NOTE

EXTRAORDINARY CONDITIONS OF RELEASE UNDER THE BAIL REFORM ACT

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I. INTRODUCTION

Bernard Madoff and Marc Dreier, two prominent white-collar criminal defendants, were recently released on bail pending trial in the Southern District of New York.[1] Each remained free on bail for several months before eventually being sent to prison.[2] In both cases, the court set bail amounts in the millions of dollars and imposed numerous additional conditions of release, including home detention enforced by security guards, twenty-four-hour video monitoring, screening of visitors, limitations on communications, and the requirement that the defendants or their families bear the considerable expense of these conditions.[3] The court imposed these terms of release

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[1] United States v. Madoff, 586 F. Supp. 2d 240 (S.D.N.Y. 2009); United States v. Dreier, 596 F. Supp. 2d 831 (S.D.N.Y. 2009). After the Court granted Madoff bail, he spent three months under home detention in his seven million-dollar penthouse. Associated Press, *Madoff Denied Bail and Ordered to Jail*, LONG ISLAND BUS. NEWS, Mar. 12, 2009, *available at* http://libn.com/blog/2009/03/12/madoff-arrives-in-court-for-plea-in-fraud-case. He then pled guilty, admitting that he had run an enormous Ponzi scheme that destroyed assets of approximately fifty billion dollars in value. Diana B. Henriques & Jack Healy, *Madoff Goes to Jail After Guilty Pleas*, N.Y. TIMES, Mar. 12, 2009, *available at* http://www.nytimes.com/2009/03/13/business/13madoff.html. He was remanded to jail pending sentencing. United States v. Madoff, 316 Fed. Appx. 58 (2d Cir. 2009). The court ultimately sentenced Madoff to the maximum term of 150 years. Jack Healy, *Madoff Sentenced to 150 Years in Prison for Ponzi Scheme*, N.Y. TIMES, June 29, 2009, *available at* http://www.nytimes.com/2009/06/30/business/30madoff.html?hp. Marc Dreier was accused of selling approximately $380 million in fraudulent securities. Alison Leigh Cowan, Charles V. Bagli & William K. Rashbaum, *Marc Dreier, a Lawyer with a Lavish Lifestyle Accused of Stealing Millions*, N.Y. TIMES, Dec. 13, 2008, *available at* http://www.nytimes.com/2008/12/14/nyregion/14lawyer.html. Dreier pled guilty and remained free on bail pending sentencing. Mark Hamblett, *Dreier Pleads Guilty to Fraud Scheme, Remains Free on Bail*, N.Y.L.J., May 12, 2009, *available at* http://www.law.com/jsp/article.jsp?id=1202430626494. The court then sentenced him to twenty years in prison. Posting of Jennifer Forsyth to WSJ Law Blog, http://blogs.wsj.com/law/2009/07/13/breaking-marc-dreier-sentenced-to-20-years-in-prison (July 13, 2009, 18:38 EST).

[2] *See supra* note 1. The median number of days between arrest and adjudication is 127 days for defendants who are released and 45 days for defendants who are detained. THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 7 (2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/prfdsc.pdf [hereinafter 2007 DOJ REPORT].

[3] *Dreier*, 596 F. Supp. 2d at 833–34; *Madoff*, 586 F. Supp. 2d at 244–45. In *Dreier*, the court specifically required that the security guards be armed. *Dreier*, 596 F. Supp. 2d at 834. The court also required Dreier to pay in advance the costs of security guards for three months, estimated at $210,000. *Id.* In Madoff's case, the video monitoring alone cost tens of thousands

pursuant to the Bail Reform Act of 1984, which mandates that courts release defendants before trial subject to "the least restrictive" set of conditions that "will reasonably assure the appearance of the person as required and the safety of any other person and the community."[4] Under the Bail Reform Act, a court will only detain a defendant if no set of available conditions will reasonably preserve the safety of the community and prevent the defendant from fleeing.[5]

The *Madoff* and *Dreier* courts interpreted the Bail Reform Act (and, in *Dreier*, the Constitution) to require them to permit the defendants to transform their own residences into the equivalent of private jails, at their own expense, in lieu of pretrial detention.[6] Such a requirement goes far beyond the "fundamental tradition in this country . . . that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt."[7] Rather, this amounts to a special privilege for defendants who have access to substantial financial resources. When wealthy defendants pose a flight risk or danger to the community, they may avoid pretrial detention by paying for extensive conditions of release.[8] By contrast, defendants who pose equivalent risks, but who cannot afford to pay for extraordinary terms of in-home detention, are detained in conditions that are often worse than those in which convicted criminals are held.[9] Judge Rakoff noted in *Dreier* that unequal access to bail conditions based on wealth exposes a "serious flaw in our system,"[10] but he felt constrained by the Bail Reform Act and the Constitution to release Dreier on the conditions noted above.[11]

The Constitution, however, does not allow for this inequality—much less mandate it. A criminal defendant does not have a Fifth or Eighth Amendment right to pretrial release on any conditions that he can finance.[12]

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of dollars, which, along with the cost of all of the other conditions, was paid for by his wife. Andrew Ross Sorkin, *In Madoff, A Court Trusts*, N.Y. TIMES, Jan. 13, 2009, at B1.

[4] Bail Reform Act of 1984, 18 U.S.C. § 3142(c)(1)(B) (2006).

[5] 18 U.S.C. § 3142(e) (Supp. II 2008).

[6] *Dreier*, 596 F. Supp. 2d at 833 (referring to Dreier's right to release as a "constitutional right"); *id.* at 835 (noting that Dreier's release on extensive conditions "accords, not only with the Bail Reform Act, but with the Constitution of the United States"); *Madoff*, 586 F. Supp. 2d at 246, 249, 250, 254–55 (emphasizing the government's obligation under the Bail Reform Act to prove that no condition or set of conditions could reasonably assure the defendant's appearance and public safety).

[7] Bandy v. United States, 81 S. Ct. 197 (1960).

[8] Some commentators have suggested that *Madoff* and *Dreier* may represent a trend toward allowing extensive conditions, funded by defendants, in white-collar cases. *See* Steven F. Reich & Arunabha Bhoumik, *Pre-Trial Detention and White Collar Defendants*, BUS. CRIMES BULL., May 2009, at 5.

[9] *See, e.g.*, Pugh v. Rainwater, 557 F.2d 1189, 1198 (5th Cir. 1977) (noting the "squalid" conditions in which pretrial detainees are imprisoned); Rinat Kitai-Sangero, *Conditions of Confinement—The Duty to Grant the Greatest Possible Liberty for Pretrial Detainees*, CRIM. L. BULL., Spring 2007, at 3 ("very often detainees experience conditions that are equal to or even worse than those of convicted criminals").

[10] *Dreier*, 596 F. Supp. 2d at 833.

[11] *See id.* at 835.

[12] *See infra* Part II.B–C.

To the contrary, taking into account an arrestee's access to funds to pay for bail conditions violates the Equal Protection Clause because it conditions access to a fundamental right—pretrial release—on the basis of wealth.[13]

Nor does the Bail Reform Act, considered as a whole, mandate this inequality, though this is a somewhat uncertain matter of statutory interpretation. In any event, Congress should amend the Bail Reform Act to make clear that courts are not required to grant defendants extraordinary bail conditions simply because they can afford to pay for them. In doing so, Congress would bring the operation of the Bail Reform Act into compliance with the Equal Protection Clause.

This Note will consider the unequal availability of bail conditions, as highlighted by the *Madoff* and *Dreier* cases. Part II argues that although pretrial release is a fundamental right, neither the Constitution nor the Bail Reform Act requires that defendants be released on any conceivable set of conditions that they can finance.[14] Part III argues that restricting the fundamental right to pretrial release on the basis of a defendant's ability to pay for bail conditions violates the Equal Protection Clause. Part III also distinguishes the non-financial conditions of bail discussed in this Note from bail bonds. Finally, Part IV offers policy recommendations that address the problem of unequal access to bail conditions.

II. Extraordinary Bail Conditions not Required by the Constitution or by Statute

A. Pretrial Release as a Fundamental Right

Bernard Madoff and Marc Dreier, like all criminal defendants, were considered innocent until proven guilty, and deserved to be treated as such. There is a "fundamental tradition in this country . . . that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt."[15] Pretrial release "permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of inno-

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[13] *See infra* Part III.

[14] This Note does not concern moderate, less costly conditions, which may be appropriate in a wider array of cases. *See, e.g.*, United States v. Simone, 317 F. Supp. 2d 38 (D. Mass. 2004) (imposing home detention and electronic monitoring on mafia defendants); United States v. Hammond, 204 F. Supp. 2d 1157 (E.D. Wis. 2002) (conditions included electronic monitoring and urine testing).

[15] Bandy v. United States, 81 S. Ct. 197, 197–98 (1960) ("The wrong done by denying release is not limited to the denial of freedom alone. . . . In case of reversal, he will have served all or part of a sentence under an erroneous judgment. Imprisoned, a man may have no opportunity to investigate his case, to cooperate with his counsel, to earn the money that is still necessary for the fullest use of his right to appeal.").

cence, secured only after centuries of struggle, would lose its meaning."[16] Thus, "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[17] In short, "[t]he right to pre-trial release under reasonable conditions is a fundamental right."[18]

The Eighth Amendment, which states that "[e]xcessive bail shall not be required,"[19] and the Due Process Clause of the Fifth Amendment,[20] under which a defendant has a liberty interest in pretrial release,[21] give this tradition of pretrial freedom constitutional significance. The Bail Reform Act, "consistent with" the Eighth Amendment,[22] requires that courts release defendants pretrial "unless . . . such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."[23] The Act also requires that courts release defendants before trial subject to "the least restrictive" condition or set of conditions that "will reasonably assure the appearance of the person as required and the safety of any other person and the community."[24]

Without question, this constitutional and statutory framework "generally favors bail release."[25] However, contrary to Judge Rakoff's conclusion

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[16] Stack v. Boyle, 342 U.S. 1, 4 (1951) (quoting Hudson v. Parker, 156 U.S. 277, 285 (1895)); *cf.* Bell v. Wolfish, 441 U.S. 520 (1979). In *Bell*, the Court held that the fact that defendants detained before trial are presumed innocent does not entitle them to better conditions of confinement. *Id.* at 533. But the presumption of innocence is certainly relevant to whether a defendant should be incarcerated at all; it is the fundamental reason why courts often release defendants pretrial. *See infra* note 18.

[17] United States v. Salerno, 481 U.S. 739, 755 (1987); *see also id.* at 763 (Marshall, J., dissenting) (noting that "[o]ur society's belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is 'implicit in the concept of ordered liberty[.]'" (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937))).

[18] Ackies v. Purdy, 322 F. Supp. 38, 41 (S.D. Fla. 1970); *see also* State v. Wright, 980 A.2d 17, 22 (N.J. Super. Ct. Law Div. 2009) ("The right to bail is linked to the presumption of innocence. '[P]retrial release on non-capital charges was a fundamental right founded in freedom and human dignity, reflected in the everpresent presumption of innocence, and requiring firm articulation in the Constitutions.'" (quoting State v. Johnson, 294 A.2d 245, 250 (N.J. 1972))). *Wright* and *Johnson* are specific to New Jersey state law. While this Note focuses on the federal bail system, the breadth of state bail rights reflects the fundamental nature of the right to pretrial release.

