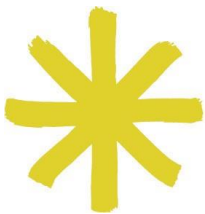




POLICY REPORT  
APRIL 2018

# Cruelty and Cost: Money Bail in Buffalo

Andrea Ó Súilleabháin and Colleen Kristich



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## Introduction: What is bail?

Bail is a condition for the release of a person charged with a crime before their trial. For centuries, the goals of bail were straightforward: to allow the pretrial release of as many defendants as possible and ensure their return to court. Historically and by law, ‘bail’ means pretrial release, and ‘no bail’ means detention. Yet today, on any given day there are 450,000 people in the United States who have not been found guilty of a crime and yet sit in jail – most of them because they cannot afford to pay “money bail.”<sup>1</sup>

The term “money bail” is commonly used to describe a monetary amount set by a judge to make sure that a defendant will return to court if he or she is released from detention.<sup>2</sup> Who pays (the defendant, their family member, or a bail bondsman) depends upon the type of bail set by the judge.

According to federal and state law, bail should not be dependent on a person’s wealth, and judges should consider the income and financial resources available to the defendant when setting money bail. In fact, New York’s bail statute offers judges nine types of bail, including several options that require defendants to pay little or no money to “make bail” and secure their release. But in practice, judges rarely set non-monetary bail, and as a result, poor people who cannot afford to pay money bail are penalized with pretrial jail time.

Though the use of money bail is widespread in criminal courts across the country, including in Buffalo City Court, it is often arbitrary, unjust, and costly. When a defendant cannot afford to make bail, he or she faces both immediate disadvantages and long-term harm. Just a few days in jail can cost a person their job, their home, custody of their children, or their mental health. This is true even when charges are eventually dismissed. Pretrial detention also leads to worse trial outcomes, and contrary to its intended goals, it harms public safety. These impacts of money bail are explored further below, after a closer look at its use in the nation and in Buffalo.

This policy report was drafted by Andrea Ó Súilleabháin, Deputy Director at PPG, and Colleen Kristich, Master of Social Work Candidate at the University at Buffalo.

It presents new data on bail in Buffalo, including frequency of money bail, average amounts by level and type of offense, and racial disparities. This dataset is based on PPG’s observation of 240 arraignment hearings from November 2017 to February 2018.

The report includes several stories from Buffalo City Court, explores the harmful impacts of money bail, and offers recommendations for reform.

The authors wish to extend their gratitude to court watchers Schyler Norton, Rosa Guerrero, and Molly Spakowski, as well as former PPG interns Sarah Alpert and Anna Magavern who worked on earlier drafts. Thanks are also due to Rebecca Town and Kevin Stadelmaier at the Legal Aid Bureau of Buffalo; Insha Rahman at the Vera Institute of Justice; Sean Hill at the Katal Center for Health, Equity, and Justice; and Katie Schaffer at Just Leadership USA.

## Overuse of Money Bail

On an average day, 25,000 people are held in local jails across New York State, including 1,200 in Erie County.<sup>3</sup> A majority—64 percent—of those in the Erie County Holding Center are held pretrial.<sup>4</sup> Across the nation, jails are crowded with individuals not convicted of a crime. The U.S. detains people pretrial at a rate three times the world average.<sup>5</sup>

The overuse of money bail has played a major role in the unparalleled incarceration rate in the United States. During the “tough on crime” reforms of the 1980s, risk to public safety was added as a consideration in bail hearings in many states. Pretrial detention surged as a result. In New York, legislators chose not to add public safety to the bail statute, and judges are not *legally* permitted to make this consideration, but narratives of public safety have still fueled rates of pretrial detention in the state.

From 1985 to 2007, the U.S. jail population tripled in size from around 250,000 to a peak of nearly 800,000 people. This increase cannot be justified by an increase in general population size or an increase in crime rates.<sup>6</sup> In fact, over this time, crime rates decreased.<sup>7</sup> This jail growth can be explained by the increased use of money bail. For example, from 1992 to 2006, the number of people charged with felonies who were released on their own recognizance fell by 32 percent (release on recognizance is a non-monetary option in which the defendant agrees to appear for their court date). By 2006, money bail was set on 70 percent of people charged with felonies.<sup>8</sup>

As bail was set more often, it was also set at higher amounts. From 1992 to 2006, the average bail amount rose by over \$30,000.<sup>9</sup> In 1998, cases with the most serious charges had bail set at \$25,000 and over. In just six years that amount doubled, saddling a defendant with the same charges with bail amounts of \$50,000 and over.<sup>10</sup>

Even defendants charged with minor, low-level offenses have been locked up for months awaiting trial, unable to pay bail amounts of \$1,000 and less. One study found that 87 percent of non-felony

“Our present bail system inflicts **hardship on defendants** and it inflicts considerable **financial cost on society**. Such cruelty and cost should not be tolerated in any event. But when they are needless, then we must ask ourselves why we have not developed a remedy long ago. For it is clear that the **cruelty and cost of the bail system are needless.**”

– Attorney General Robert Kennedy, 1964

Of the people in jail in Erie County, **64% are held pretrial** and have not been convicted of any crime.

defendants with bail set at \$1,000 or less could not post bail and were held in jail for an average of 15.7 days.<sup>11</sup>

According to the Vera Institute of Justice, “Even though the median bail amount on felony cases in New York City is \$5,000, and even lower, at \$1,000, on misdemeanor cases, over 7,000 people are detained pretrial at Rikers Island and other New York City jails on any given day because they cannot make bail.”<sup>12</sup>

Being incarcerated for even a short period of time affects whether people can keep their jobs, take care of their children, and pay their bills. A tragic example is the story of Kalief Browder, who spent three years at Rikers Island waiting for a trial to determine if he stole a backpack. He refused plea deals and insisted on his innocence, and the charges were eventually dropped. But three years in detention severely impacted his mental state and shortly after his release, he committed suicide. He was 22 years old.<sup>13</sup>

### Money Bail in Buffalo

Data on the pretrial process, and how defendants are handled in Buffalo, is difficult to access. No data is publicly available on the average amounts of bail that Buffalo City Court judges set for common charges or offenses.

