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## Keep Bernie Free

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It's time to stop jailing people before trial.

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*On Monday, judge Ronald Ellis declined to revoke bail for Bernard Madoff; last Friday, **The Big Money** laid out the reasoning for why this is a good idea.*

Rarely has a jurist had a chance to make as many people happy as Ronald Ellis, the judge who next week will rule on the latest twist in the Bernard Madoff story: the prosecution's demand that he revoke Madoff's bail and send Madoff to jail. And rarely has the case against a white-collar criminal been more clear-cut and more likely to lead to prison. That's exactly the place where Madoff should go if justice is to be served.

Except he should go there only after he's actually been convicted.

This isn't exactly a popular view. When Madoff was arrested, he was initially offered a chance to post a \$10 million bail bond but couldn't come up with four people in the world willing to co-sign it and put their own assets at risk if he decided to flee. So prosecutors agreed to an unusual arrangement involving home confinement, an ankle bracelet, and round-the-clock guards. The almost universal reaction to the conditions of Madoff's release on blogs and newspaper comment boards was to ask why the hell a rich guy like Madoff should get special breaks and stay in his multimillion-dollar apartment instead of getting locked up with other defendants who can't make bail in New York's notoriously violent Riker's Island jail.

A much better question, though, is why *anybody* is thrown in prison before trial when we have cheaper, better, and nonpunitive ways of making sure they don't disappear. Yes, thanks to his money, Madoff has managed to stay out of jail while other federal defendants haven't. But for anybody who's the least bit concerned about the rights of the accused, the way to make things fairer isn't to jail Madoff before trial but to stop automatically jailing everyone else.

Madoff's case is unusual because it started, essentially, with Madoff outing himself. It's pointless to talk about Madoff's "alleged" fraud, as news organizations generally do with cases yet to be tried, when the main allegations come from the man himself. Yet even in a case like this, we still consider trial to be a necessary step between arresting Madoff and sending him to prison—a point underlined by the fact that as yet, the prosecutors have not gathered together enough of their case to bring an indictment.

The presumption that defendants should remain free until they are convicted is centuries-old in English common law. The writers of the Constitution saw it as significant enough that they made a point of keeping judges and prosecutors from short-circuiting the trial system by prohibiting "excessive" bail. What will surprise many people now is that even the notion that someone was dangerous—a natural idea but one that stands uncomfortably with the presumption of innocence—was traditionally not enough to deny bail.

In the federal courts, the *only* purpose of bail was to prevent flight, until the passage of the [Bail Reform Act of 1984](#) [3]. Part of a package of tough crime legislation, the 1984 law changed the calculus of the presumption of bail, weakening the presumption that people should not be jailed until conviction. (Capital cases have always been exempt from bail, creating an exception for the very worst crimes.) The bill added the amorphous standard of danger to the community as a determining factor in setting bail. On top of that, in the intervening years, federal judges began confiscating bail bonds not only for actual flight but for all sorts of violations, making it harder for defendants to find bondsmen (who get paid 15 percent of the bail, which they keep whatever the outcome—a cruelty that's hard to miss) to put up collateral.

Where once it was rare for defendants to be imprisoned because they could not make bail, it is now absolutely routine. In 2005, "the most recent year for which [statistics are available](#) [4] from the Justice Department, only 34 percent of federal defendants were released before trial. Just to underline the math here, that means *two-thirds* of people charged with crimes in federal court stayed in jail until their trial. And this is happening despite the fact that electronic monitoring can make a criminal's flight vastly more difficult than it would have been in the past.

Given those numbers, you don't exactly have to be on the extreme fringe of criminal-coddling liberals to think that the right to bail has turned into an occasional privilege. Far from it: A bill to liberalize bail—or, in the words of the legislation itself, "to restore bail bonds to their historical origin as a means solely to ensure the defendant's physical presence before a court"—has come up in Congress several times. The latest version, the [Bail Bond Fairness Act of 2007](#) [5], passed the House but died in the Senate—though its Senate sponsors included Joe Biden, the incoming vice president; Arlen Specter, the ranking Republican on the judiciary committee; and the famous bleeding heart, South Carolina liberal Lindsey Graham.

Which brings us back to Madoff. The [specific accusation against Madoff](#) [6] is that he violated a condition of bail by disposing of his property—jewelry, watches, and some sentimental objects that he sent to his family. Unquestionably, some of them were valuable. The claim of the prosecution was that he was trying to hide his assets. If so, he chose a stunning way to do it, sending an odd mix of items, from mittens to diamonds, to a whole batch of relations—including his sons, who, you will recall, were the ones to go to the police in the first place. Madoff himself then told his own lawyers about the jewelry, and he told them to get it back.

Madoff's lawyers say he didn't think the restriction on disposing of assets applied to his personal items. Sound stupid? Yes. But then, trying to get rid of his assets in a way that was almost certain to be discovered and then telling his lawyers about it is equally stupid. Whether it's more likely that he really didn't understand or that he reconsidered you can judge for yourself; it's hard to choose the more likely of two idiotic options. But the prosecutors' claim is, at very best, that he considered and then changed his mind about giving away valuables that may or may not be subject to forfeiture if he's convicted. And, in addition, prosecutors point out that Madoff, *before he was arrested*, had planned to cash checks worth over \$100 million. Which, of course, we knew already—it's why he's got electronic monitors and round-the-clock guards.

The real issue is that Madoff, who initially seemed to be cooperating with prosecutors, isn't any longer. So imprisoning Madoff gives prosecutors the ability to coerce him into pleading guilty quickly. Meanwhile, the

prosecutors themselves are about to miss the deadline to file an indictment to get the case going and will ask for an extension. Federal prosecutors now boast a 90 percent conviction rate, thanks in part to the very effective strategy of lengthy imprisonment without bail—precisely the prosecutorial strategy that the Constitutional prohibition on excessive bail was designed to thwart.

Those who imagine that revoking Madoff's bail now will somehow strike a blow for equality later have it backward. Sure, it would hurt Madoff. But the high-profile precedent and the howls of satisfaction at Madoff getting his comeuppance will yield to the reality that its most severe effect will not be on those who are well-lawyered and well-connected but on those who are not. To keep Madoff electronically monitored in his home opens the door for much less well-connected people to ask, with absolute justice, why they should not have the same right as well.

The answer is that they should. For Judge Ellis to refuse to revoke Madoff's bail would send a clear signal that the purpose of keeping people in jail before trial should not be to punish and intimidate, no matter how likely it seems that they will be convicted in the end. Madoff's [fancy apartment](#) [7] is undoubtedly as gilded a cage as there can be. But it is a cage nonetheless. For someone who has not yet been convicted of a crime, that in itself is more than enough and easily as much as the law should require.

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**TBM** is Madoff central. Jeff Horwitz [discussed Madoff's fraudulent technique](#). Mark Gimein wrote about [how Madoff's fraud could have been detected earlier](#) and [how screwed his clients are](#). Daniel Gross [visited Palm Beach to see how the victims are coping](#). Harlan Protass wondered [how long Madoff should go to prison for](#). And Trevor Felix has [catalogued the Madoff saga via lolcats](#).

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