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TWO STEPS FORWARD, ONE STEP BACK: HOW NEW YORK'S BAIL REFORM SAGA TIPTOES AROUND ADDRESSING ECONOMIC INEQUALITY

Daniel Chasin[†]

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INTRODUCTION

“In our society *liberty* is the norm, and *detention prior to trial* or without trial is the carefully limited exception.”¹ Writing for the Supreme Court majority in the 1987 case *United States v. Salerno*, Chief Justice Rehnquist conjured up this utopia; however, the reality in the United States has become quite the opposite. Federal and state jail and prison populations have skyrocketed since the 1970s.² In particular, there has been a marked increase in the number of individuals imprisoned in jails pretrial and thus before conviction,³ largely through

¹ *United States v. Salerno*, 481 U.S. 739, 755 (1987) (emphasis added).

² According to The Sentencing Project, the United States prison population experienced seven hundred percent growth between 1972 and its peak in 2009. NAZGOL GHANDNOOSH, U.S. PRISON POPULATION TRENDS: MASSIVE BUILDUP AND MODEST DECLINE 1 (2019), <https://www.sentencingproject.org/publications/u-s-prison-population-trends-massive-buildup-and-modest-decline> [https://perma.cc/U29D-3LX7]. As of March 2020, the Prison Policy Initiative reported that “[t]he American criminal justice system holds almost 2.3 million people.” WENDY SAWYER & PETER WAGNER, MASS INCARCERATION: THE WHOLE PIE 2020 (2020), <https://www.prisonpolicy.org/reports/pie2020.html> [https://perma.cc/7YNR-44HM]. Of those 2,300,000 people, state prisons confine approximately 1,300,000 people, state jails confine 746,000, and federal prisons and jails together confine 226,000. *Id.*

³ As of March 2020, sixty-five percent—470,000 of the 746,000 people held in jails—had not yet been convicted of the crime for which state authorities held them. SAWYER & WAGNER, *supra* note 2. The Vera Institute of Justice reached similar conclusions:

This “pretrial population” has grown significantly over time—increasing 433 percent between 1970 and 2015, from 82,922 people to 441,790. People held in pretrial detention accounted for an increasing proportion of the total jail population over the same time period: 53 percent in 1970 and 64 percent in 2015. This growth is in large part due to the increased use of monetary bail.

LÉON DIGARD & ELIZABETH SWAVOLA, VERA INST. OF JUST., JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION 1 (2019) (footnotes omitted), <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf> [https://perma.cc/WR63-X3VV].

the use of financial conditions of pretrial release like bail.⁴ In its simplest form, bail is an amount of money or property established by a judge at arraignment, which a criminal defendant may post to remain out of jail during the proceedings leading up to and including trial.⁵ Judges typically fix bail to ensure that the individual appears in court when necessary.⁶ Declining to post bail or, more commonly, lacking the financial means to do so, means that the state or federal government will incarcerate the individual during the pendency of their trial.⁷

The Eighth Amendment to the United States Constitution provides that “[e]xcessive bail shall not be required,”⁸ but its text is silent on whether there exists an absolute right to the opportunity to post bail. After the 1984 Federal Bail Reform Act explicitly permitted preventive detention,⁹ the *Salerno* Court reiterated that the Eighth

⁴ “A significant driver of the growing number of people in jail awaiting trial has been a paradigm shift toward financial conditions of pretrial release. . . . As a result, members of the poorest communities are harmed most profoundly, despite constitutional prohibitions on punishing people for their poverty.” DIGARD & SWAVOLA, *supra* note 3, at 2.

⁵ The State of New York, for example, defines bail as follows:

A court fixes bail when, having acquired control over the person of a principal, it designates a sum of money and stipulates that, if bail in such amount is posted on behalf of the principal and approved, it will permit him to be at liberty during the pendency of the criminal action or proceeding involved.

N.Y. CRIM. PROC. LAW § 500.10(3) (McKinney 2020).

Black’s Law Dictionary primarily defines “bail” as “[a] security such as cash, a bond, or property; esp., security required by a court for the release of a criminal defendant who must appear in court at a future time.” *Bail*, BLACK’S LAW DICTIONARY (11th ed. 2019); *see also* Robert Webster Oliver, *Bail and the Concept of Preventative Detention*, 69 N.Y. ST. BAR J. 8, 8 (1997) (“‘Bail’ usually means cash money or a bail bond and is an amount fixed by the Court which is posted by, or on behalf of, the defendant which will be delivered to the Court and held to assure the defendant’s return to Court whenever necessary.” (footnote omitted)).

⁶ The American Bar Association adds that “[b]ail is not a fine. It is not supposed to be used as punishment. The purpose of bail is simply to ensure that defendants will appear for trial and all pretrial hearings for which they must be present.” *How Courts Work*, A.B.A. (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail [<https://perma.cc/5THD-CWZZ>].

⁷ *See id.*; BERNADETTE RABUY & DANIEL KOPF, PRISON POL’Y INITIATIVE, *DETAINING THE POOR* 1 (2016), <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf> [<https://perma.cc/3X3P-D4TA>] (“With money bail, a defendant is required to pay a certain amount of money as a pledged guarantee he will attend future court hearings. If he is unable to come up with the money either personally or through a commercial bail bondsman, he can be incarcerated from his arrest until his case is resolved or dismissed in court.” (footnotes omitted)).

⁸ U.S. CONST. amend. VIII.

⁹ Preventive detention is the detention of a defendant leading up to trial without affording them the opportunity to post bail. *Preventive Detention*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“Confinement imposed usu. on a criminal defendant who has threatened to escape, poses a risk of harm, or has otherwise violated the law while awaiting trial”); *see* 18 U.S.C. § 3142(e)(1) (“If . . . the judicial officer finds that no condition or combination of conditions will

Amendment's bail clause does not convey an absolute right to bail.¹⁰ In upholding the 1984 Federal Bail Reform Act as facially valid, the *Salerno* Court held that the reach of the Eighth Amendment's bail clause goes only so far as to prohibit the imposition of bail that is "excessive" given the circumstances.¹¹ In short, a criminal defendant does not have an absolute right to the opportunity to post bail; it is constitutional for the federal government to incarcerate an individual pretrial without giving them the chance to meet financial conditions of release.¹² The State of New York, in its state constitution, adopted language substantively identical to that of the Eighth Amendment to the United States Constitution,¹³ and the New York Court of Appeals has long confirmed the lack of a constitutional right to bail.¹⁴

The State of New York has contributed substantially to nationwide pretrial detention populations.¹⁵ Throughout 2019, sixty percent of the

reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.”)

¹⁰ See *United States v. Salerno*, 481 U.S. 739, 752 (1987) (“The Eighth Amendment addresses pretrial release by providing merely that ‘[e]xcessive bail shall not be required.’ This Clause, of course, says nothing about whether bail shall be available at all.”).

¹¹ *Id.* at 754 (“The only arguable substantive limitation of the Bail Clause [of the Eighth Amendment] is that the Government’s proposed conditions of release or detention not be ‘excessive’ in light of the perceived evil.”).

¹² See *id.*

¹³ Compare N.Y. CONST. art. I, § 5 (“Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.”), with U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). But for the omission of a single comma in New York State’s bail clause, New York’s bail clause mirrors the version found in the United States Constitution.

¹⁴ See, e.g., *People ex rel. Shapiro v. Keeper of City Prison*, 49 N.E.2d 498, 500 (N.Y. 1943) (“[B]ut in the States like New York, whose Constitutions follow the Federal model in this respect by prohibiting ‘excessive bail,’ such a constitutional declaration as to bail accords no accused any right to bail, but serves only to forbid excessiveness.” (citation omitted)); *People ex rel. Fraser v. Britt*, 43 N.E.2d 836 (N.Y. 1942) (affirming lower court’s authority to deny defendant’s application for bail); *People ex rel. Klein v. Krueger*, 255 N.E.2d 552, 554 (N.Y. 1969) (reaffirming that “the State constitutional guarantee against excessive bail does not require that bail be given as of right in all noncapital cases”); see also *People ex rel. Lobell v. McDonnell*, 71 N.E.2d 423, 425 (N.Y. 1947) (explaining that bail may not be “excessive” but that “[t]he bailing court has a . . . judicial, not a pure or unfettered discretion” in determining whether the amount of bail is excessive).

¹⁵ Then–New York Governor Andrew Cuomo’s 2019 State of the State Book included the following information:

A review of 2018 cases conducted by the Division of Criminal Justice Services showed that, in cases where bail is set, people are still in jail five days after bail is set in 66 percent of New York City cases and 64 percent of cases outside of New York City. This means that there are at least 45,500 people in jail annually across the state because they can’t pay bail.

New York jail population consisted of individuals incarcerated not for the conviction of any crime, but instead because they could not make bail.¹⁶ These numbers become even more staggering when trained on New York City in particular, where almost ninety percent of people arrested for misdemeanors cannot post bail set at one thousand dollars or less.¹⁷ As startling as these figures might be, the repercussions of imprisonment for failure to post bail extend far beyond one's actual period of imprisonment pending trial. Not only are individuals held on bail nine times more likely to plead guilty to a misdemeanor than those free pending trial,¹⁸ but spending time confined in jails or prisons¹⁹—particularly in pretrial detention—begets lifelong deleterious effects.²⁰

ANDREW M. CUOMO, 2019 JUSTICE AGENDA: THE TIME IS NOW 140 (2019) [hereinafter 2019 JUSTICE AGENDA], <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2019StateoftheStateBook.pdf> [https://perma.cc/D9LB-KWS5].

¹⁶ “On any given day in early 2019, more than 22,000 New Yorkers were incarcerated in a local jail—about 8,000 in New York City and 14,000 in the rest of the state. As is the case in local jails across the country, more than six in ten of these individuals were held pretrial, prior to a conviction, usually stemming from an inability to afford money bail.”

MICHAEL REMPEL & KRISTAL RODRIGUEZ, CTR. FOR CT. INNOVATION, BAIL REFORM IN NEW YORK: LEGISLATIVE PROVISIONS AND IMPLICATIONS FOR NEW YORK CITY 1 (2019) [hereinafter 2019 BAIL REFORM IN NEW YORK], https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail_Reform_NY_full_0.pdf [https://perma.cc/2K2U-6TKR].

¹⁷ “In [New York City], nearly 90% of people charged with misdemeanors can't afford bail of \$1,000 or less. As a result, on average, they will spend over two weeks in jail at Rikers Island.” BROOKLYN CMTY. BAIL FUND, MASS INCARCERATION FACT SHEET 1 (2020) [https://perma.cc/K3LN-LFWY].

¹⁸ *Id.* Nationwide, a 2018 study by the American Economic Review similarly revealed that initial pretrial release decreases the probability of being found guilty by 14.0 percentage points, a 24.2 percent change from the mean for detained defendants . . . The decrease in conviction is largely driven by a reduction in the probability of pleading guilty, which decreases by 10.8 percentage points, a 24.5 percent change.

Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 203 (2018).

¹⁹ Although the terms “prison” and “jail” are often used interchangeably, each facility serves a distinct purpose. Prisons are generally state or federal facilities that hold individuals “in long-term confinement as punishment for a crime, or in short-term detention while waiting to go to court as criminal defendants.” *Prison*, BLACK'S LAW DICTIONARY (11th ed. 2019). Alternatively, jails are generally “a local government's detention center where persons awaiting trial or those convicted of misdemeanors are confined.” *Jail*, BLACK'S LAW DICTIONARY (11th ed. 2019); see also *What Is the Difference Between Jails and Prisons?*, BUREAU OF JUST. STATS. [https://perma.cc/9ET3-B383]; Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1579 n.76 (2003).

²⁰ “Each year in prison takes 2 years off an individual's life expectancy. With over 2.3 million people locked up, mass incarceration has shortened the overall U.S. life expectancy by almost 2 years.” Emily Widra, *Incarceration Shortens Life Expectancy*, PRISON POL'Y INITIATIVE (Mar. 2021), https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy [https://perma.cc/VZJ7-FQDQ].

The tragic experience of Kalief Browder captured the conscience of New Yorkers and Americans alike,²¹ as the many broken aspects of our criminal justice system, including New York's pretrial detention mechanisms, converged on Mr. Browder to steal his life.²² On May 15, 2010, an officer arrested Mr. Browder, a sixteen-year-old Black kid from The Bronx, after Mr. Browder was accused of stealing a backpack.²³ Mr. Browder's bail was set at three thousand dollars, an amount beyond his and his family's financial means.²⁴ As a result, he was confined to Rikers Island, a notoriously violent jail complex,²⁵ during the pendency of his trial.²⁶ In spite of the Sixth Amendment's speedy trial guarantee,²⁷ Mr. Browder spent over three years on Rikers Island pretrial, about two years of which he dwelt in solitary confinement.²⁸ On May 29, 2013, after Mr. Browder had already suffered years of mental and physical abuse, and after surviving attempts to take his own life, he was released from Rikers Island; after over three years, the District Attorney decided to drop the case, deeming it too weak to take to trial.²⁹ Although Mr.

²¹ See generally *Time: The Kalief Browder Story* (Spike television broadcast Mar. 1, 2017).

²² Much of the tragedy around Mr. Browder's ordeal lies not in its uniqueness, but rather in its representation of innumerable similarly appalling stories. See, e.g., Matt Taibbi, *Jailed for Being Broke*, ROLLING STONE (June 23, 2015, 1:00 PM), <https://www.rollingstone.com/politics/politics-news/jailed-for-being-broke-72132> [<https://perma.cc/KS2N-SFRV>].

²³ Like Chief Justice Rehnquist naively viewed pretrial detention as the "carefully limited exception," the arresting officer in Mr. Browder's case believed the same, misinforming Mr. Browder that he was "just going to take [Mr. Browder] to the precinct. Most likely [Mr. Browder] can go home." Mr. Browder would not go home for more than three years. Jennifer Gonnerman, *Before the Law*, NEW YORKER (Sept. 29, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law> [<https://perma.cc/BDU9-S748>]; see *United States v. Salerno*, 481 U.S. 739, 755 (1987).