To understand how often and at what amounts money bail is set locally, Partnership for the Public Good (PPG) trained court watchers to record the amount and type of bail set at arraignment hearings. Court watchers also recorded the “top charge” in each case, the arguments on bail made by the defense and prosecution, and any factors considered by the judge in making a bail determination.

The data presented in this policy report draws from 240 arraignment hearings observed by PPG court watchers from November 2017 to February 2018, presided over by six different city court judges. The findings below include how often money bail is used in Buffalo, median amounts set by charge level and common offenses, racial disparities in bail amounts and the likelihood of release, as well as differences in the judges’ approaches to bail setting.

### DATASET

#### DEMOGRAPHICS

Defendants in the 240 arraignments observed by PPG had the following characteristics.

#### RACE

Black: 52%  
White: 29%  
Latino: 12%  
Asian: 1%  
Unknown: 6%

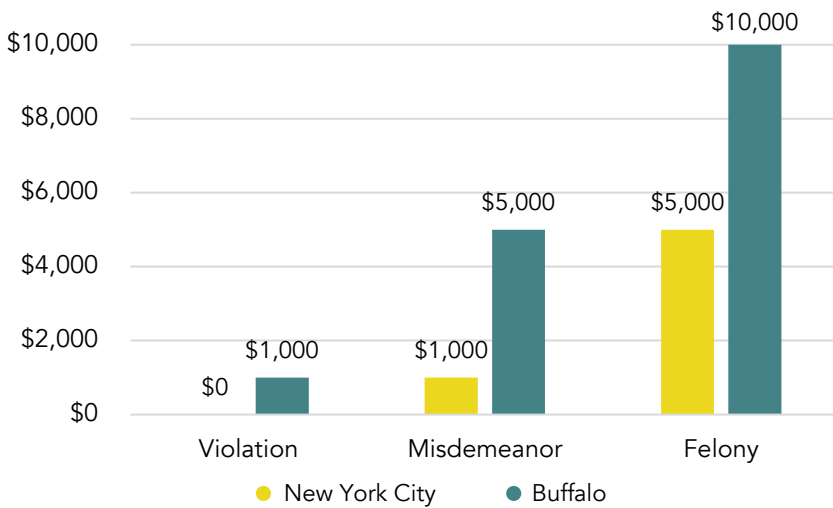
#### GENDER

Male: 82%  
Female: 16%  
Unknown: 2%

#### AGE

19-30 years old: 32%  
31-40 years old: 18%  
41-50 years old: 15%  
51-60 years old: 8%  
61+ years old: 4%  
Unknown: 23%

MEDIAN BAIL AMOUNTS IN BUFFALO VS. NEW YORK CITY<sup>14</sup>



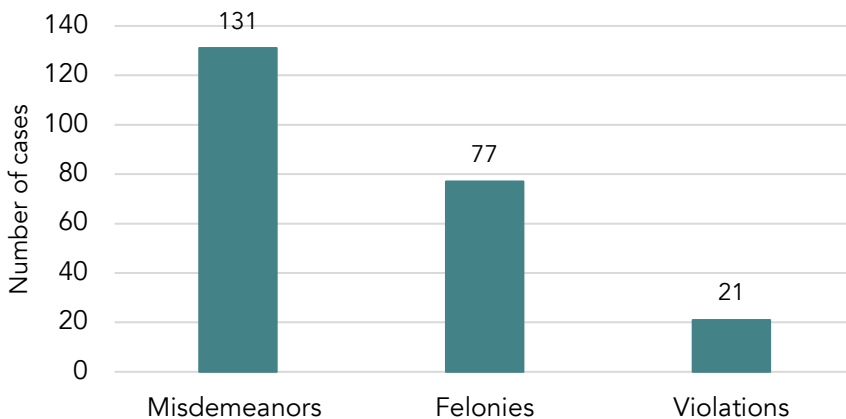
The median bail in a misdemeanor case in Buffalo is **5x higher** than in New York City.

Median bail amounts in Buffalo are far higher than in New York City. Median bail is set five times higher on misdemeanors in Buffalo, and twice as high on felonies. In addition, in the hearings observed by PPG, judges set money bail on several defendants charged only with violations, such as disorderly conduct, low-level trespass, and traffic infractions; in New York City, judges almost never set money bail in these cases.