[19] U.S. CONST. amend. VIII.

[20] U.S. CONST. amend. V.

[21] *See* United States v. Salerno, 481 U.S. 739, 750 (1987).

[22] United States v. Sabhnani, 493 F.3d 63, 75 (2d Cir. 2007); *see also* United States v. Argraves, No. 3:09cr117, 2009 WL 1859226, at *1 (D. Conn. June 26, 2009). However, this provision is not required by the Eighth Amendment. *See infra* Part II.B.

[23] 18 U.S.C. § 3142(b) (2006).

[24] *Id.* § 3142(c)(1)(B). To detain a defendant pretrial on grounds of flight risk, the government must prove, by a preponderance of the evidence, that: (1) there is a flight risk; and (2) no condition or set of conditions could reasonably assure the defendant's appearance. *Sabhnani*, 493 F.3d at 75. When the rationale for detention is public safety, the government must prove the defendant's dangerousness under the higher "clear and convincing evidence" standard. 18 U.S.C. § 3142(f).

[25] *Sabhnani*, 493 F.3d at 75. Accordingly, although many criminal defendants are detained, most are released pretrial, "including 51% for violent offenses, 57% for property offenses, and 73% for fraud." United States v. Madoff, 586 F. Supp. 2d 240, 248 n.8 (S.D.N.Y.

in *Dreier*,[26] the Constitution and the Bail Reform Act do not require that a defendant be released on any conceivable set of conditions that will assure the defendant's appearance.

B. The Bail Clause of the Eighth Amendment

In his decision granting Marc Dreier bail on extensive conditions, Judge Rakoff cited the Eighth Amendment's prohibition on excessive bail[27] and held that Dreier's release was a "constitutional right."[28] The Eighth Amendment's statement that "[e]xcessive bail shall not be required"[29] is certainly an expression of the traditional concern for defendants' pretrial rights, but it does not give defendants a right to bail conditions like those that Madoff and Dreier received.

Neither Madoff nor Dreier, if detained rather than granted bail, would have been able to successfully challenge his detention on Eighth Amendment grounds. As the Supreme Court noted in *Salerno*, the Eighth Amendment "says nothing about whether bail shall be available at all."[30] Rather, "[t]he only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil," such as the risk of flight.[31] Therefore, the Court continued, the amount of bail may be "no more" than necessary to achieve the government's interests.[32] But far from seeking lower bail, Madoff and Dreier sought and were granted costly conditions in order to avoid detention.[33] Such conditions are in no way required by the Bail Clause, as interpreted in *Salerno*. The Eighth Amendment provides defendants with a means to avoid excessive bail conditions, not a means to obtain them.

In fact, the Eighth Amendment does not even provide a powerful means of challenging large bail amounts. The Supreme Court has made it clear that while the amount of bail must be "reasonably calculated" to achieve the

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2009) (citing TRACEY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004—STATISTICAL TABLES (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/html/fdluc/2004/fdluc04st.pdf). In all, about fifty-seven percent of felony defendants are released pretrial. KYCKELHAHN & COHEN, *supra.* Another study puts that figure at sixty-two percent. 2007 DOJ REPORT, *supra* note 2, at 2. Among defendants who are detained, about five in six fail to meet financial conditions of release, while about one in six are denied bail. *Id.* at 1.

[26] *See* United States v. Dreier, 596 F. Supp. 2d 831, 833 (S.D.N.Y. 2009).

[27] *Id.* at 832.

[28] *Id.* at 833.

[29] U.S. CONST. amend. VIII.

[30] 481 U.S. 739, 753 (1987); *see also* Carlson v. Landon, 342 U.S. 524, 545–46 (1952) ("the very language of the Amendment fails to say all arrests must be bailable.").

[31] *Salerno*, 481 U.S. at 754.

[32] *Id.*

[33] The defendants specifically sought extensive conditions. United States v. Dreier, 596 F. Supp. 2d 831, 833 (S.D.N.Y. 2009); United States v. Madoff, 586 F. Supp. 2d 240, 244 (S.D.N.Y. 2009) (Madoff's extensive bail conditions were initially "jointly proposed," but Madoff later advocated for the bail package over the government's objections).

government's purposes, the Eighth Amendment does not guarantee bail in an amount that defendants are capable of paying.[34] If defendants do not have a right to bail in an amount that they can afford, it would be strange if defendants did have a right to pay for extensive bail conditions just because they can afford to do so. As the Eighth Circuit has noted, the purposes of bail "cannot in all instances be served by only accommodating the defendant's pocketbook and his desire to be free pending possible conviction."[35] If the government is not required to accommodate defendants' especially empty pocketbooks by freeing them despite their inability to post sufficient bail, there is no convincing reason why the government should be constitutionally required to accommodate defendants' especially full pocketbooks when considering what bail conditions to impose. The Excessive Bail Clause of the Eighth Amendment does rather little to restrain the amount of bail that courts can impose; it would be anomalous and inequitable for that clause to mandate extensive bail conditions.

The Eighth Amendment certainly does not guarantee excessive bail conditions. In fact, it does just the opposite by giving defendants a (rather limited) means of challenging excessive bail amounts and conditions. Defendants like Madoff and Dreier should not be able to rely on the Eighth Amendment in seeking pretrial release on extraordinary conditions.

C. The Due Process Clause of the Fifth Amendment

Criminal defendants, as discussed above, have a fundamental right to freedom prior to trial.[36] This raises the possibility that the Due Process Clause of the Fifth Amendment could guarantee defendants like Madoff and Dreier a right to pretrial release on extensive bail conditions. The Due Process Clause provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law."[37] Under the doctrine of substantive due process, the government may not interfere with rights that are "implicit in the concept of ordered liberty"[38]—in other words, rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[39]

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[34] Stack v. Boyle, 342 U.S. 1, 5 (1951) (bail is not excessive if "reasonably calculated" to assure defendant's presence); *see also* United States v. McConnell, 842 F.2d 105 (5th Cir. 1988) (approving bail of $750,000 even though the defendant could not meet it because his assets were frozen in bankruptcy); Hodgdon v. United States, 365 F.2d 679, 687 (8th Cir. 1966) ("bail is not excessive merely because the defendant is unable to pay it"). *But see* United States *ex rel.* Rubinstein v. Mulcahy, 155 F.2d 1002 (2d Cir. 1946) (bail of $500,000 was excessive for a wealthy foreign citizen accused of a selective service violation).

[35] White v. United States, 330 F.2d 811, 814 (8th Cir. 1964).

[36] *See supra* Part II.A.

[37] U.S. CONST. amend. V.

[38] United States v. Salerno, 481 U.S. 739, 746 (1987) (quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

[39] *Id.* at 751 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

Substantive due process, however, does not go so far as to guarantee a defendant's right to pay for extraordinary conditions of release.

While the right to pretrial release is fundamental, the government can restrict that right when it has a compelling interest. In *Salerno*, the Supreme Court upheld pretrial detention due to a defendant's dangerousness under the Bail Reform Act against both Fifth and Eighth Amendment challenges.[40] The Court acknowledged the "fundamental nature" of the pretrial right to liberty.[41] However, according to the Court, "this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society."[42] The Court held that the government has a "legitimate and compelling" interest in preventing crime by arrestees.[43] Therefore, the Court concluded that the government can detain defendants who pose a danger to an individual or the community.[44]

Detaining defendants like Madoff and Dreier serves the equally compelling government interest of ensuring their appearance at trial. These defendants posed a substantial risk of flight.[45] Pretrial detention, the Court has consistently held, is a legitimate way for the government to address that risk.[46] Thus, substantive due process would have posed no obstacle to detaining Madoff and Dreier.

At this point, defendants who happen to be wealthy have a potential counterargument. Madoff and Dreier had access to substantial resources that were sufficient to pay for extensive conditions of release, including security guards at their homes and twenty-four-hour video monitoring.[47] Assuming that these bail conditions would mitigate any risk of their escape,[48] Madoff and Dreier could argue that detaining them rather than letting them pay for these conditions would not serve the government's interest in preventing flight. Therefore, the argument goes, their fundamental right to pretrial release should not be impaired and they should be released on extensive conditions.

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[40] 481 U.S. at 747.

[41] *Id.* at 750.

[42] *Id.* at 750–51.

[43] *Id.* at 749 (citing De Veau v. Braisted, 368 U.S. 144, 155 (1960)).

[44] *Id.* at 747. Many commentators have condemned *Salerno* and praised Justice Marshall's blistering dissent. *See, e.g.*, Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984*, 36 FORDHAM URB. L.J. 121 (2009); *see also id.* at 148 n.160 (collecting such articles).

[45] United States v. Dreier, 596 F. Supp. 2d 831, 833 (S.D.N.Y. 2009) (finding "that Dreier, if released without conditions, would pose a genuine risk of flight"). In *Madoff*, the court ultimately found that the defendant did not pose "a serious risk of flight," but that was only due to the "unique" conditions that the court imposed on him. 586 F. Supp. 2d 240, 249 (S.D.N.Y. 2009). Functionally, the finding in *Madoff* was no different than in *Dreier*.

[46] *See Salerno*, 481 U.S. at 749 (citing Bell v. Wolfish, 441 U.S. 520, 534 (1979)).

[47] *Dreier*, 596 F. Supp. 2d at 833–34 (ordering Dreier or his relatives to pay for these conditions); *id.* at 835 (noting that these were conditions that Dreier could "reasonably be expected to meet"); *Madoff*, 586 F. Supp. 2d at 244.

[48] Some risks, however, are not adequately addressed through home confinement. *See infra* Part III.C.

However, a defendant's ability to pay for extraordinary conditions should not be relevant to the question of whether he or she will be detained. The right to pretrial release is a fundamental one; it is only because of this that Madoff and Dreier can make a substantive due process argument at all.[49] Under the Equal Protection Clause, the government may not condition access to certain fundamental rights on the basis of an individual's ability to pay, particularly in the criminal justice arena.[50] Yet Madoff and Dreier sought and were granted special privileges due to their access to substantial resources. Such preferential treatment is inconsistent with the nature of fundamental rights.[51]

The argument that defendants have a substantive due process right to pay for extensive bail conditions relies upon the idea that the fundamental right to pretrial freedom overrides any equal protection argument against preferential treatment for wealthy defendants.[52] But there is ultimately no conflict between due process and equal protection in this context. Defendants simply do not have a constitutional right to be released prior to trial under any conceivable, extraordinary conditions that they can afford. As one district court has noted in the equal protection context, "[t]he right to pretrial release under *reasonable* conditions is a fundamental right."[53] The line separating reasonable and unreasonable bail conditions may not always be easy to draw, but when courts allow wealthy defendants to transform their homes into the equivalent of private jails to avoid detention, that line has surely been crossed.

Moreover, the argument that the extensive conditions that Madoff and Dreier received are part of the fundamental right to pretrial release would prove too much. Most defendants could argue that the government, at sufficient expense, would be able to reasonably assure their appearance and the safety of the community by paying for extensive conditions. For example, the government could pay for armed security guards to be posted outside the home of every defendant who poses a substantial flight risk or danger to the community. Such an arrangement would no doubt be extremely costly and

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[49] *See supra* Part II.A.

