CONDITIONAL RELEASE UNDER THE BAIL REFORM ACT: THE SOLUTION TO PRETRIAL DETENTION FOR ‘ECONOMIC HARM’

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CONDITIONAL RELEASE UNDER THE BAIL REFORM ACT: THE SOLUTION TO PRETRIAL DETENTION FOR ‘ECONOMIC HARM’

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ABSTRACT

This comment examines whether the language of the Federal Bail Statute and the threat of ‘economic harm’ is sufficient to take away the freedom of an accused person awaiting trial. The introduction discusses Bernard ‘Bernie’ Madoff and the conditions of pretrial release used by United States Magistrate Judges to allow Madoff to remain free until conviction. After introducing this concept with a high-profile defendant, the comment provides an overview of the Bail Reform Act and how it was changed in 1984 to include ‘danger’ as a relevant factor in pretrial detention matters, adding to the preexisting power to detain defendants as a risk of flight. From the background, the comment moves to an interpretation of danger and the scope that was intended when the Act was changed by analyzing the legislative history from the United States Senate as a guide. The comment then discusses recent case law that studies the power judges wield under the Act to impose conditions of release to prevent this perceived danger.

After this initial analysis, the comment further examines the decision to release Madoff in United States v. Madoff and how this was correct, even when dealing with the potential for substantial losses to victims attempting to recover lost investments. This comment concludes by explaining why economic harm should rarely, if ever, be found to warrant pretrial detention, and that judges in the federal system should be wary of attempts to read language into laws broader than was intended. As an alternative solution to the use of extensive conditions that might prove unaffordable for a defendant, this comment suggests the United States, rather than paying the cost to jail an accused person, cover the cost of any conditions the court finds are reasonably necessary in an effort to address the disparity between wealthy and indigent defendants.

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I. Introduction

On December 11, 2008, Bernard Madoff was arrested for running an ongoing twenty-year Ponzi scheme that was considered the largest fraud in Wall Street history. His scheme was so substantial that the federal sentencing guidelines, only reaching $400 million, did not account for losses of this magnitude. Prior to Madoff’s sentencing, the amount of loss from the fraud was estimated to be US$50 billion. This would make Madoff a perfect example of a defendant warranting pretrial detention based on the threat of economic harm to persons or the community under language in the Bail Reform Act of 1984 (the “Act”). This is due to the threat Madoff posed to his victims by his ability to dissipate assets that would be subject to forfeiture if convicted. Despite this economic danger, Madoff was released pending trial with a number of conditions of bail he was required to follow. These conditions, imposed on Madoff to ensure he would not pose an economic threat when released, were exhaustive:

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3 U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2011); see also Tomoeh Murakami Tse, Madoff Sentenced to 150 Years, WASH. POST (June 30, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/06/29/AR2009062902015.html (stating the sentencing guidelines did not account for the sheer amount of Madoff’s fraud). The sentencing guidelines also offer a maximum six level increase for an offense that includes 250 or more victims, where it tops out. § 2B1.1.
5 See generally United States v. Reynolds, 956 F.2d 192, 192 (9th Cir. 1992) (holding that danger under the Bail Reform Act of 1984 can include pecuniary or economic harm); United States v. Madoff, 586 F. Supp. 2d 240, 253 (S.D.N.Y. 2009) (finding jurisprudential support for using economic harm as a factor when assessing danger to the community under the Bail Reform Act of 1984 but stating the scope of how economic harm applies was uncertain). The uncertainty discussed by Judge Ronald L. Ellis relates to crimes under 18 U.S.C. § 3142(e), where a rebuttable presumption for detention applies. Madoff, 586 F. Supp. 2d at 253 n. 14.
7 United States v. Madoff, No. 09 Cr. 213 (DC), 2012 WL 1142292, at *1 (N.D.N.Y. Apr. 20, 2009) (stating that Madoff’s assets, upon his conviction, would be subject to forfeiture).
8 Madoff, 586 F. Supp. 2d at 243–44; see also S. REP. NO. 98-255, at 12 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3195; § 3142. Numerous conditions were placed on Madoff so that he could remain free. Madoff, 586 F. Supp. 2d at 243–44. The Act states a judge shall order the release of a defendant awaiting trial, imposing conditions of that release, unless the judge determines no conditions of bond will reasonably assure the safety of any other person or the community. § 3142. Any other person relates to specific, identifiable persons such as victims or
(1) a $10 million personal recognizance bond secured by Madoff’s Manhattan apartment, and Madoff’s wife’s properties in Montauk, New York, and Palm Beach, Florida, and cosigned by two financially responsible persons, Madoff’s wife and brother; (2) the filing of confessions of judgment with respect to Madoff’s Manhattan apartment and his wife’s properties in Montauk, New York, and Palm Beach, Florida; (3) other than for scheduled court appearances, Madoff is subject to home detention at his Manhattan apartment, 24 hours per day, with electronic monitoring; (4) Madoff employs, at his wife’s expense, a security firm acceptable to the Government, to provide the following services to prevent harm or flight: (a) the security firm provides round-the-clock monitoring at Madoff’s building, 24 hours per day, including video monitoring of Madoff’s apartment doors, and communications devices and services permitting it to send a direct signal from an observation post to the Federal Bureau of Investigation in the event of the appearance of harm or flight; (b) the security firm will provide additional guards available on request if necessary to prevent harm or flight; (5) Madoff and his wife have surrendered their passports. 9

United States Magistrate Judge Ronald L. Ellis imposed these conditions 10 under the authority granted to federal judges within the Act, to detain defendants as a risk of flight, and which changed in 1984 to address defendant dangerousness. 11 These changes allowed judges to detain defendants as a danger 12 to “person(s) or the community,” 13 a concept new to pretrial detention matters aimed at addressing crimes committed by persons released on bail awaiting trial—but of an undefined scope. 14

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9 Madoff, 586 F. Supp. 2d at 244–45.
10 § 3142(c)(1)(B)(xiv). The enumerated power that gives a judge discretion to impose a number of conditions based on a particular set of facts is § 3142(c)(1)(B)(xiv). Id. This allows the judge to impose “any other condition that is reasonably necessary.” Id.
11 See S. REP. NO. 98-255, at 3 (discussing the addition of danger as a reason for pretrial detention of defendants). “The adoption of these changes marks a significant departure from the basic philosophy of the Bail Reform Act, which is that the sole purpose of bail laws must be to assure the appearance of the defendant.” Id.
12 See BLACK’S LAW DICTIONARY 450 (9th ed. 2009). Danger is defined as “[p]eril; exposure to harm, loss, pain, or other negative result.” Id.
13 See § 3142. The language throughout the Act, including § 3142, which applies to pretrial detention, now includes provisions for the safety of victims or witnesses and society at large. Id. These provisions give a judge the ability to detain a defendant pending trial who will “endanger the safety of any other person or the community,” and impose conditions to ensure “the safety of any other person and the community.” Id.
14 S. REP. NO. 98-255, at 3 (stating Federal bail laws needed to be changed to give courts the authority to detain dangerous defendants based on concerns that these defendants would commit crimes if released).
To balance this new authority to detain defendants pending trial was a list of conditions the judge could impose on the the defendant’s release to ensure that they would remain free while not posing a danger to the community.\textsuperscript{15} Included among the enumerated conditions is a broad provision that empowers a judge to impose “any other condition that is reasonably necessary to . . . assure the safety of any other person and the community.”\textsuperscript{16} When Madoff tried to disperse his assets while on bail, the Government moved for his detention based on the threat of economic harm, but instead the court applied additional conditions using the power of the “any other condition” language to keep Madoff free.\textsuperscript{17} This statutory grant of authority resulted in the pretrial release of Madoff because Judge Ellis used all the tools at his disposal to achieve the result intended under the Act, being that “detention prior to trial . . . is the carefully limited exception.”\textsuperscript{18}

This comment examines whether economic harm warrants the detention of a defendant awaiting trial. Part II begins with an overview of the act and how it was changed in 1984 to include danger as a relevant factor in pretrial detention matters.\textsuperscript{19} Part III interprets the scope of danger\textsuperscript{20} that was intended when the Act was changed by using the legislative history from the United States Senate as a guide,\textsuperscript{21} while part IV discusses cases that analyze the power judges

