PAYING FOR FREEDOM: COMMUNITY PAYMENT OF FINES AS COLLECTIVE RESISTANCE TO AUSTRALIA'S CRIMINALISATION OF RACE AND CLASS

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Since colonisation, Australia's criminal apparatus has targeted people on the basis of race and class through changing modes of legal control. This article explores two examples of collective resistance to this. In 2019, Sisters Inside's FreeHer campaign enlisted community members to pay for the freedom of Aboriginal women imprisoned for non-payment of fines in Western Australia. Simultaneously, in the United States, bail funds enabled people to free those imprisoned due to inability to afford cash bail. In both examples, by paying for the freedom of strangers, the community inserts itself into otherwise opaque criminal processes, challenging the very reason for a person's incarceration and disrupting the rhetorical divide between the community and the criminalised. Through the framework of demosprudence (ie, collective citizen mobilisations which are democracy-enhancing) and prison abolition, this article demonstrates the capacity for these forms of participatory resistance to contribute to transformative social and legal change.

I INTRODUCTION

On 4 August 2014, 22-year-old Yamatji woman, Ms Dhu,[1] died in police custody in South Hedland, Western Australia ('WA'). She is described by family as

> 'happy-go-lucky' and 'always with a smile on her face'. She was caring, full of love and cheer, with a fierce sense of loyalty to friends and family. In her spare time, she liked to paint and make artwork. She dreamed of travelling one day.[2]

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1 Ms Dhu's full name is not used for cultural reasons.

2 Quoted in Amanda Porter, 'Why We Should Honour the Humanity of Every Person Who Dies in Custody', *The Conversation* (online, 15 April 2016) <https://theconversation.com/why-we-should-honour-the-humanity-of-every-person-who-dies-in-custody-57272>.

Ms Dhu was arrested on 2 August 2014 on an outstanding warrant for failure to pay $3,622.34 of court fines.[3] Police had attended her house in response to a family violence tip related to her boyfriend.[4] A coronial inquest into her passing found that she died of an infection stemming from a rib broken by her boyfriend and from a severe case of pneumonia.[5] During her detention, police and medical staff dismissed her cries for help. They thought she was 'faking' her injuries or 'exaggerating'.[6] A coronial inquest into her passing found that she had no capacity to pay the fines for which she had been arrested, most of which were for minor offending such as swearing in public and waving a finger in a police officer's face. Her most serious charge was kicking a police officer whilst being arrested.[7]

At the time of Ms Dhu's passing, despite only representing 3% of the population, First Nations women comprised 64% of women in custody for non-payment of fines.[8] In 2016, the year of the inquest into her passing, First Nations women were 21 times more likely to be imprisoned than non-Indigenous women.[9] Ms Dhu's passing epitomised the racism, violence and injustice of Australia's criminal system[10] and fuelled a social movement which sought to challenge this injustice.

Following her passing, Ms Dhu's family, the Aboriginal Legal Service of Western Australia and other community groups called on the Western Australian government to end its practice of imprisonment for fine default.[11] When, in 2019, the government had still not followed through on its promise to end this practice,[12]

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3 *Inquest into the Death of Ms Dhu* (Coroner's Court of Western Australia, Coroner Fogliani, 16 December 2016) 4 [1], 144 [786] ('*Inquest into the Death of Ms Dhu*').

4 Calla Wahlquist, '"We've Got to Put Our Story out There": Ms Dhu's Family Prepare for Verdict on Death in Custody', *The Guardian* (online, 15 December 2016) <https://www.theguardian.com/australia-news/2016/dec/15/weve-got-to-put-our-story-out-there-ms-dhus-family-prepare-for-verdict-on-death-in-custody>.

5 *Inquest into the Death of Ms Dhu* (n 3) 27 [155], 46 [259] (Coroner Fogliani).

6 Ibid 4 [5]–[6], 87–8 [482].

7 Ibid 144 [784]–[786], 145 [790].

8 Ibid 146–7 [796].

9 Adrianne Walters and Shannon Longhurst, *Over-represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-imprisonment* (Report, May 2017) 10 <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf>, citing Australian Bureau of Statistics, *Prisoners in Australia, 2016* (Catalogue No 4517.0, 8 December 2016) tbl 20.

10 In this article, the term 'criminal system', as opposed to 'criminal justice system', is used. This is in recognition of the injustice of this system described throughout this article.

11 Calla Wahlquist, 'Ms Dhu's Family Calls for End to Jail for Fines as Death in Custody Inquest Begins', *The Guardian* (online, 23 November 2015) <https://www.theguardian.com/australia-news/2015/nov/23/ms-dhus-family-calls-for-end-to-jail-for-fines-as-death-in-custody-inquest-begins> ('Ms Dhu's Family Calls'); Aboriginal Legal Service of Western Australia, 'Addressing Fine Default by Vulnerable and Disadvantaged Persons' (Briefing Paper, August 2016) <https://www.als.org.au/wp-content/uploads/2015/08/Briefing-Paper-August-2016-signed-1.pdf>.

12 Calla Wahlquist, 'Western Australia Repeals Laws on Jailing for Unpaid Fines', *The Guardian* (online, 25 September 2019) <https://www.theguardian.com/australia-news/2019/sep/25/wa-repeals-laws-on-jailing-for-unpaid-fines> ('WA Repeals Laws'); Calla Wahlquist, 'Indigenous Groups Criticise Liberals and Labor in WA over Custody Policies', *The Guardian* (online, 9 March 2017) <https://www.theguardian.com/australia-news/2017/mar/09/indigenous-groups-criticise-liberals-and-labor-in-wa-over-custody-policies> ('Indigenous Groups Criticise').

and following advocacy by a Noongar actor and dancer who was arrested and imprisoned for five days for unpaid fines,[13] a Queensland-based community organisation, Sisters Inside, launched a GoFundMe campaign titled 'FreeHer' for community members to pay for the freedom of Aboriginal women imprisoned for fine default.[14] The campaign bears similarities to forms of collective resistance used by bail funds in the United States, where community members pay for the freedom of people in jail due to inability to afford cash bail. It sought to send a message regarding the injustice of imprisonment for fine default, particularly for Aboriginal women.[15] In June 2020, three years after promising to do so, the Western Australian parliament passed a Bill to end automatic imprisonment for fine default.[16]

This article places Ms Dhu's passing, and the FreeHer campaign, within the long history of Australia's criminalisation of race and poverty, as well as the monetisation of criminal punishments. It argues that the continuity in the targets of Australia's criminal system since colonisation, despite changing modes of legal control and punishment, speaks to the need for transformative changes to the criminal system and the limits of legal reform alone to achieve sustainable social change.

This article seeks to examine the dynamic interconnection between a specific form of collective resistance, community payment of fines, and legal and social change to Australia's criminalisation of race and class. It builds on Lani Guinier and Gerald Torres' theory of demosprudence, ie, collective citizen mobilisations which are democracy-enhancing,[17] to argue that top-down legal processes must be complemented by bottom-up mobilisations in order to achieve lasting change.

Using the theoretical framework of demosprudence, this article engages in a comparative analysis of two recent forms of collective resistance to the criminalisation of race and class: the FreeHer campaign in Australia and bail funds in the United States. This article examines community payment of fines and bail funds using a mixed methodology of interviews with the founder of the FreeHer

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13 Interview with Debbie Kilroy (Sarah Schwartz, Phone Interview, 15 August 2023) ('2023 Interview with Debbie Kilroy'); Madeline Hayman-Reber, 'Yirri Yaarkin Dancer Falls Victim to WA Fine Laws', *National Indigenous Television News* (online, 6 January 2019) <https://www.sbs.com.au/nitv/article/yirri-yaarkin-dancer-falls-victim-to-wa-fine-laws/6yb7hb0yl> ('Yirri Yaarkin Dancer'); Madeline Hayman-Reber, 'They Name Checked Us out of Nowhere: Reuben Yorkshire Speaks out', *National Indigenous Television News* (online, 8 January 2019) <https://www.sbs.com.au/nitv/article/they-name-checked-us-out-of-nowhere-rubeun-yorkshire-speaks-out/mq8scrrhf>.

14 Debbie Kilroy, 'FreeHer', *GoFundMe* (Web Page, 5 January 2019) <https://www.gofundme.com/f/bfvnvt-freethepeople>; 'GoFundMe Campaign Raises over $120,000 to Pay Jailed Indigenous Women's Fines', *SBS News* (online, 9 January 2019) <https://www.sbs.com.au/news/article/gofundme-campaign-raises-over-120-000-to-pay-jailed-indigenous-womens-fines/aq1ugtw12> ('GoFundMe Campaign Raises over $120,000'); Madeline Hayman-Reber, '"Keeping Women out of Prison": Campaign Surges Past the $230,000 Mark', *National Indigenous Television News* (online, 11 January 2019) <https://www.sbs.com.au/nitv/article/keeping-women-out-of-prison-campaign-surges-past-the-230-000-mark/thkvf8ga4>.

15 Interview with Debbie Kilroy (Sarah Schwartz, Phone Interview, 27 July 2020) ('2020 Interview with Debbie Kilroy').

16 Fines, Penalties and Infringement Notices Enforcement Amendment Bill 2019 (WA) ('Fines, Penalties and Infringement Bill').

17 Lani Guinier and Gerald Torres, 'Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements' (2014) 123(8) *Yale Law Journal* 2740.

campaign, Debbie Kilroy, and an analysis of primary sources including newspaper and internet archives. The United States cash bail context provides a fruitful comparison to imprisonment for fine default in Australia given the racial and class targets of systems of cash bail and criminal fines. The end result of both systems is that people are incarcerated as a direct result of impecuniousness. In both campaigns, a form of mutual aid is employed with community members paying for the freedom of strangers. In doing so, the community inserts itself into otherwise opaque criminal processes, challenging the reason for a person's incarceration and disrupting the rhetorical divide between the 'community' and those who are criminalised. This article explores the relationship of both campaigns to the transformative vision of prison abolition. It ultimately argues that these forms of collective resistance, if truly participatory and tied to transformative visions, have the capacity to expose the systemic injustice of Australia's criminal system.

II THE CONTINUUM OF COLONISATION: PUNISHMENT OF RACE AND CLASS IN AUSTRALIA

Australia is one of the most heavily policed countries in the world, with the second most police per capita out of all common law countries.[18] Despite its robust and well-funded criminal system, and relatively low rates of serious crime, Australians also feel less safe than those in comparable countries.[19] While most crime-related public discourse focuses on serious acts of violence, the main focus of Australia's criminal apparatus is relatively minor offences and public order offences.[20] In 2020–21, 92% of criminal matters were finalised in Magistrates or Local Courts,[21] which deal with less serious offences.[22] Across Australia, the most common penalty imposed by criminal courts was a fine.[23] This monetisation of criminal penalties sets the stage for the entrenchment of exclusion and disadvantage,

18 Andrew Bushnell, *Australia's Criminal Justice Costs: An International Comparison* (Report, December 2017) 3 <https://ipa.org.au/wp-content/uploads/2017/08/IPA-Report-Australian-Criminal-Justice-Costs-An-International-Comparison.pdf>.