[50] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (accused's right to counsel cannot be conditioned on his ability to pay); Griffin v. Illinois, 351 U.S. 12 (1956) (state must furnish trial transcript to indigent defendant on appeal); *see also* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) (right to vote is "too fundamental" to be conditioned upon payment of poll tax). This general rule is subject to qualifications, as described *infra*, in Part III.

[51] *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (due process encompasses the anti-discrimination principle of the Equal Protection Clause).

[52] The equal protection argument is taken up *infra*, in Part III.

[53] Ackies v. Purdy, 322 F. Supp. 38, 41 (S.D. Fla. 1970) (emphasis added) (holding that the use of master bond schedules, setting bail by offense without regard to ability to pay, violated Equal Protection Clause). *But see* Terrell v. City of El Paso, 481 F. Supp. 2d 757, 767 (W.D. Tex. 2007) ("despite the broad use of bond schedules across the country, the Court has not been able to find any opinions since *Ackies* finding the use of bond schedules unconstitutional . . . the *Ackies* holding is anomalous and outdated.").

burdensome for the government, and there is no reason to think that it would ever be implemented. Thus, defendants who cannot raise the funds to pay for expensive conditions are detained, regardless of whether their detention serves any government purpose that could not be achieved through home confinement. The argument that Madoff and Dreier had a fundamental right to the extensive conditions they received ignores the fact that such conditions are unavailable and unrealistic for the broader population. Rather, these extensive conditions represent a special privilege, and there is no fundamental right to pay for preferential treatment in the criminal justice system.[54]

The narrow exceptions to this principle, where a right is so strong that a defendant has a right to pay for it even on an inequitable basis, are distinguishable. In particular, a defendant's ability to pay for bail conditions is different than his ability to pay for particular legal counsel. In *United States v. Gonzalez-Lopez*,[55] the Court ruled that defendants have a right to paid counsel of their choice. In so ruling, the Court relied upon the explicit protection of the right to counsel in the Sixth Amendment.[56] By contrast, the Constitution does not specify any right to non-financial conditions of bail.

Additionally, while defendants who can afford to do so may pay for counsel of their choice, defendants without such resources are represented by state-appointed counsel[57] who must provide effective assistance that does not prejudice the client.[58] By contrast, the government could theoretically provide to non-wealthy defendants the extensive conditions that home confinement sometimes necessitates, but it does not do so. The right to counsel embraces a rough, though imperfect,[59] equality that is lacking in the area of bail conditions. Without being grounded in even a baseline level of equality, the notion that defendants like Madoff and Dreier have a fundamental right under the Fifth Amendment to pay for extensive bail conditions is untenable.

D. The Bail Reform Act

Bernie Madoff and Marc Dreier were granted pretrial release on extraordinary conditions under the Bail Reform Act. The Act could be read to require that defendants be allowed to pay for such conditions to avoid detention. However, such a construction would be overly literalist, ignoring fundamental principles of statutory construction and leading to absurd results. The Bail Reform Act, like the Constitution, does not mandate extreme conditions of release.

The Bail Reform Act requires courts to release defendants before trial subject to "the least restrictive" condition or set of conditions that "will

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[54] *See supra* notes 50–51 and accompanying text.
[55] 548 U.S. 140 (2006).
[56] U.S. CONST. amend. VI; *Gonzalez-Lopez*, 548 U.S. at 146.
[57] Gideon v. Wainwright, 372 U.S. 335 (1963).
[58] *See* Strickland v. Washington, 466 U.S. 668 (1984).
[59] *See infra* note 133 (public defenders are overburdened and underfunded).

reasonably assure the appearance of the person as required and the safety of any other person and the community."[60] The statute then lists thirteen categories of conditions that may be imposed, plus a catch-all category of "any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community."[61] Only if "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community" will the defendant be detained before trial.[62]

These provisions could be read to require courts to release defendants before trial if any conceivable set of conditions would reasonably assure the defendant's appearance and public safety. No qualifying language directly limits the scope or the cost, whether to the government or to the defendant, of the conditions to be considered. As one court noted, "[r]ead literally, 18 U.S.C. § 3142(c)(1) arguably would require a defendant's release . . . no matter what the cost of the conditions."[63] The *Madoff* and *Dreier* decisions, which imposed a broad array of extraordinary bail conditions, appear to have read the Bail Reform Act in just this way. The *Madoff* decision in particular repeatedly emphasized the government's obligation to prove that no conditions could reasonably assure the defendant's appearance and public safety.[64] *Dreier*, for its part, concluded that the defendant's release was required, not only by the Constitution, but also by the Bail Reform Act.[65] These courts held that extensive conditions would "reasonably assure" the appearance of the defendants, but they did not inquire into the reasonableness of the proposed conditions themselves.[66]

That a literal reading of the Bail Reform Act has led some courts in this direction suggests that the language of the Act should be changed, as argued *infra*, in Part IV. However, extraordinary bail conditions should not be imposed under the Act, even as it is currently written. The Act lists thirteen categories of potential bail conditions, including: maintaining employment or education, avoiding contact with alleged victims or potential witnesses, reporting to a probation officer, travel restrictions, curfews, bail bonds, and other similar conditions.[67] These enumerated conditions are certainly somewhat restrictive for the defendants subject to them. However, these condi-

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[60] 18 U.S.C. § 3142(c)(1)(B) (2006).

[61] *Id.* § 3142(c)(1)(B)(xiv).

[62] 18 U.S.C. § 3142(e)(1) (Supp. II 2008).

[63] United States v. Benatar, No. 02-CR-99, 2002 WL 31410262, at *3 (E.D.N.Y. Oct. 10, 2002) (rejecting such a literal reading).

[64] 586 F. Supp. 2d 240, 246, 249, 250, 254–55 (S.D.N.Y. 2009).

[65] 596 F. Supp. 2d 831, 835 (S.D.N.Y. 2009). While the *Dreier* court did note that the conditions it imposed were ones that "the defendant may reasonably be expected to meet," *id.*, it was, after all, the defendant who asked for the extraordinary conditions in the first place. However, the court did impose a few more conditions than Dreier proposed. *Id.* at 834.

[66] *See id.*

[67] 18 U.S.C. § 3142(c)(1)(B) (2006).

tions only require certain productive activities (e.g., maintaining employment) or restrict particular harmful behaviors (e.g., contacting alleged victims). They in no way resemble the private jail-like conditions adopted in the *Madoff* and *Dreier* cases, which subjected the defendants to twenty-four-hour security.

The Act also includes a catch-all provision which allows "any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community."[68] This provision, though broadly worded, does not support extraordinary bail conditions. The principle of *ejusdem generis* states that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[69] As a few courts have found, this canon of construction indicates that the Bail Reform Act's catch-all category should be limited to bail conditions similar to those listed, as opposed to the extraordinary conditions approved in *Madoff* and *Dreier*.[70]

Moreover, if the Bail Reform Act required courts to consider any possible bail conditions, pretrial detention would very rarely be possible. An extreme enough set of conditions, such as "teams of guards to ensure [the defendant's] 'custody' around-the-clock" and "a high, locked fence around the apartment," would be enough to prevent flight and protect safety in nearly every case.[71] Additionally, the text of the Bail Reform Act makes no distinction between conditions paid for by the defendant and those financed by the government.[72] Thus, a literal reading of the statute could require courts to grant extensive conditions of bail, whether at the government's or the defendant's expense, in nearly every case. Such an absurd result could hardly have been Congress's intent. Most courts have rejected this literal

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[68] § 3142(c)(1)(B)(xiv).

[69] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114–15 (2001) (quoting NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47.17 (1991)) (limiting "any other class of workers engaged in . . . commerce" to workers similar in kind to "seamen" and "railroad employees"). The catch-all provision at issue in *Circuit City* used the same "any other" wording as § 3142(c)(1)(B), the provision at issue here.

[70] *See, e.g.*, United States v. Tortora, 922 F.2d 880, 887 (1st Cir. 1990) ("the doctrine of *ejusdem generis* clearly applies . . . when, as here, the specific terms of an enumeration suggest a class which is not exhausted by the enumeration. In this instance, the initial thirteen elements, while quite varied, suggest a class of conditions well below the level of heroic measures"); *see also* United States v. Lee, 79 F. Supp. 2d 1280, 1288 (D.N.M. 1999) ("a judicial officer should not fashion extreme conditions of release that go well beyond the types of conditions enumerated in § 3142(c)(1)(B)(i)-(xiv)").

[71] United States v. Benatar, No. 02-CR-99, 2002 WL 31410262 at *3 (E.D.N.Y. Oct. 10, 2002) (rejecting such conditions as not required by the Bail Reform Act); *see also Tortora*, 922 F.2d at 887 ("if Congress intended that all possible conditions could be imposed under § 3142(c)(1)(B)(xiv), then there would be no room for pretrial detention because the safety of the community can almost always be assured if extraordinary conditions of release are imposed").

[72] 18 U.S.C. § 3142 (2006 & Supp. II 2008).

interpretation of the statute, holding instead that it was not Congress's intent in adopting the Bail Reform Act to require such extensive conditions.[73]

In short, the extraordinary bail conditions imposed in the *Madoff* and *Dreier* decisions were not mandated by either the Constitution or the Bail Reform Act. This conclusion undermines the reasoning of those decisions, though perhaps not fatally. After all, even if the Constitution and the Act did not mandate the conditions that the courts imposed, Bernie Madoff and Marc Dreier did not attempt to flee while on bail, and they are now both serving lengthy sentences.[74] However, the argument against the bail conditions that *Madoff* and *Dreier* approved goes further. These extraordinary conditions, far from being required by the Constitution, violated the Equal Protection Clause.

III. Pretrial Release and the Equal Protection Clause

While Judge Rakoff held that the Constitution and the Bail Reform Act compelled him to release Marc Dreier on extensive bail conditions, he noted that the availability of such conditions for wealthy defendants exposes a "serious flaw in our system."[75] Although Rakoff did not elaborate on this "serious flaw," he began his *Dreier* decision with these words:

> How glorious to be an American citizen. In so many countries, the rights of citizens are not worth the paper they are printed on. But here, any citizen—good, bad, indifferent, famous, infamous, or obscure—may call upon the courts to vindicate his constitutional rights and expect that call to be honored.[76]

Rakoff's ringing (and perhaps sarcastic) rhetoric calls attention to the close relationship between equality and substantive rights. Substantive rights, Rakoff says, are valuable when they are applied equitably, such that any citizen can expect his constitutional rights to be honored.[77] However, in

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[73] *See, e.g.*, United States v. Orena, 986 F.2d 628, 633 (2d Cir. 1993) ("We find nothing in the Bail Reform Act that requires the government to staff home detention centers or allow dangerous defendants to be at large based upon their promise not to violate conditions of bail."); *Tortora*, 922 F.2d at 887 ("The Bail Reform Act, as we read it, does not require release of a dangerous defendant if the only combination of conditions that would reasonably assure societal safety consists of heroic measures beyond those which can fairly be said to have been within Congress's contemplation."); *Benatar*, 2002 WL 31410262, at *3; United States v. Agnello, 101 F. Supp. 2d 108, 115 (E.D.N.Y. 2000) ("Just as Congress provided in the Bail Reform Act that the court 'may not impose a financial condition that results in the pretrial detention of the person,' 18 U.S.C. § 3142(c), Congress did not intend that a dangerous individual should be released because that individual was sufficiently affluent to be able to pay the cost of extravagant release conditions monitored by private security officers."); *Lee*, 79 F. Supp. 2d at 1288.

