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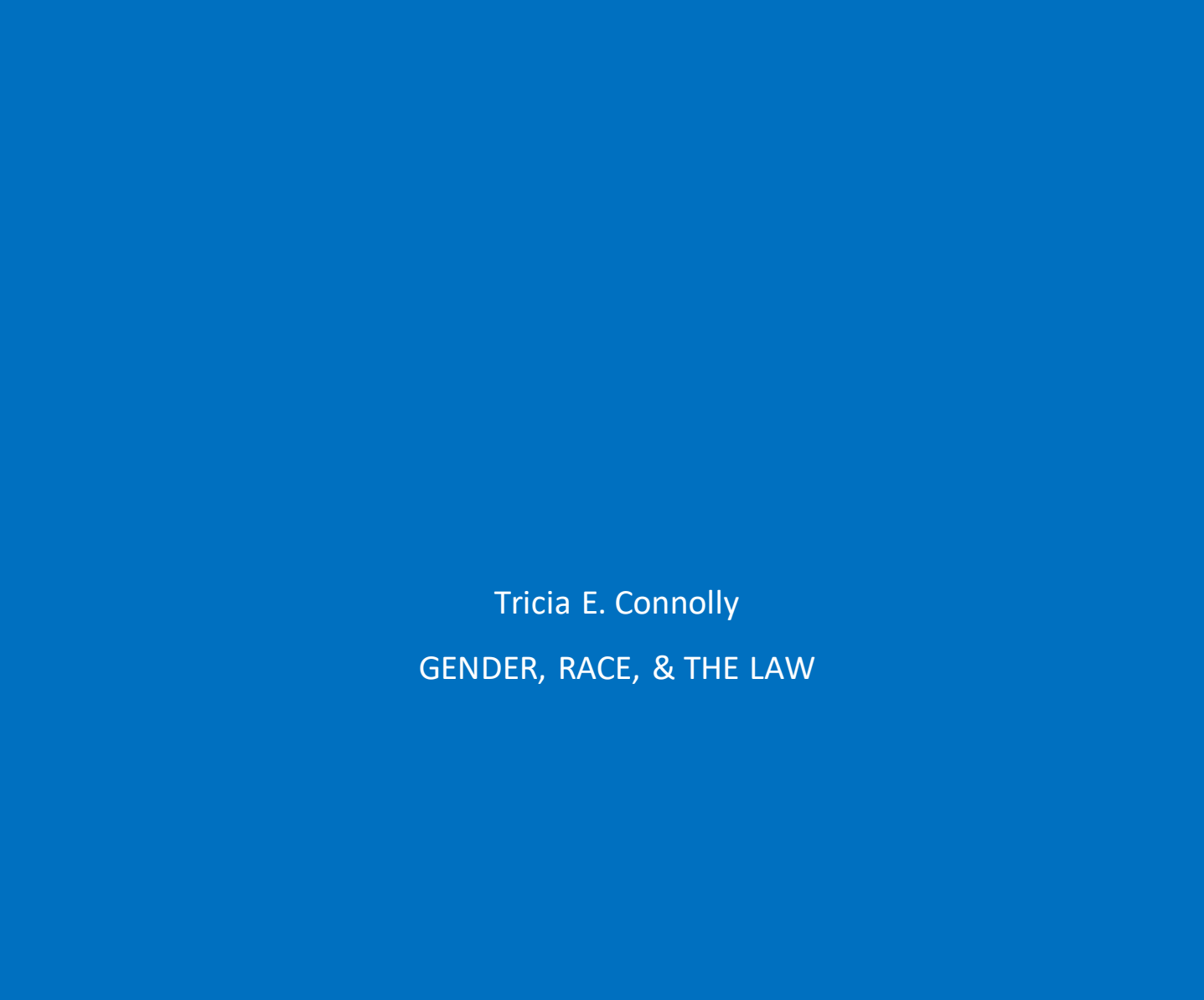
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**BAIL REFORM:
A MORE HOLISTIC APPROACH—
FROM A COP’S PERSPECTIVE**



Tricia E. Connolly
GENDER, RACE, & THE LAW

BAIL REFORM: A MORE HOLISTIC APPROACH – FROM A COP’S PERSPECTIVE

Tricia E. Connolly¹

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I. INTRODUCTION

If sitting on the fence had a poster child, it might very well be me, a seventeen-year police veteran who is also a law student and inescapably drawn to public interest and social justice. This police veteran sees the obvious – what we are doing in the criminal legal system is not working, yet there is also the gnawing feeling that the system is working exactly how it is intended – effectively keeping a large population of people downtrodden and defeated. I have been a police officer for most of my adult life. I have both personally and professionally ingrained notions of “justice” and “punishment” that come with being a cop. As I get older, I find less and less compatibility with my professional notions of justice and can feel in my gut that the current system does not provide “justice.” I find myself quick to defend those caught in the system. Collectively, we must take hold of our anger at injustice and put forth greater effort to prevent societal failures and address the root causes of crime and individual transgressions.

Most importantly, we must plan, fund, experiment, anticipate setbacks in forging a path ahead, and we must fight the urge to go back when there are failures – both real and perceived. “Bail reform” today limits itself to varying degrees of eliminating cash bail.² These reforms

² Jessica Brand & Jessica Pishko, *Bail Reform: Explained*, THE APPEAL (June 14, 2018), <https://theappeal.org/bail-reform-explained-4abb73dd2e8a/>. (The bail system is primarily about money and the ability to pay. Nationwide statistics indicate that approximately 60% of those in jails are being held pretrial. In NYC, it is 75%. Cashless bail reform is a method to stave off dramatically increased jail populations). *See also* Louis Casiano, *These States Recently Enacted Bail-Reform Laws*, FOX NEWS (Feb. 22, 2020, 10:07 PM), <https://www.foxnews.com/politics/these-states-recently-enacted-bail-reform-laws>. (“Under most bail-reform laws, criminal courts are prohibited from setting cash bail in most misdemeanor cases and some non-violent felony cases. States such as New York, California, and New Jersey have taken steps to ban cash bail, while smaller jurisdictions are adopting similar reforms”); *and see* Will Snowden, *Money Bail is Unjust and Should End*, FORBES EQ (Oct. 1, 2021, 10:00 AM), <https://www.forbes.com/sites/forbeseq/2021/10/01/money-bail-is-unjust-and-should-end/?sh=736f2c336f06>. (Mr.

completely ignore or disregard the revolving door they create and the costs of recidivism to victims, taxpayers, the recidivists themselves, and their communities.³

Bryan Stevenson, founder of the Equal Justice Initiative, reminds us that, “Each of us is more than the worst thing we’ve ever done.”⁴ If those words are not true, then we are all irredeemable. However, it is true that each of us are more than the worst thing we have ever done. It is also true that we are capable of more in our criminal legal system. We must strive to accomplish a balance of holding people accountable for the crimes and harm they commit, rebuilding those wrongdoers based off of their human potential, and preventing the need to do either of those things.

It is difficult to address any single topic in the criminal legal system without encountering a number of difficult issues that all lead to additional problems and large doses of injustice. In the case of bail reform, there are two issues that conflict with my professional notions of policing and the sworn duty of law enforcement to protect the community and remove the cancerous “dangers” who disregard the social contract we all must live by.⁵ First, it is obvious that we should not jail those who have not yet been convicted of any crime and are held only because they cannot afford their bail amount. Second, there is statistical evidence that bail reform laws have successfully

Snowden, New Orleans Director at the Vera Institute of Justice, stated, “The money bail system in the United States criminalizes poverty, destroys lives, and wastes public resources while failing to make us safer. For this reason, several states and cities around the country are reducing or ending their use of money bail. More should”).

³ *Recidivist*, BLACK’S LAW DICTIONARY (11th ed. 2019) (Recidivist is the term that is used to describe a person who is a habitual criminal. Here *recidivist* and *recidivism* are in referring to additional criminal offenses during pretrial release).

⁴ BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 17 (2014).

⁵ TIMOTHY R. SCHNACKE, NAT’L INST. OF CORRECTIONS, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 2, 91 (2014) <https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf> (Mr. Schnacke’s definition of “bail” is used here to describe the process of releasing a defendant from jail with judicially ordered conditions, usually cash-based, that are meant to provide reasonable assurance of future court appearances or to ensure public safety through the denial of release or a high enough condition to ensure legal behavior post-release).

reduced mass incarceration rates.⁶ Preventing people from being jailed pretrial has positive ripple effects on those individual cases and also on their communities and families.⁷ While the law student and human being in me cannot understand how everyone does not see this as positive, must-have reform, the police officer in me cannot talk honestly about bail reform without angrily recalling the “career criminals” I have come across in my policing career who spend their lives repeatedly harming others and cycling in and out of jail seemingly without regard to those they hurt. Essentially, these people harm themselves as well as those who are victimized by their crimes. Jailing everyone is not the answer, but neither blanket, thoughtless policies of mandatory release.

I believe firmly in the nobility and selfless service of the law enforcement profession and what I have done and stood for as a police officer, however, this paper will specifically dive into the process that occurs after the initial arrest when the individual has been taken to the halls of prosecution and jail. This piece discusses what happens after the police officer places the accused in the custody of the local jail and walks away, never to hear about the matter again ninety-seven percent of the time, thanks to plea bargaining.⁸ What historically happens is that those with the financial means buy their constitutional presumption of innocence, and freedom, and are released pretrial, generally in a timely fashion.⁹ These people will then participate in their own defense,

⁶ JAEOK KIM ET AL., VERA INST. OF JUST., THE IMPACT OF NEW YORK BAIL REFORM ON STATEWIDE JAIL POPULATIONS 2 (Feb. 2021) <https://www.vera.org/downloads/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations.pdf> (Bail reform led to a substantial reduction in jail incarceration, driven mainly by a decline in pretrial admissions for low-level and nonviolent charges).

⁷ RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 46-47 (2019) (Pretrial detention is likely to lead to loss of employment, loss of child custody, loss of housing and government benefits, as well as a higher rate of guilty pleas, longer sentences, and an increase in the likelihood of recidivism).

⁸ Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—And What Can Be Done About It*, 111 Nw. U. L. Rev. 1429 (2017) (“In 2015, only 2.9% of federal defendants went to trial, and, although the state statistics are still being gathered, it may be as low as less than 2%”).

⁹ Stuart Rabner, Opinion, *Chief Justice: Bail Reform Puts N.J. at the Forefront of Fairness*, NJ STAR-LEDGER | OPINION (Updated: Jan. 9, 2017, 2:33 PM)

https://www.nj.com/opinion/2017/01/nj_chief_justice_bail_reform_puts_nj_at_the_forefr.html (The Chief Justice of the New Jersey Supreme Court notes that before President Lyndon B. Johnson signed the Bail Reform Act of 1966, often acknowledged that those who had the financial means could post bail and buy their freedom while those who were poor would “languish in jail before trial”).

hire a lawyer, and likely see their charges reduced in a plea bargain, or dropped altogether.¹⁰ Those without the means to buy their same constitutional presumption of innocence will likely be held in jail while their life falls apart until they are offered a plea bargain they will accept, whether or not they are guilty, because of their need to get out of jail.¹¹ Those who purchased their presumption of innocence are also much less likely to be sentenced to any jail time.¹² Preventing this disparity and releasing people who are held only because they are too poor to pay cash bail is not the point of this discussion. The point of this discussion is that bail reform fails to address the elephant in the room. It fails to address repeat offenders who are chronically cycled through jails and prisons, then released more damaged than before, left to continue the same criminal behavior with an increasingly diminished chance to change each time they are arrested.¹³

This piece argues that bail reform should not merely begin with a blanket presumption of release, it should begin with the right to counsel at the first appearance and a thoughtful look at the individual, the circumstances, the offense committed, the past record and convictions of the individual, and just as importantly, their likelihood to reoffend. Bail reform should begin with investing in the process and tailoring the experience of the criminal legal system to serve the purposes of accountability, restitution, and rehabilitation, not merely to incarcerate or not

¹⁰ Robin Steinberg, *What If We Ended The Injustice Of Bail?* [Video file] (Apr. 2018), https://www.ted.com/talks/robin_steinberg_what_if_we_ended_the_injustice_of_bail/transcript (The Bronx Freedom Fund, a non-profit that posts bail for low-income defendants, found that over 50% of those for whom the Fund posted bail, their charges were completely dismissed after they were released, and fewer than 2% of their clients ever received a jail sentence).

¹¹ *Id.* (Being held in jail, even only for a few days, can mean losing your job, losing your home, jeopardizing your immigration status, etc. It may even mean losing custody of your children. Additionally, one-third of sexual victimization by jail staff occurs in the first three days in jail, and almost half of all jail deaths, including suicides, happen in that first week of incarceration).

¹² *Id.* (“If you're held in jail on bail, you're four times more likely to get a jail sentence than if you had been free, and that jail sentence will be three times longer”).

