



Preventive Detention in New York: From Mainstream to Margin and Back

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Executive Summary

New York is in the middle the most important debate over its bail system since the 1960s and 1970s and the same issue, preventive detention, stands at the heart of the discussion. Preventive detention refers to detaining someone prior to trial because they pose a risk to public safety. In 2017, as part of his State of the State address, Governor Andrew Cuomo announced plans to allow preventive detention as part of a larger reform that would make pretrial release dependent not on financial resources, but on the risk that someone would appear for trial or commit a new crime if they were released without bail.

When this practice was first debated in New York from 1960s through the 1970s as part of an overhaul of the state's criminal procedure law, proponents argued from a position of public safety. It was absurd, they suggested, to allow someone with a long criminal history to be released to commit more crimes before. Judges, they argued, agreed and through the practice of setting high bail, covertly detained people anyway – allowing detention would simply allow for a candid debate about someone's dangerousness. Opposition was fierce and the New York Civil Liberties Union went so far as to say the practice was almost “universally regarded as illegal.” Critics also suggested that judges would not be able to tell who should be detained with any accuracy, and that the practice would be used against the poor and people of color. These arguments won the day in New York, but nationally, the tide turned in favor of preventive detention.

From 1970 onward, more and more states began allowing preventive detention, buoyed by a public concern over rising crime rates. The constitutionality of the practice was resolved in 1986 in *United States v. Salerno*, where the Supreme Court declared that preventive detention violated neither the Fourteenth nor Eighth amendments. The practice gained adherents and today, New York is one of only four states that does not allow preventive detention. Moreover, even New York allows preventive detention in certain cases of domestic violence.

In some ways, today's debate is similar to that of the 1960s. Proponents continue to argue that preventive detention is a valuable public safety tool, pointing to several high-profile crimes committed by people released on bail. However, the debate has also changed in important ways: the legality of preventive detention is no longer in doubt and defenders of the practice suggest that risk assessments, tools that use social-science backed predictions to assess the likelihood that someone will endanger the public on release, will address the major concerns of the 1960s and 1970s. They urge that with a combination of risk assessments and preventive detention, New York will be able to release more people being held before trial than ever before.

Opponents counter that this is a solution in search of a problem: New York's bail law provides all the tools needed to reduce the number of people being detained without giving judges any new reasons to hold people. They point to abuses of discretion by judges and prosecutors as evidence that if there is another way to hold people before trial, the result will be more detention, not less. They also question the efficacy of risk assessments, suggesting that these tools may worsen racial bias in the justice system, making these tools a weak foundation on which to support a system of preventive detention. This paper seeks to provide the context for this discussion by describing New York's first debate over preventive detention as New York determines whether preventive detention is a step forward or back for pretrial justice in the state.

Introduction

In 2017, Governor Andrew Cuomo announced in his State of the State that New York would “transform the State’s antiquated bail system, which equates freedom with the ability to pay.”¹ New York’s legislature now faces the question of whether to enact these proposals.

In many ways, Governor Cuomo’s critique of the bail system has a long pedigree. As far back as the 1960s, New Yorkers have debated the fairness of the state’s bail practices, including the use of money bail. In particular, they have questioned whether their bail practices keep potentially innocent people incarcerated too long while unduly burdening low-income communities. Governor Cuomo’s proposed changes are the latest iteration of this debate but many of the major arguments would be familiar to reformers in the 1960s.

This may be nowhere truer than in the fight over preventive detention. Preventive detention is the practice of holding someone before trial if a judicial officer believes the person presents a risk to public safety. New York fiercely debated whether to permit this practice in the 1960s when it overhauled its entire criminal procedure law.² Proponents of the practice suggested it would improve public safety and while allowing judges to be candid about a factor they already covertly considered. Critics countered that judges and lawyers could not accurately predict who would be a danger if released. They also believed the practice was antithetical to the notions of due process and the Constitution’s prohibitions on excessive bail.

New York ultimately decided against allowing preventive detention. This choice was praised as a victory for civil liberties. However, in the years that followed, the national tide turned firmly in favor of preventive detention. Today, New York is now just one of four states that prevent judges from considering dangerousness in making bail decisions.³

Governor Cuomo’s proposal has restarted this debate. However, developments in both law and social science have changed the conversation in important ways. The Supreme Court resolved the legality of the practice in *United States v. Salerno* in 1987, which declared preventive detention constitutional.⁴ The rise of risk assessment tools that seek to identify who can be safely released⁵ has also improved the justice system’s ability to assess dangerousness, a key concern when the concept of preventive detention was first debated. However,

¹ ANDREW M. CUOMO, STATE OF THE STATE, 2017 179-80 (2017).

² OFFICE OF LEGISLATIVE RESEARCH (OLR), MAJOR PROVISIONS OF THE PROPOSED CRIMINAL PROCEDURE LAW 1 (1969).

³ CUOMO, *supra* note 1, at 180.

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

⁵ CUOMO, *supra* note 1, at 180-81.

issues remain: some critics of risk assessments suggest that they will increase racial disparities in the justice system and argue that New York's existing laws give it all the tools the state needs to create a fairer pretrial detention system.

This paper aims to capture the preventive detention debate of the late 1960s to provide historical context for Governor Cuomo's proposed amendment to New York's criminal procedure law. The paper proceeds in five parts. Part I provides a brief history of New York's bail practices in the 1960s. Part II discusses the ambiguous legal status of preventive detention at the state and federal level during this same period. Part III describes New York's debate over preventive detention in the 1960s and 1970s: its proposal by the Temporary Commission on Revision of the Penal Law and Criminal Code, the resulting debate and New York's ultimate rejection of the concept by 1970. Part IV explores how the tide turned after New York's decision and preventive detention gained increasing legal and popular support. Part V describes New York's bail practices and the current debate over preventive detention, with a focus on how risk assessment has changed the discussion. Part VI concludes by looking towards the future of bail reform in New York.

Part I: Bail Reform in the 1960s – New York and Beyond

In the early 1960s, New York City was on the cutting edge of a national wave of reform that saw the current bail system as unjust and inefficient. Justice Bernard Botein, presiding justice of the Appellate Division, First Department, offered a representative critique of the system of this era, calling it “blind” and “irresponsible” to detain people who had yet to be convicted of any crime.⁶

These critiques were given further play in the *New York Times*. Over a nine-month period in 1965, the *Times* published multiple editorials and articles criticizing both the state and federal bail systems as a “machine to penalize the poor,”⁷ “fundamentally undemocratic and unjust,”⁸ and calling for the current system to be “abolished or drastically modified.”⁹ Reformers, concerned with jail overcrowding, saw bail reform as a means to reduce overcrowding while respecting the principle of “innocent until proven guilty.”¹⁰

The Manhattan Bail Project, begun in 1961, exemplified New York's response to these issues. The Bail Project was a collaboration between New York City's criminal courts and The Vera Institute of Justice.¹¹ Vera, through a formal

⁶ Editorial, *Parole is Better Than Jail*, N.Y. TIMES, Nov. 14, 1963 at 32.

⁷ Editorial, *Bail Reform*, N.Y. TIMES, Apr. 2, 1965, at 34.

⁸ Editorial, *Changing the Bail System*, N.Y. TIMES, Sept. 30, 1965, at 34.

⁹ Editorial, *Liberalizing Bail*, N.Y. TIMES, June 21, 1965, at 28.

¹⁰ Editorial, *Parole is Better Than Jail*, N.Y. TIMES, Nov. 14, 1963 at 32.

¹¹ Scott Kohler, *Case 29, Vera Institute of Justice: Manhattan Bail Project*, in CASEBOOK FOR THE FOUNDATION: A GREAT AMERICAN SECRET 81-82 (Joel L. Fleishman et al. eds., 2007).

questionnaire, elicited information about a defendant's community ties and personal characteristics in order to determine whether they were a good candidate for pretrial release.¹² Announcing the Bail Project, Judge Abraham N. Bloch, Chief City Magistrate Judge, noted that it would “put bail in its proper perspective in the Court rather than just as a means of punishment or for some other purpose. It will be as a true function should be, that of insuring that the defendant appears whenever his presence is required by the Court.”¹³

Over its four-year period, the Bail Project resulted in 25,000 defendants being released. By 1965, the Bail Project was hailed by Justice Botein as a “radical transformation” in the administration of bail.¹⁴ He noted that the Bail Project had encouraged the “cautious’ but significant increase in the use of summonses in lieu of detention and arrest.”¹⁵ The program was also popular with law enforcement. Deputy Police Commissioner Leonard E. Reisman suggested that the program should be expanded and officials from the Office of Criminal Justice suggested it might eventually facilitate reduced sentences.¹⁶ Reformers also noted that the Bail Project’s work showed that people were less likely to fail to appear if released on Vera’s recommendation than if released on conventional bail.¹⁷ The Bail Project was thus emblematic of New York City’s enthusiasm for reforming what was still seen as a broken, inequitable bail system.

Bail reform was also gaining momentum at the federal level, where national leaders cited New York City’s bail practices as a model. Speaking at a national conference on bail and criminal justice in 1964, Attorney General Robert F. Kennedy urged communities to reform the injustices of the bail system, praising Vera’s (and ostensibly the Bail Project’s) work experimenting with pretrial release of defendants without bail.¹⁸ Two years later, on June 22, 1964, President Lyndon B. Johnson signed into law a bail reform measure that allowed poor defendants awaiting trial on federal charges to be released without bonds under certain conditions.¹⁹ Once again, Vera’s work on the Bail Project was highlighted to support the conclusion that defendants could be released without bail and still appear for future proceedings.²⁰

¹² Transcript of Record at 3, In the Matter of Bail Procedures of the Magistrates’ Court and the Court of Special Sessions (1961), available at <https://www.vera.org/publications/manhattan-bail-project-official-court-transcripts-october-1961-june-1962>.

¹³ *Id.*

¹⁴ *Bail Project Gets Praise at Parley*, N.Y. TIMES, Oct. 16, 1965, at 1.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Editorial, *Investigating the Bail System*, N.Y. TIMES, June 19, 1962 at 34.

¹⁸ Anthony Lewis, *Kennedy Scores Bail Injustices*, N.Y. TIMES, May 30, 1964 at 41.

¹⁹ *President Signs Bail Reform Act*, N.Y. TIMES, June 23, 1966 at 20.

