

JUSTICE ABANDONED



HOW THE SUPREME COURT IGNORED
THE CONSTITUTION AND ENABLED
MASS INCARCERATION

RACHEL ELISE BARKOW

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Rachel Elise Barkow, an influential legal scholar, argues that the Supreme Court played a pivotal role in the rise of mass incarceration in America.

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*How the Supreme Court Ignored the Constitution
and Enabled Mass Incarceration*

RACHEL ELISE BARKOW

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For Nate and Tony

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INTRODUCTION

They who can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.

—BENJAMIN FRANKLIN

American identity is inextricably linked with a commitment to liberty. Our founding documents are awash with paeans to freedom. How, then, did the “sweet land of liberty” end up becoming home to the world’s largest number of people behind bars? America has less than 5 percent of the world’s population but almost a quarter of the world’s prisoners. We keep nearly two million people behind bars, a rate that is five to ten times higher than that of other industrialized countries. More than four hundred thousand people—roughly equivalent to the population of Miami—are languishing in jails and have not yet even been convicted of a crime because they are awaiting their trials.¹ Those serving sentences after conviction often receive long sentences that cannot be justified by deterrence or any rational conception of what would be their just deserts for their crimes. These incarcerated people are typically held in squalid, overcrowded conditions, and they are disproportionately people of color.

It hasn’t always been like this in America. For most of the country’s existence, our punishment practices and imprisonment rates were comparable to other Western democracies. We set out on a different path beginning in the 1970s.² Many scholars and commentators, including me, have described the politics and cultural dynamics that drove these changes over the past fifty years.³ The increase in violent crime in the 1960s set in motion critical political forces that propelled mass incarceration and ultimately took on a life of their own, divorced from actual crime rates and effective crime-fighting policies. Tough-on-crime politics have been a winning strategy for more than five decades in a media culture that creates the impression that violence

and danger are ever present and that incarceration is the answer. Pressure mounts for more aggressive policing, less due process, more detention of people accused of crimes, and longer sentences served under ever-harsher conditions. Implicit and sometimes even explicit racial bias underlies many of the dynamics.

The politics of mass incarceration present an intractable problem that is not easily solved. Those of us who have identified possible political arguments or institutional changes to shift Americans' thinking about punishment and its effectiveness must concede that these strategies will take decades if not generations to reduce America's incarcerated population to levels comparable to other Western democracies and our own previous rates from fifty years ago. This is why many people have turned to more revolutionary tactics, including prison abolition or the rejection of capitalism. It is easy to see why people seek such dramatic, if unrealistic, changes. The politics of mass incarceration are deeply embedded in a history of slavery, racism, job displacement from industrialization, a lack of investment in a social safety net, and a host of other path dependencies that are not possible to change in any straightforward way.

But changing America's political landscape is not the only path for tackling mass incarceration. That is because it was not just the politics that started shifting five decades ago and paved the way for America's turn to large-scale incarceration and excessive punishment. There was another, equally important, transformation that occurred at the same time and also bears responsibility for the mass incarceration we see today.

The Supreme Court, starting in the 1960s, decided a series of cases that eviscerated the constitutional rights that were supposed to guard against government oppression through criminal punishment. Reasonable people can disagree over the proper methodology for interpreting the Constitution, but these cases are remarkable because they fail under all the leading approaches to constitutional interpretation. They contradict the original and plain meaning of the Constitution's text, they flout precedent that existed at the time they were decided, and they fly in the face of any theory of a living Constitution that is based on expanding notions of liberty and equality to changing circumstances. These cases can be defended only under a constitutional theory grounded in pathological deference to the government and its claims that liberty must be sacrificed for public safety. That, however, is less a constitutional theory of interpretation than it is pure politics.

Had the Court been faithful to the Constitution instead of its own notions of expediency and what it thought was best for public safety, we would not have the carceral landscape that dominates America today. Unpacking these cases is therefore a critical step in fully understanding mass incarceration in America. Doing so also provides a strategy for combatting it, because one way to curb mass incarceration is to reinvigorate the constitutional protections that should have been in full force throughout this time.

