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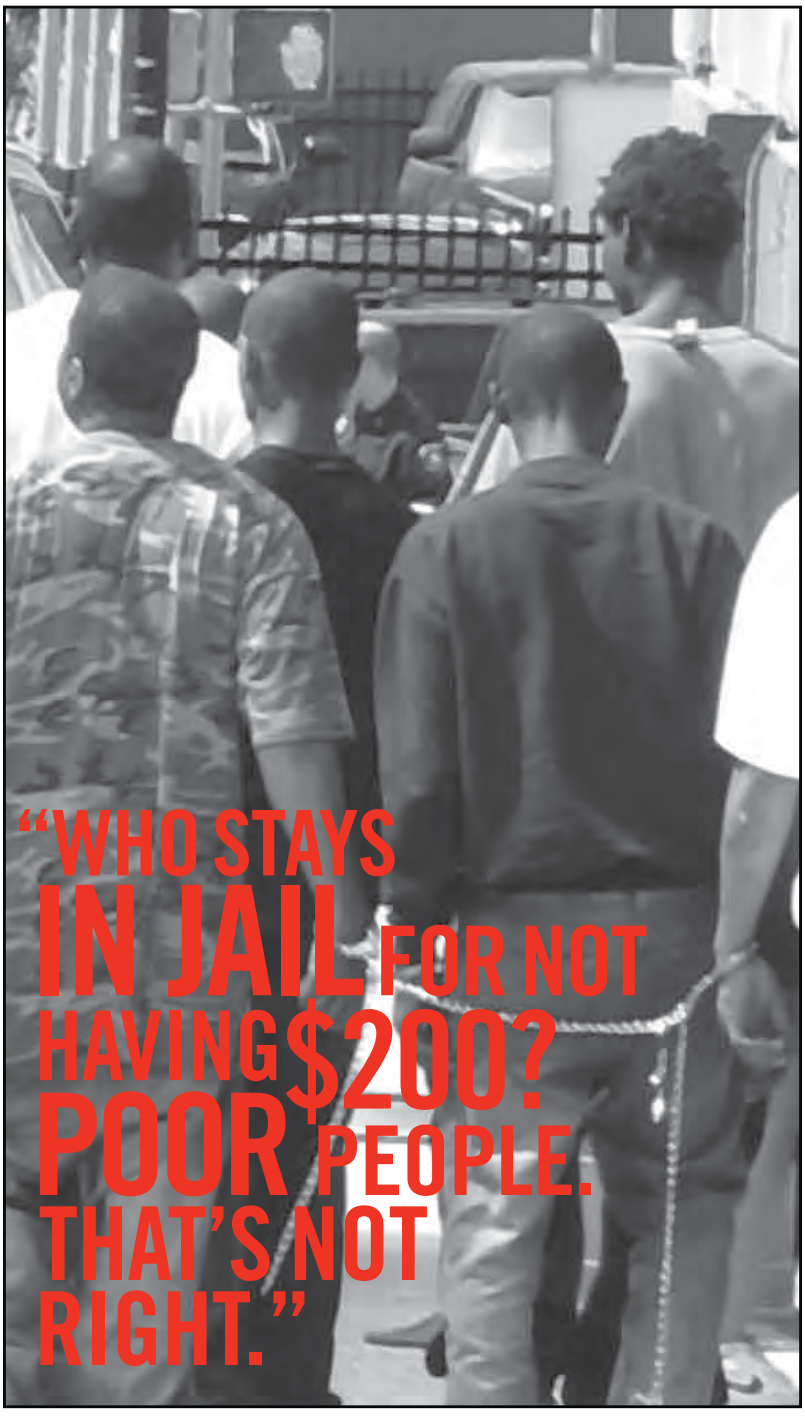

Photo: JM

PRISONERS DILEMMA

How NYC's bail system puts justice on hold

Every year New York City detains thousands of people who are presumed innocent. They are pretrial detainees. They are the majority in city jails. And most of them are behind bars not because they are dangerous, but because they could not afford bail. They await trial away from jobs and families and face a harder time proving their innocence. It's a problem with which New York has struggled for decades. But as courts deal increasingly with low-level crimes, and as the consequences become more serious for being convicted of even minor offenses, the stakes of a system that conditions freedom on finances are growing higher.

By Jarrett Murphy

Freedom (among other things) for sale off 161st Street in the Bronx, a few steps from the borough's criminal courthouse. *Photo: JM*

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PUBLISHER'S NOTE

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." —The Eighth Amendment to the United States Constitution

Excessive. So much hangs on a word.

For many of us getting our hands on $250, $500 or $1,000 in order to preserve our freedom might prove to be a financial hardship, but not impossible. Yet each year, for tens of thousands of New Yorkers, those amounts end up being the cost of liberty they can't afford.

Of the 13,000 people in a city jail on a typical day, more than 9,500 will be incarcerated pretrial—most of them because they are unable to make bail. And half of those who don't make bail are held on bails of less than $1,000.

It hasn't always been this bad. In 1964 the Vera Foundation (now the Vera Institute) found that 45 percent of the city's jailed were in pretrial lockup. Today that percentage has climbed to 72 percent.

For many, this issue is out of sight and thus out of mind. Crime is down and Gotham's grateful citizens don't particularly want to ask too many vexing questions about anything having to do with public safety. Yet are many of these pretrial detentions what make a safer city? And do such jailings come with a cost—not only in dollars and cents, but in the kind of justice system we are building? Ideas that people are "innocent until proven guilty," and that one's liberty may only to be abrogated by a jury of one's peers—notions that every schoolkid has drummed into his head—have become quaint and unrealistic in light of today's bail practices in New York City. One of the cruelest ironies of our current way of doing justice is that if you can't make bail, choosing to fight for your innocence often means more money, more time behind bars, more chance of a job lost, child custody revoked, housing denied and relationships broken. It is far too easy for many to take a false plea instead—to incriminate themselves in order to move on.

In New York our "broken windows" policing strategy may have helped drive down the crime rate, but its ever-increasing reliance on jailing those caught up in "quality of life" arrests to combat disagreeable social behavior and nonviolent crime is deforming commonly understood precepts of jurisprudence. The results are ultimately echoed in the broader context. The rate of incarceration in American prisons and jails was 737 inmates per 100,000 residents in 2005, up from 601 in 1995. In a society that incarcerates well over 2 million of its fellow citizens—more than China or Russia and more than the populations of Boston, Atlanta, Minneapolis and Washington, D.C. combined—we are developing a monstrously efficient incarceration system. What criminal justice has to do with this is an increasingly fraught question.

No one is claiming sainthood for the many that get caught up in the criminal justice system, but how bail is punishing the poor and warping common-sense notions of justice demands a close look, fresh thinking and reform. The system now is clearly troubled and troubling.

—Andy Breslau,
Publisher

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Cover image: Police lead a group of defendants into Kings County Criminal Court for their arraignment. Photo: JM

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FALL 2007 VOL. 31 NO. 02

AWAITING JUSTICE

The punishing price of NYC's bail system

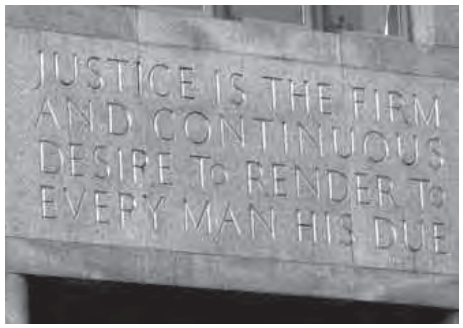
CHAPTERS

IN FOCUS

BY JARRETT MURPHY

AWAITING JUSTICE

The punishing price of NYC's bail system



Justinian's words adorn Manhattan's main criminal courthouse. *Photo: JM*

I. The plea

In a basement in Queens on a gleaming July morning, the New York City criminal justice system turned its attention to one Eric T. This article won't use his last name because Eric says he lied to the judge when he made his plea—a plea of guilty.

The charge was possession of marijuana. It was not the first time Eric had faced a drug charge, but he says he had been out of trouble for a decade, until the evening this summer when Eric and a fellow student at their automotive repair school in Queens were taking a smoke break and the police rolled up. A search of the friend's car found some marijuana. Eric says it wasn't his. The friend says it wasn't Eric's. The court-appointed lawyer who met Eric a few minutes before his arraignment told him the police report did not allege that Eric had any drugs on him, and advised his client to fight the charge.

But outside the lock-up, through the door and in Judge Ira Margulis' court room, many of those who were choosing to fight their relatively minor charges were facing the prospect of doing so behind bars. Sure, the judge was letting a good number of people out before trial, ordering "release on recognizance," but in many cases he was setting bail, whether the charge was a felony or a misdemeanor. The bails were for the most part relatively small—$500 here, $1,500 there—but even that was too high for some to meet. One mother told her son's public defender that she could afford perhaps $200 to get him out on a misdemeanor drug possession charge; the prosecutor asked for $3,500, and the judge set bail at $1,500. A guy who turned down an offer of pleading guilty to a count of diverting prescription medications and being sentenced to the time he had already served had bail set at $1,500. Upstairs the inscription in the lobby quoted Disraeli: "Justice is truth in action." Down below in arraignment court, the price of freedom was somewhere between $500 and $50,000—cash or bond.

As any good lawyer would, Eric's defender laid out the stakes for his client. If Eric said he was guilty, he'd probably be sentenced only to the time he had already served since his arrest a day earlier. If he professed his innocence, it was likely bail would be set, and if Eric were unable to pay it, that could mean staying in jail until his next court date, five days away. In other words, saying he did nothing wrong would earn him more jail time than if he claimed he'd broken the law.

With work, school and a family to think about, Eric couldn't do that kind of time. His lawyer told the judge Eric wanted to plead guilty, and Margulis

The lockup at Queens Criminal Court on Queens Boulevard. To prevent escape, there's razor wire even on the vents on upper floors. *Photo: JM*

"...I JUST WANT THIS OVER WITH." HIS LAWYER JUMPED IN: "I'VE COUNSELED [ERIC] NOT TO PLEAD GUILTY TO THIS. HIS CONCERN IS WHETHER BAIL WILL BE SET."

began the allocution, where he asks the defendant to admit to specific allegations, like, "Was it true that you were in possession of marijuana?"

"I didn't possess anything," Eric answered.

Margulis looked up. "Then I can't accept your plea," he said.

"OK. I possessed it," Eric shot back. "I have nothing to say. I just want this over with." His lawyer jumped in: "I've counseled [Eric] not to plead guilty to this. His concern is whether bail will be set."

Margulis wouldn't say. So Eric shook his head, barked "OK, I possessed it," and stepped out of the courtroom with a $160 court fee to pay, a six-month license suspension in his pocket and a Class B misdemeanor conviction on his criminal record that could disqualify him from having several types of jobs, obtaining certain government benefits and—at the very least—being able to claim ever again that he'd been out of trouble since 1997.

"I would have fought it," Eric said a couple weeks later. "It was just a matter of, I didn't want them to set a bail that I couldn't make there on the spot." He had about $120 on him. His fiancée could have brought more, but by the time she gathered up the kids and found her way there from eastern Long Island, he'd be back on Rikers. "Granted, a B misdemeanor—I don't want that on my record. But I just wanted to get out of there."

Some of those who had shared the lock-up with Eric didn't get out of there that morning. Court records indicate that one man arraigned the same day for possession of stolen property worth less than $1,000 was locked up for several days awaiting trial on $1,500 bail. People went back inside for at least some time before trial on charges like driving without a license and misdemeanor "menacing." But the guy alleged to have had 129 glassines of heroin on him got out right away; his buddies had $5,000 cash in hand.

In the 1960s, a New York City industrialist named Louis Schweitzer grew alarmed at the number of people being held in city jails before trial on minor charges simply because they couldn't pay their way out. He launched the Vera Foundation (now the Vera Institute), which ran the Manhattan Bail Project to study ways of getting more people released before their cases were tried. A 1964 report by Vera mapped out the national problem with bail. "Each year the freedom of hundreds of thousands of persons charged with crimes hinges upon their ability to raise the money necessary for bail," it read. "Those who go free on bail are not released because they are innocent but because they can buy their liberty. The balance are detained not because they are guilty but because they are poor."

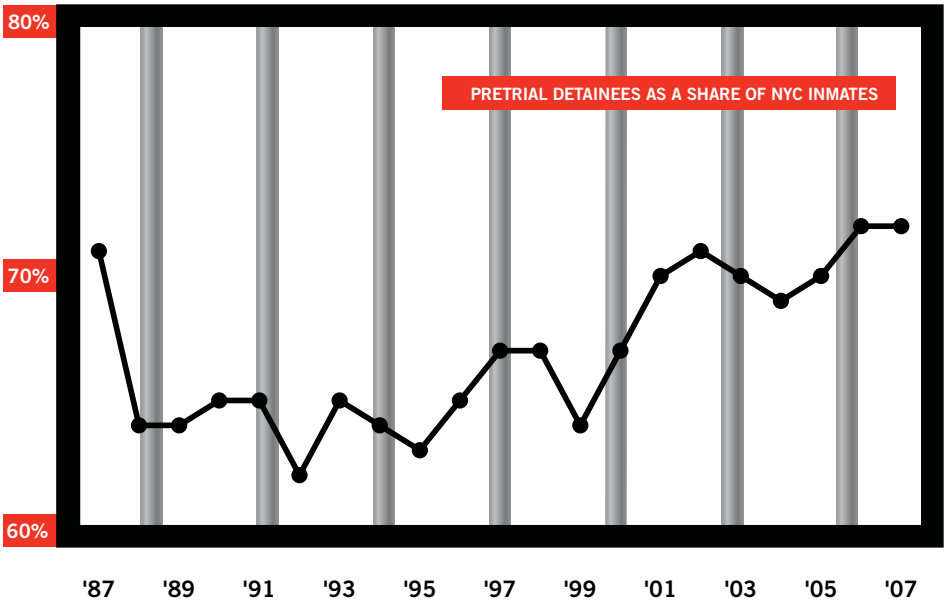
Around the same time, a State Assembly committee found that pretrial detainees—those presumed innocent but kept behind bars, most of them on bails they could not pay—comprised 45 percent of the city's jail population.

In fiscal year 2006, that figure was 71 percent, with roughly 9,700 people who were detained but presumed innocent.

Evidence suggests that the majority of people in New York City's jails today have bail set in their cases but cannot pay it. And more than half of those who don't make bail over the course of a year are held on less than $1,000, suggesting that the crimes of which they are accused are minor—perhaps trespassing, marijuana possession or low-level assault. Many stand a chance of serving more time in jail awaiting trial than they would spend behind bars if found guilty.