²⁰ *Id.*

The Bail Project reflected the general attitude of the 1960s—both in New York and at the federal level—that the bail system was broken and in need of reform. It was in this general climate that the New York State Legislature began considering preventive detention as part of a larger overhaul of the state’s criminal procedure laws. As the debate started, not only did preventive detention seem to cut against the prevailing ethos, but many doubted it was even constitutional.

Part II: The Legal Status of Preventive Detention in the 1960s

During the 1960s, the legality of preventive detention was still hotly contested, with critics claiming that it violated the Eighth Amendment’s prohibition on excessive bail and the Fifth Amendment guarantee of due process. Neither the United States Supreme Court nor the New York Court of Appeals had opined on these issues, so parties were left to divine the answer from a relatively sparse body of law.

Supreme Court Ambiguity

In 1951, more than a decade before the Legislature began revising the criminal procedure code, the Supreme Court held in *Stack v. Boyle* that bail set at a figure higher than needed to ensure a defendant’s presence at future proceedings is “excessive” under the Eighth Amendment.²¹ However, the Court did not consider whether every defendant had a right to bail in the first place or whether bail could be denied for reasons other than ensuring the defendant’s appearance. The constitutionality of preventive detention was thus left unanswered.

The Supreme Court started wrestling with the issue in 1952 when it decided *Carlson v. Landon*. *Carlson* held there was no right to bail in the context of immigration deportation hearings.²² While the Court’s holding was restricted to non-criminal cases, its language suggested a potentially broad array of scenarios where someone might have no access to bail: “The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country . . . Indeed, the very language of the Amendment fails to say all arrests must be bailable.”²³

Carlson was consistent with a line of Court cases that found that the government could, in certain “regulatory” cases, detain someone in the interest

²¹ *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (quotations omitted).

²² *Carlson v. Landon*, 342 U.S. 524, 546 (1952).

²³ *Carlson*, 342 U.S. at 545-46.

of public safety. Indeed, even before *Carlson*, the Court intimated in *Wong Wing v. United States* in 1898 that resident aliens could be detained prior to a deportation hearing.²⁴ After *Wong Wing*, the Court upheld the power to detain someone without probable cause in times of insurrection in *Moyer v. Peabody* in 1909²⁵ and in time of war in *Ludecke v. Watkins*, in 1948.²⁶ Four years after *Carlson*, the Court found in *Greenwood v. United States*, that someone could be at least temporarily detained if they were mentally unfit to stand trial.²⁷ However, while all of these cases would eventually be relied upon by the Court to approve preventive detention in *Salerno*²⁸, none answered the question of whether someone could be held on the grounds of public safety generally.

Ambiguity in the New York Courts

New York courts were similarly silent about the constitutionality of preventive detention. In 1942, the New York Court of Appeals issued its first opinion discussing bail, stating, without explanation, in *People ex rel. Fraser v. Britt* that whether to provide bail was a matter of discretion for the trial court.²⁹ The extent of the trial court's discretion and the status of bail as a guaranteed right thus remained unclear.³⁰

In 1947, in *People ex rel. Lobell v. McDonnell*, the Court of Appeals began to develop a legal framework for what constituted "excessive bail." The court stated that, given the presumption of innocence, the policy of the law favored bail, and that accordingly the amount required for bail must be "no more than is necessary to guarantee [a defendant's] presence at the trial."³¹ In making this determination, the Court of Appeals required judges to consider:

"The nature of the offense, the penalty which may be imposed, the probability of the willing appearance of the defendant or his flight to avoid punishment, the pecuniary and social condition of defendant and his general reputation and character, and the apparent nature and strength of the proof as bearing on the probability of his conviction."³²

²⁴ See *Salerno*, 481 U.S. at 748 (citing *Wong Wing v. United States*, 163 U.S. 228 (1896)).

²⁵ *Moyer v. Peabody*, 212 U.S. 78, 85 (1909).

²⁶ *Ludecke v. Watkins*, 335 U.S. 160, 165 (1948).

²⁷ *Greenwood v. United States*, 350 U.S. 366, 375 (1956).

²⁸ *Salerno*, 481 U.S. at 748.

²⁹ *People ex rel. Lobell v. McDonnell*, 71 N.E.2d 423, 424 (1947) (citing *People ex rel. Fraser v. Britt*, 43 N.E.2d 836, 837 (1942)).

³⁰ *Britt*, 43 N.E.2d at 837.

³¹ *McDonnell*, 71 N.E.2d at 425.

³² *Id.*

The *Lobell* factors required judges to consider the “nature of the offense,” as well as “the pecuniary and social condition of the defendant.”³³ As a result, it appears that at least one judge interpreted *Lobell* as permitting judges to take into account dangerousness when setting bail.³⁴ However, this was decidedly a minority viewpoint, as no other lower courts interpreted *Lobell* as endorsing or rejecting the practice of preventive detention.

While these factors did not appear to include the consideration of dangerousness upon release, they also related only to the reasonableness of bail amounts—not whether there was a constitutional obligation to provide bail to all offense classes and/or arrestees.

In 1967, just as New York was beginning to revise its bail procedures, the Court of Appeals again faced a question about whether and when bail must be provided. In *People ex rel. Gonzalez v. Warden, Brooklyn House of Detention*, the Court of Appeals addressed whether bail set at \$1,000, which the impoverished defendant could not meet, was unconstitutional.³⁵ Gonzales argued that this “[p]retial detention denied [him] due process of law in that [] he is punished without trial and in violation of the presumption of innocence without any showing of overriding necessity.”³⁶

Gonzalez could have been watershed moment for New York. While the Court of Appeals was not asked to address whether bail had to be provided in all cases, a finding for Gonzalez would have effectively mandated the creation of a non-monetary bail system, changing the entire trajectory of bail in New York.³⁷ Moreover, a finding that these detentions constituted a punishment would have undermined the argument that pretrial detention is a regulatory act, one of the lynchpins of future decisions on preventive detention.

However, the Court of Appeals, while acknowledging that the bail system was “subject to abuse,” determined that its structure was more properly the decision of the legislature.³⁸ *Gonzales* thus restricted itself to holding that the judge should determine whether to release someone without bail based on the same factors they identified in *Lobell*.³⁹

³³ *Lobell*, 71 N.E.2d at 425.

³⁴ In public comments to the New York Times, Criminal Court Judge Amos Basel criticized the Manhattan Bail Project and claimed that the concept of preventive detention had been endorsed by the Court of Appeals. Although he did not cite a specific case, it appears, based on the timing of Judge Basel’s comments that he was referring to *Lobell*. *Judge Scores Vera Institute’s Plea to Release More Suspects*, N.Y. TIMES, Feb. 11, 1969, at 24.

³⁵ *People ex rel. Gonzalez v. Warden, Brooklyn House of Detention*, 233 N.E.2d 265, 267 (1967).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 269.

³⁹ *Id.*

Despite the ambiguity in state and federal case law, many New York legal commentators were adamant that preventive detention was at best a departure from traditional legal principles and at worst blatantly illegal. The New York Civil Liberties Union, speaking on New York's proposed preventive detention statute in 1969, offered a representative remark, suggesting that preventive detention was almost "universally regarded as illegal."⁴⁰

Part III: The Temporary Commission and the Debate over Preventive Detention

In 1961, around the time that Vera and others began their attempts to reform the bail system, the New York legislature decided to modernize the state's Penal Code and Criminal Procedure Law. In order to carry out this revision, they created The Temporary Commission on Revision of the Penal Law and Criminal Code. The Temporary Commission was a 15-member body chaired by Richard J. Bartlett. It was charged with making "a study of existing provisions of the . . . Code of Criminal Procedure and . . . prepar[ing], for submission to the legislature . . . a revised, simplified code of rules and procedures relating to criminal and quasi-criminal actions and proceedings."⁴¹

The Temporary Commission began studying the Code of Criminal Procedure in 1965.⁴² In both 1967 and 1968, the Commission prepared study bills for the legislature to assess its proposals.⁴³ The Commission's 1967 Interim Report included a section that proposed including preventive detention in the revised Code of Criminal Procedure.⁴⁴ This was reflected in the 1968 study bill, which explicitly allowed the judge to consider the likelihood that a defendant "would be a danger to society or himself at liberty during the pendency of the action or proceeding."⁴⁵

By the time the Temporary Commission offered its revisions for consideration, the nation's attitude on bail was beginning to shift. Fear of crime drove support for policies like preventive detention while support for more expansive release practices like those championed by the Bail Project waned. New York's criminal procedure law thus became one of the first legislative arenas in which these two visions of bail reform clashed.

⁴⁰ Edward C. Burks, *State to Weigh Preventive Detention*, N.Y. TIMES, Feb. 23, 1969, at 62.

⁴¹ TEMP. COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, INTERIM REPORT, THE ACT CREATING THE COMMISSION 1 (1962).

⁴² OLR, *supra* note 2, at 1.

⁴³ *Id.*

⁴⁴ TEMP. COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, PROPOSED NEW YORK CRIMINAL PROCEDURE LAW: SIXTH INTERIM REPORT 11 (1967).

⁴⁵ TEMP. COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, PROPOSED NEW YORK CRIMINAL PROCEDURE LAW: 1968 STUDY BILL AND COMMISSION REPORT 194 (1968).

Preventive Detention in the Code of Criminal Procedure

While New Yorkers debated the merits of “preventive detention” in the press, the term itself did not appear in the proposed code revisions. The Temporary Commission’s 1968 study bill demonstrates how the concept of preventive detention was written in practice. Initially, preventive detention was included in section 275.30, “Application for recognizance or bail; rules of law and criteria controlling determination.” Subsection b held that in determining bail for defendants in criminal action or awaiting appeal, a judge could consider “*the likelihood that [the defendant] would be a danger to society or himself at liberty during the pendency of the action or proceeding.*”⁴⁶ In making this determination the judge was expected to consider:

- i. The defendants’ character, reputation, habits and mental condition; and
- ii. The nature of the offense or offenses with which he is charged or of which he has been conviction in the action or proceeding involved; and
- iii. His previous criminal record if any, and the nature and number of offenses of which he has been convicted and with which he has been charged.⁴⁷

The 1969 study bill used the same language, this time including the preventive detention statute in subsection b of section 510.30, which shared the same title as section 275.30 of the 1968 study bill.⁴⁸ The accompanying legislative report to the bill also explicitly stated that the goal of section 510.30 (b) was to enact preventive detention,⁴⁹ an impression confirmed by the Temporary Commission’s executive director, Richard Denzer.⁵⁰

The Rationale for Preventive Detention

The Temporary Commission had numerous reasons for including preventive detention in the proposed criminal procedure reform. One major argument was that preventive detention was already occurring and, indeed, was an inextricable part of the justice system even if not formally permitted. As the Temporary Commission noted in the legislative report of the 1969 bill:

⁴⁶ TEMP. COMM’N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, *supra* note 44, at 194 (emphasis supplied).

