

To: Governor Andrew Cuomo
From: Over 100 Community & Advocacy Groups across New York State
Re: Bail Reform in New York
Date: November 2017

Dear Governor Cuomo,

We are aware that your administration is exploring bail reform as outlined in your previous State of the State addresses. As advocates for criminal justice reform, we share your desire to reduce New York's pretrial detention population.

While we urge your administration to take decisive action to reduce the State's pretrial detention population, we are deeply concerned about efforts to amend the existing bail statute to require that judges consider a person's risk of future dangerousness. **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.**

Adding dangerousness is both counterproductive and unnecessary to the aim of decarceration. New York should, instead, build on existing law and implement changes to reduce pretrial detention statewide. New York's bail statute was specifically crafted to accomplish significant reductions in our pretrial detention population. Our statute, however, is not currently used to its full potential. Efforts in New York City to bring down the jail population and increase rates of pretrial release show what is possible within the context of current law. Rather than amend the statute to include dangerousness, your administration should encourage judges to fully implement our existing law. Comprehensive reform must (1) ensure strict limitations on the use of pretrial detention, (2) eliminate race- and wealth-based disparities, and (3) ensure individualized justice and thoughtful detention decisions through robust due process.

"Dangerousness" Risk Assessments Are Ineffective, Exacerbate Racial Disparities, and Will Likely Increase New York's Jail Population

At a time when the public and policymakers have prioritized reducing the State's jail population, we should reject the inclusion of additional reasons to jail presumptively innocent people. We should, instead, seek a comprehensive approach to bail reform that will strengthen due process, ensure careful and thoughtful determinations about the use of pretrial detention, and guarantee reductions in its use.

New York does not currently allow judges to consider the risk of future dangerousness in making bail determinations. This makes our bail statute one of the most progressive in the country. In fact, the Legislature specifically considered and rejected adding dangerousness to New York's bail statute when it was drafted,ⁱ based largely on concerns that such determinations would be too speculative and would disproportionately impact low-income communities of color.ⁱⁱ Those concerns are still valid today.

Adding considerations of dangerousness to the New York bail statute—coupled with the introduction of actuarial risk assessment instruments (RAIs)—might seem to offer a ready-made solution to the problems facing New York. New Jersey, for example, has experienced a reduction in its pretrial detention rates following recent reforms. However, there are important differences in criminal procedure and practice that do not guarantee New York would experience similar reductions. In New Jersey, pretrial detention decisions are reached only after a rigorous evidentiary hearing held within days of a defendant’s first appearance. People accused of crimes have a robust right to discovery in advance of these hearings, ensuring that important evidence is turned over early and often, and they also have meaningful speedy trial rights if detention is ordered. In New York, on the other hand, evidence can be withheld from someone accused of a crime until the day of trial, and cases can drag on for months or even years in certain counties. The new pretrial discovery rule announced by Judge DiFiore is intended to address the lack of meaningful discovery under New York law, but is insufficient to ensure fairness and due process. RAIs are ultimately not a panacea or substitute for the hard work of creating more due process, more safeguards, and more alternatives to jail. Too often, these tools are expected to accomplish difficult culture changes inside our courts, but they can easily move culture to a worse, rather than better, position on pretrial release.

Dangerousness RAIs in no way guarantee reductions in the State’s jail population, and there is good reason to believe that they would increase reliance on pretrial detention. A soon-to-be-published study by Professor Megan Stevenson of Antonin Scalia Law School at George Mason University finds that Kentucky’s adoption of a new RAI “had negligible effects on the overall release rate, [failure to appear] rate, [and] pretrial rearrest rate.”ⁱⁱⁱ A separate report found that Lucas County, Ohio, actually saw its pretrial detention rates *increase* and the rate at which people plead guilty at first appearance *double* since implementing a dangerousness RAI.^{iv} Adding dangerousness to New York’s bail statute could very well lead to increases in the State’s jail population, particularly on Rikers Island in New York City.

