

25,000 New Yorkers are jailed statewide. 70% have not been convicted and are being detained pretrial. Across New York, jail populations are rising and these trends are largely driven by increased pretrial detention. Through grassroots power-building and strategic legislative advocacy, the #FREEnewyork campaign advocates for overhaul of New York's pretrial justice system. Comprehensive bail reform is essential to this effort.

This memo describes the imperative for comprehensive bail reform in New York State. It provides an overview of how U.S. bail law developed, how bail law currently operates in New York State and City and summarizes national bail reform trends in the U.S. This document lays out a 'gold standard' bail proposal for New York State which was developed in consultation with JustLeadershipUSA's directly impacted membership; statewide grassroots organizations; and numerous legal and issue experts working at the local, state, and national level. Core components of 'gold standard' bail reform include: elimination of money bail; presumption of innocence and unconditional release; requiring judicial systems to set the least restrictive conditions to ensure return to court; individualized, evidentiary pretrial assessments based only on risk of flight; and exclusion of the use of algorithm-based risk assessment tools.

BAIL LAW: THE IMPERATIVE FOR REFORM

- The presumption of innocence, and rights to due process, equal protection, pretrial release, and protection against excessive bail are foundations of the American legal system.
- Yet, on any given day, in direct violation of these rights, thousands of people sit in New York's county jails, awaiting the outcome of their case.
- When a person is arrested, the court must determine whether the person will be unconditionally released pending trial, released subject to a condition or combination of conditions, or held in jail during the pretrial process.
- Any outcome other than unconditional release must be justified by displaying a significant risk that the defendant will not appear at future court appearances.
- This justification is routinely unmet, and people end up being held in jail simply because they cannot afford the bail that has been set. They are incarcerated as a result of their inability to buy their freedom.
- Bail and pretrial detention subject arrestees to unfair treatment, arbitrary incarceration, wealth discrimination, and other violations of their basic rights.
- People unable to pay bail remain in jail regardless of guilt or innocence.
- Most of the people in jails across New York State are *legally innocent*. They have not been convicted of the crime for which they are being held. They are denied their freedom because of a broken bail system.
- 25,000 New Yorkers are jailed statewide. 70% have not been convicted and are being detained pretrial. 63% of jailed New Yorkers are detained in counties OUTSIDE of New York City.
- Incarceration wastes public funds and intensifies racial and economic inequalities here in New York and across the nation.
- New York spends \$42 million per year to jail misdemeanor defendants held on bail amounts of \$1,000 or less.¹
- New York City spends \$116 million each year incarcerating individuals who have not been convicted of a crime, and this results in no demonstrable improvements in public safety.²

¹ <https://brooklynbailfund.org/the-problem/>

- Research shows that incarceration fuels future incarceration and justice system involvement.
- Studies have also shown that individuals who are detained pretrial, even for short periods, are actually more likely than non-detained, similarly situated individuals to commit new crimes following release.

Bail impacts individual case outcomes and drives guilty pleas.³ In New York City, over 90% of individuals plead guilty when held in jail on bail, compared to 40% when individuals are able to fight their cases from home.⁴

- Spending time behind bars also leads to significant collateral consequences, including eviction, unemployment, and family dysfunction. These burdens fall disproportionately on low-income communities and communities of color.⁵
- Poor and middle-income people incur debilitating debt in order to gain the advantages pretrial freedom (the ability to fight their case from home) bestows.
- Bail should not function as a punishment, coerce guilty pleas, or exacerbate economic and racial inequality, as it currently does.

BAIL LAW: THE HISTORY

Bail Law in the U.S.

- By 1789, bail law was consistent across the U.S. and was based on 3 principles: (1) bail should not be excessive, (2) a right to bail exists in non-capital cases, and (3) bail is meant to assure the appearance of the accused at trial.
- As the U.S. grew and expanded, people began to spread out geographically. With this spread came an increased risk of flight and risk of failure to appear in court for people charged with a crime. Courts began setting bail with increasing frequency to address these risks.
- In 1951, in deciding *Stack v. Boyle*, the Supreme Court focused on the importance of using individualized assessment to set bail. Previously these processes were based solely on the charged offense, and not the individual's ability to pay.
 - The Court said that bail should be set based on a review of risk of flight and that it shouldn't be set for any amount higher than necessary to accomplish this purpose.
- In 1984, Congress passed the Bail Reform Act of 1984, which stated that a person be released pretrial on personal recognizance or bail unless that person posed a safety risk to another person or the community.