[74] *See supra* note 1.

[75] United States v. Dreier, 596 F. Supp. 2d 831, 833 (S.D.N.Y. 2009).

[76] *Id.* at 831.

[77] *See also* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (due process includes the anti-discrimination principle of equal protection).

Madoff and *Dreier*, the defendants were granted access to the fundamental right of pretrial freedom, despite the flight risks they posed, only because they could pay for extensive bail conditions.[78] A few other courts have allowed similarly far-reaching conditions, with the same requirement that they be financed by the defendant.[79] However, when the fundamental right of pretrial release is conditioned on the basis of wealth, as it is in these cases, the notion that "any citizen . . . may call upon the courts to vindicate his constitutional rights and expect that call to be honored"[80] is crucially undermined. The Equal Protection Clause of the Fourteenth Amendment[81] bars discrimination on the basis of wealth with respect to certain fundamental rights. Under this principle, conditioning pretrial release upon a defendant's ability to pay for extraordinary conditions violates the Equal Protection Clause.

A. Access to Fundamental Rights under the Equal Protection Clause

The Supreme Court has held that classifications based upon wealth are unconstitutional when they are associated with access to certain fundamental rights, such as the right to vote[82] and the right to challenge a criminal conviction.[83] The foundational wealth discrimination case in the criminal justice context is *Griffin v. Illinois*, in which the Court held that states must provide trial transcripts to indigent defendants for appellate purposes.[84] While the Constitution does not guarantee defendants a right to appeal, the Court considered the denial of trial transcripts on the basis of wealth to be an "invidious discrimination"[85] and "a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets

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[78] *Dreier*, 596 F. Supp. 2d at 833–34; United States v. Madoff, 586 F. Supp. 2d 240, 244 (S.D.N.Y. 2009). In both cases, payment for these conditions was itself a condition of release.

[79] United States v. Sabhnani, 493 F.3d 63, 77–78 (2d Cir. 2007) (conditions included $4.5 million bond, electronic monitoring and unannounced visits by pretrial services, twenty-four-hour surveillance by private security guards, limits on communications, and searches, with costs paid by the defendants); United States v. Patriarca, 948 F.2d 789, 793 (1st Cir. 1991) (conditions included twenty-four-hour monitoring, video surveillance, unannounced searches, limited communications, a requirement that the defendant pay for these conditions, and an agreement to forfeit four million dollars in real estate upon any violation).

[80] *Dreier*, 596 F. Supp. 2d at 831.

[81] U.S. CONST. amend. XIV. Under the theory of "reverse incorporation," the Equal Protection Clause of the Fourteenth Amendment applies to the federal government due to its incorporation under the Due Process Clause of the Fifth Amendment. *Bolling*, 347 U.S. at 497; *see also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

[82] Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668–70 (1966) (noting that "[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored," and concluding that the right to vote is "too fundamental" to be conditioned upon payment of a poll tax).

[83] Griffin v. Illinois, 351 U.S. 12 (1956).

[84] *Id.*

[85] *Id.* at 17.

depends on the amount of money he has."[86] *Griffin*'s strong ideal of equality in the criminal justice system stands in stark contrast with a system that allows wealthy defendants the special privilege of paying for expensive bail conditions to avoid pretrial detention.

Griffin, and the decisions that followed it, focused on removing obstacles to an indigent defendant's ability to make his or her case before a judge.[87] The Court subsequently extended its wealth-based equal protection inquiry to incarceration in *Williams v. Illinois*.[88] In *Williams*, the Court ruled that imprisoning an indigent defendant beyond the statutory maximum in order for the defendant to "work off" his fine violated the Equal Protection Clause.[89] The state statute in question created an "invidious discrimination" because it:

> in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum. By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment.[90]

The reasoning in *Williams* applies even if the incarceration of the indigent defendant will not exceed the statutory maximum. In *Tate v. Short*, the Court held that when the defendant's original sentence included only a fine and not imprisonment, the defendant could not be incarcerated in order to "work off" his fine.[91] The Court concluded that the law "cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine."[92]

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[86] *Id*. at 19.

[87] *See, e.g.*, Mayer v. City of Chicago, 404 U.S. 189, 196–97 (1971) (holding that trial transcripts must be provided to indigent defendants in non-felony as well as felony cases; stating that *Griffin* represents "a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way."); Douglas v. California, 372 U.S. 353 (1963) (state must furnish counsel to indigent defendants without requiring them to make a preliminary showing of merit); Smith v. Bennett, 365 U.S. 708 (1961) (state may not deny the opportunity to petition for habeas corpus to indigent defendants unable to pay filing fee).

[88] 399 U.S. 235 (1970).

[89] *Id.* at 236, 240–41. States can adopt alternatives to incarceration in such cases, including payment of fines through installment plans, or potentially "a parole requirement on an indigent that he do specified work during the day to satisfy the fine." *Id.* at 245 n.21.

[90] *Id.* at 242. It should be noted that the Court in *Williams* was careful to consider only the constitutionality of the statute in front of it. *Id.* at 243–44.

[91] 401 U.S. 395 (1971).

[92] *Id.* at 399. Contemporaneous lower court decisions also rejected dividing defendants into two categories on the basis of wealth. *See* Frazier v. Jordan, 457 F.2d 726 (5th Cir. 1972) (rejecting sentences requiring indigent defendants to pay a fine or spend a certain number of days in jail); Ackies v. Purdy, 322 F. Supp. 38, 41 (S.D. Fla. 1970) (rejecting "the use of master bond schedules [which] creates two categories of defendants. One group, able to afford

Much like the statutes at issue in *Williams* and *Tate*, the *Madoff* and *Dreier* approach to bail conditions creates two categories of defendants based upon wealth. Defendants who pose a flight risk or danger to the community that can be cured by extensive conditions, and who have access to substantial funds, have the opportunity to avoid incarceration before trial. By contrast, defendants who pose the same level of flight risk or danger, but who cannot finance extensive bail conditions, are likely to be incarcerated. Thus, under the *Madoff* and *Dreier* approach, poorer defendants are incarcerated due to their indigence, in effect, while wealthier defendants are freed. *Williams* and *Tate* reject precisely this kind of discrimination.[93]

Only a few years after *Williams* and *Tate*, the Supreme Court retreated from the close scrutiny it had previously applied to wealth classifications in the criminal justice system. In *Ross v. Moffit*, the Court held that a state was not required to provide counsel to indigent defendants for discretionary appeals and applications for Supreme Court review.[94] The Court observed that the equal protection question "is not one of absolutes, but one of degrees"[95] and "the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required."[96] The Court concluded that the state did not deny the defendant an "adequate opportunity to present his claims fairly," and thus there was no equal protection violation.[97]

Notably, the *Ross* court cited Justice Frankfurter's decisive concurrence in *Griffin* rather than Justice Black's plurality opinion in that case.[98] This is significant because Frankfurter's concurrence qualified *Griffin*'s concern for equal access to fundamental rights.[99] Frankfurter opined that the government is not constitutionally required to "equalize economic conditions,"[100] and that wealth classifications "rooted in reason" are not unconstitutional.[101] Nonetheless, Frankfurter concluded that to "make lack of means an effective

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the master bond bail immediately secure their release. The second group unable to post the master bond bail, remain incarcerated for extended periods of time.").

[93] *Cf.* Rigney v. Hendrick, 355 F.2d 710 (3d Cir. 1965) (holding that requiring an indigent pretrial detainee to appear in a lineup did not violate equal protection). *Rigney* noted that classifications that "arise solely because of the inherent characteristics of confinement . . . cannot constitute invidious discrimination." *Id.* at 715. However, there is nothing inherent about the discrimination at issue in the bail conditions context. Extraordinary bail conditions could be denied for all defendants, or they could be imposed without regard to a defendant's ability to pay and provided for indigent defendants at government expense. For discussion of available alternatives, see *infra* Part IV.

[94] 417 U.S. 600 (1974).

[95] *Id.* at 612.

[96] *Id.* at 616.

[97] *Id.*; *see also* United States v. MacCollum, 426 U.S. 317, 324 (1976) (right to free trial transcript may be limited to cases where judge certifies that the transcript is necessary and that the defendant's challenge is not frivolous).

[98] *Ross*, 417 U.S. at 612.

[99] Griffin v. Illinois, 351 U.S. 12, 21, 23 (1956) (Frankfurter, J., concurring).

[100] *Id.* at 23.

[101] *Id.* at 21.

bar" to appealing a criminal conviction constitutes "a squalid discrimination" that cannot be constitutional.[102]

While the Supreme Court has limited the scope of available wealth discrimination claims, *Ross* did not negate cases like *Griffin*, *Williams*, and *Tate*. In the years since *Ross*, the Court has continued to espouse the principle that a poorer defendant may not be incarcerated in a situation where a wealthier defendant would be released. For example, in *Bearden v. Georgia*, the Court ruled that a defendant's probation could not be revoked for failure to pay a fine unless he made no bona fide effort to pay and alternative forms of punishment would be inadequate.[103] The Court noted that revoking probation under such circumstances "would be little more than punishing a person for his poverty."[104] The Court's holding in *Bearden* relied upon *Griffin*, *Williams*, and *Tate*, and it underscores the continuing vitality of those decisions.[105] The conclusion that the Court has not closed the door to wealth discrimination claims is also bolstered by more recent rulings, which have limited the application of *Ross* and upheld the principle of equal access to fundamental rights in the face of adverse government action.[106]

Together, these cases stand for the proposition that unequal access to a fundamental right in the criminal justice system violates the Equal Protection Clause if such discrimination is invidious, squalid, and unreasonable. These ambiguous terms, read in the context of the cases, express the Court's sense of moral revulsion when the criminal justice system egregiously discriminates on the basis of wealth. In particular, the Court is disinclined to allow defendants to be split into two categories, such that poorer defendants

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[102] *Id.* at 24.

[103] 461 U.S. 660 (1983). The Court noted that "[d]ue process and equal protection principles converge" with respect to this topic, and that "[m]ost decisions in this area have rested on an equal protection framework." *Id.* at 665. The Court also observed that an equal protection approach can present difficulties because "a defendant's level of financial resources is a point on a spectrum rather than a classification." *Id.* at 666 n.8.

[104] *Id.* at 671; *see also* Pugh v. Rainwater, 557 F.2d 1189, 1192–93 (5th Cir. 1977) (holding that courts must consider less financially onerous conditions of release before imposing monetary bail on indigent defendants; rejecting the notion that "an indigent, already denied the material comforts many of us take for granted, may be condemned to pretrial imprisonment under barbaric conditions for no other reason than his poverty").

