *supra* note 59, at 813.

73. *See* 18 U.S.C. § 3142(f)(1).

74. *See generally* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 307-32 (2016) (recounting crime control efforts in the 1980s).

75. *See* Baradaran, *supra* note 68, at 741.

76. *Compare* Bail Reform Act § 3146(a), 80 Stat. at 214 (repealed 1984) (permitting a judicial officer to make bail determinations "in the exercise of his discretion"), *with* 18 U.S.C. § 3142(f) (requiring a showing of clear and convincing evidence to support detention based on dangerousness).

77. *See* Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91-92 (repealed 1966); Bail Reform Act § 3146, 80 Stat. at 214 (repealed 1984).

78. Bail Reform Act § 3146(a)(1)-(5), 80 Stat. at 214 (repealed 1984).

79. 18 U.S.C. § 3142(f) ("The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence.").

civil libertarians, who expressed misgivings about incarcerating someone for being "dangerous,"[80] and partly a tactic to insulate the statute from a constitutional challenge.[81]

But Congress had not substantially altered the text of the 1966 Act dealing with appearance-based detention.[82] After more than a century, the statutory silence about the legal standard for so-called "flight risk" endured. This time, however, the silence could not hold. Congress had introduced an asymmetry into the 1984 Act: specifying clear and convincing evidence for preventive detention without doing the same for non-appearance risk. The contrast between the two provisions created a statutory gap that courts would jump to fill. As the next Subpart demonstrates, it would not be long before they did.

B. Circuit Courts' Statutory Interpretations of the BRA

Most circuit courts took up the question of which standard of proof governed appearance-based detention within two years of the 1984 Act's passage. They all arrived at the same conclusion, holding that the clear and convincing evidence requirement only applied to assessments of an accused person's dangerousness.[83] Proof by a preponderance of the evidence would

80. For an influential civil-libertarian account of predicting dangerousness, see Caleb Foote, *The Coming Constitutional Crisis in Bail* (pt. 1), 113 U. PA. L. REV. 959, 964 (1965) ("If a criterion such as future dangerousness were applied in America, it is predictable that the magistrates and lower judiciary who today deliberately set high bail for indigents to prevent their release would have an equal opportunity to obtain the detention of the poor, the friendless, and the Negro by labelling them 'dangerous.'"). For discussions of dangerousness in the BRA's legislative history, see *Bail Reform Act: Hearings on H.R. 1098, H.R. 3005, and H.R. 3491 Before the Subcomm. on Cts., C.L. & the Admin. of Just. of the H. Comm. on the Judiciary*, 98th Cong. 237-38 (1985) [hereinafter *Bail Reform Hearings*] (statement of Ira Glasser, Executive Director, American Civil Liberties Union); *id.* at 204 (statement of James I.K. Knapp, Deputy Assistant Att'y Gen., Criminal Division, United States Department of Justice) ("We recognize . . . that assessing the risk of future criminality is a difficult task. Consequently, our bail reform proposal . . . provides that the judge or magistrate shall not order a person confined prior to trial due to dangerousness unless the government demonstrates . . . clear and convincing evidence . . . .").

81. *See Bail Reform Hearings*, *supra* note 80, at 229 (statement of Roger Pauley, Director, Office of Legislation, Criminal Division, United States Department of Justice) (insisting that a law permitting detention based on probable cause of guilt and clear and convincing evidence of future dangerousness would "pass constitutional muster").

82. *Compare* Bail Reform Act § 3146, 80 Stat. at 814-17 (repealed 1984), *with* 18 U.S.C. § 3142.

83. *See* United States v. Chimurenga, 760 F.2d 400, 405-06 (2d Cir. 1985); United States v. Himler, 797 F.2d 156, 161 (3d Cir. 1986); United States v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985); United States v. Hazime, 762 F.2d 34, 37 (6th Cir. 1985); United States v. Portes, 786 F.2d 758, 765 (7th Cir. 1985); United States v. Orta, 760 F.2d 887, 891 n.20 (8th Cir. 1985) (en banc); United States v. Motamedi, 767 F.2d 1403, 1406-07 (9th Cir. 1985); United States v. Medina, 775 F.2d 1398, 1402 (11th Cir. 1985); United States v. Vortis, 785 F.2d 327, 328-29 (D.C. Cir. 1986) (per curiam).

suffice to show that no measure besides detention could reasonably guarantee an accused person's presence in court.[84] Every circuit court had read the preponderance standard into the BRA's silence by the early 2000s.[85]

Three rationales, all based on statutory analysis, guided the courts' thinking. First, the circuit courts contended that if Congress had wanted the clear and convincing evidence requirement to govern appearance-based detention, it would have said so explicitly. Observing that Congress had specified clear and convincing evidence for dangerousness but had made "[n]o comparable provision" for non-appearance risk, the circuit courts inferred that a different standard should apply where the BRA was silent.[86] Central to this reasoning was an assumption that Congress acted deliberately when it left the standard for appearance-based detention ambiguous.[87] Several courts also pointed to the section of the BRA governing release from custody at the time between conviction and sentencing.[88] There, Congress mandated detention unless the accused person could *negate* dangerousness and non-appearance risk by clear and convincing evidence.[89] The courts cited this provision as evidence that, "[h]ad Congress desired to achieve a similar result regarding the right to bail pending trial, it would have so provided."[90]

Second, the circuit courts described preponderance of the evidence as "the standard usually used in pretrial proceedings."[91] Confronted with statutory ambiguity, the courts used the preponderance of the evidence standard as a gap-filler.[92] Without specific direction from Congress, several circuits proved reluctant to depart from what they perceived as the pretrial norm.[93]

Third and finally, the more the circuit courts gravitated toward the same interpretation of the BRA, the more courts began to lean on the weight of sister-court precedent. For example, the Third Circuit observed that "[t]he United States Courts of Appeals for several other circuits have decided that the government's burden in demonstrating risk of flight is the preponderance of the

84. The Ninth Circuit is somewhat of an outlier. The court rejected the clear and convincing standard and a "mere preponderance" standard, requiring proof by a "clear preponderance" instead. *Motamedi*, 767 F.2d at 1406.

85. For the later circuit decisions, see *United States v. Patriarca*, 948 F.2d 789, 793 (1st Cir. 1991); *United States v. Stewart*, 19 F. App'x 46, 48-49 (4th Cir. 2001) (per curiam); and *United States v. Cisneros*, 328 F.3d 610, 616 (10th Cir. 2003).

86. *Fortna*, 769 F.2d at 250 (emphasis omitted).

87. *See, e.g.*, *Himler*, 797 F.2d at 161.

88. *Motamedi*, 767 F.2d at 1406; *see also Vortis*, 785 F.2d at 328.

89. 18 U.S.C. § 3143(b).

90. *Motamedi*, 767 F.2d at 1406.

91. United States v. Chimurenga, 760 F.2d 400, 405-06 (2d Cir. 1985).

92. *See, e.g.*, *id.*

93. *See, e.g.*, United States v. Orta, 760 F.2d 887, 891 n.20 (8th Cir. 1985) (en banc).

evidence standard."[94] Other courts, especially those that came to the question later, noted in conclusory terms that the preponderance standard applies to detention based on non-appearance risk, citing other circuit court decisions.[95]

None of these three rationales confronts the question that occupies this Note: What degree of persuasion does the *Constitution* require before the government can deprive an accused person of their pretrial liberty? Insofar as accused individuals raised constitutional issues, their advocates did not press on the standard of proof specifically.[96] Some advocates did assert that clear and convincing evidence governed appearance-based detention, but only because they interpreted the BRA as mandating it. For example, in the Ninth Circuit, an accused individual came close to making a due process argument when he insisted that nobody should be deprived of "constitutional rights [or] fundamental freedom[s]" unless the government has presented "clear and convincing 'substantial' evidence."[97] Yet his brief offered no support for this proposition, instead reminding the court that "[n]othing in the [BRA] provides for a different burden of proof" for non-appearance risk.[98] The concurring judge took it upon himself to perform a constitutional analysis, invoking the line of cases discussed in Part IV and agreeing with the accused person.[99] The majority opinion only analyzed the *statutory* argument about the BRA before the court, which it rejected.[100]

The chronology also matters. When most circuit courts first applied the preponderance of the evidence standard to non-appearance risk, the Supreme Court had yet to hear any constitutional challenges to the BRA.[101] That changed in 1987.[102] As the next Subpart demonstrates, the clear and convincing evidence requirement weighed heavily on the Court as it evaluated and ultimately upheld the BRA against a facial attack.[103] In the absence of any precedent, the circuit courts were free to treat the ambiguities in the BRA as a matter of pure statutory construction. Their analysis may well have looked

94. United States v. Himler, 797 F.2d 156, 161 (3d Cir. 1986).

95. *See, e.g.*, United States v. Patriarca, 948 F.2d 789, 793 (1st Cir. 1991).

96. *See, e.g.*, United States v. Medina, 775 F.2d 1398, 1402-03 (11th Cir. 1985).

97. Defendant's Brief re Standard of Review and Burden of Proof and Suggestion of Mootness at 8, United States v. Motamedi, 767 F.2d 1403 (9th Cir. 1985) (No. 84-5350).

98. *Id.*

99. *See Motamedi*, 767 F.2d at 1413-16 (Boochever, J., concurring in part and dissenting in part).

100. *Id.* at 1406-07 (majority opinion).

101. *See* Funk, *supra* note 18, at 1105 (noting that *Salerno* was the first case about bail that reached the Court since the 1980s).

102. *See infra* Part I.C.

103. *Id.*

different had they needed to reconcile their holdings with a landmark Supreme Court opinion. What follows is an explanation of *United States v. Salerno*, and why the Court's reasoning would have tipped advocates off to the potency of a constitutional argument.

C. Enter *Salerno*

The BRA's journey to the Supreme Court began in 1983, when Rudy Giuliani left his post as Associate Attorney General to become the U.S. Attorney for the Southern District of New York.[104] He developed a national reputation as "an Italian-American in hot pursuit of the Mafia."[105] Giuliani prosecuted the Mafia Commission case in 1986, which put eight of New York City's most prominent figures in organized crime on trial.[106] Among them was Anthony "Fat Tony" Salerno, a man "reputed to order hits by uttering a single word over the telephone."[107] Giuliani's efforts to combat organized crime would turn Salerno into one of the most famous names in the constitutional law of bail.

Before the Mafia Commission case reached the merits, Salerno and his associate, Vincent Cafaro, challenged the district court's decision to deny them pretrial release.[108] That court had found "overwhelming" evidence of dangerousness, concluding that the government had satisfied its burden under the BRA.[109] Salerno and Cafaro argued that treating dangerousness as an independent ground for pretrial detention violated their Fifth Amendment substantive due process rights.[110] They brought a facial challenge to the BRA that they appealed to the Supreme Court.