⁴⁷ *Id.*

⁴⁸ TEMP. COMM’N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, PROPOSED NEW YORK CRIMINAL PROCEDURE LAW: 1969 BILL 231 (1969).

⁴⁹ *Id.* at XVII.

⁵⁰ Burks, *supra* note 40 at 53.

[C]ourts invariably consider whether the defendant is likely to be a danger to society during release. In the case of a defendant charged with a forcible rape who has a bad record of sex crimes for instance, it would be a rare judge who would not commit him or fix very high bail regardless of the likelihood of his future attendance; nor, in the opinion of most, could the judge be validly criticized for such action. The proposal candidly recognizes this factor and expressly predicates possible danger to society as one of the criteria to be considered upon the bail determination.⁵¹

Or, as Chairman Bartlett put more bluntly, the Commission was trying to “make an honest woman of the courts.”⁵²

The Commission’s assessment of existing practice was not based on idle speculation. In a February 1968 hearing with Harry Subin, a New York University Professor working at the Vera Institute, both Subin and Commission members agreed that, in practice, a judge who believed a defendant was a danger to the community would simply fix bail so high that the person could not make it.⁵³ Moreover, New York Criminal Court Judge Amos Basel all but confirmed this practice publicly when criticizing the Vera Institute and the Manhattan Bail Project as “too soft” and “poorly informed on the subject of bail for dangerous defendants.”⁵⁴ Speaking to the New York Times, Judge Basel explained that high bail was often set “to detain defendants in serious cases when there is considerable evidence of guilt or there is danger to the community,”⁵⁵ and it appears he saw detention on “dangerousness” grounds as permissible pursuant to *Lobell*.

Later that same year, a reporter for the New York Times reaffirmed the view that, regardless of the statutory authorization of preventive detention, “judges [in New York] and elsewhere customarily set high bail for subject they consider dangerous to the community in an effort to keep them off the streets.”⁵⁶ Thus, the Temporary Commission suggested that preventive detention should be statutorily authorized in order to “candidly recognize this factor and expressly predicate[] possible danger to society as one of the factors to be considered upon bail determination.”⁵⁷

⁵¹ TEMP. COMM’N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, *supra* note 48, at XVII.

⁵² David Burnham, *Preventive Detention Measure to Be Considered by State Penal Law Body*, N.Y. TIMES, Aug. 17, 1969 at 64.

⁵³ TEMP. COMM’N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, *Minutes of a Public Hearing Held by the Temporary Commission on Revision of the Penal Law and Criminal Code; February 16, 1968* 50 (1968).

⁵⁴ *Judge Scores Vera Institute’s Plea to Release More Suspects*, N.Y. TIMES, Feb. 11, 1969 at 24.

⁵⁵ *Id.*

⁵⁶ David Burnham, *State Unit Drops Detention Plan*, N.Y. TIMES, Sept. 3, 1969, at 39.

⁵⁷ TEMP. COMM’N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, *supra* note 48, at XVII.

Another argument offered by the Temporary Commission was that public safety merited detention of dangerous defendants. Echoing Judge Basel's frustrations with crime, executive director Denzer argued that preventive detention was "desirable," stating, "I don't see why there isn't a valid reason for keeping in jail a defendant whose entire record indicates he's going to do it again – I mean a defendant like a professional stickup man or a sex criminal."⁵⁸ The President of the New York State Association of Chiefs of Police Frank Looney offered similar sentiments in 1970:

When it is realized that arrested rapists, muggers, and armed robbers out on bail have repeated the same identical crimes or even more serious crimes and in some cases three times over before coming to trial on the charge for which they were originally bailed, I don't feel we can afford to close our eyes to this type of danger in our midst . . . I strongly recommend to this Committee that they sponsor and support laws that will provide for judicial implementation of preventive detention.⁵⁹

The Critique of Preventive Detention

The Temporary Commission's proposal faced staunch resistance. Critics argued that the practice would be weaponized against vulnerable groups to produce "de facto discrimination."⁶⁰ The New York Civil Liberties Union warned about discrimination against the poor. They argued this group would be more likely accused of crimes that would result in preventive detention. The result would be to "imprison the poor on dubious constitutional grounds and on even less tenable policy grounds."⁶¹ They also suggested the practice might be used by police to retaliate against people who had angered them. Others believed that preventive detention would be used to discriminate against people of color, particularly if they were involved in political activity.⁶²

Critics' second line of attack was on the legality of preventive detention. The New York Civil Liberties Union declared the practice was "almost universally regarded as an illegal consideration in the determination whether to set bail."⁶³ In a June 1969 memorandum, the Office of Legislative Research, a now-defunct office providing research support to the state legislature, acknowledged

⁵⁸ Burks, *supra* note 40, at 62.

⁵⁹ FRANCIS B. LOONEY, STATEMENT BY FRANCIS B. LOONEY COMMISSIONER OF POLICE NASSAU COUNTY POLICE DEPARTMENT AND PRESIDENT OF THE NEW YORK STATES ASSOCIATION OF CHIEFS OF POLICE BEFORE THE NEW YORK STATE ASSEMBLY CODES COMMITTEE ON THE CRIMINAL PROCEDURE LAW 3 (1970).

⁶⁰ ARYEH NEIER & NEIL FABRICANT, LEGISLATIVE MEMORANDUM #20 5 (1969).

⁶¹ *Id.*

⁶² Ronald L. Goldfarb, *A Brief for Preventive Detention*, N.Y. TIMES, Mar. 1, 1970 at 221.

⁶³ Neier & Fabricant, *supra* note 60, at 5.

that preventive detention “could very well violate the due process clause of the Fifth Amendment.”⁶⁴ Some legal academics like Abraham S. Goldstein also suggested that allowing preventive detention was tantamount to permitting imprisonment without evidence and would do irreparable harm to the presumption of innocence.⁶⁵

A third critique of preventive detention, made by Vera, was that judges lacked information to adequately assess who was dangerous enough to merit detention. Speaking before the Temporary Commission in December 1968, Subin noted that: “the Code speaks of danger to society without defining dangerousness. It tells judges to consider the character, habits, reputation of the defendant but does not suggest in what regard those things are relevant to the bail decision.”⁶⁶ Three months later, he built on this critique in the pages of the *New York Times*, arguing “[n]o attempt has been made to define exactly whom you really want to detain under these provisions. There’s no way of predicting whether a defendant will commit a crime if released.”⁶⁷

Interestingly, in February 1968, Vera initially supported allowing judges to consider dangerousness in making release decisions, even if not directly supporting preventive detention. Its initial support was in reaction to the reflexive and opaque nature of bail hearings in New York. They believed that encouraging the judge to be candid in stating *why* they considered a defendant dangerous would promote a judicially tested standard of dangerousness that would protect defendants until the social sciences could provide a more accurate assessment.⁶⁸

Requiring judges to state the reason for their bail decisions would, in Vera’s view, bring transparency to an opaque process where it was unclear why judges made the decisions they did.⁶⁹ The opacity of judges’ decision-making process also likely prompted Vera’s eventual opposition to preventive detention. Having said, in 1968, that the proposed Code did not provide judges with enough guidance to make reasoned decisions on preventive detention,⁷⁰ it makes sense that they would oppose the 1969 bill, where the language of preventive detention was left virtually unchanged.

⁶⁴ OLR, *supra* note 2, at 3. See also Burnham, *supra* note 52 at 64.

⁶⁵ New York Times Editorial Board, Opinion, *Make Legal Haste Wisely*, N.Y. TIMES, Mar. 22, 1969 at 32.

⁶⁶ TEMP. COMM’N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, *Minutes of a Public Hearing Held by the Temporary Commission on Revision of the Penal Law and Criminal Code; December 13, 1968* 94 (1968).

⁶⁷ Burks, *supra* note 40, at 62.

⁶⁸ TEMP. COMM’N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, *supra* note 53, at 358.

⁶⁹ *Id.* at 385.

⁷⁰ TEMP. COMM’N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, *supra* note 66, at 93-94.

Other critics had separate concerns about the new bail procedures promoting reflexive thinking. Morris J. Zweig of the Magistrates' Association, speaking to the question of setting bail generally, noted the reflexive nature of the bail process: "I say this to you as a matter of human frailty, if you have bail at \$500 as a maximum [for specific offenses], some people or somebody is going to say it's \$500."⁷¹ Some worried about human frailty of a different kind, suspecting that politically sensitive and risk averse judges would overuse preventive detention.⁷²

Finally, some critics were concerned that preventive detention would wreak havoc on New York courts. Frank S. Hogan, the Manhattan District Attorney, came out against preventive detention by September of 1969, stating that the procedures required to implement it would create too much additional work for the courts.⁷³ Taking a different angle, Subin noted that, due to delays in caseloads, it was entirely possible that people waiting in jail on pretrial detention would spend more time in jail than they would have been sentenced for their actual offense.⁷⁴

The Fall of Preventive Detention

Initially, New York legislators expected vote on the new Code of Criminal Procedure during the 1969 legislative session. However, due to logistical delays in printing the bill and requests from groups like the New York Civil Liberties Union, the vote was delayed. During this delay, prominent civil groups including the New York Legal Aid Society, New York Civil Liberties Union, the Citizen's Union, and Vera focused intense criticism on preventive detention.⁷⁵

This coalition's first victory came in May 1969, when Governor Nelson Rockefeller vetoed a separate bill to add preventive detention to the existing criminal code. Governor Rockefeller called the bill "premature," noting that preventive detention would be included as part of the larger overall law that would soon be presented to the New York Legislature.⁷⁶

Five months later, however, the Temporary Commission removed preventive detention from the criminal procedure bill it would submit to the legislature. Justifying the decision, Chairman Bartlett noted that preventive detention had become so controversial that "its inclusion might endanger the over-all reform

⁷¹ TEMP. COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, *Minutes of a Public Hearing Held by the Temporary Commission on Revision of the Penal Law and Criminal Code; December 6, 1968* 35 (1968).

