



January 27, 2019

Joint Legislative Committee on Public Protection
New York State Capital
State Street
Albany, NY 12210

RE: STATEMENT ON BAIL REFORM IN NEW YORK

Dear Joint Legislative Committee Members:

I am writing to give the thoughts of our organization to your committee and key policy-makers in New York on the issues surrounding bail reform. This includes some discussion of the budget proposal in addition to several legislative bills that are in the same vein.

The proposal from the administration and several legislators will reject a civil rights tradition that has existed for nearly 400 years that sets New York apart from every other State in the Nation, and may also cause some public safety and accountability issues.

- i. **These Proposals Allow for Denying the Right to Bail Altogether and Imposing Preventative Detention for the First Time in the History of the State of New York; The Legislature Should Reject this Move**

In the 1980s, there was serious constitutional debate among scholars as to whether persons could be preventatively detained, that is detained without the ability to post bail or get released on their own recognizance based on some showing of a danger to the community, that is, the risk of committing a new crime. In fact, the debate specifically over whether the Federal Bail Reform Act of 1984, which first allowed for preventative detention by denying the right to bail in the federal bail system was unconstitutional. At time, the Government had denied bail and preventatively detained Anthony Salerno.¹

¹ https://en.wikipedia.org/wiki/Anthony_Salerno



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Senior U.S. Court of Appeals Judge for the Second Circuit Amalya Lyle Kearse² ruled against the constitutionality of preventative detention in a split 2-1 decision:

The system of criminal justice contemplated by the Due Process Clause--indeed, by all of the criminal justice guarantees of the Bill of Rights--is a system of announcing in statutes of adequate clarity what conduct is prohibited and then invoking the penalties of the law against those who have committed crimes. The liberty protected under that system is premised on the accountability of free men and women for what they have done, not for what they may do. The Due Process Clause reflects the constitutional imperative that incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes.³

Of course, Judge Kearse's opinion was then reversed in 1987 by the U.S. Supreme Court, with Chief Justice Rehnquist authoring the majority opinion allowing for broad preventative detention for the first time in the United States of America.⁴

Justice Thurgood Marshall's dissent in *Salerno* may not have won the legal day, but we believe it wins the policy debate every day as to whether preventative detention should be allowed in the first place:

This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court holds otherwise. Its decision disregards basic principles of justice established centuries ago and enshrined beyond the reach of governmental interference in the Bill of Rights.

...

² Judge Kearse was the first woman appointed to the U.S. Court of Appeals for the Second Circuit, and the second African-American to serve as a Judge on that Circuit, the other being U.S. Supreme Court Justice Thurgood Marshall.

³ *United States v. Salerno*, 794 F.2d 64 (2nd Cir., 1986).

⁴ *United States v. Salerno*, 481 U.S. 739 (1987).



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Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be "dangerous." Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power. Over 200 years it has slowly, through our efforts, grown more durable, more expansive, and more just. But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves. **Today a majority of the Court applies itself to an ominous exercise in demolition. Theirs is truly a decision which will go forth without authority, and come back without respect.**⁵

To go to preventative detention is to necessarily reject Justice Marshall's dissent in *Salerno* and to instead embrace Justice Rehnquist's allowance of what he termed regulatory detention. Indeed, Justice Rehnquist gave New York State the power to do this, and Justice Marshall instead asks us to collectively have the courage and self-restraint to protect ourselves.

States around the country in the 1980s and since then took the lead of the federal government, and enacted a variety of harsh preventative detention statutes that hinged on proving by clear and convincing evidence a flight risk or danger in order to allow for expanded preventative detention. Prior to then, most states only allowed for detention in capital cases.

New York rejected this preventative approach ever since, even as New Jersey went to such system in 2017 and New Mexico expanded preventative detention in 2016. Of course, several states have recently rejected similar constitutional amendments in Delaware, Idaho, and Texas.