19 Ibid 14. See also Elizabeth Moore, 'Public Confidence in the New South Wales Criminal Justice System: 2019 Update' (2020) 227 *Crime and Justice Bulletin: NSW Bureau of Crime Statistics and Research* 1, 3, indicating that the public significantly overestimates the number of crimes involving violence.

20 In the United States, Issa Kohler-Hausmann has written about the ways in which the policing and processing of misdemeanours fuels mass-incarceration: see Issa Kohler-Hausmann, *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing* (Princeton University Press, 2018) <https://doi.org/10.23943/9781400890354>.

21 Australian Bureau of Statistics, *Criminal Courts, Australia, 2020–21 Financial Year* (Catalogue No 4513.0, 24 February 2022) ('*Criminal Courts*').

22 In most states, Magistrates Courts cannot impose a maximum penalty of more than three years imprisonment for each offence: *Criminal Procedure Act 1986* (NSW) s 267(2); *Criminal Code Act 1983* (NT) sch 1 s 3; *Sentencing Act 1991* (Vic) s 113A. In Tasmania, the maximum penalty a Magistrates Court can impose is three years imprisonment for a first offence and five years for a second or subsequent offence: *Sentencing Act 1997* (Tas) s 13. In the Australian Capital Territory and South Australia, the maximum penalty a Magistrates Court can impose is five years for a single offence: *Crimes Act 1900* (ACT) s 375(13)(a); *Magistrates Court Act 1991* (SA) s 9(4).

23 Australian Bureau of Statistics, *Criminal Courts* (n 21).

entrapping people in a web of intergenerational criminalisation and, at its most violent, leading to deaths in custody such as Ms Dhu's.

Since colonisation, various laws and policies have explicitly sought to criminalise First Nations people and people experiencing poverty. Reflecting international trends, most people targeted by Australia's criminal system experience poverty, homelessness and other forms of social and economic disadvantage.[24] First Nations people are seven times more likely to be charged with a criminal offence than non-Indigenous people and, if convicted, 12.5 times more likely to be sentenced to a term of imprisonment.[25]

It is impossible to understand the current state of affairs without looking to the foundation of Australia's criminal system, being the violent dispossession of First Nations. Australia's low-level criminal system is also deeply connected to early British criminalisation of the 'idle' working class, ie, those who failed to meet the requirements of a capitalist society. This history is crucial to understanding the ways in which the current system criminalises race and class.

This Part of the article will briefly trace the history of the criminalisation of race and class in Australia. It will also highlight some examples of First Nations-led collective resistance to this criminalisation. This Part will then examine the monetisation of criminal punishments, in the form of fines, and the violence and harm of this criminal punishment. Finally, it will set the stage for the second Part of the article, by providing an overview of imprisonment for fine default in WA.

A The Criminalisation of Race and Class in Australia

As is well documented by Chris Cunneen and Amanda Porter, from the early years of colonisation, police forces were formed for the purpose of, and played a crucial role in, carrying out the violence of colonisation and curbing First Nations resistance to this violence.[26] For example, in New South Wales ('NSW') and WA, mounted police forces were established in 1825 and the 1830s, respectively, for the purposes of addressing Aboriginal resistance and protecting settlers.[27] As noted by Cunneen, these colonial police forces were also involved in 'violent repression and colonial expansion', including 'indiscriminate massacre of clan and tribal groups'.[28]

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24 See Eileen Baldry, 'People with Multiple and Complex Support Needs, Disadvantage and Criminal Justice Systems: 40 Years after the Sackville Report' in Andrea Durbach, Brendan Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017) 103, 108.

25 Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 26.

26 See Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Routledge, 2020) 46–62 ('*Conflict, Politics and Crime*') <https://doi.org/10.4324/9781003115243>; Amanda Porter and Chris Cunneen, 'Policing Settler Colonial Societies' in Philip Birch, Michael Kennedy and Erin Kruger (eds), *Australian Policing: Critical Issues in 21st Century Practice* (Routledge, 2021) 397–411 <https://doi.org/10.4324/9781003028918-29>.

27 Cunneen, *Conflict, Politics and Crime* (n 26) 48; *Royal Commission into Aboriginal Deaths in Custody* (National Report, 1991) vol 2, [10.5.4] ('*Royal Commission*').

28 Cunneen, *Conflict*, *Politics and Crime* (n 26) 49–50.

During the early years of colonisation, vagrancy, nuisance and public order laws were also used by police to 'civilise' through controlling the use of public space by those deemed 'undesirable' occupants of this space.[29] These laws had their roots in early British vagrancy laws punishing 'idleness', designed to control the working class at a time when the feudal system was transforming to a market economy.[30] The first of Australia's vagrancy laws was passed in 1833 in NSW, and gave police the power to apprehend any person found drunk in public and

> all loose idle drunken or disorderly persons whom he shall find between sunset and the hour of eight in the forenoon lying or loitering in any street highway yard or other place within the said town and not giving a satisfactory account of themselves …[31]

Other states and territories quickly followed suit.[32] Under vagrancy laws, the very acts associated with homelessness, poverty, and failing to meet the needs of capitalism, namely, idleness, loitering, begging, frequenting certain places at night, and simply being a person 'having no visible lawful means of support', were criminalised.[33] The history of violent colonial policing of First Nations resistance, and the early policing of 'vagrants' in urban areas has continued in various forms.

In the late 19th to early 20th centuries, this neo-colonial violence took the form of protection-era legislation, subjecting First Nations to extreme controls over all aspects of their lives, including through child removal, segregation and restrictions on access to basic services.[34] Amanda Nettelbeck details how from the late 19th century, vagrancy and public space laws also started to be used to control and punish First Nations peoples. These laws were used to control First Nations movement out of urban areas, their labour, their association with Europeans and to curb their resistance to protection-era legislation.[35] For example, in NSW, in the early 20th century, public order offences were used to criminalise Aboriginal resistance to the stealing of children by the Aborigines Protection Board.[36]

From the 1960s onwards, as more explicitly discriminatory protectionist laws were repealed, First Nations people were increasingly targeted by public order offences derived from vagrancy laws, including public drunkenness, 'offensive'

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29 See Jude McCulloch, *Blue Army: Paramilitary Policing in Australia* (Melbourne University Press, 2001) 37–52; RW Connell and TH Irving, *Class Structure in Australian History: Documents, Narrative and Argument* (Longman Cheshire, 1980); Emma K Russell, *Queer Histories and the Politics of Policing* (Routledge, 2020) ch 2 <https://doi.org/10.4324/9781351131636>.

30 Commission of Inquiry into Poverty, Parliament of Australia, *Law and Poverty in Australia: Second Main Report* (Parliamentary Paper No 294, October 1975) 247.

31 *Sydney Police Act 1833* (NSW) s 6.

32 *Australian Capital Territory Police Ordinance 1927* (ACT); *Northern Territory Police and Police Offences Ordinance 1923* (NT); *Vagrants, Gaming, and Other Offences Act 1931* (Qld); *Police Act 1844* (SA); *Police Act 1838* (Tas); *Vagrant Act 1852* (Vic).

33 See, eg, *Vagrancy Act 1835* (NSW) s 2.

34 Cunneen, *Conflict, Politics and Crime* (n 26) 72–5; *Royal Commission* (n 27) vol 2, [10.5.15].

35 Amanda Nettelbeck, 'Creating the Aboriginal Vagrant: Protective Governance and Indigenous Mobility in Colonial Australia' (2018) 87(1) *Pacific Historical Review* 79, 93–8 <https://doi.org/10.1525/phr.2018.87.1.79>. See also Cunneen, *Conflict, Politics and Crime* (n 26) 67–8, discussing *Aboriginals Preservation and Protection Act 1939* (Qld).

36 Cunneen, *Conflict, Politics and Crime* (n 26) 67.

or 'disorderly' behaviour and language, and public 'annoyance' or 'nuisance'.[37] Many public space offences were enacted for the stated purpose of curbing First Nations activism. For example, when debating the *Summary Offences Act 1970* (NSW) in NSW Parliament, politicians explicitly referenced the 'behaviour of the demonstrators' who 'look on demonstrations … as rehearsals for revolution'.[38]

As public order offences were increasingly used to criminalise the public activities of First Nations people, resistance and demands for civil rights focused on exposing discriminatory policing and criminal practices.[39] In response to discriminatory policing, the Aboriginal–Australian Fellowship in Redfern launched a program specifically investigating police complaints and also pursued litigation in regard to police misconduct and discrimination.[40] Discriminatory policing and criminalisation also led to the establishment of the first Aboriginal Legal Service in Redfern in 1970.[41] First Nations resistance during this period also set the stage for the establishment of the Royal Commission into Aboriginal Deaths in Custody ('Royal Commission') in 1987.[42] The Committee to Defend Black Rights ('CDBR'), co-founded by Aboriginal activist Helen Corbett, was established in 1984, one year after police officers were acquitted of manslaughter for the death of Aboriginal teenager, John Pat.[43] After a five-year-long campaign by the CDBR, other advocacy groups and the loved ones of First Nations people who had died in custody, and following the death in custody of Lloyd Boney in Brewarrina, NSW on 6 August 1987, the Royal Commission was announced.[44]

The Royal Commission proposed 339 recommendations to address the targeting of First Nations by the criminal system, particularly for minor matters and police encounters.[45] It emphasised the importance of developing alternatives to arrest and imprisonment. It also recommended the decriminalisation of public order offences such as public drunkenness and offensive language,[46] and abolishing imprisonment for fine default.[47] The Commission's recommendations emphasised that overcoming First Nations disadvantage in society, and overrepresentation

37 Ibid 81; Tamara Walsh, *Homelessness and the Law* (Federation Press, 2011) 81. See, eg, *Crimes Act 1900* (ACT) s 392; *Summary Offences Act 1988* (NSW) ss 4–4A; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 205–10; *Summary Offences Act 1923* (NT) ss 45D, 47, as at 17 September 1996; *Summary Offences Act 2005* (Qld) ss 6, 10; *Summary Offences Act 1953* (SA) ss 7, 22–3; *Police Offences Act 1935* (Tas) ss 12(1), 13(1); *Summary Offences Act 1966* (Vic) ss 13–14, 17–17A; *Criminal Code Act Compilation Act 1913* (WA) s 74A.

38 New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 November 1970, 7884 (Peter Coleman). See also Gary Foley and Tim Anderson, 'Land Rights and Aboriginal Voices' (2006) 12(1) *Australian Journal of Human Rights* 83, 90 <https://doi.org/10.1080/1323238X.2006.11910814>.

39 Cunneen, *Conflict, Politics and Crime* (n 26) 81–3.

40 Ibid 81–2.

41 Ibid 82.

42 *Royal Commission* (n 27) vol 1, [1.1.3]; Chris Cunneen, 'Aboriginal Deaths in Custody: A Continuing Systematic Abuse' (2006) 33(4) *Social Justice* 37, 38 ('Aboriginal Deaths in Custody').