[105] Lower courts have also continued to rely upon these decisions. *See, e.g.*, Hall v. Furlong, 77 F.3d 361 (10th Cir. 1996) (when indigent defendant is unable to post bail, pre-sentence incarceration must be credited toward maximum term of defendant's sentence); United States v. Rascoe, 31 M.J. 544, 564 (N.M.C.M.R. 1990) (defendant cannot be imprisoned solely due to inability to pay fine; court must consider less serious "alternative measures").

[106] *See* Halbert v. Michigan, 545 U.S. 605 (2005) (distinguishing *Ross* and holding that the state must provide appellate counsel for indigent defendants, even though first appeals were discretionary under state law); *see also* M.L.B. v. S.L.J., 519 U.S. 102 (1996) (holding that charging a fee for parental-termination appeals violates equal protection and due process). While the Court in *M.L.B.* granted that the government generally "need not provide funds so that people can exercise even fundamental rights," the government must provide equal access when a party "seeks to be spared from the State's devastatingly adverse action." *Id.* at 124–25. Pretrial detention is such an adverse action, as it infringes upon the defendant's liberty without any finding of guilt and makes trial preparation more difficult. *See supra* Part II.A.

are incarcerated while wealthier defendants are released.[107] When courts grant unequal access to pretrial release by granting extraordinary conditions that only wealthy defendants can obtain, defendants are categorized and incarcerated based upon wealth in violation of the Equal Protection Clause.

The proposition that it is fundamentally unfair to allow wealthy defendants to avoid pretrial detention by creating the equivalent of private jails in their own homes has found some support in the lower federal courts. Though a few decisions, including *Madoff* and *Dreier*, have freed defendants on extensive, self-financed conditions,[108] other courts have rejected extraordinary conditions, at least partially on equality grounds. For example, in *United States v. Lee*, the District Court of New Mexico denied the defendant bail on grounds of dangerousness.[109] While the main thrust of the opinion emphasized the danger that the defendant posed, the court also stated that "the concept . . . that a defendant can buy his pretrial release if he has sufficient funds to finance the creation of a private jail at his home . . . is repugnant to a court's sense of justice."[110] Other courts have made similar statements in the course of denying defendants' proposals to pay for extraordinary bail conditions.[111] Though they have not explored the issue in depth or framed their concerns in equal protection terms, these courts have recognized the fundamental unfairness of granting pretrial release in such an inequitable manner.

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[107] It is true that the entire bail system, in which defendants are detained pretrial if they cannot make bail, could be characterized as being such a discriminatory scheme. This concern is considered *infra*, in Part III.B.

[108] *See also* United States v. Sabhnani, 493 F.3d 63, 77–78 (2d Cir. 2007); United States v. Patriarca, 948 F.2d 789, 793 (1st Cir. 1991).

[109] 79 F. Supp. 2d 1280 (D.N.M. 1999).

[110] *Id.* at 1289. The defendant in *Lee* was Wen Ho Lee, a scientist at the Los Alamos weapons laboratory who was accused of selling nuclear secrets to China. Dr. Lee was denied bail and incarcerated, in solitary confinement, for nine months. Matthew Purdy & James Sterngold, *The Prosecution Unravels: The Case of Wen Ho Lee*, N.Y. TIMES, Feb. 5, 2001, at A1. He was eventually cleared of the most serious charges, was sentenced to time served, and was released. *Id.* The judge apologized to Dr. Lee for having been "induced" by the Executive branch into confining him "under extraordinarily onerous conditions[.]" *Id.*

What happened to Dr. Lee was tragic and unnecessary. However, in any system that permits pretrial detention, there is a risk that a person who should be released will be detained, whether by mistake or due to government misconduct. The question is whether people with substantial financial resources should have access to a path to pretrial release that is unavailable to poorer defendants.

[111] *See, e.g.*, United States v. Banki, No. 10-0373-CR, 2010 WL 772516 at *1 (2d Cir. Mar. 8, 2010) (the court was "troubled by that possibility" that the defendant could "buy [his] way out by constructing a private jail"); Borodin v. Ashcroft, 136 F. Supp. 2d 125, 134 (E.D.N.Y. 2001) ("[I]t is contrary to underlying principles of detention and release on bail that individuals otherwise ineligible for release should be able to buy their way out by constructing a private jail, policed by security guards not trained or ultimately accountable to the government, even if carefully selected."); United States v. Agnello, 101 F. Supp. 2d 108, 115–16 (E.D.N.Y. 2000) (" Nor do I think a wealthy defendant is entitled to greater consideration in the making of a bail decision than a defendant of modest means. . . . A defendant who has demonstrated his unsuitability for pretrial release . . . should not be able to buy his way out by constructing a private jail.").

The First Circuit's decision in *Patriarca* starkly demonstrates the unfairness of allowing release on extraordinary bail conditions.[112] Raymond Patriarca, the former boss of the New England Mafia Family of the same name, sought extensive conditions of release after he was arrested.[113] The court noted that the government did not have to take "heroic measures" to allow the defendant to be released.[114] However, because Patriarca was willing to pay for the "elaborate video monitoring system" himself, the court ruled that the conditions did not impose too great a burden on the government and did not amount to "establishing a private jail at public expense."[115] Thus, the court released Patriarca on extensive conditions.[116]

Judge Hill of the First Circuit, concurring *dubitante* in *Patriarca*,[117] expressed the following concern:

> I am troubled by the weight given to the finding that Patriarca can and will pay for much of the technologically exotic surveillance of himself. We must not announce that, in this country, a financially successful hood whose gotten gains permit him to imprison himself in comfort need not put up with our prison system, but one apprehended before the accumulation of great wealth will not be due our deference. The ability of the defendant to pay should have nothing to do with the decision . . . .[118]

As Judge Hill recognized, a defendant's eagerness to relieve the government of the financial burdens of surveillance and incarceration should be considered with skepticism. Freeing Patriarca due to his ability to pay for extraordinary bail conditions, while detaining poorer defendants who pose the same or even less flight risk or danger, amounts to unequal treatment based on wealth.

One might argue that the comparison between defendants like Madoff, Dreier, and Patriarca, who can afford extensive conditions of release, and poorer defendants, who cannot, is in some ways misleading. In releasing the defendants in *Sabhnani* on extensive conditions of release, the Second Cir-

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[112] 948 F.2d 789.

[113] *Id.* at 790. These conditions included twenty-four-hour electronic monitoring, video surveillance, unannounced searches, limited communications, a requirement that the defendant pay for these conditions, and an agreement to forfeit four million dollars in real estate upon violation of the conditions. *Id.* at 793.

[114] United States v. Patriarca, 948 F.2d 789, 794 (1st Cir. 1991) (quoting United States v. Tortora, 922 F.2d 880, 887 (1st Cir. 1990)).

[115] *Id.* The majority apparently did not perceive any problem with allowing the defendant to establish a private jail at private expense.

[116] Due to the defendant's poor health and his weakness within the organization, the court found that the defendant was not as dangerous and did not pose as great a flight risk as might be expected. *Id.* at 791–93. Thus, the court upheld the ruling of the district court that these conditions would reasonably assure the defendant's appearance and the safety of the community. *Id.* at 791.

[117] Judge Hill concurred out of deference to the district court's factual findings, but he expressed misgivings about the court's reasoning. *Id.* at 795.

[118] *Id.* at 796 (Hill, J., concurring).

cuit acknowledged the potential concern that the defendants were being allowed "to buy their way out by constructing a private jail."[119] However, the court noted that "defendants of lesser means, lacking the resources to flee, might have been granted bail in the first place."[120] The court reasoned that if a poorer defendant would be released anyway, then that defendant's inability to pay for extensive bail conditions would be of no concern.[121]

It is certainly true, as *Sabhnani* indicates, that many poorer defendants are released before trial without extensive conditions.[122] Some of these defendants pose little flight risk, in part because they lack the substantial resources that would be useful in an attempt to flee. Conversely, other relatively poor defendants would be remanded to custody no matter what conditions of release might be available. Such defendants may simply be too dangerous or may have a known propensity to flee. Defendants who fall into the first category have no need for extraordinary bail conditions, because they will be released regardless, and defendants in the second category cannot obtain such conditions, because they will be detained in any case. However, there is also a third category of defendants: those who pose an intermediate risk of danger or flight and for whom extensive conditions would make a difference, but who cannot afford to pay for those conditions. It is this group of defendants that is discriminated against when wealthier defendants are allowed to pay for extraordinary bail conditions.

This third category of poor defendants, ignored in *Sabhnani*, is significant. A substantial number of defendants may pose dangers or flight risk despite their lack of resources. A defendant does not need substantial financial resources, of course, to pose a danger to the community or another individual. There are also many factors other than wealth that could make a defendant a flight risk, including ties to a foreign country, a lengthy criminal record, a history of defaults, or the possibility of a substantial punishment for a serious crime.[123] However, a defendant who poses an equivalent risk but who lacks substantial resources will not be released on the costly conditions that Madoff and Dreier received.

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[119] 493 F.3d 63, 78 n.18 (2d Cir. 2007) (quoting Borodin v. Ashcroft, 136 F. Supp. 2d 125, 134 (E.D.N.Y. 2001)).

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *See, e.g.*, United States v. Neves, 11 F. App'x 6, 8 (1st Cir. 2001) (defendant remanded due to flight risk despite his lack of substantial financial resources when he had a criminal record and history of defaults, was strongly motivated to avoid deportation, and his mother had eight thousand dollars in savings). Moreover, in *Madoff*, the government cited many factors other than the defendant's wealth that created a flight risk, including the enormity of the crime, the potential for a lengthy sentence, and "the severance of Madoff's ties to New York." 586 F. Supp. 2d 240, 248 (S.D.N.Y. 2009). The *Dreier* court also cited numerous additional factors. 596 F. Supp. 2d 831, 833 (S.D.N.Y. 2009) ("Dreier's motive to flee is palpable, for he faces potentially large sentences if convicted, his money and assets are either frozen or spent, his family ties appear strained, and he has become a pariah to the profession in which he once practiced, as well as to much of the community at large.").

Such discrimination is constitutionally unacceptable. The Equal Protection Clause, as interpreted by the Supreme Court in such cases as *Williams*, *Tate*, and *Bearden*, does not permit incarceration to be determined on the basis of a defendant's wealth. Yet, this is precisely what occurred when Madoff and Dreier were released on extraordinary conditions.

B. Bail Conditions in the Broader Context of Wealth Discrimination

The argument that unequal access to pretrial release in the form of extensive bail conditions is unconstitutional may seem somewhat naïve in light of pervasive inequalities in the bail system as a whole, as well as in the criminal justice system more broadly. Functionally, such an assertion is the opposite of the point made by the Second Circuit in *Sabhnani*. *Sabhnani* argued in essence that the bail system tends to give good results to poorer defendants, and thus allowing wealthier defendants to buy their way out of incarceration by creating the equivalent of private jails does not pose an equality problem.[124] The opposing argument, however, claims that the entire system is so skewed against poor defendants that any discrimination in the area of bail conditions is a minor issue. Each objection is a partial answer to the other, but it is worth considering in more detail the place of bail conditions in the broader context of wealth discrimination.