Writing for the majority, Justice William Rehnquist proclaimed that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[111] He nonetheless concluded that the BRA "fully comport[ed] with constitutional requirements" and could withstand

104. Michael Winerip, *High-Profile Prosecutor*, N.Y. TIMES MAG. (June 9, 1985), https://perma.cc/47UE-X98K.

105. *See id.*

106. *See* Marcy Knight, *The Commission Trial Lifted the Lid on the New York Mafia*, MOB MUSEUM: BLOG (Apr. 17, 2021), https://perma.cc/7WEJ-5KK4.

107. Funk, *supra* note 18, at 1105.

108. JAMES B. JACOBS, CHRISTOPHER PANARELLA & JAY WORTHINGTON, BUSTING THE MOB: *UNITED STATES V. COSA NOSTRA* 82 n.7 (1994); United States v. Salerno, 631 F. Supp. 1364, 1375 (S.D.N.Y.), *vacated*, 794 F.2d 64 (2d Cir. 1986), *rev'd*, 481 U.S. 739 (1987).

109. *Salerno*, 631 F. Supp. at 1371-75.

110. Brief for Respondent, Anthony Salerno, *Salerno*, 481 U.S. 730 (1987) (No. 86-87), 1986 WL 727532, at *3-4.

111. *Salerno*, 481 U.S. at 755.

Salerno and Cafaro's facial attack.[112] He emphasized that Congress had enacted the BRA to serve a "legitimate regulatory goal": ensuring that accused individuals would not harm anyone before their trials.[113] The Court had already sanctioned regulatory detention in a host of other contexts, spanning civil commitment, wartime imprisonment, and immigration law.[114] Under "special circumstances," the government's regulatory interest was so weighty that it could detain someone without first obtaining a criminal conviction.[115] The Fifth Amendment, the Court concluded, did not categorically bar preventive detention.[116]

Justice Rehnquist then delineated the procedural safeguards under the BRA: the limited application of preventive detention to serious crimes, the provision of an adversary hearing, the right to request counsel during the hearing, the accused individual's ability to present evidence and cross-examine adversary witnesses, and the clear and convincing evidence requirement.[117] These protections served two intertwined ends. First, the protections shielded the individual liberty interest by preventing prosecutors from launching a "scattershot attempt" to incarcerate anyone they could characterize as dangerous.[118] Second, the BRA made accused individuals eligible for pretrial detention only if the government's interest in promoting public safety was particularly forceful.[119] As Justice Rehnquist explained, "[w]hile the Government's general interest in preventing crime is compelling, even this interest is heightened when the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community."[120] "Under these narrow circumstances," he elaborated, "society's interest in crime prevention is at its greatest."[121] With the individual's liberty interest protected, and the government's interest in protecting the public heightened, a court could impose regulatory detention under the BRA without running afoul of due process.[122]

112. *Id.* at 741.
113. *Id.* at 747.
114. *Id.* at 748-49.
115. *Id.* at 749.
116. *See id.* at 750-52.
117. *Id.*
118. *See id.* at 750.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 750-51.

As the most recent landmark case in the constitutional law of bail, *Salerno* has become something of an oracle to scholars and advocates.[123] Yet the case's scope was limited, dealing exclusively with dangerousness and only alluding to detention based on "risk of flight."[124] The opinion also operated on the logic of necessity. Taking the protections under the BRA together, the Court held that Congress struck an appropriate balance between the accused individual's liberty interest and the government's regulatory objective.[125] Chief Justice Rehnquist hinted that the BRA might even "exceed" what due process requires.[126] As courts and scholars have recognized, *Salerno* left a question of necessity unresolved: Could a statutory regime that provided fewer or weaker safeguards than those the BRA provided for preventive detention pass constitutional muster? Would detention to secure someone's appearance merit any less constitutional protection?[127]

The Court did not address these questions explicitly, but it left settled the critical importance of the clear and convincing evidence requirement. As Part IV.C explores, lower courts have even interpreted *Salerno* as effectively announcing that due process forbids the government from detaining someone pretrial based on a mere preponderance. At the very least, the standard of proof figured so heavily in the Court's reasoning that had the circuit court cases discussed in the previous Subpart arisen after *Salerno*, they would likely have addressed the Fifth Amendment constitutional issue directly. Any competent advocate would have read *Salerno* as fertile ground for a constitutional claim. Yet the parties who first litigated this question did not have *Salerno* to guide them. Nor have the circuit courts returned to their holdings since. The circuit courts' interpretations of evidentiary standards under the BRA, which rested on statutory rather than constitutional interpretation, reign to this day.[128]

II. The Policy Grounds for Enhancing Procedural Protections

In the years since *Salerno*, pretrial detention has become anything but "the carefully limited exception."[129] Judges routinely order unaffordable bail

123. *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, 123 (2009). *See generally* Van Brunt & Bowman, *supra* note 9 (drawing on *Salerno* to explore the history and future of bail reform).

124. *Salerno*, 481 U.S. at 749.

125. *Id.* at 747-48.

126. *Id.* at 752.

127. *See, e.g.*, Kleinbart v. United States, 604 A.2d 861, 869 (D.C. 1992); Carroll, *supra* note 22, at 785.

128. For the controlling circuit cases, see notes 83 and 85 above.

129. *Salerno*, 481 U.S. at 755.

amounts that keep people in custody throughout the legal proceedings against them.[130] Cash bail is not the same as a detention order, even if both lead to the same outcome: the accused person's confinement.[131] Still, examining current practices suggests that courts misunderstand the causes of non-appearance and overestimate its prevalence. This Part illustrates how fears of individuals skipping their court dates have co-opted bail hearings, leading to unjustifiably high rates of detention and compounding racial and class-based discrimination in the criminal legal system. Delving into the shortcomings of the pretrial process is a line of inquiry distinct from addressing what the Constitution requires of judges before they issue detention orders, a matter taken up in Part IV. Still, the policy implications of the lower preponderance standard will help demonstrate why the constitutional question is worth discussing and litigating, regardless of whether raising the prosecution's burden of persuasion one degree promises groundbreaking change for accused individuals.

A. Why Do People Miss Their Court Dates?

The term "risk of flight" has been part of bail's nomenclature since at least the mid-twentieth century.[132] "Flight" imputes an intention to the accused person: an active effort to evade and subvert the court.[133] Cash bail's proponents have argued that financial conditions of release are a necessary check on accused individuals' desire to do precisely that.[134] This same assumption guides pretrial release determinations. The available data suggests that concerns about non-appearance risk have contributed to the current crisis in wealth-based detention.[135]

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130. *See* RABUY & KOPF, *supra* note 4, at 1.

131. *See* Mayson, *supra* note 16, at 1655 (discussing the distinction between functional and legal equivalents).

132. *See, e.g.*, *An Address on the Juvenile Court by President Judge Fuller*, LUZERNE LEGAL REG. REP., 1923-1924, at 417, 419.

133. *See* Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 686-89 (2018) (exploring terminology associated with non-appearances).

134. *See generally* Puck Lo & Ethan Corey, *The 'Failure to Appear' Fallacy*, APPEAL (Jan. 9, 2019), https://perma.cc/L777-WXCD (describing the arguments made by cash bail's proponents).

135. In the years following the 1984 Act's passage, non-appearance risk alone accounted for around half of all pretrial detentions in federal court according to data collected by the Administrative Office of the United States Courts. *See* Thomas E. Scott, *Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis*, 27 AM. CRIM. L. REV. 1, 14 (1989). Nearly 40% of all denials of bail involved a combination of non-appearance risk and dangerousness. *See id.* The statistics were similar for detention orders issued in federal cases in 1996: Once again, non-appearance risk or a combination of non-appearance risk and dangerousness accounted for almost 90% of pretrial detentions. JOHN SCALIA, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ NO. 168635, FEDERAL PRETRIAL RELEASE AND DETENTION, 1996, at 4 (1999). More recent data is hard to come

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Yet as Lauryn Gouldin observes, courts' focus on "risk of flight" collapses a range of reasons people miss their court dates.[136] Although some accused individuals will flee the jurisdiction or persistently refuse to appear in court, non-appearances usually do not reflect any attempt to thwart the administration of law.[137] This Subpart illustrates that honest mistakes, structural inequality, and inefficiencies in the criminal legal system are the primary drivers of non-appearance.

Court appearance rates indicate that most individuals do not neglect their court dates, much less intentionally abscond. More than 80% of all individuals accused of felonies appear in court as requested.[138] Only 3% of those who miss a court date remain at large after one year.[139] Similarly, only 5% to 8% of all accused individuals do not appear within one year of obtaining pretrial release.[140] These statistics caution against reading an intent to evade the law into a missed court date. As one sociologist expressed, "when people aren't making it to court for their first appointment, most likely they'll come to their second appointment—and nearly everyone makes it by the third."[141]

Scholars offer several reasons why individuals who do not willfully and persistently evade court nonetheless fail to appear. The first is that people may forget about their scheduled court dates.[142] Having to return to court repeatedly can only make matters worse.[143] Some people must "return to court frequently, 'spend[ing] all day waiting for their cases to be called, only to be told that the proceedings are being put off for another month.'"[144] States and

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by. However, scholars speculate that cases involving relatively low bond amounts, which are common, do not always reflect judicial findings of dangerousness. *See* Samuel R. Wiseman, Essay, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1346 n.2 (2014).

136. Gouldin, *supra* note 133, at 682-83.

137. *See id.* at 731 (describing findings from a notification program in San Mateo, California); Lo & Corey, *supra* note 134.

138. REAVES, *supra* note 15, at 21 tbl.18.

139. *Id.*

140. THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ NO. 214994, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 8 (2007).

141. Lo & Corey, *supra* note 134.

142. *See* Alissa Fishbane, Aurelie Ouss & Anuj K. Shah, *Behavioral Nudges Reduce Failure to Appear for Court*, 370 SCIENCE eabb6591, at 1 (2020), https://perma.cc/K65D-E4ZD.

143. *See* Russell Ferri, *The Benefits of Live Court Date Reminder Phone Calls During Pretrial Case Processing*, 18 J. EXPERIMENTAL CRIMINOLOGY 149, 165-66 (2022) ("Individuals may be more likely to forget about the appearance if it is further into the future . . . . Or, it may be more difficult to keep commitments so far in advance . . . .").

