



**NYSACDL**  
NEW YORK STATE ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS



## STANDING FIRM FOR JUSTICE

### Fact Sheets Packet in Support of New York State's Bail Reform Law

- **Memorandum on the Bail Reform Law**
  - Position Overview of the Chief Defenders Association of New York (CDANY), New York State Association of Criminal Defense Lawyers (NYSACDL), and New York State Defenders Association (NYSDA).
- **The Dangers of Dangerousness Memorandum**
  - Summary of New York State's 50-year history in rejecting perceived 'dangerousness,' and recent legal and academic journal articles critiquing such criteria and so-called Risk Assessment Instruments.
- **Academic Excerpts**
  - *Preventive Detention in New York: From Mainstream to Margin and Back*, New York University School of Law Center on the Administration of Criminal Law, 2017.
  - *De Blasio's Bail Reform Proposal is Bad Public Policy*, by Jonathan E. Gradess (then-Executive Director, NYSDA), *Albany Times Union* Op/Ed, 2015.
  - *Pretrial Detention and Bail*, by Megan Stevenson and Sandra G. Mayson, Academy for Justice, A Report on Scholarship and Criminal Justice Reform, University of Pennsylvania Law School, 2018.
  - *Danger Ahead, Risk Assessment and the Future of Bail Reform*, by John Logan Koepke and David G. Robinson, *Washington Law Review*, 2018.
  - *Bias In, Bias Out*, by Sandra G. Mayson, *Yale Law Journal*, 2019.
- **Supportive Articles, Editorials, Op/Eds, and Letters to the Editor**
  - 15 commentaries from legal experts and opinion leaders, including former Appellate Division Presiding Justice Karen K. Peters; Henry M. Greenberg, President, New York State Bar Association; John Grisham, Author; and opinions from *The New York Times*, *The Buffalo News*, and *Albany Times Union*.
- **The Daily Debunk: Rapid Response to Lies, Mistruths, & Fearmongering on Bail**
  - <https://justicenotfear.org/> provides accurate information to dispel the mistruths on the implementation of the bail law. Also, see the state map for statistics of pre-trial detention. For instance, Erie County in 2018-2019 had 21,005 arrests of which 33% were felonies and 67% were misdemeanors, and 63% of people were held in jail pre-trial at a cost of \$278 a day.
- **Judicial Power and Discretion Under the Current Bail Law**
  - Memorandum by the national Law Enforcement Action Partnership.
- **Open Letter to Members of the New York Press Club**
  - Forty-six criminal law experts at universities across the country write to raise concerns about the onslaught of misleading and alarmist coverage of the bail law, stating, "if we want a truly just system and a safer community, we must move forward using facts, not fear, to guide us."

## STANDING FIRM FOR JUSTICE: NEW YORK'S BAIL REFORM LAW

The bail reform statute is an important step forward for fairness, justice, and public safety. This new law addresses fundamental problems that have plagued poor people forced to sit in jail for months and years simply because they could not afford bail. The law will help make our communities safer and save county taxpayers millions of dollars. While in the past, individuals with the resources to afford bail were generally released into the community without conditions, the new law provides that persons facing criminal charges may be subject to pretrial supervision; equally important, services should be made available to assist persons in need. Additional non-monetary conditions may be ordered, with the focus on the least restrictive alternative necessary to assure the person's return to court. Judges can also issue orders of protection, where needed, to protect alleged victims and witnesses.

**We commend the Governor and Legislature for maintaining New York's statutory "risk of flight" criteria on bail, established in 1970. We are proud of New York's statute as it best exemplifies how courts maintain the Constitutional principle of the presumption of innocence in pre-trial proceedings.**

**We urge the Governor and the New York State Senate not to weaken the provisions of the bail reform law and to work for full implementation to bring New York closer to the promise of equal justice under law. Perceived "dangerousness," and the use of so-called risk assessment instruments (RAIs), are strongly opposed by the Chief Defenders Association of New York (CDANY), New York State Association of Criminal Defense Lawyers (NYSACDL), and New York State Defenders Association (NYSDA), and many other organizations.**

Proposals to adopt perceived "dangerousness," or perceived threats to public safety, were rejected during the administration of Governor Nelson Rockefeller and have been continually rejected by the New York State Legislature for over 50 years. **Adding perceived 'dangerousness' to a judge's evaluation of an individual undermines the Constitutional principle of 'innocent until proven guilty.'** Simply put, allowing generalized predictions of future dangerousness to result in pretrial detention would only serve to deepen the institutionalized racism that already exists in the system by providing it legal imprimatur.

**So-called RAIs can be used to jail a larger swath of people who haven't been found guilty of any crime.** The Pretrial Justice Institute, which had continued to support pretrial risk assessment tools in the face of increasing opposition to them, reversed its long-held position on February 7, 2020, stating, "We now see that pretrial risk assessment tools, designed to predict an individual's appearance in court without a new arrest, can no longer be a part of our solution for building equitable pretrial justice systems. **Regardless of their science, brand, or age, these tools are derived from data reflecting structural racism and institutional inequity that impact our court and law enforcement policies and practices. Use of that data then deepens the inequity.**"

Former Appellate Division Presiding Justice Karen K. Peters stated in an Albany *Times Union* Commentary (1/8/20) "***The new bail law levels the playing field; pretrial incarceration is grounded upon the crime charged, not the wealth of the individual charged. Moreover, the new bail laws provide that people who will be released pretrial under court oversight can be supervised within the community in ways well beyond what the current law provides. This can include treatment for substance use and mental health issues, electronic monitoring with GPS tracking when a judge determines it to be necessary, home detention, curfew and the seizing of passports .... Whether conservative or progressive, we all want our system of justice to be fair. Gov. Andrew Cuomo and the members of the Legislature who championed these reforms should be commended for leading the way.***"

# The Dangers of Dangerousness

We urge the Governor and the New York State Senate not to weaken the provisions of the bail reform law and to work for full implementation to bring New York closer to the promise of equal justice under law. Perceived “dangerousness,” and the use of so-called Risk Assessment Instruments (RAIs), are strongly opposed by CDANY, NYSACDL, NYSDA, and many other organizations.

- **Proposals to adopt perceived “dangerousness,” or perceived threats to public safety, were rejected during the administration of Governor Nelson Rockefeller and have been continually rejected by the New York State Legislature for over 50 years.**
- **Adding “dangerousness” to a judge’s evaluation of an individual undermines the Constitutional principle of “innocent until proven guilty.”** It amounts to preventive detention, and will likely result in more people being detained pretrial as judges remand an increasing number of defendants out of personal fear of political repercussions. Allowing generalized predictions of future dangerousness to result in pretrial detention would only serve to deepen the institutionalized racism that already exists in the system by providing it legal imprimatur.
- **The implementation of a perceived “dangerousness” policy could also lead to the use of a RAI, which can be used to jail a larger swath of people who haven’t been found guilty of any crime. As discussed further below, so-called RAIs reflect the very institutional bias that reform is meant to correct.** And when an RAI indicates any risk, judges will tend toward locking up the accused person rather than setting bail for fear of political backlash should that person be accused of another crime while out on bail.
- It is important to understand New York’s deep and rich history on this issue. A key resource is the report “Preventive Detention in New York: From Mainstream to Margin and Back” by the New York University School of Law Center on the Administration of Criminal Law (2017). The report describes why New York rejected predictions of dangerousness/preventive detention in the past. For instance, the report includes statements from legal academics and attorneys.
  - **“legal academics ... suggested that allowing preventive detention was tantamount to permitting imprisonment without evidence and would do irreparable harm to the presumption of innocence.”** (Pg. 13)
- “The Pretrial Justice Institute [PJI], which had continued to support pretrial risk assessment tools in the face of increasing opposition to them, reversed its long-held position on Friday [February 7, 2020], saying in a statement, ‘We now see that pretrial risk assessment tools, designed to predict an individual’s appearance in court without a new arrest, can no longer be a part of our solution for building equitable pretrial justice systems. **Regardless of their science, brand, or age, these tools are derived from data reflecting structural racism and institutional inequity that impact our court and law enforcement policies and practices. Use of that data then deepens the inequity.**’” The Appeal (2/12/20). When asked to name a state where RAIs didn’t work out, PJI pointed to New Jersey. **State figures released last year show jail populations fell nearly by half after the changes, which took effect in 2017, eliminating cash bail and introducing RAIs. But the demographics of defendants stuck in jail stayed largely the same: about 50 percent black and 30 percent white.** WIRED (2/19/20).
- “On July 27, 2020 researchers from MIT, Harvard, Princeton, NYU, UC Berkeley, and Columbia submitted a statement of concern about the tools to criminal justice policy makers in California, the city of Los Angeles, and Missouri. **‘Actuarial pretrial risk assessments suffer from serious technical flaws that undermine their accuracy, validity, and effectiveness,’ the statement says. Among other problems, it says the tools use ‘inexact and overly**

**broad' definitions of risks and that 'no tool available today can adequately distinguish one person's risk of violence from another.' In addition, the academics say, 'people of color are treated more harshly than similarly situated white people at each stage of the legal system, which results in serious distortions in the data used to develop risk assessment tools.' As a result of these flaws, the statement says, 'These problems cannot be resolved with technical fixes. We strongly recommend turning to other reforms.'**" The Appeal (2/12/20).

- Mayor De Blasio recently came out in support of perceived dangerousness, as he did in 2015. In an Albany *Times Union* Op/Ed (11/1/15), Jonathan E. Gradess, then-Executive Director of the New York State Defenders Association, made the following comments.
  - "de Blasio has called for preventive detention to be added to our bail statute. **The mayor should pause and reflect on this idea, which is the hallmark of fascist and repressive regimes around the globe. Back in the 1970 Criminal Procedure Law revision, the state Legislature, after 10 years of careful study, rejected preventive detention.**

**Indeed, even district attorneys rejected it, rightly recognizing that laborious particularized 'dangerousness hearings' would legally be required in an already overburdened court system .... Our Legislature should not be invited to make explicit and legal the racism that is already at work.** Hundreds of New York judges already calculate 'dangerousness'; they shouldn't, but they do. Legitimizing their ill-informed prejudicial decisions by this proposed statute is a grave mistake. ... **The mayor's proposal compounds the negative racial implications of primarily incarcerating poor people of color who would otherwise return to court. It opens the door to a new era of bad public policy. And it stunts the growth of otherwise meaningful transformation of our implicitly biased system. The mayor should reverse course, and no one in Albany should follow him over the cliff."**

- "Danger Ahead, Risk Assessment and the Future of Bail Reform," by John Logan Koepke and David G. Robinson (93 *Washington Law Review* 1725 [12/31/18]) discusses RAI problems.
  - From the abstract: "**First, today's risk assessment tools lead to what we term 'zombie predictions.'** That is, predictive models trained on data from older bail regimes are blind to the risk reducing benefits of recent bail reforms. This may cause predictions that systematically overestimate risk. ... Pretrial risk assessment instruments, as they are currently built and used, cannot safely be assumed to support reformist goals of reducing incarceration and addressing racial and poverty-based inequities."
- "Bias In, Bias Out," by Sandra G. Mayson (128 *Yale Law Journal* 2218 [June 2019]) also summarizes the inherent problems of RAIs.
  - From the abstract: "**This Article's central claim is that these strategies are at best superficial and at worst counterproductive because the source of racial inequality in risk assessment lies neither in the input data, nor in a particular algorithm, nor in algorithmic methodology per se. The deep problem is the nature of prediction itself.**

**All prediction looks to the past to make guesses about future events. In a racially stratified world, any method of prediction will project the inequalities of the past into the future. This is as true of the subjective prediction that has long pervaded criminal justice as it is of the algorithmic tools now replacing it.** Algorithmic risk assessment has revealed the inequality inherent in all prediction, forcing us to confront a problem much larger than the challenges of a new technology. Algorithms, in short, shed new light on an old problem."