BAIL IN BUFFALO

Charge Level	Median Bail
Violation	\$1,000
Misdemeanor	\$5,000
Felony	\$10,000

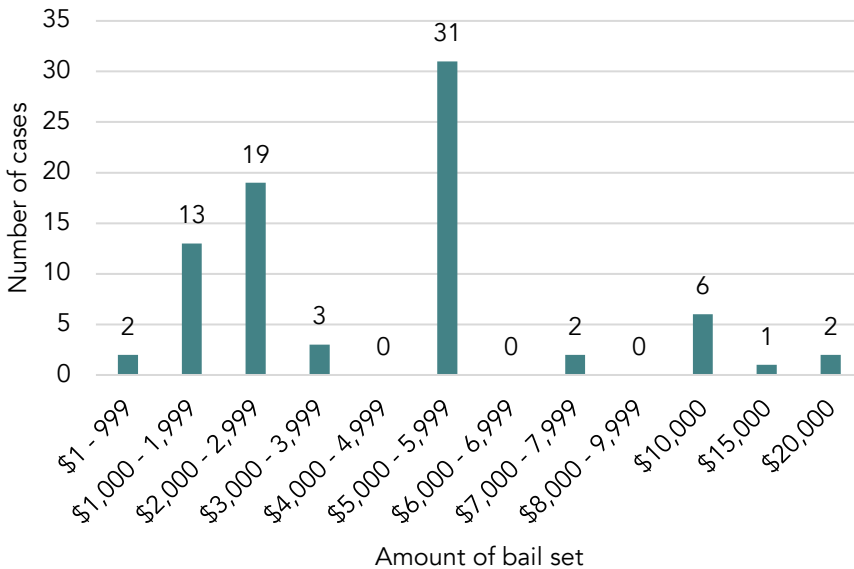
CHARGE LEVEL OF CASES OBSERVED



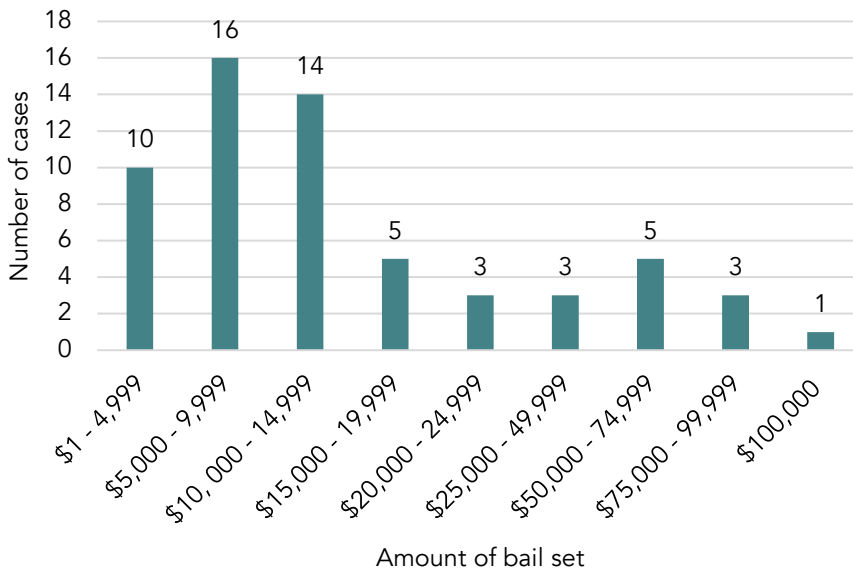
In Erie County, 70 percent of all arrests are for misdemeanor charges only.<sup>15</sup> Of the 240 arraignments observed by PPG, 57 percent were for misdemeanor charges only, 34 percent were felonies, and 9 percent were violations.

The graphs below show the amounts of bail set in the cases observed by PPG. The most common bail amounts set for misdemeanors were \$2,500 and \$5,000. The most common bail amounts for felony cases ranged from \$5,000 to almost \$15,000.

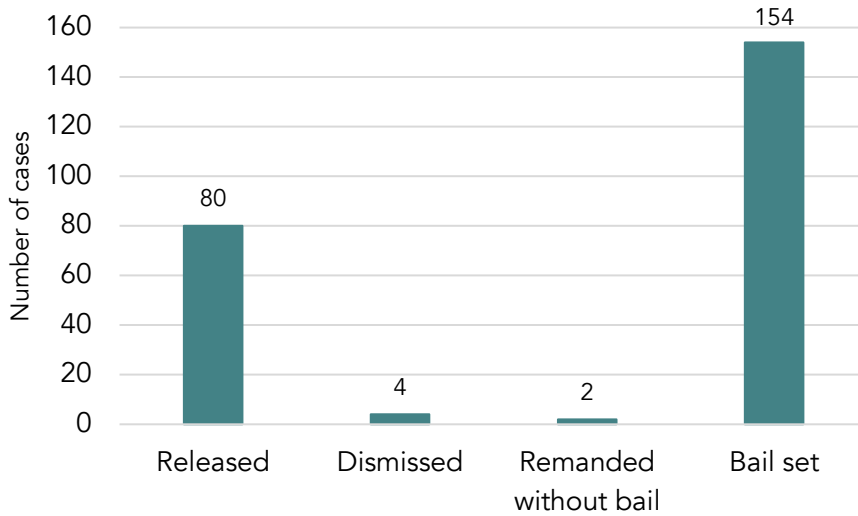
AMOUNTS OF MISDEMEANOR BAIL SET IN BUFFALO



AMOUNTS OF FELONY BAIL SET IN BUFFALO



FREQUENT USE OF MONEY BAIL



Money bail is set as a condition of release in **64%** of arraignment hearings.

In the 240 arraignments observed by PPG, every bail set by a Buffalo City Court judge used a monetary condition. Money bail was set as a condition of release in 64 percent of cases, while defendants were released in 33 percent of cases. Only four defendants had their charges dismissed at arraignment, and only two were “remanded without bail” – denied bail and ordered to be held in detention until their case ends.

MEDIAN BAIL AMOUNTS BY OFFENSE TYPE

Offense	Misdemeanor (number of cases)	Felony (number of cases)
Drug possession	\$5,000 (33)	\$5,000 (13)
Larceny	\$5,000 (17)	\$5,000 (11)
Assault/Harassment	\$3,750 (14)	\$7,500 (2)
Burglary/Robbery/ Weapon possession	n/a (0)	\$10,000 (23)
Fraud	\$3,750 (4)	\$10,000 (2)
Driving infractions	\$1,000 (3)	n/a (0)

In 240 hearings observed by PPG, every bail set used a monetary condition.

In misdemeanor cases when bail was set, drug possession and theft charges carried the highest median bail—more than assault or harassment cases.