¹³ BARKOW, *supra* note 7, at 18 (correctional facilities in the U.S. offer minimal to no programming to counter the damaging effects of being warehoused with other individuals struggling with a plethora of problems, the psychological damage from social isolation, the inability to receive treatment and therefore release individuals who are “often more damaged at the end of their sentences than when they went in”).

incarcerate. New York’s current “bail reform,” focuses largely on a lengthy list of offenses that mandate a cash-free release in what amounts to a statutorily mandated revolving door, based solely on the crime charged, without consideration of each individual.¹⁴ These thoughtless policies place law enforcement, the local community, and even the defendant, at a disadvantage, and they fail to signal accountability to the public at large. Statistics show that there are low recidivism rates among the individuals freed, however, important issues remain of what to do with “career criminals”, and that will be the primary focus of this piece.¹⁵

Part II of this paper will provide a brief history of bail and discuss the historical problems of a cash-based system and the progression of issues that left the United States with a two-tiered system based on financial status, mass incarceration, and police and jails being misused to punitively respond to social problems. The result: the U.S. incarcerates more people than any other country on the planet.¹⁶

Part III will discuss how New York lawmakers have attempted to address the problems of mass incarceration, over criminalization, and a history of racial injustice in the criminal legal system through bail reform efforts. Political gaming and overreach have sacrificed public safety and the reputation of law enforcement in an attempt to win votes, all under the guise of rectifying decades of injustice and inequity with legislation to merely placate the masses and kick the real

¹⁴ Krystal Rodriguez, Michael Rempel, & Matt Watkins, *The Facts on Bail Reform and Crime in New York City*, CTR. FOR CT. INNOVATION (Feb. 2021), <https://www.courtinnovation.org/publications/bail-crime-nyc> (On April 1, 2019, New York State passed sweeping criminal justice reform legislation that eliminated money bail and pretrial detention for nearly all misdemeanor and nonviolent felony cases. The measure went into effect on January 1, 2020. In July 2020, the state passed revisions to the law that added more crimes to be eligible for bail for pretrial detention). *And see* Rempel & Rodriguez, *infra* note 23 (The New York bail reform law eliminates the use of cash bail and pretrial detention for people charged with most misdemeanors and many nonviolent felonies, while preserving money bail and detention as legal options in virtually all violent felony cases).

¹⁵ NEW YORK CITY CRIMINAL JUSTICE AGENCY, PEOPLE IN COMMUNITY WITH PENDING NYC CASE: NEW OFFENSE COMMITTED WHILE ON RELEASE, <https://www.nycja.org/pretrial-release-dashboard> (last visited May 2, 2022).

¹⁶ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POLICY INITIATIVE REPORT 2 (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> (Download as a PDF for page numbers).

issues down road. Lawmakers have failed to address the root causes of crime and have focused primarily on policing and bail reform. These efforts have varied widely and there is a great chasm between the reforms and the results in New York and New Jersey.¹⁷ The two locales are neighbors and share borders, but the perceived “success” and public perception of New Jersey’s bail reform is vastly different than New York.¹⁸

Part IV will focus on New York’s current bail reform efforts and where those efforts have succeeded, where gaps remain, and where improvements can be made. New York remains the only jurisdiction in the country that does not allow judges to consider “dangerousness” when determining conditions of release.¹⁹ Where politicians and the government have seemingly come up short, there has been tremendous success in a Bronx-founded grass-roots, community-based bail fund that provided cash bail to those who cannot afford the bail imposed on them and who are charged with non-violent offenses and misdemeanors.²⁰ This program, the Bronx Freedom Fund,²¹ had a 96% appearance rate to court appointments and their efforts to release people who could not

¹⁷ *E.g.*, Bernadette Hogan & Bruce Golding, *NY Judges Agree With Mayor Adams on Fixing Bail Reform Law*, N.Y. POST (Jan. 25, 2022), <https://nypost.com/2022/01/25/ny-judges-agree-with-eric-adams-on-fixing-bail-reform-law-court-official-says/>. *See also* James A. Gagliano, *New York’s Bail Reform Was Shortsighted*, CNN (Updated Jan. 17, 2020, 10:18 AM), <https://www.cnn.com/2020/01/17/opinions/new-york-sweeping-bail-reform-gagliano/index.html>; Ken Berke, *New York Bail Reform is a Disaster*, ROCHE SURETY, INC., (Jan. 31, 2020), <https://www.rochesurety.com/https-www-rochesurety-com-newyorkbailreform/>. *But see* Reuben Francis, *New Jersey is Proving that Bail Reform Works*, TALK POVERTY ANALYSIS (Apr. 26, 2019) <https://talkpoverty.org/2019/04/26/new-jersey-bail-reform-works/>; *and see* Blair Zwillman, *New Jersey Leads the Way in Bail Reform*, NEW JERSEY LAWYER, THE MAGAZINE, 318-JUN N.J. LAW 16 (June 2019).

¹⁸ *Id.*

¹⁹ Jamiles Lartey, *New York Tried to Get Rid of Bail. Then the Backlash Came*, POLITICO (Apr. 23, 2020, 05:08 AM), <https://www.politico.com/news/magazine/2020/04/23/bail-reform-coronavirus-new-york-backlash-148299>.

²⁰ Steinberg, *supra* note 10.

²¹ THE BAIL PROJECT, <https://bailproject.org/> (last visited May 2, 2022) (The Bronx Freedom Fund was a non-profit organization that has since shuttered and reopened as The Bail Project, a national non-profit with the same mission – to combat mass incarceration by using a revolving pot of donated funds for those who cannot afford the price of freedom. The project allows people to face their charges while free and also provides pretrial services under their “Community Release with Support” model).

afford their bail has proven to have a dramatic impact on the outcomes of their cases, with over half of those released pretrial having their charges completely dropped.²²

Part VI argues that bail reform needs a more holistic approach than the aforementioned presumption of release and cashless bail mandates. New York's initial bail reforms made nine out of ten arrests in the state ineligible for cash bail.²³ The amendments several months later minimally expanded the list of charges and situations where judges may impose cash bail.²⁴ Additionally, New York judges "must order release on recognizance (with no conditions) unless the defendant poses a demonstrated "risk of flight", in which case judges are required to select the least restrictive condition(s) necessary" to ensure the defendant's return to court.²⁵ Reforms must not ignore a defendant's risk to public safety or likelihood of recidivism – violent or not, in addition to considering the individual's history, current charges, totality of the circumstances, and life factors, which judges in New York are not allowed to consider if a defendant is charged with a crime on the mandatory no bail list.²⁶ New York's current bail reform sets forth a list of criminal charges where cash bail is not allowed no matter the circumstances or prior record of the defendant.²⁷ The lack of judicial input and consideration of the defendant as a whole requires a re-tooling of the bail process. True reform should include the following: 1) Mandatory right to a bail hearing with effective assistance of counsel, 2) consideration of the defendant as a whole, from their prior record

²² Steinberg, *supra* note 10 (The Bronx Freedom Fund found that 90% of those charged with misdemeanors who were not able to post bail plead guilty. Of those for whom the Fund paid their bail, over half had their charges dropped completely and fewer than 2% were ever convicted of a crime).

²³ MICHAEL REMPEL & KRISTAL RODRIGUEZ, CTR. FOR CT. INNOVATION, BAIL REFORM REVISITED: THE IMPACT OF NEW YORK'S AMENDED BAIL LAW ON PRETRIAL DETENTION 5 (May 2020), https://www.courtinnovation.org/sites/default/files/media/document/2020/bail_reform_revisited_05272020.pdf.

²⁴ *Id.*

²⁵ *Id.*, at 6.

²⁶ *Id.* ("The amended law eliminates the use of money bail and pretrial detention for people charged with most misdemeanors and many nonviolent felonies, while preserving money bail and detention as legal options in virtually all violent felony cases. Additionally, judges must order release on recognizance (with no conditions) unless the defendant poses a demonstrated "risk of flight").

²⁷ *Id.*

to their current life status and mental wellbeing, 3) the ability of judges to discern whether a defendant's prior record and current standing should make them ineligible to be released, regardless of the current charges against them, and 4) give the court system the ability to enforce the civil confinement of recidivist defendants in order to initiate a treatment and counseling program prior to their being safely released pending their trial.²⁸

II. A BRIEF HISTORY OF BAIL AND BREWING PROBLEMS

The concept of bail has been a practice of the criminal legal system since the Romans.²⁹ The system required a defendant to put forth a personal surety, usually money, to incentivize them to return to court to answer the charges against them, and it has always tied freedom with the ability to pay.³⁰ It is paradoxical that bail is primarily meant to facilitate pretrial release, but instead, as we see today, it often leads to the denial of release.³¹ The United States is a society based upon liberty and founded on freedom.³² Despite this, current bail systems in the U.S. leave approximately 500,000 people in jail every day, despite not having been convicted of anything, merely because they cannot afford the bail required of them.³³

America is currently in its third generation of bail reform³⁴ and the failure of previous generations of reform to address the inherent economic inequities of the cash bail system,

²⁸ The Supreme Court of the United States justified civil confinement in landmark cases such as *O'Connor v. Donaldson*, 422 U.S. 563 (1975) and *Addington v. Texas*, 441 U.S. 418 (1979).

²⁹ Kate Torgovnick May, *How The Bail System In The US Became Such a Mess – And How It Can Be Fixed*. IDEAS.TED.COM (Aug. 31, 2018), <https://ideas.ted.com/how-the-bail-system-in-the-us-became-such-a-mess-and-how-it-can-be-fixed/>.

³⁰ *Id.* (Bail has always been a payment-based system of pretrial release).

³¹ Schnacke, *supra* note 5.

³² *Id.*

³³ Steinberg, *supra* note 10.

³⁴ Schnacke, *supra* note 5, at 17.

America's predatory thirst to profit from the bail industry, and the use of the criminal legal system to punitively address societal problems all contribute to the current unjust bail system.³⁵

A. The History of Bail

a. From the Roman Empire to the United States

Bail. To release or detain. It sounds simple, yet it has proven difficult to balance an individual's right to freedom with the community's interest in public safety. Although bail is said to be premised with liberty in mind and is intended to free the accused pretrial, it has always been based on the ability to pay.³⁶ This payment system of bail has existed since the Roman times and can be traced back to 461 B.C.³⁷ Long after the collapse of Rome, the successful English model of bail was premised on unsecured personal sureties, the release ofailable defendants, and not allowing anyone to profit from the bail system.³⁸ In England, for hundreds of years, bail was used to ensure the pretrial release of the accused while creating a personal surety incentivizing their return to answer the charges against them.³⁹ The rationale of bail is that if people have "skin in the game," they will return to court and not skip town.⁴⁰ Prior to the Declaration of Independence, American bail laws were modeled after English law⁴¹ and the colonies, while influential on one another, nevertheless each enacted their own versions of bail.⁴² Post-independence, the states each

³⁵ Alexa Van Brunt & Locke E. Bowman, *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 (Fall 2018) (The U.S. is in its third generation of bail reform). See also Torgovnick May, *supra* note 29 (The bail industry profits over \$2 billion annually); ALEXI JONES & WENDY SAWYER, PRISON POLICY INITIATIVE, ARREST, RELEASE, REPEAT: HOW POLICE AND JAILS ARE MISUSED TO RESPOND TO SOCIAL PROBLEMS 1 (Aug. 2019), <https://www.prisonpolicy.org/reports/repeatarrests.html> (Download as a PDF document for page numbers).

³⁶ Torgovnick May, *supra* note 29.

³⁷ *Id.*

³⁸ Schnacke, *supra* note 5, at 106.

³⁹ *Id.* at 1.

⁴⁰ Steinberg, *supra* note 10.

⁴¹ TIMOTHY R. SCHNACKE, MICHAEL R. JONES, & CLAIRE M. B. BROOKER, PRETRIAL JUST. INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 1 (Sept. 23, 2010), https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI_2010.pdf.

⁴² *Id.* at 28.

had their own versions granting people a right to bail, and Congress enacted the Bail Reform Act of 1789, which granted an absolute right to bail for non-capital federal crimes.⁴³ Bail laws largely remained the same for nearly 177 years, until 1966.

b. The Bail Reform Act of 1966 – The First Generation of U.S. Bail Reform

The first generation of bail reform in the United States began in the mid-1960s with the Bail Reform Act of 1966, the only major overhaul to American bail laws since 1789. Congress passed the 1966 Act after observing that those with means were able to purchase their pretrial freedom while those without means languished in jail.⁴⁴ This reform was based upon two foundational principals: “(1) a person’s financial status should not be a reason for denying pretrial release; and (2) the danger of nonappearance at trial should be the only criterion considered when bail is assessed.”⁴⁵

When a judge was to set bail, the 1966 Act listed specific factors to be considered regarding flight risk. The list included “community and family ties, employment, length of residence in the community, prior convictions, financial resources, the nature and circumstances of the offense charged, the weight of the evidence against the accused, and the defendant's record of appearance at previous court proceedings, including any prior flight to avoid prosecution.”⁴⁶ Additionally, when considering bail for capital offenses or post-conviction, danger was introduced as an element among the many considerations. For example, while danger is not to be considered in general, in

⁴³ Donald B. Verrilli, Jr., *The Eighth Amendment and the Right to Bail: Historical Perspectives*, COLUM. LAW REV., VOL. 82, NO. 2, 329 (Mar. 1982). *And see* Schnacke, *supra* note 5, at 5.

⁴⁴ Warren L. Miller, *The Bail Reform Act of 1966: Need for Reform in 1969*, 19 CATH. U. L. REV. 24, 24 (1970).

⁴⁵ *Id.*

⁴⁶ 18 U.S.C. § 3146(b) (Supp. IV, 1969).

capital cases, the judge was expressly authorized to consider “danger to any other person or to the community” as a proper element in setting bail.⁴⁷

Tellingly of problems to come, just as “danger” was being introduced as a bail consideration, the 1966 Act gave limited thought to the protection of society from recidivism through preventative detention, and Congress specifically postponed consideration of the issue.⁴⁸ The Southern District of New York recognized such in *United States v. Melville*. “There is no authority under existing law for confining defendants in noncapital cases prior to trial on the ground that they are likely to commit crimes other than the one already charged against them. Whatever some future Congress may do, the one that enacted the Bail Reform Act of 1966, by which we are now governed, made this plain beyond serious question.”⁴⁹ The court expressly stated that condoning “preventative detention” was beyond their authority under the Bail Reform Act of 1966.⁵⁰

The Bail Reform Act of 1966 expressly authorized a wide range of discretionary conditions of release that a judicial officer may set in lieu of, or in addition to, the defendant's release on personal recognizance.⁵¹ The conditions include restrictions on travel, association, residence, and “any other conditions deemed reasonably necessary to assure appearance as required.”⁵² Warren L. Miller, a former United States Attorney for the District of Columbia, criticized the unrestricted discretionary creativity of the judges as too costly, unrealistic, and unenforceable.⁵³ Miller concluded in his analysis that although the Bail Reform Act of 1966 and its presumption of release

⁴⁷ Miller, *supra* note 44, at 31.