Our constitutional republic is designed to put the brakes on government excess when it infringes on liberty. That is, after all, the central story of our country's founding and the reason we fought a revolution to free ourselves from British rule. That is why George Washington's First Inaugural Address focused on "the preservation of the sacred fire of liberty, and the destiny of the Republican model of Government."⁴ It is behind Patrick Henry's warning to the Virginia Convention on the ratification of the Constitution to "guard with jealous attention the public liberty" and to "suspect everyone who approaches that jewel."⁵ Sam Adams spoke for a revolutionary generation when he wrote that "the liberties of our country, the freedom of our civil constitution, are worth defending against all hazards: And it is our duty to defend them against all attacks."⁶

The Framers did not miss the danger of government excess when it came to the state's authority in criminal matters.⁷ Having seen the cruel operation of the Bloody Code in England and gross abuses by the kings in power, the Framers of our Constitution were well aware of the state's use and abuse of criminal laws and provided for a wealth of protections to protect and preserve individual liberty.⁸ They went out of their way to make it difficult for the state to impose punishment. Under the Constitution, all three branches must agree before criminal power can be exercised. The legislature must criminalize the conduct, the executive must decide to enforce the law, and the judiciary, typically a jury, must convict. The Constitution is also replete with other provisions that check governmental abuse in criminal matters.⁹ The Constitution covers everything from investigation to punishment.

And no wonder. Government power is most threatening in this context because it can strip away liberty and even take someone's life. The various constitutional provisions protecting liberty and setting up barriers before the government can punish someone all reflect the Framers' view that stopping governmental abuse of punishment power far outweighed any concerns with efficiency in response to crime. They intended to make it hard for the gov-

ernment to criminally punish people because they feared that making it too easy would be a far graver threat to core individual rights and safety. It is therefore not a flaw with the Constitution's design that has allowed mass incarceration to flourish. The Constitution anticipated the overreach of political actors under the guise of imposing criminal punishment. While many believe the Constitution should evolve as society changes, the threat to individual liberty from the government's power to punish has not diminished over time. We should be just as committed as the Framers were to making sure the government stays in check.

The problem is the Constitution cannot protect itself. The Supreme Court has to provide the necessary protection against government overreach when it conflicts with constitutional safeguards. Far from pushing back, however, the Supreme Court has lent the government a helping hand and paved the way for mass incarceration to thrive. Any story of mass incarceration in America is incomplete if it does not include the Supreme Court's pivotal role.

This book explores the Supreme Court's facilitation of mass incarceration by looking closely at six key decisions that, had they come out differently, could have placed an important brake on America's accelerating use of jails and prisons. While many more cases have undermined defendants' rights and increased government power than the six cases featured here, my focus is on these cases both because they form the foundation on which mass incarceration rests and because they were wrongly decided under traditionally accepted methods of constitutional interpretation that rely on text, the history at the time of the Constitution's framing, the subsequent history and precedent after the framing, and living constitutional theories that aim to expand the protection of liberty and a commitment to equality.

Most tragically of all, these cases were a fool's bargain from the outset. While the Supreme Court likely thought it was forging sensible compromises in the name of public safety when it decided these cases, thus justifying the outcomes under pragmatic or prudential theories of constitutional interpretation, empirical research shows that none of them has made us any safer.¹⁰ On the contrary, these decisions allowed the government to avoid far more effective strategies for tackling the root causes of most criminal activity. Engaging in massive policing and detention, largely targeted at communities of color, is a superficially cheaper and quicker alternative, but it is not an effective one. We have traded liberty for the appearance of security, but not the real thing. Given his quote that opens this introduction, Benjamin Franklin would say America got just what it deserved.