New York also failed to follow the lead of the 46 states which allowed considerations of dangerousness to staturily and in practice creep into the bail setting decision, and instead focusing judge's attention on considerations of appearance and flight only. Of course, that lack of tradition in other states is which then opened the door to a system of *sub rosa* preventative detention, where considerations of dangerousness and other constitutional and statutory considerations drive excessive bails (at least as required solely to guarantee appearance) but defendants are not able to show an abuse of discretion on appeal.

The Administrations' proposal and that of other legislative proposals reject this tradition of the right to bail in New York which has existed since before statehood. For the

⁵ *Id.* at 755-67.



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first time in New York's history, the legislature and governor are opening the door to allowing the government to detain someone to deny their right to post bail and then either detain them indefinitely either by directly proving dangerousness or through what I would call the back door—the creation of statutory considerations meant for judges to consider in determining risk of flight that are a thinly veiled way to tell a judge to get to consider dangerous indirectly without doing so directly. All of the proposals put forward would so dramatically shift the power to the government, despite all best intentions, and shift New York's bail policy back to 1985.

Of course, the Federal Government's implementation of the Bail Reform Act of 1984 has nearly tripled pretrial incarceration from 24% in 1983 to 72% today.⁶ The trend has been an increasing one, with the U.S. Marshals expressing concern as early as 1989 that the federal detention facilities were bursting at the seams. In the more modern era, the State of Maryland shifted away from allowing discretion to set bail to this bipolar detain or release decision. The result was to spike jail populations because judges and prosecutors chose jail, spiking the pretrial population in Baltimore over 20% in the first year. In New Jersey, which is touting success for what is really the use of citations instead of arrest, if a person is arrested in New Jersey they have a 50-50 chance of getting a motion to detain. This has gone up dramatically from the roughly 1/3 chance of getting a motion to detain when the system began. Other examples abound of the failure of these systems.

In fact, Professor Laurence Tribe explained, at the time the preventative detention movement had kicked off in the late 1960 and early 1970s, why these systems will always face greater incentive to incarcerate:

Once the government has instituted a system of imprisonment openly calculated to prevent crimes committed by persons awaiting trial, the system will appear to be malfunctioning only when it releases persons who prove to be worse risks than anticipated. The pretrial misconduct of these persons will seem to validate, and will indeed augment, the fear and insecurity that the system is calculated to appease. But when the system detains persons who could safely have been released, its errors will be invisible. Since no detained defendant will commit a public offense, each decision to detain fulfills the prophesy that is thought to warrant it, while any decision to release may be refuted by its results. **The inevitable consequence is a continuing pressure to broaden the system in order to reach ever more potential detainees. Indeed, this**

⁶ <https://escholarship.org/uc/item/6p31t6hv>



pressure will be generated by the same fears which made preventative detention seem attractive in the first place.⁷

Another article worth reviewing prior to endorsing preventative detention policies is *Preventative Detention: A Constitutional but Ineffective Means of Fighting Pretrial Crime*.⁸ In it is the problem of the false positives in preventative detention, that is the idea that we are going to lock up a lot of innocent people without bail to stop the few guilty:

Professor Ewing, commenting on this issue, argued that the accuracy of crime prediction is higher than the Harvard study would suggest, but still characterized the risk of error as unacceptable. He reviewed the potential for clinical predictions of criminal behavior and concluded that the rate of false positives ranges from 54% to 65%. He also noted that these studies assumed that the person predicting criminal behavior was a trained clinician or social scientist who relied on "sophisticated multivariate analysis," not a judge who is more likely to err by relying on other factors. Indeed, judges may often err on the side of detention because they will thereby make "fewer demonstrable mistakes" and because it will be difficult for them to distinguish between arrestees with similar criminal records and present indictments.⁹

Ultimately, this why it was concluded that even if governments could use preventative detention, to do so would reap no benefits at the cost of trammeling on individual liberties. And this is why these policies need to be rejected in New York.