⁴⁸ Miller, *supra* note 44, at 32.

⁴⁹ *United States v. Melville*, 306 F. Supp. 124, 126 (S.D.N.Y. 1969).

⁵⁰ *Id.*

⁵¹ Miller, *supra* note 44, at 43.

⁵² *Id.*

⁵³ *Id.*

could not exclusively be blamed for the “spiraling crime rate” in the District of Columbia he was “certain” that it was a contributing factor.⁵⁴ This mindset quickly ushered in a new era of bail reform beginning roughly four years after the 1966 Act, as the “free loving” 1960s and the Viet nam War were winding down.

c. The Bail Reform Act of 1984, The War on Drugs, & the Second Generation of Bail Reform in the U.S.

The second generation of bail reform in the U.S. began in 1970, when President Richard Nixon and his administration urged the legislature in the District of Columbia to alter the law to allow the pretrial detention of those not accused of capital crimes, but who were a “danger to the community.”⁵⁵ The resulting legislation, the District of Columbia Court Reform and Criminal Procedure Act of 1970, was the nation’s first sharp departure from the use of bail solely as a means to ensure appearance.⁵⁶ The legislation was unsuccessfully challenged in district court⁵⁷ and later denied certiorari by the Supreme Court in 1982.⁵⁸ Riding this monumental wave of implicit endorsement, Congress repealed the Bail Act of 1966 and replaced it with the Bail Reform Act of 1984.⁵⁹ The new act carried many of the 1970 Nixon reforms with it and diverged from the 1966 Act by allowing, in addition to the risk of flight, judicial consideration of a person’s danger to a specific person, or to the community at large.⁶⁰ For those subject to detention without bail, a special

⁵⁴ *Id.* at 48.

⁵⁵ Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*. *FORDHAM URBAN LAW J.*, VOL. 36, NUMBER 1, ARTICLE 5, 122, 139 (2009).

⁵⁶ Van Brunt & Bowman, *supra* note 35, at 721.

⁵⁷ *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981) (the court held that pretrial detention for the purpose of preventing the accused from committing additional dangerous acts against the community under D.C. Code Ann. § 23-1322(a)(1) sought to curtail reasonably predictable conduct and was not considered punishment for prior acts. The court found that pretrial detention had a substantial relation to preventing injury to the public).

⁵⁸ *United States v. Edwards*, 455 U.S. 1022 (1982).

⁵⁹ 18 U.S.C. §§ 3141-3150.

⁶⁰ 18 U.S.C. § 3141(b).

hearing would be held to verify the decision to detain.⁶¹ All others must be granted bail.⁶² Additionally, the 1984 Act contained a lengthy list of pretrial conditions judges may impose upon the accused during their pretrial release.⁶³ The consequence of these changes in the bail laws, “was both a rise in the number of pretrial detainees and an increase in racial disparities among those who were locked up,” proving the 1984 Bail Reform Act to be more restrictive of freedom and liberty than the 1966 Act.⁶⁴

Another critical step in second generation reforms, was the Supreme Court case, *United States v. Salerno*.⁶⁵ The Court upheld the Bail Reform Act of 1984, allowing the pretrial detention of an accused murderous mafia enforcer without bail, based solely on the court’s interpretation of the arrestee’s “dangerousness.”⁶⁶ The consequence of *Salerno* was that the government was provided another tool to detain through its determination that the defendant was “dangerous.” The government justified preventive pretrial detention by providing clear and convincing evidence that the accused was dangerous and likely to commit further crimes if released, based on their current charges and criminal history.⁶⁷ *Salerno* authorized a popular additional purpose for the pretrial system: protecting the public from harm caused by “dangerous” defendants.⁶⁸ The new statutes and the decision in *Salerno* gave judges broad range to decide who was and was not dangerous, and to thus impose pretrial detention, based on their opinion of the arrestee’s record.⁶⁹ Today,

⁶¹ 18 U.S.C. § 3141(f).

⁶² 18 U.S.C. § 3141(a)-(f).

⁶³ 18 U.S.C. § 3141(c) (includes requiring the defendant to: remain in the custody of a third party; maintain or seek a job or educational program; comply with restrictions on travel, living arrangements, and personal associations; avoid contact with the victim and witnesses; report to law enforcement, or other designated authorities; obey a curfew; not possess weapons; not use controlled substances or excessive alcohol; undergo medical or psychiatric treatment, including institutional treatment; and remain in custody except for specified purposes, such as work or school).

⁶⁴ Van Brunt & Bowman, *supra* note 35, at 738.

⁶⁵ *United States v. Salerno*, 481 U.S. 739, 741 (1987).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 502 (2018).

⁶⁹ *Id.*

nearly all U.S. jurisdictions authorize courts to impose pretrial conditions of release on the basis of dangerousness, New York being the lone exception.⁷⁰ Some authorize full-scale preventative detention as well.”⁷¹

The first and second generation bail reforms served mainly to increase the reasons courts could justify the detention of defendants prior to trial, first through the inability to pay, then by deeming someone to be a flight risk, and finally, through a determination by the court that the defendant was dangerous. Despite these expansions in the power to detain, the amount of incarcerated persons in the United States remained relatively consistent from the early 1900s through the 1970s, but exploded after Nixon declared the War on Drugs.⁷² As of 2021, the United States incarcerates 664 per 100,000 people, which is more than any other nation in the world.⁷³ El Salvador, the second most incarceral country, incarcerates 562 per 100,000 people.⁷⁴ Louisiana and Mississippi incarcerate 1,094 and 1,031.⁷⁵ Five other U.S. states incarcerate more than 900 per 100,000 people.⁷⁶ As the U.S.’s incarceral rate grew, obvious problems arose.

B. Problems Arise

A number of challenging issues have arisen over the course of time, some new, but mostly as old as bail itself. To this day, it is a struggle to achieve the three overlapping goals of bail: 1) to

⁷⁰ Lartey, *supra* note 19.

⁷¹ Mayson, *supra* note 68, at 502.

⁷² Heather Schoenfeld, *The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. GENDER RACE & JUST. 315, 320 (2012) (“[W]hile the war on drugs was the main cause of incarceration growth in the initial period, a change in prosecutors’ abilities to secure convictions for a variety of offenses, an increase in the time served for all inmates, and (to a lesser extent) an increase in use of incarceration for parole violations and DUI, weapons, and “other” offenses better explains the continued growth in incarceration rates. [T]he case study demonstrates that mass incarceration was predicated upon the war on drugs”).

⁷³ EMILY WIDRA & TIANA HERRING, PRISON POLICY INITIATIVE, STATES OF INCARCERATION: THE GLOBAL CONTEXT 2021 (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

maximize release, 2) to maximize court appearances, and 3) to maximize public safety, without sacrificing one for the others.⁷⁷ Bail is fraught with many issues. From the inherent unfairness of a system based on ability to pay, to mass incarceration, and racial disparities, the system manifests inequities. Part II discusses those problems and also the shortsightedness of not considering the initial bail hearing a “critical stage” in the adversarial process. The current monetary bail system leads to mass incarceration, great economic costs to both taxpayers and those who are incarcerated, racial inequities, and has created a predatory bail bond industry, yet these aspects of reform are largely ignored.

a. Initial Bail Hearings

Today, over ten million people are arrested annually in the United States.⁷⁸ This jaw-dropping number makes the determination of bail, the gateway into the criminal legal system, one of the most important issues in determining one’s fate after arrest.⁷⁹ Whether or not one is released pre-trial can even impact the outcome of their case!⁸⁰ Those who are not released pre-trial are subject to worse overall outcomes, both in their cases and in their personal lives.⁸¹ There is a growing body of evidence that those incarcerated pretrial are at great risk of losing their jobs,

⁷⁷ Schnacke, *supra* note 5, at v.

⁷⁸ Sawyer & Wagner, *supra* note 16, at 6.

⁷⁹ WILL DOBBIE & CRYSTAL YANG, BROOKINGS PAPERS ON ECONOMIC ACTIVITY: THE ECONOMIC COSTS OF PRETRIAL DETENTION 251, (Spring 2021) (the pretrial system is often the earliest point of entry into the criminal justice system and is often a person’s initial opportunity to be incarcerated).

⁸⁰ CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND, & ALEXANDER HOLSINGER, NAT’L INST. OF CORRECTIONS AND THE LAURA AND JOHN ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES (Nov. 2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_state-sentencing_FNL.pdf (A study on the impact of pretrial detention compared over 153,000 misdemeanor and felony defendants concluded that those who were incarcerated the entire time before their trial were more likely to get a jail sentence, more likely to receive a longer sentence, and more likely to be sentenced to prison). *See also* Dobbie & Yang, *supra* note 79, at 258 (Pretrial detention increases the risk of wrongful convictions because those who are detained are pressured into accepting plea bargains to secure their release and suffer the lasting consequences detailed previously in this paper).

⁸¹ LEON DIGARD & ELIZABETH SWAVOLA, THE VERA INST. OF JUST. EVIDENCE BRIEF, JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION (Apr. 2019), <https://safetyandjusticechallenge.org/wp-content/uploads/2021/06/Justice-Denied-Evidence-Brief.pdf> (Those who are incarcerated pretrial are at risk of losing employment, housing, custody of their children while detained).

housing, custody of their children, immigration status, etc.⁸² Additionally, nearly one-third of sexual victimization by jail staff occurs within the first three days in jail.⁸³ Being in jail even briefly is not only sexually violent, it is also potentially deadly as nearly half of all inmate deaths, including suicides, occur within the first week of incarceration.⁸⁴ The potential impacts of pretrial detention, both immediate and long-term, demonstrate why the Sixth Amendment right to counsel not only applies, but initial bail hearings should be considered a “critical stage” where there is a mandatory right to have counsel present.⁸⁵

In *Rothgery v. Gillespie Cty.*, the Supreme Court noted that they have “twice held that the right to counsel attaches at the initial appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty,” but the Court has actually done so on numerous occasions.⁸⁶ Despite these rulings, “defense attorneys are usually not available when the judge makes the first determination of bail or pretrial detention at the initial appearance.”⁸⁷ The Sixth Amendment is a subject matter unto itself that cannot be analyzed in depth here, but it is one point in my argument in Part V that the right to counsel is an overlooked, yet integral part of bail reform.

⁸² Steinberg, *supra* note 10.

⁸³ *Id.* (Ms. Steinberg cited the U.S. Department of Justice Report, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-09* (Aug. 2010)).

⁸⁴ *Id.*

⁸⁵ *Rothgery v. Gillespie Cty.*, 554 U.S. 191 (2008) (the Supreme Court affirmed that the Sixth Amendment right to counsel attaches when “formal judicial proceedings have begun,” but distinguished between the right to counsel attaching and the right to have counsel present, the latter requiring the proceeding to be a “critical stage” in the prosecutorial proceedings).

⁸⁶ *Powell v. Alabama*, 287 U.S. 45 (1932); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *White v. Maryland*, 373 U.S. 59 (1963); *Massiah v. United States*, 377 U.S. 201 (1964); *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Coleman v. Alabama*, 399 U.S. 1 (1970); *Kirby v. Illinois*, 406 U.S. 682, 688-689 (1972)

⁸⁷ MARC L. MILLER ET AL., *CRIMINAL PROCEDURES PROSECUTION AND ADJUDICATION: CASES, STATUTES, AND EXECUTIVE MATERIALS* 23 (6th Ed. 2019).

b. Failure to Appear and Recidivism While on Bail

The most obvious problems with pretrial release are failure to appear for court appointments and the risk that the subject will reoffend while awaiting trial. Failure to appear is an alleged problem that should be quickly dismissed as an easily solvable issue. For example, the Bronx Freedom Fund achieved a 96% rate of return among the 6,500 persons for whom the fund posted bail.⁸⁸ This rate of return can be attributed to court reminders and pretrial services invested in those released, and it is an example of what is attainable.⁸⁹ Failure to appear at court is often not indicative of an attempt to flee, as it is most often the result of many factors including: lack of transportation, work conflicts, cost (missing a day or work, childcare), or simply forgetting.⁹⁰ Additionally, vulnerable populations; those experiencing homelessness, addiction, and/or mental illness tend to struggle with court appearances, but not because they are fleeing justice.⁹¹ Other fields, such as health care providers, have used notification reminder systems to decrease patients missing appointments, and this has been used in the criminal justice field as well, though not as widespread as it should be yet.⁹²

Eliminating or greatly reducing rates of failure to appear at court alleviates one glaring problem with pretrial release. However, recidivism remains. While legislatures focus on only counting violent offenses made during pretrial release, the focus must be on a true measure of safety that addresses the issue of all recidivism by those on pretrial release. Citizens not only value personal safety and personal property, but also the safety and property of their communities.

⁸⁸ Steinberg, *supra* note 10 (96% of the Bronx Freedom Fund clients returned to every court appearance).

⁸⁹ EVELYN F. MCCOY ET. AL., URBAN INST. JUST. POL'Y CTR., REMOVING BARRIERS TO PRETRIAL APPEARANCE: LESSONS LEARNED FROM TULSA COUNTY, OKLAHOMA, AND HENNEPIN COUNTY, MINNESOTA 1 (Apr. 2021), urban.org/sites/default/files/publication/104177/removing-barriers-to-pretrial-appearance_0_0.pdf.

⁹⁰ *Id.* at 3.

