

## THE FUTURE OF PRETRIAL DETENTION IN A CRIMINAL SYSTEM LOOKING FOR JUSTICE

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### I. INTRODUCTION

America's current cash bail system is a broken system, which perpetuates inequality, disseminates institutional racism, and contributes to a higher rate of recidivism. It is destroying people's lives, depriving them of a presumption of innocence, and this deprivation affects poor and minority individuals far more than wealthy, white individuals. New Jersey and New York have been taking steps towards reform in addressing the severity of racial and class disparities in incarceration.<sup>1</sup> We are finally entering a new era of bail reform and it is important to recognize the flaws of the past movements, to better our system as a whole.

In this country, our current federal cash bail system has been unaltered since the Bail Reform Act of 1984 and this last "reform" was actually taking a step backwards.<sup>2</sup> The Constitution entitles us to a presumption of innocence until proven guilty, but this presumption is stolen when wealth is synonymous with freedom.<sup>3</sup> The American Bar Association's "Standards Relating to Pretrial Release" asserts that a judge's decision of whether to release or detain a defendant in custody requires a judge to consider and balance interests of individual liberty, the likelihood of a defendant's return to court, and public safety.<sup>4</sup> When a defendant is given the option of cash bail, he is deemed safe enough to reenter the streets, await his trial, and develop his case in

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<sup>1</sup> Roxanna Asgarian, *The Controversy Over New York's Bail Reform Law, Explained*, VOX (Jan. 17, 2020), <https://www.vox.com/identities/2020/1/17/21068807/new-york-bail-reform-law-explained>.

<sup>2</sup> 18 U.S.C. § 3142(f) (1988).

<sup>3</sup> *Coffin v. United States*, 156 U.S. 432, 454 (1895).

<sup>4</sup> Standards for Criminal Justice: Pretrial Release at 29-30 (Am. Bar Ass'n 2007).

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the comfort of his own home.<sup>5</sup> However, when a defendant is too poor to pay his cash bail, he is confronted with many more obstacles and injustices than a white, wealthy person.<sup>6</sup>

The inability to pay cash bail for a crime, as small as a misdemeanor, can change a person's entire life. While a poor defendant is waiting behind bars for his case to be resolved, he is robbed of his everyday life and stuck indefinitely in a jail cell.<sup>7</sup> This can detrimentally affect a person's education, housing, employment, immigration status, and many other aspects of life. Additionally, more time spent in jail pre-trial is directly correlated with false admissions of guilt, jail crowding, and increase in tax dollars.<sup>8</sup> Defendants are often encouraged to take plea deals, by prosecutors whose motivation is not to protect the individual, but to free up the court dockets and avoid extraneous trials.<sup>9</sup>

The need for bail reform is best illustrated by the story of Kalief Browder, a boy whose life was stolen from him because of his inability to pay cash bail.<sup>10</sup> Kalief could not afford the \$3,000 cash bail offered to him and he awaited his trial at Riker's Island Prison for three years, to eventually have all the charges dropped.<sup>11</sup> As you read Kalief's story, think about this question: If Kalief was white and wealthy, would his outcome have been different?

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<sup>5</sup> *Id.*

<sup>6</sup> Innocence Staff, *Racial Disparities Evident in New York City Arrest Data for Marijuana Possession*, INNOCENCE PROJECT (May 14, 2018), <https://www.innocenceproject.org/racial-disparities-in-nyc-arrest-data-marijuana-possession/>.

<sup>7</sup> *Id.*

<sup>8</sup> Cassie Miller, *The Two-Tiered Justice System: Money Bail in Historical Perspective*, S. POVERTY L. CTR. (June 6, 2017), <https://www.splcenter.org/20170606/two-tiered-justice-system-money-bail-historical-perspective>.

<sup>9</sup> *Id.*

<sup>10</sup> Time: *The Kalief Browder Story* (Netflix 2017); Jennifer Gonnerman, *Before the Law: A boy was accused of taking a backpack. The court took three years of his life*, THE NEW YORKER (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law>; Jennifer Gonnerman, *Kalief Browder 1993-2015*, THE NEW YORKER (June 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>; Michael Schwartz & Michael Winerip, *Kalief Browder, Held at Riker's Island for 3 years Without Trial*, N.Y. TIMES (June 8, 2015), <http://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html?>.

<sup>11</sup> *Id.*

## II. THE STORY OF KALIEF BROWDER

In May 2010, sixteen-year-old Kalief Browder was walking home from a party in the Bronx, New York, when he was stopped by the police and arrested for allegedly stealing a backpack.<sup>12</sup> When Kalief and his family were not able to afford the \$3,000 bail, Kalief was thrown in jail at Riker's Island Correctional Facility (hereinafter "Riker's"), one of the toughest jails in the country.<sup>13</sup> He was there for three years, with more than 700 days of them spent locked in solitary confinement.<sup>14</sup> After a few weeks, when his family was finally able to raise the money to pay for his bail, they were denied.<sup>15</sup> There are innocent people who spend more time in Riker's than those who are convicted.<sup>16</sup> The crime here, is that Kalief Browder was poor.<sup>17</sup>

The Bronx is one of the poorest congressional districts in the country, where 85-90% of people are unable to make bail.<sup>18</sup> Most people are sent to Riker's because they cannot pay bail of \$1,000 or less.<sup>19</sup> When you are poor, your only options are either to go to jail or plead guilty.<sup>20</sup> Individuals are sitting in jail for years, legally innocent, but awaiting their trial.<sup>21</sup> There are innocent people who spend more time in Riker's than those who are convicted.<sup>22</sup> At Riker's, "beatings are routine, accountability is rare, cultural violence endures, code of silence prevails."<sup>23</sup> We punish human beings with these abhorrent jail conditions, including aggressive beatings, vehement sexual assault, exposure to STDs, ineffective mental healthcare, and solitary confinement that destructively degrades a person's sense of reality.<sup>24</sup> These conditions are dehumanizing.<sup>25</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

