



WHEN THE EMPEROR HAS NO CLOTHES II: A PROPOSAL FOR A MORE SERIOUS LOOK AT “THE WEIGHT OF THE EVIDENCE”

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I. INTRODUCTION

In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether . . . to prosecute . . . generally rests entirely in his discretion.¹

“He’s in prison now, being punished; and the trial doesn’t even begin till next Wednesday; and of course the crime comes last of all.”

“Suppose he never commits the crime?”

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¹ *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

“That would be all the better, wouldn't it?”²

As its title suggests, this Article is a follow-on piece to *When the Emperor Has No Clothes*.³ As that article explained, it takes only probable cause for a prosecutor to bring and maintain charge(s) against a defendant.⁴ Such a charging decision is essentially unreviewable;⁵ it takes only charge(s) for a defendant to be detained pending trial, with little-to-no consideration of the strength of the supporting evidence,⁶ and delays resulting from the administration of a public-defense system count against the defendant in a speedy-trial claim.⁷ In other words, the factual showing of guilt that the prosecution must make to justify the indefinite pretrial detention of

² LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 88 (Harper & Bros. ed. 1902).

³ Carrie Leonetti, *When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases*, 84 S. CAL. L. REV. 661 (2010-2011).

⁴ See *id.* at 666.

⁵ See *id.* For analyses of the broad discretion of U.S. prosecutors, see, e.g., Norman Abrams, *Prosecution: Prosecutorial Discretion*, in 3 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1272 (Sanford H. Kadish ed., 1983); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980); Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. SUPP. 643 (2002); Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

⁶ See Leonetti, *supra* note 3, at 662. In enacting the Bail Reform Act of 1984, 18 U.S.C. § 3141 (1984), while recognizing that it “might give some additional measure of protection against the possibility of allowing pretrial detention of defendants who are ultimately acquitted,” Congress ultimately rejected a higher standard of proof that the defendant committed the offense(s) charged as a condition of pretrial detention. S. REP. NO. 98-225, at 18 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3201. A defendant who has been indicted by a grand jury, which serves as a determination of probable cause, see *United States v. Contreras*, 776 F.2d 51 (2d Cir. 1985); 24 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 609.03 (3d ed. 2011), will have no additional hearing on the issue of guilt or innocence prior to the court's pretrial detention order.

⁷ See Leonetti, *supra* note 3, at 665.

a criminal defendant is no greater than the showing required to support an arrest. The result has been a caseload of criminal prosecutions in American courts that has been described as “crushing,”⁸ and a system that lacks an official remedy for courts to employ when the prosecution charges an offense that it has no chance of proving.

Congress, in enacting the federal Bail Reform Act of 1984 (“BRA”),⁹ expressed its intent that detention under the BRA reach only a small class of defendants.¹⁰ Nonetheless, since the BRA’s enactment, the use of preventive detention of criminal defendants pending trial has dramatically increased, and pretrial detention is

⁸ Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 402 (1992).

⁹ The BRA revised the Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966), which had been the first major modification of the federal bail system since 1789. See Sam J. Ervin, Jr., *The Legislative Role in Bail Reform*, 35 GEO. WASH. L. REV. 429, 431 (1967). The 1966 statute sought to address the inequities of the Federal Judiciary Act of 1789. See *id.* at 444 n.38, under which the federal courts had generally set bail in the amount of a corporate surety bond, which meant that a defendant had to be able at least to post a percentage of the bail and collateral with a bail bondsperson to gain release from pretrial custody. See Floralyynn Einesman, *How Long Is Too Long? When Pretrial Detention Violates Due Process*, 60 TENN. L. REV. 1, 4 (1992); Ervin, *supra*, at 436. Consequently, many poor defendants had been incarcerated before trial on the basis of their indigence rather than their likelihood of flight or the danger that they posed to the community. See Ervin, *supra*, at 430.

The 1966 statute sought to eliminate financial status from bail consideration. See Pub. L. No. 89-465, 80 Stat. 214 (1966), reprinted in 1966 U.S.C.A.N. 241 (codified as amended at 18 U.S.C. §§ 3141-51 (1982)). It provided that each defendant was presumptively entitled to release on his or her personal recognizance or the execution of an unsecured appearance bond, eliminating the need for a bail bondsperson or collateral. See *id.*; Einesman, *supra*, at 4. It also established alternatives that could be ordered in addition to, or instead of, release on personal recognizance or unsecured bond. These included placing the defendant in the custody of a designated third party and/or restricting travel and association. See *id.*

¹⁰ Congress specifically intended that the preventive detention component of the BRA apply only to a small group of defendants who pose a substantial risk to the community. See S. REP. NO. 98-225, at 6-7.

now common in criminal cases.¹¹ While much of the debate surrounding preventive detention has focused on the accuracy with which courts could predict whether defendants posed a future risk to the community (i.e., identifying those defendants that are innocent of the temporary *dangerousness* of which they are accused during the detention hearing),¹² very little has focused on the other accuracy problem with pretrial detention: the extent to which courts may be detaining defendants who are innocent of the *crimes* with which they are charged – the jurisdictional triggering mechanism of the BRA and many state preventive-detention statutes.

When the Emperor Has No Clothes addressed one of the symptoms of prosecutorial overcharging: cases in which the prosecution has sufficiently pleaded a charge but lacks evidence that is legally sufficient under *Jackson v. Virginia*¹³ to support that charge at trial. *Jackson* held that due process requires that the evidence presented at trial, when viewed in the light most favorable to the prosecution, permit a rational trier of fact to find the defendant guilty beyond a reasonable doubt in order to be sufficient to sustain a conviction. The *Jackson* rule permits scenarios in which the prosecution has alleged facts in the charging document for which it has probable cause but that it cannot prove beyond a reasonable doubt at trial (“sufficiency cases”).¹⁴

This Article addresses a different overcharging problem: cases in which the prosecution’s evidence is legally sufficient under *Jackson* but not strong enough as a practical matter actually to convince

¹¹ See DIANA GORDON, THE JUSTICE JUGGERNAUT: FIGHTING STREET CRIME, CONTROLLING CITIZENS 16–35 (1990); Einesman, *supra* note 9, at 42; John Riley, *Preventive Detention Use Grows – But Is It Fair?*, 8 NAT’L. L. J. 1, 1 (Mar. 24, 1986).

¹² See SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990 80 (Oxford University Press 1993).

¹³ 443 U.S. 307, 316 (1979).

¹⁴ See Leonetti, *supra* note 3, at 667.

any given jury of twelve citizens. This scenario occurs most frequently in cases in which a mistrial has been declared after one or more juries has failed to reach a unanimous verdict and the prosecution has opted to try the defendant again, with no significant new evidence (“weak cases”). In these situations, a pretrial motion for summary judgment, like a mid-trial motion for judgment of acquittal, could not dispose of the case – the evidence is legally sufficient – and the Double Jeopardy Clause does not generally prohibit a retrial so long as the previous mistrial was declared for manifest necessity,¹⁵ a standard that almost any “hung jury” case will meet. Like the legal-insufficiency cases, these weak cases cannot be screened

¹⁵ See *infra* Part IV(A). See, e.g., *State ex. rel. Taylor v. Janes*, 693 S.E.2d 82, 89 (W. Va. 2010) (“Mistrials resulting from a deadlocked jury are based on manifest necessity.”); *Keller v. Ferguson*, 355 S.E.2d 405 (W. Va. 1987) (“Termination of a criminal trial arising from a manifest necessity will not result in double jeopardy barring a retrial.”); see also *Yeager v. United States*, 557 U.S.110, 121 – 23 (2009) (holding that the collateral estoppel component of double jeopardy did not bar the government from re-prosecuting Yeager after the jury had acquitted him of some counts of indictment but deadlocked on others, resulting in a mistrial on the deadlocked counts, because Yeager could not show that an ultimate issue of fact in the counts for which he was acquitted was also an essential element in the deadlocked counts). Of course, if a jury has deadlocked on all counts, the collateral estoppel component of double jeopardy would be irrelevant as there would be no final judgment of acquittal to act as a bar to re-prosecution. See *Yeager*, 557 U.S. 110 (holding that a jury’s inability to decide a charge in an indictment is a nonevent that has not part in the analysis of whether the collateral estoppel component of double jeopardy precludes introduction of an issue at retrial on a charge in an indictment for which the jury did not reach a verdict); see, e.g., *United States v. Howe*, 590 F.3d 552, 557–58 (8th Cir. 2009) (holding, following remand by the United States Supreme Court to apply its decision in *Yeager*, that Howe’s retrial on kidnapping and conspiracy counts for which the jury at his first trial had deadlocked was not barred by collateral estoppel because the court was unable to conclude from the record that the ultimate issue of fact that Howe sought to bar from re-prosecution had necessarily been decided by the jury in its prior acquittal of him for felony murder and a related firearm offense); *State v. Kent*, 678 S.E.2d 26 (W. Va. 2009) (holding that the jury’s failure to reach a verdict at a first trial as to a second theory of murder, while convicting Kent of the first theory of murder, did not constitute an “acquittal” for the purposes of barring Kent’s conviction on the second theory at a retrial because the first jury did not “decide” the issue of the second theory).

out by a grand jury or a preliminary hearing, primarily because of the lower burdens of proof that attach to those proceedings.¹⁶

If courts cannot regulate the prosecution's decision to maintain and proceed again to trial on weak charges, what can they do? The thesis of this Article is a simple one: while the BRA and state statutes modeled after it command courts to consider the weight of the evidence in making pretrial release/detention decisions,¹⁷ as a practical matter, courts do not do so—at least not when the weight of the evidence cuts in favor of release—and they should. In particular, courts should accord substantially more weight to the “weight of the evidence” factor in making or reviewing pretrial-detention determinations when a jury has already refused unanimously to convict the defendant of the crime(s) charged. Unless the prosecution has obtained significant, material new evidence between the mistrial and the review of the detention determination, magistrates should release these defendants, on conditions if appropriate, pending any retrial.

In many ways, this, too, is a modest proposal. Its adoption would not alter the present system as a doctrinal matter, but rather

¹⁶ See Leonetti, *supra* note 3, at 667; see, e.g., FED. R. CRIM. P. 5.1(a).

¹⁷ See 18 U.S.C. § 3146(b) (prescribing that, in determining whether conditions of release would reasonably assure a defendant's appearance in court, the judicial officer is to consider: the nature and circumstances of the offense, the weight of the evidence, the defendant's financial resources, family ties, record of employment, character and mental condition, length of residence in the community, criminal record and his record of appearance or flight in previous cases); D.C. CODE ANN. § 23-1321(b) (1970) (“In determining which conditions of release, if any, will reasonably assure the appearance of a person as required or the safety of any other person or the community, the judicial officer shall, on the basis of available information, take into account such matters as the nature and circumstances of the offense charged, *the weight of the evidence against such person*, his family ties, employment, financial resources, character and mental conditions, past conduct, length of residence in the community, record of convictions, and any record of appearance at court proceedings, flight to avoid prosecution, or failure to appear at court proceedings.”) (emphasis added).

in practice only. Nonetheless, its effects on criminal adjudication could be significant. It would remove some of the leverage that pretrial detention gives prosecutors to coerce defendants into pleading guilty to charges that prosecutors cannot prove beyond a reasonable doubt and would provide criminal defendants leverage of their own to force prosecutors to bring only those charges that they can actually prove beyond a reasonable doubt.