It is not too late to right these wrongs. The Court that opted for the path of mass incarceration can now choose to take a different course. We can eliminate injustice simply by following the law. The Constitution stands at the ready. We just need a Supreme Court willing to do its job.

It all starts by recognizing where the Court went astray from the Constitution. Each of the following chapters explores one of the Court's crucial wrong turns. The format of these chapters is the same. They begin by explaining what the law would look like if the Court had been faithful to the Constitution's text, the original understanding of its drafters and ratifiers, and the Court's precedents, before turning to the case where the Court veered off course. The first part of each chapter will therefore appeal to those who follow these standard modalities of constitutional interpretation and make the case for overturning these decisions on those grounds. Each chapter then analyzes what happened in the aftermath of the decision and explains the relationship between the case and the rise of mass incarceration. In all six contexts, the Court's approach resulted in the dramatic curtailment of liberty and increased inequality. The aftermath section should therefore convince those who embrace more dynamic models of constitutional interpretation that, even under a flexible approach that embraces a living Constitution and focuses on pragmatic or prudential arguments, these cases were wrongly decided because they failed to expand the Constitution's core values to changing times, and instead led to disastrous outcomes for anyone concerned with liberty and equality, all while failing to make us any safer.

Chapter 1 begins by discussing *United States v. Salerno*, a critical decision lowering the bar for pretrial detention and a key factor leading to the almost half a million people who find themselves incarcerated before being convicted of anything. This is one quarter of the "mass" of mass incarceration, and if the Court had been faithful to the Constitution, only a fraction of these people could be detained. The Framers abhorred pretrial detention and heralded the presumption of innocence. The modern Supreme Court seems to have reversed these priorities. In *Salerno*, the Court, for the first time in the country's history, condoned the detention of people charged with a crime before their trials simply because they were deemed "dangerous." It is a decision contrary to due process and the Eighth Amendment, and it makes a mockery of the presumption of innocence. It is, however, a vivid example of how the Court let its own worries about crime overtake its constitutional obligations.

Most people who are incarcerated have been convicted, so Chapter 2 turns to the key decision behind the explosion in convictions in the past fifty

years in America. It has been driven almost exclusively by the rise in plea bargaining and the penalties prosecutors impose on people who choose to exercise their trial rights. The government unlawfully intimidates people to give up their right to a jury trial by threatening greater punishment if they do not, but the Court has refused to protect the jury trial from this government coercion. This conflicts with the protection the Court gives other constitutional rights, where it has made clear that the government cannot impose unconstitutional conditions or penalties when someone seeks to claim a constitutional right. The Court's only reason for treating the right to a jury trial differently is a concern with judicial efficiency, not any constitutionally relevant distinction between the jury trial right and other constitutional rights that are protected from being coerced away. Chapter 2 thus explores the seminal and ultimately tragic case of *Bordenkircher v. Hayes* and its key role in the rise of mass incarceration. It is another example of how the Court set aside the Constitution because it believed it was more important to allow the government to mass-produce criminal cases to meet what it saw as public safety demands. Plea bargaining may bring efficiency benefits to the courts, but those gains come at the cost of the Constitution's jury guarantee.

Once the Court accepted coercive plea bargaining, the floodgates for incarceration opened wide. Plea bargaining not only increased admissions but also resulted in longer sentence lengths, the other key variable for mass incarceration to flourish, because prosecutors pushed for ever-harsher laws and mandatory minimums to increase their bargaining leverage. The Constitution directly confronts the dangers of excessively long sentences in the Eighth Amendment's Cruel and Unusual Punishment Clause, but the Court has almost completely abdicated its responsibility to police it, as Chapter 3 explains. The doctrinal test for whether a sentence amounts to cruel and unusual punishment has its roots in a concurring opinion by Justice Kennedy in *Harmelin v. Michigan* that a majority of the Court has embraced. That framework makes it virtually impossible for any sentence to be declared cruel and unusual because of the deference it gives the government. No matter how excessive a sentence of incarceration is in relation to a defendant's blameworthiness, the Court will accept it as long as the state can claim that it believes it brings a benefit by incapacitating the person. This standard is the reason no individualized challenge to a sentence of incarceration as violating the Eighth Amendment has succeeded before the Court in more than fifty years despite the fact that the tough-on-crime era has produced thou-

sands upon thousands of sentences that bear no relationship to any conception of someone's just deserts.

