

Benjamin Boykin II

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Legislator, 5th District

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**MEMORANDUM**

FROM: Ben Boykin, Chairman of the Board, Legislator – 5th District

DATE: February 11, 2019

RE: New York Times article 2-1-19 - Jail or Bail? There's a New Option

Please add the attached article to the February 25th Agenda for referral to the proper committees. I suggest it be forwarded to the following committees:

- Law & Major Contracts
- Social Services
- Public Safety

Jail or Bail? There's a New Option

“Supervised release” allows judges to let those who cannot afford bail be released before trial on a kind of parole — and it may be what finally helps close Rikers Island.



Nafisha, who probably would have spent time in jail on Rikers Island while awaiting trial, was instead let out on supervised release. Prosecutors later dismissed charges against her.

CreditCreditElizabeth D. Herman for The New York Times

By Ted Alcorn

Feb. 1, 2019

Nafisha had been arraigned before, so when she found herself again facing a judge in Brooklyn Criminal Court, she knew her prospects weren't great.

Arrested years earlier while still a teenager and charged with grand larceny, she'd fled before she could be tried, then turned herself in. The six-month sentence she ultimately served on Rikers Island felt like a year. “Rikers is not a place to call home,” she said. “If you're getting sent there to learn a lesson, that should be a lesson learned.”

Now she was 25 and working as a home health aide when she was again arrested, after an argument with her cousin spiraled out of control. Though she was presumed innocent until proven guilty, her track record of failing to appear in court for the earlier case meant the judge was liable to set bail and hold her in jail before a trial. The thought running through her head that morning was, simply, “not again.”

Instead, the judge offered her an alternative: a pretrial supervised release program intended to help her make future court dates without detaining her. She would not be separated from her infant daughter. And because the prosecutor ultimately dismissed the charge against her, she would not serve time for a crime that she was never to be convicted of. (Nafisha agreed to discuss her case on the condition that her last name be withheld.)

Since the city began offering supervised release in 2016, more than 11,000 people have entered the program, and the mayor's office estimates that it is responsible for 38 percent of the decline in the jailed population on Rikers Island since then. And it has done so in defiance of

traditional notions that people who've been arrested pose a danger to public safety and are best detained until trial.

During this year's State of the City address, Mayor Bill de Blasio announced that the number of people held on Rikers had fallen below 8,000 for the first time in 40 years, closing the distance to his goal of 5,000 inmates — at which point the notoriously brutal jail complex could be shuttered and the remaining detainees relocated to smaller facilities throughout the five boroughs.

Supervised release may ultimately play a decisive role in whether Rikers can be closed — but it will depend on how far judges, prosecutors, and the public are willing to go in altering how they treat risk.

Citywide, the supervising judge for arraignments is Judge George A. Grasso. Bullet-headed and garrulous, Judge Grasso wore a badge before he wore a jurist's robes. In his chambers on the top floor of the Bronx Criminal Court, a small display of medallions traces his career at the New York Police Department, where over three decades he climbed from patrol officer to first deputy police commissioner, before his appointment to the bench in 2010.

His decorated career enforcing the city's laws has made him an effective advocate for supervised release, which asks judges to relax their assumptions about which people need to be detained. "If we let our decisions be driven by fear," he says, "that is not justice."

An arraignment can feel like a formality — no witnesses are called, no evidence received, and defendants are processed at a speedy clip — but it is among the most consequential moments in any case. That's because the judge decides how to ensure that the defendant reappears in court, possibly by detaining them pretrial or releasing them on condition of paying bail.

This seemingly simple choice shapes the trajectory of the case and the defendant's prospects. Detained and enduring the discomforts and dangers of jail, the accused may grudgingly accept a guilty plea just to resolve the case. A 2018 study in the *American Economic Review* showed that defendants whose circumstances were otherwise alike were about 10 percent more likely to plead guilty if they had been held in jail before trial.