Further, RAIs present a false promise that we can accurately predict the future dangerousness of people charged with crimes. We can’t—and attempts to do so will harm low-income communities and communities of color, while likely increasing local jail populations. Studies have shown that, **among people released pretrial, only 1.9% are actually re-arrested for violent felonies.**^v While sensational cases in the media might suggest otherwise, **instances of re-arrest for violent felonies in New York are equally rare.**^{vi} In turn, the ability of RAIs to predict the risk of violent crime accurately is exceedingly limited. Even among people labeled “high risk,” rates of re-arrest for violent felonies are exceptionally low—well under 10%.^{vii} Even on their own terms, they are of limited utility.

The inability of RAIs to accurately predict dangerousness is particularly troubling given that studies have shown that even facially neutral RAIs will inevitably place more people of color in “high risk” categories, mathematically guaranteeing that there will be a disproportionate number of “false positives” among people of color.^{viii} Racial disparities of this type are hard-wired into RAI algorithms, with some studies finding that “bias in criminal risk scores is mathematically inevitable.”^{ix} This means that there will be a larger share of people of color who will *not* be re-arrested, but who will nonetheless be categorized as “high risk,” leading to disproportionate rates

of pretrial incarceration and negative case outcomes. This would present a significant step backward in addressing structural racism in New York’s criminal justice system.

RAIs are only as good as the data that goes into them; yet every one of these tools that is currently in use relies on data derived from a broken and discriminatory criminal justice system that disproportionately targets and harms people of color. This data is often outdated and incomplete, and based on arrest information rather than the outcome or facts of individual cases. Where initial inputs are tainted by structural racism, the resulting tools will inevitably reflect and exacerbate those disparities. Laurel Eckhouse, with the Human Rights Data Analysis Group, succinctly states this problem: “Inputs derived from biased policing will inevitably make black and Latino defendants look riskier than white defendants to a computer. As a result, data-driven decision-making risks exacerbating, rather than eliminating, racial bias in criminal justice.”^x For this reason, it is particularly concerning that any dangerousness RAI would necessarily draw on data from the era of Stop and Frisk and Broken Windows policing in New York City—as well as from statewide data that has been shaped by one of the great shames of our state, the Rockefeller Drug Laws. While those laws have been reformed, the legacy of their discriminatory impact carries on.

Finally, dangerousness RAIs are inconsistent with principles of transparency and individualized justice. RAIs, driven by opaque and often proprietary computer algorithms, present a complete “black box” to the public and, more importantly, to people charged with crimes whose futures would be determined by their results. More fundamentally, RAIs, particularly those that try to predict dangerousness, undermine the criminal justice system’s commitment to individualized justice. RAIs tell us nothing about the specific person that they score, but instead rely on historical group data—the past conduct of other people—to place individuals into broad risk categories. The categories and labels these instruments produce could tremendously influence and change judicial behavior, and introduce biased data that undermines the presumption of innocence. At best, it is an open question whether risk assessments can exist in harmony with basic constitutional principles. This is particularly troubling in light of both our limited ability to predict future behavior with real accuracy and the potential for exacerbating racial disparities.

The primary goals of any bail reform effort should be reducing and limiting the use of pretrial detention and increasing fairness. Adopting dangerousness and RAIs would be a step in the opposite direction. We firmly believe that the existing bail statute’s focus on ensuring people’s return to court is appropriate and that there is no pressing or legitimate need to change the underlying considerations driving pretrial detention decisions.

The Current Bail Statute Already Provides Tools to Shrink Jail Populations and Reduce Reliance on Money in Our Pretrial Detention System

New York’s bail statute, enshrined in Criminal Procedure Law §§ 500-540, includes a total of nine forms of bail and requires judges to consider a person’s ability to pay when setting bail. Despite the menu of options available to judges, and a mandate to set *at least* two forms of bail, judges almost exclusively rely on the two forms of bail that can be the most difficult for people to afford—cash bail and insurance company bond—and rarely inquire into a person’s ability to pay. This contradicts the core objective of the statute, which was specifically intended to reduce pretrial detention rates by creating four new forms of bail that would require little to no money be

deposited in order for a person to be released.^{xi} One such form, an unsecured bond, requires no upfront cash payment and has been shown to be as effective as secured bonds in ensuring that a person comes to future court dates.^{xii} For over thirty years, Madison County judges routinely approved unsecured bonds for bail in a highly successful process with a local community organization. Greater reliance on these bonds could end our two-tiered system, in which the rich go free and the poor do not, and would not require changing our existing statute.