## **Preventive Detention in New York: From Mainstream to Margin and Back**

New York University School of Law Center on the Administration of Criminal Law  
February 2017. Excerpts [Emphasis added, footnotes omitted.]

Proponents of the practice [preventive detention] suggested it would improve public safety while allowing judges to be candid about a factor they already covertly considered. Critics countered that judges and lawyers could not accurately predict who would be a danger if released. **They also believed the practice was antithetical to the notions of due process and the Constitution's prohibitions on excessive bail.** (Pg. 3)

In the early 1960's, New York City was on the cutting edge of a national wave of reform that saw the current bail system as unjust and inefficient. Justice Bernard Botein, presiding justice of the Appellate Division, First Department, offered a representative critique of the system of this era, **calling it "blind" and "irresponsible" to detain people who had yet to be convicted of any crime.** (Pg. 4) In 1961 ... the New York legislature ... created The Temporary Commission on Revision of the Penal Law and Criminal Code .... (Pg. 9) The Temporary Commission suggested that preventive detention should be statutorily authorized in order to "candidly recognize this factor and expressly predicate[] possible danger to society as one of the factors to be considered upon bail determination." (Pg. 11)

The Temporary Commission proposal faced staunch resistance. **Critics argued that the practice would be weaponized against vulnerable groups to produce "de facto discrimination."** (Pg. 12) In a June 1969 memorandum, the Office of Legislative Research ... acknowledged that **preventive detention "could very well violate the due process clause of the Fifth Amendment."** Some legal academics like Abraham S. Goldstein also suggested that **allowing preventive detention was tantamount to permitting imprisonment without evidence and would do irreparable harm to the presumption of innocence.** (Pgs. 12-13) [P]reventive detention did not make it into the final bill. On April 14, 1970, the new Code of Criminal Procedure was approved by the Legislature and sent to the governor. In August 1971, the approved Code took effect. (Pg. 15)

In a series of interviews with judges and lawyers in the New York court system in 2010, Human Rights Watch found evidence that judges use high levels of bail in order to detain people they believe pose a risk to the public. **Even more worrying, some defense attorneys interviewed by Human Rights Watch believed that judges were actually using detention facilitated by high bail to punish, a practice that would undermine the Supreme Court's argument that preventive detention is a regulatory measure.** (Pg. 26)

Human Rights Watch noted in their interviews with judges that "The judicial nightmare . . . is to end up on the cover of the New York Post for releasing without bail a defendant who then murders someone." Moreover, judges are making these decisions at arraignment, when the parties involved—CJA, defense counsel, and the prosecutor—know the least about them or their case. ... **As Assemblyman Joseph Lentol put it in 2017, if "you put public safety in the bill, nobody is getting out of jail – because they're afraid to let anybody out now."** (Pgs. 26-27)

Risk assessment tools have their critics. In 1970, opponents of preventive detention worried that the law would discriminate against African Americans and the poor. Today, this concern has become one of the central arguments against risk assessment instruments, particularly if they are to be deployed in the context of preventive detention. (Pg. 30)

Tina Luongo, the Attorney-in-Charge of criminal practice for the Legal Aid Society summarized this complaint in an April 2017 letter to the New York Times, arguing that “[a] **bail system that attempts to predict a person’s risk of future dangerousness asks the state to engage in guesswork that has historically discriminated against communities of color and poor people.**” Jonathan Gradess, [then] the Executive Director of the New York State Defenders Association, echoed this, suggesting that **allowing preventive detention would give “a legal protection to the racism that already exists in the system.”** (Pgs. 30-31)

### **De Blasio’s Bail Reform Proposal is Bad Public Policy**

*Albany Times Union, Op/Ed, Jonathan E. Gradess, then-Executive Director,  
New York State Defenders Association, 11/1/15*

Every time a human being is killed at the hand of another, a tragedy of enormous proportion occurs. The killing of NYPD officer Randolph Holder is such a tragedy. Our hearts and prayers are with his family. But his death should not and cannot be the vehicle for others’ pain and pretrial detention. More importantly, that tragic death should not be exploited by those who have waited for the moment to pounce to achieve repressive criminal justice changes.

In a startling twist, New York City Mayor Bill de Blasio is now leading a parade for these repressive changes, specifically preventive detention in bail-setting and a redundant dangerousness assessment in the judicial drug diversion statute. Recently he was joined by the New York Daily News, a newspaper that opposed the 2009 reforms to the Rockefeller Drug Law Reform and has been a reliable cheerleader for assuring district attorneys a veto over judicial decision-making.

That position has taken hold in upstate New York, where judges still defer to DAs despite the law. But in New York City, with more robust legal services and a slightly more sophisticated judiciary, drug diversion is working, as confirmed by reports of both the Vera Institute and the state Division of Criminal Justice Services. To suggest that a dangerous assessment in drug diversion is needed, when it has been present in the law for six years, reveals either ignorance or venality, neither of which are worthy of the mayor and certainly not of Officer Holder.

**More disturbingly, de Blasio has called for preventive detention to be added to our bail statute. The mayor should pause and reflect on this idea, which is the hallmark of fascist and repressive regimes around the globe. Back in the 1970 Criminal Procedure Law revision, the state Legislature, after 10 years of careful study, rejected preventive detention. Indeed, even district attorneys rejected it, rightly recognizing that laborious particularized “dangerousness hearings” would legally be required in an already overburdened court system.**

Historically, New York City is home to the Manhattan Bail Project, which 50 years ago demonstrated that the vast majority of pretrial defendants return for court; that the indicia of

roots in the community are stronger than bail itself, that money bail discriminates against the poor, and that a system of release on recognizance was a meaningful alternative to the primitive money bail system. At the same time, studies (since replicated many times over) demonstrated that defendants incarcerated pretrial were more likely to be sentenced to incarceration at the conclusion of the case. The city's own Criminal Justice Agency confirms these truths daily.

The mayor's proposals come at a moment in history when the consciousness of a nation has been raised to see that racism is the engine driving the system. The whole world is watching the mishandling of young people of color in America. Right and left on the political spectrum are coming together to reform systems propelling mass incarceration. The president, law enforcement, and the moneyed have joined advocates who have long called for criminal justice transformation. And others in the media and public are both hyperconscious of the need for a change in course.

**Into this whirlpool of reform that elevates racial equity, attacks racism and calls for civility, the mayor of the city of New York has called for our state to take a giant step backward by proposing preventive detention. He should consider who will be harmed and how and why. Within the bail domain, secret prejudices already mask "dangerousness" decisions with surrogate labels and code words in daily bail decision-making.**

**Our Legislature should not be invited to make explicit and legal the racism that is already at work. Hundreds of New York judges already calculate "dangerousness"; they shouldn't, but they do. Legitimizing their ill-informed prejudicial decisions by this proposed statute is a grave mistake. The mayor, succumbing to or taking advantage of the heat of the political moment, has called for moving our state backward in criminal justice. We still send too many poor and marginalized people to jail for want of small bail amounts. The mayor's proposal compounds the negative racial implications of primarily incarcerating poor people of color who would otherwise return to court. It opens the door to a new era of bad public policy. And it stunts the growth of otherwise meaningful transformation of our implicitly biased system. The mayor should reverse course, and no one in Albany should follow him over the cliff.**

### **Journal Article Excerpts on Bail, Pretrial Detention, and Risk Assessments**

**"Pretrial Detention and Bail,"** by Megan Stevenson and Sandra G. Mayson (Academy for Justice, A Report on Scholarship and Criminal Justice Reform, U of Penn Law School, Public Law Research Paper No. 17-18, 7/30/18) provides an important statutory summary on the issue.

*"The Supreme Court has affirmed that '[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.'<sup>i</sup> A set of federal constitutional provisions protect pretrial liberty. Most importantly, perhaps, the Equal Protection and Due Process Clauses prohibit the state from conditioning a person's liberty on payment of an amount that she cannot afford unless it has no other way to achieve an important state interest.<sup>ii</sup> Since 2015, a number of federal district courts have held that fixed money-bail schedules, which do not take ability to pay into account, violate these provisions.<sup>iii</sup> Relatedly, the Eighth Amendment prohibits 'excessive' bail.<sup>iv</sup> This requires an individualized bail determination: Bail must be 'reasonably calculated' to*

ensure the appearance of a particular defendant.<sup>v</sup> The Bail Clause permits detention without bail, but may prohibit any burden on a defendant's liberty that is excessive 'in light of the perceived evil' it is designed to address.<sup>vi</sup> The Due Process Clause prohibits pretrial punishment.<sup>vii</sup> It also requires that any detention regime be carefully tailored to achieve the state's interest and include robust procedural protections for the accused.<sup>viii</sup> The Fourth Amendment prohibits any 'significant restraint' on pretrial liberty in the absence of probable cause for the crime charged.<sup>ix</sup> The Sixth Amendment, finally, requires that counsel be appointed for an indigent defendant at or soon after her initial appearance in court.<sup>x</sup> Beyond the federal Constitution, federal statutory law and state law regulate pretrial practice. In the federal system, the Bail Reform Act lays out a comprehensive pretrial scheme.<sup>xi</sup> At the state level, there is wide variation in pretrial legal frameworks. Approximately half of state constitutions include a right to release on bail in noncapital cases. The other half allow for detention without bail in much broader circumstances.<sup>xii</sup> Most states also have statutes that structure pretrial decision-making.

