FACTS ABOUT BAIL REFORM

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SUMMARY

Recent research has exposed major flaws in claims used to justify the eradication of bail and establishment of court-administered pretrial supervision programs. These claims are as follows:

CLAIM 1: Non-monetary pretrial release programs are cost saving measures that will reduce the jail population, saving millions of dollars annually.

FACT: Bail reform costs have exceeded estimates and outpaced funding sources wherever they have been tried. New Jersey's pretrial program costs overtook revenues within one year of implementation. New York's proposed legislation would cost nearly Three Hundred Million Dollars ($300,000,000) in the first year alone.[i]

CLAIM 2: Pretrial supervision programs will be administered and funded by the state.

FACT: The public protection legislation in the FY2020 executive budget is an unfunded mandate that pushes the entire financial cost of pretrial supervision programs onto each individual county's probation department, with no state support.[ii]

CLAIM 3: The eradication of bail in favor of pretrial supervision programs and the use of pre-arraignment risk assessments will solve the racial disparity in our jails.

FACT: Arraignment risk assessments use conclusions drawn from decades of data from a racially bias system, and as such, they themselves are inherently bias.[iii] These programs not only fail to solve the racial disparity problem in jails but have in fact been shown to exacerbate it.[iv]

CLAIM 4: New York recognizes that risk assessment algorithms are racist and has therefore banned their use.

FACT: The newly proposed public protection legislation clearly opens the door for counties to use any risk assessment method they desire.[v]

CLAIM 5: The mandatory use of appearance tickets in lieu of arrest on misdemeanor and E felony cases is a fair way to ensure fewer people spend time in jail before arraignment.

FACT: The legislation allows police to arrest any suspect who is unable to provide identification.[vi] This will unfairly impact immigrant and disadvantaged populations, who are far less likely to have sufficient identification. Those who can produce ID will walk freely into their arraignment with time to prepare, while those cannot will be dragged in in handcuffs with no time or opportunity to make themselves presentable, formulate a defense, or seek legal counsel. This unfair targeting of immigrants and the poor is the very reason we do not require identification to vote.

CLAIM 6: Charitable bail is the enemy of the bail bond industry.

FACT: The bail bond industry is 100% in support of charitable bail. These organizations provide an essential and effective means of ensuring that truly indigent people are afforded the same opportunity to be free as those who are more fortunate. Further, the bail bond industry recognizes that the fatal flaw of charitable bail organizations is their inability to effectively supervise and ensure compliance. The industry has offered to help charitable bail in this endeavor.

CLAIM 7: Bail reform is necessary because the jails in New York State are overflowing with indigent defendants who cannot afford nominal bail amounts.

FACT: The crisis of indigence is a fallacy. The number of inmates in New York jails held on nominal bails is less than 2.5% of the jail population.[vii] That figure shrinks even further when accounting for additional bails, parole holds, warrant detainers, probation holds, or other restrictions on a defendant's release.

CLAIM 8: The commercial bail system is unfair and prevents people from being released.

FACT: The bail bond industry does not keep people in jail, rather, it provides another pathway to freedom for the accused while allowing their loved ones to maintain a degree of control and personal supervision. all while operating at a net financial gain to the tax payer, increasing state revenues through premium and corporate taxes, and forfeiture payments.

FACTS ABOUT BAIL REFORM

1. **<u>The proposed bail reform legislation is financially unsustainable</u>**

The currently proposed bail reform legislation has very specific provisions relating to release of the accused at arraignment. On their face they appear to be simple, cost-effective measures. However, careful examination shows that these measures impose significant financial and logistical costs in their implementation and continued use.

The Regional Economic Studies Institute at Towson University conducted an in-depth cost analysis of eliminating bail in New York, based on real-world costs incurred by implementation of a similar program in New Jersey. They assess that the cost of implementing such a program in New York would be over two hundred eighty-seven million dollars ($287,000,000) in the first year alone. This does not account for ancillary costs such as medical benefits and pensions, which will balloon the cost to well over three hundred million dollars ($300,000,000).