43 Laurie Critchley, 'Indomitable Fighter for Black Rights', *The Guardian* (London, 21 January 1992) 16.

44 Roderic Pitty, 'Brewarrina Riot: The Hidden History' (1994) 3(70) *Aboriginal Law Bulletin* 9, 9.

45 Cunneen, 'Aboriginal Deaths in Custody' (n 42) 39.

46 *Royal Commission* (n 27) vol 3, [21.1.1]–[21.1.7].

47 *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia* (Regional Report, 30 March 1991) vol 1, [4.2.5.2].

in the criminal system, could only be achieved through Indigenous-led reforms, 'empowerment, self-determination, and reconciliation'.[48]

After the report of the Royal Commission was handed down, all levels of Australian government committed to implementing the majority of its recommendations.[49] In the years following, there were a number of changes to the laws associated with low-level policing.[50] However, despite these legal changes, the low-level criminal system has continued to disproportionately target First Nations. For example, despite the formal abolition of the offence of public drunkenness in many states, public intoxication has continued to be criminalised through a variety of legal regimes, such as move on orders and other police powers, for almost two centuries.[51]

Further, many of the Royal Commission's recommendations were ignored; minor offences and imprisonment for non-payment of fines remained on the statute books and First Nations people were not given control over policing. The result being that First Nations continue to be arrested and imprisoned at vastly disproportionate rates to non-Indigenous people. Since the report of the Royal Commission, rates of First Nations imprisonment have climbed from 10 times that of non-Indigenous people in 1991 to 15.8 times that of non-Indigenous people in 2021.[52] First Nations women are 22.8 times more likely to be in custody than non-Indigenous women.[53] The rate of incarceration of First Nations women has increased by 244% since the Royal Commission's report.[54] There is limited national data on disparities in rates of policing, particularly arrests for low-level offending, as well as stops, searches and other exercises of police power. However, studies have consistently shown that First Nations are targeted by police at vastly disproportionate rates, particularly for low-level and public order offences.[55] For example, in 2021–22, First Nations people were 4.56 times more likely to be proceeded against by police for public order offences than non-Indigenous people in NSW.[56] As stated by Eddie Cubillo:

> These ever-growing numbers paint a frightening picture of Indigenous peoples' continued entanglement with the 'justice' and 'protection' industries. The recommendations of numerous government inquiries, Royal Commissions and reports initiated by successive governments of all persuasions and in all jurisdictions over the last three decades are, more often than not, ignored or result in partial and

48 Cunneen, 'Aboriginal Deaths in Custody' (n 42) 38.

49 Ibid 39.

50 See generally Chris Cunneen, 'Reflections on Criminal Justice Policy since the Royal Commission into Aboriginal Deaths in Custody' in Neil Gillespie (ed), *Reflections: 40 Years on from the 1967 Referendum* (Aboriginal Legal Rights Movement, 2007) 135.

51 Luke McNamara and Julia Quilter, 'Public Intoxication in NSW: The Contours of Criminalisation' (2015) 37(1) *Sydney Law Review* 1.

52 Australian Bureau of Statistics, *Prisoners in Australia: Prisoner Numbers and Prisoner Rates by Indigenous Status and Sex, States and Territories, 2006–2021* (Catalogue No 4517.0, 9 December 2021) tbls 40–2.

53 Ibid.

54 In 2021, the rate of incarceration of Aboriginal and Torres Strait Islander women was 459.2 per 100,000: ibid. In 1991, the rate of incarceration of Aboriginal and Torres Strait Islander women was 187.6 per 100,000: see John Walker, *Australian Prisoners 1991: Results of the National Prison Census 30 June 1991* (Report, Australian Institute of Criminology, 1992) 23.

55 Australian Law Reform Commission (n 25) 447 [14.2].

56 Australian Bureau of Statistics, *Recorded Crime: Offenders* (Catalogue No 4519.0, 9 February 2023) tbl 23.

> tepid implementation. This result is a catastrophic failure to address the impact of systemic and structural racism on Indigenous people.[57]

The continued criminalisation of race and class, by various legal modes and forms, contextualises the harm of the increasing use of monetary punishments, such as the fines imposed on Ms Dhu, for public order offences.

B The Monetisation of Criminal Punishments

While the most common criminal penalty in Australia is a fine, with a median of $500,[58] the impact of this penalty is often overlooked in political and public debates regarding criminal punishments.[59] In Magistrates and Local courts, 88% of those convicted are sentenced to a non-custodial order, and 55.7% are sentenced to a fine as their principal penalty.[60] There has also been a proliferation of laws throughout Australia enabling police and other administrative authorities, such as public transport officers, to issue on-the-spot fines for minor offences, ranging from traffic and public transport offences to possession of a prohibited drug.[61] Many of these penalty notices are for fixed amounts and issued through administrative processes, with no account being taken of an individual's capacity to pay.[62]

Both the process within Magistrates and Local courts, and the punishments meted out by these courts, including seemingly innocuous financial penalties, have collateral consequences that are most heavily felt by those experiencing other forms of social disadvantage. In the United States, there has been extensive research into the ways in which the low-level criminal or 'misdemeanour' system exacerbates cycles of poverty, homelessness and discrimination.[63] In *Punishment without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal*, Alexandra Natapoff provides a comprehensive account of the 'punishments' that come with going through the United States' misdemeanour process. Natapoff states that while punishments for misdemeanours 'are usually deemed minor', the reality is that

> [t]he misdemeanor process commonly strips the people who go through it of their liberty, money, health, jobs, housing, credit, immigration status, and government benefits. Even a brief stint in jail can be dangerous. People with misdemeanor arrests and convictions often lose their jobs and find it hard to get new ones. Fines and fees lead to incarceration for those who are too poor to pay them. Students, poor people,

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57 Eddie Cubillo, '30th Anniversary of the RCIADIC and the "White Noise" of the Justice System is Loud and Clear' (2021) 46(3) *Alternative Law Journal* 185, 186 <https://doi.org/10.1177/1037969X211019139>.

58 Australian Bureau of Statistics, *Criminal Courts* (n 21).

59 See Julia Quilter and Russell Hogg, 'The Hidden Punitiveness of Fines' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 9 <https://doi.org/10.5204/ijcjsd.v7i3.512>.

60 Australian Bureau of Statistics, *Criminal Courts* (n 21).

61 Gaye Lansdell et al, 'Infringement Systems in Australia: A Precarious Blurring of Civil and Criminal Sanctions?' (2012) 37(1) *Alternative Law Journal* 41 <https://doi.org/10.1177/1037969X1203700110>; Quilter and Hogg (n 59). Since January 2019, police can issue on-the-spot fines of $400 for a number of low-level drug possession offences: *Criminal Procedure Regulation 2017* (NSW) sch 4.

62 Quilter and Hogg (n 59) 11.

63 See generally Alexandra Natapoff, *Punishment without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal* (Basic Books, 2018) ('*Punishment without Crime*'); Kohler-Hausmann (n 20).

> and the elderly can lose their government aid. For immigrants, a misdemeanor can trigger deportation.[64]

In Australia, Julia Quilter and Russell Hogg have documented the real, yet often hidden, 'penal and social realities' that fine enforcement has on vulnerable and marginalised persons.[65] These include compounding civil debt problems, the mental health repercussions caused by cumulative stress, and increased involvement in the criminal system through 'secondary offending', 'acquisitive crime' or 'due to other instability and disorder caused by multiple disadvantage (drug and/or alcohol problems, "sleeping rough", violent conflict, and so on)'.[66] First Nations people are amongst the most heavily impacted by fine enforcement, with as high as 9 out of 10 First Nations persons issued with fines referred for enforcement after failure to pay.[67] The most serious and visible repercussion for failure to pay a fine is that of imprisonment, the reason for Ms Dhu's arrest in 2014. Although, formally, all states have now abolished automatic imprisonment for fine default, this penalty exemplifies the very real punitive consequences of Australia's low-level criminal system for already marginalised groups. Further, in many states, such as NSW, the collateral consequences of fine default, such as drivers licence suspension, can ultimately lead to imprisonment.[68]

1 Imprisonment for Non-payment of Fines in WA

In WA, until June 2020, individuals could be imprisoned for failing to pay court-issued fines.[69] As described by Amanda Porter, the context for these laws was the increasingly punitive and 'tough on crime' law and order politics of the WA Government, including a campaign to '[clamp] down on fines'.[70] Those who defaulted on the payment of a court-issued fine, after other enforcement action had been taken, could either elect to pay off the fine through serving a term of imprisonment or were subject to having a warrant of commitment issued, requiring that the fine be paid off through spending a set number of days in prison.[71] From 2008–13, over 1000 people were imprisoned each year for non-payment of fines, for an average length of several days.[72]

A parliamentary discussion paper in 2014 highlighted the increasing number of people imprisoned for fine default in WA and the disproportionate impact of

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64 Natapoff, *Punishment without Crime* (n 63) 3.
65 Quilter and Hogg (n 59) 15, 27.
66 Ibid 16.
67 Ibid.
68 Ibid 23–6.
69 Fines, Penalties and Infringement Bill (n 16). Western Australia differentiates between court-issued fines and penalty notices (or on-the-spot fines). A person can only be imprisoned for court-issued fines.
70 Amanda Porter, 'The Price of Law and Order Politics: Re-Examining the *Fines, Penalties and Infringement Notices Enforcement Amendment Act 2012* (WA)' (2015) 8(16) *Indigenous Law Bulletin* 28, 29.
71 *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 53 ('*Fines, Penalties and Infringement Act*'), as at 24 May 2019.
72 Melinda Cooper, 'Money as Punishment: Neoliberal Budgetary Politics and the Fine' (2018) 33(96) *Australian Feminist Studies* 187, 188 <https://doi.org/10.1080/08164649.2018.1517244>.

this penalty on First Nations people, particularly First Nations women.[73] The paper revealed that

> as the number of fine defaulters being imprisoned has escalated, the number of Aboriginal people jailed for fine default has grown by more than 480 percent. Since 2010, one in every six Aboriginal people going to prison were there to pay off fines.
> …
> In 2013, almost one third of all women entering the prison system in Western Australia were sent there solely for fine default. It is a striking statistic that almost two-thirds of these women were Aboriginal.[74]

Even after the passing of Ms Dhu, news reports highlighted cases in which First Nations women were imprisoned for fine default after calling police for assistance. Instead of assisting these women, police responded by executing warrants for unpaid fines.[75]

III PAYING FOR FREEDOM AS DEMOSPRUDENCE: BAIL FUNDS AND COLLECTIVE PAYMENT OF FINES

According to Lani Guinier and Gerald Torres, without democratic intervention, legal change alone is unlikely to 'change the wind' – that is, achieve lasting social change.[76] The continuity in the targets of Australia's criminal system, as described above, calls for an examination of the limits of top-down legal reform to achieve sustainable social change. It speaks to the need to critically examine whether forms of resistance to the criminalisation of race and poverty, such as collective payment of fines, which combine bottom-up community input into criminal processes with advocacy for top-down reform, can assist in 'changing the wind'.