In the policy realm, the American Bar Association has codified standards on pretrial release that represent the mainstream consensus among scholars about best practices in the pretrial arena.<sup>xiii</sup> Three core principles are worth highlighting. First, wealth cannot be the factor that determines whether someone is released or detained pretrial.<sup>xiv</sup> *Secondly, money bail should be set only to mitigate flight risk (not threats to public safety) and as a last resort.*<sup>xv</sup> *Finally, the state should always use the least restrictive means available to mitigate flight or crime risk.*<sup>xvi</sup> (Pgs. 26 – 28)

**"Danger Ahead, Risk Assessment and the Future of Bail Reform,"** by John Logan Koepke and David G. Robinson (93 *Washington Law Review* 1725 [12/31/18]) summarizes some of the problems with risk assessments.

"This Article highlights three underlying challenges that have yet to receive the attention they require. *First, today's risk assessment tools lead to what we term 'zombie predictions.'* That is, predictive models trained on data from older bail regimes are blind to the risk reducing benefits of recent bail reforms. This may cause predictions that systematically overestimate risk. Second, 'decision-making frameworks' that mediate the court system's use of risk estimates embody crucial moral judgments, yet currently escape appropriate public scrutiny. *Third, in the long-term, these tools risk giving an imprimatur of scientific objectivity to ill-defined concepts of 'dangerousness,' may entrench the Supreme Court's historically recent blessing of preventive detention for dangerousness, and could pave the way for an increase in preventive detention. Pretrial risk assessment instruments, as they are currently built and used, cannot safely be assumed to support reformist goals of reducing incarceration and addressing racial and poverty-based inequities.*"

**"Bias In, Bias Out,"** by Sandra G. Mayson (128 *Yale Law Journal* 2218 [June 2019]) also summarizes the inherent problems of risk assessments.

"Abstract. Police, prosecutors, judges, and other criminal justice actors increasingly use algorithmic risk assessment to estimate the likelihood that a person will commit future crime. As many scholars have noted, these algorithms tend to have disparate racial impacts. In response, critics advocate three strategies of resistance: (1) the exclusion of input factors that correlate closely with race; (2) adjustments to algorithmic design to equalize predictions across racial lines; and (3) rejection of algorithmic methods



altogether. *This Article's central claim is that these strategies are at best superficial and at worst counterproductive because the source of racial inequality in risk assessment lies neither in the input data, nor in a particular algorithm, nor in algorithmic methodology per se. The deep problem is the nature of prediction itself. All prediction looks to the past to make guesses about future events. In a racially stratified world, any method of prediction will project the inequalities of the past into the future. This is as true of the subjective prediction that has long pervaded criminal justice as it is of the algorithmic tools now replacing it. Algorithmic risk assessment has revealed the inequality inherent in all prediction, forcing us to confront a problem much larger than the challenges of a new technology. Algorithms, in short, shed new light on an old problem.*"

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<sup>i</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>ii</sup> See, e.g., *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983) (holding that to “deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine ... would be contrary to the fundamental fairness required by the Fourteenth Amendment”); see also Statement of Interest of the United States at 1, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC (M.D. Ala., Feb. 13, 2015) (“Incarcerating individuals solely because of their inability to pay for their release ... violates the Equal Protection Clause of the Fourteenth Amendment.”) (citing *Tate v. Short*, 401 U.S. 395, 398 (1971); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970); *Smith v. Bennett*, 365 U.S. 708, 709 (1961)). But see Brief for Amici Curiae Am. Bail Coalition et al., *Walker v. Calhoun*, No. 16-10521 (11th Cir. June 21, 2016) (arguing that this line of case law has no application in the pretrial context).

<sup>iii</sup> *Pierce v. City of Velda City*, 4:15-cv-570-HEA (E.D. Mo. June 3, 2015); *Jones v. City of Clanton*, 2:15-cv-34-MHT (M.D. Ala. Sept. 14, 2015); *Thompson v. Moss Point, Miss.*, 1:15-cv-00182-LG-RHW (S.D. Miss. Nov. 6, 2015); *Walker v. City of Calhoun, Ga.*, 4:15-cv-170-HLM (N.D. Ga. Jan. 28, 2016); *O'Donnell v. Harris Cty.*, 4:16-cv-01414 (S.D. Tex. Apr. 28, 2017). The Department of Justice took the same position under the Obama Administration. See Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellee and Urging Affirmance of the Issue Addressed Herein at 3, *Walker v. City of Calhoun*, No. 16-10521-HH (11th Cir. Aug. 18, 2016); Letter from Vanita Gupta, Principal Deputy Assistant Att’y Gen., Civil Rights Div., Dep’t of Justice, and Lisa Foster, Director, Office for Access to Justice, to Colleagues 7 (Mar. 14, 2016), <https://www.justice.gov/crt/file/832461/download>.

<sup>iv</sup> U.S. Const. amend. VIII (“[E]xcessive bail shall not be required.”).

<sup>v</sup> *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

<sup>vi</sup> *United States v. Salerno*, 481 U.S. 739, 754-55 (1987).

<sup>vii</sup> *Id.* at 748-52.

<sup>viii</sup> *Id.* at 747, 750-52. The Supreme Court upheld the federal pretrial detention regime against (among other things) a procedural due process challenge on the ground that it provided for an adversarial hearing, guaranteed defense representation, required that the state prove “by clear and convincing evidence that an arrestee presents an identified and articulable threat,” directed that the court make “written findings of fact” and “reasons for a decision to detain,” and provided immediate appellate review. *Id.* at 751-52.

<sup>ix</sup> *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975); *Manuel v. City of Joliet*, 137 S. Ct. 911, 914 (2017).

<sup>x</sup> *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 199, 212 (2008).

<sup>xi</sup> 18 U.S.C. §§ 3141-50, 3062.

<sup>xii</sup> Wayne R. LaFare et al., 4 Criminal Procedure § 12.3(b) (3d ed. 2000).

<sup>xiii</sup> See generally ABA Standards, *supra* note 13.

<sup>xiv</sup> *Id.* at 42 (§ 10-1.4(c)-(e)), 110 (§10-5.3).

<sup>xv</sup> *Id.* at 110.

<sup>xvi</sup> *Id.* at 106 (§ 10-5.2).

# **Standing Firm for Justice: New York State's Bail Reform Law**

## ***Sampling of Supportive Articles, Editorials, Op/Eds, and Letters to the Editor***

### **Give the New Bail Reform Law Time to Work**

*The New York Times, Editorial, 2/18/20*

### **A Back-And-Forth to Bail Reform Comments**

*Albany Times-Union, Commentary, Chris Churchill, 1/30/20*

### **Lies and Misinformation will Doom New York Bail Reform**

*Albany Times Union, Commentary, Chris Churchill, 1/27/20*

### **Bail Laws a Lesson in New York's Strong Leadership**

*Albany Times Union, Opinion, John Grisham, Author, 1/25/20*

### **New Bail Reform Laws Make New York State a Safer Place**

*Albany Times Union, Commentary, Judge Karen K. Peters, 1/8/20*

### **Bail Reform Always Existed for the Rich**

For too long, defendants have been jailed only for their poverty

*Albany Times-Union, Column, Chris Churchill, 1/5/20*

### **There's Nothing to Fear in Bail Reform Law**

*The Long Island Herald, Editorial, 12/31/19*

### **Don't Retreat on Bail Fix**

*Albany Times Union, Editorial, 12/25/19*

### **NY's Coming Bail, Discovery Reforms Support Rule of Law**

*Syracuse.com, Commentary, Henry M. Greenberg, President, New York State Bar Association, 12/20/19*

### **Don't be Scared of Fearmongering Over Bail Reform**

*Newsday, Op/Ed, Serena Liguori, Executive Director, New Hour for Women and Children, 12/9/19*

### **Don't Delay Bail Reform**

*Buffalo News, Editorial, 12/7/19*

### **Impending Bail Reforms Make NY a More Just State**

*Times Herald Record, My View, Benjamin Ostrer, Past President of the New York State Association of Criminal Defense Lawyers (NYSACDL), 11/29/19*

### **The Alarmist Hype on Bail Reform**

*Olean Times Herald, Op/Ed, Barbara J. Kelley, Allegany County Public Defender, 11/25/19*

### **Lawyer Says Bail Reform Will Bring Fairness to System**

*Huntington Now, Article, 11/22/19*

### **Stop Complaining and Enact Bail Reform Laws**

*The New York Times, Editorial, 11/17/19*

## **Give the New Bail Reform Law Time to Work**

*The New York Times, Editorial, 2/18/20*

New York lawmakers appear poised to bow to the state's law enforcement lobby and weaken a law that just took effect. It just so happens that a campaign to roll back New York's landmark bail reforms is unfolding as Michael Bloomberg's presidential run forces a reckoning with stop-and-frisk, the policing tactic that led to the harassment and humiliation of millions of innocent people, most of them black and Hispanic boys and men, while Mr. Bloomberg was mayor of New York City. Police officials and prosecutors made arguments about stop-and-frisk that sound familiar in the current conversation about bail reform. **For over a decade, these officials assured Mr. Bloomberg and the public that the enormous human cost of stop-and-frisk was worth it, because the practice reduced crime and saved lives. They were wrong. When stops finally plummeted — first amid Bloomberg-era legal battles and later under Mayor Bill de Blasio — crime rates in the city actually fell.**

Now, law enforcement officials are again making arguments against reforms based largely on anecdotal evidence, and they are being given the same benefit of the doubt. It has been less than seven weeks since landmark criminal justice reforms went into effect statewide banning bail for defendants charged with most misdemeanor and nonviolent offenses. But already, prosecutors, police officials and others are cherry-picking cases and crime data to make a case for rolling back some of the reforms. "Violent criminals are being returned to the community and will know the names of their accusers and where to find them," the police commissioner, Dermot Shea, wrote in a *Times* Op-Ed on Jan. 23, lobbying for changes to the law. (A spokesman for Commissioner Shea said that he does support many of the reforms.)