⁹¹ *Id.*

⁹² *Id.*

Although recidivist concerns are not new, it remains very difficult to calculate the rate of recidivism because the numbers considered do not tell the full story as politicians and pro-reform advocates only want to consider the smaller pool of violent offenses when reporting recidivism rates.⁹³ In his article from 1969, United States Attorney Warren Miller estimated that recidivism rates by persons who had been released prior to their trial could be as high as seventy percent, in large part because the statistics only counted violent felonies committed, a glaring red flag in the low recidivism calculations.⁹⁴ Misdemeanor crimes are not calculated.⁹⁵ Felonies dropped down to lesser charges, unreported crimes, and reported crimes which do not result in arrest are not considered either.⁹⁶ It is very difficult to calculate the rate of recidivism because the numbers considered do not tell the full story. In addition to the practices of the judicial system dropping cases and charges, someone who is released pretrial may commit any number of crimes before they are arrested, or they may commit a number of crimes that are not reported to the police, all contributing to a much higher rate of recidivism than is calculated and conveyed to the public.

c. Bail and Mass Incarceration, Policing, and Over Criminalization

What does our incarceration rate, criminogenics, and these statistics have to do with bail? Simple. “The cash bail system is fueling mass incarceration.”⁹⁷ Of those in jail in the United States on any given day of the year, nearly 550,000 people are being detained without having been convicted of any crime,⁹⁸ and the fact is that more people are in jail today “simply because they can’t afford the price of bail.”⁹⁹ These people are held in jail until their trial date, which can be

⁹³ BAIL REFORM FAQs, <https://www.nysenate.gov/newsroom/press-releases/brad-hoylman/bail-reform-faqs> (last visited May 2, 2022).

⁹⁴ Miller, *supra* note 44, at 32.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ THE BAIL PROJECT, *supra* note 21.

⁹⁸ Brand & Pishko, *supra* note 2 (nationwide statistics indicate that approximately 60% of those in jails are being held pretrial. In NYC, it is 75%).

⁹⁹ Torgovnick May, *supra* note 29, at 1.

delayed for weeks, months, or even years.¹⁰⁰ The median bail amount for those in local jails nationwide is \$10,000.¹⁰¹ For the typical person that is currently being held on this bail amount, that figure represents eight months' income.¹⁰²

In 2022, we currently have “almost 2 million people [locked in our] 1,566 state prisons, 102 federal prisons, 2,850 local jails, 1,510 juvenile correctional facilities, 186 immigration detention facilities, and 82 Indian country jails.”¹⁰³ During the summer of 2020, the COVID-19 pandemic¹⁰⁴ briefly lowered the prison population by fifteen percent, and by twenty-five percent in local jails. As encouraging as this was to some, this level of decrease would be required year after year to actually end mass incarceration in the U.S.¹⁰⁵ These numbers were not a sign of significant policy changes and incarceration rates have already begun to return to pre-COVID levels.¹⁰⁶

During the aforementioned second generation of bail reforms, a major shift occurred in the criminal legal system of the United States. In 1971, President Richard Nixon and his administration declared a “War on Drugs,” which led to an increase in the quantity of drug laws, an increase in

¹⁰⁰ *Id.*

¹⁰¹ Sawyer & Wagner, *supra* note 16, at 26.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ CENTERS FOR DISEASE CONTROL AND PREVENTION, COVID-19 TIMELINE, <https://www.cdc.gov/museum/timeline/covid19.html> (last visited May 2, 2022) (the World Health Organization (WHO) formally declared the COVID-19 virus an international public health concern. In Feb. 2020, Italy was the first country to “lock down” residents and prohibit non-emergency public appearance by citizens in an effort to stop the spread of the highly contagious COVID-19 virus. What follows are international lockdowns, prohibited international and local travel, the closing of non-essential businesses, tens of millions of infected persons, and millions of deaths world-wide. COVID-19 was declared a global pandemic by the WHO on Mar. 11, 2020).

¹⁰⁵ Torgovnick May, *supra* note 29.

¹⁰⁶ *Id.*

the harshness of the penalties, mandatory minimum sentences, and a dramatic increase overall in prison sentences for drug violations.¹⁰⁷

The War on Drugs and tough on crime politics have made the United States of America the most incarcerated country on the planet.¹⁰⁸ For fifty-five years, from 1925 until 1980, the prison population in the U.S. remained steady and then exploded from 1980 to 2008.¹⁰⁹ Yet, during those same years, the number of people convicted of crimes remained relatively the same.¹¹⁰ The U.S. jailed more people, gave them longer sentences, and held them pretrial, but there was no increase in the number of people actually convicted of crimes.¹¹¹ Incarceration may have some impact on crime simply because those who are incarcerated are not committing crimes against the general public, but incarceration as a crime prevention strategy is one of “diminishing returns.”¹¹² This is true for a number of reasons. First, incarcerating people has a criminogenic effect (producing or tending to produce crime), that is specifically tied to length of prison sentences and the difficulties of reentry and reintegration into society.¹¹³ The longer the sentence, the less likely someone, without significant support, will effectively reintegrate into society.¹¹⁴ Ninety-five percent of prisoners are released from jail or prison.¹¹⁵ Jeremy Travis, the former director of the National Institute of Justice and currently the president of John Jay College of Criminal Justice, calls the criminogenic outcome “the iron law of imprisonment: they all come back.”¹¹⁶ Secondly, not only

¹⁰⁷ JAMILA HODGE, VERA INST. OF JUST., FIFTY YEARS AGO TODAY, PRESIDENT NIXON DECLARED THE WAR ON DRUGS (June 17, 2021), <https://www.vera.org/blog/fifty-years-ago-today-president-nixon-declared-the-war-on-drugs> (“The war on drugs was officially inaugurated by Nixon in June 1971”).

¹⁰⁸ THE SENTENCING PROJECT, www.sentencingproject.org/criminal-justice-facts/ (last visited Apr. 23, 2022).

¹⁰⁹ *Id.*

¹¹⁰ Torgovnick May, *supra* note 29.

¹¹¹ *Id.*

¹¹² Joan Petersilia, *Beyond the Prison Bubble*, NAT’L INST. OF JUST. J., ISSUE NO. 268 28 (Oct. 2011).

¹¹³ BARKOW, *supra* note 7, at 47-51.

¹¹⁴ BARKOW, *supra* note 7, at 47.

¹¹⁵ *Id.*

¹¹⁶ BARKOW, *supra* note 7, at 47.

is incarceration criminogenic, but unnecessary pretrial detention is the beginning of a potential pitfall from which it is difficult to recover one's footing in life. Pretrial detention due to an inability to pay bail likely leads to loss of employment, loss of child custody, loss of housing and government benefits, as well as a higher rate of guilty pleas, longer sentences, and an increase in the likelihood of recidivism.¹¹⁷ And finally, incarceration is "particularly ineffective" at reducing or preventing drug crimes, which constitute a large portion of those incarcerated and those arrested.¹¹⁸

Today, the United States arrests over ten million people annually.¹¹⁹ Bail and pretrial detention are important issues considering the sheer volume of those impacted and the compounding and lasting consequences pretrial detention has on people's lives and case outcomes.

d. The Cost of Pretrial Detention

The pretrial system is one of the earliest points of entry in the criminal justice system.¹²⁰ Whether someone is awaiting trial or serving a sentence post-conviction, the cost of incarcerating individuals is the same for each. It costs more than \$1000 a day, up to \$447,000 a year, to lock someone in Riker's Island jail in New York City.¹²¹ As of March 2022, the average number of inmates held at Riker's on any given day hovers around 5,600.¹²² Eighty-five percent, or approximately 4,760 people in Rikers, who are being held pretrial are incarcerated only because they cannot afford their bail.¹²³ In fact, Inmate # 20099753, who has been charged with Second

¹¹⁷ BARKOW, *supra* note 7, at 47.

¹¹⁸ Schnacke, *supra* note 5, at v.

¹¹⁹ REBECCA NEUSTETER & MEGAN O'TOOLE, VERA INST. OF JUST. PUBLICATION EVERY THREE SECONDS: UNLOCKING POLICE DATA ON ARRESTS (Jan. 2019), <https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/overview>.

¹²⁰ *Id.*

¹²¹ Eva Herscovitz, *NYC Rikers Closure Called Model for Shrinking Jail Populations*, THE CRIME REPORT (July 21, 2021), <https://thecrimereport.org/2021/07/21/rikers-closure-called-model-for-shrinking-jail-populations/>.

¹²² NYC OPEN DATA, DAILY INMATES IN CUSTODY <https://data.cityofnewyork.us/Public-Safety/Daily-Inmates-In-Custody/7479-ugqb> (last visited Mar. 21, 2022) (publicly available webpage for Department of Correction data).

¹²³ Herscovitz, *supra* note 121.

Degree Murder, has been at Riker's Island since October 28, 2012, awaiting trial.¹²⁴ Simple math shows that it costs New York taxpayers \$4,760,000 per day to detain those at Riker's Island who have not been convicted of anything.

While the cost to taxpayers is demonstrably great, the cost to individuals in the system is great as well. Defendants detained before trial represent over 75% of all jail inmates in some parts of the country.¹²⁵ These individuals are particularly and acutely damaged by pretrial incarceration and potentially lose jobs, families, custody of their kids, etc. while detained and recovery may take years, if ever.¹²⁶ Pretrial detention also causes financial burdens for the families who were reliant on the detainee's income and household contributions.¹²⁷

The cost of pretrial detention to the public and to the persons detained goes beyond just dollars and cents. Behind the exorbitant costs of prisons and jails to taxpayers, there are the costs to families and individuals alike, and communities as a whole. Parents lose their kids, kids lose their parents, employers lose their employees, employees lose their jobs, and communities lose their faith. We all bear these costs.

e. From Personal Surety to the Commercial Bond Industry

When the required bail amount is beyond the financial capabilities of a defendant and their family, they often turn to a commercial bail bondsman to secure their release. A bail bondsman essentially loans the defendant the full bail amount in exchange for fees and interest.¹²⁸ The commercial bond industry, through fees, high interest rates, questionable tough-guy tactics, and discriminatory lending, is a further example of the injustice of cash bail system and how it siphons

¹²⁴ NYC Open Data, *supra* note 122.

¹²⁵ Dobbie & Yang, *supra* note 79, at 252.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Torgovnick May, *supra* note 29.

money from low income communities.¹²⁹ Over the past one-hundred years, the United States quietly, and perhaps unwittingly, moved from an unsecured personal system where payment was only required if one failed to perform their obligations, to a secured commercial system that requires payment in order to be released.¹³⁰ The result is that over this time period, there has been a dramatic increase in the number ofailable defendants.¹³¹ As bail amounts became increasingly arbitrary, coupled with a growing number of defendants unable to pay, the commercial bail bond industry took off.¹³²

The bail industry was born in 1898 when the McDonough brothers began underwriting bail bonds out of their saloon in San Francisco, California.¹³³ Over the last one hundred twenty years, the bail bond business has grown from a side business in a San Francisco saloon, to a \$2-3 billion industry annually.¹³⁴ In New York City, despite a dramatic reduction in the use of commercial bonds, 57% of felony cases in the New York Supreme Court used a commercial bondsman in 2020.¹³⁵ This industry continues to drain millions of dollars out of low-income communities.¹³⁶

Today, the commercial bail industry is only legal in the United States and the Philippines.¹³⁷ With cashless bail on the horizon, the bail bond industry has taken an aggressive

¹²⁹ *Id.* And see Lander, *infra* note 135, at 14 (in 2021, in New York Criminal and Supreme Courts, \$226 million was posted in bail bonds by defendants and their families).

¹³⁰ Schnacke, *supra* note 5, at 26. (the bail system changed from a personal promise to pay if one defaulted on their obligations to an often commercial secured system that required payment prior to release).

¹³¹ *Id.*

¹³² *Id.* at 6.

¹³³ *Id.* at 7.

¹³⁴ Torgovnick May *supra* note 29 (the bail bond industry is a \$2 billion industry). *But see* Michael Hiltzik, *Facing Eradication, the Bail Bond Industry Gears up to Mislead the Public About Its Value*, L.A. TIMES (Oct. 4, 2019 6:00 AM), <https://www.latimes.com/business/story/2019-10-04/hiltzik-bail-industry-eradication> (The bail bond industry is a \$3 billion industry).

¹³⁵ BRAD LANDER, NEW YORK CITY COMPTROLLER BUREAU OF BUDGET AND BUREAU OF POLICY AND RESEARCH NYC BAIL TRENDS SINCE 2019 14 (Mar. 2022), (from 2019 to 2020, the New York Supreme Court saw a reduction in the use of commercial bondsman from 74% to 57%).

¹³⁶ *Id.*

¹³⁷ Adam Liptak, *Illegal Globally, Bail for Profit Remains in the U.S.*, N.Y. TIMES (Jan. 2008), https://www.nytimes.com/2008/01/29/us/29bail.html?pagewanted=Uppagewanted=all&_r=1.

stance lobbying politicians and local elections, fighting for their livelihoods.¹³⁸ With creative measures and investments in the well-being of all members of society, bail bondsmen may soon be a relic of the past, but until then, they are an example of how the cash bail system further exacts financial costs on defendants and their families, particularly those from low-income communities.

III. WHAT HAVE NY LAWMAKERS DONE IN THE THIRD GENERATION OF BAIL REFORM?

Thus far, this paper has laid down a solid line of reasoning advocating for bail reform – pretrial detention of low-risk individuals is costly, damaging, and largely unnecessary. However, New York’s 2019 effort at bail reform is narrowly focuses, short-sighted, and ignores issues beyond mass incarceration. The contrast between New York and New Jersey’s reforms will be discussed in this section to show where New York can improve.