These first three cases alone could have changed the entire landscape of punishment in America had they come out differently. If the Court were faithful to the Constitution, we would not have massive pretrial detention on the basis of predictions of dangerousness. We would not have coercive plea bargains, which would dramatically lower the number of convictions and require prosecutors to focus on the most serious crimes worthy of the time for a trial instead of mass processing minor offenses because it is essentially costless to them to do so. And we would have limits on how much punishment people could receive for their crimes, thus preventing a huge proportion of the excessive sentences that have been handed down over the past five decades and that are continually meted out in courtrooms across America. These are literally game-changing cases, and all of them were wrongly decided under all the traditional methods of constitutional interpretation. They were justified only if one believes the government should win when it claims it needs something for the sake of public safety and administrative convenience. Unfortunately, we have had enough justices on the Court who have believed just that.

While the first three chapters explore the cases that most directly facilitated mass incarceration, the last three chapters analyze cases that have an indirect but still critical role in allowing mass incarceration to metastasize. Mass incarceration costs money, and at some point the price tag will be too high for the government to continue to pursue it as a strategy. The Court, however, essentially put in place a massive clearance sale on the constitutional price of incarceration by failing to police overcrowding and the conditions of confinement in any meaningful way. Chapter 4 explores the Court's tolerance of double bunking and all the mental and physical harm that flows from it by describing the case of *Rhodes v. Chapman*. *Rhodes* is not the only key case in this area, but it is emblematic of the Court's failure to police prison conditions, and that failure has been an indispensable aspect of mass incarceration's success. If jurisdictions had to provide adequate space and constitutional conditions, incarceration would cost far more, and inevitably jurisdictions would use it less. Instead, the Court did everything in its power to lower the price instead of enforcing the Eighth Amendment's limits.

Mass incarceration depends on the police because every person in jail or prison got there after being arrested. In that sense, anything that expands the

power of the police will feed mass incarceration to some extent. There is a multitude of Supreme Court cases that wrongly expanded police power, and properly exploring the relationship between the Court, policing, and mass incarceration requires the exploration of several cases, not just one. Put another way, the problems with policing are the result of a series of bad decisions. Chapter 5, however, focuses on the most consequential policing case for mass incarceration, *Terry v. Ohio*, because it is the case that ushers in the era of mass policing. The Court in *Terry* authorized the police to stop and frisk individuals based merely on suspicion, diverging from the nation's long-standing tradition of requiring probable cause for police seizures and searches. It was a key ingredient to mass incarceration because it led to a new policing model of programmatic stop-and-frisk that resulted in millions of forcible police encounters. While most of those encounters turn up no evidence of crimes, even the small percentage that do has resulted in hundreds of thousands of people occupying the country's jails and prisons, mostly for minor offenses like trespassing, disorderly conduct, and drug possession. Moreover, *Terry* reflects what was to become the dominant Court approach in the decades that followed in other policing cases: a Court capitulating to law enforcement demands instead of holding the constitutional line. The outcome in *Terry* must have seemed like a sensible balancing of interests to the Court, but instead it ushered in an era of aggressive policing that has fed mass incarceration and decimated the perceived legitimacy of the police in communities of color. It has, like all the other cases discussed, harmed instead of helped public safety.