\textsuperscript{15} See generally § 3142(c) (listing conditions of release a judge can order a defendant to follow when released on bail).
\textsuperscript{16} § 3142(c)(1)(B)(xiv).
\textsuperscript{17} See infra notes 130–35 and accompanying text.
\textsuperscript{18} United States v. Salerno, 481 U.S. 739, 746 (1987) (holding the Act constitutional over complaints that it violated the Due Process Clause of the Fifth Amendment and the proscription against excessive bail in the Eighth Amendment). See generally S. Rep. No. 98-255, at 11–12 (stating that the new conditions “provid[e], in limited circumstances, for pretrial detention”). The Court concluded the Act was not facially invalid under the Due Process Clause. \textit{Salerno}, 481 U.S. at 752. In support of this position, the Court cited three factors: the burden on the government to provide clear and convincing evidence that a defendant is a danger to the community; the requirement of a judge to include written findings of fact and reasoning that support a decision in favor of detention; and that a decision to detain is immediately available for appellate review. \textit{Id}.
\textsuperscript{19} See discussion infra Part II.
\textsuperscript{20} See supra note 14 and accompanying text; infra note 51 and accompanying text.
\textsuperscript{21} See discussion infra Part III.
wield under the Act to impose conditions of release to prevent any perceived danger. Part V explains why the decision in United States v. Madoff was correct even when dealing with the potential for substantial losses to victims attempting to recover their lost investments. This comment concludes by explaining why economic harm should rarely, if ever, be found to warrant pretrial detention and that judges in the federal system should be wary of attempts to read language into laws broader than was intended when they were drafted. As an alternative solution to the use of extensive conditions that might prove unaffordable for a defendant, this comment suggests the government cover the cost of any conditions the court finds are reasonably necessary in an effort to address the disparity between wealthy and indigent defendants.

II. Changes to the Bail Reform Act of 1966

The Act made substantial changes to the Bail Reform Act of 1966, which was inadequate in addressing the concerns of dangerous defendants released pending trial. These changes were made in response to what the United States Senate called an “alarming problem.” After the changes more defendants would be detained due to their perceived danger, but releasing the majority of federal defendants remained the intent behind the Act.

22 See discussion infra Part IV.
24 See discussion infra Part V.
25 See infra notes 95, 149–60 and accompanying text.
26 See infra notes 161–64 and accompanying text.
27 S. REP. NO. 98-255, at 5 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3188 (“The constraints of the Bail Reform Act fail to grant the courts the authority to impose conditions of release geared toward assuring community safety, or the authority to deny release to those defendants who pose an especially grave risk to the safety of the community.”). The Act made substantial changes to the Bail Reform Act of 1966. Id. at 3.
28 S. REP. NO. 98-255, at 3. Senate Report 255 stated the following:

Many of the changes in the Bail Reform Act incorporated in this bill reflect the Committee’s determination that federal bail laws must address the alarming problem of crimes committed by persons on release and must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.

Id.
29 See S. REP. No. 98-255, at 12 (stating that release pending trial is and should continue to be appropriate for “the majority of federal defendants.”); see also United States v. Salerno, 481 U.S. 739, 755 (1987) (holding that detaining a defendant awaiting trial under the Act was constitutional, but that detention should be a “carefully limited exception.”).
released either on their own recognizance, on an unsecured appearance bond, or under a set of conditions contained within the Act that would reasonably assure the appearance of the defendant as required and the “safety of any other person and the community.”

Although it would seem the impetus behind the new language “endanger the safety of any other person or the community” was to address the physical danger a defendant would pose to others if released, the intent behind the language was elaborated upon in reports from the legislature. The Senate Report provided that the term “safety” was to be read broadly enough to encompass more than safety from physical harm.

The statute outlines four factors to be considered when a judge is asked to weigh a defendant’s risk of flight and danger, which include the nature and circumstances of the offense

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30 18 U.S.C. § 3142 (2012); S. Rep. No. 98-255, at 13. These conditions include that the defendant not commit a federal, state, or local crime; cooperate in the collection of DNA samples; and a combination of other conditions that the judge determines to be the least restrictive means to reasonably assure the safety of any other person and the community. § 3142(c). The judge has discretion to impose any number of additional conditions under the power included in § 3142(c)(1)(B)(xiv). Id. The provision under § 3142(c)(1)(B)(xiv) is a “catch-all,” giving a judge flexibility to impose conditions not specifically stated in § 3142(c)(1)(B). S. Rep. No. 98-255, at 13.

31 § 3142. The language relating to safety is contained throughout § 3142, which deals with defendants released pending trial. Id.

32 Cf. § 3142 (listing violent crimes and crimes with lengthy maximum sentences as warranting a detention hearing, and including crimes of violence as a factor to be included in determining what conditions to impose on a defendant). But cf. S. Rep. No. 98-255, at 12–13 (citing a number of dangers relevant to detention under the Act, but not any crimes of an economic nature). The government can move for a detention hearing under § 3142(f)(1) in cases involving crimes of violence, sex trafficking by force, acts of terrorism under 18 U.S.C. § 2332b, and repeat felony offenders of either a crime of violence or act of terrorism. § 3142. These crimes are all violent in nature and address the physical danger a defendant would pose if released pending trial. Id. The two other offenses under § 3142(f)(1) are offenses that carry a maximum sentence of life in prison or death, and when the maximum term of imprisonment is ten years or more under a number of statutes concerning illegal drugs. Id. These address the defendant’s risk of flight. Id. The final listed offenses that warrant a detention hearing are non-violent crimes that involve a minor victim or possession of a firearm or destructive device. Id. This first protects innocent minors and then the community at large from potential violence stemming from the defendant’s possession of a firearm or destructive device. Id. Nothing in the Senate Report mentions economic or pecuniary harm, or crimes of fraud. S. Rep. No. 98-255. The Senate addresses the concerns that danger might be read narrowly to only include physical violence by specifically stating that the “safety of the community refers to the danger that the defendant might engage in criminal activity to the detriment of the community.” Id. at 12. The committee mentions a corrupting influence over a labor union and continuing to sell drugs when released as two examples of defendant dangerousness that is non-physical that would qualify as danger under the Act, but nothing about pecuniary crime or fraud. Id. at 12–13.

33 S. Rep. No. 98-255, at 12. The Senate Report stated the term ‘safety’ should be interpreted broader than only applying to safety from physical violence. Id.
charged, charged, charged, charged, charged, charged, charged, charged, charged, charged, the weight of the evidence, the weight of the evidence, the weight of the evidence, and the nature and seriousness of the danger to any person or the community that would be posed if the defendant was released. If a judge finds that no combination of conditions will ensure the safety of persons and the community after weighing the above factors, he or she must issue a detention order that includes the facts relevant to the detention and why detention was warranted. Looking at these factors and the statute itself, child pornography and drug dealing are two dangers that clearly fit within the legislature’s framework of what constitutes danger. Any allusion to economic harm is conspicuously absent throughout § 3142 and the legislative history behind the changes.

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34 § 3142; see Sex Trafficking of Children or by Force, Fraud, or Coercion, 18 U.S.C. § 1591 (2012) (criminalizing sex trafficking and commercial sex acts of minors). This section of the Act reads “the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device.” § 3142.

35 § 3142. But see Shima Baradaran, Restoring the Presumption of Innocence, 72 Ohio St. L.J. 723, 754 (2011). This statute reads purely “the weight of the evidence against the person.” § 3142(g)(2). However, according to Associate Professor Baradaran, “[t]his legislation has also opened the way for judges to weigh defendants’ guilt in determining whether to release them . . . eviscerating the traditional influence of the presumption of innocence before trial.” Baradaran, supra at 754.

36 § 3142. The first subpart of this section focuses on the defendant’s “character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings.” § 3142(g)(3)(A). The second subpart addresses whether the defendant was “on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law,” at the time the offense was charged or arrest. § 3142(g)(3)(B).

37 § 3142. This section reads “the nature and seriousness of the danger to any person or the community that would be posed by the person’s release,” and continues to state that any conditions relating to the potential forfeiture of property put up as collateral to secure a bond should be looked into so that the property is sufficient to “reasonably assure the appearance of the person as required.” § 3142(g)(4).

38 See § 3142(i). The Act includes the requirement that a Judge support an order to detain a defendant in a written order, which shall “include written findings of fact and a written statement of the reasons for the detention.” § 3142(i)(1).

39 See § 3142; § 1591. The Act states that a judge should take into consideration whether the defendant is charged with an offense that is “a violation of section 1591, . . . or involves a minor victim or a controlled substance.” § 3142. The language in § 1591 protects minor victims from sex trafficking and engaging in commercial sex acts, and imposes penalties if the victim is under fourteen years of age that differ if the victim is under eighteen years of age. § 1591. The language in the pretrial detention statute groups together physical violence with the court’s concerns about curbing drug dealing and protecting minor victims as factors to consider. § 3142.