The final point is that the legislation allows for detention on the basis of flight risk by a preponderance of the evidence, and widens that to cases where there is a willful failure to appear or a pattern of failing to appear. This will allow wide-swaths of misdemeanor and felony defendants to face detention. For example, we have received numbers from one state indicating that the average rate of failures to appear in a case where there is a failure is approximately 1.6. Which means that there is more likely than not to be two failures to appear than one. If we assume that none of the first failures to appear are willful, and we assume prosecutors will seek preventative detention in cases of a second failure, and we assume half of those will get detention. So, we can safely assume ½ of those who fail to appear will inevitably get a motion to detain. If we assume a safe 15% failure to appear (FTA) rate in misdemeanor

⁷ Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 U. VA. L. REV. 371, 375 (1970)

⁸ Scott D. Himsell, *Preventive Detention: A Constitutional But Ineffective Means of Fighting Pretrial Crime*, 77 J. Crim. L. & Criminology 439 (1986).

<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6520&context=jclc>

⁹ *Id.*



cases, then that will result in detention in 7.5% of those. That sounds great, until systems see exploding failure to appear rates when the use of bail declines, as in Houston, Texas where the results have been more in the 40-50% range. Assuming a 40% FTA rate in New York then leaves 20% detainable. So less the accountable the system, the more FTA's will climb, then bringing forward the self-fulfilling prophesy of then detaining more people to stop them.¹⁰

It is also worth noting that 50 civil rights groups in California opposed these preventative detention policies, which ultimately became law. A referendum drive was launched to then stop that law, which will not take effect until 2021, if the voters approve it.¹¹

II. Relying on Risk Assessment Algorithms to Make Decisions Encouraged and Allowed in Some of These Proposals; The Legislature Should Reject the Move to Expand Algorithms in Bail Setting and Criminal Justice

Robert Werth of Rice University contends that the use of algorithms in the criminal justice system fortifies the legitimacy of the system and allows to continue to grow. He explains in part the growth incarceration and probation and parole based on the increased use of such algorithms, called risk assessments, since 1970. Said Werth: "It has been argued that risk assessment tools could help stem the tide of mass incarceration. However, the evidence suggests that thus far, risk assessment instruments have contributed to expanding the number of people enmeshed in the criminal justice system – encompassing imprisonment, probation and parole."¹² He further stated:

I would contend that risk assessment has, to this point, helped organize the penal state and fortify its legitimacy. Producing offenders and penal subjects as risky beings and reproducing them as such over time, undergirds and provides ideological support for incarcerating, supervising, regulating, and criminalizing a massive number of people, as well as for imposing an array of restrictive post-penal measures to more and more individuals. And the rise of this historically unprecedented legal-penal complex has occurred alongside, and in interaction with, the proliferation of risk knowledges, discourses and technologies.¹³

¹⁰ In fact, the misdemeanor judges in Harris County issued a new bail policy where they are now going to apparently seek preventative detention in misdemeanor cases, which is contrary to the Texas Constitution.

¹¹ <https://www.kqed.org/news/11707702/referendum-to-block-bail-law-appears-headed-for-ballot>

¹² <http://news.rice.edu/2018/06/06/study-risk-assessment-tools-may-increase-incarcerations-rates/>

¹³ Theorizing the Performative Effects of Penal Risk Technologies: (Re)producing the Subject Who Must Be Dangerous, Robert Werth <http://ambailcoalition.org/download/24/risk-assessments/835/performance-effects-risk-tech-robert-werth-rice-university.pdf>



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Joining the chorus was also more than 100 national civil rights groups, as part of the Leadership Conference on Civil Rights who called for an end to the use of pretrial risk assessments in the United States due largely to concerns of lack of transparency, racial bias, and validation issues.¹⁴ “In the statement, the groups underscore that risk assessment tools are not a panacea to reforming our unjust and broken bail systems, and that, in fact, **these tools can worsen racial disparities and allow further incarceration.**”¹⁵

Not to mention that over 100 civil rights groups in New York already told the Governor that they do not support the two key legislative comments presented here, adding considerations of dangerous and detention and relying in risk assessments in the system:

