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Public Defenders as Gatekeepers of Freedom

Alma Magaña

ABSTRACT

Nearly half a million people are currently held in pretrial detention across the United States. Legal scholarship has explored many of the actors and factors contributing to the deprivation of freedom of those presumed innocent. And while the scholarship in these areas is rich, it has primarily focused on certain system actors—including judges, prosecutors, and profit-seeking sheriffs—structural concerns, such as the role race plays in who is being held in pretrial detention, or critiques of the failed promise of algorithms to deliver on bias-free bail determinations. But relatively little scholarship exists about the contributions of public defenders to this deprivation. This Article discusses those contributions. Specifically, it discusses public defenders who act as gatekeepers of bail litigation by substituting their own beliefs and values for those of the people they represent and who, consequently, decide for their clients whether to challenge pretrial detention. Through an exploration of the silence around bail litigation in relevant case law, statutes, and ethical rules, this Article identifies how the rules governing indigent representation have promoted and accommodated this dynamic between public defenders and persons charged with crimes. It explores the implications of this gatekeeping, including the dangers that arise when predominantly white public defenders make decisions for predominantly Black and Brown indigent people charged with crimes. Finally, it calls for a change in the norms and ethics of criminal defense practice as a first step toward rectifying these problems.

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INTRODUCTION

In Nevada in June of 2022, Kristopher Gonzalez filed a pro-se complaint against his public defender.¹ The public defender had refused to seek a bail reduction hearing on Mr. Gonzalez's behalf.² According to Mr. Gonzalez, his public defender's reasons for not litigating bail were, "I have too many cases, you know that" and "your desire to get out and run is apparent to all."³ Mr. Gonzalez attempted to litigate bail on his own behalf, only to have his bail reduction motion dismissed because the trial court required his attorney to file the motion.⁴ Mr. Gonzalez's final attempt at bail reduction was to file a pro se complaint.⁵ The claim was eventually dismissed without prejudice because Mr. Gonzalez had used improper procedural channels.⁶ He would need to file a writ of habeas corpus to challenge the bail amount, set at the discretion of the bail setting judge. Any complaints against his attorney would have to wait until his case was resolved. However, once the case is resolved, any pretrial bail issues become moot.⁷

For some, the consequences of remaining in pretrial detention, including on nominally low bail amounts, can be severe. In tragic contrast to Mr. Gonzalez's experience, Layleen Polanco's⁸ pretrial detention ended in her death.⁹ After Polanco was arrested for a misdemeanor sex work charge, a judge set bail in the

1. Gonzalez v. Washoe Cnty. Pub. Defender's Office, No. 3:22-cv-00172-MMD, 2022 U.S. Dist. LEXIS 155841 (D. Nev. June 7, 2022).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See Thorne v. Warden, Brooklyn House of Det. of Men, 479 F.2d 297, 299 (2d Cir. 1973) ("Since [petitioner] is now held as a convicted defendant rather than merely on a criminal charge not yet brought to trial, the issue as to the legality of his continued pretrial detention has been mooted, and it therefore becomes unnecessary to resolve the constitutional issues presented"); see also Powers v. Schwartz, 587 F.2d 783, 784 (5th Cir. 1979); Medina v. People of State of Cal., 429 F.2d 1392 (9th Cir. 1970); Fassler v. U.S., 858 F.2d 1016, 1018 (5th Cir. 1988).

8. See Natasha Lennard, *How New York's Criminal Justice System Killed a Transgender Woman at Rikers Island*, THE INTERCEPT (June 13, 2019, 12:28 PM), <https://theintercept.com/2019/06/13/layleen-polanco-death-rikers-trans-woman-sex-work/> [<https://perma.cc/E63L-FWEK>].

9. *Id.*

amount of \$500—which she could not afford.¹⁰ Polanco suffered from seizures, which did not stop the Department of Corrections from putting her in solitary confinement, where she was infrequently monitored.¹¹ She was found dead in her cell two months later.¹² Adding to these tragic circumstances was the fact that six months after Polanco’s death, New York enacted new bail laws mandating pretrial release for a range of charges, including the one Polanco was facing at the time of her detention and death.¹³ Missing from the media coverage surrounding Polanco’s death was a discussion of any further actions¹⁴ her attorney took to challenge the \$500 bail determination. This is because there were none.¹⁵

Gonzalez’s account exemplifies public defender gatekeeping, and Polanco’s tragedy exemplifies the stakes for many held in prolonged pretrial detention. Gatekeeping¹⁶ occurs when public defenders substitute their own judgment for that of their clients on matters that materially impact their clients’ interests, often without providing adequate information to their clients to enable them to make an informed decision themselves. Focusing on observations during my work at the Decarceration Project at The Legal Aid Society in New York City, I recount the behavior of some public defenders who engaged in gatekeeping with

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10. See Transcript of Proceeding at 1, *The People of the State of New York v. Layleen Polanco*, April 16, 2019, Docket No. 2017NY049849; Transcript of Proceeding at 1, *The People of the State of New York v. Layleen Polanco*, April 19, 2019, Docket No. 2017NY049849; Transcript of Proceeding at 1, *The People of the State of New York v. Layleen Polanco*, May 3, 2019, Docket No. 2017NY049849; and Transcript of Proceeding at 1, *The People of the State of New York v. Layleen Polanco*, May 17, 2019, Docket No. 2017NY049849.
 11. See Hannah Gold, *What Really Happened to Layleen Polanco?*, THE CUT (Aug. 31, 2020), <https://www.thecut.com/2020/08/what-really-happened-to-layleen-polanco.html> [<https://perma.cc/6GAS-4L85>].
 12. *Id.*; Lennard, *supra* note 8.
 13. Lennard, *supra* note 8.
 14. There was one bail application at her arraignment. See Transcript of Proceeding at 3–4, *Polanco*, April 16, 2019, Docket No. 2017NY049849. Layleen Polanco had three more court appearances before her death, and no bail applications were made during those three appearances. See Transcript of Proceeding at 1, *Polanco*, April 19, 2019, Docket No. 2017NY049849; Transcript of Proceeding at 1, *Polanco*, May 3, 2019, Docket No. 2017NY049849; and Transcript of Proceeding at 1, *Polanco*, May 17, 2019, Docket No. 2017NY049849. Layleen’s assigned public defender did not make a subsequent bail application. *Id.*
 15. *Id.*
 16. The mainstream dictionary definition of gatekeeping is “a person who controls access.” *Gatekeeper*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/gatekeeper> [<https://perma.cc/ET8D-HPG6>]. I have chosen this term to describe the dynamic because it paints a picture of what public defenders are doing when they do not litigate bail. Judges are the legal system stakeholders who have the authority to make the bail decision of who gets to be free or in custody. Public defenders are putting themselves in front of a figurative gate and controlling who has access to attempt to fight for freedom.

respect to bail litigation by making decisions about when, how, or if to litigate bail without seeking or considering input from the person in pretrial detention.

In the bail litigation context, gatekeeping can take many forms: vetoing an individual's wish to continue litigating bail, declining to discuss nonfrivolous bail litigation options, and failing to challenge bail determinations because of adherence to professional norms. What makes gatekeeping distinct from practices sometimes giving rise to a claim of ineffective assistance of counsel¹⁷ is that gatekeeping occurs within the bounds of the legal profession's standard practice norms, while ineffective assistance of counsel occurs when attorneys violate those norms. Accordingly, claims of ineffective assistance of counsel by gatekeeping attorneys are doomed to failure, leaving aggrieved people charged with crimes with little recourse. Further, by acting as gatekeepers, public defenders contribute to mass pretrial detention in ways not previously widely understood or appreciated.¹⁸ This Article illuminates and critiques this overlooked trend.

Professional and doctrinal silence over bail related gatekeeping has served to reinforce the permissibility and acceptance of these acts in criminal legal representation. There are currently no laws, ethical rules, caselaw, or widespread professional norms requiring a public defender to have a discussion with the person they represent about litigating bail, let alone anything requiring the person charged with a crime to have the final say over fighting for pretrial release or not—a fact directly informing how the scenarios described above, and countless others like them, play out in criminal courts across the country. Existing caselaw finds such failure to litigate bail not to be constitutionally ineffective.¹⁹ Examples

17. See discussion *infra* Subparts II.B.1.c & II.B.2 (describing how silence in the legal cannon permits gatekeeping).

18. There are probably also examples of public defenders violating ethical obligations and, through those violations, contributing to mass pretrial detention and mass incarceration in general. I do not discuss the ethical violation forms of gatekeeping in this Article.

19. See, e.g., *Gonzalez v. Washoe Cnty. Pub. Defender's Office*, No. 3:22-cv-00172-MMD-CD, 2022 U.S. Dist. LEXIS 155841 (D. Nev. June 7, 2022) (dismissing the plaintiff's case for failure to file the appropriate claim); *Patterson v. United States*, No. 14 Civ. 7624, 2016 U.S. Dist. LEXIS 72150, at *10 (S.D.N.Y. June 2, 2016) (rejecting plaintiff's ineffective assistance of counsel claim despite plaintiff not being advised of his right to a bail hearing because plaintiff failed to provide evidence he would have sought bail or release on bail would have affected his decision to plead guilty, and noting claims of ineffective assistance of counsel related to bail are rendered moot upon conviction and sentence); *Ennis v. United States*, No. 12-CV-28-F, 2012 U.S. Dist. LEXIS 194603, at *19 (D. Wyo. Sept. 19, 2012) (declining to find failure to litigate bail ineffective where plaintiff did not allege the outcome of the case would have been different if his attorney advocated for bail and did not provide specific and particularized allegations to support his argument); *People v. Langley*, 41 Cal. App. 3d 339, 350 (1974) ("A lack of a motion to reduce bail certainly does not show ineffective assistance of counsel."); *Condon v. Carlin*, No. 3:14-cv-00043-REB, 2016 U.S. Dist. LEXIS 66875, at *10 (D. Idaho May 20, 2016)

surrounding the litigation or failure to litigate bail²⁰ show how when counsel is assigned, there is no guarantee a public defender will place the same value on pretrial liberty as the person whose liberty has been infringed. Changing this requires amending professional norms and rules to ensure public defenders avoid assuming a gatekeeping role and, instead, abide by the detained individual's decision about litigating bail.

Polanco's tragic case unfolded in one of the few jurisdictions where a public defender is assigned within twenty-four hours of arrest.²¹ Currently, there are only ten states providing counsel within forty-eight hours after a person is arrested, and only four states where three-quarters of the localities do so.²² In the jurisdictions where a public defender is not assigned at the bail hearing, "a person accused of a crime may wait from several days to several weeks, and possibly even longer, before returning to court and obtaining the assistance of an assigned counsel."²³ Scholars have recognized the dearth of discourse regarding the crisis faced by those accused of crimes in jurisdictions where counsel is either not assigned at the bail hearing, the bail review hearing, or at all.²⁴ As an immediate response to this crisis, most of

(affirming the district court's decision to dismiss petitioner's ineffective assistance of counsel claim based on bail because the petitioner "had neither pleaded nor presented evidence of prejudice from counsel's failure to pursue the excessive bail issue"); *Akinola v. United States*, No. 04-2757, 2006 U.S. Dist. LEXIS 10484, at *7 (D.N.J. Feb. 23, 2006) ("[F]ailure to secure bail for Akinola had no effect on the judgment of the Court and does not give rise to a claim of ineffectiveness of counsel."); *Robben v. State*, Nos. 04-07-00019-CR, 04-07-00020-CR, 04-07-000-21-CR, 04-07-00022-CR, 04-07-00023-CR, 04-07-00024-CR, 04-07-00025-CR, 2008 Tex. App. LEXIS 1573, at *12 (Tex. Ct. App. Mar. 5, 2008) ("And although Robben argues that his counsel was deficient in failing to obtain reasonable bail, counsel's failure to move for a reduction in bail does not constitute ineffective assistance of counsel."); *Harling v. State*, 899 S.W.2d 9, 13 (Tex. Ct. App. Mar. 8, 1995) ("Counsel's failure to move for a reduction in bail also does not constitute ineffective assistance of counsel.").

20. See discussion *infra* Subpart II.A (describing examples of public defender who made bail litigation decisions without input from their clients).
21. *People ex rel. Maxian on Behalf of Roundtree v. Brown*, 570 N.E.2d 223, 225 (N.Y. 1991).
22. See Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 389 (2011) (identifying the current states providing counsel within forty-eight hours as California, Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, North Dakota, Vermont, Wisconsin, and Washington D.C.; and the states where three-quarters of localities provide counsel within forty-eight hours as Minnesota, Montana, Oregon, and Washington).
23. *Id.* at 409–10.
24. See, e.g., Shima Baradaran, *The State of Pretrial Detention*, in THE STATE OF CRIMINAL JUSTICE 2011, at 187 (Myrna S. Raeder ed., 2011); Douglas L. Colbert, *Coming Soon to a Court Near You – Convicting the Unrepresented at the Bail Stage: An Autopsy of a State High Court's Sua Sponte Rejection of Indigent Defendants' Right to Counsel*, 36 SETON HALL L. REV. 653 (2006); Douglas L. Colbert, *Connecting Theory and Reality: Teaching Gideon and Indigent Defendants' Non-Right to Counsel at Bail*, 4 OHIO ST. J. CRIM. L. 167 (2006); Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Determination*, 111 MICH. L. REV. 1513 (2013); John

these scholars advocate for counsel to be assigned at the bail hearing stage as a solution to mass pretrial detention, predicated on the belief that providing counsel will ensure better advocacy and, as a consequence, more favorable pretrial outcomes.²⁵ While public defenders assigned at the bail hearing would be a first step to protecting a person's liberty, there remain other threats to overcome—including the threats to liberty posed by public defenders who shape their advocacy around what they believe their clients' best interests to be, a view sometimes directly at odds with their clients' beliefs.

The importance of the bail determination cannot be overstated.²⁶ The question of pretrial release is critical to the success of the case²⁷ and the wellbeing of the person charged with a crime.²⁸ On any given day, nearly half a million people are held in pretrial detention across the United States,²⁹ a trend fed in large part by the penchant to incarcerate Black and Brown folks.³⁰ As illustrated by Polanco's death, pretrial detention often yields real and adverse consequences. The immediate consequences are the loss of a job, of custody of a child, of state or federal benefits, or even of one's life. People in custody are less able to help with their defense,³¹ are not able to show they have the potential to rehabilitate while the

P. Gross, *The Right to Counsel but Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FLA. L. REV. 831 (2017); Johanna Kalb, *Gideon Incarcerated: Access to Counsel in Pre-Trial Detention*, 9 U.C. IRVINE L. REV. 101 (2018); Pamela Metzger and Janet C. Hoeffel, *Criminal (Dis)Appearance*, 88 GEO. WASH. L. REV. 392 (2019).