Section II lays out the statutory structure of pretrial detention under the BRA, which is typical of pretrial detention statutes nationwide, particularly the “weight of the evidence” factor that courts are supposed to look at in making their pretrial-detention determination. It also examines the constitutional constraints on preventive detention under *United States v. Salerno*,¹⁸ particularly the Court’s finding that the BRA’s pretrial detention regime was neither punitive nor excessive in relation to Congress’s regulatory goal of preventing danger to the community. It posits that courts tend to disfavor consideration of the strength of the evidence against a particular defendant in making their detention determinations and that, when courts do consider the weight of the evidence, it is almost always in cases in which that factor cuts in favor of detention and against the defendant.

Section III analyzes two recent cases as illustrations of this wider practice. The first is the ongoing prosecution of Lincoln Stuart Taylor in West Virginia as a real life example of a defendant being tried over and over again to a draw, while waiting in lockup with no prospect for a final judgment to end his/her pretrial incarceration. The second is the recently concluded case of Larry Starling, who was convicted after the State of Oregon’s third bite at the prosecutorial apple, the first two trials resulting in hung juries.

Section IV considers three potential alternatives to pretrial release—the prohibition against double jeopardy, the right to a

¹⁸ 481 U.S. 739 (1987).

speedy trial, and substantive due process—and argues that none are an adequate remedy for the overcharging problem caused when the prosecution’s evidence is weak but legally sufficient under *Jackson*. Section V argues that the only remedy left for courts to minimize the prejudice to defendants being held in pretrial detention pending trial on charges that may never result in a final judgment is release from custody and that a weak prosecution case resulting in a hung jury should militate in favor of a defendant’s release from custody pending retrial. It argues that, despite statutory and case law authorization to do so, courts rarely invoke this mechanism of pretrial release as a remedy for weak cases, even when asked specifically by a defendant to do so.

Section VI concludes that trial courts should factor the weakness of the prosecution’s evidence of guilt in balancing the need for pretrial detention with its restriction of the defendant’s liberty and use the “weight of the evidence” factor in ordering release of defendants with little prospect of conviction to the same extent that they use the strength of the evidence of guilt in ordering detention.

II. PREVENTIVE DETENTION: THE STATUTORY & CONSTITUTIONAL STRUCTURE

The government may detain a defendant prior to trial, consistent with the Due Process Clause of the Fifth Amendment, so long as confinement does not amount to “punishment of the detainee.”¹⁹ The BRA revolutionized the way in which bail was determined in federal criminal cases by authorizing courts, in noncapital cases, to consider the defendant's risk of flight and possible danger to the community when deciding whether the defendant should be detained pending trial in a federal criminal case, in lieu of the traditional system of setting monetary bail from a schedule of offenses and enforcing bail conditions primarily through bondspeople and bounty hunters.²⁰ In *Salerno*, the Supreme Court upheld the BRA’s constitutionality in the face of a number of constitutional challenges, most importantly for the purpose of this Article, substantive and procedural due process challenges.

The BRA’s statutory structure is typical of pretrial detention statutes. The BRA permits individuals charged with certain enumerated offenses to be detained pending trial on the basis of their flight risk or future dangerousness. It permits the court to detain in

¹⁹ *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (“[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”). See *United States v. Salerno*, 481 U.S. 739, 746 (1987) (holding that, in order to be constitutional, pretrial detention had to be “regulatory, not penal”). Absent an expressed intention to punish, whether detention constitutes impermissible punishment or permissible regulation turns on whether the Government has a nonpunitive reason for detention and whether detention “appears excessive in relation to” the nonpunitive purpose. *Wolfish*, 441 U.S. at 538 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)). Prevention of flight and protection of the community from a potentially dangerous individual are permissible regulatory goals. See *Salerno*, 481 U.S. at 747–49; *United States v. Gonzales Claudio*, 806 F.2d 334, 338 (2d Cir. 1986).

²⁰ See 18 U.S.C. § 3142(g); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1329–30 (2012); Einesman, *supra* note 9, at 1.

custody, without bail, a presumptively innocent individual charged with a federal offense when no conditions of release would “reasonably assure” appearance at trial or “the safety of any other person and the community.”²¹

Salerno challenged the BRA’s pretrial detention scheme under the Eighth Amendment’s Excessive Bail Clause and the Due Process Clause of the Fifth Amendment. The due process challenge was a facial, rather than as-applied, one for a very simple reason: the petitioner, Anthony “Fat Tony” Salerno, was precisely the type of defendant to whom the new statute was meant to be applied; he was the “boss” of the Genovese crime family and an accomplished hit-man.²² The Court rejected Salerno’s Eighth Amendment challenge on the ground that the prohibition against excessive bail did not prohibit the denial of bail.²³ The Court rejected the procedural due process challenge on the basis of the statute’s many procedural safeguards, particularly its provision of a full adversarial hearing before a neutral decisionmaker:

In our society liberty is the norm, and detention prior to trial or without trial is the *carefully limited exception*. We hold

²¹ 18 U.S.C. § 3142(e).

²² Salerno was charged with violating the Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. §1962 (d) (1982), by participating in a racketeering enterprise, in violation of §1962 (c); mail fraud, in violation of 18 U.S.C. §1341 (1982); wire fraud, in violation of 18 U.S.C. §1343 (1982); extortion, in violation of 18 U.S.C. §1951 (1982); and operating an illegal bookmaking and numbers business, in violation of 18 U.S.C. §1955 (1982). See *United States v. Salerno*, 794 F.2d 64, 66–67 (2d Cir. 1986), *rev’d*, 481 U.S. 739 (1987); see also *United States v. Salerno*, 631 F. Supp. 1364, 1375 (S.D.N.Y. 1986), *vacated*, 794 F.2d 64 (2d Cir. 1986), *rev’d*, 481 U.S. 739 (1987) (“When business as usual involves threats, beatings, and murders, the present danger such people pose to the community is self-evident.”).

²³ Because the focus of this Section is the basis for the Court’s finding pretrial detention constitutional under the Due Process Clause, it does not discuss the Court’s Eighth Amendment ruling in any detail.

that the provisions for pretrial detention in the Bail Reform Act of 1984 fall *within that carefully limited exception*. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. [N]umerous procedural safeguards . . . attend this adversary hearing.²⁴

The Court rejected the substantive due process challenge on the grounds that the statute's pretrial detention regime was neither punitive nor excessive in relation to Congress's regulatory goal of preventing danger to the community, which the Court held could outweigh an individual's liberty interest.

Under the BRA, like most pretrial detention statutes, there are several factors that courts are supposed to consider in making a pretrial detention determination: the nature and circumstances of the offense(s) charged; the weight of the evidence against the person; the danger to the community posed by release; and the history and characteristics of the defendant (family ties, employment, community residency, financial resources, history of drug and alcohol abuse, criminal history, etc.).²⁵ It is the second of these factors, the weight of the evidence against the defendant, with which this Article is concerned. In practice, courts tend not to look at the strength of the evidence against a particular defendant in making their detention determinations because of the nature of the detention proceedings: they are usually relatively quick, not governed by the rules of evidence, occur at an early stage in the proceedings

²⁴ See *Salerno*, 481 U.S. at 755 (emphasis added).

²⁵ See 18 U.S.C. § 3146.

when the judge and the parties have incomplete information,²⁶ and judges are hesitant to turn a detention hearing into a miniature trial on the merits. The United States Courts of Appeals for the Eighth and Ninth Circuits, for example, have held that the weight of the evidence is the least important of the § 3142 (g) factors.²⁷

When courts do consider the weight of the evidence, it is almost always in cases in which that factor cuts against the defendant. In other words, courts may detain a defendant in part because the evidence of guilt appears to be extremely strong;²⁸ they rarely release defendants because the evidence seems to be particularly weak. While the BRA establishes a stricter standard for release from detention after a verdict of guilt and pending appeal, it does not establish a symmetrical, more lenient standard for release from detention after a hung jury or dismissal with lack of prejudice. What this Article proposes is that courts take more seriously their obligation to examine the (lack of) strength of the prosecution's evidence of a defendant's guilt when making a release/detention decision, par-

²⁶ It is not uncommon for a defendant to be represented by a "duty" defender or meet his/her permanent attorney for the first time at or immediately before a detention hearing.

²⁷ See *United States v. Apker*, 964 F.2d 742, 744 (8th Cir. 1992) (per curiam); *United States v. Motamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985). The rationale underpinning this minimization of the scrutiny afforded the offense charged arises from an uneasy recognition that the greater the focus on the past offense charged, the more the statute assumes punitive rather than regulatory proportions. See *Salerno*, 481 U.S. 739.

²⁸ See, e.g., *United States v. Salas-Urenas*, No. 11-3182, 2011 U.S. App. LEXIS 14941, at *5-6 (10th Cir. 2011) (affirming Salas's pretrial detention in part because the "weight of the evidence" against him "favored detention"); *United States v. Alexander*, 742 F. Supp. 421 (N.D. Ohio 1990) (affirming the preventive detention of Alexander, despite his lack of prior criminal record, strong family and religious ties to the community, and father willing to post his unencumbered house as security, because the pound of cocaine and large sum of cash (allegedly) found in his home constituted such strong evidence that Alexander was guilty of drug trafficking).

ticularly when there has already been one or more mistrials resulting from a jury's inability to reach a unanimous verdict.²⁹

III. ILLUSTRATIVE CASES

These may seem like very rare or even hypothetical scenarios – defendants being tried over and over again to a draw, while waiting in lockup with no prospect for a final judgment to end his/her pre-trial incarceration – but, in light of the virtually unbridled charging discretion afforded prosecutors and the imbalance of resources between prosecution and defender agencies, it happens relatively often. One example is the ongoing prosecution of Lincoln Stuart Taylor in West Virginia. In July 2007, Taylor was arrested on a criminal complaint, denied bail, and remanded to custody pending trial.³⁰ On October 2, 2007, he was indicted for the first-degree murder, and conspiracy to commit the first-degree murder, of Derrick Osborne.³¹ The State's theory of the crime was that Taylor and three other men planned Osborne's murder and that Taylor carried it out by shooting and killing him.³² The sole overt act alleged in furtherance of the murder conspiracy was Taylor's shooting and killing of Osborne.³³ Only two elements of the conspiracy charge were at issue in Taylor's trial: the agreement and the overt act.³⁴

²⁹ This proposal has a historical analogue. Early colonial laws allowed the denial of bail in capital cases "where the proof [wa]s evident, or the presumption great." William Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 80-81 (1977).