Estimated Costs of CJR in New York, Based on New Jersey Estimates

	Total Arrests[4]	Start-up Costs	Operating Costs	Indirect Costs	Total Cost
NJ	208,971	$37,271,724	$80,991,166	$7,320,836	$125,583,725
NY	478,977	$85,429,550	$185,637,747	$16,779,898	$287,847,193

Sources: New York State Division of Criminal Justice Services,[5] RESI, State of New Jersey Department of Law and Public Safety, Various

New Jersey eliminated monetary bail in 2017. Within the first year the judiciary discovered that the program was financially unsustainable, not in the long-term, but immediately.[viii]

In the first annual Criminal Justice Reform Report to the New Jersey Governor and Legislature, the New Jersey Judiciary highlighted massive expenses related to bail reform, far exceeding anticipated cost estimates and revenue sources.[ix]

Despite misguided promises made to the legislature when they voted on the program that costs would be covered by increased court fees, the report stated that program costs had already overrun revenue less than one year after implementation, and that money would need to be allocated from the general fund (taxpayer dollars) to cover costs in order to sustain the reforms.

> ***The funding of an ongoing court operation through court filing fees is simply not sustainable... The Pretrial Services Program requires a stable and dedicated funding stream at an appropriate level through the General Fund, rather than from court fee revenue.***[x]

Now, New York is on the verge of implementing a similar program, but unlike New Jersey, we have designated absolutely NO funding source.

Some additional highlights from the New Jersey report:
In 2017, the first year of implementation, direct costs for the Pretrial Services Program alone cost the State of New Jersey 33.8 million dollars:

- $17.8 million in salaries for 267 managers, supervisors, & staff for pretrial assessment & monitoring, which does not include additional costs such as pensions, healthcare, training, equipment, etc.
- $9.3 million in Judge and staff salaries for 20 new Superior Court judgeships, which had to be created to support the drastic increase in pretrial release hearings. Again, this number is salaries only, independent of additional costs.
- $855,000 in payments to per-diem Judges brought in to augment courthouses overwhelmed by the burdens of the new system.
- $784,000 in costs related to the electronic monitoring of 3,686 defendants.
    - This cost is likely to dramatically increase in coming years as defendants under electronic monitoring carry over from the previous year, compounding the number of defendants in the program.
    - The cost to monitor each defendant was between $3.59 - $4.19 per day. Annualized, 3,686 defendants at $4.00 per day is over $5,000,000 per year.

These numbers will be exponentially higher in New York. Clearly, the disaster in New Jersey resulting from bail reform, in terms of both public safety and financial burden, should be examined closely and seriously considered when deciding whether or not to implement a similar system here in New York.

2. **<u>Pretrial supervision programs will be administered and funded by individual county probation departments, with no support from the state</u>**

Last year's proposed legislation directed that the Office of Court Administration, a state agency, would be responsible for establishing, maintaining, and funding pretrial supervision programs statewide.[xi] This year's bill, however, clearly states that pretrial services will be provided by each county's probation department, who will be solely responsible for monitoring all principles released under non-monetary conditions, with no financial or logistical support from the state.[xii]

The Regional Economic Studies Institute at Towson University conducted an in-depth analysis of the currently proposed legislation and has published a county-level estimate of the cost of this unfunded mandate, which is included as an addendum to this report.[xiii]

They estimate that in the first year alone, this program will cost New York City more than one hundred fifty-four million dollars, which will cause them to exceed their 2019 probation budget by 152%.

Suffolk county's cost will surpass thirteen million dollars; Nassau County: eleven million; Westchester: eight million.

And it's not just a downstate problem either. Erie county's cost will be over thirteen million dollars; Monroe county will be nearly ten million.

ESTIMATED PRETRIAL SERVICE PROGRAM IMPLIMENTATION COSTS

JURISDICTION	2019 PROBATION BUDGET	ESTIMATED PSP COST	TOTAL PROBATION EXPENSES	BUDGET OVERAGE
NEW YORK CITY	$101,400,000	$154,506,394	$255,906,394	152%
SUFFOLK	$39,578,190	$13,440,633	$53,018,823	34%
ERIE	$14,529,445	$13,403,424	$27,932,869	92%
NASSAU	$22,484,259	$11,160,387	$33,644,646	50%
MONROE	$18,895,489	$9,330,372	$28,225,861	49%
WESTCHESTER	$44,771,910	$8,418,408	$53,190,318	19%

Source: Towson University Regional Economic Studies Institute

On average, the passage of this legislation will result in each of these counties going over their 2019 probation budgets by more than 66%. This will undoubtedly force counties to redirect funds from other public safety initiatives, and ultimately from their general funds, which will obviously take away from many other projects and initiatives.

In this way, less populated counties upstate will suffer disproportionately, as their already tight budgets will be hard-pressed to absorb this unanticipated expense. They simply may not be able to find the money.

To make matters worse, the executive budget calls for slashing public safety funding by thirty million dollars;[xiv] significantly reducing the amount of state aid these already strained probation departments will receive.