It looks as if opponents of the reforms may get their way, at least in part. The Senate majority leader, Andrea Stewart-Cousins, under pressure to protect Democratic members in swing districts this November, has floated changes to the new law. Those changes include eliminating cash bail altogether, but giving judges more discretion to jail defendants they deem to be flight risks or defendants with problematic criminal histories. **Even before the reforms, New York law didn't allow judges to consider dangerousness when setting bail. Criminal justice experts have said doing so exacerbates racial disparities in the system. The history of cash bail shows why New Yorkers have reason to be cautious about giving such latitude to judges.** For decades in New York, judges routinely used their discretion to set bail that poor people could not pay. As NY1's Errol Louis noted recently, that's how the state ended up with so many people charged with low-level offenses behind bars before trial in the first place. **In 2017, the city's Independent Budget Office estimated that 72 percent of those incarcerated in the city pretrial were behind bars solely because they could not afford to post bail at their arraignments.**

What's really needed is a focused campaign by prosecutors, the police and others worried about crime to strengthen and increase funding for the state's mental health system. City officials estimate that roughly 40 percent of the individuals jailed at Rikers Island struggle with mental illness, so it's likely that many of the people accused of committing low-level offenses in New York need help, not punishment. **Rolling back the reforms would be a mistake. It's possible that the law would benefit from small changes, but those ought to stem from substantial data analysis, not from the bullying of elected officials by the state's law enforcement lobby.** Commissioner Shea and others who oppose many of the reforms argue that an uptick in crime in recent weeks is proof that the changes are a danger to the public. But policing experts, including New York Police Department analysts, have contended for years that crime trends should be studied over long periods of time. Dips and spikes in crime can be attributed to many causes, including the weather. This is especially true when the actual number of crimes is small, as is the case in New York City today.

These reforms were enacted by a Legislature and governor elected by New York voters, who in 2018 delivered Democrats a clear majority in the State Senate for the first time in years. If prosecutors, the

police or others believe that the law is causing public harm, it is their job to make a reasoned case. Instead, too many have resorted, once again, to whipping up fear over crime to defend policies that lead to over-policing and incarceration. Regularly missing from their lectures about public safety is any significant recognition of the ways these policies have harmed the safety and dignity of black and Hispanic people in New York. The Police Department went largely unchecked by Mr. Bloomberg. Mayors like David Dinkins and Mr. de Blasio who tried to hold the department accountable in basic ways were made to pay a terrible political price. It's no wonder that Ed Mullins, the president of the Sergeants Benevolent Association, a New York police union, felt so comfortable declaring war — his words — on Mr. de Blasio on Feb. 9. Then he scurried to the White House for a meeting with President Trump. "The Trump administration is very aware of the plight of police officers in NYC and is closely monitoring the situation. @realDonaldTrump has our backs!" he tweeted this week.

**In this context, the campaign against the bail reforms seems less about public safety than it does about power, devised to make clear that law enforcement remains an untouchable political force in New York politics. The state's elected officials should not allow themselves to be bullied. They should defend the law, and stand by their commitments to the voters.**

### **A Back-And-Forth to Bail Reform Comments**

*Albany Times-Union, Commentary, Chris Churchill, 1/30/20*

Bail reform is a hot topic in New York, so the big reaction to my Tuesday column didn't surprise me. The column was a defense of the reform and an attempt to confront the misinformation that some opponents are spreading. Many of you appreciated it. Many of you didn't, of course. For today, I thought I'd respond to some of that reaction. What follows are comments from readers, albeit edited for grammar and conciseness.

"I take offense that someone is allowed out after committing manslaughter."

**It is true that judges can no longer set bail for second-degree manslaughter, which is considered a nonviolent crime. But manslaughter defendants were previously "allowed out," so long as they were wealthy enough to make bail. Again, the reform eliminates cash bail for misdemeanor and nonviolent crimes, thus granting poorer defendants what wealthier counterparts already enjoyed. The system as it existed was blatantly unfair. Fear of a defendant's potential danger to the public was not previously a reason a judge could set bail. But even if you believe it should be used that way, why for second-degree manslaughter? If a defendant didn't intentionally do harm, how is he a public risk?**

"It has been less than a month and crime is up 31 percent in New York City. The law was well intentioned but needs refinement."

Police Commissioner Dermot Shea last week said robberies are up 32 percent in the city since the start of the year, and he blamed that and some other crime increases directly on bail reform, which went into effect Jan. 1. The increases are worrying, for sure, but I'd caution against drawing conclusions from three weeks of data. The city's rate of robberies, felony assault, shootings and murder were all up in 2019, before bail reform. And New Jersey did not experience a crime rise after enacting similar changes....

"Let's remember that before Jan. 1, some people released on bail were committing new crimes. So don't be surprised when it happens in 2020."

**Exactly! An accused burglar who was freed pretrial Jan. 15 could also have been freed before the reform for that very same burglary IF THEY HAD MADE BAIL. That's why so much of howling and fear mongering from prosecutors and politicians strikes me as dishonest. Also, as I said in Tuesday's column, a non-violent thief who can post \$3,000 bail is no more threatening than one who can't. The money is irrelevant, unless you believe that being poor makes a person inherently more dangerous.**

“If you do not interface with police as a criminal, you need no bail. The libs gloss right over this FACT! To be in need of bail means one probably did something.”

**Well, so much for innocent until proven guilty. It baffles me that some conservatives, who are typically skeptical of government power, make an argument that suggests being OK with a totalitarian police state. If the government says you did something, you did it? Vladimir Putin agrees.**

“My problem with the reform is that the judges don’t have the discretion to impose incarceration on any violent crime perpetrators, poor or rich.”

**Your problem is not with bail reform. Judges have rarely imposed incarceration on those accused of violent crimes. That’s why Harvey Weinstein, accused of rape and other crimes, is free on bail pending the outcome of his trial in Manhattan. That’s why Christopher Porco was free on \$250,000 cash bail before a jury found him guilty of murdering his father and attacking his mother in Delmar. Bail reform always existed for the rich. Please understand, though, that judges can still impose bail for violent offenses, and wealthier defendants can still post it. That has not changed. And while even some supporters of the reform would like more judicial discretion, it isn’t true that judges have none. They can impose oversight by a case manager, referrals to treatment or mental-health counseling, and, in some cases, electronic monitoring of defendants. Some of the more publicized cases of recent days — the ones being used to scare the public about bail reform — suggest that judges should use those tools more often.**

“Our law enforcement friends are whining that they got sandbagged by this legislation and denied an opportunity to participate in the process. If the chiefs, sheriffs and district attorneys didn’t hear the howling indignation that was building, one has to wonder why.”

Agreed. Bail reform didn’t just appear out of nowhere. It was a long time coming, and much of the law enforcement community has been too accepting of an immoral status quo that kept poor defendants charged with misdemeanor crimes in jail — simply because they were poor. Bail reform, which has proven surprisingly easy for prosecutors to condemn, is kind of a Trojan horse. Hidden inside is their real bogeyman: discovery reform (how evidence is handed over to the defense).

There is truth to what you say. But discovery reform is a topic for another day.

### **Lies and Misinformation will Doom New York Bail Reform**

*Albany Times Union, Commentary, Chris Churchill, 1/27/20*

A recent poll by the Siena Research Institute shows surprisingly strong support for much of what Gov. Andrew Cuomo and Democrats in the Legislature want to accomplish this year. More than seven in 10 New Yorkers, for example, support a ban on Styrofoam containers and a bond that would devote \$3 billion to environmental restoration. Marijuana legalization is supported by nearly 60 percent of voters. The only unpopular policy in the poll, as it turns out, is one that Cuomo and the Democrats have already passed: Bail reform. Roughly half of New Yorkers now say bail reform is bad for the state, the poll said, and the legislation is even less popular outside of New York City. Only 32 percent of upstate residents support it. The numbers are a stark warning to those of us who believe bail reform was an important step toward a fairer system — one that grants poor defendants the same rights as the wealthy. Clearly, bail reform is losing the public-relations fight, putting intense and increasing pressure on lawmakers to undo what they’ve done.

**The falling poll numbers are understandable, given the blatant fear mongering in recent weeks from opponents of the changes — the prosecutors and politicians who are spreading misinformation that obscures the truth. Even before the howling of recent weeks, there was tremendous confusion about what bail reform actually changes. So, let’s go over this again.**

**Bail reform has done nothing new; the rights it grants to everybody have always existed for the rich and powerful. When men like Sheldon Silver or Harvey Weinstein are accused of crimes, they post bail or large bonds and remain free unless convicted at trial. In Silver's case, he has remained free even after his conviction. Where's the outrage? Why aren't prosecutors and Republican lawmakers holding press conferences about that? Even defendants accused of horrendously violent crimes — Chris Porco, who attacked his parents with an ax in Delmar, is the example I used in a prior column — were allowed to remain free pending their convictions. (Porco was wealthy enough to post \$200,000 bail.)**

**Would the now-convicted killer have been more dangerous to the public if he'd failed to come up with the money? Of course not. His wealth was irrelevant, but he would have stayed in jail without it. Likewise, a non-violent thief who can post \$3,000 bail is no more threatening than one who can't. The money is irrelevant; being poor doesn't make a defendant inherently more dangerous. But as practiced, New York's legal system has long operated as if poverty equals danger. It was a tremendous perversion of what a fair justice system should be. It was an affront to a constitution that insists on every person, rich or poor, being treated equally under the law.**

**Consider that before reform more than 60 percent of the 21,000 New Yorkers in jail on a given night had not been convicted of a crime but, unable to make bail, were simply waiting for their trial to begin.** That's according to the Vera Institute of Justice, a research organization focused on criminal-justice issues. In 2015, 62 percent of the jail population in Albany County was held on misdemeanor charges, also largely because of inability to make bail. In Saratoga County, it was 70 percent, the Vera Institute says. Infamously, a teenaged Kalief Browder, accused of stealing a backpack in the Bronx, waited three years in Rikers for a trial that never came — a nightmare that brings to mind the inhumanity of totalitarian regimes, one that should have no place in a free and fair society. And so, the Legislature enacted bail reform, which does something very simple: It eliminates cash bail for misdemeanor and non-violent crimes. It says that if you are poor, you won't sit in jail just because you are poor.

**If you disagree with bail reform, well, what's a better alternative? Should we go back to the old system, allowing poorer defendants to sit in jail while men such as Weinstein, charged with two counts of rape and other charges, are allowed to walk free?** Or should all defendants, rich and poor alike, simply sit in jail before their trials? I'm not arguing for that the second option, although it would be more fair, in a sense. It would at least treat the rich and poor equally. But you'll notice that equality isn't what prosecutors and politicians are asking for as they denounce bail reform. They aren't saying that the Weinsteins of the world shouldn't be free before trial. They're saying poor defendants shouldn't be.

**They're arguing for a return of the status quo. They're arguing for a legal system that, for anyone who believes in what the constitution says, should be an affront to patriotism.**

### **Bail Laws a Lesson in New York's Strong Leadership**

*Albany Times Union, Opinion, John Grisham, 1/25/20*

This month, New York became the first state to contemporaneously and seriously reform its money bail system and roll back Draconian discovery practices that produced countless wrongful convictions and other miscarriages of justice. These common sense and imminently fair new laws were passed earlier this year thanks to the leadership of Gov. Andrew Cuomo and the state Legislature. The bail reform law eliminates cash bail for most misdemeanor and non-violent felony offenses. This is a significant change in the law and procedure because it will allow those charged with lesser offenses — and, as always, presumed legally innocent — to avoid jail pending a court hearing, and instead continue working and supporting their families. In other words, those charged will be allowed to continue on with their lives while waiting on an appearance date. Cash bail is supposed to ensure that

the accused will show up in court, but research has shown that 95 percent do not miss their court dates even when they cannot afford bail.