³⁰ See *Taylor v. Janes*, No. 5:10cv49 2010 U.S. Dist. LEXIS 67818, at *2 (N.D. W. Va., June 18, 2010).

³¹ See *id.*; *State ex. rel. Taylor v. Janes*, 693 S.E.2d 82, 85 (W. Va. 2010) (holding that collateral estoppel, as a component of double jeopardy under the West Virginia Constitution, could bar the re prosecution of a defendant on deadlocked charges after a mistrial if the jury acquitted the defendant of one or more related charges).

³² *State ex. rel. Taylor*, 693 S.E.2d at 85.

³³ *Id.*

³⁴ See *Taylor v. Janes*, 2010 U.S. Dist. LEXIS 67818, at *23 (N.D. W. Va., June 18, 2010).

The State's evidence purported to show that Taylor and his three coconspirators had had a falling out with Osborne over drugs and conspired to kill him and that Taylor obtained a handgun from one of the coconspirators, was driven to Osborne's residence by another coconspirator, and hid in the yard to ambush Osborne.³⁵ The State presented little physical or forensic evidence linking Taylor to the murder at his trial. Instead, the case was based primarily on testimonial evidence, rendering the credibility of the witnesses crucial to the jury's verdict.³⁶ Two of Taylor's alleged coconspirators testified that Taylor was involved in Osborne's shooting, but with inconsistent versions of events: one testified that Taylor was supposed to kill Osborne to protect them from him, but that another person was actually the shooter, while the other testified that Taylor killed Osborne to absolve a drug debt.³⁷ The State also offered testimony from jailhouse "snitches" who claimed that Taylor had confessed to them.³⁸

In addition to challenging the credibility of the State's witnesses, the defense presented an alibi witness to prove that Taylor was not present at the time or place of the shooting and two witnesses who testified that two of the other charged coconspirators were.³⁹

At the conclusion of the first full trial,⁴⁰ the jury acquitted Taylor of the conspiracy charge but deadlocked on the first-degree murder

³⁵ *State ex. rel. Taylor*, 693 S.E.2d at 85.

³⁶ See *Taylor v. Janes*, 2010 U.S. Dist. LEXIS 67818, at *23 (N.D. W. Va., June 18, 2010).

³⁷ See *id.* at *24.

³⁸ See *id.* at *25.

³⁹ See *id.*

⁴⁰ Taylor's "first trial" was actually his second trial; his true first trial, which began on September 15, 2008, resulted in a mistrial six days later on the ground of juror misconduct. See *id.* at 2; *State ex. rel. Taylor*, 693 S.E.2d at 85. This Article refers to the second trial, which commenced on November 10, 2008, see *Taylor v. Janes* 2010 U.S. Dist. LEXIS 67818, at *2 (N.D. W. Va., June 18, 2010), as the "first trial" and the retrial,

charge, and the court declared a mistrial on that count and set the matter for retrial on August 24, 2009.⁴¹

Prior to retrial, on July 14, 2009, Taylor moved *in limine* to preclude the State, on double jeopardy collateral estoppel grounds, from introducing evidence that he shot and killed Osborne or, in the alternative, that he acted as a member of a group to kill Osborne on the ground that those issues had been decided in his favor in the jury's verdict of acquittal for conspiracy at the first trial because the jury's verdict meant that it had necessarily decided either that he had not committed the sole alleged overt act of the conspiracy (shooting and killing Osborne) or that he had not conspired with the others to do so.⁴² The trial court denied the motion, holding that double jeopardy did not preclude the second jury from rehearing evidence relating to those issues, and, on April 5, 2010, the West Virginia Supreme Court denied Taylor's petition for writ of prohibition, agreeing with the trial court that Taylor's acquittal of conspiracy to commit murder did not act as a jeopardy bar to his retrial on the substantive murder count on which the jury deadlocked.⁴³

On April 29, 2010, in light of the West Virginia Supreme Court's denial of his writ of prohibition, Taylor filed a petition for writ of *habeas corpus* in the United States District Court for the Northern District of West Virginia, pursuant to 28 U.S.C. § 2241.⁴⁴ The district

which has not yet occurred, as the "second trial" because the actual first trial has no relevance to the overcharging issue discussed herein.

⁴¹ See Taylor v. Janes, 2010 U.S. Dist. LEXIS 67818, at *2 (N.D. W. Va., June 18, 2010); *State ex. rel. Taylor*, 693 S.E.2d at 85.

⁴² See Taylor v. Janes, 2010 U.S. Dist. LEXIS 67818, at *2 (N.D. W. Va., June 18, 2010); *State ex. rel. Taylor*, 693 S.E.2d at 85, 91-92.

⁴³ See Taylor v. Janes, 2010 U.S. Dist. LEXIS 67818, at *4 (N.D. W. Va., June 18, 2010); *State ex. rel. Taylor*, 693 S.E.2d at 85, 91-93 (reaffirming, in light of *Yeager*, that an acquittal on one charge and deadlock on another did not bar retrial on the deadlocked charge, even if the charges involved the same or similar facts, so long as the acquittal could rationally have been based upon an ultimate issue of fact different than that underlying the deadlocked charge).

⁴⁴ Taylor v. Janes, 2010 U.S. Dist. LEXIS 67818, at *1 (N.D. W. Va., June 18, 2010).

court granted Taylor's request for expedited consideration, but also granted the State's motion for an extension of time to file its response to the petition. On June 18, 2010, the magistrate judge recommended denial of the petition on the ground that Taylor had failed to establish a double jeopardy violation because it was not possible to conclude that the jury had necessarily decided either of the two key issues in Taylor's first trial in his favor, but also found that, during the second trial, the State could not attempt to reprove that Taylor participated in a conspiracy to murder Osborne.⁴⁵ On July 8, 2010, the district court declined to affirm and adopt the magistrate judge's report and recommendation, instead granting the State's motion for abstention,⁴⁶ denying Taylor's amended petition as moot, and dismissing the *habeas corpus* action with prejudice.

In July 2010, as Taylor was preparing to face his third trial, he entered an *Alford* plea to second-degree murder.⁴⁷ The agreed-upon sentence was a ten-year term of imprisonment, with credit for the more than three years that he had already served in pretrial detention.⁴⁸ With credit for good conduct, Taylor was released from prison on July 3, 2012.⁴⁹

⁴⁵ See *id.* at *26.

⁴⁶ The leading case on abstention doctrine is *Younger v. Harris*, 401 U.S. 37, 54 (1971) (holding that the federal courts should not interfere with ongoing state criminal proceedings except in very narrow and extraordinary circumstances—to wit, “a showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief”); see, e.g., *Nivens v. Gilchrist*, 444 F.3d 237, 244 (4th Cir. 2006) (holding that “a party must show a ‘substantial likelihood of an irreparable double jeopardy violation’ in order to avoid *Younger* abstention”); *Gilliam v. Foster*, 75 F.3d 881, 903–05 (4th Cir. 1996) (“Equitable federal court interference with ongoing state criminal proceedings should be undertaken in only the most limited, narrow, and circumscribed situations.”).

⁴⁷ See Debra Minor Wilson, *Lincoln Taylor Released from Custody*, THE TIMES WEST VIRGINIAN, Sept. 27, 2012.

⁴⁸ See *id.*

⁴⁹ See *id.*

The second example is the case of Larry Starling Dunn in Oregon. Dunn was convicted of rape and sexual abuse in April 2011 by the third jury to hear his case.⁵⁰ Two previous prosecutions of Dunn, in February and March 2011, ended in mistrials as the result of hung juries.⁵¹ The third jury found him guilty in May 2011 of one count of first-degree rape, two counts of first-degree unlawful sexual penetration with a foreign object, and two counts of first-degree sexual abuse, but acquitted him of one count of first-degree sexual abuse and one count of second-degree unlawful sexual penetration after trial.⁵² While ultimately Dunn was found guilty of at least some of the charges against him, there were no material changes in the State's evidence between the three trials, giving rise to the question of whether his lengthy pretrial incarceration and the State's multiple opportunities to try to secure his conviction were the cause of his ultimate conviction.⁵³

IV. ALTERNATIVES TO PRETRIAL RELEASE

Unfortunately, there are no dispositive remedies to the overcharging problem caused when the prosecution's evidence is weak but legally sufficient under *Jackson*. Ultimately, a defendant against

⁵⁰ See Karen McCowan, *Creswell Man Gets 45 Years for Rape*, EUGENE REGISTER-GUARD, May 4, 2011, at B1.

⁵¹ See *id.* The prosecution dismissed multiple charges against Dunn between the first and second trials. See *id.*

⁵² See *id.* Dunn had prior adversarial history with Lane County, Oregon. Dunn had previously sued the county, alleging that his son had been coerced into falsely confessing that he had shot a neighbor's dog with his pellet gun. See *id.* An aggravated animal abuse charge against him was dropped after ballistic tests showed his gun couldn't have killed the dog. See *id.* Dunn's lawsuit claimed that a sheriff's deputy and school officials violated his son's rights by pressuring him to confess during an interview without an attorney or a parent present. See *id.* Lane County and his son's school district paid \$20,000 and \$22,000, respectively, to settle that case. See *id.*

⁵³ This concern is all the more salient in Oregon, which (like Louisiana) permits criminal conviction of a felony on a less-than-unanimous vote of the jury. In Oregon, it takes only ten guilty votes out of twelve to convict a defendant of even serious felonies. See *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972).

whom the prosecution takes multiple bites at the apple either is or is not convicted. If s/he is ultimately acquitted after multiple trials, there is no remedy for restoring the time lost to or burdens of protracted pretrial incarceration. If s/he is ultimately convicted after multiple trials, the question arises whether the evidence strengthened over time to become proof beyond a reasonable doubt or whether the mere act of incarcerating during multiple trials itself caused the conviction. In adopting the BRA, Congress expressly rejected a proposed amendment to limit the potential duration of pretrial detention,⁵⁴ so such limit can only come from elsewhere. The most likely alternatives are the Fifth Amendment prohibition against double jeopardy, the Sixth Amendment right to a speedy trial, or the strictures of substantive due process, but none of these constitutional alternatives can remedy the successive-trial problem with pretrial detention.