Finally, mass incarceration is about more than just the rate of imprisonment and the overall size of the incarcerated population. It also refers to the fact that the brunt of the hardship disproportionately falls on communities of color. David Garland, the leading sociologist of punishment, explains that "imprisonment becomes mass imprisonment when it ceases to be the incarceration of individual offenders and becomes the systematic imprisonment of whole groups of the population," which, in the case of American incarceration, means young Black males from largely urban communities. At its peak, mass incarceration resulted in one in every three Black men between the ages of twenty and twenty-nine being either incarcerated or under criminal supervision.¹¹ Thus, as Garland notes, "every family, every household, every individual in these neighbourhoods has direct personal knowledge of the prison—through a spouse, a child, a parent, a neighbour, a friend. Imprisonment ceases to be the fate of a few criminal individuals and becomes a

shaping institution for whole sectors of the population.”¹² Mass incarceration would never succeed in America if its misery was not disproportionately experienced by minority groups with relatively less political power. In the key case of *McCleskey v. Kemp*, explored in Chapter 6, the Court made it almost impossible to succeed on claims of racial discrimination in the enforcement of criminal law. The case is an outgrowth of earlier cases decided by the Court, but it was not an inevitable progression to decide *McCleskey* as the Court did. The result is that racial bias permeates every aspect of the criminal punishment pipeline, from policing to charging, from plea bargaining to sentencing, and the Constitution’s command for equal protection has become an empty platitude.

Taken together, these six cases serve as the foundation for mass incarceration, each one deviating from constitutional principles that should have prevented the scale of imprisonment that ultimately materialized. To be sure, long before the Court gave its imprimatur, judges were detaining people they believed to be dangerous, prosecutors were engaged in coercive plea negotiations, long sentences existed, prison conditions were dismal, the police were stopping and frisking people without probable cause, and racial bias characterized the operation of criminal law. The Supreme Court’s approval, however, gave license for these practices to be employed on a massive scale. Before the Court’s rubber stamp, these were often sub rosa practices or only occasionally used because of their questionable legality. When these practices remained in the shadows, their numbers stayed in check. It was not until the Court gave its explicit blessing to detention on the basis of predicted dangerousness, to coercive plea bargaining, to prison and jail overcrowding, and to police stops and searches without probable cause that their use exploded. While sentence lengths were already growing ever longer by the time the Court abandoned its Eighth Amendment oversight, and racial discrimination has characterized the operation of criminal law from the nation’s founding, the Court’s failure to take a stand against those developments meant that mass incarceration flourished.

What the Court says matters greatly, and there is a direct through line between the Court’s pronouncement that a practice is constitutional and its explosive use throughout the country. The Court has thus played a pivotal role in establishing mass incarceration in America, and the central goal of this book is to expose its culpability. We might like to think of the Court as above the political fray, guarding long-term constitutional values against short-term panics. As the following chapters show, however, the Court fell prey to

the same tough-on-crime frenzy as the public. The Supreme Court has been a key contributor to the rise of mass incarceration, and this book explores its role.

But the book aims to be more than an autopsy of what the Court got wrong and the relationship between key Supreme Court cases and mass incarceration. It is also a blueprint for shifting course. While respect for precedent is an important part of common-law decision-making and steadiness in governance, sometimes stability requires admitting error and putting the country on a better course. These cases were wrong under the major metrics by which we typically judge constitutional decisions. They conflict with the original meaning of the Constitution's text, they contradict historical tradition, and they are at odds with core notions of individual liberty and a commitment to equality that remain cornerstones of dynamic or living constitutional interpretation theories. Instead, what these cases have in common is an unquestioning deference to whatever the government argued was necessary for the efficient pursuit of public safety. And because the government got it wrong, and the compromises in these cases do not make us safer, even the most pragmatic approaches to constitutional interpretation should see these cases as abject failures.

Litigants should therefore urge the Court to overturn these cases, or at least limit their reach, because they were wrongly decided. While the current Court is a conservative one, it contains enough justices who are committed to originalism and willing to overturn cases that it is not unthinkable to imagine a doctrinal shift even with the current crop of justices staying in place. The justices who decided these cases did not focus on originalist arguments; nor did they have the empirical evidence that undercuts the government's public safety claims. It is much easier for justices today to resist the government's public safety claims in light of their inconsistency with the Constitution's original meaning and their failed track record on the ground.