⁷² Goldfarb, *supra* note 76 at 221.

⁷³ Burnham, *supra* note 56, at 39.

⁷⁴ TEMP. COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, *supra* note 66, at 107.

⁷⁵ OLR, *supra* note 2, at 3.

⁷⁶ *Governor Vetoes Two Criminal Bills*, N.Y. TIMES, May 24, 1969, at 70.

of the procedure law.”⁷⁷ The Temporary Commission provided state legislators with the language so that they could reintroduce it into the Code,⁷⁸ but the legislature declined the invitation and preventive detention did not make into the final bill.⁷⁹ On April 14, 1970, the new Code of Criminal Procedure was approved by the Legislature and sent to the governor.⁸⁰ In August 1971, the approved Code took effect.⁸¹

The 1970 Statute: No Mention of Preventive Detention

Had New York passed preventive detention, it would have been the first state in the nation to adopt the practice.⁸² Instead, section 510.30 of the Code of Criminal Procedure instructed the judge to consider a set of factors very similar to the ones the Court of Appeals laid out in *Lobell*:

- i. The principal’s character, reputation, habits and mental condition;
- ii. His employment and financial resources; and
- iii. His family ties and the length of his residence, if any, in the community; and
- iv. His criminal record, if any; and
- v. His previous record, if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and
- vi. If he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating the probability or improbability of conviction; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and
- vii. If he is a defendant, the sentence which may be imposed or has been imposed upon conviction.⁸³

Noticeably absent was the language from the Temporary Commission’s 1968 study bill that would have allowed the judge to consider whether a defendant “would be a danger to society or himself at liberty during the pendency of the action or proceeding.”⁸⁴

The Code also specified what types of bail a judge could authorize in section 520.10. The law limited authorized bail to eight varieties: cash bail, an

⁷⁷ Burnham, *supra* note 56, at 39.

⁷⁸ *Id.*

⁷⁹ Lacey Fosburgh, *New Criminal Process Law in Effect*, N.Y. TIMES, Sept. 5, 1971, at 34.

⁸⁰ William E. Farrell, *Criminal Law Revision Sent to Governor*, N.Y. TIMES, Sept. 5, 1971, at 36.

⁸¹ Fosburgh, *supra* note 79, at 34.

⁸² Burks, *supra* note 40, at 62.

⁸³ Criminal Procedure Law, ch. 996, 1970 N.Y. Laws 3288.

⁸⁴ TEMP. COMM’N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, *supra* note 45, at 194.

insurance company bail bond, secured, partially secured, and unsecured surety bonds, secured, partially secured, and unsecured appearance bonds.⁸⁵

Types of Bail in New York State

The types of bail specified in the 1970 Criminal Procedure Law are effectively the same as the ones used today. In fact, the only change in section 520.10 came in 2005 when the statute was amended to govern the use of credit cards in paying bail. The types of bail currently allowed in the state are:

Cash Bail: the full bail amount paid in cash. This is returned if the defendant appears at all court dates, minus a 3 percent administrative fee.

Insurance Company Bail Bond: bail provided by a bail bondsman who typically requires collateral of some kind like cars or property and charges a non-returnable fee. The collateral is returned if the defendant makes all their required court appearances.

Surety Bond: someone other than the defendant provides collateral worth the bond or real estate worth twice the value of the bond. If a surety bond is partially secured, then the collateral deposited needs to be worth no more than 10 percent of the total bail required. If it is unsecured, no deposit is required.

Appearance Bond: the defendant provides collateral worth the bond or real estate worth twice the value of the bond. If an appearance bond is partially secured, then the collateral deposited needs to be worth no more than 10 percent of the total bail required. If it is unsecured, no deposit is required.

Cash bail, commercial bail bonds, and surety bonds are generally considered the most common types of bail set by judges.

Sources: 2005 N.Y. Laws 457; *A User Guide to Bail*, NYC Bail Lab, <http://bail-lab.nyc/bail-faqs/> (last visited Jan. 1st 2018); HUMAN RIGHTS WATCH, *THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY* 13 (2010).

⁸⁵ Criminal Procedure Law, ch. 996, 1970 N.Y. Laws 3290.

Part IV: Preventive Detention Gains National Acceptance

Although New York rejected preventive detention, the tide was turning in favor of the practice. As crime increased in the late 1960s and 1970s and became the focus of increasing media coverage, public debate began to focus more and more on the need to check violent crime. On the legal front, the Supreme Court issued a series of opinions that expanded the power of courts to proactively detain defendants, ultimately blessing the practice as consistent with constitutional principles in 1987. New York courts, meanwhile, remained silent as to whether the practice was consistent with state constitutional principles. The door to preventive detention was open, and states began walking through. By 1978, twenty-three states and the District of Columbia had laws designed to address defendant danger in the pretrial decision-making process. By 1984, this had risen to 34 states and the federal government.⁸⁶

The Public Push for Preventive Detention

Ronald Goldfarb's 1965 book *Ransom: A Critique of the American Bail System*, foreshadowed the argument many would advance in favor of preventive detention. Goldfarb, a former special prosecutor with the Department of Justice, agreed with the mainstream critique of the bail system—that it ran counter to the presumption of innocence and hurt the poor the most. However, he embraced the idea of screening defendants “who are too dangerous to be freed and should, therefore, be held in ‘preventative detention’”⁸⁷

Protecting the public from crime was quickly becoming the central objective of federal criminal justice policy and bail reforms proposed by federal officials reflected this. In January 1969, a number of congressional representatives introduced a preventive detention bill, and Attorney General John Mitchell, in his first news conference, raised the problem of “suspects who persisted in getting arrested while out on bail.”⁸⁸ One month later, federal Judge Charles W. Halleck urged Congress to be pragmatic in considering whether to force courts to release someone “to the community where in many instances [that person] will commit further depredations on society.”⁸⁹

Then, in July 1969—while the Temporary Commission was still working—the Nixon Administration sent a proposal to Congress to allow preventive detention

⁸⁶ John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 17 (1985).

⁸⁷ Eliot Fremont-Smith, *Books of the Times: A Racket in the Hall of Justice*, N.Y. TIMES, Dec. 24, 1965 at N.Y. TIMES, Dec. 24, 1969, at 15.

⁸⁸ Fred P. Graham, *Pretrial Jailing Weighed by Nixon*, N.Y. TIMES, Jan. 30, 1969, at 1.

⁸⁹ Fred P. Graham, *When Bail is a License for Crime*, N.Y. TIMES, Feb. 2, 1969, at E11.

of dangerous defendants charged with federal crimes.⁹⁰ Commenting on the rapidly growing support for preventive detention, Goldfarb noted that in 1965, when he testified before a Senate subcommittee, he was asked to speak on the record in support of preventive detention, because no one else was willing to do so. However, by 1970, this apparent “taboo” had ended: the Nixon Administration and five separate Congressmen had proposed preventive detention bills, including New York’s Charles Goddell. In making the case for the practice, Goldfarb’s article hammered home public safety concerns and sought to allay fears about the practice by asserting that it would be limited to only a “bare minimum of cases.”⁹¹ In July 1970, the federal government authorized the practice through the passage of the D.C. Crime Bill.⁹²

Perhaps not surprisingly, this gradual shift toward preventive detention tracked the steady rise in violent crime that began in the late 1960s and continued throughout the decade. The degree to which this sentiment was driven by political opportunism or the actual rise in crime is still debated. Certainly, violent crime rates doubled between 1960 and 1970, then climbed even higher in the 1980s. Some argue that this drove public calls for action.⁹³ Others suggest that America’s turn towards more punitive justice policies beginning in the mid-1960s actually preceded the rise in crime⁹⁴ and may have been driven as much by political opportunism stroked by figures like Richard Nixon as by a genuine fear of crime.⁹⁵

Regardless of the impetus, the pressure on elected officials to do something about crime was real and bipartisan. By 1975, after the passage of the D.C. Crime Bill, African American community organizations and papers were urging judges and prosecutors to keep more people in jail before trial. They also decried the “revolving door” of criminal justice, which they believed coddled criminals by releasing them into communities where they victimized African Americans.⁹⁶ North, New York’s relatively liberal Republican governor, Nelson Rockefeller, had determined by 1970 that forging a “law and order” reputation

⁹⁰ Burnham, *supra* note 56, at 39.

⁹¹ Goldfarb, *supra* note 76 at 221.

⁹² *Model of Injustice*, N.Y. TIMES, July 30, 1970 at 27.

⁹³ Barry Latzer, THE RISE AND FALL OF VIOLENT CRIME IN AMERICA 110, 177-78 (2016).

⁹⁴ See, e.g. HEATHER ANN THOMPSON, BLOOD IN THE WATER: THE ATTICA PRISON UPRISING OF 1971 AND ITS LEGACY, 19 (2016) (“This profound shift in public policy—a watershed moment that would eventually lead to the United States imprisoning more people than any other country on the globe—had depended upon a serious misperception regarding just how dire America’s crime problem” really was. In 1964, when federal and state officials first embraced the more punitive laws and more aggressive policing, the nation’s crime rate was historically unremarkable.”).

⁹⁵ See, e.g. RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES, 69-71 (2013) (describing the Nixon campaign’s criminal justice rhetoric and policies as being based primarily on electoral considerations).

⁹⁶ JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 127-128 (2017).

was essential to his political success.⁹⁷ It was against this background that the push for preventive detention began to accelerate in the United States.

Supreme Court Expansion of the Power of Preventive Detention

As the public became more supportive of preventive detention, so did the doctrinal landscape in the courts shift to accommodate the practice. Although the Supreme Court would not explicitly approve preventive detention until *Salerno* in 1987, the late 1970s saw the Court move towards this resolution in a series of decisions that expanded courts' ability to detain defendants pending disposition of their criminal proceedings.