A. DOUBLE JEOPARDY & MANIFEST NECESSITY

The Double Jeopardy Clause⁵⁵ does not generally prohibit a retrial after a mistrial as long as the mistrial was declared for manifest

⁵⁴ See 130 CONG.REC. S938-S945 (daily ed. Feb. 3, 1984). Prior to *Salerno*, in its guidelines and recommendations for the criminal justice system, the American Bar Association recommended that a court ordering the pretrial detention of a defendant be required, at the time of such detention order, to set a date by which pretrial detention must terminate. See ABA STANDARDS FOR CRIMINAL JUSTICE 10-5.10(g)(iii) (3d ed. 2007) (“The court’s order for preventive detention should include the date by which the detention must terminate . . .”).

⁵⁵ The Double Jeopardy Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. CONST. amends. V, XIV; *Benton v. Maryland*, 395 U.S. 784 (1969). The Double Jeopardy Clause bars “a second prosecution for the same offense after acquittal or after conviction.” *United States v. Yearwood*, 518 F.3d 220, 227 (4th Cir. 2008). The constitutional protection against double jeopardy unequivocally prohibits a second trial following a final judgment of acquittal, even if “the acquittal was based upon an egregiously errone-

ous foundation.” *Fong Foo v. United States*, 369 U.S. 141, 143 (1962). Two related offenses are the “same” for double jeopardy purposes, and the Clause bars additional punishment or successive prosecution, unless each contains an element that the other does not. *See Yearwood*, 518 F.3d at 227. Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. *See Arizona v. Washington*, 434 U.S. 497, 505 (1978).

The Double Jeopardy Clause also contains a collateral-estoppel component that bars “relitigation of adjudicated issues whether they emerge in trials for the same or distinct offenses.” *United States v. Ruhbayan*, 325 F.3d 197, 201 (4th Cir. 2003) (quoting *United States v. Nash*, 447 F.2d 1382, 1385 (4th Cir. 1971)). Pursuant to the collateral estoppel component of double jeopardy, once an issue of ultimate fact has been decided, that same issue is precluded from litigation at a subsequent trial. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970) (holding that “when an issue of ultimate fact has once been determined by a valid and final judgment” of acquittal, it “cannot again be litigated” in a second trial for a separate offense).

Ashe was charged with participating in the robbery of a poker game. *Id.* at 437. After he was tried and acquitted of robbing one of the players, he was tried in a subsequent trial with robbing a second player and found guilty. *Id.* at 438–40. The Supreme Court held that the subsequent prosecution was constitutionally prohibited because the only contested issue at the first trial was whether *Ashe* had been one of the robbers, so the first jury’s verdict of acquittal collaterally estopped the State from trying him for robbing a different player during the same alleged criminal episode. *Id.* at 445–47.

Of course, if a jury has deadlocked on all counts, the collateral estoppel component of double jeopardy is irrelevant, as there would be no final judgment of acquittal to act as a bar to reprosecution. *See Yeager v. United States*, 557 U.S. 110 (2009) (holding that a jury’s inability to decide a charge in an indictment is a nonevent that has no part in the analysis of whether the collateral estoppel component of double jeopardy precludes introduction of an issue at retrial on a charge in an indictment for which the jury did not reach a verdict); *see, e.g., United States v. Howe*, 590 F.3d 552, 557–58 (8th Cir. 2009) (holding, following remand to apply *Yeager*, that *Howe*’s retrial on kidnapping and conspiracy counts for which the jury at his first trial had deadlocked was not barred by collateral estoppel because the court was unable to conclude from the record that the issue of fact in question had been decided by the jury in its prior acquittal of *Howe*); *State v. Kent*, 678 S.E.2d 26 (W. Va. 2009) (holding that the jury’s failure to reach a verdict at a first trial as to a second theory of murder, while convicting *Kent* of the first theory of murder, did not constitute an “acquittal” for the purposes of barring *Kent*’s conviction on the second theory at a retrial because the first jury did not “decide” the issue of the second theory).

Jeopardy also attaches before the judgment becomes final, embracing the defendant’s “valued right to have his trial completed by a particular tribunal.” *Wade v. Hunter*, 336 U.S. 684, 689 (1949). The “particular tribunal” principle is implicated

necessity, a standard that almost any “hung jury” case will meet.⁵⁶ While “a constitutionally protected interest is inevitably affected by any mistrial decision,”⁵⁷ a trial court’s determination that the jury is unable to reach a verdict has long been considered the classic basis

whenever a mistrial is declared over the defendant’s objection and without regard to the presence or absence of governmental overreaching. *See Washington*, 434 U.S. at 508. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial. *See id.* at 505.

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187–88 (1957).

⁵⁶ *See Yeager*, 557 U.S. at 118 (“[A] jury’s inability to reach a decision is the kind of ‘manifest necessity’ that permits the declaration of a mistrial and the continuation of the initial jeopardy that commenced when the jury was first impaneled. The ‘interest in giving the prosecution one complete opportunity to convict those who have violated its laws’ justifies treating the jury’s inability to reach a verdict as a nonevent that does not bar retrial.”) (internal citations omitted); *see, e.g., State ex. rel. Taylor v. Janes*, 693 S.E.2d 82, 89 (W. Va. 2010) (“Mistrials resulting from a deadlocked jury are based on manifest necessity.”); *Keller v. Ferguson*, 355 S.E.2d 405, 405 (W. Va. 1987) (“Termination of a criminal trial arising from a manifest necessity will not result in double jeopardy barring a retrial.”); *see generally Yeager*, 557 U.S. at 119–22 (holding that the collateral estoppel component of double jeopardy did not bar the government from re-prosecuting Yeager after the jury had acquitted him of some counts of indictment but deadlocked on others, resulting in a mistrial on the deadlocked counts, because Yeager could not show that an ultimate issue of fact in the counts for which he was acquitted was also an essential element in the deadlocked counts); *Yearwood*, 518 F.3d at 228 (noting that collateral estoppel prohibits neither a subsequent trial on a conspiracy charge nor “the admission of evidence related to both [an] acquitted [substantive] charge and to [a] charge of conspiracy”). *But see Brown v. Superior Court*, 114 Cal. Rptr. 3d 804 (Ct. App. 2010) (holding that under the issue preclusion component of double jeopardy, retrial on four counts of committing a forcible lewd act upon a child, on which counts the jury had hung, was barred, after the jury had acquitted Brown of a fifth count of continuous sexual abuse of a child).

⁵⁷ *Washington*, 434 U.S. at 514.

for a proper mistrial.⁵⁸ Without exception, courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial.⁵⁹ As the Court explained in *Kennedy*:⁶⁰

Where the trial is terminated over the objection of the defendant, the classical test for lifting the double jeopardy bar to a second trial is the 'manifest necessity' standard first enunciated in Justice Story's opinion for the Court in *United States v. Perez*. *Perez* dealt with the most common form of "manifest necessity": a mistrial declared by the judge following the jury's declaration that it was unable to reach a verdict. While other situations have been recognized by our cases as meeting the "manifest necessity" standard, the hung jury remains the prototypical example. The "manifest necessity" standard provides sufficient protection to the defendant's interests in having his case finally decided by the jury first selected while at the same time maintaining "the public's interest in fair trials designed to end in just judgments."⁶¹

The high-profile trial of several former Enron executives provides an example of the inadequacy of the prohibition against double jeopardy to protect defendants facing retrial on weak cases. In 2004, Rex Shelby, Joseph Hirko, and Scott Yeager, all former senior

⁵⁸ See *id.* at 509; *Downum v. United States*, 372 U.S. 734, 735–36 (1963).

⁵⁹ See *Washington*, 434 U.S. at 509.

⁶⁰ *Oregon v. Kennedy*, 456 U.S. 667 (1982).

⁶¹ *Id.* at 672 (internal citations omitted). See also *United States v. Perez*, 22 U.S. 579 (1824) (holding that a jury's failure to reach a verdict did not bar a subsequent trial for the same offense, and that trial courts had discretion to discharge a jury from reaching any verdict if the jury could not reach a unanimous verdict whenever it was a "manifest necessity" or the goals of justice would not be met).

executives of Enron Broadband Services, were indicted on charges of wire fraud, securities fraud, insider trading, money laundering, and related conspiracy offenses. The government alleged that the defendants had provided deceptive information to investors regarding Enron's broadband project and that they had used undisclosed knowledge about the true state of the struggling project to make millions of dollars selling Enron stock. After a trial in 2005, Yeager was acquitted of the conspiracy, securities fraud, and wire fraud charges, Hirko was acquitted of some of the insider trading and money laundering charges, and Shelby was acquitted of some of the insider trading charges relating to a particular group of trades. The jury deadlocked on Shelby's remaining charges of securities fraud, conspiracy, and insider trading related to another group of trades, and the court declared a mistrial on those counts. The court also granted Shelby's motion for judgment of acquittal on the wire fraud and money laundering charges.⁶² In 2008, the government obtained a new indictment charging Shelby with conspiracy, securities fraud, and insider trading.⁶³ Shelby moved to dismiss most of the charges on the ground that his previous acquittals and ensuing mistrial on the remaining counts collaterally estopped any subsequent criminal prosecution on the related charges. The district court denied his motion, and, in March 2008, the United States Court of Appeals for the Fifth Circuit affirmed the denial on the ground that the jury's acquittal of Shelby on the insider trading counts was not necessarily based on a finding that he lacked the criminal intent necessary to establish the other charged offenses.⁶⁴

⁶² See FED. R. CRIM. P. 29.

⁶³ The indictment also charged Hirko with conspiracy, securities fraud, and insider trading, and Yeager with insider trading and money laundering.

⁶⁴ Yeager's double jeopardy claims were resolved in the *Yeager* case. See *supra* notes 15, 55, 56. The Supreme Court later dismissed Shelby's petition for review of the Fifth Circuit's decision rejecting his double jeopardy challenge.

Double jeopardy could not protect Shelby from being tried multiple times on charges arising from the same course of conduct.

B. THE RIGHT TO A SPEEDY TRIAL

Although the ABA Criminal Justice Standards in effect at the time that Congress adopted the BRA recommended that preventatively-detained defendants be given the right to accelerated trials,⁶⁵ the detention imposed under the BRA is subject only to whatever time constraints may be supplied by the Speedy Trial Act ("STA")⁶⁶ and the Constitution⁶⁷ for all criminal trials. The BRA contains no

⁶⁵ See ABA STANDARDS FOR CRIMINAL JUSTICE 10-5.11 (3d ed. 2007) ("Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice. These accelerated time limitations should be shorter than current speedy trial time limitations applicable to defendants on pretrial release. The failure to try a detained defendant within such accelerated time limitations should result in the defendant's immediate release from detention under reasonable conditions that best minimize the risk of flight and danger to the community pending trial, unless the delay is attributable to or agreed to by the defendant.").

⁶⁶ 18 U.S.C. §§ 3161-3174 (1988) (depriving federal courts of jurisdiction over criminal cases that are not prosecuted within certain periods of time). See, e.g., § 3161(c)(1) (providing that a criminal defendant must be brought to trial within seventy days from the filing of an information or indictment or from the date defendant has appeared before a judicial officer of the court in which the charge is pending); § 3162(a)(2) ("If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant.").