We, the undersigned organizations, are united in the belief that: we do not have to add dangerousness to New York’s bail statute to reduce our pretrial detention population; the use of risk assessment instruments to predict dangerousness will further exacerbate racial bias in our criminal justice system; and the use of these instruments will likely lead to increases in pretrial detention across the state.¹⁶

Further, 138 other community organizations joined this chorus against the heart of this bail reform package on December 8, 2018 in a letter to the Governor:

We cannot abide legislation that maintains other for-profit influences or replaces money bail with mass community surveillance, racially-biased risk assessment instruments, or an expansion of “preventative” detention.

Yet, that is what is precisely on the table here—to enact pretrial supervision, a new dragnet to supervise those charged but not convicted, and then to implement a system of risk based preventative detention and expanding the use of risk assessments. This is so contrary to the direction that New York appears to be going in, that it is astounding to even consider that these legislative proposals could become law. There is also significant other research that demonstrates that these risk assessment processes don’t achieve reductions in jail populations and cause further harm to defendants and the system.¹⁷

¹⁴ <https://civilrights.org/more-than-100-civil-rights-digital-justice-and-community-based-organizations-raise-concerns-about-pretrial-risk-assessment/>

¹⁵ *Id.*

¹⁶ Letter to Governor Cuomo from more than 100 community groups in New York, dated November 2017: <http://bds.org/wp-content/uploads/Bail-Reform-Letter.pdf>

¹⁷ Risk Assessment Research <http://ambailcoalition.org/download-center/#24-risk-assessments>



III. New York's Bail System Stands Alone and the National Talking Points Don't Square with Reality

The tradition of bail as a mechanism to guarantee appearance is one that New Yorkers have not abandoned. And they should not abandon it. If anything, reforms should go to that point, which is maintaining the sanctity of bail and not allowing other considerations to creep into what is already a fairly good system as compared to the rest of the nation. This is one of the reasons why New York ranks in the lower ten in per capita incarceration in the United States, not an acceptable number but better than nearly most.

Unlike California, for example, the bonds in New York are extremely low, often a fraction of the costs of bond in California. The average felony bond in New York City is \$5,000. In the nation, it is \$10,000. In California, it is over \$50,000, ten times higher than New York City. San Francisco, for example, has the second highest bail schedule in the nation.¹⁸ Even misdemeanor bonds in San Francisco are set at the approximate average felony bond in New York. As mentioned, the bonds in New York are lower because judges cannot get into this risk-predicting business, basing bail and whether or not the person is going to do it again, and instead have to focus on appearance and the standards that bear on that.

Second, the concerns of due process are not present in New York, although we would always support speeding up the process of bail and making improvements to increase the system. In fact, I often advocate for the second *de novo* hearing that is afforded to criminal defendants in New York as a policy solution in states that have woeful due process procedures. For example, one of the federal civil rights cases involved holding a defendant on a \$160 bond for public intoxication for over 10 days before he was able to get in front of a judge, only to be released on his own recognizance. We would encourage taking a look at due process procedures in New York however to see if there are opportunities.

Certainly, there are concerns with indigent parties in the criminal justice system, but I would point out that New York was the first state to authorize charitable bail funds to try to get at this problem, a practice that is on extremely shaky legal grounds in other states.

IV. Eliminating Commercial Bonds Will Eliminate a Key Economic Incentive to Decarcerate and Will Harm Defendants

¹⁸ <http://bailbondsdirect.com/bail-schedules/San-Francisco--County-Felony-Misdemeanor-Bail-Schedule.pdf>



First, bail agents have an economic incentive to decarcerate, and will bail out all persons they can under their particular guidelines. Without this economic incentive to put pressure on the system and force the speedy release of clients, the bureaucracy could proceed on unmolested by simply taking their time to decide who gets bail and then taking as much time as they need to process a bond and release someone. Bail agents facilitate a typical third-party transaction as quickly and expeditiously as they can. The competition for the business guarantees steady economic pressure on the state to release from jail, but to also do it quickly.