144. Gouldin, *supra* note 133, at 739 (alteration in original) (quoting Editorial, *A Nightmare Court, Worthy of Dickens*, N.Y. TIMES (May 11, 2016), https://perma.cc/C6NJ-F8PN (to locate, select "View the live page")).

localities have increased court appearance rates by sending reminders about upcoming hearings.[145] Using letters, calls, texts, and emails, governments around the country have reduced non-appearance rates by as much as 52% in some jurisdictions.[146] If willful absconding were common, it would be unlikely these programs could have achieved such remarkable success.

Second, logistical challenges can increase the likelihood of non-appearance.[147] Court dates may conflict with work hours.[148] Not everyone has the freedom to take time away from their job or the resources for childcare and transportation. Additionally, emergencies may leave someone unable to appear in court. For example, *The Appeal* chronicled the ordeal of one man who missed an appearance as he lay in a hospital bed being treated for a heart condition.[149] At a subsequent court date, the judge cited his non-appearance and ordered his detention.[150]

Third, some people do not appear due to confusion or mistrust. For minor offenses, like receiving a speeding ticket, accused individuals do not always understand that a court date is more than just a formality and that not appearing in court can lead to the issuance of a bench warrant.[151] Consequently, researchers have found that low levels of "trust and confidence" in the legal system reduce the likelihood that people will attend court hearings as scheduled.[152] For this group, detention orders may not address the underlying causes of non-appearances.

B. Non-Appearance as the Basis of Pretrial Detention

Understanding why people do not appear in court is essential for two reasons. First, to ensure an accused individual's appearance, a judge has various tools at their disposal. These tools include detention orders, money bail, and other conditions of release.[153] Clarifying the causes of non-appearance can

145. *See generally* JOANNA THOMAS & ABDIAZIZ AHMED, N.Y.C. CRIM. JUST. AGENCY, COURT DATE NOTIFICATIONS: A SUMMARY OF THE RESEARCH AND BEST PRACTICES FOR BUILDING EFFECTIVE REMINDER SYSTEMS (2021), https://perma.cc/67UX-WJHE (highlighting these approaches).

146. *Id.* at 19 (reporting results of notification systems in Jefferson County, Colorado).

147. *Id.* at 9.

148. *Id.*

149. Lo & Corey, *supra* note 134.

150. *Id.*

151. Fishbane et al., *supra* note 142, at 4.

152. Brian H. Bornstein, Alan J. Tomkins, Elizabeth M. Neeley, Mitchel N. Herian & Joseph A. Hamm, *Reducing Courts' Failure-to-Appear Rate by Written Reminders*, 19 PSYCH., PUB. POL'Y & L. 70, 77 (2013).

153. U.S. Dep't of Just., Crim. Res. Manual § 26 (2020), https://perma.cc/CJJ9-X65W.

shed light on which judicial intervention is most appropriate.[154] For example, cash bail may not be as effective at preventing people from forgetting their court dates as simple reminders from the government. Detention orders can guarantee an accused person's appearance, but the burdens they place on the individual and the state may not justify their cost. Pretrial confinement often entails the same downstream effects as a bona fide criminal sentence: disruption in housing and employment, complications with child custody arrangements, and loss of standing among one's peers.[155] Once behind bars, a person experiences a profound loss of privacy, disconnect from loved ones, and exposure to infectious disease.[156] Scholars have also found that denying someone pretrial release can increase the likelihood of a conviction.[157] Pretrial detention makes someone more likely to plead guilty for the express purpose of getting out of jail, especially for lower-level offenses.[158] Taxpayers shoulder the harms of pretrial detention as well, spending $38 million per day to keep accused individuals in custody.[159]

Non-appearance also matters because a missed court date will follow an individual in subsequent legal proceedings. An accused person's record of court attendance is one of the primary determinants of whether a judge will release them on their own recognizance.[160] Yet as the preceding Subpart illustrated,

154. *See* Gouldin, *supra* note 133, at 740.

155. Carroll, *supra* note 22, at 772-75; Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 546 n.257 (2018).

156. Regarding exposure to infectious disease, see Eddie Burkhalter et al., *Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, N.Y. TIMES (Apr. 10, 2021), https://perma.cc/N2T6-CHSG (to locate, select "View the live page").

157. Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 203 (2018) ("We find that initial pretrial release decreases the probability of being found guilty by 14.0 percentage points, a 24.2 percent change from the mean for detained defendants, with larger effects for defendants with no prior offenses in the past year. The decrease in conviction is largely driven by a reduction in the probability of pleading guilty, which decreases by 10.8 percentage points, a 24.5 percent change."); *see also* Barker v. Wingo, 407 U.S. 514, 533 (1972) ("[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense."). *See generally* LÉON DIGARD & ELIZABETH SWAVOLA, VERA INST. OF JUST., JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION (2019), https://perma.cc/XV6E-MS3P (synthesizing the scholarly literature about the harms of pretrial detention).

158. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1322 (2012) ("[M]any arrestees plead guilty to petty offenses in exchange for a sentence of time served as a way of terminating what might otherwise be a longer period of incarceration than the offense carries.").

159. PRETRIAL JUST. INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST? 2 (2017), https://perma.cc/KQ82-27YA.

160. *See* Lo & Corey, *supra* note 134.

missing a court date may not have much predictive value.[161] Someone who confuses the date or time of a prior hearing may be on guard against doing so again, much as someone who could not attend court due to an emergency will present little risk of non-appearance once the problem clears.

When courts deny release on one's own recognizance based on a spotty attendance record, they risk punishing people for circumstances beyond their control.[162] Indigence, for example, is associated with a higher likelihood of non-appearance.[163] As the previous Subpart discussed, an indigent person may not appear in court for myriad reasons: a lack of childcare, transportation, or financial stability to go without a day's wages.[164] If someone lacks the means to attend court, and a judge uses their prior non-appearance as the basis for denying them release on their own recognizance, the accused person is effectively punished for their poverty.

There is a critique along these same lines that the pretrial process sets people up for failure. When courts experience a heavy backlog, and have no reminder or notification protocols, they create conditions that make it difficult for people to remember their court dates. In other words, "forgetfulness" may not be the product of carelessness but rather structural inefficiencies in the criminal legal system. Similarly, when courts schedule hearings during business hours, they force indigent individuals to choose between complying with the law and forgoing their wages.[165] Under these circumstances, the pretrial process has a hand in manufacturing the non-appearances that judges then use as a basis for imposing cash bail and detention orders.

C. Racial Inequities in Bail Hearings

Bail hearings are also susceptible to biased—and particularly racially biased—decision-making. According to a 2015 study, court-appearance rates do not vary significantly by race if factors like indigence are held constant,[166] and

161. *See supra* Part II.A (discussing how non-appearances can reflect temporary conditions like emergencies).

162. *Salerno* held that pretrial detention is not punishment per se. United States v. Salerno, 481 U.S. 739, 747 (1987). However, the distinction is largely academic to someone behind bars.

163. Haley R. Zettler & Robert G. Morris, *An Exploratory Assessment of Race and Gender-Specific Predictors of Failure to Appear in Court Among Defendants Released via a Pretrial Services Agency*, 40 CRIM. JUST. REV. 417, 426 (2015).

164. *See supra* notes 147-50 and accompanying text.

165. Maximilian A. Bulinski & J.J. Prescott, *Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency*, 21 MICH. J. RACE & L. 205, 224 (2016).

166. Zettler & Morris, *supra* note 163, at 427. *But see* THOMAS & AHMED, *supra* note 145, at 10 ("Demographic variables such as gender, race, and age have all been significantly

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white accused individuals who are released pretrial commit more crimes before their cases resolve than similarly-situated Black people.[167] Yet courts deem people of color to present a "danger" or "flight risk" more often than they do white people accused of the same crimes.[168] Black people are more likely to have detention or cash bail imposed in their cases,[169] and the bail amounts they must satisfy are about $10,000 higher on average.[170]

Inequities in the pretrial process begin well before bail hearings. Police and prosecutors' decisions about whom to arrest and charge determine which cases reach the initial-appearance stage.[171] But judges are not immune to implicit bias. In one study of New York City courts, nearly 90% of judges in the researchers' sample discriminated against Black people when presiding over the initial appearance.[172] As a result, researchers attributed around two-thirds of the observed racial disparities to bias in the legal system.[173] Police officers' and prosecutors' biased decisions may slant bail hearings against people of color, but judges' prejudices can distort the outcome.

Implicit biases can be uniquely potent during the initial appearance, as judges make quick decisions based on limited information. In some jurisdictions, bail hearings only last a few minutes.[174] In that time, judges must guess how an accused person might behave out of custody. The judge has some evidence to consult—including the accused person's criminal record, the charges against them, any prior missed court dates, and some information about the individual's ties to the area—but the inquiry is inherently

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associated with failure to appear in the previous research, but with varying results." (citations omitted)).

167. *See* David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q.J. ECON. 1885, 1888 (2018).

168. *See* Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 938 (2013).

169. *Id.* In large urban areas, Black people accused of felonies are over 25% more likely than white individuals to be detained pretrial. Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POL'Y INITIATIVE (Oct. 9, 2019), https://perma.cc/8MPZ-9CNB. Racial inequity is even more pronounced for young Black men, who are 50% more likely than young white men to experience pretrial confinement. *Id.*

170. Arnold et al., *supra* note 167, at 1886.

171. Carroll, *supra* note 22, at 767.

172. David Arnold, Will Dobbie & Peter Hull, *Measuring Racial Discrimination in Bail Decisions*, 112 AM. ECON. REV. 2992, 2994 (2022).

173. *Id.* at 3017.

174. Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L., ECON. & ORG. 511, 514 (2018) ("Bail hearings are generally quite brief—in Philadelphia most last only a minute or two—and often do not have any lawyers present.").

speculative.[175] Even if a judge concludes that someone might be a safety or non-appearance risk, it is not always clear what level of risk justifies burdening an accused individual's liberty.[176] The limited information available to judges, combined with the assembly-line-like tempo of bail hearings, makes pretrial release determinations vulnerable to impressionistic thinking.

Furthermore, dangerousness and "flight risk"—the criteria used in bail hearings—have a racialized quality. Regarding dangerousness, scholars have demonstrated that racism distorts Black bodies, which appear older, stronger, and less "innocent" to the white gaze.[177] The non-appearance prong traffics in a different but no less pernicious set of racial tropes. When a judge evaluates whether to release someone pretrial, they must ask whether the accused person can be trusted to appear in court, obey the judge's instructions, and comply with any conditions of release.[178] People of color are more likely to be perceived as unreliable or dishonest.[179] In other words, statutes like the BRA task judges with making character judgments that historically have been tainted by racial bias.