The new safety prong\textsuperscript{41} that allowed federal judges to detain defendants based on their perceived danger attempted to address the problem of releasing violent criminals.\textsuperscript{42} This new tool in a judge’s arsenal to detain defendants whose crimes and circumstances warranted detention was added to the already present “risk of flight” prong, which addressed only the likelihood of a defendant to show up in court.\textsuperscript{43} However, the legislature intended the concept of danger to be an expansive one, to include “nonphysical harms such as corrupting a union.”\textsuperscript{44}

This reference to the 1979 post-sentencing detention in \textit{United States v. Provenzano}\textsuperscript{45} made that opinion essential. The legislative history provided the framework for courts to interpret danger in increasingly broad ways, including the danger of economic harm.\textsuperscript{46} When discussing the applicable types of danger the Senate Report specifically addressed the threat of non-physical harm in \textit{Provenzano}, as well as the dangers posed by drugs, “emphasiz[ing] that the risk that a defendant will continue to engage in drug trafficking constitutes a danger.”\textsuperscript{47} By specifically addressing certain kinds of danger within the legislative history or enumerating them

\textsuperscript{41} § 3142. A detention hearing to determine whether the judge can reasonably assure the safety of any persons and the community can be held upon motion of the government in a case that involves a crime of violence. § 3142(f)(1)(a).
\textsuperscript{42} See S. REP. NO. 98-255, at 6 (calling the problem of defendants committing crimes when on bail a “deep public concern” that justified giving Judges additional authority to weigh defendant dangerousness). The Senate Report cited a study that included eight jurisdictions in which fifteen percent of defendants were rearrested when released during the pretrial period. \textit{Id.} at 6. Of that fifteen percent, one-third were rearrested more than once, while others were rearrested up to four times and still released on bail. \textit{Id.}
\textsuperscript{43} See S. REP. NO. 98-255, at 5; see also DAVID N. ADAIR, JR, \textbf{THE BAIL REFORM ACT OF 1984}, 8, (Federal Judicial Center, 3rd ed. 2006) (citing cases from eight federal courts of appeals). The risk of flight was inadequate to address the dangerousness of some defendants, which resulted in judges detaining dangerous defendants by imposing a high money bond. S. REP. NO. 98-255, at 5. The standard of proof to detain a defendant as a flight risk has been interpreted to be a preponderance of the evidence based on the Act failing to explicitly state a standard. ADAIR, \textit{supra} at 8.
\textsuperscript{44} S. REP. NO. 98-255, at 13.
\textsuperscript{45} 605 F.2d 85 (3d Cir. 1979).
\textsuperscript{46} See infra notes 63–70 and accompanying text.
\textsuperscript{47} S. REP. NO. 98-255, at 13.
within the Act, it was logical for judges to apply the safety component in those scenarios, such as crimes of violence\textsuperscript{48} and drug crimes.\textsuperscript{49}

**III. Defining Danger**

Pretrial detention is warranted if a judge finds that a defendant may “pose a danger to any other person or the community.”\textsuperscript{50} Merriam-Webster defines danger as “exposure or liability to injury, pain, harm, or loss.”\textsuperscript{51} Due to the broad definition of danger, and no limiting language included in the legislative history of the Act to cabin in this broad definition,\textsuperscript{52} it is reasonable for courts to have found economic danger as a relevant factor to pretrial detention.\textsuperscript{53} The Senate Report’s lack of clear limitations on the extent to which danger applies in this context led courts to interpret danger to include the receipt of child pornography,\textsuperscript{54} selling drugs,\textsuperscript{55} and a broad array of economic harm.\textsuperscript{56}

\textsuperscript{48} § 3142; S. REP. NO. 98-255, at 19. A pretrial detention hearing can be held to determine whether a defendant will be detained in cases that involve violent crimes. § 3142. Crimes where a destructive device is used are included in the statute. \textit{Id}. This reflects the comments within the Senate Report, which viewed a defendant who uses or possesses a destructive device as presenting an unreasonable risk to the safety of others. S. REP. NO. 98-255, at 19.

\textsuperscript{49} § 3142. A pretrial detention hearing can be held to determine whether a defendant will be detained in cases that involve offenses for which the maximum term of imprisonment is ten years or more as listed in the Controlled Substances Act, 21 U.S.C. § 801; the Controlled Substances Import and Export Act, 21 U.S.C. § 951; or Chapter 705 of title 46. § 3142(f)(1)(C). These offenses all relate to illegal drugs. \textit{Id}.

\textsuperscript{50} § 3142 (d)(2).

\textsuperscript{51} Danger Definition, Merriam-Webster Online, http://www.merriam-webster.com/dictionary/danger?show=0&t=1358538730 (last visited Jan. 18, 2013) (listing as an example of danger relating to financial loss, the web page states “[t]here’s less danger you’ll lose your money if you have a wide variety of investments.”).

\textsuperscript{52} S. REP. NO. 98-255, at 12. The Senate Report does the opposite, expanding the definition of danger by specifically stating that danger be read broadly to include more than danger of physical violence. \textit{Id}.

\textsuperscript{53} United States v. Reynolds, 956 F.2d 192, 192 (9th Cir. 1992). The defendant’s motion for bail pending appeal was denied on the basis of economic harm and affirmed by the 9th circuit. \textit{Id}.

\textsuperscript{54} United States v. Schenberger, 498 F. Supp. 2d 738, 743 (D.N.J. 2007). \textit{But see} United States v. Brown, No. 2:07-mj-0279, 2008 WL 1990358 (S.D. Ohio May 1, 2008) (finding the government did not meet the clear and convincing standard of proof required to detain the defendant pending trial as a danger to the community, and discussing similar cases where defendants were not detained, including a defendant who had history of actual child molestation from fifteen years prior). The court applied the safety of the community in a pretrial detention matter to the defendant’s receipt of child pornography, noting the “mere receipt of child pornography is dangerous and encourages illicit activity.” \textit{Schenberger}, 498 F. Supp. at 743. The Defendant, a police officer in charge of the police office’s online and computer systems, was charged with receiving and distributing 799 digital images and 9 movies of child pornography, and was arrested moments before he believed he was going to witness a live molestation of a five-year-old girl via a webcam. \textit{Id}.
In the 1979 case of *United States v. Provenzano*, the United States Court of Appeals for the Third Circuit held that the concept of danger, as applied to defendants awaiting appeal, was broader than merely danger from physical harm and included “a defendant’s propensity to commit crime generally.” While making this claim the judge also wrote that any danger to the community that warrants detention “must be of such dimension that only [the defendant’s] incarceration can protect against it.” When the Act was changed in 1984 to include danger as a factor at the pretrial phase, the interpretation of danger in *Provenzano* was endorsed by the United States Senate as within the intent behind these changes. The Senate Report continued, stating danger should be interpreted broadly to include non-physical types of danger.

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55 United States v. King, 849 F.2d 485, 486 (11th Cir. 1988). The contested issue in *King* was the lower court’s interpretation of danger to the community. *Id.* The defendant was indicted on charges of conducting a continuing criminal enterprise and several counts of possession with intent to distribute cocaine. *Id.* The government moved for pretrial detention of the defendant, which was granted on the basis of both risk of flight and danger to the community. *Id.* at 488. The finding of danger to the community was based on the defendant’s alleged leadership of a high volume cocaine distribution scheme which delivered multi-kilogram quantities of cocaine between various points in the southeastern United States. *Id.* The court based this interpretation of danger on the language in the Senate Report, stating the word ‘danger’ as it applied to the community would apply to a drug dealer’s potential to continue drug dealing if released pending trial. *Id.* at 487 n.2 (quoting S. Rep. No. 98-255, at 13).