Bail Law in New York State

- Bail Law is governed by Criminal Procedure Law §510. According to the law, the following factors must be considered when deciding whether to release or set bail (except in domestic violence cases, which require additional considerations):
 - Character, reputation, habits and mental condition;
 - Employment and financial resources;
 - Family ties and length of residence in the community;
 - Criminal record;
 - Record of previous adjudication as a juvenile;
 - Record, if any, of appearing in court when required.
- New York law provides nine types of bail and judges are required by law to set at least two types in each case. Types of bail are:
 - Cash Bail;
 - Insurance company bail bond;

² <http://www.ibo.nyc.ny.us/iboreports/pretrial-detention-rates-may-2017.pdf>

³ https://scholar.princeton.edu/sites/default/files/wdobbie/files/dgy_bail_0.pdf

⁴ <https://brooklynbailfund.org/the-problem/>

⁵ <https://static1.squarespace.com/static/577d72ee2e69cfa9dd2b7a5e/t/595d48d1e6f2e1e5bcaa411a/1499285717652/Lippman+Commission+Report+FINAL+Single+s.pdf>

- Secured surety bond;
 - Secured appearance bond;
 - Partially secured surety bond;
 - Partially secured appearance bond;
 - Unsecured surety bond;
 - Unsecured appearance bond;
 - Credit Card.
- In New York, judges are legally required to consider only risk of flight (i.e. failure to appear in court) when deciding whether or not to set bail.
 - New York does not currently allow judges to consider the risk of future dangerousness when making bail determinations. This is a strength in our current law and must be maintained in future pretrial assessment systems.
 - Inclusion of dangerousness would only further entrench the structural racism prevalent in our criminal justice system, and it would inevitably lead to higher rates of pretrial incarceration by legally allowing judges to make decisions based on implicit racial bias and fear.
 - Judges are supposed to consider the individual's ability to pay when setting money bail terms to ensure return to court.
 - Judges regularly set cash bail, secured bond, and insurance company bail bond, which are the most burdensome forms of bail for low-income families.
 - Moreover, bail is routinely set at amounts that charged individuals are unable to pay, resulting in pretrial detention of innocent individuals.
 - Research has shown that less burdensome forms of bail (non-money based, unsecured forms) yield the similar rates of re-appearance in court.⁶

Bail Law in New York City

- After an individual is arrested, and before arraignment, they are interviewed by the Criminal Justice Agency (CJA), which conducts a brief assessment to determine the person's risk of flight and failure to appear at subsequent court dates, and then makes bail recommendations to judges.
- Regardless of CJA's recommendations, prosecutorial recommendations to judges are the strongest predictor of bail decisions.
- Judges ultimately set bail. If a person is released on recognizance, they are released from the courthouse, and are required to return for their next scheduled court date.
- If bail is set and an individual can post bail at the courthouse after arraignment, the person can be released immediately. Otherwise, the person is sent to Rikers Island. This occurs in 72% of cases where bail is set.
- Additionally, CJA oversees New York City's pretrial supervised release program, operated by several service organizations across the five boroughs. To assess 'fitness' for the pretrial supervised release programs, CJA conducts an independent assessment and makes recommendations on who should be released with pretrial conditions rather than held on bail.

BAIL REFORM: NATIONAL TRENDS

- Litigation across the country has resulted in the bail systems of several jurisdictions being declared unconstitutional, destabilizing well-established practices and focusing the attention of policymakers on the problems resulting from money bail.

⁶ <http://www.morejustnyc.org/the-reports/#the-commissions-report>

- Since 2012, over 500 bills across all 50 states were enacted related to pretrial release, pretrial services and supervision, diversion programs, nonfinancial conditions of release and victim support and services.⁷
 - In 2016 alone, 44 states enacted nearly 120 laws related to pretrial administration.⁸
- As policy makers across the political spectrum seek to end the era of mass incarceration, reforming pretrial administration has emerged as a critical mechanism to impede the flow of people into jails.
- National best practices for bail reform:
 - Shift away from a money-based bail system;
 - Expand pretrial release;
 - Establish supportive pretrial services;
 - Exclude pretrial detention for categories of charges;
 - Ensure ‘ability to pay’ in money-based systems;
 - Mandate individualized bail determinations and elimination of bail schedules;
 - Create enforceable procedural protections for those detained pretrial.