²⁴ Seventy-four days later, Mr. Browder was indicted on second-degree robbery charges. The Department of Probation determined this was a probation violation from an earlier incident, leading the judge to remand Mr. Browder without bail. Gonnerman, *supra* note 23.

²⁵ A one-time slaughterhouse for pigs and a one-time landfill, Rikers Island confines thousands of individuals and has provided the backdrop for far too many violent, lethal encounters to list here; the maelstrom that is Rikers Island warrants a Note unto itself, but for an inside look at life on Rikers Island from those confined there and those who work there, see Noreen Malone & Raha Naddaf, *This Is Rikers: From the People Who Live and Work There*, MARSHALL PROJECT (June 28, 2015, 9:00 PM), <https://www.themarshallproject.org/2015/06/28/this-is-rikers> [<https://perma.cc/Y6CT-2FWD>].

²⁶ *Id.*

²⁷ U.S. CONST. amend. VI.

²⁸ Mr. Browder was frequently placed in solitary confinement after fights with other incarcerated people. Gonnerman, *supra* note 23 ("Not long after arriving on Rikers, Browder made his first trip to solitary confinement. It lasted about two weeks, he recalls, and followed a scuffle with another inmate."); Benjamin Weiser, *Kalief Browder's Suicide Brought Changes to Rikers. Now It Has Led to a \$3 Million Settlement.*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/nyregion/kalief-browder-settlement-lawsuit.html> [<https://perma.cc/9S8S-T4LV>].

²⁹ Gonnerman, *supra* note 23.

Browder was finally freed from Rikers Island, sans guilty plea or conviction,³⁰ his life was irreparably altered.³¹ On June 6, 2015, Mr. Browder took his own life at the age of twenty-two.³² This chilling excerpt further illustrates the tragedy:

“He may have hung himself, but the strings were pulled by the system,” Venida [Browder] once said. This is a reality that Kalief Browder’s mother lived with every day: that her son didn’t take his own life so much as submit to a weight he carried with him out of the hole. The imagery sticks: Kalief’s body, the cord around his neck, *its other end disappearing somewhere in the depths of Rikers Island.*³³

Mr. Browder’s death wrought by the icy steel hands of New York’s criminal justice system precipitated the State’s newfound effort to reform its racially³⁴ and economically discriminatory bail system.³⁵

In April 2019, New York State enacted sweeping reforms to its criminal justice system set to take effect on January 1, 2020.³⁶ Among

³⁰ *Id.*

³¹ In Mr. Browder’s own words upon his release, “I’m not all right. I’m messed up.” Alysia Santo, *No Bail, Less Hope: The Death of Kalief Browder*, MARSHALL PROJECT (June 9, 2015, 6:04 PM), <https://www.themarshallproject.org/2015/06/09/no-bail-less-hope-the-death-of-kalief-browder> [<https://perma.cc/D8AC-HRS3>].

³² Natalie Chang, *This Is Solitary*, ATLANTIC (Feb. 22, 2017), <https://www.theatlantic.com/sponsored/spike/this-is-solitary/1245> [<https://perma.cc/Q7H8-A7HY>]; see Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> [<https://perma.cc/Z4KB-STJF>].

³³ Chang, *supra* note 32 (emphasis added).

³⁴ See JAEOK KIM, QUINN HOOD & ELLIOT CONNORS, VERA INST. OF JUST., THE IMPACT OF NEW YORK BAIL REFORM ON STATEWIDE JAIL POPULATIONS: A FIRST LOOK 16 (2021), <https://www.vera.org/downloads/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations.pdf> [<https://perma.cc/DZ96-WM67>] (recounting preexisting racial disparities in New York City pretrial admissions and analyzing bail reform’s lack of impact on those disparities).

³⁵ Mr. Browder’s death brought to the forefront the issue of reforming the State’s system of pretrial detention:

The move to sharply curtail the use of cash bail, in many ways, was the long-awaited response to the case of Mr. Browder . . . For many left-leaning politicians, he is a symbol of the problems inherent in the bail system, which they argue discriminates against the poor. When Democrats seized control of the state Legislature last fall, the party finally appeared poised to stop the use of cash deposits or bonds to ensure people return to court. . . . Andrea Stewart-Cousins, a Westchester County Democrat, reiterated that she and fellow Democrats in her chamber wanted to “make sure that we’re not criminalizing poverty, and that there would never, ever, ever be another instance of a Kalief Browder.”

Jesse McKinley & Ashley Southall, *Kalief Browder’s Suicide Inspired a Push to End Cash Bail. Now Lawmakers Have a Deal.*, N.Y. TIMES (Mar. 29, 2019), <https://www.nytimes.com/2019/03/29/nyregion/kalief-browder-cash-bail-reform.html> [<https://perma.cc/UFG8-5QKQ>].

³⁶ See generally S. 1509, 2019 Leg., 242d Sess. (N.Y. 2019); Barry Kamins, *Annual Review of New Criminal Justice Legislation*, 91 N.Y. ST. BAR J. 24 (2019) (summarizing the reforms).

the goals of these reforms, the State intended to diminish economic inequality in its bail and pretrial detention systems. Before turning even three months old, these reforms reduced the pretrial prison population in New York City by forty percent: as of March 5, 2020, about three thousand people were in New York City prisons awaiting trial, down from nearly five thousand people at the time of the reform's enactment.³⁷ Progress notwithstanding, just months after the new bail law had taken effect, the Legislature enacted a series of amendments, restoring the bail law somewhat closer to its original state before the April 2019 reforms.³⁸

This Note will analyze how, despite the fact that New York's bail reforms reduced city and state prison populations, the revised bail law falls flat in its attempt to resolve the economic inequality in the State's pretrial detention system—an overarching purpose of the reforms.³⁹ Part I of this Note will chronicle the turbulent recent history of bail reform in New York and will describe the key differences between the old bail laws, the reformed bail laws, and the amendments to those reforms. Part II will analyze how the current state of New York's pretrial detention system does little to address the Legislature's goals. After assessing the shortcomings of the newly minted—and subsequently reminted—bail law, Part III of this Note will offer solutions to ensure that the bail law achieves its intended purposes. These solutions will focus on securing an individual's return to court and reducing pretrial detention, while also ensuring that an individual's wealth does not decide their freedom while they await trial.

³⁷ MICHAEL REMPEL & KRISTAL RODRIGUEZ, CTR. FOR CT. INNOVATION, BAIL REFORM REVISITED: THE IMPACT OF NEW YORK'S AMENDED BAIL LAW ON PRETRIAL DETENTION 12 (2020) [hereinafter BAIL REFORM REVISITED], https://www.courtinnovation.org/sites/default/files/media/document/2020/bail_reform_revisited_05272020.pdf [https://perma.cc/X2A7-E2LM].

³⁸ See Jamiles Lartey, *New York Rolled Back Bail Reform. What Will the Rest of the Country Do?*, MARSHALL PROJECT (Apr. 23, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/23/in-new-york-s-bail-reform-backlash-a-cautionary-tale-for-other-states> [https://perma.cc/Y9TB-KBU7]; Beth Fertig, *What the New Rollbacks to Bail Reform Mean in New York*, GOTHAMIST (July 2, 2020, 8:07 PM), <https://gothamist.com/news/what-new-rollbacks-bail-reform-mean-new-york> [https://perma.cc/TYK9-3V3G].

³⁹ See S. 1509, 2019 Leg., 242d Sess., Part JJJ (N.Y. 2019).

I. BACKGROUND

A. *New York's Bail History, in Brief*

Bail and pretrial detention are far from novel tools of “criminal justice”; their usage spans thousands of years.⁴⁰ In New York, the recent bail reform efforts are not the first time New Yorkers have focused their radar on this ancient aspect of the criminal justice system.⁴¹ Bail reform efforts in New York have roots that stretch to the 1960s and beyond.⁴² After learning of—and expressing horror at—New York City’s prison population in 1960, Louis Schweitzer, a retired chemical engineer and businessman,⁴³ teamed up with Herbert Sturz, a magazine editor, to found the nonprofit Vera Foundation,⁴⁴ known today as the Vera Institute of Justice.⁴⁵ The Vera Foundation’s initial iteration had one primary mission: to create a bail fund geared toward shrinking New York City’s rising pretrial prison population.⁴⁶ Though this bail fund would help some individuals gain a semblance of freedom before trial,

⁴⁰ TIMOTHY R. SCHNACKE, MICHAEL R. JONES & CLAIRE M. B. BROOKER, *THE HISTORY OF BAIL AND PRETRIAL RELEASE 1* (2010), https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI_2010.pdf [<https://perma.cc/45YY-GNY4>] (“While the notion of bail has been traced to ancient Rome, the American understanding of bail is derived from 1,000-year-old English roots. . . . [B]ail [originally] reflected the judicial officer’s prediction of trial outcome.’ In fact, bail bond decisions are all about prediction, albeit today about the prediction of a defendant’s probability of making all court appearances” (second alteration in original) (footnotes omitted)).

⁴¹ See, e.g., *Bail Reform*, N.Y. TIMES, Apr. 2, 1965, at 34.

⁴² See generally CTR. ON THE ADMIN. OF CRIM. L., N.Y.U., *PREVENTIVE DETENTION IN NEW YORK: FROM MAINSTREAM TO MARGIN AND BACK* (2017), https://www.law.nyu.edu/sites/default/files/upload_documents/2017-CACL-New-York-State-Bail-Reform-Paper.pdf [<https://perma.cc/8KC7-CM5V>].

⁴³ 1970s Mr. Schweitzer might have been further horrified if 1990s Mr. Schweitzer told him that, before the turn of the millennium, New York City’s pretrial prison population would more than double. See *Incarceration Trends*, VERA INST. OF JUST. [<https://perma.cc/8M7R-7UEA>] (detailing the explosion of New York City’s pretrial prison population from around 6,300 in 1970 to over 14,500 in 1995); see also Lee S. Friedman, *The Evolution of a Bail Reform*, 7 POL’Y SCIS. 281, 285 (1976) (“The germination of what was soon to become the Vera Foundation occurred in the Fall of 1960 at a cocktail party, when Louis Schweitzer was asked if he was aware of the number of people confined in the New York City jails awaiting trial. Astounded by an answer of ‘thousands,’ he arranged through Anna Kross, then New York City’s Commissioner of Corrections, to tour the facilities.”).

⁴⁴ Friedman, *supra* note 43, at 285–86.

⁴⁵ Today, Vera’s mission is “[t]o end the overcriminalization and mass incarceration of people of color, immigrants, and people experiencing poverty.” It envisions “[s]afe, healthy, empowered communities and a fair, accountable justice system.” *About Us*, VERA INST. OF JUST., <https://www.vera.org/about> [<https://perma.cc/P9LW-KHUU>].

⁴⁶ Friedman, *supra* note 43, at 286.

it would never resolve the underlying issues wrought by New York's harsh bail system.⁴⁷ This realization brought about the Manhattan Bail Project. The Project identified indigent defendants who posed little risk of flight to avoid prosecution. It then recommended to judges who should be granted release through the pendency of their trial.⁴⁸ This study quickly proved a reliable tool—perhaps as reliable as bail itself—in predicting and ensuring an individual's return to court.⁴⁹ A year before the Manhattan Bail Project concluded operations, New York City institutionalized the Project's release on recognizance procedures in the Office of Probation.⁵⁰

In the years following the efforts of the Vera Foundation and the Manhattan Bail Project, the issues of bail and, in particular, preventive detention remained at the forefront of the conversation around criminal justice reform.⁵¹ Throughout the 1960s and 1970s, advocates split on whether the State should allow judges to impose preventive detention because the individual posed a risk to public safety,⁵² or whether the practice should be outlawed.⁵³ Studies have shown that the consideration of public safety or “dangerousness” can function as a proxy for racism, as judges are more likely to find nonwhite defendants

⁴⁷ *Id.* at 287.

⁴⁸ *Id.* As the Project grew more successful, it continued to recommend the release of more individuals on their own recognizance:

In its first months the Project recommended only 27 percent of their interviews for release. After almost a year of successful operation, with the growing confidence of judges, the Project recommended nearly 45 percent of arrestees for release. After three years of operation, the percentage grew to 65 percent with the Project reporting that less than one percent of releases failed to appear for trial.

SCHNACKE, JONES & BROOKER, *supra* note 40, at 10.

⁴⁹ “During the 3 year experiment, 3505 defendants had been granted ROR following Vera recommendations. Only 56 parolees, or 1.6% of the total, failed to appear. The ROR system, as used in the experiment, seemed at least as reliable as bail (4% fail to appear) in ensuring appearance for a large number of defendants.”

Friedman, *supra* note 43, at 290–91.

⁵⁰ *Id.* at 292–93. In 1973, the Pretrial Services Agency (PTSA) was created to take over the program and in 1977, “PTSA became independent from Vera and was incorporated as the New York City Criminal Justice Agency.” MARY T. PHILLIPS, A DECADE OF BAIL RESEARCH IN NEW YORK CITY 2 (2012), <https://www.prisonpolicy.org/scans/DecadeBailResearch12.pdf> [<https://perma.cc/2X26-996U>].

⁵¹ See CTR. ON THE ADMIN. OF CRIM. L., *supra* note 42, at 1–3.

⁵² “Proponents of the practice suggested it would improve public safety and [would allow] judges to be candid about a factor they already covertly considered.” *Id.* at 3.

⁵³ “Critics countered that judges and lawyers could not accurately predict who would be a danger if released. They also believed the practice was antithetical to the notions of due process and the Constitution's prohibitions on excessive bail.” *Id.*

more “dangerous” than white defendants.⁵⁴ Although New York opted not to allow for preventive detention on the basis of public safety, the vast majority of jurisdictions nationwide—both federally and at the state level—allow preventive detention on this basis.⁵⁵ Although the Supreme Court in 1987 declared preventive detention on the basis of risk to public safety constitutional,⁵⁶ New York remains, to this day, in the scant minority of states prohibiting the practice.⁵⁷ In the years since, the question has thus morphed from whether preventive detention is constitutional to whether preventive detention is fair and just.

