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**INCARCERATING THE ACCUSED:
REFORMING BAIL FOR THE PRETRIAL
DETENTION OF JUVENILES AND YOUTHS
AGED EIGHTEEN TO TWENTY-ONE**

BY: LEIGHA A. WEISS

INTRODUCTION

“Money won’t buy you happiness, but it’ll pay for the search.”¹

In April of 2015, Kalief was arrested for disorderly conduct and resisting arrest after an alleged fight.² According to his brother, being arrested and possibly incarcerated “definitely brought back some bad memories.”³ As a result, on June 6, 2015, the day before his court date, Kalief committed suicide.⁴ According to his attorney, Paul Prestia, “the last time Mr. Browder had a case in Bronx County, it took them three years to dismiss the charges, and that’s why he’s no longer with us.”⁵

Five years earlier, on May 15, 2010, Kalief was accused of stealing a backpack and was identified by the victim during a police show-up.⁶ He was arrested by police and charged with grand

¹ Prince, AZQUOTES, <https://www.azquotes.com/quote/176158> (last visited Nov. 7, 2018).

² Ben Kochman, Shayna Jacobs & Bill Hutchinson, *Former Rikers Island Inmate Killed Himself Days before Facing New Charges in Court*, DAILY NEWS (June 11, 2015), <http://www.nydailynews.com/new-york/nyc-crime/exclusive-kalief-browder-died-days-court-appearance-article-1.2254078>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Jennifer Gonnerman, *Before the Law*, The New Yorker (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law>; Michael D. Cicchini & Joseph G. Easton, *Reforming the Law on Show-Up Identifications*, 100 J. CRIM. L. &

larceny, robbery, and assault.⁷ The police did not recover the backpack, or any other allegedly stolen merchandise, from Kalief.⁸ In fact, besides the victim's identification, there was no other evidence at all linking him to the alleged robbery.⁹

Kalief Browder, a sixteen-year-old African American boy from Bronx County, New York, subsequently spent three years at Riker's Island Correctional Facility awaiting a trial that would never occur.¹⁰ During his prison stay, Kalief was sent to solitary confinement, refused food and medical treatment, and was assaulted by correction officers and inmates alike.¹¹ Of the more than one thousand days that Kalief lived at Riker's, nearly eight hundred days were spent locked in solitary confinement.¹² In addition, Kalief attempted suicide on at least two separate occasions while incarcerated, but, he never received any mental health treatment or intervention.¹³ In 2013, Kalief was released from Riker's after the charges against him were finally dropped.¹⁴

As a result of Kalief's age and abject poverty, Kalief was a victim of unconstitutional bail procedures that resulted in his pretrial detention at Riker's Island correctional facility.¹⁵ Due to the fact that the age of criminal responsibility in New York State was sixteen, at that time, Kalief faced charges in adult criminal court.¹⁶ When he was arraigned, the judge set the bail at three

CRIMINOLOGY 2, 381 (Spring 2010)(show-up identification involves bringing the victim to the alleged perpetrator for identification. Unlike in a line-up or photo-array, which presents several possible people for identification, a show-up involves only the alleged perpetrator who is presented solely to the victim for identification).

⁷ Cicchini & Easton, *supra* note 6; Gonnerman, *supra* note 6 (2014).

⁸ *Id.*

⁹ *Id.*

¹⁰ Jim Dwyer, *A Life that Frayed as Bail Reform Withered*, THE NEW YORK TIMES, (June 9, 2015), http://www.nytimes.com/2015/06/10/nyregion/after-a-shocking-death-a-renewed-plea-for-bail-reform-in-new-york-state.html?_r=0.

¹¹ Eyder Peralta, *Kalief Browder, Jailed for Years without Trial, Kills Himself*, NPR (June 8, 2015), <http://www.npr.org/sections/thetwo-way/2015/06/08/412842780/kalief-browder-jailed-for-years-at-rikers-island-without-trial-commits-suicide>; Jennifer Gonnerman, *Kalief Browder*, THE NEW YORKER (June 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

¹² Dwyer, *supra* note 10.

¹³ Christie Thompson, *From Solitary to the Street*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/2015/06/11/from-solitary-to-the-street#.0clESyTIU>.

¹⁴ Gonnerman, *supra* note 6 (2014).

¹⁵ *Id.*

¹⁶ In 2018, New York State raised the age of criminal responsibility to eighteen. In October 2018, sixteen-year-olds were to be charged as juveniles and in 2019, seventeen-year-olds would similarly be subject to juvenile jurisdiction. This was a part of Governor

thousand dollars because Kalief did not pose a risk of failing to appear for his court dates.¹⁷ However, even though Kalief's family was required to pay only ten percent of the bail amount, they were never able to come up with three hundred dollars in order to obtain pretrial release for their son.¹⁸ As a result, Kalief was forced to live at Riker's Island in New York City awaiting his trial.¹⁹ Having never been convicted of a crime, Kalief lived at Riker's for three years, while his friends went to school, attended prom, and graduated from high school without him.²⁰ His family subsequently filed a lawsuit for wrongful death and mistreatment against the City of New York, the New York City Police Department, the New York City Department of Corrections and many others.²¹

The tragedy of Kalief Browder is not an isolated incident. Many youths, aged eighteen to twenty-one, experience pretrial detention due to their inability to afford bail and, therefore, many young inmates in jail are merely accused of crimes even though they have not yet been found guilty.²² Yet, the horrific abuses experienced by Kalief, including solitary confinement, denial of food, and lack of medical care, are imposed on pretrial detainees as they would be on convicted offenders.²³ In fact, approximately sixty-two percent of detained offenders nationwide are awaiting trial, which has risen significantly in the past thirty years.²⁴ In addition, some

Cuomo's Budget Bill section: A-3009c/S-2009c Part WWW. *See also* Raise the Age, NY, *Get the Facts*, <http://raisetheageny.com/get-the-facts>. However, in 2013, during Kalief's incarceration, forty states plus Washington DC established the age of criminal responsibility at eighteen and eight states established the age at seventeen. *See* Final Report of the Governor's Commission on Youth, *Public Safety and Justice*, 28 (2015), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ReportofCommissiononYouthPublicSafetyandJustice_0.pdf; *see generally* Ashley D. Cannon, *The Laws Governing the Age of Adult Criminal Responsibility*, CITIZENS CRIME COMMISSION OF NEW YORK CITY (Dec. 6, 2013).

¹⁷ Dwyer, *supra* note 10.

¹⁸ Gonnerman, *supra* note 6 (2014).

¹⁹ Dwyer, *supra* note 10.

²⁰ *Id.*

²¹ *Kalief Browder v. The City of New York, et. al.* Compl. May 22, 2015 (the lawsuit named as defendants the arresting officers, correctional officers of the New York City Department of Corrections, as well as the District Attorney of Bronx County who were all sued individually and in their official capacities as city employees).

²² Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L. J. 5 (2014).

²³ *Id.*

²⁴ Tina Rosenberg, *Putting Fewer Innocents Behind Bars*, THE NEW YORK TIMES (July 3, 2015) (an increase of nearly forty percent throughout the past thirty years).

thirty-nine percent of New York City's jails are detained pretrial criminal defendants awaiting trial.²⁵ Moreover, nearly thirty percent of state court defendants are detained on bonds of less than five thousand dollars.²⁶ Much like Kalief, these detainees are unable to obtain pretrial release due to their inability to afford even a nominal bail amount. According to the Vera Institute of Justice, "money, or the lack thereof, is now the most important factor in determining whether someone is held in jail pretrial."²⁷

This note addresses the injustice of pretrial detention on juveniles, minors, and youths aged eighteen to twenty-one, in New York State. This note will address juveniles, aged eighteen to twenty-one, who are subject to criminal proceedings in adult criminal court and incarceration in adult criminal facilities as well as juveniles or minors below the age of criminal responsibility who are subject to juvenile delinquency proceedings and incarceration in juvenile detention facilities.²⁸ So many youths are in unnecessary detentions under horrific conditions in adults and juvenile correctional facilities across the country. Serious bail reform is long overdue to provide humane alternatives to incarceration and diversionary programs prior to incarceration, particularly for pretrial detainees.

²⁵ Rhonda Tomlinson, Geoffrey Bickford & Alison Wilkey, *Report and Recommendations on Bail Reform in NYS*, NEW YORK COUNTY NYCLA LAWYERS ASSOCIATION (Jan. 15, 2014), http://www.nycla.org/siteFiles/Publications/Publications1668_0.pdf.

²⁶ Wiseman, *supra* note 22.

²⁷ *Incarceration's Front Door: The Misuse of Jails in America*, VERA, 32 (Feb. 2015), http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report_02.pdf (last updated July 29, 2015).

²⁸ This note focuses on juveniles, both minors and youths ages eighteen to twenty-one, who are subject to adult criminal sanctions in New York State; however, the proposal includes provisions applicable to juvenile delinquency proceedings that can be used throughout all states nationwide and to adult criminal defendants facing pretrial detention in state and federal proceedings. Currently, North Carolina is the only states in the country that prosecute youths aged sixteen and older as adults. The movement in New York State to raise the age of criminal responsibility to eighteen was passed in January 2018. *see generally* <http://raisetheagency.com/>; Bill S.1409-2013. The house bill was to raise the age of criminal responsibility in New York to seventeen in 2018 and eighteen in 2019 and to amend the criminal procedure law, executive law, family court act, and the penal law. It also proposed an increase to the age of juvenile jurisdiction from seven to twelve for non-homicide offenses. *see generally* Annie-Lise Vray, *Momentum for Youth Justice* (Feb. 11, 2016), <http://www.campaignforyouthjustice.org/news/blog/tag/Youth%20in%20Adult%20Jails%20and%20Prisons>.

Alternatives to incarceration and diversionary programs, such as monetary caps on bail and in-home supervision, offer a more cost-effective means than the traditional approach of pretrial detention. Through the use of fixed bail schedules that establish monetary caps based upon the individual defendant and the crime committed, as well as, in-home placement by means of ankle bracelets and supervised home confinement, juveniles, minors, and youths aged eighteen to twenty-one, will be able to avoid the detrimental effects of pretrial detention and states can also secure their attendance in court for the pendency of their criminal prosecutions.

Part two of this note will address the current laws concerning pretrial detention and the general process of bail. It will discuss only the state of New York and will look to the United States Constitution, the United States Code, and the New York Criminal Procedure Law, but the doctrines and the empirical patterns are applicable in most states' pretrial detention of juveniles and adult offenders as well. Part three will address the negative impact of incarceration on juveniles in the context of mental, emotional, and physical harm suffered by youths who are detained and incarcerated as well the differences between youths and adults in mental cognitive abilities. Part four will discuss various proposed measures of bail reform such as the use of monetary caps for juveniles, fixed bail schedules, and alternatives to incarceration such as home confinement, house arrest, and the possible use of electronic monitoring. These proposed solutions address both the negative effects and impacts on incarcerated and detained juveniles and provide a more cost-effective means than pretrial incarceration.

