# Pretrial Liberty: An Exception Rather Than a Norm

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POL 378: Mass Incarceration

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From the Judiciary Act of 1789 through most of the twentieth century, individuals accused of non-capital offenses were provided non-excessive bail pretrial. This right, formally enshrined under the Eighth Amendment, grants defendants access to "unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction."[1] The sole consideration for determining bail was the risk of failing to appear in court for trial. That changed in 1984. With the passage of the Bail Reform Act, courts were allowed to consider an additional factor: community safety. Following its passage, the Bail Reform Act was promptly challenged in court as a violation of the Excessive Bail Clause of the Eighth Amendment and the Due Process Clause of the Fifth Amendment. In the case *U.S. v. Salerno*, the Supreme Court held that since "liberty is the norm, and detention prior to trial…is the carefully limited exception," the additional consideration of community safety does not violate the provisions of the Eighth or Fifth Amendments.[2] The Court was wrong.

In 2025, the U.S. District Courts handled 36,985 pretrial criminal cases.[3] Of those, 19,922 (53.9%) resulted in individuals being detained without release, while only 46.1% of defendants were released.[4] This reality is a drastic departure from the realities the Court initially considered in *Salerno*. Liberty is no longer the norm; it is the exception. In *Salerno*, the Court opinion contained four main holdings. First, the Court held that the Bail Reform Act's provision allowing detention following a finding of risk to community safety (18 U.S. Code §3142) serves a "legitimate and compelling regulatory purpose" and includes sufficient procedural protections, including its narrow scope, to satisfy the requirements of the Due Process Clause of the Fifth

[1] *Stack v. Boyle*, 342 U.S. 1, 4 (1951).
[2] *U.S v. Salerno*, 481 U.S. 739, 755 (1987).
[3] Data excludes the District of Columbia and illegal alien cases.
[4] Table H-14b. U.S. District Courts----Pretrial Services Release and Detention, Excluding Illegal Alien Cases For the 12-Month Period Ending September 30, 2025. Accessed May 7, 2026.

Amendment.[5] Second, the Court held that the legislative history indicates Congress created the detention provisions not to punish individuals, but as a solution to the pressing societal problem of crimes committed by persons on release. Third, the Court held that the Government's "regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."[6] Finally, the Court held that pretrial detention is not facially unconstitutional as violative of the Excessive Bail Clause of the Eighth Amendment. The Court even took it a step further, claiming "[The Excessive Bail] Clause, of course, says nothing about whether bail shall be available at all."[7]

At the time of its decision, the Court lacked critical context, context now widely available. The practice the Court greenlit, finding it limits liberty in narrow instances with strict procedural safeguards, does not operate as they claimed: The restrictions on liberty are widespread and normalized. Pretrial incarceration under the Bail Reform Act of 1984, as it is currently practiced, violates two core rights that the U.S. The Constitution grants the accused: the right to due process of law and the right to bail that is not excessive. As such, 18 U.S. Code §3142, the provision of the Bail Reform Act of 1984 that allows federal courts to detain defendants before trial to ensure community safety, and the Supreme Court's subsequent decision in *Salerno,* upholding this provision, runs afoul of the Constitution. As such, to comport with the values and rights enshrined in the Constitution, the Bail Reform Act of 1984 should be repealed, and *Salerno* should be overruled.

The Due Process Clause of the Fifth Amendment holds that no person shall "be deprived of life, liberty, or property, without due process of law."[8] The right to due process has played a

[5] *U.S. v. Salerno*, 481 U.S. 739, 752 (1987).
[6] *U.S. v. Salerno*, 481 U.S. 739, 748 (1987).
[7] *U.S. v. Salerno*, 481 U.S. 739, 752 (1987).
[8] U.S. Const. amend. V cl. 4.

fundamental role in protecting the rights of the accused against the government. §3142 violates central components of the Due Process Clause of the Fifth Amendment. As Justice Frankfurter eloquently explains,