3. **Risk assessment programs are racist and fail to correct racial disparities in jails**

It is widely recognized that the criminal justice system in this country has a long history of being institutionally racist. Pretrial risk assessment programs make assessments based on historical data from that same flawed criminal justice system, so, logically, such programs are themselves inherently racist. Assessment programs are only as infallible as the data used to create them. If the data input is drawn from a bias and unfair system, then how could one expect the output to be fair?

Perhaps that explains the bail reform disaster in Wisconsin, which began state-wide use risk assessments in 2012, intending to address racial disparities in state jails. In particular, Wisconsin wanted to address the fact that African-Americans made up 38%

of the incarcerated population, despite accounting for only 6% of the state's overall population.[xv]

Despite mandating the use of risk assessments at each step in the criminal justice process, from initial arraignment, to sentencing, to parole, the number of African-American inmates under the custody of the Wisconsin Department of Corrections has actually INCREASED by nearly 4% since 2012, and African-Americans went from making up 38% of all inmates, to 43% in that time, and increase of 5%.[xvi]

This year, Iowa nearly made the same catastrophic mistake as Wisconsin. Buying into the hype and hysteria drummed up by bail reform lobbyists, The Iowa Legislature enacted a PSA pilot program in four counties beginning in January 2018, without commissioning a study or thoroughly exploring the issues and potential pitfalls.

Less than six months after implementing this bail reform program, the same legislature voted overwhelmingly to repeal it with immediate effect, citing lack of transparency in the data and algorithms used to make risk decisions, concerns that people who commit major crimes were being released because of the program, and a reduction in Judicial discretion.

Obviously, pretrial risk assessments, because they are based on decades of data from an inherently bias system, will not solve the racial disparity problem in our jails.

4. **New York has opened the door for the use of risk assessment algorithms**

The proposed legislation allows a Judge to order, before trial, the detention of any defendant that the court determines poses a high risk of flight. While this does not appear to break from current practices, the problem with this legislation is the method in which such a determination is made.

It mandates that every defendant be screened for releasability by a pretrial service agency administered by the county probation department, and that the agency may use any "criteria, instrument, or tool" they desire to conduct the assessment, provided the following:

1. It may only consider a person's risk for failing to appear in court, and not their general risk to public safety.
2. If scores are calculated to predict the risk of failure to appear, that the scoring formula be made available to the defendant or their counsel.
3. The tool be periodically validated, and validation studies be made available upon request.

Clearly, this limited set of requirements allows of the use of many, if not all, algorithmic risk assessment programs currently available, which, as has already been demonstrated, are inherently racist.

So, if they have been proven to be racist, why would county probation departments choose to use these tools? The answer is that these woefully underfunded departments they are extremely cost effective. Paying for software that allows a computer to quickly determine the risk of each defendant is far cheaper than paying for multiple employees to do it slowly. The only person that loses is the one who's very freedom is determined by a piece of racist computer code. As ridiculous as that may sound, it is the unfortunate truth.

5. **Mandatory use of appearance tickets unfairly targets immigrant and the poor**

The new public protection and general government legislation requires police to issue an appearance ticket in lieu of arrest on all misdemeanor and class E felony cases, with enumerated exceptions. The idea being that using appearance tickets instead of arresting people will cause fewer people to spend time in jail before arraignment.

While this makes sense on the surface, as usual the devil is in the details, and in this case the devil is the "enumerated exceptions."

In this legislation, police are granted the discretion to arrest a suspect instead of issue an appearance ticket if the suspect cannot provide proof of their identity. Obviously, one can easily see how this will have an unfair impact on immigrant and disadvantaged populations, who are far less likely to be able to produce the required identification. This was the very reason our state chose not to require identification in order to vote.

This will create a situation where those who can produce identification will walk freely with dignity into their arraignment after having weeks to prepare, while those less fortunate who cannot produce identification are dragged in in handcuffs with no time or opportunity to make themselves presentable, formulate a defense, or seek legal counsel. This will only exacerbate the very problem of equity and fairness in the criminal justice system that we are working to solve.

Furthermore, the proposed legislation allows the police to arrest suspects instead of issue an appearance ticket if they have a documented history of failure to appear for court proceedings.

But the use of appearance tickets instead of immediately producing suspects for arraignment creates an unfair burden that will inevitably lead many poor and working-class people to miss their arraignment, thereby creating a documented history of failure to appear.