In 1975, in *Gerstein v. Pugh*, the Supreme Court considered whether someone detained for trial was entitled to a judicial determination of probable cause and, if so, whether that determination needed to be made through an adversarial proceeding.⁹⁸ The Court answered the first question affirmatively.⁹⁹ Crucially, however, they determined that the assessment of probable cause could be made without an adversarial hearing. The Court stated that a determination of probable cause was a limited function that did not involve technical legal judgments, but practical considerations based on everyday experience.¹⁰⁰ *Gerstein* thus limited the due process protections required in pretrial detention decisions, a precedent that would be important as the Court began to directly address the constitutionality of preventive detention.¹⁰¹

The Court returned to the issue of pretrial detention in 1979 in *Bell v. Wolfish*. *Bell* arose from a class action challenging practices at the Metropolitan Correctional Center, a detention facility in New York City.¹⁰² The case forced the Court to assess the “constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law.”¹⁰³

The test the Court decided on to determine whether a practice deprived someone of due process was whether it amounted to “punishment.”¹⁰⁴ In order to assess what constituted a punishment, the Court employed a two-part test: first, whether the restriction is based on an express intention to punish, and second, if not, whether the restriction is reasonably related to a legitimate government objective.¹⁰⁵ If there was no express intention to punish and the

⁹⁷ THOMPSON, *supra* note 94 at 19.

⁹⁸ *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975).

⁹⁹ *Id.* at 126.

¹⁰⁰ *Id.* at 121.

¹⁰¹ Goldkamp, *supra* note 86, at 40-41.

¹⁰² *Bell v. Wolfish*, 441 U.S. 520, 523 (1979).

¹⁰³ *Id.* at 535.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 538.

restriction reasonably fulfilled a legitimate government objective, the Court classified it as a “regulatory” measure that could be constitutionally imposed prior to a determination of guilt.¹⁰⁶

Bell set the stage for *Schall v. Martin*, which expressly addressed the question of whether a preventive detention scheme could be constitutional. At issue was Section 320.5(3)(b) of the New York Family Court Act. This authorized the pretrial detention of a juvenile if the court found a serious risk that the juvenile would commit an act that would constitute a crime for an adult prior to their adjudication date.¹⁰⁷ The Second Circuit struck the law down on the grounds that this constituted a punishment prior to a determination of guilt, in violation of the Due Process Clause of the Fourteenth Amendment.

The Supreme Court reversed.¹⁰⁸ The decision turned on two issues: first, per *Bell*, whether the preventive detention statute served a legitimate government objective, and second, per *Gerstein*, whether the detention process laid out in the statute provided sufficient procedural protections.¹⁰⁹ Writing for a six-justice majority, Justice Rehnquist determined that preventive juvenile detention passed the *Bell* test. The Court found no indication that the law was intended to be punitive,¹¹⁰ and found that keeping society safe from juvenile crime was a legitimate purpose.¹¹¹

The Court also found that the Family Court Act’s procedures provided at least the minimum procedural protections required by *Gerstein*. Recalling Vera’s critique of preventive detention, the team challenging preventive detention argued that because there was no way to accurately predict future criminal offending, the procedural standards for detention were inadequate.¹¹² The Court rejected this argument, noting that in prior cases they had already “rejected the contention, based on the same sort of sociological data relied upon by appellees and the District Court, ‘that it is impossible to predict future behavior and that the question is so vague as to be meaningless.’”¹¹³ Moreover, the Court noted that New York’s juvenile preventive detention law provided “far more predetention protection for juveniles than we found to be constitutionally required for a probable-cause determination for adults in *Gerstein*.”¹¹⁴ Accordingly, the preventive detention scheme did not violate the Fourteenth Amendment’s Due Process Clause.

¹⁰⁶ *Id.* at 537.

¹⁰⁷ *Schall v. Martin*, 467 U.S. 253, 255 (1984).

¹⁰⁸ *Id.* at 256.

¹⁰⁹ *Id.* at 264.

¹¹⁰ *Id.* at 269.

¹¹¹ *Id.* at 264-65.

¹¹² *Id.* at 277.

¹¹³ *Id.* at 278-79.

¹¹⁴ *Id.* at 275.

The question of preventive detention came to a head in 1987 with the *Salerno* decision, which challenged the 1984 Bail Reform Act. Under the authority of the Act, the government had detained Anthony Salerno and Vincent Cafaro. The government argued that since Salerno was believed to be the boss of the Genovese crime family and Cafaro a high-ranking member, no condition or combination of bail conditions could assure the safety of the community if the two men were released.¹¹⁵

Salerno challenged this detention on two grounds. First, echoing *Schall*, he claimed the Bail Reform Act violated the Due Process Clause of the Fifth Amendment, the federally applicable analogue of the Fourteenth Amendment. Second, adding a new argument, he claimed that it violated the Excessive Bail Clause of the Eighth Amendment. Without addressing the Eighth Amendment question, Second Circuit found the detention authorized by the Bail Reform Act to be an unconstitutional deprivation of liberty under the Fifth Amendment.¹¹⁶

As in *Schall*, the Supreme Court reversed the decision of the Second Circuit. To assess the Fifth Amendment issue, the Court applied the *Bell* test.¹¹⁷ Drawing on *Schall*'s rationale of juvenile crime prevention, the Court found that the government's interest in crime prevention is "is no less compelling when the suspects are adults."¹¹⁸ The Court further concluded that Congress's intention in allowing preventive detention was not punishment. Accordingly, preventive detention in the Bail Reform Act was an allowable regulatory measure.¹¹⁹

The Court also returned to the logic of *Gerstein*. They found that the safeguards of the Bail Reform Act "are more exacting than those we found sufficient in the juvenile context. . . and they far exceed what we found necessary to effect limited postarrest detention in *Gerstein*."¹²⁰ Since the government had both a compelling rationale and sufficient procedural protections, the constitutionality of preventive detention was upheld.

The Court also disposed of the Eighth Amendment argument. The Second Circuit had not considered this issue since they found that the Bail Reform Act violated the Fifth Amendment. Since the Supreme Court did not agree, they addressed the issue in the final part of their opinion, noting that the Excessive Bail Clause of the Eighth Amendment "says nothing about whether bail should be available at all."¹²¹ The court then drew on *Carlson*, stating they had previously determined that Congress had the power to determine what classes of cases could obtain bail in the civil context. *Salerno* extended this logic to

¹¹⁵ *Salerno*, 481 U.S. at 744.

¹¹⁶ *Id.* at 745-46.

¹¹⁷ *Id.* at 746.

¹¹⁸ *Id.* at 749.

¹¹⁹ *Id.* at 748.

¹²⁰ *Id.* at 752.

¹²¹ *Id.*

criminal cases, finding that, at least in the case of the Bail Reform Act, Congress had the power to determine when bail should not be offered.¹²²

The Court's decision in *Salerno* was not without critics. Justice Marshall, writing in dissent, argued that the Court's rationale effectively eviscerated the protection against punishment prior to adjudication: "merely redefine any measure which is claimed to be punishment as 'regulation,' and, magically, the Constitution no longer prohibits its imposition."¹²³ Other critics suggested that the Court had misapplied precedent by relying on *Bell*. The appropriate test they argued, was found in *Kennedy v. Mendoza-Martinez*, which assesses the constitutionality of a law based on whether it functions in a way that effectively serves to punish a defendant. Pointing to the substantial harms imposed by pretrial detention, these critics argued that preventive detention failed the *Mendoza-Martinez* test and accordingly, should have been found unconstitutional.¹²⁴ The Supreme Court disagreed: *Salerno* still governs the constitutionality of preventive detention.

New York's Cautious Embrace of Preventive Detention

New York was not immune from the wave of enthusiasm for preventive detention that swept the nation. Even before *Salerno*, the legislature began crafting certain, limited circumstances under which the practice was allowable.

This process began in 1981 when the Legislature amended section 530.60 of the criminal procedure law. Initially, the section allowed bail to be reconsidered and revoked only, as in section 510.30, under such conditions as were necessary to ensure the defendant's appearance at court. The procedures for doing so, however, were relatively cursory, requiring only a simple court review and demonstration of good cause.¹²⁵ In 1981, however, the Legislature modified this section to allow the judge to revoke bail if the court found "reasonable cause to believe the defendant committed one or more specified class A or violent felony offenses." This type of revocation required more involved processes, including an opportunity for the defendant to examine witness and present evidence on their behalf.¹²⁶

The debate over allowing such revocations mirrored the 1970 Criminal Procedure Law debate, albeit with less coverage. The bill's sponsor, Bronx Democrat George Friedman, called the law "one major step in tightening up

¹²² *Id.* at 754-55.

¹²³ *Id.* at 760.

¹²⁴ Michael J. Eason, *Eighth Amendment – Pretrial detention: What Will Become of the Innocent*, 78 J. Crim. L. & Criminology 1048, 1062-65 (1988).

¹²⁵ Peter Preiser, Practice Commentaries, McKinney's Cons. Laws of N.Y., Crim. Proc. Law §530.10 (McKinney 2011).

¹²⁶ Act of Jul. 27, 1981, ch. 788, 1981 N.Y. Laws 2161.

loopholes in the criminal justice system, which now permits people on bail to perpetrate violent felonies and serious crimes and still remain on the street.”¹²⁷ The change was opposed by civil liberties groups and Andrew Jenkins, a Queens Democrat, and Assemblyman called it “a step towards preventive detention.”¹²⁸ This time, however, detention advocates were successful – the law was passed July 27, 1981.¹²⁹

The reach of the law was then extended in 1986 to allow revocation in cases of witness intimidation.¹³⁰ This time, there was far less debate – in January 1986, Governor Mario Cuomo proposed changes designed to make it more difficult to obtain bail if there was evidence of witness intimidation.¹³¹ By August 2, the governor had gotten his wish.¹³²

After the 1980s, New York’s bail procedures would not be revised until 2012, when domestic violence prevention became a state priority. On October 25, 2012, the Legislature modified section 510.30 so that in cases of domestic violence, a judge could consider the defendant’s violation of any prior court protection orders and their possession of a firearm in determining whether to allow bail.¹³³ The goal of this modification was expressly preventive. By allowing judges to consider the risk that people accused of domestic abuse might further harm their families based on “established risk factors” like firearm possession, the legislature sought to protect these family members from further abuse. Moreover, the law’s accompanying legislative memorandum referred to it as a “preventative measure.”¹³⁴

Despite framing the new law in expressly preventive terms, the domestic violence modification did not create the public pushback that either the 1970 or 1980s bail reform laws did. Indeed, the new law received only limited press coverage, none of which suggested that the law had been the subject of serious resistance. In fact, the concept appeared to be drawing new allies: New York County’s District Attorney Cyrus Vance was a strong proponent of the law,¹³⁵

¹²⁷ E.J. Dionne, *Assembly Approves Ending of Bail in Some Cases*, N.Y. TIMES, Jul. 2, 1981, at B2.