GOLD STANDARD BAIL REFORM IN NEW YORK

- **New York State must eliminate money bail** and implement a pretrial decision process that is rational and transparent, where money does not influence pretrial decisions.
- **Courts must recognize an explicit presumption of innocence, accompanied by the presumption of unconditional release**
 - Pretrial detention must be the option of last resort in all cases. Prosecution must evidence why any conditions more restrictive than release on recognizance are necessary.
- **Judicial systems must set the least restrictive conditions to ensure return to court**
 - Judges must set the least restrictive conditions to ensure release and return to court.
 - All low-level charges must be categorically excluded from pretrial detention, including all misdemeanors and non-serious felonies.
 - Conditions can **ONLY** be determined via an individualized evidentiary pretrial hearing to assess risk of purposeful flight (as opposed to non-appearance due to excusable, urgent life circumstances). This hearing must come within 24 hours of arrest.
 - Our pretrial system *must not* be transformed into a restrictive environment based on mass community surveillance.
 - Evidence-based and community-oriented assistance, such as text/phone reminders and transportation to court, must be prioritized over supervision-based interventions.
 - Pretrial services should be cost-effective and defer no financial obligation to the individual under supervision.
 - Supervised release terms must protect against the overuse of conditions like drug testing, electronic monitoring, GPS technologies, etc.
 - Pretrial detention may only be instituted for the most serious, specifically enumerated charges, and require a judicial determination of both:
 - probable cause that the individual committed the crime of which they are accused based on specific evidence; and
 - specifically, defined risk that the defendant will intentionally fail to appear at future court dates (flight risk) based on evidence in the record.
 - Any pretrial detention must be regularly reassessed and must be accompanied by expedited speedy trial and discovery protections.

⁷ http://www.ncsl.org/portals/1/html_largeReports/trends_pretrial_release17.htm

⁸ http://www.ncsl.org/portals/1/html_largeReports/trends_pretrial_release17.htm

- **Exclusion of Algorithm-Based Risk Assessment Tools:**
 - Risk assessment tools do not, by themselves, facilitate release. The scoring system can be scaled, the algorithm adjusted, exceptions added or taken away.
- Depending upon how these tools are designed, they can result in an increase of people who are either detained or placed under supervision pre-trial.
- The data used in risk assessment tools is tainted by the structural racism embedded in our criminal justice system. The assumption undergirding the tools of predictive validity can create consequences whereby false “risk” is ultimately assigned by race. Disparity in arrests and convictions for people of color means that algorithm-based tools will inevitably reflect and exacerbate racial disparities that exist in the criminal justice system.⁹
- Even when use is limited to decisions around release conditions, these tools have potential to increase onerous and invasive requirements like electronic monitoring, house arrest, the use of other GPS technologies, and probation reporting.

BAIL LAW REFORM: WHAT IT MEANS FOR NEW YORKERS

Pretrial detention is a significant driver of mass incarceration, and epitomizes the senselessness, injustice, and inequity of our criminal justice system. Passage of gold standard bail law reform, along with comprehensive speedy trial and discovery law reform, will put New York at the forefront of pretrial justice reform. Systemic reform is urgently needed, and has benefits that extend across our criminal justice system.

Gold standard bail reform will:

- Keep people out of jail and protect the presumption of innocence.
- Significantly reduce pretrial detention, and overall incarceration, in New York State.
- Sever the existing tie between freedom and wealth so that a person’s freedom does not depend upon the amount of money in their bank account.
- Reduce the number of people who are pressured to plead guilty and then carry a criminal record for life just to get out of jail, even when they are innocent or are involved in cases that are weak or stem from unlawful arrests.
- Protect the right to a fair trial and ensure more just case outcomes as more people are able to fight their cases from home.
- Reduce disparities in the criminal justice system, as well as the collateral consequences of pretrial incarceration.
- Save millions in taxpayer dollars¹⁰ that are currently being used to jail legally innocent New Yorkers.

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⁹ <https://www.hrw.org/news/2017/07/17/human-rights-watch-advises-against-using-profile-based-risk-assessment-bail-reform>

¹⁰ https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration/legacy_downloads/price-of-jails.pdf