25. *Id.* (arguing the reasons counsel is necessary at the bail hearing stage).
26. Dwayne Betts writes about the significance of bail in one of his poems. "I won't tell you how it ended, & his mother won't, either, but beside me she stood & some things neither of us could know, & now, all is lost; . . ." Bett's poetic verse that "all was lost" once bail was denied is not hyperbole. Reginald Dwayne Betts, "For a Bail Denied," in *Felon* (2019).
27. See Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. Econ. & Org. 511 (2018); CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, LAURA & JOHN FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES (2013) (finding that pretrial detention increases the likelihood of an individual receiving prison time and the length of any sentence imposed).
28. See discussion *infra* Introduction (describing Layleen Polanco's death while in pretrial detention); *infra* Subpart I.C (describing the harmful consequences of pretrial detention).
29. See ZHEN ZENG, U.S. DEP'T OF JUST., BULLETIN JAIL INMATES IN 2017 (2019).
30. See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012) (casting the current criminal legal system as a continuation of Jim Crow-era caste systems).
31. See Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 714 (2017) ("A detained defendant 'is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.'").

case is pending,³² are offered more punitive plea offers, and are susceptible to being manipulated into a plea³³—even if they are innocent³⁴—if it means securing their eventual release. These pleas can in turn carry severe consequences even after the person is released, including punitive collateral consequences and, for noncitizens, deportation.³⁵

Despite what is known about the consequences of pretrial detention and the value of liberty, public defenders, by default, are permitted to make critical bail litigation decisions once bail is set. Gatekeeping committed by public defenders leads to mass incarceration, but it is also made legal, endorsed, and perpetuated by the criminal legal system. First, under constitutional law, the U.S. Supreme Court has ruled there are certain “[f]undamental criminal procedure rights [which are] so personal to [an] accused that only the accused can waive them.”³⁶ Currently, the Supreme Court mandates that only the person charged with a crime can decide “whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.”³⁷ At the other end of the decisionmaking spectrum are the strategic decisions which a public defender dictates for “nonfundamental rights” or “tactical rights”³⁸—anything not expressly reserved to a person charged with a crime, by default, falls into this category. Second, there is currently no caselaw declaring gatekeeping of the bail decision as ineffective assistance of counsel.³⁹

32. See Will Dobbie, Jacob Goldin & Crystal Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 118 AM. ECON. REV. 201 (2018).

33. See Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 872 (2018).

34. See generally Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013) (presenting the findings of a psychological study in which more than half of innocent participants were willing to admit guilt in exchange for a benefit).

35. See ALEXANDER, *supra* note 30, at 142–43 (listing the potential collateral consequences for a conviction, including ineligibility for many federally-funded health and welfare benefits, food stamps, public housing, and educational assistance, as well as voting disenfranchisement, driver's license suspension, employment and professional license ineligibility, bars from military service and firearms ownership, and, for noncitizens, deportation).

36. Pamela Metzger, *Fear of Adversariness: Using Gideon to Restrict Defendants' Invocation of Adversary Procedures*, 122 YALE L.J. 2550, 2556 (2013).

37. *Id.*

38. *Id.* at 2557.

39. There have been claims of ineffective assistance filed when a person charged with a crime has felt a public defender did not properly litigate bail. The claims have been unsuccessful, like most other ineffective assistance claims. This is because of the long-known issues with the standard required for a person charged with a crime to make out ineffective assistance of counsel. See John H. Blume & Sheri Lynn Johnson, *Gideon Exceptionalism?*, 122 YALE L.J. 2126, 2137–39 (2013)

Finally, there are no ethical rules putting the bail decision in the domain of decisions that only the person charged with a crime can make. The few ethical rules potentially governing this problem are the same rules public defenders use to justify their gatekeeping practices.⁴⁰ The silence in these three areas makes gatekeeping possible and makes the task of ending gatekeeping nearly insurmountable—indicating the immense need for policy change, ethical code amendments⁴¹, and further discussion.

Reforming rules around the counsel public defenders must provide regarding pretrial litigation of detention sits at the intersection of several scholarly conversations. This discussion contributes to the growing body of literature exploring the relationship between public defenders and indigent people charged with crimes.⁴² It also adds to the body of scholarship examining the bail system and mass incarceration. And while the scholarship in these areas is rich, it has neglected public defenders, focusing instead on judges,⁴³ “carceral” prosecutors,⁴⁴ profit-seeking sheriffs,⁴⁵ structural concerns such as inherently racist algorithms,⁴⁶ and the insidious role of race⁴⁷ in determining who is held in pretrial detention.

This Article makes two core contributions toward the bail system and mass incarceration scholarship. First, it adds to the current debate about pretrial mass

(describing the barriers to ineffective assistance claims erected by the *Strickland* standards); *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing a constitutional standard to determine whether an attorney provided effective representation); Paul Marcus, *The United States Supreme Court (Mostly) Gives Up Its Review Role With Ineffective Assistance of Counsel Cases*, 100 MINN. L. REV. 1745, 1767 (2016) (arguing the U.S. Supreme Court has not taken broader ineffective assistance cases and has only applied *Strickland* to a limited number of cases).

40. See discussion *infra* Subpart II.A (providing an example of a public defender who believed in was their ethical duty to gatekeep).
41. For example, see discussion of the possible amendment to Rule 1.2 in *infra* Part IV.
42. See, e.g., MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT (2020); Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493 (2021); Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389 (2020).
43. See, e.g., Lauryn P. Gouldin, *Disentangling Flight Risk From Dangerousness*, 2016 BYU L. REV. 837.
44. See, e.g., Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301 (2017).
45. See, e.g., Aaron Littman, *Jails, Sheriffs, and Carceral Policymaking*, 74 VAND. L. REV. 861 (2021).
46. See, e.g., Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007 (2022).
47. See, e.g., David Arnold, Will Dobbie & Peter Hull, *Measuring Racial Discrimination in Bail Decisions* (Becker Friedman Inst. for Econ., Univ. of Chi., Working Paper No. 2020–33), https://bfi.uchicago.edu/wp-content/uploads/BFI_WP_2020331.pdf [<https://perma.cc/KZ5Z-HGDP>].

incarceration by exploring the hidden contributions to mass incarceration by the system-actor designated to safeguard “the fundamental rights of life and liberty”:⁴⁸ the public defender. It does so by examining the behavior of some New York City public defenders as witnessed and experienced by myself, alongside a review of relevant caselaw, statutes, and ethical rules. It identifies how the rules governing indigent representation have promoted and accommodated a power imbalance between indigent people charged with crimes and their public defenders. Second, it further explores the structural flaws of public defender offices, including racial and class hierarchies and resource constraints, and how these dynamics can perpetuate paternalistic notions even in offices claiming to be progressive and client centered.

This Article proceeds in several parts. Part I describes the bail process, beginning with a brief history of the evolution of bail followed by an exploration of the modern bail application, including the use of personal narrative in bail litigation. Part II details the gatekeeping behaviors of New York City public defenders on the question of bail and explains how the silence of ethical rules and norms, and the troublesome public defender-client dynamics they enable, contribute to the mass pretrial detention of indigent people charged with crimes. Part III discusses the implications of public defenders making the bail litigation decision for the person held in pretrial detention. Finally, Part IV calls for a change in the norms and ethics of criminal defense practice as a first step toward rectifying these problems and includes the limitations of the prescription.

I. BAIL BACKGROUND AND PRACTICE

Before planting a flag on these unexplored dynamics, it is important to give some background, including the history of bail, an overview of current bail procedures, and an examination of the reasons why pretrial freedom is critical. Understanding the history of bail allows us to understand the narrative component of bail applications and the role of bail in the racial subordination of nonwhite Americans post-Reconstruction. It also allows us to understand why the paternalism animating gatekeeping is harmful.

Reviewing current bail procedures illustrates two things: first, how bail statutes and their factors provide the person charged with a crime an opportunity to present a defense; and second, why bail relitigation is often necessary and why only the person charged with a crime can decide whether to

48. *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

relitigate bail. Finally, examining the importance of pretrial freedom cements the conclusion that gatekeeping should never be permitted to happen.

A. The History of Bail

The current bail system stems from English common law, which, itself, has roots in the foundation of bail from the Normans.⁴⁹ The pretrial release system, however, emerged much later when crime was no longer considered a dispute between two parties, but as an offense against the state—which led to delays in adjudication.⁵⁰ These delays led to more individuals in pretrial status for longer periods of time and the need to ensure those individuals continued to appear in court while the case was pending. Initially, sheriffs were responsible for getting individuals to court, though not without significant professional risk.⁵¹ Over time, it was discovered that “[family] or friends often could be more successful than the sheriff in guaranteeing the appearance of an individual on the court-day. Letting an individual to pledges in return for a certain sum insured the sheriff against amercement⁵² for failing to produce the prisoner.”⁵³

At this point in history, bail literally meant release, and usually the release would be to a surety, a person who would agree to stand in the place of the individual charged with a crime if the individual charged with a crime fled under their watch.⁵⁴ With the birth of the pretrial release system came the practice of abusing the pretrial release system,⁵⁵ which then led to attempts at

49. In the eleventh century, the Normans invaded England and changed the way an individual was punished for committing a crime against another person. See William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 42 (1977). Instead of imposing arbitrary fines for different types of crimes, “payments were replaced by corporal punishment and prison” and, eventually, the monarchy oversaw “the establishment of a definite class of felonies of royal concern.” *Id.* at 44.

50. The phrase “[j]ustice slowly became public” emerged, meaning crimes were now against the State or, in this case, the monarchy. Timothy R. Schnacke, *A Brief History of Bail*, 57 JUDGES’ J. 4, 5 (2018). This led to “placing persons accused of crimes under the control and jurisdiction of itinerate royal justices.” *Id.* The advent of these changes is when people accused of committing crimes could be held in detention, but with itinerate justices came delays in the adjudication of crimes; “thus was born the pretrial release system,” which sought to ease the burden of those accused of crimes as they awaited adjudication of the charges against them. *Id.* at 5.

51. Duker, *supra* note 49, at 43.

52. An amercement is the fine or penalty imposed by a court. *Amercement*, BLACK’S LAW DICTIONARY (8th ed. 2004).

53. Duker, *supra* note 49, at 42.

54. *Id.* at 37.

55. These abuses led King Edward I and the English parliament to attempt to curtail the abuses by passing the Statute of Westminster in 1275, which became the first law to require sheriffs to

reform.⁵⁶ One of the first bail reform attempts occurred in thirteenth century England. The country established bail factors, such as the person's character, the likely outcome of the case, and the weight of the evidence, to be considered when making bail decisions.⁵⁷ This marked the start of the personal narrative in the bail context, and this system would largely endure until its exportation to the American colonies centuries later.

When English emigrants brought the bail system to the colonies, bailable offenses also meant offenses for which people facing charges would be released, typically under personal recognizance with personal sureties or promises to pay.⁵⁸ Under this system, excessive bail was rare and pretrial release was the norm.⁵⁹ The notion of bail as release continued in the American colonies even after England passed bail laws giving judges more discretion to determine who would be eligible for release.⁶⁰

The colonial practice of releasing people charged with a crime on personal sureties continued after American independence, and well into the nineteenth century, until it became harder for the person charged with a crime to find individuals willing to act as personal sureties.⁶¹ When it became more difficult to find personal sureties, judges tried to find solutions for individuals to obtain release, including secured money conditions for the individual to self-pay and then be released.⁶² Eventually, around 1900, the United States departed from England's bail trajectory and began permitting commercial sureties—the insurance bail bond companies endemic to our system of bail—instead of permitting individuals to be released without sureties as England and other

look beyond the crime charged in deciding who would be bailable. *Id.* at 44–46. Specifically, under the new statute, sheriffs were obligated to make an individualized bail determination, factoring in the person's character, the likely outcome of the case, and the weight of the evidence when making bail decisions. *Id.* The new bail system, however, was vulnerable to abuse by sheriffs, who could profit by requiring poor people to pay for their release and, in some cases, permitted rich people charged with nonbail eligible charges (meaning these individuals could not be out pending the adjudication of their charges) to be released if they paid the sheriffs a fee. *Id.*

56. *Id.* at 45.

57. *Id.* at 45–46.

58. This is essentially an “I owe you” condition. Instead of cash bail up front, it is a mere promise to return or a requirement to pay or give up property if you do not return. In other words, the person was trusted to return based on their word, otherwise, they would be required to pay or give up assets if they broke their promise to return.

59. Schnacke, *supra* note 50, at 6.

60. *Id.*

61. *Id.*

62. *Id.* “Throughout the 1800s, American judges wrestled with the problem and began placing secured money conditions on defendants hoping they could ‘self-pay.’” *Id.*

common law countries did.⁶³ This move led to most bail conditions being secured by bonds and other financial instruments, rather than by a mere promise to pay.⁶⁴

Why did the United States change in 1900 from bail literally meaning release to bail meaning secured monetary conditions? It must be more than coincidental that the changes to American bail practices coincided with Black emancipation from legal bondage and the subsequent development of Jim Crow policies. Before the American Civil War, enslaved individuals were considered chattel, and not citizens of the country.⁶⁵ Any so-called crimes enslaved individuals committed were considered crimes against the enslaver.⁶⁶ But after the Civil War, offenses committed by formerly enslaved people were treated as crimes against the state.⁶⁷ Especially in the South, arrests and convictions of formerly enslaved individuals for acts never previously having been deemed crimes against the state dramatically increased.⁶⁸ Once slavery was abolished, the slave laws used to control Black people gave way to a formal criminal legal system, which became a new tool for controlling Black people.⁶⁹

Multiple racially-motivated factors, made salient post-emancipation, drove the creation of this new system. Chief among them were the white supremacist arguments of white and Black people being inherently different mentally and morally. The era's newspapers published editorials arguing these differences necessitated differential treatment for Black people in the criminal legal system based primarily on the myth of their moral inferiority.⁷⁰ Much has been written on the origins of the overpolicing of Black communities—including the well-documented trend of newly-freed Black people often becoming the

63. *Id.* at 7. “Other countries found other solutions to the problem of losing personal sureties—for example, England passed a law allowing courts to release defendants without sureties—but America acted alone among common law countries when, roughly in 1900, it began allowing commercial sureties by gradually discarding the longstanding rules against profit and indemnification at bail.” *Id.*

64. *Id.*

65. The property in a slave exists in a State where slavery is established, by contract, by gift, or inheritance. *Neal v. Farmer*, 9 Ga. 555, 572 (1851).

66. DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 32 (1997) (“[S]omething fundamental had changed. Throughout the South, thousands of ex-slaves were being arrested, tried, and convicted for acts that in the past had been dealt with by the master alone.”).