A. New York Bail Reform 2019

New York’s Bail Reform was enacted by the state legislature on April 1, 2019, and went into effect on January 1, 2020.¹³⁹ Some minor reforms were made the following summer that added more crimes to the bail eligible list, removing them from the mandated no bail list.¹⁴⁰ New York’s bail reform is inarguably ideal in theory, but it is a disaster in practice because of a lack of political fortitude or ability to set up and invest in the infrastructure to successfully punish those who deserve to be held accountable, rehabilitate those we can, and help those who fall between those two parameters. On paper, New York’s bail reform law promotes justice and proportionate accountability for those charged with crimes, without subjecting people to unnecessary pretrial jail

¹³⁸ *Id.*

¹³⁹ N.Y. Crim. Proc. Law §§ 510.10, 510.20, 510.30.

¹⁴⁰ Here, “bail eligible” means that the judge has the option to set cash bail or nonmonetary conditions, whereas “no bail” means the crime alleged is on the exempt list of crimes and the judge does not have the option to impose cash bail.

time. Below are the main takeaways of New York’s new bail law, including the amendments made in July 2020.

a. Mandatory No Bail and Mandatory Desk Appearance Tickets – Catch and Release

The primary and most controversial aspect of the New York bail reform is the mandatory no cash bail requirement for cases involving all misdemeanors, except for two categories, and all non-violent felonies except three categories, plus four of the five Class A felonies involving drug offenses.¹⁴¹ (Class A felonies are their own category in New York and primarily include homicide, manslaughter, terrorism, and major drug trafficking). The two misdemeanor categories include misdemeanor sex offenses and criminal contempt with an underlying charge of domestic violence.¹⁴² Misdemeanors outside of those two charges, plus all non-violent felony charges (except witness tampering, witness intimidation, and three types of felony sexual offenses against children) are not to be assigned cash bail.¹⁴³ New York took “presumption of release” a step further forcing “mandatory release.”

The July 2020 revisions added additional crimes and circumstances to the list of those where cash bail may be imposed. The list now includes second-degree burglary where the defendant is charged with entering the living area of a home, some sex trafficking offenses, and the promotion of an obscene sexual performance of a child.¹⁴⁴ Also included are some crimes involving assault, including vehicular assault, and all charges alleged to have caused the death of a person.¹⁴⁵ Under the revisions, judges will be able to set cash bail based not only on the crime

¹⁴¹ N.Y. Crim. Proc. Law § 510.10(4)(a)-(t).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Taryn A. Merkl, Opinion, *New York’s Latest Bail Law Changes Explained* (Apr. 16, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained>.

¹⁴⁵ *Id.*

committed but also on a person's legal history and pending court cases.¹⁴⁶ Additionally, the new revisions allow the court to consider specific victim-based offenses. This means that, "if someone is out on pretrial release for an offense involving a specific victim, cash bail may be set if that person is arrested for a new crime that likewise has a specific victim. For example, if someone charged with a nonviolent robbery is released pretrial and then commits another nonviolent robbery, a judge would have the option of setting cash bail on the second arrest even though cash bail is generally not permitted for that type of robbery."¹⁴⁷

In general, except where otherwise prescribed by law, judges must release defendants on their own recognizance unless it is shown that the defendant poses a flight risk.¹⁴⁸ Some factors to consider that are deemed relevant to the defendant's return to court include: 1) activities and history, 2) current charges, 3) criminal conviction record, 4) record of court appearance history, and 5) history of firearm use.¹⁴⁹

Additionally, with a small handful of exceptions,¹⁵⁰ defendants arrested for all misdemeanor offenses or Class E felony charges, must be issued a desk appearance ticket (DAT) from the arresting officer, and then released from the precinct of arrest.¹⁵¹ A DAT is effectively a summons to appear in court at a later date for a delayed arraignment.¹⁵² The DAT will assign a date within twenty days of the arrest, and on that date, the defendant must bring themselves to appear in front of a judge to answer the charge(s).¹⁵³ Until then, they are free of restrictions or

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ N.Y. Crim. Proc. Law § 510.10(1).

¹⁴⁹ N.Y. Crim. Proc. Law § 510.30(a)-(g).

¹⁵⁰ N.Y. Crim. Proc. Law § 150.20(1)(a)-(b).

¹⁵¹ N.Y. Crim. Proc. Law § 150.20(a).

¹⁵² *Id.*

¹⁵³ *Id.*

conditions.¹⁵⁴ They may consult with a lawyer and plan their defense. This means that for most misdemeanors and all Class E felony arrests, the defendant walks free within a few hours of arrest, pending verification of their identity, fingerprinting, and processing.¹⁵⁵ The new DAT requirements do not mandate a government-issued photo identification, merely that the officer can reasonably verify your identity.¹⁵⁶ Truly a “catch and release” revolving door.

b. Considerations When Determining Conditions of Release – Does Not Include “Dangerousness”

Another prominent and controversial feature of the new bail reform is that New York is the only state that does not allow the consideration of a person’s future dangerousness or risk to public safety when determining bail or conditions.¹⁵⁷ In fact, “[s]ince 1971, public safety — the idea of the “potential dangerousness” of someone accused of a crime — has not been a legal reason to set bail for a defendant in New York.”¹⁵⁸ The court may only consider factors that would be used to determine whether or not the defendant is a flight risk.¹⁵⁹ In those instances where bail will be set, a judge must set at least three forms of bail and must consider the defendant’s ability to pay.¹⁶⁰ This includes the individual’s financial circumstances, the ability to pay without “undue hardship”, and their ability to obtain a secured, unsecured, or partially secured bond.¹⁶¹

¹⁵⁴ *Id.*

¹⁵⁵ THE LAW FIRM OF ANDREW STENGEL, www.stengellaw.com/desk-appearance-tickets-dat-nyc (last visited Mar. 23, 2022).

¹⁵⁶ N.Y. Crim. Proc. Law § 150.20(1)(b)(iii)

¹⁵⁷ Rempel & Rodriguez, *supra* note 23, at 4-5.

¹⁵⁸ Roxanna Asgarian, *The Controversy Over New York’s Bail Reform Law, Explained*, VOX (Jan. 17, 2020, 8:30 AM), <https://www.vox.com/identities/2020/1/17/21068807/new-york-bail-reform-law-explained>.

¹⁵⁹ *Id.*

¹⁶⁰ N.Y. Crim. Proc. Law § 510.30(f).

¹⁶¹ *Id.*

While we allow a risk-based guess at to whether a defendant will return to court based largely on their past history and criminal record, we do not allow the same to determine whether an individual will commit crimes based on their past records of criminal activity.¹⁶²

c. Non-Monetary Release Conditions, Pre-Trial Service Agencies and Court Reminders

Judges are mandated to select the “least restrictive” conditions that will “reasonably assure the principle’s return to court.”¹⁶³ Non-monetary conditions may include: (a) that the defendant be in contact with a pretrial services agency serving defendants in that county; (b) that the defendant abide by reasonable, specified restrictions on travel that are reasonably related to an actual risk of flight from the jurisdiction, or that the defendant surrender their passport; (c) that the defendant refrain from possessing a firearm, destructive device, or other dangerous weapon; (d) that the defendant refrain from associating with certain persons who are connected with the instant charge, including, when appropriate, specified victims, witnesses, or co-defendants; (e) that the defendant be referred to a pretrial services agency for placement in mandatory programming, including counseling, treatment, and intimate partner violence intervention programs, (f) that the defendant makes diligent efforts to maintain employment, housing, or enrollment in school or educational programming; (g) that the defendant obey an order of protection issued by the court; and (j) when it is shown that no other realistic non-monetary condition or set of non-monetary conditions will suffice to reasonably assure the defendant's return to court, the defendant's location be monitored with an approved electronic monitoring device.¹⁶⁴

¹⁶² *Supra* note 46 (criteria used to determine flight risk).

¹⁶³ N.Y. Crim. Proc. Law § 510.10(1).

¹⁶⁴ N.Y. Crim. Proc. Law § 500.10(3-a).

At least one pre-trial services agency is to be created in every county, that is either publicly funded or a non-profit organization.¹⁶⁵ The agencies are to annually report their progress and statistics to the court¹⁶⁶ and are in charge of maintaining contact with defendants who are released pretrial, assuring their compliance with release conditions, and they must notify every defendant, via the defendant's preferred method, of upcoming court appearances.¹⁶⁷

d. Electronic Monitoring

The new law limits the use of electronic monitoring and eliminates any financial responsibility of the defendant in regard to the cost burden of monitoring.¹⁶⁸ The electronic monitoring cannot be for longer than sixty days but may be renewed for another sixty days after a de novo proceeding determines it should be renewed.¹⁶⁹ Even if ordered and renewed, the court must show that the monitoring is the “least restrictive procedure and method” that will assure the defendant's return to court, and it must be “unobtrusive to the greatest extent practicable.”¹⁷⁰

e. Critical Oversight - Funding

A critical point of failure for both the original and the revised law, is that there is no specific funding to implement the services or programs for people released under non-monetary conditions.¹⁷¹ As mentioned above, defendants are no longer responsible for the cost of electronic monitoring imposed on them by the court as “all expenses related to pretrial supervision—from electronic monitors to programs and mandates—must be paid for by the county.”¹⁷² As discussed

¹⁶⁵ N.Y. Crim. Proc. Law § 510.45.

¹⁶⁶ *Id.*

¹⁶⁷ N.Y. Crim. Proc. Law § 510.43.

¹⁶⁸ INSHA RAHMAN, VERA INST. OF JUST. NEW YORK, NEW YORK: HIGHLIGHTS OF THE 2019 BAIL REFORM LAW 10 (July 2019), <https://www.vera.org/downloads/publications/new-york-new-york-2019-bail-reform-law-highlights.pdf>.

¹⁶⁹ N.Y. Crim. Proc. Law § 510.40(4)(d).

¹⁷⁰ N.Y. Crim. Proc. Law § 510.40(4)(b).

¹⁷¹ Merkl, *supra* note 144.

¹⁷² Rahman, *supra* note 168, at 10.

in Part V, pretrial services are critical points in the new bail system, vital for success, none of which have earmarked funds.¹⁷³

f. Decriminalization and the New District Attorney

New York lawmakers made bold moves in bail reform and NYC district attorneys have also made bold changes. There are a number of laws which are no longer being prosecuted by our elected district attorneys. For example, Manhattan District Attorney, Alvin Bragg, has come under sharp criticism since his election in November 2021 and assumption of office on January, 1 2022. Bragg ran for the position on a platform of progressive change, alternatives to incarceration, and decriminalization.¹⁷⁴ He published a “Day 1 Memo” outlining his vision to revamp the district attorney’s office, its administration, and its operation.¹⁷⁵ The memo reads more like a public defender’s wish list than a plan of action for a prosecutor whose job is to prosecute crime, but nevertheless, Bragg has maintained the majority of his positions. Bragg openly campaigned that if elected, his office would not prosecute “under any circumstances” the following Penal Laws and Vehicle Traffic Laws: marijuana misdemeanors, fare evasion, trespass (unless a family or felony offense), driving with a suspended license (suspension resulting from fines only), any violation or traffic infraction not accompanied by a criminal charge, consensual sex trade, obscenity, fortune telling, adultery, resisting arrest (when not accompanied by another charge), and obstructing governmental administration in the second degree.¹⁷⁶ After the general public got wind of Bragg’s extreme plan, he was forced to temper some of his objectives and did so in his “Day 1 Letter.”¹⁷⁷

¹⁷³ Rahman, *supra* note 168.

¹⁷⁴ Deanna Paul, *Alvin Bragg Leans on Harlem Roots in Manhattan District Attorney Race*, WALL ST. J., (May 9, 2021), <https://www.wsj.com/articles/alvin-bragg-leans-on-harlem-roots-in-manhattan-district-attorney-race-11620576001>.

¹⁷⁵ ALVIN BRAGG, *Day 1 Memo*, <https://www.alvinbragg.com/day-one> (last visited May 2, 2022).

¹⁷⁶ *Id.*

¹⁷⁷ ALVIN BRAGG, *Day 1 Letter*, <https://www.manhattanda.org/wp-content/uploads/2022/01/Day-One-Letter-Policies-1.03.2022.pdf> (last visited May 2, 2022).

In this letter, released on January 3, 2022, the third day of his tenure, Bragg revised his Day 1 Memo to state that all of the above charges would now be prosecuted, but only when accompanied by a misdemeanor or felony charge.¹⁷⁸ Bragg's Day 1 Letter stated that his office will exercise a presumption of pre-trial non-incarceration for every case with the exception of those charged with homicide or the death of a victim, some violent felonies with a deadly weapon that causes serious physical injury or death, certain sex offenses, some domestic violence charges, and public corruption, rackets, or major economic crimes.¹⁷⁹ Bragg's memo also includes calls for diversion, alternatives to incarceration, 20-year maximum sentences, no life without parole sentences, reducing pretrial incarceration, focusing more on accountability and less on prison sentence length, limiting youth in adult court, restorative justice, and actively supporting those reentering society from prison/jail.¹⁸⁰ Bragg's office also will not seek a carceral sentence for any crimes except homicide, cases involving the death of a victim, a Class B violent felony with a deadly weapon that involved serious physical injury or death, or public corruption or major economic crimes, unless he was otherwise required by law to do so.¹⁸¹

The Day 1 Letter revisions make the initial changes palatable to the police officer in me and when read completely, they should make sense to those in law enforcement. However, publicly advertising which laws are not going to be prosecuted under which circumstances, while also not providing discretion and the ability to individualize the course of action taken, is a recipe for disaster that leaves judges' hands tied when faced with someone who should not be released upon arrest. A major problem with these changes, and with New York reform in general, is that the

¹⁷⁸ Bragg Memo, *supra* note 175.

¹⁷⁹ *Id.* at 6.

¹⁸⁰ *Id.* at 8-9.