Kalief had over thirty court dates, where he was transported to court, but these trips consistently resulted in prosecutorial delays and adjournments.<sup>26</sup> Meanwhile, there were too many holes in his case for the prosecution to make any progress, including errors in police paperwork and the date of the incident being inconsistent across multiple reports.<sup>27</sup> Kalief was offered a plea deal on several occasions and his lawyers, friends, and family were consistently encouraging him to take the guilty plea.<sup>28</sup> Kalief was among the small percentage of people resilient enough to hold his ground and refuse to admit to something that he did not do, even if that meant spending years in one of the toughest jails in the country.<sup>29</sup> Over 90% of defendants who stay in jail on bail will plead guilty, even if they did not commit the crime.<sup>30</sup> Finally, at Kalief's last court appearance, the prosecution revealed that their only witness had left the country, they had no contact with him for a long time, and the witness was not willing to return to the United States to testify.<sup>31</sup> As a result, Kalief was released, with his case dismissed. He was sent home with a metro card, his items that he entered with when he was 16 years old, and his complete loss of innocence.<sup>32</sup> The criminal system stole Kalief Browder's life. Kalief's right to a speedy trial was manipulated due to the blatant abuse of the "ready rule" by the prosecution to delay trial and encourage defendants to accept a plea bargain.<sup>33</sup>

Kalief attempted suicide three times while at Riker's and was never given psychiatric treatment or taken out of solitary following the incidents.<sup>34</sup> Two years after he was released, on June 6, 2016, Kalief committed suicide in his home by hanging himself out of his bedroom window.<sup>35</sup> Kalief's story is about more than being wrongfully convicted and aggressively mistreated. It is about a system that is

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *The Bronx Freedom Fund*, THE BRONX FREEDOM FUND (Dec. 26, 2019), <http://www.thebronxfreedomfund.org/>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> N.Y. C.L.S. C.P.L. § 30.30.

<sup>34</sup> Time, *supra* note 10; Gonnerman, *supra* note 10; Gonnerman, *supra* note 10; Schwartz, *supra* note 10.

<sup>35</sup> *Id.*

fundamentally backwards.<sup>36</sup> A system that prefers throwing a person's life away rather than giving him a chance to prove his innocence.<sup>37</sup> Kalief's story of injustice happened to be one that reached mainstream media, but this does not discount the collective experience happening on a daily basis to minorities and low-income people in this country. Kalief's story and the story of many others are a continuation of the unjust cash bail system that excessively targets minority populations and continually suppresses their abilities to rise out of the trenches.<sup>38</sup>

Cash bail in the criminal system in the United States is inherently unfair and removes an individual's right to a presumption of innocence. If you are poor and a minority, the system inherently fails you. The cash bail system cost Kalief his life.

### III. HISTORY OF BAIL REFORM

The right to bail in noncapital cases has been a fundamental part of the law in the U.S. since colonial times.<sup>39</sup> The American system followed English Law and the English bail tradition of personal sureties contributed to the progressive bail policies of the American colonies.<sup>40</sup> This system relied on a defendant's friends and family ("personal sureties") to pay a certain amount if the defendant failed to appear at court.<sup>41</sup> Accordingly, "[T]hese persons were unpaid and unreimbursed, and administered what we would call today 'unsecured bonds, that is, with only promises to pay an amount of money in the event of default.'"<sup>42</sup> When America was founded, England's system of personal sureties was enacted.<sup>43</sup> Personal sureties and promises to pay were the foundation of the system adopted by the American Colonies, which essentially guaranteed the release ofailable defendants.<sup>44</sup> This

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Timothy R. Schnacke et al., *The History of Bail and Pretrial Release*, PRETRIAL JUSTICE INSTITUTE (Sept. 24, 2010), [https://b3cdn.net/crjustice/2b990da76de40361b6\\_rzm6ii4zp.pdf](https://b3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Timothy R. Schnacke, *A Brief History of Bail*, 57 JUDGES' J. 4 (2018).

<sup>44</sup> *Id.*

system took on almost all of England's bail practices, but incorporated a more liberal criminal penalty law.<sup>45</sup>

The United States Constitution solidified pretrial detainee protections in the Eighth Amendment's Excessive Bail Clause and the Judiciary Act of 1789.<sup>46</sup> The Judiciary Act of 1789 recognized a right to bail under certain circumstances.<sup>47</sup> In the 1800's, as personal sureties were not as readily accessible as expected, the courts shifted to the use of "secured" money bail.<sup>48</sup> This system was meant to provide a financial incentive for a person accused of a crime to attend court hearings at a later date.<sup>49</sup> The American system started off by allowing release before trial by declaring people "bailable" before calculating any risk assessment.<sup>50</sup> There were minimal exceptions, but the consistent outlier was that capital defendants were exempt from the right to bail.<sup>51</sup>

In 1951, the Supreme Court addressed the issue of excessive bail in *Stack v. Boyle* and held that the Eighth Amendment Excessive Bail Clause and the Judiciary Act of 1789 provide further protections to defendants and that a person arrested for a non-capital offense shall have the right to bail that is not excessive.<sup>52</sup> In this case, multiple federal defendants petitioned to have their cash bail bond amounts reduced on the grounds that they were excessive under the Eighth Amendment.<sup>53</sup> The Supreme Court found the government's actions unconstitutional because the government showed no evidence to justify that the excessive amount set was reasonably likely to ensure the defendant's presence at the trial.<sup>54</sup> The Supreme Court articulated the reasons for a federal right to bail by explaining, "[t]raditional right to freedom before conviction permits the unhampered preparation of a

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<sup>45</sup> *Id.*

<sup>46</sup> U.S. CONST. Amend. VII; Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (1789).

<sup>47</sup> Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (1789).

<sup>48</sup> Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People From Jail, Explained*, VOX (Oct. 17, 2018), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality>.

<sup>49</sup> *Id.*

<sup>50</sup> Schnacke, *supra* note 43.

<sup>51</sup> *Id.*

<sup>52</sup> *Stack v. Boyle*, 342 U.S. 1, 14 (1951) (The excessive bail clause prohibits excessive bail set in pre-trial detention and the Judiciary Act of 1789 explains that federal law has provided that a person arrested for a noncapital offense *shall* be admitted to bail).

<sup>53</sup> *Id.* at 3.