67. *Id.*

68. *Id.*

69. NIKOLE HANNAH-JONES, *THE 1619 PROJECT: A NEW ORIGIN STORY* 280 (2021).

70. *Id.* (“Laws governing slavery were replaced with laws governing free Black people An 1866 editorial in the *Macon Daily Telegraph* said: ‘There is such a radical difference in the mental and moral constitution of the white and [B]lack race that it would be impossible to secure order in a mixed community by the same legal sanction.’”).

first and only suspects of crimes, no matter how baseless the accusations.⁷¹ So pervasive were the racialized characteristics of this new legal regime that, in some places, only Black people were suspected of crimes and only Black people were tried and convicted for them.⁷² Furthermore, white people continually redefined criminality by broadening what was considered a crime. Eventually, Black people's actions seen as contrary to the old social order were deemed crimes, and if the criminal legal system did not punish these formerly enslaved individuals, white mobs would resort to extrajudicial lynching.⁷³ The huge rise in formerly enslaved people accused of all manner of crimes, both petty and major, meant they were now occupying the cells which, pre-emancipation, were once filled with mostly white men charged with violence.⁷⁴

There is not much literature on the effects of emancipation or Reconstruction on the judicial bail decision, but two trends during this time period likely influenced the change in how the state ensured people accused of crimes returned to court. First, the change in the racial makeup of those cycling through the criminal legal system certainly would have influenced this development. This change forms a tragic foundation for our criminal legal system, and it is unreasonable to presume the bail system would have remained untouched by it. Much more likely is that the changing racial composition of those cycling through the criminal legal system directly influenced the transformation of the bail system from one tending toward release to one tending toward detention through the setting of unaffordable bail. This transformation would have established the bail system as another legally sanctioned way to control formerly enslaved individuals. Second, judges who were making bail decisions had discretion to subject individuals to pretrial detention based on factors largely rooted in the judge's evaluation of the particular individual's character and trustworthiness.⁷⁵ If formerly enslaved people were viewed as morally inferior and incapable of

71. *Id.*

72. See, OSHINSKY, *supra* note 66, at 33–34 (“Law enforcement now meant keeping the ex-slaves in line. ‘Whenever larceny, burglary, arson, and similar crimes are committed in the south,’ said a Charleston attorney, ‘no one is suspected [anymore] save negroes.’ And almost no one save Negroes went to trial.”).

73. HANNAH-JONES, *supra* note 69, at 281 (“In the eyes of white people, Black criminality was broadly defined. Anything Black people did to challenge racial hierarchy could be seen as a crime, punished either by law or lawless lynching, which were epidemic in the South but also took place in the West and the North.”).

74. OSHINSKY, *supra* note 66, at 34.

75. Duker, *supra* note 49, at 114.

following society's rules, then convincing a judge to trust a Black person to return to court while at liberty became an insurmountable task.⁷⁶

This historical survey is important in assessing and contextualizing the current landscape of pretrial bail, but more importantly, it gives the context needed to understand the dangers of gatekeeping. The birth of the bail narrative implicates the right of people charged with a crime to control their narrative.⁷⁷ This history is important to understand why the decision to fight for pretrial release can only rightly be decided by the person who is, or can be held, in pretrial detention. Public defenders who usurp the decision to litigate bail from individuals charged with crimes predominantly do so against the descendants of formerly enslaved people and other marginalized groups. These racial dynamics are directly and inescapably connected to the implications of gatekeeping by predominantly white public defenders.

B. Bail Procedures Today

This Subpart focuses on role of the bail application as the first opportunity for the person accused of a crime to begin telling their personal narrative. It then discusses bail procedure in New York State, the jurisdiction where the real-life examples of gatekeeping were observed.

In the United States, the federal government and virtually all states permit bail amounts to be set both to ensure people charged with crimes return to court and to act as a form of preventive detention on the basis of future danger.⁷⁸ Only New York's bail laws stand as an outlier: courts are not allowed to preventively

76. HANNAH-JONES, *supra* note 69, at 279. Scholars have noted that the Thirteenth Amendment: [could] not abolish the true evil of American slavery, which was the belief that Black people are less evolved, less human, less capable, less deserving, less trustworthy than white people. . . . The existing racial hierarchy was sustained by myths about Black criminality . . . After emancipation, Black people, once seen as less than fully human "slaves," were now seen as less than fully human "criminals."

Id.

77. See *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018); see *infra* Subpart II.B.1.b (describing the Supreme Court's autonomy right's jurisprudence).

78. Preventive detention as a bail factor was not used in bail determinations until later in the twentieth century when U.S. Congress passed the 1984 Federal Bail Reform Act and state legislatures across the country began to adopt this new factor. Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 505–07 (2012).

detain anyone based on dangerousness.⁷⁹ There are, however, many features of bail hearings and bail decisions that are essentially the same across the country.

While bail statutes differ across all jurisdictions, most jurisdictions give judicial officers discretion in setting bail.⁸⁰ In some states, judicial officers make bail decisions *ex parte*, outside the presence of the person charged with a crime or their counsel.⁸¹ In other states, the arresting officer sets the bail amount that is later assessed once a judge becomes available;⁸² in some jurisdictions, this can lead to individuals being held without a judge's bail decision for several days when a judge or magistrate is unavailable.⁸³ Most bail decisions in most states are made upon a "slim evidentiary record in 'hearings' lasting less than two minutes."⁸⁴ In these largely perfunctory hearings, the prosecution typically begins by either agreeing to release the person charged with a crime, asking for monetary bail, or demanding the person charged with a crime be held without bail.⁸⁵ The prosecutor's recommendation thus largely sets the tone of the proceeding.⁸⁶ I have also seen that, if the prosecutor asks for bail or detention, the public defender typically responds by countering the prosecution's contentions and presenting alternative considerations to the court such as release or a lower bail amount. My work and experience showed the considerations are rooted primarily in the personal narrative of the person charged with a crime and can relate to everything from their ties to the community to their employment history, among other deeply personal factors. The judge then decides after hearing from

79. Even though New York does not presently permit preventive detention through the bail process, virtually all other states and the federal government do, which only serves to heighten the liberty interests for accused persons. See James Allen, Note, "Making Bail": Limiting the Use of Bail Schedules and Defining the Elusive Meaning of "Excessive" Bail, 25 J. L. POL'Y 637, 653 (2017); see also Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion*, 26 CRIM. JUST. 12, 13 (2011). Specifically, the prospect of being detained either to ensure one's return to court or because of perceived dangerousness only adds further importance to the development of the bail narrative and the person's interest in shaping and controlling it.

80. Some jurisdictions rely on mandatory schedules removing discretion from the setting of bail. See, e.g., Allen, *supra* note 79, at 641; Carlson, *supra* note 79, at 13–14. Accordingly, the prescription described in this Article may not apply everywhere. But reformers should challenge these schedules since, as several scholars have already suggested, their constitutionality is dubious. See, e.g., *id.*

81. Gross, *supra* note 24, at 836.

82. ANTHONY G. AMSTERDAM & RANDY HERTZ, TRIAL MANUAL 6 FOR THE DEFENSE OF CRIMINAL CASES 61–121 (6th ed. 2016).

83. *Id.* at 88.

84. See Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1100 (2019).

85. I observed this practice during my more than ten years of trial work as a public defender.

86. There are studies showing the prosecutor does more than set the tone. "Sometimes judges are just doing what the prosecutors ask for." CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 81 (2021).

both sides.⁸⁷ This process mirrors the process used centuries ago in the early English bail system.

The Westminster Statute of 1275 established the first criteria governing “bailability” beyond the charge, including prediction of outcome, weight of evidence, and character of the person charged with a crime.⁸⁸ Although the factors can vary from state to state, they largely overlap with one another and the original factors from 1275⁸⁹ and can cover many different parts of the defendant’s narrative. For example, some factors consider “evidence that the defendant is stable and law abiding,”⁹⁰ which permits the defense to affirmatively present such evidence as part of their bail application.⁹¹ Additionally, those considering whether someone will return to court ultimately depend on “whether the defendant has a home, a job, and a family,”⁹² which are central to the defendant’s personal narrative and, consequently, the narrative of their defense.

Aside from the bail process, the only other opportunity people accused of crimes typically have to share their personal narrative is during the adjudication or

87. How does a judge determine who should be released and trusted to return on their own, and how is the monetary bail decision or conditions set to ensure the person returns to court? In Issa Kohler-Hausmann’s *Misdemeanorland*, a study of New York City’s criminal courts, one judge shared her thought process when making bail determinations at arraignment:

Do I really want to put someone in jail? Go through the expense at the taxpayer’s expense in keeping someone housed for five days or ten days, or until the case is resolved? . . . Do I want to put someone that warranted three times in a period of ten years, sporadically and the charge is for not paying a subway fare? Or for taking a pack of gum, or for taking a pair of earrings in Macy’s?

ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 108 (2018). But not all judges are so thoughtful. “For instance, one defense attorney described how more than one judge will typically ‘split the baby’ between a prosecutor’s bail recommendation and a defense attorney’s bail recommendation.” CLAIR, *supra* note 42, at 150.

88. Duker, *supra* note 49, at 46.

89. Not all states have the same factors, but the following is a breakdown of the similarities between jurisdictions: “Thirty-one states expect judicial officers to assess the quality of the evidence against a defendant, estimate the likelihood of conviction, and the potential sentence that would be imposed when making a determination regarding bail.” Gross, *supra* note 24, at 850–53. Nineteen states ask the judicial officer to use the weight of the evidence as a factor. *Id.* at 850. Nine states factor in the “likelihood or probability of conviction and sentence.” *Id.* at 852. At least five states factor in the actual charge, nature of charge, and likelihood of conviction. *Id.* Twenty-eight states permit judicial officers to factor in dangerousness or posing a threat to an individual or a community. *Id.*

90. M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493, 510 (2021).

91. *Id.* at 510–11.

92. *Id.* at 511.

disposition of their case.⁹³ In other words, their narrative gets shared either when they enter a plea, go to trial, or are awaiting sentencing after conviction. The wheels of so-called justice, however, turn very slowly in many jurisdictions, and a criminal case, including those with low level charges, can be open for years.⁹⁴ The ability to convey a narrative at this initial appearance, thus, becomes extremely important, not just because the appearance is “before a judicial officer who has the power to place restrictions on their liberty,”⁹⁵ and who will do so largely upon consideration of the defense narrative, but because of the scarcity of future opportunities to do so.

New York differs from this model in several ways. The New York legislature has, for decades, rejected the idea of permitting bail to be set due to future dangerousness or fear of people charged with crimes reoffending if released.⁹⁶ Instead, under its bail statute,⁹⁷ a judicial officer is required to release the person charged with a crime pending trial “unless it is demonstrated and the court makes an individualized determination that the principal poses a risk of flight to avoid prosecution.”⁹⁸ If the judge decides there is a risk the person will not return to court, the judge can entertain options for restricting the person’s liberty “by the least restrictive means”⁹⁹ after considering the following factors: the person’s activities and history, the charges they face, their criminal record—including any juvenile offense history or history of flight to avoid prosecution—and several additional factors if the case includes allegations of domestic violence.¹⁰⁰ One important factor was added in 2020: a person’s ability to afford the bail amount

93. This is based on my work as a public defender and on general criminal procedure in the life of a criminal case.

94. Patrick Wall, *DNAinfo: 10 Judges Will Head to Bronx to Target Criminal Case Backlog*, BRONX DEFENDERS (Jan. 15, 2013), <https://www.bronxdefenders.org/bxd-in-the-news-10-judges-will-head-to-bronx-to-target-criminal-case-backlog-dnainfo> [https://perma.cc/99AJ-4Q6M].

95. Gross, *supra* note 24, at 833.

96. Even the newest bail statute passed in the spring of 2019 which took effect in January 2020 does not include dangerousness as a factor. Grace Ashford & Jonah E. Bromwich, *New York’s Bail Laws, Reconsidered: 5 Things to Know*, N.Y. TIMES (Mar. 29, 2022, updated Mar. 30, 2022), <https://www.nytimes.com/2022/03/29/nyregion/bail-reform-hochul-ny.html> [https://perma.cc/P5ZC-SZK8]. There were also bail rollbacks after the new statute took effect, but even the rollbacks did not include the dangerousness factor. *Id.*

97. Here, I am referring to the bail statute enacted in January 2020. This provision remained the same even after the summer 2020 rollbacks. *Id.*

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

99. This is the statutory requirement—the way the legislature has determined bail should be decided. *Id.* § 510.30(1). Whether judges are adopting the new bail laws is an entirely separate question.

100. *Id.* § 510.30(1)(a)–(e), (g).

being considered.¹⁰¹ Almost invariably, the personal narratives comprising these factors are conveyed to the judge through the public defender.

Among United States counties with public defender systems, two models prevail: In one, public defenders are assigned before the bail hearing¹⁰²; and in the other, public defenders are assigned after the bail hearing has been conducted.¹⁰³ New York City adheres to the first model, with the public defender typically assigned to represent the person accused of a crime at their arraignment.¹⁰⁴ At arraignments, prosecutors provide little information to the court, the people charged with a crime, and the defense counsel.¹⁰⁵ This information consists of the charges and minimal facts to make out the offenses charged, the accused's criminal history—if one exists—and the police report, which is not shared with the public defender or the person charged with a crime.¹⁰⁶ The defense attorney, who usually meets the person charged with a crime for the first time moments before the arraignment, conducts a brief interview and delivers a narrative to the court explaining why bail is unnecessary to ensure the defendant's return to court.¹⁰⁷ Pre-arraignment interviews are often short, typically under thirty

101. *Id.* § 510.30(1)(f) (requiring courts to “consider and take into account information about the principal that is relevant to the principal’s return to court, including . . . the principal’s individual financial circumstances, and . . . ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured, or partially secured bond”).