B. *New York’s 2019 Bail Reforms*

1. Political Context of the 2019 Reforms

“Akeem, I want you to know that your brother did not die in vain,”⁵⁸ then–New York Governor Andrew Cuomo vowed to Kalief Browder’s brother during his 2018 State of the State address, promising to rectify New York’s cruel criminal justice system.⁵⁹ Among an array of criminal justice reforms, Governor Cuomo specifically proposed an

⁵⁴ See 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> [<https://perma.cc/QZQ7-9M2A>] (“The idea of ‘dangerousness,’ advocates stress, is tied into the racial discrepancies of our justice system. Two studies of state court data from 75 large jurisdictions in the 1990s found that bail was set at significantly higher rates for black and Latinx people.”). Nonwhite defendants are denied bail more often than white defendants, and mean bail amounts are higher for nonwhite defendants than for white defendants. See generally Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170 (2005); Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873 (2003).

⁵⁵ “New York ultimately decided against allowing preventive detention. This choice was praised as a victory for civil liberties. However, in the years that followed, the national tide turned firmly in favor of preventive detention.” CTR. ON THE ADMIN. OF CRIM. L., *supra* note 42, at 3.

⁵⁶ *United States v. Salerno*, 481 U.S. 739, 748 (1987). For a more thorough look into the constitutionality of preventive detention, see CTR. ON THE ADMIN. OF CRIM. L., *supra* note 42, at 6–9.

⁵⁷ CTR. ON THE ADMIN. OF CRIM. L., *supra* note 42, at 1; PHILLIPS, *supra* note 50, at 25.

⁵⁸ Andrew Cuomo, *Governor Cuomo Outlines 2018 Agenda: Realizing the Promise of Progressive Government*, YOUTUBE, at 46:22–28 (Jan. 3, 2018), <https://youtu.be/N4SVFp8EFXw> [<https://perma.cc/23V6-MF3B>].

⁵⁹ *Id.* at 41:40. For a written transcript of Governor Cuomo’s 2018 State of the State address, see *Video, Audio & Rush Transcript: Governor Cuomo Outlines 2018 Agenda: Realizing the Promise of Progressive Government*, N.Y. STATE (Jan. 3, 2018) [<https://perma.cc/B67F-9WLY>] (“Our bail system is biased against the poor . . . [O]ur jails are filled with people who should not be incarcerated. . . . The blunt ugly reality is that too often, if you can make bail you are set free and if you are too poor to make bail you are punished.”).

overhaul to New York's bail laws.⁶⁰ But the time was not politically ripe for the passage of such reforms into law: although a Democratic-majority Assembly was paired with a Democratic governor, a Republican-majority Senate forestalled any chance of substantive criminal justice reform. Bail reform became a much more plausible reality when the New York State Senate gained a Democratic majority in the November 2018 elections.⁶¹ With the Assembly maintaining a Democratic majority⁶² and Democratic Governor Cuomo winning reelection,⁶³ the Democratic Party assembled its first "trifecta"⁶⁴ since 2010.⁶⁵ Finally, New York State seemed poised to make good on the Governor's promise to Akeem Browder: to enact meaningful, progressive bail reform.⁶⁶ For perhaps the first time in decades, the State seemed unified in pursuing and achieving this elusive goal.

⁶⁰ Governor Cuomo outlined the following priorities of potential reforms:

We must reform our bail system so a person is only held if a judge finds either a significant flight risk or a *real threat to public safety*. If so, they should be held in preventive detention whether they are rich or poor, black or white—but if not, they should be released on their own recognizance whether they are rich or poor, black or white. That is only fair. Race and wealth should not be factors in our justice system. It's that clear.

Cuomo, *supra* note 58, at 43:09–54 (emphasis added). Incorporating public safety into judges' bail decisions would have constituted a major departure from decades and decades of prior New York State law. See generally *infra* Section II.A.

⁶¹ *New York State Senate Elections, 2018*, BALLOTPEDIA, https://ballotpedia.org/New_York_State_Senate_elections,_2018 [<https://perma.cc/WD22-LHKF>] ("Democrats gained control of the chamber and expanded their majority in the 2018 elections for the New York State Senate, winning 40 seats to Republicans' 23. All 63 Senate seats were up for election. At the time of the election, Democrats held 32 seats to Republicans' 31. However, Republicans controlled the chamber, as one Democratic state senator caucused with the Republican Party.").

⁶² *New York State Assembly Elections, 2018*, BALLOTPEDIA, https://ballotpedia.org/New_York_State_Assembly_elections,_2018 [<https://perma.cc/XL38-FX9C>] ("Democrats held their veto-proof majority in the 2018 elections for New York State Assembly, winning 106 seats to Republicans' 43 and the Independence Party's one. All 150 assembly seats were up for election in 2018. At the time of the election, Democrats held a 104–41 majority.").

⁶³ *New York Gubernatorial and Lieutenant Gubernatorial Election, 2018*, BALLOTPEDIA, https://ballotpedia.org/New_York_gubernatorial_and_lieutenant_gubernatorial_election,_2018 [<https://perma.cc/YZ34-V8TF>].

⁶⁴ *Party Control of New York State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_New_York_state_government [<https://perma.cc/DG3Y-4ZEQ>] ("Trifectas influence how hard a party must work to advance its agenda. When one party controls the three vital centers of state political power—the office of the governor, the state House, and the state Senate—Ballotpedia considers that party to control a 'trifecta.' Trifectas make it easier for the dominant party to pursue its agenda, and more difficult for opposition parties to challenge it.").

⁶⁵ *Id.* ("In New York, Democrats held trifecta control of state government from 2009 to 2010. In all other years from 1992 to 2017, control of state government was divided.").

⁶⁶ Russell Berman, *Democrats in New York Are Ready to Deploy Their Newfound Power*, ATLANTIC (Dec. 22, 2018), <https://www.theatlantic.com/politics/archive/2018/12/democrats-new-york-cuomo-progressive-agenda/578896> [<https://perma.cc/DM9U-Q22B>] ("The result [of

Emboldened by a more progressive state government and by bail reforms in states including California and New Jersey,⁶⁷ Democratic leadership in New York expressed an interest in ending the use of bail altogether.⁶⁸ Although there seemed to be widespread support for this position, disagreement on other issues prevented serious movement in the effort to eliminate bail. Specifically, unlike federal law,⁶⁹ New York law allowed judges to consider *only* the likelihood of an individual's return to court when making bail decisions,⁷⁰ long disallowing judges from considering the individual's "dangerousness" or risk to public safety.⁷¹ Akin to the travails of decades earlier,⁷² views on whether public safety should be a valid concern of judges in making bail decisions

the 2018 elections] is the most commanding governing majority Democrats have had in New York in decades, giving the party a seemingly unfettered opportunity to enact legislation that has been bottled up for years and to place the state firmly on the leading edge of progressive policy nationwide. In the next several months, Democrats hope to . . . end a cash-bail system blamed for enabling mass incarceration. . . . On criminal-justice reform, activists have secured Cuomo's support for making the state the second in the nation, after California, to end cash bail.").

⁶⁷ For example, Senate Bill 10, eliminating cash bail entirely, had just been signed into law in California. However, after a challenge by the bail bond industry, California voters rejected Proposition 25 in the 2020 elections, thereby repealing Senate Bill 10 and allowing cash bail in California to see another day. The Times Editorial Board, *Editorial: The Welcome but Glacial Dismantling of California's Bail System*, L.A. TIMES (Dec. 16, 2019, 3:00 AM), <https://www.latimes.com/opinion/story/2019-12-16/eliminate-bail-in-california-justice> [<https://perma.cc/2HZ7-YHAC>]; *California Proposition 25, Replace Cash Bail with Risk Assessments Referendum (2020)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_25_Replace_Cash_Bail_with_Risk_Assessments_Referendum_\(2020\)](https://ballotpedia.org/California_Proposition_25_Replace_Cash_Bail_with_Risk_Assessments_Referendum_(2020)) [<https://perma.cc/WRD3-2PED>]. In 2017, New Jersey eliminated cash bail almost in its entirety. See N.J. STAT. ANN. § 2A:162-15 (West 2017).

⁶⁸ In addition to Governor Cuomo's initial proposal to end cash bail, Assembly Speaker Carl Heastie explained that "[t]he Assembly Majority remains committed to reforming the state's antiquated criminal justice system by . . . ending cash bail." Press Release, Carl E. Heastie, Assemb. Speaker, Assembly 2019-20 Budget Includes Funding to Combat Gang Violence and Invests in Programs to Help New Yorkers Navigate the Criminal Justice System (Mar. 13, 2019), <https://nyassembly.gov/Press/?sec=story&story=85594> [<https://perma.cc/76L4-GG2U>].

⁶⁹ See 18 U.S.C. § 3142(b)-(c)(1) (allowing judges to consider whether releasing the individual "will endanger the safety of any other person or the community" when making bail decisions); *United States v. Salerno*, 481 U.S. 739, 747 (1987) (holding constitutional the 1984 Bail Reform Act's provision that judges may consider danger to the community when setting bail).

⁷⁰ Cf. *In re Restaino*, 890 N.E.2d 224 (N.Y. 2008) (removing from the bench a judge who committed forty-six individuals into custody, revoking their recognizance release and imposing bail, after a cell phone went off in the courtroom and none of the individuals claimed ownership of the device).

⁷¹ Cf. *Sardino v. State Comm'n on Jud. Conduct*, 448 N.E.2d 83, 84 (N.Y. 1983) (removing from the bench a judge who "regularly abused his authority with respect to setting bail . . . [by] acting punitively with little or no interest in the only matter of legitimate concern, namely, whether any bail or the amount fixed was necessary to insure the defendant's future appearances in court" and who "often ordered defendants to be held without bail for no apparent reason").

⁷² See *supra* Section I.A.

presented a formidable obstacle⁷³: although Senate Majority Leader Andrea Stewart-Cousins and Assembly Speaker Carl Heastie agreed that “dangerousness” should not be introduced into the equation out of fear of its racist outcomes,⁷⁴ Governor Cuomo had initially proposed to do just that.⁷⁵ The solution was compromise. The 2019 bail reforms that Governor Cuomo would eventually sign into law neither entirely eliminated bail, nor did they introduce the concept of public safety into judges’ bail decisions.⁷⁶

Instead, when the lawmakers struck a deal, the reforms explicitly introduced a presumption of release, providing a nondiscretionary baseline that the court *shall* release an individual on their own recognizance, *unless* that individual poses a flight risk,⁷⁷ tilting the scale further toward release rather than confinement. When a court determined that an individual posed a risk of flight to avoid prosecution, it was now *required* to “select the least restrictive alternative and condition or conditions that will reasonably assure the principal’s return to court.”⁷⁸ In the past, setting bail had functioned as the default for many offenses, but the reforms made nearly all misdemeanors and nonviolent felonies ineligible for bail.⁷⁹ For some qualifying offenses—mainly violent felonies—a judge could still fix bail, but only if the judge deemed it the least restrictive method of assuring a defendant’s return to court.⁸⁰

Beyond these fundamental alterations to New York’s pretrial detention system, the initial reforms put into place three other

⁷³ See *infra* Section II.A.

⁷⁴ See Dan M. Clark, *NY Senate Dems Have Reservations About ‘Dangerousness’ Standard in Bail Reform Bill, Leader Says*, N.Y.L.J. (Mar. 27, 2019, 3:31 PM), <https://www.law.com/newyorklawjournal/2019/03/27/ny-senate-dems-have-reservations-about-dangerousness-standard-in-bail-reform-bill-leader-says> [<https://perma.cc/NM49-GPSH>].

⁷⁵ See *id.*

⁷⁶ “Bail reform, which was a major sticking point among lawmakers in recent weeks, will leave the option of cash bail in place for most violent felony offenses, Class A felonies and a list of other charges outlined in the bill.” Dan M. Clark, *Cuomo, Lawmakers Announce Deal on State Budget, Criminal Justice Reforms*, N.Y.L.J. (Apr. 1, 2019, 11:15 AM), <https://www.law.com/newyorklawjournal/2019/03/31/cuomo-lawmakers-announce-deal-on-state-budget-criminal-justice-reforms> [<https://perma.cc/5WT8-E3LY>].

⁷⁷ “[T]he court *shall* release the principal pending trial on the principal’s own recognizance, *unless* it is demonstrated and the court makes an individualized determination that the principal poses a risk of flight to avoid prosecution.” N.Y. CRIM. PROC. LAW § 510.10(1) (McKinney 2020) (effective Jan. 1, 2020 to July 1, 2020) (emphases added). The statute’s prior language required the court to release the principal on their own recognizance, fix bail, or commit the principal to the sheriff’s custody, but it did not indicate any presumption. See N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2019) (effective through Dec. 31, 2019).

⁷⁸ N.Y. CRIM. PROC. LAW § 510.10(1) (McKinney 2020) (effective Jan. 1, 2020 to July 1, 2020).

⁷⁹ See *id.* § 510.10(4) (effective Jan. 1, 2020 to July 1, 2020).

⁸⁰ *Id.*

significant changes: (1) requiring judges to offer individuals three forms of bail for eligible offenses;⁸¹ (2) providing a variety of nonmonetary conditions that judges could impose to ensure an individual's return to court;⁸² and (3) instructing judges to consider an individual's "activities and history" when making decisions about pretrial conditions.⁸³

2. Three Forms of Bail

In those circumstances where the charged offense qualified for bail and a court determined that fixing bail was the least restrictive condition to ensure the individual's return to court, the reforms required judges to provide the individual with at least three methods of posting bail from an authorized list of options.⁸⁴ Previously, judges were permitted, though not required, to offer individuals multiple methods of posting bail,⁸⁵ although multiple forms were rarely offered. Not only did the reforms mandate that judges fix at least three forms of bail, but they also required that judges select at least one of a partially secured surety bond⁸⁶ or an unsecured surety bond⁸⁷ as an option.⁸⁸ The reforms retained earlier language that, when fixing multiple forms of bail, judges "may designate different amounts varying with the forms."⁸⁹

⁸¹ See *infra* Section I.B.2; N.Y. CRIM. PROC. LAW § 520.10.