¹²⁸ *Id.*

¹²⁹ Peter Preiser, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Crim. Proc. Law §530.10 (McKinney 2011).

¹³⁰ Act of Aug. 2, 1986, ch. 795, 1986 N.Y. Laws 3073.

¹³¹ *Cuomo Asks Stricter Bail Rules*, N.Y. TIMES, Jan. 26, 1986, at B3.

¹³² Act of Aug. 2, 1986, ch. 795, 1986 N.Y. Laws 3072.

¹³³ Domestic Violence—Aggravated Family Offense—Confidential or Privileged Information—Health Insurance, 2012 Sess. Law News of N.Y. Ch. 491 (McKinney).

¹³⁴ William C. Donnino, Supplementary Practice Commentary, McKinney’s Cons. Laws of N.Y., Crim. Proc. Law §530.10 (McKinney 2012).

¹³⁵ See, e.g. Glenn Blain, *Gov. Cuomo Signs Bills to Get Tough on Repeat Domestic Violence Offenders, Including Legislation That Creates a New Felony, Aggravated Family Offense*, N.Y. Daily News (Oct. 25, 2012), <http://www.nydailynews.com/new-york/ny-toughens-laws-repeat-domestic-violence-offenders-article-1.1192421>.

an important change given that in 1970, preventive detention had been opposed by then District Attorney Frank Hogan.

Part V: Bail in New York Today and the New Debate Over Preventive Detention

While the 2012 amendment to New York’s bail procedure did not generate much discussion, Governor Andrew Cuomo’s 2017 announcement set the stage for the most important debate about the future of bail in New York since 1960. Both supporters and opponents of preventive detention start from a point of consensus: New York is detaining too many people before trial many of whom are only held because they cannot make bail.¹³⁶ However, New Yorkers are split on how to address this issue. Some believe that the 1970 law provides New York all the tools it needs to reduce the number of people it detains. For example, in 2017, a group of over 100 community and advocacy organizations argued that New York could reduce the number of people it detains by encouraging judges to use less onerous forms of bail.¹³⁷

Advocates of preventive detention, however, argue that New York can reduce its pretrial detention population *and* improve public safety by using risk assessments to determine who can be safely released. As Governor Cuomo put it in the 2017 State of the State, “[v]alidated and transparent risk assessments show that most people do not pose a serious risk to public safety if released before trial and thus should be released. Meanwhile, people who pose a risk should be held.”¹³⁸ This safety-focused argument recalls the arguments for preventive detention of the 1960s but adds that risk assessment tools can minimize the risks identified in the 1960s.

Critics of preventive detention have also returned to some of the 1960s arguments, again arguing that the practice will create troubling racial disparities even with, or possibly because of, risk assessments. They also return to the issue of human frailty, arguing that the demonstrated abuses of judicial and prosecutorial discretion make it risky to provide another way to detain people before trial.

¹³⁶ ANDREW M. CUOMO, STATE OF THE STATE, 2018 59 (2018); Letter from Over 100 Community and Advocacy Groups Across New York State to Andrew Cuomo, Governor, New York State, Letter to Governor Cuomo on Bail Reform 1-2 (last visited November 21, 2017) [hereinafter *Community Letter*](on file at <http://bds.org/wp-content/uploads/Bail-Reform-Letter.pdf>).

¹³⁷ Community letter, *supra* note 136, at 3-4.

¹³⁸ CUOMO, *supra* note 1, at 180.

Bail in New York Today

New York, and New York City, in particular occupy an odd position in the world of bail reform. On the one hand, in 2017, New York City made much more substantial use of non-financial alternatives to bail than other similarly sized cities, releasing 69 percent of people at arraignment. While comparable yearly national rates are not available, a 2006 review of comparably sized cities found that only 28 percent of people were released under similar conditions.¹³⁹ However, the sheer scale of New York City's system means that, even with a relatively high release rate, tens of thousands of people are still incarcerated due to a lack of bail every year. For instance, according to the city's Independent Budget Office, in 2016 49,786 individuals were incarcerated due to lack of bail.¹⁴⁰

As a result of the Legislature's decision in 1970, New York is one of only four states that prohibits judges from formally considering community safety in bail decisions. Ostensibly, bail determinations are based on information given to the judge from a variety of sources. Staff from the New York City Criminal Justice Agency conduct pre-arraignment interviews of all individuals held in police custody. They also use a risk assessment instrument to assess the risk that an individual will fail to appear at future proceedings, which is used to inform recommendations regarding release and bail. Finally, the prosecutor can provide the court with information about a given defendant, including, but not limited to, the facts of the case, their criminal history, and any other facts that might bear on detention or release. However, reformers argue that in practice, bail decisions are made in a far less even-handed manner than this process would suggest and worry that preventive detention would exacerbate these issues.

Judicial Discretion: Essential Tool or Recipe for Over-incarceration?

In November 2017, a group of more than one hundred criminal justice reform organizations released an open letter to Governor Cuomo warning that judges are exercising discretion in a way that thwarts the purpose of the bail statute.¹⁴¹ People opposed to preventive detention today believe that, in the face of these abuses, allowing preventive detention would exacerbate, rather than remediate, the inequities of bail in New York.

¹³⁹ Letter from Aubrey Fox, Executive Director, New York Criminal Justice Agency, to Courtney Oliva, Executive Director, Center for the Administration on Criminal Law (Nov. 29, 2017) (on file with author); MARY T. PHILLIPS, NEW YORK CITY'S BAIL SYSTEM – A WORLD APART, 2 (2012).

¹⁴⁰ Letter from Ronnie Lowenstein, Director, City of New York Independent Budget Office, to Rory Lachman, Council Member, New York City, May 16, 2017, <http://www.ibo.nyc.ny.us/iboreports/pretrial-detention-rates-may-2017.pdf>.

¹⁴¹ Community Letter, *supra* note 136 at 3-4.

As proof that courts are misusing their discretion, advocates begin by noting that the 1970 statute authorized eight different forms of bail, later expanded to include credit cards in order to provide courts with more flexibility in crafting bail alternatives. Indeed, in 1972, the bail law was modified so that if the judge did not set a particular form of bail, the default options included unsecured bonds, the least financially onerous form.¹⁴²

In practice, however, courts do not appear to have embraced this flexibility or to be making individualized bail decisions as required. Instead, advocates argue that judges abuse their discretion by relying on rote procedures. As evidence of this, they note that judges rarely inquire about a defendant's finances before setting bail.¹⁴³ Judges also, in a practice that would be familiar to Morris Zweig, tend to set bail in generic round numbers and set increments of \$250 and \$500,¹⁴⁴ which suggests a lack of tailoring to individual financial circumstances. Third, judges rarely use the full array of bail options provided by the legislature, instead routinely opting to set the most financially onerous forms of bail: cash bail, commercial bail bonds, and secured bonds.¹⁴⁵

Advocates also argue that judges abuse their discretion by engaging in the kind of stealthy preventive detention that troubled reformers in the 1960s. In a series of interviews with judges and lawyers in the New York court system in 2010, Human Rights Watch found evidence that judges use high levels of bail in order to detain people they believe pose a risk to the public.¹⁴⁶ Even more worrying, some defense attorneys interviewed by Human Rights Watch believed that judges were actually using detention facilitated by high bail to punish,¹⁴⁷ a practice that would undermine the Supreme Court's argument that preventive detention is a regulatory measure.

Political caution may also play a role: Human Rights Watch noted in their interviews with judges that "The judicial nightmare . . . is to end up on the cover of the New York Post for releasing without bail a defendant who then murders someone."¹⁴⁸ Moreover, judges are making these decisions at arraignment, when the parties involved—CJA, defense counsel, and the prosecutor—know the least about them or their case.¹⁴⁹ Given this uncertainty,

¹⁴² HUMAN RIGHTS WATCH, *THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY* 13 (2010).

¹⁴³ Justine Olderman, *Fixing New York's Broken Bail System*, 16 CUNY L. Rev. 9 18 (2012).

¹⁴⁴ Justine Olderman, Testimony Before the New York City Council Committees on Courts and Legal Services and Fire and Criminal Justice at 7 (Jun. 17, 2015); HUMAN RIGHTS WATCH *supra* note 142, at 26.

¹⁴⁵ *Id.*; *A User Guide to Bail*, NYC Bail Lab, <http://bail-lab.nyc/bail-faqs/> (last visited Jan. 1st 2018)

¹⁴⁶ HUMAN RIGHTS WATCH *supra* note 142, at 26.

¹⁴⁷ *Id.* at 28.

¹⁴⁸ *Id.* at 46-47.

¹⁴⁹ NEW YORK COUNTY LAWYERS' ASSOCIATION, *REPORT AND RECOMMENDATIONS ON BAIL REFORM IN NEW YORK STATE* 6 (2014).

advocates argue that judges, worried about reoffending, set bail as a safeguard against seeing “his or her name . . . on the front page of the New York *Post* or *Daily News* because he or she released someone who went out to commit a headline grabbing crime.”¹⁵⁰ Opponents of preventive detention are similarly worried that, if given the discretion to detain people in the name of public safety, judges will use their discretion to hold more people prior to trial. As Assemblyman Joseph Lentol put it in 2017, if “you put public safety in the bill, nobody is getting out of jail – because they’re already afraid to let anybody out now.”¹⁵¹

Advocates of preventive detention respond to these critiques with an updated version of an argument from the 1960s: if judges are, and likely for half a century have been, considering dangerousness, due to both caution and an information vacuum, the solution is to candidly recognize this and provide them with the tools to make this decision intelligently. In his 2013 State of the Judiciary report, former Chief Judge Jonathan Lippman advocated forcefully for this, stating that “[f]ew, if any, would seriously argue that judges should not consider the safety and well-being of people on our streets or in our homes when making bail decisions. This makes no sense and certainly does not serve the best interests of our communities and our citizens.”¹⁵² Risk assessments would support this decision, providing judges with an evidence-based foundation for their decisions.¹⁵³

Prosecutorial Discretion and Preventive Detention: A Risk of Undue Leverage?