New York State law says that a judge is supposed to consider only one thing when he decides whether to release defendants without bail or set bail in their cases: making sure they show up for their next court date. Bail is only supposed to be set to prevent court-skipping, not to punish or prevent some future crime or get someone to plead guilty. But research on bail in New York indicates that bail decisions in the five boroughs bear, at best, an inconsistent relationship to defendants' risks of flight. Bail seems to be operating as something other than an incentive to show up in court. "Bail is a form of preventive detention for poor people," says Robert Gangi, executive director of the jails watchdog Correctional Association of New York. "They're mainly detained because they're poor. That's an important understanding to have: Whatever the theoretical justification for bail, that's what it really is."

It's an obvious truth that the poor have a harder time paying bail than the wealthy, and courtroom veterans have known for years that being detained before trial hurts your chances of winning acquittal or getting a lighter sentence if convicted. But the dynamics of the bail system are different in 2006 than they were in 1960. In an era of falling felony crime rates but rising arrest numbers, New York City's courts are increasingly dealing with low-level misdemeanor offenses that years ago might never have led to arrest, arraignment and bail. And at the same time, a growing litany of life consequences—the loss of housing, ineligibility for some jobs, disqualification for government assistance—have been arrayed to target people found guilty even of petty crimes and non-criminal



THE WAITING ROOM

The city's jail system consists of nine facilities on Rikers Island as well as the Manhattan Detention Complex and the Vernon C. Bain barge docked off the Bronx. Those in custody include people sentenced to a year or less in jail, those sentenced to longer stints who are awaiting transfer to a state facility and defendants who have yet to be tried. Nowadays, pretrial detainees are taking up more room than in the past two decades.

Source: Mayor's Management Reports, 1987-2007.

violations like disorderly conduct. People who get arrested today are likely to be accused of more minor crimes but face penalties for a conviction that go well beyond prison or probation. Bail can hasten those convictions regardless of guilt or innocence.

In other words, bail matters. If bails are being set too high, or bail is being set in too many low-level cases against people who can't afford even low bail, taxpayers, defendants and justice will suffer.

But while civil liberties activists critique police methods that lead to arrest and social policy advocates denounce the difficulties facing people getting out of prison, bail—a middle-ground between freedom and guilt—gets little scrutiny, even though it makes a deep mark on the criminal justice system in courtrooms in each borough every day.

II. Making bail

Almost every hour of every weekday, someone is being arraigned somewhere in New York City. When most people are at work, arraignments are underway on Targee Street in a worn-looking section of Staten Island's Stapleton neighborhood, in the basement courtroom on Queens Boulevard, and in two chambers in the criminal court building just up the street from Yankee Stadium. In Manhattan and Brooklyn, as in the Bronx, there are two arraignment courtrooms running each day. All boroughs but Staten Island offer night court as well; Manhattan devotes two judges to it. The arraignment courtrooms—usually staffed with a rotation of judges—range in dimension from a tiny classroom-sized space in the Bronx courthouse basement to a large theater-like room at 100 Centre Street in Manhattan. The main arraignment "part" (as they call it) in Brooklyn has a kind of dingy grandeur, while its counterpart in Queens is all dark wood paneling and crisp marble. Each room has "In God We Trust" inscribed above the judge's chair. The arraignment process is essentially the same in any city courthouse.

That process really begins on the street. Not every encounter with the NYPD ends in arraignment, of course—officers can issue summonses for minor infractions, and Desk Appearance Tickets (which are technically arrests but allow a defendant to stay free until his first court date) can be written for crimes up to and including Class E felonies like "forgery of a vehicle identification number." But if the police take a person into custody, he or she is usually brought to the precinct and then to the lockup at the borough courthouse to await arraignment, which state courts have said is supposed to occur within 24 hours of the arrest. The police who work in arraignment court don't carry firearms because they walk in and out of the lockup where weapons are not permitted. Many wear black baseball batting gloves in case they need to handle somebody.

An armed New York State court officer runs each arraignment courtroom, doubling as chief guard and court clerk. Assisted by three or four other court officers, he or she calls the docket ("Docket ending 343. Doe, John. Defendant is charged with violating section 178.20 of the penal law and related charges.") and the defendant steps into the courtroom. He usually isn't handcuffed but is required to stand with his hands clasped behind his back. In some courtrooms, the next defendants wait on benches off to the side. They are overwhelmingly black and Hispanic.

The assistant district attorneys (ADAs) who work arraignments tend to be young, but already many have developed smooth ways to say the same things over and over again without sounding bored by their own words. First, the ADA hands over any notices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SAM
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The Post's Son of Sam slam on the CJA. *Image:* New York Post

STUNG BY SAM

.44-caliber bail reform

The New York City Criminal Justice Agency (CJA) is a private, nonprofit organization that contracts with the City of New York to provide information to judges on whether criminal defendants are likely to appear in court if they are released before trial. An outgrowth of the city's 1960s bail reform movement, CJA interviewers question defendants awaiting arraignment about their ties to the community, and check their rap sheets for indications of other open cases or a history of "bench warrants," which are what judges issue when somebody misses a court date.

Using a point system, the CJA interviewer then generates a score for each defendant. That score translates into a recommendation that CJA gives to the judge. Some defendants are recommended for release on their own recognizance (ROR). Some are dubbed to be a "moderate risk" of failing to appear in court, while others are deemed "high risk." For a few, however, CJA makes no recommendation at all as a matter of policy—a policy that is in some ways the work of David Berkowitz, a.k.a. Son of Sam.

On the morning of August 11, 1977, a few hours after he was arrested and as he awaited his arraignment in Brooklyn, Berkowitz met with a CJA interviewer named Harold Raines. The killer gave his name, nickname ("Son of Sam"), place of work (Bronx General Post Office at 149th Street) and home address. He said—truthfully—that he had never been arrested before, had never skipped a court date, wasn't on parole or probation. When the interview was done, Raines followed procedure and stamped Berkowitz's form "Recommended for ROR Based on NON-Verified Community Ties."

Understandably, the judge rejected that recommendation and sent Berkowitz—who had admitted to killing six people and wounding several others in a year-long spree of violence—for psychiatric screening behind bars. When the story of the CJA recommendation leaked, there was an uproar. On August 19, the same day it endorsed Ed Koch for mayor on its front page, the *New York Post* headline was "Sam Bail Row." Mayor Abe Beame said it made him wonder "whether judges, confronted with busy courtroom calendars, are accepting recommendations that permit dangerous criminals to walk the streets on little or no bail." Then-Deputy Mayor Nicholas Scoppetta (the present-day fire commissioner), told reporters, "According to [CJA's] procedures, they did what they normally do. But, following their procedures, they achieved an absurd result."

Immediately, the head of the CJA—which had been operating with little fanfare in city courts for 16 years—said the agency would no longer make recommendations in homicide cases, although it would give judges information on the defendant. That policy stands to this day. —*JM*

she is filing—like a demand for alibi, an advisory about looming grand jury action, or a transcript of something the defendant foolishly told the police (like the guy in the Bronx who allegedly said to his arresting officers, "Fuck you. Fuck this. I already got a summons. Fuck America.") Or, in some cases, she will make an offer, suggesting the defendant plead guilty and do three days of community service, for example.

If the offer is turned down—or none is made in the first place—the ADA will usually say, "As to bail, your honor," and announce how much she wants and why.

The framework for that request is section 510.30 of the New York Criminal Procedure Law, which says that in setting bail, "the court must consider the kind and degree of control or restriction that is necessary to secure [a defendant's] court attendance when necessary," and lists elements that the judge can consider in setting that degree of control, from the defendant's ties to the community—which might prevent him from fleeing—to the seriousness of the crime. A more serious crime can mean more prison time, and therefore more incentive to go on the lam. In rare cases, the prosecutor will ask for remand, which means the person is jailed without bail. In a few others, the prosecutor might consent to the defendant's pretrial release without bail.

When the defense attorney gets to talk, he usually asks for his client's release, or at least a "more reasonable bail" than the prosecution requested. The defense lawyer might question the reason for the police search or critique the wording of the criminal complaint. He might point out the defendant's father or wife in the audience. Often, he will tell the judge that his client simply cannot pay a bail as high as the prosecution wants, or any bail at all.

The judge, prosecutor and defense attorney each have in front of them a report from the New York City Criminal Justice Agency (CJA), a private nonprofit entity that has a city contract to interview all criminal court defendants and make recommendations on whether to release them on their own recognizance, or "ROR" in court jargon. CJA's interviewers—there are 96 citywide—meet defendants in courthouse lockups and conduct brief interviews, asking questions like whether they are working, if they have a phone and whether they expect someone to show up for them

in court. Then the interviewer tries to verify the information with a few phone calls and checks the defendants' rap sheets to see if there are other open criminal cases against them or any "bench warrants" active at present or in the past. Bench warrants are what a judge issues when someone misses a court date or fails to do community service or pay a fine after being sentenced. CJA asks these questions because its research has shown that the answers are linked to a defendant's likelihood to appear in court. When all the defendant's information is gathered, the CJA interviewer computes a score on a point scale and uses the result to recommend the defendant for release or identify him as a moderate or high risk to flee.

Depending on whose case that recommendation helps, either side might mention the CJA report in the arraignment hearing. Or no one might. The judge may or may not consider it in rendering—once everybody else is done talking—a bail decision.

Many arraignments never reach the bail decision. Roughly half of criminal cases in the city end at arraignment, either with guilty pleas, dismissals, or "ACDs"—adjournments in contemplation of dismissal, under which the case is dismissed if defendants avoid arrest for the next six months or year. Of the cases that continue beyond arraignment, most defendants (about 62 percent) are released on their recognizance.

But given the volume the city's courts handle, the 36 percent of continuing cases where bail is set represents more than 51,000 people a year. And as CJA data indicate, having bail set and making it are two different stories.

Even if you've got the cash, paying bail in New York is not easy. Families who show up at arraignment court with money in hand can be seen racing to pay the court cashier before the defendant is trucked back to Rikers Island, the Vernon C. Bain jail barge docked off the Bronx or the Manhattan Detention Complex. Bail can be posted at any jail for an inmate held anywhere in the city.

LENGTHY TRIAL

A brief history of bail

While the concept of bail is rooted in ancient times, its precise origin remains unknown. In the King James version of the Bible, verses throughout the Old Testament rail against sureties or the assumption of a stranger's debt, which is central to the American bail system. Proverbs, Chapter 22, Verses 26 and 27 caution: "Be not thou one of them that strike hands, or of them that are sureties of debts. If thou hast nothing to pay, why should he take away thy bed from under thee?"

Yet the Biblical warnings didn't prevent the earliest incarnations of bail, which historians have traced back at least to the Roman Empire, although they suspect that the process predated that era. As the author Olivia Robinson writes in her 1995 book, "The Criminal Law of Ancient Rome," "a citizen in good standing" was "free during the period of the *inquisito*, which he used to prepare for his defense." Still, the decision as to who met the criteria for detention or freedom prior to trial was entirely arbitrary.

Between 529 and 534 AD, Byzantine Emperor Justinian I issued a series of edicts, popularly known as the Justinian Code, which among other legal provisions addressed the release of the accused by sureties. "No accused person shall, under any circumstances, be confined in prison before he has been convicted," according to one ruling.

By the medieval period, the Roman Empire had collapsed. Yet its legal provisions endured throughout Europe, particularly in England, where the criminal justice system found ample room to use and abuse the bail process. The accused were held or released at the sole discretion of sheriffs, which created more than enough wiggle room for corruption. Reform efforts began with the Statute of Westminster in 1275, which outlined bailable offenses.

With the Petition of Right in 1628 and the Habeas Corpus Act of 1677, respectively, further modifications were made by the British Parliament to curb the detention of suspects before trial "without due cause." None of those provisions, however, established bail as a universal right. Nevertheless, the English Bill of Rights of 1689 condemned "excessive bail" in criminal cases. Like many other English legal measures, this phrase was later adopted by jurisdictions in colonial America and served as a foundation for the U.S. Constitution's Eighth Amendment prohibition of excessive bail. Congress moved further with the Judiciary Act of 1789, which declared that all defendants in non-capital cases were entitled to bail.

It really wasn't until the dawning of the Great Society that the nation comprehensively revisited the issue of bail. In 1964, the Department of Justice and the New York-based Vera Foundation convened a conference in Washington to examine bail reform on the heels of three years of pioneering work by Louis Schweitzer, a wealthy New York businessman, and civic leader Herbert Sturz to create a system that offered release without bail to poor criminal defendants. Beginning in 1961, Sturz's pilot project interviewed defendants and, using a point system, recommended some for pretrial release without bail.

The initiative sparked the bail reform movement of the 1960s as similar programs were adopted nationwide, culminating in the Federal Bail Reform Act of 1966. Congress required that defendants in non-capital criminal cases be released on their own recognizance unless judges deemed it unlikely they would return for trial.

Yet by the 1980s and 1990s, as narcotics arrests and fear of violent crime soared, greater emphasis was placed on the potential risk that criminal defendants posed to the larger community. In 1984, Congress passed the Crime Control Act, which curbed access to bail. Also that year, the murky world of bail enforcers rose to prominence with the book "Bounty Hunter" by Bob Burton, the famed California-based "bail recovery agent," and its 1990 sequel "Bail Enforcer." The latter how-to book includes a host of tips like, "Try to make an arrest without too many witnesses."

Since then, even relatively wealthy criminal defendants have felt the sting of pretrial detention. "I'm stuck in jail / The DA's tryin' to burn me / I'd be out on bail if I had a good attorney," the late rapper Tupac Shakur lamented in his 1994 tune "Out On Bail." And while some current legislative proposals would reduce access to bail, some experts predict an increased reliance upon pretrial release alternatives in the future. "Jails are overcrowded and it's proving too expensive to keep people there on lesser offenses," says Floyd Feeney, professor of law at the University of California at Davis. "It isn't practical." *—CURTIS STEPHEN*

The courthouse at 100 Centre Street in Manhattan runs two arraignment parts each day and night to 0deal with the volume of defendants. *Photo: JM*

But lawyers tell anecdotes about long waits to spring somebody. "If they bring them to Rikers, then it takes hours and hours to get out," says Stephen Mahler, a criminal defense attorney whose best-known client, City Councilmember Dennis Gallagher, had to pay $200,000 to be released pending trial on rape charges, despite having no criminal record and community ties sufficient to get him elected to public office.