<sup>54</sup> *Id.*

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defense and prevents inflicting punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggling, would lose its meaning.”<sup>55</sup> This sentiment of bail being set at a reasonable amount promotes the fundamental right to freedom before conviction.

The Supreme Court also set the principle that bail should be based on an individualized assessment of each defendant.<sup>56</sup> Yet, as early as the 1920s, there is evidence that money bail was being abused.<sup>57</sup> Bail agents were taking advantage of defendants and judges were setting money amounts far too high for people to afford.<sup>58</sup> Due to this, the first generation of bail reform in America is said to have begun in the 1920s.<sup>59</sup> Bail reform gained momentum throughout the 1960s, which was reflected in the Bail Reform Act of 1966.<sup>60</sup>

The 1966 Act was enacted as Congress’ response to judges denying defendants bail or setting bail too high.<sup>61</sup> It made no cash bail the default condition of release in federal court and it was meant to allow defendants to be released from custody with as little financial strain as possible.<sup>62</sup> President Lyndon B. Johnson hoped that the fundamental problems with a system that relies heavily on cash bail would be solved by the Bail Reform Act of 1966.<sup>63</sup>

Historically, the only reason for limiting pretrial release was to secure a defendant’s presence at future proceedings.<sup>64</sup> In the 1960s and 1970s, the courts began seeing some examples of defendants, who were

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; Schnacke, *supra* note 39.

<sup>57</sup> Wykstra, *supra* note 48.

<sup>58</sup> *Id.*

<sup>59</sup> Schnacke, *supra* note 43.

<sup>60</sup> Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966); *Symposium on Bail Bond Reform: Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What’s Next*, 108 J. CRIM. L. & CRIMINOLOGY 701 (2018).

<sup>61</sup> Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966); Ariana K. Connelly & Nadin R. Linthorst, *The Constitutionality of Setting Bail Without Regard to Income: Securing Justice or Social Injustice?*, 10 ALA. C.R. & C.L.L. REV 115, 121-122 (discussing bail reform and the different social and political perspectives that shaped the criminal system through history).

<sup>62</sup> *Id.*

<sup>63</sup> Lyndon B. Johnson, *Remarks at the Signing of the Bail Reform Act of 1966*, THE AMERICAN PRESIDENCY PROJECT (June 22, 1966), <http://perma.cc/KWP7-D9CL>.

<sup>64</sup> Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, NATIONAL INSTITUTE OF CORRECTIONS (Aug. 2014), [http://clebp.org/images/2014-09-04\\_Fundamentals\\_of\\_Bail.pdf](http://clebp.org/images/2014-09-04_Fundamentals_of_Bail.pdf).

released on bail and fleeing or committing new crimes.<sup>65</sup> During this time, there was social uprising and people were afraid due to major events like the Vietnam War and Martin Luther King’s assassination.<sup>66</sup> The violent crimes committed by pretrial defendants were being copiously publicized and the public was becoming increasingly worried.<sup>67</sup> This fear-based messaging was a strategic tool used by opponents of the bail reform. Thus, began “a decades-long second-generation bail reform that focused on boundaries and processes of intentional detention for flight and on whether public safety should be a valid consideration at bail.”<sup>68</sup>

In the 1970s and 1980s, states began to include a public safety purpose for limiting pretrial freedom.<sup>69</sup> The fear of rising crime led to the Bail Reform Act of 1984, which mandated that courts added an additional basis for pretrial detention in federal court, to protect public safety.<sup>70</sup> The Bail Reform Act of 1984 was a step backwards because it added potential dangerousness to the community as a factor in permitting bail as an option.<sup>71</sup>

In 1984, the U.S. Supreme Court upheld the 1984 Act in *United States v. Salerno*, holding the Act did not violate the Fifth Amendment’s Due Process Clause or the Eighth Amendment’s Excessive Bail Clause.<sup>72</sup> Chief Justice William Rehnquist’s famous words in *Salerno* were, “In our society, liberty is the norm, and detention prior to or without trial is the carefully limited exception.”<sup>73</sup> Justice Rehnquist was ironically hopeful at this time, considering the lasting negative impact this decision had on America’s criminal system.<sup>74</sup> The holding in *Salerno* solidified the ability to detain a defendant based on reasons of a public safety, which contributed to the imprisonment of countless pretrial detainees in America.<sup>75</sup> This

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<sup>65</sup> Schnacke, *supra* note 43.

<sup>66</sup> *Id.*

<sup>67</sup> Muhammad B. Sardar, *Give Me Liberty or Give Me . . . Alternatives? ENDING CASH BAIL AND ITS IMPACT ON PRETRIAL INCARCERATION*, 84 BROOKLYN L. REV. 1421, 1430 (2019).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Schnacke, *supra* note 43.

<sup>73</sup> *United States v. Salerno*, 481 U.S. 739, 746 (1987).

<sup>74</sup> *Id.* at 755.

<sup>75</sup> *Id.*; Sardar, *supra* note 67, at 1432.

effectively reversed the progress of the previous bail reform era, as a judge was able to use his discretion to decide whether or not a defendant was “likely to commit crimes, unrelated to the pending charges, at any time in the future.”<sup>76</sup>

Nowadays, our bail system is over-reliant on money through monetary bail bond schedules, excessive use of commercial sureties, financial conditions set to protect the public from criminal conduct, and financial conditions set without consideration of the defendant’s ability to pay.<sup>77</sup> After a person is charged with a crime, a judge or magistrate decides whether to jail the person without the possibility of release until the case is over or to release the person on his own recognizance, conditionally release them with certain conditions, or release them on bail.<sup>78</sup> A judge or magistrate will decide the amount of cash bail by weighing a few factors, including the risk of the defendant fleeing, the type of crime alleged, the “dangerousness” of a defendant, and the safety of the community.<sup>79</sup> These factors give judges a lot of discretion. A generation ago, it was the norm for judges to release defendants on their own recognizance, even on felony charges, but now people in the same position are being held in jail essentially because they cannot afford cash bail.<sup>80</sup> Failing to consider a person’s ability to pay, creates an extremely disparate impact on economically vulnerable populations.

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<sup>76</sup> *Salerno*, 481 U.S. 739 at 755.