Some jurisdictions have attempted to circumvent the problems of racial inequity and judicial discretion by implementing risk assessments.[180] These tools use algorithms that quantify factors like an accused person's record of court attendance, criminal history, and housing stability to generate a risk "score."[181] Although bail reformers have championed data as a cure for inconsistent and

175. *See* 18 U.S.C. § 3142(g) (describing the factors to be considered at a detention hearing).

176. *See* Mayson, *supra* note 155, at 494-95 (discussing divergence among risk assessment tools in defining a "high risk" of rearrest).

177. *See, e.g.*, Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 539-40 (2014).

178. *See* 18 U.S.C. § 3142(e).

179. *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 147 (1991) ("I was raised to be acutely conscious of the likelihood that no matter what degree of professional I am, people will greet and dismiss my black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational, and probably destitute."); Joleen Kirschenman & Kathryn M. Neckerman, *"We'd Love to Hire Them, But . . .": The Meaning of Race for Employers*, *in* THE URBAN UNDERCLASS 203, 204 (Christopher Jencks & Paul E. Peterson eds., 1991) ("Our interviews at Chicago-area businesses show that employers view inner-city workers, especially black men, as unstable, uncooperative, dishonest, and uneducated.").

180. *See Why Jurisdictions Choose RATs*, MAPPING PRETRIAL INJUSTICE, https://perma.cc/42QS-B3FY (archived Nov. 30, 2022).

181. *See* Gouldin, *supra* note 133, at 717-18 (listing the factors considered by different risk assessment tools); Matt Henry, *Risk Assessment: Explained*, APPEAL (Dec. 14, 2019), https://perma.cc/GB9A-E4RN.

unfair decisions,[182] risk assessments have not delivered on their promise. Activists, journalists, and scholars have condemned risk assessments for introducing biased algorithms into the pretrial process.[183] The failure of algorithms offers an important lesson: Racial inequities will always shape legal outcomes—at bail hearings and throughout the life of a criminal case.

III. The Standard of Proof: How the Law (Re)Allocates the Risk of Error

There is no panacea for inconsistency and bias in the criminal legal system, but the law has several ways to mitigate these issues. One powerful tool is the burden of proof, which allocates between parties the responsibilities for marshaling evidence and convincing the factfinder.[184] The law not only concerns itself with which party shoulders these burdens but also with the "quality, or degree, of [the factfinder's] persuasion."[185] This "standard of proof," or "standard of persuasion," has symbolic and practical import.[186] The law prescribes the degree of certainty the burdened party must obtain so the factfinder does not "substitut[e] its own notions of policy" for those of the legal system.[187] This Part explains how the standard of proof can and should be adjusted in response to the concerns raised in Part II. Part IV then explains why the Constitution *requires* a heightened standard of persuasion in proceedings that place a substantial liberty interest in jeopardy—and why the same rationale should encompass bail hearings.

Standards of proof "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[188] The law has three main standards of persuasion at its disposal. In criminal cases, the prosecutor must establish the grounds for conviction beyond a reasonable doubt.[189] In most

182. *See, e.g.*, *21 Cities, States Adopt Risk Assessment Tool to Help Judges Decide Which Defendants to Detain Prior to Trial*, ARNOLD VENTURES (June 26, 2015), https://perma.cc/3PFN-FLMU.

183. *See* Bryce Covert, *A Bail Reform Tool Intended to Curb Mass Incarceration Has Only Replicated Biases in the Criminal Justice System*, INTERCEPT (July 12, 2020, 5:00 AM), https://perma.cc/8Q5S-Q2FN. *But see* Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 443-44, 455-56 (2016) (defending risk assessments).

184. 2 KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELREID, DAVID H. KAYE & ELEANOR SWIFT, MCCORMICK ON EVIDENCE § 336, at 692 (Robert P. Mosteller ed., 8th ed. 2020).

185. 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2497, at 404-05 (James H. Chadbourn ed., 1981).

186. *See* Addington v. Texas, 441 U.S. 418, 426 (1979).

187. BROUN ET AL., *supra* note 184, § 336, at 694.

188. *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

189. *Id.* at 364 (majority opinion).

civil cases, the standard is a mere preponderance of the evidence, which requires proof that "the existence of the contested fact is more probable than its nonexistence."[190] Other civil cases, including fraud claims, employ an intermediate standard: clear and convincing evidence.[191] These standards of proof apportion the risk of error between the parties.[192] The more sacred the liberty interest subject to deprivation, and the more society has an interest in avoiding an erroneous outcome in favor of the burdened party, the more persuaded the factfinder should be.[193]

As the late Judge Jack Weinstein once expressed, "there is little doubt that utilizing one rather than the other of the [burdens of proof] will make a difference in the results in some cases."[194] Judge Weinstein surveyed his fellow jurists in the Eastern District of New York, asking them to express their understanding of what different standards of proof required as a probability percentage.[195] Most judges believed that clear and convincing evidence demanded a much higher degree of certainty than the preponderance of the evidence standard.[196] Subsequent studies have confirmed Judge Weinstein's findings: "[J]udges generally understand the preponderance standard to be satisfied by any probability exceeding 50%, clear and convincing evidence to be in the range of 70% to 80% probability, and beyond a reasonable doubt to require at least 80% probability."[197] This shared understanding provides hope that judges will apply standards of proof consistently and predictably.[198]

Changing the degree of persuasion can affect case outcomes in several ways. For one, as Judge Weinstein suggested, a decision-maker beholden to a more exacting standard must reach a greater level of certainty about the matter at issue before siding with the burdened party.[199] A higher evidentiary threshold should screen out weaker arguments that barely satisfy the preponderance of the evidence standard.[200] Additionally, the standard of proof

190. BROUN ET AL., *supra* note 184, § 339, at 709.

191. *See id.* § 340, at 712.

192. *See In re Winship*, 397 U.S. at 371 (Harlan, J., concurring).

193. *See id.*

194. United States v. Fatico, 458 F. Supp. 388, 411-12 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979).

195. *See id.* at 410.

196. *See id.*

197. David L. Schwartz & Christopher B. Seaman, *Standards of Proof in Civil Litigation: An Experiment from Patent Law*, 26 HARV. J.L. & TECH. 429, 439 (2013).

198. *But see* Jennifer K. Robbennolot, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 502 (2005) (canvassing available literature and observing that "the decisionmaking of judges and jurors is strikingly similar").

199. *See Fatico*, 458 F. Supp. at 409.

200. *See id.*

can influence where the government invests its resources. In bail hearings, a prosecutor may be less likely to seek detention if they believe a judge is unlikely to agree. Even if the prosecutor does choose to argue for detention, they may be less likely to spend time and energy preparing for a hearing they expect to lose. One study alluded to a similar phenomenon in tax court following a legislative change that shifted the burden of proof from the taxpayer to the Internal Revenue Service (IRS).[201] At first glance, the reform did not appear to generate taxpayer-friendly rulings,[202] but the number of cases brought by the IRS began steadily declining with each passing year.[203] Although it is difficult to draw any firm conclusions from this trend,[204] one likely explanation is that the combination of fewer annual cases and relatively consistent amounts owed to the government deterred the IRS from going to trial or initiating cases in the first place.[205]

Even elevating the standard of proof by a degree, a much subtler change than a burden shift, can change a case's outcome. The Ninth Circuit said as much in *Eastwood v. National Enquirer, Inc.*, in which the actor Clint Eastwood sued the *National Enquirer* for publishing an "Exclusive Interview" with him that had, in fact, never occurred.[206] The evidence was damning: The *National Enquirer* had gotten the interview from a freelance writer who claimed to have already spoken with Eastwood but erased the recording.[207] An editor conducted only a cursory investigation into the writer's credibility.[208] The Ninth Circuit held that Eastwood had proven the *National Enquirer*'s liability

201. John R. Gardner & Benjamin R. Norman, Empirical Study, *Effects of the Shift in the Burden of Proof in the Disposition of Tax Cases*, 38 WAKE FOREST L. REV. 1357, 1357-58 (2003). For background about the legislative change, see 14 JACOB MERTENS, JR., THE LAW OF FEDERAL INCOME TAXATION § 50:117, at 50-531 to -537 (2008).

202. Gardner & Norman, *supra* note 201, at 1372 ("[A]lthough the 1988 Act was intended to benefit the taxpayer, our results cannot clearly support this outcome.").

203. *Id.* at 1374.

204. *Id.*

205. *Id.* at 1357-58 ("[A]lthough the data do not reveal a significant change in the amount of cases won or lost by the taxpayer, the decline in the number of cases brought by the IRS indicates that the shift in the burden of proof has, in fact, benefited the taxpayer."); *id.* at 1374 ("[I]t is logical to assume that the shift in the burden of proof caused the IRS to settle some of the cases that they may previously have taken to trial, but it is equally logical that . . . it would also have chosen not to bring some cases that it previously may have brought and settled."). *But see* Janene R. Finley & Allan Karnes, *An Empirical Study of the Change in the Burden of Proof in the United States Tax Court*, 6 PITT. TAX REV. 61, 79-81 (2008) (speculating that the IRS settling or not bringing cases explained the findings, but concluding based on the available data that "taxpayers . . . were not helped by the change in the burden of proof").

206. 123 F.3d 1249, 1250 (9th Cir. 1997).

207. *Id.* at 1253.

208. *See id.*

by a preponderance of the evidence, but the suit required Eastwood to present clear and convincing evidence.[209] The Ninth Circuit "[could not] say that Eastwood established, by clear and convincing evidence, that the [*National*] *Enquirer* published the interview knowing it was false."[210]

At the state level, in *In re C.C.*, the Georgia Court of Appeals refused to terminate a woman's parental custody[211]—a determination that, as Part IV.A explains, the Supreme Court has held to require clear and convincing evidence.[212] The government argued that C.C.'s mother was experiencing a mental health condition and in denial about it, compromising her ability to care for her daughter.[213] Yet the court criticized the government for inconsistencies surrounding whether the mother had ever received a formal diagnosis, what her prognosis was, and how her condition might affect her parenting.[214] In this "close case," the court would have sided with the government "[i]f the standard of proof was the preponderance of the evidence," but it did not find clear and convincing evidence.[215]

The point is: Standards of proof matter. Beyond conveying to judges the extra caution they should take before issuing their rulings, legal degrees of persuasion drive case outcomes.[216] In bail hearings, requiring clear and

209. *Id.* at 1254-55.

210. *Id.* at 1255. The Ninth Circuit ultimately upheld the plaintiff's verdict on a different theory: that the tabloid labeled the interview as "exclusive" despite knowing that Eastwood had purportedly spoken to a freelance writer, not directly to the *Enquirer*. *Id.* at 1255-56.