¹⁸¹ *Id.*

support and services needed to allow plans of decriminalization and decarceration to succeed are not in place, sending the message that there is no accountability.¹⁸²

Bragg also made positive organizational changes to the structure of the New York County District Attorney's Office. His Day 1 Memo promised that "success and promotion will no longer be tied to conviction rates."¹⁸³ Bragg was elected in November 2021 with 83.6% of the nearly 250,000 votes cast, but within weeks of his assumption of the role, he was met with fierce backlash about his Day 1 Memo.¹⁸⁴ Bragg was publicly criticized by Dominique Luzuriaga, the widow of Police Officer Jason Rivera, one of two NYPD officers who were executed in the line of duty on January 21, 2022.¹⁸⁵ While she delivered Officer Rivera's eulogy at St. Patrick's Cathedral on January 28, 2022, Luzuriaga spoke directly to DA Bragg in her statement, calling him out for failing to keep the City's citizens safe: "The system continues to fail us. We are not safe anymore, not even the members of the service. I know you [Officer Rivera] were tired of these new laws, especially the ones from the new DA. I hope he's watching you speak through me right now."¹⁸⁶

¹⁸² Cynthia Van Gaasbeck, *NYC's Revolving Door of Injustice: Repeat Offenders to Blame for Soaring Crime Rate Police Say*, LAW ENFORCEMENT TODAY (Apr. 10, 2022), <https://www.lawenforcementtoday.com/nycs-revolving-door-of-injustice-repeat-offenders-fuel-soaring-crime-rate/> (quoting NYPD Commissioner, Keechant L. Sewell at a news conference on April 7, 2022: "It's clear what we are confronting: A perception among criminals that there are no consequences, even for serious crime").

¹⁸³ Bragg, *supra* note 175.

¹⁸⁴ CITY OF NEW YORK BOARD OF ELECTIONS, STATEMENT AND RETURN REPORT FOR CERTIFICATION GENERAL ELECTION 2021 - 11/02/2021 NEW YORK COUNTY - ALL PARTIES AND INDEPENDENT BODIES DISTRICT ATTORNEY NEW YORK, (Nov. 29, 2021).

https://vote.nyc/sites/default/files/pdf/election_results/2021/20211102General%20Election/00100600010New%20York%20District%20Attorney%20New%20York%20Recap.pdf. *But see* Grace Ashford & Jonah E. Bromwich, *New York's Bail Laws, Reconsidered: 5 Things to Know*, N.Y. TIMES (Apr. 20, 2022), <https://www.nytimes.com/2022/03/29/nyregion/bail-reform-hochul-ny.html>; Shayna Jacobs, *New York District Attorney Toughens Prosecution Policy That Drew Outrage*, WASH. POST COURTS & LAW (Apr. 23, 2022), <https://www.washingtonpost.com/national-security/2022/02/04/bragg-felonies-prosecutions-new-york/>.

¹⁸⁵ Landon Mion, *Manhattan DA Alvin Bragg Reverses Course on Crime Policies Amid Backlash*, TOWNHALL – POLICE (Feb. 4, 2022, 7:00 PM), <https://townhall.com/tipsheet/landonmion/2022/02/04/manhattan-da-alvin-bragg-reverses-course-on-crime-policies-amid-backlash-n2602865> (on Jan. 21, 2022, Police Officers Jason Rivera and Wilbert Mora were ambushed and executed with an illegal gun while answering the 911 call of the gunman's mother regarding a dispute with him. Rivera's widow gave a eulogy on Jan. 28, 2022).

¹⁸⁶ *Id.*

Facing a rising violent crime rate in New York City and criticism that his policies were too lenient, Bragg walked back several memo notes, particularly illegal gun prosecutions, violence committed against police officers, robberies, and retail theft, which have plagued New York City since bail reform took effect.¹⁸⁷ It may be too little, too late.

B. New Jersey Bail Reform 2017

New Jersey's bail reform mandated that judges stop issuing cash bail to all criminal defendants and instead determine who would be held pretrial based on *the risk they posed to the public*.¹⁸⁸ The New Jersey Bail Reform and Speedy Trial Act of 2017 went into effect after passing the legislation and public vote in 2014.¹⁸⁹ The need for reform was primarily based upon a study by the Drug Policy Alliance that was meant to find ways to reduce the jail population while maintaining public safety and the integrity of the judicial process.¹⁹⁰ The study found that three-fourths of New Jersey's jail population consisted of pretrial detainees, and 38.5% of those inmates were being held solely due to their inability to afford bail.¹⁹¹ New Jersey's law recognizes that "whether a defendant is released pretrial is one of the most significant decisions in the criminal

¹⁸⁷ ALVIN BRAGG, *Work of the Office* (Feb. 4, 2022), <https://www.manhattanda.org/wp-content/uploads/2022/02/2022.02.04.Letter.pdf> (last visited May 2, 2022).

¹⁸⁸ Joe Hernandez, *N.J Officials Finally Release Data on Bail Reform. Their Conclusion? It's Working* (Apr. 2, 2019), <https://why.org/articles/n-j-officials-have-finally-released-data-on-bail-reform-their-conclusion-its-working/#:~:text=N.J.%20officials%20finally%20release%20data,It's%20working&text=Rates%20of%20recidivism%20and%20failure,Tuesday%20by%20the%20state%20Judiciary>.

¹⁸⁹ Daniel Rosenberg, *It's Coming: New Jersey Bail Reform*, <https://www.rosenbergperry.com/blog/new-jerseys-bail-reform-what-to-expect-in-2017/> (last visited May 2, 2022) (the reform bill originated in the Senate and was later amended to also allow for the pre-trial release of low-risk defendants and the establishment of an alternative bail system. The bill (S946/A1910) passed the Senate 29-to-5 and the General Assembly 53-to-7 with nine abstentions in the summer of 2014. New Jersey voters enacted the law that autumn by passing — 891,373-to-550,698 — a general election poll question).

¹⁹⁰ MARIE VANNOSTRAND, THE DRUG POLICY ALLIANCE, N.J. JAIL POPULATION ANALYSIS: IDENTIFYING OPPORTUNITIES TO SAFELY AND RESPONSIBLY REDUCE THE JAIL POPULATION 1 (Mar. 2013), https://drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf (The goal of the study is to use this profile to identify opportunities to responsibly reduce New Jersey's jail population while maintaining public safety and the integrity of the judicial process).

¹⁹¹ *Id.* at 1, 14 (The study concluded that greatest opportunity to reduce New Jersey's jail population without harming public safety is to more efficiently and effectively manage the pretrial population).

justice system,” and their bail reform reflects that.¹⁹² The State’s bail reform was a unified and cohesive effort across the criminal legal system and law enforcement, in cooperation with advocacy groups and public defenders.¹⁹³

New Jersey’s bail system now works on the following premise: All defendants, except those facing life imprisonment, are entitled to a presumption of release.¹⁹⁴ Once a defendant is arrested and a complaint against them is filed, a Public Safety Assessment (PSA) is used to determine whether the defendant is a flight risk or whether they are likely to commit another crime if released.¹⁹⁵ Crimes such as murder and weapons charges will result in a “no release” status.¹⁹⁶ The PSA considers factors such as the defendant’s age, current violent offense, any pending charges at the time of arrest, prior misdemeanor, violent, and felony convictions, as well as past failures to appear and previous periods of incarceration.¹⁹⁷

Within 48-hours after a defendant is taken to jail, a motion for detention based off of the PSA assessment must be made, otherwise, a judge will set conditions for release.¹⁹⁸ A prosecutor may only motion for a detention hearing if the defendant fits into one of a set list of categories, which include specific charges (murder, domestic violence, human trafficking), charges that ordinarily lead to a life sentence, or, most importantly, where the prosecutor believes that the defendant will not appear in court, poses a danger to a person or to the community, or will obstruct

¹⁹² Rabner, *supra* note 9.

¹⁹³ *Id.* (Chief Justice Rabner commends the hard work across the spectrum of the criminal justice field, from the attorney general, to public defenders and law enforcement, to advocacy groups such as the Arnold Foundation).

¹⁹⁴ Rosenberg, *supra* note 189.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* (A defendant may be released without conditions (Released on Recognizance), released with conditions such as house arrest or monitoring, or detained, in which case the court must indict within ninety days, and hold trial within 180 days, due to the speedy trial guidelines in the statute).

justice.¹⁹⁹ New Jersey uses proven statistical measures to determine not only the likelihood of court appearance, but vitally, whether a defendant will likely pose a danger to the public if they are released pending their most current charges.²⁰⁰ The reforms have resulted in a decrease in jail populations, fewer poor defendants remaining behind bars pretrial, and the new rules also allow judges to detain more violent offenders with no chance of them paying bail and walking free because they have the financial means, before answering the charges against them.²⁰¹

An integral part of New Jersey's bail reform has been the Pretrial Services Program, a unit within the criminal division of the New Jersey Judiciary.²⁰² The purpose of the program is to conduct pretrial monitoring in order to manage pretrial defendants' risk of failure to appear in court, risk to community safety, and risk of obstructing the criminal justice process.²⁰³ Pretrial Services partakes in the detention proceeding to ensure appropriate pretrial defendants are released as quickly as possible and using the least restrictive means of monitoring.²⁰⁴ Pretrial Services also sends text and email reminders of court dates, provides community referrals for assistance, and monitors the conditions of defendants' release.²⁰⁵

¹⁹⁹ *Id.*

²⁰⁰ Rabner, *supra* note 9 (the PSA risk-assessment tool was developed in partnership with the Laura and John Arnold Foundation as a predictive tool. It has been validated with data from thousands of real New Jersey criminal cases).

²⁰¹ Rosenberg, *supra* note 189 ("The state's jails now largely [only] include those defendants who present a significant risk of flight or danger to the community. Low-risk defendants who lack the financial resources to post bail are now released back into the community without having to suffer the spiraling, lifechanging consequences of being detained for weeks and months while presumed innocent").

²⁰² N.J. JUDICIARY, PRETRIAL SERVICES PROGRAM, LEAFLET NO. CN 12088 – MAY 2017, CRIM. JUST. REFORM PRETRIAL SERVICES PROGRAM (2017).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

In the five years since its enactment, New Jersey's bail reform has been credited with a decrease in the crime rate in the state, reducing the jail population, retaining the ability to detain violent offenders, and keeping appearance rates equal to those prior to the reforms.²⁰⁶

IV. THIS COP CALLS STRIKE THREE – NEW YORK'S THIRD GENERATION BAIL REFORM IS A SWING AND A MISS

New York's third generation of bail reform has greatly lowered the City's jail population, however, the rapidly rising crime rate, and the spike in violent crimes and shootings, expose the areas left to improve upon.²⁰⁷ New York's bail reforms leave too expansive a list of crimes that mandate cash-free release, often a delayed initial arraignment, and there is no plan of action for dangerously mentally ill recidivists, or the career criminals who are taking advantage of the revolving door catch and release bail reforms.²⁰⁸ We cannot rectify generations of inequality in one measure of legislation, or even in one field of civil and legal rights. Equality, equal protection, justice, and curing societal failures span more than just bail reform. What bail reformers fail to acknowledge is that "fixing" bail does not mean freeing everyone upon arrest or decriminalizing every measure. Just as we cannot arrest our way out of societal failures, we cannot empty the jails to rectify our history, or expect all to be cured.

²⁰⁶ Rosenberg, *supra* note 189.

²⁰⁷ Lander, *supra* note 135, at 7 (as of Apr. 17, 2022, New York City year-to-date crime statistics indicted the following compared to the same period the year before: Overall crime rate increase of 43%, Robbery 48% increase, Felony Assault – 21% increase, Rape – 16% increase, Shooting Incidents – 10% increase, Shooting Victims – 16% increase, Hate Crimes – 32% increase, Burglary – 32% increase, Felony Theft (Grand Larceny) – 55% increase, Grand Larceny Auto – 71% increase, Misdemeanor Theft (Petit Larceny) – 41% increase, Misdemeanor Assault – 30% increase, Sex Crimes (other than Rape) – 14% increase).

²⁰⁸ Interview with Chief Robert Boyce, Former NYPD Chief of Detectives (Mar. 4, 2022), <https://abc7ny.com/new-york-city-crime-statistics-subway/11618737/> (Chief Boyce acknowledged that virtually no one could be held in jail under the bail reform laws for misdemeanors and the City's inability to manage the crisis of homelessness and mental illness have made New York City's streets and subway trains less safe). *And see* Cynthia Van Gaasbeck, *NYC's Revolving Door of Injustice: Repeat Offenders to Blame for Soaring Crime Rate Police Say*, LAW ENFORCEMENT TODAY (Apr. 10, 2022), <https://www.lawenforcementtoday.com/nycs-revolving-door-of-injustice-repeat-offenders-fuel-soaring-crime-rate/>.

Despite its flaws, New York's bail reform law has led to 30% fewer people detained pretrial.²⁰⁹ The problem is that while politicians on both sides pander to their most extremist supporters, common sense, data, and the investment into human beings are all being ignored. People who pose little to no risk should not be held in jail pretrial when the sole reason they are held is because they cannot afford the set bail amount. That seems like common sense. Politicians fail to realize that the public needs to feel safe and needs to be able to walk the streets or ride public transportation in peace. No one wants to see others suffering in jail or on the streets. New York City residents in particular are concerned about the now ever-present feeling of lawlessness and the current fear of random acts of violence and feelings of helplessness.²¹⁰ New Yorkers are looking over their shoulders for the dangerous recidivists whose repeated releases have them emboldened to commit crimes imperviously.²¹¹ New Yorkers worry for those suffering from mental illness on the streets of the City, but also worry whether they can get to work safely or if they will be the next victim in the headlines.²¹²

A. N.Y. Reforms Fail to Address Revolving Door Recidivists & the Severely Mentally Ill

Since 1971, New York State remains the only state in the country where judges do not have the discretion or authority to consider a person's "dangerousness" to public safety when

²⁰⁹ Lander, *supra* note 135.