56 See United States v. Giampa, 904 F. Supp 238, 358 (D.N.J. 1995) (collecting cases relating to economic harm, including where detention based on economic harm was applied to detention matters post-conviction both pending sentencing and appeal for mail fraud, a fraudulent check cashing scheme, and interstate transportation of forged securities). But see United States v. Persaud, No. 05-CR-368, 2007 WL 1074906, at *1 (N.D.N.Y. Apr. 5, 2007) (holding that economic harm is relevant to bail decisions according to the Act, but finding conditions of bail for Defendant set by the magistrate judge based on potential economic harm to the community were too restrictive); United States v. Gentry, 455 F. Supp. 2d 1018, 1032 (D. Ariz. 2006) (discussing pretrial detention of the Defendant, who had a total of fifty-nine fraud-related charges, and finding that any perceived economic danger weighed neither for nor against release, instead finding risk of flight a basis for pretrial detention); United States v. Stein, No. S105 CRIM 0888(LAK), 2005 WL 3071272, at *1–2 (S.D.N.Y. Nov. 15, 2005) (finding insufficient economic danger to the community for pretrial detention in what was described as “the largest criminal tax case in United States history,” and instead detaining defendant as a risk of flight).

57 605 F.2d 85 (3d Cir. 1979).

58 *Provenzano*, 605 F.2d at 89, 95. The opinion quoted the language of the district judge, who “recognized the ambiguity inherent in the clause ‘danger to . . . the community.’” *Id.* at 95. The district judge was convinced that economic danger was “clearly contemplated within the meaning of the Act” as the statute relating to detention pending appeal was written in 1979. *Id.*

59 *Provenzano*, 605 F.2d at 94.

60 See 18 U.S.C. § 3142 (2012); *Provenzano*, 605 F.2d at 94; S. Rep. No. 98-255, at 12 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3195. “This principle was recently endorsed in [*Provenzano*] in which it was held that the concept of danger as used in current 18 U.S.C. § 3148 extended to nonphysical harms such as corrupting a union.” *Id.* at 12–13.

61 S. Rep. No. 98-255, at 12. “The committee intends that the concern about safety be given a broader construction than merely danger of harm involving physical violence.” *Id.*
In *Provenzano*, defendant Anthony Provenzano had been convicted of violating federal racketeering laws and was sentenced to twenty years in prison for using his position in the Teamsters Union for his own financial gain. Following sentencing, Provenzano’s bail was revoked because the court found that Provenzano would pose a danger to the community if released. District Judge H. Curtis Meanor based this decision on Provenzano’s perceived ability to continue influencing the union while on bail awaiting appeal, his criminal record containing similar convictions, and the burden of proof pending appeal being greater than at the pretrial phase.

In addressing Provenzano’s risk of flight at the trial court, Judge Meanor found that due to Provenzano’s ties to the community and record of prior court appearances, bail could be set to minimize any potential flight risk. When Judge Meanor decided to base detention solely on Provenzano’s danger to the community, he “recognized the ambiguity inherent in the clause ‘danger . . . to the community.’” Judge Arlin M. Adams, who authored the opinion for the United States Court of Appeals for the Third Circuit, wrote the language that was referenced in

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62 *Provenzano*, 605 F.2d at 88.
63 *Id.*
64 *Provenzano*, 605 F.2d at 89. There was concern that Provenzano would be able to control the union through his family if released. *Id.* Provenzano’s twenty-four year old daughter took over her father’s position as Secretary-Treasurer of the union when Provenzano resigned due to a murder conviction that was subsequently reversed on appeal. *Id* at 89 n.7. Provenzano’s brothers held the positions of President and Vice President of the union. *Id.*
65 *Id.* The court noted the conviction in this case was Provenzano’s third felony for some type of labor extortion or racketeering. *Id.*
66 See United States v. Madoff, 316 F. App’x 58 (2d Cir. 2009); *Provenzano*, 605 F.2d at 88. Provenzano’s bail was complicated, the court said, because while awaiting trial he was in prison for an unrelated murder conviction which was later reversed by the New York Supreme Court Appellate Division. *Provenzano*, 605 F.2d at 88. When Provenzano was released on bail in the underlying case he was also released in the case before this court. *Id.* However, when Provenzano was convicted and sentenced, the court revoked his bail pending appeal finding he would present a danger to the community if released. *Id.* at 89. This is similar to the decision concerning Madoff, who was on bail but was subsequently detained after he plead guilty due to the shift of the burden of proof to Madoff. *Madoff*, 316 F. App’x at 59–60. However, even when up on appeal the Second Circuit did not detain Madoff as an economic danger and instead affirmed the district court’s decision to detain Madoff as a risk of flight. *Id.* The Second Circuit opinion did not address whether Madoff posed a threat of economic harm warranting his detention because the district court detained Madoff solely as a risk of flight. *Id.* at 60.
67 *Provenzano*, 605 F.2d at 88.
the Senate Report accompanying the changes to the Act in 1984, in that a judge can consider “any . . . information indicative of the defendant’s propensity to commit crime generally.”

Judge Adams’ thorough analysis was later referenced in a one-page opinion, submitted without oral argument, by the court in Reynolds. The Reynolds court made the sweeping assertion “that danger may, at least in some cases, encompass pecuniary or economic harm,” without citing any potential factors that were relevant in the case below. Reynolds is controlling for the United States Court of Appeals for the Ninth Circuit, but this view has not been adopted by other appellate courts.

IV. Using Conditions to Prevent Danger

The Reynolds opinion was cited by both Madoff and United States v. Jinwright to support economic danger as a factor relevant to detention. In Jinwright, the court found that Anthony Jinwright, the senior pastor at Greater Salem Church (“GSC”), “posed a risk to the economic safety of the community, particularly because Jinwright’s crimes involved manipulating the financial operations of the church where he worked.” Jinwright was convicted of conspiracy to defraud the Internal Revenue Service (“IRS”), six counts of tax evasion for the years 2002 through 2007, and six counts of filing a false tax return for the years 2002 through 2007. Jinwright had been out on bail pending trial and requested release pending

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69 Provenzano, 605 F.2d at 96.
70 See generally United States v. Reynolds, 956 F.2d 192, 192 (9th Cir. 1992) (stating the panel found the case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4).
71 See Reynolds, 956 F.2d at 192. The only fact stated by the court that would weigh on whether to detain the defendant was that he had violated the terms of his pretrial release. Id.
72 See ADAIR, supra note 43, at 8 (describing dangerousness as interpreted by various courts of appeals, including the Ninth Circuit’s recognition of economic danger).
75 Jinwright, 2010 WL 2926084, at *1.
76 Jinwright, 2010 WL 2926084, at *1 (listing the crimes with which the defendant was charged).
sentencing after the jury returned a guilty verdict.\textsuperscript{77} Jinwright argued that economic harm was not a proper basis for detention pending sentencing,\textsuperscript{78} and in the alternative, if it was, “the court’s imposition of supervisory conditions would ameliorate Defendant’s economic threat to the community.”\textsuperscript{79}

To address Jinwright’s first position, the court looked to the plain language of the statute, briefly engaging in statutory interpretation after finding only the word ‘danger’ expressly stated within the act, but no mention of either physical or economic danger.\textsuperscript{80} Unable to reach a definitive conclusion, the court then found there was “ample authority” suggesting economic danger was relevant to detention matters, citing \textit{Reynolds} and other cases that interpreted danger to include non-physical or economic harm.\textsuperscript{81} The court then concluded, after citing case law from several districts over multiple decades, that economic danger provided an adequate basis for detention pending sentencing under 18 U.S.C. § 3143(a)(1).\textsuperscript{82}

\begin{itemize}
\item \textsuperscript{77} \textit{Id.}
\item \textsuperscript{78} See 18 U.S.C. § 3143 (2012); \textit{Jinwright}, 2010 WL 2926084, at *2.
\item \textsuperscript{79} \textit{Jinwright}, 2010 WL 2926084, at *4. See also 18 U.S.C. § 3143 (stating the statute is for post-conviction cases).
\item The conditions proposed by Jinwright were as follows:

\begin{itemize}
\item [The] requirements that Defendant: (1) resign from all roles relating to financial decisions of GSC;
\item (2) accept no funds greater than $300,000 from GSC;
\item (3) abstain from solicitation of contributions from GSC members while on GSC property or using GSC resources;
\item (4) submit to continued verification by the Probation Office confirming that Defendant is not receiving improper funds;
\item and (5) resign from membership on GSC’s Board of Directors.
\end{itemize}