211. *In re* C.C., 571 S.E.2d 537, 544 (Ga. Ct. App. 2002).

212. *See infra* Part IV.A.

213. *In re C.C.*, 571 S.E.2d at 542-43.

214. *Id.* at 542 ("Merely eliciting the word bipolar does not provide clear and convincing evidence of a condition that renders a person incapable of parenting.").

215. *Id.* at 544.

216. For other cases highlighting the difference between a preponderance of the evidence and clear and convincing evidence standard, see *Borg-Warner Acceptance Corp. v. Watkins (In re Watkins)*, 90 B.R. 848, 849 (Bankr. E.D. Mich. 1988) ("After a trial on the merits, the plaintiff has established by a preponderance of the evidence, but not by clear and convincing evidence, that this debt is one for willful and malicious injury by the defendant-debtors to property of the plaintiff."); *IBP, Inc. v. Tyson Foods, Inc.*, 789 A.2d 14, 72 n.172 (Del. Ch. 2001) ("If . . . IBP bore the burden to prove the absence of a Material Adverse Effect by clear and convincing evidence . . . it would not have met that burden. It would prevail under a preponderance standard . . . ."); *Small Business Administration v. Echevarria*, 864 F. Supp. 1254, 1265 (S.D. Fla. 1994) ("While the evidence presented by the Plaintiff . . . was greater than the evidence the Defendants presented to the contrary, the Court does not find that it meets the clear and convincing evidence standard."); and *Webster City Production Credit Ass'n v. Simpson (In re Simpson)*, 29 B.R. 202, 211 (Bankr. N.D. Iowa 1983) ("If the standard of proof in these matters was a preponderance of the evidence, this Court would have to decide whose testimony was more credible. The Plaintiff's burden, however, is to prove each element by clear and

footnote continued on next page

convincing evidence can give accused individuals a better chance to contest the evidence against them. As cases like *Eastwood v. National Enquirer, Inc.* and *In re C.C.* illustrate, courts do not find the clear and convincing standard satisfied if the non-burdened party can challenge the quality of the adversary's evidence or the adversary's characterization of that evidence. A prosecutor will struggle to meet a higher degree of persuasion with bare allegations of a prior non-appearance or a pending charge for a serious crime. An accused person would be in a stronger position to argue that their court-attendance record or the charges against them lack clear and convincing predictive value. Additionally, given the quick tempo of bail hearings, the higher evidentiary threshold can screen out close cases under the preponderance of the evidence standard in which the outcome hinges in large part on the judge's perception of the accused person's trustworthiness.

IV. The Constitutional Case for Clear and Convincing Evidence

Having illustrated how elevating the standard of proof can mitigate bias and inequity in bail hearings, this Part turns to why the Constitution forbids the government from depriving an accused person of their pretrial liberty based on a mere preponderance of the evidence. The Supreme Court has long held that some liberty interests are so sacred that basing a deprivation on a degree of persuasion lower than clear and convincing evidence would violate due process.[217] Tracing the history of these cases will demonstrate the Supreme Court's attention to how an adverse outcome would affect the individual. The standard of proof is constitutionally calibrated to the harms of losing one's liberty. This Part illustrates why requiring clear and convincing evidence for pretrial detention follows from existing precedent, how lower courts have responded favorably to this argument, and why any differences between dangerousness and non-appearance risk do not rise to the level of constitutional concern regarding their requisite evidentiary standards.

A. Understanding the *Addington* Rationale

The constitutional case for clear and convincing evidence centers on *Addington v. Texas*,[218] which upheld the civil commitment of supposedly dangerous individuals with mental illnesses. The *Salerno* Court cited *Addington* as one of several precedents authorizing preventive detention under "special

convincing evidence. Given that standard, the Plaintiff has failed to prove reasonable reliance." (citation omitted)).

217. *See infra* Part IV.A.

218. 441 U.S. 418 (1979).

circumstances."[219] Salerno and Cafaro argued that no government objective could outweigh their interest in pretrial liberty.[220] The Court disagreed, concluding that the BRA should "be evaluated in precisely the same manner that [the Justices] evaluated the laws" at issue in prior cases that had upheld regulatory detention.[221] With these words, Chief Justice Rehnquist captured the heart of what this Note argues more than three decades later: Courts must hold pretrial detention to the same constitutional standard that *Addington* prescribed for civil commitment.

In *Addington*, the Court held that due process did not mandate a standard as high as "beyond a reasonable doubt" in civil commitment proceedings.[222] Yet a preponderance would not suffice.[223] The Court went to great lengths to expound upon the importance of an evidentiary standard in providing due process protections. Standards of proof "allocate the risk of error between the litigants and . . . indicate the relative importance attached to the ultimate decision."[224] And the degree of persuasion "reflects the value society places on individual liberty."[225] For these reasons, an intermediate standard is often used where "[t]he interests at stake . . . are deemed to be more substantial than mere loss of money."[226]

The Court concluded that, given the loss of liberty and stigmatic harm inherent in civil commitment, an "individual should not be asked to share equally with society the risk of error."[227] The risk of erroneous deprivation endangered such a sacred liberty interest that "the possible injury to the individual" outweighed "any possible harm to the state."[228] Having balanced the risk to the individual against the state's interest in protecting the public, the Court concluded that "due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence."[229] This Note will use the term "*Addington* rationale" to describe when legal proceedings threaten such egregious harm that they trigger an intermediate evidentiary

219. United States v. Salerno, 481 U.S. 739, 748-49 (1987).

220. Brief for Respondent Anthony Salerno, *supra* note 110, at *33.

221. *Salerno*, 481 U.S. at 749.

222. 441 U.S. at 430-31.

223. *Id.* at 427.

224. *Id.* at 423.

225. *Id.* at 425 (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part)).

226. *Id.* at 424.

227. *Id.* at 425-27.

228. *Id.* at 427.

229. *Id.*

standard, one between a preponderance of the evidence and beyond a reasonable doubt.

The *Addington* rationale traces back to the late nineteenth century—when the Court declared that it would not invalidate land patents without clear and convincing evidence.[230] The Court characterized land patents as the foundation for "so much property in this country and so many rights."[231] Because land patents were so bound up with other liberties, the Court refused to invalidate them for fraud or error based on a mere preponderance of the evidence.[232]

In the mid-twentieth century, the rationale for requiring clear and convincing evidence began to shed its attachment to property rights. Fears of Communism had ravaged the nation during the first "Red Scare," leading to the deportation and denaturalization of individuals designated as radical subversives.[233] In the decades that followed, denaturalization became a potent tool that the government could flexibly apply to the heretics of the day.[234] The Attorney General in 1942 hailed denaturalization as "a most important weapon in dealing with organized subversive and disloyal activities."[235]

Confronted with an appeal from an alleged Communist sympathizer, the Court held that the government must establish the basis for denaturalization with clear and convincing evidence.[236] The Court compared a naturalization certificate to a land patent, characterizing both as "public grants" of "political privileges."[237] In other words, both land patents and citizenship were legal rights conferred by the government that became the basis of a whole system of privileges. Just as the Court had mandated a showing of "clear, unequivocal, and convincing" evidence before invalidating a land grant, it imposed the same standard of persuasion in denaturalization proceedings.[238] Beyond the parallel to property law, the Court proclaimed that rights

230. Maxwell Land-Grant Case, 121 U.S. 325, 381 (1887).

231. *Id.*

232. *Id.* at 381-82 (emphasizing that land patents must be resistant to the "whims and caprices of every person who chooses to attack them in a court of justice").

233. *See, e.g.*, Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1555 (1993) (recounting that Emma Goldman—an advocate for feminism, labor, and LGBTQ+ rights—was denaturalized).

234. *See* Cassandra Burke Robertson & Irina D. Manta, *(Un)Civil Denaturalization*, 94 N.Y.U. L. REV. 402, 426-28 (2019).

235. *Id.* at 427 (quoting PATRICK WEIL, THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC 100 (2013)).

236. Schneiderman v. United States, 320 U.S. 118, 122-23 (1943).

237. *Id.* at 125 (quoting Johannessen v. United States, 225 U.S. 227, 238 (1912)).

238. *Id.* (quoting Maxwell Land-Grant Case, 121 U.S. 325, 381 (1887)).

deserve special protection "when [they] are precious and when they are conferred by solemn adjudication."[239]

This latter rationale, based on the sacred character of the rights and privileges subject to deprivation, came to eclipse the parallel to land patents as the Court heard subsequent challenges to denaturalization orders. The Court homed in on how denaturalization proceedings involved "judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship."[240] The possibility that the government could subject someone "to permanent exile with all the fateful consequences following for himself and his family" demanded a departure from "ordinary civil procedures."[241] The Court placed less rhetorical weight on the government's role in conferring the grant of rights, as in the land patent cases, and instead looked to the fundamental nature of the liberty at stake.[242]

The Court cemented its focus on fundamental liberties as the primary justification for requiring clear and convincing evidence when it extended the holding in the denaturalization cases to deportation proceedings. The Court highlighted the "drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here."[243] As in the land patent and denaturalization cases, deportation hearings involved the deprivation of a government-granted privilege: lawful residence status.[244] Yet the Court did not pay much mind to the sacred quality of residence status itself or the government's role in bestowing it. Instead, what made the liberty interest fundamental was the individual's desire to preserve the "family, social, and economic ties" that deportation would rupture.[245] The denaturalization and deportation cases reflected the Court's growing concern with the nature of the liberty interest at risk and the effect of its deprivation on the individual.

Addington became the new pillar of this historical and intellectual genealogy. Citing the denaturalization and deportation cases, the Court proclaimed that the clear, unequivocal, and convincing standard can "protect

239. *Id.*

240. Baumgartner v. United States, 322 U.S. 665, 671 (1944).

241. Klapprott v. United States, 335 U.S. 601, 618-19 (1949) (Rutledge, J., concurring in the judgment).

242. Knauer v. United States, 328 U.S. 654, 658 (1946) ("[I]t is plain that citizenship obtained through naturalization carries with it the privilege of full participation in the affairs of our society, including the right to speak freely, to criticize officials and administrators, and to promote changes in our laws including the very Charter of our Government.").

243. Woodby v. INS, 385 U.S. 276, 285 (1966).

244. *See id.* at 277, 280 (describing how the petitioners once had lawful residence status).

245. *See id.* at 286.

particularly important individual interests."[246] Involuntary confinement represented a "significant deprivation of liberty" that also stigmatized the patient.[247] Just as its predecessors used the standard of proof to insulate constitutional liberties from the throes of political will, *Addington* acknowledged the danger of confining someone based on "a few isolated instances of unusual conduct."[248] The standard of proof keeps the government within its regulatory aims and prevents it from using detention, denaturalization, and deportation to oppress political dissidents and social outcasts.