## MEDIAN BAIL AMOUNTS BY RACE

Race of Defendant	Median Bail Amount
Latino	\$5,000
Black	\$3,500
White	\$5,000

In misdemeanor cases when bail was set, the *median* bail amounts do not show a clear racial disparity. Interestingly, when we calculated the *average* bail by race, this changed: average bail for was \$5,000 for Latino defendants, \$4,800 for black defendants, and \$3,580 for white defendants. This average reflects that defendants of color tended to receive the highest bail in our dataset—a fact that the median amounts do not capture.

## RACE AND LIKELIHOOD OF RELEASE

Race of Defendant	Percent of Defendants Released Without Bail
Latino	32%
Black	37%
White	54%

White defendants charged with misdemeanors were more likely to be released than defendants of color. White defendants were released without bail 17 percent more often than black defendants and 22 percent more often than Latino defendants.

## RATIONALE FOR SETTING BAIL

In general in the United States, bail is decided very quickly, with little evidence considered and few, if any arguments made, and any rationale offered varies widely with the judge. In 2014, the U.S. Department of Justice criticized the common practice of rapid and superficial arraignment hearings: “America tolerates its judges often ordering de-facto pretrial detention through brief and perfunctory bail hearings culminating with the casual utterance of an arbitrary and often irrational amount of money.”<sup>16</sup>

White defendants were released without bail **17 percent more often** than black defendants and **22 percent more often** than Latino defendants.



In Chicago, one study found that judges took an average of 37 seconds to reach a bail decision.<sup>17</sup> Arraignments in Buffalo do not last much longer. In our observation of six judges, only one routinely asked defendants if they were employed and what they could afford to pay for bail. Among the other five judges, there was no discussion of the individual's financial or personal circumstances. One judge asked attorneys to waive the reading of the charges the defendant faced to clear the arraignment docket as fast as possible. This meant that family members who were present in the courtroom were not made aware of what offenses their loved one was charged with.

In our observation of Buffalo City Court judges, the average bail amount set by each judge varied widely, from \$3,780 for the lowest bail-setting judge to \$9,902 for the highest. There was often no rationale stated for why a defendant should be incarcerated pre-trial, and when reasons were given, the amount of bail did not seem to correlate closely to the reasons.

#### How often did each judge set money bail?

Judge A	92% of cases
Judge B	80% of cases
Judge C	71% of cases
Judge D	68% of cases
Judge E	46% of cases

#### Box 1. The Cost of a Judge's Discretion

*The defendant was a 23-year-old black man, who was charged with misdemeanors including marijuana possession and trespass. At first, the judge decided that the defendant was eligible for the Release Under Supervision (RUS) program; he would not have to pay bail and would not be detained pretrial. The defendant then told the judge that he had been mistreated at the Erie County Holding Center the night before, while waiting for his arraignment. After the defendant was seated again, waiting for a RUS representative, he slouched in his chair with what the judge perceived as a negative attitude. The judge told him to sit up, and when he did not comply the judge called him back to the stand. The defendant complained again about his treatment at the Holding Center, and the judge stated, "If you're acting like this in front of me, I can only imagine what you were doing at the Holding Center." When the defendant protested, she continued, "If I want to put \$100,000 bail on you for acting silly in here, I can do that." Apparently due to the judge's dislike of the young man's demeanor, bail was set for \$5,000 cash or insurance bond.*

In New York State, judges are directed by law to consider the following factors about a person when setting bail:<sup>18</sup>

- Character, reputation, habits, and mental condition;
- History of appearing for court dates;
- Family ties and length of residence in the community;
- Employment and financial resources;
- Past juvenile delinquency or youthful offender status;
- Criminal record; and
- The weight of the evidence.

Under the law, the prosecutor or district attorney requests bail and must demonstrate why bail is necessary to ensure the defendant's return to court. The defense attorney (typically a public defender in Buffalo City Court) can then make arguments for the bail to be a lower amount or different type of bail or argue that the defendant should be released on recognizance before trial. The judge then makes the final determination.

Bail arguments in Buffalo tended to focus mainly on past failures to appear in court. In 25 percent of cases observed by PPG, the defendant was wanted by another judge for an outstanding warrant or had previously failed to appear for a court date. In most cases, the public defender argued for release on recognizance, rarely advocating for a lower amount or a different type of bail. Often, the district attorney's request for bail seemed to carry more weight.

### Types of Bail in New York State

According to current New York State law, judges can choose from nine forms of bail to make sure a defendant returns to court, including several that require a person to pay little to no money.<sup>19</sup> The table below explains five of the nine types of bail in New York.

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FIVE OF NEW YORK'S NINE TYPES OF BAIL, ADAPTED FROM THE KATAL CENTER FOR HEALTH, EQUITY, AND JUSTICE<sup>20</sup>

TYPE	HOW IT WORKS
CASH BAIL "A"	Anyone, including the defendant, pays the full bail amount in cash. Payment is made at the courthouse, if the defendant is still there, or at the jail facility if the defendant has been moved. Methods of payment can include cash, cashier's check, or money order. Bail is returned at the end of the case, minus a 3% fee if the defendant pleads or is found guilty.
INSURANCE COMPANY BOND "B"	A bondsman agrees to cover the cost of the bond set by the judge in exchange for a non-refundable fee and cash or property as collateral. The fee is 10% for a bond of \$3,000 or less, and then increases with the bond amount. The judge must approve the bond and the bondsman may impose additional conditions on the defendant like weekly check-ins and additional fees for missed court appointments.
SECURED SURETY BOND "C"	The family and friends of the defendant, sometimes with the defendant, supply the court with personal property (a car, jewelry, stocks) equal to or greater than the bond amount, or real property (the deed to a home) worth at least twice the amount.
PARTIALLY SECURED SURETY BOND "E"	The family and friends of the defendant, sometimes with the defendant, pay a percentage of the total bond in cash to the court, not to exceed 10% of the total amount. Unlike with an insurance company bond, this is a refundable deposit.
UNSECURED SURETY BOND "G"	The family and friends of the defendant, sometimes with the defendant, enter a legal agreement with the court. The people signing agree to pay the full bond amount if the defendant does not come to future court dates. No cash payment or property is required.