All of these issues can be addressed under the *existing* bail statute by:

- Educating stakeholders, raising awareness of additional forms of bail, and encouraging judges to set alternative forms of bail that are less onerous than insurance company bonds;
- Simplifying the associated paperwork and procedures required for alternative forms of bail;
- Ensuring that courts are conducting the mandatory inquiry into a person's ability to pay before selecting a form of bail;
- Encouraging judges to impose the least onerous conditions necessary to ensure a person returns to court; and
- Holding the bail bond industry accountable through robust regulation and intensive oversight.

New York already has one of the most progressive bail statutes in the country. Your administration should take steps to ensure that it is used to its full capacity.

There Should Be Strict Limitations on the Use of Pretrial Detention and Individualized Justice Should Be Strengthened

We urge your administration to take the best of the existing bail statute and build on it. To fully realize the reduction in the State's jail population we all hope to see, we should: (1) strictly limit the use of pretrial detention, (2) mandate individualized justice and thoughtful detention decisions, and (3) work to eliminate race- and wealth-based disparities. Adoption of dangerousness RAIs will not achieve these goals. A more comprehensive approach to structural bail reform must embrace the following principles:

- New York must eliminate pretrial detention and money bail for all misdemeanors and nonviolent felonies and create a presumption of release for violent felonies.
- Pretrial conditions, including detention, must be determined through individualized evidentiary hearings held immediately after a person's first court appearance. On the record, judges must detail: why bail was set, why the amount and form of bail was selected, and why the individual will be able to gain release with the conditions that have been set. Judges must regularly revisit detention decisions whenever a person remains incarcerated over an extended period of time.
- For-profit bail bonds must be eliminated. Commercial bail bonds are a particularly onerous form of bail, and the only type of bail that requires consumers pay an upfront, non-refundable fee that families lose no matter the outcome of the case. An estimated \$14 to \$20 million in legally charged fees were paid to for-profit bail bond companies in New York City in 2016, alone.^{xiii} This estimate does not even account for illegal fees that families are often charged or for the collateral that is withheld by bondsmen.

- If money bail is set, courts must set the amount and form at a level the person can afford.
- The state must track and regularly report on racial disparities in pretrial detention decisions in every county.

These are just the starting points for a discussion on true pretrial justice reform. Comprehensive reform will require stronger discovery laws, to ensure the prosecution cannot withhold evidence from the defense until the day of trial. It will also require robust speedy trial laws, to ensure no person is incarcerated for years before the resolution of their case.

Conclusion

There is a growing consensus in New York that we must close jails, eliminate racial disparities and wealth-based detention, and redirect resources to initiatives that support and build communities. Dangerousness and RAIs will not achieve these goals. A more comprehensive approach is needed.

We would welcome the opportunity to work with you on developing a plan of action to safeguard constitutional rights, reduce jail populations, and build communities. Thank you for considering our views.

Sincerely,

Listed in alphabetical order by org name

106 Signatories as of 7:50 am on 11/15/2017

- **5 Boro Defenders** (NYC)
- **Albany County Public Defender**
- **Allegany County Public Defender**
- **Alliance for Quality Education** (Statewide)
- **Alliance of Families for Justice** (Harlem, Albany, and Statewide)
- **American Friends Service Committee** (Statewide)
- **Amistad Long Island Black Bar Association**
- **Antiracist Alliance** (Statewide)
- **Association of Legal Aid Attorneys – UAW Local 2325** (NYC)
- **Bernard Harcourt**, Professor of Law & Professor of Political Science, Columbia University
- **BOOM!Health** (Bronx)
- **BronxConnect (Urban Youth Alliance)**
- **Bronx Defenders**
- **Bronx Freedom Fund**
- **Brooklyn Community Bail Fund**
- **Brooklyn Defender Services**
- **The Brotherhood/Sister Sol** (NYC & National)
- **CAAHV Organizing Asian Communities** (NYC)
- **Campaign for Alternatives to Isolated Confinement** (NYC)
- **Capital Area Against Mass Incarceration**
- **Center for Appellate Litigation** (NYC)
- **Center for Community Alternatives, Inc.** (Syracuse & NYC)
- **Center for Law and Justice** (Albany)
- **Challenging Incarceration** (Statewide)