⁶⁷ The Sixth Amendment guarantees the right of criminal defendants to a "speedy and public trial." U.S. CONST. amend. VI. The right to a speedy trial attaches at the earlier of arrest or indictment. See *United States v. Marion*, 404 U.S. 307, 320-21 (1971); *Jackson v. Ray*, 390 F.3d 1254, 1261 (10th Cir. 2004). In determining whether a delay violates a defendant's constitutional right to a speedy trial, courts must balance: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of (or failure to assert) his/her right to a speedy trial; and (4) any prejudice to the defendant resulting from the delay. See *Barker v. Wingo*, 407 U.S. 514, 530 (1972). None of these four factors is, by itself, "a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Id.* at 533. Instead, courts must consider the four *Wingo* factors together with any other relevant circumstances. See

provision to limit the length of time a defendant could spend in pretrial detention.⁶⁸ Instead, Congress relied on the STA, which it mistakenly believed would restrict the period of a defendant's pretrial confinement to ninety days.⁶⁹

id. Nonetheless, the first factor (the length of the delay) functions as a gatekeeper: courts will examine the other factors only if, in the first instance, the delay is long enough to be presumptively prejudicial. *See id.* at 530. Ordinarily, delays of one year or more will trigger a presumption of prejudice. *See Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992); *Jackson*, 390 F.3d at 1261. The length of the delay depends upon "the peculiar circumstances of the case," *Wingo*, 407 U.S. at 530-31, but "the presumption that pretrial delay has prejudiced the accused intensifies over time." *Doggett*, 505 U.S. at 652.

⁶⁸ Congress modeled the BRA largely after District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970) ("DCCRA"), *see Einesman, supra* note 9, at 7, which required that cases involving detained defendants be placed on an expedited calendar and limited pretrial detention to a period of no more than sixty days, unless the trial was in progress or the defendant had caused the delay in getting the case to trial. § 23-1322 (d) ("The following shall be applicable to persons detained pursuant to this section: (1) The case of such person shall be placed on an expedited calendar and, consistent with the sound administration of justice, his trial shall be given priority. (2) Such person shall be [released pending trial] (A) upon the expiration of sixty calendar days, unless the trial is in progress or the trial has been delayed at the request of the person other than by the filing of timely motions (excluding motions for continuances); or (B) whenever a judicial officer finds that a subsequent event has eliminated the basis for such detention."). For a thorough analysis of the DCCRA, *see Frederick D. Hess, Pretrial Detention and the 1970 District of Columbia Crime Act—The Next Step in Bail Reform*, 37 BROOK. L. REV. 277 (1971). Nonetheless, when it enacted the BRA, Congress rejected proposals to adopt a specific time limit for detention under its auspices. *See* 130 CONG. REC. S945 (Feb. 3, 1984); *compare* §§ 3141-51 with §§ 23-1321-32. Several states with preventive detention statutes have specific time limits for such detention. *See, e.g.,* Colo. Const. art. II, § 19(2) (permitting preventive pretrial detention for only ninety days in non-capital cases).

⁶⁹ *See* S. REP. NO. 98-225, 17 n.73 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3205 ("18 U.S.C. 3161, (*sic*) specifically requires that priority be given to a case in which a defendant is detained, and also requires that his trial must, in any event, occur within 90 days, subject to certain periods of excludable delay, . . . These current limitations are sufficient to assure that a person is not detained pending trial for an extended period of time."); *Einesman, supra* note 9, at 13-14. The Senate Judiciary Committee also rejected an amendment to the STA that would have reduced the period in which a pretrial detainee must be brought to trial from ninety to sixty days. *See id.* at 14; *see, e.g.,* 130 CONG. REC. 1821 (1984) ("No evidence has been presented

The right to a speedy trial is intended to avert, *inter alia*, unnecessary pretrial incarceration.⁷⁰ Nonetheless, the speedy-trial guarantees contained in the federal statute⁷¹ and Constitution are largely

that at any time in our hearings that the 90 day Speedy Trial Act limit has not worked perfectly well to protect against lengthy incarceration.”) (statement of Sen. Grassley). The Senate debate about the BRA indicates that several senators believed that the ninety-day time period for bringing a detained defendant's case to trial under the STA was firm and not likely to expand. Senator Thurmond told the Senate that “the 90 days is the worst case limit,” 130 CONG. REC.1817 (1984); Senator Laxalt referred to the 90 day limit as the “upper bound,” *id.* at S943; and Senator Grassley stated that “no defendant will be detained indefinitely while the processes of justice grind to a halt.” *Id.* at S945. In reality, a detained defendant proceeding to trial within ninety days of formal charge is the exception rather than the rule. *See United States v. Colombo*, 777 F.2d 96, 101 (2d Cir. 1985) (noting that Congress had relied on the STA to limit the period of pretrial incarceration but that, in a complex case such as *Colombo's*, excludable time under § 3161(h) for the filing and consideration of pretrial motions, scheduling difficulties, and the delays in the interest of justice would substantially delay trial and would likely extend trial for detained defendants well beyond the ninety days set forth in § 3164); Einesman, *supra* note 9, at 42.

⁷⁰ *See Wingo*, 407 U.S. at 532.

⁷¹ Section 3161(c) states:

In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

Section 3164 states:

- (a) The trial or other disposition of cases involving –
- (1) a detained person who is being held in detention solely because he is awaiting trial, and
 - (2) a released person who is awaiting trial and has been designated by the attorney for the Government as being of high risk,
- shall be accorded priority.
- (b) The trial of any person described in subsection (a)(1) or (a)(2) of this section shall commence not later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitation specified in this section.

swallowed by their innumerable exceptions,⁷² resulting not in a sharply limited confinement but rather in a virtually indeterminate

(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required.

⁷² See Einesman, *supra* note 9, at 1-2. The problem is that there are eighteen separate exclusions of time from the ninety-day limit enumerated in § 3161(h), particularly the open-ended exclusion "that the ends of justice [are] served" permitted by § 3161(h)(7)(A). These exclusions include one for the pendency of motions, which, in an Orwellian irony, includes the pendency of a defendant's motion to review detention status. See § 3161(h)(1)(D) (excluding from STA time limits the delay resulting from any pretrial motion, from its filing through the conclusion of its hearing or other disposition); *United States v. Mendoza*, 663 F. Supp. 1043, 1047-48 (D.N.J. 1987) ("If the accused exercises his constitutional rights by filing pre-trial motions, he thus extends his period of pre-trial incarceration. This is so even if he is successful on said motions."); Einesman, *supra* note 9, at 17. After a motions hearing, the court may take the matter under advisement for an excludable period of up to thirty days. See § 3161(h)(1)(H). Furthermore, a "reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted" is excludable. § 3161(h)(6). Consequently, the delay attributable to one defendant for the filing of pretrial motions is attributable to all defendants in the case, even if they have not joined in those motions, as long as the delay resulting therefrom is "reasonable." See *United States v. Piteo*, 726 F.2d 50, 53 (2d Cir. 1983); *United States v. Campbell*, 706 F.2d 1138, 1141 (11th Cir. 1983); *United States v. Novak*, 715 F.2d 810, 815 (3d Cir. 1983); *United States v. Noriega*, 746 F. Supp. 1548, 1559 (S.D. Fla. 1990). As a result, a defendant who has not acted in any way to delay trial, requested a severance from other codefendants, filed few, if any, motions, and at all times demanded an immediate trial, may still be detained for a substantial period of time under the STA. See, e.g., *Noriega*, 746 F. Supp. 1548. In *Noriega*, the court found that Noriega's codefendant Saldriaga's twelve-month pretrial detention and four additional months anticipated detention until the scheduled trial date did not violate his right to due process despite his lack of responsibility for the delay and repeated efforts to sever his case from Noriega's be-

one, rendering them an ineffective remedy for defendants detained pending trial on weak charges.

The case of *United States v. Batie*⁷³ is a typical example of the ineffectiveness of the speedy trial right as a remedy for defendants detained pending (repeat) trial on weak cases. On May 15, 2003, Batie was indicted for armed bank robbery and brandishing a fire-arm during a crime of violence for an armed robbery that allegedly took place on March 27, 2003.⁷⁴ The magistrate judge ordered Batie

cause he nonetheless posed a significant flight risk and the Government was not responsible for the delay, even though it opposed his motions to sever. *See id.* at 1561-62; *but see* *United States v. Theron*, 782 F.2d 1510, 1516-17 (10th Cir. 1986) (holding that, after over four months of pretrial incarceration, due process demanded that Theron either be released on bond or be tried within thirty days because he had repeatedly sought an immediate trial and the delays were attributable to the filing of motions by his codefendants).

Once the court finds an exclusion of time under any one of these grounds, the STA stops the clock from running, and the ninety-day period is tolled. *See* § 3161(h). The United States Court of Appeals for the Third Circuit has characterized the STA with its exclusions as “porous.” *United States v. Perry*, 788 F.2d 100, 118 (3d Cir. 1986). Federal courts have recognized that the STA does not protect defendants from lengthy pretrial incarceration. *See Colombo*, 777 F.2d at 101 (conceding that the exclusions authorized by § 3161(h) for pretrial motions, scheduling difficulties, and unforeseeable delays granted in the interests of justice meant that the STA “might not work perfectly well to protect against lengthy incarceration.”) (internal quotations omitted); *United States v. Gallo*, 653 F. Supp. 320, 342 (E.D.N.Y. 1986) (noting that “extended imprisonment has become the rule rather than the exception whenever pretrial detention is used in complex, multi-count, multi-defendant actions”). The cases interpreting the STA upholding extraordinarily lengthy intervals between indictment and trial because of validly excludable delay underscore the inability of the STA to function as the necessary safeguard against unwarranted and burdensome pretrial incarceration. *See, e.g., Henderson v. United States*, 476 U.S. 321 (1986); *Novak*, 715 F.2d 810; *see also* George S. Bridges, *The Speedy Trial Act of 1974: Effects on Delays in Federal Criminal Litigation*, 73 J. CRIM. L. & CRIMINOLOGY 50, 69 (1982) (finding that approximately ten percent of all federal criminal cases require more than 360 days of processing time). Cases like *Salerno* reflect the fact that prosecutions resulting in preventive detention are often complex and unlikely to be resolved without significant exclusions of time under the Speedy Trial Act and the Sixth Amendment.

⁷³ 433 F.3d 1287 (10th Cir. 2006).