²¹⁰ Marcia Kramer, *New Poll Finds Crime, Subway Safety Are Top Concerns Keeping New Yorkers From Returning to Offices*, CBS NEW YORK (Mar. 25, 2022, 10:25 AM), <https://www.cbsnews.com/newyork/news/nyc-return-to-office-concerns-poll/> ("People are scared. The poll reflects the basic anxiety that people feel about their own personal security and about the future of the city. Almost 40% of those polled said they were considering moving out of the city").

²¹¹ Van Gaasbeck, *supra* note 182 (quoting NYPD Commissioner, Keechant L. Sewell at a news conference on Apr. 7, 2022: "It's clear what we are confronting: A perception among criminals that there are no consequences, even for serious crime").

²¹² Kramer, *supra* note 210 (of the 10,000 NYC residents polled by Morning Consult, 94% said that not enough was being done to address homelessness and mental illness, 74% of transit riders said safety has gotten worse since the start of the COVID-19 pandemic. A key takeaway from the poll is that safety, homelessness, and mental illness rank as top issues for NYC's private sector employees delay in returning to work. They are resisting returning to their offices until something is done to address them, particularly on public transit).

determining pretrial release conditions.²¹³ There is a wide gap between being first and setting a new trend and being the last one left clinging to something while everyone else is doing it differently. Some critics call the restriction on judicial discretion a must-have to prevent racial discrimination and are adamant about excluding judges' ability to use their "instincts" or "gut feelings" when determining bail conditions.²¹⁴ However, maintaining the ability to detain those who repeatedly disregard the law, as well as those who are substance abusers or dangerously mentally ill, and doing so with transparent methods to assist, not punish, is necessary for local governments to maintain order without excessively incarcerating low-risk individuals.²¹⁵

The element of "dangerousness" should be read as not merely the likelihood that a person is going to injure someone, but simply whether or not they will commit another crime, any crime, during pretrial release and are therefore a risk to public safety. Those who commit more crimes and hurt people in between their court dates are not only a problem for law enforcement, they are also a societal problem. In the same manner we use data to predict the risk that someone will not show up to their court appointments, we can use predicative data to determine the dangerousness someone poses to their communities and fellow citizens. This does not necessarily mean that they must be incarcerated, but it does mean that there should be extra precautions taken to ensure the individual does not recidivate.

New York's bail reform fails to address the revolving door it has created for career criminals and the severely mentally ill – the "frequent utilizers" who repeatedly interact with the

²¹³ Lartey, *supra* note 19.

²¹⁴ Steve Hughes, *Issue of Judicial Discretion Becoming Focus of Bail Reform*, TIMESUNION (Jan. 15, 2020), <https://www.timesunion.com/news/article/Issue-of-judicial-discretion-becoming-focus-of-14978027.php> (critics of New York's bail reform decry the lack of judicial discretion while supporters of reforms without judicial discretion argue that allowing judges to have the ability to make bail determinations for individual defendants would disproportionately harm minority defendants, likening the discretion to providing permission to discriminate).

²¹⁵ NJ Star-Ledger Editorial Board, *The Verdict is In: Bail Reform Works*, NJ STAR-LEDGER (Oct. 14, 2021, 7:00 AM), nj.com/opinion/2021/10/the-verdict-is-in-bail-reform-works-editorial.html.

criminal legal system.²¹⁶ (Frequent utilizers are addressed later in this paper). Instead, we are left to rely upon the police and law enforcement to respond to people who repeatedly commit crimes, and/or are having a health crisis, and thus deal with them in a punitive manner, when what they need are social services and medical care.²¹⁷ A recent analysis by the Prison Policy Initiative showed that “repeated arrests are related to race and poverty, as well as high rates of mental illness and substance abuse.”²¹⁸ The “social, economic, and health problems [of this population] cannot and should not be addressed through incarceration.”²¹⁹ The typical person with multiple arrests is “Black, low-income, less educated, and unemployed,” and the vast majority are arrested for non-violent offenses.²²⁰ The overwhelming majority of arrests made in this country are for non-violent low-level offenses or even violations.²²¹

The state of the system for frequent utilizers leaves much to be desired. For example, most recently, on March 29, 2022, Rewell Altunga, a forty-four-year-old homeless man was “living” in tree branches thirty feet above the ground in Riverbank State Park on Manhattan’s Upper West Side.²²² He was littering, yelling at passersby, and sleeping in a tarp atop a tree until he was arrested for physically attacking a news reporter and a photographer, striking one of them in the head with a tree branch, hitting the other, and then smashing their camera to the ground.²²³ He was charged

²¹⁶ ALEXI JONES & WENDY SAWYER, PRISON POL’Y INITIATIVE, ARREST, RELEASE, REPEAT: HOW POLICE AND JAILS ARE MISUSED TO RESPOND TO SOCIAL PROBLEMS 7 (Aug. 2019), <https://www.prisonpolicy.org/reports/repeatarrests.html> (frequent utilizers are those who “repeatedly interact with the criminal justice system and with public services like emergency rooms and emergency shelters”).

²¹⁷ *Id.* at 1.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 3.

²²¹ Alice Speri, *Police Make More Than 10 Million Arrests a Year, But That Doesn’t Mean They’re Solving Crimes*, THE INTERCEPT (Jan. 31, 2018, 12:32 PM), <https://theintercept.com/2019/01/31/arrests-policing-vera-institute-of-justice/> (the bulk of the ten million plus annual arrests are for noncriminal behavior, drug violations, and low-level offenses).

²²² Tamar Lapin, “‘Squirrel Man’ Who Lives In Manhattan Tree Released Without Bail In Attack On Post Reporter,” N.Y. POST (Mar. 29, 2022, 1:55 PM), <https://nypost.com/2022/03/29/squirrel-man-who-lives-in-manhattan-tree-released-without-bail-in-attack-on-post-reporter/>.

²²³ *Id.*

with felony assault, released without bail, and placed under “supervision.”²²⁴ Not only is Mr. Sewell reduced to living in a tarp in a tree, he is also reduced to being called “Squirrel Man” in the nationally distributed local newspaper.²²⁵ We can do better. Dominic Staton, a thirty-four year old homeless man, has at least thirty total arrests, including six already this year through March.²²⁶ He was arrested on March 29, 2022, charged in the violent beating and attempted robbery of a seventy-three-year-old man in a corner store.²²⁷ Within the last thirty days, Mr. Staton was arrested for arson, and then days later, arrested for a robbery.²²⁸ After both of these arrests, he was released in less than twenty-four hours, despite demonstrating a clear need for services.²²⁹ On February 21, 2022, Frank Abrokwa, a thirty-seven-year-old “career criminal” smeared his own feces into the face of a stranger who was sitting on a bench waiting for the next subway train.²³⁰ Mr. Abrokwa was charged with assault and yes, released without bail.²³¹ Despite dozens of arrests, a deranged, unprovoked, disgusting fecal attack on a total stranger, rambling Facebook videos indicating clear mental illness,²³² Mr. Abrokwa was released twice in the same day for two different arrests, both times without bail. Sadly, the victims of these frequent utilizers can be considered lucky. They survived the attacks by their disturbed assailants. And while the headline-making tragedies are too numerous to mention here, the surge in violence, not only in New York City, but throughout the

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Joe Marino & Emily Crane, *Suspect Busted In Elderly Man’s Midtown Beating Has Lengthy Rap Sheet*, N. Y. POST (Mar. 29, 2022, 12:21 PM), <https://nypost.com/2022/03/27/elderly-man-beaten-during-attempted-robbery-in-nyc/>.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Steven Vago & Mark Lungariello, *Poop Attack Perp Bragged On Facebook About Getting Out Without Bail*, N.Y. POST (Mar. 3, 2022, 5:46 AM), <https://nypost.com/2022/03/03/poop-attack-perp-bragged-on-facebook-about-getting-out-without-bail/>.

²³¹ *Id.*

²³² *Id.*

country deserves mentioning.²³³ In March of 2022, New York State governor, Kathy Hochul, admitted herself that, “These repeat offender rates were a failure before bail reform, and they remain a failure today.”²³⁴

B. Lack of Funding for Preventative Measures

The budgets of pretrial service agencies in most counties in New York State have either decreased, not increased, or increased less than the rate of inflation.²³⁵ Under the current reformed bail laws of New York, each county is responsible for maintaining and funding services that at the very least, monitor and track the people in their jurisdiction who have been released pretrial.²³⁶ It is also at the county’s discretion to provide additional services such as drug counseling, trauma counseling, mentoring, job placement, mental health counseling, etc., all of which contribute to a reduction in recidivism and crime.²³⁷ Instead, the vast majority of New York counties are not increasing funding for pretrial service agencies despite the dramatic increase in those awaiting trial outside of jail.²³⁸ After a slow start, New York City is now leading the way in funding these pretrial services and they are set to spend \$155 million dollars on pretrial service programs for people awaiting trial who are in need of assistance.²³⁹ Additionally, Westchester County increased their pretrial services budget by 27%.²⁴⁰

²³³ German Lopez, *A Violent Crisis: The Brooklyn Shooting and Other Headline-making Violence are Part of a Broader Trend*, N.Y. TIMES (Apr. 17, 2022), <https://www.nytimes.com/2022/04/17/briefing/violent-crime-ukraine-war-week-ahead.html> (in the United States, murders have spiked nearly 40% since 2019, and violent crimes have increased overall); *See also supra* note 205 (NYC crime statistics).

²³⁴ Grace Ashford & Jonah E. Bromwich, *New York’s Bail Laws, Reconsidered: 5 Things to Know*, N.Y. TIMES (Update Mar. 30, 2022), <https://www.nytimes.com/2022/03/29/nyregion/bail-reform-hochul-ny.html>.

²³⁵ Charles Lane, *As More People Wait for Trial at Home, Few Communities are Paying for Services to Support Them*, THE GOTHAMIST (Mar. 3, 2022), <https://gothamist.com/news/as-more-people-wait-for-trial-at-home-few-communities-are-paying-for-services-to-support-them>.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

While some counties are realizing the investment into their citizens is vital for reducing crime and recidivism, many counties are not following suit. In order for bail reforms to avoid revolving door recidivism, there must be a mandatory investment from both the local county and the State coffers. Instead, New York's bail reform legislation neglected to establish a state-based funding mandate, and instead, put the onus on each individual county, thus allowing short-sighted and lackadaisical approaches by most of New York's sixty-two counties, many of whom claim to be waiting on State funding that does not exist.²⁴¹

V. TAKING A HOLISTIC APPROACH THAT EVEN COPS WILL SUPPORT

The problems facing the judicial system are multi-faceted and therefore need a multi-faceted approach. Human beings, and our shared humanity, must be the driving factor in the criminal legal system, particularly post-pandemic when there is so much suffering and economic instability for so many.²⁴² The pandemic and the lockdowns caused great disruption in all aspects of our lives, including the social services many relied upon to maintain public order and curb crime and violence.²⁴³ The disruption in social services, the high-profile police killings in 2020 that fractured an already fragile police-community relationship, and the protests that followed, all put Americans on edge.²⁴⁴ No small coincidence, during this time period, Americans bought a lot of guns...and used them.²⁴⁵ These three issues must also be considered together with Americans'

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ Champe Barton, *New Data Suggests Connection Between Pandemic Gun Sales and Increased Violence*, THE TRACE (Dec. 8, 2021), <https://www.thetrace.org/2021/12/atf-time-to-crime-gun-data-shooting-pandemic/> (between Mar. 2020 and Dec. 2020, a record 19 million firearms were purchased, shattering every annual sales record. During this time period, shootings across the country also skyrocketed, with dozens of cities setting records for homicides).

growing sense of social discord, political polarization, poor economic conditions, a deepening wealth gap, and distrust fueled by the loss of faith in our institutions and each other.²⁴⁶

There is a dramatic conflict between how we should deal with people in the criminal legal system in a morally and just manner, and what occurs in practice.²⁴⁷ There must be a balance in place to hold the individual accountable, provide them with the means to improve themselves and right their wrongs, and also protect the community's interest in safety and justice. This conflict cannot be fought against or ignored, it must be acknowledged by our political leaders and worked into our reforms.

A. A Focused Approach to Reform

Bail reforms requires deeper thinking than simply cash or no cash. Statistics, data, and realism must be focal points of policy. We must experiment, collect information, and mold our policies based on effective, data-driven practices, not by popular vote or political expedience.²⁴⁸ By collecting data that will allow us to analyze and improve our bail reform measures, we provide ourselves with the scientific standard of policy formation and execution that is standard in other industries.²⁴⁹ In addition, we cannot ignore the giant elephant in the room of bail reform – we must address the small, but potent population of “frequent utilizers.”

a. Defining Recidivism in Order to Measure Policy Effectiveness

Recidivism, when defined as a relapse in criminal behavior, is used to measure one's public safety risk, however, we must carefully determine how we measure recidivism and insert a standard measure into our reform policies.²⁵⁰ How we measure recidivism directly impacts

²⁴⁶ *Id.*

²⁴⁷ Miller, *supra* note 44, at 41.

²⁴⁸ BARKOW, *supra* note 7, at 1 (the United States does not formulate EPA or OSHA standards based off of popular vote, so why do we accept that standard for our criminal legal system?).

²⁴⁹ *Id.*

²⁵⁰ Sawyer & Wagner, *supra* note 16, at 16.

statistical interpretation and who we determine to be a danger to society.²⁵¹ Someone who commits a petty crime within a few months of release from incarceration poses a greater risk to public safety than someone who does not commit another crime for twenty years, yet both may be counted the same if there is no standard definition.²⁵² Additionally, the type of crime committed is a measure of danger to the public.²⁵³ Someone repeatedly stealing food or items of low value should be counted and treated differently than someone who repeatedly commits acts of violence or burglarizes dwellings.