**Cash bail has effectively criminalized poverty. Poor people, many of whom are innocent, sit in jail because they cannot “bail out,” while their cases are pending. In fact, cash bail has led to the mass incarceration of legally innocent people before they are proven guilty. It is time to end cash bail in this country, and, thankfully, New York is taking a heroic leadership role in its abolition.**

Similarly, the new discovery law is both fair and overdue. Most importantly, it takes on a huge contributing factor of wrongful convictions. Under the old law, prosecutors were permitted to withhold crucial evidence — such as witness statements and police reports — until the day of the trial, making a fair defense impossible. Now, under the new law, defense attorneys can properly advise their clients with full knowledge of the evidence in the case and prevent them from pleading guilty to crimes they did not commit. As documented in the Innocence Project’s [guiltypleaproblem.org](http://guiltypleaproblem.org) website, 95 percent of felony convictions are obtained through guilty pleas. Eighteen (18!) percent of those who pled guilty were not guilty of the crimes they pled to.

Other wrongful convictions result from trials. The importance of the new discovery law was brought into stark relief with the exoneration of Felipe Rodriguez at the Queens County Supreme Court on Dec. 30. At the hearing, 30 years after his wrongful conviction, it was revealed that critical material — information that existed in police files — had never been handed over to the defense. Queens prosecutors stated on the record that the documents in the police files would have impeached the chief informant witness against Rodriguez, as well as the integrity of the police investigation itself. Indeed, the nature of the materials withheld was so plainly significant that prosecutors joined in the Innocence Project’s motion to vacate the murder conviction and dismissed all charges.

The miscarriage of justice that marked Rodriguez’s original trial is precisely what the new law is intended to prevent. Had it been in effect in 1990, Rodriguez likely would not have lost 30 years of his life to this wrongful conviction and his son, just three years old at the time of his trial, would have had the opportunity to grow up with a father by his side.

**Innocent people who are poor and stuck in jail because of bail are often coerced into pleading guilty to multiple charges — just to close their case and begin their sentences. The new legislation is a positive step toward eliminating the wealth- and race-based detention that has plagued New York for decades. This law will change the lives of thousands of New Yorkers — all presumed to be innocent. Mass incarceration makes none of us safer and tough-on-crime policies only criminalize poverty and race. The laws passed last year in Albany are a lesson in leadership. Let’s hope the prosecutorial community will join these leaders rather than double down on antiquated and unfair laws.**

*John Grisham is an author and a member of the board of directors of the Innocence Project.*

**New Bail Reform Laws Make New York State a Safer Place**  
*Albany Times Union, Commentary, Judge Karen K. Peters, 1/8/20*

Our collective understanding of how best to address safety and advance justice is constantly evolving. Change in our justice system is always met with some opposition. We New Yorkers see this tension in real time as various groups and entities respond to the sweeping new criminal justice reforms that passed the New York Legislature this past spring. Whether opponents are driven by a sincere concern for public safety or by inadequate preparation for implementation, I offer a more reasonable and nuanced perspective. **Notwithstanding the fearmongering that has occurred in opposition to the changes to the bail and discovery statutes, they will undoubtedly make our state a safer and more just place to live.**

According to the Innocence Project, guilty pleas are more likely to be coerced from defendants who are incarcerated pretrial. This disproportionately affects low-income people and people of color. Under the outgoing bail law, pretrial incarceration has been overwhelmingly based on the amount of money in a person's bank account. If you have access to money, you go free. If you don't, you sit behind bars. We know that we do not need to keep legally innocent people with low-level charges in jail. We know that pretrial incarceration leads to job loss and disruption of families.

**The new bail law levels the playing field; pretrial incarceration is grounded upon the crime charged, not the wealth of the individual charged. Moreover, the new bail laws provide that people who will be released pretrial under court oversight can be supervised within the community in ways well beyond what the current law provides. This can include treatment for substance use and mental health issues, electronic monitoring with GPS tracking when a judge determines it to be necessary, home detention, curfew and the seizing of passports.**

The state has also enacted desperately needed reforms to our discovery laws, which will now require prosecutors to disclose evidence to a defendant early in a case. These reforms will bring more fairness and transparency to the criminal legal process. They will also prevent abuses in situations where individuals convicted of very serious crimes were ultimately exonerated because prosecutors or law enforcement failed to disclose — or in some cases proactively concealed — exculpatory evidence. Over the past 30 years, our state has paid out \$670 million in penalties and settlements for wrongful convictions, many of which may well have been prevented had the new full-disclosure discovery laws been in effect. Not only have these failures cost the taxpayers millions of dollars, but innocent people have spent years incarcerated, thereby allowing the true perpetrators of the crime to remain free.

**As a former trial judge, appellate judge and presiding judge of the Third Department, I can envision firsthand the systemic benefits of these reforms. They are long overdue, will result in a fairer criminal justice system, and will make a true difference for justice. Whether conservative or progressive, we all want our system of justice to be fair. Gov. Andrew Cuomo and the members of the Legislature who championed these reforms should be commended for leading the way.**

*Karen K. Peters was the first woman to be elected as a state Supreme Court justice within the 28-county Third Department, which stretches from Albany to the Finger Lakes and the Canadian border. She retired as presiding justice in 2017.*

### **Bail Reform Always Existed for the Rich**

For too long, defendants have been jailed only for their poverty  
*Albany Times-Union, Column, Chris Churchill, 1/5/20*

After Sheldon Silver was arrested on federal corruption charges, he put up a \$200,000 bond and walked out of court. Silver has since been convicted and sentenced to seven years in prison. And yet the former speaker of the state Assembly is still free, pending another appeal of his conviction. It's outrageous, but par for the course. The bail system, as it has long existed, has always worked for the rich and the powerful. Well, you say, Silver committed white-collar, federal crimes with no hint of violence. You can't compare the federal system to the state system. And you can't compare a guy like Silver with the accused criminals who are suddenly being freed (at least until their trials are over) under the controversial bail reform enacted by the Legislature.

OK, then let's talk about Christopher Porco. In 2004, Porco attacked his parents with an ax as they slept in their Delmar home. It was a heinous, vicious and violent crime. And yet Porco, a child of relative privilege, was able to amass the \$250,000 needed to post bail, and he remained free as he waited for the trial where a jury convicted him. How was it OK for Porco to be freed on bail while New Yorkers accused of much less serious crimes sat in cells awaiting their trials, simply because they were poor?



It wasn't, which is why the Democrats who control the Legislature eliminated cash bail for misdemeanor and non-violent crimes. Regular readers of this column will know that I don't compliment the Legislature and the governor often, but this time, at least, they deserve credit. Even a broken cuckoo clock gets it right now and again.

Now, let's talk about Kalief Browder. In 2010, Browder was accused of stealing a backpack in the Bronx. Bail was set at \$3,000, but it might as well have been \$3 million. Browder and his family couldn't pay it. So the teenager spent *three years* in Rikers waiting for his trial. Security video from inside the notorious jail showed Browder being beaten by guards and inmates.

In an especially cruel twist, Browder's robbery charge never went to trial. The case fell apart when his accuser vanished. Browder, in the end, had been jailed only for his poverty. The damage was lasting. Browder never recovered from the torture of Rikers; he never again felt free. Five years after his arrest, Browder committed suicide by jumping from a second-floor window with an air-conditioner cord wrapped around his neck.

**That isn't America. The nightmare inflicted on Browder violates everything this country is supposed to stand for.**

**Totalitarian governments let people rot in jail without a trial. Our system, operating under a Constitution that honors God-given rights, is supposed to be better than that.**

***Innocent until proven guilty.* It's a fundamental concept. Just because the government says you did something doesn't mean you really did it. The government has to prove its case before throwing you in jail.**

**Do we still believe in the presumption of innocence? Lord, I hope so. But you wouldn't know it from the reaction to bail reform in recent days.**

Politicians, prosecutors and other practitioners of shallow outrage are wailing at the very notion of defendants going free prior to their trials. The rhetoric is overheated, designed to inspire fear and motivate votes. *Mayhem! Danger! Lock your doors or run for the hills!* **Left unsaid is that people accused of crimes — even crimes as horrific as Porco's — were already going free pending their trials, so long as they had money. The new law is only giving the poor the same privileges as, well, the privileged. How is a thief who can come up with \$3,000 less of a threat than one who can't? Does being poor make you inherently more dangerous? Please don't say yes.**

**Of course, under state law judges were supposed to set bail based on a defendant's flight risk, not on the potential risk to public safety. Not many of us would blame a judge, though, for setting bail high for a person who was a true danger. But in practice, many judges got into the habit of imposing bail as a routine matter of course. The system was thoughtless and bureaucratic, and it created new victims — like Browder, who was neither a flight risk nor a threat.**

Could the new law be tweaked and improved? No doubt. (That's especially true of its changes to discovery rules.) Should lawmakers restore some judicial discretion? Perhaps. But don't let the noise and the fear mongering obscure what is truth. Bail reform is about punishing defendants for actual crimes, and not just for being poor. It's about ensuring that we live up to the promise of American greatness.

**There's Nothing to Fear in Bail Reform Law**  
*The Long Island Herald, Editorial, 12/31/19*

New York State's new, long-overdue bail reform law, which passed last April and took effect Jan. 1, is desperately needed. Changes to the law were last made in 1971. Requiring anyone and everyone to

make bail, regardless of the offense, led to large numbers of mostly poor African-American and Hispanic offenders being incarcerated for months while awaiting trial or a plea agreement.

The new law will allow most defendants who are charged with nonviolent crimes and misdemeanors to be released after their arraignment without having to make bail. Hardliners have argued against the new law, saying it will allow thousands of potential offenders onto our streets, where they could continue their criminal ways.

**News flash: Any one of these offenders could have been on the streets in the past, if only they had had the cash to make bail, but they didn't, so they stayed locked up. Meanwhile, if you were affluent enough to afford bail, you got out of jail, and were free to carry on with your life with your family — and potentially earn a living.**

**Because of economic inequities, the old bail system tended to favor white defendants over those of color. And a Harvard University study showed that punishment tended to be harsher for blacks and Latinos. Thus, racial bias was built into the system from the outset.**

According to research by New Hour for Women and Children, of the 2,400 people in jail on Long Island before Jan. 1, roughly 70 percent were unable to make bail during the pre-trial period. On Jan. 1, 619 prisoners were eligible for release from the Nassau County jail, according to state records. Roughly one-third were expected to be released. And the county announced on Dec. 31 that it would let go 29. The new law has obvious personal and financial benefits for low-level defendants. Rather than languishing in jail, they could be working, which many would do if not for their incarceration. Beyond that, however, there are financial benefits for us all.