<sup>77</sup> Schnacke, *supra* note 64.

<sup>78</sup> Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1126 (2018).

<sup>79</sup> American Bar Association, *How Courts Work*, ABA (Sept. 9, 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/bail/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail/).

<sup>80</sup> Note, *supra* note 78, at 1126.

#### IV. GUILTY UNTIL PROVEN INNOCENT

After someone is initially arrested, and before he is convicted, our criminal system is supposed to presume a defendant innocent until proven guilty.<sup>81</sup> This presumption is derived from the Supreme Court's opinion in *Coffin v. United States*, in which the Court wrote: "a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."<sup>82</sup> The presumption of innocence is closely related to bail because it determines which classes of defendants are bailable and the constitutional and statutory rights that result from that decision.<sup>83</sup> For example, if an individual pays his cash bail, gets released, and then shows up to court as required, he is entitled to get his bail money back, even if he is found guilty.<sup>84</sup> If he does not show up in court as required, the court keeps the money.<sup>85</sup>

When judges set cash bail, it usually takes minutes. They do not actually make an investigation into a defendant's financial situation, so they end up routinely assigning bail that defendants cannot afford to pay.<sup>86</sup> In many places, courts follow bail schedules, which require defendants to pay arbitrary amounts that are based on charge alone, without taking into consideration the details of a person's case or their ability to pay, and often without defense counsel being present.<sup>87</sup>

A *New York Times* article reveals that more people are spending time in jail because they have insufficient funds to post bail or pay fines or because they are too sick with mental health or drug addiction to care for themselves properly.<sup>88</sup> Jails across the country have become

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<sup>81</sup> *Id.*

<sup>82</sup> *Coffin v. United States*, 156 U.S. 432, 453 (1895).

<sup>83</sup> Schnacke, *supra* note 64.

<sup>84</sup> Rabi Lahiri, *Why Bail Matters*, ACLU WASHINGTON (June 17, 2010), <https://www.aclu-wa.org/blog/why-bail-matters>.

<sup>85</sup> *Id.*

<sup>86</sup> Robin Steinberg, *Robin Steinberg's Passionate Quest to Reform Cash Bail*, THE TED INTERVIEW (Nov. 20, 2018), [https://www.ted.com/talks/the\\_ted\\_interview\\_robin\\_steinberg\\_s\\_quest\\_to\\_reform\\_cash\\_bail/transcript?language=en](https://www.ted.com/talks/the_ted_interview_robin_steinberg_s_quest_to_reform_cash_bail/transcript?language=en); Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961 (2013); The Bail Project's mission is to "pay bail for people in need, reunite[e] families and restor[e] the presumption of innocence." *Mission*, BAIL PROJECT, <https://bailproject.org/mission/>, (last visited Feb. 22, 2021).

<sup>87</sup> *Id.*

<sup>88</sup> Michael Gonchar, *What Should Be the Purpose of Prison*, N.Y. TIMES (Feb. 27, 2015), <https://learning.blogs.nytimes.com/2015/02/27/what-should-be-the-purpose-of-prison/>.

places for people to be punished for their lack of income instead of places to enforce punishment for legitimate crimes.<sup>89</sup>

Throughout America, about 450,000 people or 63% of the jail population have not yet been convicted of any crime.<sup>90</sup> In fact, jail populations have been increasingly rising since the *Salerno* decision and have been attributed to defendants being held in pretrial detention, many of whom do not need to be held in jail because a judge has already determined their non-threatening status.<sup>91</sup> Additionally, on any given day, more than 450,000 people who have not been determined to be a flight risk by a judge are sitting in jails.<sup>92</sup> Commentators have noted that the faulty bail practices are likely responsible for the unsustainable jail populations across the country.<sup>93</sup>

Between 1992 and 2006, the average bail amount nationwide increased by more than \$30,000.<sup>94</sup> This heavy use of cash bail results in extreme disparities of wealth and race-based discrimination.<sup>95</sup> Additionally, in 2006, local jail facilities were already operating at about a 94% capacity.<sup>96</sup> The data from the Bureau of Justice Statistics shows that jail populations have continued to rise even as reported crime has gone down, the growth of the pretrial inmate population is increasing because of cash bail, and that a defendant's inability to afford cash bail relates directly to increasing his length of stay in jail.<sup>97</sup> This data shows how such dependency on the use of cash bail is not the answer to protecting the public.<sup>98</sup> Ironically, a country that was founded upon liberty, is the country with a pretrial detention system which jails defendants at three times the world average.<sup>99</sup>

Furthermore, jailing arrested people before trial is extremely costly.<sup>100</sup> It is the largest expense produced by current pretrial justice

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<sup>89</sup> *Id.*

<sup>90</sup> *Pretrial Justice: How Much Does It Cost?*, PRETRIAL JUSTICE INSTITUTE (Jan. 12, 2017), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c2f50513-2f9d-2719-c990-a1e991a57303&forceDialog=0>.

<sup>91</sup> Note, *supra* note 78.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Schnacke, *supra* note 39.

<sup>98</sup> Schnacke, *supra* note 64.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

practices, which greatly affects taxpayers and communities.<sup>101</sup> The United States Department of Justice determined that pretrial detention costs American taxpayers around nine billion dollars each year.<sup>102</sup> This estimates to be around 38 million dollars a day spent on defendants who have not yet been convicted of a crime and also have been deemed by a judge to not be a risk to society.<sup>103</sup> Each defendant could cost from 50 to 150 dollars per day in a jail cell.<sup>104</sup> Putting a person in jail is no small task; the intake costs include booking, creating records, medical screenings, and uniforms, which could exceed \$800.<sup>105</sup> Low-level, nonviolent offenders are usually the individuals who cycle in and out of jails repeatedly, so those defendants cost three times as much to process.<sup>106</sup> Unfortunately, the alleged crimes by these defendants will often come from homelessness, substance abuse, and mental health issues.<sup>107</sup>

The Bail Reform Act was meant to ensure fair amounts were being set for the respective crimes, but how is a fair amount decided?<sup>108</sup> In a congressional district like the Bronx, \$3,000 was far too much for Kalief Browder's family to come up with.<sup>109</sup> More than 400,000 pre-trial detainees are held in jails in the United States, many times because they cannot afford bail.<sup>110</sup> In a higher income neighborhood, this \$3,000 could probably be posted within an hour of the arrest, and a middle class white 16-year-old's parents would come armed with a team of lawyers ready to have their child released. So, when a 16-year-old like Kalief Browder is initially arrested for a crime, whether he has committed the crime or not, his inability to post bail is

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<sup>101</sup> *Pretrial Justice: How Much Does It Cost?*, *supra* note 90.