102. Colbert, *supra* note 22, at 385–86.

103. *Id.*

104. This is not the case in all of New York State, which is why the legislature included a provision in the new bail statute requiring assigned counsel to help the criminal defendant prepare for an application for release. See N.Y. CRIM. PROC. LAW § 510.10(2) (McKinney 2020). This has the potential to benefit the folks accused of crimes in jurisdictions where a public defender is not assigned at arraignments. Unfortunately, the person in pretrial detention must be aware of their right to request an application for release without the assistance of counsel in order to be entitled to counsel. See *id.*

105. See KOHLER-HAUSMANN, *supra* note 87, at 125.

106. *Id.*

107. The ability to make a good bail application is something public defenders must be able to do, or, at least, it is one of the things several large city public defender offices assess when interviewing potential public defender candidates. In 2007, when I was applying and interviewing for public defender positions in New York City, Brooklyn Defender Services and The Legal Aid Society required potential candidates to do a mock bail litigation application. Most recently, I have prepped a law student applying for public defender job at New York County Defender Services, and the student was also going to be presenting a mock bail application during the interview. It takes skill to piece together the accused's narrative to convince a judicial officer to release the person while the criminal case is unresolved. In public defender offices with the resources to have training units, a couple of days of training are dedicated to the art of a bail application. The Legal Aid Society's training unit spends a couple

minutes. Even at this stage, the public defender must balance between getting relevant information and speed; the faster a public defender can arraign each client, the more clients can be interviewed and potentially released.¹⁰⁸

The sociologist Matthew Clair describes a similar process in Boston:

Typically, the lawyer will chat with their new client for a few minutes, discussing the details of the criminal charge, the police report, and any personal information the lawyer could use to make argument for a more lenient bail decision, such as whether the client has a history of returning to court in the past and the client's financial circumstances. After the arraignment hearing, lawyers typically provide clients with information for how they should stay in touch. These brief interactions set the stage for the rest of their relationship. People charged with crimes assigned to court-appointed lawyers in this way often report feeling rushed and confused—and, importantly, bothered by their lack of choice in the lawyer they were assigned.¹⁰⁹

Such are the hectic and underwhelming circumstances under which the defense's critical bail narrative are typically developed.

Looking closely at the bail factors, we can see how, during the bail hearing process, a person charged with a crime and their assigned public defender first develop the foundation of their personal defense narrative. Considering how the bail and arraignment process operates in New York City (and elsewhere), it is obvious why a person who has just been arrested and ensnared in the criminal legal system would feel confused and rushed, even bewildered. There is so much to cover in a first meeting with a public defender, and the public defender may not have the time to thoroughly explain why the judge needs to know about factors unrelated to their guilt or innocence. My colleagues and I have seen that the information required for the bail factors may entail speaking to the friends and family members of the people charged with crimes, and if the person charged with a crime is fortunate enough to have had the opportunity to alert people that they

of days doing bail application training. In 2010 I attended this training, and later participated as a trainer during the bail application sessions.

108. KOHLER-HAUSMANN, *supra* note 87, at 126. Public defenders also feel pressure to get to the arraignment quickly, even if there is little chance the person will be released. The conditions of most pre-arraignment cells are inhospitable. See e.g., Jan Ransom, Jonah E. Bromwich & Rebecca Davis O'Brien, *Inside Rikers: Dysfunction, Lawlessness and Detainees in Control*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/2021/10/11/nyregion/rikers-detainees-correction-officers.html> [<https://perma.cc/L3TW-5TG3>]. And for those with nonurgent medical issues, they will not be able to get medical attention until after the arraignment has concluded and they are transferred to the jail where they will be housed during the pending case. KOHLER-HAUSMANN, *supra* note 87, at 126.
109. CLAIR, *supra* note 42, at 72.

are in custody, those individuals will be in court. The presence of family and friends is also important in showing the person charged with a crime has community ties, which factors into whether someone is a high or low flight risk. Some public defenders will even delay an arraignment, if needed, while friends or family make their way to court. Most often, family or friends will not be present at the arraignment; thus, missing from the bail application is an assurance to the judge of this person having community ties and an opportunity for the family to present other information about the person's "trustworthiness", among other bail factors. Writing on this issue, Eve Hanan notes how:

[In] these inquiries, the defendant may have relevant, important information to share with the court that could be weighed in the decision whether the defendant should be released. Moreover, when the court orders defendants to pay a financial bond or bail, defendants can speak about their ability to pay and request a bail that will not result in wealth-based detention.¹¹⁰

In sum, the details forming the core of a person's bail narrative are deeply personal, containing information about a person's financial, familial, and occupational circumstances known fully only to the person accused of a crime. An effective bail application, thus, requires a public defender to extract and reconstitute this information to a court in a convincing way to have it rule in favor of the person charged with a crime. It is realistically impossible, however, to do all of this in the scant amount of time most public defenders have when first meeting their clients in court.

In fact, when the bail interviews occur as described above, it is difficult to imagine how the subsequent bail application will be effective. It is, therefore, unsurprising that "the vast majority of pretrial detainees in the United States are confined because they cannot afford to post a bail amount set according to a schedule or after a perfunctory hearing."¹¹¹ But the bail fight need not end at this junction.

Under the New York bail statute, similar to other jurisdictions, there is no limit to the number of times bail can be relitigated at the trial level.¹¹² There is also a mechanism for de novo review, creating opportunities for advocates to refashion

110. Hanan, *supra* note 90, at 511.

111. Funk, *supra* note 84, at 1100.

112. If you have failed at the trial level to have bail set, reduced, or eliminated, then you can file a writ of habeas corpus (a civil lawsuit) if the judge has abused their discretion, ignored the bail law, or violated the client's constitutional rights. AMSTERDAM & HERTZ, *supra* note 82, at 90–92. If you lose the writ, you can appeal it all the way to the Supreme Court before the case is resolved—meaning, you do not have to wait for the criminal case to be resolved. *Id.*

bail arguments after increasing their familiarity with the person charged with a crime and with the details of the case.¹¹³

C. Pretrial Freedom is Critical

In this Subpart, I provide a brief outline of why pretrial liberty is critical. Pretrial detention significantly impacts an individual's life and the outcome of their case.¹¹⁴

Most obviously, once a person is held in pretrial detention, their liberty is taken from them. People held in pretrial detention, although presumed innocent, are treated no differently than individuals who are in jail or prisons after they have been found guilty of a crime—suffering adverse consequences as a result.¹¹⁵ But detention inflicts more costs than just a loss of liberty. There are psychological and cognitive consequences, as well.¹¹⁶ Being in pretrial detention contributes to the plea machine¹¹⁷, typically resulting in worse case outcomes¹¹⁸ upon resolution of the criminal charge which landed the person in pretrial detention.¹¹⁹

113. Some U.S. jurisdictions offer an automatic bail review, permit other paths to challenge bail after the trial level, or allow for re-arguments upon an offering of new reasoning or circumstances warranting a renewed bail application. Dorothy Weldon, Note, *More Appealing: Reforming Bail Review in State Courts*, 118 COLUM. L. REV. 2401, 2427–36 (2018). There is even one section permitting a public defender to have a judge conduct a de novo review of any bail conditions. *Id.* at 2430–31. This empowers the reviewing judge to revisit the bail question with fresh eyes and to avoid finding the arraignment judge did anything wrong; a mere difference of opinion would be legally sufficient to warrant a change in the existing bail order. *See id.* Also, there is no requirement for the public defender to present new, previously unconsidered information. *Id.*

114. Pretrial detention also comes with a cost for both the individual and the jurisdiction detaining the individual. For a beautifully written analysis of this concept, *see generally* Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1 (2017).

115. *See* Stack et al. v. Boyle, 342 U.S. 1, 4 (1951) (stating how pretrial liberty “permits the unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction”); *see* People v. Johnson, 27 N.Y.3d 199, 210 (2016) (Pigott, J., concurring) (recognizing how inequity in conviction rates of pretrial detainees stems from detainees’ inability to gather evidence and contact witnesses).

116. Amber Baylor, *Beyond the Visiting Room: A Defense Counsel Challenge to Conditions in Pretrial Confinement*, 14 CARDOZO PUB. L. POL’Y & ETHICS J. 1, 15–16 (2015).

117. Thea Johnson, *Crisis and Coercive Pleas*, 110 J. CRIM. L. & CRIMINOLOGY ONLINE 1 (2020); Ninety to ninety-five percent of criminal convictions are resolved through guilty pleas. LINDSEY DEVERS, DEPARTMENT OF JUSTICE RESEARCH SUMMARY: PLEA AND CHARGE BARGAINING 1 (2011), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/pleabargainingresearchsummary.pdf> [<https://perma.cc/6SXJ-6QXW>].

118. *See supra* note 115.

119. Weldon, *supra* note 113, at 2424.

Any loss of liberty, by itself, can be dehumanizing and result in severe psychological trauma, but when coupled with the violence of American jails, the trauma of pretrial confinement can lead people to “experience hypervigilance, or exaggerated sensitivity to threat, in environments where their safety is constantly at risk.”¹²⁰ Once in custody, it is common for detained people to suffer from posttraumatic stress disorder;¹²¹ their detention experiences alter the way their brains function afterward,¹²² even impacting their cognition and ability to function.¹²³ Amber Baylor details the impact trauma can have on a person’s communication with counsel, narrative memory, and decisionmaking.¹²⁴ The negative impact of trauma can make someone less able to discuss and prepare their defense with their attorney. The experience of one young man—Kalief Browder—offers a particularly tragic example of the consequences of jail-induced trauma.

Browder, a teenager, was held in pretrial detention in New York’s notorious Rikers Island jail on \$3,000 bail for three years, during which time he was held in both regular detention and solitary confinement.¹²⁵ After his release from detention, Browder came out a very different person. “Before I went to jail,” he wrote, “I didn’t know about a lot of stuff, and now that I’m aware, I’m paranoid I feel like I was robbed of my happiness.”¹²⁶ Over the “one thousand days in Rikers [Browder spent] for a trial that never happened,”¹²⁷ he spent a total of two

120. Baylor, *supra* note 116, at 15.

121. *Id.*

122. *Id.* at 16.

123. *Id.*

124. *Id.* at 15–17.

125. Jennifer Gonnerman, *Before the Law*, NEW YORKER (Sept. 29, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law> [https://perma.cc/444T-EW27]. See also Sharon Shalev, *Solitary Confinement as a Prison Health Issue*, in WHO GUIDE TO PRISONS AND HEALTH 27–35 (S. Enggist, L. Moller, G. Galea & C. Udensen eds., 2014) (“WHO defines health as a ‘state of complete physical, mental, and social wellbeing, not merely the absence of disease or infirmity’, affirming that health, as defined is a fundamental human right. Solitary confinement negatively affects all these aspects of health. It is an extreme form of confinement whose deleterious physical, mental and social health effects have long been observed and documented by practitioners and researchers [alike.]”); Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Unusual Punishment*, 90 IND. L.J. 741, 742 (“In this [solitary confinement] extreme environment, many prisoners suffer serious psychological and physical deterioration. Prisoners entering solitary confinement with [mental health] issues often find those issues severely exacerbated. Prisoners entering without [mental health] issues often acquire acute mental illness during their stay.”).

126. *Id.*

127. *Id.*

years in solitary confinement.¹²⁸ While in isolation, he attempted suicide several times.¹²⁹

Browder was finally released in November 2013 and, six months later, attempted to commit suicide again.¹³⁰ He bravely shared his story with a journalist from *The New Yorker*, and his story became a rallying cry for bail reform, the elimination of trial backlogs, and an end to solitary confinement.¹³¹ Celebrities took an interest in him, and a private donor gave him a scholarship to continue attending community college.¹³² But, despite the support he received after enduring those terrible years, the trauma he suffered was too great. Browder's pretrial detention led to severe mental health issues for him and, ultimately, to his death by suicide on June 6, 2015, nineteen months after his release from detention.¹³³

Browder's attorney reflected on Browder's ordeal, stating: "When you go over the three years that he spent [in jail] and all the horrific details he endured, it's unbelievable that this could happen to a teenager in New York City. He didn't get tortured in some prison camp in another country. It was right here!"¹³⁴ Although Browder's case never went to trial, one can imagine how his mental health issues caused by his trauma would have also impacted his ability to help with his defense.

While a person is incarcerated, their attorney proceeds to litigate their case, conducting investigation, reviewing discovery, and researching legal arguments. All of these tasks take time, during which the detained person remains in jail. Experienced attorneys recognize the high likelihood of a person in pretrial detention simply pleading guilty, even if they are innocent, in order to get out of jail and end the purgatory of not knowing how long they will spend in pretrial detention.¹³⁵ Judges and prosecutors are well aware an individual's pretrial detention will often mean: (1) a faster disposition of the case; (2) a more likely

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. 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/3LL4-6BEB>].

133. *Id.*; Gonnerman, *supra* note 125.

134. Gonnerman, *supra* note 125.

135. HESSICK, *supra* note 86, at 84.

probability of a guilty plea as compared to those who have been released,¹³⁶ and (3) a higher likelihood of receiving a more severe sentence.¹³⁷

Finally, people in pretrial detention who decline to plead guilty are at a significant disadvantage when it comes to preparing for trial. The tasks needed to successfully prepare—even ones as simple as meeting with one’s attorney—can be incredibly difficult to complete when a person is in jail, and “[d]efense attorneys know that a client is better placed to fight a case successfully if he is not being held at Rikers Island (the largest city jail) on bail.”¹³⁸

II. TENSION IN THE ROLE OF PUBLIC DEFENDERS

There is a common conception that it is the public defender’s responsibility to ensure the person charged with a crime avoids jail or, if detained, is released from jail as soon as possible. The reality is more complicated. Current laws and ethical codes do not explicitly recognize autonomy for the person charged with a crime regarding the decision to litigate bail. The silence of laws and codes around the decision to litigate bail means, by default, public defenders can exercise unfettered discretion in determining what constitutes the accused’s best interests. Sometimes, these public defenders conclude, both implicitly and explicitly, how it is in their clients’ best interest to remain incarcerated.

This Part describes observations of gatekeeping; namely, the tendency of some public defenders to make decisions about when or whether to litigate bail without seeking or considering input from the person in pretrial detention. It illustrates gatekeeping and the reasons it occurs. Subpart II.A describes the Decarceration Project of the Legal Aid Society of New York, and some of the real-life examples of gatekeeping I observed as a member of the Project. It details how gatekeeping, even when well intentioned, contributes to mass incarceration. Subpart II.B describes how silence in legal canon and ethics makes gatekeeping possible. It also reveals how practice norms encourage gatekeeping.

136. KOHLER-HAUSMANN, *supra* note 87, at 177 (“There are strong professional and organizational reasons that prosecutors and judges ask for bail when a person has a record of past bench warrants, even if a prospective jail sentence is an unlikely disposition from the arrest. Once bail is set, the defendant is much more likely to take a plea to a criminal conviction.”); Blume & Johnson, *supra* note 39, at 3.

137. Stevenson, *supra* note 27, at 513 (“[In a study in Philadelphia] I also find that pretrial detention leads to a 42% increase in incarceration sentence, an effect that is only partially explained by release on time-served. This suggests that the impacts of pretrial detention extend beyond the classic examples of defendants pleading guilty in order to get out of jail.”).