\begin{itemize}
\item In sum, Defendant offers his assurances that he has learned his lesson and invites the Court, the Government, and the Probation Office to closely monitor his financial activities, as well as those of the church.
\item \textit{Jinwright}, 2010 WL 2926084, at *4.
\item However, the court did not find the suggested conditions would overcome the presumption of detention under § 3143. \textit{Id.}
\item \textsuperscript{80} \textit{Jinwright}, 2010 WL 2926084, at *2. The court noted that the words ‘danger’ and ‘safety’ could be used interchangeably, as could the words ‘economic’ and ‘physical.’ \textit{Id.} Congress has not included either [physical or economic] . . . terms in the statute.” \textit{Id.} “It is the statute’s phrase as a whole and whether it encompasses protection for the community from defendants who commit pecuniary crimes that is of utmost importance.” \textit{Id.}
\item \textsuperscript{82} \textit{Jinwright}, 2010 WL 2926084, at *2–3. The court discusses cases spanning 1986 through 2010, in district courts in the states of Texas, Pennsylvania, Florida, and North Carolina. \textit{Id.}
\end{itemize}
Finding economic danger relevant, the court turned to address whether any number of conditions would prevent Jinwright from posing a threat of economic harm to any other person or the community. The court explained there was a “heavy burden of proof” within § 3143 that defendants had to meet before being released, and that any conditions had to provide clear and convincing evidence that Jinwright would not pose an economic threat if released.\(^83\) To meet this burden, Jinwright suggested a number of conditions so restrictive that the court questioned their legality under the First Amendment.\(^84\) Jinwright also argued it would be less expensive for the government to release him than to jail him,\(^85\) and easier for him to repay his debt to the IRS if released.\(^86\) The court dismissed these arguments, calling the first “meritless,”\(^87\) and the second insufficient due to the high standard of presenting clear and convincing evidence as required under § 3143.\(^88\)

This comment agrees with Jinwright’s general argument that imposing conditions of release will prevent economic harm. However, Jinwright had the burden of proof because this

\(^83\) See § 3143; Jinwright, 2010 WL 2926084, at *4. A judge shall order a defendant who has been found guilty awaiting sentencing to be detained unless the judge finds by clear and convincing evidence that the defendant is not likely to pose a danger to the safety of any other person or the community. § 3143(a)(1). Jinwright faced a “heavy burden of proof” under § 3143(a)(1) after he was found guilty. Jinwright, 2010 WL 2926084, at *4.

\(^84\) Jinwright, 2010 WL 2926084, at *4. See supra note 79 (listing conditions suggested by Jinwright). The court found that the “conditions [were] inadequate to overcome the presumption of detention” without an analysis of the restraints imposed on the court’s power to impose conditions under the First Amendment. Jinwright, 2010 WL 2926084, at *4.

\(^85\) Jinwright, 2010 WL 2926084, at *4. Jinwright cited the cost of detention and his ability to pay back the IRS as factors that would prove to be an economic benefit to the government if he was allowed to remain free. Id.

\(^86\) See § 3143; Jinwright, 2010 WL 2926084, at *4. The court reviewed an affidavit from one of Jinwright’s associates supporting the theory that Jinwright would be in a better position to conduct his business affairs if out on bail, but the court stated this difficulty did not overcome the burden of proof placed on defendants under § 3143(a)(1). Jinwright, 2010 WL 2926084, at *4.

\(^87\) Jinwright, 2010 WL 2926084, at *4. Jinwright argued that the government needed “all the tax revenue it can get, since it is running at a substantial deficit.” Id. The court sarcastically responded to this position by stating the amount Jinwright owed to the IRS was substantial but would hardly impact the national debt. Id.

\(^88\) Jinwright, 2010 WL 2926084, at *4. “Defendant’s ability to increase his income is not a sufficient basis to permit his pre-sentence release.” Id. Although Jinwright would be in the county jail, he would still have access to a phone, the ability to receive visitors, and to send and receive mail. Id. The court found this partial isolation from the outside world would not stop Jinwright from liquidating his assets to repay the IRS. Id.
was a post-conviction issue. This comment specifically addresses pretrial detention matters—
when the burden of proof is on the government and the presumption of innocence remains in the
defendant. Like Jinwright, Madoff was detained once he pleading guilty and was saddled with the
burden of proof. However, the court did not find that Madoff’s continued release posed a
threat of economic harm and instead detained him as a risk of flight due to his incentive to flee
when considering his age and potentially lengthy sentence.

Similar to the decision in Madoff, the court in United States v. Persaud found that
pretrial detention was inappropriate and that the imposition of supervisory conditions could
prevent economic danger. There are a number of standard release conditions a judge is able to
 impose on a defendant. In addition, a judge has discretion to include any number of additional
conditions not expressly listed, giving a judge great power included within the plain language of
the statute and intended by the legislature, not a power subsequently read into the Act by the
courts. The Senate Report stated that granting judges this discretion was a “catch-all,”

89 Jinwright, 2010 WL 2926084, at *1 (stating the burden is on the defendant after trial and the standard of proof is
clear and convincing).
90 See § 3143; United States v. Madoff, 316 F. App’x 58, 59 (2d Cir. 2009). “[Section] 3143(a) places the burden on
a defendant to demonstrate by clear and convincing evidence that he is not likely to flee or pose a danger to the
safety of others or the community.” Madoff, 316 F. App’x at 59.
91 Madoff, 316 F. App’x at 59. Madoff was detained as a risk of flight and not as a threat of economic harm to other
persons or the community. Id. The appellate court discussed Madoff’s threat of economic harm generally because
economic harm was not found to warrant detention at the trial court when Madoff’s bail was denied. Id. The
appellate court did find, however, “that there was substantial evidence in the record to support a finding by the
district court that bail should be denied” due to Madoff’s risk of economic harm. Id. at 59–60.
93 Id. at *1 (listing conditions that were appropriate to prevent economic harm when defendant was released).
94 18 U.S.C. § 3142 (2012). The enumerated conditions of bond include: remaining in the custody of a designated
person who agrees to report any violation of a release condition to the court; maintaining or actively seeking
employment; maintaining or starting an educational program; abiding by specified restrictions on personal
associations, place of abode, or travel; avoiding contact with alleged victim or potential witnesses; reporting on a
regular basis to a designated agency; complying with a curfew; refraining from possessing a firearm or other
dangerous weapons; refraining from the use of alcohol or drugs; undergoing medical or psychological treatment;
agreeing to forfeit any property upon failure to appear, and executing a surety bond. § 3142(c).
95 See § 3142; United States v. Madoff, 586 F. Supp. 2d 240, 251–52 (S.D.N.Y. 2009). A judge has freedom under
the Act to impose “any other condition that is deemed reasonably necessary to assure the appearance of the person
as required and to assure the safety of any other person and the community.” § 3142(c)(1)(B)(xiv). Judge Ellis
stated:
advancing a judge’s power to keep the community safe while allowing defendants to remain free pending trial.  

When discussing the array of bond conditions available to a federal judge to impose on a defendant, Persaud addresses an important point. Esther Persaud was released on bail pending trial with certain conditions as part of that bail. Later, on review, the conditions were determined to be too restrictive. This is due to the limiting language in the Act, which reigns in a judge to impose only the “least restrictive . . . condition or combination of conditions . . . [that will assure] the safety of any other person and the community.”

Persaud was charged with one count of conspiracy to commit wire fraud, one count of making false statements in a bankruptcy hearing, one count of conspiracy to launder monetary instruments, and numerous substantive counts of wire fraud. Persaud engaged in falsely representing herself as someone working at a financial institution who could help investors obtain funding for investment projects. After Persaud and her co-defendants illegally obtained the money, Persaud participated in attempts to launder the money.

Courts should approach such ‘invitations’ to broadly construe statutes with caution. The line between construing a statute and judicial lawmaking can become blurred. Because the Committee indicates that ‘harm’ to the community should not be limited to ‘physical violence,’ it does not mean a court should be able to identify other types of harm and read them into the statute.

Madoff, 586 F. Supp. 2d at 251–52.

S. REP. NO. 98-255, at 13 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3196 (granting the judge such discretion permits a judge to impose a number of other conditions not mentioned in the Act).

See generally Persaud, 2007 WL 1074906, at *1 (finding one of the conditions imposed by the magistrate judge too restrictive).

Id. “[T]he court fails to see why the extensive financial disclosures are reasonably necessary . . . .”

§ 3142(c). The judge may order the defendant released “subject to the least restrictive further condition, or combination of conditions, that such [judge] determines will reasonably assure the . . . safety of any other person and the community.” Id.

United States v. Persaud, 411 F. App’x 431, 432 (2d Cir. 2011) (listing Persaud’s convictions at the trial court).

Id.