<sup>102</sup> Schnacke, *supra* note 64.

<sup>103</sup> *Pretrial Justice: How Much Does It Cost?*, *supra* note 90.

<sup>104</sup> Schnacke, *supra* note 64.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Salerno*, 481 U.S. 739 at 752.

<sup>109</sup> Time, *supra* note 10; Gonnerman, *supra* note 10; Gonnerman, *supra* note 10; Schwirtz, *supra* note 10.

<sup>110</sup> Deion Browder, *My Mom Died Trying to Preserve the Legacy of Her Son. Keeping Kids Out of Solitary Will Preserve*, USA TODAY (Apr. 23, 2019), <https://www.usatoday.com/story/opinion/policing/spotlight/2019/04/23/kalief-browder-suicide-solitary-confinement-venida-browder-policing-the-usa/3540366002/>.

an engine of racial inequality.<sup>111</sup> In this country, we incarcerate black Americans at a rate five times higher than that of white Americans.<sup>112</sup> Two studies from 75 large jurisdictions in the 1990s found that bail was set at disproportionately higher rates for black and Latino people.<sup>113</sup> In New York specifically, more than half of those individuals incarcerated are black, while the population of black people in New York is only 16%.<sup>114</sup>

## V. HOW PRETRIAL DETENTION PERPETUATES RACISM

The racialization of the criminal system in America starts long before anyone goes to prison.<sup>115</sup> The injustice starts with placing more police in low-income neighborhoods, with a majority of the communities being minority populations.<sup>116</sup> The injustice continues with the first arrest of an individual.<sup>117</sup> Two-thirds of the jail population in this country exists because of their inability to afford a bail payment; a distinct indication of the criminal system criminalizing poverty.<sup>118</sup> Many individuals cannot afford bail, so they are stuck in jail while their case is being resolved.<sup>119</sup> These bail policies continue to disseminate institutional racism by stealing people away from their daily lives, from their families, their jobs, and their freedom, and hold them hostage for crimes they may or may not have committed.<sup>120</sup> Like Kalief, a defendant can be offered probation and a fine the day of his arraignment if he pleads guilty.<sup>121</sup> The plea deal being offered gives a

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<sup>111</sup>Alexandra Natapoff, *Voir Dire: Criminal Justice Policy Program*, HARVARD LAW SCHOOL (Dec. 26, 2019), <https://podcasts.apple.com/us/podcast/punishment-without-crime-with-alexandra-natapoff/id1293347824?i=1000443098544>.

<sup>112</sup>Thea L. Sebastian, *Challenging Money Bail in the Courts*, AMERICAN BAR ASSOCIATION (Aug 1. 2018), [https://www.americanbar.org/groups/judicial/publications/judges\\_journal/2018/summer/challenging-money-bail-the-courts/](https://www.americanbar.org/groups/judicial/publications/judges_journal/2018/summer/challenging-money-bail-the-courts/).

<sup>113</sup>Asgarian, *supra* note 1.

<sup>114</sup>*Id.*

<sup>115</sup>Natapoff, *supra* note 111.

<sup>116</sup>*Id.*

<sup>117</sup>*Id.*

<sup>118</sup>*Id.*; Lawrence K. Marks, *New York Justice Task Force Issues Report on Bail Reform*, STATE OF NEW YORK UNIFIED COURT SYSTEM (Feb. 11, 2019), [https://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PR19\\_05.pdf](https://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PR19_05.pdf).

<sup>119</sup>*Id.*; Natapoff, *supra* note 111.

<sup>120</sup>*Id.*

<sup>121</sup>*Id.*

defendant the opportunity to go home, so he can keep his job and take care of his children.<sup>122</sup> The prosecutor offering this plea deal most likely does not explain how any criminal conviction, even a misdemeanor, can be burdensome in the world of employment, credit institutions, housing, and education.<sup>123</sup> In this moment, a defendant is not fully realizing that the misdemeanor conviction he just accepted will haunt him for a lifetime in many of the same ways that a felony conviction will.<sup>124</sup> This issue exploits low-income communities and people of color the most.<sup>125</sup> An article reviewing Alexandra Natapoff's book explains a recent study finding that, "white people facing misdemeanor charges were nearly 75% more likely than black people to have all charges carrying potential imprisonment dropped, dismissed, or reduced to lesser charges."<sup>126</sup> This displays how it is not just speculation and black families are legitimately more vulnerable than white families in the criminal system in this country.<sup>127</sup>

## VI. IDENTIFYING THE SOURCE

The bail bond industry is another reason the country's pretrial system has morphed into the discriminatory structure it is today.<sup>128</sup> Even modest bail amounts may be inaccessible for many defendants, because so many low income defendants will rely on bail bonds to pay for their cash bail release in desperate times, while not realizing how hard these debts will be to pay off in the future.<sup>129</sup> The bail bond industry is a multibillion-dollar private industry that built its business off the back of a cash bail system.<sup>130</sup> Offering these defendants the option of using a bail bond for their release is usually not a solution, but rather a furtherance of the underlying problem.<sup>131</sup> Overwhelmingly, people in jail cells are already living on the edge of

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Browder, *supra* note 110.

<sup>126</sup> *America's Massive Misdemeanor System Deepens Inequality*, EQUAL JUSTICE INITIATIVE (Jan. 9, 2019), <https://eji.org/news/americas-massive-misdemeanor-system-deepens-inequality>.