⁷⁴ *Id.* at 1289.

detained pending trial.⁷⁵ Batie's first trial began on December 9, 2003, and ended in a mistrial for reasons unrelated to the strength of the government's evidence.⁷⁶ On May 11, 2004, Batie's second trial began, and it also ended in a mistrial for reasons unrelated to the strength of the Government's evidence.⁷⁷ When his third trial resulted in a mistrial after a hung jury, more than seventeen months after he was indicted, he moved to dismiss for, *inter alia*, violation of his right to a speedy trial, and the district court granted his motion on the ground that the seventeen-and-one-half-month delay and "the accompanying tortured procedural history" violated his constitutional right to a speedy trial.⁷⁸ The government appealed the district court's decision, and the United States Court of Appeals for the Tenth Circuit reversed, holding that although the seventeen-and-a-half-month delay between the time of Batie's indictment and the grant of his motion to dismiss was presumptively prejudicial,⁷⁹ nearly half of the delay of which Batie complained was consumed by his motions for continuances and dismissal and he was not prejudiced by the delay. The *Batie* case, therefore, exemplifies the limitations of the speedy trial right to dispose of these weak cases, because each individual (mis)trial is itself speedy.

⁷⁵ *Id.*

⁷⁶ The court declared a mistrial when a Government witness testified that he had first met Batie in prison. *Id.*

⁷⁷ The court declared a mistrial on the second day of trial when a juror saw Batie in handcuffs. *Id.* at 1290.

⁷⁸ *Id.* at 1289-90.

⁷⁹ *Id.* at 1290. *Cf.* *United States v. Santiago-Becerril*, 130 F.3d 11, 22 (1st Cir. 1997) (finding that a fifteen-month delay in prosecuting Santiago for carjacking and a related firearm offense was arguably sufficient to "tip the scales *slightly* in favor" of Santiago's speedy trial claim) (emphasis added); *United States v. Gomez*, 67 F.3d 1515, 1522 (10th Cir. 1995) (finding that the delay resulting from two continuances that the Government requested and to which Gomez consented and one continuance that the court ordered *sua sponte* weighed *lightly* against the Government in the absence of evidence of Government misconduct).

Batie was, however, released from pretrial detention following the third mistrial. The appellate record is devoid of an explanation of the basis for the magistrate judge's modification of the pretrial detention order,⁸⁰ but it appears that the case is a rare example of a court doing precisely what this Article proposes to remedy the lengthy detention problem.

C. SUBSTANTIVE DUE PROCESS

The Fifth Amendment prohibits deprivation of liberty without due process of law and the imposition of punishment before trial.⁸¹ *Salerno* was the only case in which the Supreme Court addressed a substantive due process challenge to pretrial preventive detention.

In rejecting *Salerno*'s facial due process challenge to the BRA, the Court left open the possibility of a future as-applied challenge (by a more sympathetic defendant, presumably) to an episode of preventive detention that was excessive in relation to its purpose. What the Court did not decide was at what point in any particular case pretrial detention could become excessive and therefore punitive,⁸² preferring instead to outline several rather extreme analogous situations, in some of which pretrial detention would be permitted and in some of which it would be prohibited. All courts that have examined this issue have agreed that, after the passage of some period of time, pretrial detention may pass from permissible

⁸⁰ See *Batie*, 433 F.3d at 1292.

⁸¹ U.S. CONST. amend. V; *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

⁸² See *Salerno*, 481 U.S. at 747 n.4 ("We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore, punitive, in relation to Congress' regulatory goal."); Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 516-17 n.30 (1986) ("Just when the preventive tadpole would become a punitive bullfrog seems to be anyone's guess.").

regulation to impermissible punishment.⁸³ Nonetheless, in the almost thirty years since its decision in *Salerno*, the Court has never returned to the question of preventive detention to find any pretrial incarceration excessive in comparison to its justification, and the federal courts have largely been hostile to such as-applied challenges to the BRA.⁸⁴

⁸³ See, e.g., *United States v. Infelise*, 934 F.2d 103 (7th Cir. 1991); *United States v. Melendez-Carrion*, 820 F.2d 56 (2d Cir. 1987); *United States v. Accetturo*, 783 F.2d 382 (3d Cir. 1986); *United States v. Gotti*, 776 F. Supp. 666, 671 (E.D.N.Y. 1991); *United States v. Noriega*, 746 F. Supp. 1548, 1561 (S.D. Fla. 1990). *Accetturo* is particularly noteworthy on the issue of pretrial detention because, after protracted pretrial custody and a twenty-one-month trial by jury, all twenty codefendants were found not guilty on all counts. See Terrance G. Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691, 719 (1990).

⁸⁴ See, e.g., *United States v. Kennedy*, 327 Fed. Appx. 706 (9th Cir. 2009) (construing the mandatory pretrial release conditions of the Adam Walsh Act to be discretionary in order to avoid an as-applied constitutional challenge); *United States v. Hare*, 873 F.2d 796 (5th Cir. 1989) (rejecting Hare's as-applied challenge to the BRA); *United States v. Zannino*, 798 F.2d 544 (1st Cir. 1986) (rejecting an as-applied challenge to Zannino's pretrial detention despite its duration of more than sixteen months); *United States v. Rondeau*, 2010 WL 5253847 (D.R.I. 2010) (denying Rondeau's motion to strike his statutorily mandated home detention and electronic monitoring conditions of pretrial release on the ground, *inter alia*, that they were unconstitutional as applied to him under the Due Process Clause); *United States v. Cossey*, 637 F. Supp. 2d 881 (D. Mont. 2009) (rejecting Cossey's as-applied challenge to the Adam Walsh Act amendments to the BRA); *United States v. Arzberger*, 592 F. Supp. 2d 590 (S.D.N.Y. 2008) (rejecting Arzberger's facial challenge to the constitutionality of the Adam Walsh Act amendments to the BRA and reserving judgment for future proceedings as to whether the Act was unconstitutional as applied to him); *United States v. Kahn*, 524 F. Supp. 2d 1278, 1284 (W.D. Wash. 2007) (applying the doctrine of constitutional avoidance to Kahn's contention that the Adam Walsh Act's mandatory pretrial release conditions were unconstitutional, as applied to him, under the Due Process Clause). *But see* *United States v. Karper*, 847 F. Supp. 2d 350 (N.D.N.Y. 2010) (holding that the home detention and electronic monitoring conditions mandated by the Adam Walsh Act amendments to the BRA were unconstitutional as applied to Karper under the Due Process Clause); *United States v. Polouizzi*, 697 F. Supp. 2d 381 (E.D.N.Y. 2010) (holding that the Adam Walsh Act amendments mandating curfew with electronic monitoring for pretrial release of a certain class of defendants violated the guarantee of procedural due process as applied to Polouizzi).

The *Batie* case again serves as a good illustration. In addition to his speedy trial argument, Batie also moved, prior to his fourth trial, to dismiss the charges on due process grounds, and the district court agreed.⁸⁵ The district court based its decision explicitly on the weakness of the government's case against Batie, finding that it "would be inconsistent with the 'concept of ordered liberty' . . . and would arguably 'shock the conscience' to try Mr. Batie a fourth time 'when the government's prospects of a conviction are so sparse.'"⁸⁶

The Tenth Circuit rejected Batie's argument that subjecting him to a fourth trial following three mistrials would violate his right to substantive due process, on the ground that "determining whether to prosecute is a decision ordinarily entrusted to prosecutorial, rather than judicial discretion."⁸⁷ In doing so, the Tenth Circuit noted that Rule 29⁸⁸ provided a mechanism for the district court to grant Batie a judgment of acquittal if "an overzealous prosecutor brings a case with insufficient evidence to support it,"⁸⁹ ignoring the fact that, although the evidence in Batie's case was apparently too weak to result in a conviction, it was clearly legally sufficient and, therefore, too strong to permit a directed verdict of not guilty. The United States Court of Appeals for the Second Circuit reached a similar conclusion in *United States v. Lai Ming Tanu*.⁹⁰

⁸⁵ *Batie*, 433 F.3d at 1293.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ F. R. CRIM. P. 29 (requiring the court to grant a motion for judgment of acquittal after the close of the Government's case if the evidence is legally insufficient).

⁸⁹ *Batie*, 433 F.3d at 1294 ("Any prejudice resulting from the prosecution of a case with insufficient evidence to support the charges could therefore be mitigated by filing a Rule 29 (a) motion at the appropriate time.").

⁹⁰ 589 F.2d 82, 90 (2d Cir. 1978) (holding that Tanu's retrial after two previous trials ended with deadlocked juries did not violate due process and admonishing the district court that dismissing the case would infringe on the duties and prerogatives of the prosecutor).

V. WEIGHT OF THE EVIDENCE

“The argument that a jury's inability to agree establishes reasonable doubt as to the defendant's guilt, and therefore requires acquittal, has been uniformly rejected.”⁹¹ So has any bright-line rule for determining the point at which pretrial detention has become too lengthy to withstand due process scrutiny—i.e., “precisely when defendants adjudged to be flight risks or dangers to the community should be released pending trial.”⁹² Nonetheless, it does not follow that a “hung jury” should have no legal significance. Since there is no dismissal remedy for a weak but legally sufficient case, the only remedy left for courts to minimize the prejudice to defendants being held in pretrial detention pending trial on charges that may never result in a final judgment is release from custody.

In the quarter century since *Salerno*, a great deal of scholarship and jurisprudence has been generated on the issue of what factors courts should consider in determining when pretrial incarceration has become so onerous as to violate due process.⁹³ This Article fits within that scholarly framework, except that it focuses on the relative weight of the evidence against the defendant as the predominant factor in determining the undue burden of detention⁹⁴ rather

⁹¹ *Arizona v. Washington*, 434 U.S. 497, 509 (1978).

⁹² *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986). Courts have universally agreed that, because “due process is a flexible concept,” *id.*, the due process limit on the duration of pretrial detention should be evaluated on a case-by-case basis. *See, e.g.*, *United States v. Berrios-Berrios*, 791 F.2d 246 (2d Cir. 1986); *Accetturo*, 783 F.2d 382; *United States v. Theron*, 782 F.2d 1510 (10th Cir. 1986); *United States v. Portes*, 786 F.2d 758 (7th Cir. 1985); *United States v. Colombo*, 777 F.2d 96 (2d Cir. 1985); *United States v. LoFranco*, 620 F. Supp. 1324 (N.D.N.Y. 1985), *app. dismissed sub nom.* *United States v. Cheeseman*, 783 F.2d 38 (2d Cir. 1986); *United States v. Hall*, 651 F. Supp. 13 (N.D.N.Y. 1985); *United States v. Hazzard*, 598 F. Supp. 1442, 1451 n.5 (N.D. Ill. 1984).

⁹³ *See, e.g.*, Einesman, *supra* note 9, at 16.

⁹⁴ Some courts have rejected using the weight of the prosecution's evidence as a factor in making a case-by-case determination of the due process limits of preventive

than the length of detention that has already occurred and the likely length of anticipated future detention,⁹⁵ the complexity of the case,⁹⁶ the reasonableness of pretrial delay and the role of the parties in contributing to it,⁹⁷ the strength of the evidence of the risk of flight

detention. *See, e.g.*, *United States v. Gonzales Claudio*, 806 F.2d 334, 340–43 (2d Cir. 1986).