When a family needs a bail bond, there's a different burden to be borne. When her brother was brought before a judge in Brooklyn for assaulting their grandmother by closing a door on her arm, Cynthia (whose last name—like those of most of the defendants referenced in this story—won't be used because of the stigma that might attach) and the public defender pleaded for his release, claiming the grandmother had dementia and didn't know what she was saying. The prosecutor didn't relent, and asked for $50,000 bail. The judge set $15,000. Cynthia was able to gather enough money to post a bond and get her brother out. But getting a bail agent to post the bond cost the family a premium of $1,500 that they won't get back, even if her brother makes all his court dates and is found innocent. "So it sucks," she says. "It just sucks."

Once bail is set in a case, a defendant is most likely going to spend some time behind bars after arraignment. In 2005, defendants made bail at arraignment in only 11 percent of cases where bail was set, according to CJA research. When he makes bail at arraignment, the defendant is released at the courthouse and his pretrial detention is limited to the time the police had him in custody before arraignment. Everyone else spends some time—hours, days or more—inside. A little more than a quarter of defendants make bail later on, and 20 percent are released without bail after their arraignment, often because the trial judge overrules the arraignment judge's bail decision.

Then there are those who never make bail. Forty-two percent of criminal defendants who have bail set do not post bail before their case is completed by plea, dismissal or trial. More than a third of those with bails less than $500 never make it, nor do 42 percent of those with bails between $500 and $1,000. Defendants in some boroughs have a harder time making bail than others: In the Bronx, about half of those with bails less than $1,000 were kept in for the duration of their cases. Some research indicates that a higher proportion of defendants made bail citywide in 1980 than do now.

A QUARTER OF NON-FELONY DETAINEES WERE ACQUITTED, AND ANOTHER 24 PERCENT RECEIVED A NON-JAIL SENTENCE. SO THEIR LACK OF MONEY, RATHER THAN THEIR GUILT, WAS WHAT KEPT THEM IN JAIL.

Felonies are, of course, a major part of this bail caseload. But while defendants in most non-felony cases—those involving misdemeanors or even violations, which aren't crimes—are released without bail, more than half of those non-felony defendants who have bail set never post it, say CJA's figures. Low-level defendants who are detained pretrial serve a median pretrial term of five days—at $181 a day in city expenses per inmate—but in 2004, CJA found that one misdemeanor defendant had been locked up for 332 days.

The bails in these minor cases were probably set low: $500, $1,000 or maybe $1,500. The problem is that defendants with bails like that can fall into a gap: They are too small for most bondsmen to handle—the 10 percent fee on a $500 bond, for example, is just not worth most businesspersons' trouble—but still too much for many defendants to afford. "What we mean by high [bail] is low by middle-class standards," says Matthew Knecht, a supervising attorney at Neighborhood Defender Service of Harlem. "$500 is enough to keep our clients in indefinitely."

That might be no big deal if those low-level defendants were headed to jail anyway after conviction. But half of them weren't, according to a CJA study that found almost a quarter of non-felony detainees were acquitted, and another 24 percent received a non-jail sentence. So their lack of money, rather than their guilt, was what kept them in jail.

III. Asking for it

Research by CJA indicates that the prosecutor's bail request is the "most important factor"—more important than criminal history or charge severity or anything else—influencing the judge's decision of whether to set bail, and the "only important factor" shaping the amount of bail set. But recent analysis by CJA of prosecutor bail requests found no consistent link between the amount of bail requested by prosecutors and the likelihood that a defendant would return for trial.

A tough task faces prosecutors in arraignment court. As case after case is called, the ADA has to scan each defendant's rap sheet, skim the police report and digest the CJA recommendation. Sometimes there are open warrants to look at and out-of-state criminal records to contemplate, all while the ADA—often young and inexperienced, because it's where newcomers to the DA's office land—is gathering up the motions and

Assistant DAs Alana De La Garza (Connie Rubirosa) and Jack McCoy (Sam Waterston) like to win—and to make six-figure bail requests. *Photo: NBC*

RIPPED FROM ARRAIGNMENTS

Bail 'Law & Order' style

From one end of the buzzing courtroom a clerk belts out, "Docket ending 323430, the people versus John David Myers, murder in the second degree." Everyone in the courtroom recognizes the name: The guy is a big-time Broadway composer. Now he's in a jam because of the young woman found in his apartment slain by repeated stab wounds.

"I assume your client can make substantial bail," Judge Elizabeth Mizener, who admits to once having been a fan of Myers, says to the defendant's lawyer. But the assistant district attorney jumps in. "We're not consenting to bail, judge," proclaims ADA Serena Sutherlyn. "The people request remand."

"His face is recognized all over the world! Where's he gonna go?" asks Lisa Cutler, the defense lawyer, incredulously. Up steps the composer's psychiatrist. "Mr. Myers is heavily medicated. He can't function –"

"He confessed to brutally slaughtering a woman he just met!" Sutherlyn interjects. Mizener had heard enough: "I'm remanding the defendant."

Then the scene shifted to the office of Chief Assistant District Attorney Jack McCoy (played by Sam Waterston) for a little snippy dialogue among the psychiatrist and the lawyers—standard fare for the 17 years during which "Law & Order" has turned millions of Americans into experienced backseat lawyers.

Cling-Clang!

Most courtroom dramas don't even mention bail, let alone show the arraignment at which it's set. Its inclusion in "Law and Order" reflects, on one hand, the show's longstanding effort to have the feel of a documentary. On the other, it's a useful dramatic tool for the show's writers.

"The arraignment scene, which is usually where the bail application is, is usually the top of act three. It comes after the important middle commercial break," says William Fordes, a former Manhattan assistant district attorney who has written for the show since its launch. The bail hearing transitions the episode from the "police who investigate crimes" to the "district attorneys who prosecute the offenders." Says Fordes: "The bail application, in the show as in real life, allows us to talk about the strength of the case. If we need a dramatic twist, we can diminish the strength of the case against the defendant and raise the possibility that he will escape."

The "Law & Order" bail scenes move a bit faster than authentic arraignments and strip out much of the legal jargon. "What happens in five minutes on 'Law & Order' probably takes five years in real life," says Suzanne O'Malley, who has written several episodes. The writers try to avoid too much repetition of what the viewers already learned. Fordes says: "It can be colossally boring."

So what are the motivations for McCoy's bail requests: Getting the defendant to show up in court, protecting public safety or squeezing the accused into a plea deal? "All three," says Fordes. "Obviously, if someone is rotting in jail, you have more leverage on them than if they're sitting in their townhouse on 15th Street enjoying a martini." (Tell that to Charlotte Swan, lawyer for Dr. Charles Blanchard, accused of infecting his former lover with SARS, who in the episode "Patient Zero" tells Sutherlyn, "Guilty pleas are only for the guilty.")

Bail can have a major effect on real life cases. Do the outcomes of the bail hearings matter on the show? "It depends on the episode," says O'Malley. "In the end a great percentage of the time our guys win because that's how the audience likes it." Waterston has told O'Malley of a time he got into a cab only to be berated by the driver for losing a case. "Fans of the show really do get on him," she says.

As the show moves into season 18, the bail hearings are going to fade. "It's sort of lost its pop," says Fordes. "We're gonna get away from it a little bit."

They can do that on TV.

Cling-Clang! —JM

notices she has to serve and deciding on whether to offer a plea deal and whether to request bail.

"Our people have about a minute to try to digest all of those things," and must do so 50 to 60 times a day, says Staten Island District Attorney Daniel Donovan. That's not hyperbole; the volume really can be that high. Adding to the difficulty is the fact that "so much of that information that we're required to base our information on is actually provided by the defendant," Donovan says. "We know the rap sheet, the evidence; we're gonna know if we found the gun in your house, if there were eyewitnesses. But we're going to know only from you regarding your family ties, your employment, your financial means, whether you have a phone or not. All that comes from the defendant," he says. "The most difficult things you are going to do as a prosecutor is select jurors and come up with an articulate reason for making a request for bail," Donovan adds. "This is not a science. This is an art. This is a feel. If some young assistant were to say, 'We have a weak case, let's set high bail,' an experienced judge is going to just laugh."

Donovan's assistants must get bail requests approved in advance by a supervisor. In Manhattan, "we don't have formal guidelines on what people ask for bail," says James Kindler, the chief assistant district attorney, although he adds that, "normally we wouldn't ask for bail on a minor offense unless someone has a significant criminal record." In the Bronx, bail gets covered in the three-week training course that assistant district attorneys complete before they enter the courtroom. "Obviously, even with guidelines it takes some experience to get it right," Bronx District Attorney Robert Johnson says, "but essentially, you're starting off with the statute and then you're assessing the strength of the case. I think some of the most significant factors are if the person has a past warrant history, if a person doesn't have ties to the community."

Indeed, in more than 250 arraignments that *City Limits Investigates*

witnessed over eight days and one night of court action spread around the five boroughs, prosecutors often referred to defendants' "extensive contacts with the criminal justice system" and any "bench warrant history." With hundreds of thousands of such warrants outstanding (see *Wanted, Late and Alive*, p. 25), there's a lot of that history out there. But prosecutors also frequently cited merely "the nature of the case" in asking for financial conditions on a person's liberty.

Court observers can only see what a prosecutor says, not what she's thinking. Former prosecutors give some insight to how ADAs approach the bail request.

"I personally formulated it by number," says former Bronx Assistant District Attorney Jason Steinberger, now in private practice in the city. "There are certain levels that were set by the office and within those levels, the district attorneys have a certain amount of discretion. I first looked at the defendant's record. Obviously if they're a predicate felon, then they're facing significant jail time if convicted. I looked to see if they're on parole or probation," because, if so, they could face a stiffer sentence and have more incentive to flee.

Prosecutors are under considerable pressure to get bail right, says another former Bronx ADA, Jonathan Sennett, now a defense lawyer upstate. "If you made a mistake, you were accountable for it—if it *was* a mistake," he recalls. "We lived with the cloud over our heads constantly that you had to be on your toes because things could certainly come back to bite you in the ass. That was always in the front of our mind, that we couldn't be sloppy with the safety of the community, or the rights of the defendants. That's always out there."

Their boss is out there too. Bronx DA Johnson said in August that he'd recently visited the arraignment parts and, after observing the action, had to remind his assistants that bail should be a rarity when arraigning Desk Appearance Tickets.

Along with the "In God We Trust" inscription, the assemblage of court officers and the door to the lockup, the scene in arraignment courtrooms usually includes a battery of two or three public defenders. Most work for the Legal Aid Society of New York, which covers courts citywide, or for one of the smaller indigent defense organizations like The Bronx Defenders, Brooklyn Defender Services and Neighborhood Defender Service of Harlem. Some low-income defendants are represented by 18-B lawyers, who are in private practice but are paid by the state to accept some indigent defendants' cases.

Public defenders are obviously predisposed to take a critical view of what prosecutors do. But they are not starry-eyed about their clients, either. (At least you couldn't say that about the Manhattan Legal Aid lawyer who, watching a defendant exit the courtroom, muttered audibly: "Fucking moron.") From their vantage point, bail requests have grown increasingly harsh.

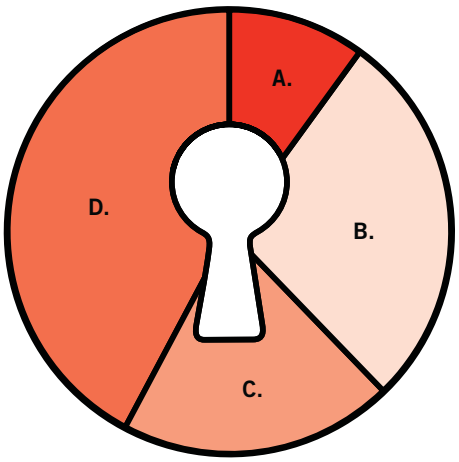
"The amounts requested by the DAs have certainly gone up, and that will change depending on what judge is working," says Alan Gordon, a Legal Aid lawyer who has worked in Queens Criminal Court for 14 years. "Some of the numbers, it's like it's 'Let's see how high we can get it.' Cases where they used to be asking $5,000, they're suddenly asking for these high numbers that are just impossible to meet. If they're going to ask for $50,000, with our clients, who are poor, they might as well be asking for a remand." But a remand would be easier for a defense lawyer to challenge on appeal. When bail is set, a challenge faces a higher burden.

Some see the trend of higher bails as very recent in origin. "They used to ask for reasonable bail. Now they're asking for $10,000 and $20,000," says Laura Saft, a supervising attorney with Brooklyn Defender Services who has worked in the courts for 25 years and says the requests have swelled noticeably in the past year or so. "Every bail request is astronomical. There are no normal bail requests any more." (The Brooklyn and Queens district attorney's offices declined to comment for this story.)

Defense lawyers aren't the only ones who complain about bail decisions. Back in Queens arraignment court the same day Eric T. made his false plea, Margulis set $50,000 on Johanny for a laptop robbery that, according to the papers initially filed by the Queens DA, took place *after* he'd been arrested for marijuana on the night in question. Then it was $50,000 on a guy accused of brandishing a knife to avoid paying cab fare, followed by $25,000 on an assault case. Yet the ADA on duty complained to a colleague, "He's setting less than half of what I ask for!"

STAYING IN

Most New York City criminal defendants are released before trial on their own recognizance, but in 2005 more than a third—about 52,000 people—had bail set in their cases. A surprising number never post bail and stay in jail until their case is disposed—usually for several days but, in one recent case, for nearly a year.



A. 11% Make bail at arraignment
B. 28% Make bail later
C. 20% Released later
D. 42% Never make bail

Source: New York City Criminal Justice Agency, Annual Report 2005. Numbers rounded.

If prosecutors face a tough task in deciding on an appropriate bail to request, defense lawyers are faced with an equally challenging time trying to construct a counter argument. "You have these public defenders with tons of cases, very little time to interview their clients," says Robert Garcia, an attorney at Neighborhood Defender Service. "It's very difficult to establish trust with their client. You have very little opportunity to learn the information, to corroborate it. You have to make a few phone calls. You don't have time for that."

Some clients don't offer much ammunition for a defense lawyer's argument, no matter how well researched. About a Manhattan defendant with a lifelong criminal record to go with his gray hair, a defense lawyer could only say, "In this last decade it's mostly turnstile jumps. His last arrest was in 2005. He is a man who has matured." Another lawyer boasted that his client "hasn't had a drug arrest for four months." And one Staten Island defendant asked Judge Alan Meyer to be merciful by saying, "I smell. I'm not doing well."