THE CONSTITUTIONAL DIMENSIONS OF BAIL AND THE PROCESS OF BAIL IN NEW YORK STATE

*“A man of courage never needs weapons, but he may
need bail.”²⁹*

While criminal defendants have no constitutional right to bail, the federal Constitution and state constitutions protect against arbitrary and excessive bail determinations.³⁰ State procedures are modelled after the federal codes and procedures. Thus, a discussion of federal provisions further explains the provisions and protections in New York State law.

The Constitutional Protections and Federal Bail Procedures

The Eighth Amendment of the United States Constitution protects against excessive bail.³¹ Similar safeguards are found in article one, section five of the New York State Constitution, which protects the right to be free from excessive bail.³² These protections prohibit arbitrary determination of bail in the court’s discretion of fixing a bail amount, and, further, protect against bail that is excessive.³³

The United States Supreme Court confronted the issue of excessive bail under the Eighth Amendment in 1951.³⁴ In *Stack v. Boyle*, members of the communist party were charged with conspiring to advocate or teach the overthrow of the government by force.³⁵ The government only proffered evidence that previous violators had forfeited bail and failed to appear at court, but produced no evidence relating to the charged defendants.³⁶ The

²⁹ Lewis Mumford, *Quote by Lewis Mumford*, QUOTATION.IO, <https://quotation.io/page/quote/man-courage-never-needs-weapons-may-needs> (last visited Nov. 7, 2018).

³⁰ Robert Webster Oliver, *Bail and the Concept of Preventative Detention*, N.Y. ST. B.J., 1, 8 (Sept./Oct. 1997).

³¹ U.S. CONST. amend. VIII: “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

³² N.Y. C.L.S. CONST. art. I, § 5: “excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.”

³³ Oliver, *supra* note 30.

³⁴ *Stack v. Boyle*, 342 U.S. 1 (1951)(petitioners were charged with violations under the Smith Act, 18 U.S.C. 371).

³⁵ *Id.* at 3.

³⁶ *Id.*

court held: “the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as *additional assurance* of the presence of an accused. Therefore, bail that is set at a figure higher than an *amount reasonably calculated* to fulfill this purpose is ‘excessive’ under the Eighth Amendment.”³⁷ Thus, “the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of *that specific and particularized* defendant.”³⁸

The standards established in *Stack* and the factors that are to be considered are codified in the Federal Rules of Criminal Procedure (“FRCP”).³⁹ State determinations of bail are based upon and tempered by the FRCP, which states, in pertinent part, that the judge should consider “the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.”⁴⁰ Finally, the burden of proof is on the defendant to show lack of flight risk.⁴¹

Furthermore, the United States Code (“USC”) similarly contains provisions mirrored by states nationwide which provide for the release from detention of a criminal defendant during the pendency of trial.⁴² The judge must issue an order whereby the defendant is released on either personal recognizance, appearance bond, granted conditional release, or temporarily detained prior to trial.⁴³ Of particular relevance to juveniles, conditional release allows for the defendant to be released based upon specific conditions, such as requiring the defendant “to remain in the custody of a designated person.”⁴⁴ In addition, the USC provides

³⁷ *Id.* at 5 (emphasis added).

³⁸ *Id.* (emphasis added).

³⁹ FED. R. CRIM. P. 46(c) (state procedures nationwide follow federal substantive and procedural law in bail determinations).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 18 U.S.C. § 3142.

⁴³ 18 U.S.C. § 3142(a)1-4.

⁴⁴ 18 U.S.C. § 3142(c)(B)(i)-(x) (“judicial officer may impose upon a pretrial defendant specific conditions, which may include requiring the defendant to: remain in the custody of a designated person; seek and maintain employment; maintain or commence an education program; abide by specific restrictions on personal associations, place of abode, or travel; avoid contact with alleged victims; report on a regular basis to a designated agency; comply with a specified curfew; refrain from possessing a firearm, destructive device, or other dangerous weapon; refrain from excessive use of alcohol or any use of a narcotic drugs or other controlled substance... without a prescription by a licensed medical practitioner; and

that the defendant may also be required to “return to custody for specified hours following release for employment, schooling, or other limited purposes.”⁴⁵

Finally, included in this section of the USC is a catch-all provision which states that the defendant may be required to “*satisfy any other condition* that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.”⁴⁶ Thus, the use of alternatives to incarceration, such as in-home confinement appropriately address both the concerns of community safety and appearance of the defendant at court. Furthermore, conditions and bail amounts require that “the judicial officer may not impose a financial condition that results in the pretrial detention of the person.”⁴⁷ Thus, bail may not be set at a bail amount or conditioned on anything that would make the defendant unable to obtain release in order to subject the defendant to pretrial detention, whether intentionally or incidentally.⁴⁸

The Process of Bail in New York State

Following the federal standard, the New York State Constitution similarly secures the right of criminal defendants to be free from excessive bail.⁴⁹ Bail determinations are established for the specific purpose of ensuring court attendance of the criminal defendant and codified in the New York Criminal Procedure Law (“NYCPL”).⁵⁰ Under the NYCPL, the court is

undergo available medical, psychological or psychiatric treatment, including treatment for drug or alcohol dependency and remain in a specified institution required for that purpose”).

⁴⁵ 18 U.S.C. § 3142(c)(B)(xiii).

⁴⁶ 18 U.S.C. § 3142(c)(B)(xiv).

⁴⁷ 18 U.S.C. § 3142(c)(2).

⁴⁸ *Id.*

⁴⁹ N.Y. C.L.S. CONST. art I, § 5.

⁵⁰ N.Y. CRIM. PRO. LAW § 510.30 (McKinney 2018)(application for recognizance or bail); N.Y. CRIM. PRO. LAW § 500.10(9) (McKinney 2018)(bail means cash bail or a bail bond); N.Y. CRIM. PRO. LAW § 500.10(13)(McKinney 2018)(bail bond means a written undertaking, executed by one or more obligors, that the principal designated in such instrument will, while at liberty as a result of an order fixing bail and of the posting of the bail bond in satisfaction thereof, appear in a designated criminal action or proceeding when his attendance is required and otherwise render himself amenable to the orders and processes of the court, and that in the event that he fails to do so the obligor or obligors will pay to the people of the state of New York a specified sum of money, in the amount designated in the order fixing bail).

required to consider the “kind and degree of control or restriction that is necessary to secure [the defendant’s] court attendance when required.”⁵¹ Thus, the judicial officer must consider the specific defendant and the means that will ensure his or her appearance at court dates.⁵² Therefore, the court may base its determination upon the following criteria:

the principal’s character, reputation, habits and mental condition; his employment and financial resources; his family ties and the length of his residence, if any, in the community; his criminal record, if any; his record of previous adjudication [including] as a juvenile delinquent.... or a youthful offender, if any; and his previous record, if any, in responding to court appearances when required, or with respect to flight to avoid criminal prosecution.⁵³

However, the bail amount and the decision to grant or deny bail are matters of judicial discretion.⁵⁴ Judicial discretion comes into play because bail is ultimately a veracity determination by the judicial officer of the court.⁵⁵ In New York, the judge is explicitly empowered to make a character determination by deciding the credibility and reliability of the criminal defendant in appearing for future court dates.⁵⁶

At arraignment, the court must issue a securing order which delineates whether the defendant will be detained, released, or the amount of bail that is required for release.⁵⁷ The court makes this determination based upon NYCPL §530.40.⁵⁸ Under the NYCPL, if the defendant is charged with a crime that is a misdemeanor, the court is required to release the defendant on recognizance or bail.⁵⁹ Releasing the defendant on recognizance means the

⁵¹ N.Y. CRIM. PRO. LAW § 510.30(a) (McKinney 2018).

⁵² *Id.*

⁵³ N.Y. CRIM. PRO. LAW § 510.30(a)(i)-(vi) (McKinney 2018).

⁵⁴ N.Y. CRIM. PRO. LAW § 510.30(b) (McKinney 2018).

⁵⁵ Oliver, *supra* note 30.

⁵⁶ *Id.*

⁵⁷ N.Y. CRIM. PRO. LAW § 520.10(1)-(2) (McKinney 2018); N.Y. CRIM. PRO. LAW § 500.10(5) (McKinney 2018)(securing order means an order of a court committing a principal to the custody of the sheriff, or fixing bail, or releasing him on his own recognizance).

⁵⁸ N.Y. CRIM. PRO. LAW § 530.40 (McKinney 2018).

⁵⁹ N.Y. CRIM. PRO. LAW § 530.40(1) (McKinney 2018).

defendant is not required to post bail and may not be detained based upon the sole condition that they attend all required court dates and refrain from committing further criminal offenses.⁶⁰ When the defendant is charged with a felony, the court may detain the defendant, release the defendant on recognizance, or set the bail amount.⁶¹ In either case, the court is required when setting bail to fix an amount which will secure the defendant's appearance for all future court dates and the person (also known as the surety) who posts the bail must have some personal relationship with the defendant and be capable of ensuring the defendant's appearance at court.⁶² Underlying this requirement is an "assumption [sic] that a defendant will have incentive to appear if a defendant's assets or those of a family member are put at a risk if the defendant absconds."⁶³ Finally, the court may revoke bail at any time for good cause.⁶⁴

In addition, the New York State Family Court is guided by similar provisions in juvenile delinquency proceedings.⁶⁵ The judge bases the decision to detain the offender consistent with the Family Court Act §320.5 ("FCA"), which states, in pertinent part, "the court finds that unless the respondent is detained: (i) there is a substantial probability that he or she will not appear in court on the return date; or (ii) there is a serious risk that he or she may before the return date commit an act which if committed by an

⁶⁰ N.Y. CRIM. PRO. LAW § 500.10(2) (McKinney 2018)(a court releases a principal on his own recognizance when, having acquired control over his person, it permits him to be at liberty during the pendency of the criminal action or proceeding involved upon condition that he will appear thereat whenever his attendance may be required and will at all times render himself amenable to the orders and processes of the court); *see also*: American Bar Association, *Pretrial Release*, Criminal Justice Section Standards, available at: http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html.

⁶¹ N.Y. CRIM. PRO. LAW § 530.40(2) (McKinney 2018).

⁶² *People v. Baker*, 188 Misc. 2d 821, 729 N.Y.S.2d 580 (Sup. Ct. 2001)(court refused to accept bail because of lack of testimony or evidence regarding how posted bail would ensure petitioner's appearance in court due to the fact that the persons posting bail had no personal relationship with the defendant and could not assure the court that the posting of bail would secure the defendant to return to court would contravene public policy).

⁶³ *Id.* at 585.

