

Protass: Bail spotlights law's inequity

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Last week, a New York judge granted bail to Dominique Strauss-Kahn, the former chief of the [International Monetary Fund](#), freeing him from Rikers Island to stay in a Manhattan apartment while his sexual assault case is pending.

Justice Michael Obus required him to put up \$1 million cash, post a \$5-million bond, wear an electronic ankle bracelet and remain under 24-hour house arrest with an armed guard that

Strauss-Kahn must pay for posted outside.

Similarly, [Bernard Madoff](#) was, until he pleaded guilty to running a multibillion-dollar Ponzi scheme, also free on bail. He too was locked away under guard in his swanky Manhattan penthouse. The same goes for Marc Dreier, the accomplished Gotham lawyer convicted of conning a series of sophisticated investors out of more than \$400 million. He was confined under 24-hour surveillance to his posh Upper East Side high rise both before and after he pleaded guilty.

To many, allowing these haute-bourgeois defendants to relax in luxury residences after having been charged with serious crimes is an offensive example of the judicial system favoring the rich. But denying them bail wouldn't level the playing field between the haves and the have-nots. Rather, only reducing bail amounts for those without the financial resources of the rich and powerful would.

Within the American criminal justice system, those accused of crimes are presumed innocent until proven guilty beyond a reasonable doubt. This core principle is so rooted in our collective consciousness that the nation's founders incorporated a prohibition against "excessive bail" in the Eighth Amendment.

Various state and federal laws govern post-arrest release decisions. They typically require

judges to free defendants on "reasonable bail" -- individualized determinations generally within the discretion of the court -- unless they can't be relied upon to appear for future court dates or if they pose a danger to the community. Criminal defendants may be denied bail only if no conditions will satisfy those dual goals.

Thus, when setting bail, the issue for courts should be selecting a figure that is high enough to serve as incentive to get defendants back for future court proceedings but not so high as to be unattainable -- not what defendants have been charged with, whether what they did should be publicly condemned, or even what their ultimate punishment will be if convicted. That's why defendants like Galleon's [Raj Rajaratnam](#), Enron's [Jeffrey Skilling](#) and Tyco's [Dennis Kozlowski](#) all roamed the streets like free men after they were arrested.

But most defendants never make bail. In the 12 months ending Sept. 30, 2008, the most recent period for which federal statistics are available, the [U.S. Department of Justice](#) reported that only 28.5 percent of the 91,000-plus individuals arrested and charged with federal crimes were released on bail.

Likewise, [Human Rights Watch](#) reported last year that 87 percent of defendants arrested in New York City in 2008 on non-felony charges were incarcerated because they couldn't post bail of \$1,000 or less. As described by Jamie Fellner, author of the report, "For people scrambling to pay the rent each month, finding \$1,000 for bail can be as impossible as finding \$1 million." Simply put, bail for the low-income and indigent is often out of financial reach, even if they are deserving of pretrial release.

Keeping high-profile, affluent defendants locked up before trial might suit the public's pitchfork and burn-at-the-stake state of mind when it comes to violent crimes and large-scale financial frauds. And it might satisfy those who think that people like Strauss-Kahn -- whose presence on a plane bound for [Paris](#) at his arrest might indicate he presents a flight risk -- shouldn't be permitted to buy their way out of jail. But burdensome bail conditions for the well-to-do also keep the bar at unreasonably high levels for those without substantial financial resources to make bail.

We should worry a lot less about whether wealthy criminal defendants like Strauss-Kahn get to stay in their private prisons while awaiting trial, and worry more about calibrating bail amounts to the financial resources of each individual defendant. That may be the best way to achieve equality in a criminal justice system that doesn't so much favor the rich as it disfavors the poor when it comes to affording pretrial freedom.

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