<sup>127</sup> *Id.*

<sup>128</sup> Steinberg, *supra* note 86.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

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poverty and for a family to scrape together the money to pay a bail bondsman and then pay interest on top of that further pushes them to the margins of society.<sup>132</sup> The underlying problem of this oppressive system is that if \$1,000 cannot be paid today, it probably cannot be paid ever.<sup>133</sup> “All too often our current system permits the unfettered release of dangerous defendants while those who pose minimal, manageable risk are held in costly jail space.”<sup>134</sup>

A person’s inability to afford bail can also lead to them pleading guilty and taking the low-level offense “take it or leave it” plea deal often offered by prosecutors.<sup>135</sup> Ironically, the Sixth Amendment of the Constitution guarantees defendants a speedy and public trial by jury.<sup>136</sup> Yet, plea-bargains account for 94% of state level cases and 97% of felony cases at the federal level, with only less than three percent of cases actually making it to trial.<sup>137</sup> With the American criminal dockets flooded with low-level crimes, the plea system prioritizes and rewards early guilty pleas, as early as the initial arraignment.<sup>138</sup> Prosecutors plea bargaining with defendants makes it possible for the system to handle millions of criminal cases each year.

Furthermore, the overload of misdemeanor cases filed every year give public defenders, prosecutors, and judges an overwhelming caseload.<sup>139</sup> Public defenders do not have the time or resources to investigate these cases closely.<sup>140</sup> This is exactly why judges, defense counsel, and prosecutors all have their own strong incentives to pursue guilty pleas.<sup>141</sup> It could be argued that the defendant gets a good deal for pleading guilty, by avoiding jail, avoiding going to court multiple

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Tim Murray, *National Symposium on Pretrial Justice*, PRETRIAL JUSTICE INSTITUTE (May 31, 2011), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=a67b7c24-c6ab-f9db-9f94-ddfa189a9596&forceDialog=0>.

<sup>135</sup> *Id.*

<sup>136</sup> U.S. CONST. Amend. VI.

<sup>137</sup> Emily Yoffe, *Innocence is Irrelevant*, THE ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/#:~:text=The%20vast%20majority%20of%20felony,percent%20at%20the%20federal%20level>.

<sup>138</sup> Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 306–07 (2011).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

times, and avoiding meetings with his lawyer. But, in the end, the court gets the benefit, with its dockets being freed up. As a result, the defendant will eventually be confronted with the consequences of his guilty plea, whether through being denied a job, housing, the right to vote, or worse. It is not easy to point a finger at one actor involved and place the blame. Scholars have considered the police, media, lawyers, judges, juries, and legislators as major players in creating and perpetuating the effects of racial bias.<sup>142</sup>

## VII. CONSEQUENCES OF PRETRIAL DETENTION

When a person enters the criminal system, his wellbeing is attacked from the inside out.<sup>143</sup> The consequences of being detained are extremely detrimental to a person's entire life. Those who are detained can be faced with losing their job from an inability to go to work, losing their home as a result of not being able to pay rent or a mortgage, children can be removed from their care, immigration status may be jeopardized, or they may lose their place in school.<sup>144</sup> Federally, a marijuana possession conviction will result in the loss of federal student loan assistance for at least a year.<sup>145</sup> Low-level drug crime convictions can lead to eviction from public housing.<sup>146</sup> Many misdemeanor drug convictions can lead to automatic deportation for an undocumented person.<sup>147</sup> Many misdemeanors will also disqualify individuals from licenses and federal aid.<sup>148</sup> In many states, a number of misdemeanor sex crime convictions guarantee that a person will be placed on a sex offender registration list.<sup>149</sup> Additionally, because access to criminal records online is so pervasive, many employers may use this information to avoid hiring a person with any type of record.<sup>150</sup>

Pretrial detention has collateral consequences for a defendant implicitly as well. From awaiting his trial in jail, a defendant is likely

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<sup>142</sup> Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157. (2012).

<sup>143</sup> Johnson, *supra* note 63.

<sup>144</sup> Note, *supra* note 78.

<sup>145</sup> 20 U.S.C. § 1091(r)(1) (2003); Roberts, *supra* note 138.

<sup>146</sup> 42 U.S.C. § 1437(d)(1)(6) (2011); Roberts, *supra* note 138.

<sup>147</sup> 8 U.S.C. § 1227(a)(2)(B)(i)(2011).

<sup>148</sup> Roberts, *supra* note 138.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

to become a victim of violence or sexual victimization.<sup>151</sup> Almost half of jail deaths happen in that first week that someone is in jail, including suicide and homicide.<sup>152</sup> The conditions are inhumane and they cause negative impacts on a person's mental and physical health.<sup>153</sup> When Kalief was in jail, he was subject to brutal beatings from both inmates and corrections officers.<sup>154</sup> His reluctance to join a gang made him a target for this type of treatment.<sup>155</sup> Videos of the assaults were captured and blatantly showed inmates attacking Kalief without guards' intervention; the guards themselves were assaulting Kalief on multiple occasions.<sup>156</sup>

A study from the Laura and John Arnold Foundation of 150,000 cases showed that defendants detained pretrial were over four times more likely to be sentenced to jail and receive longer sentences than those who were not detained.<sup>157</sup> This study also found that low and moderate risk defendants detained for only two to three days were more likely to commit crimes than similar defendants held 24 hours or less.<sup>158</sup> The researchers found that the increase of jail time was consistent with the likelihood of a defendant committing another crime.<sup>159</sup> This paradox should be a wake-up call to judges, who claim to set the condition of bail with the intention of protecting public safety. The reality is that a defendant detained pretrial inadvertently increases the danger to society.

We often are presented with the argument about the risks associated with releasing somebody from jail, that the person might commit another crime or never return to court. It is important to shed light on the risks that we know do happen to thousands of people who are held in jail cells, under inhumane conditions. The risks that are overt and undeniable. These risks that force people's lives and their families' lives to fall apart.