⁹⁵ *See, e.g.*, *United States v. Gallo*, 653 F. Supp. 320, 344 (E.D.N.Y. 1986); *United States v. LoFranco*, 620 F. Supp. 1324 (N.D.N.Y. 1985), *app. dismissed sub nom*; *United States v. Cheeseman*, 783 F.2d 38 (2d Cir. 1986); *United States v. Colombo*, 616 F. Supp. 780, 786 (E.D.N.Y. 1985), *rev'd*, 777 F.2d 96 (2d Cir. 1985); *Einesman*, *supra* note 9, at 42–43 (proposing that the BRA be amended to limit the period of permissible pretrial detention to a maximum period of ninety days). Courts have expressed different subjective views on how much detention is too much. While some courts consider a relatively short period of pretrial custody to be onerous, *see, e.g.*, *United States v. Vastola*, 652 F. Supp. 1446, 1448 (D.N.J. 1987) (finding that Vastola’s three-and-a-half month detention required immediate release in light of the likelihood of extended future detention); *Gallo*, 653 F. Supp. at 323–25 (finding the four-and-a-half months that Gallo spent in pretrial custody to warrant his immediate release in light of the probability of much longer incarceration), other courts view a substantially longer period of detention to be an acceptable consequence of being accused of a serious crime. *See, e.g.*, *United States v. Quartermaine*, 913 F.2d 910, 918 (11th Cir. 1990) (explaining that “the prospect of eight to ten months of pretrial detention, without more, does not mandate the release of a defendant for whom pretrial detention is otherwise appropriate”); *United States v. Tortora*, 922 F.2d 880, 889 (1st Cir. 1990) (finding that Tortora’s six-plus-month pretrial detention had not been “so protracted as to support a due process claim”); *United States v. Melendez-Carrion*, 820 F.2d 820, 859–60 (2d Cir. 1987) (rejecting a claim that Melendez’s nineteen-month detention was a *per se* violation of his right to substantive due process).

⁹⁶ If a case is “unusual” or “complex,” the time-limit provisions of the STA do not apply. *See* 18 U.S.C. § 3161(h)(7)(B)(ii).

⁹⁷ *See, e.g.*, *United States v. Gelfuso*, 838 F.2d 359 (9th Cir. 1988) (requiring courts to consider only the length of the detention and the extent to which the Government was responsible for the delay in resolving substantive due process challenges to pretrial detention); *Gonzales Claudio*, 806 F.2d at 340; *Accetturo*, 783 F.2d at 388; *Gallo*, 653 F. Supp. at 343. In some cases, courts have found that defendants were responsible for prolonging their own detention by filing extensive pretrial motions. *See, e.g.*, *United States v. Infelise*, 934 F.2d 103, 105 (7th Cir. 1991) (holding that Infelise’s sixteen-month pretrial incarceration did not violate due process because “the length or depth of [defense] preparation” could not be used to justify release from pretrial detention); *United States v. Ojeda Rios*, 846 F.2d 167, 169 (2d Cir. 1988) (finding that Ojeda’s thirty-two month pretrial incarceration was largely due to the “zealous, perhaps overly zealous, pretrial demands of the defendants”); *Berrios-Berrios*, 791 F.2d at

or danger that the defendant poses,⁹⁸ the hardships to the defendant caused by the detention,⁹⁹ or the availability of less restrictive alternatives.¹⁰⁰

In another sense, however, the thesis of this Article is an exercise in statutory construction rather than constitutional theory. The lack of new evidence following a mistrial could be cognizable under the two existing criteria for adjudicating pretrial release.¹⁰¹ The BRA requires the court to assess the risk that either the defendant will fail to appear for trial or will commit a crime while on release.¹⁰² Under the BRA, to order a defendant detained pending trial, or to continue a defendant's detention after a mistrial, the judicial officer must find by clear and convincing evidence "that no condition or combination of conditions will reasonably assure the safety of any other person and the community."¹⁰³ If the prosecution's evidence against a defendant remains substantially the same after a mistrial, the risk of the defendant fleeing prior to retrial is much lower, since the defendant's incentive to flee is significantly lower. The same is

253 (holding that Berrios's eight-month pretrial detention was not unconstitutionally onerous because it was the result of the complexity of the case, which was "exacerbated by the defendants' many motions"); *Gonzales Claudio*, 806 F.2d at 341 (holding that Gonzales' fourteen-month pretrial detention violated his right to due process but noting, in *dictum*, that "defendants cannot litigate pretrial matters to the ultimate degree and then rely on the extra time attributable to their motion practice to claim that the duration of pretrial detention violates due process."). The DCCRA that served as a prototype for the BRA, by contrast, explicitly dictates that a defendant's filing of motion(s), other than motion(s) for continuance, cannot be used to extend pretrial detention. See D.C. CODE § 23-1322(d)(2)(A).

⁹⁸ See, e.g., *Gonzales Claudio*, 806 F.2d at 340-41.

⁹⁹ See, e.g., *Gallo*, 653 F. Supp. at 336-38.

¹⁰⁰ See *id.* at 338.

¹⁰¹ This Article is not intended as a critique of the BRA or the Court's decision in *Salerno*, both of which topics have been extensively canvassed in the scholarly literature. See, e.g., Alschuler, *supra* note 82.

¹⁰² See generally 18 U.S.C. § 3142.

¹⁰³ 18 U.S.C. § 3142(e).

true for the defendant's incentive to intimidate witnesses or otherwise obstruct a retrial.

The pretrial-release remedy seems particularly appropriate, if not constitutionally mandated, in light of the Court's substantive due process balancing test in *Salerno*. In *Salerno*, the Court specifically admonished that, when detention becomes "excessively prolonged," it may no longer be reasonable in relation to the regulatory goals of detention, and a violation of due process would occur,¹⁰⁴ although it did not specifically define excessive prolongation. To determine whether the length of pretrial detention has become constitutionally excessive, courts are supposed to consider, among other things, the extent of the prosecution's responsibility for the delay of the trial and the strength of the evidence upon which detention is based.¹⁰⁵ It would seem that a weak prosecution case resulting in a hung jury should militate, with regard to both factors, in favor of release. This appears to be what the district court found in *Batie*.

Nonetheless, courts rarely invoke this mechanism of pretrial release as a remedy for weak cases, even when asked specifically by a defendant to do so. The case of *United States v. Millan* provides an example.¹⁰⁶ On August 1, 1991, Millan was arrested and charged with participating in a conspiracy to distribute heroin.¹⁰⁷ Millan was ordered detained pending trial immediately subsequent to his arrest.¹⁰⁸ On March 9, 1993, Millan's first trial began.¹⁰⁹ After the district court declared a mistrial during Millan's first trial, he moved for conditional release from detention pending retrial. On April 14,

¹⁰⁴ *Salerno*, 481 U.S. at 747 n.4. See *United States v. Gonzales Claudio*, 806 F.2d 334, 339 (2d Cir. 1986).

¹⁰⁵ See *United States v. Orena*, 986 F.2d 628, 630 (2d Cir. 1993).

¹⁰⁶ *United States v. Millan*, 4 F.3d 1038 (2d Cir. 1993).

¹⁰⁷ *Id.* at 1040.

¹⁰⁸ *Id.* at 1041; *United States v. Millan*, 824 F. Supp. 38, 42-43 (S.D.N.Y. 1993) (explaining that Millan was detained on the ground that he posed both a risk of flight and a danger to the community).

¹⁰⁹ *Millan*, 4 F.3d at 1041.

1993, the district court granted Millan's motion for a mistrial on the basis of Government misconduct.¹¹⁰ On June 23, 1993, the district court granted his motion to be released on bail pending mistrial on the ground that the length of his pretrial detention had exceeded constitutional limits and his continued detention would constitute punishment in violation of the Due Process Clause of the Fifth Amendment.¹¹¹ At that time, no date for Millan's second trial had been set, and the government was unable to provide the court with an estimate as to when it would be able to proceed to retrial.¹¹² On July 30, 1993, the district court denied Millan's motion to bar his retrial on double-jeopardy grounds and set the retrial for October 12, 1993.¹¹³

On the government's appeal, the United States Court of Appeals for the Second Circuit reversed the district court's order on the ground that Millan's thirty-month detention prior to trial did not violate the Due Process Clause. In reaching that conclusion, the Second Circuit considered the length of Millan's detention, Millan's responsibility for the delay, the risk of flight, and dangerousness to

¹¹⁰ During the course of Millan's first trial, three agents involved in the investigation of his case were arrested for narcotics trafficking, Millan's attorney was indicted on felony charges in another district (about which the prosecuting attorney had known ahead of time, but failed to inform the court or Millan), and between \$50,000 and \$80,000 that had been seized as evidence in the case went missing from agents' custody. *Id.* at 1042.

¹¹¹ *Id.* at 1042. The judge ordered Millan released on the conditions, *inter alia*, that he post a \$1,000,000 bond, \$600,000 of which was to be secured by cash and real property and six sureties; not associate or communicate with any of his codefendants except as necessary to prepare his defense; obey all laws; report daily by telephone and weekly in person to the Pretrial Services Agencies; submit to home detention and electronic monitoring; submit to weekly drug testing; and surrender his passport and all other travel documents. *Id.*; *Millan*, 824 F. Supp. at 45–46.

¹¹² *Millan*, 824 F. Supp. at 40 n.4.

¹¹³ *Millan*, 4 F.3d at 1042; *United States v. Millan-Colon*, 829 F. Supp. 620, 637 (S.D.N.Y. 1993).

the community,¹¹⁴ but it did not consider the weight of the evidence of Millan's *guilt*. Instead, the court considered the "strength of the prosecution's evidence *regarding the risk that Millan . . . [would] flee, and the danger [that his] release would pose to any other person and the community.*"¹¹⁵ In other words, for the Second Circuit, even if the Government did not have enough evidence to convince a jury of Millan's guilt, as long as it had enough evidence that (a potentially innocent) Millan might flee prior to his (second, third, fourth?) trial, it could hold him indefinitely without violating due process.

VI. CONCLUSION

What is the harm of giving the prosecution multiple weak bites at a high hanging apple? As *When the Emperor Has No Clothes* explained, even a defendant who is factually innocent of a crime charged may decide to plead guilty in an act of risk aversion.¹¹⁶ The chance of conviction also increases with each successive prosecution, even when the strength of the evidence has not changed.¹¹⁷ In

¹¹⁴ *Millan*, 4 F.3d at 1038.

¹¹⁵ *Id.* at 1045 (emphasis added).

¹¹⁶ *See id.* Other commentators have identified this link between prosecutorial discretion and plea bargains. *See, e.g.,* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 862-73 (1995).