A former patrol officer, George A. Grasso, is the supervising judge for arraignments citywide and an advocate for supervised release. Credit Elizabeth D. Herman for The New York Times

And those who do not plead guilty may endure even bleaker ordeals. Kalief Browder, the 16-year-old who became the face of pretrial reform, was held on Rikers for three years for allegedly swiping a backpack, all the while maintaining his innocence, before prosecutors ultimately dropped the charges for lack of evidence. Browder struggled in the aftermath of his

release, and two years later killed himself. Last week his family was awarded \$3.3 million to settle a wrongful-death lawsuit against the city.

It may come as a surprise, but judges in New York City have a far lighter touch than most. In the early 1960s, the city was among the first places to show that a vast majority of defendants released without bail would return to court. While many jurisdictions still release fewer than half of defendants this way, New York City judges did so 67 percent of the time in 2017.

And yet tens of thousands cycle through the jail each year. It was with this population in mind that the city developed the supervised release program. First piloted in Queens and Brooklyn in the waning years of the Bloomberg administration, Judge Grasso and others pushed the program citywide. Where judges previously had to choose between either releasing a defendant without conditions or detaining him until bail had been paid, the program offers a third way. “Think of it as having a larger tool kit,” Judge Grasso explained: “Good options, good tools, that didn’t previously exist.”

Defendants offered supervised release are required to meet regularly with case managers employed by independent nonprofits, who assist them in making future court appearances and offer to connect them with social services. Supervision lasts until the cases are resolved, which may be just a few months for misdemeanors and more than a year for felonies.

Eric Simmons, a social worker at one of the nonprofits, Bronx Community Solutions, typically manages a caseload of about 60 defendants. Some are disinterested in services, he said, but on occasion he has been able to make a meaningful difference. He recalled how one client, who had been addicted to heroin for decades and entered the program after a related arrest, had long been stymied in entering a drug-treatment program because he’d lost his only means of identification. Mr. Simmons helped him replace it and begin the recovery process. “He’s reconnected with his daughters, who had lost touch with him,” Mr. Simmons said.

Pretrial supervision is not a novel idea — cities around the country have operated programs for decades — and Miriam Popper, the executive director of the New York City program, said it benefited from their experience. “We built this program on: What does the evidence say? Can it help someone get back to court and be successful?”

Whereas programs elsewhere may monitor defendants through electronic ankle bracelets and mandatory drug-testing — prompting reformers like Michelle Alexander to warn that they “contain the seeds of the next generation of racial and social control” — New York City doesn’t incorporate either practice.

Cherise Fanno Burdeen, chief executive of the Pretrial Justice Institute, a nonprofit that advocates for reforms of pretrial practices, said that New York City is also setting a markedly different tone by employing social workers as case managers. “Treating this as a structured opportunity to provide people connections to the services in the community that they need in order to be successful is much better than a law enforcement-focused model.”

Felony theft and felony drug possession are among the most common charges faced by people admitted to supervised release. Those participants assessed as being at lowest risk of failing to appear in court are required to meet with a case manager monthly; those at highest risk are required to meet weekly, accompanied by a weekly check-in by phone. Judges are apprised of participants’ compliance as their cases proceed.

After growing quickly in the year following its citywide launch, supervised release has steadily enrolled around 400 new cases per month. The mayor’s office reports that in the program’s

first three years, 89 percent of defendants made all court appearances; only 8 percent were rearrested for a felony while participating in the program.

But some remain skeptical. On one side, James Quinn, who has been a prosecutor in the Queens district attorney's office for 41 years, maintains that the risk to public safety posed by many of the people who secure release through the program is not being given sufficient consideration. Taking into account both misdemeanors and felonies, nearly 20 percent of those on supervised release are rearrested during the program, city data show.

"The more expansive the city becomes in taking people into the supervised release program, the more of these defendants are going to be committing crimes when they're out," Mr. Quinn said. "And that's our concern."

Then there is the possibility that supervised release is ensnaring people who pose little risk at all. Instead of only liberating defendants who might have been held in jail until trial, judges may be mandating defendants to supervision who they would have otherwise released unconditionally.