- **Chief Defenders Association of New York**, Mark Williams
- **Child Welfare Organizing Project** (NYC)
- **Citizen Action of New York** (Statewide)
- **Columbia County Public Defender**, Robert Linville
- **Common Justice** (Brooklyn & the Bronx)
- **Community Service Society of New York**
- **DAYLIGHT** (NYC)
- **Decarcerate Tompkins County**
- **Defending Rights & Dissent** (National)
- **Discovery for Justice** (Bronx & Statewide)
- **Drive Change** (NYC)
- **Families Together in New York State**
- **The Fortune Society** (NYC)
- **Genesee County Public Defender**, Jerry Ader
- **Grand St. Settlement** (Lower East Side)
- **Harm Reduction Coalition** (Statewide & National)
- **The Homeless and Travelers Aid Society of the Capital District, Inc.**
- **Housing Works** (Statewide & National)
- **Human Rights Watch** (US Program), John Raphling
- **Immigrant Defense Project** (NYC)
- **Innocence Project** (Statewide)
- **Interfaith Impact of New York State**
- **Jews for Racial & Economic Justice** (NYC)
- **Justice and Unity for the Southern Tier** (Binghamton)
- **JustLeadershipUSA** (NYC & National)
- **Katal Center for Health, Equity, and Justice** (Albany & Statewide)
- **Labor-Religion Coalition of New York State**
- **LatinoJustice PRLDEF** (National)
- **Legal Action Center** (Statewide)
- **The Legal Aid Society** (NYC)
- **Legal Aid Society of Nassau County**, N. Scott Banks
- **Legal Aid Society of Westchester County**
- **LGBTQ Community for Racial Justice** (Hudson Valley)
- **LPS/LIFE Progressive Services Group, Inc.** (Mount Vernon)
- **Madison County Bail Fund, Inc.**, Marianne Simberg
- **Make the Road New York** (Statewide)
- **Middle Collegiate Church** (NYC)
- **Mid Hudson Jews for Racial Justice** (Statewide)
- **Milk Not Jails** (Statewide)
- **Mobilization for Justice** (NYC)
- **Nassau County Criminal Courts Bar Association**
- **Nassau County Jail Advocates**
- **Second Chance Committee, National Action Network** (NYC)
- **National Alliance on Mental Illness, NAMI-NYS (Criminal Justice)**
- **National Alliance on Mental Illness, NAMI-Huntington**
- **Neighborhood Defender Service of Harlem**
- **New York City Books Through Bars**

- **New York City Jails Action Coalition**
- **New York Civil Liberties Union**
- **New York Communities for Change**
- **New York County Defender Services**
- **New York Harm Reduction Educators (NYC)**
- **New York State Association of Criminal Defense Lawyers, John Wallenstein**
- **New York State Prisoner Justice Network (Albany & Statewide)**
- **The Office of the Appellate Defender (NYC)**
- **Partnership for the Public Good (Buffalo)**
- **Peace and Justice Task Force of the Unitarian Church of All Souls (New York)**
- **Peer Network of New York (Statewide)**
- **Prisoners' Rights Task Force (Buffalo)**
- **Queens Law Associates**
- **Queer Detainee Empowerment Project (Statewide)**
- **Release Aging People in Prison/RAPP Campaign (Statewide)**
- **Second Chance Reentry, Inc. (Long Island)**
- **Social Responsibilities Council of Albany Unitarian Universalists**
- **Southern Tier AIDS Program (Ithaca)**
- **St. Ann's Corner of Harm Reduction (Bronx)**
- **STEPS to End Family Violence (NYC)**
- **Steuben County Office of the Public Defender**
- **Syracuse Jail Ministry, Keith Cieplicki**
- **Tompkins County Assigned Counsel Program**
- **Ulster County Public Defender**
- **United Voices of Cortland**
- **Urban Justice Center (NYC)**
- **VOCAL-NY**
- **VOICE-Buffalo**
- **Washington Heights CORNER Project**
- **Washington Square Legal Services Bail Fund**
- **Wayne County Public Defender, James Kernan**
- **The West Side Commons (NYC)**
- **Woodstock Jewish Congregation Task Force to End the New Jim Crow**
- **Working Families Party**
- **Youth Represent (NYC)**