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<sup>151</sup> Steinberg, *supra* note 86.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, NATIONAL INSTITUTE OF CORRECTIONS (2013), <https://nicic.gov/investigating-impact-pretrial-detention-sentencing-outcomes>.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

### VIII. WHAT DOES THE FUTURE HOLD FOR BAIL?

Because there is no uniform federal bail system, the state systems are responsible for the vast majority of criminal prosecutions in U.S. and have the power to facilitate progression.<sup>160</sup> Robin Steinberg, a public defender and the CEO of The Bail Project, proposes that the problem lies heavily with police officers over-arresting and prosecutors over-prosecuting.<sup>161</sup> She emphasizes in her Ted Talk how a solution to mass incarceration starts with preventing people from entering the system from the start and focus on diverting people into other mechanisms of problem solving.<sup>162</sup> She highlights how our solution to most social problems is the criminal legal system and our system just cannot handle it.<sup>163</sup> Moreover, bail reform is designed for people who are legally innocent.<sup>164</sup> The goal is to ensure that the poor and wealthy are not treated differently.<sup>165</sup>

Studies have shown that ending pretrial detainment is very impactful for progress in the criminal system.<sup>166</sup> Ending pretrial incarceration for all but serious violent crimes helps defendants maintain their employment, keeps families together, prevents needless infliction of the mental and emotional harms of incarceration, and helps prevent wrongful conviction and coercive guilty pleas.<sup>167</sup> Politicians across political parties have collectively advocated against bail practices that disproportionately discriminate against minority parties.<sup>168</sup> There has been an influx of scholarly criticism and media coverage<sup>169</sup> that make it clear that the current system is broken.

A pretrial system with limited cash bail is not so farfetched. Attempts to change the U.S. cash bail system have been in progress for

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<sup>160</sup> Baradaran, *supra* note 142.

<sup>161</sup> Steinberg, *supra* note 86.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Kim Bellware, *Class, Race and Geography Emerge as Flashpoints in New York's Bail Reform Debate*, THE WASHINGTON POST (Feb. 15, 2020), <https://www.washingtonpost.com/nation/2020/02/15/new-york-bail-reform/>.

<sup>165</sup> *Id.*

<sup>166</sup> Rachel Smit, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, 25 GEO. J. POVERTY LAW & POL'Y 451 (2018).

<sup>167</sup> *Id.*

<sup>168</sup> Baradaran, *supra* note 142.

<sup>169</sup> *Id.*

the past two decades and most noticeably, in the past few years.<sup>170</sup> Washington, D.C. has been at the forefront of operating and exemplifying that defendants do return to court, even without cash bail.<sup>171</sup> D.C. releases 94% of its defendants pretrial and 90% effectively make it to their court dates.<sup>172</sup> In 2017, New Jersey became a leader in implementing methods of bail reform, which have dropped the number of pretrial detainees 40% in the state.<sup>173</sup> Before this, a 2013 study in New Jersey by the Drug Policy Alliance and Luminosity found that 40% of people in jail were stuck there because they could not afford cash bail.<sup>174</sup> Many of these people were Black and Latinos.<sup>175</sup> New Jersey's method in January 2017 was to eliminate cash bail for most nonviolent defendants using an algorithm.<sup>176</sup> The unique method to New Jersey's bail reform was to use the public safety assessment tool, a risk assessment algorithm.<sup>177</sup> This algorithm evaluates a defendant by two risk scores: 1) the likelihood for a defendant to fail to appear in court and 2) the likelihood of a defendant engaging in new crimes if released.<sup>178</sup> Some have criticized the algorithm method by saying that using a public safety component is racially and gender biased.<sup>179</sup> On the bright side, the data in New Jersey through 2018 has shown no spike in crime and evidence that people who were released were just as likely to show up to their court dates.<sup>180</sup> Chief Justice Stuart Rabner of the New Jersey Supreme Court said in a news release, "The annual report reveals that Criminal Justice Reform has reduced the unnecessary detention of low-risk defendants, ensured community

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<sup>170</sup> Bellware, *supra* 164.

<sup>171</sup> Smit, *supra* note 166.

<sup>172</sup> *Id.*

<sup>173</sup> Asgarian, *supra* note 1.

<sup>174</sup> Cassandra Aquart, *New Jersey Used an Algorithm to Revamp its Bail System: Is it Working, and at What Cost?*, CENTER FOR COURT INNOVATION (Aug. 16, 2018), <https://medium.com/re-thinking-tech/new-jersey-used-an-algorithm-to-revamp-its-bail-system-is-it-working-and-at-what-cost-1bb42d60f451>.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Madeleine Carlisle, *The Bail-Reform Tool That Activists Want Abolished*, THE ATLANTIC (Sept. 21, 2018), <https://www.theatlantic.com/politics/archive/2018/09/the-bail-reform-tool-that-activists-want-abolished/570913/>.

<sup>178</sup> *Id.*

<sup>179</sup> Aquart, *supra* note 174.

<sup>180</sup> Asgarian, *supra* note 1.

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safety, upheld constitutional principles, and preserved the integrity of the criminal justice system.”<sup>181</sup>

An increasing number of jurisdictions are eliminating cash bail altogether, like California, which is a state that has historically set some of the highest bail in the country.<sup>182</sup> California lawmakers have voted to eliminate cash bail, but this reform has been put on hold until voters decide in November 2020.<sup>183</sup> California’s action for bail reform was put on hold when thousands of voters signed petitioned to qualify this referendum.<sup>184</sup> With no surprise, this pushback came especially from the bail bonds industry.<sup>185</sup>

In New York, on any given day as of early 2019, more than 22,000 New Yorkers were imprisoned in a local jail.<sup>186</sup> More than six in ten of these individuals were detained pretrial, without a conviction, because of their inability to afford cash bail.<sup>187</sup> It has become clear that far too many presumed innocent defendants are forced to suffer in our State’s jails because they cannot afford to pay bail. After Kalief Browder’s story became so mainstream and widespread, pressure was put on lawmakers and politicians to eliminate cash bail in New York.<sup>188</sup> His story was symbolic for what hundreds of thousands of defendants in New York and across the country have gone through. The injustices that destroyed Kalief’s life were able to occur because the arraignment system in New York has been plagued with horrific problems.<sup>189</sup>

The movement towards putting an end to pretrial incarceration started on April 1, 2019, when bail laws in New York were completely

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<sup>181</sup> Katherine Landergan, *Report: Bail Reform Has Lowered Jail Population, but Program Facing “Funding Crisis”* POLITICO (Apr. 2, 2019), <https://www.politico.com/states/new-jersey/story/2019/04/02/report-bail-reform-has-lowered-jail-population-but-program-facing-funding-crisis-945756>.