> [T]he Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are, the less likely they are to be explicitly stated. But respect for them is of the very essence of the Due Process Clause.[9]

One of those deeply embedded rights central to the U.S. legal system is the presumption that all defendants are innocent until proven, beyond a reasonable doubt, guilty. While this presumption is not derived explicitly from the text of the U.S. Constitution, legal scholars and commentators have considered it an essential, albeit implicit, element of the Due Process Clauses of the Fifth and Fourteenth Amendments. In 1895, in *Coffin v. U.S.*, the Supreme Court cemented the presumption of innocence as a central component of the Due Process Clause, holding **"**the principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[10] Individuals held in detention pre-trial under §3142 are undoubtedly deprived of this presumption.

Historically, bail amount or availability was determined based on the likelihood that a defendant would fail to appear in court for trial. The Bail Reform Act of 1984 required judges to take into consideration additional factors. §3142(g) outlines the factors judges must take into account when determining eligibility for bail. These factors include the nature and circumstances of the crime charged, the weight of the evidence against the person, the criminal history and character of the person, and the nature and seriousness of the danger posed by the person's

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[9] *Solesbee v. Balcom*, 399 U.S. 9, 16 (1950) (Frankfurter J., dissenting).
[10] *Coffin v. U.S.*, 156 U.S. 432, 453 (1895).

release. By allowing judges to consider both the weight of the evidence against the person and that person's criminal history and character, §3142 unconstitutionally permits a court to determine guilt before trial. Considering the weight to give evidence is a jury's role. By allowing judges to consider this factor before trial, judges are permitted to determine the likelihood of guilt and circumvent the presumption that an accused individual is innocent. Further, considering the individual's prior criminal history to determine if they pose a threat to the community allows judges to circumvent the presumption of innocence by considering whether an individual's prior convictions increase the likelihood of a finding of guilt on the crimes charged. By allowing judges to consider the presumed danger an individual poses to the community using these factors, §3142 violates a defendant's right to presumed innocence until being proven guilty and convicted by a jury.

Furthermore, §3142 violates other core due process requirements. Traditionally, due process analysis rests on "whether governmental interests served by any given restriction outweigh the individual's deprivations suffered."[11] In this instance, the purported governmental interest is community safety. To achieve this interest, the government contends that detaining individuals prior to trial who pose a threat to the community is a narrowly-tailored restriction and not a punishment. I agree that pretrial incarceration under §3142 does not meet the criteria to be considered punishment, since the detention occurs before conviction; nevertheless, the restriction §3142 imposes on defendants is not narrowly tailored and inflicts significant harm. Defendants detained pre-trial often experience the *same* conditions and consequences as incarcerated individuals. They are crammed into overcrowded cells, lose access to fundamental liberties, such as access to reading materials and being free from frequent body cavity searches, and face significant economic loss.[12] The length of time individuals remain detained pre-trial is not short—five months is not uncommon.[13] Outside of the direct harm caused by detention, there is a

[11] *Bell v. Wolfish*, 441 U.S. 520, 563 (1979) (Marshall J., dissenting).
[12] *Bell v. Wolfish*, 441 U.S. 520, 563 (1979).
[13] Ted Enamorado, Anne McDonough, and Tali Mendelberg, "The Shadow Carceral State and Racial Inequality in Turnout," *British Journal of Political Science* 54, no. 4 (October 2024): 1318–39.

significant likelihood of job loss and significant economic hardship placed on families of individuals detained pre-trial. The harm is significant. The government's restriction is not narrowly tailored to reduce that harm. In fact, these conditions and length of time are specifically designed to facilitate more plea bargains, further circumventing an individual's liberty interests.[14] As such, under the traditional balancing framework of the Due Process Clause, the individual deprivation suffered as a result of this restriction significantly outweighs the government's legitimate interest in community safety. As such, §3142 violates the Due Process Clause of the Fifth Amendment.