This Part of the article will employ Guinier and Torres' theory of demosprudence to argue that there are limits to the capacity for top-down legal reform to achieve sustainable social change to Australia's criminal legal system. Then it will critically examine and compare the strategies employed by the FreeHer campaign and collective payment of fines in Australia, and bail funds in the United States. It will examine these modes of collective resistance as 'demosprudence' and will discuss their combination of collectivism, mutual aid and transformative abolitionist visions for the criminal system.

A 'Demosprudence', Abolition and the Limits of Top-down Legal Reform

From the violence of colonisation to vagrancy laws, to the extreme controls of Protection-era legislation, to public space policing and the monetisation of criminal justice, Australia's criminal apparatus has consistently targeted people

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73 Paul Papalia, 'Locking in Poverty: How Western Australia Drives the Poor, Women and Aboriginal People to Prison' (Discussion Paper, WA Labor, November 2014).

74 Ibid 8–9.

75 See, eg, Sarah Collard, 'Aboriginal Woman Jailed over Unpaid Fines after Police Call, 10 Months on from Ms Dhu Inquest', *ABC News* (online, 29 September 2017) <https://www.abc.net.au/news/2017-09-29/indigenous-woman-jailed-over-unpaid-fines-after-police-call/9002656>.

76 Guinier and Torres (n 17) 2745.

based on race and class. Despite repeated commissions and inquiries, as well as countless legal reforms, First Nations people and people experiencing social and economic disadvantage are still grossly targeted at every stage of the criminal system. This continuity supports Ruth Wilson Gilmore's argument that the criminal system cannot be understood in simple terms of 'crime', 'law' or 'justice', but should be understood as a complex system designed to deal with the surpluses of finance, capital, land and labour generated by racial capitalism.[77] Gilmore describes capitalism as the system by which surpluses of value are generated by the maintenance of inequity and racism as 'the state-sanctioned and/or extra-legal production and exploitation of group-differentiated vulnerabilities to premature death, in distinct yet densely interconnected political geographies'.[78] In the Australian context, as argued by Porter, the criminal legal system is 'one of the most enduring and deeply entrenched legacies of British colonisation'.[79] Within this context, the proliferation of legal reports, inquiries and reforms, without meaningful material change, also demonstrates the limit of top-down reforms to change the targets of the criminal system. As stated by Cubillo,

> I have thought long and hard about whether this practice of appointing bodies and then ignoring them is a deliberate strategy of distraction, designed to keep our people occupied and engaged with these serious problems, but always kicking a response down the road to some future government. Our human and material resources are already stretched thin. The demands made of us by these inquiries, especially on those who are already suffering, would only be worth it if they generated concrete action and meaningful system change. So far, they have not. They have resulted in a rehash and rewrite of recommendations and themes that have been emphasised and repeated in all these past inquiries.[80]

Legal interventions, such as changes to legislation and legal inquiries, often fail to change public discourse and narratives regarding crime. The definitions of public order and low-level offences reinforce the labelling of First Nations people, particularly women and those experiencing poverty, as pathologically disordered, negligent, and 'deviant', thereby justifying the criminalisation of these groups and their continued need for control and punishment. As stated by Aileen Moreton-Robinson, '[p]atriarchal white sovereignty, as a regime of power, functions pathologically through various mechanisms and embodied relay points, making Aboriginal people targets of state violence'.[81] Porter has shown how the portrayal and labelling of First Nations peoples by Australian mainstream media, including

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77 Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (University of California Press, 2007) 58–78 ('*Golden Gulag*').

78 Ruth Wilson Gilmore, 'Race and Globalization' in RJ Johnston, Peter J Taylor and Michael Watts (eds), *Geographies of Global Change: Remapping the World* (Blackwell Publishing, 2002) 261, 261.

79 Amanda Porter, 'Non-State Policing, Legal Pluralism and the Mundane Governance of "Crime"' (2018) 40(4) *Sydney Law Review* 445, 445. See also Debbie Kilroy, 'Imagining Abolition: Thinking Outside the Prison Bars' (2018) 60 *Griffith Review* 264 ('Imagining Abolition').

80 Cubillo (n 57) 187.

81 Aileen Moreton-Robinson, 'Subduing Power: Indigenous Sovereignty Matters' in Timothy Neale, Crystal McKinnon and Eve Vincent (eds), *History Power Text: Cultural Studies and Indigenous Studies* (UTS ePress, 2014) 191, 195 <https://doi.org/10.5130/978-0-9872369-1-3.l>, quoted in Crystal McKinnon, 'The Lives behind the Statistics: Policing Practices in Aboriginal Literature' (2019) 45(2) *Australian Feminist Law Journal* 207, 209 <https://doi.org/10.1080/13200968.2020.1800931>.

First Nations resistance to police brutality, is designed to induce moral panic.[82] As stated by Porter,

> [w]ithin the Australian mainstream media, protests in the US are constructed as civil expressions … For protesting much the same thing, Indigenous Australian protestors in Redfern and Palm Island are portrayed as 'folk devils' – violent rioters and anarchic 'others' against whom 'something must be done' immediately.[83]

This portrayal reinforces the notion of criminalised First Nations as separate to the general public.

The rhetorical separation between the community and criminalised people is furthered through the legal system's silencing of the voices of those impacted by the criminal system. Writing in the United States, but equally applicable to the Australian context, Natapoff details how the criminal system is designed to silence the voices of accused persons, from the time of arrest, when individuals are warned of the right to remain silent, to trial and sentencing, when accused persons are encouraged to speak through lawyers.[84] This silencing is often seen as a victory for the accused, and their only defence against the coercive power of the state. However, this silencing of the voices of criminalised people in legal processes can mean that these voices are excluded from broader criminal system discourse, meaning 'the democratic processes that generate our justice system proceed without those voices'.[85] Without the voices of those who are targeted and criminalised by public space laws, there is nothing to combat powerful public narratives surrounding the need to criminalise and individualise perceived 'disorder'.

Guinier and Torres' theory of demosprudence responds to these challenges of top-down legal reform. They argue that sustainable social change, including legislative and judicial change, gets its 'enduring force' from democratic efforts.[86] The term 'demosprudence' is used to describe these democratic efforts, and involves the collective mobilisation of historically marginalised groups in a way that is 'democracy enhancing', ie, that 'opens up space to … [enable] them to participate more fully in helping to make decisions that affect their lives'.[87] Guinier and Torres define social movements as those in which 'ordinary people join forces … to change the exercise and distribution of power'.[88] Social movements are 'animated by more radical aspirational visions of a different, better society', and 'are more likely to engage in "disruptive, 'symbolic' tactics … that halt or upset ongoing

82 Amanda Porter, 'Riotous or Righteous Behaviour? Representations of Subaltern Resistance in the Australian Mainstream Media' (2015) 26(3) *Current Issues in Criminal Justice* 289 <https://doi.org/10.1080/10345329.2015.12036022> ('Riotous or Righteous Behaviour?'); Amanda Porter, 'Not Criminals or Passive Victims: Media Need to Reframe Their Representation of Aboriginal Deaths in Custody', *The Conversation* (online, 20 April 2021) <https://theconversation.com/not-criminals-or-passive-victims-media-need-to-reframe-their-representation-of-aboriginal-deaths-in-custody-158561>.

83 Porter, 'Riotous or Righteous Behaviour?' (n 82) 290 (citations omitted).

84 Alexandra Natapoff, 'Speechless: The Silencing of Criminal Defendants' (2005) 80(5) *New York University Law Review* 1449 <https://doi.org/10.2139/ssrn.709363>.

85 Ibid 1452.

86 Guinier and Torres (n 17) 2745.

87 Ibid 2749–50.

88 Ibid 2757.

social practices"'.[89] They argue that social movements involving democratic collective citizen mobilisations have the potential to 'expand the field on which the formal institutions of the society (courts and legislatures, for example) function most effectively as democracy-enhancing venues'.[90] In turn, this can enable laws and institutions to better serve the interests of oppressed groups.

B Bail Funds and Community Payment of Fines

The FreeHer campaign represents a form of collective resistance to Australia's longstanding criminalisation of race and poverty which combines direct community disruption of the criminal process with pushes for top-down reform. In order to critically examine this form of resistance, there are lessons to be learnt from similar forms of resistance in the United States, where community members use bail funds to pay for the freedom of strangers who are unable to afford cash bail. In both examples, by paying for freedom the community directly challenges the law's conclusion that poverty, or inability to pay a sum of money, should be punished.

1 Bail Funds in the United States: Black Mama's Bailout

In many states in the United States, after a person is arrested, a judge or magistrate will decide whether to release them while their case is being determined, subject to the payment of an amount of cash bail. This bail is traditionally returned after the conclusion of the person's case, provided they attend court. If the person can afford to pay or is able to rely on a loan from a for-profit (and often predatory) bail bond company,[91] they will be released while their case is pending. If they cannot afford to pay, as is commonly the case, they will remain in jail.[92]

Throughout the United States, almost two-thirds of people in jail have not been convicted of any crime. Many are in jail due to inability to pay cash bail.[93] The social and economic harms of the cash bail system are numerous.[94] Jocelyn Simonson summarises the critical and perverse nature of the decision to impose cash bail on the outcome of a defendant's case, stating:

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89 Ibid, quoting Michael McCann, 'Law and Social Movements' in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (Blackwell Publishing, 2004) 506, 509 <https://doi.org/10.1111/b.9780631228967.2004.00029.x>.

90 Guinier and Torres (n 17) 2756.

91 See Color of Change and American Civil Liberties Union Campaign for Smart Justice, *Selling Off Our Freedom: How Insurance Corporations Have Taken over Our Bail System* (Report, May 2017) <https://www.aclu.org/publications/selling-our-freedom-how-insurance-corporations-have-taken-over-our-bail-system>.

92 See Léon Digard and Elizabeth Swavola, 'Justice Denied: The Harmful and Lasting Effects of Pretrial Detention' (Evidence Brief, Vera Institute of Justice, April 2019) <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>; Jocelyn Simonson, 'Bail Nullification' (2017) 115(5) *Michigan Law Review* 585, 593–5 <https://doi.org/10.36644/mlr.115.5.bail>.

93 Digard and Swavola (n 92) 1.

94 Vera Institute of Justice, 'New York's New Bail Reform Model: The Next Wave of Bail Reform Goes Beyond Ending Money Bail', *State of Justice Reform 2019* (Web Page) <https://www.vera.org/state-of-justice-reform/2019/bail-reform>.