IV. Judgment calls

According to Judge Z., a veteran criminal court judge who asked not to be named, arraignments are one of the least popular assignments among judges. "It can be tedious, to put it kindly. 'Oh here's another buy-and-bust. Oh, here's another prostitution case. This guy spat on the sidewalk. This guy had a bottle in a brown bag in the park.' It can get to that," he says. He adds that judges working arraignments have a tougher schedule than their counterparts in trial courtrooms. What's more, the judgments made at arraignments are necessarily made on the fly. One quirk of the bail system is that while the decision on whether to release or set bail is crucial to how the rest of a criminal case plays out, judges must base their decision on scant, hastily assembled information of questionable reliability.

Bronx Judge Doris Gonzalez, for example, had to weigh what to do with Darryl—accused of misdemeanor menacing, who had an open assault case and a record of robbery and gun charges, but had made his past court dates and came to the police station voluntarily after detectives called him—and Tony, who came in on misdemeanor assault charges and had a long felony record in Louisiana and New York but was living in a shelter, meaning he couldn't afford much bail at all. She set $750 on both. "I'm going to set bail because I'm not sure he's going to show up," she said of Tony.

"At trial, you're in an entirely different posture," says Judge Juanita Bing Newton, administrative judge for New York City's criminal courts. "You have all the parties before you. The judge and/or the jury is going to be looking strictly at the evidence with an eye towards answering a single question, which is, 'Does the evidence convince you that this person is guilty beyond a reasonable doubt?'" In the bail decision at arraignment court, however, there is a crystal ball aspect to what judges are supposed to do. They have to try to predict, based on a hint of the evidence in the case, not just how likely it is that a person will be convicted—and, if convicted, how likely it is he'll be jailed—but what the chances are that the defendant will recognize his likelihood of losing and decide to flee. Some say that making those sorts of predictions requires relaxing—very carefully—the presumption of innocence. "For the purposes of bail, the presumption doesn't hold," says New York City Bar Association President Barry Kamins. "A judge is supposed to look at all the factors. One of them is the seriousness of the crime."

But what about in the misdemeanor cases that increasingly dominate criminal court dockets in New York City? From 1996 to 2006, the number of felonies processed by New York City courts dropped 36 percent. The number of misdemeanors and lesser offenses rose slightly over that period and their share of the overall caseload swelled to 80 percent. Meanwhile, the number of arrests in New York City climbed 17 percent but police officers issued 79 percent fewer Desk Appearance Tickets that would have spared defendants from spending time behind bars awaiting arraignment. Taken together, the numbers mean that the context of the bail decision is changing in New York City. "What's happening is there is a shift," says Robin Steinberg, executive director of the Bronx Defenders. "Because the system is handling more misdemeanors, what you're setting bail on are misdemeanors." Ricardo Barreras, a fellow from the Soros Foundation studying bail in the Bronx, says it's like there's a new population facing bail decisions these days. "It's the nature of who's going through the system now. It's basically flipped," he says. "The people who are being put through the system are there on charges that weren't being arrested or charged years ago."

Misdemeanors cover a range of crimes, from unlawful assembly to assault, that can carry sentences from a few days to a year in jail. What creates the most severe conflicts within the bail system are the lowest-level misdemeanors—the petty public order offenders that the NYPD's "quality-of-life" enforcement has delivered into courtrooms in increasing numbers. While "quality-of-life" was a hallmark slogan for Mayor Rudolph Giuliani, the police crackdown on open containers, bicycles on the sidewalk, and public urination has produced 47 percent more quality-of-life tickets in the past four fiscal years under Mayor Michael Bloomberg than during his predecessor's final four years.

As the number of quality-of-life tickets has climbed, so has the number of actual arrests for certain minor crimes. Take misdemeanor criminal trespass. In 1988, the NYPD arrested about 3,400 people for criminal trespass in the second or third degree, which occurs when someone "knowingly enters or remains unlawfully in a building or upon real property . . . or dwelling." By 1994, the number had roughly doubled. In 2000, there were 15,000 such arrests. And as of mid-July 2007, data from the State Division of Criminal Justice Services suggested that trespassing arrests were

on pace to hit around 21,000 in 2007. In many cases these arrests stem from Operation Clean Halls in which the NYPD sweeps buildings, ostensibly for anyone who doesn't live there. It's a response to the crime that plagues some low-income neighborhoods. But it catches anyone who cannot convince a police officer that she had a legitimate reason for visiting. "It stems from trying to deal with a legitimate problem," says Paul Lieberman, a trial supervisor at Brooklyn Defender Services, "but what happens is, it turns into the police going through this building and that building and arresting everyone in them," from the armed heroin dealer to the kid without ID visiting a friend.

The rise in misdemeanor arrests at a time of falling felony crimes might strike some as odd, but not proponents of the "broken windows" theory of policing, which underlies the NYPD's quality-of-life enforcement. First postulated in a 1982 *Atlantic Monthly* article, the theory holds that police must target nuisance crimes like public urination and graffiti in order to reduce more serious crime. The idea is that nuisance crime scares decent people off the streets, inviting in robbers and killers. Some "broken windows" adherents even see a direct link between pretrial detention and broken windows—that holding people for just a few hours or days gets potential felons off the street and, because pretrial incarceration is so unpleasant, deters some of them from committing the next crime.

Of course, not everyone picked up for jumping a turnstile or trespassing was on their way to kill someone. And not everyone who is caught smoking marijuana is a violent criminal of any sort. What most of those defendants are is black or Hispanic. In the city's arraignment courts, white defendants are a stark minority. Queens College sociologist Harry Levine has compiled data showing that of the 360,000 New Yorkers busted for marijuana possession from 1997 to 2006, 55 percent were black and 30 percent were Hispanic. Only 15 percent were white, despite the fact that some surveys indicate that whites are more likely to use marijuana than their black or Hispanic counterparts. A disturbing manifestation of broken windows is that nuisance enforcement, taken to an extreme, targets non-white youth rather than crime.

When it comes to impact on the bail system, the surge in misdemeanors has a complex effect. On one hand, research indicates that defendants are more likely to abscond on misdemeanors than felonies. After all, misdemeanors are easier for a defendant to forget about, or for a defendant to think a court system would forget about. That's an argument for setting bail in minor cases—as a reminder. But if the bail can't be met, and a person stays behind bars awaiting disposition of a low-level misdemeanor case, he or she runs the risk of doing more time pretrial than he or she could possibly do post-conviction, since the charge is minor.

That's especially true given what Judge Newton says is another change—beyond the "quality of life" surge—in the composition of the misdemeanor caseload. "While misdemeanors far outnumber felonies, and that's been something that's happened over time, the nature of the misdemeanors are often cases that aren't capable of being disposed of at arraignment. Domestic violence assault, DWI—usually there's some screening that has to be done," she says. "The kinds of misdemeanor cases that we have means that the caseload is not one you would have seen 30 years ago disposed of on arraignment."

Judge Z. says that when he did arraignments he was careful not to look just at a person's criminal record. "There've been cases where a person would have a dozen arrests, and they'd say 'Put him in [to jail].' But I'm looking at the dozen arrests and there's not one bench warrant. Obviously this man comes to court," he says. The judge would scan the paperwork with other questions in mind. How long has he been in the community? Does he have a family? A job? "He's not about to give up a job, especially since, for some of these people, a job is gold." The judge would try to confirm the information but, "basically you take it at face value." He'd also consider the nature of the crime. "Is it murder in the second degree, or is it spitting on the sidewalk? And the likelihood of conviction is important, and also whatever other factors the attorneys tell the judge," he says. "You can glean that in ten seconds. You can get all of that in ten seconds."

In the Bronx, more than half of defendants with bail set in their cases never post it. *Photo: JM*

CLANG FOR A BUCK

The curious case of dollar bails

Sometimes when a criminal defendant is facing two sets of charges, bail in the less serious case will be set at $1. This is done when a high bail or remand on the more serious charge is keeping him in jail. It can also happen when a defendant is a possible parole or immigration violator and must be held until those matters are cleared up, regardless of what happens in his criminal case.

To take an example, let's say you're busted for assault, bail is set at $5,000 and you can't make it, so you relocate to Rikers. While on Rikers, you get into a tussle with a guard and she hauls you in for "obstructing governmental administration." The judge would release you pending trial, except you're already stuck on Rikers for the assault case. Your lawyer asks for a dollar bail on the "obstructing" charge, so that if you're found guilty on that charge and sentenced to a few days in jail, you'll get credit for having already served that time sitting on Rikers awaiting trial on the assault.

Suddenly the assault case gets dismissed. You should be able to fight the obstruction charge from the outside. You start packing, when somebody breaks the bad news: You've got a dollar bail set on you, and no one has paid it.

It sounds crazy, and it's very rare, but it happens. "One client, it was a month before he finally got through to me. 'I'm still in jail,' he says. I'm like, 'What?!'" recalls public defender Matthew Knecht. "A lot of people are getting held for significant periods of time—at least a few weeks—on a dollar bail."

The Department of Correction says it allows church groups and corrections officers to bail out people for a buck. But there are no guarantees that will happen.

A recent CJA survey found that dollar bail was set in 1 percent of felony cases and 6 percent of non-felonies. It is unclear, however, whether that was the sole bail holding each defendant. —*J. M.*

Then comes the decision. In the majority of cases (62 percent in 2005), New York City's judges release the defendant. That's not surprising given the purpose of bail, the fact that most defendants do show up for court and the decades of precedent creating a "presumption of release" for defendants. The question is how many should have been released, and which ones. "In Manhattan, probably 80 percent [of defendants] are released on recognizance," says one bail bond agent. "Probably, 90 percent should be ROR'd, but I can't tell you that as a bail bondsman."

When the judge does set bail, he's essentially asking for an insurance policy, Judge Newton says. "In some respects, ROR is a handshake," she adds. "And sometimes you want a little more collateral to the handshake." And some judges want more collateral than others. A CJA study found that there is a judge in Brooklyn who, over a period of observation, released on recognizance less than half of the defendants he saw, while a judge in Manhattan released everyone who passed through his courtroom. The variation makes arraignment court something of a lottery. "That's a bad thing," says attorney Lieberman of Brooklyn Defender Services. "That's a really bad thing. It's a matter of luck."

But even judges who are inclined to release most defendants without bail end up setting bail in many cases. Manhattan Judge Ellen Coin, for one, released a healthy share of her caseload on one typical day this summer, telling one lucky defendant, "If you miss the next day [of court], I will set bail. Rikers Island will be very happy to make sure you make your court dates." But Jerome, another defendant brought before Coin that day, who was accused of possessing stolen property, was hit with $1,000 bail. Jevon, charged with petit larceny, had bail of $750, as did Jori, charged with drug possession. Jonas was accused of using a stolen credit card at a MetroCard vending machine and had an out-of-state criminal record. The DA asked for $2,000 bail. Since Jonas was living in a shelter, the defender told the judge, "he cannot afford any amount of bail." But Coin went with the prosecutor's request. Elie, who had a criminal record, was accused of selling marijuana. "He's in a shelter. He has a right to return there. If he is incarcerated, he'd have to move to the end of the line," his lawyer said. "The shelter has offered him the stability to pursue employment. He is working. There is no reason to suspect he wouldn't return." The judge disagreed and set $750 bail. Nelson, who allegedly took money for hailing cabs, had $750 set. Rufus, accused of resisting arrest, balked at pleading guilty, and then was told it'd cost $500 to get out.

The Criminal Justice Agency and judges sometimes disagree on who deserves ROR. In 2005, judges refused to release one in five defendants whom CJA had marked as "recommended for release," and released more than a third of the defendants that CJA had recommended against setting free. Still, the CJA recommendation is an important factor in the judge's decision. And it has its critics. Prosecutors dislike how much of CJA's information comes solely from the defendants. Defense lawyers, on the other hand, think some of the agency's questions discriminate against the poor. "One of the criteria is, 'Do you expect someone to be in court?' which is ridiculous," says Knecht of Neighborhood Defender Service. "A lot of [defendants' relatives] have jobs and can't sit around to figure out when their loved one is going to be arraigned." Another CJA criterion is whether a person has a phone. "A lot of our clients can't afford a land line, can't even afford those pre-paid cell phones." Those criteria might explain why in the cases of more than half of Bronx defendants, but only a third of Staten Islanders, CJA recommended against release.

In the advice CJA gives judges, the weight given to most of the answers they get from defendants—if they live in the area, if they have a phone, if someone will be in court, if they have a job—is dwarfed by the response to a single

question: Have you ever missed court? Having a single bench warrant in your life is more important than any other individual factor and most of them combined. CJA says that's because its research has indicated that no matter how long ago the bench warrant occurred, having one is still correlated with a risk of failure to appear in court. The agency thinks the courts will make the right exceptions. "One would expect that if there's a bench warrant that's 10 years old and the guy has been an altar boy ever since, that the defense lawyers will make a persuasive argument," says Jerome McElroy, CJA's executive director. Indeed, defense lawyers do make those arguments. But they don't always win. In the day of arraignments observed in Judge Margulis' courtroom in Queens, an ADA asked for bail in a DWI case because the man had a bench warrant 14 years ago. The judge set bail at $1,500.