Moreover, over the longer term, the personnel of the Court will change, and advocates who care about mass incarceration should pay close attention to nominations and urge the appointment of justices who will not simply reflexively rule in the government's favor in criminal matters. The social movement to reduce mass incarceration should not ignore the Court's potential as a driver for change because, while it currently props up mass incarceration, it can aid in its demise. As those who oppose mass incarceration and support racial justice gain political power, it is important to channel that power in the most productive ways to resist backlash and reversal. The Court is an ideal target for these advocates because putting justices on the Court

who share those commitments can produce generational change that is not vulnerable to shifting political winds. While advocates should target state supreme court and lower federal court appointments as well, Supreme Court nominations are the most important because the Supreme Court sets the bar nationally. Lower federal courts have to follow its edicts, and while state supreme courts can go further than the US Supreme Court in protecting rights, they cannot fall below the federal threshold. This is critical because the political landscape in most states is nowhere near a point that electing state high court judges committed to reducing mass incarceration is feasible. Change is, however, achievable on the Supreme Court precisely because the appointments process is not based on a direct election and because the cases discussed here fail under so many different constitutional approaches, including the originalist methodology that appeals to Republicans and the more progressive theories of interpretation that Democrats favor. These cases are the relatively rare ones where both theories should lead to a conclusion that they should be overruled.

It is hard to imagine many other areas where the Court's failings have been more disastrous than in the cases that have failed to protect cornerstone principles of liberty and turned America into the planet's premier penitentiary operator. These cases undermine America's core values, dismiss the value of human dignity, and destroy lives and communities. And they do so without making us any safer. It is time to recommit to the Constitution's safeguards of liberty, and overturning these cases is the place to start. The Constitution provides checks on mass incarceration—it just needs a Court willing to fulfill its promise.

CHAPTER ONE

LOWERING THE BAR FOR PRETRIAL DETENTION

United States v. Salerno

Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be “dangerous.” Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power.

—JUSTICE THURGOOD MARSHALL

It would be hard to explain the presumption of innocence to Tyrone Tomlin. He purchased a soda from a discount store, and the clerk handed it back to him in a paper bag, along with a straw. Tomlin came outside and rejoined the group of friends he had been talking to outside the store in the Crown Heights neighborhood of Brooklyn, where Tomlin had lived his whole life. Two officers from the New York Police Department’s narcotics squad called the group over. One of the officers inspected Tomlin’s bag and questioned him about an object in his other hand. Despite Tomlin explaining that the object was just a straw for his soda, the officer arrested him, alleging that the straw was drug paraphernalia. In the arrest documentation, the officer claimed his training and experience led him to conclude straws were a “commonly used method of packaging heroin residue.” The prosecutor told Tomlin if he pleaded guilty to a misdemeanor charge of possession of a controlled substance, he would get a thirty-day sentence. Tomlin refused, telling his defense lawyer, “It’s a regular straw!” He was confident he

would be cleared once they tested the straw. But at his arraignment, the prosecutor requested bail, and the judge set it at \$1,500.

Unable to pay the \$1,500 bail, Tomlin was sent to Rikers Island, one of the country's most horrific jails. All this happened without a trial, a test of the straw, or any deliberation on the necessity of his detention. Tomlin's description of Rikers echoed what so many others have said: "That place is miserable. It's dangerous. It's every man for himself. You could get abused; you could be raped; you could be extorted." A group of men brutally attacked him in the shower. It wasn't until three weeks after his arrival at Rikers that the prosecutor finally reviewed the lab report of the straw, which confirmed it was clean. The prosecutor then asked the judge to dismiss the case. Without expressing an ounce of regret that this innocent man lost his freedom for three weeks and was severely beaten while in custody, the judge told Tomlin, "This is your lucky day; you're going home." Tomlin still suffers from blurred vision in his left eye due to the assault.