> For most indigent defendants, bail is the ballgame: if a judge sets bail in an amount that they can afford, then they are able to fight their case from a position of freedom, without losing jobs, housing, or custody of their children. On the other hand, if bail is set in an amount higher than a defendant can pay, that defendant is incentivized to plead guilty early in the process ... Studies have shown time and time again that pretrial detention increases the chances of a conviction, extends the probable length of a sentence, and decreases the chance that the charges will be dismissed altogether.[95]

Numerous studies document the vastly disproportionate impact of the cash bail system on poor Black and Brown communities and the ways this system reproduces and exacerbates pre-existing inequalities. Not only does the imposition of cash bail mean that those experiencing poverty are less likely to be able to buy their pre-trial release, but judges are more likely to set higher bail amounts for people of colour than White people in similar circumstances.[96]

In recent years, the harsh impact of America's cash bail system on Black communities has received increased attention. The deaths of Kalief Browder and Sandra Bland, who remained in jail because they could not pay cash bail, were catalysts for increased community outrage regarding this issue.[97] Communities have long informally disrupted the cash bail process by collecting funds to pay bail for members of their communities. This includes a bail fund operated by the then newly formed Redfern Aboriginal Legal Service in the 1970s, at a time when NSW still had cash bail.[98] However, in recent years, in the United States, these informal collections have expanded into formalised bail funds in which members of the public post bail on behalf of strangers or persons with specific identities (eg, transgender sex workers). These bail funds were formed with the explicit purpose of challenging the injustice of the cash bail and pre-trial detention system and its disproportionate impact on marginalised groups.[99]

One recent example of a collective bailout for a specific identity group is the Black Mama's Bailout. In 2017, a coalition of grassroots racial and economic justice organisations mobilised for a large-scale tactical bailout of Black mothers in pre-trial detention so they could be released to spend Mother's Day with their families.[100] Since 2017, this coalition has come together under the National Bail Out Collective ('NBO') and has bailed out over 450 people in pre-trial detention

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95 Simonson (n 92) 589 (citations omitted).

96 Wendy Sawyer, 'How Race Impacts Who is Detained Pretrial', *Prison Policy Initiative* (Blog Post, 9 October 2019) <https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/>.

97 Simonson (n 92) 590, citing Jennifer Gonnerman, 'Kalief Browder, 1993–2015', *The New Yorker* (online, 7 June 2015) <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>; Leon Neyfakh, 'Why Was Sandra Bland Still in Jail?', *Slate* (online, 23 July 2015) <https://slate.com/news-and-politics/2015/07/sandra-bland-is-the-bail-system-that-kept-her-in-prison-unconstitutional.html>.

98 Johanna Perheentupa, *Redfern: Aboriginal Activism in the 1970s* (Aboriginal Studies Press, 2020) 43.

99 Simonson (n 92) 586–7.

100 'A Labor of Love: Black Mama's Bail Out Action + Reflection', *Southerners on New Ground* (Web Page, 16 May 2017) <https://southernersonnewground.org/a-labor-of-love/> ('*Southerners on New Ground*'); Mariame Kaba, 'For Mother's Day, Activists are Bailing Black Mamas Out of Jail', *Vice* (online, 11 May 2017) <https://www.vice.com/en/article/paegbb/for-mothers-day-activists-are-bailing-black-mamas-out-of-jail>; Melissa Gira Grant, 'Abolition in the Now', *Pacific Standard* (online, 10 May 2017) <https://psmag.com/social-justice/home-for-mothers-day>.

and supported them post-release.[101] In 2019, the Black Mama's Bailout raised over $1 million, from over 17,000 donations, to bail out 123 Black mothers and caregivers held in pre-trial detention in 37 cities throughout the United States.[102] The funds raised were also used to support these mothers and caregivers following their release from detention and were used to pay for housing, transportation, legal services, employment assistance, food and childcare.[103]

Bail funds such as the Black Mama's Bailout form part of a broader social movement which has resulted in tangible reforms throughout the country to the cash bail and pre-trial detention system. In recent years, states such as California, New Jersey and New York, as well as a number of other cities and counties, have passed comprehensive bail reform legislation either limiting the capacity of judges to rely on cash bail, or eliminating cash bail entirely.[104] Some of these reforms have been criticised for failing to actually reduce the number of people in pre-trial detention, and many have suggested that replacing cash bail with other systems, such as computerised risk assessments, simply amounts to another way of incarcerating people on the basis of race and class.[105] However, it is clear that the 'wind' is changing in regard to the public's perceptions of pre-trial detention and the harms of the cash bail system. Bail funds are a part of this 'changing wind' and the larger social movement exposing the injustice of cash bail and pre-trial detention.[106]

2 FreeHer: Community Payment of Fines

The passing of Ms Dhu in police custody on 4 August 2014 served as a catalyst for a renewed campaign to end the practice of imprisonment for fine default in WA. Following her passing, community-led groups such as the Aboriginal Legal Service of WA strongly advocated for the removal of this form of punishment. This included by supporting family members of Ms Dhu in their advocacy, including in the coronial inquest into her passing, as well as producing a comprehensive briefing paper in 2016 on the harms of imprisonment for fine default.[107] In December 2016, the State Coroner handed down her findings into Ms Dhu's passing, determining that Ms Dhu had 'no realistic means of paying the fines' for which she had been incarcerated, and recommending an end to the

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101 'Black Mamas Bail Out', *National Bail Out* (Web Page), archived at <perma.cc/3MS3-6GL3>.

102 Ibid.

103 Ibid.

104 Vera Institute of Justice (n 94).

105 See Tom Simonite, 'Algorithms Were Supposed to Fix the Bail System. They Haven't', *Wired* (online, 19 February 2020) <https://www.wired.com/story/algorithms-supposed-fix-bail-system-they-havent/>; 'The Use of Pretrial "Risk Assessment" Instruments: A Shared Statement of Civil Rights Concerns' (Statement of Concern, 2018) <https://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf>; 'More than 100 Civil Rights, Digital Justice, and Community-based Organisations Raise Concerns about Pretrial Risk Assessment', *The Leadership Conference Education Fund* (Web Page, 30 July 2018) <https://civilrights.org/2018/07/30/more-than-100-civil-rights-digital-justice-and-community-based-organizations-raise-concerns-about-pretrial-risk-assessment/>.

106 See Vera Institute of Justice (n 94); Simonson (n 92).

107 Aboriginal Legal Service of Western Australia (n 11); Wahlquist, 'Ms Dhu's Family Calls' (n 11).

practice of jailing fine defaulters.[108] During its election campaign in 2017, the WA Labor Government promised to abolish the penalty of imprisonment for non-payment of fines.[109] However, it was not until two years after its election that the government introduced changes to the penalty.[110]

In January 2019, Noongar actor and dancer, Rubeun Yorkshire, was arrested and imprisoned for $1,700 of unpaid fines while walking on the beach with a friend. After he was released, Rubeun joined in advocacy calling for the WA Government to end imprisonment for unpaid fines.[111] Following contact by Rubeun, on 5 January 2019, Debbie Kilroy, Chief Executive Officer of the Queensland-based community group, Sisters Inside, launched an online GoFundMe campaign, titled 'FreeHer', aimed at raising money to pay for the freedom of Aboriginal women in jail for unpaid fines and who had warrants out for unpaid fines.[112] Debbie Kilroy is a leading human rights activist who was the first person in Australia with serious convictions to be admitted as a lawyer in the Supreme Court of Queensland. Debbie is also the founder of Sisters Inside, an organisation which advocates for the human rights of women and girls impacted by the criminal system.[113] Kilroy said,

> during the time this [Rubeun's arrest] happened, I was thinking of Ms Dhu. Rubeun could have gone to prison and died as well. How do we stop police arresting Aboriginal women for non-payment of fines? GoFundMe was a new thing. I had heard about it and looked at it. I just opened it up and wrote the page without thinking too much about it – to raise money to get women out.[114]

The GoFundMe page statement for the FreeHer campaign requested donations to 'free women from prison and have warrants vacated' and for donors to also contact the Attorney-General to 'demand that these discriminatory laws be repealed as a matter of urgency'.[115]

In just two days, the campaign had well surpassed its original goal of $99,000, and raised more than $120,000 from over 2,500 donors.[116] By day five, the campaign had raised over $300,000 and received international media coverage – putting a spotlight on the discriminatory impact of imprisonment for non-payment of fines, particularly for First Nations mothers.[117] One year after its launch, in January 2020, the campaign

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108 *Inquest into the Death of Ms Dhu* (n 3) 144 [786], Recommendation 6.
109 Wahlquist, 'Indigenous Groups Criticise' (n 12).
110 Wahlquist, 'WA Repeals Laws' (n 12).
111 Hayman-Reber, 'Yirri Yaarkin Dancer' (n 13).
112 2020 Interview with Debbie Kilroy (n 15); 2023 Interview with Debbie Kilroy (n 13).
113 'About Debbie Kilroy', *Sisters Inside* (Web Page) <https://sistersinside.com.au/about-debbie-kilroy-oam>.
114 2023 Interview with Debbie Kilroy (n 13).
115 Kilroy, 'FreeHer' (n 14).
116 'GoFundMe Campaign Raises over $120,000' (n 14).
117 Miki Perkins, 'How Many Times Does One Person Have to be Tested?', *Sydney Morning Herald* (online, 28 July 2019) <https://www.smh.com.au/national/how-many-times-does-one-person-have-to-be-tested-20190724-p52adv.html>; Rangi Hirini and Ella Archibald-Binge, 'How Strangers Stopped More than 100 Aboriginal Women Going to Jail', *National Indigenous Television News* (online, 17 April 2019) <https://www.sbs.com.au/nitv/article/how-strangers-stopped-more-than-100-aboriginal-women-going-to-jail/o4u8k0ndf>.

had received $500,000 from approximately 10,000 donors, all of which was stated to have gone to the payment of women's fines and outstanding warrants.[118]

On 26 September 2019, the Fines, Penalties and Infringement Notices Enforcement Amendment Bill 2019 (WA) ('the Bill') was introduced into the Western Australian parliament. After a lengthy delay in the upper house and following weeks of Black Lives Matter protests throughout Australia, in June 2020 the Bill was passed into law. The law cleared all unserved warrants of commitment for non-payment of fines and released all persons in prison solely for fine default.[119] However, it still allowed individuals to be imprisoned by a Magistrate for non-payment of fines in specific circumstances.[120] In the second reading speech introducing the Bill into the Legislative Assembly, the Attorney-General John Quigley credited the 2014 death of Ms Dhu as the 'catalyst for these overdue changes'.[121] He also stated: 'I … have received continuous correspondence from all corners of the state and from interstate calling upon us to reform our fines enforcement legislation, and particularly the practice of imprisoning people for fine default alone.'[122] After the Bill was passed into law, the Attorney-General acknowledged '[t]here is systematic discrimination against Indigenous people in our justice system that's got to be addressed'.[123]

3 Inserting the Community into the Criminal Process

The first feature of bail funds and collective payment of fines that warrants consideration is their participatory nature and insertion of the community into the very legal processes that have served to punish and oppress marginalised groups. According to Simonson, the importance of bail funds lies in their 'participatory quality', whereby large numbers of citizens can contribute what are often small amounts that 'add up to a communal expression of frustration with legal and constitutional standards'.[124] Simonson writes about community bail funds as a form 'community nullification' of a judge's bail determination.[125] When community members, as opposed to the individual accused person, pay off a person's bail, they essentially nullify a judge's determination that a certain amount of bail is necessary to ensure that the accused person returns to court. As such, '[c]ommunity bail