138. KOHLER-HAUSMANN, *supra* note 87, at 125.

A. Case Study of Gatekeepers

The Decarceration Project of the Legal Aid Society was formed to make a strategic push to reduce mass pretrial detention through the strategic litigation of bail.¹³⁹ The Decarceration Project team serves as a resource for public defenders who lack the time to litigate bail or know-how to challenge bail decisions.¹⁴⁰

In March 2017, the Legal Aid Society began a pilot program to test what would happen if two attorneys, a social worker, and a paralegal focused exclusively on litigating bail for a unit of twenty-five trial attorneys.¹⁴¹ The results were promising: Out of the 141 detained clients given bail litigation assistance, 20 percent were released on their own recognizance or to alternatives to incarceration, while some had bail reduced.¹⁴² Further, when including clients who received other nonlitigation assistance from the program, a total of 33 percent of the clients were released.¹⁴³ The pilot project's success resulted in additional funding from the New York City Mayor's Office of Criminal Justice for expansion.¹⁴⁴ In 2018, the Decarceration Project added five additional attorneys and five more paralegal case handlers, enough for each of the Legal Aid Society's trial offices to have a dedicated lawyer-paralegal Decarceration team.¹⁴⁵ Each office also had a social worker mitigation specialist who worked closely with the Decarceration Project.¹⁴⁶ The mission of the expanded Decarceration Project was to assist the trial offices, which contained about two hundred attorneys, with bail litigation to reduce pretrial mass detention. The Decarceration Project also

139. See MALIA N. BRINK, A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, EXEMPLARY DEFENSE: A STUDY OF THREE GROUNDBREAKING PROJECTS IN PUBLIC DEFENSE 2 (2018).

140. *Id.*

141. *Id.*

142. *Id.* at 3.

143. *Id.* Some examples of nonlitigation assistance included helping family or friends of incarcerated clients navigate the sometimes difficult process of posting bail and having members of the pilot program intervene when the New York City Department of Corrections made administrative errors resulting in illegal longer detention periods.

144. BRINK, *supra* note 139, at 3.

145. I was in the Decarceration Project from June 2018 to December 2020, at which time I made observations and heard observations from other Decarceration Project attorneys and social workers, which showed us just how much gatekeeping public defenders are doing relating to litigating bail for clients in pretrial detention. I include observations I made during my time in the Decarceration Project, and one observation relayed to me by a social worker during my time in the Project.

146. *Id.*

succeeded in educating other system actors on bail litigation, such as prosecutors and judges.¹⁴⁷

Members of the Decarceration Project consistently observed gatekeeping by other attorneys during the Project's work. In many instances of gatekeeping, the public defender made a predetermination of who would continue to fight for their freedom. When a public defender closed the gate by unilaterally deciding not to pursue bail litigation, they not only prevented the person in jail from putting forward their personal bail narrative, but they also assumed control of the narrative presented to the judge. The results of the Decarceration Project pilot showed how relitigating bail resulted in more individuals being released from pretrial detention.¹⁴⁸ When public defenders gatekeep by deciding to discontinue litigating bail, they remove any possibility of the detained person being released from jail. Therefore, by not litigating bail, public defenders are, in effect, contributing to mass pretrial detention.

The following examples are the first to shine a light on the dynamics between the public defender and the person charged with a crime regarding the bail decision and highlight the silence in legal and ethical canon about this issue.

During my time in the Decarceration Project, I observed countless examples of gatekeeping. I have picked a few to illustrate prominent patterns. The following are real-life examples of gatekeeping, grouped by theme. These examples show how some public defenders can override or attempt to override an accused person's desires to fight for pretrial release. There are also examples of public defenders who do not believe they have a duty to counsel or consult the person charged with a crime when deciding to stop litigating bail. Finally, there are some examples showing a passive resistance to litigating bail by not responding to offers from the Decarceration Project to assist in litigating for the release of people charged with crimes who are in pretrial detention.

147. These efforts were particularly impactful at the beginning of the COVID-19 pandemic, with the Decarceration Project spearheading systemwide efforts to depopulate New York City's jails of people in pretrial and postconviction detention; this was not only a matter of justice and equity but also a matter of public health. See Jane Wester, *From Her Kids' Playroom, This NYC Public Defender Has Helped Set Hundreds of Prisoners Free*, N.Y. L.J. (May 5, 2020).

148. The goal of the Decarceration Project's creation and expansion was to assist public defenders with bail litigation. BRINK, *supra* note 139, at 1. As an inaugural member of the Decarceration Project, I had no anticipation of public defenders engaging in widespread gatekeeping, though gatekeeping dynamics would later become apparent as the project's work developed.

1. So-Called Best Interest

“I have a fiduciary duty to my client,” stated one public defender in explaining her refusal to litigate bail.¹⁴⁹ This public defender believed the best interest of her client included not litigating bail. The public defender’s client, Shawn Smith,¹⁵⁰ was charged with a misdemeanor assault and had been arrested several times for assault on medical staff while hospitalized. Smith was not a U.S. citizen and, if convicted of the charge, would become deportable due to prior convictions he already had.¹⁵¹ With no guarantee the government would grant relief for humanitarian reasons or cancel the removal, Smith would likely be forced to return to a country where he would experience persecution. Smith’s attorney provided representation conforming to the attorney model professional expectations: counseling the client about the choices they get to make; negotiating with the prosecutor for a favorable disposition on the case; and composing a prepleading memorandum detailing the great harm the client would suffer if convicted and deported for this crime. Arguably, she even went beyond the norms by discussing available bail litigation options with the Decarceration Project. But Smith’s attorney refused to continue to litigate his bail and did not consult with him about this decision. She cited teachings from more senior attorneys, some of them supervising attorneys, stating zealous advocacy meant achieving the so-called right outcome as determined by the attorney. This attorney indicated her role was to protect—although her refusal to consult with Smith on ending bail litigation certainly puts her so-called protective nature into doubt—the person accused of a crime from themselves. For Smith’s case, this meant usurping his decision to litigate bail, while still working toward mitigating the immigration consequences.

For attorneys like Smith’s, the purported right outcome is one minimizing the harms of the criminal legal system. The public defender, guided by their experience, will often determine what this outcome is based on the particulars of a case, including the charges, the assigned prosecutor, and the presiding judge. And, as sociologist Matthew Clair points out, “[l]awyers’ efforts to control their clients are often well intentioned: passionate defense attorneys view their jobs as reducing their client’s legal costs, costs sometimes resulting from the exercise of certain legal rights.”¹⁵² In the above example, the attorney sincerely believed her decisions were

149. Quoting a public defender who made this statement, during a bail consultation, to the author of this article in the Summer of 2018.

150. Name and some facts have been changed.

151. 8 U.S.C. § 1227(a)(2)(A)(ii).

152. CLAIR, *supra* note 42, at 3.

in her client's best interest based on her assessment of the case. The danger, however, is that one's understanding of the supposed right decision is highly subjective and can vary greatly from public defender to public defender. Further, a public defender's view can depart substantially from the views of those they represent, which, as discussed here, can severely undermine the interests of the person charged with a crime.

2. Preventive Detention

In April 2020, a Rikers Island doctor asked a Legal Aid Society social worker to intervene on a Legal Aid Society attorney's case because the attorney was not responding to the doctor's emails. The social worker and an attorney from the Decarceration Project¹⁵³ reached out to the assigned public defender. This public defender had worked closely with the Decarceration Project on other bail litigation cases but responded to the Project on this occasion by listing the reasons why she was ignoring the doctor's outreach. The attorney's reasons included that the request was unlikely to be successful because the client had recently been released with a discharge plan by the same team and that the attorney was concerned the client would continue to commit the same crime. She explained: "I don't want to deal with more arrests." The attorney shared none of this information with her client, who continued to be detained.

While Decarceration Project attorneys and social workers frequently witnessed judges refuse to change bail conditions unless the person charged with a crime pleaded guilty first,¹⁵⁴ they sometimes witnessed public defenders express a similar preference for tying a prospective change in bail to the case's resolution. For these defenders, avoiding bail litigation in the absence of some advance assurance of the case's resolution was ideal since bail litigation could undermine the public defender's attainment of the so-called right outcome on the case. Plea deals could be jeopardized, clients could get re-arrested, or relationships with judges and prosecutors could be frayed after contentious bail litigation—all outcomes to be avoided even if it meant sacrificing the liberty of the person whose interests the public defender was supposed to be defending. This dynamic was particularly present whenever a public defender feared their client's release might increase the likelihood of going to trial when their client's case had unfavorable

153. The author of this Article was the Decarceration Project attorney who was asked to intervene.

154. Judges were always very careful to not make an official record of these grotesque offers but would hint, off the record, they would feel more comfortable releasing someone if they first took a plea.

facts or circumstances. In these instances, defenders were keenly aware a case was less likely to go to trial the longer someone remained in pretrial detention. If a plea offer would better achieve the supposed right outcome over going to trial, then situational coercion was merely a necessary evil to accomplish a noble aim. This view, however, ignored the practical and scholarly evidence that clients who are released before trial are statistically likelier to receive more favorable plea offers than if they were to remain detained.¹⁵⁵

3. Systemic Gatekeeping

These examples of gatekeeping did not involve individual attorneys who decided to go rogue or who ignored office policies by making the bail litigation decision for persons charged with a crime. In fact, the management of the Legal Aid Society created policies giving supervising attorneys—and not the person accused of the crime—veto power over bail litigation that management determined could result in unfavorable caselaw.¹⁵⁶ There were some notable examples of this dynamic.

In one example, during the lead up to the effective date of New York's bail reform law, the Legal Aid Society prepared to strategically litigate against the anticipated pushback from prosecutors and judges, who would narrow the reform's application. Management decreed once the new bail law went into effect, both Decarceration Project attorneys and criminal trial office attorneys would need to get approval from management before challenging a person's pretrial detention beyond the trial level decision. Management expressed concern that litigating all bail decisions without scrutiny could result in bad bail caselaw. The management policy meant the interests of the individual client would be ignored if the client's narrative was not deemed sympathetic enough and, thus, created a danger of establishing detrimental caselaw for all people charged with a crime. To the Decarceration Project attorneys, this policy raised ethical concerns as it took the decision to litigate bail out of the clients' hands and did not take their individual needs into consideration. When these ethical concerns were raised

155. This completely ignores many studies which have shown how a plea offer is usually worse for someone who is in pretrial detention. See generally Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. L. ECON. & ORG. 511 (2018); Samuel R. Wiseman, *Bail and Mass Incarceration*, 52 GA. L. REV. 235 (2018).

156. I focus on the veto power by the supervisors in this example, and not the reason for management's policy. Whether or not bail litigation could result in unfavorable caselaw is a different issue beyond the scope of this Article.

to management, the response was: “[W]hat ethical concerns?”¹⁵⁷ Although defense attorneys are ethically bound to zealously represent individuals in their cases, there is no ethical rule or caselaw saying the individual charged with a crime is the one who decides when and how to continue litigating bail, or outlines the considerations which must guide an attorney’s decisionmaking in this regard.¹⁵⁸

A second example of management vetoing bail litigation without client input involved appeals of bail writs. Management required Decarceration Project attorneys to consult with the supervisor of the Decarceration Project to screen and vet potential bail writ cases for appeal. Because these appeals were civil in nature, attorneys lacked a clear understanding of what obligations were owed to the person for whom the writ was pursued. One appeals supervisor explained how, because bail writ litigation was being heard by a civil court rather than a criminal court, there was no obligation to consult with the person charged with a crime regarding bail litigation in those instances.

The appeals supervisor believed there was no requirement to litigate bail beyond the trial level in criminal court because the avenue for litigating bail was civil in nature. As a result, management could decide which cases would be appealed and which would not. Although appellate strategy can legitimately consider the strength of any argument on appeal, there was never a step in the vetting process in which the person who was in pretrial detention had a say. Instead, most instances would see a Decarceration Project attorney become a de facto advocate for the detained person in the hopes of convincing management to permit an appeal.

In each of the previous examples of gatekeeping, we can tease out the rationales the attorneys had for not seeking the release of their incarcerated client, with certain themes emerging. One is the need to control the client for fear of the

157. I was participating on a phone conference when this was said. Ultimately, management agreed that attorneys could consult an ethics expert when the issue arose. The COVID-19 pandemic, however, halted any further development over this proposed policy, which, as of my departure from the Decarceration Project, remained unimplemented.

158. Courts have ruled that although the person charged with a crime is the only person who can waive an appeal, the defense attorney’s authority to make strategic decisions extends to deciding which issues to appeal postconviction. Further, courts have held postconviction appellants have diminished interests compared to those still in the pretrial phase of their case. *See, e.g.,* *Martinez v. Ct. of Appeal of Cal., Fourth App. Dist.*, 528 U.S. 152, 162–63 (2000) (holding that a defendant’s postconviction autonomy interest is outweighed by the government’s interest in ensuring the “integrity” and “efficiency” of the trial). *See also* Robert E. Toone, *The Incoherence of the Defendant Autonomy*, 83 N.C. L. REV. 621, 627 (2005). The decision to pursue pretrial bail litigation, however, is different because the person charged with a crime is still presumed innocent at the point where litigation decisions are made, which would presumably leave their interests undiminished in the court’s estimation.

client making a bad decision once released. Another theme is making sure the client took the attorney's advice to plea when the attorney thought it was the best decision to ensure the least amount of incarceration feasible under the circumstances. Another theme was fear of release, and the person charged with a crime not returning to court. As noted previously, one of the factors judges consider when making a bail decision is the risk of flight. There were public defenders making their own decisions about their perceived concerns their clients would flee who chose to reject the Decarceration Project involvement in those cases. Regardless of the rationale, the broader, unavoidable implication is the attorney decided the best interest of the client was to stay in jail, rather than be at liberty pretrial.

The Decarceration Project's role in these examples helps control for other factors¹⁵⁹ commonly highlighted when typically examining public defenders' participation in a system of mass incarceration. For example, the involvement of Decarceration Project attorneys helped minimize the lack of quality of representation, since the goal of the Project was to help ensure that all viable opportunities for decarceration were pursued. Other notable factors include the persistent trend of public defenders being simultaneously underfunded and having responsibility over very large caseloads. These two issues in particular have led to some public defenders' inability to meet their ethical obligations, even if they wanted to do so, given the competing demands of many clients and finite resources to allocate to their defenses.¹⁶⁰ The examples of gatekeeping observed through the Decarceration Project allow us to separate some of those issues from the analysis of what causes some public defenders to engage in gatekeeping. Given the Decarceration Project's creation as a unit specifically designed to solve the issue of overwhelmed public defenders by making available to them the assistance of other attorneys, social workers, and paralegal case handlers who were specialized in bail litigation, we can evaluate these examples free from the constraint of presuming resource limitations as a primary motivator behind the behavior of the public defenders in each case.

159. Dru Stevenson, *Monopsony Problems With Court-Appointed Counsel*, 99 IOWA L. REV. 2273, 2286 (2014) ("In recent years, academic commentary addressing appointed counsel has focused on the chronic problems of providing indigent defense: pervasive lack of funding, lack of quality representation, case overload and so on. . . . Cases routinely appear to be under-investigated and under researched, and assignments often go to unqualified, inexperienced lawyers, even for capital cases.").