Tomlin's story would likely resonate with Adriana, a young mother of a toddler, who had her own horrific experience with pretrial detention. She left a shelter for survivors of domestic violence, where she had been staying, to buy diapers for her daughter. A friend at the shelter agreed to babysit while Adriana went to the nearby store. A staff member noticed Adriana leaving without her baby and reported her to the police. When Adriana returned with the diapers, the police arrested her and charged her with endangering the welfare of a child. At her arraignment, the prosecutor objected to the defense's request for Adriana's release on her own recognizance. The judge sided with the prosecution and set bail at \$1,500. Adriana's public defender asked the judge to "state the reason for setting bail in this case." The judge's response: "Thank you, counsel." No explanation, no consideration of why detention was necessary. Adriana spent two weeks on Rikers Island. She lost her bed at the shelter, and her baby was placed in foster care. After agreeing to a deal with prosecutors to attend a life-skills class, she was finally released. The judge told her, "Congratulations on being in a place where a lot of people care about you." She was still fighting to get her daughter back five months after her arrest.¹

Even a short stay in jail can cause lasting damage, as the cases of Tyrone Tomlin and Adriana show. But often, pretrial detention drags on much longer. Take Victor Jimenez, who was arrested in August 2016 on charges of illegal possession of a firearm and selling drugs. Opting to exercise his right to a jury trial, he was acquitted of all charges in January 2018. Jimenez nev-

ertheless spent 503 days in jail because he was detained while awaiting his trial and verdict.² He spent that time in a Los Angeles County jail infamous for violent gangs, savage abuse of detained individuals by corrections officers, massive overcrowding, and grossly unsanitary conditions.³

Kalief Browder was sixteen years old when he was arrested for allegedly stealing a backpack. He rejected prosecutors' plea deal offers and continued to assert his innocence. He was detained for three years on Rikers Island, spending roughly two of those years in solitary confinement. During this time, he suffered repeated abuse at the hands of corrections officers and fellow detainees. He made multiple attempts to take his own life while incarcerated. Eventually, prosecutors dismissed the case against him. But Browder never recovered from the trauma of his incarceration. His mental health continued to deteriorate after he was released, and he died by suicide.⁴

These stories are the tip of a tragic iceberg. On any given day in America, we have almost half a million stories like these, of people locked away in jails awaiting trial. Like Tyrone Tomlin, Victor Jimenez, and Kalief Browder, many of these individuals are detained and ultimately not convicted. Before the rise of plea bargaining inflated conviction rates, studies showed that a quarter of people detained pretrial were not ultimately convicted.⁵ Even when people were convicted, they often would not face incarceration were it not for pretrial detention.⁶ Additionally, many defendants detained pretrial are sentenced to the time they served in jail, which masks excess time that would never have been imposed in the first place were it not for pretrial detention.⁷ These people are not compensated for their lost liberty. They are casualties in a failed war on crime that has become a war on liberty.

People locked away before their trials find themselves living in deplorable facilities. Our nation's jails are often overcrowded, lack proper heating and air conditioning, and contain mold and asbestos. They are teeming with disease. Physical and sexual violence are common, and health care in jails is notoriously bad. Suicides and other deaths are all too frequent.⁸ Crushing boredom is pervasive because there is often no programming or activities.

These periods of detention are devastating to people's lives. They lose their jobs, their housing, custody of their kids. They are less likely to receive treatment for mental health and addiction problems. It should not surprise anyone that detention itself causes crime. Locking people away upends their lives in the worst of ways.⁹ While media reports may lead people to think that pretrial detention is the answer to preventing crimes, it is just the op-

posite. We are leading people to desperate situations and criminal behavior by overusing incarceration before trial.