118 Kilroy, 'FreeHer' (n 14).
119 Fines, Penalties and Infringement Bill (n 16) cl 8, inserting *Fines, Penalties and Infringement Act* (n 71) ss 116–17.
120 Fines, Penalties and Infringement Bill (n 16) item 56, inserting *Fines, Penalties and Infringement Act* (n 71) s 52S(1)(e); Explanatory Memorandum, Fines, Penalties and Infringement Notices Enforcement Amendment Bill 2019 (WA) 1.
121 Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 September 2019, 7490a–7492a (John Quigley, Attorney-General) ('Second Reading Speech').
122 Ibid.
123 Aaron Fernandes, 'WA Parliament Passes Bill to End Controversial Imprisonment of People for Unpaid Fines', *SBS News* (online, 17 June 2020) <https://www.sbs.com.au/news/article/wa-parliament-passes-bill-to-end-controversial-imprisonment-of-people-for-unpaid-fines/073ls3rlz>.
124 Simonson (n 92) 592.
125 Ibid 587.

funds inject community input into a critical moment in the public adjudication of a criminal case'.[126]

Like bail funds, the FreeHer campaign involved a large-scale mobilisation, of tens of thousands of people, into a criminal process that is usually far removed from public input. As stated by Kilroy, imprisonment for non-payment of fines was an issue which First Nations communities had been advocating and organising against for decades. Kilroy describes FreeHer as a 'springboard' which 'put [the issue] back into the public arena. This was just a push and it got hundreds of thousands of people watching what the Labor Government was doing and targeting them to change the laws.'[127] She stated the campaign 'allowed people to be part of something, they could see women being released from prison, a physical outcome of their donations'.[128] When a judge issues a fine following the commission of a criminal offence, the judge makes a determination that this penalty is 'commensurate with the seriousness of the offence' and is appropriate in light of the purposes of sentencing.[129] After a fine has been issued, a Registrar makes the decision to issue a warrant of commitment if the person fails to pay.[130] This decision is made unilaterally, without input from the person subject to the warrant. By paying for the fines of strangers, the community overrides the judge's determination that a fine is an appropriate penalty and the Registrar's unilateral decision to imprison. The community determines, for itself, that a fine is not a just penalty for a person who cannot afford to pay and that imprisonment for non-payment of fines is also unjust. By overriding the judge's determination, a clear message is sent rejecting the imposition of monetary penalties and imprisonment for fine default.

The participatory nature of bail funds and community payment of fines, and their expression of collective rejection of judicial decisions, also normatively disrupts the rhetorical divide between the 'public' and those who are imprisoned and criminalised. As described above, rhetoric and media representation of 'criminals', particularly those who are First Nations, segregates and creates hierarchies of value between those who are criminalised and the broader Australian public, against whom they are deemed to have 'offended'. When a judge issues a fine, the determination is made that this is an appropriate penalty in light of the purposes of sentencing.[131] Simonson notes that the decision to impose bail is often expressly made for the purpose of 'community safety', with many bail statutes defining 'dangerousness' by reference to 'community protection', effectively pitting 'the defendant *against* the community'.[132] The assumption behind these statutes and many judicial decisions is 'that community safety cannot align with a defendant's liberty interests'.[133] By paying for fines and bail, the community rejects the criminal

126 Ibid 589.
127 2023 Interview with Debbie Kilroy (n 13).
128 2020 Interview with Debbie Kilroy (n 15).
129 *Sentencing Act 1995* (WA) s 6(1) ('*Sentencing Act* (WA)').
130 *Fines, Penalties and Infringement Act* (n 71) s 53(1), as at 24 May 2019.
131 *Sentencing Act* (WA) (n 129) s 6; *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ).
132 Simonson (n 92) 612–14 (emphasis in original).
133 Ibid 615.

system's assumption that those who are criminalised and the community at large have opposing interests.

The mechanism of mutual aid by which individuals contribute to bail funds and community payment of fines also enhances their participatory nature. In *Mutual Aid: Building Solidarity During This Crisis (and the Next)*, Dean Spade defines mutual aid as

> collective coordination to meet each other's needs, usually from an awareness that the systems we have in place are not going to meet them. … They directly meet people's survival needs, and are based on a shared understanding that the conditions in which we are made to live are unjust.[134]

In this way, mutual aid is distinct from charity and other bureaucratic modes of assistance which are non-political in nature and normalise the injustice of the status quo. Spade documents how mutual aid forms part of every social movement,

> whether it's people raising money for workers on strike, setting up a ride-sharing system during the Montgomery Bus Boycott, putting drinking water in the desert for migrants crossing the border, training each other in emergency medicine because ambulance response time in poor neighborhoods is too slow, raising money to pay for abortions for those who can't afford them, or coordinating letter-writing to prisoners.[135]

In the context of bail funds and community payment of fines, community members pay for the basic necessity of freedom. Kilroy describes this payment as more than a simple act of charity; rather, it is a collective rejection of the unjust nature of the system which created the necessity. As she said, 'people [were] voting with their donations'.[136]

The democracy-enhancing nature of bail funds and community payment of fines is also enhanced by the ways in which these campaigns are rooted in community and elevate the voices of those who are imprisoned and oppressed by the criminal system. For example, the Bail Project has sought to maintain its connection to communities through supporting community-based organisations, and using local 'bail disrupters' to connect with incarcerated persons.[137] The FreeHer campaign exists as one campaign run by Debbie Kilroy and Sisters Inside, which is committed to building the strength and centring the experiences and perspectives of women in the criminal system.[138] This commitment to centring and elevating the voices of those affected by the criminal system is important to ensure that these modes of resistance can expose the real impact of this system and the ways it targets race and class. It also serves to connect incarcerated and criminalised persons with non-incarcerated people, further breaking down the rhetorical divide between the 'community' and 'criminals'.

These participatory features make bail funds and community payment of fines powerful examples of democratic input into the criminal system. This democratic

134 Dean Spade, *Mutual Aid: Building Solidarity During this Crisis (and the Next)* (Verso, 2020) 7.
135 Ibid.
136 2020 Interview with Debbie Kilroy (n 15).
137 'Our Approach', *The Bail Project* (Web Page), archived at <perma.cc/YNL2-SNY8>.
138 'Our Values and Vision', *SistersInside* (Web Page) <https://sistersinside.com.au/our-values-and-vision/>.

input has the 'potential to contribute to political change from the ground up'.[139] In reflecting on lessons learned from the first Black Mama's Bailout in 2017, one of the community groups organising the bailout, Southerners on New Ground ('SONG'), stated that it was the large-scale nature of the bailout that proved to be successful in highlighting the gravity of America's cash bail crisis and its impact on Black communities and in particular Black mothers.[140] The successes of the bail reform movement in the United States, and the fact that there have been real changes to bail legislation in many states demonstrates the impact that this bottom-up mobilisation can have on top-down legal change. In the case of imprisonment for non-payment of fines, Kilroy reflected that after the campaign was launched, she met with staff from the Attorney-General's office, who made a promise to change the laws.[141] That the Attorney-General referenced increased political pressure and 'continuous correspondence from all corners of the state and from interstate' when introducing the Bill into parliament may also evidence the impact of this community input on the political process.[142]

4 Combining Transformative Visions with 'Non-reformist Reforms'

Both the Black Mama's Bailout and the FreeHer campaign combine a guiding transformative and abolitionist vision with advocacy for immediate 'non-reformist reforms'. The term 'non-reformist reforms' was popularised in the prison abolition movement by Ruth Wilson Gilmore.[143] In *Golden Gulag,* Gilmore defines non-reformist reforms as 'changes that, at the end of the day, unravel rather than widen the net of social control through criminalization'.[144] As stated by Gilmore, 'unfortunately, many remedies proposed for the all-purpose use of prisons to solve social, political, and economic problems get caught in the logic of the system itself, such that a reform strengthens, rather than loosens, prison's hold'.[145] However, transformative changes to oppressive systems can occur over time, with 'persistent small changes' and reforms which remove the power of the criminal system to incarcerate, punish and control, without replacing this power with, or reinforcing, other forms of coercion and punishment.[146]

In the case of the Black Mama's Bailout, the transformative vision was abolitionist, ie, to build alternatives to the current criminal system that render prisons obsolete, and the immediate 'non-reformist reform' was ending cash bail.[147] Mary Hooks, co-director of SONG, and originator of the idea for the bailout, said that the vision was about 'naming the massive impact cash bail is having on

139 Simonson (n 92) 589.
140 *Southerners on New Ground* (n 100).
141 2020 Interview with Debbie Kilroy (n 15).
142 Second Reading Speech (n 121) 7490.
143 Gilmore, *Golden Gulag* (n 77).
144 Ibid 242.
145 Ibid.
146 Ibid 242–3.
147 See Kaba (n 100). See also Brett Davidson et al, 'Community Bail Funds as a Tool for Prison Abolition', *Law and Political Economy Project* (Web Page, 13 February 2020) <https://lpeproject.org/blog/community-bail-funds-as-a-tool-for-prison-abolition/>.

families and on black mamas' and was about 'abolition in the now'.[148] According to another of the organisers, Marbre Stahly-Butts, a lawyer and organiser with Law for Black Lives, the bailout was to serve as an opportunity to pursue the vision of ending money bail. Stahly-Butts said the bailout should be viewed

> as a short-term reform necessary to dismantle the current, unjust criminal punishment system … Across the country, in anticipation of the mamas coming home, 'people are connecting with faith communities, service providers, and healers to build a web of support that is helping our communities build alternatives to the current system, exercise their collective power, and explore their collective resources' …[149]

The combination of this transformative vision with the short-term goal of ending cash bail is reflected by the bailout being just one component of the NBO's 'three-pronged strategy focused on public education, direct action/community mobilisation, and strategic policy interventions'.[150] Reflecting this broader strategy, the NBO has also produced educational materials such as the 'Transformative Bail Reform: A Popular Education Curriculum' to educate communities about bail, and 'Until Freedom Comes: Comprehensive Bail Out Toolkit', which provides a step-by-step guide for individuals and groups to develop their own bailouts.[151] These education and advocacy materials support the bailout's transformative vision by acknowledging abolition as a long-term and transformative project.

In the case of the FreeHer campaign, Kilroy describes meeting with activists in the United States decades prior to FreeHer, to share the success of the Sisters Inside Supreme Court Bail Program, focused on making bail applications for women remanded in custody. As stated by Kilroy,

> [a]s abolitionists, we are always looking at different actions on the ground, always sussing out different campaigns and strategies and what we can use across borders … Being an abolitionist is about abolition in practice. What is it we can do to stop women and girls being criminalised. How can we get them out and what is the fastest way to keep them out.[152]

The transformative vision of the FreeHer campaign was the release of all Aboriginal women from custody, and the short-term goal was to end imprisonment for non-payment of fines.[153] The organiser of the campaign, Debbie Kilroy, a formerly incarcerated woman, is a strong advocate for prison abolition and the dismantling of racist and capitalist structures rooted in colonisation.[154] In regard to the FreeHer campaign, Kilroy described the campaign as a decarceration strategy with abolition being the end goal. Part of the campaign involved educating the broader public about the 'reality of the criminal punishment system and how

148 Grant (n 100).

149 Kaba (n 100).

150 National Bail Out, 'Until Freedom Comes: A Comprehensive Bailout Toolkit' (Toolkit, 2019) 9 <https://southernersonnewground.org/wp-content/uploads/2019/07/Until-Freedom-Comes-A-Comprehensive-Bailout-Toolkit.pdf>.