In some ways, the bail system as a whole is inherently unfair. The idea of a bail bond is that a defendant pledges security in order to be released before trial. A wealthier defendant has more assets to pledge, while an indigent defendant may have no assets at all. The entire concept of bail, it could be argued, conditions the fundamental right of pretrial release upon a defendant's wealth.[125]

Bail bonds are indeed an imperfect mechanism for ensuring that defendants appear in court, but there is at least a rough equality about them that is lacking with respect to other bail conditions. Under the Bail Reform Act, bail bonds are set at an amount "reasonably necessary to assure appearance of the person."[126] The wealthier a defendant, the more expensive a bail bond must be in order to meet this goal.[127] Conversely, all else being equal, poorer

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[124] *See supra* note 120 and accompanying text.

[125] *See Conference Report: New York City's Criminal Courts: Are We Achieving Justice?*, 31 FORDHAM URB. L.J. 1023, 1045 (2004) (noting "the inequitable effect of bail on those who simply cannot afford bail" and expressing "concern that defendants unable to post bail usually pleaded guilty rather than pursue litigation because this option resulted in less time in jail"). *See also* Pugh v. Rainwater, 557 F.2d 1189, 1196 n.13 (5th Cir. 1977) ("It is evident that such [a procedure] is hostile to the poor and favorable only to the rich. The poor man has not always a security to pledge . . . ." (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 55–56 (Bradley ed. 1963))).

[126] 18 U.S.C. § 3142(c)(1)(B)(xii) (2006).

[127] A relatively small pledge, though perfectly adequate in many cases, may offer no real impediment to flight in the case of a wealthier defendant.

defendants are burdened with less expensive bail bonds.[128] Except for those defendants who are so poor that they cannot offer any security at all—a serious and quite unfair exception[129]—the bail bond system treats people in a roughly egalitarian manner regardless of wealth.[130] The same cannot be said of extraordinary bail conditions, which are only granted to defendants who can afford to pay for them. Meanwhile, poorer defendants who pose the same level of risk are detained.

To illustrate the distinction between bail amounts and non-financial conditions, suppose that there are two defendants, one wealthy and one poor (but not entirely indigent). The defendants pose equivalent risks of flight or other dangers. Suppose further that these risks are small enough that both defendants could be released before trial without requiring extraordinary conditions. In this scenario, the court will set a higher bail for the wealthy defendant than for the poor one, but both bail amounts should be attainable, and both defendants should be released. Bail amounts differ based on wealth, but as long as those amounts are scaled appropriately, wealth does not generally determine whether a defendant is incarcerated.[131] But suppose that both defendants pose greater risks, such that only costly, extensive bail conditions will permit pretrial release. Extraordinary bail conditions cannot

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[128] In *Bellamy v. Judges and Justices Authorized to Sit in the N.Y. City Criminal Court and the N.Y. State Superior Court in N.Y. County*, 342 N.Y.S.2d 137, 143 (1973), *aff'd*, 346 N.Y.S.2d 812 (App. Div. 1973) (upholding state bail system), the court noted that "[t]he amount of bail has a rational relationship to and is adjusted to the defendant's circumstances." *Id.* at 143. The court also observed that bail "is not a field for exact science, and we do the best we can in an imperfect world." *Id.* at 140.

[129] In those states where bail bondsmen are permitted, some of these individuals may be able to afford the bondsman's fee and thus obtain pretrial release. *But see All Things Considered: Bail Burden Keeps U.S. Jails Stuffed With Inmates* (National Public Radio broadcast Jan. 21, 2010). In this broadcast, Laura Sullivan tells the stories of indigent defendants who languish in jail, unable to pay a bondman's fee on minimal bail bonds. *Id.* She also observes that judges often set bail at ten times what they believe the defendant should pay (taking into account a bondsman's fee of ten percent of the total bail amount). *Id.*

[130] This holds true regardless of the presence of bail bondsmen, so long as courts generally impose lower bail amounts on poorer defendants. *See supra* note 128.

[131] It is unclear, however, whether courts succeed in appropriately scaling bail amounts to defendants' access to resources. Precision in this area is not possible. *See supra* note 128. Generally, the greater the bail amount, the less likely a defendant is to be able to meet it. 2007 DOJ REPORT, *supra* note 2, at 1. This is not necessarily indicative of improper scaling, however, because bail amounts take into account both defendants' wealth and the need to prevent flight risk or danger.

One provision that mandates some scaling down of bail amounts for poorer defendants is 18 U.S.C. § 3142(c)(2), which states: "The judicial officer may not impose a financial condition that results in the pretrial detention of the person." This provision does not bar a court from setting bail in an amount that the defendant cannot pay, if only such an amount will reasonably assure the defendant's appearance. United States v. McConnell, 842 F.2d 105, 108 (5th Cir. 1988) (quoting S. REP. NO. 98-225 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3199). However, if the judge determines "that some amount of money will assure the appearance of the defendant, then he must select an amount that is attainable." United States v. Holloway, 781 F.2d 124, 127 (8th Cir. 1986) (denying the government's request to withdraw its bail proposal and seek detention when it unexpectedly appeared that the defendant could make bail).

be scaled down in terms of cost (in the way bail amounts can) and still serve the same function of reasonably preventing flight or danger. Thus, only the wealthier defendant will be released on those conditions; the poorer defendant will remain in jail. Such discrimination is distinct from inequality in the bail system as a whole and is unconstitutional.

The bail system is, of course, only part of the larger criminal justice system. Courts have attempted to ensure that the system is fair to all defendants, regardless of wealth or other characteristics, by protecting the procedural rights listed in the Constitution.[132] A reasonably effective public defender or appointed lawyer can, at least in theory, secure an indigent defendant's rights and present the strongest available defense. With public defenders severely underfunded and overburdened, and appointed counsel subject to stringent fee caps, broader equality in the criminal justice system may be little more than an appealing fiction.[133] But surely that very serious concern is no reason to refrain from remedying an equal protection violation like unequal access to bail conditions.[134]

Indeed, one reason that discrimination in the area of bail conditions is so invidious is that it reinforces other inequalities in the criminal justice system. Pretrial release is a fundamental right in part because it gives a defendant the "opportunity to investigate his case, to cooperate with his counsel, to earn the money that is still necessary for the fullest use of his right to appeal."[135] Wealthy defendants surely benefit from the opportunity to freely prepare their defenses, but if they are incarcerated, they will still have funds to hire counsel to spend significant amounts of time on their cases. Conversely, poorer defendants, who are unable to pay for extensive bail conditions, will also probably lack the funds to pay others to investigate their cases for them. Indigent defendants do have a right to counsel, but public defenders and appointed counsel are overburdened and thus unlikely to spend significant time investigating any particular defendant's case.[136] If any investigatory work is to be done at all, these defendants may need to do it

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[132] *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (arguing that courts' focus on procedural rights has ultimately been damaging to defendants by displacing merits-based defenses).

[133] *Id.* at 9–11. *But see* RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 1187 (2005) (surveying the literature suggesting that "notwithstanding the serious resource constraints they face, [appointed defense] counsel do indeed function as aggressive advocates").

[134] Similarly, wealth discrimination in society at large is no reason to avoid addressing the inequality of bail conditions. Judicial action to mitigate discrimination depends upon identifying a fundamental right that is being infringed. *See supra* notes 82–83 and accompanying text. For better or for worse, courts have been very reluctant to read broader social and economic rights into the Constitution. *See* Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1 (2005). However, the Court has recognized a fundamental right to pretrial release, which is a necessary predicate to a constitutional challenge to unequal bail conditions. *See supra* Part II.A.

[135] Bandy v. United States, 81 S. Ct. 197, 198 (1960); *see also* Stack v. Boyle, 342 U.S. 1, 4 (1951).

[136] *See supra* note 133.

themselves. The fundamental right of pretrial release is thus particularly important for poorer defendants, yet those are the defendants with less access to the extensive bail conditions that could allow them to be released. In this way, unequal access to bail conditions reinforces other inequalities in the criminal justice system.

In short, the fact that wealth discrimination exists in other forms in the criminal justice system is no reason to avoid redressing unequal access to bail conditions.[137] To the contrary, such broader discrimination is a reason to take action in the area of bail conditions and to attempt to mitigate this reinforcement effect.[138]

Addressing inequalities in the granting of bail conditions would also counter the perception that wealth discrimination in the criminal justice system is just business as usual. In the aftermath of Bernie Madoff's arrest and subsequent release on bail, there were reports of widespread sentiment that Madoff had received special treatment due to his wealth.[139] Such views were, in fact, perfectly accurate; a poorer defendant, unable to afford extraordinary conditions of release, would not have been able to avoid pretrial detention.[140] This kind of unfairness feeds the perception that there are two separate justice systems—one for the rich, and one for everybody else.[141] Such inequality has a negative effect on the perceived legitimacy of the criminal justice

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[137] This inequality may also have a racial and gender component. *See* Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 KAN. L. REV. 879, 898–99 (2009) (finding that "black offenders were more likely than white offenders, and male offenders were more likely than female offenders, to be held in custody prior to the sentencing hearing" and concluding that, due to stereotypes of "black drug traffickers and male drug traffickers as more dangerous," judges "interpret the legally relevant criteria set forth in the bail statute in ways that disadvantage black offenders").

[138] Additionally, if wealthier defendants were subject to the same harsh conditions of imprisonment that defendants on bail generally face, there would perhaps be more pressure on the government to improve conditions of detention. *See supra* note 9.

[139] *See, e.g.*, Jason Fink, *Bail Decision in Madoff Case Slammed by Angry New Yorkers*, AMNEWYORK, Jan. 12, 2009, http://www.amny.com/urbanite-1.812039/bail-decision-in-madoff-case-slammed-by-angry-new-yorkers-1.1127166. Sharon Smith of Brooklyn was quoted as saying, "[Madoff] needs to go to jail. . . . If it had been me, I would be [sent] to jail." *Id.* The article also quoted Eric Sears, a defense attorney in Manhattan, as saying, "I represent a lot of people who have done things that haven't damaged so many people in so many ways that Madoff did and they're all in jail because they don't have money." *Id.*; *see also* Anthony M. Destefano, *No Jail for Madoff, But New Restrictions*, NEWSDAY (N.Y.), Jan. 13, 2009, at A8 (quoting former federal prosecutor Steven K. Frankel of Manhattan as saying, "The investors feel once again this guy has bought his way out of a situation which most other people could not.").

[140] Madoff's wealth was only one reason the government argued that he was a flight risk. *See supra* note 123.

[141] *See, e.g.*, Sorkin, *supra* note 3 ("Someone without Madoff's bank account surely would be locked up by now. Of course, this has always been the way of the white-collar world . . . . Welcome to the two-tiered system of justice: one for the super-rich, the other for the rest of us.") The article also cites the pretrial release of prominent white-collar defendants Martha Stewart, Kenneth Lay, Dennis Kozlowski, Bernard Ebbers, and Phillip Bennett. *Id.* However, not all prominent white-collar defendants are released pretrial. *See, e.g.*, United States v. Stanford, 341 F. App'x 979, 982 (5th Cir. 2009) (affirming the pretrial detention of well-known white-collar defendant Robert Allen Stanford).

system and erodes public trust and confidence in that system.[142] For this reason, it is ultimately circular and self-defeating to assert that because wealth discrimination is so pervasive, it is not worthwhile to challenge it in a particular context.