⁸² See *infra* Section I.B.3; N.Y. CRIM. PROC. LAW § 500.10(3-a) (effective Jan. 1, 2020 to July 1, 2020).

⁸³ See *infra* Section I.B.4; N.Y. CRIM. PROC. LAW § 510.30(1).

⁸⁴ The list of nine authorized forms of bail remained unchanged from the statute's prior iteration. The authorized forms of bail are (a) cash bail, (b) insurance company bail bond, (c) secured surety bond, (d) secured appearance bond, (e) partially secured surety bond, (f) partially secured appearance bond, (g) unsecured surety bond, (h) unsecured appearance bond, and (i) credit card or similar device. N.Y. CRIM. PROC. LAW § 520.10. For definitions of each of the authorized forms of bail, see *id.* § 500.10.

⁸⁵ *Id.* § 520.10(2)(b) (effective through Dec. 31, 2019).

⁸⁶ A surety is "an obligor who is not a principal." *Id.* § 500.10(12). A surety bond is "a bail bond in which the obligor or obligors consist of one or more sureties or of one or more sureties and the principal." *Id.* § 500.10(15). That the bond is partially secured means that the surety's up-front monetary deposit may not exceed ten percent of the total amount of the undertaking. *Id.* § 500.10(18). In simpler terms, a partially secured surety bond "allows defendants (or their friends or family) to pay 10 percent or less of the total bail amount up front; the balance is only paid if the defendant skips court." 2019 BAIL REFORM IN NEW YORK, *supra* note 16, at 4.

⁸⁷ That the bond is unsecured means that it is "not secured by any deposit or lien upon property." N.Y. CRIM. PROC. LAW § 500.10(19). In non-statutory language, an unsecured bond functions similarly to a partially secured bond, except it does not require any up-front payment. 2019 BAIL REFORM IN NEW YORK, *supra* note 16, at 4.

⁸⁸ N.Y. CRIM. PROC. LAW § 520.10(2)(b).

⁸⁹ *Id.*

Previously, judges could fix bail with total disregard for the individual's financial circumstances, without considering whether there was even a remote possibility that the individual could post bail.⁹⁰ With the introduction of the reforms, judges, if fixing bail, now had to consider the individual's financial circumstances and whether fixing bail would impose undue hardship on the individual.⁹¹

3. Nonmonetary Conditions of Release

In conjunction with the institution of a presumption of release, the reforms introduced into law the concept of nonmonetary conditions as a method for securing the return to court of an individual deemed a risk of flight to avoid prosecution.⁹² Since the 2019 reforms made most misdemeanors ineligible for bail,⁹³ when an individual was charged with a bail-ineligible misdemeanor, judges now possessed two options: (1) by default, release the individual on their own recognizance, or (2) if the individual is deemed a risk of flight to avoid prosecution, impose the least restrictive nonmonetary condition(s) that would reasonably assure the individual's return to court.⁹⁴ Excised from judges' toolkits was the option to fix bail for this group of charged offenses.⁹⁵

⁹⁰ See *id.* § 510.30 (effective through Dec. 31, 2019).

⁹¹ In determining whether monetary bail would be the least restrictive condition that would reasonably assure the individual's return to court, judges must consider "the principal's individual financial circumstances, and, in cases where bail is authorized, the principal's ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured, or partially secured bond." *Id.* § 510.30(1)(f).

⁹² *Id.* § 510.10(1) (effective Jan. 1, 2020 to July 1, 2020).

⁹³ *Id.* § 510.10(4) (effective Jan. 1, 2020 to July 1, 2020). According to the Center for Court Innovation, the initial bail reforms "disallow[ed] money bail in almost all cases charged with a misdemeanor, with two exceptions: (1) sex offense misdemeanors, and (2) misdemeanor criminal contempt (PL 215.50) where there is an underlying allegation of domestic violence." 2019 BAIL REFORM IN NEW YORK, *supra* note 16, at 2.

⁹⁴ The relevant statute reads as follows:

In cases other than as described in subdivision four of this section the court shall release the principal pending trial on the principal's own recognizance, unless the court finds on the record or in writing that release on the principal's own recognizance will not reasonably assure the principal's return to court. In such instances, the court shall release the principal under non-monetary conditions, selecting the least restrictive alternative and conditions that will reasonably assure the principal's return to court. The court shall explain its choice of alternative and conditions on the record or in writing.

N.Y. CRIM. PROC. LAW § 510.10(3) (effective Jan. 1, 2020 to July 1, 2020).

⁹⁵ See *id.*

Even when an individual was charged with one of the dwindling number of qualifying offenses,⁹⁶ judges retained the discretion to release the individual on their own recognizance.⁹⁷ However, if a judge deemed an individual a risk of flight to avoid prosecution, that judge remained obligated to select the least restrictive condition that would reasonably assure that individual's return to court.⁹⁸ For those qualifying offenses, that least restrictive condition could be bail or it could be nonmonetary conditions if the judge thought them necessary to ensure the individual's return to court.⁹⁹ Only where the individual was charged with a qualifying felony could the judge consider remanding the individual to custody.¹⁰⁰ Even in such cases, remand would only be appropriate if it were the least restrictive condition that would reasonably assure the individual's return to court.¹⁰¹

The reforms provided judges with a non-exhaustive list¹⁰² of nonmonetary conditions from which they could choose to impose any one, or a combination of conditions, the least restrictive of which would reasonably ensure the individual's return to court.¹⁰³ The statute

⁹⁶ See *id.* § 510.10(4) (effective Jan. 1, 2020 to July 1, 2020) (listing charged offenses for which a judge retained discretion to set bail or, for qualifying felonies, remand an individual to custody).

The law establishes nine criteria where both money bail and remand remain permissible in felony cases, while also indicating a range of other options that should be considered in these cases, including release on the defendant's own recognizance or non-monetary conditions such as pretrial supervision. As a practical matter, the nine criteria permit bail and detention with nearly all violent felonies but rule it out with nearly all nonviolent felonies.

2019 BAIL REFORM IN NEW YORK, *supra* note 16, at 2.

⁹⁷ N.Y. CRIM. PROC. LAW § 510.10(4) (effective Jan. 1, 2020 to July 1, 2020).

⁹⁸ *Id.* § 510.10(1).

⁹⁹ *Id.* § 510.10(4).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* § 510.10(1) (effective Jan. 1, 2020 to July 1, 2020) ("If such a finding is made [that the individual poses a risk of flight to avoid prosecution], the court must select the least restrictive alternative and condition or conditions that will reasonably assure the principal's return to court.").

¹⁰² Before listing a series of possible conditions, the statute provides that "[s]uch conditions may include, among other conditions reasonable under the circumstances." *Id.* § 500.10(3-a) (effective Jan. 1, 2020 to July 1, 2020) (emphasis added).

¹⁰³ The text of the statute provides the following examples of nonmonetary conditions, among others not listed here:

Such conditions may include, among other conditions reasonable under the circumstances: (1) that the principal be in contact with a pretrial services agency serving principals in that county; (2) that the principal abide by reasonable, specified restrictions on travel that are reasonably related to an actual risk of flight from the jurisdiction . . . ; (3) that the principal refrain from possessing a firearm, destructive device or other dangerous weapon; (4) that . . . the person be placed in reasonable pretrial supervision with a pretrial services agency serving principals in that

provided that the “principal shall not be required to pay for any part of the cost of release on non-monetary conditions.”¹⁰⁴

4. “Activities and History”

Lawmakers maintained the State’s status quo by withholding from judges the explicit authority to consider “dangerousness” or threat to public safety when making bail decisions.¹⁰⁵ In fact, the revised statute added language that judges consider “information about the principal that is *relevant to the principal’s return to court*,”¹⁰⁶ which had been absent from the statute’s previous iteration.¹⁰⁷ Once a judge decided that an individual posed a risk of flight to avoid prosecution, that judge was now left with the task of determining which condition(s) would be the least restrictive to secure the individual’s return to court.¹⁰⁸ To guide judges in this determination, the reforms provided a revised list of factors for judges to consider and take into account.¹⁰⁹ While many of the factors remained substantively similar to the statute’s prior version, the reforms removed from consideration “[t]he principal’s character, reputation, habits and mental condition,”¹¹⁰ among other considerations, replacing them with “[t]he principal’s *activities and history*.”¹¹¹

county; . . . (5) that . . . the principal’s location be monitored with an approved electronic monitoring device.

Id. (numbering added for clarity).

¹⁰⁴ *Id.*

¹⁰⁵ See *infra* Section II.A; Clark, *supra* note 76. The words “dangerousness,” “public,” and “safety” do not appear in the statute. See N.Y. CRIM. PROC. LAW § 510.30(1).

¹⁰⁶ N.Y. CRIM. PROC. LAW § 510.30(1) (emphasis added).

¹⁰⁷ See *id.* § 510.30 (effective Dec. 24, 2012 to Dec. 31, 2019).

¹⁰⁸ *Id.* § 510.30.

¹⁰⁹ Compare *id.* (effective Jan. 1, 2020), with *id.* (effective Dec. 24, 2012 to Dec. 31, 2019).

¹¹⁰ *Id.* § 510.30(2)(a)(i) (effective Dec. 24, 2012 to Dec. 31, 2019).

¹¹¹ *Id.* § 510.30(1)(a) (emphasis added).

C. New York's 2020 Amendments to the Reforms

1. Backlash to the 2019 Reforms

New York's bail reform saga did not end with the introduction of 2019's reforms.¹¹² Although the reforms quickly reduced prison populations,¹¹³ they were met with severe pushback from various media outlets,¹¹⁴ from the New York Police Department (NYPD),¹¹⁵ and even directly from the New York City police commissioner.¹¹⁶ Local media seized on the story of a mentally ill Black woman who was rearrested upon being released without bail to conclude that the bail reforms had failed.¹¹⁷ If this style of dog-whistle-laden attack evokes decades-old

¹¹² See generally Kim Bellware, *Class Race and Geography Emerge as Flashpoints in New York's Bail Reform Debate*, WASH. POST (Feb. 15, 2020, 1:41 PM), <https://www.washingtonpost.com/nation/2020/02/15/new-york-bail-reform> [<https://perma.cc/FR7M-US86>].

¹¹³ BAIL REFORM REVISITED, *supra* note 37, at 12.

¹¹⁴ Local tabloids criticized the reforms as the source of a purported—though disputed—crime uptick, writing incendiary, and sometimes outright false, headlines such as “Revolving Door Lunacy,” “No Bail Madness,” “The Feds Can’t Save New York from the Insane ‘No-Bail’ Law,” and “Set Free to Rape: Suspect Busted in Train Station Sex Assault Was Freed Through State’s New Bail Reform Laws,” among countless others. Lartey, *supra* note 38; Laura Bennett, *Media Must Focus News Coverage on Facts, Not on Fear*, TIMES UNION (May 27, 2021, 5:00 AM), <https://www.timesunion.com/opinion/article/Media-must-focus-news-coverage-on-facts-not-on-16205702.php> [<https://perma.cc/8WXZ-LWLL>]; Post Editorial Board, *The Feds Can’t Save New York from the Insane ‘No-Bail’ Law*, N.Y. POST (Jan. 28, 2020, 8:24 PM), <https://nypost.com/2020/01/28/the-feds-cant-save-new-york-from-the-insane-no-bail-law> [<https://perma.cc/KXP7-LM5H>].

¹¹⁵ Coinciding with the start of the new year and the implementation of these reforms was a reported crime increase. NYPD reported a 22.5% crime increase in February 2020 and exclaimed that “[c]riminal justice reforms serve as a significant reason New York City has seen this uptick in crime.” *NYPD Announces Citywide Crime Statistics for February 2020*, N.Y. POLICE DEP’T (Mar. 5, 2020), <https://www1.nyc.gov/site/nypd/news/pr0305/nypd-citywide-crime-statistics-february-2020> [<https://perma.cc/932D-BZRV>]. However, criminal justice reform advocates and experts expressed skepticism, explaining that the number of arraignments had decreased by twenty percent, which “starkly contradict[s] claims by the New York Police Department that crime has risen since the new bail law went into effect on January 1, 2020.” Erin Durkin, *NYPD, de Blasio Blame Bail Reform for Crime Spike as Defenders Question Police Stats*, POLITICO (Mar. 5, 2020, 6:41 PM), <https://www.politico.com/states/new-york/albany/story/2020/03/05/nypd-reports-spike-in-crime-as-public-defenders-question-the-stats-1265616> [<https://perma.cc/86K7-BEXG>].

¹¹⁶ In response to the passage of the reforms, New York City Police Commissioner Dermot Shea penned an op-ed in the *New York Times* in which he stoked fear in the community, making dubious claims that the reforms “present a significant challenge to public safety” and that “[v]iolent criminals are being returned to the community.” Dermot Shea, *New York's New Bail Laws Harm Public Safety*, N.Y. TIMES (Jan. 23, 2020), <https://www.nytimes.com/2020/01/23/opinion/shear-nypd-bail-reform.html> [<https://perma.cc/YA38-YK43>].