⁶⁴ Warren J. Murray, Melissa Eisen Azarian, & Jill Shapiro, *New York Criminal Procedure*, LEXISNEXIS ANSWERGUIDE (2012)(thus, failing to appear at one court date, failure to abide by conditions, or attempted flight constitutes forfeiture of bail and can result in detention).

⁶⁵ Juvenile proceedings do not involve bail, but the same factors are considered in determining whether or not the juvenile should be detained prior to trial.

adult would constitute a crime.”⁶⁶ The Office of Children and Family Services uses a Juvenile Detention Risk Assessment Instrument (“JDRAI”).⁶⁷ The JDRAI considers empirically validated factors in determining whether a juvenile should be detained in a juvenile detention facility.⁶⁸ While the assessment is required, the Court is not bound by the result, and may, at its discretion, detain the juvenile absent a high risk.⁶⁹

However, unlike the application of the provisions that govern bail determinations in adult criminal court, the FCA disfavors detention of offenders.⁷⁰ FCA §320.5(3)(a) states, “the court shall not direct detention unless available alternatives to detention, including conditional release, would not be appropriate.”⁷¹ Similar to the federal laws, alternatives to detention include release to parental custody, conditional release, and non-secure detention, with the most stringent application reserved for secure detention, all of which are based on the individual characteristics of the offender.⁷²

The Rise of Preventative Detention

In 1984, the federal bail law was reformed to include other considerations, such as community safety, in addition to securing the defendants attendance at subsequent court appearances.⁷³ National concern over “the alarming problem of crimes committed by persons on release” spurred Congress to enact preventative legislation.⁷⁴ This new consideration was added by the passage of

⁶⁶ N.Y. FAM. CT. ACT § 320.5(3)(a)(i)-(ii).

⁶⁷ N.Y. FAM. CT. ACT § 320.5(3)(b); See also *NYS Juvenile Detention Risk Assessment Instrument*, OFFICE OF CHILDREN AND FAMILY SERVICES, <http://ocfs.ny.gov/main/rehab/drai/Final%20DRAI%20Instrument%20Draft%202-6-13.pdf> (last visited Nov. 7, 2018).

⁶⁸ See generally Jennifer Fratello, Anni Salsich, & Sara Mongulescu, *Juvenile Detention Reform in New York City- Measuring Risk through Research*, VERA INSTITUTE FOR JUSTICE (April 2011), <http://www.vera.org/sites/default/files/resources/downloads/RAI-report-v7.pdf>.

⁶⁹ N.Y. FAM. CT. ACT § 320.5(3)(b)(requiring that the judicial officer clearly state its reasons on the record).

⁷⁰ N.Y. FAM. CT. ACT § 320.5(3)(a)

⁷¹ *Id.*

⁷² Merrill Sobie, N.Y. FAM. CT. ACT § 320.5 Westlaw Practice Commentaries; *supra* note 45.

⁷³ 18 U.S.C. § 3142(e).

⁷⁴ Margaret S. Gain, *The Bail Reform Act of 1984 and United States v. Salerno: Too Easy to Believe*, 39 CASE WESTERN RESERVE L. REV. 4, 1372 (1989).

the Federal Bail Reform Act (“FBRA”) which allows for preventative detention.⁷⁵ The Supreme Court upheld the Bail Reform Act which called for bail determinations to include a public policy consideration of community safety, in addition to the requirement that bail be reasonable to insure the defendant’s appearance in court or at trial.⁷⁶

In the seminal case of *United States v. Salerno*, the United States Supreme Court determined the constitutionality of preventative detention and held that “protecting the community from dangerous persons is a legitimate regulatory goal” and that “the pretrial detention provisions found in the Bail Reform Act are regulatory in nature” and, therefore, are constitutional.⁷⁷ Furthermore, the United States Supreme Court held that preventative detention did not violate the Eighth Amendment’s Excessive Bail Clause of the United States Constitution.⁷⁸

In *Salerno*, defendants Anthony Salerno and Vincent Cafaro were charged with various counts of Racketeer Influenced and Corrupt Organizations Act (RICO) violations.⁷⁹ The prosecution proffered evidence which demonstrated that Salerno was “the ‘boss’ of the Genovese crime family of La Cosa Nostra and that Cafaro was a ‘captain’ in the Genovese family.”⁸⁰ In *Salerno*, the Court held that the interest of the government concerning community safety was a compelling government interest that was sufficiently balanced with the liberty interests of the defendants.⁸¹

⁷⁵ Michael J. Eason, *Eighth Amendment—Pretrial Detention: What Will Become of the Innocent*, 78 J. CRIM. L. & CRIMINOLOGY 1048 (1987-1988). *see also*: Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 FORDHAM URBAN L. J. 1, 139 (2008)(during the Nixon Administration, the legislature of the District of Columbia enacted laws permitting the pretrial detention of defendants whose release would pose a safety risk to people and the community. The D.C. courts found the law constitutional and the United States Supreme Court denied certiorari, which resulted in Congress enacted similar legislation codified in the Bail Reform Act of 1984).

⁷⁶ Lindsey Carlson, *Bail Schedules A Violation of Judicial Discretion?*, PRETRIAL JUSTICE INSTITUTE (Dec. 6, 2010), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=b646a57f-6399-2fe4-5683-021480c3634a>.

⁷⁷ *United States v. Salerno*, 481 U.S. 739, 747 (1987).

⁷⁸ *Id.* (The court also concluded the Due Process Clause of the Fifth Amendment was not violated).

⁷⁹ Eason, *supra* note 75.

⁸⁰ *Salerno*, *supra* note 77, at 2099.

⁸¹ *Id.*

Under the provisions of The Bail Reform Act of 1984, the Court is required to detain defendants prior to trial who are charged with certain specified felonies and the prosecution can show, through clear and convincing evidence, that no release conditions “will reasonably assure the safety of any other person and the community.”⁸² Furthermore, the FBRA, upon motion of the prosecutor, or the court, *sua sponte*, may detain the defendant upon a showing of a serious risk of flight or that “a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimate” or attempt same against a “prospective witness or juror.”⁸³ The factors the Court must consider, include, the nature and seriousness of the crime, the evidence against the accused, the defendant’s criminal background, and personal characteristics, as well as, the nature and seriousness of the danger posed by the defendant’s release.⁸⁴ Thus, this act gives authorization for preventative detention for the purpose of community safety.⁸⁵

The court found that this type of preventative detention is warranted because under the provisions of the FBRA the defendant is guaranteed certain procedural safeguards in order to rebut the prosecution’s case calling for pretrial detention. This includes the right to testify, proffer evidence, and to cross-examine witnesses, in addition to representation by counsel.⁸⁶ Thus, because of the compelling government interests of protecting the public, the FBRA adequately addressed the problem of preventative detention while maintaining necessary safeguards to the liberty interests of the defendants.⁸⁷

The United States Supreme Court addressed this issue of preventative detention imposed on juveniles in *Schall v. Martin*, which held that the pretrial detention of juvenile offenders was similarly constitutional.⁸⁸ In *Schall*, the Court considered the constitutionality of the comparable preventative detention statute

⁸² 18 U.S.C § 3142(f)(1)(A)-(E); *supra* note 73.

⁸³ 18 U.S.C § 3142(f)(2)(A)-(B); *supra* note 82.

⁸⁴ *Salerno*, *supra* note 77.

⁸⁵ *Supra* note 73.

⁸⁶ 18 U.S.C. § 3142.

⁸⁷ *Id.*; *supra* note 73, at 1052.

⁸⁸ *Id.*; *supra* note 73, at 1050.

contained in Section 320.5(3)(b) of the FCA.⁸⁹ Similar to *Salerno*, the Court in *Schall*, found that the pretrial detention provisions of the FCA “serves a legitimate state object, and that the procedural protections afforded pretrial detainees... satisfy the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.”⁹⁰

However, the Court found that, unlike adult offenders, juvenile defendants have a diminished liberty interest.⁹¹ The Court held that juveniles “are always in some form of custody” and “are not assumed to have the capacity to take care of themselves.”⁹² In addition, “they are assumed to be subject to the control of their parents” and similarly, the juvenile’s liberty interest may, in appropriate circumstances, be subordinated to the State’s *parens patriae* interest in preserving and promoting the welfare of the child.⁹³ Thus, preventative detention of pretrial detainees for juvenile and adult offenders is constitutional as long as it is not punitive in nature, is necessary to ensure the attendance of defendants at court or trial, and is also necessary as a matter of public policy to protect community safety.⁹⁴

Unlike the federal government and nearly twenty-seven states that permit preventative detention based upon community safety concerns, the New York legislature rejected a statutory scheme that permitted pretrial detention based solely upon public safety.⁹⁵ However, New York permits community safety to be considered during arraignment under C.P.L. §530.20 and C.P.L. §530.40.⁹⁶ However, the judge is empowered to “deny the [bail] application and commit the [defendant] to, or retain him in, the

⁸⁹ *Schall v. Martin*, 467 U.S. 253 (1984).

⁹⁰ *Id.* at 256.

⁹¹ *Id.* at 264.

⁹² *Id.*

⁹³ *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).

⁹⁴ *Id.* at 1050; *supra* note 82-83.

⁹⁵ *Report on Legislation by the Criminal Courts Committee and the Corrections and Community Reentry Committee*, NEW YORK CITY BAR 4 (July 2013), <http://www2.nycbar.org/pdf/report/uploads/20072490-BailLegislation.pdf>.

⁹⁶ N.Y. CRIM. PRO. LAW § 530.20 and N.Y. CRIM. PRO. LAW § 530.40 (requiring release for misdemeanors and non-violent felonies, unless release would not assure return to court or endanger public safety). *see also* Report on Legislation by the Criminal Courts Committee and the Corrections and Community Reentry Committee, *supra* 95.

custody of the sheriff.”⁹⁷ In addition, New York provides for revocation of bail or pretrial release based upon C.P.L. §530.60.⁹⁸ This provision required the defendant to appear before the court for a hearing at which time the court may, “for good cause shown, [sic] revoke the order of recognizance or bail.”⁹⁹ Thus, while lacking a specific statute permitting pretrial detention, New York state allows defendant’s to be detained for public safety concerns as well as permitting the revocation of bail or pretrial release for community safety policy reasons.¹⁰⁰ Most importantly, critics of preventative detention argue that the statutory scheme permits and enables judges to set bail amounts at such high amounts, amounting to excessive bail, in order to detain the defendant prior to trial.¹⁰¹

As discussed above, bail determinations are based upon statutory regulations and restricted through federal constitutional provisions.¹⁰² These bail determinations primarily focus on flight risk and are used in order to ensure that the defendant will appear for court dates or trial.¹⁰³ However, bail amounts are often set in ways that deprive poverty stricken individuals from the ability to obtain pretrial release because of their inability to obtain the monetary funds or access to financial assets (such as property) necessary to post bail.¹⁰⁴ This is particularly true in the case of juvenile defendants, youths aged eighteen to twenty-one, who are subject to the adult criminal proceedings as well as detention in

⁹⁷ N.Y. CRIM. PRO. LAW § 510.40(c). *see also* Report on Legislation by the Criminal Courts Committee and the Corrections and Community Reentry Committee, *supra* 95.