Opponents of preventive detention also worry that the practice will give the state, through the discretion to ask for detention, undue leverage in plea negotiations, a charge hotly disputed by New York prosecutors. Certainly, prosecutors’ recommendations are the single-most important factor in court’s determination about whether or not to detain someone, set bail, or release them.¹⁵⁴ Moreover, the Independent Commission on New York City Criminal Justice and Incarceration Reform noted that “[w]hen defendants are detained pretrial, the prosecutor invariably gets leverage. Getting out of jail is an

¹⁵⁰ Olderman, *supra* note 143, at 17-18.

¹⁵¹ Sarina Trangle, *Lawmaker: Cuomo’s Plan to Make Public Safety Risk Part of Bail Decision Unpopular with Assembly Democrats*, CITY & STATE NEW YORK, Feb. 1, 2017, <http://cityandstateny.com/articles/politics/new-york-state-articles/lawmaker-cuomo%E2%80%99s-plan-to-make-public-safety-risk-part-of-bail-decision-unpopular-with-assembly-democrats.html#.WfXpt2hSw2w>.

¹⁵² JONATHAN LIPPMAN, STATE OF THE JUDICIARY 2013 3 (2013).

¹⁵³ Glenn Blain, *Attorneys [sic] Unite to Support Bail Overhaul in NY*, N.Y. DAILY NEWS, Feb. 6, 2013, <http://www.nydailynews.com/new-york/attorneys-unite-suport-bail-overhaul-ny-article-1.1257329>.

¹⁵⁴ Scott Spivak, *Prosecutor’s Role in Bail Reform*, NEW YORK LAW JOURNAL (Mar. 6, 2014 12:00 am), <https://www.law.com/newyorklawjournal/almlD/1202591004628>.

enormous incentive to agree to a plea deal.”¹⁵⁵ Indeed, this is borne out by statistics: statistics from the Criminal Justice Agency (CJA), a non-profit that provides pretrial services to the city, show that people who are detained are far more likely to be convicted and sentenced to incarceration.¹⁵⁶

Yung-Mi Lee, a member of Brooklyn Defender Services (BDS), provided an example of how this functions in practice. Lee told the story of a “Mr. C” who the assistant district attorney mistakenly believed had been released. Based on this information, Mr. C. was offered a plea to a sentence of the time he had already served. Upon learning Mr. C was detained, the assistant district attorney changed the offer to 6 months’ incarceration. Based on this, the prosecution was subsequently compelled by the court to acknowledge that they occasionally made offers based on the incarceration status of the defendant.¹⁵⁷ Critics of preventive detention argue this practice would provide another way for prosecutors to obtain this leverage through their discretion to recommend bail.

Some New York prosecutors, however, dispute the idea that they seek bail as a means to leverage case resolutions. Former District Attorney for Staten Island, Daniel M. Donovan, criticized a Human Rights Watch report on misdemeanor bail practices and, specifically, their suggestion that prosecutors asked for high bail in order to pressure defendants into guilty pleas. Donovan argued that prosecutors could not possibly be engaged in this strategic behavior because they had “about 30 seconds...to come up with a dollar figure that that young person believes is adequate...[w]e don’t get to interview the defendant; we have to make a determination without substantiating any of the information before us.”¹⁵⁸ This raises the separate question of whether it is wise to allow preventive detention if these decisions are being made under such circumstances, though advocates might again point to risk assessments as a tool for increasing the data available at this crucial juncture.

¹⁵⁵ INDEPENDENT COMMISSION ON NEW YORK CITY CRIMINAL JUSTICE AND INCARCERATION REFORM, A MORE JUST NEW YORK CITY 45 (2017).

¹⁵⁶ Olderman, *supra* note 143, at 14-15.

¹⁵⁷ Yung-Mi Lee, Testimony before the New York City Council Committee on Courts and Legal Services (Feb. 29, 2016).

¹⁵⁸ Mosi Secret, *Low Bail, But Weeks in Jail Before Misdemeanor Trials*, N.Y. TIMES, Dec. 3 2010, at A27.

The Rise of Risk Assessment Instruments¹⁵⁹

Changing attitudes toward risk assessment instruments from the 1960s to today may be the biggest difference in the debate over preventive detention. Advocates argue that these tools provide a way to give judges the knowledge they need to reduce uncertainty and misuse of preventive detention while promoting public safety. Critics however worry that these tools could propagate racial biases and are unnecessary to improve the fairness and efficacy of bail in New York.

In theory, risk assessments help judges determine if someone is likely to appear for their court proceeding or commit a crime while on release. These tools assess someone's risk using a range of factors that have been determined to predict future offending and failures to appear.¹⁶⁰ Proponents of risk assessment suggest that this information will allow judges to detain only those unlikely to appear in court or likely to commit further offenses, reducing the unnecessary use of pretrial detention.¹⁶¹

These instruments are not new: some of the first ones were developed by Vera in conjunction with the Manhattan Bail Project.¹⁶² However, these tools are now receiving substantial national attention from both researchers and policymakers. One such tool, the Laura and John Arnold Foundation's Public Safety Assessment Tool, is already used by 38 jurisdictions, including New Jersey, which made the Tool a centerpiece of its bail reform policies.¹⁶³ In a recent evaluation of every state's pretrial practices, the Pretrial Risk Institute gave New Jersey an "A" grade for its overhauled bail system, which reduced its pretrial detention population by 34 percent and virtually eliminated money bail while maintaining public safety.¹⁶⁴

¹⁵⁹ The debate about risk assessment instruments and how to craft ones that minimize racial disparity and are valid for the city and state where they are being used is a nuanced one that is deserving of its own paper – this discussion seeks to provide only a broad overview of these tools in the context of the debate over preventive detention. *See, e.g.*, Julia Angwin & Jeff Larson, *Bias in Criminal Risk Scores is Mathematically Inevitable, Researchers Say*, PROPUBLICA (Dec. 30, 2016, 4:44 PM), <https://www.propublica.org/article/bias-in-criminal-risk-scores-is-mathematically-inevitable-researchers-say>.

¹⁶⁰ PRETRIAL JUSTICE INSTITUTE, PRETRIAL RISK ASSESSMENT: SCIENCE PROVIDES GUIDANCE ON ASSESSING DEFENDANTS 2-3 (2015).

¹⁶¹ *Id.* at 2.

¹⁶² Transcript of Record at 3, In the Matter of Bail Procedures of the Magistrates' Court and the Court of Special Sessions (1961), available at <https://www.vera.org/publications/manhattan-bail-project-official-court-transcripts-october-1961-june-1962>.

¹⁶³ *Public Safety Assessment*, THE LAURA AND JOHN ARNOLD FOUNDATION, (last visited Oct. 29, 2017) <http://www.arnoldfoundation.org/initiative/criminal-justice/crime-prevention/public-safety-assessment/>.

¹⁶⁴ *The State of Pretrial Justice in America*, PRETRIAL JUSTICE INSTITUTE (last visited Nov. 21, 2017) <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=99c5aa38-8756-581b-b722-a61bf0fb20e6&forceDialog=0>.

The changing attitudes towards risk assessment are perhaps best captured by Vera's evolving position. Despite the fact that they created one of the first risk assessments for use in the Bail Project, during the 1960 debate the organization opposed amending the Code of Criminal Procedure to allow preventive detention, arguing that judges lacked sufficient information to make decisions about who presented a "risk" to society and who did not.¹⁶⁵ Today, however, Vera supports the use of evidence-based risk instruments to facilitate pretrial decision-making for both youth and adults.¹⁶⁶

New York City and State officials have also made a public commitment to utilizing these tools. For instance, Governor Cuomo made adopting risk assessment a part of his proposed 2017 legislative agenda alongside the use of preventive detention.¹⁶⁷ In April 2016, New York City announced plans to adopt its own risk assessment tool in conjunction with the expansion of non-custodial alternatives for pretrial supervision. New York's goal in adopting these tools is to use risk instruments to more accurately identify people who should be either detained or for whom bail should be set while allowing the majority of defendants to be released, which in turn will lessen the number of individuals in pretrial detention.¹⁶⁸ The New York City Criminal Justice Agency, which administers New York City's risk assessment tool, also recently announced a redesign of the tool.

Risk assessment tools have their critics. In 1970, opponents of preventive detention worried that the law would discriminate against African Americans and the poor. Today, this concern has become one of the central arguments against risk assessment instruments, particularly if they are to be deployed in the context of preventive detention. Tina Luongo, the Attorney-in-Charge of criminal practice for the Legal Aid Society summarized this complaint in an April 2017 letter to the New York Times, arguing that "[a] bail system that attempts to predict a person's risk of future dangerousness asks the state to engage in guesswork that has historically discriminated against communities of

¹⁶⁵ TEMP. COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, *supra* note 66, at 94 (1968); Burks, *supra* note 40, at 62.

¹⁶⁶ *New Vera Report on Juvenile Detention Risk Assessment*, VERA INSTITUTE OF JUSTICE (Apr. 8, 2011), <https://www.vera.org/newsroom/press-releases/new-vera-report-on-juvenile-detention-risk-assessment> (describing how a new risk assessment tool, the RAI, has assisted judges in finding alternatives to incarceration for youth); *Why is Bail More Closely Tied To Wealth Than Risk?*, VERA INSTITUTE OF JUSTICE (Sept. 4, 2015), <https://www.vera.org/blog/justice-in-katrinawake/why-is-bail-more-closely-tied-to-wealth-than-risk> (encouraging the use of risk assessment tools to reduce incarceration in New Orleans).

¹⁶⁷ Cuomo, *supra* note 1, at 180.