¹¹⁷ On December 27, 2019, amid a spate of anti-Semitic hate crimes, Tiffany Harris, a thirty-year-old Black woman from Brooklyn suffering from mental health issues, allegedly physically

memories, it might not be a coincidence.¹¹⁸ Specifically, parallels abound with the 1988 United States presidential election, when a George H.W. Bush–backing political action committee ran the notorious “Willie Horton ad”¹¹⁹ as a way of attacking Democratic nominee Michael Dukakis and his views on criminal justice.¹²⁰ In each

slapped and yelled slurs at a group of Orthodox Jewish women. Harris was arrested and charged with attempted assault as a hate crime. *Woman Charged with Hate Crime Amid NYC Anti-Semitic Attacks*, ASSOCIATED PRESS (Dec. 28, 2019), <https://apnews.com/article/8fab4c32e88141001024c2d6a8467eda> [<https://perma.cc/Z4WL-4N86>]. Just days in advance of the bail reforms taking effect, Harris was released without bail. *Id.* The next day, while out on bail, Harris allegedly assaulted another victim. *NYC Woman Accused of Anti-Semitic Attacks Arrested Again a Day After Release*, NBC N.Y. (Dec. 30, 2019, 3:18 AM), <https://www.nbcnewyork.com/news/local/nyc-woman-accused-of-anti-semitic-attacks-arrested-again-a-day-after-release/2252361> [<https://perma.cc/83C3-XUJQ>]. Harris was again released without bail and was again rearrested, this time for failure to comply with the court-imposed nonmonetary conditions of her release. Rebecca Rosenberg, Paul Martinka, Reuven Fenton & Laura Italiano, *Hate Crime Suspect Tiffany Harris Arrested for Third Time in One Week*, N.Y. POST (Jan. 1, 2020, 9:02 AM), <https://nypost.com/2020/01/01/hate-crime-suspect-tiffany-harris-arrested-for-third-time-in-three-days> [<https://perma.cc/B5DL-A56Y>]. Local media outlets were quick to vilify the brand new reforms, calling them “soft on crime” and “troublesome.” See, e.g., Andrew Denney, Emily Saul & Rebecca Rosenberg, *Tiffany Harris Indicted on Felony Hate-Crime Charges—but Still Won’t Face Bail*, N.Y. POST (Jan. 14, 2020, 10:06 PM), <https://nypost.com/2020/01/14/tiffany-harris-indicted-on-felony-hate-crime-charges-but-still-wont-face-bail> [<https://perma.cc/WNJ2-QJGA>].

¹¹⁸ Per Vincent M. Southerland, “[r]acist [f]earmongering . . . is among the strongest tools in the anti-reform toolbox.” Vincent M. Southerland, *The Racist Fearmongering Campaigns Against Bail Reform, Explained*, APPEAL (June 7, 2021), <https://theappeal.org/the-lab/explainers/the-racist-fearmongering-campaigns-against-bail-reform-explained> [<https://perma.cc/43KZ-XRTE>]. Southerland writes that “[e]xamples abound” of this sort of racist fearmongering:

Richard Nixon’s racially coded law and order presidential campaign, George H.W. Bush’s use of Willie Horton to portray Michael Dukakis as soft on crime, Bill Clinton’s tough-on-crime campaign messaging, and Donald Trump’s embrace of law enforcement and harsh criminal and immigration system policies are the legacies of centuries-old attitudes rooted in white anxiety and fear. The debunked “superpredator” myth, which produced a wave of death in prison sentences for youth, is another.

Id. See generally Rachel Withers, *George H.W. Bush’s “Willie Horton” Ad Will Always Be the Reference Point for Dog-Whistle Racism*, VOX (Dec. 1, 2018, 4:10 PM), <https://www.vox.com/2018/12/1/18121221/george-hw-bush-willie-horton-dog-whistle-politics> [<https://perma.cc/6AAX-QVR3>].

¹¹⁹ National Security PAC, *Willie Horton 1988 Attack Ad*, YOUTUBE (Nov. 4, 2008), <https://www.youtube.com/watch?v=Io9KMSSEZ0Y> [<https://perma.cc/8ZU2-BMXJ>]. See generally Jon Schuppe, *Fair or Dangerous? Days After Ending Cash Bail, New York Has Second Thoughts*, NBC NEWS (Jan. 7, 2020, 4:30 PM), <https://www.nbcnews.com/news/crime-courts/fair-or-dangerous-days-after-ending-cash-bail-new-york-n1111346> [<https://perma.cc/J7DA-R6P7>].

¹²⁰ William Horton is a Black man from South Carolina who had been convicted, and was serving a life sentence without the possibility of parole, for a murder he committed in 1974. In 1986, Horton was furloughed from a Massachusetts prison to which he never returned. In 1987, Horton raped a woman and stabbed her fiancé, before he was apprehended. Dukakis, then-governor of Massachusetts, supported the furlough program. Bush supporters leveraged

instance, detractors of progressive criminal justice policy relentlessly parroted the case involving a single Black individual to demonstrate the policy's shortcomings. Then, as now, the unfortunate exception to progress made in the criminal justice arena was leveraged as an attack on the movement as a whole.¹²¹

The vocal pushback to the new reforms precipitated amendments to those reforms. Detailed in the following Section, these amendments would be, in essence, rollbacks of the initial reforms, reining in New York's criminal justice system closer to where it stood before the April 2019 reforms.¹²² The Legislature's hedge of rolling back the reforms—but only partially so—pulled off the remarkable feat of dissatisfying advocates on both sides of the ever-polarized bail debate, alike.¹²³

2. Rollbacks of the 2019 Reforms

Before detailing how the amendments altered the initial reforms, it is worth highlighting the key components of the reforms that remained intact.¹²⁴ Fundamental to the reforms, the amendments retained the presumption of release.¹²⁵ When determining the least restrictive conditions to secure an individual's return to court, judges must still consider an individual's "activities and history."¹²⁶ And before concluding that bail would indeed be the least restrictive condition, judges must still consider any undue hardship fixing bail would pose due to the individual's financial circumstances.¹²⁷ When fixing bail is the least restrictive condition for a qualifying offense, judges must still

Dukakis's position to create the inflammatory ad, "insinuat[ing] [that], if you elect Governor Dukakis as president, we're going to have black rapists running amok in the country." Race2012pbs, 1988: *Willie Horton Ad*, YOUTUBE, at 0:50 (Oct. 10, 2012), <https://www.youtube.com/watch?v=dwWbkb-TKho> [<https://perma.cc/FH94-AJK6>]. See generally Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited: We Talk to the Man Who Became Our National Nightmare. Thirty Years Later, Does He Still Matter?*, MARSHALL PROJECT (May 13, 2015, 6:37 PM), <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited> [<https://perma.cc/Z7UL-HPJ7>]. Dukakis would go on to lose the 1988 election to Bush. See generally Monte Piliawsky, *Racial Politics in the 1988 Presidential Election*, 20 BLACK SCHOLAR 30 (1989).

¹²¹ See Doug Criss, *This Is the 30-Year-Old Willie Horton Ad Everybody Is Talking About Today*, CNN (Nov. 1, 2018, 6:17 PM), <https://www.cnn.com/2018/11/01/politics/willie-horton-ad-1988-explainer-trnd/index.html> [<https://perma.cc/H8XF-3YJW>].

¹²² Lartey, *supra* note 38; Fertig, *supra* note 38.

¹²³ "And while advocates were crushed by the setback, the move was still insufficient for the most fervent opponents of the law." Lartey, *supra* note 38.

¹²⁴ See generally BAIL REFORM REVISITED, *supra* note 37.

¹²⁵ N.Y. CRIM. PROC. LAW § 510.10(1) (McKinney 2020).

¹²⁶ *Id.* § 510.30(1)(a).

¹²⁷ *Id.* § 510.30(1)(f).

offer it in at least three forms.¹²⁸ In an attempt to ensure that indigent people can afford bail, at least one of those forms must still be a partially secured surety bond or an unsecured surety bond.¹²⁹ Spared from revision throughout both the 2019 reforms and the 2020 amendments was the language that judges “may designate different amounts varying with the forms” of bail they decide to fix.¹³⁰

On April 3, 2020, the Legislature enacted various amendments to the bail reforms. Two amendments in particular hinder the progress made in reducing economic inequality in New York’s pretrial system.¹³¹ First, the amendments expanded the list of qualifying offenses, allowing judges to fix bail in a wider array of cases.¹³² Misdemeanors and nonviolent felonies, such as bail jumping or financial crimes, were relabeled qualifying offenses—a category that had previously included mainly violent felonies.¹³³ In many instances, these were the very same misdemeanors and nonviolent offenses that were deemed non-qualifying offenses just months earlier.¹³⁴

Additionally, the amendments altered the definition of nonmonetary conditions, expanding the enunciated list of nonmonetary conditions from which judges could select. Among the added nonmonetary conditions were restrictions on who the individual could associate with, various forms of mandatory programming, and orders of protection.¹³⁵ While judges were already required to select the least restrictive conditions that would “reasonably assure the principal’s

¹²⁸ *Id.* § 520.10(2)(b).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ The amendments, which were certain to increase prison and pretrial populations, were signed into law in the heart of the COVID-19 pandemic in which jails and prisons were particularly rampant hotspots for the virus. *See, e.g.*, Beth Schwartzapfel, Katie Park & Andrew Demillo, *1 in 5 Prisoners in the U.S. Has Had COVID-19*, MARSHALL PROJECT (Dec. 18, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19> [<https://perma.cc/C3QC-U84B>]; Nick Pinto, *Amid Coronavirus Crisis, Andrew Cuomo Held New York’s Health Care Hostage to Undo Criminal Justice Reforms*, INTERCEPT (Apr. 3, 2020, 3:06 PM), <https://theintercept.com/2020/04/03/andrew-cuomo-coronavirus-bail-criminal-justice> [<https://perma.cc/5Q2A-7XXK>].

¹³² BAIL REFORM REVISITED, *supra* note 37, at 2–5.

¹³³ *Id.*

¹³⁴ The Center for Court Innovation estimated that the amendments to the reforms would have led to an additional six thousand individuals eligible for bail based on 2019 arraignment data. *Id.* at 8.

¹³⁵ Compare N.Y. CRIM. PROC. LAW § 500.10(3-a) (effective July 2, 2020), *with id.* (effective Jan. 1, 2020 to July 1, 2020).

return to court,” the amendments added that those conditions must also “reasonably assure the principal’s *compliance with court conditions*.”¹³⁶

II. ANALYSIS

This Part will parse the goals of the New York State Legislature in enacting the various reforms to its Criminal Procedure Law¹³⁷ and outline the ways in which these laws in their current state fail to achieve their intended purpose of reducing economic inequality in the State’s pretrial detention system.¹³⁸ The reformed and amended bail laws fall short of their goals because they allow judges to retain discretion in two troublesome ways. First, judges’ discretion in setting the amounts of partially secured surety and appearance bonds inhibits the decrease in pretrial detention,¹³⁹ and second, imprecise criteria allow judges to retain the discretion to weave public safety and “dangerousness” into bail decisions,¹⁴⁰ each of which disparately impacts less-wealthy individuals.

“As a general rule, words used in Penal Law and Criminal Procedure Law are to be given their usual ordinary and commonly accepted meaning.”¹⁴¹ Legislative provisions governing bail must be related to proper purposes for detention of defendants prior to conviction and judicial applications of discretion authorized by the Legislature must be similarly related.¹⁴²

A. *The Legislature’s Intent*

Since 1971, judges in New York have not been permitted to consider a criminal defendant’s threat to public safety or “dangerousness” when making decisions on bail or other pretrial

¹³⁶ The meaning of this seemingly circular language is not clear and has not yet been interpreted by courts. *See id.* (effective July 2, 2020). The Center for Court Innovation understands that “one plausible interpretation is that a judge may add *further* conditions, so long as they aid someone’s ability to comply with the judge’s initial, minimum conditions.” BAIL REFORM REVISITED, *supra* note 37, at 5 (emphasis added).

¹³⁷ *See infra* Section II.A.

¹³⁸ *See infra* Sections II.B–II.C.

¹³⁹ *See infra* Section II.B.

¹⁴⁰ *See infra* Section II.C.

¹⁴¹ *People v. Chensky*, 120 N.Y.S.3d 621, 623 (N.Y. Sup. Ct. 2020); *accord* *People v. King*, 463 N.E.2d 601, 603 (N.Y. 1984); *People v. Munoz*, 615 N.Y.S.2d 730, 731 (App. Div. 2d Dep’t 1994).

¹⁴² *People ex rel. LaForce v. Skinner*, 319 N.Y.S.2d 10 (Sup. Ct. 1971); *Chensky*, 120 N.Y.S.3d 621.

conditions.¹⁴³ Unlike most of the United States,¹⁴⁴ and unlike the provisions set forth in the 1984 Federal Bail Reform Act,¹⁴⁵ public safety and dangerousness have not been written into New York law as potential considerations for judges.¹⁴⁶ Although the Eighth Amendment's bail clause has never been construed to prohibit considerations of public safety and dangerousness,¹⁴⁷ and although the United States Supreme Court has deemed constitutional the consideration of dangerousness in pretrial detention decisions,¹⁴⁸ legislative and judicial history in New York show public safety and dangerousness have, in fact, been uniquely excluded from consideration by judges in New York.¹⁴⁹

¹⁴³ “[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.” Asgarian, *supra* note 54.

¹⁴⁴ New York is one of only four states in the United States (Connecticut, Mississippi, and Missouri being the others) that does not allow its judges to consider public safety and dangerousness when making bail decisions. CTR. ON THE ADMIN. OF CRIM. L., *supra* note 42, at 1; PHILLIPS, *supra* note 50, at 25.

¹⁴⁵ Although the federal Bail Reform Act of 1966 did not allow judges to consider public safety when making bail decisions in noncapital cases, the Bail Reform Act of 1984, which amended the 1966 law, allowed judges to do just that. Patricia M. Wald & Daniel J. Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A. J. 940, 940 (1966) (“In two major respects the [1966] act falls short of completely revising the old bail system: *it does not authorize courts to consider danger to the community in setting conditions of pretrial release in noncapital cases*; and, while it subordinates, it fails to eliminate money as a condition which can cause the detention of persons unable to raise it.”) (emphasis added); CHARLES DOYLE, BAIL: AN OVERVIEW OF FEDERAL CRIMINAL LAW 4–5 (2017), <https://fas.org/sgp/crs/misc/R40221.pdf> [<https://perma.cc/98YL-SY93>] (“In 1984, Congress amended federal bail law to permit the use of preventive detention in certain limited instances when the accused posed a danger to the public or particular members of the public.”); 18 U.S.C. § 3142.