Unequal access to conditions of release is a particularly egregious example of wealth discrimination in the criminal justice system, and it is an appropriate context in which to challenge that inequality. The bail system as a whole, though beset with unfairness, maintains a rough equality under the general principle that wealthy defendants are required to post larger bonds than poorer defendants. However, wealth discrimination is much more explicit when extraordinary conditions of release are granted only to defendants who are able to pay for them. Redressing inequalities in the area of bail conditions is a limited goal, but a valuable one.

C. Further Evidence that Extraordinary Conditions of Release are Unreasonable

Approving extraordinary bail conditions for defendants who can afford to pay for them is inequitable because it divides defendants into two categories based on wealth, with only poorer defendants subjected to incarceration before trial. As the Supreme Court has ruled in such cases as *Williams*, *Tate*, and *Bearden*, incarceration on the basis of wealth violates the Equal Protection Clause.[143] But inequality is not the only basis for concluding that unequal access to conditions of release is unreasonable. Any notion that such a policy is so "rooted in reason"[144] that it would survive constitutional scrutiny despite its inequality is belied by the continuing risks posed by defendants who have been granted extensive conditions. Extraordinary bail conditions do not provide the same protection to the community and assurances against flight risk as incarceration. Moreover, they do not achieve great cost savings for the government. Thus, in addition to being inequitable, these conditions raise other serious concerns as well.

Although home confinement under extensive conditions paid for by the defendant does save the government the costs of incarceration, the government still incurs substantial administrative costs. In such cases, the government has to expend resources to supervise the defendant's surveillance and to monitor the defendant to ensure that all of the conditions of release are

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[142] On the relationship between the perceived legitimacy of the criminal justice system and its effectiveness, see TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); *see also* William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1826 (1998) (arguing that in the area of drug enforcement, "[t]he perception that the system is enforcing the norms differently with different groups is bound to have significant consequences for how those groups view the norms, and how those groups view the law").

[143] *See supra* Part III.A.

[144] Griffin v. Illinois, 351 U.S. 12, 21 (1956) (Frankfurter, J., concurring).

being met.[145] Thus, cost savings are not a convincing reason to impose extraordinary conditions of release.

Moreover, no matter how extensive the conditions of release may be, allowing defendants to construct the equivalent of private jails does not offer the same protection to the community as incarceration, and it still leaves a small but real flight risk. The effectiveness of strict conditions of release ultimately depends upon the good faith compliance of the defendant.[146] Sophisticated defendants can circumvent electronic surveillance,[147] "[s]ecurity guards are not trained to act as jailers or detectives, and a home is not a secure facility."[148] Such conditions "at best elaborately replicate a detention facility without the confidence of security such a facility instills."[149]

Bernie Madoff and Marc Dreier did not pose any physical danger to another person or the community, they made no effort to flee, and they are now in federal prison.[150] The risk that they would attempt flight was not entirely remote, however. Numerous white collar or wealthy defendants

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[145] United States v. Orena, 986 F.2d 628, 632–33 (2d Cir. 1993) (ensuring compliance would require "trustworthy, trained staff to carry out . . . extensive monitoring"); United States v. Argraves, No. 3:09cr117, 2010 WL 283064, at *4 (D. Conn. Jan. 22, 2010) (noting that the need for monitoring would create a "significant burden in terms of employee time and other resources"); Borodin v. Ashcroft, 136 F. Supp. 2d 125, 134 (E.D.N.Y. 2001) ("Even if the cost of surveillance is covered by Borodin, the government still incurs an added administrative burden in supervising the surveillance."); United States v. Agnello, 101 F. Supp. 2d 108, 116 (E.D.N.Y. 2000) ("The burden on the government remains substantial, despite the measures proposed by the defendant to lessen that burden. Government personnel must still review the surveillance tapes and monitor the defendant's compliance with the conditions of his confinement."); United States v. Infelise, 765 F. Supp. 960, 964 (N.D. Ill. 1991) (noting the need for "house arrest, twenty-four hour a day phone monitoring, and twenty-four hour a day availability of law enforcement agents to respond to an electronic monitor violation. The government was not certain that such an enormous commitment of manpower could even be obtained for the next eight to nine months . . . . [T]here is a limit to the amount of government resources which have to be expended to release dangerous defendants pretrial, when their constitutional rights are not being violated by continued detention.").

[146] *See, e.g.*, United States v. Hir, 517 F.3d 1081, 1092 (9th Cir. 2008); United States v. Tortora, 922 F.2d 880, 886 (1st Cir. 1990) (noting that this flaw is the "Achilles' heel" of extraordinary restrictions). *But see* United States v. Madoff, 586 F. Supp. 2d 255 (S.D.N.Y. 2009) (rejecting the notion that bail conditions rely on the defendant's good faith, because "implicit in the bail condition analysis is the assumption that the defendant cannot be trusted on his own.").

[147] United States v. Bellomo, 944 F. Supp. 1160, 1167 (S.D.N.Y. 1996).

[148] *Agnello*, 101 F. Supp. 2d at 116.

[149] United States v. Gotti, 776 F. Supp. 666, 672 (E.D.N.Y. 1991); *see also* United States v. Millan, 4 F.3d 1038, 1048–49 (2d Cir. 1993); United States v. Orena, 986 F.2d 628, 632–33 (2d Cir. 1993); United States v. Morrison, No. 04-CR-699, 2009 WL 2973481 at *2 (E.D.N.Y. Sept. 10, 2009); *Argraves*, 2009 WL 1859226, at *9.

[150] *See supra* note 1.

have attempted to jump bail,[151] and Marc Dreier lied to the court about his links to foreign countries.[152]

There is also a real possibility that defendants will dissipate their assets or obstruct justice.[153] Bernie Madoff acknowledged that, after he was initially released on bail, he sent valuable "gifts" to family members and friends.[154] These items included Cartier and Tiffany diamond-encrusted watches, four diamond brooches, an emerald ring, jade and diamond necklaces, and other jewelry.[155] While Madoff characterized these items as being "sentimental personal items," the government noted that their value was in excess of one million dollars and considered the gifts to be an attempt by Madoff to dissipate assets that would otherwise be used for restitution to his victims.[156] When the government learned of this breach of his bail conditions, it moved to detain Madoff without bail.[157] Judge Ellis agreed with the government that economic harm can threaten the "safety of any other person or the community" under the Bail Reform Act[158] and thus can serve as a predicate to pretrial detention.[159] However, the court noted that the question was not what Madoff had already done, but rather his propensity to cause

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[151] *See, e.g.*, Posting of Amir Efrati to WSJ Law Blog, http://blogs.wsj.com/law/2009/03/18/bail-jumper-roundup-one-pleads-another-is-captured/tab/article/ (Mar. 18, 2009, 10:53 EST) (reporting on two separate white-collar bail jumpers, both of whom were eventually captured); *cf.* United States v. Patriarca, 776 F. Supp. 593, 603–04 (D. Mass. 1991) (observing that, while some mafia defendants have attempted to flee while on bail, many have not).

[152] United States v. Dreier, 596 F. Supp. 2d 833, 833 (S.D.N.Y. 2009).

[153] Oddly, the Bail Reform Act allows the government to move for a detention hearing under 18 U.S.C. § 3142(f)(2)(B) (2006) when there is a serious risk of obstruction of justice, but the possibility of obstruction of justice is not actually the subject of the hearing. Under 18 U.S.C. § 3142(e)(1) (Supp. II 2008), only flight risk and danger to another individual or the community are sufficient reasons for pretrial detention. However, obstruction of justice in the form of dissipation of assets can be considered a danger to the community for purposes of § 3142(e)(1). *See infra* note 159.

[154] United States v. Madoff, 586 F. Supp. 2d 240, 245 (S.D.N.Y. 2009).

[155] David Glovin & Erik Larson, *Madoff Gets to Remain Free on Bail*, BOSTON GLOBE, Jan. 13, 2009, at B5; Walter Hamilton, *Effort to Jail Madoff Fails*, L.A. TIMES, Jan. 13, 2009, at C3; Diana B. Henriques, *Judge Lets Madoff Stay Free on Bail*, N.Y. TIMES, Jan. 13, 2009, http://query.nytimes.com/gst/fullpage.html?res=9A00E7D8123DF930A25752C0A96F9C8B63; Sorkin, *supra* note 3. Most of the items were eventually recovered. Henriques, *supra*.

[156] Glovin & Larson, *supra* note 155. Madoff did not dispute this valuation. *Madoff*, 586 F. Supp. 2d at 245.

[157] *Id.* at 243.

[158] 18 U.S.C. § 3142(c)(1).

[159] *Madoff*, 586 F. Supp. 2d at 251–53 (citing United States v. Reynolds, 956 F.2d 192 (9th Cir. 1992)); *see also* United States v. Provenzano, 605 F.2d 85, 95 (3d Cir. 1979); United States v. DeSimone, CR No. 09-024S, 2009 WL 904688 at *2 (D.R.I. Apr. 1, 2009) (collecting cases); United States v. Stein, No. S105 CRIM 0888, 2005 WL 3071272, at *2 (S.D.N.Y. Nov. 15, 2005); S. REP. NO. 98-225, at 12 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3195 ("The committee intends that the concern about safety be given a broader construction than merely danger of harm involving physical violence."); *but see* United States v. Byrd, 969 F.2d 106, 109-10 (5th Cir. 1992) (no detention based solely on economic dangers because § 3142(f) only allows the government to move for detention in cases involving flight risk, obstruction of justice, or an indictment for offenses listed in § 3142(f)(1)); United States v. Friedman, 837 F.2d 48, 49 (2d Cir. 1988) (same).

economic harm in the future.[160] The court ruled that the government had not presented enough evidence that Madoff's potential dissipation of assets would cause sufficient economic harm and that the government had failed to meet its burden of proving that "no condition or combination of conditions of pretrial release will reasonably assure the safety of the community."[161] The court imposed new conditions on Madoff and allowed him to remain on bail.[162]

The new conditions that the court imposed on Madoff were presumably sufficient to prevent him from mailing any more valuable items to friends and family members.[163] However, this case demonstrates a major problem with allowing defendants who would otherwise be detained to buy their way out of jail with extensive conditions. Most risks can be remedied after the fact by imposing additional bail conditions, as in *Madoff*, making it unlikely that the exact same problem will occur a second time. However, *Madoff* also demonstrates that it is not always possible to predict in advance what risks will arise. Thus, even extraordinary conditions may not be sufficient.

Moreover, the risk of dissipation of assets is only an issue for defendants who have reasonably substantial assets. Such defendants pose economic dangers due to their wealth, while at the same time they have been released on extraordinary conditions only because they have the resources to pay for them. When courts fail to detain such defendants, as in *Madoff*, the problem of inequality is thus compounded.[164] The fact that Madoff could mail valuable items in violation of his bail conditions, yet still avoid incarceration, intensified the public perception that he was receiving special privileges.[165]

In short, allowing defendants to buy their way out of jail by paying for extensive conditions of bail may result in significant administrative costs, increased flight risk, and heightened danger to the community. Each of these negative consequences also undermines the possibility that extraordinary bail conditions, though unequal, may somehow be reasonable enough to survive constitutional scrutiny. If defendants who have avoided incarceration

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[160] *Madoff*, 586 F. Supp. 2d at 253.