**The five most populous counties in New York State outside of New York City, including Nassau, spend an average of \$114 million per year to incarcerate prisoners, or about \$115,000 per inmate, according to the Civil Liberties Union. Releasing low-level defendants who couldn't make bail on Jan. 1 could save the county hundreds of thousands, if not millions of dollars a year — money that it desperately needs to help fill its coffers, or that could be used to fund youth and drug-prevention services to stop crime before it starts. Will there be problems with bail reform? Questionable cases, quirks in the system? No doubt. On balance, though, bail reform is good for us all.**

### **Don't Retreat on Bail Fix**

*Albany Times Union, Editorial, 12/25/19*

THE ISSUE: Opponents of bail reform warn of dire consequences come Jan. 1.

THE STAKES: The state should not delay justice for the sake of political agendas. As the law in New York stands today, a person accused of breaking into a home can go free pending trial — if he can post bail. Starting next month, he can still go free, but without posting bail. **The only real change here concerns defendants' ability to purchase their freedom while awaiting trial. Their guilt or innocence is irrelevant in either scenario. Yet to hear critics breathlessly describe it, society is on the verge of anarchy.**

**Let's take a breath, New York. Change can be scary, and those opposed to the reforms that will take effect Jan. 1 are working mightily to scare the heck out of the public. The critics are primarily Republicans in the state Legislature who have long opposed these reforms, and district attorneys who have benefited from the imbalance of power they wield in the criminal justice system. Simply put, defendants who can't make bail are often stuck with a choice: cut a deal to plead guilty to a lesser offense — ensuring them a criminal record for life — or languish in jail for weeks or months even though they haven't been convicted of a crime, leaving them unable to work, feed their families, or keep paying the rent and other bills. It deprives them, in short, of liberty and property without the due process that both the U.S. and**

**New York constitutions guarantee before those things can be taken away from any of us by government.**

Opponents like to cite the burglary example for good reason. Under reforms enacted this year, bail will still be required for most violent felonies. Second-degree burglary is a violent felony, but it will be exempt from bail, because violence isn't needed to make the charge. All that's necessary is that the burglary occur in "a dwelling" — which can be the lobby of an apartment building, or a store with apartments upstairs. So what could be a non-violent crime, without even the threat of or potential for violence, is elevated to a violent felony simply because of an overly broad definition in the law. That's not to say that all burglaries aren't violent. They can and do occur in dwellings when people are at home. The potential for violence is implicit and terrifying. That arguably should be considered a violent felony.

**The problem is, the hair-on-fire alarmism leaves no oxygen in the Capitol for a reasonable discussion on how the law might be more nuanced. Nor does it take into account the reality that even under the present system, a person accused of second degree burglary can still go free pending trial if they have the means to post bail. They'll be no more or less dangerous, and no more or less entitled to the presumption of innocence, come Jan. 1.**

What's needed is not to put these reforms on hold, as some critics demand. Rather, we need legislators to see how these reforms play out, and be willing and nimble enough to fix the law if the dire predictions of critics come to pass. But we should not delay justice, especially not for the sake of fears manufactured by those who make political careers out of them.

**NY's Coming Bail, Discovery Reforms Support Rule of Law**  
*Syracuse.com, Commentary, Henry M. Greenberg, President,*  
*New York State Bar Association, 12/20/19*

**The rule of law is the foundation of our nation. It is the simple idea that everyone — from the wealthiest and most powerful to the poorest and most downtrodden — is entitled to equal treatment under the law.** Supporting the rule of law has been at the heart of the New York State Bar Association's (NYSBA) mission since it was founded 144 years ago. There are times when supporting the rule of law means changing existing law. Such was the case when NYSBA advocated for new laws, effective on Jan. 1, that will reform the cash bail system and give criminal defendants more information about the evidence prosecutors have against them.

The new laws reduce the need to impose bail for those charged in misdemeanor and most nonviolent felony cases, which account for 90 percent of all arrests statewide. Requiring bail in such cases creates a two-tier system of justice. The wealthy are far more likely than the poor to meet monetary bail requirements and avoid incarceration. Moreover, requiring the poor to post bail or face jail leads to devastating human costs. Jailed defendants unable to make bail spend unnecessarily long periods behind bars, cutting them off from their families and potentially leading to the loss of jobs and homes.

**In minor criminal cases, bail is almost always inappropriate. It is imposed on those who have been charged with criminal wrongdoing, but whose cases have not been adjudicated. The presumption of innocence is an essential element of the rule of law. Simply being accused of committing a crime is not an indication of guilt or a reason to be imprisoned pending trial.** As a matter of fundamental fairness, persons charged with criminal conduct should know the evidence against them. However, defendants in criminal cases often receive limited information prior to trial. The information is often provided so late in the process that it is not possible to properly investigate it, secure additional evidence that would support a defendant's innocence or allow defendants to adequately weigh a guilty plea.

Under the discovery reform law that will be effective in January, prosecutors must turn over evidence to defense attorneys within 15 days of arraignment. This change will make the system

fairer for defendants and bring New York in line with other states and jurisdictions across the country. **To be sure, the coming bail and discovery reforms represent significant changes in the way our state's justice system works. Bail reform underscores the need for community-based supervision programs that help to ensure that individuals return to court to face the charges against them.** And discovery reform adds to the workload of courts and hard-working prosecutors, who will need additional resources to effectively implement the new requirements. **Ultimately, for our democracy to thrive, the rule of law must prevail. The coming bail and discovery reforms will bolster the rule of law by helping to ensure equal treatment under the law for all New Yorkers.**

### **Don't be Scared of Fearmongering Over Bail Reform**

*Newsday, Op/Ed, Serena Liguori, Executive Director, New Hour for Women and Children, 12/9/19*

A desperately needed and long-overdue bail reform bill passed the State Legislature this year, and Gov. Andrew M. Cuomo signed it into law. Now, some prosecutors with the District Attorneys Association of New York are employing a campaign of fear to either change the law or delay its implementation, and keep more people in jail to await trial.

Let's be clear: Despite the fearmongering, this reform is necessary. Our organization, New Hour for Women and Children-Long Island, works in jails and knows their realities. This year, we worked with more than 1,000 women jailed in Suffolk County, offering support for them and their children.

**Ending money bail for people accused of misdemeanors and nonviolent felonies means more fairness and more safety for Long Islanders. Between Nassau and Suffolk counties, nearly 2,400 people languish behind bars each day. More than 70 percent are incarcerated pretrial, most on bail they cannot afford. Money bail creates a two-tiered system of justice: People who can afford bail return to their families and jobs, while people who cannot are locked up.**

Being in jail obliterates the possibility of equal justice. People in jail are far more likely to plead guilty, and most who do are never sentenced to prison. In other words, they are pleading guilty, regardless of guilt or innocence, just to go home. This should shock anyone who believes in fair and equal justice. Perhaps the most tragic bail injustice was the case of Kalief Browder, who spent three years on Rikers Island, including two years in solitary confinement, because he was unable to afford bail on a charge of stealing a backpack. After his release, he hanged himself. Most bail injustices don't reach that horrifying level, but every such case is unfair and unnecessary.

**Contrary to the misleading hypotheticals promoted by prosecutors, reducing pretrial jailing actually improves public safety because incarceration aggravates many of the root drivers of harm and crime: poverty, trauma, housing instability, unmet needs for mental and physical health, and untreated substance use disorder.**

**Our experience shows that targeted, individualized programs, not punishment, are what keep our communities safe. The women who work with us after release have only a 2% likelihood of being rearrested, compared to a 65% overall rearrest rate in Long Island's jails. Recognizing that and working with New Hour, the Suffolk County Sheriff's Department has taken groundbreaking steps: training qualified officers and providing rehabilitative prerelease planning. In fact, along with the sheriff's office, we are working to arrange for prerelease planning for those being released on their own recognizance (ROR) from court, starting Jan 1.**

**Despite this good work, jail is not a cost-efficient place to provide services desperately needed by our communities. Long Islanders suffer from lack of supportive and affordable housing and health care, including drug treatment and mental health services, while millions of taxpayer dollars are spent on our local jails.**

**As we work to successfully implement bail reform on Long Island, we must all understand the systemic challenges that lead people to incarceration. Often, the underlying pathways to**

crime begin with families in crisis. So, it's urgent that our communities be ready not just to limit money bail, but to support needed, lifesaving treatment programs as part of the solution.

*Serena Liguori is executive director of the nonprofit organization New Hour for Women and Children — Long Island in Brentwood.*

**Don't Delay Bail Reform**  
*Buffalo News, Editorial, 12/7/19*

If by calling for state officials to rethink bail reform, critics mean there are areas to tweak, we agree. But that's not what they seem to mean. Instead, they want Albany somehow to drop the bill it passed this year after some 18 months of effort because it is imperfect.

**State officials should look past those doubts and listen instead to Erie County District Attorney John J. Flynn, who for the past 18 months has implemented a policy similar to the legislation that will take effect on Jan. 1. He also has some concerns about the new law, but is a firm supporter. Calling worries about bail reform "a little overblown," he offered reassurance to those calling for a delay: "The world will not end come Jan. 1." In fact, the change in the law will benefit the cause of justice while reducing costs. And if Flynn's experience carries forward, it will do so without creating a serious risk of increases in crime or no-shows at subsequent court dates.**

Nevertheless, some critics, including many police agencies, are calling for the state, in some mysterious way, to back off a law that was debated for 18 months before being adopted this spring. It's an odd request. The law's history shows there was plenty of time for interested parties to make themselves heard and, what is more, its advocates note that states that have already enacted bail reform haven't seen an increase in crime and that defendants are actually more likely to show up for court appearances. "It has been studied. It works," said Orlando Dickson, a civic educator with the Partnership for the Public Good.