Id.
Persaud was granted release on her own recognizance subject to an order that Persaud follow additional conditions not expressly listed in the Act. These conditions required Persaud provide a probation officer with access to any requested financial information, refrain from opening additional lines of credit, and notify her employer of the risks of employing her due to her criminal record and personal history. These conditions were specifically applied to Persaud’s bail to address any potential economic harm she would pose to the community if released pending trial.

Persaud contested these conditions, arguing they were not the least restrictive conditions that could have been imposed. Persaud also disputed the judge’s finding that economic harm constituted a danger within the meaning of the Act. The district judge held that the magistrate judge was correct to use economic harm as a factor in determining whether pretrial detention was warranted and in imposing conditions of bail to address these concerns, but agreed with Persaud that the conditions were overly restrictive.

103 Persaud, 2007 WL 1074906, at *1. See generally § 3142(c)(1) (listing conditions a judge can impose on a defendant).
104 Persaud, 2007 WL 1074906, at *1; see also § 3142(c)(1)(B)(xiv); S. REP. No. 98-255, at 13 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3196 (describing § 3142(c)(1)(B)(xiv) is a catch-all provision). Persaud’s conditions were imposed under the power granted to a judge to impose additional conditions of bail that are “reasonably necessary to assure the . . . safety of any other person and the community.” § 3142(c)(1)(B)(xiv).
105 Persaud, 2007 WL 1074906, at *1 (finding the conditions of bail imposed on Persaud adequate to prevent further economic harm).
106 Id. (stating that Persaud contested the conditions on the grounds that they exceeded the authority given to the judge because they were not the least restrictive as required under the Act.)
107 Id. (stating Persaud disputed the finding that economic harm was relevant to detention matters under the Bail Reform Act of 1984).
108 Id.; see also United States v. Rechnitzer, No. 05-CR-368, 2007 WL 676671, at *1 (N.D.N.Y. Feb. 28, 2007) (listing the conditions imposed on Persaud to address the threat of economic harm and her lack of disclosure of certain facts to Pretrial Services). “Judge [David] Homer held . . . that economic harm qualifies as a danger within the contemplation of the Bail Reform Act. This Court agrees with Judge Homer.” Persaud, 2007 WL 1074906, at *1.
109 § 3142(c)(1)(B); Persaud, 2007 WL 1074906, at *1. The district judge thought the conditions could be relaxed, so he changed the conditions to allow Persaud to sign a general waiver, if requested by Pretrial Services, that would allow Pretrial Services access to any of Persaud’s bank and financial accounts without violating Persaud’s rights under the Fifth Amendment. Persaud, 2007 WL 1074906, at *1. The judge must impose the “least restrictive” conditions that will reasonably assure the safety of the community. § 3142(c)(1)(B).
The extent of the allegations against Persaud prior to her trial were great,\(^\text{110}\) and the district court judge found that economic harm was a valid consideration in a pretrial detention hearing.\(^\text{111}\) Even though the fraudulent scheme generated US$1.6 million for Persaud and three co-defendants charged in the case,\(^\text{112}\) the court did not find that Persaud posed enough of an economic danger to the community to detain her before trial.\(^\text{113}\) This decision was contemplated in light of Persaud attempting to launder the illegally obtained money through a series of financial transactions.\(^\text{114}\) Persaud was eventually convicted of all the above charges and sentenced to 188 months in prison.\(^\text{115}\) Persaud’s husband, one of the co-defendants, also was sentenced to 188 months in prison.\(^\text{116}\)

Although the weight of the evidence against Persaud was strong before trial and the amount of the fraud exceeded one million dollars, the district court found that the magistrate judge imposed unnecessary conditions of bail on Persaud—conditions that were too restrictive.\(^\text{117}\) Instead of requiring Persaud to provide a probation officer with access to any requested financial information, the district court ordered Persaud to sign a consent form authorizing Pretrial Services to obtain information from any bank or trust companies with which Persaud had an account of any type.\(^\text{118}\)

\(^{110}\) See United States v. Persaud, 411 F. App’x 431, 432 (2d Cir. 2011) (stating two defendants in the case plead guilty as part of their plea agreements with the government).

\(^{111}\) Persaud, 2007 WL 1074906, at *1 (agreeing with the magistrate judge that economic harm was contemplated as a harm within the Act).

\(^{112}\) Persaud, 411 F. App’x at 432.

\(^{113}\) Persaud, 2007 WL 1074906, at *1. The government did not move for detention under § 3142(f) on grounds of danger to the community. Id. Persaud was released on her own recognizance, subject to certain conditions included as part of Persaud’s bail. Id.

\(^{114}\) Persaud, 411 F. App’x at 433 (stating Persaud was found guilty for conspiracy to launder monetary instruments).

\(^{115}\) Id. Of the “numerous counts” Persaud was facing, she was convicted of all but one count of wire fraud. Id.

\(^{116}\) Id. at 436 (denying Persaud’s husband’s claim that his 188 month prison sentence was procedurally and substantially unreasonable).

\(^{117}\) Id.

\(^{118}\) Id.
The important point examined here by using *Persaud* is the limiting language of the Act that restricts the power of judges when imposing conditions of bail—any conditions must be the least restrictive in achieving the goal, whether that goal is appearance in court or safety from danger.\footnote{See *Persaud*, 2007 WL 1074906, at *1. See generally 18 U.S.C. § 3142 (2012) (stating a judge must impose the least restrictive conditions on a defendant awaiting trial). When reviewing the conditions imposed by the magistrate judge, the court struck down the condition that was too restrictive and replaced it with one that was less restrictive. *Persaud*, 2007 WL 1074906, at *1.} Conditions of bail are immediately available for appellate review, so if the conditions are too restrictive, they can be easily changed.\footnote{United States v. Salerno, 481 U.S. 739, 746 (1987) (stating a decision by a judge to impose conditions on a defendant is immediately available for appellate review).} In reviewing the conditions imposed by the magistrate judge in *Persaud*, the district court judge determined that some of the conditions were necessary to address the potential risk of economic harm when Persaud was released, while one condition was too restrictive.\footnote{See *Persaud*, 2007 WL 1074906, at *1.} Even though Persaud was not detained before trial, the threat of economic harm she posed if released was a consideration when determining what conditions to impose on her, and conditions were chosen and imposed to address this threat.\footnote{See id. (holding that danger qualifies as a relevant factor in pretrial detention and agreeing with the magistrate judge that certain conditions imposed on Persaud were necessary to ensure the safety of the community from this danger when she was released).} This is how judges should address potentially economically dangerous criminals—release them with conditions that render any attempts to continue such danger impossible.

V. Releasing Madoff was the Correct Decision

Madoff is a household name, reviled by all, and notorious throughout the world.\footnote{See generally Leigh Remizowski, Victims Frustrated by New Attention to Madoff, CNN MONEY (Oct. 28, 2011, 8:33 AM), http://money.cnn.com/2011/10/27/news/companies/madoff_victims/index.htm (calling Madoff a “notorious Ponzi schemer”).} However, even after Madoff’s pretrial release, the question remained as to what factors should guide a judge when determining whether to detain a defendant prior to trial on the basis of...
economic harm. Judge Ellis knew the world was watching and wanted Madoff to be detained, but did not succumb to this pressure and interpreted the Act as was intended when drafted by the legislature.

Even after Madoff admitted to running one of the largest Ponzi schemes ever imagined, he was not detained after his initial court appearance, nor was he detained after the government moved for a pretrial detention hearing due to changed circumstances. This was despite any economic danger Madoff posed to the victims by his ability to dissipate his assets while on bond—assets that would be subject to forfeiture if convicted.

Initially, Madoff and the government agreed to a laundry list of conditions. However, after Madoff was caught sending

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124 Cf. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2011) (accounting for the amount of loss under section 2B1.1(b)(1)(P), and the number of people affected under section 2B1.1(b)(2)(C), when determining the length of imprisonment under fraud and related pecuniary crimes); Madoff Index, supra note 2 (citing a great number of persons affected by Madoff and a large dollar amount of fraud).