⁹⁸ N.Y. CRIM. PRO. LAW § 530.60; *see also* Report on Legislation by the Criminal Courts Committee and the Corrections and Community Reentry Committee, *supra* 95.

⁹⁹ N.Y. CRIM. PRO. LAW §530.60(1).

¹⁰⁰ Report on Legislation by the Criminal Courts Committee and the Corrections and Community Reentry Committee, *supra* 95.

¹⁰¹ Report on Legislation by the Criminal Courts Committee and the Corrections and Community Reentry Committee, *supra* 95, at 2 (judge to set prohibitively high bail and/or preventively detain an accused without the constitutionally required procedural safeguards and does not provide adequate definitions or tools to assist courts in assessing public safety effectively); *see also* Mary T. Phillips, “A Decade of Bail Research in New York City,” Final Report, NEW YORK CRIMINAL JUSTICE AGENCY, INC. 27 (Aug. 2012)(“New York City judges do not ignore safety; they address it by setting high bail to detain individuals who pose a threat to the community.”)(herein “A Decade of Bail Research”).

¹⁰² Tomlinson, et al., *supra* note 25.

¹⁰³ *Id.*

¹⁰⁴ Carlson, *supra* note 76.

adult jails and correctional facilities, yet lack the financial means to obtain pretrial release.¹⁰⁵

THE MENTAL, EMOTIONAL AND PHYSICAL PROBLEMS
ASSOCIATED WITH THE PRETRIAL DETENTION OF
JUVENILES

“The young, owing to their early stage of human development, require particular care and assistance with regard to physical, mental, and social development, and require legal protection in conditions of peace, freedom, dignity, and security.”¹⁰⁶

Pretrial detention leads to acute and long term negative behavior and both physical and mental health effects.¹⁰⁷ This is particularly true for juveniles, minors, and youths aged eighteen to twenty-one whose immaturity and lack of experience puts them at a greater disadvantage than their adult counterparts. As research suggests, pretrial detention leads to the higher probability of becoming formally charged, convicted, and committed to a detention and/or correctional facility, due in large part to the inability of the criminal defendant to participate in the preparation and maintenance of their own defense.¹⁰⁸

In addition, due to the incarceration of juveniles, aged eighteen to twenty-one, being housed in adult correctional facilities, they are particularly at risk of victimization in a correctional facility, such as at Riker’s Island, that is not designed for their particularized needs. As stated by Governor Cuomo: ““Providing young people with age-appropriate facilities and rehabilitation will restore hope and promise and help them turn their lives around to build a better future for themselves, their families and

¹⁰⁵ *Id.*

¹⁰⁶ UN Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), G.A. Res. 40/33 of 29 (Nov. 1985). UN Convention on the Rights of the Child, G.A. Res 44/25, annex, 44 U.N. GAOR Supp. (No.49) at 167, U.N. Doc. A/44/49 (1989). *Entered into force* September 2, 1990 (The United States is not a party because the age of maturity established in the Convention is eighteen).

¹⁰⁷ Barry Holman & Jason Ziedenisberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, JUSTICE POLICY INSTITUTE REPORT 1, 2, http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf.

¹⁰⁸ Rosenberg, *supra* note 24.

for our great state.”¹⁰⁹ Moreover, juveniles are still maturing, physically and emotionally, and therefore, lack the mental capability of adequately protecting themselves in detention and correctional facilities.

The Disparate Treatment of Poor Juveniles

On arraignment, “almost everyone is offered monetary bail, but the majority of defendants cannot raise the money quickly or, in some cases, at all.”¹¹⁰ Juveniles, minors, and youths aged eighteen to twenty-one, are particularly vulnerable to the negative impacts associated with pretrial incarceration because of their heightened poverty and limited mental capacities. In the *New York Times*, an article discussed the tragedy of Kalief Browder; Tina Rosenberg wrote: “because he was poor, the city spent a half million dollars to keep him in jail for three years. Because he was poor, Browder spent nearly a sixth of his life in jail and a tenth of his life in solitary confinement. Because he was poor, he died.”¹¹¹

Pretrial detention has only recently contributed to the increase in prison and jail populations, despite crime and arrests rate being lower than in previous years.¹¹² “In 1985, with crime much higher than today, about half of people arrested were cited and released.¹¹³ By 2012, 95 percent of people arrested were detained.”¹¹⁴ Some 27,281 youths, aged sixteen and seventeen, were arrested in 2015 in the State of New York alone.¹¹⁵ This trend of detention disproportionately affects indigent defendants, particular juveniles who lack financial resources to obtain release on bail. Thus, many juveniles are at risk of experiencing pretrial detention in the absence of adequate resources to obtain bail.

¹⁰⁹ Press Release, Andrew M. Cuomo, Governor of New York, Governor Cuomo Signs Legislation Raising the Age of Criminal Responsibility to 18-years-old in New York (April 10, 2017), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-raising-age-criminal-responsibility-18-years-old-new-york>.

¹¹⁰ AJ Vincens, *We Lock Up Tons of Innocent People-and Charge Them for the Privilege*, MOTHERJONES (Feb. 17, 2015), <http://www.motherjones.com/politics/2015/02/jails-prison-bail-racial-disparity>.

¹¹¹ Rosenberg, *supra* note 24.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ New York State Division of Criminal Justice, *New York State Arrests Among 16-17 Year Olds*, <http://www.criminaljustice.ny.gov/crimnet/ojsa/youth-arrests/nys.pdf>.

In fact, in a comparison study of New York and New Jersey, New York youths were eighty-five percent more likely to be re-arrested for violent crimes when prosecuted in the adult courts than their New Jersey counterparts in juvenile court.¹¹⁶ Additionally, the New York youths were twenty-six percent more likely to be re-incarcerated than juveniles prosecuted in juvenile delinquent court in New Jersey.¹¹⁷ Furthermore, New York youths are more likely to be re-arrested as well as experience re-arrests more frequently, for more serious offenses and are therefore more likely to face re-incarcerations within as little as a few years.¹¹⁸

In addition, juveniles, minors, and youths aged eighteen to twenty-one, are more likely to be treated as violent offenders and thus, are more likely to be arrested, prosecuted, convicted, and detained for serious offenses than their adult counterparts (as most juveniles come to adult court for violent felonies and serious offenses; otherwise they would be processed in juvenile courts and facilities).¹¹⁹ In a 2003 study, conducted in forty urban counties in the United States, including 7,000 juveniles charged with felonies in adult criminal court, reports suggest juveniles are more likely than adults to be charged with a violent felony.¹²⁰ Additionally, juvenile defendants are treated as serious offenders, with some sixty-four percent being charged with violent felonies compared to twenty-four percent of adults.¹²¹ Moreover, as compared to adults, juveniles are less likely to receive pre-trial release and are more likely to be convicted and sentenced to prison, with an average sentence of ninety months.¹²² Thus, the treatment received by juveniles in court is not only drastically more stringent than but also stricter and more restrictive than the treatment of adult offenders. This is evidenced by their diminished liberty as well. Due to the vulnerability of juveniles, they are at an increased risk of harm from criminal justice interactions.

¹¹⁶ *New Jersey's Reform Efforts are the Subject of National Publication*, The State of New Jersey Department of Law and Public Safety: Office of the Attorney General (Oct. 28, 2014), <http://nj.gov/oag/newsreleases14/pr20141028b.html>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* (prosecution of juveniles in adult criminal court is generally restricted to include serious offenses, including *inter alia*, murder, robbery, and aggravated assault).

¹²¹ *Id.*

¹²² *Id.*

Physical, Mental, and Emotional Harm

Incarceration is a punishment reserved for those who are guilty of criminal offenses and warrant detainment; however, pretrial detainees are subjected to the same horrors as convicted offenders even though they have not been found guilty in court. Studies suggest suicide, self-harm, and depression are the most prevalent afflictions.¹²³ Moreover, studies have concluded that one third of incarcerated youths are depressed with the occurrence beginning after incarceration.¹²⁴

In fact, according to a report conducted by the Campaign for Youth Justice, juveniles, minors, and youths eighteen to twenty-one “are 19 times more likely to commit suicide while behind bars than young people on the outside” and “they are 36 times more likely to kill themselves in an adult jail than young people held in juvenile facilities.”¹²⁵ In addition, suicide during incarceration, “were heavily concentrated in the first week spent in custody (48%), with almost a quarter of suicides taking place on the day of admission to jail (14%) or on the following day (9%).”¹²⁶ These high rates of suicide are related to and caused by “inadequate supervision of inmates by staff.”¹²⁷

In addition, “youth in adult jails are more likely to be beaten, physically or sexually assaulted, or raped.”¹²⁸ In a study released in 2015, conducted on pretrial and post-trial conviction, New York Governor Cuomo’s Final Report of the Commission on Youth, Public Safety and Justice stated “extensive research on the significant negative impacts on adolescents of incarceration in adult jails and prisons has brought a sense of urgency for reform. Higher suicide rates, increased recidivism, and many other

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Throwing away Young People: Prison Suicide*, THE NEW YORK TIMES (Nov. 21, 2007), <https://theboard.blogs.nytimes.com/2007/11/21/throwing-away-young-people-prison-suicide/>.

¹²⁶ *Id.*

¹²⁷ United States Attorney, Southern District of New York, *CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island*, US DEPARTMENT OF JUSTICE (Aug. 4, 2014), <http://www.justice.gov/sites/default/files/usaosdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf>.

¹²⁸ Hickey T, Roberson, *Pretrial Detention of Youths Prosecuted as Adults*, 44 MARYLAND BAR J. 6, 44-49, (Nov. 2011).

measures all suggest that both offenders and their communities are harmed by placing adolescents into adult jails and prisons” and “suicide is in fact the number one cause of death for people under eighteen in jails.”¹²⁹

Furthermore, juveniles who face prosecution in adult criminal courts, “go on to re-offend more often and more violently than youth tried and punished in the juvenile system for equivalent offenses.”¹³⁰ Finally, pretrial detention of juveniles does not “deter or prevent youth crime, is ineffective in protecting public safety in the long term, and places youth at a greater risk of harm.”¹³¹ As argued by Nate Balis, the director of the juvenile justice strategy group at the Annie E. Casey foundation, “The last thing you want is to introduce them to [criminal offenders] who will introduce them to a life of crime.”¹³² Thus, while negative effects are suffered by all detainees, this extreme hardship suffered by juveniles is due in part to their lack of mental maturity that leaves them ill-equipped to deal with the chaotic and detrimental environment in adult correctional and juvenile detention facilities.