Recidivism is frequently talked about and even less frequently tracked. Very few states collect data that would allow meaningful tracking, analysis, and improved practices.²⁵⁴ Most states only track whether someone is ever reincarcerated post-release and only eleven states track any data for those on parole.²⁵⁵ For example, New York only tracks whether those who are released from prison or jail are ever reincarcerated, and for those on parole, the State tracks whether they get rearrested while on parole.²⁵⁶ These are incomplete data sets because reincarceration rates do not detail how often someone had contact with the criminal legal system, and only tracking arrests does not account for discrepancies in enforcement and the faults in our criminal legal system that include over policing in minority neighborhoods, racial disparities in police contacts, and charges that are dismissed, downgraded, or do not result in a conviction.²⁵⁷ Tracking arrests, plea bargains, convictions, and incarceration, while considering time in between these events is critical to

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

gathering a complete picture to analyze and using that information to create policies that target areas for improvement, and close the shortcoming in reforms.

b. Addressing “Frequent Utilizers”

Frequent utilizers are a specific category of recidivists who are most often from marginalized communities and who “repeatedly interact with the criminal justice system and with public services like emergency rooms and emergency shelters.”²⁵⁸ These are people who need help breaking the cycle of incarceration by “addressing their needs [through] their communities rather than through the criminal justice system.” A more humane, practical, and effective method of dealing with those suffering addiction and untreated mental health issues is desperately needed.²⁵⁹ Importantly, this population is also overwhelmingly arrested for non-violent offenses.²⁶⁰ They are more likely to be impoverished, have low educational attainment, be unemployed, and have greater health needs such as addiction and mental health issues.²⁶¹ There is nothing surprising about these statistics. What is surprising and disheartening is that as a society, we keep arresting, jailing, and releasing them without treatment, only for these vulnerable and troubled people to repeat this cycle indefinitely. Instead, we spend money only to punish them without also providing a means of terminating the cycle.

B. Helping People Solve Their Own Problems

A well-known parable teaches us that we need to stop just pulling drowning people out of the river; we need to walk upstream and find out why they are falling in.²⁶² The United States must

²⁵⁸ Jones & Sawyer, *supra* note 216, at 7.

²⁵⁹ *Id.* at 1.

²⁶⁰ *Id.* at 3.

²⁶¹ *Id.* at 5.

²⁶² COMMITTEE ON INTEGRATING SOCIAL NEEDS CARE INTO THE DELIVERY OF HEALTH CARE TO IMPROVE THE NATION’S HEALTH ET AL., THE NAT’L ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, INTEGRATING SOCIAL CARE INTO THE DELIVERY OF HEALTH CARE 19 (2019) (the upstream/downstream parable is attributed to medical sociologist Irving Zola, and underscores the immediacy of the need to save those drowning in a river, the

change the narrative around the criminal legal system and turn to an advocacy-based approach. There is a time and place for punishment and accountability, but within that system, there must also be advocates and tools for change. People need to be called in, more often than they need to be called out. We must embrace our shared humanity and lift one another up, lest we find ourselves all falling into the river.

a. Close the Revolving Door

A predominantly cashless bail system is appropriate for the vast majority of those who are arrested.²⁶³ In New York City, since January 2019, on a month-to-month basis, between 94-96% of those who were released pending trial were not rearrested that month.²⁶⁴ Clearly, the overwhelming majority of those with pending criminal matters are not committing additional crimes while they are released pretrial. Since January 2019, New York City averages 47,745 people on pretrial release with pending cases every month.²⁶⁵ Of those, on average, 267 are rearrested for a violent felony, 338 for a non-violent felony, and 1,268 for a misdemeanor – every month.²⁶⁶ That is 1,873 new and additional crime victims every month by people who already had charges pending. While those individuals represent only 4% of those on pretrial release, the costs of their recidivism is high – in literally lives lost, in the number of citizens victimized and traumatized, as well as the financial cost of putting them through arrest, court proceedings, and incarceration, all totaling as much as \$118,746 per incident.²⁶⁷ This cost is unacceptable and

unsustainable pace at which people need saving, and the immediacy and the pace preventing those who are helping from traveling upstream to determine how these drowning people had fallen in the river to begin with).

²⁶³ Lander, *supra* note 135, at 3 (between 95-96% are not rearrested while on pretrial release).

²⁶⁴ *Id.*

²⁶⁵ *Supra* note 122 (NYC Open Data).

²⁶⁶ *Id.*

²⁶⁷ BRYANT JACKSON-GREEN, ILLINOISPOLICY.ORG, THE HIGH COST OF RECIDIVISM (Oct. 20, 2015), <https://www.illinoispolicy.org/the-high-cost-of-recidivism/> (recidivism is a problem in corrections systems across the country. The Illinois Sentencing Policy Advisory Council reported that each instance of recidivism in Illinois costs, on average, approximately \$118,746 – broken down as cost to taxpayers (\$40,987 of the cost by paying for arrests, trials, court proceedings, incarceration, and supervision), victims (\$57,418 deprivation of property, incurred medical

avoidable. New York must take note of the primary source of New Jersey's success – the ability to stop the revolving door of recidivism by using a data-driven assessment tool proven to be accurate and not produce biased results.²⁶⁸ New York must use a system that presumes release to avoid detaining low-risk individuals, that also implements a support system in place to provide people with the tools to improve themselves. Policy-making must have a forward-looking focus on ending recidivism.

b. Rehabilitation-Minded Incarceration

We cannot close the revolving door simply by locking people in cages. Prior to the mid-1970s, rehabilitative services were a key part of U.S. prison policy.²⁶⁹ After the “get tough on crime” era began, those services lost funding and prisons turned toward a punitive philosophy.²⁷⁰ Up until this shift, prisons had programs that encouraged prisoners to learn and develop occupational skills as well as resolve their psychological and substance abuse problems in order to positively reintegrate into society after their release.²⁷¹ Americans tend to view crimes as immutable characteristics of the actor, not merely an act or mistake, and therefore take a punitive approach to prison and a harsh mindset for punishment.²⁷² Over 95% of those incarcerated will be released someday.²⁷³ The difference between today's prisoners and those of decades past is that today, those leaving prison now are more likely to have lengthy criminal records, lengthy histories of alcohol and drug abuse, significant periods of unemployment and homelessness, and a physical

expenses, lost wages, and endured pain and suffering), and another \$20,432 from indirect costs in foregone economic activity).

²⁶⁸ Rosenberg, *supra* note 189 (the PSA considers factors such as the defendant's age, current violent offense, any pending charges at the time of arrest, prior misdemeanor, violent, and felony convictions, as well as past failures to appear and previous periods of incarceration).

²⁶⁹ Etienne Benson, *Rehabilitate or Punish?* MONITOR ON PSYCHOL., VOL. 34 NO. 7 JULY/AUGUST 2003, at 46.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 941 (2016).

²⁷³ BARKOW, *supra* note 7, at 57.

or mental disability.²⁷⁴ They are more likely to partake in gang activities and drug dealing.²⁷⁵ Since the 1980s, states have repeatedly cut prison educational, occupational, and therapeutic programs, so it should come as no surprise that our correctional system does not correct.²⁷⁶ However, data shows that programs allowing prisoners to earn a high school GED, receive vocational skills training, or receive intensive drug treatment result in people who are more likely to get jobs, have higher wages, and are less likely to relapse post-release.²⁷⁷ Research finds that participation in educational and vocational programs while incarcerated is associated with lower recidivism rates and a return on investment of \$4-5 for every dollar spent on the programs.²⁷⁸ This investment and return should be a concrete part of every reform-minded policy moving forward.

c. Community-based Investment into Pre-Trial Services Agencies

Advocacy must begin during the pre-trial process, and then continue through incarceration and post-release to ensure lasting change in people's lives. Robin Steinberg, founder of the Bronx Freedom Fund and The Bail Project advocates for using methods that assist people in solving their own problems.²⁷⁹ The Bail Project uses employees called Bail Disruptors who are community-based advocates working in local teams to identify people in need of bail assistance, post bail for them, and then maintain contact with them, providing pretrial services to enhance their ability to show up to court appointments, get the therapy or services they may need, and avoid additional interactions with the criminal legal system.²⁸⁰ Once the client is freed on bail, Bail Disruptors turn into client support hubs, developing post-release support plans, and coordinating with support partners to provide services ranging from counseling and therapy, to transportation to/from court

²⁷⁴ Petersilia, *supra* note 112, at 27.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 28-29.

²⁷⁷ *Id.* at 29.

²⁷⁸ Jackson-Green, *supra* note 267.

²⁷⁹ THE BAIL PROJECT, <https://bailproject.org/careers/> (last visited May 2, 2022).

²⁸⁰ *Id.*

appointments.²⁸¹ Community-based solutions foster a local investment and facilitates self-sufficiency and the ability to support oneself.²⁸² The ability to support oneself through a good-paying job is often a determinative factor in preventing recidivism.²⁸³

VI. COUNTERARGUMENTS AND CONCLUSION

A. Presumption of Innocence

The presumption of innocence does not appear in the U.S. Constitution, but it has everything to do with bail.²⁸⁴ Construed as a hard fought and “traditional right”, linked to the 5th, 6th, and 14th Amendments, the presumption of innocence was strongly defended in *Stack v. Boyle* where Chief Justice Vinson and the Court saw the presumption as a defendant’s right to freedom prior to conviction, the ability to participate in one’s own defense, and the avoidance of punishment prior to conviction.²⁸⁵ The right to bail is not absolute and is secured by the defendant giving “adequate assurance that he will stand trial and submit to sentence if found guilty.”²⁸⁶ In addition to its language limiting the absolute right to bail, in *Taylor v. Kentucky*, the Court narrowed their definition of the presumption of innocence as well.²⁸⁷ The *Taylor* Court called it an inaccuracy to portray the presumption of innocence as a factual, evidentiary fact.²⁸⁸ The presumption of innocence does not mean that one should be treated as factually innocent prior to trial, it means that during a trial, the state must prove the statutory elements of the crime beyond a reasonable

²⁸¹ *Id.*

²⁸² Jackson-Green, *supra* note 267.

²⁸³ *Id.*

²⁸⁴ Miller, *supra* note 44, at 44.

²⁸⁵ *Id.* And see *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

²⁸⁶ *Stack v. Boyle*, at 4.

²⁸⁷ *Taylor v. Kentucky*, 436 U.S. 478 (1978).

²⁸⁸ *Id.* at 485.

doubt to secure a conviction, and the suspicion that arises from arrest, indictment, arraignment, etc. must be put aside by the jury in favor of the facts and evidence presented at the trial.²⁸⁹

The presumption of innocence is not an absolute right that ignores probable cause, a defendant's risk of flight, or danger to the community. It is an "aura" and "special area of caution" around the defendant that mandates the prosecutor prove the elements of a crime beyond a reasonable doubt.²⁹⁰ The presumption of innocence therefore does not mandate pretrial release.

B. Cost and Time to Implement Successful Community-Based Pre-Trial Service Agencies

Clearly, implementing robust community-based pretrial services agencies in vulnerable neighborhoods throughout jurisdictions will be time-consuming and expensive. The counter argument to this line of thinking is simply that it costs a lot of money to incarcerate people and bear the financial burdens and costs of recidivism, and those high costs do not correlate to increased public safety.²⁹¹ Investing money in human beings is far better than spending money to lock them in cages strictly as a means of punishment and ignoring the fact that jails and prisons make people much more likely to commit more crimes due to of the atmosphere of our jails/prisons, as well as the psychological, emotional, economic and social impacts jail inflicts on people.²⁹² Because of the violent and inhumane conditions of prisons in the United States, their excessive use, their lack of rehabilitative and treatment programs, their negative effects on families, and the overall lack of accountability in their management and results, our prisons are themselves criminogenic and counterproductive to public safety.²⁹³

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ DON STEMEN, VERA EVIDENCE BRIEF, VERA INST. OF JUST., THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER 1 (2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf.

²⁹² BARKOW, *supra* note 7, at 56-72.

²⁹³ *Id.*

C. Conclusion

We can continue to pull drowning people out at the end of the river, or we can walk upstream, find out what is making them fall into the water, and stop them from falling in to begin with. The pieces are all here. Too often jurisdictions focus on one aspect of reform and reactively make singular, blanket changes that fail to fully grasp the need to invest in people to prevent crime and truly promote public safety. The cynical cop in me feels that the system is working as intended, but I also remain hopeful. To succeed, true bail reform must focus on the bigger picture of ending senseless incarceration and stopping people from getting swallowed up in the criminogenic cycle. Effective bail reform must include the following: 1) a mandatory right to a bail hearing with effective assistance of counsel present, 2) consideration of the defendant as a whole, from their prior record to their current life status and mental wellbeing, 3) the ability of judges to discern whether a defendant's prior record and current standing should make them ineligible to be released, regardless of the current charges against them, and 4) give the court system the ability to enforce or extend the civil confinement of frequent utilizer recidivist defendants prior to being released pending the adjudication of charges or trial, not to punish them, but to get them counseling and services prior to their trial.²⁹⁴

Reforms must fix what ails us, not simply trade one issue for another. While reducing and eventually eliminating unnecessary pretrial confinement is a fine goal, it must not be blindly accepted as the only goal while ignoring the high costs of recidivism under the current blanket policies of release. We must have bail reform that reduces mass incarceration, eliminates

²⁹⁴ HOSPITALIZATION PURSUANT TO MENTAL HEALTH AND HYGIENE LAW § 9.43 (court-ordered hospitalization for at least 72 hours, where this 72-hour period can be extended as deemed necessary by medical staff, based on an ongoing assessment of the individual).

unnecessary confinement for low-risk offenders, enhances public safety through rehabilitative confinement, eliminate frequent utilizers, and prevent people from falling in the river to begin with.