Most judges in Buffalo set one of three options—cash bail, insurance company bond, or secured surety bond (A, B, or C bail)—all of which require defendants and their families to put up significant amounts of money. In 240 observations, we did not see a single instance of a judge using one of the other six options available.

As these examples show, the types of bail in the current New York bail statute offer judges significant leeway in when and how much bail is set on any case.

## **Box 2. A Morning in Buffalo City Court**

*A friend or family member of yours gets arrested. The next day, you go to Buffalo City Court and make your way to the courtroom known as Part 1, where arraignments for defendants held in custody take place. You walk in and are told that you must take off your coat and hat and turn your cellphone off. If your cellphone goes off in court, you are escorted out by an officer and not allowed back in. Arraignments are scheduled to start at 9:30, but often begin later, depending on when the judge arrives.*

*Female defendants are heard first, then male defendants. In small groups, defendants are led in by officers and told to sit in a row on the right side of the room, facing forward toward the judge. There is a thick wall of clear plastic behind them, physically separating the defendants from the gallery where you are sitting. All defendants are handcuffed and are not allowed to turn around to look at the gallery; if they do, a guard will immediately, and harshly, tell them to face forward.*

*Once the judge enters, you are not allowed to talk. If you talk in the gallery, you are escorted out by an officer and not allowed back in. The court secretary calls the name of the defendant and they are escorted to the podium where their lawyer is, most often a public defender unless a private attorney was obtained before arraignment. Some judges will read what the defendant is being charged with, while others do not. Some judges will ask the defendant for their birthdate, address, phone number, and place of work, while others do not.*

*The judge will then ask the district attorney's representative if they are serving anything. The prosecution will respond and then may request bail. The defense will then respond with their argument on bail, sometimes arguing for release and other times not contesting the prosecution's request. The bail is then set by the judge. In some cases, the defense will ask the judge to reconsider the amount or type of bail set.*

*With the final decision made, the defendant is then led to sit down in the row of chairs with the other defendants, waiting to either be released or brought back to the holding center. From the gallery, it can be difficult to hear what the lawyers and judge are saying. For information, many family members and friends approach a court officer and ask them where their loved one is being transferred or what their bail was set at and what they should do next.*

*This entire process usually takes less than two minutes for each defendant.*

*- Schyler Norton, PPG Court Watcher*

## Impacts of Money Bail

First and foremost, money bail hurts poor defendants and defendants of color. In an effective reversal of justice, the system punishes poor defendants before their case is heard in court. The consequences of money bail—and the needless incarceration it causes—ripple throughout the criminal justice system, causing vulnerable individuals to suffer and harming entire communities.

### INDIVIDUALS AND FAMILIES

The detrimental impact of money bail is felt by individual defendants and their families. Even the briefest jail time can cause a person to lose his job due to absence.<sup>21</sup> Defendants might have their cars repossessed, be evicted from their homes, suffer disruption to Medicaid, or lose their health insurance altogether.<sup>22</sup> Homeless people can lose their places in shelters.<sup>23</sup> Parents can lose custody of their children.<sup>24</sup> Being detained pretrial pushes many people deeper into poverty. Far too many defendants whose right it is to be presumed innocent, and of whom the majority will be released into the community once their cases end, are punished before they are tried because they cannot afford money bail.

### Box 3. A Defendant's Plea

*The defendant was a black man in his early twenties charged with misdemeanor drug possession. He was about to be released, until the judge realized she had overlooked the man's out of state criminal history from 2015. She then set bail at \$2000, cash or insurance bond, which meant he would have to pay at least \$200 to a bail bondsman that he would not get back. He asked to speak directly to the judge and pleaded with her for a lower bail. He told her that he did not have family in the area and did not have \$200. He stated that he was missing work to be arraigned and would lose his job if he wasn't released. The man continued to explain that his out of state criminal history was from several years ago and that he had been on a better path since then. The judge interrupted him and said, "I've done all I can, bail is \$2000." That was the end of the discussion.*

Besides the loss of livelihood, spending time in jail takes a psychological toll. People who have existing mental health issues often find their problems compounded in the jail setting where there can be bright lights, noise, harsh treatment, confinement, isolation, lack of access to medications, and the potential to be harmed by other inmates.<sup>25</sup> Nationwide, the Department of Justice reports that an alarming 64 percent of jail inmates have mental health problems, with 24 percent suffering from psychotic disorders.<sup>26</sup>

Suicide is the leading cause of death within jails and occurs at much higher rates than in the rest of society. For every 100,000 people jailed, 50 take their own life.<sup>27</sup> In the Erie County Holding Center, there have been 22 inmate deaths since 2006, including 13 suicides.<sup>28</sup> In 2010 the State reported that over a five year period Erie County accounted for 7.5 percent of the state jail population but 21 percent of the suicides.<sup>29</sup>

#### JUSTICE SYSTEM

No evidence supports the effectiveness of money bail: there has been no connection found between an amount of money and a person's likelihood of appearing in court or of avoiding illegal activity while on release.<sup>30</sup> Instead, money bail undermines the integrity of the justice system in many ways.

First, because of the trauma of incarceration, many defendants who cannot afford bail accept plea deals—even if they are innocent—to get out of jail. In our criminal justice system, plea bargains resolve 95 percent of cases each year.<sup>31</sup> With this in mind, prosecutors can use the prospect of pretrial detention as a means of coercing low-income defendants to plead guilty. People forced into plea bargains then face the obstacles that come with a criminal record, making it difficult to find a job and making any further involvement in the criminal justice system more costly.