Mental Immaturity and Diminished Culpability of Juveniles

Research in the past fifteen years has displayed that juveniles, minors, and youths aged eighteen to twenty-one lack full capacity for reasoning and that brain immaturity plays into poor decision making.¹³³ Moreover, juveniles are neurologically developing, particularly in the prefrontal cortex, which controls reasoning and judgment, and as such, it is not only argued that it is inherently unfair to expect juveniles to adhere to adult standards, but also furthers the argument that juveniles would benefit from the specialized services received in diversionary programs rather than placement in detention facilities.¹³⁴ According to the Final Report of the Governor’s Commission on Youth, Public Safety and Justice (hereinafter referred to as the “Final Report”):

¹²⁹ Final Report of the Governor’s Commission on Youth, *supra* note 16, at 1.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Rosenberg, *supra* note 24.

¹³³ Final Report of the Governor’s Commission on Youth, *supra* note 16, at 17.

¹³⁴ *Id.*

Evidence of significant changes in brain structure and function during adolescence strongly suggests that these cognitive tendencies characteristic of adolescents are associated with biological immaturity of the brain and with an imbalance among developing brain systems. This imbalance model implies dual systems: one involved in cognitive and behavioral control and one involved in socioemotional processes. Accordingly, adolescents lack mature capacity for self-regulation because the brain system that influences pleasure-seeking and emotional reactivity develops more rapidly than the brain system that supports self-control.¹³⁵

Finally, the Final Report notes that differences between adults and juveniles are primarily focused in three areas.¹³⁶ First, the lack of or diminished ability to self-regulate, specifically as it relates to “emotionally charged contexts.”¹³⁷ Second, juveniles are particularly susceptible to peer influence and self-gratification behaviors, such as seeking immediate rewards.¹³⁸ Finally, the diminished ability to strategize or “ability to make decisions that require an orientation toward the future.”¹³⁹ Thus, the Supreme Court has found minors have diminished culpability, warranting special treatment by the criminal justice system, which should likewise be applied to youths aged eighteen to twenty-one.

United States Supreme Court Cases regarding Juveniles

The Final Report gathered these general criteria from several US Supreme Court cases that have recognized the diminished culpability of juveniles due to their brain immaturity¹⁴⁰ The Court finds in the three subsequent cases that youth is a mitigating

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 18. The Final Report notes that this is particularly true of adolescent males when attempting to “suppress a response to an emotional cue.”

¹³⁸ *Id.* The Final Report notes that the inability to delay gratification is theorized as making adolescents particularly vulnerable.

¹³⁹ *Id.* The Final Report notes this as an important criterion in that juvenile criminal offenders lack the cognitive ability to accurately assess risks and evaluate the rewards of their behavior.

¹⁴⁰ *Id.* at 19.

factor, and “the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings.”¹⁴¹

In 2005, in *Roper v. Simmons*, the Court held that the Eighth Amendment prohibited states from imposing the death penalty on defendants under the age of eighteen.¹⁴² The Court pointed to three factors which distinguish juveniles from adult criminal offenders.¹⁴³ First, the Court noted that scientific and sociological studies demonstrate that juveniles have “a lack of maturity and an underdeveloped sense of responsibility” which “often results in impetuous and ill-considered actions and decisions.”¹⁴⁴ The Court points to the fact that “adolescents are overrepresented statistically in virtually every category of reckless behavior.”¹⁴⁵ Most importantly, the Court finds that this lack of maturity is recognized by the states through the prohibition against minors from participating in voting, serving on juries, and marrying without parental consent while under the age of eighteen.¹⁴⁶ In addition, this is also displayed through the drinking age being set to twenty-one and the inability to buy cigarettes until twenty-one in some states.¹⁴⁷

Second, the Court finds that juveniles are “more vulnerable or susceptible to negative influences and outside pressures.”¹⁴⁸ This includes peer pressure, lack of control, inexperience, and susceptibility to psychological damage.¹⁴⁹ Furthermore, “as legal

¹⁴¹ *Miller v. Alabama*, 133 S. Ct. 2455 (2012) (“might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys”).

¹⁴² *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (categorically denying the imposition of the death penalty against juveniles).

¹⁴³ *Id.* at 1195.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ U.S. Department of Health & Human Services, *Age 21 Minimum Legal Drinking Age*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/alcohol/fact-sheets/minimum-legal-drinking-age.htm> (last visited Nov. 7, 2018); see also *Tobacco 21 Laws: Tracking Progress Toward Raising the Minimum Sales Age for All Tobacco Products to 21*, AMERICAN LUNG ASSOCIATION, <https://www.lung.org/our-initiatives/tobacco/cessation-and-prevention/tobacco-21-laws.html> (last updated Aug. 17, 2018).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

minors, juveniles lack the freedom that adults have to extricate themselves from a criminogenic setting” and are therefore less able to avoid certain behaviors and events.¹⁵⁰ Finally, the Court notes that the character and propensity of juveniles are not fully formed or established and have greater propensity towards rehabilitation than their adult counterparts.¹⁵¹ The Court states “the personality traits of juveniles are more transitory, less fixed.”¹⁵²

Following *Roper*, in 2010, *Graham v. Florida* was decided.¹⁵³ In *Graham*, the US Supreme Court held that the Eighth Amendment prohibited states from imposing mandatory life without parole sentence statutory schemes on defendants under the age of eighteen convicted of non-homicidal crimes.¹⁵⁴ The Court affirmed its findings in *Roper* that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,” such that “parts of the [juvenile’s] brain involved in behavior control continue to mature through *late adolescence*.”¹⁵⁵

Finally, in 2012, in *Miller v. Alabama*, the Court held that the Eighth Amendment prohibited states from imposing mandatory life without parole sentence statutory schemes on defendants under the age of eighteen convicted of homicide without considering their age as mitigating factor.¹⁵⁶ The Court affirmed its findings in *Roper* and *Graham* that “children are constitutionally different from adults for purposes of sentencing.”¹⁵⁷ Therefore, “just as the *chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Graham v. Florida*, 130 S. Ct. 2011 (2010)(categorically denying the imposition of life without the possibility of parole for non-homicide offense for juveniles).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Miller v. Alabama*, 133 S. Ct. 2455, 2466 (2012)(“our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that [the imposed sentence] follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty”).

¹⁵⁷ *Id.*

defendant be duly considered” during sentencing.¹⁵⁸ The Court found that juveniles are entitled to special safeguards due to their lack of maturity and inability to effectively assess the consequences of their actions, and most importantly, as such “cannot be viewed simply as miniature adults.”¹⁵⁹ It is also important to note that the Court recognized the potential of maturity and rehabilitation of juveniles and the increased likelihood of such as compared to adults.¹⁶⁰

These cases concern the sentencing of juveniles, but the rationale is applicable in the case of bail determinations in that juveniles should not be subjected to the same standards and guidelines as applied to adults in criminal proceedings due to their mental immaturity. Moreover, pretrial detention is uniquely damaging to juveniles who are particularly vulnerable due to their lack of financial resources enabling them to make bail.

Lack of Adequate Safeguards Protecting Juveniles in Correctional Facilities

Further contributing to the hardship suffered by juveniles is the practice of housing youths, aged eighteen to twenty-one, in adult correctional facilities. In fact, New York has nearly 150 juveniles incarcerated in adult state prisons, the second highest state.¹⁶¹ One facility that houses adults and juveniles is Riker’s Island jail located in New York City.¹⁶² Riker’s has separate facilities for these youths where they housed away from the general adult population as required by law.¹⁶³ However, approximately, fifty detainees are housed in the Central Punitive Segregation Unit (“CPSU”) that does not segregate adult and juvenile offenders (because in solitary inmates are alone in their cells).¹⁶⁴ The CPSU is used as a punitive measure for when detainees commit an

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 2470.

¹⁶⁰ *Id.*

¹⁶¹ Annie-Lise Vray, *Momentum for Youth Justice*, CAMPAIGN FOR YOUTH & JUSTICE (February 11, 2016), <http://www.campaignforyouthjustice.org/news/blog/tag/Youth%20in%20Adult%20Jails%20and%20Prisons>.

¹⁶² United States Attorney, Southern District of New York, *supra* note 127.

¹⁶³ *Id.* at 5.

¹⁶⁴ *Id.*

infraction of correctional facility rules.¹⁶⁵ The CPSU was where Kalief Browder lived for nearly eight hundred days of the three years he lived at Riker’s awaiting his trial.¹⁶⁶ Solitary confinement in this CPSU is “known to be detrimental to young person’s physical and mental health, and... is actually prohibited in juvenile facilities.”¹⁶⁷ Moreover, detainees are held for twenty three hours a day in solitary which results in the person losing “their sense of reality, and becom[ing] paranoid, anxious and despondent.”¹⁶⁸

In the 2014 report on Riker’s Island, initiated by Governor Cuomo and conducted as a result of Kalief Browder’s story making national headline news, the New York City Department of Corrections was found to have “systematically failed to protect adolescent inmates from harm in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.”¹⁶⁹ In addition, the report states that juveniles were subject to the same procedures as their adult counterparts but faced more stringent restrictions, such as the “use of prolonged punitive segregation for adolescent inmates [that was found to be] excessive and inappropriate.”¹⁷⁰

Specifically, the report cites to the “repeated use of excessive and unnecessary force by correction officers against adolescent inmates”, as well as “high levels of inmate-on-inmate violence.”¹⁷¹ Furthermore, the report found that physical harm to inmates was used as punishment as well as in response “to verbal altercations with correctional officers” which is exacerbated by “inadequate supervis[ion] by inexperienced and inadequately trained correction officers.”¹⁷² Nearly five hundred youths, aged sixteen and seventeen, were held at Riker’s Island as of 2014, compared to nearly seven hundred in 2013 and approximately eight hundred in 2012.¹⁷³ The report notes that these adolescents are

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* see also: Dwyer, *supra* note 10.

¹⁶⁷ Roberson, *supra* note 128.

¹⁶⁸ *Id.*

¹⁶⁹ United States Attorney, Southern District of New York, *supra* note 127, at 10.

¹⁷⁰ *Id.* at 4.

¹⁷¹ *Id.*

¹⁷² *Id.* at 7.

¹⁷³ *Id.* at 6.

disproportionately the victims of physical harm, while composing about six percent of the detained population, they were involved in “twenty-one percent of all incidents involving use of force and/or serious injuries.”¹⁷⁴ “Simply put, Rikers is a dangerous place for adolescents and a pervasive climate of fear exists.”¹⁷⁵

The report noted that even though “the constitutional rights of convicted prisoners and pretrial inmates are guaranteed under different constitutional norms, courts have consistently held that pretrial detainees, at a minimum, “retain at least those constitutional rights . . . enjoyed by convicted prisoners [under the Eighth Amendment],” thus, entitling them to protection from cruel and unusual punishments during incarceration.¹⁷⁶ Therefore, it follows that juveniles, aged eighteen to twenty-one, who are incarcerated in adult correctional facilities should likewise have special protections afforded to them above the general population due to the increased risk of harms associated with pretrial detention in general, and the particular vulnerabilities of juveniles due to their lack of maturity.