151 Ibid; National Bail Out et al, 'Transformative Bail Reform: A Popular Education Curriculum' (Curriculum) <https://www.nationalbailout.org/bailreform>.

152 2023 Interview with Debbie Kilroy (n 13).

153 See Kilroy, 'FreeHer' (n 14).

154 Kilroy, 'Imagining Abolition' (n 79); 2020 Interview with Debbie Kilroy (n 15).

people can end up in debt'.[155] The unifying message of the campaign was that the criminal system, in imposing monetary penalties, unfairly punishes poor and First Nations people, in particular women. Kilroy said,

> [i]t's very clear from the comments on the GoFundMe page that they [the donors] don't want Aboriginal women, Aboriginal mothers in prison or arrested and put in prison for fine default. … Single Aboriginal mothers make up the majority of those in prison who do not have the capacity to pay fines. They are living in absolute poverty and cannot afford food and shelter for their children let alone pay a fine.[156]

The campaign's 'non-reformist reform' was the abolition of imprisonment for non-payment of fines. This demand is made clear by the request on the GoFundMe page to email the Attorney-General of WA to demand that laws enabling imprisonment for non-payment of fines be repealed 'as a matter of urgency'.[157] Sisters Inside, as an organisation, advocates broadly for the rights and dignity of incarcerated women and for structural reform to the criminal system, including through policy advocacy, legal support and education.[158] By complementing the FreeHer campaign with this broader advocacy and education, the demand for abolition of imprisonment for fine default can be seen as part of a larger transformative vision for Australia's criminal system.

While abolishing imprisonment for fine default may be viewed as a non-reformist reform by reducing the power of the state to incarcerate, the punitive nature of fines in other jurisdictions, such as NSW, demonstrates the risk that this penalty will be replaced by other punitive regimes. For example, in NSW, while imprisonment for non-payment of fines was abolished, mandatory license disqualification for fine default continues to be disproportionately punitive to those experiencing social disadvantage.[159] As acknowledged by Kilroy, ultimately, the funds from the campaign were going to the state and there was a concern that the state was dragging its feet on changing the legislation due to getting money from the campaign. However, the campaign was 'about getting the women out and keeping them out so that the tentacles of the criminal punishment system aren't in her life'.[160]

The transformative vision of both the Black Mama's Bailout and the FreeHer campaign is also reflected in the structure of the campaigns themselves, specifically, that neither defined the recipients of donations by offence type. In both campaigns, the recipients of the bailouts and fine payments were solely defined as 'Black mothers and caregivers' or 'Aboriginal mothers', and not by their offence type or any other characteristics a judge might rely on when imposing bail or a fine. Essentially, with minimal context or background on the circumstances of

155 2020 Interview with Debbie Kilroy (n 15).

156 Maani Truu, 'Viral Campaign to Free Jailed Indigenous Women Reaches $230,000', *SBS News* (online, 11 January 2019) <https://www.sbs.com.au/news/article/viral-campaign-to-free-jailed-indigenous-women-reaches-230-000/30xuooybd>.

157 Kilroy, 'FreeHer' (n 14).

158 See 'About Sisters Inside', *Sisters Inside* (Web Page) <https://sistersinside.com.au>, archived at <perma.cc/6E33-MTPH>.

159 Quilter and Hogg (n 59) 21–6.

160 2020 Interview with Debbie Kilroy (n 15).

recipients, community members were donating to strangers – ie, their support and solidarity with the campaign was non-conditional. In reflecting on the 2017 Black Mama's Bailout, SONG stated that '[t]hroughout, we had to resist the refrain from supporters and naysayers wanting to know what these mothers and caregivers were arrested for and then judging if they deserved to be free'.[161]

By refusing to separate the recipients of the money by offence type, the message was sent that regardless of offence type, no one should be imprisoned for inability to pay bail or a fine.

5 Risk of Legitimising Unjust Systems: New York City Bail Funds

The last few years have seen a proliferation of bail funds in the United States, many funded by large-scale philanthropy and some funded by the very governments and cities which also underwrite the funding of police and jails. With their popularisation there is a risk that these funds become an embedded part of a broader unjust framework, legitimising and normalising the existing system of cash bail and pre-trial detention. This bureaucratisation of funds also removes their grounding in principles of mutual aid. The case of New York City bail funds demonstrates both the power of bail funds in exposing injustice and propelling legal reform, as well as the risk of these funds becoming institutionalised. While this risk is less apparent in the case of community payment of fines, the case of New York bail funds provides important lessons for this form of collective resistance.

The Bronx Freedom Fund was launched in 2007 by a group of public defenders from the Bronx Defenders who set up a fund to bail out their clients charged with misdemeanours.[162] After being shut down by a judge in 2009, who found that the fund was operating as an illegal insurance scheme,[163] in 2012 its backers successfully pushed for New York to change its laws to permit the operation of bail funds. In 2012, the *Charitable Bail Act* was passed, permitting the operation of bail funds but restricting them to paying for the bail of persons charged with misdemeanours where the bail amount is set at less than $2,000.[164] As the issue of cash bail gained increased popular attention, the founders of the Bronx fund launched a national fund, the Bail Project, which saw donations come in from high profile investors such as Richard Branson and Michael E Novogratz, to set up 40 bail funds throughout the United States.[165] The Envision Freedom Fund, formerly known as the Brooklyn Community Fund, founded in 2015, emerged as

161 *Southerners on New Ground* (n 100).

162 'Bail Reform Initiative', *The Bronx Defenders* (Web Page) <https://www.bronxdefenders.org/programs/bail-reform-initiative/>.

163 *People v Miranda* (NY Sup Ct, 51560(U), 22 June 2009); Nick Pinto, 'Making Bail Better', *The Village Voice* (online, 10 October 2012) <https://www.villagevoice.com/making-bail-better/>.

164 Nick Pinto, 'Bailing Out', *The New Republic* (online, 6 April 2020) <https://newrepublic.com/article/156823/limits-money-bail-fund-criminal-justice-reform> ('Bailing Out'), citing 28 NY Insurance Law § 6805 (McKinney 2012).

165 Ibid.

the largest bail fund in the country, having paid bail for 4,700 accused persons as at September 2019.[166]

Marking the start of the institutionalisation of bail funds, and a drift from principles of mutual aid, in August 2017 the government of New York City launched its own bail fund, despite also overseeing and underwriting 'the police and jail apparatus that keeps New Yorkers held on bail'.[167] The city-run fund was 'launched with $1.4 million in city funding for operating costs and another $400,000 for bail payments donated by a private foundation'.[168] Public defenders also reported that the court system itself started adapting to the existence of bail funds. One public defender told The New Republic that

> [y]ou're supposed to have a good reason for setting bail, but instead, you'd see judges set bail at $500, which is nuisance bail, and then they say off the record, 'Well, the bail fund will pay that, so they'll be out,' … That became daily happenstance in court, but it's not OK. These people should just be released, period. It's just cover for the judge.[169]

In April 2019, following sustained advocacy efforts to end cash bail in New York City, including from bail funds such as the Envision Freedom Fund, New York passed bail reform legislation which eliminated cash bail for most misdemeanour and non-violent felony offences.[170] The legislation came into effect in January 2020. According to the Vera Institute of Justice, if implemented effectively, the legislation could see a 40% reduction of New York's pre-trial detention population.[171] However, the legislation did not end cash bail entirely. Cash bail remained for specified offences.[172] Further, in April 2020, in the midst of the coronavirus pandemic, legislators passed a budget that expanded the list of offences for which cash bail could be set, further setting back goals to reduce the pre-trial detention population.[173] In the months following the passage of the legislation in 2019, the government sought to amend the *Charitable Bail Act* to enable bail funds to pay for bail where it is set for up to $10,000.[174] According to

166 Ibid; Envision Freedom Fund, 'Community Bail Funds & the Fight for Freedom', *Medium* (Web Page, 27 September 2019) <https://envfreefund.medium.com/community-bail-funds-the-fight-for-freedom-17dc40311230>; 'About Us', *Envision Freedom Fund* (Web Page) <https://envisionfreedom.org/about-us/>.

167 Pinto, 'Bailing Out' (n 164).

168 Ibid.

169 Ibid.

170 Insha Rahman, *New York, New York: Highlights of the 2019 Bail Reform Law* (Report, July 2019) 4, 12 <https://www.vera.org/downloads/publications/new-york-new-york-2019-bail-reform-law-highlights.pdf>.

171 Ibid 4.

172 Ibid 4.

173 Pinto, 'Bailing Out' (n 164); Aliza Chasan, 'Bail Reform Overhauled in New York Budget', *Pix 11* (online, 2 April 2020) <https://pix11.com/news/local-news/bail-reform-overhauled-in-new-york-budget/>.

174 Envision Freedom Fund (n 166). Note that this amendment was vetoed by Governor Cuomo in December 2019: Dan M Clark, 'Cuomo Vetoes Bills Expanding Charitable Bail Organizations, Expediting Rap Sheet Disclosure', *New York Law Journal* (online, 13 December 2019) <https://www.law.com/newyorklawjournal/2019/12/13/cuomo-vetoes-bills-expanding-charitable-bail-organizations-expediting-rap-sheet-disclosure/>, citing S Res 494, 203rd Leg, Reg Sess (NY 2019).

the leaders of the Envision Freedom Fund, '[b]ail funds became an escape hatch for a political system that lacked the courage to end money bail'.[175]

In September 2019, the Envision Freedom Fund released a statement that it was ceasing to operate as a revolving bail fund. A revolving bail fund is one in which money is taken from a pool to pay for a person's bail and then returned to the pool after the person's matter has concluded, thereby creating a revolving pool of funds. Its leaders referred to the 2019 bail reform legislation and stated, '[w]e believe that revolving bail funds in New York may now be used to perpetuate money bail'.[176] Given the legislation, continuing to operate the bail fund would

> amount to acquiescence to the continued existence of money bail. We would effectively be transformed into a permanent fixture of the system which we have fought so tirelessly to dismantle. It is not difficult to imagine future legislative battles focusing on expanding the reach of bail funds to cover exceptions and carve-outs rather than eliminating money bail and pretrial detention entirely.
>
> …
>
> We cannot continue operating as a revolving bail fund if we are to be the state's band-aid. We would no longer be a community bail fund fighting for the end of pretrial detention if we were to be an extension of the state.[177]

As stated by Simonson,

> [t]he state is essentially giving bail funds the purpose of posting bail for people who fall into these carve-outs … When bail funds do that, in a sense they're legitimizing that choice, because maybe things will still quote-unquote 'work'. It can function as legitimizing the rhetoric the state uses to justify incarceration.[178]

Other bail funds have experienced similar dilemmas, with criminal systems becoming dependent on these funds to alleviate short term overpopulation pressures. For example, in Washington County, Arkansas, in 2019 the Sheriff sought to rely on a local bail fund to alleviate overcrowding in the County's jails. As stated by the National Bail Fund Network Director Pilar Weiss,

> [a]t a certain point, it can be like letting off steam in a pressure cooker … If you have a sheriff getting nervous that jail conditions have reached a point where there's going to be public outrage, or a legal issue, or a budget issue, what's the best way to be in tension with the system that produced that outcome? Is it to pay the bail for enough people to alleviate the situation just enough that the sheriff can say, 'Phew, now there isn't going to be a human rights investigation?'[179]

Examples such as this highlight the ways bail funds can be co-opted by the criminal system, alleviating short-term pressures all the while reinforcing the system itself.