Second, money bail leads to worse trial outcomes. Defendants held pretrial receive harsher punishments than those who can afford to secure their release. They are four times more likely to be sentenced

The prospect of pretrial detention can be used to coerce low-income defendants to accept plea bargains.

to jail and receive three times longer jail sentences.<sup>32</sup> Pretrial detention limits a person's ability to prepare for trial, reduces their time with their defense counsel, and increases jury bias when they appear in court in a jail uniform.<sup>33</sup>

In fact, numerous studies have shown that the single greatest predictor of whether someone will be convicted of a crime is whether they are detained pretrial. In New York City, conviction rates for those incarcerated for the entire pretrial period is 92 percent, versus a 50 percent conviction rate for those released.<sup>34</sup> The disparity persists through the sentencing process: defendants held pretrial receive harsher punishments than those who can afford to secure their release.

Third, money bail erodes due process. In a large percentage of criminal cases, defendants are ultimately cleared of charges. In New York City, for example, 42 percent of arrests ultimately resolve in dismissal, or adjournment in contemplation of dismissal (ACD).<sup>35</sup> In other cases, defendants agree to plea bargains with "time served," so that only 3 to 5 percent of jail inmates nationwide are actually sentenced to prison time.<sup>36</sup> If so few people are convicted of crimes serious enough to warrant a prison sentence, why does our justice system deem it necessary to keep so many people locked up before trial?

#### PUBLIC SAFETY

According to the U.S. Department of Justice, research shows that money bail, compared with nonfinancial conditions for release, does not lead to any improvement in court appearance or public safety rates—all it does is lead to significantly higher detention rates.<sup>37</sup> In fact, our current bail practices undermine public safety in several ways.

First, when large numbers of defendants who cannot afford bail agree to plea bargains to secure their release, many people are wrongfully convicted. When an innocent person pleads guilty, the real perpetrators are not arrested and brought to justice.

Defendants held pretrial are **4x more likely** to be sentenced to jail and receive **3x longer** jail sentences.

Pretrial detention is the **lead predictor** of whether a person will be convicted of a crime.



Second, money bail erodes public safety by increasing recidivism. When compared to low-risk defendants held for no more than 24 hours, those held for 8 to 14 days pretrial were 56 percent more likely to be rearrested before trial, and 51 percent more likely to reoffend after completing their sentence.<sup>38</sup> The increase in recidivism could be attributed to the significant negative effects of being held pretrial, such as the exacerbation of mental health concerns, or the loss of home, job, or children that may occur while detained.

Bail is meant to protect public safety by preventing defendants from fleeing justice. But even without cash bail as an incentive to return to court, most defendants do appear for their court dates. In one New York study, 88 percent of defendants who were released with alternative and more affordable forms of bail returned to court.<sup>39</sup> Furthermore, requiring money bail, and holding people in jail until they post it, may make them *less likely* to appear in court. In another study, those held for two or three days were 22 percent more likely to fail to appear in court compared to those released at arraignment.<sup>40</sup>

There are many other tools to help improve appearance rates, including simple reminder notices. Nationally, failure to appear rates vary by county from less than 10 percent to 30 percent for low level charges, but in counties where reminder systems notify defendants of their court dates immediately beforehand, the average failure to appear rate is less than 13 percent.<sup>41</sup>

#### PUBLIC MONEY

Besides the psychological costs sustained by the individual and the public cost of a loss of faith in the justice system, pretrial detention also comes with an enormous financial cost to taxpayers. In Erie County, it costs approximately \$164 per day per inmate to house a person at the Erie County Holding Center and the Alden Correctional Facility.<sup>42</sup> Nationally, the Department of Justice estimates that keeping the pretrial population locked up costs taxpayers about 9 billion dollars per year.<sup>43</sup> In contrast, pretrial release services that allow defendants to be released under supervision can cost only \$3 to \$5 per day per defendant.<sup>44</sup> By

Requiring money bail, and holding people in jail until they post it, may make them **less likely to appear in court.**

choosing alternatives to money bail, counties can save millions of dollars each year.<sup>45</sup>

The personal losses sustained by pretrial detainees also have widespread financial costs to the community when defendants lose their jobs and subsequently their income.<sup>46</sup> Lower-income defendants can be pushed into requiring public assistance by the losses jail time causes them, or, if they are released, by the cost of the bail bond or the bondman's fee.<sup>47</sup> Either incarceration or the cost of release can cause defendants to lose their homes, and this certainly leads to broader social costs.<sup>48</sup>

#### PRIVATE PROFIT AND ABUSES

Money bail also feeds into a \$2 billion industry of for-profit bail bondsmen that is rife with exploitation and abuse. The U.S and the Philippines are the only countries left in the world that allow a for-profit bail industry, and four states (Kentucky, Wisconsin, Illinois, and Oregon) have banned it. As the Justice Policy Institute summarizes their research, "The fact that for-profit bail bonding introduces money and profit into the pretrial process and gives bail agents complete control of an accused person's liberty has led to numerous instances of abuse and corruption in the industry. Cases abound of bondsmen bribing jailers and inmates for increased access to potential clients, employing brutal and illegal methods to extort money and information and even using their extralegal powers to coerce people into sexual acts."<sup>49</sup>

#### Principles for Bail Reform

In January 2018, New York Governor Andrew Cuomo included bail reform in his proposed budget for 2018-2019, and soon after, bills on bail reform were issued in the New York State Assembly and Senate. All of these proposals agreed on the urgent need for reform, yet following intense negotiations, bail reform was not achieved in the state budget. During the remaining months of the legislative session, lawmakers should take urgent action to remedy the severe injustice of wealth-based incarceration.