The Court has since extended the *Addington* rationale to termination-of-parental-rights proceedings.[249] *Addington* has also shaped the Court's analysis in right-to-die cases,[250] in which a judge must determine whether someone in a vegetative state would have wished to terminate their life-sustaining care.[251] In the civil-commitment realm, the Court cited *Addington* to strike down a Louisiana law that committed anyone who was acquitted based on an insanity defense unless they could prove they were *not* dangerous.[252] The same outcome befell an Oklahoma statute that presumed competence to stand trial absent clear and convincing proof otherwise.[253]

Across these applications, three factors have guided the Court's reasoning when determining if a threatened deprivation of liberty warrants heightened procedural protections. First, the Court has consistently highlighted the existence of a "significant" or "fundamental" liberty interest before holding that the state must establish the grounds for deprivation by clear and

246. Addington v. Texas, 441 U.S. 418, 424 (1979).

247. *Id.* at 425-26.

248. *Id.* at 427.

249. *See* Santosky v. Kramer, 455 U.S. 745, 768-70 (1982).

250. *See* Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282-83 (1990). *Cruzan* only held that Missouri could constitutionally require clear and convincing evidence of a patient's wishes to terminate their life-sustaining care. *Id.* at 282. Yet Chief Justice Rehnquist's argument for permitting Missouri to impose such a standard does not look that different from an argument to extend the *Addington* rationale to right-to-die cases. *See* David F. Forte, *The Role of the Clear and Convincing Standard of Proof in Right to Die Cases*, 8 ISSUES L. & MED. 183, 201-03 (1992). However, right-to-die cases are different from the other deprivations of liberty to which the Court has extended the *Addington* rationale. They are often initiated by a third party—not the government—and involve two competing liberty interests: freedom from nonconsensual removal of care and freedom from an existence defined by dependence on others. *See id.* at 184.

251. *See generally* Christina White, Comment, *Physician Aid-in-Dying*, 53 HOUS. L. REV. 595 (2015) (providing an overview of the right-to-die cases).

252. Foucha v. Louisiana, 504 U.S. 71, 73, 86 (1992).

253. Cooper v. Oklahoma, 517 U.S. 348, 350, 368-69 (1996).

convincing evidence.[254] So far, citizenship, U.S. residency, parental rights, life itself, and freedom from involuntary confinement—at least in the context of civil commitment—have all been deemed weighty enough to satisfy this threshold requirement.[255]

Second, the Court has applied the *Addington* rationale only in proceedings that effect a change in legal status, such as from citizen to non-citizen, lawful resident to deported person, or free individual to ward of the state.[256] *Addington* and its progeny collectively illustrate that a proceeding must threaten to reshape the individual's relationship with the government before clear and convincing evidence becomes necessary as a matter of due process.

Third, maintaining one's status should be a precondition for a system of privileges, regardless of whether those privileges are formal legal rights.[257] This requirement harkens back to the early land-grant cases, which characterized property rights as the foundation for the exercise of basic civil liberties.[258] Although the *Addington* rationale has since transcended property law, the Court has remained committed to applying the clear and convincing evidence requirement when the deprivation of liberty would wreak broad-based havoc on an individual's social, familial, and economic life.[259]

When running through these three factors, the Court has also dwelled on questions of policy and fairness. The Justices have asked, intuitively, if it makes sense to let the government deprive someone of a sacred privilege "upon no higher degree of proof than applies in a negligence case."[260] Other factors that have swayed the Court include the resemblance of the proceedings to criminal trials;[261] the use of "imprecise substantive standards," especially when the outcome is uniquely susceptible to "cultural or class bias";[262] and anything else that may compromise someone's ability to prepare their case.[263]

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254. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 425 (1979); *Santosky*, 455 U.S. at 753.

255. *See supra* notes 222-53 and accompanying text.

256. *See supra* notes 222-53 and accompanying text.

257. The right-to-die cases do not fall squarely within the *Addington* rationale because they are not government-initiated proceedings. *See supra* note 250. Still, the change of condition contemplated—from life to death—is so serious that it roughly parallels the legal status at issue in *Addington* and its progeny.

258. *See supra* notes 230-32 and accompanying text.

259. *See, e.g.*, Woodby v. INS, 385 U.S. 276, 286 (1966) (emphasizing the social and economic burdens imposed by deportation).

260. *Id.* at 285.

261. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 762 (1982) (noting that custody proceedings "bear[] many of the indicia of a criminal trial").

262. *Id.* at 762-63.

263. *See id.* at 763-64.

B. Applying the *Addington* Rationale to Pretrial Detention

Pretrial detention makes for a natural application of the *Addington* rationale. First, bail hearings endanger a substantial liberty interest: the freedom from confinement. Decades' worth of precedent establishes that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause."[264] This liberty interest is interpreted broadly to "mean[] more than freedom from handcuffs, straitjackets, or detention cells."[265] A deprivation of liberty occurs, triggering due process protections, whenever the government subjects someone to "confine[ment] in a prison, a mental hospital, or some other form of custodial institution."[266] Even *Salerno*, which ultimately upheld pretrial detention based on dangerousness, did not question "the importance and fundamental nature" of the freedom from bodily restraint.[267] The Court has even described the "interest in being free from physical detention by one's own government" as "the most elemental of liberty interests."[268]

Second, a detention order effects a change in status; an accused person who loses their pretrial liberty becomes a member of the incarcerated population.[269] As in civil-commitment hearings, an adverse outcome will turn someone into a ward of the state.[270] Consequently—shifting to the last of the three conditions enumerated in the preceding Subpart—an accused person subject to detention can no longer exercise a panoply of rights and privileges. People behind bars lose their freedom of movement, control over their diet, ability to work in a profession of their choosing, and other expressions of autonomy.[271] They cannot freely contact their attorneys,[272] and their confinement gives them an incentive to plead guilty to escape custody.[273]

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264. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992). For a discussion of Supreme Court precedents confirming the status of freedom from confinement as a substantial and fundamental liberty, see Salil Dudani, Note, *Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences*, 129 YALE L.J. 2112, 2122-24 (2020).

265. Reno v. Flores, 507 U.S. 292, 315 (1993) (O'Connor, J., concurring).

266. *See id.*

267. United States v. Salerno, 481 U.S. 739, 750, 755 (1987).

268. Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004).

269. 18 U.S.C. § 3142(e) (providing for pretrial detention).

270. *Id.*

271. *See* Jerry Metcalf, *A Day in the Life of a Prisoner*, MARSHALL PROJECT (July 12, 2018, 10:00 PM), https://perma.cc/RAL3-Q6KK.

272. Johanna Kalb, Gideon *Incarcerated: Access to Counsel in Pretrial Detention*, 9 U.C. IRVINE L. REV. 101, 104-05, 117 n.116 (2018).

273. Natapoff, *supra* note 158, at 1322.

Finally, the *Addington* rationale makes sense in bail hearings as a matter of fairness. The initial appearance resembles a bench trial: Before a judge, the accused person can testify, call witnesses, and cross-examine any adversarial witnesses present.[274] At issue is the accused person's character, as a judge evaluates whether someone is non-threatening and reliable enough to be released on their own recognizance.[275] These factors invite the racial and class biases that have long concerned the Court.[276] They are arguably more subjective than the psychiatric diagnoses at play in civil commitment proceedings, which the Court has "recognized repeatedly" are rife with "uncertainty . . . and the tentativeness of professional judgment."[277] Bail hearings examine someone's character and past conduct to determine how they might behave if released, importing the same subjectivity without the counterbalancing wealth of medical research.

To be clear, applying *Addington* to bail hearings would not remove legislatures' discretion to afford heightened protection to either preventive detention or appearance-based detention. A legislature may conclude that providing more safeguards around one type of confinement than around the other is necessary as a policy matter—which, as Part IV.D explores more fully, is a credible position. *Addington* only prescribes a minimum standard of proof.[278] A legislature is free to require a higher degree of persuasion—such as "clear, *unequivocal*, and convincing evidence" or "beyond a reasonable doubt"[279]—for either dangerousness or non-appearance risk. Whether treating these two grounds for detention differently is normatively desirable goes beyond this Note's scope. As long as the evidentiary threshold does not dip below clear and convincing evidence, a legislature is free to differentiate between dangerousness and non-appearance risk without offending *Addington*.

C. Tracing Developments in the Lower Courts

District and state courts have already begun to require clear and convincing evidence in bail hearings as a matter of constitutional law. Their justification for doing so has taken one of two forms. The first is to infer the constitutional

274. 18 U.S.C. § 3142(f).

275. *See id.* § 3142(b) (providing for release on personal recognizance).

276. *See supra* note 262.

277. Jones v. United States, 463 U.S. 354, 364-65 n.13 (1983) (quoting Greenwood v. United States, 350 U.S. 366, 375 (1956)); *see also* Addington v. Texas, 441 U.S. 418, 429 (1979) (emphasizing "the lack of certainty and the fallibility" inherent in psychiatric diagnoses).

278. *See Addington*, 441 U.S. at 433.

279. *See id.* at 432 ("[W]e conclude that use of the term 'unequivocal' is not constitutionally required, although the states are free to use that standard.").

requirement from *Salerno* itself.[280] *Salerno* strongly hinted that the government could not detain someone pretrial without first presenting clear and convincing evidence of the basis for doing so. The majority opinion mentions clear and convincing evidence six times, more frequently than it does other procedural safeguards.[281] Much of the opinion's key language also focuses on the standard of proof: "When the Government proves by *clear and convincing evidence* that an arrestee presents an identified and articulable threat to an individual or the community . . . a court may disable the arrestee from executing that threat."[282] *Salerno*'s language and logic suggest that adopting a lower standard of persuasion would abandon the "careful delineation" of "narrow" circumstances that warded off Salerno and Cafaro's facial challenge.[283]

In a pair of cases, the District of Columbia Court of Appeals adopted this interpretation. The court read *Salerno* as imposing a "constitutional requirement of a clear and convincing evidence standard" for preventive detention.[284] The court subsequently held that the same standard governed detention based on non-appearance risk, emphasizing that freedom from confinement deserves "no less protection" when the government claims someone will miss their court date.[285] The court observed that the cases holding the preponderance of the evidence standard governed non-appearance risk relied heavily on statutory interpretation and had not reevaluated their holdings since *Salerno*.[286] In March 2021, the California Supreme Court drew on the District of Columbia Court of Appeals' reasoning and interpreted the California Constitution to require clear and convincing evidence before detaining someone due to non-appearance risk.[287]

The second way courts have endorsed the constitutional requirement is through *Addington*. The Eastern District of Louisiana synthesized the Court's precedents as requiring clear and convincing evidence "where physical liberty

280. *See infra* notes 282-85 and accompanying text.