125 See generally Government Reply Brief at 1, United States v. Madoff, 586 F. Supp 2d 240 (S.D.N.Y. 2009), available at http://www.justice.gov/usao/nys/madoff/madoffreply.pdf [hereinafter Government Reply Brief] (stating “the eyes of the world” were on Madoff, as well as the eyes of prosecutors and regulatory authorities); Joanna Molly, Take Comfort, Crooks: Judges May Send You to Posh Pad Instead of Jail, Just Like Madoff, N.Y. DAILY NEWS (Jan. 7, 2009, 1:54 AM), http://www.nydailynews.com/news/crime/comfort-crooks-judges-send-posh-pad-jail-madoff-article-1.422446 (suggesting incoming mail be checked for grappling hooks and expressing outrage over the release of Madoff). But see Keep Bernard Madoff Free! Why It’s a Bad Idea to Jail People Before Trial, NEWSWEEK (Jan. 8, 2009), http://www.thedailybeast.com/newsweek/2009/01/09/keep-bernard-madoff-free.html [hereinafter Keep Madoff Free] (stating the release of Madoff pending trial was an unpopular view, but should be done). “[T]he way to make things fairer isn’t to jail Madoff before trial but to stop automatically jailing everyone else.” Keep Madoff Free, supra.

126 Government Memorandum at 1, United States v. Madoff, 586 F. Supp. 2d 240 (S.D.N.Y. 2009), available at http://www.justice.gov/usao/nys/madoff/madofffiled.pdf [hereinafter Government Memorandum]. “[T]he complaint alleged the defendant had admitted to two senior employees . . . that the investment advisory business that he ran was, ‘basically, a giant Ponzi scheme,’ and that he estimated the losses from his fraud to be approximately [US]$50 billion.” Id.

127 United States v. Madoff, 586 F. Supp. 2d 240, 253–54 (S.D.N.Y. 2009) (finding economic harm was intended within the Act, but holding that the government had not met its burden of proof in a pretrial detention context); Government Memorandum, supra note 126, at 1–2. (listing the initial conditions agreed on by Madoff and the government to allow Madoff’s continued freedom after being charged).

128 United States v. Madoff, No. 09 Cr. 213 (DC), 2012 WL 1142292, at *1 (N.D.N.Y. Apr. 20, 2009) (listing a variety of personal and business assets, which “in the event of conviction, [would] be subject to forfeiture.”).

129 Madoff, 586 F. Supp. 2d at 244–45 (listing original conditions agreed upon between Madoff and the government).
packages of expensive personal items, potentially valued at upwards of US$1 million, to friends and relatives, the government moved for pretrial detention.  

The personal items were returned to Madoff before the detention hearing, in which the government moved for detention due in part to Madoff’s threat of economic danger. Even following the possible loss of US$1 million for Madoff’s victims through Madoff’s attempted disbursement of these luxury items, and with more to potentially follow, the court found there were ways to shape the conditions of Madoff’s bail that would allow him to remain free. The economic danger Madoff presented to the community directly related to his potential to hide or disperse his assets, and the conditions of release specifically addressed this concept of danger. A number of conditions were incorporated from other sources, and new conditions included the requirement that Madoff:

[C]ompile an inventory of all valuable portable items in [Madoff’s] Manhattan home. In addition to providing this inventory to the Government, Casale Associates, or another security company approved by the Government, SHALL check the inventory once every two weeks. Casale Associates, or another security company approved by the Government, SHALL search all outgoing physical mail to ensure that no property has been transferred. The Government and Madoff shall agree on a threshold value for inventory items within one week of this Order.

130 Government Memorandum, supra note 126, at 4. The personal items sent out included multiple watches, necklaces, cufflinks, and other assorted jewelry. Id. “[T]he value of those items could exceed [US]$1 million.” Id.

131 Madoff, 586 F. Supp. 2d at 243–44 (“The specific harm identified by the Government is the pretrial dissipation of assets.”); Government Memorandum, supra note 126, at 3–4 (analyzing cases on economic harm to support the detention of Madoff on the grounds that he would pose an economic threat if released).

132 See Madoff, 586 F. Supp. 2d at 243–44 (imposing conditions on Madoff to prevent economic harm).

133 Id. at 255. Judge Ellis said the conditions initially imposed on Madoff “appear[ed] well considered” and “greatly diminished” Madoff’s ability to harm the community by hiding or dispersing his assets while on bail pending sentencing. Id. The additional conditions were added to provide further protection the judge thought was necessary. Id.

134 Id. at 243–44. The restrictions set forth in the preliminary injunction entered on December 18, 2008, in the civil case brought by the U.S. Securities and Exchange Commission before District Judge Louis L. Stanton, were incorporated into the current bail conditions, as were the restrictions set forth in the voluntary restraint agreement signed by Madoff’s wife on December 26, 2008. Id.

135 Id. at 243–44 (emphasis in original).
During his time on bond, Madoff did not flee or pose any economic danger due to these conditions placed on Madoff by Judge Ellis and two other magistrate judges. 136 There were no further issues during Madoff’s release pending trial, and Madoff was, at the time this comment was written, in federal prison. 137 However, Madoff was allowed to remain free pursuant to the intention of the Act in the time between his first court appearance and his guilty plea. 138

The conditions imposed on Madoff made it much more difficult for Madoff to hide or transfer any of his possessions or assets that would soon be subject to forfeiture. 139 The conditions of bond were imposed to address these very concerns, 140 and led to Judge Ellis’ finding that the government had not met its burden of providing clear and convincing evidence that Madoff would, or even could, continue to pose a threat of economic harm. 141 Madoff complied with the conditions and eventually pled guilty to eleven felony counts, from securities fraud and money laundering to perjury. 142 He was sentenced to 150 years in prison, a life sentence for anyone, more so for seventy-one-year-old Madoff. 143 The lawsuits to retrieve the money invested in Madoff’s scheme were both numerous and for sizable amounts, and reflect the

136 See Molly, supra note 125. See generally 18 U.S.C. § 3142(c)(1) (2012) (stating conditions are placed on a defendant to assure their appearance in court and the safety of the community). The two magistrate judges initially involved in imposing conditions of bail on Madoff were Judges Gabriel Gorenstein and Theodore Katz. Molly, supra note 125. The judge who presided over the pretrial detention hearing was Magistrate Judge Ellis. Id.
138 See supra note 29 and accompanying text.
139 Government Memorandum, supra note 126, at 3–4. The government took the position that Madoff had the potential to dissipate assets, including “valuable items of personal property in [Madoff’s] three residences,” and that Madoff’s continued release while awaiting trial represented a “danger to the community of additional economic harm.” Id.
140 Madoff, 586 F. Supp. 2d at 255. The conditions placed on Madoff “have greatly diminished Madoff’s ability to effectuate any kind of transfer” of assets while released on bail. Id.
141 Id. at 254. “The Government has failed to meet the additional burden of proving by clear and convincing evidence that there is no condition or combination of conditions that will reasonably prevent dissipation of [Madoff’s] property.” Id.
142 Madoff Index, supra note 2.
extent of Madoff’s impact on society—his fraud was far-reaching in both dollar amount and in the number of people affected. In May 2010, a group of more than 700,000 of Madoff’s international investors settled with their banks for US$15.5 billion. These statistics satisfy two potentially relevant factors to pretrial detention due to the threat of economic harm incorporated in the sentencing guidelines: the dollar amount of the fraud and the number of persons affected by the fraud. After his guilty plea, Madoff was required to forfeit upwards of US$170 billion.

While there were sizable allegations against Madoff, his threat of economic harm if on bond was not found to be enough to warrant pretrial detention. This threat did not reach the threshold in part because the burden of proof rests with the government to present clear and convincing evidence that a defendant poses a danger when released, regardless of the conditions imposed on the defendant’s release. The burden shifts to the defendant after the defendant

144 See Madoff Index, supra note 2; see also Madoff Client List, WALL ST. J., http://online.wsj.com/public/resources/documents/madoffclientlist020409.pdf (listing more than 12,000 Madoff victims, both individuals and corporations, on a spreadsheet as part of a bankruptcy court filing).

145 See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b) (2011). There are two factors relevant to the sentencing guidelines that are relevant in Madoff: the amount of loss, under section 2B1.1(b)(1)(P), and the number of victims, under section 2B1.1(b)(2)(C). Id.

146 See Government Reply Brief, supra note 125, at 2 (arguing that the case against Madoff was strong because Madoff “admitted his crimes to numerous witnesses, including [Federal Bureau of Investigation] agents”); see also Binyamin Appelbaum, et. al., All Just One Big Lie, WASH. POST (Dec. 13, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/12/12/AR2008121203970.html?hpid=topnews.

147 Madoff was initially charged, in a figure that matters in a pretrial detention context, with stealing as much as US$50 billion to cover his losses in what was called the largest fraud in the history of Wall Street. Id.

148 See United States v. Madoff, 586 F. Supp. 2d 240, 254 (S.D.N.Y. 2009). The court found that “the Government fail[ed] to provide sufficient evidence that any potential future dissemination of Madoff’s assets would rise to the level of an economic harm cognizable under [the Act].” Id.