Raise the Age in New York State

Recognizing that youths have diminished culpability as a result of their immaturity, on April 10, 2017, juvenile accountability, or the age of criminal responsibility, was raised from sixteen to eighteen in New York. As of October 1, 2018, juveniles aged sixteen and seventeen, like Kalief Browder, will no longer be held in adult facilities, like Riker’s Island.¹⁷⁷ Instead they will be held in specialized juvenile detention facilities certified by the State Office of Children and Family Services, in conjunction with the State Commission of Corrections.¹⁷⁸

Most importantly, as of October 1, 2018 juveniles aged sixteen, and as of October 1, 2019, juveniles aged seventeen will no longer be treated as adults as the presumptive age of criminal

¹⁷⁴ *Id.* at 8.

¹⁷⁵ *Id.* at 8.

¹⁷⁶ *Id.*, at 6.

¹⁷⁷ See A-3009c/S-2009c Part WWW.

¹⁷⁸ Youth Detention Facilities, *Frequently Asked Questions*, NEW YORK STATE (Sept. 21, 2017), <https://www.ny.gov/raise-age/frequently-asked-questions>.

responsibility has been raised to eighteen.¹⁷⁹ Thus, most cases involving juveniles will be placed in the family court by originating there or being transferred from youth parts, or adolescent diversion parts, in criminal court.¹⁸⁰ Therefore, now juveniles, aged sixteen and seventeen, for the most part will be processed by the family court pursuant to existing juvenile delinquency laws.¹⁸¹ In the youth part, juveniles, aged sixteen and seventeen, while processed in criminal court, the presiding judges will be family court judges and age and maturity must be considered during sentencing.¹⁸² These juveniles are part of a new category of offenders entitled “adolescent offenders.”¹⁸³

The new legislation involves various new components and apportions treatment of juveniles based upon the offenses committed.¹⁸⁴ All misdemeanors will originate in the family court and all felonies will originate in the youth part of the criminal court.¹⁸⁵ Nonviolent felonies will automatically be transferred from the youth part to family court, unless the district attorney files a motion to keep the juvenile in the youth part based upon a showing of “extraordinary circumstances”.¹⁸⁶ Violent felonies may also be transferred to the family court, but only if the offense does not include accusations of displaying a deadly weapon in furtherance of the offense, causing significant physical injury, or engaging in unlawful sexual conduct.¹⁸⁷ However, even the specified offenses may be transferred to the family court with the consent of the district attorney.¹⁸⁸

¹⁷⁹ Raise the Age, *Get the Facts*, http://raisetheagency.com/wp-content/uploads/2017/06/rta.billsummary.final_June-2017.pdf (last visited Nov. 7, 2018).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

COST EFFECTIVE BAIL REFORM FOR JUVENILES

*“The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”*¹⁸⁹

As a result of the particular vulnerability of juveniles, minors, and youths aged eighteen to twenty-one in the criminal justice system, additional safeguards are necessary to protect youth from the harms suffered in detention and correctional facilities. Since minors and youths aged eighteen to twenty-one are subject to the same detention procedures but experience far more stringent applications as a result of ineffective and unfair bail practices, alternatives to detention are necessary to adequately address the problems associated with incarceration. As youths have relative immobility and a lack of financial resources, this note advocates for alternatives such as monetary caps and supervisory programs including in-home confinement, ankle bracelets, and electronic monitoring.

Monetary Caps and Fixed Bail Schedules

As previously discussed, approximately half a million people nationwide are pretrial detainees and nearly thirty percent of state court defendants are detained on bonds of less than five thousand dollars.¹⁹⁰ Furthermore, in New York, two thousand dollars is the average amount of bail set statewide.¹⁹¹ Moreover, in New York City, more than fifty percent of pretrial detainees are incarcerated on bonds equal to or less than two thousand five hundred dollars.¹⁹² The use of pretrial detention should “be reserved for flight risks or dangers to society.”¹⁹³ However, the current system punishes indigent defendants who cannot afford bail because “using money to determine who is detained allows

¹⁸⁹ UN Convention on the Rights of the Child, G.A. Res 44/25, annex, 44 U.N. GAOR Supp. (No.49) at 167, U.N. Doc. A/44/49 (1989). *Entered into force* September 2, 1990 (The United States is not a party because the age of maturity established in the Convention is eighteen).

¹⁹⁰ Wiseman, *supra* note 22.

¹⁹¹ Tomlinson, et al., *supra* note 25.

¹⁹² Rosenberg, *supra* note 24.

¹⁹³ *Id.*

those who are dangerous but rich to go free.”¹⁹⁴ Thus, it is an unjust and discriminatory system that disproportionately affects the poor who are unable to post bail, even when set in nominal amounts.¹⁹⁵

In order to address the problem faced by indigent defendants, monetary caps should be placed on bail with further consideration given to the financial condition of the defendant, particularly in the case of indigent juveniles, youths aged eighteen to twenty-one. Currently, nearly sixty-four percent of polled counties in the United States have fixed bail schedules.¹⁹⁶ Bail schedules establish standardized monetary amounts for specified charges that a judicial officer will use when setting bail.¹⁹⁷ Depending on the state, some of these bail schedules are mandatory while others are merely advisory.¹⁹⁸ They are created at the state or local level as an average bail amount for a specified crime.¹⁹⁹ Typically, these fixed bail schedules are utilized without any consideration of the individual defendants when setting bail.²⁰⁰ Fixed bail schedules are useful in the discussion of monetary caps as they are helpful in curbing judicial discretion but are also problematic because of their lack of consideration of the individual characteristics of the defendant, particularly the financial condition of the defendant.

However, fixed bail schedules allow for the prosecution and defendants to petition the court in order to increase or reduce the specified monetary amount denoted in the bail schedule.²⁰¹ Therefore, if the prosecution or arresting officer, has “reasonable cause to believe that amount of bail set forth in the schedule is insufficient to assure the defendant’s appearance or assure the protection of a victim... [the officer or prosecution] shall prepare a declaration... setting forth the facts and circumstances in support of a higher bail.”²⁰² Conversely, the defendant is similarly able to

¹⁹⁴ *Id.*

¹⁹⁵ Tomlinson, et al., *supra* note 25.

¹⁹⁶ Carlson, *supra* note 76.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Sheila Hanson, *2018 Uniform Bail Schedule (Felony and Misdemeanor)*, UNIFORM BAIL PROCEDURES COMMITTEE, <http://www.occourts.org/directory/criminal/felonybailsched.pdf> (last visited Nov. 7, 2018).

petition the Court for a reduction of the bail amount as specified in the bail schedule.²⁰³ This permits an additional layer of protection for the defendant to have the bail amount reviewed.

New York does not currently use any form of monetary caps or fixed bail schedules. In order to properly determine what amounts would be efficient in New York, the state would have to conduct a survey delineating the average amounts of bail set for each particular crime.

Alternative Forms of Bail

Currently there are nine types of bail available in all fifty states.²⁰⁴ Cash bail is a certain specified amount of bail that must be paid in full in cash.²⁰⁵ An insurance company bail bond (also called a surety bond) is provided through a bail bondsman acting as an agent of the defendant.²⁰⁶ The defendant pays a fee to the bail bondsman who posts the full amount of the bail.²⁰⁷ Typically the insurance company bail bond amount will be a higher dollar amount than would be required for a cash bail.²⁰⁸ A partially secured surety bond is a bail bond secured by either personal or real property.²⁰⁹ An unsecured surety bond is not secured by a deposit or lien upon property.²¹⁰ An unsecured appearance bond is

²⁰³ *Id.*

²⁰⁴ N.Y. CRIM. PRO. LAW § 520.10(1)(a)-(i)(McKinney 2018).

²⁰⁵ N.Y.C.P.L. §500.10(10)(cash bail” means a sum of money, in the amount designated in an order fixing bail, posted by a principal or by another person on his behalf with a court or other authorized public servant or agency, upon the condition that such money will become forfeit to the people of the state of New York if the principal does not comply with the directions of a court requiring his attendance at the criminal action or proceeding involved or does not otherwise render himself amenable to the orders and processes of the court).

²⁰⁶ N.Y. CRIM. PRO. LAW § 500.10(15)(McKinney 2018)(surety bond means a bail bond in which the obligor or obligors consist of one or more sureties or of one or more sureties and the principal).; N.Y.C.P.L. §500.10(16)(Insurance company bail bond” means a surety bond, executed in the form prescribed by the superintendent of financial services, in which the surety-obligor is a corporation licensed by the superintendent of financial services to engage in the business of executing bail bonds).

²⁰⁷ Wiseman, *supra* note 22.

²⁰⁸ *Id.*

²⁰⁹ N.Y. CRIM. PRO. LAW. § 500.10(18)(McKinney2018)(partially secured bail bond” means a bail bond secured only by a deposit of a sum of money not exceeding ten percent of the total amount of the undertaking).

²¹⁰ N.Y. CRIM. PRO. LAW § 500.10(19)(McKinney 2018)(unsecured bail bond means a bail bond, other than an insurance company bail bond, not secured by any deposit of or lien upon property).; N.Y. CRIM. PRO. LAW § 520.20(4)(c)(McKinney 2018)(an affidavit justifying a partially secured bail bond or an unsecured bail bond must state the place and nature of

a bail bond made by the defendant.²¹¹ Finally, a credit card may be used for bail.²¹² However, even in the face of all these alternatives, bail is usually always set as either cash or fully secured bonds in New York.²¹³

Judicial officers have discretion as to the amount of bail as well as the type of bail.²¹⁴ The judicial officer may even order a combination of the above-mentioned types of bail.²¹⁵ However, cash or secured bonds are traditionally the only two forms of bail that are used in criminal proceedings.²¹⁶ Through the use of alternative forms of bail, such as an unsecured bond or partially secured bond, as well as a combinations of the nine types, more defendants would be able to post bail and receive pretrial release.²¹⁷ An unsecured bond does not require money to be paid up front prior to the defendant's release.²¹⁸ A unsecured bond is termed a "personal recognizance bond with a financial condition."²¹⁹ Studies have shown they are as effective and more efficient than secured bonds in attaining goals related to public safety, ensuring court appearance, and maximizing defendant release from custody.²²⁰ Similarly, partially secured bonds require that the individual pay a percentage of the bail amount up front, usually ten percent.²²¹

Currently, New York State continues to use "only the most financially burdensome forms of bail."²²² Through the use of

the obligor-affiant's business or employment, the length of time he has been engaged therein, his income during the past year, and his average income over the past five years).