¹⁶⁸ *Mayor de Blasio Announces Citywide Rollout of \$17.8 Million Bail Alternative Program*, NYC, (Apr. 8, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/336-16/mayor-de-blasio-citywide-rollout-17-8-million-bail-alternative-program>.

color and poor people.”¹⁶⁹ Jonathan Gradess, the executive director of the New York State Defenders Association, echoed this, suggesting that allowing preventive detention would give “a legal protection to the racism that already exists in the system.”¹⁷⁰

Concern for the racial impact of risk assessment has factual grounding. A 2016 investigation suggested that risk assessment tools were biased *against* blacks and biased *toward* whites.¹⁷¹ ProPublica studied risk scores for more than 7,000 people arrested in Broward County, Florida in 2013 and 2014. Their study checked to see how many were charged with new crimes over the next two years. Not only did they find that the tool unreliable at forecasting future crime, but it falsely flagged black defendants as criminals at almost twice the same rate as white defendants. White defendants were also mislabeled as low risk more often than black defendants.¹⁷² While the accuracy of ProPublica’s analysis has since been questioned,¹⁷³ their critique of the efficacy of risk assessments captured some of the wider concerns many community groups have about risk assessment tools.

Addressing these concerns, proponents of risk assessments argue that evidence of racial bias in these tools is minimal, and, to the degree there is bias, it can be eliminated through a careful review of the factors these tools use. For example, the Public Safety Assessment tool supported by the Laura and John Arnold Foundation relied exclusively on prior failures to appear, age at arrest, and other markers of criminal history. The result is a tool that is highly effective at predicting violence on release while not discriminating or rating black people as being higher risk for release than white people.¹⁷⁴

The credibility of these tools can be enhanced further if their operation is transparent. One major criticism of some risk assessments is that they are proprietary, making it difficult, if not impossible to determine or challenge why someone received a rating. For example, one of the reasons COMPAS, the risk assessment tool critiqued in the ProPublica study, is considered controversial is because it relies on a proprietary algorithm, the workings of which are not

¹⁶⁹ Tina Luongo, Letter to the Editor, *Setting Bail and Assessing Risk to Public Safety*, N.Y. TIMES, updated April 3, 2017, <https://www.nytimes.com/2017/04/03/opinion/setting-bail-and-assessing-risk-to-public-safety.html?mcubz=0> ½.

¹⁷⁰ David Howard King, ‘Dangerousness’ Aspect of Cuomo’s Plan Troubles Reformers, GOTHAM GAZETTE, Jan. 22, 2016, <http://www.gothamgazette.com/index.php/government/6106-dangerousness-aspect-of-cuomos-bail-plan-troubles-reformers>.

¹⁷¹ Julia Angwin et al., *Machine Bias*, PROPUBLICA, (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

¹⁷² Angwin et al., *supra* note 171.

¹⁷³ Anthony W. Flores et al., *False Positives, False Negatives, and False Analyses: A Rejoinder to “Machine Bias: There’s Software Used Across the Country to Predict Future Criminals. And it’s Biased Against Blacks*, FEDERAL PROBATION, VOL. 80, at 38 (2016).

¹⁷⁴ LAURA AND JOHN ARNOLD FOUNDATION, RESULTS FROM THE FIRST SIX MONTHS OF THE PUBLIC SAFETY ASSESSMENT – COURT™ IN KENTUCKY 2, 4 (2014).

easily determined.¹⁷⁵ Instead of allowing closed assessments, a common recommendation is thus to increase the transparency of risk assessment tools by opening them to auditing and to investigations of how they weigh various factors to make their determinations. Such transparency could also reduce the risk of bias: outside audits can increase the possibility of identifying and correcting algorithmic discrimination.¹⁷⁶

Building on this, proponents suggest that risk assessments can actually be a tool for *reducing* racial bias in the justice system. The biases in risk assessments, they argue, can be identified and mitigated, making them less problematic than the status quo, which relies on the use of judicial discretion. Both sides acknowledge that this discretion is the source of many of New York's current problems and financial resources, which is clearly not tied to risk.¹⁷⁷ In comparison, transparent, auditable risk assessments offer a marked improvement. In other words, risk assessments can shift decision makers in the justice system away from money, a clear driver of racial disparities, and toward factors that actually influence risk.

Advocates of risk assessment also argue that these tools do not operate in a vacuum: judges still weigh in and make the ultimate decision regarding bail versus detention. For instance, Dr. Marie VanNostrand, one of the developers of the Public Safety Assessment Tool, noted that insight from risk assessments did not amount to a required decision by the judge, but merely an additional source of information judges could use to inform their decision.¹⁷⁸

This approach has been supported by retired Chief Judge of the New York Court of Appeals Jonathan Lippman, the chair of the Independent Commission on New York City Criminal Justice and Incarceration Reform. Judge Lippman stated “I think [advocates are] fearful of this idea of preventive detention, but at some point you have to have confidence in judges and their judgment — that's what judges are there for — and you have to have a balanced bail statute that makes some sense and keeps violent people in.”¹⁷⁹

Judge Lippman's remarks also highlight the public safety concern that Denzer and Looney first referenced in the 1960s and 1970s and that remains relevant today. Indeed, the push to recognize dangerousness as a legitimate ground for pretrial detention gained further momentum in March 2017 when a man released without bail killed an emergency medical technician by backing a

¹⁷⁵ DANIELLE L. KEHL ET AL., ALGORITHMS IN THE CRIMINAL JUSTICE SYSTEM: ASSESSING THE USE OF RISK ASSESSMENTS IN SENTENCING 11 (2017).

¹⁷⁶ *Id.* at 32.

¹⁷⁷ Flores at al., *supra* note 173, at 38.

¹⁷⁸ Marie VanNostrand, Justice Project Manager, Luminosity Inc., Launching CJA's New Pretrial Risk Assessment Instrument: a Panel Discussion at New York University Law School (Sept. 18, 2017).

¹⁷⁹ King, *supra* note 170.

stolen ambulance over her. Another high-profile killing by someone released on bail in 2015 encouraged New York Mayor Bill de Blasio to support considering dangerousness in release decisions.¹⁸⁰ Court officials took the case as an opportunity to criticize New York judges' inability to consider dangerousness when making bail decisions.¹⁸¹ These arguments have also won the support of district attorneys. Both Manhattan District Attorney Cyrus Vance¹⁸² and Bronx District Attorney Darcel Clark¹⁸³ have come out in favor of Governor Cuomo's preventive detention proposal.

Critics of preventive detention offer two responses to these arguments. First, high-profile incidents aside, compliance with pretrial detention is already high. Only 4 percent of people charged with felonies and 7 percent of those charged with non-felonies fail to appear within 30 days of their scheduled court dates.¹⁸⁴ Given the high rates of return, they argue that risk assessment is effectively a solution in search of a problem. Second, they argue that preventive detention is likely to increase the number of people detained before trial.¹⁸⁵ Thus, even if risk assessment-informed detention takes New York one step forward on public safety, which they would argue is questionable given current low failure rates, it is one step back in terms of reducing the number of people detained before trial.

Part VI: The Future of Bail Reform in New York

In his 2017 State of the State, Governor Cuomo announced his intention to push to “[a]llow judges to account for an individual’s risk to public safety when contemplating bail.” He also announced that judges would have access to risk assessments to make these decisions.¹⁸⁶ With these words, the governor set into motion the latest round of a debate that began in 1965 with the Temporary Commission. As in the 1960s, today’s bail reform debate begins from a point of consensus. Reformers on all sides generally agree that New York overuses pretrial detention, detaining people because they cannot pay bail rather than because they will fail to appear in court.

Where the consensus begins to fracture is in the question of how to fix bail. While crime has dropped substantially since the 1980s, public safety continues

¹⁸⁰ Trangle, *supra* note 151.

¹⁸¹ James C. McKinley, Jr., *Freed From Custody, then Accused of Murder: Is the Bail System at Fault?*, N.Y. TIMES, Mar. 21, 2017, <https://www.nytimes.com/2017/03/21/nyregion/jose-gonzalez-yadira-arroyo-killing.html>.

¹⁸² King, *supra* note 170.

¹⁸³ Trangle, *supra* note 151.

¹⁸⁴ Robin Steinberg & David Feige, *The Problem with NYC’s Bail Reform*, THE MARSHALL PROJECT (July 9, 2015, 4:16 pm) <https://www.themarshallproject.org/2015/07/09/the-problem-with-nyc-s-bail-reform>.

¹⁸⁵ Community Letter, *supra* note 136, at 1.

¹⁸⁶ CUOMO, *supra* note 1, at 179-81.

to be the leading goal for many criminal justice reforms. Preventive detention has the potential to support this goal, making it an attractive option for many policymakers, particularly after high-profile incidents of pretrial crime. Advocates of this option suggest that preventive detention informed by risk assessments will let the public have the best of both worlds: lower rates of pretrial detention and improved safety without the predictive or constitutional uncertainty that discouraged preventive detention in the 1960s.

Critics argue that preventive detention, even with risk assessments, is a solution in search of a problem. They believe New York already has a progressive bail law that could facilitate substantial reductions in the number of people detained prior to trial. Moreover, the rare high-profile incidents aside, New York already has low rates of failure to appear for court so there is little need for further assessment, much less an additional tool to hold people prior to trial. Given the risk of racial bias inherent in both discretion and risk assessments, an argument that has become even more salient since the 1960s, critics argue that the risks are high and the payoff marginal.

The preventive detention reforms Governor Cuomo is proposing reflect the tensions inherent in New York's last debate over its criminal procedure code. On the one hand, preventive detention, especially when practiced in conjunction with risk assessment instruments, has the potential to improve public safety while minimizing the use of pretrial detention. On the other hand, preventive detention may disproportionately harm communities of color and low-income communities. It also seems counterintuitive to find a way to hold more people before trial if the overarching goal of reform is to reduce the pretrial population.

As policymakers and legislators grapple with these questions, they should remember the debate that led New York to become one of the few states to reject preventive detention. Many of those arguments and concerns remain as relevant today as in 1970. However, they must also recognize the extent to which the legal and social science landscape has shifted. The constitutional issues that were so fraught in 1970 have been decided and risk assessments offer at least the *possibility* of better informed decision-making while, at the same time, society has become more sensitive to the need to deter racial bias in the justice system. All of this will inform the decision about whether Governor Cuomo's proposed reform is a step towards a more sophisticated New York pretrial system or a step back from the progress of the 1960s and 1970s.¹⁸⁷

¹⁸⁷ For instance, the November 2017 open letter to Governor Cuomo notes that the current bail statute is routinely disregarded when judges set bail. One key question, then, is how many people are currently detained due to failure to adhere to the statute, and whether releasing this group (on the assumption that they would not have been detained had the statute been properly applied) would materially impact the pretrial population.



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