<sup>182</sup> Carlisle, *supra* note 177.

<sup>183</sup> Jazmine Ulloa, *California’s Historic Overhaul of Cash Bail is Now on Hold Pending a 2020 Referendum*, L.A. TIMES (Jan. 16, 2019), <https://www.latimes.com/politics/la-pol-ca-bail-overhaul-referendum-20190116-story.html>.

<sup>184</sup> *Id.*

<sup>185</sup> Asgarian, *supra* note 1.

<sup>186</sup> Michael Rempel, *Bail Reform in New York, Legislative Provisions and Implications for New York City*, CENTER FOR COURT INNOVATION (Apr. 2019), [https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail\\_Reform\\_NY\\_full\\_0.pdf](https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail_Reform_NY_full_0.pdf).

<sup>187</sup> *Id.*

<sup>188</sup> Jesse McKinley, *Kalief Browder’s Suicide Inspired a Push to End Cash Bail. Now Lawmakers Have a Deal*, N.Y. TIMES (Mar. 29, 2019), <https://www.nytimes.com/2019/03/29/nyregion/kalief-browder-cash-bail-reform.html>.

<sup>189</sup> *Id.*

transformed.<sup>190</sup> New York State passed criminal justice reform legislation that removes cash bail and pretrial detention for almost all misdemeanors and nonviolent felony charges and guarantees defendant's mandatory release.<sup>191</sup> A study from the Center for Court Innovation shows that if we were to look at the 205,000 criminal cases that were arraigned in New York in 2018, only 10% of those would have cash bail as an option today.<sup>192</sup> Under New York's bail statute before January 1, 2020, the only factor judges had to take into account was a defendant's flight risk when determining if he will be assigned bail and the amount at which bail will be set.<sup>193</sup> In New York City, in roughly 50% of cases where a defendant was imprisoned, the crime charged was a misdemeanor or less.<sup>194</sup> The Governor's estimate is that 90% of arrestees will be released without bail.<sup>195</sup> In New York City, 43% of pretrial detainees held only on bail would be released.<sup>196</sup> This accounted for 20,000 defendants in 2018.<sup>197</sup>

This new criminal legislation in New York mandates new extreme risk protection order legislation, new bail legislation, new discovery legislation, and new speedy trial legislation.<sup>198</sup> The new laws in New York are monumental for this generation of bail reform. They provide additional procedural and due process safeguards by eliminating the aspect of public safety consideration and reducing the use of cash bail on many misdemeanors and non-violent felonies, through mandatory release.<sup>199</sup> The new laws change the consideration for release from considering future dangerousness to risk of flight.<sup>200</sup> Defendants are required to be released on their own recognizance, unless the court decides the defendant poses a risk of flight to avoid prosecution.<sup>201</sup> Specifically, the laws provide for mandatory release on qualifying offenses, including all misdemeanors, except sex offenses

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<sup>190</sup> Rempel, *supra* note 186.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Rempel, *supra* note 186.

<sup>199</sup> *Id.*; CPL 510.10.1 (McKinney 1984).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

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and DV contempt, non-violent felonies (everything up to an E felony), robbery in the second degree and burglary in the second degree.<sup>202</sup> It is also required that the court notifies defendants of their court dates through “friendly reminders” via text, phone calls, email, or mail on these charges.<sup>203</sup>

In determining bail, the court must now consider a defendant’s “activities and history,” as opposed to the previous practices of considering reputation, employment, family ties, and length of residence.<sup>204</sup> A court must also consider a defendant’s “criminal conviction record,” as opposed to the previous practice of looking at criminal history.<sup>205</sup> Additionally, a court must look at record of “flight to avoid criminal prosecution,” as opposed to record of responding to court appearances.<sup>206</sup> The court must consider a defendant’s individual financial circumstances including if posting cash bail would pose an undue hardship.<sup>207</sup> When the defendant qualifies, the court must set bail in three forms, including either unsecured or partially secured security bond.<sup>208</sup> Furthermore, the new laws do not eliminate cash bail all together. In situations where cash bail is acceptable, the court has widened its range of ways to accept payment.<sup>209</sup> If a person vouches on the defendant’s behalf to pay for their bail, this promise will be accepted.<sup>210</sup>

Courts will now have to issue on the record findings to justify their decisions. The Bronx freedom fund has found that effective notification systems and the ability to contact people and remind them about their court dates, is critical in getting high return rates.<sup>211</sup> This shows how slight changes in the decades-old cash bail system can highly benefit many defendants. No human being should lose his liberty because of his socioeconomic status.<sup>212</sup>

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<sup>202</sup> *Id.*; C.P.L 150.10.3 (McKinney 1984).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*; CPL 510.30.2a (McKinney 1984).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> CPL 520.10.2b (McKinney 1984).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Steinberg, *supra* note 86.

<sup>212</sup> *Id.*

Hopefully, these new laws in New York start stimulating conversations around the ways we use the criminal system to make racial decisions for so many individuals, families, and communities. Giving defendants the opportunity to be released before trial takes away the courts' power to use criminalization as a way to fill their coffers and generate revenue. These new cash bail laws force us to reevaluate the pretrial system that has accrued so much power over the centuries. The implementation of these new laws truly gives defendants back their due process rights and makes the courts actually consider whether people are innocent or guilty before convicting them. It is time to bring this system into conformity with our modern principles and understand of the nature of official bureaucracy, the incentives of government officials, and the administrative state.

If our system really is a criminal “justice” system, then maybe it is time to hand back power to the statement “innocent until proven guilty.” Attorney General Robert Kennedy once said, “What has been made clear . . . is that our present attitudes toward bail are not only cruel, but really completely illogical. . . . [O]nly one factor determines whether a defendant stays in jail before he comes to trial [and] that factor is, simply, money.”<sup>213</sup>

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<sup>213</sup> *National Conference on Bail and Criminal Justice*, UNIVERSITY OF PRETRIAL (Jan. 25, 2017), <https://university.pretrial.org/testing/glossary/entry?GlossaryKey=95855aa4-4435-41dc-a259-bd1216c2d2a5>.