²¹¹ N.Y. CRIM. PRO. LAW § 500.10(14)(McKinney 2018)(appearance bond" means a bail bond in which the only obligor is the principal).

²¹² N.Y. CRIM. PRO. LAW § 520.10(1)(i)(McKinney 2018).

²¹³ Tomlinson, *supra* note 25.

²¹⁴ N.Y. CRIM. PRO. LAW § 520.10(2)(a)(McKinney 2018)(a court may designate the amount of the bail without designating the form or forms in which it may be posted. In such case, the bail may be posted in either of the forms).

²¹⁵ N.Y. CRIM. PRO. LAW § 520.10(2)(a)(b)(McKinney2018)(the court may direct that the bail be posted in any one of two or more of the forms specified in subdivision one, designated in the alternative, and may designate different amounts varying with the forms).

²¹⁶ Wiseman, *supra* note 22.

²¹⁷ Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, PRETRIAL JUSTICE INSTITUTE, 13, (Oct. 2013).

²¹⁸ *Id.*

²¹⁹ *Id.* at 19.

²²⁰ *Id.* at 4.

²²¹ *Id.*; *supra* note 189.

²²² Tomlinson, *supra* note 25, at 2.

unsecured bonds or partially secured bonds, it is possible to lessen the burden on defendants, which is particularly true of juveniles who have less financial resources at their disposal.

While any form of bail can be used, the most financially burdensome forms of bail are often applied in cases because of privatization and the creation of an industry which serves as bail bondsmen.²²³ Criminal defendants pay a fee to these private companies who in turn post the bail and are responsible for ensuring the appearance of the accused in order to get the return of their money.²²⁴ This “commercial bail” system is criticized as “discriminat[ing] against the poor and places Americans’ liberty at the mercy of private businesses.”²²⁵

Even though bail is the most prevalent issue in the pretrial context, the efficiency of bail producing the desired result of ensuring the appearance of the defendant at future court appearances is questionable. Almost twenty-five percent of state court felony defendants between 1990 and 2004 failed to appear at a court date when released on bail or recognizance.²²⁶ Moreover, twenty-five percent of the defendants who failed to appear had been released on surety bond; of all defendants released on surety bonds during this time, there was an eighteen percent failure-to-appear rate.²²⁷ Furthermore, thirty percent of defendants released on unsecured bonds and forty-five percent of defendants released on an emergency basis did not appear for a court date or trial.²²⁸ Therefore, monetary bail itself does not adequately ensure that defendants will appear for court and does not efficiently address the problem of flight risk in the context of bail despite its preferred use. While it is politically untenable to abolish the bail system, monetary caps and fixed bail schedules, as well as, alternative forms of bail help ensure an application that can benefit juveniles.

However, as seen in the case of Kalief Browder, bail reform alone is not enough to ensure justice for indigent defendants. In fact, in

²²³ See generally Shane Bauer, *Inside the Wild, Shadowy and Highly Lucrative Bail Industry*, MOTHER JONES (May/June 2014), <http://www.motherjones.com/politics/2014/06/bail-bond-prison-industry>.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Wiseman, *supra* note 22.

²²⁷ *Id.*

²²⁸ *Id.*

a New York study, only thirteen percent of defendants were able to post bail when the amount was set at one thousand dollars.²²⁹ This displays the discriminatory nature of bail which impacts indigent defendants who are unable to post even nominal bail amounts. This is of particular concern for juveniles who lack adequate resources to post bail and obtain pretrial release. Therefore, additional alternatives should be considered in the context of pretrial detention. Thus, alternatives to bail should be considered for those most vulnerable to experience pretrial detention as a result of inadequate resources. According to the American Bar Association Standards for Pretrial Release, financial conditions “should only be used when *no other conditions* will provide reasonable assurance a defendant will appear in court.”²³⁰

Alternative to Incarceration

Alternatives to incarceration or detention include varying types of supervisory programs. These programs range from minimal restriction, such as curfews and check-ins, to maximum restriction, through the use of in-home confinement and house arrest. The use of such supervisory programs in conjunction with technological advancements, such as electronic monitoring, properly address the problems associated with bail or detention while efficiently ensure the defendant’s appearance in court. Therefore, alternatives to incarceration are the most promising measures in bail reform and pretrial detention for indigent juveniles, minors, and youths aged eighteen to twenty-one.

Supervisory Programs

The alternative supervisory programs make use of improving technology. A prime example is the use of text-message reminders for court dates, mandatory curfews, and regular check-ins.²³¹ Supervisory programs, particularly in the context of juveniles and youths, are efficient and cost-effective alternatives to monetary

²²⁹ Carlson, *supra* note 76.

²³⁰ *Id.* at 2.

²³¹ NYC Announces Bail Reforms, Looks for More Ways to ‘Fix’ Process, CBS NEW YORK (Oct. 13, 2015), <http://newyork.cbslocal.com/2015/10/13/nyc-bail-reforms/>.

bail and pretrial detention.²³² These cost-effective measures greatly benefit juveniles and youths who would be able to stay in their homes with their families and continue work and school during the pretrial period.²³³ This is beneficial for the community because taxpayers would avoid the cost of incarcerating the defendant during the pendency of the trial as well as benefit the mental and emotional health of the youth. While the application of these minimally restrictive supervisory programs are still in their early stages and there are no empirically verifiable results on efficiency, the use of these programs are a promising step towards alternatives to incarceration that can benefit low level and misdemeanor offenders.

For low-level offenders, supervisory programs like kiosk reporting can be the most beneficial and cost-effective option. Kiosk reporting involves offenders reporting to a machine, similar to an ATM, which uses thumb print scanning for identification followed by a photograph of the defendant and a video recording of the session.²³⁴ The session requires the offender to answer a series of questions concerning their release and compliance, and then implements instructions to shape the offender's behavior through a negative response, the imposition of more restrictions or requiring action like substance abuse counselling or therapy, or a positive response, the reduction or elimination of restrictions or treatments.²³⁵ These programs are "best used for offender accountability" as well as "treatment compliance and adding structure to offenders' lives."²³⁶

House Arrest and Home Confinement

Home confinement and house arrest are additional examples of alternative supervisory programs. Home confinement generally

²³² Jeffrey N. Hurwitz, *House Arrest: A Critical Analysis of an Intermediate-Level Penal Sanction*, 135 U. PA. L. REV. 771, 772 (1987).

²³³ *Id.* (however, schools retain the discretion to place students on probation during the pendency of criminal charges, but the youth would be able to be schooled in home and remain with their family).

²³⁴ US Department of Justice, *Offender Supervision with Electronic Technology*, BUREAU OF JUSTICE ASSISTANCE, https://www.appa-net.org/eweb/docs/APPA/pubs/OSET_2.pdf (last visited Nov. 7, 2018).

²³⁵ *Id.*

²³⁶ *Id.*

involves mandatory time blocks of remaining in the home.²³⁷ In contrast, house arrest, which is the most extreme form of supervisory programs that is employed for felony and high risk offenders, requires the defendant to be confined to their residence and may only leave based upon certain conditions or with permission.²³⁸ Permission to leave the residence usually includes block time periods for work, school, religious exercise, community service, as well as other mandatory conditions instituted by the courts, such as drug treatment or meetings with supervisory personnel including probation officers or police.²³⁹ However, a person on house arrest may also be able to leave the residence for essentials such as medical treatments or appointments, shopping, and family or medical emergencies.²⁴⁰ Typically home confinement and house arrest today are employed in conjunction with electronic monitoring which monitors the defendant's location at all times.²⁴¹ The monitoring not only ensures the defendant is not a danger to society but also provides the greatest certainty that the defendant will appear at court or for trial.²⁴² While house arrest monitoring is the most burdensome of the proposed alternatives on the defendant, it may be the only appropriate way for defendants who are accused of violent crimes to avoid detention.

Criticism regarding house arrest and the use of electronic monitoring in conjunction with GPS tracking systems concern the idea of "big brother".²⁴³ This monitoring has been criticized for "both the actual physical confinement [of house arrest] and the constant knowledge of being watched-seeps into each moment of a confined person's daily life."²⁴⁴ It has been described as "lock[ing] people into a life of stasis and boredom."²⁴⁵ Furthermore, the stigma associated with the ankle bracelet or house arrest may affect school and employment opportunities. As reported in a

²³⁷ Hurwitz, *supra* note 232, at 772.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Maya Schenwar, *The Quiet Horrors of House Arrest, Electronic Monitoring, and other Alternative Forms of Incarceration*, MOTHERJONES (Jan. 22, 2015), <http://www.motherjones.com/politics/2015/01/house-arrest-surveillance-state-prisons>.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

Justice Department survey, eighty-nine percent of probation officers believed the monitored defendant's relationship with others changed because of their status of being electronically monitored or on house arrest.²⁴⁶ These types of programs have been called "open-air prisons" due to the continuous monitoring and restrictive conditions imposed upon defendants.²⁴⁷

Thus, while "technology [sic] cannot completely eliminate pretrial detention for flight risk, at most, by being more effective than money bail, it could narrow the class of defendants considered too great of a flight risk to release."²⁴⁸

Electronic Monitoring

House arrest and home confinement differ slightly from electronic monitoring, although GPS tracking and electronic monitoring are often used in conjunction with house arrest. Electronic and GPS monitoring usually involves a continuous radio signal that will notify supervisors or the police department if the defendant has left his or her home.²⁴⁹ Through the use of GPS tracking, law enforcement will be able to quickly find the defendant when the conditions of house arrest have been broken.²⁵⁰

Electronic monitoring technology has been used since the 1980's and has largely been used for the purpose of pretrial detention.²⁵¹ Including convicted offenders, nearly 100,000 defendants are monitored electronically daily nationwide.²⁵²

In general, electronic monitoring functions through radio devices and are usually combined with conditions such as check-ins or curfews.²⁵³ Ankle bracelets are worn by the defendant whereby a continuous signal is sent to the base, either attached to

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Wiseman, *supra* note 22.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² Eric Markowitz, *Chain Gang 2.0: If You Can't Afford This GPS Ankle Bracelet, You Get Thrown In Jail*, INTERNATIONAL BUSINESS TIMES (Sept. 21, 2015), <http://www.ibtimes.com/chain-gang-20-if-you-cant-afford-gps-ankle-bracelet-you-get-thrown-jail-2065283>.