People who live check to check are often at the mercy of their employers, who may not allow them to take off work on the day of their arraignment. Court clerks often cannot grant an adjournment on an appearance ticket, because prior to the arraignment there is no case to adjourn. So, these working-class defendants are forced to choose between their jobs and making it to their unmovable court appearance.

And once these defendants fail to make their arraignment, they get a failure to appear history which will negatively impact them not only in future interactions with the police, but also when the Judge ultimately decides whether or not to release them, and under what conditions.

6. **<u>The bail bond industry unequivocally supports charitable bail, and wants to help</u>**
Contrary to common mischaracterizations, the bail bond industry believes that nobody should remain in jail solely because they are poor, and it is 100% in support of charitable bail. The industry's stance, as it always has been, is that these organizations provide an essential and effective means of ensuring that truly indigent people are afforded the same opportunity to be free as those who are more fortunate.

While charitable bail agencies should be commended for their admirable work, they do, however, face an unfortunate but dangerous dilemma. These organizations simply do not have the resources or experience necessary to effectively monitor and ensure compliance of those that they release.

While most defendants freed with charitable bail comply with release conditions and make all their court appearances, there are many who do not. When defendants violate the terms of their release, or fail to appear in court, these organizations have no means of locating and returning them. This not only presents a problem for the courts, as the defendant is not present to continue their case, but it also causes these non-profits to lose substantial amounts of money in forfeiture payments. Money that could be used to bail out other indigent defendants.

The professional men and women in the bail bond industry are experts in the supervision and recovery of non-compliant defendants. Collectively, bail agents across the state represent hundreds of years of experience, and their shared resources and capabilities often rival or exceed those of many local law enforcement agencies or probation departments.

That is why the New York State Bail Bondsman Association has publicly committed to voluntarily provide compliance services to any charitable bail organization that requests it, statewide, at absolutely zero cost to them or the state.

At the end of the day, the bail bond industry and charitable bail, together, represent the best option for ensuring the safe release of those awaiting trial, because both work to

free the accused at absolutely no cost to the taxpayers.

7. **The Crisis of Indigence is a fallacy**

The most commonly cited reason for changing New York's bail laws is a "crisis of indigence," the claim that there are thousands of destitute souls languishing in jails across the state, all because they cannot afford "nominal" bail amounts.

Though this narrative is frequently championed by bail reform advocates, it is completely baseless; there is no crisis of indigence in New York. Deep-dive studies on years of data have clearly disproven these claims.

A review of the New York City Criminal Justice Agency Study commissioned in 2012 showed that of 284,000 defendants arraigned, 50% of all cases were disposed of at arraignment (dismissed, reduced, or plea-bargained). Of the 144,000 remaining cases, 68% were released on their own recognizance. The number of people with bails in the amount of $2,000.00 or less was less than 3% after arraignment.[xvii]

How long they remain in jail after arraignment depends largely on whether they have any additional bails, holds, or other restrictions on their release. The fact that someone may have additional bail on a separate case, a warrant or hold from another jurisdiction, or other detaining order in addition to their nominal bail is never factored into analysis of why a person remains in jail.

Furthermore, though there are no statistics to quantify the number of such cases, the rapidly expanding opioid crisis is creating an ever-increasing number of cases in which families choose to leave their loved ones in custody, rather than see them die on the street.

Despite the obviousness of these statistics, those advocating for bail reform often quote other, more "carefully worded" statistics to support their cause. One of the most often quoted statistics is as follows:

> *87% of defendants arrested in 2008 that had bail set at $1,000 or less were not able to post bail at their arraignment and were incarcerated pending trial.*[xviii]

This statistic is intentionally misleading and factually inaccurate. Bail is almost always posted after the arraignment.

In most cases bail is set at arraignment and the defendant is placed into custody. Then, once they know the amount of bail set by the Judge, the defendant's family or friends post bail either in cash or through a bond agency, and the defendant is released.

Furthermore, this statistic does not reflect the fact that in most jurisdictions bail bond agents are not allowed into arraignment parts to post a bond at arraignment and may not post bail 24 hours a day, which often causes delays in getting a defendant released.

New York City Comptroller Scott Stringer used the 87% statistic to advocate eradication of cash bail. Ironically, in the same report, Comptroller Stringer also disclosed some real numbers that clearly contradict the claim.[xix]

- 1 out of 4 people are released on bail the same day
- More than half make bail within 72 hours
- More than 75% are out within a week
- 90% make bail within 2 weeks
- Only 5% of people take longer than 1 month to make bail.