A memorial for Kalief Browder, who was held in Rikers for three years before charges were dismissed. Today, a young defendant facing similar charges would have been eligible for supervised release. Credit: Lucas Jackson/Reuters

Defense attorneys in Brooklyn say they see this wider net being cast, and there is some data to confirm their concerns. Between 2016 and 2018, the mix of people enrolled in their borough's program has shifted slightly toward those assessed to be at a lower risk of felony rearrest.

Mr. Simmons, the social worker, said that even the light touch of supervised release can inadvertently harm participants, for whom any additional contact with the criminal justice system poses a risk. For example, a client of limited means might jump a turnstile to get to one of the required meetings at the courthouse, risking a new citation.

The man Mr. Simmons helped get into a drug-treatment program was nearly rearrested when he tried to pass through the court's metal detector with a syringe in his pocket. The guards on duty that day confiscated the paraphernalia and let him go; had he been charged with criminal possession of a hypodermic instrument, a misdemeanor, it could have added to his already lengthy rap sheet and complicated further proceedings in court. And if he hadn't been under supervised release, he wouldn't have needed to pass through a metal detector that day in the first place.

The biggest challenge to ensuring supervised release reaches people who would otherwise be on Rikers Island is by design: the program does not currently accept those charged with violent

felonies or domestic violence. But on a typical day, more than half the people detained in the jail before trial are charged with these types of crimes.

Some charges for so-called violent crimes do not necessarily entail violent behavior, either. The crime Kalief Browder was charged with, the theft of a backpack, is considered second-degree robbery and, technically, a violent crime.

Critics say there is no evidence that supervision would be less effective for people charged under these statutes, and their exclusion instead reflects a political stance. Some pretrial programs elsewhere have no exclusions, allowing judges to consider each individual's circumstance regardless of the crime committed.

Scott Levy, special counsel at the Bronx Defenders, a public defender nonprofit, said that excluding certain statutes hampers real reform. "It reinforces this notion that people charged with violent offenses are somehow less deserving of the presumption of innocence than other people."

Which isn't to say there is no risk: No judge or algorithm can reliably predict future behavior. That uncertainty may motivate judges to detain defendants out of fear, but their belief that doing so will prevent harm is misplaced, reformers say. "We aren't just talking about the risk of letting somebody out; we're also talking about the risks of keeping somebody in," said Tyler Nims, executive director of the Independent Commission on NYC Criminal Justice and Incarceration Reform. "There's a ton of harm that comes from putting people in jail who don't belong there. And that's hard to measure, but it happens every day."

Since last March, the city has opened the door a crack, allowing people 17 and under who are charged with certain violent felonies, including the charge Kalief Browder was facing, to participate in a youth track of supervised release. All but a few have reappeared in court and avoided further arrest during the program. In a pilot program, Brooklyn has enrolled people as old as 19, and other boroughs may follow.

Some prosecutors and victims' advocacy groups also signaled new openness to supervised release for people charged with misdemeanor crimes of domestic violence, reflecting how far attitudes toward detention have shifted. In 2017, there were nearly 6,000 misdemeanor domestic violence cases in which bail was set, according to the Office of Court Administration. But so far, supervised release has not been an option in these cases. One reason for the hesitation is the historic underprotection the criminal justice system has afforded to victims of domestic violence, where the nature of the crime is often repetitive and escalating.

"That was sort of a red line initially," said Brooklyn's district attorney, Eric Gonzalez. "But my thinking on that has evolved, and I would support the option for screening for supervised release on domestic violence cases."

Supervised release poses a quandary for Dorchen Leidholdt, who directs legal services at the domestic violence advocacy group Sanctuary for Families but was once a public defender herself. She understands well the harm that pretrial detention inflicts on defendants. "The victim's safety must be paramount," she said. And yet, she sees a time when even those accused of domestic abuse could be released before trial. If all such defendants were assessed intensively for risk of future violence, she said, her organization would be open to giving judges some discretion in offering supervised release.

"Our position," she said, "is not one of absolutism."