The United States and the Philippines are the only countries left in the world that allow a for-profit bail industry.

PPG calls on Governor Cuomo and state and local lawmakers to end money bail for misdemeanor and non-violent felony charges and permit pretrial detention on only a limited pool of serious offenses. People with low incomes and people of color endure the most drastic harms of the current bail system, and any proposed solutions to the bail crisis must reduce and ultimately eliminate racial disparities *and* lead to a major reduction in the jail population. There should be a presumption of release in all cases, and if a defendant is not released, an evidentiary hearing should be conducted to prove the necessity of detention.

Bail reform should be coupled with real discovery and speedy trial reform to ensure that defense attorneys can access all of the relevant information about their client’s case, and to ensure that defendants are not incarcerated for months at a time waiting for a trial date. In Buffalo City Court, all indigent defendants are provided with a free attorney at arraignment, but public defenders are too often overworked and are not given enough time with each client to adequately represent their needs. The chart below offers nine principles for meaningful bail reform in New York State.<sup>50</sup>

“Race and wealth should not be factors in our criminal justice system.”

– Governor Cuomo, *State of the State*, January 3, 2018

NINE PRINCIPLES FOR BAIL REFORM IN NEW YORK STATE FROM THE KATAL CENTER FOR HEALTH, EQUITY, AND JUSTICE

<p><b>1 CONFRONT &amp; ELIMINATE</b> racial disparities in pretrial practices. Any bail reform must reverse and end the disproportionate detention of select racial groups.</p>	<p><b>2 LIMIT &amp; DRASTICALLY REDUCE</b> the use of pretrial detention. New York must pursue and execute the original intent of the bail statute and protect the presumption of innocence.</p>	<p><b>3 END</b> wealth-based detention. No one should be in jail because they can't afford to buy their freedom.</p>
<p><b>4 REMOVE PROFIT</b> from pretrial justice decisions. Stop exploitative practices that profit off low-income people.</p>	<p><b>5 ENSURE</b> right to counsel—and quality representation—at any individualized hearings to determine bail or prior to any use of pretrial detention.</p>	<p><b>6 INCLUDE</b> people directly impacted by the justice system in discussions and planning for bail reform.</p>
<p><b>7 ESTABLISH</b> standardized collection and public reporting of pretrial detention data, and couple with accountability mechanisms.</p>	<p><b>8 ACCOUNT FOR &amp; MINIMIZE</b> differences in bail and pretrial detention practices between New York City and the rest of the state.</p>	<p><b>9 ADDRESS</b> the linkage of bail, discovery, and speedy trial to achieve real pretrial justice reform in New York.</p>

## Recommendations

Even before bail reform is achieved through statewide legislation, local lawmakers, officials, and judges can take steps to reduce the cruelty and cost of our current bail practices.

### **Increase the use of alternatives form of bail.**

Alternatives to money bail, such as unsecured bonds or release under supervision, can increase public safety and reduce failures to appear and other violations of release.<sup>51</sup> Judges can already set several more affordable forms of bail under state law; they should be educated about these types of bail, including the paperwork and procedures required to set them, and begin setting them routinely.<sup>52</sup>

Making better use of the existing alternatives to money bail will help Buffalo's judges prepare for statewide reforms. Under Governor Cuomo's proposed reforms, people will be released on their own recognizance or released with non-monetary conditions imposed by the court—including reporting to a pretrial services agency.

### **Expand pretrial services.**

Erie County Pretrial Services operates Release Under Supervision (RUS), a program for pretrial release under probation-like conditions. The eligibility criteria for RUS should be revisited and expanded to help reduce the use of money bail. Pretrial Services can also create programs that help defendants get to court appointments, such as transportation and notifications. For example, New York City recently implemented a text message system to remind people to appear for their court dates.<sup>53</sup>

As pretrial services are expanded, it will be important not to pass on the cost of additional programs to defendants. Additional fines or fees for pretrial release can place an unfair burden on presumptively innocent people (replicating the harms of money bail). Further, pretrial supervision must not become a mechanism for the widespread surveillance of communities of color, and strict restrictions must be placed on pretrial monitoring. Reducing

Detention should **never be based on wealth** or a person's ability to pay for their freedom.

unnecessary pretrial detention will bring significant cost saving; some of the funds can be redirected to facilitate new and expanded programs for pretrial release, but the majority of these funds should be invested in communities that have been historically and directly impacted by unfair pretrial practices.

### **Stop seeking money bail for misdemeanors.**

Erie County District Attorney John Flynn should direct his assistant district attorneys not to request money bail for misdemeanor offenses. This year, district attorneys in Manhattan, Brooklyn, and Westchester counties have taken this step, while the district attorney in Philadelphia announced he would no longer seek money bail for 25 different crimes.<sup>54</sup>

The Erie County District Attorney has the authority to take this action immediately. This step would go a long way toward reducing the use of money bail.

### **Conduct an independent assessment of ability to pay.**

In the limited cases where release on recognizance is not judged appropriate, pretrial services should conduct an individualized assessment of a person's ability to pay bail. This could be an interview with the defendant to gather information about their income and financial obligations. The assessment would provide the court with a recommendation for how much bail the defendant could afford to pay, and what forms of bail should be set as options.<sup>55</sup>

Judges should be prohibited from setting bail beyond the defendant's ability to pay. In February 2018, the Dutchess County Supreme Court "ruled that judges must consider a defendant's ability to pay bail, as well as less restrictive alternatives to bail, when setting release conditions for people facing criminal charges."<sup>56</sup> In the decision, the Court found that assigning bail without considering a defendant's ability to pay and offering less restrictive alternatives violates equal protection and the due process clause of the federal and state constitution.