[161] *Id.* at 254 (citing 18 U.S.C. § 3142(e)(1) (Supp. II 2008)).

[162] These additional conditions included restrictions on all transfers of property, restrictions on Madoff's wife, and searches of all outgoing mail. *Id.* at 243-244. In addition, Madoff was required to compile an inventory of all valuable items in his Manhattan home, and a security company was to check the inventory once every two weeks. *Id.* at 255.

[163] Even these conditions were not foolproof. "Oddly enough, Judge Ellis instructed Mr. Madoff to conduct the initial inventory of assets, which puts the entire idea of monitoring them into question." Sorkin, *supra* note 3.

[164] Additionally, the wealth of such defendants may constitute ill-gotten gains. In *Madoff*, the court noted that it could "hold a hearing to ensure that whatever assets are offered to support a bail package are derived from legitimate sources." *Madoff*, 586 F. Supp. 2d at 254 n.15. However, the government never raised the issue, so the court did not pursue it. *Id.* Madoff ultimately forfeited all rights to the assets that flowed through his accounts, totaling $170 billion, and his wife forfeited $80 million in assets, retaining $2.5 million. *Ruth Madoff Forfeits Asset Claims, Left with $2.5 Million*, REUTERS, June 27, 2009, *available at* http://www.reuters.com/article/idUSTRE55Q0BF20090627.

[165] *See supra* notes 139–140.

only because of their ill-gotten wealth can then attempt to obstruct justice by dissipating those very assets, then the special privileges of wealthy defendants are vast indeed. Such advantages have no place in the criminal justice system.

IV. Remedies

The extraordinary arrangements approved by the court in *Madoff* and *Dreier* are unconstitutional in light of the fact that such conditions are not available to poorer defendants. However, judicial remedies for this unlawfulness may not be available. Courts should take action, but ultimately, a statutory amendment would be a more thorough and decisive solution.

One potential way to address the problem of unequal access to pretrial release is through a constitutional challenge. A defendant who is unable to pay for extensive bail conditions, and who is detained, could challenge the operation of the Bail Reform Act on equal protection grounds. However, such a claim would face serious obstacles. Judges rarely, if ever, expressly state that a defendant would have been released if only the defendant could afford to pay for extensive conditions.[166] Without even considering the possibility that the government might pay for extensive conditions, courts simply decide whether non-wealthy defendants pose enough of a danger or flight risk to justify pretrial detention. It would therefore be very difficult for a defendant to prove that he or she is in the category of defendants that has been subjected to wealth discrimination.

Moreover, there is a serious question as to what remedy a defendant in such a case could seek. Generally, remedies for equal protection violations can include either improving the condition of the previously disfavored class or worsening the condition of the previously favored class.[167] As to improving the condition of the disfavored class, it would be a radical step for a court to force the government to pay for extraordinary conditions when the defendant could not do so himself.[168] Imposing harsher burdens on the favored class may be a better approach to this problem, but a poorer defendant would probably lack standing to prevent wealthier defendants from obtaining extraordinary bail conditions.[169] In addition, a poorer defendant

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[166] The author could not locate any decisions in which judges made such statements.

[167] Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 247 (1931).

[168] If applied generally, such a ruling could impose tremendous costs upon the government. Courts are unlikely to require the government to accept such costs. *See* United States v. Patriarca, 948 F.2d 789, 794 (1st Cir. 1991) (the government need not take "heroic measures" to allow defendant to be released (quoting United States v. Tortora, 922 F.2d 880 (1st Cir. 1990))). Moreover, while pretrial release is a fundamental right, and conditioning that right on the basis of wealth is unconstitutional, it would be difficult to argue that unusual, extraordinary conditions fall within an individual defendant's fundamental right to pretrial release. *See supra* Part II.C.

[169] These poorer defendants would not meet the constitutional standing requirement of injury-in-fact if the proceedings in the wealthier defendants' cases had not personally injured them. *Cf.* Allen v. Wright, 468 U.S. 737 (1984) (parents of black school children lacked stand-

would lack an incentive to pursue a constitutional claim that, if successful, would only be to the detriment of wealthier defendants without directly benefiting the poorer defendant.

Thus, a constitutional challenge would be unlikely to succeed. Unless judges themselves stop allowing wealthy defendants to avoid detention by paying for extraordinary bail conditions, the judicial system will continue to discriminate on the basis of wealth in the context of pretrial release. Neither the Constitution nor the Bail Reform Act requires courts to release defendants on extraordinary bail conditions,[170] and courts can and should refuse to do so.

Alternatively, as suggested by Judge Hill in his concurrence in *Patriarca*, courts could first decide what conditions to impose pursuant to the Bail Reform Act "without reference to who pays[.]"[171] If the proposed conditions are within the meaning of 18 U.S.C. § 3142(c)(1), then "the court may also consider imposing the cost upon the defendant[.]"[172] As Judge Hill noted, these conditions "cannot be found to be within the contemplation of the Act *because* the defendant can afford to pay for them."[173] This would certainly exclude the court's approach in *Patriarca*, where the defendant's willingness to pay for the conditions led the court to decide that the conditions did not overly burden the government.[174] *Madoff* and *Dreier* are also inconsistent with this approach, because they made it a condition of release that the defendants or their relatives pay for the extraordinary conditions.[175]

However, this alternative approach begs the question of what kinds of conditions are consistent with the Bail Reform Act. If the kinds of conditions imposed in *Madoff* and *Dreier* are not contemplated by the Act, then this solution would be no different than simply ceasing to adopt extraordinary conditions. The other possibility is that courts could impose such conditions regardless of the defendant's wealth. However, unless the government becomes willing to pay for twenty-four-hour security for huge numbers of nonwealthy arrestees—and there are no indications of such willingness—it will remain the case that this path to pretrial release is only open to the wealthy. Conditioning incarceration on wealth in such a manner is precisely the equal protection violation that exists in the current law.[176] Thus, Judge Hill's alternative is insufficient. Rather, courts should stop adopting costly, extraordinary conditions of release.

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ing to make equal protection claim that the IRS had not done enough to ensure that racially discriminatory private schools were denied tax-exempt status).

[170] *See supra* Part II.

[171] 948 F.2d at 796 (Hill, J., concurring *dubitante*).

[172] *Id.*

[173] *Id.*

[174] *Id.* at 794.

[175] United States v. Dreier, 596 F. Supp. 2d 833, 833–34 (S.D.N.Y. 2009); United States v. Madoff, 586 F. Supp. 2d 240, 244 (S.D.N.Y. 2009).

[176] *See supra* Part III.A.

Courts can indeed act to redress this inequality, one case at a time. However, the requirements of the Bail Reform Act are not entirely clear as a matter of statutory interpretation. While there is reason to believe that Congress did not intend to require that courts impose extraordinary conditions, a literal reading of the Act could imply that such conditions are required.[177]

In light of this uncertainty, congressional action would be the best way to redress unequal access to bail conditions. Congress has an independent duty to ensure that it is acting within the bounds of the Constitution,[178] and the Bail Reform Act has been interpreted in a way that has led to unconstitutional results.[179] Congressional action would apply more broadly, and with more certain results, than would piecemeal judicial action in this area.

Congress should amend the Bail Reform Act to make clear that courts are only required to impose conditions that are reasonable. To accomplish this, Congress should amend 18 U.S.C. § 3142(c)(1)(B) and § 3142(c)(1)(B)(xiv) to require only that courts impose the least restrictive *reasonable* condition or set of conditions necessary to assure the public safety and the appearance of the defendant. It should also amend § 3142(e)(1) to allow courts to detain defendants if no *reasonable* condition or set of conditions will accomplish those goals. The Act uses the language of reasonableness in other places, for example by requiring that conditions need only "reasonably assure the appearance of the person."[180] A reasonableness test should also be applied to the conditions themselves. This rather simple modification to the Bail Reform Act would only affect proposals for truly extraordinary bail conditions, and it would give courts the flexibility to reject such proposals regardless of whether the defendant is willing to pay for the conditions.[181]

While courts can and should act to redress unequal access to bail conditions, it is ultimately the duty of Congress to make its intent clear. In doing so, it should bring the operation of the Bail Reform Act in line with the Equal Protection Clause. Congress should make clear that courts are only required to impose reasonable conditions of release.[182]

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[177] *See supra* Part II.D.

[178] City of Boerne v. Flores, 521 U.S. 507, 535 (1997) ("When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.").

[179] *See supra* Part III.

[180] 18 U.S.C. § 3142(c)(1) (2006).

[181] The contours of this reasonableness standard would have to be determined on a case-by-case basis, but the private jail-like conditions adopted in *Madoff* and *Dreier* would surely not be permitted. Relevant factors could include the costs of the conditions, whether those conditions are routinely granted, and the government's administrative costs. Other factors such as the level of flight risk and danger to the community, which are already considered under the Bail Reform Act, could also be relevant to the reasonableness of the conditions themselves.

[182] Alternatively, Congress could consider funding extensive bail conditions in a wide range of cases. However, such a proposal would be quite expensive and would result in many more defendants being released pretrial. It seems very unlikely that such a proposal would ever be adopted, and it is ultimately unnecessary in light of the cheaper and simpler solution of only requiring courts to consider reasonable conditions of release.

V. Conclusion

The Supreme Court observed in *Griffin*: "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal."[183] By amending the Bail Reform Act to equalize access to bail conditions, Congress would send a public signal that, at least on the issue of bail conditions, the criminal justice system is becoming fairer and more equitable.[184] This is surely a worthy goal, regardless of whether it is mandated by the Constitution.

But the Constitution does speak to this issue. The Equal Protection Clause, as interpreted by the Supreme Court, does not allow defendants to be incarcerated on the basis of wealth.[185] Yet, this is precisely what happens when defendants like Bernie Madoff and Marc Dreier are released on extraordinary bail conditions because they can afford to pay for them, while poorer defendants, who pose the same or lesser flight risk or danger to the community, are detained. If the fundamental right of pretrial release is to be meaningful, it cannot be conditioned on the basis of wealth in this manner. Wealthy defendants certainly have other advantages in the criminal justice system, but that is no reason to avoid redressing this particular inequality.

Incarcerating wealthy defendants before trial may seem like a harsh result, particularly in light of the appalling conditions in which some pretrial detainees are held,[186] but such imprisonment is already a reality for poorer defendants. The proposals in this Note are entirely consistent with improving conditions for all pretrial detainees. Another alternative would be to decrease the number of defendants who are imprisoned pretrial more generally, without privileging wealthy defendants, although such a change could result in increased flight risk or danger to the community. In any event, courts should be given the flexibility to reject extraordinary bail conditions that are only available because wealthy defendants are willing to pay for them.

Bernie Madoff and Marc Dreier are now in federal prison, but there is not likely to be any shortage of wealthy criminal defendants in the future. It should not be wealth that determines whether they, or any other defendants, have access to bail conditions as an alternative to pretrial detention.

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[183] Griffin v. Illinois, 351 U.S. 12, 16 (1956).

[184] For the importance of public perceptions of inequality in the criminal justice system, see *supra* note 142 and accompanying text.

[185] *See supra* Part III.A.

[186] *See supra* note 9.