160. See Oritseweyinmi Joe, *supra* note 42, at 392 (detailing how public defender offices are forced to pick and choose which clients or tasks to prioritize because of overwhelming caseloads and ultimately fail at providing effective assistance of counsel).

Accordingly, we can presume with a reasonable degree of confidence the public defenders in each example were not basing their decisions in response to limited resources. Further, we can presume the public defenders were acting purely upon consideration of whether they believed an effort to seek their client's pretrial release melded with the public defender's own beliefs about what their client's pretrial release status should be. These public defenders in the previous examples were offered the resources to focus on the bail litigation of clients being held in pretrial detention, which they rejected. And although this Article does not deny resource and funding issues are definitely part of the equation when it comes to how public defenders can inadvertently contribute to mass incarceration, it seeks to introduce and explore an issue which has not been noted by any other scholars of mass incarceration: namely, intentional gatekeeping by public defenders resulting in less bail litigation (often contrary to the client's own wishes), which, in turn, results in more individuals remaining in pretrial detention.

The attorneys' self-stated reasons for supplanting their clients' decisionmaking with their own are worthy of further exploration. But, a more critical step is to determine how and why the criminal legal system permits, and in many ways endorses, gatekeeping by public defenders.

B. Reasons

To find answers, it is worthwhile to explore how public defenders can behave this way within a practice where they are the only system actors tasked with zealously representing the person charged with a crime. Gatekeeping does not occur in a vacuum, and several factors contribute to why it is allowed to happen at all, including the silence of the profession's legal canon and practice norms regarding the client's liberty interests and the attorney's obligation to zealously defend them.

1. Silence in Legal Canon

The profession's legal canon comprises the ethical rules and caselaw governing the bounds of its practice, including the "autonomy rights"¹⁶¹ attorneys are obligated to respect. Regarding gatekeeping, there is no canon signaling to a

161. The term was coined by Kathryn Miller and refers to the current six decisions the Supreme Court has deemed to belong only to the person charged with a crime. See Kathryn E. Miller, *The Myth of Autonomy Rights*, 43 *CARDOZO L. REV.* 375 (2021). They are the right to self-representation, the right to plead guilty, the right to waive a jury, the right to testify, the right to waive appeals, and the right to maintain innocence at a capital trial. See *id.*

public defender that bail litigation decisionmaking is or should be reserved to the person whose liberty has been infringed; nor is there a canon expressly reserving the authority for public defenders to make these decisions themselves. The legal canon is, effectively, silent on this issue, though the legal canon's cumulative guidance tends toward permitting attorneys to either make decisions regarding bail litigation without consulting their clients or to outright overrule their clients' wishes whenever the defender and the client are at odds. Below I discuss the silence regarding the bail litigation decision in the ethical rules, autonomy rights jurisprudence, and ineffective assistance of counsel caselaw.

Although we are largely left to speculate about why ethical rules are silent on bail litigation, we can posit some possibilities. One possibility is there is a presumption within the profession of the public defender's values and the person charged with a crime's values lining up, and, therefore, of no conflict existing between them. This presumption could be rooted in the general mandate for attorneys to "zealously assert the client's position under the rules of the adversary system."¹⁶² A second possibility is the presumption of attorneys being able to accurately gauge the best interests of their clients, being entrusted to pursue them, and performing a balance among competing interests—like the interests of securing pretrial release versus securing a favorable plea or trial outcome. Whatever the bases for these presumptions, reality strongly refutes their validity.¹⁶³

a. Ethical Rules

The American Bar Association's (ABA) *Criminal Justice Standards for Defense Function* contains a section titled "Seeking a Detained Client's Release from Custody, or Reduction in Custodial Conditions." This section states: "Counsel should request reconsideration of detention or modification of conditions whenever it is in the client's best interests."¹⁶⁴ A separate statement in

162. MODEL CODE OF PRO. RESP.: PREAMBLE & SCOPE § 2 (AM. BAR ASS'N 2020).

163. See Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 MERCER L. REV. 715, 732–33, 737 (2018) ("Public Interest lawyers can become overwhelmed by the tragedies of their clients' lives, seeing only deficits, rather than resilience, [and] 'may struggle to reconcile a duty to abide by a client's decisions concerning the objectives of the representation with the realities of a severely underfunded criminal justice system . . .'" (quoting Ann Southworth, *Our Fragmented Profession*, 30 GEO. J. LEGAL ETHICS 431, 437 (2017))).

164. CRIM. JUST. STANDARDS.: DEF. FUNCTION § 4–3.2(g) (AM. BAR ASS'N 2017). Tellingly, the ABA's standards do not define best interests, leaving significant room for interpretation. *Id.* § 4–1.1(a).

the beginning of the standards makes it clear that this guidance is all aspirational.¹⁶⁵ As explained by the ABA, “the words ‘should’ or ‘should not’ are used in these Standards, rather than mandatory phrases such as ‘shall’ or ‘shall not’ to describe the conduct of lawyers that is expected or recommended under these Standards.”¹⁶⁶

While much of the guidance issued by the ABA was adopted by the Supreme Court jurisprudence on the obligations of defense counsel to those they represent, the ABA is free to modify its standards beyond those now set by Supreme Court caselaw. Despite this, the ABA has yet to issue guidance specific to whether the decision to seek pretrial release should be reserved to the person charged with a crime or to their public defender. Instead, its guidance presumes the authority for defense counsel to make this decision without stating such authority outright or articulating a basis for why this decisionmaking should be entrusted to counsel.

The ABA’s *Model Rules of Professional Ethics*, like its *Criminal Justice Standards for Defense Function*, are silent on this as well. Paragraph (a) of Rule 1.2 of the model rules (entitled “Scope of Representation & Allocation of Authority Between Client & Lawyer”) states: “[In] a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive a jury trial, and whether the client will testify.”¹⁶⁷ In other words, under the ABA’s model rules, persons charged with a crime only have direct authority to make certain enumerated decisions relating either to their trial (like whether to testify or waive a jury) or their case’s disposition (like whether to plea and to which charges). These rules, and their silence on a person’s authority to initiate bail litigation, serve to default responsibility over bail litigation decisionmaking to the public defender.

b. Autonomy Rights Jurisprudence

Despite what is known about the consequences of pretrial detention and the value of autonomy at this juncture, the critical decisions needing to be made once bail is set have been, by default, left in the hands of the public defender. Under its Sixth Amendment jurisprudence, the Supreme Court has ruled there are certain “[f]undamental criminal procedure rights . . . so personal to the accused that only

165. *Id.* § 4-1.1(c).

166. *Id.*

167. MODEL RULES OF PRO. CONDUCT R. 1.2(A) (AM. BAR ASS’N 1983).

the accused can waive them,¹⁶⁸ which legal scholar Erica Hashimoto calls “autonomy interests.”¹⁶⁹

The Supreme Court’s recognition of autonomy for a person charged with a crime—at least in the certain limited circumstances listed above¹⁷⁰—reflects “a broad and powerful principle—namely that the right to control the defense of one’s own case has deep roots in both the text and the history of the Constitution.”¹⁷¹ Whereas the strategic decisions reserved for defense counsel are fundamentally decisions about how to achieve the defense’s objectives in a case,¹⁷² the decisions reserved for a person charged with a crime define what those objectives are.

In its 2018 decision in *McCoy v. Louisiana*,¹⁷³ the Supreme Court cited prior precedent to explain why the decision to represent oneself in a case was one of those fundamental decisions which could be made only by a person charged with a crime.¹⁷⁴ Specifically, the Court reiterated “the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty;”¹⁷⁵ such choices could not properly be made by a person’s counsel. In another case, Justice Antonin Scalia explained how, as between a person charged with a crime and their counsel, “our system of laws generally presumes that the defendant, after being fully informed, knows his own best interests and does not need them dictated by the state.”¹⁷⁶ Finally, in *Faretta v. California*,¹⁷⁷ the Court stated:

Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. . . . [A]lthough he may conduct his own defense ultimately to his own detriment, his choice must be honored out of ‘that respect for the individual which is the lifeblood of the law.’¹⁷⁸

168. Metzger, *Fear of Adversariness*, *supra* note 36, at 2556 (citing *New York v. United States*, 528 U.S. 110, 114–15 (2000)); *see also supra* p. 10 (discussing specific rights currently recognized by the Supreme Court).

169. Hashimoto, *infra* note 171, at 1153.

170. *See supra* footnote 162.

171. Erica Hashimoto, *Resurrecting Autonomy: The Criminal Defendant’s Right to Control the Case*, 90 B.U.L. REV. 1147, 1148 (2010).

172. *See McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* (citing *Martinez v. Ct. of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring)).

177. 422 U.S. 806 (1975).

178. *Id.* at 834 (citation omitted).

This body of caselaw, both in its holdings and its dicta, reflects a strong undercurrent of constitutionally rooted logic tending toward recognizing a person's autonomy to determine important aspects of their criminal defense—particularly to the extent their liberty interests are directly impacted by those determinations. Given the clear intersection between bail litigation and the liberty outcomes arising from it, one can see how pursuit of bail litigation decisions should fall within the same category as those personal decisions already recognized by the Court's precedent. Pursuing bail litigation is not a decision over how to achieve a defense objective; it is, in fact, a decision determining the bounds of key defense objectives. In other words, the decision to seek pretrial release or not acts as the inflection point determining the trajectory of all subsequent case-related decisionmaking, including those decisions specifically reserved by the Supreme Court to the person charged with a crime. A person's pretrial status—particularly whether they are incarcerated or not—can determine how they exercise each subsequent decision specifically reserved to them, like whether to plead guilty or waive a jury trial. This fact transforms the bail litigation decision from a simple tactical decision to the chief decision, from which virtually all others will find their root. Further, the extent to which the Court's autonomy precedent is cognizant of the grim consequences, like incarceration, resulting from the outcomes of fundamental decisions, makes it surprising bail litigation decisionmaking has yet to be recognized as one of these fundamental decisions. If a bail litigation case ever does make it up to the Supreme Court, one could assume (and hope) the Court would extend the logic of its autonomy umbrella to bail litigation decisionmaking.

c. Caselaw on the Ineffective Assistance of Counsel

Although many appeals filed by people charged with a crime argue their counsel was ineffective for not litigating bail or not opposing pretrial detention, there is no body of law recognizing that the decision to seek pretrial release belongs to the client. This silence in the caselaw is most likely the result of what many scholars have argued is a toothless ineffective assistance of counsel standard.¹⁷⁹ Under the Supreme Court's standard for ineffective assistance, set forth in *Strickland*,¹⁸⁰ an attorney's performance must fall below an objective standard of reasonableness and their performance must give rise to a reasonable probability, if they had performed adequately, of the result being different.¹⁸¹ This standard has

179. Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 STAN. L. REV. 1581, 1584 (2020).

180. 466 U.S. 668 (1984).

181. *Id.*

consistently failed to capture representational deficiencies arising from an attorney's decision to not seek pretrial release for their client. Examining *Strickland*'s two prongs demonstrates how a person charged with a crime would virtually never be able to show constitutionally defective representation, even if they could show they would have been released if bail litigation had been pursued.¹⁸²

Strickland erects a barrier from the outset under its first prong, which requires showing an attorney's representation fell below an objective standard of reasonableness.¹⁸³ This requirement alone is a near impossibility for aggrieved people charged with crimes to meet given the profession's presumption that pursuing pretrial release is a decision vested with defense counsel and not with defendants. Even if one could somehow demonstrate an attorney's representation fell below an objective standard of reasonableness, *Strickland*'s second prong would similarly present a nearly impermeable barrier.

To satisfy *Strickland*'s second prong, a person would have to demonstrate a reasonable probability—not a mere possibility—of the result of the deficient representation being different if the attorney had performed adequately.¹⁸⁴ The highly discretionary nature of judicial adjudication of bail litigation makes this showing exceptionally difficult. As discussed earlier, judges are routinely afforded broad discretion to evaluate bail factors, make bail amount determinations, impose pretrial conditions of release, and, where permitted, remand people charged with a crime to pretrial detention.¹⁸⁵ This discretion can be informed by a multitude of factors, including: personal judicial ideology; the facts of a case; the construction of statutory bail factors; judicial biases in favor or against a person charged with a crime; and other myriad factors.¹⁸⁶ Given this broad discretion and the limitless number of variables at play, variability in bail adjudication outcomes is high. This variability would make it difficult for an appellate court to conclude there would have been a reasonable probability of achieving a different result but for the attorney's inadequate level of representation. Isolating the attorney's level of representation from any other factors would be a daunting task for both the appellant and the appellate court.