The point of the law is to ensure that people charged with low-level offenses are not jailed before trial simply because of poverty. A gainfully employed stock trader may easily manage \$1,000 bond, but a jobless store clerk, charged with a similar crime, is likely to sit behind bars until his case is resolved. **Race is also tangled up in the question of bail. Observations last year by the Partnership for Public Good found that white defendants were released without bail 17% more often than black defendants and 22% more often than Latino defendants. While the figures don't represent a scientific assessment, they are troubling nonetheless.**

**A welcome side benefit is that public costs can be significantly reduced. Speaking with The News editorial board last week, Flynn said that based on his own bail policy, the number of pretrial inmates in Erie County's two jails declined by 50% since September 2018. At an average per-inmate cost of \$164 per day, the savings top \$35 million, and that's just in Erie County... Change is frequently stressful and law enforcement is no less susceptible to that than anyone else. But this change has been well considered, implemented elsewhere and well considered by Erie County's calm and perceptive district attorney. Given that, there is no reason to delay.**

**Impending Bail Reforms Make NY a More Just State**  
*Times Herald Record, My View, Benjamin Ostrer, Past President,  
New York State Association of Criminal Defense Lawyers (NYSACDL), 11/29/19*

The bail and discovery reforms due to take effect on Jan. 1 should not be a cause for bell ringing by the district attorney. These laws are a step forward for fairness and equality. They help address both problems faced by low-income people and which contribute to wrongful convictions and other injustices. The discovery reforms lift the blindfold requiring disclosure of evidence more fairly and

quickly. The bail reforms guarantee that the poor will no longer be jailed because they cannot afford even modest bail.

**The governor and State Legislature did the right thing in passing these long needed improvements to our criminal justice system. We have many talented prosecutors and police in our region who want justice to be served and who will implement the reforms on Jan. 1.**

The bail reform law provides that people facing criminal charges may be subject to supervision, including, in some cases, electronic GPS monitoring or regular reporting. Training materials provided to judges by the state's Office of Court Administration describe the use of tools such as home detention, curfews and surrender of passports. Supervised release will make our communities safer and has been shown to work. New York City's program, started in 2016 has resulted in a reduction in felony re-offenses by persons on supervised release.

The Bail Reform Law continues to subject people accused of a violent felony to bail or detention by the judge. The law provides for cash bail for people charged with violent crimes and even non-violent sex offenses or who repeatedly fail to appear. Bail reforms improve justice, fairness and public safety. There can be no debate that under the current system significant bail can and is frequently posted resulting in unsupervised release of defendants pending trial.

**The New York State District Attorneys Association has exercised great impact upon criminal justice legislation and opposed meaningful change for many years opting to preserve the unfair status quo. Justice and due process require fairness in our bail system and discovery. The reforms make the system fairer for all New Yorkers and will save taxpayers money by reducing costly pre-trial incarceration while making our communities safer.**

People charged with most misdemeanors and certain non-violent felonies will no longer be subject to restrictive bail requirements. Reports from charitable bail funds in New York state confirm that bail is not necessary to ensure people return to court. About 95 percent of the people whose bail was paid by a community bail fund — from Suffolk to Tompkins and Onondaga counties — returned for all of their court dates.

Bail funds provided appearance reminders and connected people to needed social services. The discovery reforms require prosecutors to disclose evidence to a defendant early in a case instead of on the eve of trial. These reforms will result in the quicker resolution of many cases and increase fairness. It will reduce the likelihood of wrongful convictions, which have resulted in the payment of tens of millions in settlements to compensate for the enormous social cost to people exonerated because prosecutors or law enforcement failed to disclose exculpatory evidence. **Despite publicly claiming to support 'reform,' prosecutors have sounded false alarms in an attempt to delay implementation of these long overdue reforms. Justice delayed is justice denied.**

#### **The Alarmist Hype on Bail Reform**

*Olean Times Herald, Op/Ed, Barbara J. Kelley, Allegany County Public Defender, 11/25/19*

**Bail reform is coming to New York State on Jan. 1 and there is a great deal of misinformation and alarmist hype being circulated on this issue. Contrary to what you may have heard from various politicians, this is not the end of civilization as we know it. I can assure you that the sky is not falling.**

To understand what is really going on, we need to look beyond the fear-mongering. As of Jan. 1, individuals charged with most misdemeanor offenses and non-violent felonies will no longer be subject to pre-trial incarceration when they are unable to post bail. Essentially, the number of people who are charged with crimes and sent to jail upon mere arrest, before they are convicted of anything, will be greatly reduced.

**Statewide statistics show that under the current bail system roughly 65% to 80% of the local jail populations are being held pre-conviction at any given time. So, what the politicians and**

naysayers are advocating is perpetuation of a system where people are deprived of their liberty and sent to jail simply because they have been charged with a crime and are too poor to post bail.

Given that the presumption of innocence is a bedrock principle of our democracy, this point of view — that people should be jailed before conviction — is particularly disturbing. Also, often overlooked by those promoting the anti-reform talking points are two facts about the new legislation. Bail will still be an available option in cases alleging violence or sex offenses. Secondly, persons who have financial means have always had the ability to remain at liberty while their case is pending. It is the poor who have suffered the consequences of the current bail laws.

I have heard some offer the opinion that this reform is unnecessary in Upstate areas, that somehow the current system works just fine here. While specific rural issues may differ from those in the urban areas, this reform is intended to correct abuses statewide.

I have worked as a criminal defense attorney in Allegany County for more than 30 years and have seen countless abuses of discretion under the current system. For example, I have seen bail set at \$10,000 on a charge of aggravated unlicensed operation of a motor vehicle in the third degree, an unclassified misdemeanor under the vehicle and traffic law. My office routinely sees clients sent to jail pre-conviction for very minor offenses. This is done under the misguided notion that somehow the first appearance in court upon arrest should subject the defendant to judgment (guilty) and punishment (jail) at the complete whim of the local justice. All too often, this is how the question of bail is decided. Unfortunately, the real purpose of bail, to secure the defendant's return to court, has not always been the primary concern.

The new legislation is designed to correct these abuses. I suggest we focus on the facts rather than listen to the fear-mongering. We should all be proud that New York State has seen fit to make these legislative changes, and by doing so is moving toward a fairer and more just process.

### **Lawyer Says Bail Reform Will Bring Fairness to System**

*Huntington Now, Article, 11/22/19*

Prominent Huntington lawyer who has led cases as both a prosecutor and a defense attorney said Thursday that bail reform coming to New York State will provide balance to the justice system. The New York State Legislature passed laws eliminating bail for most misdemeanors and non-violent felonies, with some exceptions. The laws will take effect in January.

John LoTurco, who served as a prosecutor handling narcotics and major crimes cases in the Suffolk County District Attorney's Office and now defends clients, said the point of the bail system is to ensure that someone who is charged with a crime comes back to court. "I've complained about (bail) for years," he said. "Often there's higher bail on minorities than non-minorities and you're dealing with implicit bias." Under the reform law, LoTurco said, "for 90 percent of arrests, we will not have bail."

That doesn't mean, though, that everyone arrested will be immediately turned loose, he said. Those charged with sex offenses, domestic violence or DWI will be held, he said. In DWI cases, defendants would be held in police jail until arraignment but meanwhile, their licenses will be suspended. Those suspects aren't held on bail but police won't issue a Desk Appearance ticket to let them go free before arraignment.

Bail will be set for sex offenses. And, he said, domestic violence cases aren't necessarily classified as violent. But those arrested would not be issued a Desk Appearance Ticket, but would be brought

before a judge, who would issue a stay-away order and the accused is prohibited from having any contact with the victim. “The law hasn’t changed,” he said.

“If you hear from bail bondsmen, it’s a horrible thing,” LoTurco said. “But it’s been happening across the country and it’s worked quite well,” citing New Jersey, North Carolina and California as among the states that have eased or eliminated bail requirements. **“People have to remember that this is long overdue. Many states have similar bail reform and it’s working perfectly. We’re just catching up to other states.”**

**“Bail wasn’t meant to prevent future crime,” he said in response to those who fear an outbreak of crime by those awaiting trial. “Punishment comes at the finding of guilt.”**

*LoTurco, a partner in the firm Barket Epstein Kearon Aldea and LoTurco, is a Huntington native. While with the Suffolk County District Attorney’s Office, he prosecuted more than 25 jury trials, with a 100% conviction rate. He currently represents Christopher Loeb, who in 2012 was beaten by James Burke, then chief of department of the Suffolk County police. Burke pleaded guilty in the beating, went to prison and was freed last year.*

### **Stop Complaining and Enact Bail Reform Laws**

*The New York Times, Editorial, 11/17/19*

Across the country, a movement away from incarceration has been a rare point of consensus among Americans who can agree on little else. Yet talking about reform is one thing. Doing the work — asking for public trust while emptying cells in jails and prisons — will be harder. That’s what’s happening now in New York, where landmark criminal justice reforms are set to go into effect on Jan. 1. Beginning next year, people charged with misdemeanors and nonviolent felonies will in most cases be released without cash bail, pending their trials. In another reform, prosecutors will be required to disclose evidence to the defense within 15 days of an indictment instead of shortly before trial, a practice that prompted many a guilty plea before court proceedings even got underway. Similar reforms in New Jersey and elsewhere have reduced jail populations without endangering public safety.

Yet, in New York, on the eve of the reforms coming into force, a familiar chorus of concern has piped up. New York City Police Commissioner James O’Neill wrote in an op-ed in May that the law would have a “significant negative impact on public safety.” His successor, incoming Police Commissioner Dermot Shea, expressed similar views this month. Prosecutors and police unions across the state have issued ominous warnings. Republicans in recent days have introduced legislation that would not only roll back the reforms, which were approved by the Legislature earlier this year, but go further. One bill, introduced by state Sen. James Tedisco, R-Glenville, and Assemblywoman Mary Beth Walsh, R-Ballston, would put a one-year moratorium on the reforms. Experience elsewhere and ample research show that there is no reason to believe New York’s reforms will lead to mayhem or endanger the public.

**In Philadelphia, which eliminated cash bail for most misdemeanor and felony offenses in 2018, there has been no significant change in the percentage of people who show up for their court dates.** In New Jersey, which introduced its reforms in 2017, a report from the state’s Administrative Office of the Courts found no increase in crime associated with the reforms. Studies suggest the opposite may be true: that pretrial detention makes people likelier to commit future crimes.

Pretrial detention, which involves jailing people who have been arrested for a crime but not yet convicted of it, comes with enormous costs to individuals and society. Studies show that those held before trial are likelier to lose their jobs, their homes and custody of their children. Pretrial detention costs the United States an estimated \$14 billion each year. Reform is crucial to shrinking New York’s jail population.