One might think that the category of people who are ultimately sentenced to additional terms of incarceration beyond the period they were locked away pretrial are not worse off because the time they served pretrial counts toward their sentence. But they, too, suffer injustices from their pretrial detention. The detention itself makes it more likely they will be convicted. People are more likely to plead guilty to shorten the time they will spend in jail, either because it means they will be released based on time already served or because they prefer to go to a prison that may have better conditions. Convictions are also more likely because detention makes it harder for people to help with their own defense. They are limited in how often they can meet with counsel, and they cannot help search for evidence and witnesses. Sometimes defendants know witnesses only by sight or a nickname, making it hard for counsel to locate them without the defendant's help.¹⁰ The job loss that comes with detention means fewer resources to hire a lawyer, investigators, or expert witnesses or to procure lab analysis to help their case. The harsh conditions of confinement may "damage [a detained person's] appearance or mental alertness at trial."¹¹ It is no wonder people detained pretrial are more likely to be convicted as compared to people charged with the same crimes and with similar records who are released. People detained pretrial get longer sentences, too.¹² People released pretrial can show the judge what they will do if not incarcerated, whereas those detained pretrial show up in jail uniforms, and the judge may have a harder time seeing them adjusting successfully.¹³ And these negative effects do not fall equally across society. People of color are detained pretrial at higher rates.¹⁴

People seem to take the reality of broad pretrial detention for granted in America. If the public questions anything about it, the question usually pertains to why someone is released pretrial at all. This is largely because media reports focus on cases where someone who has been released pretrial commits a heinous crime while awaiting trial. These stories are then inevitably met with calls to find out why the person was free in the first place. The prevailing public sentiment seems to be that people should be locked up after arrest.

It was not like this for most of American history. We used to release almost everyone charged with a crime pending their trial. The shift began at the end of the 1960s. From 1970 to 2015, there was a 433 percent increase in people detained pretrial.¹⁵ We went from a presumption of release to the op-

posite. Now it is more likely you are going to be detained than retain your freedom if you are charged with a crime. A whopping 60 percent of all defendants face pretrial detention.¹⁶ In the federal system, a staggering 75 percent of defendants are detained.¹⁷

Like many roads to hell, this one was paved with good intentions. In the 1960s, reformers aimed to address the problem of indigent individuals being detained pretrial simply because they could not afford even modest bail. They were also concerned that people were being detained as a form of punishment or because they were viewed as dangerous, neither of which were permissible grounds for detention until the Supreme Court changed a legal landscape more than two hundred years old. These reformers relied on studies showing that people could be released on their own recognizance and would still appear for their trials. These findings ultimately led to the passage of the federal Bail Reform Act in 1966, which required noncapital defendants to be released on their own recognizance unless the judge found they presented too great a risk of flight.¹⁸ The drafters of the law explained that it “does not deal with preventive detention of the accused because of the possibility that his liberty might endanger the public” for the very good reason that “under American criminal jurisprudence pretrial bail may not be used as a device to protect society from the possible commission of additional crimes by the accused.”¹⁹

Successfully implementing the 1966 law proved difficult. Courts struggled to establish and enforce terms of release, and crimes committed by those on release drew negative publicity.²⁰ As crime rates exploded toward the end of the 1960s and the nation experienced widespread civil disorder, political pressure to limit pretrial release mounted. Despite the reminder from the Bail Reform Act’s drafters that American law does not permit the detention of people pretrial for dangerousness, the public instinct is to lock away anyone who presents a danger because the public overestimates the benefit of pretrial detention on community safety and essentially values the defendant’s liberty interest at zero.

This was the climate in the late 1960s. With crime rates spiking, politicians saw the advantage of taking a tough-on-crime position. A few states responded by changing their laws to allow judges explicitly to consider dangerousness as a factor in pretrial release decisions.²¹ Richard Nixon proposed pretrial detention of “dangerous hard core recidivists” in the District of Columbia as part of a federal crime-fighting package he put forward within days of taking office.²² The DC law proved a model for many states, with almost half the states following that approach within eight years.²³ By the

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