¹⁴⁶ See N.Y. CRIM. PROC. LAW § 510.30(1) (McKinney 2020).

¹⁴⁷ “Nothing in the text of the Bail Clause limits permissible Governmental considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government’s proposed conditions of release or detention not be ‘excessive’ in light of the perceived evil.” SCHNACKE, JONES & BROOKER, *supra* note 40, at 18.

¹⁴⁸ See *United States v. Salerno*, 481 U.S. 739, 747–49 (1987) (upholding as a legitimate regulatory goal in making pretrial detention decisions the consideration of preventing danger to the community).

¹⁴⁹ See, e.g., CTR. ON THE ADMIN. OF CRIM. L., *supra* note 42, at 15 (“Noticeably absent [from section 510.30 of the Code of Criminal Procedure adopted in 1970] was the language from the Temporary Commission’s 1968 study bill that would have allowed the judge to consider whether a defendant ‘would be a danger to society or himself at liberty during the pendency of the action or proceeding.’”); *People ex rel. Lobell v. McDonnell*, 71 N.E.2d 423, 425 (N.Y. 1947) (“The bailing court has a large discretion, but it is a judicial, not a pure or unfettered discretion. The case calls for a fact determination, not a mere fiat. The factual matters to be taken into account include: ‘[t]he nature of the offense, the penalty, which may be imposed, the probability of the willing appearance of the defendant or his flight to avoid punishment, the pecuniary and social condition of defendant and his general reputation and character, and the apparent nature and

In New York, the sole purpose of pretrial conditions like bail has been to ensure that a criminal defendant returns to court at a future date.¹⁵⁰ Even amid the turbulence surrounding New York's bail laws in recent years—and around the consideration of public safety, in particular—this remains the case today.¹⁵¹ When Governor Cuomo embarked on revamping New York's bail system, he opted not to propose introducing public safety into the equation of judges' bail decision-making.¹⁵² Thus far, the Legislature has maintained the status quo on that front.¹⁵³

In Governor Cuomo's 2019 Justice Agenda, Cuomo expressly prioritized bail and pretrial detention reform, with the specific goal of removing a defendant's wealth as a factor impacting their pretrial status.¹⁵⁴ Democratic state leadership echoed Cuomo's goals,¹⁵⁵ as did Cuomo's executive proposal submitted to the New York Senate and

strength of the proof as bearing on the probability of his conviction." (internal citations omitted).

¹⁵⁰ See N.Y. CRIM. PROC. LAW § 510.10.

¹⁵¹ See *id.*

¹⁵² "New York is one of only four states in the nation that does not allow public safety to be taken into consideration in release and bail decisions. This approach means people in New York who do not present a risk to public safety, but cannot afford bail, are detained while those who may present a risk to public safety can post bail and gain release. As part of the Governor's Justice Agenda, legislation submitted with the Budget will end cash bail so that no one is detained because they cannot afford the cost of bail."

ANDREW CUOMO, FY 2020 EXECUTIVE BUDGET 130 (2019).

¹⁵³ See N.Y. CRIM. PROC. LAW § 510.10.

¹⁵⁴ "Governor Cuomo is advancing legislation that will end cash bail once and for all, significantly reduce the number of people held in jail pretrial, and ensure due process for anyone awaiting trial behind bars. Right now, money stands in the way of freedom for too many presumed-innocent New Yorkers. . . . [T]he legislation will eliminate money as a means of deciding who is free and who is not. Instead, people will be released first on their own recognizance, or, only if the judge makes necessary findings, under pretrial conditions. . . . This legislation will protect the rights of presumed innocent people to remain free before trial, with as few conditions of release as possible, reserving detention as the carefully determined exception rather than the rule."

2019 JUSTICE AGENDA, *supra* note 15, at 140–42.

¹⁵⁵ Speaker Carl Heastie explained that "[w]ealth should not determine whether a person, accused but not convicted of a crime, will be jailed while awaiting trial. The budget reforms New York State's bail system by . . . substituting release on recognizance or on non-monetary conditions when appropriate." Press Release, Carl E. Heastie, Assemb. Speaker, SFY 19-20 Budget Includes Critical Criminal Justice Reform Legislation and Funding (Apr. 1, 2019), <https://nyassembly.gov/Press/files/20190401a.php> [https://perma.cc/3LT2-B7RQ]. Assemblymember Latrice Walker added, "Every year, thousands of New Yorkers are incarcerated awaiting trial because of unreasonably high bail that is impossible for most minority families to meet. But change is upon us. . . . This budget will reassure New Yorkers that in this state, justice is not for sale." *Id.*

Assembly in January 2019.¹⁵⁶ Although Cuomo's initial vision of removing the use of bail altogether did not come to fruition, and although New York courts have acknowledged Cuomo's intent,¹⁵⁷ the bail reforms that Cuomo would later sign into law fail to achieve the semi-aspirational ends he preached from the onset of his efforts.

B. *Prohibitively High Partially Secured or Unsecured Bonds*

On first glance, the reformed provisions guiding how judges fix bail appear to reduce economic inequality in New York's pretrial system. After all, judges now must offer individuals at least three options for posting bail, upped from two in the law's previous iteration.¹⁵⁸ And at least one of those three options must be a partially secured surety bond or unsecured surety bond,¹⁵⁹ regarded as "two of the least onerous forms of bail."¹⁶⁰ Even further, judges now must consider whether fixing bail would impose an undue financial hardship on the individual.¹⁶¹ These are all positive, if not necessary, steps to reducing economic inequality in the pretrial criminal justice system.

However, one provision in the bail statutes—a provision that preceded these most recent reform efforts—has managed to survive iteration after iteration of the law. That is, that judges "may designate different amounts varying with the forms" of bail that judges choose to

¹⁵⁶ S. 1505, 2019–2020 Leg. Sess., Part AA (N.Y. 2019), <https://legislation.nysenate.gov/pdf/bills/2019/s1505> [<https://perma.cc/8Y6V-UEJD>] ("This state, like most across the United States, has for far too long needlessly incarcerated those meant to be guaranteed a presumption of innocence simply because of an inability to pay bail and have forced those same people to choose between facing lengthy prison sentences or a speedy return to society without providing them with sufficient information regarding the case against them. This Part will usher into New York true reforms in the areas of bail . . . [T]he bill breaks the link between paying money and earning freedom, so that defendants are either released on their own recognizance or, failing that, released under non-monetary conditions."). In a Memorandum in Support of the FY 2020 New York State Executive Budget, the reforms to bail and pretrial detention were summarized as follows: "New York's current bail system fails to recognize that freedom before trial should be the rule, not the exception, and by tying freedom to money, it has created a two-tiered system that puts an unfair burden on the economically disadvantaged." MEMORANDUM IN SUPPORT OF FY 2020 NEW YORK STATE EXECUTIVE BUDGET 39 (2019), <https://www.budget.ny.gov/pubs/archive/fy20/exec/artvii/ppgg-artvii-ms.pdf> [<https://perma.cc/6RAW-QUQ2>].

¹⁵⁷ See, e.g., *People v. Steininger*, 117 N.Y.S.3d 512, 521 (Sup. Ct. 2019) ("[T]he bail reform law was also designed to significantly reduce disparities based on wealth and reduce pretrial incarceration in any case where a court chose to set monetary bail.").

¹⁵⁸ N.Y. CRIM. PROC. LAW § 520.10(2)(b).

¹⁵⁹ *Id.*

¹⁶⁰ See 2019 BAIL REFORM IN NEW YORK, *supra* note 16, at 4.

¹⁶¹ N.Y. CRIM. PROC. LAW § 510.30(1)(f).

fix.¹⁶² That the Legislature retained this pesky language removes the decision whether to take the step of reducing pretrial inequality from the hands of the Legislature and drops it squarely on the shoulders of New York supreme court or criminal court judges.

Although judges are prohibited from setting “excessive” bail, they retain otherwise limitless leeway in designating the dollar amount of bail and the difference in amount between each option.¹⁶³ For example, it is not uncommon for judges to set cash bail, secured or partially secured surety, and appearance bonds all at the same time, although judges rarely opt to set unsecured bonds.¹⁶⁴ The statute provides no guidance on how the amount for each of these methods should compare to one another.¹⁶⁵ Thus, judges set surety or appearance bonds that exceed the amount of cash bail.¹⁶⁶ Some argue that one reason for this disparity is that unsecured bonds provide little incentive for the individual to return to court,¹⁶⁷ even though an individual out on an unsecured bond who fails to return to court will be liable for the entirety of the often-exorbitant unsecured bond. A common result of prohibitively high partially secured or unsecured bonds, then, is that defendants are unable to meet any of the methods, resulting in their pretrial detention. This all-too-common result flies in the face of the very purpose of this newly added section of the bail laws.¹⁶⁸

¹⁶² *Id.* § 520.10(2)(b). This language has been embedded within the statute since the modern statutory bail scheme was enacted in 1971.

¹⁶³ *See id.*; U.S. CONST. amend. VIII; *United States v. Salerno*, 481 U.S. 739, 752 (1987).

¹⁶⁴ *See* Akash Mehta, *A Broken Bond: How New York Judges Are Getting Around Bail Reform*, CITY (Oct. 12, 2020, 4:00 AM), <https://www.thecity.nyc/2020/10/12/21512018/new-york-judges-getting-around-bail-reform-bond> [<https://perma.cc/6JCR-CLSJ>] (“But since the mandate took effect Jan. 1, judges across New York have seldom used one of these bail forms, ‘unsecured bonds,’ and have set the other, [partially secured bonds], at dramatically higher rates than traditional bail.”).

¹⁶⁵ *See* N.Y. CRIM. PROC. LAW § 520.10(2)(b).

¹⁶⁶ According to the Office of Court Administration, judges in Brooklyn Criminal Court have only set unsecured bonds in 0.3% of cases, and partially secured bonds were on average set 140% of the commercial bond amount and 268% of the cash bail amount. Citywide data collected by New York County Defender Services and Court Watch NYC show that partially secured bonds are set on average at 144% of commercial bonds and 232% of cash bail. Mehta, *supra* note 164.

¹⁶⁷ For example, one New York Supreme Court judge wrote that

[w]here . . . a defendant is indigent or has very limited means, an unsecured bond provides defendant with little incentive to return to court. In such a case the defendant knows that if he or she fails to return to court as required, the amount of the unsecured bond likely cannot ever be collected as a practical matter.

People v. Portoreal, 116 N.Y.S.3d 514, 525 (Sup. Ct. 2019).

¹⁶⁸ Assemblymember Latrice Walker, a sponsor of the 2019 bail reforms, remarked, “What that sounds like is an unequal administration of justice.” Mehta, *supra* note 164. Unequal administration of justice is the precise problem the reforms were intended to combat.

Although the purpose of requiring judges to fix partially secured bonds is to make it more likely that an individual can post bail, thereby decreasing the pretrial prison population and removing wealth from the equation, by setting prohibitively high partially secured bonds, judges can make it even less likely that a less-wealthy individual can post bail. Providing multiple methods of bail is intended to increase the likelihood that one such method will work for a defendant, meaning they can remain free during the pendency of their trial, all while the court can ensure that the individual will show up when needed because of what the defendant has placed at risk. Placing this burden on judges who are not necessarily committed to the same goals as the Legislature has proved ineffective.¹⁶⁹ Three examples illustrate this failure of the revised bail law to make it more likely that an individual can avoid pretrial detention while ensuring that they return to court: (1) the case of J.S.,¹⁷⁰ (2) the case of an unnamed defendant,¹⁷¹ and (3) *People v. Chensky*.¹⁷²

1. The Case of J.S.

After J.S. was arrested in April 2020, a Bronx judge set cash bail at \$30,000 and a partially secured bond at \$50,000.¹⁷³ J.S. and his family were unable to cobble together \$30,000 to pay cash bail.¹⁷⁴ That left just the partially secured bond, which meant J.S.'s family would have to provide the court with a ten percent refundable deposit—in this case, \$5,000—to secure J.S.'s release. J.S.'s girlfriend managed to come up with the money, but J.S. remained in jail for a month as the judge required J.S.'s girlfriend to provide complicated paperwork to prove her income before the bond was approved.¹⁷⁵ In all, J.S. remained in jail for six months following his arrest in the midst of the COVID-19 pandemic, even though he remained legally innocent.¹⁷⁶

Even though J.S. and his family ultimately posted the partially secured bond, J.S. spent six months in jail during a deadly pandemic for

¹⁶⁹ “Judges have ‘defeated the intent of the Legislature by setting the [partially secured bond] amount so high that no one can post it,’ said Timothy Donaher, the chief public defender of Monroe County.” Mehta, *supra* note 164.

¹⁷⁰ See *infra* Section II.B.1; Mehta, *supra* note 164.

¹⁷¹ See *infra* Section II.B.2; Mehta, *supra* note 164.

¹⁷² See *infra* Section II.B.3; *People v. Chensky*, 120 N.Y.S.3d 621 (Sup. Ct. 2020).

