



Legislative Affairs
One Whitehall Street
New York, NY 10004
212-607-3300
www.nyclu.org

2019-2020 Legislative Memorandum

**Subject: Bail Elimination Act
S.2101-A (Gianaris)**

Position: SUPPORT

In New York, tens of thousands of people are held in jail prior to trial in large part because they cannot afford to post bail. Individuals who have not been convicted of a crime account for fully 67 percent of the average daily jail population across the state.¹ For many of these, inability to post bail leads to pretrial incarceration, with harsh, life-altering consequences – including the loss of jobs, housing, benefits, and even child custody. These harms are borne disproportionately by persons of color.

Governor Cuomo and lawmakers have acknowledged the inequities in our state’s existing bail practices, highlighting the inherent injustice worked by money bail and its disparate harmful impact along the lines of race and class. However, the Executive budget proposal on bail reform would authorize preventive detention for a wide net of offenses at the broad discretion of prosecutors.

Along with a broad and growing alliance of advocates, criminal justice system practitioners, and concerned New Yorkers, the NYCLU urges lawmakers to support S.2101-A, the Bail Elimination Act, and to insist that its approach be incorporated into any measure purporting to meaningfully transform New York’s bail system.

New York’s Bail Practices Lead to Disproportionate Incarceration of New Yorkers of Color and Improperly Link Liberty to Wealth

In the NYCLU’s 2018 analysis of bail practices across eight counties outside of New York City, we found that 90,000 individuals were detained after bail was set in their cases during a 5 year-period from 2010 through 2014.² The majority of these

¹ Vera Institute of Justice, *Empire State of Incarceration*, (Dec. 2017), <https://www.vera.org/state-of-incarceration/data-clearinghouse>.

² New York Civil Liberties Union (“NYCLU”), *Presumed Innocent for a Price*, (Mar. 2013) at 2, https://www.nyclu.org/sites/default/files/field_documents/bailreport_20180313_final.pdf.

individuals had either a misdemeanor or a violation as their most serious charge, and bail amounts less than \$2,500. Among those arraigned, black New Yorkers were two times more likely to remain in jail overnight after arraignment than white New Yorkers. Consistent with the longstanding claims of those familiar with the state's systemic pretrial justice failures, the report's findings illustrate the degree to which wealth and race determine who languishes in jails across the state awaiting trial, primarily due to current bail practices.

The long-held legal justification for requiring an individual to post bail as a condition of release is to address risk of flight – that is, to ensure the individual facing criminal charges appears in court. Bail practice, however, is too often in the hidden service of preventive detention. Money bail as standard practice flouts the presumption of innocence and preemptively deprives accused persons of liberty, often in ways that affect the course of their entire lives. At bottom, the practice results in varied case outcomes that are largely driven by the size of one's bank account, violating constitutional principles and fundamental fairness.

S.2101-A Would Transform New York's Unfair Bail System and Avoid Standards That Could Lead to More New Yorkers in Jail Awaiting Trial

The Bail Elimination Act, S.2101-A, is based on the ideal that justice should be equally available to the poor as to the wealthy, and it rejects penal standards that can further promote entrenched racial bias. The bill would amend New York's bail statute in harmony with the purpose of the law. Like the Executive budget proposal, it eliminates the requirement that an individual charged with a crime must post bail as a condition of release; and it would strengthen pretrial protections by requiring individualized determinations based on competent, reliable evidence. But S.2101-A moves a crucial step further toward justice and fairness, providing that a court may order a person detained only when they are accused of committing one of a narrow set of serious felony offenses and are deemed a high flight risk.

The Bail Elimination Act would:

- Protect pretrial liberty in the vast majority of cases by mandating the release of persons charged with misdemeanors and nonviolent felony offenses;
- Eliminate money bail, ensuring that pretrial release is not tied to wealth;
- Ensure the constitutional and due process rights of all New Yorkers, requiring individualized, evidentiary hearings and speedy trial protections for individuals subject to detention;
- Require courts to make individualized determinations on the necessity of electronic monitoring, supervision, and other conditions to ensure that they are the least restrictive option to ensure a person's return to court;

- Limit mass surveillance by imposing limits on who might be subject to electronic monitoring, permitting the locations of individuals charged with certain offenses to be tracked for no more than 60 days at a time and to be subject to speedy trial protections;
- Restrict courts subject to the rules of local jurisdiction from using pretrial risk assessment instruments that would have an adverse disparate impact or rely on data that is not disclosed; and
- Require robust data collection and sharing to make transparent the various decision points determining who waits in jail pretrial.

The Bail Elimination Act represents the possibility for true, transformative change in New York’s pretrial practices, and, if enacted, would go a long way to address systemic overreliance on incarceration and the gross racial disparities in jail populations. It is the best of several measures under consideration in Albany; and unlike other proposals, it does not expose New York’s justice system to the risk of replicating ill-advised “reforms” adopted in other states.

The NYCLU strongly supports S.2101-A, and urges lawmakers to reject misguided approaches to bail reform that appear to be progressive but could actually lead to more New Yorkers behind bars awaiting trial. To best ensure community safety, lawmakers must resist adopting notoriously vague standards that would allow bias to remain pervasive in pretrial justice decisions. Our constitution demands more of our courts, and of our justice system as a whole.