¹¹⁷ *See Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("This prohibition [against a second trial], lying at the core of the [Double-Jeopardy] Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would . . . create a risk of conviction through sheer governmental perseverance."); *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980) ("[I]f the Government may re prosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own."); *Green v. United States*, 355 U.S. 184, 187-88 (1957) ("[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby . . . enhancing the possibility that even though innocent he may be found guilty."); Janet E. Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem*, 129 *U. PA. L. REV.* 701, 730 (1981) ("The rate of reconviction following reversal on appeal is suffi-

Carsey v. United States,¹¹⁸ the United States Court of Appeals for the District of Columbia Circuit described how subtle changes in the prosecution's testimony, initially favorable to the defendant, could occur during the course of successive prosecutions:

[T]he Government witnesses came to drop from their testimony impressions favorable to defendant. Thus a key prosecution witness, the last person to see appellant and the deceased together, who began by testifying that they had acted that evening like newlyweds on a honeymoon, without an unfriendly word spoken, ended up by saying for the first time in four trials that the words between them had been "firm," and possibly harsh and "cross."

We also note that the police officer who readily acquiesced in the two "hung jury" trials that appellant was "hysterical," later withheld that characterization. This shift, though less dramatic, was by no means inconsequential in view of the significance of appellant's condition at the time he made

ciently high to warrant an assumption that, unless key defense evidence has been excluded, reconviction is the likely result."); James F. Ponsoldt, *When Guilt Should Be Irrelevant: Government Overreaching as a Bar to Reprosecution Under the Double Jeopardy Clause After Oregon v. Kennedy*, 69 CORNELL L. REV. 76, 91 (1983) ("[T]he [Supreme] Court has acknowledged several times that a second jeopardy, more often than not, increases the possibility of fabrication and erroneous dispositions. The adversary nature of criminal investigations and trials undercuts any presumption of increased reliability.") (footnote omitted). See also *United States v. Ingram*, 412 F. Supp. 384, 386 (D.D.C. 1976) ("Retrials are almost always unsatisfactory. Counsel tend to try them more perfunctorily, testimony lacks freshness, subtle differences in recollections are blown up to challenge credibility and a certain atmosphere of staleness is created. All this impedes the search for truth."). Cf. *Oregon v. Kennedy*, 456 U.S. 667, 686 n.19 (1982) (Stevens, J., concurring) ("The prosecutor might wish to provoke a mistrial in order to shop for a more favorable trier of fact, or to correct deficiencies in [the] case, or to obtain an unwarranted preview of the defendant's evidence.") (citation omitted) (internal quotation marks omitted).

¹¹⁸ *Carsey v. United States*, 392 F.2d 810 (D.C. Cir. 1967).

a statement inconsistent with what he later told another officer.¹¹⁹

Permitting a weak or even frivolous prosecution case to proceed to trial over and over again while the defendant remains detained affords the prosecution too much power in the form of oppressive pretrial incarceration of the defendant. As Human Rights Watch recently noted in discussing the pretrial detention epidemic in New York City:

Time in jail before one has had one's day in court is particularly troubling for the one in five detained non-felony defendants who . . . will not be convicted. It is also disproportionate in light of sentences typically imposed when there is a non-felony conviction: data from the New York State Division of Criminal Justice Services, for example, indicates that eight out of ten convicted misdemeanor arrestees receive sentences that do not include jail time.¹²⁰

As it is currently practiced, the preventive detention regime in the United States inflicts an unspecified term of imprisonment solely on the basis of a legally sufficient, but not necessarily provable criminal charge. In the meantime, the defendant bears significant burdens as the result of the ongoing pretrial detention: stigma;¹²¹

¹¹⁹ *Id.* at 813–14.

¹²⁰ HUMAN RIGHTS WATCH, *THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF NONFELONY LOW-INCOME DEFENDANTS IN NEW YORK CITY* (2010), available at http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf.

¹²¹ See *United States v. Scott*, 450 F.3d 863, 886 (9th Cir. 2006) (quoting *United States v. Motamedi*, 767 F.2d 1403, 1414 (9th Cir. 1985) (Boochever, J, concurring and dissenting in part)) (noting that pretrial detention may result in permanent stigma and loss of reputation); *Campbell v. McGruder*, 580 F.2d 521, 530 n.15 (D.C. Cir. 1978) (“Even without the stigma of conviction, however, pretrial detention may permanently damage the detainee’s reputation.”); *United States v. Gallo*, 653 F.Supp.

the isolation of being cut off from friends and family;¹²² loss of employment;¹²³ loss of liberty; the impairment of the ability to mount an effective defense;¹²⁴ the degradations of imprisonment;¹²⁵ and threats from other inmates, violence, or even rape,¹²⁶ not to mention

320, 336 (E.D.N.Y.1986) (identifying stigma as one of the harms of pretrial detention); *Harris v. Charles*, 256 P.3d 328, 336 (Wash. 2011) (observing that a defendant in pretrial detention is made to suffer the public stigma of incarceration without a finding of guilt); *State v. Perrett*, 936 P.2d 426, 429 (Wash. Ct. App. 1997) (noting that the hardships associated with pretrial detention include the stigma of incarceration). *Cf. Vitek v. Jones*, 445 U.S. 480, 488 (1980); *Addington v. Texas*, 441 U.S. 418, 426 (1979) (requiring clear and convincing evidence of mental illness and dangerousness prior to involuntary civil commitment).

¹²² See *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (“Pretrial confinement may imperil the suspect’s job, interrupt his source of income, and impair his family relationships.”). See also *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (explaining the interest in continued liberty); *Gallo*, 653 F. Supp. at 336.

¹²³ See *Gallo*, 653 F. Supp. at 337.

¹²⁴ See *id.* Courts have declined to find that pretrial detention has become unconstitutionally lengthy when they conclude that a defendant is “responsible” for prolonging the pretrial detention by requesting additional time to prepare for trial, irrespective of the complexity of the case. See, e.g., *United States v. Infelise*, 934 F.2d 103, 104–05 (7th Cir. 1991) (holding that Infelise’s pretrial detention of approximately fifteen months did not violate due process because his trial preparation was responsible for the delay in bringing the case to trial in a complex case in which multiple defendants were charged in a forty-two-count indictment based on one-thousand hours of court-authorized wiretaps); *United States v. Gelfuso*, 738 F.2d 358, 359 (9th Cir. 1988); *United States v. Jackson*, 823 F.2d 4, 7 (2d Cir. 1987); *United States v. Melendez-Carrion*, 820 F.2d 60 (2d Cir. 1987); *United States v. Gotti*, 776 F. Supp. 666, 671 (E.D.N.Y. 1991). The *Infelise* court explained:

[T]he extent of delay is to some extent within the control of the defendants themselves, and they cannot be allowed to manufacture the grounds for their constitutional argument. . . . The delay appears to be due to the time that the defendants’ counsel are taking to prepare their clients’ defense. Of course we do not criticize them for preparing as carefully as possible, but neither do we think that the length or depth of their preparation can obtain the release of defendants whose dangerousness has been amply demonstrated.

Infelise, 934 F.2d at 104–05.

¹²⁵ See *Gallo*, 653 F. Supp. at 338.

¹²⁶ The BRA ostensibly requires that those ordered detained be housed in a place of commitment “separate, to the extent practicable, from persons awaiting or serving

the possibility of wrongful conviction.¹²⁷ “The burdens of pretrial detention are substantial ones to impose on a presumptively innocent man, even when there is probable cause to believe he has committed a crime.”¹²⁸ The weight of these burdens is all the more concerning when it is placed upon the shoulders of an individual whose guilt at least one jury has already failed to find beyond a reasonable doubt.¹²⁹ In the words of Justice Douglas: “Denial of bail should not be used as an indirect way of making a man shoulder a sentence for unproved crimes.”¹³⁰

Courts have uniformly recognized that a defendant may not be detained indefinitely and that constitutional challenges to the length of pretrial detention in particular cases must be determined

sentences or being held in custody pending appeal”. 18 U.S.C. § 3142(i)(2). Many detainees, however, are held in the very same facility as convicts awaiting or serving their sentences. See *Gallo*, 653 F. Supp. at 336.

¹²⁷ See Leonetti, *supra* note 3 at 711, and sources cited therein; see generally *Stack v. Boyle*, 342 U.S. 1, 7–8 (1951) (“Without th[e] conditional privilege [to bail pending trial], even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.”). Numerous studies have shown the strong correlation between pretrial detention, conviction, and the length of sentence ultimately imposed. See Charles E. Ares *et al.*, *The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole*, 37 N.Y.U. L. REV. 67, 84–86 (1963) (establishing that defendants who are incarcerated pending trial are more likely to be convicted than those at liberty to prepare for trial); Patricia Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U. L. REV. 631 (1964) (documenting the relationship between pre- and post-trial losses of liberty); see generally Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641 (1964).

¹²⁸ *Baker v. McCollan*, 443 U.S. 137, 153 (1979) (Stevens, J., dissenting).

¹²⁹ An innocent defendant held in pretrial detention has no post-deprivation remedy for the loss of liberty. The judge who entered the detention order, see *Stump v. Sparkman*, 435 U.S. 349 (1978), the prosecutor who brought the charge and sought detention, see *Imbler v. Pachtman*, 424 U.S. 409 (1976), and the witnesses who testified for the prosecution, see *Briscoe v. Lahue*, 460 U.S. 325 (1983), would all be immune from liability. The government has not waived its sovereign immunity with respect to such claims. See 28 U.S.C. § 2680. If detained defendants are ultimately acquitted, they will not even have the consolation of credit against any subsequent sentence of imprisonment imposed for time served in detention pending trial.

¹³⁰ *Carbo v. United States*, 82 S.Ct. 662, 667 (1962) (Douglas, J., Circuit Justice).

in light of the facts of each individual case.¹³¹ What they have not determined is how much pretrial detention is too much pretrial detention – particularly when the evidence of the defendant’s guilt is weak.

Both the text of the BRA, and the Court’s interpretation of it in *Salerno*, suggest that courts should factor the weakness of the prosecution’s evidence of guilt in balancing the need for pretrial detention with its restriction of the defendant’s liberty, but lower courts have not followed this instruction. Particularly since defendants against whom the evidence is weak are less likely to have a motive to flee or to pose a threat to witnesses or the community, courts should use the “weight of the evidence” factor in ordering release of defendants with little prospect of conviction to the same extent that they use the strength of the evidence of guilt in ordering detention.

¹³¹ See, e.g., *United States v. Zannino*, 798 F.2d 544, 548 (1st Cir. 1986) (per curiam); *United States v. Accetturo*, 783 F.2d 382, 387–88 (3d Cir. 1986); *United States v. Portes*, 786 F.2d 758, 768 & n. 14 (7th Cir. 1985).