¹⁷³ Presumably, a third unreachable form of bail was fixed to abide by the statute. See Mehta, *supra* note 164.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

no reason other than the fact that the court hesitated to approve the bond, given his family's precarious financial position.¹⁷⁷ Although a partially secured bond has the potential to make the lives of families like J.S.'s easier after a family member is arrested, that has not borne out in reality when the partially secured bonds are set so much higher than cash bail and when the individual and their family lack financial means. While judges are now somewhat restrained in how many and which types of bail they may fix, they retain complete discretion in the actual bail amounts.¹⁷⁸ That discretion leads to cases like J.S.'s, in which less-wealthy individuals spend months on end in jail awaiting trial as a direct consequence of their lack of financial means, while wealthier individuals make bail and retain some semblance of freedom.¹⁷⁹

2. The Case of an Unnamed Defendant

In January 2020, an unnamed man—let us refer to him as John—was arrested.¹⁸⁰ In September 2020, a Queens Supreme Court judge fixed three forms of bail for John's release as follows: (1) \$75,000 cash bail; (2) \$75,000 insurance company bond; and (3) \$750,000 partially secured bond.¹⁸¹ John could not make cash bail.¹⁸² His family could not afford the nonrefundable ten percent fee—\$7,500—that accompanied the insurance company bond.¹⁸³ That left the partially secured bond, specifically enumerated in the statute as one of two required options for judges, since it is typically a less onerous form of bail. However, at that amount, it would require an up-front refundable deposit of \$75,000—the same amount as cash bail, although riskier in comparison. John and his family could not post the partially secured bond.¹⁸⁴ Thus, John remained in jail pending trial for nothing more than his lack of financial wealth.¹⁸⁵

¹⁷⁷ *Id.*

¹⁷⁸ See N.Y. CRIM. PROC. LAW § 520.10 (McKinney 2020).

¹⁷⁹ “By setting [partially secured bonds] at rates unaffordable for many defendants, criminal justice advocates and public defenders say, judges, who have complete discretion, have in effect nullified a program instituted by the legislature to free more poor people from jail.” Mehta, *supra* note 164.

¹⁸⁰ See *id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See *id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

3. *People v. Chensky*

On January 15, 2020, Joseph Chensky was arrested and charged with two separate counts of Grand Larceny in the Fourth Degree.¹⁸⁶ Neither of these felonies qualified for bail under the reformed bail law.¹⁸⁷ The court released Chensky on his own recognizance.¹⁸⁸ Twelve days later, Chensky failed to appear for his court date.¹⁸⁹ Another week later, Chensky again failed to appear.¹⁹⁰ As a result, the court issued a bench warrant for Chensky's arrest, and Chensky was rearrested on February 7.¹⁹¹ Chensky's "persistent" and "willful" failures to appear rendered his offense bail-eligible.¹⁹² Under the statute instructing judges on fixing bail, the court set cash bail at \$10,000, bond at \$30,000,¹⁹³ and unsecured surety bond at an exorbitant \$300,000.¹⁹⁴ The court satisfied the requirements of the statute by fixing at least three forms of bail and by fixing either an unsecured surety bond or a partially secured surety bond.

It is unclear whether Chensky was able to post any of these three forms of bail. However, especially given the nature of the charged offenses, it would be no surprise to learn that Chensky did not have a spare \$10,000 cash laying around or that he and his family lacked the nonrefundable \$3,000 deposit due to a bail bond company. That left just the \$300,000 unsecured bond, which would only become due upon Chensky's failure to appear in court. Detractors of the unsecured bond would argue it provides no incentive to return to court, as it would be difficult to collect the amount from an individual who fails to appear and who may be judgment-proof, although wages can be garnished over

¹⁸⁶ *People v. Chensky*, 120 N.Y.S.3d 621, 622 (Sup. Ct. 2020).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 622.

¹⁹⁰ *Id.* at 623.

¹⁹¹ *Id.*

¹⁹² *Id.* at 623–24; *see also* N.Y. CRIM. PROC. LAW § 530.60(2)(b) (McKinney 2020) (“[W]henever in the course of a criminal action or proceeding a defendant charged with the commission of an offense is at liberty as a result of an order of recognizance, release under non-monetary conditions or bail issued pursuant to this article it shall be grounds for revoking such order and fixing bail in such criminal action or proceeding when the court has found, by clear and convincing evidence, that the defendant persistently and willfully failed to appear after notice of scheduled appearances in the case before the court . . .”).

¹⁹³ Although the decision does not specify, for the sake of this analysis, I assume this refers to an insurance company bail bond for which Chensky would need to pay a commercial bail bond company a ten percent nonrefundable fee of three thousand dollars to secure his release.

¹⁹⁴ *Chensky*, 120 N.Y.S.3d at 624.

time, for example, to satisfy an unsecured bond that has become due.¹⁹⁵ Taking that as fact for the sake of argument, none of the three forms of bail fixed by the judge in *Chensky* would reasonably assure that he would return to court in the future, which is, after all, the sole reason that bail exists in New York.¹⁹⁶

C. *The Meaning of “Activities and History”*

Although legislative history tells us that New York judges may not consider “dangerousness” or risk to public safety when making bail decisions,¹⁹⁷ the actual language of New York’s reformed bail law fails to send the same message.¹⁹⁸ Conspicuously absent from the bail law is any mention of public safety or dangerousness.¹⁹⁹ In its stead is the phrase “activities and history,” as in, judges must take into account an individual’s “activities and history” when determining the least restrictive conditions necessary to secure the individual’s return to court.²⁰⁰ However, neither the phrase as a whole, nor the individual words “activities” or “history,” are defined by the statute.²⁰¹ Notwithstanding the legislative history, these vague, amorphous words forming this vague, amorphous phrase give judges carte blanche to consider just about anything they can think up when determining the least restrictive conditions necessary to secure an individual’s return to court.

Further, this provision of the bail law appears to be non-exhaustive in nature. The statute provides that when determining the least restrictive conditions, judges must consider factors “including” those enumerated in the statute.²⁰² The use of the term “including” indicates that judges may look outside the corners of the statute and consult other factors for further guidance on making these bail decisions.²⁰³ Without

¹⁹⁵ See, e.g., *People v. Portoreal*, 116 N.Y.S.3d 514, 525–26 (Sup. Ct. 2019).

¹⁹⁶ See N.Y. CRIM. PROC. LAW § 510.10.

¹⁹⁷ See *supra* Section II.A.

¹⁹⁸ See N.Y. CRIM. PROC. LAW § 510.30(1).

¹⁹⁹ See *id.*

²⁰⁰ See *id.* § 510.30(1)(a).

²⁰¹ The provision of the bail law that defines terms does not define these particular terms. See *id.* § 500.10. The provision setting forth judges’ instructions for determining the least restrictive conditions also fails to define these terms. See *id.* § 510.30. Black’s Law Dictionary is not particularly instructive, defining “activity” as “[t]he collective acts of one person or of two or more people engaged in a common enterprise.” *Activity*, BLACK’S LAW DICTIONARY (11th ed. 2019). Black’s Law Dictionary does not define the term “history.”

²⁰² N.Y. CRIM. PROC. LAW § 510.30(1) (emphasis added).

²⁰³ See *People v. Portoreal*, 116 N.Y.S.3d 514, 520–22 (Sup. Ct. 2019) (analyzing the meaning of the revisions to this provision of the statute).

much guidance, then, on what judges may or may not consider beyond the statute's list of factors, judges have yet another opportunity to read into the statute whether an individual is a risk to public safety.²⁰⁴

The Legislature attempted to clear these muddied waters by adding to the bail law that judges “shall explain [their] choice of release, release with conditions, bail or remand on the record or in writing.”²⁰⁵ In some cases, judges have provided thorough reasoning,²⁰⁶ while, in others, the explanation is sorely lacking.²⁰⁷ Ultimately, even with this requirement, it can be difficult to parse a judge's reasoning behind bail decisions, and it can be even more difficult to discern whether those decisions accounted for “dangerousness” or public safety, whether intentionally or implicitly. With that in mind, recent examples help to highlight this ambiguity.

1. *People v. Connon*

In *People v. Connon*, Connon had been charged with Criminal Obstruction of Breathing and Endangering the Welfare of a Child, neither of which is a qualifying offense per se under the reformed bail law.²⁰⁸ However, since this particular incident was allegedly directed against a member of Connon's family or household, it became bail-eligible.²⁰⁹ Thus, the judge was tasked with determining the least

²⁰⁴ Judge Greenberg succinctly summarizes this difficulty in his *Portoreal* opinion:

On the one hand, the statute's directive that the court consider—*without any express limitation*—information that is “relevant” to the defendant's return to court certainly appears to be a broad and elastic “catch-all” provision that permits the court to consider *any* factor the court deems relevant to the question whether the defendant is likely to return to court. Yet, on the other hand, the use of the word “including” in Revised CPL § 510.30(1)(a) makes the meaning of the Revised Bail Law unclear.

Id. at 521.

²⁰⁵ See N.Y. CRIM. PROC. LAW § 510.10(1).

²⁰⁶ See, e.g., *People v. Brown*, 129 N.Y.S.3d 298, 303–04 (Cnty. Ct. 2020); *Portoreal*, 116 N.Y.S.3d at 524–25.

²⁰⁷ See, e.g., *People v. Connon*, 136 N.Y.S.3d 844, 849 (City Ct. 2020) (explaining in a single sentence that “the defendant's three prior felony convictions and prior probation delinquency convince[] the Court that bail is the least restrictive method for securing the defendant's return to Court notwithstanding other factors militating in favor of his release on lesser restrictions”); *People v. Hood*, No. CR-1395-20, 2020 WL 1672425, at *1 (N.Y. City Ct. Apr. 4, 2020) (“After determining that Criminal Possession of a Weapon in the Second Degree is a qualifying offense for purposes of New York's bail statute, and after reviewing the relevant statutory factors, I also concluded that bail is the least restrictive kind and degree of control or restriction necessary to secure Defendant's return to court when required.” (internal citations omitted)).

²⁰⁸ *Connon*, 136 N.Y.S.3d at 846.

²⁰⁹ *Id.* at 846–47.

restrictive conditions that would ensure Connon's return to court.²¹⁰ After considering the statutory factors, including, of course, Connon's "activities and history," the judge decided to fix monetary bail.²¹¹

In explaining his reasoning behind the decision, the judge appeared to rely heavily on Connon's three prior felony convictions, although it was not explained how that sample of Connon's activities and history weighed in the judge's decision-making.²¹² It is possible that, as a result of those three prior felony convictions, the judge viewed Connon as a threat to public safety, leading the judge to fix monetary bail. Without the benefit of sufficiently detailed reasoning on the record, it is hard to imagine that Connon's "dangerousness" did not factor into the judge's decision-making.

2. *People v. Lang*

In *People v. Lang*, the seventy-eight-year-old Lang was awaiting a new trial and sought to be released on his own recognizance or on nonmonetary conditions in the lead up to the new trial.²¹³ Lang had been convicted of second-degree murder after he shot and killed his brother in 2012.²¹⁴ After an issue with an alternate juror, the New York Court of Appeals reversed an order by the Appellate Division affirming the conviction.²¹⁵ Second-degree murder remains a qualifying offense, and the judge was tasked with determining the least restrictive conditions to secure Lang's return to court.²¹⁶

In accounting for Lang's "activities and history," the judge noted Lang's lack of prior criminal convictions, that there was no evidence he was anything other than a model prisoner, that Lang had no record of flight to avoid criminal prosecution, and, specifically, that Lang did not attempt to flee to avoid prosecution in the eleven days he remained free after his arrest.²¹⁷ Yet, the judge emphasized the nature of Lang's particular offense and specifically the nature of his actions giving rise to

²¹⁰ *Id.* at 849.

²¹¹ While this case is an example of judges' leeway to read "dangerousness" into the statute, it doubles as an example of the reforms reducing inequality in the pretrial system through judges setting more manageable amounts of monetary bail. Here, the judge fixed bail as follows: (1) cash bail at \$1,000; (2) insurance company bond at \$1,000; or (3) partially secured surety bond at \$2,000 with a ten percent deposit. *Id.*

²¹² *See id.*

²¹³ *People v. Lang*, No. CR-12-034-I, 2020 WL 5552874, at *1, *4 (N.Y. Cnty. Ct. July 20, 2020).

²¹⁴ *Id.* at *1.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at *1–2.

this case.²¹⁸ The judge refrained from explicitly calling Lang dangerous or a risk to public safety. However, the judge's bail decision, combined with the judge's reasoning, reflects such a conclusion. The judge opted to fix three forms of bail in the following inflated amounts: (1) \$500,000 cash bail; (2) \$2,000,000 insurance company bail bond; or (3) \$2,000,000 partially secured surety bond with a ten percent deposit.²¹⁹

III. PROPOSAL

A. *Regulating Dollar Amounts of Monetary Bail*

The current state of New York's bail law affords judges nearly unrestricted discretion to set bail at amounts so high that the intention of the reforms to reduce economic inequality in the criminal justice system is easily sidestepped. Although the new requirement that judges must fix at least one of a partially secured surety bond or unsecured surety bond is a step in the right direction, judges' unfettered discretion renders the requirement nearly toothless. Assuming that eliminating monetary bail outright is not a politically likely outcome for the time being, and assuming that the Legislature would be unwilling to eliminate the decades-old language in the statute allowing judges to fix bail in differing dollar amounts, we must look elsewhere for possible solutions.

A Bronx County Supreme Court judge authored a possible resolution to this dilemma in his decision in *People v. Portoreal*.²²⁰ After thoroughly laying out the machinations of New York's bail law following the 2019 reforms,²²¹ the judge reiterated that the Legislature intended to make it more likely that a given individual could post bail through the reforms.²²² The judge also maintained that the lack of an up-front deposit accompanying unsecured bonds means that they provide little incentive for an individual to return to court.²²³

Having decided, in this particular case, that monetary bail was the least restrictive condition that would reasonably assure the defendant's

²¹⁸ *Id.* at *3.

²¹⁹ *Id.* at *4–5.

²²⁰ See generally *People v. Portoreal*, 116 N.Y.S.3d 514 (Sup. Ct. 2019).

²²¹ *Id.* at 518–24.

²²² “Plainly, the Legislature intended that some defendants who cannot afford an insurance company bail bond should still be able to afford a partially-secured surety bond; otherwise, the provision of the Revised Bail Law mandating the availability of partially-secured bonds would have no practical meaning.” *Id.* at 526.