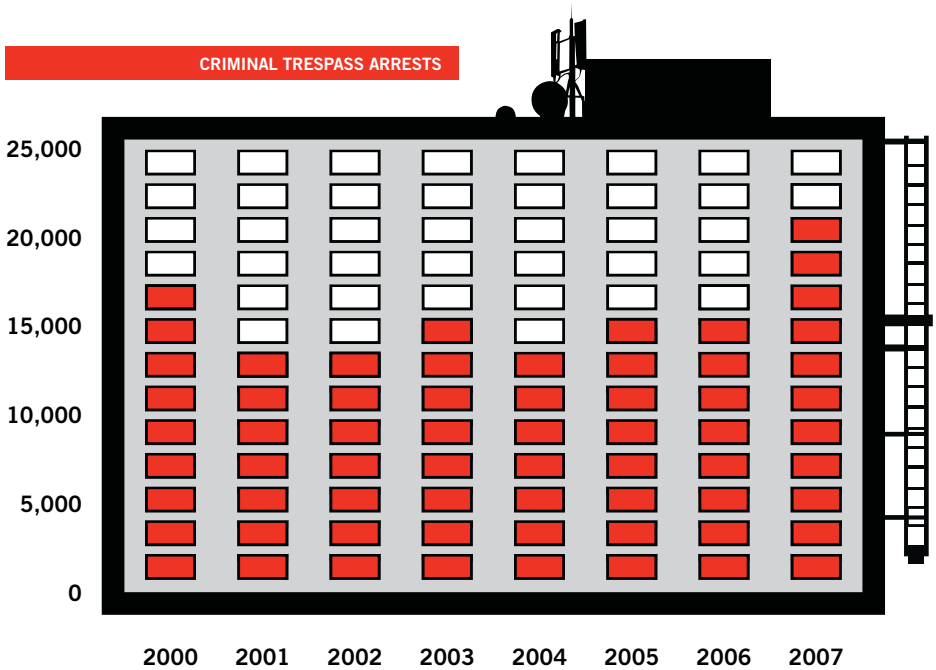
CJA's role in the bail reform movement of the 1960s was to try to identify factors that could predict court-skipping, in order to give judges a rationale for releasing more people. Over the years, the approach has succeeded in getting millions of defendants released without bail. But as skilled as the agency is, a mechanical approach will always have its limits. For one thing, because CJA uses a point system, some people will fall near the cutoff point for getting a good recommendation. If you're expecting a friend in court and your cellmate is not, it can mean the difference between you being a "moderate risk" and him getting labeled a "high risk" defendant not recommended for release, even though you'd have about the same odds of showing up for court.

Skipping court is not inconsequential. It means that witnesses, judges and lawyers waste time. It needlessly delays the trials of other defendants, some of whom might be in jail. It triggers the potential cost of a police search, and ensures that if you are stopped by police again, you will be arrested and the city will incur all the attendant costs.

The fact is, a solid majority of people do make their court dates, accounting for the long lines at the door of the criminal courthouses every morning. In 2005, the overall rate of court-skipping in New York City was 17 percent. And within a month, most of those defendants who skipped had gone into court to address their absence. Even defendants whom CJA has labeled at "high risk" of flight come to court 74 percent of the time, when judges opt to release them. That more than a quarter of them skipped court is a problem. But most of them did show up, and if they had all been locked up to secure their appearance instead of released, the detention would have been unnecessary in three out of four cases.

"The general perception of failure to appear is this is someone who's thumbing their nose at the courts," says Mary Phillips, a researcher at CJA. But, she says, that's not often the reality. Neglect, rather than flight, is the more likely explanation for some skips. "I think they are not paying attention and they don't care. They forget or they don't care," says Allison Palais, a Bronx-based bail bond agent. "Not that they plan it. That almost never happens."

Every day the city's courts see people who missed a court date and are coming in to face the music, like Gerald (littering from vehicle), Annette (loitering), Jason (excessive noise) and James (open container) who all showed up on one day in the basement courtroom in the Bronx. One woman who was arraigned in Queens this summer was busted when she was in town from Florida to make a court date for an earlier charge. Some people even forget to pick up their bail after they have shown up for court; the city's Department of Finance currently has a list of more



THOSE WHO TRESPASS

From 2002 to 2006, arrests for major felony crimes in New York City dropped 17 percent, but total arrests increased 14 percent—a rise driven by low-level busts. Graffiti arrests, for example, soared 129 percent during that period. Over the longer term, one of the most striking changes in New York City policing has been the increase in arrests for misdemeanor criminal trespass, which refers to someone who "knowingly enters or remains unlawfully in or upon premises." In 1988, there were only 3,400 such arrests.

Source: State Division of Criminal Justice Services

than 500 abandoned bails, where a person showed up for court and had the bail refunded, but the city cannot find the person to whom it owes the cash.

Some defendants, however, do choose to skip. Perhaps they are trying to escape the consequences of their actions, or are afraid of punishment, deserved or not. "Some clients are terrified that as soon as they come back to court they'll be thrown in jail," says Seann Patrick Riley, an attorney at The Bronx Defenders. Many face practical barriers to coming: Courts don't offer childcare, and employers aren't always understanding about missing work for court.

And it's not like skipping court means skipping a trial. Many of the court appearances that defendants are required to make are brief procedural hearings at which the accused plays almost no role. The court calendars are full of people who in the past year have had—and shown up for—eight, 10, 13 or more court dates on the same minor charge and still haven't gone to trial. Most of the appearances might last five minutes or less, but they still could require a morning's wait and time off work, time out of school or having somebody watch your kids—real challenges for the low-income people who are often the clientele at criminal court.

So the 83 percent of defendants who CJA statistics show do not skip court are showing up in many cases not just once, but several times. If they slip up once, however, they have a "bench warrant history" for all time.

V. Fear and flight

The truth is, judges aren't only worrying about whether defendants will fail to show up to court. Somewhere in the back of their heads, there must be the fear that, as Lorin Duckman puts it, "I'll be Duckmanized."

In 1997, Duckman was removed from the Brooklyn Criminal Court bench by the State Commission on Judicial Ethics as punishment for more than a dozen instances of judicial misconduct that included imposing sentences that were inconsistent with the law, berating prosecutors for their bail requests and making inappropriate comments about prosecutors' and defendants' appearances or background—including gender and race. But while Duckman is hardly a poster boy for judicial temperament, he does personify what can happen to a judge when he's accused of coddling defendants by setting lenient bail. The charges that doomed him only emerged after a bail decision turned him into a target of tabloid scorn.

Duckman's problems really began in 1996 when he lowered to $2,000 the bail on a defendant accused of violating an order of protection by contacting his girlfriend, whom he had beaten up. The man made bail and three weeks later killed the girlfriend and himself at a car dealership owned by one of then-Mayor Giuliani's best friends. The way Duckman explains it,

Staten Island's Criminal Courthouse on Targee Street handles lighter volume than its counterparts in other boroughs. *Photo: JM*

he had little choice but to set reasonable bail because the defendant had been held for 40 days without trial on a misdemeanor. But the events that followed turned him into a pariah, led the mayor and Governor Pataki to call for his ouster and triggered his downfall.

Every judge knows that the same thing could happen with someone he releases. "The judge is a human being," says Judge Z., the veteran judge who spoke on background. "He sits there and looks at the case and says, 'All the factors appear to be that this person comes back, but this guy, given his record, will probably commit another crime.' Most of his crime has been nonsense—small stuff—but you think, 'What if the next time he really beats up on someone and he hurts someone?' And that's when you get the headlines of the papers: 'Why was this guy out?'"

Judges can get in trouble for setting excessive bail, too: Henry R. Bauer, a judge in upstate Troy, was removed in 2004 for setting $25,000 bail on a defendant accused of stealing cigarettes. But the press is much more likely to attack a low bail set in a highly publicized crime, or a release that leads to another offense. "I think that judges are human and I think that to say that a judge would never have that in the back of his mind would be an impossible notion," says Judge Newton. "On the other hand, I think judges understand what their obligations are and take those seriously and set bail that's appropriate for the case before them because we don't have a crystal ball."

The court system's spokesperson, David Bookstaver, has battled for years to get reporters and commentators to understand that bail is only meant to secure attendance at court, not to punish. "I tell the judges, 'Any bail a defendant can make, in the press, that's a low bail.'" Bookstaver says judges resist that media pressure. "I think overwhelmingly, judges make bail decisions according to the law," he says. "There is a great deal of criticism of judges who act as independent jurists. But judges do keep in mind the presumption of innocence here."

Public Defender Steinberg disagrees. "I think judges are afraid not to set bail because they don't want to be the judge who ends up on the front page of the *New York Post* for releasing a guy who then does something terrible," she says. "I think judges and prosecutors take cover behind bail."

Sometimes, however, even high bail doesn't afford enough cover. When a Peruvian illegal immigrant was implicated in the murder of three Newark college students this summer, the public furor was directed not only at his immigration status but at the fact that he was out on bail in a sexual abuse case. His bail, however, was $150,000 and he put up $5,000 to get a bail bond for the full amount—a fee not easily afforded by a low-income person, but apparently not enough to discourage the man from allegedly committing three murders. Perhaps what the Vera Foundation reported in 1964 is still true: "The trouble with the present [bail] system is that by relying on money it jails too many of the poor; it also protects too little against the dangerous."

"... YOU THINK, 'WHAT IF THE NEXT TIME HE REALLY BEATS UP ON SOMEONE AND HE HURTS SOMEONE?' AND THAT'S WHEN YOU GET THE HEADLINES OF THE PAPERS: 'WHY WAS THIS GUY OUT?'"

Some states' bail statutes and the federal bail law list public safety as one criterion a judge can consider in releasing defendants. In other words, if the court thinks there's a chance the defendant will strike again, it can remand him or, in some systems, set higher bail. New York State's bail laws do not allow that consideration, but judges probably weigh it informally.

This year, as in many years past, New York's legislature is considering several proposals for making public safety an explicit criterion in setting or denying bail. Several call for a "Jilly's Law," named after Jill Cahill, an Onondaga County woman whose husband was accused of assaulting her, got bailed out, and tracked his wife down at a hospital to kill her in 1998.

Joan Christensen, an assemblywoman from the Syracuse area, is sponsoring one of the Jilly's Law bills. "It would give the judge a lot more leeway in considering other criteria because right now the only criteria is, 'Will the defendant appear in court?' It just gives a lot more reasons or facts that could be considered in setting bail. It allows the court to consider any record of violations of court orders. It will allow the court to consider history or patterns of violence or threats. The violent nature of the crime would be considered as well as the impact that crime had on the [victim]," she says.

A separate bill by Assemblywoman Amy Paulin of Westchester would require judges to consider the likelihood that a person accused of domestic violence might intimidate or harm the complaining witness. In other words, the judge would have to try to predict future violence. "Where it is a first offense, the judges would have to look at the pattern of the relationship," Paulin says. "It would be pure judicial discretion. Sometimes they would guess right and sometimes they would guess wrong."

Prosecutors and some judges agree that public safety should be addressed explicitly, if only to make more formal and transparent an element that probably already enters unofficially into judges' bail decisions. If public safety were made an explicit criterion for bail, then at least there would be a process

Rikers Island functions mostly as a holding pen for the city's criminal court system. *Photo: JM*

to evaluate the supposed threat. States that employ a public safety criterion for pretrial release generally have in place a procedure for challenging—on an expedited timetable—preventive detention.

The trick, however, would be how to predict which released defendants will commit crimes that actually threaten public safety. The vast majority don't. A CJA study of New York City re-arrests of released defendants in 2001 found that while 17 percent of those released before trial were arrested for new crimes, a mere 3 percent were re-arrested for violent crimes.

If everyone getting arraigned were accused of rape or murder, the argument for considering public safety before releasing them might be stronger. But 80 percent of criminal cases these days are misdemeanors. To wit, attorney McGregor Smyth of The Bronx Defenders, asks, "What exactly is the substantive risk to the community of jumping a turnstile?"

VI. Truth or consequences

Lorin Duckman had few allies when he went down, perhaps with good reason. After all, he admitted to some of the inappropriate behaviors of which he was accused. But one of the alleged acts of misconduct for which Duckman was removed was an exchange with a prosecutor in which Duckman said: "Who stays in jail for not having $200? Poor people. That's not right . . . You deprive a person of his liberty; made them go to jail for five days because he didn't have $200. That's not right. Outrageous." From his current office in Vermont, where he works as a public defender, Duckman asks the kind of question that judges grapple with: "What does the Eighth Amendment [which prohibits 'excessive bail'] mean right now? Does reasonable bail mean reasonable in terms of a number, or reasonable that the person can pay and that the person will recognize as an important figure?"

Judge Newton, the city criminal courts chief, believes her judges do not deliberately set bail that people cannot make. But while judges are supposed to consider a defendant's financial resources in setting bail, there is no explicit requirement for judges to make bail affordable for defendants. When prosecutors discuss the affordability of bail, it's usually only to stress the danger that it will be too affordable for wealthy people. "The only way it comes up is when a person has a great deal of money, you probably adjust it upwards," says Manhattan prosecutor Kindler.

On the lower rungs of the income ladder, however, even very low bail can be too high to make. Staten Island DA Donovan acknowledges this impact of financial conditions on release. "I do believe there are many people who are in jail because they didn't post a minimal bail," he says. "Some of our indigent defendants, their family and friends can't afford it either." Low bails are "tantamount to remand for most of our clients," says Saft from Brooklyn Defender Services. One of her agency's clients was jailed for three weeks on $250 bail for her first arrest, an assault case. "She was ROR'd finally," says the woman's lawyer, Elizabeth Latimer. "The case ended with a disorderly conduct plea and five days community service. She was pissed off."

The question is, what's the purpose of setting bail in cases like that? Critics don't think it's really to bring a person back to court. They think it's intended to coerce guilty pleas. Veterans of the system acknowledge that this occurs. "The judges and the DAs both do it," says Steinberger, the former Bronx ADA. At least one judge agrees. "That is certainly the case, unfortunately, and to me it's appalling," says Judge Z. "And it occurs, I think, more where a judge feels that this is a case that he's concerned about how many cases get pleaded out at arraignment so the statistics look good. Unfortunately, where low bail is set in cases where people cannot afford a $10 bail, it is to coerce a plea. And no one will admit that."

Coercing pleas is sometimes about the math. In New York, sentenced inmates typically serve two-thirds of their time. On a five-day sentence, an inmate might serve only three days. But a defendant who is held in on bail at arraignment might not be able to see another judge, who could release him, for five days. So if you're offered a five-day sentence in exchange for a guilty plea, you can say yes and go back inside for three days or say no and do five days behind bars. In other words, for short jail sentences, staying in jail to fight your case means

you'll do nearly as much or more time as if you pleaded guilty.

But defendants can also be pressured when longer sentences are at stake. One day this summer in Brooklyn arraignment court, Judge William McGuire released several defendants and set bail on others. Then McGuire (who declined to comment for this piece) took up the case of a Ms. Brown, a repeat offender accused of possessing two glassines of heroin. The ADA recommended a year behind bars. McGuire offered her 60 days in jail, and warned that if she rejected the deal, her case "would come back to my court and there would definitely be a sentence of more than 60 days," then added to the ADA: "Just hold off on the bail offer." The defense lawyer asked that Brown be given a couple days to arrange for her children's care. "No," McGuire said. "Sixty days today. While she's thinking about it, what's your bail request?" The ADA asked for $2,000. McGuire turned again to the defense side. "Is there a disposition or not?" he asked. There was no deal. "She's not working," the defense lawyer said. "She's not in a position to make bail." The judge set bail of $1,000.