182. *Id.*

183. *Id.*

184. *Id.*

185. See *supra* Subpart I.B. (describing the role of judges at the bail hearing).

186. See *supra* Subpart I.B. (describing the common factors judges consider when making bail decisions).

Given these difficulties, it is unsurprising there is no caselaw applying *Strickland* that finds against attorneys who usurp the decision to seek (or not seek) pretrial release from their clients. But the availability of cases where effective assistance challenges are mounted against such attorneys provides compelling anecdotal evidence of discontent with this practice by people whose liberty has been infringed by it.¹⁸⁷

2. Norms

Even more important than the theoretical and aspirational expectations of counsel is the behavior of public defenders in everyday practice. The gatekeeping witnessed by the Decarceration Project occurred in one of the oldest and largest nonprofit criminal defense organizations in the country,¹⁸⁸ where the practice

187. See, e.g., *Gonzalez v. Washoe Cnty. Pub. Defender's Office*, No. 3:22-cv-00172-MMD, 2022 U.S. Dist. LEXIS 155841 (D. Nev. June 7, 2022) (“Plaintiff alleges he was given excessively high bail and Edwards did not request a bail reduction, telling Plaintiff, ‘I have too many cases and you know that’ and that Plaintiff’s ‘desire to get out and run is apparent to all.’”); *Patterson v. United States*, No. 14 Civ. 7624, 2016 U.S. Dist. LEXIS 72150, at *10 (S.D.N.Y. June 2, 2016) (“First, Patterson asserts that his counsel’s assistance was ineffective because he was not advised of his right to a bail hearing”; *Ennis v. United States*, No. 12-CV-28, 2012 U.S. Dist. LEXIS 194603, at *19 (D. Wyo. Sept. 19, 2012) (“Petitioner’s sixth claim for ineffective assistance of counsel is that his attorney failed to zealously advocate for bail. Petitioner asserts that if he had been released on bail, he could have helped clear up errors in his criminal history and explain how ‘petty’ his past crimes really were.”); *People v. Langley*, 41 Cal. App. 3d 339 (Ct. App. 1974) (“Defendant contends her trial counsel was inadequate because he made no motions for reduction of bail, discovery, suppression of evidence, or change of venue.”); *Condon v. Carlin*, No. 3:14-cv-00043, 2016 U.S. Dist. LEXIS 66875, at *10 (D. Idaho May 20, 2016) (“Petitioner’s third claim is a Sixth Amendment ineffective assistance of counsel claim. He alleges that his trial counsel erred in withdrawing a ‘motion for pre-trial release,’ seeking to reduce bail. He asserts that, had he been released on bail, the outcome of his sentencing hearing would have been different.”); *Akinola v. United States*, No. 04-2757, 2006 U.S. Dist. LEXIS 10484, at *7 (D.N.J. Feb. 23, 2006) (“Akinola asserts that his first attorney, Ms. Biancamanno, and his second attorney, Mr. McInnis, were ineffective because they failed to argue for bail pending trial and that movant was thus unlawfully detained.”); *Robben v. State*, Nos. 04-07-00019-CR, 04-07-00020-CR, 04-07-000-21-CR, 04-07-00022-CR, 04-07-00023-CR, 04-07-00024-CR, 04-07-00025-CR, 2008 Tex. App. LEXIS 1573, at *12 (Tex. Ct. App. Mar. 5, 2008) (“Robben argues that his counsel was deficient in failing to obtain reasonable bail”); *Harling v. State*, 899 S.W.2d 9 (Tex. Ct. App. Mar. 8, 1995) (“Appellant argues he was denied effective assistance when counsel failed to file a motion for reduction in bail.”); *State v. Sigler*, 789 N.W.2d 166 (Iowa Ct. App. 2010) (“On appeal, Sigler argues his defense counsel rendered ineffective assistance of counsel when he failed to object to the State’s motion to revoke Sigler’s bail on the grounds that it violated the parties’ plea agreement.”); *Drennon v. Tennessee*, No. 3:16-CV-2824, 2021 WL 838338 (M.D. Tenn. Mar. 5, 2021) (“Drennon’s first two claims . . . , and that his trial counsel’s refusal to request a bond hearing constituted ineffective assistance of counsel.”).

188. See Sol Stern, *The Legal Aid Follies*, CITY J. (1995), <https://www.city-journal.org/html/legal-aid-follies-11963.html> [<https://perma.cc/YH7F-UXGR>]; Shaun Ossei-

norms are ostensibly the most client centered. This practice ethos, however, has its obvious limitations. For example, the two examples of the Legal Aid Society's management declaring they had veto power to end bail litigation regardless of the individual client's wishes strongly indicates the prevailing view of attorneys making bail litigation decisions reflects institutional and not merely individualistic views.

The Legal Aid Society's website lists nine client rights, one of which states "[y]ou are entitled to have your legitimate objectives respected by your attorney. . . ."¹⁸⁹ But the qualifier in which a client's objectives must be legitimate effectively protects the attorney's role in being the ultimate arbiter of a client's interests, including in the context of bail and pretrial detention. In the several examples of gatekeeping outlined in this Article, this logic is endemic.

Beyond practice norms, there is an ideology, documented by some legal scholars,¹⁹⁰ of public defenders—with their wealth of legal knowledge and experience—knowing what is best for the indigent clients charged with crimes they represent and can, therefore, do whatever it takes to force those clients to do what the public defender thinks is best.¹⁹¹ In fact, there are some courts willing to find ineffective assistance of counsel if the defense attorney does not attempt to persuade the people charged with crimes to choose what the defense attorney believes is the best decision.¹⁹² A very popular trial manual for defense attorneys, for example, includes a section supporting the coercion of people charged with crimes into taking a plea if the attorney believes it is the option that will cause the least harm to the person charged with a crime.¹⁹³

Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1178 (2019).

189. *Your Rights as a Client*, LEGAL AID SOC'Y, <https://legalaidnyc.org/about/your-rights-as-a-client> [<https://perma.cc/6WA2-E7CA>].

190. See, e.g., Abbe Smith, *The Lawyer's "Conscience" and the Limits of Persuasion*, 36 HOFSTRA L. REV. 479, 481 (2007) ("The sort of coercion I have in mind goes beyond honest, painful counseling. I mean a range of behaviors, both subtle and not so subtle. On the subtle side is the deliberate use of trust, fear, guilt, sadness, and grief. Not so subtle behaviors include ganging up, hounding, and outright bullying.").

191. See generally Steve Ziedman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841 (1998) (arguing against the legal scholars and public defenders supporting coercive methods).

192. See, e.g., *Boria v. Keane*, 99 F.3d 492, 497 (2d. Cir. 1996). The U.S. Second Circuit Court of Appeals held there was ineffective assistance of counsel when a defense attorney did not try to persuade their client to take a plea deal. *Id.*

193. See ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES 3 (5th ed. 1988) ("counsel may forcefully urge the client to make choices that counsel believes to be in the client's best interests"); see also *id.* at 297 ("often the only way for counsel to protect the

Legal scholars have written about the erosion of the accused's autonomy in general and the usurpation of decisions belonging to the person charged with a crime, including the silencing of indigent people charged with crimes by their public defenders.¹⁹⁴ These scholars have written comprehensive studies of these dynamics, and this Article offers only a brief summation. This includes the effects of silencing indigent people charged with crimes, which “prevents defendants from contesting aspects of the proceedings that are unfair or harmful to them.”¹⁹⁵ This silencing also adds to a structural issue: “This may lead to worse outcomes in [indigent peoples'] cases, but it also functions as part of a larger, well-documented struggle over ‘narrative social power’ in which the experiences of those targeted by criminal laws are ignored and devalued.”¹⁹⁶

III. IMPLICATIONS OF GATEKEEPING IN THE BAIL CONTEXT

When public defenders gatekeep bail litigation, the natural consequence is fewer bail applications. Fewer bail applications, in turn, results in a lower likelihood of people being freed during pretrial detention. There are, however, other implications of public defender gatekeeping. What follows is a discussion of three of the most prominent implications: continued racial subordination, broken trust between public defenders and persons held in pretrial detention, and reduced judicial review of bail decisions.

A. Race

While bail statutes are race neutral¹⁹⁷, there are many studies and articles showing how in practice, they are not; and a person's race has clear implications for the outcome of their bail determination.¹⁹⁸ Furthermore, attempts to remove

client from disaster is by using a considerable amount of persuasion to convince the client that a plea which the client instinctively disfavors is, in fact, in his or her best interest”).

194. See, e.g., Monica Bell, *The Community in Criminal Justice: Subordination, Consumption, Resistance, and Transformation*, 16 DU BOIS REV. 197, 199 (2019); see, e.g., Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449 (2005).

195. Hanan, *supra* note 90, at 501.

196. *Id.*

197. Arnold et al., *supra* note 47, at 4–6.

198. See generally Lennard, *supra* note 8; Charles M. Katz and Cassia C. Spohn, *The Effect of Race and Gender in Bail Outcomes: A Test of an Interactive Model*, 19 AM. J. CRIM. JUST. 161 (1995) (examining the dynamics of race, gender, and bail); David Arnold, Will Dobbie & Peter Hull, *Racial Bias in Bail Decisions*, 112 AM. ECON. REV. 2992 (2022) (applying a racial bias lens to bail adjudication); Marcia Johnson & Lockett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris*

racial bias from the bail decision, including using risk assessment tools, have been deeply flawed.¹⁹⁹ Many of these risk assessment tools, for example, were developed using data from the same racially biased criminal legal system that originated the problematic bias in the first place.²⁰⁰ Race, therefore, matters in the bail decision, and race has significant implications when it comes to public defenders' gatekeeping people from fighting for freedom.

Public defenders are more likely to be white and privileged than the people they represent,²⁰¹ and most people accused of crimes will be represented by a public defender.²⁰² The majority of Black people accused of crimes at the state and federal level are represented by public defenders.²⁰³

Alexis Hoag, in her article *Black on Black Representation*, points out how lack of diversity in the legal profession leads to predominantly white public defenders representing Black people charged with crimes.²⁰⁴ By extension, the same assuredly holds true for other underrepresented groups, like indigent Latinx people charged with crimes. The harm from predominantly white people making decisions for predominantly people of color, arises from the anthem of Critical Race Theorists: "[R]ace matters."²⁰⁵

In the gatekeeping context, race matters because of in-group favoritism,²⁰⁶ unconscious bias,²⁰⁷ and the unseemly implications of race-based power

County, Texas, 7 NW. J. SOC. POL'Y 42, 65 (2012) (examining a case study from Texas)); Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 U. KAN. L. REV. 879 (2009) (exploring race and sex dynamics in the federal bail context)).

199. See Ngozi Okidegbe, *The Democratizing Potential of Algorithms?*, 53 CONN. L. REV. 739 (2022).

200. See *id.*

201. See Hoag, *supra* note 42, at 1497.

202. *Id.* at 1496, n. 19.

203. *Id.*

204. *Id.* at 1497.

205. Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1335 (1988) ("This expanded critique presents race consciousness as a central ideological and political pillar upholding existing social conditions; race consciousness, I contend, must be taken into account in efforts to understand hegemony and politics of racial reform.").

206. See generally Anothony G. Greenwald & Thomas F. Pettigrew, *With Malice Toward None and Charity for Some: Ingroup Favoritism Enables Discrimination*, 69 AM. PSYCH. 669 (2014) (describing how in-group favoritism can lead to harms against other groups even when no such harm is intended).

207. See L. Song Richardson & Phillip Atiba Goff, *Implicit Bias in Public Defender Triage*, 122 YALE L.J. 2627, 2629 (2013). L. Song Richardson and Phillip Atiba Goff write:

Implicit social cognition is a branch of psychology that studies how mental processes that occur outside of awareness and that operate without conscious

imbalances manifesting even within the sacred attorney-client relationship.²⁰⁸ It is not only that white privileged people should not usurp a Black or Latinx person's decisions over their freedom because it perpetuates racial subordination, but also because public defenders may not be in the best position to make this vital decision, especially in light of studies demonstrating public defenders have their own biases.²⁰⁹

If there is any doubt over whether public defenders can be biased because of the mythology around their purported heroic roles, Hoag points out “[t]he existence of anti-Black bias among defense counsel is well-documented.”²¹⁰ Even public defenders, and former public defenders turned legal scholars, have written about the harm public defenders cause their nonwhite clients.²¹¹

Sociological observations of courtrooms support the conclusions reached by these studies. Nicole Gonzalez Van Cleve notes how daily courtroom practice involves the racialized moral pricing of someone charged with a crime. This price is then compared to the cost incurred by an attorney for zealously advocating for that person, which might erode an attorney's standing before the court if the person's valuation is low.²¹² According to Gonzalez Van Cleve, “[t]his triage gauging capital or ‘goodwill’ of the courts and moral pricing of defendants requires seeing your clients through the racialized lenses of the Cook County Courts, much like placing a price on slaves and gauging their worth. Each defendant had a going rate, and part of defending was knowing that value in the market of the court.”²¹³

control can affect judgments about and behaviors toward social groups. These unconscious processes are simply an extension of the way humans think and process information. Briefly stated, our mental processes facilitate decisionmaking by making automatic associations between concepts.

Id.

208. CLAIR, *supra* note 42, at 74 (explaining how the power asymmetry in attorney client relationships combined with a difference in everyday cultural experiences leads to mistrust within the attorney client relationship of criminal defense attorneys and “working class, poor, and racially marginalized defendants”).

209. See generally Richardson & Goff, *supra* note 207.

210. Hoag, *supra* note 42, at 1497.

211. See Oritseweyinmi Joe, *supra* note 42, at 398–99 (“[L]awyers will make decisions about which clients will receive which level of representation through a lens that is affected by the lawyer’s own background and preconceived notions. Such behavior or actions would undermine the role of the of the public defender in establishing a fair process for indigent persons charged with criminal offenses.”); see also Jeff Adachi, *Public Defenders Can Be Biased, Too, and It Hurts Their Non-White Clients*, WASH. POST. (June 7, 2016, 12:31 PM), <https://www.washingtonpost.com/posteverything/wp/2016/06/07/public-defenders-can-be-biased-too-and-it-hurts-their-non-white-clients> [https://perma.cc/9Y3K-WXSF].

212. NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT 161 (2016).

213. *Id.*

This dynamic, while not expressly in the context of bail litigation, is nonetheless relevant. In this Article's examples of gatekeeping, this practice of moral pricing is evident in the actions of attorneys who made the decision about the worth of making a bail argument and the decision to keep someone in jail for what they deemed were good reasons. It is also evident in the concern the client would not return or be rearrested. Underlying these stated reasons is a calculus weighing the value of seeking pretrial release on behalf of someone. If judges are known to make bail decisions based, at least in part, on their own biases, then public defenders will inevitably undertake their cost-benefit analysis through this same racialized lens.²¹⁴ Accordingly, the same bias exhibited by a judge when determining bail will infect the public defender's representation before that judge. This dynamic adds to the public defender's own in-group favoritism and the implicit bias in triaging heavy caseloads.²¹⁵ These dynamics give cause to question whether public defenders would truly be able to determine whether their mostly nonwhite clientele are, objectively, strong candidates for pretrial release.

B. Broken Trust

Trust is integral to the relationship between a public defender and a person charged with a crime.²¹⁶ But the attorney-client relationship between indigent people accused of crimes and court-appointed lawyers is inherently fraught with distrust.²¹⁷ Among many who public defenders represent, there are stereotypes about court-appointed attorneys not being real lawyers, public defenders serving as public defenders because they could not get work anywhere else, or public defenders being in cahoots with—or working for—prosecutors' offices.²¹⁸ Less maliciously, there is often the perception, even if a public defender has good intentions, there is no way they can do all of the work they are required to do for all

214. See Arnold et al., *supra* note 47.

215. See Richardson & Goff, *supra* note 207, at 108–09 (concerning the high probability that implicit bias is a factor affecting triaging decisions public defenders make without a clear mechanism in place to check the harms caused to the indigent people they represent).

216. See U.S. ex rel. Wilcox v. Johnson, 555 F.2d 115, 122 (3rd Cir. 1977) (explaining that “mutual trust” between the attorney and client is “necessary to effective representation”).

217. See CLAIR, *supra* note 42, at 9 (“The disadvantaged, who are afforded court-appointed attorneys by law, nevertheless find themselves in attorney-client relationships that are fraught, commonly resulting in unfavorable legal outcomes and almost always leaving defendants feeling unheard and resentful.”).