²²³ *Id.*

return to court, and having decided that an unsecured bond in any dollar amount would do little to achieve that end, the judge then set out on fixing the appropriate partially secured bond.²²⁴ He haphazardly reasoned that a partially secured bond amount should exceed an insurance company bail bond, since, dollar amounts being equal, the partially secured bond provides less of a financial incentive for a defendant to return to court.²²⁵ Meanwhile, the judge noted that setting the partially secured bond significantly higher than the insurance company bail bond would circumvent the Legislature's goals.²²⁶ The judge's solution was simple, yet arbitrary and seemingly pulled out of thin air: a partially secured bond should not be set more than three times higher than an insurance company bail bond.²²⁷ Thus, in *Portoreal*, the judge fixed bail in the following amounts: (1) \$50,000 cash bail; (2) \$200,000 insurance company bail bond; or (3) \$250,000 partially secured bond.²²⁸ The outcome of *Portoreal*—setting three unaffordable forms of bail—underscores the flaw in this judge's conception—a flaw that might yet be remedied with further tweaking.

As exemplified by *Portoreal*, the widespread consequence of the judge's idea would likely be higher bail amounts across the board. Without capping cash bail or insurance company bail bond amounts, judges would be tempted to raise those amounts to meet the “three times” requirement proposed by this judge, instead of lowering the partially secured bond amount to meet that same requirement. But codifying the judge's idea into the bail law and building upon it might yet prove helpful to achieve the Legislature's goals. The Legislature could build upon the *Portoreal* judge's idea in three ways: (1) by capping cash bail and insurance company bail bonds at certain amounts, (2) by creating a presumption that judges set unsecured bonds rather than partially secured bonds, and (3) by reducing the maximum percentage of the undertaking that judges may require as an up-front deposit for partially secured bonds.

In all, the revised bail law would look something like this: When judges determine that fixing monetary bail is the least restrictive condition that would reasonably ensure an individual's return to court,²²⁹ judges would still be required to set three forms of bail, at least one of which would have to be a partially secured bond or unsecured

²²⁴ *Id.* at 525–27.

²²⁵ *Id.* at 526.

²²⁶ *Id.*

²²⁷ *Id.* at 526–27.

²²⁸ *Id.* at 527.

²²⁹ *See* N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2020). Ideally, this would be an increasingly infrequent outcome.

bond.²³⁰ The revised statute would devise a cap on cash bail and on insurance company bail bonds. When deciding between setting either a partially secured bond or unsecured bond—assuming judges are unlikely to set both—there would be a presumption that judges shall opt for the unsecured bond unless the individual presents an acutely high risk of flight to avoid prosecution or has a history of failing to return to court. When judges select partially secured bonds, judges would be limited to setting them only so much higher than the amount of cash bail or insurance company bond—for the sake of clarity, let us say judges may only set partially secured bonds up to 120 percent of cash bail or an insurance company bail bond. Lastly, if a judge opts for a partially secured bond, the maximum that judges could require as an up-front deposit would be reduced from ten percent of the bond to, perhaps, one percent.

Having built on the judge's approach in this fashion, the dollar amount of each of the three forms of bail that judges must set will be both lower and closer in value. With a cap in place on cash bail and insurance company bail bonds, the previously untethered partially secured bond will now be anchored and more manageable for individuals to post. But in all such cases, the presumption in favor of the unsecured bond will often not require an individual to make any sort of up-front deposit. In all, this revision to New York's bail law would meet the Legislature's goal of reducing how one's wealth impacts their freedom pending trial, while continuing to ensure that individuals return to court.

B. Revamping "Activities and History"

The simplest path to excising, once and for all, public safety and "dangerousness" from judges' considerations when determining the least restrictive conditions to ensure an individual returns to court would be to insert language to that effect directly into the statute. However, given the heated and polarized debate that has ensued each time the issue of public safety arises in the context of bail reform,²³¹ that might be the path of *most* resistance, the path *least* likely to succeed, and maybe even the path *most* likely to backfire. Alternatively, the phrase "activities and history" could be removed from the statute altogether, though this is also unlikely to provide the sought-after clarity. Since the list of factors for judges to consider is non-exhaustive,²³² judges would

²³⁰ See *id.* § 520.10.

²³¹ See *supra* Section II.A.

²³² See *Portoreal*, 116 N.Y.S.3d at 520–22.

remain free to consider “activities and history,” and countless other factors, even if the phrase were no longer to appear explicitly in the statute.

Therein lies the first affirmative step towards eliminating public safety and “dangerousness” from factoring into bail outcomes. The Legislature should consider simply replacing the word “including” with the phrase “limited to.” In doing so, the Legislature would explicitly confine judges to the enumerated list of factors within the statute. The Legislature might then consider revising the list of factors, but, in any case, this revision would give judges a finite number of considerations, none of which involve public safety or “dangerousness.”

This change, though, does not cure the ambiguity of the phrase “activities and history.” Defining the phrase as excluding public safety and “dangerousness” is unlikely to come to fruition, again due to the contentious nature of similar debates in years past. Beyond this option, the Legislature could consider refining the statutory language involving how judges explain their decisions. Currently, the bail law provides that judges “shall explain [their] choice of release, release with conditions, bail or remand on the record or in writing.”²³³ Requiring judges to explain their reasoning has the potential to be an effective way of holding judges to account and ensuring they only contemplate the appropriate considerations. But the statute as written allows judges to skate by with the most bare-bones of explanations of their reasoning. While it might be outside the scope of the Legislature to tell judges how to write their decisions, the Legislature should consider requiring judges to reaffirm on the record or in writing that they have not considered public safety or “dangerousness” when determining the least restrictive conditions to ensure an individual’s return to court.

It is not possible to get inside of a judge’s head to truly understand their reasoning, beyond what they put on the record or in writing. No matter what the text of the statute says, there must always be a leap of faith that judges stay true to the considerations the Legislature affords them in making decisions involving pretrial conditions. While no revision to the statute can absolutely ensure that judges will not factor public safety and “dangerousness” into these decisions, this requirement can, at the very least, serve as a frequent reminder to judges of what remains in-bounds and what lies out-of-bounds when judges make these critical pretrial decisions.

²³³ N.Y. CRIM. PROC. LAW § 510.10(1).

CONCLUSION

As demonstrated, New York's bail reform travails of the past few years have fallen flat in reducing the impact of economic inequality in pretrial detention outcomes. Although the revised bail law has already decreased jail and prison populations considerably,²³⁴ a goal of the reforms from the outset,²³⁵ New York's criminal justice system and its pretrial detention system, in particular, continue to treat most harshly those with the least financial means. More important than failing to live up to the Governor's and Legislature's promises, the previous sentence describes an inherently unjust justice system: a system deploying something closer to a presumption of guilt—a presumption of guilt only for those of lesser financial means, that is—than we often profess. As Bryan Stevenson has presented, we operate “a system of criminal justice that continues to treat people better if they are rich and guilty than if they are poor and innocent.”²³⁶ Hope endures though, as bail reform efforts spearheaded by dedicated activists and reformers make inroads nationwide, and as the injustice of bail laws around the country begin to enter into the nation's collective conscience.²³⁷

The United States claims to regard as sacrosanct its presumption of innocence. In 1987 Chief Justice Rehnquist told us that “[i]n our society *liberty* is the norm, and *detention prior to trial* or without trial is the carefully limited exception.”²³⁸ But then, as now, that is not reality.²³⁹ That is not reality for the thousands upon thousands of people

²³⁴ See BAIL REFORM REVISITED, *supra* note 37, at 8–15.

²³⁵ 2019 JUSTICE AGENDA, *supra* note 15, at 140.

²³⁶ BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 313 (paperback ed. 2015).

²³⁷ For example, Illinois lawmakers recently voted to end the use of cash bail. See Isaac Scher, *Illinois Will End Cash Bail—And Limit Use of High-Tech Incarceration*, INTERCEPT (Jan. 17, 2021, 7:00 AM), <https://theintercept.com/2021/01/17/illinois-cash-bail-reform> [<https://perma.cc/CSQ9-FMYE>].

²³⁸ *United States v. Salerno*, 481 U.S. 739, 755 (1987) (emphasis added).

²³⁹ The following anecdote, tweeted by Rhiannon Hamam, a public defender in Texas and cohost of the 5-4 podcast, captures the sobering reality of this sentiment:

I'm on hold with a county jail and the hold message playing references to people on the inside as “offenders.” More than 70% of people in this county jail have not been found guilty of a crime, they haven't “offended” any law. Presumption of innocence where[?]

@AywaRhiannon, TWITTER (Jan. 17, 2021, 8:15 PM), <https://twitter.com/AywaRhiannon/status/1350974958181228549> [<https://perma.cc/5VNX-K37T>]; see also Claire Lampen, *The Prison Abolitionist Redefining What It Means to Win*, CUT (Jan. 25, 2021), <https://www.thecut.com/2021/01/rhiannon-hamam-how-i-get-it-done.html> [<https://perma.cc/2ZYB-U8CH>].

confined to jails, yet presumed innocent, for no reason other than the fact that they lack the financial means to get out.

That was not reality for Brandon Rodriguez, a twenty-five-year-old Staten Island man, who took his own life on August 10, 2021, while incarcerated pretrial at Rikers Island.²⁴⁰ Mr. Rodriguez was arrested on August 4, 2020, and he lacked the financial means to post cash bail of \$5,000 or a bond set at \$15,000, causing his incarceration pending trial.²⁴¹ The State of New York may have reformed its pretrial detention system since Kalief Browder's passing in 2015, but the reforms have not stamped out the injustices wrought by excessive bail and economic inequality. Mr. Rodriguez—a legally innocent man—was punished with a death penalty of sorts not for the commission of any crime, but rather for his lack of monetary wealth.²⁴²

Writing this Note in the midst of the COVID-19 pandemic,²⁴³ with social justice movements reinvigorated following continued police killings of Black Americans including George Floyd and Breonna Taylor,²⁴⁴ and following the January 6, 2021, attack on the United States Capitol, a reframing of the debate around bail is in order. Instead of expressing outrage at the few individuals who are able to remain free

²⁴⁰ George Joseph, *Twenty-Five Year Old Detainee Found Dead at Rikers*, GOTHAMIST (Aug. 12, 2021, 4:03 PM), <https://gothamist.com/news/twenty-five-year-old-detainee-found-dead-rikers> [<https://perma.cc/BVE4-L75G>].

²⁴¹ At arraignment, a judge first set Mr. Rodriguez's cash bail at \$5,000 and a bond at \$15,000, before reducing the amounts days later to \$3,000 and \$10,000 respectively. *Id.*; Graham Rayman, *Staten Island Detainee Hangs Himself in NYC Jail Using T-Shirt: Sources*, N.Y. DAILY NEWS (Aug. 13, 2021, 7:35 PM), <https://www.nydailynews.com/new-york/nyc-crime/ny-man-dead-rikers-island-20210813-4dmqk7zi2rbcbp2ntfwxdho2ba-story.html> [<https://perma.cc/3Y6W-DNM7>]; Tracey Porpora, *Staten Island Man Found Dead in Prison Was Result of Alleged Suicide, Report Says*, SILIVE.COM (Aug. 14, 2021, 9:14 AM), <https://www.silive.com/news/2021/08/staten-island-man-found-dead-in-prison-was-result-of-alleged-suicide-report-says.html> [<https://perma.cc/SDV7-HSJ9>].

²⁴² Mr. Rodriguez's ordeal exemplifies Bryan Stevenson's notion that "[t]he opposite of poverty is not wealth; the opposite of poverty is justice." See STEVENSON, *supra* note 236, at 18.

²⁴³ The pandemic has wreaked acute devastation throughout jails and prisons across the United States. Given the cramped and confined nature of these facilities, combined with unsanitary conditions, inadequate testing, and a general apathy toward vaccinating people who are incarcerated along with employees of these facilities, jails and prisons quickly became hotbeds for the spread of the virus. See generally Schwartzapfel, Park & Demillo, *supra* note 131. Rikers Island, in particular, has become a "humanitarian crisis" during the pandemic due to high infection rates, rising inmate populations, staffing shortages, delays in court proceedings, and official mismanagement. Deanna Paul, *Rikers Island Conditions Spiral Out of Control for Inmates and Officers*, WALL ST. J. (Sept. 19, 2021, 11:00 AM), <https://www.wsj.com/articles/rikers-island-conditions-spiral-out-of-control-for-inmates-and-officers-11632063601> [<https://perma.cc/ZY6D-BLF7>].

²⁴⁴ The inclusion of these names is in no way meant to exclude the many, many others lost to police violence.

pending trial—even those accused of committing heinous acts²⁴⁵—perhaps we should channel this frustration into remedying the havoc wreaked upon the lives of thousands upon thousands of people by an unjust system of pretrial detention.

²⁴⁵ See, e.g., Travis Caldwell, *Prosecutors Push to Rearrest Kyle Rittenhouse. Here's How the Case Has Unfolded Since He Posted Bail*, CNN (Feb. 4, 2021, 9:50 AM), <https://www.cnn.com/2021/02/04/us/kyle-rittenhouse-since-arrest-bail/index.html> [https://perma.cc/WZA4-YBTv]; Natalie Parks, *UK Senior Charged in Capitol Riot Released on \$10,000 Bail After Court Appearance*, KENTUCKYKERNEL (Jan. 27, 2021), http://www.kykernel.com/uk-senior-charged-in-capitol-riot-released-on-10-000-bail-after-court-appearance/article_ac0d570e-5ac6-11eb-bf6b-937095f80615.html [https://perma.cc/J8SL-GUW9]; *Woman Who Allegedly Helped Steal Pelosi Laptop to Be Released from Jail*, GUARDIAN (Jan. 21, 2021, 12:04 PM), <https://www.theguardian.com/us-news/2021/jan/21/riley-june-williams-nancy-pelosi-laptop-capitol-jail-release> [https://perma.cc/4WV3-SLJC].