Not everything in arraignment court is obvious to the casual observer. An audience member can't know what the judge and prosecutor are seeing in the defendant's case file—the rap sheet, the criminal complaint, the statement he made to cops. But there are cases where it seems clear that bail is being used as a stick to get defendants to bite the carrot of a plea deal. "Of course that's not supposed to happen," says the Bar Association's Kamins. "Does it happen? I think occasionally," Judge Newton says she "hopes that answer is no," and adds, "That would be an inappropriate use of bail."

Prosecutors interviewed deny that they use bail coercively. Truth is, it's sometimes the defense lawyers who do the squeezing. One afternoon in Manhattan arraignments, a man named Koram was accused of illegal vending, and it looked like the judge was going to set bail. The plea offer was four days in jail. "If you're not going to make bail by tomorrow you should plead guilty," his defense lawyer told him. Koram agreed. But when Judge Coin asked, "Did you exchange the sneakers for money?" Koram hesitated. His lawyer grabbed his arm. "Perhaps you were unsuccessful [selling the sneakers]. You're playing too many games now. Listen to me. The question is, 'Were you going to sell them or not?'" she yelled, furiously cross-examining her own client. Throwing up her hands, she told the judge, "There is no disposition." Koram relented. "I was selling it. I was selling it," he yelled. Then he went to jail.

Some defense lawyers might use the threat of bail to shed some caseload. Others sincerely think they're doing the best thing for their clients by getting them to plead and walk out of jail as soon as possible. Many try to leave it up to the defendants. "You have to have a really honest conversation with your client," says Bronx Defenders attorney Riley. "You say, 'I will fight this case as quickly as possible but you'll be fighting it from the inside.'"

Then the accused has to consider his options. "They're kind of weighing the principle of, 'I didn't do it so I won't plead' with a certain practical element: 'Do I want to be here 24 hours or five days?'" says former public defender Zeke Edwards, now with the Innocence Project, which pursues the exoneration of the falsely accused. "They make a decision which is not really related to guilt or innocence. It's related to 'out' or 'in.'"

Staying in jail to fight your case means accepting an uphill battle. Detained defendants have a harder time meeting with their lawyers. They can't visit the scene of the crime or introduce their lawyers to witnesses who are hard to track down. And detained defendants can look worse for wear in court. It's no surprise, then, that pretrial detention is linked to higher conviction rates: Of defendants facing misdemeanor or lesser charges who are released pre-trial, CJA research has found that about half are convicted, versus 92 percent of those who are jailed before trial. Even those detained for a short time and later released had higher conviction rates than those never locked up at all. It's possible that some of that impact has to do with the strength of the cases: In other words, the defendants facing stronger cases were less likely to be released and more likely to be convicted because of the evidence. But research has found that detention is an important independent factor in how cases end—especially if they end by plea. "It's one of the factors that plays on a defendant's mind when they consider plea deals," says Bronx DA Johnson, a former defense attorney. "There are cases that we think merit a jail sentence and it's a lot more difficult to get a defendant to acknowledge or accept that when they're out."

Even if the threat of bail doesn't lead to a plea at arraignment, the pressure of being locked up on unaffordable bail will encourage a plea later on. "A $1,000 bail is really enough to get a conviction that you wouldn't get from people who could afford bail," says Brooklyn defender Latimer.

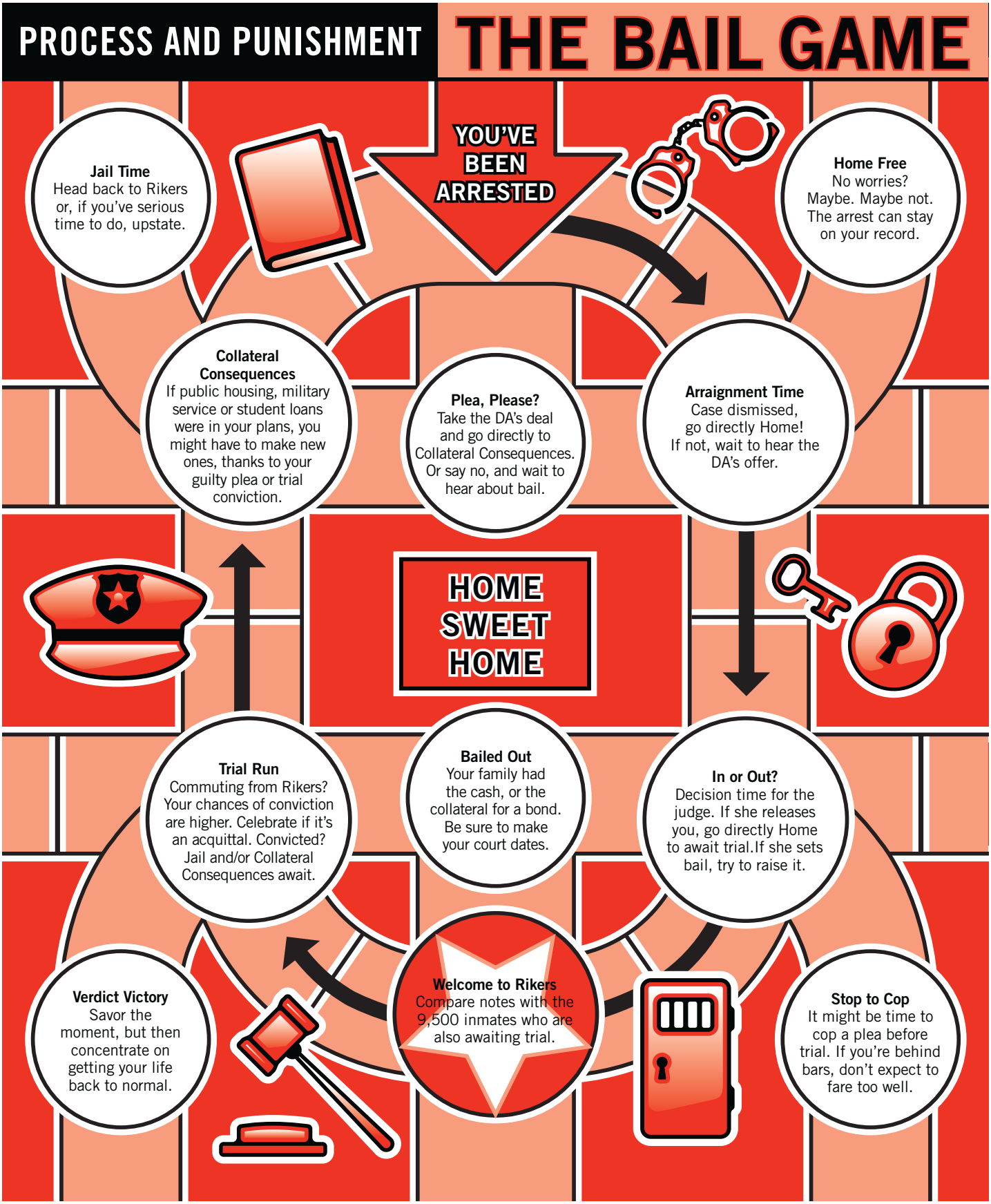
Presiding over night court in Manhattan one evening in August, Judge Abraham Clott is setting high bails. He imposes $7,000 bond or $3,500 cash for a cell-phone robbery. A drug sale defendant gets $20,000 bond over $10,000 cash and another felony drug defendant is hit with $200,000 cash or fully secured bond. But one thing Clott is doing—that many judges don't—is telling defendants what a guilty plea really means.

Of the guy pleading guilty to marijuana possession to get out with time served, he asks, "Do you understand that this will give you a criminal record?" and "Do you understand that this plea might make you ineligible for several kinds of employment, for public housing, for school aid. It can have effects for some time."

Defense lawyers would agree. "Nowadays there are huge collateral consequences to taking a plea offer for a crime—or even a violation," says Knecht of Neighborhood Defender Services. It's always been true that convictions

PROCESS AND PUNISHMENT

THE BAIL GAME



OVERDUE FINDS

NYPD's Warrants Section

The State Division of Criminal Justice Services says there are at least 250,000 open arrest and bench warrants in New York State (see graphic, next page). Roughly two-thirds of them are from New York City. Other estimates of open warrants in the city run as high as 1.5 million. Whatever the numbers, they represent the caseload of the NYPD's Warrants Section. When people skip court, the warrants squad—with 370 officers divided into squads that work each borough—is supposed to bring them back.

Depending on which estimate of the number of warrants you use, the Warrants Section is charged with finding a fugitive population equivalent to a city at least as big as St. Petersburg, Fla., and perhaps as large as Philadelphia. They obviously have to prioritize. "Different resources get expended on different cases," says a veteran warrants officer who spoke on condition he not be named. "Violent crimes, it's all out." A guy wanted for criminal drug possession, on the other hand, can wait. "But there are nuances to it," the officer adds. While a judge might reduce a charge from a felony to misdemeanor, Warrants will look at the nature of the allegations. A robber who punches his victim in the face and runs away might not be charged with a felony, but Warrants won't treat him as a run-of-the-mill misdemeanant. Some crimes get particularly close attention: A few Warrants officers specialize in murders and gun crimes, and carry smaller caseloads.

According to the officer, Warrants is a choice NYPD assignment. "If you're a detective in the precinct, you work in that precinct. If you're a detective in Warrants, your cases could take you anywhere in the city, anywhere in surrounding counties, states—potentially anywhere in the country." The work is also rewarding. "I like finding people, knowing how to do that—to interact with people, to speak to people in ways that are conducive to getting them to help you," says the Warrants cop. "It's not all hard-nose."

He adds that his section is struggling to cope with reduced staffing: "We're very selective, let's just put it that way." —*JM*

had an impact beyond jail. But years of tough-on-crime legislation have expanded those consequences.

Take public housing. In 1988, the U.S. Department of Housing and Urban Development implemented a "One Strike" policy that evicted public housing residents who engaged in "criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises." That seems very reasonable: No resident should be forced to live amid violence. But a 1990 law added "any drug-related criminal activity" to the list, which lumped in nonviolent crimes committed in the projects. And after President Clinton called for a tougher policy in 1996, the rules were amended once more to include crimes that occurred nowhere near the public housing where the defendant lives, sought to block new applicants who had criminal records, and made criminal history files more accessible to public housing authorities.

A Class E felony (the lowest level of felony, encompassing charges like "criminal injection of a narcotic drug") now makes NYCHA housing off limits for five years. Most Class A misdemeanors like making graffiti taint you for four years, and most Class B misdemeanors like third-degree criminal trespass for three. Even some violations, like disorderly conduct, come with a two-year ineligibility period. Separately, drug-related convictions and violations can also impair your eligibility for Section 8 vouchers.

But that's just the beginning. In New York, incarcerated felons cannot vote until their sentence is complete and can not serve on a jury without court permission. Drug convictions can block you from student aid and college tax breaks. Some convictions come with a driver's license suspension of up to a year, and under some circumstances a commercial driver's license can be yanked for life. Some convictions trigger the forfeiture of property. If you have a drug-related felony, you cannot ever get food stamps and most federal cash assistance unless the state you live in opts out of that provision. New York has opted out, but if a defendant moves to a state where the rule is still applicable, the ban binds. People with government contracts can lose them, and military service might be off limits after a conviction. Other countries can bar your entry. The State Division of Criminal Justice Services tells public employers when their workers are arrested, and this can lead to suspensions. People with some jobs, like barbers and funeral directors, can lose their licenses because of a conviction. State law now requires people convicted of low-level, nonviolent crimes like petit larceny to provide samples to the DNA database.

Within the courts themselves, convictions have obvious consequences: Today's guilty plea is tomorrow's "prior conviction" for a defendant unlawful or unlucky enough to get arrested again. But collateral consequences in the criminal justice system are multiplying. In 2002, Mayor Bloomberg initiated Operation Spotlight, meant to target repeat misdemeanor offenders. DAs now red-flag defendants who have two or more misdemeanor convictions in their lives and three or more arrests in the past year—including arrests that might not result in convictions. Judges see that information anyway, but Spotlight is an effort to highlight it so judges take a harder line. And research indicates that it's working: Spotlight defendants have been denied bail more often, even though there's sometimes confusion in arraignment court over who merits the designation and why. On a couple occasions in arraignments that *City Limits* witnessed, an ADA was heard to lament, oddly, that a defendant had been charged with a felony in a past case—because, if he'd been charged with a misdemeanor instead, he'd qualify for Spotlight.

Meanwhile, employers and credit rating companies are increasingly using private criminal records databases to check applicants' backgrounds. In New York State, misdemeanor and felony convictions can never be sealed, and criminal records are sold at $52 a name. Most public records of violations (like disorderly conduct) are automatically sealed,

Source: State Division of Criminal Justice Services

WANTED, LATE AND ALIVE

In New York State there are at least a quarter million open warrants—both arrest warrants, issued when the police are searching for a person who's suspected of a crime, and bench warrants, which a judge authorizes when someone misses court. The most commonly warranted crime is larceny, with 35,327 warrants outstanding as of April 2007. Above are how many are at large statewide for some other crimes.

except for DWIs and prostitution, but private databases can still record them.

"You get this, like, domino effect of consequences that are produced but don't necessarily relate to the criminal proceeding," says Bronx Defender Smyth. "We're kind of sitting in the middle of this perfect storm. On one hand you've got the steady accumulation of life consequences—that affect everything from housing to education to welfare, to child welfare—that every single year get added to because they're politically easy; they seem to be low-cost for legislators. On the other hand is the unprecedented access to criminal history data. This is reinforcing the problem because everybody has access to everything." Smyth works with indigent clients fighting evictions from NYCHA. "Either the entire family loses their housing because they want to stay together or they rip apart the family," he says. "The choices that the system is forcing these families to make because they are poor are abhorrent."

The growth of collateral consequences "is probably the most serious issue in the criminal justice system," says Judge Newton. "When I started an independent training session a few years ago, one of the very first topics we looked at in depth was collateral consequences for criminal convictions. I think that all of the judges are now very aware of this. Once again, the question is, what do you do with it?"

When a defendant refuses to plead guilty in order to avoid the long-term collateral consequences of a conviction, she has to accept the immediate life consequences of pretrial detention: missing work and school, being separated from children and facing potential custody problems, skipping appointments with doctors or welfare administrators and being held in the potentially dangerous environment of a city jail. And perhaps not for just a few days. "Let's say you have a client who says, 'No. I'm innocent. Let's go to trial,'" says Garcia of Neighborhood Defender Service. "That takes months."