218. See Steven Zeidman, Opinion, *The Year of the Public Defender*, GOTHAM GAZETTE, <https://www.gothamgazette.com/opinion-pieces/130-opinion/8662-the-year-of-the-public-defender> [<https://perma.cc/R83U-QTAC>].

their assigned clients,²¹⁹ or their routine relationship with prosecutors has made them more sympathetic to the views of alleged victims and they, therefore, cannot have the best interests of their clients in mind.²²⁰

Only through the development of trust between a public defender and those they represent can these fraught dynamics be addressed, especially when it comes to overcoming the racial dynamics inherent in indigent criminal defense work.

As noted by one sociologist, distrust between public defenders and those they represent can have dire consequences, including worse outcomes both in individual cases and in the aggregate across dockets.²²¹

C. Reduced Judicial Review

Part of the silence in court jurisprudence on bail issues generally arises as a direct consequence of gatekeeping. Specifically, gatekeeping greatly reduces the rate of bail litigation, which, in turn, reduces judicial opportunities to examine and address questions of law relating to bail.

When the Legal Aid Society decided to create a unit to focus on strategic bail litigation, one of the unit's stated goals was to have higher courts review bail decisions at the trial level in the hopes they would see how the old bail statute and the new bail statute were being ignored or misused.²²² But gatekeeping by some public defenders undermined this goal. When these attorneys decided to prevent further bail litigation, they took away the possibility of higher courts reviewing these cases and creating precedent to reverse adverse bail-related caselaw.

While the Decarceration Project case study examines the experience within just one public defender organization from New York City, the trend of gatekeeping contributing to reduced judicial review of bail should be studied in other jurisdictions as well. In California, a recent California Supreme Court decision, *In re Humphrey*,²²³ declared bail must be set in an amount the person

219. See CLAIR, *supra* note 42, at 64–65 (“The mistrust of court-appointed lawyers was profound; the complaints, numerous. . . . [T]hese attorneys could not be trusted to devote resources needed to advocate in their clients’ best interests. . . . The bottom line was simple: court-appointed defense attorneys as a group, could not be trusted to protect their interests or seek justice.”).

220. There are a multitude of reasons people do not trust court-appointed lawyers. See *id.* at 71.

221. *Id.*

222. *Decarceration Project*, THE LEGAL AID SOCIETY, <https://legalaidnyc.org/programs-projects-units/decarceration-project> [<https://perma.cc/6N4T-9TAA>].

223. *In re Humphrey*, 11 Cal. 5th 135 (2021).

charged with a crime can afford.²²⁴ After such a monumental decision, one would reasonably expect a flood of bail applications and bail litigation to follow; however, this does not appear to be the case. As highlighted in a report by the California Policy Lab, “[c]ontrary to expectations, effectively lowering bail amounts [after *Humphrey*] did not increase the number of individuals released on bail.”²²⁵ The report surmised, the study “demonstrates that . . . while pretrial reforms may alter the process and type of [pretrial] release, it may have limited effects on the overall jail population.”²²⁶ In an interview discussing the report, a research director with the California Policy Lab identified potential factors impacting how bail reform outcomes might be blunted, including through behavioral changes by system actors like prosecutors.²²⁷ To the extent expanded studies on the impact of California bail reform may be warranted, they would be wise to not overlook the potential for public defender gatekeeping as another potential factor affecting bail outcomes.

IV. PRESCRIPTION AND LIMITATIONS

Although the primary purpose of this Article is to introduce and explore the problem of public defender gatekeeping and to spur further scholarly investigation into it, even during this early exploration there is an apparent prescription that can begin to address it. Foremost, reforming the legal canon directing how public defenders approach their representation of indigent people charged with crimes is critical. This would involve establishing a clear ethical rule prohibiting gatekeeping in the bail context by specifically reserving decisionmaking over whether to initiate or continue bail litigation to the person held in pretrial detention and not their lawyer.

One step likely discouraging gatekeeping in the bail litigation context is to amend the ethical rules governing client-controlled decisionmaking. Paragraph (a) of Rule 1.2 of the ABA’s *Model Rules of Professional Ethics* currently states that “[in] a criminal case, the lawyer shall abide by the client’s decision, after

224. *Id.* at 143.

225. JOHANNA LACOE, ALISSA SKOG & MIA BIRD, CAL. POL’Y LAB, BAIL REFORM IN SAN FRANCISCO: PRETRIAL RELEASE AND INTENSIVE SUPERVISION INCREASED AFTER HUMPHREY 3 (2021) (discussing the results of a case study analysis of the impact of *In re Humphrey* in San Francisco).

226. *Id.* at 5.

227. Matt Keyser, Q&A, *California Supreme Court Creates ‘Tidal Shift’ in Pretrial Justice System*, ARNOLD VENTURES (Aug. 10, 2021) <https://www.arnoldventures.org/stories/california-supreme-court-creates-tidal-shift-in-pretrial-justice-system> [<https://perma.cc/RH4P-S79D>].

consultation with the lawyer, as to a plea to be entered, whether to waive a jury trial, and whether the client will testify.”²²⁸ The ABA could amend this rule by adding a provision requiring criminal defense attorneys to counsel their clients on how to challenge their pretrial detention and mandating those attorneys to abide by their clients’ decisions whether to seek pretrial release when doing so would be nonfrivolous. This ethical rule would serve the immediate purpose of resolving any doubts public defenders may have over who is allowed to make this critically important decision. Instituting a new ethical rule prohibiting gatekeeping would impact public defense practice in a number of ways. First, it would empower persons held in pretrial detention to proactively seek their pretrial release rather than having their pretrial detention status treated as yet another strategic consideration in a defense calculus controlled by the public defender. Removing authority from the public defender to the detained person will, predictably, result in a jarring adjustment for long-time public defense practitioners. The shift, however, would align public defense practice with the autonomy right’s jurisprudence, which says only the accused can waive rights that are “so personal to the accused.” Given that a person’s liberty interest is personal, and that pretrial detention directly infringes on that interest, it follows that the decision to challenge pretrial detention should fall within the established autonomy rights paradigm.

Second, instituting a new ethical rule would compel public defenders, during the earliest stages of their representation, to discuss with their clients the availability of colorable avenues for seeking pretrial release. Much in the same way public defenders must discuss with their clients the rights to waive a jury trial, to testify at trial, and to plead guilty, so would they be compelled to discuss available options for seeking pretrial release. This compulsion would have a particular impact in jurisdictions where counsel is routinely assigned after an initial bail determination has been made and where public defenders do not routinely seek a bail review after their assignment. Public defenders in such jurisdictions would effectively be mandated to discuss bail litigation options with people held in pretrial detention and to abide by their decisions as to which, if any, options to pursue. Consequently, the detained person would be situated as not just a participant in their defense but also as a recognized pretrial decisionmaker. Further, the public defense profession’s norms of practice would shift, with the standard of reasonableness for effective assistance of counsel including the provision of advice regarding available options for bail litigation.

228. MODEL RULES OF PRO. CONDUCT, 1.2 (A) Scope of Representation & Allocation of Authority Between Client & Lawyer (AM. BAR ASS’N 1983).

Finally, a change in ethical rules could serve to reinforce the central legal principles and values upon which the criminal legal system, at its most ideal, is built. The values of liberty, autonomy, and due process—and through it the right to be heard—would all be advanced directly by anti-gatekeeping ethical rules.

The argument of a mere ethical rule helping improve the agency of people charged with crimes in the bail litigation context raises some concerns and questions. First, there is the concern an ethical rule will not have a great enough impact and something grander should be pursued instead—particularly since there are attorneys who either intentionally disobey their ethical obligations or for whom resources constraints limit compliance. Although there is truth to these contentions, they ignore the importance of ethical rules in shaping the criminal defense profession, including public their representation and can reinforce important concepts like autonomy rights.²²⁹ By and large, attorneys who gatekeep are not bad apples; many, in fact, go above and beyond by exploring the detained person's bail litigation options, a practice not mandated by law or practice norms.²³⁰ These attorneys typically care about their ethical obligations, and there is every expectation they would similarly abide by an ethical rule shifting the bail litigation decision to their client.

Second, why not simply make bail reviews mandatory? Some states, like Maryland,²³¹ already do so. But this approach has limitations of its own. In Maryland, for example, a public defender is not appointed at the bail hearing stage and is also not always appointed prior to the mandatory bail review.²³² As such, persons may enjoy the benefit of having their bail status reviewed but are deprived of the benefits of legal representation. Even in states with a right to counsel at a bail hearing, like New York, a mandatory bail review, while helpful,²³³ will not by itself address gatekeeping. Without an ethical rule to accompany the mandatory bail review, such reviews could become perfunctory for attorneys seeking to advance the case past a required procedural hurdle and closer to disposition.

Third, the Supreme Court has refused to recognize the bail hearing as a critical stage and, therefore, does not require counsel be present for a bail hearing.

229. *Id.* at r. 1.2.

230. *Supra* Subpart II.A. (describing the circumstances under which public defenders were gatekeeping).

231. Colbert, *Connecting Theory and Reality*, *supra* note 24, at 177. Maryland also requires bail reviews. MD. CODE ANN, CRIM. PROC. § 4-216.2 (West 2017).

232. Colbert, *supra* note 24, at 177.

233. *See* Weldon, *supra* note 113, at 2429–31.

An ethical rule cannot resolve this bigger hurdle. Getting the Supreme Court to include the bail litigation decision in the autonomy rights is going to be a heavy lift, even though there are strong arguments to be made of a bail hearing being considered a critical stage.²³⁴ Additionally, the ABA standards on autonomy rights preceded the Supreme Court's decisions, which adopted and expanded upon them.²³⁵ Recognizing a bail litigation autonomy right could, therefore, serve as an important precursor to an evolution in the Court's autonomy rights jurisprudence. Even without a change in the Court's jurisprudence, an ethical rule would require defense counsel to discuss bail litigation with someone in pretrial detention regardless of when counsel had been assigned, since bail litigation is not limited to the initial setting of bail upon arraignment. Rather, it can be commenced after counsel has been assigned, whenever the assignment occurs. If the ethical rule prescribed above is enacted, public defenders would be required to discuss bail litigation options with their clients and then abide by the client's decision accordingly. For public defenders who shirk this ethical responsibility, the rule's existence would help the person charged with a crime overcome the first hurdle of the *Strickland* standard in challenging the effectiveness of the representation they received.

Fourth, will an ethical rule spread already-scant public defense resources more thinly and prevent public defenders from investing those resources in other critical stages of a case? This Article demonstrates how bail litigation, and the decision to pursue it, is one of the most critical points in a criminal case, with the potential to determine its trajectory and ultimate resolution. Accordingly, there is inherent and indispensable value in respecting the autonomy of the person in pretrial detention, who must live with the consequences of the decision of whether to litigate bail. Therefore, to the extent the rule will require public defenders to invest time, resources, and energy in this stage of their representation, the investment is worthwhile. Further, the work invested in preparation of bail litigation helps form a foundation for work at other stages of the case, including plea negotiations and trial. Investigation into the facts of a case and how they relate to applicable bail factors serves to develop the defense's overall

234. See Gerstein, *supra* note 24, at 1513. Charlie Gerstein highlights the lack of a federal right to counsel at bail hearings because they have not been deemed a critical stage. *Id.* at 1529–34. Gerstein, however, also argues, “[c]onsidering the conceptual link between critical-stage jurisprudence and prejudice analysis under *Strickland*, as well as the Court’s expansion of prejudice in *Cooper* and *Frye* to include pleas, both of these strands support finding bail to be a critical stage.” *Id.* at 1528.

235. Robert E. Toone, *The Absence of Agency in Indigent Defense*, 52 AM. CRIM. L. REV. 25, 40 (2011).

narrative of the case. This investigation will familiarize the defender and their client with the case's relevant evidence, the government's interpretation of the evidence, and the court's consideration of it. These steps are already recommended by the criminal defense profession's minimum standards for effective representation,²³⁶ so the overall effort expended to meet this new ethical obligation would not be considerably higher than defenders are already expected to invest. Certainly, the reality is that the persistent lack of resources for public defenders already makes it difficult for them to litigate as often as their clients may want them to, or as often as public defenders themselves would like to. However, recalibrating the distribution of decisionmaking authority, with all of its attendant resource demands, serves to reveal that existing resource constraints are even more severe than already understood, which makes the argument for further investments into public defense even more compelling.

And, finally, what if the client's decision to litigate bail conflicts with the public defender's obligation to refrain from making arguments in court unless they are reasonably grounded in fact or law?²³⁷ Simply, the prohibition against frivolous or baseless arguments²³⁸ would still apply, just as it applies when it conflicts with other decisions reserved for the person charged with a crime.

As mentioned with describing the prescribed ethical rule proposed herein, this rule would be only an initial step toward addressing gatekeeping. It would, however, be an important one, along with other reforms which, while not about the bail litigation decision, would help the public defense bar move away from its predominant paternalistic norms.²³⁹

236. Criminal Justice Section, *Criminal Justice Standards: Defense Function*, 4 A.B.A. SEC. CRIM. JUST. SEC. § 4-1.1, § 4-3.7(a)-(h) (2017).

237. MODEL RULES OF PRO. CONDUCT, r. 3.1 (AM. BAR ASS'N 1983).

238. *Id.*

239. See Godsoe, *supra* note 163, at 737. Cynthia Godsoe writes:

An anti-paternalistic world view lies at the heart of the participatory defense movement. The movement's core aim is to challenge the dominant practice framework of a largely passive criminal defense client By explicitly *not* deferring to the professional elite, challenging the status quo, and positing a novel view of expertise, participatory defense directly takes on the means questions that the Rules leave ambiguous. Accordingly, disagreements over strategies and tactics will not just sometimes arise in this context; rather, they are virtually inevitable. Defenders who embrace this model—and I argue here that they should—have to come up with a more coherent approach to disputes over means and strategies than the Rules provide.

Id.

CONCLUSION

“Though slavery was abolished, the wrongs of my people were not ended. Though they were not slaves they were not yet quite free. No man can be truly free whose liberty is dependent upon the thought, feeling, and action of others; and who has himself no means in his own hands for guarding, protecting, defending, and maintaining that liberty.”

—Frederick Douglass

With nearly half a million people held in pretrial detention across the United States, considering an underappreciated contributor to the problem of pretrial mass detention—public defenders—is timely. Although many public defenders strive to exemplify the ideals of zealous advocacy, many act as gatekeepers of bail litigation, substituting their own decisions on whether to seek pretrial release over those of the people they represent. The legal canon governing indigent representation, including the profession’s ethical rules, has promoted and accommodated this dynamic between public defenders and their clients. It is important to condemn this paternalism as unjustified, especially when predominantly white public defenders make decisions for indigent Black and Brown people charged with crimes. At a minimum, the American legal profession must make a change in the ethics code for public defenders, recognizing a client’s fundamental authority to decide whether to seek their own pretrial release.