281. United States v. Salerno, 481 U.S. 739, 741-44, 748-52 (1987) (mentioning probable cause two times and an adversarial hearing four times).

282. *Id.* at 751 (emphasis added).

283. *Id.* at 750-51. In *Foucha v. Louisiana*, the Court held that a Louisiana law was not "narrowly focused" like the BRA because it did not entitle an individual "to an adversary hearing at which the State must prove by *clear and convincing evidence* that he is demonstrably dangerous to the community." 504 U.S. 71, 81-83 (1992) (emphasis added).

284. Lynch v. United States, 557 A.2d 580, 585 (D.C. 1989) (en banc) (Ferren, J., concurring in part and dissenting in part); *see also* Kleinbart v. United States, 604 A.2d 861, 869-70 (D.C. 1992).

285. *Kleinbart*, 604 A.2d at 868, 870.

286. *Id.* at 869 n.14.

287. *In re* Humphrey, 482 P.3d 1008, 1020 (Cal. 2021).

is at stake."[288] The court was "convinced of the vital importance of the individual's interest in pretrial liberty recognized by the Supreme Court."[289] Similarly, a Northern District of Alabama court invoked *Addington* and its progeny when it struck down a standing bail order.[290] One of the order's constitutional deficiencies, among others, was the failure to specify the degree of persuasion needed for ordering an unaffordable bail amount—an order which the court treated as the equivalent of a detention order.[291] The court thereby held that the order should have included a standard of proof, and that standard should have been clear and convincing evidence at a minimum.[292] "The level of certainty that the clear and convincing evidence standard provides," the court explained, "is necessary to ensure fundamental fairness in bail proceedings."[293]

The *Addington* rationale has also circulated in immigration law. Like accused individuals under the BRA, undocumented persons can face detention based on either dangerousness or non-appearance risk before their deportation hearings.[294] Citing *Addington*, the First Circuit has held that the government cannot place the burden on undocumented individuals to prove they are *not* dangerous or non-appearance risks.[295] Instead, the government must prove dangerousness with clear and convincing evidence.[296] However, for reasons discussed in the next Subpart, the court did not extend the same protections to appearance-based detention.[297]

In *Casas-Castrillon v. Department of Homeland Security*, the Ninth Circuit held that an individual subject to detention under the Immigration and Nationality Act must receive a bond hearing if that detention becomes prolonged.[298] In a subsequent case, the Ninth Circuit elaborated that the government must present clear and convincing evidence to justify keeping the

288. Caliste v. Cantrell, 329 F. Supp. 3d 296, 313 (E.D. La. 2018), *aff'd on other grounds*, 937 F.3d 525 (5th Cir. 2019).

289. *Id.*

290. Schultz v. Alabama, 330 F. Supp. 3d 1344, 1371-72 (N.D. Ala. 2018).

291. *Id.*

292. *Id.* at 1372.

293. *Id.*

294. *In re* Guerra, 24 I. & N. Dec. 37, 38 (B.I.A. 2006).

295. Hernandez-Lara v. Lyons, 10 F.4th 19, 28-39 (1st Cir. 2021) (referencing *Addington* and "conclud[ing] that the government must bear the burden of proving dangerousness or flight risk in order to continue detaining a noncitizen under section 1226(a)"); *id.* at 39-40 (referencing the *Addington* line of cases and declining to "vary from that approach").

296. *Id.* at 41.

297. *Id.*; *see infra* Part IV.D.

298. Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 944 (9th Cir. 2008), *abrogated by* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

person in custody.[299] Like the First Circuit, the Ninth Circuit cited *Addington* and its companion cases to justify requiring this standard of proof.[300] The court also rejected the government's contention that undocumented people have a significantly diminished liberty interest compared to those at risk of civil commitment under *Addington*.[301] The importance of an individual's freedom from confinement drove the court's analysis for both dangerousness and non-appearance risk.[302]

The Supreme Court has since held that the Immigration and Nationality Act does not require additional bond hearings for undocumented individuals subject to prolonged detention, effectively overruling *Casas-Castrillon*.[303] But whether the statute should be read to require such bond hearings, on the one hand, and what standard of proof would govern them as a constitutional matter, on the other, are different legal questions. The Supreme Court left the latter unaddressed.[304] For this Note's purposes, the Ninth Circuit's invocation of the *Addington* rationale in the context of immigration law remains instructive. Indeed, one judge in the Western District of New York has applied similar reasoning to a trio of recent immigration detention cases.[305]

D. Considering Counterarguments

The lower court cases discussed in the preceding Subpart make the constitutional argument for clear and convincing evidence seem straightforward: Pretrial liberty is fundamental within the meaning of *Addington*, a detention order effects a change in status by incarcerating the accused person, and that change of status interferes with their ability to exercise basic rights and privileges. Yet many courts still rely on statutory

299. Singh v. Holder, 638 F.3d 1196, 1203 (9th Cir. 2011), *abrogated by Jennings*, 138 S. Ct. 830.

300. *Id.* at 1204.

301. *Id.*

302. *See id.* at 1204-05.

303. *See Jennings*, 138 S. Ct. at 846-48; Avilez v. Garland, 48 F.4th 915, 925 (9th Cir. 2022) ("We hold that *Jennings* abrogates this portion of our decision in *Casas-Castrillon*.").

304. *See* Rodriguez Diaz v. Garland, 53 F.4th 1189, 1223 n.2 (9th Cir. 2022) (Wardlaw, J., dissenting) ("[T]he Supreme Court's decision in *Jennings v. Rodriguez* . . . did not overrule our decision in *Singh* because '*Singh* was decided on constitutional grounds,' and *Jennings* 'left open any constitutional questions that prolonged immigration detention may pose.'" (citation omitted) (quoting the majority opinion)). However, the Ninth Circuit has rejected the application of the *Addington* rationale to an initial bond hearing under 8 U.S.C. § 1226(a). *Id.* at 1210-12.

305. Tapia Lopez v. Garland, No. 22-cv-00039, 2022 WL 3009530, at *5-7 (W.D.N.Y. July 29, 2022); Alvarado v. Garland, No. 21-cv-01293, 2022 WL 2187263, at *8 (W.D.N.Y. June 17, 2022); Tucker v. Searls, No. 22-cv-00608, 2022 WL 16832642, at *8 (W.D.N.Y. Nov. 9, 2022).

rather than constitutional analysis, applying the preponderance standard to non-appearance risk.[306] Entertaining counterarguments can help clarify why courts might be reluctant to adopt the *Addington* rationale for pretrial detention and why many have not done so already. This Note identifies two categories of counterarguments: that *Addington* does not encompass pretrial detention at all, or that even if it does, there is room doctrinally to distinguish between dangerousness and non-appearance risk. This Subpart discusses both of those views in turn.

First, it may not be self-evident that bail hearings fulfill the *Addington* rationale's threshold requirement: the existence of a fundamental liberty interest. As Part II discussed, pretrial detention imposes a profound loss of liberty and autonomy on the accused person. Yet there are ways one might distinguish bail hearings from the proceedings that the Supreme Court has already recognized fall under *Addington*. Bail hearings are but one phase in the life of a criminal case.[307] They occur in the shadow of a trial—a structural difference from civil commitment, termination of parental rights, deportation, and denaturalization proceedings, all of which represent the final adjudication on the matter before the court.[308]

The Supreme Court's language in those cases could be read narrowly to exclude pretrial detention. After all, the *Addington* rationale has consistently applied to proceedings where the possible deprivation of liberty has an aspect of permanence.[309] The civil-commitment cases discussed above all involved indefinite detention for treatment.[310] In *Addington*, the Court phrased the liberty interest as "not being involuntarily confined *indefinitely*."[311] Similarly, denaturalization and deportation proceedings threaten banishment from the country and termination of the legal status of citizenship and lawful residence, respectively.[312] Right-to-die cases involve a similar sense of finality, as death cannot be undone.[313] Finally, the Court justified its

306. *See supra* Part I.B.

307. *See* Off. of the Fed. Pub. Def., E. Dist. of Va., A Federal Criminal Case Timeline (n.d.), https://perma.cc/8KSQ-VSCB.

308. *See supra* Part IV.A.

309. *See supra* Part IV.A.

310. *E.g.*, Addington v. Texas, 441 U.S. 418, 425 (1979).

311. *Id.* (emphasis added); *see also* Foucha v. Louisiana, 504 U.S. 71, 81-82 (1992) (identifying "Foucha's liberty interest under the Constitution in being freed from *indefinite* confinement in a mental facility" (emphasis added)).

312. *See* Schneiderman v. United States, 320 U.S. 118, 122-23 (1943); Woodby v. INS, 385 U.S. 276, 285 (1966).

313. *See* Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 283 (1990) ("An erroneous decision to withdraw life-sustaining treatment . . . is not susceptible of correction.").

application of *Addington* to parental termination orders based on their "severe and . . . irreversible" character.[314] When the government moves to strip someone of their parental rights, it "seeks not merely to infringe [a] fundamental liberty interest, but to end it."[315]

Pretrial detention, by contrast, is temporary—even though the accused person may experience prolonged confinement.[316] Because an individual can only be held until the ultimate disposition of their case, pretrial confinement must have an endpoint. The Constitution guarantees the right to a speedy trial, which theoretically limits the length of pretrial detention.[317] Pretrial confinement is but a means of securing someone's appearance in court and preventing the commission of further harm in the interim.

Salerno itself, however, challenges this argument. There, the Court characterized the liberty interest in bail hearings as "strong," "importan[t]," and "fundamental"[318]—deserving of protection from government interference absent "carefully limited" circumstances.[319] Even though an indefinite deprivation was not at issue, the Court discussed freedom from pretrial confinement with the same reverence it has other liberty interests recognized as fundamental under *Addington*. This rhetoric provides compelling support that the *Salerno* Court would recognize pretrial liberty as "particularly important" and "more substantial than mere loss of money."[320]

The Court has never rested an application of the *Addington* rationale on the permanent, semi-permanent, or indefinite quality of the deprivation.[321] Permanence was merely one element the Court mentioned to express the gravity of the harm to the individual.[322] It would pervert the spirit of the Courts' holdings to use its attempts to empathize with the scope of an individual's loss to cabin the *Addington* rationale. Even if bail hearings do not threaten a permanent deprivation of liberty in a technical sense, they can leave indelible scars.[323] An accused person cannot recover the time they spent behind bars or erase the trauma they may have experienced.[324] Nor can they simply

314. Santosky v. Kramer, 455 U.S. 745, 759 (1982).

315. *Id.*

316. *See supra* notes 5-6.