**The focus should be on implementation: Gov. Andrew Cuomo and the state Legislature failed to include funding to help enact the reforms, a choice that means local officials will have to step up. Panic from the law-and-order crowd is nothing new in New York, which has often been surprisingly regressive on issues of criminal justice and policing.**

**There were the infamous Rockefeller drug laws of the 1970s that put generations of black and Latino New Yorkers in jail for minor offenses. Former New York City Mayor Michael Bloomberg and Police Commissioner Raymond Kelly used to issue dire warnings that reducing police stops of pedestrians under a practice known as stop-and-frisk would lead to an increase in crime. Their predictions turned out to be bunk — stops have plummeted, while crime remains at record lows. That's history worth considering as the old foes of reform sing their familiar tune. Prosecutors and police unions trying to thwart the will of the voters and undermine the public's trust in long-overdue reforms should instead get to work making the change.**

# THE DAILY DEBUNK: RAPID RESPONSE TO LIES, MISTRUTHS, & FEARMONGERING

<https://justicenotfear.org/>

In addition to Daily Debunks on Bail Fearmongering, scroll down to see the New York State map and explore the statistics of pre-trial detention by county. For instance, Erie County in 2018-2019 had 21,005 arrests of which 33% were felonies and 67% were misdemeanors, and 63% of people were held in jail pre-trial at a cost of \$278 a day.

JUSTICE  
NOT FEAR

NEW YORK STATE

THE TRUTH

LIES DEBUNKED

## THE DAILY DEBUNK: RAPID RESPONSE TO LIES, MISTRUTHS, & FEARMONGERING



2.19.20: ALBANY TIMES UNION

Fact Check: False  
"Bail Reform Blamed for Teenagers' Release"



2.16.20: NEW YORK POST

Fact Check: False  
"Brooklyn judge uses forgotten state law to bypass bail reform"



2.14.20: NASSAU COUNTY LEGISLATURE

Fact Check: False  
"New York State's controversial bail reform is putting public safety at risk"



2.13.20: NEW YORK DAILY NEWS

Fact Check: Misleading  
"Bail Reform Blamed for Man's Lengthy Record"



2.12.20: NEW YORK STATE SENATE

Capitulation  
"After Pressure Campaign From Law Enforcement, NY State Politicians Say They Will Change Bail Reforms"



2.11.20: MAYOR BILL DE BLASIO

Fact Check: Misleading  
"Mayor Blames Bail Reform for NYPD Statistics"



2.11.20: WRGB-ALBANY

Fact Check: Misleading, Fearmongering  
"Tedesco Raises Bail Reform Concerns Over Alleged Repeat Offender"



2.6.20: NBC NEW YORK

Fact Check: Lie  
"Bail Reform Law to Blame for Death of Man Set to Testify in MS-13 Case"



## **Judicial Power and Discretion Under the Current Bail Law**

1. Judges can set bail in cases involving:
  - a. violent felony or class A felony charges (except most drug charges)
  - b. allegations of sex offenses (including incest)
  - c. money laundering in support of terrorism & acts of terrorism
  - d. witness intimidation and tampering
  - e. a domestic violence offense where an order of protection has been violated
2. Judges can order a wide range of conditions of release including but not limited to:
  - a. check-ins with pretrial service agencies
  - b. restrictions on travel and owning/possessing firearms
  - c. supervised release
  - d. electronic monitoring
    - i. Electronic monitoring (EM) can be ordered for all felonies, domestic violence, and sex offenses, ensuring accused individuals meet a curfew, respect limits on their movement, and do not violate an order of protection.
    - ii. EM can be ordered in any case if the person has a felony conviction within the last 5 years.
  - e. an order of protection requiring the accused to stay away from a person or place
    - i. Violations of orders of protection can result in bail or remand.
    - ii. An order of protection can also forbid the person from owning or purchasing a firearm.
    - iii. The new “extreme risk order of protection” law permits a prosecutor, police officer, or family member to ask for an order requiring the accused to immediately surrender any known or suspected weapons. A police officer may also conduct a search for such weapons.
3. Judges can adjourn cases for very short periods to monitor compliance with conditions of release.
4. Judges are more limited in their power to jail someone and impose conditions at the pre-trial phase because the person is presumed innocent. Once a case has been resolved, judges have the full range of sentencing options.

### Judicial Power and Discretion in Specific Circumstances

#### **Mental Health Issues**

1. A judge can order that an accused person be civilly committed under Mental Hygiene Law 9.43. In such cases, the person is taken to the hospital directly from court and held. Within 3 days, a psychiatrist, not a judge, will decide if the person is a “danger to themselves or others.” If they find the person is a “danger to themselves or others,” they can keep the person until that is no longer the case.
2. While in the hospital, the patient receives mental health services designed to treat their illness and when they are ready to leave the hospital, they receive discharge planning. This system addresses the underlying illness, unlike incarceration, which would likely make their illness worse.

## **Domestic Violence**

1. If the accused violates an order of protection on the original case, whether or not it was a non-bail case, the judge can set bail or remand.
2. Some jurisdictions are developing pretrial conditions and programming specific to cases involving allegations of domestic violence.

## **Driving While Intoxicated**

1. The accused's driver's license can be suspended or revoked while the case is pending.
2. Judges can order a drug and alcohol assessment at the arraignment which must be completed within five days of the arraignment.
3. Judges can order a person to wear a SCRAM ankle bracelet which indicates if the individual has consumed alcohol.

## **Re-Arrest**

1. If someone is released on a felony charge and gets re-arrested on another felony charge, the court can set bail on the original felony. If the new charge is bail-eligible, the court can also set bail on that case.
2. If someone is re-arrested, the judge can also require additional conditions of release such as in-person and more frequent monitoring.

## **Non-appearance in court**

1. The judge can set bail if a person willfully and persistently misses court on their case.

01.27.2020

# **DEAR MEMBERS OF THE NEW YORK PRESS CLUB AND OTHER INTERESTED JOURNALISTS:**

**We are criminal law experts at universities and colleges in New York and across the country. Among us, we have decades of experience with New York’s criminal courts. We write to raise our concerns about the onslaught of misleading and alarmist coverage of the new bail reform laws that took effect on January 1, after years of hard work by directly impacted people, grassroots organizations, advocates, legal researchers, and lawmakers.**

Studies have shown that overuse of pretrial detention has **devastating costs to individuals as well as the community**, and that reducing the number of people who are unnecessarily detained in jail pretrial improves **public safety**. Rather than providing accurate and objective context about the new law, some local news outlets, such as CBS-New York and the New York Post, have merely amplified the fear-mongering voices of police union officials, prosecutors, and politicians who have long opposed bail reform. Within days of the law taking effect, many local outlets began a barrage of cherry-picked stories designed to stoke panic and outrage with headlines like **“Why New York criminals are celebrating the New Year.”** This divisive reporting furthers a troublesome false narrative that the new bail reform law is putting our communities in danger. It pushes New Yorkers to blindly reject the new bail reform law based on fear and bias, not facts. New Yorkers deserve better.

**New Yorkers depend on local journalism to provide honest coverage of the issues impacting their communities. Local reporting, especially reporting on crime, shapes the public perception and discourse about the safety of the community and the fairness of the criminal legal system. When reporters publish stories that are misleading, or reinforce false narratives based on fear and prejudice, they all but ensure that our justice system will continue to criminalize and incarcerate poor people and people of color, destroying families and communities, without making us safe – all because people act out of unfounded fear.**

One example is the **story** CBS-New York ran recently about an individual who was charged and released after allegedly spitting at a Port Authority officer. The headline initially read **“‘Absolutely Ridiculous’: HIV-Positive Suspect Released By Judge After Attacking, Spitting In Port Authority Officer’s Mouth”** and their social media handle initially described it as an “HIV Attack” (it has now changed its posts and headline, but did not retract the story). **As advocates who protested this coverage made clear**, HIV cannot be transmitted via saliva, but CBS irresponsibly spread this misinformation, encouraging stigma of people who live with HIV to instill fear of bail reform.

The case of Tiffany Harris is another example of how local news has misleadingly sought to incite rage against the new bail reform. Ms. Harris, a young woman living with mental illness, was charged with misdemeanor assault for allegedly slapping several individuals and making anti-Semitic statements.

Under the new law, Ms. Harris was released and able to receive mental health treatment instead of being detained at Rikers Island for inability to pay bond. The Post ran a series of articles with headlines like “**Bail reform is setting suspects free after string of anti-Semitic attacks,**” attempting to tie her misdemeanor case to unrelated serious and high-profile anti-Semitic attacks, leaving readers to think that because of bail reform, people who violently attack Jewish communities are running rampant. Rather than offering objective and honest context, these articles weaponize fear to undermine the new bail reform. Recognizing this danger, **Jewish legislators have spoken out**, rejecting the narrative that bail reform encourages anti-Semitic violence in the community.

There are countless important stories that are not being covered – of **individuals who have been released under the new law** and gone home to their families without the devastation of losing their jobs or housing. There are stories of individuals who are now able to get community-based treatment or care, rather than sitting in a jail cell. There are stories of individuals whose release under the new law has allowed them to maintain the vital roles that hold their families together and makes the community as a whole more safe. Those stories should be told.

Contrary to **Willie Horton**-like claims that bail reform will make New York more dangerous, the evidence shows that an overreliance on pretrial detention **makes us less safe**. Pretrial release can **effectively ensure that people return to court** and positively impact community safety. Under the new law, judges can order monitoring of individuals if there are flight risk concerns. They also still have the ability to impose bond in serious cases: most violent felonies, sex-related charges, and certain domestic violence charges remain cash bail-eligible. However, those kinds of cases are actually a small minority – historically, **only 10 percent** – of the cases that come through New York’s criminal courts.

The new bail law makes progress towards reducing economic and racial disparities in the criminal justice system. Under the old cash bail system, on any given day across New York State, **roughly 14,000 unconvicted people sat in jail** awaiting trial simply because they could not afford to pay for their freedom, not because their release posed a risk to the community. Those in jail pending trial are overwhelmingly poor and disproportionately people of color. Incarceration for even a few days, much less months or years, has devastating impacts on the individual, their family, and their community. Under the new law, fewer people will be forced to sit in jails because of an inability to afford an arbitrary fee. These steps are long overdue.

The danger of fear-driven news coverage cannot be overstated. These reforms are a critical first step towards a fairer criminal legal system and a stronger and safer New York. Continued examination, discourse, and engaging different viewpoints are essential to making this system fair and just for all of us, not just our most privileged. But if we want a truly just system and a safer community, we must move forward using facts, not fear, to guide us. **WE ASK THAT YOU REJECT THIS HARMFUL REPORTING AND MEANINGFULLY ENGAGE NEW YORKERS IN THIS EFFORT.**

Cc: *Governor Andrew Cuomo*  
*Assembly Speaker Carl Heastie*  
*Senate President Andrea Stewart-Cousins*  
*Sean Giancola (CEO and Publisher, New York Post)*  
*David Friend (Senior Vice President, CBS-New York)*



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