²⁵³ Wiseman, *supra* note 22.

the defendant's phone or body (hence the term "ankle bracelet").²⁵⁴ The equipment allows supervisors to track the defendant's whereabouts, to confirm compliance with release conditions, such as curfews and location (such as being at home, work, or school), and is also equipped with technology to prevent tampering with the machine.²⁵⁵ Typically, an alert will be sent within ten seconds of tampering, and offenders are generally caught within forty-eight hours.²⁵⁶ It has been argued that electronic monitoring and GPS tracking, either through a cell phone or attached to the defendant's body, "accura[tely] deters flight , [sik] allows fugitives to be readily located, and it is much less restrictive than a curfew requirement."²⁵⁷

Furthermore, similar GPS tracking technology allows for "periodic check-ins through 'voice-verification'" systems.²⁵⁸ As this technology continues to expand, audio and video conferencing systems may emerge which allow for supervisory programs to expand in order to include high risk defendants and low risk defendants alike.²⁵⁹ In a recent study conducted in 2010, house arrest and GPS monitoring decreased recidivism and increased compliance with conditions of release.²⁶⁰ The ability to utilize GPS tracking and electronic monitoring technology is particularly efficient and beneficial for juveniles, who would be able to avoid detention in adult correctional facilities while maintaining their school and home life.

A recent notable defendant who was given house arrest with pretrial monitoring and nightly curfews was Bernie Madoff.²⁶¹ Moreover, other famous criminal defendant's such as Paris Hilton, Dr. Dre, T.I., and Michael Vick were sentenced to house arrest

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Police say Ankle Bracelet Removal Not a Problem*, WCNBC (Mar. 16, 2012), <http://www.wcnc.com/story/news/crime/2014/06/29/10831456/>.

²⁵⁷ Wiseman, *supra* note 22, at 1368.

²⁵⁸ *Id.* at 1366.

²⁵⁹ *Id.* at 1368.

²⁶⁰ *See generally* US Department of Justice Office of Justice Programs, *Electronic Monitoring Reduces Recidivism*, NATIONAL INSTITUTE OF JUSTICE (Sept. 2011), <https://www.ncjrs.gov/pdffiles1/nij/234460.pdf>.

²⁶¹ Lucas Kavner, *House Arrest of the Rich and Famous*, HUFFPOST BUSINESS (July 26, 2011), http://www.huffingtonpost.com/2011/05/26/dominique-strauss-kahn-house-arrest_n_867596.html.

with pretrial monitoring.²⁶² In addition, Dominique Strauss-Kahn, the former International Monetary Fund managing director, opted for house arrest with electronic monitoring, which costs him out-of-pocket nearly two hundred thousand dollars a month.²⁶³ In contrast, Strauss-Kahn's incarceration at Riker's Island would have cost taxpayers more than six thousand a month.²⁶⁴ However, this highlights the problem associated with house arrest and electronic monitoring, in that it has often been used for wealthy defendants in order to avoid pretrial detention (in the absence of authorizing bail as a means for release) rather than associated with indigent defendants who are unable to make bail.²⁶⁵ More often than not the option to use electronic monitoring has placed the burden on the defendant to carry the costs associated with electronic monitoring and GPS tracking.²⁶⁶

The Offender Management Services ("OMS"), a for-profit private company located in Richland County, South Carolina that offers electronic monitoring and GPS tracking services, charges installation fees as well as daily charges for the electronic monitoring services.²⁶⁷ For example, a set-up fee of \$179.50 and a daily charge of \$9.25 for electronic monitoring of OMS, would be more than indigent defendants would be able to afford in order to avoid pretrial detention.²⁶⁸ South Carolina is not alone in having defendants shoulder these costs, and other states, such as Georgia, Arkansas, Colorado, Washington, and Pennsylvania, have followed suit and implemented so-called "offender-funded" electronic monitoring systems.²⁶⁹ This saves the courts, governments and correctional facilities money while further burdening already financially deprived defendant.²⁷⁰ While not all

²⁶² *Id.*

²⁶³ *Id.* (due to Strauss-Kahn's high risk of flight because of his vast financial assets, expansive measures were required for his compliance with pretrial detention release, including in-home video surveillance cameras in addition to an ankle bracelet).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Eric Markowitz, *Chain Gang 2.0: If You Can't Afford This GPS Ankle Bracelet, You Get Thrown In Jail*, INTERNATIONAL BUSINESS TIMES (Sept. 21, 2015), <http://www.ibtimes.com/chain-gang-20-if-you-cant-afford-gps-ankle-bracelet-you-get-thrown-jail-2065283>.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

states charge such prices as above-mentioned, “in all states, except Hawaii, and the District of Columbia, there’s a fee for the electronic monitoring devices defendants and offenders are ordered to wear.”²⁷¹ However, implementing house arrest and electronic monitoring as an alternative to incarceration for pretrial detainees would cost taxpayers far less than that of detaining indignant defendants, which is therefore not only beneficial for the defendant but also results in cost savings for the criminal justice system as well.

Cost Savings of Alternatives to Incarceration

Juvenile delinquent detention diversion reduces costs.²⁷² For example, Connecticut found an improved cost-benefit analysis.²⁷³ Through the implementation of avoiding incarceration of these defendants, Connecticut saved three dollars for every dollar spent by moving these juveniles away from adult criminal prosecution.²⁷⁴ In sum, the Attorney General estimates that the annual cost nationwide to taxpayers to detain pretrial offenders is approximately nine billion dollars, due in part to the large number of detainees who are *unable to obtain release on bail or pretrial release as well as the increasing costs associated with housing offenders*.²⁷⁵

New York City spends approximately forty-five thousand dollars annually to detain one pretrial defendant.²⁷⁶ Furthermore, daily averages nationwide can range from fifty dollars in Kentucky, eighty-five dollars in Florida, and one hundred twenty-three dollars in New York.²⁷⁷ Thus, the cost of detaining defendants prior to trial far outweighs the costs of alternate means to

²⁷¹ Joseph Shapiro, *As Court Fees Rise, The Poor are Paying the Price*, NPR (May 19, 2014), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

²⁷² *Juvenile Justice Reform in Connecticut: How Collaboration and Commitment have Improved Public Safety and Outcomes for Youth*, JUSTICE POLICY INSTITUTE, http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi_juvenile_justice_reform_in_ct.pdf (last visited Nov. 7, 2018).

²⁷³ *Id.*

²⁷⁴ *Id.* (for offenders of low-level felonies and misdemeanors)

²⁷⁵ Wiseman, *supra* note 22 (included in these costs are housing, feeding, and the cost of paying personnel to supervise and service offenders).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

incarceration. The diversion from the costly criminal justice system and court processes, benefits not only tax payers and offenders alike, but, most importantly, it also properly allocates those resources to those offenders requiring such treatment by the criminal justice system.²⁷⁸

CONCLUSION

“Humanity has the stars in its future, and that future is too important to be lost under the burden of juvenile folly.”²⁷⁹

The costs of pretrial detention far outweigh its benefits. This can be seen not only in the dollar amounts that are spent to incarcerate those who are merely accused and not yet convicted of a crime, but also in the harms that are suffered by pretrial detainees. This is particularly true of juveniles, aged eighteen to twenty-one, who are subject to the adult criminal court and confined in adult correctional facilities. As seen in the case of Kalief Browder, indigent youths suffer the greatest from the ineffective and unconstitutional application of bail in New York State. As Fredrick Douglass is quoted with saying, “it is easier to build strong children than to repair broken men.”²⁸⁰ After being mistreated by the system and abused in jail, Kalief found himself to be one such broken man and committed suicide to avoid the pain he could not avoid even after his release from Riker’s. Perhaps if treated differently by the system, Kalief Browder would be alive today.

Pretrial detention causes more harm that it prevents. Youths, like Kalief, are put at a greater risk than adults by the harms posed by detention because they are less equipped to deal with the traumas they face while incarcerated or detained. Due to the mental immaturity and impetuous nature of youths, they are more likely to find themselves in the clutches of the criminal justice

²⁷⁸ *Id.*

²⁷⁹ Isaac Asimov, *Quotable Quote*, GOODREADS, <https://www.goodreads.com/quotes/905266-humanity-has-the-stars-in-its-future-and-that-future> (last visited Nov. 7, 2018).

²⁸⁰ Charles M. Blow, *Fathers’ Sons and Brothers’ Keepers*, THE NEW YORK TIMES (Feb. 28, 2014), <http://www.nytimes.com/2014/03/01/opinion/blow-fathers-sons-and-brothers-keepers.html>.

system while simultaneously unable to deal with the environments they will find themselves in. These same vulnerabilities that subject them to criminal proceedings further substantiate the argument that juveniles should not be subjected to the same sanctions as adult and warrant special treatment. This is particularly true because the physical, emotional, and mental trauma of incarceration or detention is inflicted upon pretrial detainees in the absence of any justification for their punishment.

Thus, alternatives to incarceration are the most effective and cost-effective measures that benefit the defendant and the criminal justice system alike. Defendants are able to avoid the detrimental effects of detention while simultaneously incurring lower costs than traditional pretrial detention. Monetary caps and the establishment of specialized fixed bail schedules for juveniles would help judicial officers set attainable bail amounts that would enable defendants to obtain pretrial release. Fixed bails schedules will also curb the judicial discretion which results in bail amounts that do not adequately reflect the juvenile defendant's ability to pay. Due to the lack of financial resources, juveniles, minors, and youths aged eighteen to twenty-one who are subject to proceedings in adult criminal court and confinement in adult correctional facilities, require additional safeguards to protect their liberty interests.

Perhaps the most effective alternative to incarceration are supervisory programs and in-home confinement through the use of house arrest with electronic monitoring and GPS tracking. In-home confinement and house arrest are beneficial and cost-effective alternatives to incarceration that would greatly impact the lives of juveniles who face pretrial detention, while also minimizing costs for the courts, government, and correctional facilities. The increasing costs of confining defendants coupled with the unnecessary restrictions placed on defendants who pose no flight risk or community safety concern warrant the use of alternatives to incarceration. This is particularly true for juveniles, minors, and youths aged eighteen to twenty-one, whose immobility coupled with lack of financial resources makes them unlikely candidates to flee to avoid court appearances. The institution of house arrest and electronic monitoring ensures that

the defendant will pose no risk to the community while simultaneously ensuring their appearance at future court dates.

Most importantly, juveniles require specialized treatment and safeguards due to their infancy. As stated by Nelson Mandela, the former president of South Africa, “there can be no keener revelation of a society’s soul than the way in which it treats its children.”²⁸¹ Due to their immaturity, juveniles, minors, and youths aged eighteen to twenty-one lack the ability to sufficiently deal with criminal justice proceedings that are geared towards adult offenders. Youths should be treated with the utmost care in the criminal justice system to help them mature into adults and avoid future criminal behavior. Therefore, as stated by Abraham Lincoln, “The way for a young man to rise is to improve himself in every way he can, never suspecting that anybody wishes to hinder him.”²⁸²

²⁸¹ Scheherazade Rehman, *Living Nelson Mandela’s Words*, USNEWS (Dec. 16, 2013), <http://www.usnews.com/opinion/blogs/world-report/2013/12/16/world-leaders-should-live-these-nelson-mandela-quotes>.

²⁸² Abraham Lincoln, AZQUOTES, <https://www.azquotes.com/quote/176158> (last visited Nov. 7, 2018).