Additionally, Stringer admitted that most people with bail make bail quickly:

> *Because many detainees with bail set exit jail quickly, they account for a smaller...share of the daily jail population. As of June 29, 2017, New York City jails housed 3,340 people who were detained due to an inability to post bail, accounting for 36 percent of the daily population. Some of these people likely went on to post bail within the next few days*[xx]

One must ask the question, how can Mr. Stringer claim that somebody is detained "due to an inability to make bail", and then admit that they make bail within days? Obviously, those people did have the ability to make bail. There is a difference between the inability to make bail and the inability to make bail at arraignment. One indicates true indigence, while the other indicates flaws in the expediency of the system. Again, intricacies of language are used to convey a more serious problem than actually exists.

8. **New York's bail system is already a successful and progressive model for the country**

New York has long been hailed nationwide as an example of fair and progressive bail regulations. Governor Cuomo himself has indicated that our current bail statutes were the most progressive in the country when they were enacted. Why is that suddenly not true?

Under New York's current system:[xxi]

- 90% of all misdemeanor cases are released without bail
- 80% of Class A misdemeanor cases (the most severe misdemeanors) and 90% of all other misdemeanor cases are released without bail

- 70% of all defendants, including those charged with felonies, are released on their own recognizance
- More than 30% of those charged with an A or B felony are released without bail

Under the proposed legislation many of those defendants would be remanded in "pretrial detention" with no opportunity for release, even on bail.[xxii]

Yet another quote from Comptroller Stringer illustrates the overwhelming success of New York's current bail system:

> *In recent decades, impressive strides have been made in reducing the number of people entering jail overall, including those entering pretrial...between 1995 and 2015 the number of annual admissions to New York City jails fell from over 120,000 to under 65,000 (46.9 percent), and the average daily jail population dropped from over 18,000 to under 10,000 (47.1 percent).*
> *Consistent with this trend, the number of pretrial admissions has similarly fallen by 48.6 percent during this same time (from over 97,000 admissions in 1995 to under 50,000 admissions in 2015).*

9. Bail Reform Legislation Has Made Communities Less Safe

Even the staunchest of bail reform advocates admit that the removal of judicial discretion, automatic release of defendants, and lack of supervision can lead to catastrophic results.

For example, in 2015, after the murder of a fourth police officer in less than a year, and the revelation that his killer was on the streets without supervision or accountability, despite a long history of "non-violent" misdemeanor drug-related arrests, New York City Mayor Bill De Blasio called for tougher pretrial release restrictions.

Mayor De Blasio, a longtime advocate of bail reform and liberal release policies, completely reversed course, making the case that someone like the officer's killer, who had never been indicted on a violent offense, should be considered dangerous to the community because of his history of selling drugs.[xxiii]

Under currently proposed bail reform legislation, the defendant would not only be released automatically, he would be released with little to no supervision, and with no accountability to those who posted money for his release.

New Jersey's legislature and judiciary are scrambling to put positive spins on the abject failures of their states bail reforms, all while the media increasingly reports grave public safety concerns over the policy, and public perception is that criminals are not afraid to

commit crimes.[xxiv]

10. **The distortion of presumption of innocence**

Bail reform proponents often make the case that people should not be incarcerated while awaiting trial because they are presumed innocent. The presumption of innocence argument is a fiction, designed to support the no-money bail argument.

The presumption of innocence is a standard that requires the prosecution to meet a burden of proof at trial. The arraignment is not a trial, nor is the prosecutor required to provide proofs at arraignment. What the presumption of innocence does provide the defendant at arraignment is a right under the 8th amendment to bail.

Our criminal justice system in New York contains many circumstances that contain far more onerous punishments imposed on defendants after arrest and before conviction; suspension of driving privileges at arraignment on a DWI, or the issuance of an order of protection without a hearing on a domestic violence matter as examples.

What is not mentioned in the discussion of mandatory release on misdemeanors and non-violent felonies is pretrial detention. In consideration of crimes that are not mandatory release, the court has the right to remand the defendant for the duration of the case.

If the foundation of the entire bail reform movement is based on a person's presumption of innocence, how can supporters of bail reform also justify remanding defendants just because the alleged crime is violent in nature?

Furthermore, a bail system that provides remand as the only alternative to automatic release produces a greater percentage of minority incarceration (see the above example of Wisconsin) and significantly detracts from the Judge's discretion to consider any mitigating factors or information in formulating the release decision.

One cannot logically support both the presumption of innocence argument and the currently proposed bail reform legislation, which allows for, and indeed encourages, pretrial detention without the possibility of bail for certain defendants based on the severity of the accusations against them.

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