There are consequences as well for the taxpayer—namely the more than $600 million it probably costs the city annually to hold pretrial detainees—and for the people who work in the jails. Norman Seabrook, head of the Correction Officers' Benevolent Association, says pretrial detention can turn into "a real nightmare" for both detainees and guards. "A young man or woman that's brought into the city's jail system [on bail]—now here's the dangerous part—he or she is then put into the general population housing with someone who's been charged with murder," he says. "So what you're doing is contaminating these youngsters. They may be subjected to joining a gang. The correction officer has to work twice as hard to hear that person calling for help who's not calling [out loud] for help. It makes it that much more difficult."

It's unclear if Matthew Cruz called for help. But he may have paid a higher price for his pretrial detention in 2006 than others.

Not much is known about Cruz. He apparently grew up in New York, lived in Brooklyn, had an ex-wife who'd gone to court over his alleged failure to pay child

George Zouvelos wants political clout for bail agents. *Photo: JM*

THE BUSINESS OF BAIL

The city's bond agents sing the blues

Behind the Greek helmet in the front window and the lobby bedecked with memorabilia from "Goodfellas" and "Scarface," George Zouvelos sits in the back office of his company, Spartan Bail Bonds on Manhattan's Baxter Street. He's positioned in front of two computers, with law books at arm's reach, a few yards from where his staffers are freeing people from jail—for a price—in what he calls "a very gray part of the criminal justice system."

When a judge opts not to release a defendant and sets bail that's higher than he can pay in cash, a commercial bail bond agent decides, in effect, whether the guy stays in or goes free. The role accords bond agents little prestige, but much power. The 1872 Supreme Court decision that gave bail agents many of their expansive rights declared that "their dominion is a continuation of the original imprisonment." Zouvelos, a hulking, affable man who once was an aide to Brooklyn DA Charles Hynes, explains it this way: "I don't need a search warrant to come into your house. I don't have to follow extradition treaties. Sometimes [NYPD] Warrants Section guys will say to me, 'This guy's in Connecticut there's nothing we can do—at least not now. Is there anything you can do?' And I'm like, 'There's a lot I can do. I have a car.'" Bail bond agents can also detain a person and, at their discretion, withdraw his bond and throw him back in jail, he says. "I can knock down somebody's door and take them in the middle of the night."

While no agency keeps data on who pays bails in the city, bail bondsmen aren't considered big players in the New York criminal justice arena. The State Insurance Department, which regulates the industry because surety bail bonds are a form of insurance, lists only 33 registered bail bond agents in the city and around 100 in the state. (For comparison, in 2005 alone the state licensed 128,000 life and health insurance salespeople.) New York is considered a tough place to do bail business. Besides passing an exam and posting a $5,000 bond, applicants for a bail bond license must undergo an extensive background check. And once they start writing bonds, they'll earn fees that can be much lower than neighboring states: The premium on a typical $100,000 bond is $10,000 in New Jersey but only around $6,200 in New York.

It can also be tough to find bounty hunters (or "bail enforcement agents," as they're more genteely known), who track fugitives and save bail agents money. In fact, there is not a single licensed bail enforcement agent in the state, probably because few applicants can post the required $500,000 bond. That hasn't stopped at least 14 schools from registering to train bail enforcement agents ("Feel the THRILL OF THE HUNT every time you search for and take another fugitive down!" reads

support. He was a licensed stockbroker who in the late 1990s through 2005 had jumped from one firm to another, including a few reputed "boiler rooms" that used aggressive tactics to sell stock. People who knew Cruz say he was trying to put his association with such controversial firms behind him. "He was trying to get out," says his last employer, who didn't want to be named. At two of the firms in Cruz's past he worked with a man named Christopher Janish, who is now accused by a Manhattan grand jury of costing his clients $13 million by hyping stock in his uncle's company and making trades with little regard for his investors' wishes.

Janish faces enterprise corruption, grand larceny and other charges (which he denies) that could earn him up to 25 years in prison. When Janish was arraigned last summer, Judge Arlene Goldberg at first remanded him. Then she set bail, asking for a fortune—$5 million. The seven other stockbrokers who were indicted in the case with Janish also faced high bails. Cruz, then 38 years old, was held on $10 million bond or $5 million cash.

Janish's family hustled to put together enough cash and property to post a bail bond. It wasn't the highest bail ever demanded—the judge in the Robert Durst murder case in Texas set bail at $3 billion. But Durst didn't post it. Janish did. "It took me four months," bail agent Ira Judelson says, claiming it was "the highest bail ever made in the United States." Janish walked out of Rikers in December.

But Cruz was already gone by then—not on bail, because with no assets and about $10,000 in the bank he had no chance of posting even a tenth of what the judge was asking. In early November 2006, the Department of Correction reported that Cruz had died in his cell of "an apparent suicide." The medical examiners office concluded that he hanged himself. But Cruz's lawyer, Barry Turner, isn't sure that his client took his own life. "There was some expectation that we were going to get him out of jail soon," by having his bail reduced, Turner says. "He was a great father and very much in love with his child. It just didn't make sense. He wasn't depressed. He was getting optimistic." What's more, in a letter he sent to Turner before his death, Cruz had said he'd learned of a

one school's ad), but it has driven bounty hunters—who can be deputized by any bail agent—underground, Zouvelos says. And that leads to trouble with the police.

"No one wants to be in this business with one hand tied behind their back," says Joseph Best, an 11-year veteran of the bond business who operates out of a second-floor office in Jamaica. "Anybody who does bail in New York is on a fool's errand because they release people to us and then they restrict our supervisions." Best—a former nightclub owner who became a bail agent in order to retain his pistol permit after his establishment was shut down—has been fined by state regulators for allegedly overcharging a client and once angered a judge so much she got his sponsoring insurance company to drop him. Three of Best's deputies were arrested recently while they were trying to pick up a fugitive in Manhattan. Best complains about this treatment. But he acknowledges that his industry has a terrible reputation. Zouvelos agrees: "People think we're Chico's Bail Bonds," he says, a reference to the seedy sponsors of the fictional "Bad News Bears."

As the founder and president of a new state association of bail bond agents, Zouvelos is trying to change that image, and increase the political power of the people who underwrite bail in New York. Their legislative wish list includes higher premiums and easier recovery of forfeited bail—money that bond agents lose when a defendant skips. Even after a fugitive is returned to custody, it's so difficult to get bail back from city judges that some bond agents say they don't bother with the courts and instead seek to seize the collateral. "We don't even go after the defendants," says Bronx-based bond agent Allison Palais. "I just go after the families."

An easier business environment for bail bond agents could mean more people living at liberty before trial. But the problem for many New Yorkers is that neither they nor their families have much to offer to secure a bail bond. When he writes bail upstate, Zouvelos considers tractors, cows and horses as collateral. No such luck in the city, he says. "You gotta understand, in Manhattan, nobody owns shit here." And even when a family does own property, attempts to write bail against it are sometimes foiled by a few city judges who insist on fully-secured bail, which essentially requires property with assessed value worth twice the price of the bond. Other judges require up to half of a bond to be secured with cash. Either requirement can be a deal killer.

Zouvelos—who says he must have his clients attain an overall 98.75 percent court appearance rate for him to make a profit—says he keeps his wards on track by explaining that they have a vested interest in staying free. "In a case like this," he tells them, "being dressed to the nines and coming in from the back of the courtroom is going to be a lot better than coming in from behind the bench, in handcuffs, looking like a skell." Zouvelos also imposes strict conditions on clients, requiring some to attend anger management classes or drug treatment.

A number of studies in recent years have claimed that defendants out on bond tend to show up for court more reliably than those out on their own recognizance. The bail bond industry, which doubled in size nationwide from 1997 to 2002, points to those numbers with pride. Mike Whitlock of the American Surety Company, a national leader in the industry, boasts, "The only guaranteed form of release is through a bail agent."

Critics of commercial bonds—which the American Bar Association wants to abolish—doubt that it's bail bond agents' watchful eyes that deter defendants from fleeing. More likely, they say, is that bond agents cherry-pick defendants who are more affluent and more likely to show up anyway. "The bonding-for-profit system excludes those who don't have the cash to participate," says Tim Murray of the Pretrial Justice Institute, a reform advocacy group. "It doesn't exclude successful criminals."

But while they approach the criminal justice system with the cool detachment of businesspeople protecting their profits, many bond agents see the same flaws that Murray observes. When it comes to bail, Zouvelos says, "There is a profound injustice for the poor in this city." —*J. M.*

plot against him. "He says in the letter that here was a hit set up for him. It was supposed to occur on the way to dinner," Turner says.

Turner says his client's bail was "excessive." The Manhattan DA claims it asked for such high bail because Cruz tried to flee and was arrested outside the county, but Turner insists that his client surrendered to the DA.

Janish was indicted this year, along with his wife, on new criminal charges—for criminal contempt. Prosecutors allege that he moved company stock and took money out of his company's bank accounts in violation of a restraining order. He was returned to jail and will likely remain there until trial.

Since he's safely behind bars, Judge Goldberg on August 17 released Janish's bail, one day short of a year after she set it.

VII. Room for reform

The Correctional Association's Gangi wonders why judges in New York have so few options for balancing the needs of the courts with the rights of defendants. "Why don't we come up with ways to divert people from jail," he asks, "save the city money and treat people more justly and more fairly and reduce the discrimination against poor people—and in NYC, it's poor people of color?"

The last time New York City embraced bail reform, it did so fleetingly and only under legal pressure. In 1984, after a federal court cited the city for jail overcrowding, the city released more than 600 defendants on their own recognizance or 10 percent bond—a form of bail that requires only a small deposit against the value of the bail. But releasing people wasn't the city's long-term solution to the problem. "To prevent future forced releases," a mayoral report explained, the city undertook "a $314 million building program."

That's a typical policy response. Correctional overcrowding usually forces changes in jail policy rather than bail policy. Systems in other parts of the country have sometimes even released convicted people in order to accommodate those presumed innocent and held on unmet bail. "When you reach a certain population level at the jail and there's new incoming business in terms of arrests and bookings, one of the ways

[to relieve overcrowding] is releasing those who have already been sentenced by giving them credit for time served or diverting them to alternative treatment centers," says Tim Murray, president of the Pretrial Justice Institute, a reform advocacy group.

But even as an imperfect impetus for reform, overcrowding is not a factor in New York City. Statistics reported by the Department of Correction show that the city's jails today are less crowded that they've been since 1994. Meanwhile, the Department of Correction is pursuing a plan to reopen a jail in Brooklyn and build a new one in the Bronx. While that plan is described as replacing rather than augmenting capacity on Rikers Island, it doesn't seem that a lack of space is a problem for New York City jails.

That open space, however, could be a problem in itself for people awaiting trial. There's more room for them to wait behind bars, and systems tend to use that room. "I've worked in communities where crime has gone down and remained down and detention has gone up," Murray says. When that happens, he takes a look at the jails to see who is there. "What you find is [the same thing] you have found in this country over the last 50 years, and that is a large number of individuals who are awaiting court process." Indeed, as the crime rate has fallen in New York City, the percentage of jail inmates who are pretrial detainees has steadily increased.

The absence of bail reform in New York City is not for a lack of alternatives. The state bond statute itself allows eight forms of bail, but cash bail and commercial surety bonds secured by some property or cash are the only ones regularly used. Also permitted, but almost never used, are unsecured surety bonds—which could be more affordable—as well as appearance bonds. Appearance bonds involve no bail bond agent or family members. They are a deal struck between the court and the defendant. Sometimes they involve property as collateral. But New York State law also allows unsecured appearance bonds, which are essentially just pledges to appear in court or pay the full financial penalty.

The American Bar Association has called for the abolishment of commercial bail bonds and four states—Illinois, Oregon, Kentucky, and Wisconsin—have outlawed them. In their place, the states have offered alternatives. Illinois, for example, has a 10 percent bail system similar to the one New York City used under federal duress in 1984. Under a 10 percent bail system, defendants post 10 percent of their bail amount directly to the court.

Setting up new forms of bail is one way to reduce unnecessary pretrial detention. Another is to come up with an alternative to bail itself. Judges who don't want to jail poor people but are legitimately worried about them missing court are in a bit of a jam: Bail could be punitive, and ROR is a gamble. A middle ground would be some sort of release under supervision. Some systems use electronic bracelets to keep people from fleeing, but they aren't perfect solutions. If the technology comes with high user fees, it might be as out of reach for the poor as financial bail. And the very ease of imposing such monitoring can lead to its abuse: People with little risk of fleeing go from being released without conditions to dragging around an ankle bracelet.

In the nation's capital, courts send most criminal defendants to the District of Columbia Pretrial Services Agency, which operates a battery of programs to keep track of those released before trial without bail. Some of those defendants face virtually no conditions, but about 5,000 people at any time are enrolled in the agency's supervision programs, some of which involve personal contact with one of the agency's 200-odd caseworkers, plus drug testing, electronic monitoring and sanctions for failing to follow the rules. The agency also identifies people jailed on low bails and alerts the courts, prompting their release into the agency's supervision programs. "We're proud that money doesn't make a difference in this city," says Susan Shaffer, director of the D.C. program. Court skipping rates in the D.C. program are slightly lower than New York City's.

HE FEELS LIKE WE'RE STUCK WITH BAIL . . . "OTHER THAN FINANCIAL OBLIGATIONS, I DON'T KNOW OF ANOTHER WAY TO ENSURE THAT SOMEONE WILL COME BACK."

The question is, could supervised pretrial release work here? There is some evidence that it might: A 2005 CJA pilot project to contact by phone all people in Queens and Brooklyn who missed court dates found that in the half or so of cases where phone contact was made, more than 80 percent of the defendants contacted went to court to clear up the matter. But a full program would have to contact more than just half the defendants who blow their court dates. And crucially, Shaffer says, D.C.'s courts have a public safety provision that allows detaining people before trial if they are deemed dangerous; New York doesn't have such a provision.

Prosecutors like District Attorneys Johnson in the Bronx and Donovan on Staten Island are skeptical that a program like D.C.'s could work in larger and more populous New York. So is the Bar Association's Kamins. He feels we're stuck with bail: "Is there any other

way? If there is, I don't think they've found it yet. Other than financial obligations, I don't know of another way to ensure that someone will come back. I wish there were another way, but that's the system."

If there's no escaping bail, one way to offset its discriminatory impact would be to simply pay the bails of low-income people doing pretrial jail time on minor charges. That's exactly what The Bronx Defenders will start doing soon through their Freedom Fund.