Second, bail agents offer payment plans that are not allowed to collect interest on such plans. Eliminating that option will force many defendants to post full cash, which is a situation that occurred in the City of New Orleans when the bonds were all made cash only and the option of a surety was denied to defendants during a short-run pilot project. A commercial bail bond is not for everyone, as many should be released on their own recognizance as they are today, but that option is a necessary option to protect the choice of defendants and allow another mechanism to expeditiously get out of jail pending trial.

Third, supervision as an alternative seems an easy pathway, but the trammeling of defendants by putting them into the system before conviction is not worth the costs or the benefits in terms of crime control or appearance. Pretrial agencies have no arrest powers and may not compel a defendant. A law enforcement official would first have to act to make the dragnet a reality. Second, the costs of such systems are so great in terms of the benefit, and there will always be pressure to pass the costs onto defendants, which we think is inappropriate. New York should not create a new pre-conviction dragnet of probation.

V. Enacting Speedy Trial Reforms is the Surest Way to Decrease Issues in the Bail System

When the Bail Reform Act of 1984 was passed, many testified that the need was not to fix the bail system so much as it was to decrease the time period between arrest and trial or disposition. This has been clear for more than a generation, and would actually eliminate the need for bail reform:

One commentator has asserted that if the Speedy Trial Act is fully implemented, pretrial crime would be reduced by 50%. These empirical findings comport with judicial experience. Judge George L. Hart noted that if trials could be held "within weeks to two months of the arrest," there would be no need to amend the previous Bail Reform Act. Judge Harold Greene agreed, noting that if trials were held quickly the problem of crime on bail would be greatly diminished because "many crimes are committed in the first 45 to 60 days" after



arrest. Judge Green also noted that "the mere fact that a speedy trial is available would be a much greater deterrent to crime than what we have now, when it takes a year to a year and a half to have a criminal case tried in the district court."¹⁹

In addition, I had one candid conversation on bail reform with a State Attorney General who said he believes that the answer to the problem, when considering resource issues, is to have the incarcerated population on a speedier trial track than those who are at liberty. New York should take seriously this idea, as I think it can solve many of the ills.

Sadly, the system of preventative detention is going to have a full-blown adversarial hearing to try future dangerousness and risk of flight within 48 hours of arrest, and require full discovery to be exchanged in 24 hours including all *Brady* material. As one judge said of the Bail Reform Act of 1984, if we're going to do all of that, why don't we just have the actual trial instead.

Enacting speedy trial reform is the most neutral, bipartisan way to move the dial forward on this issue, and we encourage the Administration and legislature to move swiftly in this direction. We also have a slate of other reforms that are designed to improve the bail system that we encourage the Administration and legislature to take a look at.²⁰

VI. No Major Reform of This Size Has Passed in Any State Without Significant Study, None of Which Occurred Here

We have participated in reform panels in many states. Anytime significant legislation has either been proposed or enacted, there was a panel of experts appointed to take a serious look at the particular issues in each state and make recommendations for reform. These included California, Colorado, New Mexico, New Jersey, Ohio, Connecticut, Washington, Idaho, Delaware, Virginia, and many others.

VII. Conclusion

We would love to be part of the conversation to take a serious look at improvements to New York's bail system, which we believe had not occurred as it has in other states. We think private bail is an important mechanism in the system, and we look forward to working with you

¹⁹ Scott D. Himsell, *Preventive Detention: A Constitutional But Ineffective Means of Fighting Pretrial Crime*, 77 J. Crim. L. & Criminology 439, 473-474 (1986).


²⁰ The Fourth Generation of Bail Reform, American Bail Coalition <http://ambailcoalition.org/download/17/4th-generation-of-bail-reform/801/the-4th-generation-of-bail-reform.pdf>



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to build on that tradition in New York that not only should you want to keep but is something that should be a point of pride for all New Yorkers.

Sincerely,

DocuSigned by:

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