Ultimately, bail funds such as the Envision Freedom Fund were part of a sustained social movement that exposed the systemic injustices of the cash bail system and ultimately led to the passage of legislation that has the potential to see monumental reductions in New York's pre-trial detention population.[180] However, the ways bail funds became institutionalised and normalised in New York also

175 Envision Freedom Fund (n 166).
176 Ibid.
177 Ibid.
178 Pinto, 'Bailing Out' (n 164).
179 Ibid.
180 Rahman (n 170) 4.

demonstrates the danger that this form of community resistance may actually prop up and reinforce, rather than dismantle, unjust systems. In doing so, the 'democratic' and collective aspect of demosprudence is eliminated.

Further, the fact that bail funds in New York were only used to pay for the bail of those charged with misdemeanours also highlights the risk that these funds alleviate the burden of cash bail for a select few who are deemed to have committed 'minor' offences, while reinforcing the cash bail system for others who may be deemed less deserving. The recent expansion of the carve-out in April 2020 further reinforces this divide between those deemed worthy and unworthy of being imprisoned on the basis of poverty. As stated by Weiss, '[t]he carve-outs created a hole, and now they can try to push more people into the hole'.[181]

According to Simonson, 'in order to stem the risk of legitimation', bail funds should be 'accompanied by social movements to eliminate the use of money bail and substantially reduce the use of pretrial detention overall'.[182] Many bail funds adopt this strategy and state that the funds themselves are just one part of a larger project to dismantle the systemic injustice of the pre-trial detention system.[183] The transformative vision of the Black Mama's Bailout, and its broader strategy, which includes advocacy and community education, provides an example of this.[184] Even after the closure of its revolving bail fund, the Envision Freedom Fund continues to operate and engage in community resistance to the criminal system in other ways, including through court watching and an immigrant freedom fund to secure the release of those in immigration detention who cannot afford to pay bonds.[185] This demonstrates the need for community resistance to remain flexible and committed to a broader vision, in order to adapt if it does face institutionalisation.

In the context of the FreeHer campaign, Kilroy was well aware of the risk that the state would come to rely on the fund to pay for the fines of those who could not afford to do so.[186] However, with the passage of the legislation in June 2020,[187] and the continued advocacy of Sisters Inside, there is no indication that the fund will be institutionalised in the same way as bail funds in New York. The lessons from New York demonstrate that campaigns such as FreeHer are most effective as part of a broader transformative strategy, working within communities and social movements, and adapting when faced with changing circumstances.

6 Will This Revolution Be Funded?

In recent years, there has been more critical discussion of the influence of philanthropy and large funders on social justice movements, particularly in the United States.[188] One issue that warrants further examination is the proper role of

181 Pinto, 'Bailing Out' (n 164).
182 Simonson (n 92) 631.
183 'About', *National Bail Out* (Web Page) <https://www.nationalbailout.org>.
184 National Bail Out (n 150) 8–9.
185 Envision Freedom Fund (n 166).
186 2020 Interview with Debbie Kilroy (n 15).
187 Fines, Penalties and Infringement Bill (n 16).
188 See INCITE! (ed), *The Revolution Will Not Be Funded: Beyond the Non-profit Industrial Complex* (Duke University Press, 2017) <https://doi.org/10.1215/9780822373001>.

philanthropy and donations in community resistance to criminal processes, and the risk that philanthropy and donations obscure the rhetorical value of 'community' input and the voices of those impacted by the criminal system.

While philanthropy can insert much needed funding into social movements, and can enable messages regarding the injustice of the criminal system to reach wide audiences, there is a risk that reliance on large funders reduces the 'democracy-enhancing' power and mutual aid elements of these movements. If bail funds are funded by large foundations, such as Ford and Macarthur, rather than community members, the rhetorical value of the 'community' sending a message regarding the injustice of these systems may be negated. In the context of the Bail Project, as the problems of cash bail became more well-known in the wake of the Black Lives Matter movement, donations from large philanthropic foundations started flooding in. As stated by journalist Nick Pinto, '[b]ail had become sexy. Facebook co-founders, the TED-talk empire, and other high-profile philanthropists wanted in'.[189] The revolving nature of bail funds, and their capacity to have an immediate and measurable impact on decarceration was attractive to funders.[190] There has been no research on the influence of philanthropy on shaping the course of the bail reform campaign in New York City. However, it seems clear that the popularisation of bail funds, achieved in part due to philanthropy, was part of their institutionalisation and ultimate co-optation by the very system they sought to disrupt.

In the context of the FreeHer campaign, there was little risk of the campaign experiencing the same tensions with philanthropy. Being on a GoFundMe page meant that every donation was visible. Out of the over $1 million that had been donated to the campaign by September 2020, the largest donation was $7,000 from celebrity Russell Crowe.[191] This perhaps reflects the different funding landscape in Australia, where there are fewer high-profile philanthropists. However, lessons from New York may indicate that to have the greatest democracy-enhancing effect, campaigns such as FreeHer are most powerful when funding reflects widespread community input. Not only does the insertion of philanthropy bear the risk that this resistance will lose the rhetorical value of 'community' input, but the fact that these modes of resistance rely on donated funds also risks obscuring the voices of those most impacted by the criminal system.

IV CONCLUSION

Australia's criminal system continues to generate new ways of controlling and punishing people on the basis of race and class. In Victoria, changes to bail laws have seen the number of Aboriginal women in prison skyrocket, a factor leading

189 Pinto, 'Bailing Out' (n 164). See also Philip Rojc, 'Disrupting Bail: An Innovative Criminal Justice Reform Idea Gains Momentum – And Funders', *Inside Philanthropy* (Web Page, 22 May 2018) <https://www.insidephilanthropy.com/home/2018/5/22/key-leverage-point-an-innovative-criminal-justice-reform-idea-gains-momentum-and-funders>.

190 Rojc (n 189).

191 Kilroy, 'FreeHer' (n 14).

to the horrific passing in custody of beloved Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman Veronica Marie Nelson, who was in prison for shoplifting-related offences.[192] Governments are increasingly reliant on on-the-spot fines for low-level offences such as drug possession, public intoxication and public disorder offences.[193] Many states responded to the coronavirus pandemic with heavy policing and monetised punishments. Those who breached public health laws faced fines ranging from $1,000 in South Australia to $16,800 in Tasmania.[194] Data from NSW showed that those being fined were disproportionately from places with high First Nations and migrant populations and low socio-economic status.[195] Criminal punishments, including heavy fines, are also increasingly used to attempt to quash protests. This includes attempts to suppress First Nations resistance actions[196] and draconian penalties against climate protesters.[197] It is important to critically examine these new modes of control and punishment in light of Australia's long history of criminalising race and class.

This article demonstrates the power of bottom-up collective input to challenging the entrenched nature of the racial and class targets of Australia's criminal system, in order to meet new modes of control and punishment. There are currently many examples of collective resistance into the criminal system which warrant further research and analysis. These include court watching and live tweeting by the Dhadjowa Foundation during coronial inquests into First Nations deaths in custody,[198] mutual aid funds and peer support for criminalised transgender people such as Beyond Bricks & Bars,[199] and local community-led peer support

192 See *Inquest into the Passing of Veronica Nelson* (Coroner's Court of Victoria, Coroner Simon McGregor, 30 January 2023); Victorian Aboriginal Legal Service, 'Submissions on Behalf of Uncle Percy Lovett', Submission in *Inquest into the Passing of Veronica Nelson*, COR 2020 0021, 17 June 2022. I am privileged to act for Veronica's life partner, Uncle Percy Lovett, in relation to Veronica's passing.

193 See above n 58.

194 'Coronavirus Rules: How Different States in Australia Are Implementing New Restrictions and What the Penalties Are', *ABC News* (online, 31 March 2020) <https://www.abc.net.au/news/2020-03-31/how-australian-states-are-enforcing-coronavirus-measures/12106774>; Kelsie Iorio, 'Coronavirus Rules and Restrictions Explained: Can I See My Parents? Can I Go Fishing?', *ABC News* (online, 6 April 2020) <https://www.abc.net.au/news/2020-04-03/coronavirus-rules-restrictions-can-i-go-fishing-visit-relatives/12112446>.

195 Although every state issued its own public health orders, only NSW initially released data on fines to reporters: see Osman Faruqi, 'Compliance Fines under the Microscope', *The Saturday Paper* (online, 18 April 2020) <https://www.thesaturdaypaper.com.au/news/health/2020/04/18/compliance-fines-under-the-microscope/15871320009710>.

196 See Tarneen Onus-Williams, Crystal McKinnon and Meriki Onus, 'Why We Organised Melbourne's Black Lives Matter Rally', *The Saturday Paper* (online, 13 June 2020) <https://www.thesaturdaypaper.com.au/opinion/topic/2020/06/13/why-we-organised-melbournes-black-lives-matter-rally/15919704009972>.

197 Yan Zhuang, 'Climate Protesters in Australia Face Harsh New Penalties', *The New York Times* (online, 1 July 2022) <https://www.nytimes.com/2022/07/01/world/australia/climate-protest-laws.html>.

198 See @dhadjowa (Dhadjowa Foundation) (Twitter, 30 January 2023, 9:58am AEST) <https://twitter.com/dhadjowa/status/1619832353718927360>; 'The Dhadjowa Foundation', *Dhadjowa Foundation* (Web Page, 2023) <https://dhadjowa.com.au/>.

199 'Beyond Bricks & Bars', *Flat Out* (Web Page, 2023) <https://www.flatout.org.au/beyond-bricks-bars>.

groups for Aboriginal men such as those run by Deadly Connections.[200] These modes of collective resistance provide new opportunities for community input into the criminal system. The examples of bail funds and community payment of fines being used to pay for the freedom of criminalised people examined in this article demonstrate that community resistance is most effective where it enables participatory and democratic input into institutions and systems of power, where it combines transformative abolitionist visions with demands for immediate non-reformist reforms, and where it is grounded in the experiences, and uplifts the voices, of criminalised persons. The criminal system is fuelled and maintained by 'tough on crime' rhetoric, which seeks to create a divide between the 'community' and criminalised persons. Modes of collective resistance which insert the community into opaque criminal processes have the power to disrupt this divide, expose systemic and entrenched injustice, and 'change the way the wind is blowing'[201] in Australia's criminal system.

200 See, eg, 'Deadly Brothers', *Deadly Connections* (Web Page) <https://deadlyconnections.org.au/deadly-brothers/>.

201 Guinier and Torres (n 17) 2742, quoting 'Jim Wallis: The New Evangelical Leaders, Part I', *On Being with Krista Tippett* (On Being, 29 November 2007) <https://onbeing.org/programs/jim-wallis-the-new-evangelical-leaders-part-i/>.