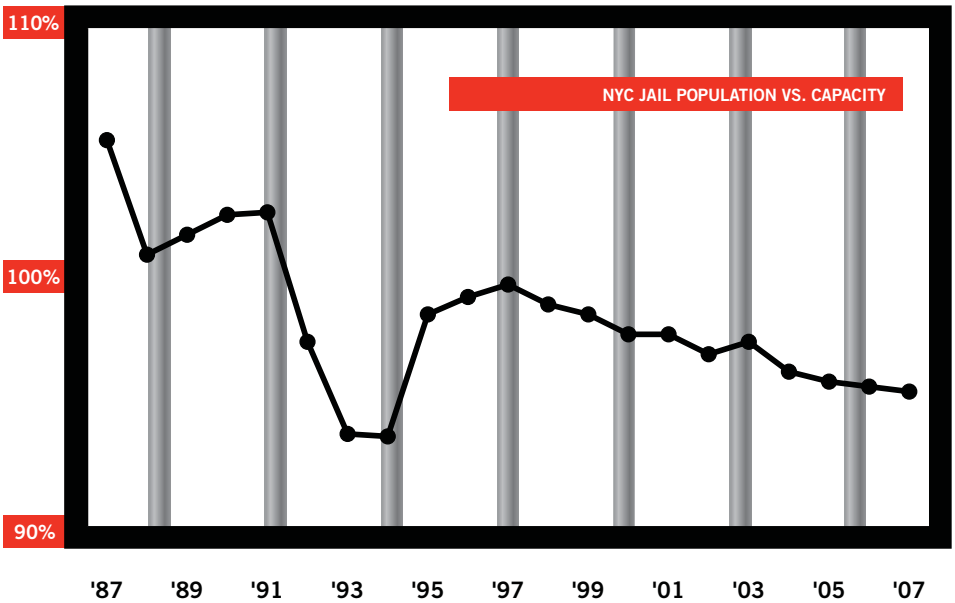
Supplied with bail money from the Flom Foundation and other sources, the Freedom Fund will bail out and offer social services to a random sample of Bronx Defender clients who meet certain criteria—say, bails less than $1,500 set on defendants who were recommended for release by CJA. The Fund is still working out the details to achieve a mix of clients that they can afford to spring from jail. Freedom Fund caseworkers will do outreach to stay in touch with clients and keep them going to court, so that the fund doesn't lose money.

"The hope is that the Freedom Fund is self-sustaining," and that it produces "some hard data to advocate for reform on how bail is used in New York City," Bronx Defenders Executive Director Steinberg says. Researchers will compare what happens in the bailed cases to a control group of un-bailed prisoners. Lead researcher Ricardo Barreras says the world of pretrial detention has been virtually ignored by scholars. "Almost everything that's been done is looking at what's happening in prison, when in New York the number of people being put through jails is much larger," he says.

A similar project, the Nassau Bail Bond Project, bailed about 150 people over a seven-year span during the 1990s and had only two absconders, says Rebecca Bell, executive vice president of the Education and Assistance Corporation, the human services agency that ran the project. "We would go through the list of the detainees in jail. We would look for people who had reasonable ties to the community and low bails—anything under $500—and who simply because they couldn't come up with the bail were sitting in jail waiting for trial," she explains. The program, which targeted only nonviolent crimes, would have up to 25 people out on bail at a time, with two caseworkers visiting them in the field to make sure they were keeping up with the conditions of their release. "We would monitor them to make sure we didn't lose money." The program ended when the bail bond agent who was assisting them moved out of the area. "We couldn't find anyone who was willing to do this, even though we were guaranteeing the money," says Bell. "We would actually love to start it up again because those people are still there, but we can't because we don't have the money."

Getting more people out on bail would put more defendants in a position to fight their cases to the end. That could be a boon to justice. But it would also pose a challenge for the city's overburdened courts. which manage volume by avoiding trials. More than a half of cases end in guilty pleas or dismissals at arraignment, and most other cases end in pleas or dismissals later on. Fewer than 1 in 500 city criminal cases went to trial in 2006.

Judge Newton says judges are not pressured to obtain a certain amount of pleas. There are, however, real constraints with which jurists must contend. "There is one pressure, and that is to get a lot done, because of the sheer volume. We have to move cases along for that purpose," she says. If fewer people pleaded guilty early in the case, she adds, "We would have to have more judges sitting in the criminal court to do more cases. We're stretched right now."



SPACE AVAILABLE

New York City's jails are less crowded now than they've been over most of the past 20 years. The last time overcrowding was a serious problem here, a federal judge ordered the city to release inmates.

Source: Mayor's Management Reports, 1987-2007.

Given the enormous volume of cases the court system faces, credit is due for the many decisions that Newton's judges get right. Like Clarence, a goofy kid in a Miami Vice T-shirt arrested for violating New York City Parks Regulation 1-03, or trespassing. It seemed odd that one could be arrested at 12:45 in the afternoon for trespassing in a park, but the DA sought bail anyway. When Judge Dena Douglas released him instead, Clarence bounded out of the courtroom chanting, "I can get to work. I can get to work. Yes. Yes."

A couple weeks later in the same Manhattan courtroom, a skinny 18-year-old named Israel faced a marijuana possession charge. The DA offered a sentence of time served if he pled. But the public defender wanted to avoid giving him a criminal record. The lawyers huddled with Judge Marc Whiten, he adjourned the case, the lawyers huddled again, and all three reached a deal: With a plea to disorderly conduct and completion of a drug program, Israel could avoid a criminal record. Other judges named in this article made their own good calls.

But there are also cases where the decision to release, set bail or remand exposes the system's flaws. One Manhattan ADA offered a guy a mere three days community service on a plea to misdemeanor possession of a weapon, and when the defendant turned that down, asked for $1,000 bail; the judge set $500 and the defendant didn't make it right away. On another day in the same courthouse, Bianca—charged with possessing drugs and a weapon—was offered a sentence of "time served" if she pleaded guilty, meaning she would have walked free if she said yes. She said no, and was returned to lockup until she came up with $250 cash.

Sometimes bad bail decisions get reversed, but only after the defendant has done time waiting to see a different judge. Like the woman accused of stealing prescriptions who was held on $1,500 but released five days later on her own recognizance. Or Charles, who was charged with domestic violence and spent five days in jail on $500 bond until another judge released him. Then there were the two defendants accused in an assault who were held on $2,500 each and released five days later. And Daniel, accused in another domestic assault, who waited 48 hours for his arraignment and had bail set at $750. Five days later a different judge released him. All these people did time because they couldn't pay for their liberty. Their release at their next court date indicates that the belief that they were flight risks, if that's what the first judge really was motivated by, was not widely held.

Juan Burgos could afford $2,500 bail, but not the nine months he did on remand before a Bronx jury acquitted him. *Photo: JM*

Criminal cases are complicated however—rarely black and white. Take the case of Juan Burgos. It should have been a good day for the criminal justice system when in October 2006 it acquitted Burgos of a Class B drug felony involving the alleged sale of two bags of heroin. The police hadn't found any drugs on him, they had no eyewitness and hadn't used prerecorded drug buy money, his lawyer says. He was the wrong guy, and he got off. The only problem was that he'd already served nine months in jail.

Burgos, now 44, had pleaded guilty to a drug sale in 2000 and was on probation when he was picked up for the alleged heroin sale in March 2005. He was able to make the initial $2,500 bail after 17 days in jail. But when he was arrested on a new misdemeanor count (for resisting arrest), the probation department issued a violation, and the judge remanded Burgos.

That was in January 2006. His trial was in October. The intervening months were not pleasant. "There was a lot of gang activity. Thefts. People getting slashed on the patio and in the hallways," Burgos says of life in Rikers. Meanwhile, his being in jail meant he lost his chance for permanent housing, his SSI benefits (which he says are for a mental condition and diabetes) and his wife. (They split up as the case dragged on.) After a two-week trial, the jury found him not guilty of the felony. In June 2007, he pleaded guilty to the resisting charge, and was sentenced to the time he served awaiting his earlier trial—a long sentence for a minor charge. When Burgos finally got out, he was able to restore his SSI. He's now paying a friend $400 a month for a place to sleep. He tried to reconcile with his wife, but it didn't work out. One wonders if the experience made Burgos more or less likely to run afoul of the law again.

The Bronx DA says in a statement: "The reality is that not everyone is trusted by the courts to show up on his or her adjourn date. Where a defendant is on probation for a felony offense and is re-arrested for another crime, the chance of incarceration increases, and with it the risk of flight."

Burgos' case illustrates the price that pretrial detention can exact. For him, the problem was not bail but remand. But on Rikers, he says, he met people who were there because they could not afford $100 bail.

The Bronx district attorney's office was offering Burgos 18 months to three years in prison if he pleaded, Riley says. In the middle of his trial, Burgos turned to his lawyers and said, "I think I'll take the year and a half." He was scared of a longer sentence, and 18

Empire Bail Bonds, a dominant player in the city's bail bond industry, beckons to defendants across the street from Queens Criminal Court. *Photo: JM*

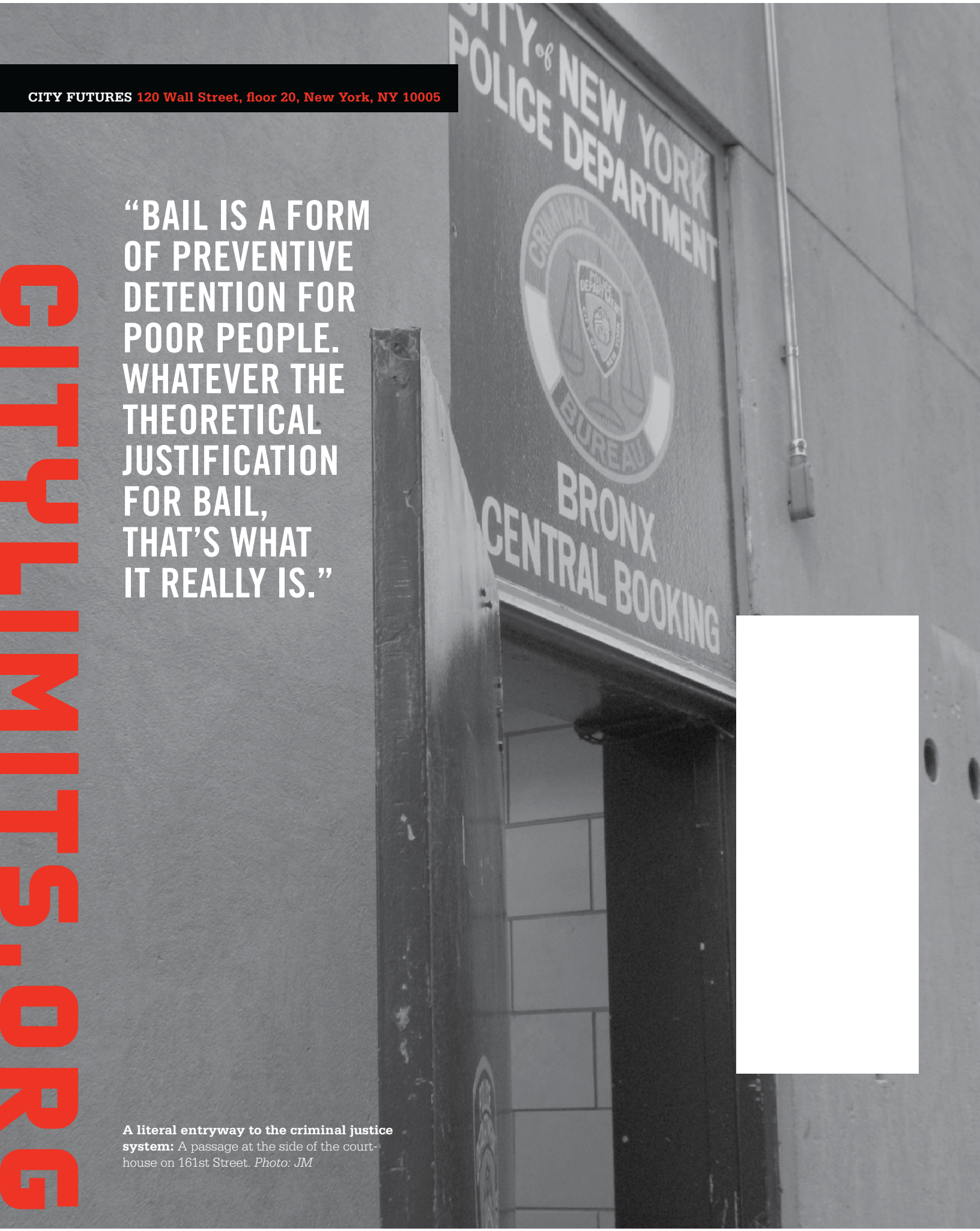
months looked like a bargain because he had already done nine. Riley talked him down. Had Burgos pled—given that he was ultimately acquitted—it would have been another false plea chalked up to the pretrial detention system.

It's impossible to know how many false pleas—the legal term for an innocent person pleading guilty—occur in the city's criminal courts. What is known is that false pleas are just one impact of a system that, for tens of thousands of defendants every year, conditions a person's liberty on their ability to pay. Those who can't afford pretrial freedom suffer the disruptions and danger of incarceration and face tougher odds of proving their case. If they lose, they face potential lifelong consequences. If they win, they must try to put their lives back together.

For years there has been a debate in legal circles about whether false pleas are a tragedy or merely a tool. Josh Bowers, a legal scholar at the University of Chicago who used to work as a Bronx Defender, argues in an forthcoming paper that false pleas only bother those who "hold on to this last vestige of an outmoded truth-seeking ideal." He does not. For people busted on minor charges who must choose between getting out of jail by saying "guilty" or returning to the lockup by claiming they aren't, pleading out is a good deal. They ought to take it. Who can afford the principle of refusal? "The fact is that the criminal justice system no longer has much to do with transparent adversarial truth seeking," Bowers writes. "It has much to do with the opaque processing (rightful or wrongful) of recent arrests."

So are false pleas wrong? To Brooklyn public defender Laura Saft, the answer is obvious. "It's bad," she says, "because the courts are supposed to do justice and it's not justice taking pleas from innocent people." Or holding them in jail for three months, or two weeks, or even five days just because they were short on cash. ♦

"BAIL IS A FORM OF PREVENTIVE DETENTION FOR POOR PEOPLE. WHATEVER THE THEORETICAL JUSTIFICATION FOR BAIL, THAT'S WHAT IT REALLY IS."



A literal entryway to the criminal justice system: A passage at the side of the courthouse on 161st Street. *Photo: JM*