149 18 U.S.C. § 3142 (2012). The standard of proof for pretrial detention matters is to present clear and convincing evidence. Id. If the government does not provide clear and convincing evidence that a defendant will pose a danger to the community upon being released pending trial, then the defendant will be released on bail. Id.
pleads or is found guilty.\textsuperscript{151} In addition to the burden of proof, another factor that separates the phases of pretrial detention from detention awaiting sentencing or appeal is the presumption of innocence.\textsuperscript{152} However, because the danger language is the same in both statutes concerning these matters—pending trial, and pending sentence or appeal—it is reasonable for courts to have interpreted harm in the way that they have, to include economic harm as a relevant factor in all stages of a criminal trial.\textsuperscript{153}

The question of how any perceived threat of economic harm should be applied to the danger prong of the Act is a question few appellate courts have clearly addressed.\textsuperscript{154} The analysis in \textit{Reynolds} is nonexistent.\textsuperscript{155} This makes for a limited amount of authority clearly

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\item \textsuperscript{151} 18 U.S.C. § 3143 (2012). After conviction, the burden is on a defendant to provide clear and convincing evidence that they are not likely to pose a danger to the community pending sentencing or appeal. \textit{Id.}
\item \textsuperscript{152} See \textit{Madoff}, 586 F. Supp. 2d at 252 (“The presumption of innocence remains with the defendant in the context of pretrial detention.”); see also § 3142 (“Nothing in this section shall be construed as modifying or limiting the presumption of innocence.”); United States v. Jinwright, 3:09-cr-00067-W, 2010 WL 2926084 (W.D.N.C. July 23, 2010). But see United States v. Freitas, 602 F. Supp. 1283, 1294–95 (N.D. Cal. 1985) (detaining the defendant pending trial based on the defendant’s past involvement in drug activity and other crimes); Baradaran, supra note 35, at 753 (“The \textit{Freitas} court essentially found that the defendant was guilty of drug manufacturing . . . .”). During trial, Jinwright, who was out on bail, “spent nearly three days offering testimony to the jury that he had neither knowledge of nor involvement in a conspiracy to commit tax fraud and tax evasion.” \textit{Jinwright}, 2010 WL 2926084, at *4. When the jury convicted Jinwright, they found his testimony was not credible. \textit{Id.} Additionally, due to his guilt, it was proven that Jinwright was able to defraud the Internal Revenue Service, showing he had “experience in concealing financial resources that a periodic audit from the Probation Office might not uncover.” \textit{Id.} The court was not persuaded by Jinwright’s argument that he would remove himself from the financial dealings of the church of which he was the pastor. \textit{Id.} However, in Freitas, the defendant was facing charges of manufacturing methamphetamine and conspiracy to manufacture methamphetamine. \textit{Freitas}, 602 F. Supp. at 1295. The court stated that “the charges are supported by strong evidence” when deciding to detain Freitas pending trial. \textit{Id.}
\item \textsuperscript{153} \textit{Jinwright}, 2010 WL 2926084. Before discussing the authority, which held that the danger referred to in the Bail Reform Act of 1984 was not strictly physical but included economic harm, the court noted that the cases cited by the parties included matters concerning pretrial detention under § 3142, detention pending sentencing under § 3143(a), and detention pending appeal under § 3143(b). \textit{Id.} at *2 (citing \textit{Madoff}, 586 F. Supp. 2d at 252). The court stated that the burden of proof may be different in these three circumstances, but the terminology “danger to the safety of any other person or the community” included in all three sections, which makes up one Bail Reform Act, should be given the same meaning. \textit{Id.}
\item \textsuperscript{154} United States v. Reynolds, 956 F.2d 192, 192 (9th Cir. 1992) (holding that in some circumstances danger under the Act includes pecuniary or economic harm); United States v. Provenzano, 605 F.2d 85, 89 (3d Cir. 1979) (holding the concept of danger extended to non-physical harms such as corrupting a union).
\item \textsuperscript{155} \textit{Reynolds}, 956 F.2d at 192; United States v. Parr, 399 F. Supp. 883, 888 (W.D. Tex. 1975). “We agree with the district court that \textit{Reynolds} has failed to show by clear and convincing evidence that he does not constitute an economic danger to the community. We further hold that danger may, at least in some cases, encompass pecuniary or economic harm.” \textit{Reynolds}, 956 F.2d at 192. The \textit{Reynolds} court supported this holding by citing \textit{United States v. Provenzano}, 605 F.2d 85 (3d Cir. 1979) and \textit{Parr}, thus taking the leap from \textit{Provenzano} and the corrupt influence on a union to a prior and broader application in the \textit{Parr} case from 1975, not mentioned in the legislative history of
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outlining the circumstances in which such a danger would rise to the level to be considered a reasonable ground for detention.\textsuperscript{156} After quoting the Senate Report that discussed the Act, one Judge announced “[i]t is therefore clear that the intent of the Legislature was to afford great flexibility to the judicial officer in deciding the question of detention.”\textsuperscript{157}

This flexibility must be exercised appropriately and fairly in pretrial detention hearings. Judge Ellis did what was intended under the Act when he used a vast array of conditions to ensure the safety of individuals and the community.\textsuperscript{158} This is the solution proposed by this comment, in that the detention of a defendant based on economic danger seldom, if ever, rises to meet the burden of proof under § 3142. Like Judge Ellis, judges in the federal system should use their power under the Act and do what they feel is necessary to ensure that persons and the community are safe from economic danger.\textsuperscript{159} The use of this power under the Act would include addressing any perceived threat of economic harm that would arise if a defendant were released with a condition to specifically address that harm.\textsuperscript{160} A judge should virtually always be able to impose conditions on a defendant that make it impossible for the government to meet the burden of proof that a defendant will pose a danger to the community if released.

Alternatively, if a judge feels he or she needs to impose conditions that pose a financial hardship on a defendant, such as electronic monitoring, and the defendant cannot afford these

\textsuperscript{156} United States v. Persaud, No. 05-CR-368, 2007 WL 1074906, at *1 (N.D.N.Y. Apr. 5, 2007). A magistrate judge imposed conditions on the defendant that were found to be too restrictive. \textit{Id.} These conditions specifically related to the Defendant’s risk of economic harm to the community if released, effectively addressing any potential economic danger that did not rise to the level of warranting detention. \textit{Id.}

\textsuperscript{157} United States v. Knight, 636 F. Supp. 1462, 1466 (S.D. Fla. 1986) (detaining two defendants, but not a third, as a danger to the community where the third defendant was a small dealer in narcotics but the first two were organizers of a violent criminal organization trafficking narcotics).

\textsuperscript{158} See infra notes 134--35 and accompanying text (listing the conditions imposed by Judge Ellis).

\textsuperscript{159} See generally 18 U.S.C. § 3142 (2012) (granting judges the ability to address potentially dangerous defendants by imposing conditions on their release).

\textsuperscript{160} See infra note 140 and accompanying text.
conditions, the necessary conditions should be paid for by the government. Payment of these costs would allow a defendant to remain free, while addressing the fairness concerns between defendants of means who can afford to buy their way out of prison with conditions and indigent defendants who cannot.\textsuperscript{161} In nearly all cases, the cost to the government would be less than incarcerating a defendant who is awaiting trial.\textsuperscript{162}

The flexibility given federal judges in determining whether a defendant will be incarcerated or remain free is a great power.\textsuperscript{163} However, with great power comes great responsibility.\textsuperscript{164} This power must be wielded fairly, allowing the accused to remain free until their guilt is determined through a plea or at trial.

\textsuperscript{161} See generally Jonathan Zweig, Note, \textit{Extraordinary Conditions of Release Under the Bail Reform Act}, 47 HARV. J. ON LEGIS. 555, 572–74 (2010) (arguing that the disparity between rich and poor defendants is unfair because poor defendants are detained pending trial more frequently than rich defendants, who oftentimes are allowed to buy themselves out of jail with extensive and expensive conditions).


\textsuperscript{163} See generally § 3142 (granting judges flexibility in determining whether a defendant should be released pending trial and, if so, what conditions of release should be imposed).

\textsuperscript{164} Stan Lee & Steve Ditko, \textit{Spider-Man!,} AMAZING FANTASY #15, August, 1962, at 11 (concluding that Spider-Man alter ego Peter Parker was “aware at last that in this world, with great power there must also come–great responsibility!”).