In addition to violating the Due Process Clause, §3142 also deprives defendants of their right to bail that is not excessive under the Eighth Amendment. In *Stack v. Boyle,* the Court held that "[b]ail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment."[15] The Court in *Salerno* denied that *Stack* was controlling, writing that the Court in *Stack* "had no occasion to consider whether the Excessive Bail Clause requires courts to admit all defendants to bail, because the statute before the Court in that case in fact allowed the defendants to be bailed."[16] In ruling that the Excessive Bail Clause does not require bail to be available at all, the Court circumvented a core protection that defendants are afforded under the Eighth Amendment. The original intent of the Eighth Amendment was to ensure that defendants, regardless of wealth, did not face indefinite imprisonment before being convicted of a non-capital crime. By ruling that the Eighth Amendment's restriction on excessive bail only applies to instances when bail is available and does not require bail to be available in the first place, the Court produces a reading of the Eighth Amendment incongruent with its initial design. In his dissent, Justice Marshall highlights this illogical reading of the Excessive Bail Clause:

> "The Eighth Amendment, as the majority notes, states that '[e]xcessive bail shall not be required.' The majority then declares, as if it were undeniable, that: '[t]his Clause, of

[14] Samuel Wiseman, "Bail and Mass Incarceration," *Georgia Law Review* 53, no. 1, art. 5 (2018): 235-79.
[15] *Stack v. Boyle*, 342 U.S. 1, 5 (1951)
[16] *U.S. v. Salerno* 481 U.S. 739, 753 (1987).

> course, says nothing about whether bail shall be available at all.' If excessive bail is imposed, the defendant stays in jail. The same result is achieved if bail is denied altogether. Whether the magistrate sets bail at $1 billion or refuses to set bail at all, the consequences are indistinguishable. It would be mere sophistry to suggest that the Eighth Amendment protects against the former decision, and not the latter."[17]

By allowing judges to deny bail to defendants who are summarily declared a danger to the community before conviction, §3142 violates the core principles underlying the Excessive Bail Clause. Bail affords defendants the right to "unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction."[18] By expanding the scope of instances in which bail can be denied beyond those with a record of being exceptions (cases where the defendant is charged with a capital crime or poses a flight risk), §3142 violates the Excessive Bail Clause of the Eighth Amendment.[19]

For most of its history, a defining characteristic of the Constitution has been strong protections for those charged with crimes. The provisions of the Bail Reform Act of 1984, specifically §3142, which allow courts to deny bail as a result of a defendant's potential threat to the community, and the Court's decision in *Salerno*, undermine that history. For almost four decades, the decision in *Salerno* has allowed federal courts to violate defendants' rights under the Fifth Amendment Due Process Clause and the Eighth Amendment Excessive Bail Clause. The current practice of pretrial incarceration is fundamentally misguided and has led to the rapid expansion of incarceration. Individuals charged with a crime are incarcerated and face conditions that deprive them of their fundamental liberties without being convicted by a jury of their peers. Undoubtedly, many innocent individuals who may eventually be found not guilty or have their

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[17] *U.S. v. Salerno*, 481 U.S. 739, 760-61 (1987) (Marshall J., dissenting).
[18] *Stack v. Boyle*, 342 U.S. 1, 4 (1951).
[19] The argument presented here addresses the constitutionality of §3142 as a whole and does not address the plethora of case-by-case arguments that could be made. As social science literature highlights, there is a significant number of individual cases where the bail imposed on defendants is excessive. Although those cases potentially present important challenges to §3142, they are not at issue here. For more information see Joshua Page, and Christine S. Scott-Hayward, "Bail and Pretrial Justice in the United States: A Field of Possibility," *Annual Review of Criminology* 5, no. 1 (January 13, 2022): 91–113.
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cases dropped entirely are forced into these conditions every year. That reality does not square with the fundamental premise of the Constitution. Liberty must not be the exception; it must be the rule. If this country is committed to liberty, the Bail Reform Act of 1984 should be repealed, and *Salerno* should be overruled.

# Bibliography

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