317. *See* U.S. CONST. amend. VI; *see also* United States v. Torres, 995 F.3d 695, 698-99 (9th Cir. 2021).

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

319. *Id.* at 755.

320. Addington v. Texas, 441 U.S. 418, 424 (1979).

321. *See supra* Part IV.A.

322. *See supra* notes 309-15 and accompanying text.

323. *See supra* Part II.

324. *See supra* Part II.

undo any disruption to their financial, housing, and employment stability. Moreover, bail hearings cannot be "indefinite" within the meaning of *Addington* only because another, more profound deprivation lurks in the background: the possibility of a criminal conviction. Although the permanent and non-permanent distinction may have descriptive salience, "the differences will not support a distinction in the standard of proof."[325]

The second counterargument is that even if the *Addington* rationale encompasses bail hearings, it is but a factor for courts to consider when evaluating whether to require heightened procedural safeguards; even if the liberty interest is identical, considerations external to *Addington* might justify different evidentiary standards for dangerousness and flight risk. The First Circuit recently took this view in the context of immigration law.[326] The question before the court was whether due process required the government to bear the burden of proof at a bond hearing under the Immigration and Nationality Act.[327] The First Circuit ran through the requisite three-part balancing test to evaluate a procedural due process claim under *Mathews v. Eldridge*,[328] which considers the private liberty interest; the risk of erroneous deprivation, as well as the cost and the value of additional protections; and the government's interest.

The court concluded that the government had to bear the burden and that, drawing on *Addington*, the standard of persuasion for dangerousness was clear and convincing evidence.[329] The court emphasized that the dangerousness determination would likely turn on evidence in the government's control, such as immigration records.[330] For non-appearance risk, though, an undocumented person already had the most material evidence in their possession, including information about their employment and community ties.[331] The First Circuit surmised that detention would inhibit someone from gathering evidence related to dangerousness more than non-appearance risk.[332] For that reason, the court claimed that the second *Mathews* factor—the risk of erroneous deprivation—was weaker for appearance-based detention.[333] Given the lower risk of error, the preponderance of the evidence standard was

325. *In re* Winship, 397 U.S. 358, 374 (1970) (Harlan, J., concurring).

326. Hernandez-Lara v. Lyons, 10 F.4th 19, 40 (1st Cir. 2021).

327. *Id.* at 23-24.

328. 424 U.S. 319 (1976).

329. *Hernandez-Lara*, 10 F.4th at 39-40.

330. *Id.* at 30, 40.

331. *Id.* at 40.

332. *Id.*

333. *Id.*

appropriate.[334] The First Circuit's reasoning raises the novel question of whether the *Addington* rationale can apply partially or unevenly within the same legal proceeding.

Assuming for the moment that the First Circuit's approach is sound, a court applying the *Mathews* test to bail hearings could justifiably conclude that preventive detention presents a higher risk of erroneous deprivation than appearance-based detention. As Part I discussed, statutorily authorized preventive detention is a relatively new phenomenon in American legal history. Courts and legislatures have long accepted that one of the pretrial process's primary objectives is to ensure the accused person's attendance at hearings.[335] One reason dangerousness has not been a focal point to the same extent is that preventive detention resembles punishment. As first-year students learn in criminal law, the theoretical justifications for punishment include retribution, rehabilitation, deterrence, and incapacitation.[336] Preventive detention dovetails uncomfortably with incapacitation and may even have echoes of retribution. Yet it is justified on the basis of being regulatory.[337] Because non-appearance risk does not blur the regulatory-punitive boundary to the same degree, it makes sense that legislatures might afford it less protection.

Additionally, judges may be particularly predisposed to impose detention orders or conditions of release based on dangerousness. Judges, especially elected ones, are often loath to appear "soft on crime."[338] If an accused person receives pretrial release and violates the law, the judge may become the target of politicians' and the media's ire.[339] These reputational risks and political hazards may compel judges to err on the side of detention when the government claims that an accused person is dangerous. In Houston, for example, a judge came under fire for granting release on bond to a man who

334. The First Circuit also substantiated its holding by noting that the government only needs to prove non-appearance risk by a preponderance of the evidence in bail hearings, a premise this Note calls into question. *See id.*

335. *See supra* Part I.A.

336. *See* Ewing v. California, 538 U.S. 11, 25 (2003).

337. United States v. Salerno, 481 U.S. 739, 747 (1987).

338. Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 323-24, 327, 331 (2010).

339. *See id.* at 364 ("While it is impossible to predict who will commit a crime while released on bail, it is easy for politicians in hindsight to criticize a judge who granted bail to the defendant who re-offends while out on bail." (quoting Jeannine Bell, *The Politics of Crime and the Threat to Judicial Independence*, *in* JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY, app. F, at 3 (2003))).

then shot two police officers.[340] The police union called for the judge's resignation. "Until he decides to step up and explain himself, we will continue to come after him," the union's president vowed. He swore to "actively search for people who will run against him."[341] The safeguards around preventive detention counteract the political pressures that may make judges more conservative about releasing accused individuals pretrial[342]—incentives that are not present to the same degree with non-appearance risk.

The other way to shift the scales of the *Mathews* test would be to press on the first factor: the individual liberty interest. Even if a court is prepared to recognize the freedom from bodily restraint as fundamental, it might conclude that the accused person's interest in freedom from appearance-based detention is weaker than their interest in freedom from preventive detention. Mayson observes that several of the Court's Fourth Amendment cases have recognized that arrested individuals have "diminished expectations of privacy,"[343] permitting law enforcement to strip search and collect DNA from them without first obtaining a warrant.[344] Mayson reads the Court's jurisprudence as authorizing special intrusions on arrested and accused individuals' liberty "to ensure the integrity of the ongoing proceeding,"[345] including "to prevent flight, harm to witnesses, or other obstructions of justice . . . ."[346] However, the Court has not sanctioned "special authority for restraint to prevent unrelated future crime."[347] Read this way, an individual's interest in freedom from appearance-based detention is diminished by the legal system's needs and does not figure as prominently into the *Mathews* analysis as does preventive detention. The *Mathews* balancing test would therefore support a downward departure from the degree of persuasion prescribed for dangerousness.

The problem with these arguments is that they manage to simultaneously simplify and complicate the *Addington* rationale. The First Circuit's uneven application of *Addington* reduces it to a rote application of *Mathews* balancing while muddying its basic mandate: When a fundamental liberty interest is at

340. Courtney Zubowski, *Houston Police Union Calls for Judge's Resignation After Man Who Was Given Low Bond Shoots Two HPD Officers*, KPRC 2 HOUS. (Sept. 21, 2021, 6:17 PM), https://perma.cc/99P8-3UCC.

341. *Id.*

342. *See* Swisher, *supra* note 338, at 364-65 (explaining that the fear of negative publicity can bias judges toward detention).

343. Mayson, *supra* note 155, at 527 (quoting Riley v. California, 573 U.S. 373, 392 (2014)).

344. Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 324, 339 (2012) (upholding warrantless strip searches); Maryland v. King, 569 U.S. 435, 465-66 (2013) (upholding warrantless DNA collections).

345. Mayson, *supra* note 155, at 530.

346. *Id.* at 533.

347. *Id.*

stake, the clear and convincing evidence requirement must apply, period.[348] Like the First Circuit, the Supreme Court ran through the *Mathews* factors when considering whether to extend *Addington*'s holding to parental-termination orders.[349] However, the *Addington* rationale was not merely a factor to be weighed. Rather, it framed the Court's entire *Mathews* analysis that followed.[350] The Court even rejected the suggestion that other safeguards could compensate for a constitutionally deficient standard of proof, given its unique function of "instruct[ing] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions."[351] The fact that a proceeding may have a lower risk of erroneous deprivation does not mean that the importance of the liberty interest at stake has been adequately conveyed to judges and juries. The First Circuit therefore erred by applying *Addington* only to treat clear and convincing evidence as a standard from which *Mathews* could justify departing downward, instead of a constitutionally-mandated floor that the court could only supplement.

The history discussed in Part IV.A helps clarify this point. As far as legal doctrines go, the *Addington* rationale is unusually empathetic and pragmatic.[352] Over time, the Court has become increasingly concerned not only with the importance of the legal right or status at stake but also with the effect of its deprivation on the individual.[353] Thus, the Court held that deportation hearings required the same standard of proof as denaturalization proceedings because of the familial, social, and professional relationships at risk of rupture.[354] It did not matter whether lawful permanent status was as sacred as citizenship.[355] Similarly, *Addington* emphasized the lived experience of confinement and "adverse social consequences" for the individual.[356] The lived consequences of the possible error are what justify the heightened protections to minimize it. Applying *Addington* partially to bail hearings would graft an inquiry for how the government proves its case for deprivation onto the nature of the deprivation itself. Such extrapolation would be an unprecedented and unwarranted dilution in the Court's jurisprudence of evidentiary standards.

348. *See generally* Addington v. Texas, 441 U.S. 418 (1979) (emphasizing the significance of the standard of proof).

349. Santosky v. Kramer, 455 U.S. 745, 758-68 (1982).

350. *See id.* at 756.

351. *Id.* at 755 (quoting *Addington*, 441 U.S. at 423).

352. *See supra* Part IV.A.

353. *See supra* Part IV.A.

354. *See supra* notes 236-45 and accompanying text.

355. *See supra* notes 236-45 and accompanying text.

356. *Addington*, 441 U.S. at 426.

Conclusion

How persuaded must a judge be before issuing a detention order? Even as the movement to end wealth-based detention surges nationwide, the constitutional criteria for pretrial confinement have eluded scholarly attention. As more courts resolve to treat unaffordable bail amounts as de facto detention orders, clarifying the due process protections afforded to an accused individual will be critical. The circuit courts have addressed the *statutory* constraints on bail hearings, but they have left the constitutional question largely untouched. This Note has looked to *Addington* and its progeny to argue that due process requires clear and convincing evidence in bail hearings. The Supreme Court has consistently drawn on the standard of proof to allocate additional risk of error to the government in cases involving uniquely compelling liberty interests. The profound loss of autonomy, privacy, and financial stability that a detention order imposes falls well within the *Addington* framework. This argument has intuitive appeal: If the government wishes to incarcerate someone without obtaining a conviction, its evidence should be thoroughly convincing. More robust procedural protections can also help check the biased, "tough-on-crime" thinking that has compromised the pretrial process. The standard of proof is one of the law's oldest tools for ensuring that deprivations of liberty do not hinge on the factfinder's whims and caprices. At long last, courts should be required to wield it appropriately.