This year, district attorneys in Manhattan, Brooklyn, and Westchester counties stopped requesting money bail in misdemeanor cases.

**Collect and release data on pretrial processes and bail.**

Data about bail in New York City is relatively easy to find due to the standard collection process of the Criminal Justice Agency and reporting from the Office of Court Administration. However, in Buffalo and across much of New York, no similar data is available. There should be a standardized collection procedure for all pretrial detention data, and it should be available publicly. This can help ensure accountability for disparities in bail setting, and that corrective action is taken to achieve the goals of bail reform. It should also track the types and amounts of bail requested by prosecutors, whether public defenders argue for alternative forms of bail, and the judge's rationale in setting bail.<sup>57</sup>

**Include impacted people and communities in reforms.**

Directly impacted communities should be at the center of bail reform efforts and programs, including the reinvestment of jail dollars into education, health, and safety. As the use of money bail decreases, so will the huge costs of unnecessary pretrial detention. Local and state governments should engage communities on how this newly available funding should be spent and create processes for communities to participate in redirecting these funds.<sup>58</sup>

People who have been directly affected by unjust bail practices should be included in the policy discussion around how to fix a broken system. Those who have experienced the devastating consequences of our current bail policies have the most knowledge of the harms that it causes and can provide the most meaningful ideas for how it should be changed.

**Promote alternatives to arrest and incarceration.**

Ending money bail is a critical step toward ending mass incarceration. But it must happen alongside reforms that keep more people out of the criminal justice system in the first place.

As PPG has previously recommended, the Buffalo Police Department should reduce arrests through alternative responses to low-level offenses, such as “fix-it tickets,” Law Enforcement Assisted Diversion (LEAD), and mandatory community policing.<sup>59</sup>

Directly impacted communities should be at the center of bail reform efforts and programs, including the reinvestment of jail dollars into education, health, and safety.



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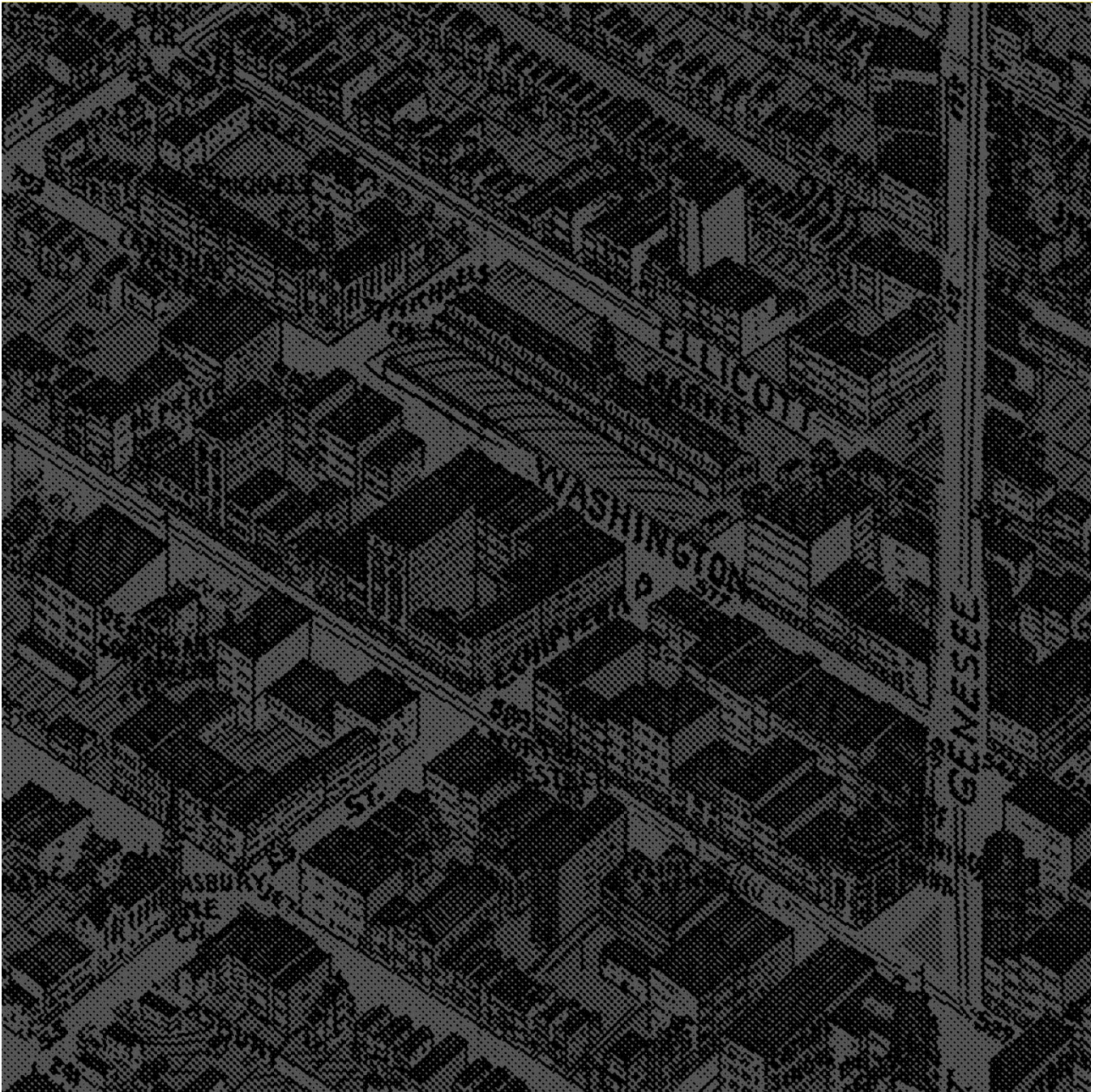
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