**For more information, or to be added as a signatory, please contact:
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- ⁱ David Burnham, “State Unit Drops Detention Plan,” *The New York Times* (Sept. 3, 1969), available at <http://query.nytimes.com/mem/archive/pdf?res=9405EFDF1031EE3BBC4B53DFBF668382679EDE>.
- ⁱⁱ Aryeh Neir and Neil Fabricant, “NYCLU Legislative Memorandum #20” (Feb. 6, 1969), available at http://www.nycourts.gov/library/nyc_criminal/penal-law-bartlett/099.pdf.
- ⁱⁱⁱ Megan Stevenson, “Assessing Risk Assessment,” 54, *George Mason University Law and Economics Research Paper Series* (Forthcoming, 2017) (acknowledging the use of risk assessment instruments before the state shifted to use of the Arnold Foundation’s RAI, the Public Safety Assessment).
- ^{iv} Human Rights Watch, “Not in it for Justice,” 99-100 (April 11, 2017), available at <https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly>.
- ^v Baughman, Shima Baradaran and McIntyre, Frank, “Predicting Violence,” 527, *Texas Law Review*, Vol. 90 (2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1756506.
- ^{vi} Qudsia Siddiqi, “Predicting the Likelihood of Pretrial Failure to Appear and/or Re-Arrest for a Violent Offense Among New York City Defendants: An Analysis of the 2001 Dataset,” 12, *NYC Criminal Justice Agency* (January 2009), available at <https://goo.gl/WK2813> (finding that, in their 2001 at-risk sample, only 3% of accused people were re-arrested for a violent offense).
- ^{vii} For example, the Laura and John Arnold Foundation found that only 8.6% of people flagged as “significantly more likely to commit an act of violence if released before trial” by their RAI (the Public Safety Assessment) were actually arrested for a new violent crime. See Laura and John Arnold Foundation, “Results from the First Six Months of the Public Safety Assessment-Court in Kentucky” (July 2014), available at <http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf>.
- ^{viii} See Julia Angwin et al., “Machine Bias,” *ProPublica* (May 23, 2016), available at <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.
- ^{ix} Julia Angwin & Jeff Larson, “Bias in Criminal Risk Scores Is Mathematically Inevitable, Researchers Say,” *ProPublica* (Dec. 30, 2016), available at <https://www.propublica.org/article/bias-in-criminal-risk-scores-is-mathematically-inevitable-researchers-say>.
- ^x Laurel Eckhouse, “Big data may be reinforcing racial bias in the criminal justice system,” *The Washington Post* (Feb. 10, 2017), available at https://www.washingtonpost.com/opinions/big-data-may-be-reinforcing-racial-bias-in-the-criminal-justice-system/2017/02/10/d63de518-ee3a-11e6-9973-c5efb7ccfb0d_story.html?utm_term=.e78f54f265d9.
- ^{xi} “Proposed New York Criminal Procedure Law: 1969 Bill,” XVIII, available at http://www.nycourts.gov/library/nyc_criminal/penal-law-bartlett/196.pdf.
- ^{xii} “Brief of Pretrial Justice Institute and the National Association of Pretrial Services Agencies...,” 9-12, *Walker v. City of Calhoun*, Docket No. 16-10521 (Aug. 18, 2016).
- ^{xiii} Brooklyn Community Bail Fund, “License & Registration Please...”, 2, available at https://static1.squarespace.com/static/5824a5aa579fb35e65295211/t/594c39758419c243fdb27cad/1498167672801/NYCBailBondReport_ExecSummary.pdf.